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No. 68006-4-I
[NO. 11-1-00199-3 SEA]

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION ONE**

**STATE OF WASHINGTON,
Respondent,
vs.
JEFFREY MATTHEW HARPER,
Appellant.**

**On Appeal from the Superior Court
of the State of Washington
at King County**

**The Honorable
Superior Court Judge Jim Rogers**

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Evidence Was Insufficient to Convict Harper
2. Harper Was Denied Effective Assistance of Counsel at Trial
3. The Trial Court Exceeded Its Jurisdiction When Imposing its Sentence

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State present sufficient evidence to convict Harper of four separate counts of rape of a child in the first degree between the specific dates outlined in the “to convict” jury instruction? **NO.**
2. When looking at the totality of trial counsel’s performance, was Harper denied effective assistance of counsel? **YES.**
3. Did the trial court exceed its jurisdiction by imposing sentencing conditions unrelated to the offenses charged? **YES.**

C. STATEMENT OF THE CASE

1. Overview

Jeffrey and Stacy Harper have six children, including his stepdaughter K.R.¹, and reside in Redmond, Washington. RP2 at 27-29.²

¹ The alleged victim is a minor and the defense finds some measure of anonymity appropriate. Accordingly, she will be referred to as “K.R.”.

On October 7 2010, Detective Coats of the Redmond Police Department took eight year old K.R. from the Harper home following allegations of physical abuse. RP2 at 26. K.R. had previously been removed from home between October 10, 2006 and October 9, 2010, for 19 months. RP4 at 68. K.R. is currently residing with her foster parents, Jennifer and Shane Wilson. RP2 at 26-27.

On January 12, 2011, Redmond Police Department officers were granted a warrant to search the Harper residence. RP3 at 11. Later that day, the officers served the warrant and arrested Jeffrey Harper. RP3 at 12. The State later charged Mr. Harper with four counts of Rape of a Child in the First Degree – Domestic Violence, in violation of RCW 9A.44.073 for period between October 10, 2006 and October 9, 2010. Clerk’s Papers (CP) at 1, 46.

2. Evidence and Trial

At trial, the State first called Sara Luft, a social worker at the Department of Social and Health Services. RP2 at 23. Luft testified that Child Protective Services (CPS) received an intake alleging K.R. had been sexually abused. RP2 at 29.

² “RP1” refers to the Report of Proceedings from October 6, 2011. Similarly, “RP2” refers to the Report of Proceedings from October 10, 2011, while “RP3”, “RP4”, and “RP5” refers to the October 11 Report of Proceedings from October 11, 12 and 13, respectively.

The State next called Kate Conover, a University of Washington researcher administering a program “designed for kids with history of trauma exposure and post-traumatic stress.” RP2 at 30. Conover was referred to K.R.’s case by Sara Luft. RP2 at 31. Conover initially met with K.R. at her foster home where she asked K.R. standardized evaluation questions including questions regarding any “history of trauma and potential post- traumatic stress . . . basic psycho-social measures of well-being.” RP2 at 33. Conover’s questions included whether “an adult or someone much older touch[ed] your private sexual body parts when you did not want them to.” RP2 at 35. K.R. responded affirmatively that her step-father, Jeffrey Harper had. RP2 at 36. Following her interview with K.R., Conover interviewed K.R.’s foster-father, Shane Wilson. RP2 at 37. While Conover was still speaking with Wilson, K.R. “came back in the room” and asked “when are you going to ask me the scary, hard things?” RP2 at 37. K.R. asked to speak with Conover in private and disclosed that the alleged touching that K.R. referred to earlier “was S E X.” RP2 at 38. Conover testified that K.R. told her the touching began when K.R. “was three or four or five.” RP2 at 39.

The State next called Redmond Police Department Detective Patty Neorr. RP3 at 4. During her investigation of K.R.’s case, Detective Neorr observed an interview of K.R. conducted by Molly Rice at Child

Protective Services. RP3 at 10. Following the interview with Rice, Neorr coordinated with K.R.'s foster parent, Jennifer Wilson, to set up a medical examination of K.R. RP3 at 10. Neorr then testified that she applied for and was granted a warrant to search the Harper residence. RP3 at 11. At the Harper residence, Redmond Police Department officers recovered bedding from both K.R. and Harper's beds and various bottles of lotion from Mr. Harper's drawers. RP3 at 16, 23.

The State next called K.R. RP3 at 26. K.R. testified that her step-father "abused [her]" but could not remember when the alleged abuse occurred. RP3 at 28-29. K.R. testified that Mr. Harper "touch[ed] her vagina . . . with this penis." RP3 at 31. When asked "was it one time or more than one time?", K.R. replied that she didn't remember. RP3 at 31. K.R. testified that Mr. Harper had touched her vagina with "[j]ust his penis" and did not touch the outside of her vagina with anything else. RP3 at 31. She also testified that Mr. Harper had "touch[ed] [her] bottom with . . . [h]is penis." RP3 at 31. K.R. could not remember how many times Mr. Harper allegedly touched her bottom. RP3 at 31. K.R. also testified that she did not remember if Mr. Harper ever "touch[ed] his penis to [her] mouth." RP3 at 32.

K.R. also testified to one specific incident in which she was injured when glass had broken in the house. RP3 at 33. K.R. testified that, after

showering, Mr. Harper “took [her] into his room and he dried [her off] and he took out the glass pieces and then he laid – then he put me on the bed and then he stuck his penis in [her] vagina and [her] anus.” RP3 at 34.

Carolyn Webster, a Child Interview Specialist with the King County Prosecutor’s Office, testified about her interview with K.R. regarding the alleged sexual contact. RP4 at 8-40. A video recording of the interview was played for the jury and entered as Exhibit 21. RP4 at 29. During the interview Webster asked K.R. about her recent birthday and to recount what K.R. had done on her birthday, 3 months prior to the interview. RP4 on video. K.R. was able to describe the events of that day in detail, and easily recalled the answers to questions Webster posed to her, and volunteered most of the information, such as who’s room she had played in, and what presents she had received. RP4 on video. When asked about the sexual contact, K.R. mentioned the incident with the glass door, however she said he stuck his penis in her B-U-T-T. RP4 on video. K.R. said she couldn’t remember how old she was when the incident occurred but it was possibly when she was 1 or 2, but probably 4 or 5. RP4 on video.

Webster prompted her further regarding other incidents of sexual contact and K.R. said there was one time when she was napping that he had put his finger in her privates. RP4 on video. She said he did it really

slowly to not wake her up but she was fake sleeping because she doesn't nap unless she's really tired. RP4 on video. K.R. thought she was maybe 6 at the time but wasn't sure. RP4 on video.

Further prompting brought up an incident where Mr. Harper allegedly put his penis in K.R.'s mouth after rubbing lotion on it, however she does not remember how old she was or when it occurred or if it occurred more than once. RP4 on video.

During the interview K.R. frequently stated she "did not know" or "did not remember" and only after further prompting and very specific questions would K.R. then remember an incident. RP4 on video. Her recollection of the incident was generally vague, even with Webster's prompting questions. K.R. also stated she could not remember any incidents occurring after she was returned to the home in July 2009. RP4 on video.

The State later called Doctor Rebecca Wiester, who examined K.R. for possible sexual abuse on January 12, 2011. RP4 at 41, 48. Wiester testified that her physical examination of K.R. was a "completely normal anal/genital examination". RP4 at 57. Wiester also testified that her examination revealed that K.R. had a "completely normal" hymen. RP4 at 58. On cross-examination, Wiester testified:

Q. If there was allegations of repeated acts of penis entering the vagina with [K.R.]'s age, would you expect any abnormalities?

A. Well, you would think so.

RP4 at 66.

Following the close of evidence, the defense unsuccessfully moved for acquittal. RP4 at 67. The defense argued that the State had failed to present sufficient evidence of four separate counts of child rape. RP3 at 67. Specifically, the defense argued that the instances K.R. spoke of were "very vague and there is nothing concrete even with them . . . she has not given any timelines . . . [m]ost of the time it's, I don't remember." RP4 at 67. The State countered that it had shown four specific instances of sexual intercourse, namely:

[K.R.] describing the defendant penetrating her anus with his penis. That's the first one. Number two, we have [K.R.] describing the defendant penetrating her vagina with his finger. Number three, we have [K.R.] describing the defendant penetrating her anus with his finger. And finally number four, we have [K.R.] describing the defendant putting his penis in her mouth and even ejaculating.

RP4 at 69. The trial court denied the defendant's motion but did note that "[K.R.] is not necessarily consistent as to when this all occurred" and that "[t]here is conflicting evidence on penetration." RP4 at 70-71.

In the "to convict" jury instructions, the trial court instructed the jury, in part:

[t]o convict the defendant of the crime of rape of a child in the first degree, as charged in [one of the counts], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a time intervening between October 10, 2006 and October 9, 2010, on an occasion separate and distinct from [the other counts], the defendant had sexual intercourse with [K.R.].

CP at 48-56.

The jury found Mr. Harper guilty as charged. CP at 11. The trial court sentenced Mr. Harper to concurrent confinement sentences of 276 months to life for each count and entered a no-contact order for life with any minors without adult supervision. CP at 12,14, 15. Mr. Harper timely appeals. CP at 64.

D. ARGUMENT

1. The State Failed to Present Sufficient Evidence to Convict Mr. Harper of Four Separate Counts of Rape of a Child

Between the Dates Contained in the “To Convict”

Instruction

The State presented insufficient evidence to prove each of the four alleged acts of Rape of a Child. Specifically, the State was required to present sufficient evidence of each instance of the crime and failed to do so.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury’s verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 100 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980). This court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). This court does not need to be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the jury’s verdict. *State v. Jones*, 93 Wn.

App. 166, 176, 968 P.2d 888 (1998), *review denied*, 138 Wn.2d 1003 (1999).

To prove first degree child rape, the State had to show that (1) Mr. Harper had sexual intercourse with K.R., (2) K.R. was less than 12 years old and not married to Mr. Harper, (3) Mr. Harper was more than 24 months older than K.R., and (4) the acts occurred in Washington. RCW 9A.44.073. The definition of “sexual intercourse” includes any acts “involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.” RCW 9A.44.010(1)(c).

“Criminal defendants in Washington have a right to a unanimous jury verdict.” *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); WASH. CONST. ART. I, § 21. If the State alleges different means as to how the crime may have been committed the jury must be unanimous on how the defendant committed the crime. *Ortega–Martinez*, 124 Wn.2d at 707. “If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means.” *Ortega–Martinez*, 124 Wn.2d at 707–08. “But where the evidence is *insufficient* to present a jury

question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.” *Ortega–Martinez*, 124 Wn.2d at 708.

In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. *State v. Newman*, 63 Wn. App. 841, 851, 822 P.2d 308, review denied, 119 Wn.2d 1002, 832 P.2d 487 (1992). The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find “separate and distinct acts” for each count when the counts are identically charged. *State v. Noltie*, 116 Wn.2d 831, 842–43, 809 P.2d 190 (1991).

Here, the State alleged specific and distinct acts of sex abuse during the charging period. The trial court also complied with the requirement to properly instruct the jury. CP at 48-56. Thus, this court’s inquiry is whether the evidence was sufficiently specific as to each count charged. *Newman*, 63 Wn. App. at 851. Here, the State was required to present sufficient evidence of each instance of the crime and failed to do so.

In *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992), this court considered a case in which a nine year old girl made specific allegations of sexual misconduct. *Alexander*, 64 Wn. App. at 149-50. She told both her mother and counselor that Alexander had touched her, but the dates on which she said the touching occurred when talking to her mother and counselor differed from her testimony at trial. *Alexander*, 64 Wn. App. at 149-50. This court reversed the defendant's convictions because there, as here in Mr. Harper's case, "the inconsistencies in [the girl]'s testimony regarding when the abuse occurred, and whether the . . . incidents occurred at all, were extreme. *Alexander*, 64 Wn. App. at 158. This court held that "the evidence presented to this jury was too confused to allow it to find Alexander guilty on either count beyond a reasonable doubt." *Alexander*, 64 Wn. App. at 158.

Here, as in *Alexander*, the State presented confused and inconsistent evidence. K.R. could not remember when the abuse began nor could she remember if some of the alleged incidents had even occurred. K.R. stated that she "[didn't] remember when it started." RP3 at 28. When pressed by the State if she remembered how old she thought she was at the time, K.R. replied, "*I don't remember.*" RP3 at 29 (emphasis added). K.R. likewise did not remember if she was already in school when the alleged sexual contact occurred. RP3 at 29. Further, when asked by the State if she

“remember[ed] any specific times when [the defendant] touched [her],” K.R. replied that she did not. RP3 at 33. K.R. did not even remember how old she was when the defendant “came into [her] life.” RP3 at 33. K.R.’s testimony at trial differed greatly from her accounts of the abuse during the interview with Webster. She did not testify to any specific incidents of abuse until prompted by the prosecutor, and stated she only knew what Jeff’s penis looked like “[b]ecause at our house he would walk around naked with no clothes on.” RP3 at 33, 39. Likewise, an examination of the record reveals that the State’s other witnesses did not identify any specific instances of abuse but rather merely relayed that K.R. had told them of “S E X.” RP2 at 38. These many inconsistencies in K.R.’s story, such as those in *Alexander*, created such a doubt that it is not possible to determine that a rational jury would have a verdict of guilty on all counts beyond a reasonable doubt. *Alexander*, 64 Wn. App. at 158.

As noted above, the State argued that it had presented sufficient evidence of four separate incidents of sexual intercourse between Mr. Harper and K.R., namely Mr. Harper: (1) penetrating K.R.’s anus with his penis; (2) penetrating K.R.’s vagina with his finger; (3) penetrating K.R.’s anus with his finger; and (4) putting his penis in K.R.’s mouth. RP4 at 69. Contrary to the State’s claim, it has failed to present sufficient evidence to convict Mr. Harper of each of these four alleged acts.

The State was required to prove that the four alleged acts occurred between October 10, 2006 and October 9 2010 and failed to do so. Under the law of the case doctrine, because of the language used in the “to convict” instruction, the State assumed the burden of proving that Mr. Harper’s four alleged acts occurred between October 10, 2006 and October 9, 2010. *See State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). Specifically in the criminal context, the law of the case doctrine holds that the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction. *Hickman*, 135 Wn.2d at 102 (citing *State v. Lee*, 127 Wn.2d 151, 159, 904 P.2d 143 (1995); *see also State v. Barringer*, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982) (where the “to convict” instruction required the jury to find valium was a “controlled substance”, this became the law of the case and an added element the State had to prove), *overruled in part on other grounds by State v. Monson*, 113 Wn.2d 833, 849-50, 784 P.2d 485 (1989)). Where the State has assumed the burden of proving additional “elements” by including such “elements” in the “to convict” instruction, a defendant may assign error to such added “elements” and the court may consider whether the State has met it’s burden of proving them. *Hickman*, 135 Wn.2d at 102. “There is but one question . . . that is, [i]s there

sufficient evidence to sustain the verdict *under the instructions of the court?*” *Hickman*, 135 Wn.2d at 103 (emphasis added).³

i. Mr. Harper Allegedly Penetrating K.R.’s Anus with His Penis

The State’s evidence in support of its assertion that Mr. Harper penetrated K.R.’s anus with his penis may be summarized as: (1) K.R.’s statement to Sara Luft that Mr. Harper had touched her and the touching “was S E X;” (2) K.R.’s testimony that Mr. Harper “touch[ed] [her] bottom . . . with this penis;” (3) K.R.’s statement to Webster that Mr. Harper had touched her B-U-T-T with his wiener. RP2 at 38; RP3 at 31, RP4 on video. However, the equivocal, imprecise, and vague testimony of K.R., viewed as a whole, cannot form a sufficient basis upon which to uphold Mr. Harper’s conviction. Specifically, the State’s evidence is woefully insufficient to establish when this alleged act occurred.

³ Division Two of this court has held that the State’s inclusion of a particular charging period in the “to convict” instruction makes that charging period the law of the case. *State v. Jensen*. 125 Wn. App. 319, 104 P.3d 717 (2005), *review denied*, 154 Wn.2d 1011 (2005). In *Jensen*, a child molestation case, the defendant argued that the State assumed the burden of proving the alleged molestation occurred during the charging period in the “to convict” instruction. *Jensen*, 125 Wn. App. at 325-26. The *Jensen* Court agreed, but affirmed on factual grounds, finding that sufficient evidence that the acts occurred during the charging period had been presented. 125 Wn. App. at 326.

The State's information charged Mr. Harper with four separate counts of child rape occurring between October 10, 2006 and October 9, 2010. CP at 1, 46. To convict Mr. Harper based on its assertion that Mr. Harper penetrated K.R.'s anus with his penis, the State was required to present sufficient evidence to permit a rational trier of fact to find that this alleged act occurred between the above dates. *Salinas*, 119 Wn.2d at 201.

While testifying, K.R. stated that she "[didn't] remember when it started." RP3 at 28. When pressed by the State if she remember how old she *thought* she was at the time, K.R. replied, "I don't remember." RP3 at 29 (emphasis added). K.R. stated on the video that she was one or two or maybe four or five. RP4 on video. K.R. likewise did not remember if she was already in school when the alleged sexual contact occurred. RP3 at 29. Further, when asked by the State if she "remember[ed] any specific times when [the defendant] touched [her]," K.R. replied that she did not. RP3 at 33. Only after being prompted by the prosecutor regarding a glass door breaking did K.R. recall the incident. RP3 at 33, 34. K.R. did not even remember how old she was when the defendant "came into [her] life." RP3 at 33. Viewed as a whole, K.R.'s testimony cannot be sufficient to establish when Mr. Harper allegedly penetrated her anus. Indeed, even a general time frame cannot be established based on K.R.'s testimony.

Viewing the above evidence in the light most favorable to the jury's verdict, a rational jury may have been able to infer that Mr. Harper touched K.R.'s buttocks. *Salinas*, 119 Wn.2d at 201. However, it was unreasonable for the jury to find guilt within the specific time frame for which the State alleges the act occurred because the State presented no evidence to establish a timeline. K.R.'s vague, and inconsistent testimony and the State's failure to present any other evidence establishing that the alleged acts occurred within the specific dates cannot be sufficient to uphold the jury's verdict. Accordingly, Mr. Harper's conviction for this alleged act cannot be sustained as substantial evidence does not support the jury's verdict. *Jones*, 93 Wn. App. at 176.

This court's decision in *State v. A.M.*, 163 Wn. App. 414, 260 P.3d 229 (2011) compels reversal of this count of rape of a child. In *A.M.*, this court considered an issue of first impression on the issue of whether "penetration of the buttocks is 'sexual intercourse.'" 163 Wn. App. at 420. The victim in *A.M.* testified that the defendant "stuck his wiener in [his] poop – butt" and "it felt bad." 163 Wn. App. at 417. This court considered the distinction between the "buttocks" and "anus", noting that

it stretches credulity to maintain that the buttocks and anus are components of the same organ or that one is part of the other. A buttock is "either of the two rounded prominences separated by a

median cleft that form the lower part of the back in man and consist largely of the gluteus muscles.” Webster's Third New International Dictionary 305 (2002). In contrast, the anus is “the posterior opening of the alimentary canal.” Webster's Third New International Dictionary 97 (2002). The two parts, albeit related, are distinct. And the legislature has not indicated that penetration of the buttocks alone is sufficient to be sexual intercourse.

A.M., 163 Wn. App. at 421. Accordingly, the *A.M.* court held that “penetration of the buttocks, but not the anus, does not meet the ordinary meaning of ‘sexual intercourse.’” 163 Wn. App. at 421.

Here, as the victim in *A.M.*, K.R. testified that Mr. Harper “touch[ed] [her] bottom . . . with this penis.” RP2 at 38; RP3 at 31; 163 Wn. App. at 417. As in *A.M.*, K.R. did not explicitly testify that the defendant’s penis went inside her body. RP2 at 38; 163 Wn. App. at 217. Doctor Rebecca Wiester, who examined K.R. for possible sexual abuse, testified that she asked K.R. “could you tell if any part of his body ever went inside of your body?” RP4 at 41, 48, 56. K.R. said “I couldn’t really.” RP4 at 56. Wiester also testified that her physical examination of K.R. was a “completely normal anal/genital examination”. RP4 at 57. Dr. Wiester’s testimony did not support the State’s allegation of Mr. Harper penetrating K.R.’s anus. In essence, it is inconclusive.

Thus, this court's decision in *A.M.* compels reversal of Mr. Harper's conviction based on the victim's testimony that the defendant touched her "butt." *A.M.*, 163 Wn. App. at 421. "We hold that penetration of the buttocks, but not the anus, does not meet the ordinary meaning of "sexual intercourse." Accordingly, we reverse the conviction for rape of a child in the first degree." *A.M.*, 163 Wn. App. at 421.

ii. Mr. Harper Allegedly Penetrating K.R.'s Vagina
With His Finger

K.R.'s testimony at trial directly contradicted what she told Webster during the interview. During her testimony, the following exchange occurred:

Q. Okay. And did Jeff Harper ever touch your vagina?

A. He did with his penis. . . .

Q. Did Jeff touch your vagina with anything else?

A. *Just his penis.*

Q. Just his penis. Okay. Did he ever touch the outside of your vagina with anything?

A. *No.*

RP3 at 31 (emphasis added).

K.R. also testified she did not remember any specific times Jeff touched her. RP3 at 33. However, during the interview with Webster, K.R.

says Mr. Harper put his finger in her “privates” and her “B-U-T-T” when she was napping. RP4 on video.

K.R.’s testimony and the information she provided in the interview with Webster directly contradict each other. Based on the contradictory information it is difficult to ascertain exactly what, if anything, happened. This contradictory information cannot be sufficient for any rational trier of fact to find Mr. Harper guilty of this alleged act beyond a reasonable doubt. *Alexander*, 64 Wn. App. at 158; *Jones*, 93 Wn. App. at 176. Because there is insufficient evidence this court should dismiss Mr. Harper’s conviction that he allegedly penetrated K.R.’s vagina with his finger. *Jones*, 93 Wn. App. at 176.

iii. Mr. Harper Allegedly Penetrating K.R.’s Anus With His Finger

The State asserts that Mr. Harper’s allegedly penetrating K.R.’s anus with his finger serves as a sufficient basis to convict him of one count of child rape. RP4 at 69. During K.R.’s testimony, the following exchange took place:

Q. Did he ever touch your bottom with anything?

A. His penis.

RP2 at 32. However, K.R. told Webster that Mr. Harper had put his finger in her “B-U-T-T” while she was napping. RP4 on video.

Again K.R.'s testimony directly contradicts her statement to Webster. RP4 on video. K.R. also alleges during the interview with Webster that two of the charged acts occurred during a specific incident – when she was napping. RP4 on video. Since the State charged two separate acts it must “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. *Newman*, 63 Wn. App. at 851.

The State did not provide evidence of two separate incidents in which Mr. Harper put his finger in K.R.'s anus and vagina. *Newman*, 63 Wn. App. at 851.

Since “penetration of the *buttocks, but not the anus*, does not meet the ordinary meaning of ‘sexual intercourse,’” and during the interview with Webster, K.R. stated he put his finger in her B-U-T-T, there is not sufficient evidence of penetration to satisfy the case law. *A.M.*, 163 Wn. App. at 421 (emphasis added); RP4 on video.

Given the confusing testimony and interview responses, along with only one specific incident of the conduct occurring, the State did not prove Mr. Harper penetrated K.R.'s anus with his finger by sufficient evidence. *Alexander*, 64 Wn. App. at 158; *Jones*, 93 Wn. App. at 176.

- iv. Mr. Harper Allegedly Putting His Penis in K.R.'s Mouth

Again, K.R.'s testimony at trial directly contradicted her responses to Webster. During trial the following exchange took place:

Q. Did Jeff ever touch his penis to your mouth?

A. I don't remember or I don't know.

RP3 at 33.

While interviewing with Webster, K.R. described one time when she was four or five that Harper had "put his wiener in [her] mouth." RP4 on video. K.R. did not mention this occurrence to Dr. Weister.

K.R.'s equivocal testimony and contradictory interview responses cannot possibly be sufficient to sustain Mr. Harper's conviction. As substantial evidence does not exist to support the jury's verdict, this court should reverse Mr. Harper's conviction based on his allegedly putting his penis to K.R.'s mouth. *Jones*, 93 Wn. App. at 176.

2. Mr. Harper was Denied Effective Assistance of Counsel at Trial

This court reviews de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 127 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on a claim of ineffective assistance of counsel, the appellant must show that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.

2d 674 (1984); *State v. Brockrob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). The standard for determining whether a criminal defendant has been denied the effective assistance of counsel is whether “after considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Emmert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980).

This court presumes effective counsel and this presumption can only be overcome by showing the absence of a legitimate strategic or tactical basis for the challenged conduct. *State v. McFarland*, 127 Wn.2d 332, 335-36, 899 P.2d 1251 (1995). “Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336. Further, “[t]here may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial.” *McFarland*, 127 Wn.2d at 336. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have differed. *In re the Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

The extent of cross-examination is a matter of judgment and strategy. *In re the Personal Restraint of Davis*, 152 Wn. 2d 647, 720, 101 P.3d 1 (2007). This court finds ineffective assistance of counsel based on

trial counsel's decisions during cross-examination if counsel's performance does not fall within the range of reasonable representation. *Davis*, 152 Wn.2d at 720.

An examination of the entire record reveals that Mr. Harper's trial attorney failed to provide effective representation. Mr. Harper's failure to cross-examine most of the State's witnesses proved detrimental to the case, and in looking at the record for the few cross-examinations trial counsel conducted, trial counsel merely reiterated points established during the State's direct examination. *See, e.g.*, RP3 at 26 (again asking if the bedding removed from Mr. Harper's room was tested for DNA, a point already established (RP3 at 16)); RP4 at 35-37 (where trial counsel simply suggests if asking a follow-up question to the response of "I don't know" by an alleged victim could be a leading question); RP4 at 66 (merely asking if a penis entering a child's vagina could reveal any abnormalities, a point already established at RP4 at 57).

Trial counsel failed to call any witnesses, despite his meeting with a defense investigator, Mike Powers. RP1 at 6. Powers spoke with K.R. for "an extensive period," yet counsel did not call Powers to testify. RP1 at 6.

Prior to trial, counsel presented a questionnaire for the jury which the trial court substituted for the shorter, standard questionnaire. Counsel

admitted on the record “I didn’t know the policies usually with this kind of case.” RP1 at 4. He only brought the questionnaire because he “didn’t want to come empty handed.” RP1 at 3.

Given K.R.’s confused, imprecise, and vague testimony (especially considering her repeated answers of “I don’t know” and “I don’t remember.”), it is not within the range of reasonable representation for Mr. Harper’s trial attorney to fail to cross-examine K.R. at all. *Davis*, 152 Wn.2d at 720. A few simple questions would have highlighted the inconsistencies in K.R.’s testimony, and emphasized the insufficiency of the State’s evidence.

But for trial counsel’s inexperience with this type of case, by his own admission, and failure to cross-examine the alleged victim, this court cannot find beyond a reasonable doubt that the jury would have found Mr. Harper guilty. *Strickland*, 466 U.S. at 687; *Brockrob*, 159 Wn.2d at 344-45. Accordingly, this court should reverse Mr. Harper’s convictions as he received ineffective assistance of counsel at trial.

3. The Trial Court Exceeded Its Jurisdiction by Imposing Sentencing Conditions Unrelated to the Offenses Charged

RCW 9.94A.505(8) authorizes the trial court to impose “crime-related prohibitions” as part of any sentence. “Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the

circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” *State v. Corbett*, 158 Wn. App. 576, 597, 242 P.3d 52 (2010). This court reviews crime-related prohibitions for an abuse of discretion. *State v. Riley*, 121 Wn. 2d 22, 37, 846 P.2d 1365 (1993). Abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

Parents have a fundamental right to raise their children without State interference. *See In re Custody of Smith*, 137 Wn. 2d 1, 15, 969 P.2d 21 (1998) (recognizing a parent's right to rear his or her children without State interference as a constitutionally-protected fundamental liberty interest), *aff'd*; *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). But parental rights are not absolute and may be subject to reasonable regulation. *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

RCW 9.94A.120(2) requires that sentencing conditions “relate directly to the circumstances of the crime.” *See also State v. Letourneau*, 100 Wn. App. 424, 432, 997 P.2d 436 (2000). For example in *State v.*

Riles, 135 Wn.2d 326, 347, 957 P .2d 655 (1998), our Supreme Court upheld a condition that Riles have no contact with minors after Riles anally raped a six-year-old boy, finding the prohibition reasonable for protecting the public, especially children. But in a companion case where the victim was a 19-year old woman, the court struck a similar restriction, reasoning that there had been no showing that children were at risk and needed special protection from the defendant. *Riles*, 135 Wn.2d at 39-50.

Similarly, in *State v. Julian*, 102 Wn. App. 296, 306, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001), an order prohibiting unsupervised contact with minors under 18 years of age was directly related to the defendant's molestation of a four-year old child. However, the *Julian* court held that the sentencing court had no authority to proscribe the defendant's use of alcohol because there was no connection between alcohol and the crime. *Julian*, 102 Wn. App. at 305.

The prohibitions imposed in *Riles* and *Julian* were designed to protect potential victims. But where the State cannot show that the defendant poses a threat to those the order aims to protect, the sentencing court lacks authority to restrict contact. *Letourneau*, 100 Wn. App. at 441-42. In *Letourneau*, the court struck an order denying the defendant any contact with her biological children. Letourneau protested the denial of her fundamental right to raise her children. *Letourneau*, 100 Wn.2d at 438.

Competing with her interest was the State's compelling interest in preventing harm to Letourneau's children. *Letourneau*, 100 Wn. App. at 439. The court found that the State had failed to prove that the restriction was reasonably necessary to prevent Letourneau, who had molested a 13 year old student, from sexually molesting her own children. *Letourneau*, 100 Wn. App. at 439. The court explained, “[t]here must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention.” *Letourneau*, 100 Wn. App. at 442.

Here, Mr. Harper has no criminal history, and no history of sex offenses against children. The court did not explain its reasons for imposing a no contact order with all minors, but rather just accepted the State’s recommendations, which also were not accompanied by any articulated reasoning. There is no evidence that Mr. Harper would pose a danger to his biological children. Further, the State failed to show that the condition was reasonably necessary to protect Mr. Harper’s other children from sex offenses. The State further did not provide any evidence that contact between father and children would harm Mr. Harper’s children.

Barring father-son contact does not directly relate to the father's crimes in this case. RCW 9.94A.120(20). Absent an “affirmative

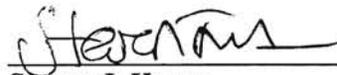
showing” that the desired contact poses a danger to the sons, the trial court lacked authority to impose such a condition. *Letourneau*, 100 Wn. App at 442. Accordingly, if this court does not reverse all of Harper’s conviction, this court should remand for re-sentencing without the condition of no-contact with his biological children.

E. CONCLUSION

For the above reasons, Mr. Harper respectfully asks this Court to reverse and dismiss his convictions. If this Court does not accept his sufficiency and/or ineffective assistance arguments, Mr. Harper respectfully asks this Court to remand for re-sentencing without the condition of no-contact with his biological children.

DATED this 17th day of May, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 17th day of May, 2012, I caused a true and correct copy of this Opening Brief to be served on the following by United States Mail:

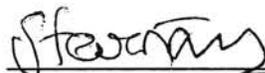
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