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Division Two

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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	No. 52432-5-II UNPUBLISHED OPINION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.

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[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. <u>Adequate Preparation</u>

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).

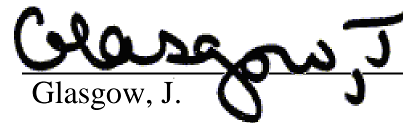
VII. STATEMENT OF ADDITIONAL GROUNDS

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

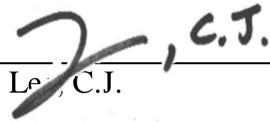
We affirm Torrence's convictions. We remand for the trial court to strike the community supervision fee from his judgment and sentence and to amend the interest accrual provision to comply with RCW 10.82.090(1).

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

[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.