Supreme Court No. 99206-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACKERY TORRENCE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Zachery Torrence, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Torrence seeks review of the unpublished opinion of the Court of Appeals in ***State v. Torrence***, No. 52432-5-II, 2020 WL 5908924, filed October 6, 2020. A copy of the decision is in the Appendix A at pages A-1 through A-32.

C. ISSUES PRESENTED FOR REVIEW

Should this Court accept review where the petitioner was denied his right to present a defense and does the decision below conflict with other decisions of the Court of Appeals concerning the right to introduce evidence regarding the "grooming" of child victims that is relevant to rebutting the State's allegations of sexual assault?

D. STATEMENT OF THE CASE

1. Procedural history

The State charged Mr. Torrence with multiple counts of first-degree child rape and first-degree child molestation, as well as one count each of indecent liberties and second-degree rape. ***State v. Torrence***, 2020 WL 5908924, at *1. The jury convicted Mr. Torrence on all counts and found that he had used his position of trust to facilitate the commission of the

crimes. ***Torrence***, at *1. The trial court imposed an exceptional sentence based on abuse of his position of trust and the fact that Mr. Torrence's offender score was so high that some of his crimes would go unpunished. *Id.*

a. Trial testimony

Laura Alexander is the mother of A.A. and J.A. 4RP at 621. A.A. was born July 26, 2000, the children's father is Brian Alexander. 2RP at 355, 4RP at 621, 5RP at 896. A.A.'s parents divorced when she was four and she first met Savannah Alexander when she was five years old. 2RP at 356. After her parents' divorce she primarily lived with her father and Savannah but had periodic visitation with her mother. 2RP at 356, 4RP at 762. Laura Alexander and Brian Alexander were married in March 2000 and divorced in December 2004. 4RP at 621, 5RP at 897. After they divorced, they had a shared custody agreement and Laura saw the children every week, but after Brian and Savannah moved to Texas with the children, her visits ceased. 5RP at 898-99. Brian stated that last time that A.A. saw her mother in person was during the summer of 2011, and that she had infrequent telephone calls with her mother since that time. 5RP at 912, 917. A.A. was homeschooled by Savannah Alexander. 2RP at 355. The family moved to Texas and then to South Dakota. 4RP at 762. A.A. and J.A. visited with Laura three times when she was involved with Mr. Torrence. 4RP at 764. The first visit was in 2010, and during spring break in 2011, and then for a six to eight week visit during the summer of 2011. 4RP at 764. She stated

that after the children returned from the third visit, they moved to Texas within a month. 4RP at 765.

A.A. was home schooled from the second grade until she finished the equivalent of eleventh grade, and then attended her last year at high school in Utah when she started living with Ms. Beardall. 2RP at 354, 355, 5RP at 919.

Laura Alexander met Zachery Torrence in 2008 in Vancouver, Washington. 4RP at 622-23. Mr. Torrence has two children, his son C.T. and his daughter V.T. 4RP at 633, 6RP at 1073. After initially living in an apartment complex, Laura and Mr. Torrence moved to a townhouse in Vancouver. 4RP at 623. After living in the townhouse for about six months they moved to a house on Whitman Avenue in Vancouver where they lived for two years. 4RP at 625, 633.

Laura Alexander testified that A.A. and her sister J.A. visited them at the townhouse once in 2009 or 2010. 4RP at 623. She stated that the children visited them at the house on Whitman Avenue two times, once for Christmas and once during the summer of 2011. 4RP at 626. Laura Alexander stated that the children's last visit in 2011 was for six weeks. 4RP at 628. Laura Alexander stated that she worked during part of that time and when she and Mr. Torrence were at work, their friend Anne Scheinle would watch the four children at the house. 4RP at 629. She stated that Ms. Scheinle would sleep on the couch when she stayed overnight at the house

and would also sometimes spend time in the garage or carport. 4RP at 632.

A.A. first visited her mother in Vancouver when she was nine or ten, and her last visit was when she was eleven. 2RP at 358. A.A. testified that the third visit was for about seven weeks during July and August. 2RP at 362. While visiting her mother in Vancouver, Laura lived with Zackery Torrence, and sometimes his two children, C.T. and V.T., would also visit. 2RP at 359. During the times that she visited her mother, A.A.'s father and stepmother lived in Everett or Lynwood, Washington. 2RP at 360. After the final visit A.A. and J.A. were driven to Everett in August 2011, and in early September 2011, the family moved to Texas, shortly after the visit with Laura. 2RP at 361.

A.A. stated that during the visits, Mr. Torrence was nice and they would do "normal things like eating dinner around the table as a family setting," and playing outside, but that at other times when drinking "he would get violent and throw things" like furniture and bottles. 2RP at 363.

A.A. said that Mr. Torrence "[s]ometimes he got us changed and undressed" during the third visit but did not recall if that had happened during the first two visits. 2RP at 365-66.

Vancouver police Department Detective Dustin Goudschaal arranged for A.A. be interviewed by police in Orem, Utah, and a videotaped interview took place on February 27, 2017. 5RP at 936. Detective Goudschaal interviewed several people by telephone including Savannah Alexander,

Dianna Beardall, and Laura Alexander. 5RP at 937. Detective Goudschaal interviewed Zackery Torrence on June 14, 2017. 5RP at 938, 939. Detective Goudschaal stated that Mr. Torrence said that he and Laura Alexander started a dating relationship in 2009 and ended in 2011, and that the children had gone to Vancouver to visit Laura two times. 5RP at 940-41.

A.A. said the first occurred when she was in V.T.'s bedroom getting undressed and he was rubbing her legs and then put his hands under her underwear and "stuck his fingers" into her vagina. 2RP at 370, 371. She said that she tried to push him away and that she fought back and then gave up, and he left the room. 2RP at 370. She said that while this occurred he said "things like[']it was okay—nothing's wrong—you don't—you don't need to be afraid.[']" 2RP at 372.

A.A. testified that a second incident took place in the living room of the house while she was watching television on the couch. 2RP at 376. She stated that he touched her and that it stopped when someone came into the living room. 2RP at 376. She stated that she was wearing pajamas and Mr. Torrence sat down next to her and started to touch and rub her body with his hand over her clothes, touching her vagina and on her chest. 2RP at 377. She said that this happened twice. 2RP at 377-78. She said that he said "reassuring things" like "[']it's okay—it's fine—don't be afraid—it's okay.[']" 2RP at 379.

A.A. testified that during another incident she was in V.T.'s room and

Mr. Torrence came into the room and started to undress her, then touched her and she tried to push him away. 2RP at 380. She said that he "ended up pinning me to the bed and he stuck his penis" in her vagina. 2RP at 380. She stated when he first entered the bedroom, Mr. Torrence shut the door and started to undress her by taking off her jeans after A.A. tried to get up and run out the door, and she stated that he grabbed her arms and pinned her down and "once again he shut the door and locked it." 2RP at 381, 3RP at 385. She said that he also blocked the bedroom door with a toy chest. 3RP at 385-86. She said that the door locked with a locking doorknob. 3RP at 386. She said that he was not able to get her pants down because she kept trying to pull them back on, and that is when she tried to leave the room. 3RP at 385. After locking the door, he pulled her back and then started to undress her. 3RP at 387-88. She stated that she started to yell and trying to escape and "I was then told to be quiet otherwise my sister could get hurt." 3RP at 388. She said that he also threatened her mother, and it was "[v]ery similar to what he said about my sister." 3RP at 388. She said that she would find blood in her underwear, and that "this was about the time that [Savannah] started talking to me about having my period[.]" 3RP at 397. She said that when she found blood in her underwear, she would throw it in the trash outside. 3RP at 398. She stated that he told her "not to tell every time." 3RP at 395.

A.A. said that after that incident he raped her "about seven times"

and that this occurred in the bedroom and that this happened "[a]round" the last week of the third visit. 3RP at 396, 3RP at 450. She said that in addition to seven rapes, there were two to three instances of touching her. She said that she knew "what happened several times with the rapes and that's just the number I recall." 3RP at 465.

Dianna Beardall said that after the family moved from Everett to Texas, she visited the family for Christmas following their move to Texas the previous summer, and noticed "a lot of anger" in A.A. 3RP at 555-56. A.A.'s anger culminated in assaulting her father in 2016, at which point the family told her that she needed to go into counselling and that if she did not do so, her father would press charges against her for assault. 4RP at 769.

After moving to Texas, Mr. Alexander stated that A.A. began to "act out more" and started to become oppositional, defiant, and angry. 5RP at 903. A.A. assaulted her father and she was told that her behavior would have to change, and she would have to go into counselling, or she would not be able to live with the family any longer. 5RP ta 905-07.

A.A. went to live with Ms. Beardall in Orem, Utah. 5RP at 911. After she went to live in Utah, her father saw her "a couple of times a year." 5RP at 900. A.A. moved to Ms. Beardall's house in April 2016 and later engaged in counselling sessions. 3RP at 557. Ms. Beardall stated that in November 2016, while driving her back from a session with her therapist, Savannah called to check on the status of the session. 3RP at 562. During

the telephone call with Savannah, A.A. was crying and mentioned Mr. Torrence. 3RP at 570-71. A.A. testified that it was possible that she told her stepmother and grandmother first and then told her counsellor after that. 3RP at 532.

Ms. Beardall stated that A.A. did not report acts of sexual penetration until September 2017, almost year after the allegation of molestation. 3RP at 611-12.

A.A. testified that after moving to Texas she was angry for "years" and that her behaviors were bad when she was 15 or 16. 3RP at 406. She said that her father and stepmother told her that she would have to go to counselling or that they would put her in a mental institution. 3RP at 407. She stared to live with her grandmother in Orem, Utah in April 2016 and started counselling in July 2016. 3RP at 408. She said that in counselling, her therapist said that they needed to figure out "where this anger stems from, what's causing it and he was having me talk about my childhood," and said that the abuse "came up during that talk." 3RP at 410. She sided that she told her stepmother about the abuse the same day while on speaker phone while being driven by her grandmother. 3RP at 410.

Anne Schienle testified that she lived with Zachary for three periods of time in Vancouver, and that she did not see Mr. Torrence break things in the house. 6RP at 976. She stated that she got along with Laura's children and that Mr. Torrence got along with A.A. and did not see any problems

between them. 6RP at 977. Ms. Schienle testified that during the summer that the girls were with them in the house she was present in the house every day that the girls were there. 6RP at 991. Ms. Schienle testified that there was never a time when Mr. Torrence was in the house with the girls when Laura was not present. 6RP at 992.

Mr. Torrence met Laura in 2009 and at the beginning of February 2010 they moved into a townhouse, where they lived for nine months. 6RP at 1007-08. During the summer of 2010 time Laura's daughter stayed with them at the townhouse for six weeks. 6RP at 1008. In October 2010 they moved to a house on Whitman avenue. 6RP at 1011-12. Laura's children visited the Whitman Avenue house twice. 6RP at 1012. Mr. Torrence testified that the first visit at the Whitman street house was for about two weeks during spring break in April 2011. 6RP at 1015. Mr. Torrence stated that there was a lock on the master bathroom that was broken that he replaced and that he installed a lock on the master bedroom door. 6RP at 1022. He stated that he got along well with A.A. during the visit. 6RP at 1033. The children visited the house a second time for two weeks during the summer of 2011, returning to in the middle of the visit to Laura's house for the weekend. 6RP at 1033.

During the third visit Mr. Torrence worked part of the time as a car salesman. 6RP at 1055. He stated that during the third visit, A.A. started to have an "attitude" regarding doing chores and they would give her "time

outs." 6RP at 1058. He stated that when he returned home from work, he would cook dinner for everyone. 6RP at 1060-61.

Mr. Torrence stated that during the last visit he did not help A.A., or J.A. change their clothes. 6RP at 1061. He stated that he did help change the clothes of his four-year-old daughter V.T. 6RP at 1061. He denied throwing bottles against the walls or throwing furniture around and denied pushing Laura and denied hitting her across the face. 6RP at 1062. He did not recall a time when he was ever alone with A.A., although it may have been possible for them to have been alone in the kitchen and other people were in the other room or outside the house. 6RP at 1063. He stated that A.A. spent a lot of time in her bedroom reading by herself and may have been in her room when bringing in laundry, but that he did not do that for very long because Laura liked the laundry done in a specific way and so he did not do the laundry for very long. 6RP at 1063. He denied that there was a time when A.A. could have seen him without clothing. 6RP at 1064. He said that Ms. Scheinle usually slept on the couch or in Mr. Torrence's son's room when he was not there. 6RP at 1066. He denied ever touching A.A. on the chest, taking her clothes off, denied dragging a toy chest to the bedroom across the floor to block the door to keep it from opening, denied touching her sexually and denied that he put his penis in her vagina. 6RP at 1068-69. He stated that he did not have any troubles with A.A. during her last visit, but that AK.A. had issues with her mother and that "there was

yelling back and forth." 6RP at 1069. Mr. Torrence acknowledged that he pushed Laura when the girls were visiting. 6RP at 1084.

The third visit to the house ended in August 2011. 6RP at 1073. Mr. Torrence rented a car to drive Laura, A.A. and J.A. from Vancouver back to Everett. 6RP at 1074. After returning, Brian Alexander, Laura, A.A. and J.A. almost immediately began packing to move to Texas; Mr. Torrence did not see A.A. again after dropping them off in Everett. 6RP at 1083.

Mr. Torrence's total period of contact with A.A. was only for a few weeks during a total of a three-month period during the spring and summer of 2011. 6RP at 1080.

Savannah Alexander and A.A. acknowledged that A.KA. did not have a physical genital examination. 3RP at 538, 4RP at 781. She testified that she was given an explanation for the two blood drops by A.A. and that she was satisfied with that answer. 5RP at 832. She stated that the blood drops were located in an area "beside" the vaginal area, but "not above it." 5RP at 831.

b. Defense motion for expert testimony by Dr. Johnson on "grooming" to rebut the State's accusations

Dr. Christopher Johnson testified regarding the prevalence of delayed reporting of sex offenses. 4RP at 696-708. The court denied a motion by the defense to elicit testimony regarding "grooming" behavior by sex offenders from Dr. Johnson. 4RP at 719-21. The prosecutor argued that the

evidence of grooming was "reverse propensity" evidence. 4RP at 713-14. Defense counsel argued that it was not propensity evidence and that grooming is part of the typical pattern of sexual abuse of children. 4RP at 714. Defense counsel noted it was not propensity but the absence of the typical pattern seen in child abuse cases, and that counsel had hired Dr. Johnson on other cases to testify regarding grooming behavior and that "[i]t comes up in every single case." 4RP at 716-17. The court stated that there is "an insufficient basis—factual basis or legal basis for me to allow that information in." 4RP at 719. The court also stated that "this appears to be a type of character evidence or kind of reverse character evidence." 4RP at 719. Judge Fairgrieve stated that "Dr. Johnson's testimony to what grooming activity is not going to be enough," and that he "would have to testify that the lack of grooming activity decreased the probability that the defendant –you know—committed the crime in this case." 4RP at 743.

c. Direct appeal

Mr. Torrence appealed his convictions and sentence arguing that the trial court violated his Sixth Amendment right to present a defense by excluding expert testimony on the prevalence of grooming behaviors in sexual assault cases, that several of his convictions constituted the same criminal conduct, and that he received ineffective assistance of counsel because defense counsel failed to argue same criminal conduct at sentencing, and that an e-mail surprised defense counsel when it came up at trial.

Torrence, at *1. He also challenged a community custody condition limiting his contact with his biological children and challenged the imposition of legal financial obligations. *Id.* By unpublished opinion filed October 6, 2020, the Court of Appeals, Division II, affirmed the convictions. See ***Torrence***, *1.

Mr. Torrence now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. TORRENCE'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED BY THE COURT'S RULING AND THE COURT DID NOT TAKE INTO CONSIDERATION THE EXCEPTION NOTED IN *STATE V. BRAHAM*

Mr. Torrence was denied his right to present a defense when the trial court excluded testimony by Dr. Johnson regarding "grooming" behavior typically seen in child abuse cases and that grooming or building a relationship is a common feature of child sexual abuse cases, and that it is less common for a perpetrator to suddenly engage in sexually abusing a child without grooming him. ***Torrence***, at *3-*4, *5. This evidence was relevant to rebutting the State's

case and it was not so prejudicial as to disrupt the fairness of the trial. Hence, the trial court erred in excluding the testimony.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantees the criminal defendant's right to present a defense. ***State v. Starbuck***, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015); ***State v. Hollow***, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). This is a fundamental element of due process. ***Chambers v. Mississippi***, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); ***Washington v. Texas***, 338 U.S. 14, 19, 18 L. Ed. 2d 1019,87 S.Ct. 1920 (1967).

A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. ***State v. Jones***, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). Under the Sixth Amendment, "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."' *Id.* at 720 (quoting ***Chambers v. Mississippi***, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). "A defendant's right to an opportunity to be heard in his defense... is basic in our system of jurisprudence." *Id.* That right is not absolute, however. *Id.* Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. ***State v. Gregory***, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006). Therefore, for defense evidence to be admissible it must be at least minimally relevant. ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

"Relevancy and the admissibility of relevant evidence are governed by

ER 401 and ER 402." ***State v. Rice***, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). Relevant evidence is evidence with probative value, meaning a tendency to prove or disprove a material fact. ER 401; ***Rice***, 48 Wn. App. at 12.

To be admissible, evidence must be relevant. ER 402. Relevant evidence is generally admissible, and irrelevant evidence is inadmissible. ER 402. ER 402 provides:

> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

To be relevant, evidence need only tend to prove or disprove the existence of a fact that is of consequence to the outcome of the case, including facts that provide evidence of any element of a defense. ER 401. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); ***City of Kennewick v. Day***, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). "Evidence is relevant if a logical nexus exists between the evidence and the fact to be established." ***State v. Burkina***, 94 Wn.App. 677, 692, 973 P.2d 15 (1999); ***State v. Peterson***, 35 Wn. App. 481, 484, 667 P.2d 645 (1983).

If defense evidence is shown to be relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding

process at trial." ***Darden***, 145 Wn.2d at 622. Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." ***Jones***, 168 Wn.2d at 720. The Supreme Court has cautioned that courts must remember "the integrity of the truth finding process and [a] defendant's right to a fair trial" are important considerations. ***State v. Hudlow***, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

To show a violation of the right to present a defense, the excluded evidence of the prevalence of grooming in sex cases, must first be of at least minimal relevance. ***Jones***, 168 Wn.2d at 720. Here, the trial court excluded general testimony on grooming. ***Torrence***, *5. The Court found that the ruling "did not eliminate Torrence's defense that he did not act like an abuser," and that he was nevertheless able to testify that he was a good father figure and took care of A.A. and J.A. and got along well with them. ***Torrence***, at *3. In the unpublished opinion, the Court cites ***State v. Jennings,*** No. 52275-6-II, 2020 WL 5903557 (Wash. Ct. App. Oct. 6, 2020), a decision handed down the same day as Torrence's decision.

Torrence, at *4. In ***Jennings,*** the trial court excluded a toxicology report that showed there was methamphetamine in the victim's body at the time of death, which could have corroborated the defendant's stated belief that the victim was under the influence of methamphetamine at the time of the homicide, in support of a claim of self-defense. *Id.* at *2. The Court of Appeals held the exclusion was not a Sixth Amendment violation because the report did not have extremely high probative value and did not constitute the entire defense. *Id* at *4-5.

The Court notes that trial court's decision limited the cross examination of Dr. Johnson not based on ER 404, but rather on its finding that the grooming testimony was not relevant under ER 402. ***Torrence***, at *6. To that extent, ***Jennings*** is inapposite because the Court's decision to affirm the trial court's ruling overlooks an exception enunciated in ***State v. Braham***, 67 Wn.App. 930, 841 P.2d 785 (1992). An expert opinion in the form of "profile" testimony creates the risk of "unfair prejudice and the ensuing false impression the jury might derive about the value of the expert's ostensible inference." ***Braham***, 67 Wn. App. at 935. In ***Braham***, the State was permitted in the trial court to present expert testimony regarding the "grooming process" whereby child molesters establish a relationship with the intended victim. ***Braham***, 67 Wn. App. at 932. From

this, the prosecutor argued that this expert's general information about grooming applied to the defendant and could be used as circumstantial evidence of guilt. *Id.* at 938. The prosecutor argued the elements of grooming present in that case were substantial circumstantial evidence supporting " 'that in fact' " the defendant had molested the child. *Id.* at 934. The ***Braham*** Court ruled that the State's use of this expert testimony implying guilt based on the characteristics of known offenders was "unduly prejudicial and therefore inadmissible." *Id.* at 937, 939. Division One in reversing held that such profiling evidence implying guilt based on characteristics of known offenders was inadmissible. The Court, however, reserved in its ruling that there may be probative value in testimony regarding grooming for rebutting a State's accusation of molestation. The ***Braham*** Court expressly did not hold "that such evidence will always be inadmissible" and described several situations in which grooming evidence may be appropriate and admissible. ***Braham***, 67 Wn. App. at 939. The Court stated:

> That circumstances might arise in which similar evidence would have probative value. **For example, a different result might be reached were testimony on grooming offered as rebuttal evidence after the defense claimed that a perpetrator's conduct was inconsistent with the behavior of those who commit abuse or rape.** Cf. *State v. Madison*, 53 Wash.App. 754, 764–65, 770 P.2d 662 (testimony regarding "recantation phenomenon" properly admitted in rebuttal), review denied, 113 Wash.2d 1002, 777 P.2d

> 1050 (1989); *State v. Stevens*, 58 Wash.App. 478, 497–98, 794 P.2d 38 (expert testimony on typical behaviors of sexually abused children admissible to rebut defense theory that victim's behavior was consistent with innocent explanation), review denied, 115 Wash.2d 1025, 802 P.2d 128 (1990). This is quite different from the State offering the expert testimony in its case in chief to prove an element of the crime, i.e., that sexual abuse/rape did in fact occur. See *State v. Black*, 109 Wash.2d 336, 351–52, 745 P.2d 12 (1987) (Utter, J. concurring) (noting the importance of this distinction).

Braham, 67 Wn.App. at 938 (footnote omitted, emphasis added).

Here, the Court noted that even without Dr. Johnson's testimony, the defense was able to argue that there was no evidence that Torrence groomed A.A. and that grooming is common in child sex abuse cases. ***Torrence***, at *5. Torrence argues, however, that the trial court abused its discretion by excluding the expert testimony of Dr. Johnson regarding the aspects of grooming by offenders, and the Court of Appeals —although it referenced ***State v. Braham*** in its ruling—erred by overlooking that ***Braham*** specifically delineates that testimony regarding grooming may be admissible in some cases, such as the present case, where testimony on grooming is offered as rebuttal evidence after the defense claimed that a perpetrator's conduct was inconsistent with the behavior of those who commit abuse or rape. ***Braham***, 67 Wn.App. at 938. Here, although the defense was able to argue that there was no evidence of grooming and that grooming is common in sexual assault cases, the trial court's ruling ensured that the defense was

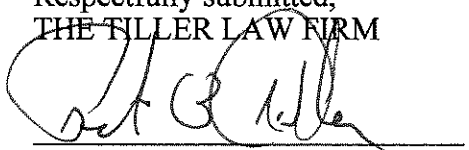
forced to made the argument without the imprimatur of expert testimony by Dr. Johnson. Where there was virtually no physical evidence, no physical genital examination, the allegations were extremely remote in time, and none of the typical hallmarks of predatory behavior where present, the testimony of an expert to rebut the State's allegation was at the very least, minimally relevant under ER 402, and resulted in a violation of Torrence's right to present a defense. The Court of Appeals erred by overlooking ***Braham*** and review should be accepted.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: November 5, 2020.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on November 5, 2020, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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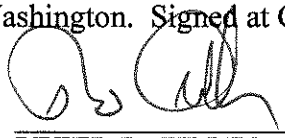
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 5, 2020.



PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 6, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ZACKERY CHRISTOPHER TORRENCE, Appellant.	No. 52432-5-II UNPUBLISHED OPINION

GLASGOW, J.—AA disclosed to her stepmother and another relative that Zackery Christopher Torrence, the boyfriend of AA's biological mother, had sexually assaulted her several times when she visited Torrence's home when she was 11 years old. The State charged Torrence with multiple counts of first degree child rape and first degree child molestation, as well as one count each of indecent liberties and second degree rape.

At trial, AA testified in detail about several incidents where Torrence molested and raped her. The jury convicted Torrence on all counts and found that he had used his position of trust to facilitate the commission of the crimes. The trial court imposed an exceptional sentence based on abuse of his position of trust and the fact that Torrence's offender score was so high that some of his crimes would go unpunished.

Torrence appeals, arguing that the trial court violated his Sixth Amendment right to present a defense by excluding expert testimony on the prevalence of grooming behaviors in sexual assault cases, something he asserts was absent here. He also contends that several of his convictions constituted the same criminal conduct. He argues that he received ineffective assistance of counsel

because defense counsel failed to argue same criminal conduct at sentencing and an e-mail surprised defense counsel when it came up at trial, suggesting counsel was unprepared to try his case. Torrence also challenges a community custody condition limiting his contact with his biological children. Finally, Torrence challenges the imposition of certain legal financial obligations. He also filed a statement of additional grounds (SAG).

We hold that the trial court did not violate Torrence's Sixth Amendment rights or abuse its discretion in excluding irrelevant grooming testimony. We also hold that none of Torrence's convictions constituted the same criminal conduct and he received effective assistance of counsel. We further hold that the trial court did not err in limiting Torrence's contact with his children or imposing a criminal filing fee. However, the trial court erred in imposing a community supervision fee and ordering that interest accrue on Torrence's legal financial obligations. None of the arguments in Torrence's SAG requires reversal.

We affirm Torrence's convictions but remand for the trial court to strike the community supervision fee from his judgment and sentence and to amend the interest accrual provision to comply with RCW 10.82.090(1).

FACTS

AA and her sister, JA, are the daughters of Brian and Laura A.[1] Brian and Laura divorced in 2004 and entered into a shared custody agreement wherein Brian was the primary caretaker and Laura saw the children every week. AA and JA lived with Brian and his wife, Savannah, in the Everett, Washington, area while Laura lived in Vancouver, Washington, where she met Torrence. Laura moved in with Torrence in Vancouver.

[1] We use the initial A instead of the family's surname to avoid easy identification of the victim.

AA and JA visited Laura and Torrence for six to eight weeks in summer 2011. AA testified to multiple distinct incidents of abuse during the same week toward the end of the visit, although the order in which they occurred is unclear.

In one incident, AA was watching television on the living room couch early in the morning when Torrence sat down next to her and started rubbing her chest and vagina over her clothes. He told her that everything was okay and not to be afraid. This incident formed the basis for count 1, first degree child molestation.

In a second incident, Torrence came into her bedroom while AA was undressing and then proceeded to massage her legs and vagina and then insert his fingers into her vagina. Torrence told her not to be afraid and that everything was okay as he did this. This incident formed the basis for counts 2 and 3, first degree child rape and first degree child molestation.

In a third incident that week, AA was again in her bedroom when Torrence came in and started taking off her clothes. This time AA resisted and tried to keep her clothes on and then tried to leave the room, but Torrence shut the door and blocked it with a toy chest. He then pushed her down onto the bed and raped her, penetrating her vagina with his penis. He told AA to be quiet or else he would hurt her sister and mom, and she complied. This incident formed the basis for counts 4 through 7, second degree rape, indecent liberties with forcible compulsion, first degree child rape, and first degree child molestation.

AA also testified that in total Torrence raped her seven times and molested her several other times, all around the final week of the visit. She said that she would sometimes see blood in her underwear during this time, and she would throw her underwear away. This testimony formed the basis for counts 8 and 9, first degree child rape and first degree child molestation.

Shortly after AA and JA returned from the visit to Torrence's house, they moved with Brian and Savannah to Texas. Around this time, AA developed anger problems, which got progressively worse over time. Brian and Savannah wanted AA to go to counseling for her anger issues, but AA refused. In 2016, AA moved to Utah to stay with Savannah's mother, Dianna Beardall, and she started going to counseling soon afterward.

After a counseling session in November 2016, AA told Beardall and Savannah that Torrence had sexually abused her. They then told Brian about the allegation, and he called the police in both Vancouver and Orem, Utah, where AA was living at the time.

Torrence was arrested and charged with four counts of first degree child molestation (counts 1, 3, 7, and 9), three counts of first degree child rape (counts 2, 6, and 8), one count of second degree rape (count 4), and one count of indecent liberties with forcible compulsion (count 5). For each count, the State alleged that Torrence used his position of trust or confidence to facilitate the commission of the crime.

At trial AA testified extensively about the abuse described above. She never had a sexual assault examination because she did not tell anyone about the abuse for several years.

Savannah testified that she saw a couple drops of blood in AA's underwear after she returned from the summer 2011 visit. Defense counsel asked her why she had not told him about this during an earlier interview, and she stated that she did not remember until after the interview and that she promptly e-mailed the victim advocate with the information. Defense counsel then asked the court to strike this line of testimony and instruct the jury to disregard it. Outside of the presence of the jury, counsel explained that he had never received this e-mail. But the prosecutor confirmed that the e-mail had been provided in discovery. The prosecutor produced proof that

defense counsel's office had provided signed confirmation of receipt. Defense counsel admitted the e-mail was a "complete surprise" to him and moved for its admission. 5 Verbatim Report of Proceedings (VRP) at 825. The e-mail apparently explained that the blood was unrelated to the allegations of abuse and, thus, Savannah did not pursue the issue further with AA. The trial court denied the motion and excluded the e-mail because it contained hearsay—AA's explanation for the blood was that she had cut herself shaving. In front of the jury, defense counsel then elicited testimony from Savannah that AA had given her a satisfactory explanation for the blood drops and that AA would not have been wearing this particular pair of underwear during her visit to Vancouver.

The State called Dr. Christopher Johnson, a psychologist, to discuss the prevalence of delayed reporting in sexual abuse cases. On cross-examination, Torrence attempted to ask Johnson about the prevalence of "grooming" in sexual abuse cases. 4 VRP at 710. The State objected on the grounds that such testimony was outside the scope of direct examination. Torrence indicated that he would just call Johnson in his own case-in-chief, and the State then requested that the trial court determine the admissibility of such testimony at that time. The State added relevance as a basis for excluding the testimony on grooming. The State explained that it was not claiming Torrence ever groomed AA.

Outside of the presence of the jury, defense counsel questioned Johnson, who testified on voir dire that grooming or building a relationship with a child is a common feature in child sexual abuse cases, and it is less common for a perpetrator to suddenly engage in sexual intercourse with a child without grooming them first.

Torrence argued that the lack of evidence of grooming in this case made it less likely that Torrence abused AA because grooming is a common phenomenon in sexual abuse cases. The parties and the trial judge discussed the admissibility of this testimony in the context of relevance and ER 404(a) character evidence. The State countered that this amounted to improper "reverse propensity" evidence because it suggested that, since grooming is common among sexual abusers and Torrence did not groom AA, Torrence could not have committed the abuse. 4 VRP at 714.

The trial court stated that it tended to agree with the State that the testimony was improper "reverse character" evidence, but ultimately ruled that this testimony was outside the scope of direct examination and did not relate to Johnson's credibility and would not be admitted on cross-examination. 4 VRP at 719. The court reserved its ruling on relevance and ER 404.

The following day, the trial court issued a ruling concluding that Johnson's testimony would not be admissible on direct examination because it was not relevant. The court reasoned that general testimony on grooming would not be relevant without an offer of proof establishing that the lack of grooming by a particular defendant decreases the probability that he actually committed sexual abuse, something that Johnson did not say in voir dire. The trial court also discussed the State's reverse propensity rationale and indicated that it might be an alternative basis for excluding the testimony, but ultimately ruled that the testimony was inadmissible because it was not relevant.

Torrence testified on his own behalf. He denied abusing AA, explaining how he tried to be a good father figure toward her when she was at his house. He also testified that he cooperated with the police investigation.

During closing argument, defense counsel emphasized to the jury that the blood Savannah found in AA's underwear could not have been the result of abuse. Defense counsel also argued, without any objection from the State, that there was no evidence that Torrence groomed AA and that grooming is a common occurrence in sexual assault cases. Counsel further explained that Torrence otherwise did not act like an abuser, pointing to his treatment of AA during her visit and the fact that Torrence cooperated with police.

The jury found Torrence guilty on all counts and also made a finding that he abused his position of trust in the commission of his offenses. The trial court entered a finding under RCW 9.94A.535(c)(2) that Torrence committed multiple current offenses and his high offender score of 28 resulted in some of the current offenses going unpunished. During sentencing, defense counsel argued that recent case law cited by the State did not compel a finding of "separate criminal conduct" with respect to some of Torrence's convictions and so those convictions should not score against each other, but the trial court did not adopt this argument. 8 VRP at 1314. Based on the aggravators, the trial court imposed an exceptional sentence of 360 months to life. The trial court found that it would impose the same sentence even if one of the aggravators was not present.

The trial court ordered that Torrence "not have any contact with minors under the age of sixteen years without prior approval of [the Department of Corrections] and [his] sexual deviancy treatment provider. [Torrence] may have contact in writing and by phone with his biological children." Clerk's Papers at 448.

The trial court found that Torrence was not indigent under RCW 10.101.010(3)(a)-(c), but that he did not have the ability to pay present and future legal financial obligations. The trial court

ordered Torrence to pay the mandatory criminal filing fee, the discretionary community supervision fee, and interest on these obligations.

Torrence appeals.

ANALYSIS

I. JOHNSON'S TESTIMONY

Torrence argues that the trial court violated his right to present a defense by excluding background expert testimony on "grooming" behavior often exhibited by perpetrators of sexual abuse. Br. of Appellant at 31. We disagree.

A. Right to Present a Defense and Standard of Review

Criminal defendants have a constitutional right to confront and cross-examine adverse witnesses and to present their defense. U.S CONST. amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *e.g.*, *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). In *State v. Arndt*, the Washington Supreme Court clarified the two-part analysis for determining whether the exclusion of evidence violates a defendant's constitutional right to present a defense. 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). Appellate courts must not only review the trial court's evidentiary rulings for an abuse of discretion, but must also consider de novo whether those rulings deprived the defendant of their constitutional right to present a defense. *Id.*; *see also generally State v. Darden*, 145 Wn.2d 612, 621-22, 41 P.3d 1189 (2002) (applying a test similar to *Arndt*'s in the context of the right to confrontation).

Arndt clarified that the constitutional analysis is required even where the trial court did not abuse its discretion in making its evidentiary ruling. 194 Wn.2d at 812. Although we generally

avoid unnecessarily addressing constitutional questions, under *Arndt*, this question must be analyzed even absent evidentiary error. *Id.* As a result, in this case, we address the constitutional question first because if there were a constitutional violation, there would be no need to address whether evidentiary error has also occurred. *See State v. Jennings*, No. 52275-6-II, slip op. at 7 (Wash. Ct. App. Oct. 6, 2020).

If the trial court's exclusion of Johnson's testimony violated Torrence's right to present a defense under the Sixth Amendment as described in *Arndt*, then we next perform a constitutional harmless error analysis. *Id.* If the exclusion of Johnson's grooming testimony did not violate the constitutional protections described in *Arndt*, or if any error was harmless under the constitutional harmless error standard, we then turn to whether the trial court abused its discretion in applying the evidentiary rules and whether any evidentiary error was harmless under the nonconstitutional harmless error analysis. *State v. Barry*, 183 Wn.2d 297, 317, 352 P.3d 161 (2015). This test requires the defendant to show a reasonable probability that the error materially affected the outcome of the trial. *Id.* at 317-18.

B. Whether the Trial Court Violated Torrence's Sixth Amendment Rights

In analyzing whether exclusion of Johnson's testimony was a violation of Torrence's Sixth Amendment right to present a defense, we balance the State's interest in excluding Johnson's testimony against Torrence's need for the information pertaining to the prevalence of grooming in sexual abuse cases. *See Arndt*, 194 Wn.2d at 812. In *Arndt*, the court held that the defendant's Sixth Amendment rights were not violated because the trial court's evidentiary rulings did not eliminate her entire defense and she was still able to advance the defense theory of the case. *Id.* at 814. The court distinguished Arndt's situation from *State v. Jones*, where "the trial court

interpreted a rape shield law to preclude the defendant from presenting any evidence that the victim had voluntarily engaged in an 'all-night[] drug-induced sex party.'" *Id.* at 812-13 (quoting *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010)). The *Arndt* court explained that the evidence at issue in *Jones* "was 'evidence of extremely high probative value; it [was] Jones's entire defense.'" *Id.* at 813 (quoting *Jones*, 168 Wn.2d at 721). In contrast, Arndt was still permitted to present evidence that pointed to an alternative cause for the fire that she was accused of starting. *Id.* at 813-14.

Similarly, in this case, the trial court's exclusion of general grooming testimony did not eliminate Torrence's defense that he did not act like an abuser. Torrence was able to testify that he gave AA "free range" when she was at his house, took good care of AA and JA, got along well with them, and tried to be a good father figure toward them. 6 VRP at 1067. He also testified that he cooperated with the police investigation. And defense counsel was still able to elicit testimony from Johnson that supported Torrence's defense theory that AA falsely accused Torrence in order to explain away her anger issues.

Moreover, defense counsel was able to advance Torrence's theory of the case during closing argument. Counsel argued that Torrence was a good father figure and did not try to isolate AA from family and friends or avoid the investigation, as a typical abuser might have. In fact, defense counsel argued, without any objection from the State, that there was no evidence that Torrence groomed AA and that grooming is a common occurrence in sexual assault cases. Thus, even without Johnson's testimony, defense counsel was still able to argue to the jury that the absence of any evidence of grooming and other typical abuser behavior made it less likely that Torrence sexually abused AA. Additionally, defense counsel was able to argue more generally

about the inconsistencies in AA's testimony, the lack of physical evidence, AA's anger toward her mother, Brian and Savannah's ultimatum regarding counseling, and the delay in AA's disclosure, all as support for the notion that AA fabricated the abuse.

Torrence was able to present evidence that supported his defense theories and advance his theory of the case in closing. We accordingly hold that the trial court did not violate Torrence's Sixth Amendment rights by excluding Johnson's grooming testimony.

C. Whether the Trial Court Abused Its Discretion Under the Evidence Rules

Having determined that there was no Sixth Amendment violation, we next examine whether the trial court abused its discretion in limiting Torrence's cross-examination of Johnson under the rules of evidence. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Barry*, 184 Wn. App. 790, 801-02, 339 P.3d 200 (2014).

Torrence argues the trial court erred in ruling that Johnson's testimony regarding grooming constituted improper character evidence. Torrence reasons that a proper analysis under ER 404(a)(1) does not prevent a defendant from offering evidence of their own pertinent character trait. Thus, according to Torrence, Johnson's testimony on grooming should have been admitted as evidence of a particular character trait common to sexual abusers that Torrence lacked, thereby making it less probable that Torrence is a sexual abuser. Torrence also argues in the alternative that Johnson's testimony was admissible as expert testimony because it would have been helpful to the jury.

Contrary to Torrence's assertions, the record shows that the trial court ultimately did not limit Torrence's cross-examination of Johnson based on ER 404. The trial court concluded that

general testimony on grooming would not be relevant, as required by ER 402, without an offer of proof establishing that the lack of grooming by a particular defendant decreases the probability that he actually committed sexual abuse. Because the proffered testimony from Johnson was more general, it was inadmissible as lacking probative value. The trial court also discussed the State's reverse propensity rationale, but ultimately ruled that the testimony was inadmissible because it was not relevant.

Irrelevant evidence is inadmissible. ER 402. Evidence is irrelevant if it lacks "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if it is relevant, evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403.

We agree with the trial court's assessment of relevance in this instance. A lack of evidence that a person committed a crime in one common way does not make it more or less probable that they committed the crime.

Torrence raises two additional arguments to support his assertion that the trial court should have admitted Johnson's testimony about grooming. First, he argues that the trial court conflated character evidence, which is admissible as it pertains to the defendant under ER 404(a)(1), with profile evidence, which merely identifies a person as a member of a group more likely to commit the charged crime. Profile evidence "is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice." *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). But Johnson's proffered testimony was not about a character trait of Torrence's, it was

about whether grooming is common in sex abuse cases. The trial court properly declined to admit Johnson's testimony based on ER 404(a)(1).

Second, Torrence claims Johnson's testimony was admissible as general expert witness testimony under ER 702 because it would have explained the concept of grooming and so would have been helpful for the trier of fact in understanding the lack of evidence that Torrence groomed AA for abuse. He analogizes such testimony to a police officer explaining, for example, how drug trafficking organizations function in order to contextualize for the jury the significance of the actions of a defendant accused of drug trafficking.

At trial, Torrence did not invoke ER 702 as a basis for admitting the testimony, so the trial court never had the opportunity to consider that rationale. "A party may assign evidentiary error on appeal only on a specific ground made at trial." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). We therefore do not consider Torrence's alternative basis under ER 702 for admitting Johnson's testimony.

In sum, we hold that the exclusion of Johnson's testimony on grooming was not an abuse of discretion because whether or not Torrence groomed AA did not make it more or less probable that he sexually abused her. The testimony was not relevant, and it was not admissible under ER 404(a)(1).

II. SAME CRIMINAL CONDUCT

Torrence argues that several of his convictions constituted same criminal conduct. First, he argues that his convictions for first degree child rape (count 2) and first degree child molestation (count 3) constituted same criminal conduct. Second, he argues that his convictions for second degree rape (count 4), indecent liberties (count 5), first degree child rape (count 6), and first degree

child molestation (count 7) constituted same criminal conduct. Counts 2 and 3 were based on the digital-vaginal rape that occurred in AA's bedroom, while counts 4 through 7 were based on the first penile-vaginal rape that occurred in AA's bedroom. We hold that none of Torrence's convictions constituted same criminal conduct.

A. Same Criminal Conduct Principles and Standard of Review

All current and prior convictions are generally counted separately when determining a defendant's offender score, but if concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender score. RCW 9.94A.589(1)(a).

We "will reverse a sentencing court's determination of 'same criminal conduct' only on a 'clear abuse of discretion or misapplication of the law.'" *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (quoting *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)). "'[T]he statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.'" *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013) (alteration in original) (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)). Hence, "when the record supports only one conclusion on whether crimes constitute the 'same criminal conduct,' a sentencing court abuses its discretion in arriving at a contrary result. But where the record adequately supports either conclusion, the matter lies in the court's discretion." *Id.* at 537-38 (citation omitted). It is the defendant's burden to establish that the crimes constitute the same criminal conduct. *Id.* at 539.

Crimes encompass the "[s]ame 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). It is undisputed that, with respect to both incidents, Torrence's crimes involved the same victim

and occurred at the same time and place. Our inquiry for the intent prong is to what extent Torrence's criminal intent, viewed objectively, changed from one crime to the next. *Id.*; *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Historically, Washington courts have conducted this inquiry by asking whether one crime furthered the other. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

However, the Supreme Court more recently looked to relevant statutes to identify the objective intent requirement for each crime. *State v. Chenoweth*, 185 Wn.2d 218, 223, 370 P.3d 6 (2016). In *Chenoweth*, the court held that the defendant's convictions for child rape and incest, though based on the same physical act, nevertheless involved separate criminal intent under the relevant statutes and, therefore, did not encompass the same criminal conduct. *Id.* The court reasoned that "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." *Id.* Thus, when analyzing the relevant intent, the court considered objective intent in the sense of what end a person intends to accomplish, as opposed to the mens rea of the crime.

Division One recently declined to apply the statutory intent framework from *Chenoweth* because *Chenoweth* did not discuss or overrule the *Dunaway* standard. *State v. Hatt*, 11 Wn. App. 2d 113, 143, 452 P.3d 577 (2019), *review denied* 195 Wn.2d 1011 (2020). The *Hatt* court reasoned that the Supreme Court has not applied *Chenoweth* outside the context of the particular crimes of rape and incest, and so the *Dunaway* standard remains controlling. *Id.*

However, in *State v. Johnson*, 12 Wn. App. 2d 201, 213, 460 P.3d 1091, *review granted*, 471 P.3d 227 (Sept. 9, 2020), we followed *Chenoweth* and looked only to the statutory elements of the crimes to determine whether they shared the same criminal intent:

> The intent for second degree rape of a child is the intent to have sexual intercourse, whereas the intent for commercial sexual abuse of a minor is the intent to exchange something of value for sexual conduct. RCW 9A.44.076; RCW 9.68A.100. Further, the intent required for communication with a minor for immoral purposes requires a different intent than the other two crimes; the intent to communicate with a minor with a predatory purpose of sexualizing the minor. Accordingly, we hold that these three crimes require different criminal intent.

We considered the defendant's intent to have sexual intercourse because he was convicted of *attempted* second degree rape, which requires that the defendant intend to have sexual intercourse. *Id.* at 212; *see also State v. Wilson*, 158 Wn. App. 305, 317, 242 P.3d 19 (2010).

Each of Torrence's crimes was a sex crime arising under chapter 9A.44 RCW, including the crime of rape analyzed by *Chenoweth* and the crime of rape of a child analyzed by *Johnson.* We, therefore, are compelled to apply *Chenoweth* in this case.

B. Torrence's Objective Intent for Each Crime

To convict Torrence of first degree child molestation, the State had to prove that he had sexual contact with AA, that AA was under 12 years old at the time, and that Torrence was at least 36 months older than AA. RCW 9A.44.083(1). "[S]exual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

To convict Torrence of first degree child rape, the State had to prove that he had sexual intercourse with AA, that AA was under 12 years old at the time, and that Torrence was at least 24 months older than AA. RCW 9A.44.073(1).

To convict Torrence of indecent liberties, the State had to prove that he knowingly caused AA to have sexual contact with him by forcible compulsion. RCW 9A.44.100(1)(a).

To convict Torrence of second degree rape, the State had to prove that he had sexual intercourse with AA by forcible compulsion. RCW 9A.44.050(1)(a).

Torrence first argues that his convictions for first degree child rape and first degree child molestation under counts 2 and 3, stemming from the digital-vaginal rape in AA's bedroom, constituted the same criminal conduct. We disagree.

Torrence argues this case is like *State v. Dolen*, 83 Wn. App. 361, 365, 921 P.2d 590 (1996), *abrogated on other grounds by Graciano*, 176 Wn.2d 531, where we held that the defendant's crimes of child molestation and child rape constituted the same criminal conduct because they each "involved the same objective criminal intent—present sexual gratification." But *Dolen* was decided before *Chenoweth,* so the *Dolen* court did not use *Chenoweth*'s formula of examining the statutory elements of the charged crimes. Rather, it determined that the defendant's intent of sexual gratification did not change from one crime to the next because the crime of child molestation furthered the crime of child rape in that case. *Dolen*, 83 Wn. App. at 365.

In *Chenoweth*, the Supreme Court explained that the intent for third degree child rape is "the intent to have sex with a child." 185 Wn.2d at 223; *see also Johnson*, 12 Wn. App. 2d at 213 (defining the intent for second degree child rape similarly). The definitions of "first degree," "second degree," and "third degree" child rape differ from each other only in the age of the child and the age of the offender in relation to the child. RCW 9A.44.073(1), .076(1), .079(1). Thus, the relevant intent for first degree child rape, like second and third degree child rape, is intent to have sexual intercourse with a child.

First degree child molestation, on the other hand, requires that the defendant have sexual contact with a child. RCW 9A.44.083(1). The statutory definition of "sexual contact" is "any

touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Thus, the crime of first degree child molestation requires a different statutory intent—to accomplish touching of the sexual or intimate parts of a child for the purpose of sexual gratification—that is not required for first degree child rape. Under *Chenoweth*, these two crimes are not the same criminal conduct.

Torrence next argues that his convictions for second degree rape (count 4), indecent liberties (count 5), first degree child rape (count 6), and first degree child molestation (count 7), stemming from the first penile-vaginal rape in AA's bedroom, constituted the same criminal conduct. He again reasons that because each of these crimes furthered the others and because Torrence maintained the same intent of pursuing sexual gratification throughout, they all constitute the same criminal conduct. No combination of counts 4 through 7 constituted same criminal conduct because each of those crimes has a different statutory intent. Therefore, we disagree with Torrence.

Indecent liberties with forcible compulsion (count 5) requires that the defendant intend to have sexual contact with the victim, which is defined as contact for the purpose of sexual gratification, through forcible compulsion. RCW 9A.44.100(1)(a), .010(2). Second degree rape (count 4) requires the intent to have sexual intercourse by forcible compulsion. RCW 9A.44.050(1)(a). But second degree rape does not have to be for the purpose of sexual gratification. First degree rape of a child (count 6) requires the intent to have sex with a child. RCW 9A.44.073(1); *see Chenoweth*, 185 Wn.2d at 223. Finally, first degree child molestation (count 7)

requires sexual contact with a child for sexual gratification, but it does not require forcible compulsion. RCW 9A.44.083(1), .010(2).

Because each of these four crimes requires a different intent, none of these four counts can be the same criminal conduct as any other count under the *Chenoweth* analysis. Torrence has not met his burden to show that any of his convictions constituted same criminal conduct.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Torrence argues that defense counsel was unprepared to try his case because counsel was not aware of Savannah's e-mail to the victim advocate describing the blood drops found in AA's underwear.[2] We disagree.

A. General Principles of Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To demonstrate that he received ineffective assistance of counsel, Torrence must show both that defense counsel's performance was deficient and that the deficient performance resulted in prejudice. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842 (2018).

Defense counsel's performance is deficient "if it falls 'below an objective standard of reasonableness.'" *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). We strongly presume that defense counsel's performance was not deficient. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). To overcome this presumption, the defendant must show "'the absence of legitimate

[2] Torrence also argues he received ineffective assistance due to counsel's failure to argue same criminal conduct at sentencing. Because we hold that none of Torrence's convictions were same criminal conduct, this argument fails.

strategic or tactical reasons supporting the challenged conduct by counsel.'" *Id.* (quoting *McFarland*, 127 Wn.2d at 336).

Prejudice ensues if there is a reasonable probability the result of the proceeding would have been different had defense counsel not performed deficiently. *Estes*, 188 Wn.2d at 458. Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end our inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant raising a "'failure to investigate'" claim must show "a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). Even if a defendant can show such information would have been uncovered, the potential resulting prejudice "'must be considered in light of the strength of the government's case.'" *Id.* (internal quotation marks omitted) (quoting *Rios v. Rocha*, 299 F.3d 796, 808-09 (9th Cir. 2002)).

B. Adequate Preparation

It is undisputed that the State provided Savannah's e-mail to defense counsel, but counsel was not aware of it when it came up at trial. The State concedes counsel performed deficiently and there was no conceivable strategic reason to neglect or ignore the e-mail. But even assuming counsel performed deficiently, Torrence was not prejudiced because counsel established through cross-examination, and effectively argued in closing, that the drops of blood were not likely the result of rape or molestation.

Also, the trial court ultimately did not admit the e-mail into evidence because it was hearsay. During cross-examination, Savannah testified that she was satisfied with AA's explanation of where the blood drops came from and so did not pursue the matter further. And she testified that this particular pair of underwear could not have been from laundry AA brought home from Torrence's visit. At most, it could have been from the day she returned home. Finally, during closing argument, defense counsel emphasized to the jury that, according to Savannah, those drops of blood could not have been the result of abuse.

Based on the evidence at trial, the jury could have concluded that the drops of blood in AA's underwear were not related to her allegations of abuse. Torrence has not shown that there is a reasonable probability that the outcome of this trial would have been different had counsel been aware of the e-mail earlier.

IV. SUFFICIENCY OF THE EVIDENCE

Torrence argues that AA's testimony was insufficient for a rational jury to find him guilty because the testimony was vague, offered several years after the abuse took place, and not corroborated by physical or other evidence. When reviewing a claim of insufficient evidence, this court asks whether a rational trier of fact could find that the State proved all of the crime's essential elements beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). This court views all the evidence in the light most favorable to the State. *Id.* at 265-66. And the defendant admits the truth of the State's evidence and all reasonable inferences that arise therefrom. *Id.* at 265. Both circumstantial and direct evidence are considered equally reliable. *Id.* at 266.

The testimony of the alleged victim of a sex offense need not be corroborated in order to sustain a conviction. RCW 9A.44.020(1); *see State v. Chenoweth*, 188 Wn. App. 521, 537, 354 P.3d 13 (2015). The substance of AA's testimony need only establish the elements of each of Torrence's crimes. Discussed above are the elements necessary to prove each count. *See*, *supra* at 16-17.

AA made sufficiently specific allegations of rape, molestation, and indecent liberties that, if the jury believed her, would satisfy the elements of each of the nine counts described above. Torrence does not appear to dispute that the various age requirements of each crime were satisfied, but rather that there simply was not enough evidence that he performed any of these acts.

On the first count of child molestation, AA testified that Torrence rubbed her chest and vagina over her clothes while they were on the couch. This testimony satisfies the elements of first degree child molestation as charged in count 1.

AA testified that in another incident, Torrence put his fingers in her vagina. This testimony was sufficient to establish the elements of first degree child rape and first degree child molestation as charged in counts 2 and 3.

AA also testified that in another incident, Torrence touched her vagina and then pinned her down and forced her to have sex with him. Accepting the truth of this testimony, it established the necessary elements for second degree rape, indecent liberties, first degree child rape, and first degree child molestation as charged in counts 4 through 7.

Finally, when asked how many times "penis and vagina sex happen[ed]" after the previous time Torrence raped her, AA responded, "About seven times." 3 VRP at 396. She explained that these incidents happened at the end of her third visit to Torrence's house, and also included two

or three more instances of sexual touching. This testimony was sufficient to establish that Torrence committed at least one more instance of child rape and child molestation against AA, as charged in counts 8 and 9.

In sum, accepting the truth of the State's evidence and all reasonable inferences therefrom, we hold that each of Torrence's convictions is supported by sufficient evidence.

V. CONDITIONS OF COMMUNITY CUSTODY

Torrence argues that the trial court erred in prohibiting him from having in-person contact with his minor children. We disagree.

A. Trial Court's Authority to Impose Conditions and Standard of Review

The trial court may impose crime-related conditions on a defendant's sentence and term of community custody. RCW 9.94A.505(9), .703(3)(f). "Crime-related" refers to conduct that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "'Directly related' includes conditions that are 'reasonably related' to the crime." *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015) (quoting *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014)).

We review a crime-related condition for abuse of discretion. *Id.* "A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons." *Id.* We review the factual basis for a crime-related condition for "'substantial evidence.'" *Id.*

However, when a sentencing condition interferes with a fundamental constitutional right, such as the fundamental right to parent, more careful review is required. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). "Conditions that interfere with fundamental rights must be

reasonably necessary to accomplish the essential needs of the State and public order" and must be "sensitively imposed." *Id.* Such conditions must be narrowly drawn and there must be no reasonable alternative to achieve the State's interest. *Id.* at 34-35. Nevertheless, because the imposition of crime-related conditions is a fact-specific exercise that depends on the trial court's in-person appraisal of both the trial and the defendant, the standard of review remains abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

B. Prohibition on In-Person Contact with Torrence's Children

Here, the trial court ordered that Torrence not have any contact with minors under 16 years old without prior approval of the Department of Corrections, but it allowed him to have contact with his biological children in writing or over the phone. Torrence argues that this condition was overly restrictive and not reasonably necessary to protect his children.[3] We disagree.

In *State v. Berg*, 147 Wn. App. 923, 941, 198 P.3d 529 (2008), the defendant was convicted of molesting his wife's minor daughter, and the sentencing court prohibited him from all unsupervised contact with minor females, including his own biological daughter. Division One upheld the order because the victim lived in a home where the defendant was acting as her parent. *Id.* at 942-43. Thus, the trial court reasonably feared that the defendant's daughter might also be at risk of abuse. *Id.* at 943. The *Berg* court further concluded that the order was sufficiently tailored to the crime, even though it prohibited all contact with minor females, not just physical contact. *Id.* at 944.

[3] Torrence also argues that he should be allowed to have supervised contact with his children, but it is clear that he is already permitted to do so with the Department's approval.

Like the victim in *Berg*, AA spent a significant amount of time in her abuser's home while he was in a relationship with AA's mother. Although Torrence may not have been a father figure to the same extent as Berg, he was still an authority figure within the home, and AA was left partially in his care for multiple weeks. Defense counsel even made the case during closing argument that Torrence was "doing what a father should do" when AA and her sister were visiting. 7 VRP at 1199. Torrence testified that he bought bunk beds and a swing set for AA and her sister to use when visiting, that he and Laura would make joint decisions in disciplining them, and that he generally tried to be a father figure toward them. Moreover, the order here is less restrictive than the order that was upheld in *Berg* in that it still allows Torrence to have written and telephonic contact with his children and permits broader contact with the Department of Corrections's approval.

We applied *Berg*'s reasoning in *State v. Corbett*, 158 Wn. App. 576, 599, 242 P.3d 52 (2010), where a defendant had abused his stepdaughter while she lived with him for a seven month period. *Corbett* upheld an order prohibiting the defendant from having unsupervised contact with his minor children without approval because he had "abused his parenting role by sexually abusing a minor in his care." *Id.* Again, although Torrence was not formally AA's stepparent, he too filled and abused that role while AA was living with him.

For these reasons, we hold that the trial court did not abuse its discretion in prohibiting Torrence from having in-person contact with his biological children until they turn 16. Based on Torrence's parent-like relationship with AA, the trial court's order was reasonably necessary to protect his biological children from potential abuse. Like the order in *Corbett*, the trial court's

order here still allows Torrence to have contact with his biological children with approval from the Department of Corrections.

VI. LEGAL FINANCIAL OBLIGATIONS

A. Criminal Filing Fee

Torrence argues the criminal filing fee must be stricken because he is indigent. We disagree.

RCW 36.18.020(2)(h) prohibits the imposition of the criminal filing fee if a defendant is indigent as defined in RCW 10.101.010(3)(a)-(c). Although Torrence was found indigent for the purposes of seeking appellate counsel, the trial court expressly found that Torrence was not indigent under RCW 10.101.010(3)(a)-(c). Therefore, the criminal filing fee, which is a mandatory fee unless the person is indigent under RCW 10.101.010(3)(a)-(c), was proper.

B. Community Supervision Fee

Torrence argues the trial court erred in imposing the community supervision fee because it did not conduct an individualized inquiry of his ability to pay. We agree that this fee was improper.

Under RCW 9.94A.703(2)(d), when a trial court sentences a defendant to a period of community custody, it shall order them to pay the costs of community supervision, unless waived by the court. Because the statute allows the trial court to waive such costs, they are discretionary. *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, *review denied*, 195 Wn.2d 1022 (2020).

Here, the trial court found that Torrence did not have the ability to pay discretionary fees, indicating an intent not to impose discretionary fees. We therefore remand to strike the community supervision fee.

C. Interest Accrual

Torrence argues the trial court erred in ordering that interest accrue on his nonrestitution legal financial obligations. The State concedes the trial court should not have imposed interest accrual. We agree.

RCW 10.82.090(1) provides that legal financial obligations other than restitution do not accrue any interest. Torrence's judgment and sentence orders that any legal financial obligations shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. We remand for the trial court to strike this provision from Torrence's judgment and sentence and replace it with language that complies with RCW 10.82.090(1).

VII. STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Torrence first suggests AA's sister would testify on his behalf. Torrence also suggests that Laura's ex-husband abused her in front of AA. These allegations rely on evidence outside the existing record and we do not consider them. *McFarland*, 127 Wn.2d at 335. The proper avenue for raising arguments based on new evidence is through a personal restraint petition. *Id.*

CONCLUSION

We affirm Torrence's convictions. We remand for the trial court to strike the community supervision fee from his judgment and sentence and to amend the interest accrual provision to comply with RCW 10.82.090(1).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

I concur:

Lee, C.J.

MELNICK, J. (concurrence) — I respectfully concur with the majority's result; however, I write separately because of my disagreement with its analysis on the evidentiary issue.

A jury convicted Zackery Torrence of multiple class A and class B felony sex crimes. Torrence sought to introduce expert testimony on the prevalence of grooming behaviors by child sex abusers. He wanted the jury to hear evidence from an expert that in child sex abuse cases, a common feature included grooming of the child victims by the offenders. Additionally, he wanted the expert to testify it was less common for a perpetrator to sexually abuse a child without first grooming the child. Torrence argued the lack of grooming in his case made it less likely that the abused the victims. The court excluded the testimony on the basis of relevancy.

Torrence argues the exclusion of the evidence violated his constitutional right to present a defense. But in essence we are reviewing a trial court's evidentiary ruling. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). A defendant's right to present a defense is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919 (2015).

Pursuant to *State v. Arndt*, 194 Wn.2d 784, 453 P.3d 696 (2019), and *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017), we review constitutional challenges to evidentiary rulings utilizing a two-step process. We first review the evidentiary ruling under an abuse of discretion standard. We then review the constitutional question of whether the court violated the defendant's right to present a defense. *Arndt*, 194 Wn.2d at 798; *Clark*, 187 Wn.2d at 648-49. "If the court

excluded relevant defense evidence, we determine as a matter of law whether the exclusion violated the constitutional right to present a defense." *Clark*, 187 Wn.2d at 648-49.[4]

The order in which we apply this test is important. There are three possible scenarios. If the trial court abused its discretion in making an evidentiary ruing, and the ruling was prejudicial to the defendant, we would avoid the constitutional issue altogether.[5] On the other hand, if the abuse of discretion constituted harmless error, we would address the constitutional standard. Lastly, if the trial court did not abuse its discretion, then we would review the constitutional issue. However, my research has not unveiled one case in Washington where the appellate court explicitly concluded that the trial court did not abuse its discretion by excluding evidence proffered by the defense or by limiting a defendant's cross-examination, and then went on to conclude that a constitutional violation occurred.[6]

This analysis is in keeping with the development of the jurisprudence in this area. As to the right to a fair trial, "[a]llegations that a ruling violated the defendant's right to a fair trial does

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[4] This portion of the test is based on an assumption that the evidence was excluded based on relevance; however, evidence may be excluded for any number of reasons. I do not know how to apply this portion of the test if the court had excluded the relevant evidence based on incompetent evidence, privileged evidence, or otherwise inadmissible evidence under standard rules of evidence or statutes. *Taylor*, 484 U.S. at 410. As an example, an incompetent witness would not be permitted to testify even if the witness had relevant defense evidence. Likewise, a witness asserting a valid privilege could not be compelled to testify even if the witness had relevant defense evidence. *See* chapter 5.60 RCW. Additionally, clear hearsay evidence is inadmissible even if it is relevant to a defense. *See* ER 802. It would seem to me that these examples of excluded evidence would not constitute a constitutional violation of a defendant's right to present a defense.

[5] We should refrain from deciding a case on constitutional grounds unless it is absolutely necessary. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

[6] This research is consistent with my prior research which resulted in *State v. Blair*, 3 Wn. App. 2d 353, 415 P.3d 1232 (2018).

not change the standard of review." *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Assessing the constitutional question first shifts the emphasis from an evidentiary ruling to a constitutional claim. It changes the focus from where it should be.

I can imagine situations where the excluded evidence would seem to violate a defendant's constitutional rights; however, based on well-recognized, rules of evidence, the court clearly and properly excluded inadmissible evidence. Hypothetically, the only evidence of a defendant's alibi defense is hearsay evidence that the defendant was at a different location other than the crime scene. Excluding this evidence would probably violate a defendant's right to present a defense because it would completely gut the defendant's defense. It would prejudice the defendant. The hearsay evidence is clearly relevant evidence. However, because all of the proffered evidence would be inadmissible under Washington's Rules of Evidence, there would be no abuse of discretion in excluding it. In that scenario, analyzing the constitutional prong first would result in a miscarriage of justice.

In the present case, I believe that the evidence that most child abusers groom their victims had *minimal* relevance.[7] *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). However, I do not think that the trial court abused its discretion by excluding the evidence.[8] It had minimal

[7] I agree with the trial court that Torrence failed to show a nexus between Torrence's lack of grooming and a decrease in the probability that he actually committed the sexual abuse. However, the evidence did have *minimal* relevance. It had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

[8] "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State's desire to exclude prejudicial evidence is "balanced against the defendant's need for the information sought," and relevant evidence should be excluded only "if the State's interest outweighs the defendant's need. *Darden*, 145 Wn.2d at 622.

relevance and could have easily confused the jury and disrupted the fairness of the jury's fact finding.

I also do not believe that a violation of Torrence's right to present a defense occurred. Torrence denied sexually abusing the victims and the trial court did not prohibit him from presenting that defense.

For the preceding reasons, I respectfully concur in the majority's result.

Melnick, J.

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Superior Court Case Number:	17-1-01632-2

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