

NO. 70955-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN P. BLACKMON,

Appellant.

2014 JUN -9 11:11 AM
COURT OF APPEALS
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BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court properly admit defendant's prior trial testimony as an admission by party opponent and properly limit portions offered by defendant to those portions of the statement necessary to: explain the admitted evidence; place the admitted portions in context; avoid misleading the jury; and insure fair and impartial understanding of the evidence?

2. Did witnesses express improper opinions on defendant's guilt?

3. Did the trial court abuse its discretion in denying defendant's motion for mistrial for a de minimis violation of the court's order in limine regarding prior trials?

4. Has defendant met his burden to establish prosecutorial misconduct: That the prosecutor's conduct was improper and prejudicial; that any prejudicial effect had a substantial likelihood of affecting the verdict; and was not cured by the court's instructions?

5. Does the Cumulative error doctrine does apply where the errors are few and have little or no effect on the outcome of the trial?

6. Was the trial court's imposition of an exceptional sentence an abuse of discretion when defendant's multiple current

offenses resulted in an offender score greater than nine resulting in a presumptive sentence identical to that which would be imposed if defendant had committed fewer current offenses?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

John Patrick Blackmon, defendant, began having sexual contact with his 13 year old daughter, I.B., sometime between September 2007 and August 2008. The first incident occurred in the living room. I.B. was sitting in a chair with her father watching TV; her mother and younger brother and sister had gone to bed. Defendant put his hand down the front of I.B.'s shorts and began rubbing her genitalia on top of her underwear. He asked her if it felt good and when she said "yes," he asked her to take off her underwear. After I.B. removed her underwear defendant put his hand down the front of her shorts and began rubbing the lips of her vagina. Defendant again asked I.B. how it felt. When he stopped defendant told I.B. to keep it between the two of them and not tell anyone. Defendant frequently engaged in similar behavior with his

daughter I.B. prior to her fourteenth birthday both on the couch and in defendant's bedroom. RP¹ 303-312, 329.

Defendant continued to have sexual contact with I.B. after she turned 14 years old, but prior to when she turned 16 years old. The sexual contact included several occasions when defendant performed oral sex on his daughter. The first time occurred in defendant's bedroom when he placed his mouth on her vagina. During the same time period defendant on several occasions put his penis between I.B.'s butt cheeks while lying next to her in bed. Defendant also had I.B. fondle his genitals during the time period between her fourteenth and sixteenth birthdays. One incident involved having I.B. masturbate defendant on his bed. RP 333-339, 348-355, 358-362.

The sexual contact between defendant and his daughter ended shortly after I.B. started her sophomore year of high school. She was an honor student and played varsity basketball, she was often exhausted from school, basketball and homework. I.B. wanted to have a normal relationship with her father without the

¹ RP designates the five volume Verbatim Report of Proceedings, consecutively paginated 1-1043. Other Verbatim Report of Proceedings are designated by date, e.g., RP (7/1/14).

sexual activity and told defendant that she wanted the sexual activity to stop. RP 379-381, 574.

B. PROCEDURAL HISTORY.

On January 27, 2012, defendant was charged by information was with one count 2nd Degree Child molestation, one count 3rd Degree Rape of a Child, and one count 1st Degree Incest. CP 299-300. Before the case proceeded to trial on October 29, 2012, three amended informations had been filed. CP 269, 289-295. The fourth amended information was filed on November 1, 2012. CP 267-268. On November 5, 2012, the court found the jury was deadlocked on all counts and declared a mistrial. CP 288.

On March 18, 2013, the fifth amended information was filed charging defendant with: Count I, 2nd Degree Child molestation; Count II, 2nd Degree Child molestation; Count III, 3rd Degree Rape of a Child; Count IV, 3rd Degree Child molestation; and Count V, 3rd Degree Child molestation. On March 18, 2013, the case proceeded to trial a second time. On March 26, 2013, the court found the jury was deadlocked on all five counts and declared a mistrial. CP 236-264, State's Supplemental Clerks Papers ____ (sub# 107, Jury Trial).

On July 1, 2013, the third trial commenced with motions in limine. RP (7/1/13) 1-198. The trial proceeded through July 15, 2013, when the jury returned verdicts finding defendant guilty on all five counts. CP 142-146; RP (7/15/13) 1-6.

On September 9, 2013, defendant was sentenced. The prosecutor's recommendation was for a standard range sentence with all counts to run concurrently. CP 23, 40; RP (9/9/13) 17-22. The court inquired about consecutive sentences under RCW 9.94A.535(2)(c) and the prosecutor reiterated that the State's recommendation was for a standard range sentence with all counts served concurrently. RP (9/9/13) 22-24.

The court sentenced defendant to 176 months total confinement: 116 months on count I; 116 months on count II; 60 months for count III; 60 months for count IV; and 60 months for count V; counts I—IV to run concurrently and count V to run consecutive to counts I—IV. The court found that the aggravating factors of the multiple counts and defendant's offender score established substantial and compelling reasons that justified an exceptional sentence above the standard range and ordered that count V be served consecutively to counts I-IV. CP 22-24, 34, 40-41; RP (9/9/13) 30-45; RP (9/10/13) 47-56.

Defendant timely appealed. CP 2-19.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S TESTIMONY FROM A PRIOR TRIAL AS AN ADMISSION BY PARTY OPPONENT AND PROPERLY LIMITED PORTIONS OFFERED BY DEFENDANT TO THOSE PORTIONS OF THE STATEMENT NECESSARY TO EXPLAIN THE ADMITTED EVIDENCE, PLACE THE ADMITTED PORTIONS IN CONTEXT, AVOID MISLEADING THE JURY, AND INSURE FAIR AND IMPARTIAL UNDERSTANDING OF THE EVIDENCE.

Defendant argues that the trial court erred in allowing portions of his testimony from a prior trial to be introduced as evidence while limiting his right to have other portions admitted under the "rule of completeness." Appellant's Brief at 23-28. Under the rule of completeness, if a party introduces a statement, an adverse party may require the party to introduce any other part "which ought in fairness to be considered contemporaneously with it." ER 106; State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). However, "the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received." Larry, 108 Wn. App. at 910. The trial court's decision regarding admission of evidence is reviewed for an abuse of discretion. State v. Simms, 151 Wn. App. 677, 692, 214 P.3d 919 (2009) aff'd, 171 Wn.2d 244, 250 P.3d 107 (2011). The portions of the statement that the proponent seeks to admit must, of

course, be relevant to an issue in the case. Larry, 108 Wn. App. at 910.

Defendant's prior testimony was admissible under the hearsay rule. Admission of a "party's own statement" is exempt from exclusion as hearsay under admission by a party opponent. ER 801(d)(2)(i)-(ii). Self-serving admissions of a party are not admissible as an exception to the hearsay rule. State v. Stubsojen, 48 Wn. App. 139, 147, 738 P.2d 306 (1987); Marin, 669 F.2d at 84. "An admission is not binding on the party—he is permitted at trial to explain or deny the admission, or introduce evidence to the contrary." Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 859, 292 P.3d 779 (2013).

Finding that ER 106 "is substantially the same as Federal Rule 106" the court in Larry applied the test set forth in United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir., 1992). Under that test "a trial judge need admit only that evidence which qualifies or explains the evidence offered by the opponent." Id. Once relevance has been established, the court determines whether the offered portions of the statement are necessary to: 1) explain the admitted evidence; 2) place the admitted portions in context; 3) avoid misleading the trial of fact; and 4) insure fair and impartial

understanding of the evidence. Larry, 108 Wn. App. at 910, citing Velasco, 953 F.2d 1467, 1475.

Prior to the third trial, the prosecutor gave notice of intent to use portions of defendant's testimony from his first trial.² Defendant's initial response was a request that defendant's prior testimony be admitted in its entirety, pursuant to ER 106. CP 184-185; RP (7/1/13) 6-7. When the prosecutor suggested that reading the entire transcript of defendant's prior testimony would be the easiest way to accommodate both parties' interests, defendant objected, arguing that there were portions that he wanted kept out. RP 499-500. The trial court addressed the portions of defendant's prior testimony that the parties wanted read to the jury.³

Defendant requested thirteen portions of the transcript be read to the jury. The court considered whether the portions requested by defendant were necessary to: explain the portions the prosecutor wanted read into evidence; place the portions the prosecutor wanted read in context; avoid misleading the jury; and insure fair and impartial understanding of the evidence. RP 782-

² See SCP 305-384; the 79 page transcript of defendant's prior testimony from November 1 and 2, 2012.

³ Appendix A contains copies of the 69 pages of the transcript where portions were either read, or requested by defendant to be read, as testimony. The pages are redacted to show which portions were read and which portions were requested by defendant.

808. The court ruled that if the prosecutor chose to read some portions of defendant's prior testimony, then other relevant portions necessary to clarify or explain the portions that were introduced would also be included. RP 818-833, 864-868. The trial court "need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received." Simms, 151 Wn. App. at 692; Larry, 108 Wn. App. at 910. "The completeness doctrine does not ... require introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages." United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982). The appellate court will not disturb admission of redacted statements absent an abuse of the trial court's sound discretion. Larry, 108 Wn. App. at 910. Because defendant objected to admitting the entire transcript as evidence, argument is limited to the portions requested by defendant that the trial court denied.

The trial court permitted all but five of the portions requested by defendant to be read to the jury.⁴ The first portion defendant requested that was not read to the jury pertained to defendant's

⁴ Defendant's request included 557 lines of the transcript; 428 of the lines requested by defendant were read as testimony.

education and military experience. SCP 306-307; Appendix A, page 1 line 14 through page 2 line 9. Defendant's reason for requesting this portion was to show that defendant was nervous, and to explain defendant's statement, "She was the financial provider and I was Mr. Mom," and portions offered by the prosecutor referring to Jenifer's and defendant's marriage. RP 783-787. The trial court permitted the four lines, page 1 lines 18 through 21, to be read, but denied the rest finding that it did not make any of the portions offered by the prosecutor more complete. RP 818-819.

The second portion pertained to how defendant met Jenifer, that both he and Jenifer had previously been married, and when they were married. SCP 308-309; Appendix A, page 3 line 9 through page 4 line 12. Defendant's reason for requesting this portion was that it related to defendant's and Jenifer's marriage and showed how their marriage started. RP 787-789. The trial court denied reading this portion finding that it did not make any of the portions offered by the prosecutor more complete or fair. RP 819.

The next portion pertained to when defendant spoke to police on January 6, 2012, and agreed to leave the family residence for the day. SCP 339-341; Appendix A, page 34 line 23

through page 36 line 18. Defendant's reason for requesting this portion was that the prosecutor offered portions relating to defendant's behavior earlier on January 6. RP 791-792, 820-821. The trial court denied reading this portion finding that the prosecutor was not offering portions regarding defendant's interaction with the police on January 6; reading this portion was not necessary to put the portions offered by the prosecutor in context; and not reading this portion was not unfair or misleading. RP 820-821.

The next portion pertained to condoms, whether defendant and Jenifer ever had anal sex, and defendant's feelings about anal sex. SCP 344-345; Appendix A, page 39 line 13 through page 40 line 22. Defendant's reason for requesting this portion was that it related to portions offered by the prosecutor regarding condoms and the lack of sex between defendant and Jenifer. RP 796-797. The trial court permitted the portion from page 39 line 13 through page 40 line 18 to be read finding the portion regarding condoms and anal sex related to portions offered by the prosecutor. The trial court denied reading the four lines, page 40 lines 19 through 22, finding that defendant's feelings about sodomy were not necessary

to explain or complete the portions offered by the prosecutor. RP 821-822.

The last portion pertained to defendant's denial that he committed the crimes. SCP 350-351; Appendix A, page 45 line 18 through page 46 line 25. Defendant's reason for requesting this portion was that it would be supremely unfair to let the jury know that he testified previously and leave them with the impression that he may have admitted the offenses during that testimony. RP 798-800. The admitted portions did not contain a confession by defendant. RP 799-800. The trial court denied reading this portion finding that the portions the prosecutor was offering to read did not contain an admission by defendant that he committed any of the offenses. RP 822-824.

Defendant also argues that by not allowing his prior testimony to be read into evidence in its entirety, specifically his denial that he committed the crimes, the trial court violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, sections 3, 9 and 22 of the Washington State Constitution. Appellant's Brief at 24-28. Defendant never made a confession. To the contrary, the defense theory was that I.B. "decided to tell a very terrible lie about her

father.” RP 990. Defendant’s reliance on federal cases in support of this argument is misplaced.

In Glover, while noting that the trial judge “should be sensitive to the defendant’s right to present evidence on his own behalf, as well as his right not to testify,” the court concluded that the trial judge “did not abuse his discretion in denying Glover’s request to admit the entire transcript of his testimony from his first trial into evidence at his retrial, and that the judge’s ruling did not deprive Glover of his right to a fair trial.” United States v. Glover, 101 F.3d 1183, 1192 (7th Cir. 1996), rev’d on other grounds, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). Here, the trial court considered defendant’s right to either testify or not testify. RP 805-808, 811-818.

In Sutton, the court found that the “excluded statements would have partially rebutted the government’s use of the recordings, and were relevant to [his] defense.” United States v. Sutton, 801 F.2d 1346, 1370 (D.C. Cir. 1986). After considering the defendant’s right not to testify, the court determine that the error in excluding the statements did not substantially prejudice the defendant’s right to a fair trial. Id. at 1371. Here, defendant has

not shown how the excluded portions of his the statements substantially prejudiced his right to a fair trial.

In Marin the court held that the “completeness doctrine,” did not require introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages. United States v. Marin, 669 F.2d 73, 85 (2d Cir. 1982). The court specifically found that the question of whether the defendant’s Fifth Amendment rights had been implicated was not before the court. Id. at 85 n.6.

In Walker, the court found that “most of Walker’s excluded testimony did qualify for admission under Fed.R.Evid. 106” and that “the Government’s incomplete presentation may have painted a distorted picture of Walker’s prior testimony which he was powerless to remedy without taking the stand.” United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981). Here, the excluded testimony did not qualify for admission under ER 106. The trial court denial of defendant’s request to have portions of the transcript of his testimony from his first trial read into evidence at this trial was not an abuse of discretion and did not deprive defendant of his right to a fair trial.

B. WITNESSES DID NOT EXPRESS IMPROPER OPINIONS ON DEFENDANT'S GUILT.

For the first time on appeal defendant raises the issue that Officer Allen and Detective Shackleton were allowed to express their opinions of defendant's guilt. Appellant's Brief at 28-30. "As a general rule, appellate courts will not consider issues raised for the first time on appeal." RAP 2.5(a). Opinion testimony is testimony that is "based on one's belief or idea rather than on direct knowledge of facts at issue." Saunders, 120 Wn. App. at 811, citing State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). "The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." State v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). Here, Officer Allen testified regarding his response to a 911 call on January 6, 2012, involving a teenage girl hiding in the bushes. Officer Allen's testimony was not an improper opinion on guilt. Rather, his testimony was based on his direct observation and knowledge of facts he observed.

On January 6, 2012, defendant picked I.B. up from school and drove her home to discipline her for continuing to have contact

with her friends at school. On the way home defendant was yelling at I.B. and poked her in the head with his finger. Defendant called Jennifer and told her to pick up the younger children and take them somewhere so they would not witness I.B. being disciplined. I.B. heard this phone call and began “freaking out” because she did not know what was going to happen when she got home. When they arrived home defendant told I.B. to go into his bedroom. She asked if he was going to kill her and he replied that she could consider herself dead. I.B. panicked and ran out of the house. She knocked on a neighbor’s door and told the man she needed to come in. The man lived alone and told her to hide in the bushes while he contacted the woman next door and called the police. The police contacted I.B. and asked her why she ran. I.B. was hysterical and had difficulty talking; she concluded that the police were not going to help her; she did not say anything about the sexual activity with her father. RP 411-419.

1. Officer Allen’s Testimony.

Officer Allen testified that he contacted the reporting party and learned that the girl was in the neighbor’s house. Officer Allen was asked:

Q Tell us what you remember of your first impressions when you walked into the living room and saw her?

A I remember a very scared teenage girl who was sitting on the couch. She was all curled up into a ball and kind of like something that we commonly associated with defensive posture.

So her legs were pulled up; her arms were pulled into her sleeves; she was crying into her arms, wasn't looking around. Just crying a lot.

RP 735-737. Defendant did not object to this testimony at trial.

When a party fails to object to testimony, the party does not preserve for review any alleged error in admitting the testimony.

State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003).

More importantly, Officer Allen's testimony was based on his direct knowledge of facts he observed, it was not an improper opinion on guilt.

2. Detective Shackleton's Testimony.

Detective Shackleton was the lead investigating officer in this case. At the beginning of her testimony the prosecutor asked:

Q Do you remember how it was that you became involved in an investigation focusing on John Blackmon?

A Yes.

Q Tell us how that happened?

A I received a call from Mark Froland, who is an Edmonds Officer, and he said that his

daughter's friend had told his daughter that she had been molested by her father.

RP 839. The following testimony ensued:

Q So instead of this coming to you through a patrol officer referral or your sergeant assigning to you, this came directly from Mark Froland from what you can remember?

A Yes.

Q Is he an officer that you had worked with on previous occasions?

A No, not that I know of.

Q Did you even know who he was before he called?

A No.

Q Did he identify himself to you as a fellow law enforcement officer when he called?

A Yes.

Q And was it explained to you that he was calling about essentially a personal matter, not something that he was working on in a professional capacity?

A Yes.

RP 839-840. Defendant did not object to this testimony at trial.

A claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 686-687, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Improper opinions on guilt invade the jury's province and thus

violate the defendant's constitutional right to a jury trial. State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2005); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). However:

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with precedent holding the manifest error exception is narrow.

State v. Kirkman, 159 Wn.2d 918, 936, 938, 155 P.3d 125 (2007).

Detective Shackleton’s testimony was not a nearly explicit statement that she believed the accusing victim, nor did she express her opinion on defendant’s guilt. Rather, Detective Shackleton’s testimony regarding the call from Mark Froland was made to explain how she became involved in the investigation, not to assert the truth of statements made by Mark Froland, his daughter or his daughter’s friend. Washington Courts recognize that an out-of-court statement may properly be admitted, not for the truth for the matter asserted, but to explain why an officer conducted an investigation.

When a statement is not offered for the truth of the matter asserted but is offered to show why an officer

conducted an investigation, it is not hearsay and is admissible.

State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005).

Out-of-court statements may also be admitted to explain how an investigation came to center on a defendant specifically.

The challenged statement [a telephone call from an individual who provided defendant's name] was not hearsay. It was not offered for the truth of what the caller said; rather, it is clear when viewed in context that the testimony was offered to establish why the detective acted as he did.

State v. Post, 59 Wn. App. 389, 394-395, 797 P.2d 1160 (1990).

Out-of-court statements have also been admitted to explain certain events and steps taken by the detective in the investigation of an already known crime. "The State did not offer [the] statements to prove what the cardholders had said, but to show how [the detective] conducted his investigation. The evidence was not hearsay." State v. Lillard, 122 Wn. App. 422, 437, 93 P.3d 969 (2004). Here, if defendant had objected at trial to the admission of the out-of-court statement of Mark Froland, the court would have admitted the statements to explain Detective Shackleton involvement in the investigation.

The court applies the "overwhelming untainted evidence" test to determine if the constitutional error was harmless. State v.

Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); State v. Thach, 126 Wn. App. 279, 312-313, 106 P.3d 782 (2005). The “overwhelming untainted evidence” test is met if the untainted evidence presented at trial is so overwhelming that it necessarily leads to a finding of guilt. State v. Watt, 160 Wn.2d 626, 636, 160 P.3d 640 (2007); Hudson, 150 Wn. App. at 656. The question is whether the facts to be proved by the testimony are reasonably subject to dispute. Watt, 160 Wn.2d at 639. In the present case, the untainted evidence satisfies the harmless error test. Because overwhelming evidence established the facts contained in Detective Shackleton’s testimony, the admission was harmless beyond a reasonable doubt. Watt, 160 Wn.2d at 647.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT’S MOTION FOR MISTRIAL FOR A DE MINIMIS VIOLATION OF THE COURT’S ORDER IN LIMINE REGARDING PRIOR TRIALS.

Defendant argues that the trial court erred in denying his motion for a mistrial for violation of the court’s ruling in limine excluding references to the prior trials. Appellant’s Brief at 30-32. A trial court should grant a mistrial “only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” State v. Rodriguez, 146 Wn.2d

260, 270, 45 P.3d 541 (2002). Because the trial judge is in the best position to determine the impact of a potentially prejudicial remark, a trial court's decision to grant or deny a mistrial is reviewed for an abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-255, 742 P.2d 190 (1987). A trial court's denial of a motion for mistrial will only be overturned when there is a 'substantial likelihood' that the error prompting the mistrial affected the jury's verdict. Rodriguez, 146 Wn.2d at 269-270.

Here, defendant fails to show how he was prejudiced by the testimony, "I was in trial or, like a hearing like this for two weeks." Defendant moved in limine to exclude reference to the "prior mistrial." CP 184. In his motion, defendant recognized that during the trial the parties and witnesses would reference portions of prior testimony,⁵ and requested that "such references not explicitly mention the prior mistrial" but "simply refer to their testimony in a prior proceeding in this same case." CP 184. Defense counsel was asked, "do you object to the State getting into the fact that the

⁵ The fact that witnesses had been previously been questioned, interviewed and testified in prior proceeding was a significant topic in this case. During the trial all but one of the witnesses was asked about testifying at prior court proceeding. RP 24, 54, 59, 222, 237, 243, 326, 471, 473, 475, 478, 495, 544-546, 554, 564, 566, 569, 570, 575, 582, 596, 598, 606, 616, 673-674, 693, 703-704, 716, 755. Witnesses were also asked about prior interviews and questioning. RP 297, 307, 330, 466, 530, 542, 562, 568, 604, 703-704.

child has testified at two trial?” Counsel replied, “Yes, at this point, based on what I know now, I don’t think it’s relevant and speculation about it is prejudicial.” The court ruled, “Then trials won’t be mentioned.” RP 27.

During cross examination I.B. was questioned about and shown transcripts of her interviews and prior testimony sixteen times. RP 466, 471, 473, 475, 478, 495, 530, 542, 544-546, 554, 562, 564, 566, 568, 569, 570. On I.B.’s third day of testifying, defense counsel challenged the credibility of a statement I.B. had written on May 1, 2013, that she testified against her father for two weeks. RP 544-546. I.B. was shown the statement and defense counsel specifically asked, “So this was a statement that you wrote between the second time you testified and this time, the third time that you’ve testified; right? RP 544.

On re-direct the prosecutor asked I.B. about the statement, her answers to defense counsel’s questions, and what she meant by her statement that she testified for two weeks straight. She replied, “I was meaning that I was in trial or, like a hearing like this for two weeks.” RP 582-583. Defendant did not object at the time, but rather, during the morning recess moved for a mistrial. RP 591-592. The trial court found that there were not sufficient grounds for

a mistrial. Since defense counsel had repeatedly asked I.B. about prior testimony it was clear to the jury that there had been hearings prior to this trial; there was no suggestion of the result of any prior trial; and the single use of the word "trial" was de minimis. The court denied the motion for mistrial. RP 592-596.

To determine whether a trial irregularity deprived a defendant of a fair trial, a reviewing court considers the following factors: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow." Escalona, 49 Wn. App. at 254. While a violation of an order in limine is considered a serious trial irregularity, not all violations of orders in limine are held to be so serious as to deprive the defendant of a fair trial. State v. Thompson, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998) (remark "was sufficiently serious because it violated a motion in limine," but "not so egregious as to deny ... a fair trial"); State v. Condon, 72 Wn. App. 638, 648-650, 865 P.2d 521 (1993). (remarks violating the motion in limine that the defendant had been in jail had the potential for prejudice, but were not so serious to warrant a

mistrial). Claims of prejudice are reviewed “against the backdrop of all the evidence.” Escalona, 49 Wn. App. at 254.

Here, viewed in context of the entire record and against the backdrop of all the evidence, I.B.'s statement, “I was meaning that I as in trial or, like a hearing like this for two weeks” was not so serious as to deprive defendant of a fair trial. Defendant has not shown how he was prejudiced. The single use of the word “trial” was de minimis. The statement did not suggest the result of any prior trial. The statement was cumulative of other evidence before the jury that there had been hearings prior to this trial. While no curative instruction was given the remark was sufficiently vague about whether the statement referred to a trial or a hearing. The trial court did not abuse its discretion in determining that the statement was not so prejudicial as to deprive defendant of a fair trial.

D. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR’S CONDUCT WAS IMPROPER AND PREJUDICIAL; THAT ANY PREJUDICIAL EFFECT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT; AND WAS NOT CURED BY THE COURT’S INSTRUCTIONS.

Defendant alleges that the prosecutor committed misconduct by: 1) eliciting testimony from M.F. that she found it hard to talk about what happened and see the defendant; 2) referring to a

document as a “trial transcript” after defense motion for a mistrial for the statement “in trial or, like a hearing like this” had been denied; and 3) telling the jury in rebuttal closing argument that their choice was to find the state’s witnesses were lying or the defendant guilty. Appellant’s Brief 32-38. Defendant did not object to any of these statements at trial. When a party fails to object to testimony, the party does not preserve for review any alleged error in admitting the testimony. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a).

However, a claim of error may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right”. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellant must show actual prejudice in order to establish that the error is “manifest.” State v. Contreras, 92 Wn. App. 307, 311, 966 P.2d 915 (1998). It is not enough for defendant to allege prejudice; actual prejudice must appear in the record. McFarland, 127 Wn.2d at 334. To show that he was prejudiced by the statements, defendant must show that the trial court would likely have sustained the objection if made. Id. Because no

objections were made, there exists no record of the trial court's determination of the issues in this case. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333. Without an affirmative showing of actual prejudice, the asserted errors are not "manifest" and thus are not reviewable under RAP 2.5(a)(3). McFarland, 127 Wn.2d at 334.

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

Scott, 110 Wn.2d at 685. Defendant's challenge squarely confronts these procedural barriers.

1. The Prosecutor's Conduct Was Not Improper Or Prejudicial.

In a prosecutorial misconduct claim, the burden rests on the appellant to establish that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The burden to establish prejudice requires proof that "there is a substantial likelihood [that] the instances of

misconduct affected the jury's verdict." Thorgerson, 172 Wn.2d at 442-443, citing State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Thorgerson, 172 Wn.2d at 443, citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Since the statements defendant complains about were not objected to at trial, they must be analyzed under the "enduring and resulting prejudice" standard. Russell, 125 Wn.2d at 86. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); Russell, 125 Wn.2d at 85. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125, 130 (2007); McFarland, 127 Wn.2d at 333; State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

2. Witness' Testimony That She Found It Hard To Talk About What Happened and See The Defendant, Did Not Violate Defendant's Rights Under the Confrontation Clause.

Defendant argues that by asking M.F., "Why is it that you are so upset now?" the prosecutor drew an adverse inference on defendant's exercise of his right to confront witnesses. Appellant's Brief at 34-36. The rights guaranteed under the Confrontation Clause include the right to have the witness physically present, to have that testimony offered under oath and subject to cross examination, and to provide the trier of fact with an opportunity to observe the demeanor of the witness. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998), citing Maryland v. Craig, 497 U.S. 836, 845-846, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990). Indeed, a primary interest secured by the Confrontation Clause is the right of cross-examination, the "principal means by which the believability of a witness and the truth of his testimony are tested." State v. Martin, 171 Wn.2d 521, 536, 252 P.3d 872 (2011), quoting Foster, 135 Wn.2d a 456. Here, the witness was present, testified under oath, was subject to cross examination by defendant, and the jury had opportunity to observe the witness' demeanor.

Cross examination of M.F. began with the following colloquy:

Q Are you okay?

A I'm okay.
Q Do you want to take a short break?
A I think I'll be fine. Thank you.
Q It's pretty hard for you to be here today, huh?
A Yes.
Q And that's because John Blackmon is here?
A Yes.
Q You understand that he has to be here?
A Yes.
Q Okay. And this isn't the first time you've done this, is it?
A No.
Q You've testified before?
A Yes.

RP 23-24. The record clearly reflects that M.F. was having difficulty testifying. The record also demonstrates that defendant wanted to draw attention to her demeanor. In the context of the entire record and the circumstances at trial, the prosecuting attorney's question was neither improper nor prejudicial. Further, defendant has failed to show that M.F.'s answer engendered an incurable feeling of prejudice in the mind of the jury.

3. The Prosecutor's Misstatement, "That's A Trial Transcript – Excuse Me – A Transcript Of A Hearing" Was Not Misconduct.

Defendant argues that the prosecutor's referring to a document as a "trial transcript" was prosecutorial misconduct.

Appellant's Brief at 36. In the context of the entire record and the circumstances at trial, the prosecuting attorney's misstatement was neither improper nor prejudicial.

During cross examination defense counsel questioned I.B. about her prior testimony regarding when the sheetrock was removed from the wall between the master bedroom and the kitchen. RP 492-496. Defense counsel asked I.B.:

Q You testified about the wall the first time you were in court in this case?

A Yes.

Q You were asked about that the last time you were in court on this case, right?

A Yes.

RP 495. Counsel then directed I.B.'s attention to Exhibit 64, a transcript of her prior testimony, and asked questions about her prior testimony. RP 495-496.

On re-direct the prosecutor addressed I.B.'s prior testimony regarding the wall. RP 596-603. The prosecutor directed I.B.'s attention to Exhibit 64 and asked:

Q That's a trial transcript – excuse me – a transcript of a hearing that occurred in October of 2012; is that correct?

A Yes.

RP 596-597. The prosecutor instantly corrected his misstatement. Further, the statement was cumulative of other evidence before the jury that there had been testimony at other hearings prior to this trial. Defendant has failed to show, in the context of the entire record and the circumstances, how the prosecuting attorney's misstatement was improper or that the misstatement engendered an incurable feeling of prejudice in the mind of the jury.

4. The Prosecutor's Statement During Rebuttal Closing Argument Was Neither Improper Nor Prejudicial.

Defendant argues that it was prosecutorial misconduct to tell the jury in rebuttal closing argument that their choice was to find the state's witnesses were lying or the defendant guilty. Appellant's Brief 36-38. The prosecutor did not say the jury had to find witnesses were lying or the defendant was guilty. What the prosecutor actually said was:

Ladies and gentlemen, it should be abundantly clear to you at this point, if it wasn't days ago, that through the presentation of the evidence in this case, you have been presented with two different options. Two very different options.

Either this was an elaborate, brilliantly constructed and perfectly executed fabrication designed by [I.B.] to get rid of her dad, and along the way enlisting the help of her mother and siblings and best friend and police officers, or it really happened.

RP 1021-1022. The prosecutor's statement focused on the credibility of I.B and the evidence presented; there was no reference to finding defendant guilty.

Defendant did not object to the prosecutor's rebuttal closing argument. Where there is no objection to alleged misconduct during trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012), citing State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Nor did defendant request a mistrial. "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. Emery, 174 Wn.2d at 756; Stenson, 132 Wn.2d at 718. The defense has the burden of showing both the impropriety of the prosecutor's remarks and their prejudicial effect. State v. Guizzotti, 60 Wn. App.

289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d 762 n.13; State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Remarks of the prosecutor, even if improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to defense counsel's acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. Russell, 125 Wn.2d at 86. Defendant's closing argument began by stating, "For various reasons [I.B.] decided to tell a very terrible lie about her father." RP 990. After reciting various reasons to doubt I.B.'s credibility, near the end of closing argument defendant stated, "[I.B.] has decided this is a situation where lying is the right thing to do." RP 1019-1020.

The prosecutor may attack a defendant's exculpatory theory. State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Moreover, closing argument is, after all, argument. In that context, a prosecutor has wide latitude

to draw reasonable inferences from the evidence and to express such inferences to the jury. Stenson, 132 Wn.2d at 727; Brown, 132 Wn.2d at 568-569 (counsel may use dramatic rhetoric in arguing inferences supported by the evidence); State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983) (counsel has latitude in closing argument to draw and express reasonable inferences from the evidence). If impropriety is present, reversal is required only if a substantial likelihood exists that the misconduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). The reviewing court must consider what would likely have happened if defendant had timely objected. Emery, 174 Wn.2d at 762. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). Defendant has not shown that the prosecutor's argument was improper.

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 760. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent

potential abuse of the appellate process.” Emery, 174 Wn.2d at 762, citing State v. Weber, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006) (were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal); Swan, 114 Wn.2d at 661 (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). “An objection is unnecessary in cases of incurable prejudice only because ‘there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.’” Emery, 174 Wn.2d at 762, quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

Under the heightened standard where there was no objection at trial, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” Emery, 174 Wn.2d at 760-761, citing State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The reviewing court’s focus is on whether any resulting prejudice could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the

minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762, quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932). Defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury.

Further, in the present case the court's instructions cured any potential prejudice stemming from the prosecutor's remarks. The statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993). The court may mitigate potential prejudice by so instructing the jury. Guizzotti, 60 Wn. App. at 296. Here, the trial court did instruct the jury:

The attorney's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement, or argument that is not supported by the evidence or the law as stated by the court.

CP 149 (Jury Instruction 1, WPIC 1.02). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Any potential prejudice from the prosecutor's statement was obviated by the court's instruction to the jury. Defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice that affected the jury's

verdict. The prosecuting attorney did not commit misconduct that constituted reversible error.

E. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY WHERE THE ERRORS ARE FEW AND HAVE LITTLE OR NO EFFECT ON THE OUTCOME OF THE TRIAL.

Finally, defendant argues that his convictions should be reversed because “the reference to a prior trial, the opinion evidence at to guilt, the comment on the right to confrontation and the improper closing argument cumulatively denied” him a fair trial. Appellants Brief at 38-39. The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006); State v. Hodges, 118 Wn. App. 668, 673-674, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Defendant is entitled to a fair trial free from prejudicial error, not a trial totally free from error. State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937 (2009); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981); State v. White, 72 Wn.2d 524, 531, 433 P.2d 682 (1967).

As discussed above, defendant has failed to show how each alleged instance of misconduct affected the outcome of his trial. Similarly, defendant has not indicated how the cumulative effect of these instances of alleged misconduct affected the outcome of his trial. Therefore, defendant's cumulative error doctrine claim fails in this case.

F. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE WAS NOT AN ABUSE OF DISCRETION WHEN DEFENDANT'S MULTIPLE CURRENT OFFENSES RESULTED IN AN OFFENDER SCORE GREATER THAN NINE.

Defendant argues that the court's imposition of an exceptional sentence violated the Sentencing Reform Act and his right to due process. Appellant's Brief at 39-41. Here, the trial court did not err by imposing an exceptional consecutive sentence for count V. The court may impose an exceptional sentence when the number of current offenses results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses. State v. Newlun, 142 Wn. App. 730, 743, 176 P.3d 529 (2008). A sentencing judge does encroach on defendant's Sixth Amendment rights by finding facts necessary to impose consecutive, rather than concurrent, sentences for discrete crimes.

State v. Vance, 168 Wn.2d 754, 762, 230 P.3d 1055 (2010), citing Oregon v. Ice, 555 U.S. 160, 168, 129 S.Ct. 711, 717, 172 L. Ed. 2d 517 (2009).

An offender score is computed based on both prior and current convictions. RCW 9.94A.525(1). For the purposes of calculating an offender score when imposing an exceptional sentence, current offenses are treated as prior convictions. Newlun, 142 Wn. App. at 742. A defendant's standard range sentence reaches its maximum limit at an offender score of "9 or more." RCW 9.94A.510. Where a defendant has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range. See State v. Alvarado, 164 Wn.2d 556, 561-563, 192 P.3d 345 (2008). A trial court may impose an exceptional sentence under the free crimes aggravator when "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c); State v. France, 176 Wn. App. 463, 468-469, 308 P.3d 812 (2013) review denied, 179 Wn.2d 1015, 318 P.3d 280 (2014).

An appellate court analyzes the appropriateness of an exceptional sentence by asking: (1) Are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard? (2) Do the reasons justify a departure from the standard range under the de novo review standard? And (3) Is the sentence clearly too excessive or too lenient under the abuse of discretion standard? Alvarado, 164 Wn.2d at 560-561. The trial court has “all but unbridled discretion” in fashioning the structure and length of an exceptional sentence. France, 176 Wn. App. at 470. The trial court’s discretion to impose an exceptional sentence on all current offenses is triggered once the defendant has some current offenses going unpunished. Id. Here, the trial court clearly intended to impose an exceptional sentence of 176 months and had authority to do so, because defendant had current offenses going unpunished.

Here, any four of defendant’s convictions resulted in an offender score of 9. The fifth conviction increased his offender score to 12. Because the sentencing grid ends at 9, defendant’s standard range stayed the same. Therefore, if the trial court had imposed a standard range sentence, one of defendant’s current convictions would have gone unpunished. The trial court imposed

an exceptional sentence by making count V consecutive to the other counts under RCW 9.94A.535(2)(c). By imposing an exceptional sentence the trial court ensured that defendant did not receive a “free crime.” State v. Brundage, 126 Wn. App. 55, 67, 107 P.3d 742 (2005).

An exceptional sentence may be imposed by a court without findings of fact by a jury when a current offense will go unpunished. Ice, 555 U.S. at 168; Vance, 168 Wn.2d at 762; Alvarado, 164 Wn.2d at 561.

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535(2)(c). Here, the record supports the trial court's finding that a current offense would go unpunished if an exceptional sentence was not imposed. Under the clearly erroneous standard of review, substantial evidence supports the trial court's reason for the exceptional sentence. The reason justified a departure from the standard range. The trial court did not abuse its discretion when it imposed sentences of 116 months for counts I and II, second

degree child molestation, and 60 months for count III, third degree rape of a child, and 60 months for count IV, third degree child molestation, counts I—IV to run concurrently, and an exceptional sentence of 60 months for count V, third degree child molestation, to run consecutive to counts I—IV. Defendant's total confinement is 176 months, 60 months above the top of his standard range. RCW 9.94A.510. This exceptional sentence reflects defendant's convictions. Without the additional time, one of defendant's convictions would go unpunished, an unjust result. Brundage, 126 Wn. App. at 68-69. Imposition of the exceptional sentence was not excessive. The trial court properly applied the "free crimes" doctrine.

While notice is clearly required as to factors that go to the jury, defendant's argument that his state and federal right to due process were violated by the court's imposition of an exceptional sentence without notice is misdirected. When the statutory scheme is considered as a whole, notice is not required by the statutory provisions when the aggravating factor is based on prior criminal history. State v. Edvalds, 157 Wn. App. 517, 531, 237 P.3d 368 (2010). RCW 9.94A.537(1) requires:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

Here, the State did not request a sentence above the standard sentencing range. RP (9/9/13) 17-24. Further, RCW 9.94A.535 specifically excludes prior convictions from the procedural requirements of RCW 9.94A.537. Edvalds, 157 Wn. App. at 531. Washington's exceptional sentencing system provided notice of the sentence defendant could receive. State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). Additional process is not required for sentences based on prior convictions because the statute itself provides notice. Edvalds, 157 Wn. App. at 534.

Defendant's reliance on State v. Siers, 174 Wn.2d 269, 274 P.3d 358, 361 (2012) and State v. Shaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993) is misplaced. Neither case addressed an exceptional sentence based solely on the defendant's criminal history. In Siers the issue was whether an aggravating factor need to be charged in the information as an essential element. Siers was charged with two counts of assault in the second degree, including a deadly weapon enhancement on each count. Siers

received notice prior to trial of the State's intent to seek a "good Samaritan" aggravator on count II. The jury returned guilty verdicts on both counts of second degree assault, with a deadly weapon enhancement on each count, and also returned a special verdict on count II, finding that Siers had committed the assault while the victim was acting as a Good Samaritan. At sentencing, the State did not request an exceptional sentence on the Good Samaritan aggravator. However, the trial court did impose a sentence on that count which was at the high end of the standard range "in order to give some weight to the jury's finding of a good Samaritan aggravator." Siers appealed and the Court of Appeals reversed the conviction for count II concluding that "the State's failure to plead the Good Samaritan aggravator in the information functionally undermined the jury's verdict on the substantive crime of second degree assault." The State sought review. 174 Wn.2d at 272-273. The Court held that an aggravating factor is not the functional equivalent of an essential element, and, thus, need not be charged in the information. 174 Wn.2d at 276-277.

The issue in Schaffer was the constitutional validity of a midtrial amendment to a charging document during the State's case adding an additional method of committing the offense. Schaffer

was charged with malicious mischief. At trial, prior to resting, the State amended the information to bring it into conformity with the evidence. The court found Schaffer guilty of third degree malicious mischief as charged in the amended information. Schaffer appealed. The Court of Appeals affirmed the conviction and the Supreme Court accepted review. 120 Wn.2d at 618-619. The Court held that the amendment was proper under article 1, section 22 of our Constitution and affirmed Schaffer's conviction for malicious mischief. 120 Wn.2d at 623.

Likewise, Defendant's reliance on Alleyne v. United States, 133 S.Ct. 2151, ___ U.S. ___, 186 L. Ed. 2d 314 (2013) and Burrage v. United States, 134 S.Ct. 881, ___ U.S. ___, 187 L. Ed. 2d 715 (2014) is also misplaced. Alleyne addressed the issue of whether the fact of brandishing a firearm, that increases the mandatory minimum, is an "element" that must be submitted to the jury. The Court found that the touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense. 133 S.Ct. at 2158. In holding that facts that increase mandatory minimum sentences must be submitted to the jury, the Court took care to note what its holding did not entail.

Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment.

133 S.Ct. at 2163.

In Burrage the issues were: Whether the defendant may be convicted under the “death results” provision (1) when the use of the controlled substance was a “contributing cause” of the death, and (2) without separately instructing the jury that it must decide whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense. 134 S.Ct. at 886. The Court found that because the “death results” enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt. 134 S.Ct. at 887. The court held that,

at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.

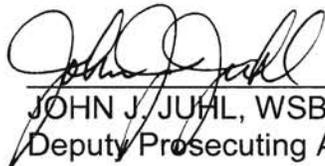
134 S. Ct. at 892. The case did not address the issue of judicial discretion in the imposition of an exceptional sentence based on the defendant's criminal history.

IV. CONCLUSION

For the reasons stated above, defendant's convictions and sentence should be affirmed.

Respectfully submitted on June 2, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

JOHN J. JUHL, WSBA #18951
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX A

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~~AFTERNOON SESSION~~

~~November 1, 2012~~

~~(Beginning of the testimony of JOHN BLACKMON:)~~

~~(The following occurred in the presence of the jury:)~~

~~JOHN BLACKMON, the defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:~~

~~DIRECT EXAMINATION~~

~~BY MR. BROWNE:~~

~~Q. Mr. Blackmon, I think that's a good example. You need to listen to the question before you answer it.~~

~~A. Yes.~~

~~Q. Are you nervous?~~

~~A. Yes, I am.~~

~~Q. Okay. State your name, spell your last name for the court reporter, please.~~

~~A. My name is John Patrick Blackmon, J-O-H-N, P-A-T-R-I-C-K, B-L-A-C-K-M-O-N.~~

~~Q. How old are you?~~

~~A. I'm 48.~~

~~Q. Okay. What's your educational background?~~

~~A. Thirteen-plus.~~

~~Q. Slow down. What does thirteen-plus mean?~~

~~A. I have about three-and-a-half years of college.~~

RECORDED BY JILLIAN

REQUESTED BY DEFENDANT

1 Q ~~Were you in the military?~~

2 A ~~Yes, I was.~~

3 Q ~~And what did you do in the military?~~

4 A ~~I was in the United States Navy. I was a sonar
5 supervisor on board a trident submarine.~~

6 Q ~~And for how many years did you do that?~~

7 A ~~For six years.~~

8 Q ~~When did you get out of the military?~~

9 A ~~1989. July timeframe.~~

10 Q ~~Okay. Where were you raised, Mr. Blackmon?~~

11 A ~~Cumberland, Maryland.~~

12 Q ~~Do you have brothers and sisters?~~

13 A ~~Yes, I do.~~

14 Q ~~How many?~~

15 A ~~I have three brothers, I mean, yeah, there's three
16 boys, three girls.~~

17 Q ~~But we heard a little testimony in this trial about
18 your mom. Is your mom still alive?~~

19 A ~~Yes.~~

20 Q ~~What's her name?~~

21 A ~~Agnes Blackmon.~~

22 Q ~~And you have a good relationship with her?~~

23 A ~~Yes, I do.~~

24 Q ~~What type of environment were you raised in as far
25 as discipline?~~

1 ~~A It was a loving environment, but it was strict,~~
2 ~~Firm.~~

3 ~~Q Were you spanked from time to time?~~

4 ~~A We were whipped.~~

5 ~~Q By your dad?~~

6 ~~A From time to time.~~

7 ~~Q What did your dad do?~~

8 ~~A My dad was an engineer.~~

9 ~~Q When did you meet Jenifer?~~

10 ~~A I met Jenifer around 1990 timeframe.~~

11 ~~Q Okay. And where did you meet Jenifer?~~

12 ~~A I met her at a pub, dance floor place.~~

13 ~~Q What did you think when you met her?~~

14 ~~A She's beautiful.~~

15 ~~Q Was it like a dance place?~~

16 ~~A It was a dance place, restaurant. It's called Fish~~

17 ~~House Charlie's in Edmonds, Washington.~~

18 ~~Q How long after you met her did you guys become a~~
19 ~~couple? Whether you were married or not, how long~~

20 ~~did you become a couple?~~

21 ~~A We became a couple probably within a month.~~

22 ~~Q Okay. And had you been married previously?~~

23 ~~A Yes, I was.~~

24 ~~Q Any children?~~

25 ~~A No children.~~

REQUESTED BY DEFENDANT

1 ~~Q Had Jenifer been married previously?~~

2 ~~A Yes, she was.~~

3 ~~Q Any children?~~

4 ~~A No.~~

5 ~~Q Okay. How long did you and Jenifer date before you~~
6 ~~were married?~~

7 ~~A Approximately three years.~~

8 ~~Q Okay. Was there any discussion when did you get~~
9 ~~married?~~

10 ~~A We got married, I was about 31.~~

11 ~~Q What date, what month, what year?~~

12 ~~A It was April 25th, 1993.~~

13 ~~Q Okay. And was there any discussion between and you~~
14 ~~Jenifer before you got married about children?~~

15 ~~A Yes.~~

16 ~~Q And what was it?~~

17 ~~A Basically I wanted a lot of children.~~

18 ~~Q Okay. Was she okay with that?~~

19 ~~A Yes.~~

20 ~~Q Who was your first child?~~

21 ~~A Ivy Jordan.~~

22 ~~Q And where was she born?~~

23 ~~A She was born in Marysville, Washington.~~

24 ~~Q And before Ivy was born, were there pregnancies that~~
25 ~~didn't work out?~~

REQUESTED BY J. J. HIGGINS

JOHN BLACKMON - Direct

1 ~~basketball. I was into basketball big. I'd go play~~
2 ~~basketball on Saturday mornings, Tuesday and~~
3 ~~Thursday mornings. So in the beginning Zack and~~
4 ~~Bleighn and Ivy would get up with me and go play~~
5 ~~basketball. Then Zack started taking a pillow with~~
6 ~~him to go play basketball.~~

7 ~~Q I don't think you're listening to me. We got to~~
8 ~~keep our answers short. Okay. So how was~~
9 ~~discipline handled in your house with the kids?~~

10 ~~A It was basically three cracks with a spoon, you~~
11 ~~know, if there was rebellious, retaliation, or~~
12 ~~disobedience. If you fought me or squirmed around a~~
13 ~~lot, myself or Jenifer, then there was a break and~~
14 ~~you got an extra two cracks.~~

15 ~~Q And did that stop at any particular time when Ivy~~
16 ~~got older?~~

17 ~~A Not that I recall.~~

18 ~~Q Okay. We've heard a lot about interactions between~~
19 ~~you and Ivy on the dates in January, but let's go~~
20 ~~back to the summer and fall of 2011. Okay.~~

21 ~~A Okay.~~

22 ~~Q Was anything going on with Ivy that required your~~
23 ~~intervention?~~

24 ~~A Summer, fall 2011. I mean, there was -- basically~~
25 ~~she had a friend, you know, that she had befriended.~~

RECORDED BY DEFCO/W

1 Q And who was that?

2 A That was Maddy Froland.

3 Q Okay. And what happened as a result of that?

4 A Well, like I started letting her -- Maddy Froland
5 would come over to the house; she would go over to
6 Maddy Froland's house. She had a couple other
7 friends, the Halacoa (phonetic spelling) twins. She
8 would go over to their place. She actually spent
9 the night over there. But whenever she befriended
10 Maddy, Maddy was over at the house one time, and she
11 basically -- you know, we talked and changed. And I
12 like Maddy. There's nothing I have against Maddy.
13 It's just that she wasn't being responsible, and I
14 don't think she was being a leader in a certain
15 incident which created her to get on a no-contact
16 list.

17 Q And that sounds pretty strict, no-contact list. Is
18 that something you did with your other children?

19 A I did it with Zack. It actually helped Zack through
20 the bullying issue, and he was talked into stealing
21 --

22 Q Okay. ~~That's enough, Mr. Blackmon.~~ You know the
23 football game we've been talking about?

24 A Yes.

25 Q ~~This is going to be a really short answer.~~ What day

RECORDED BY [REDACTED]

- 1 was that?
- 2 A September 30th.
- 3 Q That would be 2011?
- 4 A Yes.
- 5 Q What happened? Well, no, let me start. Where was
- 6 the game?
- 7 A The game was at Arlington.
- 8 Q Okay. And did you drive?
- 9 A Yes.
- 10 Q And who was with you?
- 11 A Zack -- Zechariah, Ivy, and Maddy Froland.
- 12 Q Had you been to other football games?
- 13 A Yes.
- 14 Q And this was who playing who?
- 15 A Arlington and Lake Stevens away.
- 16 Q Did you enjoy those outings?
- 17 A Yes.
- 18 Q Did something happen that you witnessed that evening
- 19 that caused you to put Maddy on the no-contact list?
- 20 A Yes.
- 21 Q Okay. Tell us what you observed. First tell us
- 22 what you observed then -- briefly, and then I'll ask
- 23 you more questions.
- 24 A Okay. All right. Basically I got -- Zack wanted
- 25 some hot chocolate. So I was heading to the, what's

REQUESTED BY DEFENDANT

1 it called, booth, you know, where they have all the
2 food and the candy.

3 Q Concession?

4 A Concession stand. Yeah, thanks.

5 ~~Q Slow down.~~

6 A So I passed Maddy and my daughter. And there were
7 this group of boys standing around them, and one of
8 the boys was on the backside of Maddy gyrating on
9 her backside. And there was another one on the side
10 of her doing the same thing. And they were wiggling
11 money around in her face doing that.

12 Q What do you mean, like gyrating?

13 A I mean they were like dry humping her.

14 Q How far away from that group were you when you saw
15 that?

16 A Well, I was actually -- I got Zack and I walked by,
17 and I walked by, and I seen it in passing.

18 Q What did you do after you saw that?

19 A When I seen it I just said Hey, guys, knock that
20 stuff off.

21 Q To everybody?

22 A Yes. I said, It's inappropriate. I stopped right
23 there and said, It's inappropriate. And I said,
24 Knock that stuff off.

25 Q Did you say anything to Maddy?

REQUESTED BY DEFENDANT

1 A I said something to Maddy. They walked away for a
2 brief moment, and I said, Tell them I'm your dad.
3 And just, you know, it's not acceptable.

4 And, you know, she's like, Okay, you know. And
5 she went back to talking to them. Because to me it
6 wasn't a big deal at first. You know when I first
7 seen it, I just wanted to correct it. That was it.

8 Q Okay. Did you correct it?

9 A Well I went and got hot chocolate, and on the walk
10 back they're pulling the same thing.

11 Q Did you say anything then?

12 A I just told them basically, I said, I told you once.
13 I said if you guys keep this up. I said you're not
14 going to be socializing with my daughter. I said
15 people that do this, I said, you know, you can't --
16 you can't socialize. You know, she's a leader. You
17 guys got to be a leader, and it's inappropriate.

18 Q Who's a leader?

19 A Ivy Jordan is a leader.

20 Q I don't know if it's relevant, but who won the game?

21 A We won the game. Lake Stevens.

22 Q When you watch the football game, what do you
23 usually do?

24 A I was running back and forth.

25 Q From one end of the field to the other?

REQUESTED BY DEFENDANT

1 A Yes.

2 Q Okay. When you went home did you take the same
3 people home that you brought with you?

4 A Yes.

5 Q Okay. Was there any discussion in the car, may or
6 may not have been, I don't know, about this
7 incident?

8 A I just basically told the girls that, you know,
9 listen, if that kind of behavior -- if you're going
10 to allow that, then you're not going to be
11 socializing with one another. You know, that's it.

12 Q Were you loud and angry about it?

13 A I didn't think I was yelling, but I was firm.

14 Q You're firm often?

15 A Yes.

16 Q Did they -- do you remember if they had any reaction
17 to what you said?

18 A Now that -- you know, listening to this, you know,
19 over the week, I do remember it getting kind of
20 quiet in the truck.

21 Q Okay. Did you have -- what happened to Maddy? Did
22 you drop her off?

23 A I took her home, um-hum.

24 Q Okay. And then did you have any discussion, further
25 discussion that night with Ivy about that incident

RECORDED BY JEFFREY

1 and/or her reaction to it?

2 A Yeah. Basically Ivy seemed to disagree with what I
3 was saying. So I basically just told her until
4 further notice -- there were three boys doing the
5 misbehavior. One of those boys came up and
6 apologized to me for it, the other two boys -- but
7 all three boys were on the no-contact list. And
8 Maddy Froland's on the no-contact list. Same thing
9 I did for my son.

10 Q And had you done no-contact lists with Ivy before?

11 A No.

12 Q What did a no-contact -- did you explain to Ivy what
13 a no-contact list meant?

14 A Yes.

15 Q And what does a no-contact list mean?

16 A It just means that there's no socializing, no
17 communication, no interaction with that person until
18 the issue is resolved. ~~Basically kind of how that~~
19 ~~paperwork, the paperwork that we reviewed says.~~

20 ~~Q Okay. Well, we're going to get to that in a minute.~~

21 ~~The paperwork was from January?~~

22 ~~A Yes. But~~

23 ~~Q Yes or no; right?~~

24 ~~A Yes.~~

25 Q So the no-contact -- how did Ivy react when you put

REQUESTED BY DEFENDANT

REQ. BY DEF.

REQUESTED BY DEBORAH

1 these people on the no-contact list, if you
2 remember?

3 A Well, she was upset with me.

4 Q Was there tension between you guys during this
5 period of time?

6 A Ivy and I, there was always actually tension between
7 Ivy and I, you know. You know, as far as, you know,
8 because we played basketball. So I mean if I take a
9 shot, I'm an outside shooter, I drop a shot and
10 never hit the rim, and she would be all over me.
11 And same thing likewise, just a little basketball
12 smack, you know, back and forth.

13 Q Were there conflicts about lifestyle, though, with
14 her?

15 A Not too much. Just not anymore than the other two
16 children.

17 ~~Q Let's get into this whole thing right now about the~~
18 ~~house. When was the flood?~~

19 ~~A August 16, 2008.~~

20 ~~Q Okay. And how long did it take you to get the~~
21 ~~insurance company to pay up?~~

22 ~~A It was January, 2011 timeframe.~~

23 ~~Q What's that, two and a half years?~~

24 ~~A Yeah.~~

25 ~~Q I'm not good at that.~~

1 ~~Q Okay. Do you know approximately when that was?~~

2 ~~A It was the last -- it was the next-to-the-last door~~
3 ~~or window that went on to the house. So it would~~
4 ~~have been around May, July timeframe of 2011.~~

5 ~~Q We saw a photograph -- well, one of the photographs~~
6 ~~that shows your bed and a wall missing. You know~~
7 ~~that photograph?~~

8 ~~A Yes.~~

9 ~~Q Let me ask you a couple questions. First I'm going~~
10 ~~to hand you State's Exhibit No. 19 and ask you if~~
11 ~~that's you and Jenifer's bed. I'm sorry.~~

12 ~~A Yes, it is.~~

13 ~~Q Is that your bed?~~

14 ~~A Yes.~~

15 ~~Q Okay. Is that the new bed or the old bed?~~

16 ~~A That's the new bed.~~

17 ~~Q When did you get the new bed?~~

18 ~~A The new bed was about six months, I would say.~~
19 ~~About the same timeframe. It was about, you know,~~
20 ~~between May and July of 2011.~~

21 Q Okay. By the way, from the door to your bedroom,
22 can you see the television?

23 A Yes.

24 Q Okay. Were there times you watched movies with Ivy
25 that you did not allow the other children to watch?

1 A Yes.

2 Q How often did that happen?

3 A It depended on the movie that the kids picked. I
4 was an at-home dad, so if I was tired and the kids
5 were at school, I would watch anything I wanted to.
6 So basically when they were home I let them pick the
7 movies.

8 Q We heard Ivy talk about American Pie.

9 A Yes.

10 Q Did she pick that?

11 A Yes.

12 Q And the other one was?

13 A Fast and Furious.

14 Q Fast and Furious. I don't think she remembers that.

15 A Italian Job.

16 Q Italian Job?

17 A Yes.

18 Q Was Ivy allowed to watch PG-13 movies?

19 A Yes.

20 Q Was she allowed to watch R movies?

21 A Yes.

22 Q Did that happen at a certain age?

23 A Around the time, 15-and-a-half, 16.

24 Q So in State's Exhibit No. 21, does this show the
25 door to your bedroom?

REQ. BY DEF.

1 A No, I don't think so.

2 Q What is this?

3 A Actually that is the door, yeah. It's the edge of
4 the door.

5 Q So this part of this lighter is the door?

6 A That's the hallway.

7 Q Okay. And at some point was the moulding around the
8 door removed?

9 A Yes.

10 Q And when did that happen?

11 A I don't know. I don't know when that was.

12 Q And if you and Ivy were watching movies in your room
13 and your wife's room, did you or Ivy block some
14 light --

15 A The door.

16 Q Something where the moulding didn't match the door
17 or something?

18 A There are times where the door was closed because
19 Zechariah was really bad about coming in, trying to
20 watch movies. I mean, Zack would come in and talk
21 to me for 15 or 20 minutes, and he would never look
22 at me. He would be looking at the TV the entire
23 time. And I would have to keep redirecting him,
24 redirecting him, redirecting him. Then there were
25 times where basically I would watch a movie, but I

REC. BY [unclear]

1 would never get to watch the movie because Zechariah
2 was constantly, you know, he was watching the movie,
3 you know.

4 Q So the question I asked you actually was: Was there
5 a space between the door -- when the moulding was
6 removed, was there a space between the sheet rock
7 and the door?

8 A Yes.

9 Q Okay. And were there times that you covered that
10 up, or Ivy covered that up?

11 A Yes.

12 Q Purpose of that was?

13 A To keep Zechariah from watching TV.

14 Q Okay. Was there a time, long period of time where
15 Zack was prohibited from watching TV at all?

16 A I wouldn't say for a long period of time. There
17 were times where he got grounded and he had to work
18 on his studies, you know, because like he was lazy
19 with his multiplication tables. He was lazy with
20 his --

21 Q I think you've answered the question. Okay. I'm
22 handing you State's Exhibit No. 5. And I will take
23 back State's Exhibit No. 19. State's Exhibit No. 5,
24 what is that? And give us the short answer first,
25 please.

RECORDED BY DEFENDANT

1 A It's a draft copy of, looks like the rules for Ivy.

2 Q Is that dated?

3 A Yes. It is January 8th, 2012.

4 Q Did you type those?

5 A I do believe, yes.

6 Q Okay. So that was January 8th, 2012?

7 A Yes.

8 Q What prompted you -- let me start all over again.

9 Did Jenifer participate in drafting those rules?

10 A Over a period of time I would say generally yes,
11 because they had been disobeyed three or four times.

12 Q Did Ivy participate in drafting the rules?

13 A She had been informed about these rules and
14 disobeyed them as many times, and that's why they
15 were put in writing.

16 Q That's my next question. Was this the first time
17 you put the rules in writing?

18 A Yes.

19 Q Okay. And January 8th; right?

20 A Yes.

21 Q And what prompted you to put the rules in writing on
22 January 8th?

23 A I just didn't think I was getting through to her.

24 Q Was there a specific incident of any kind?

25 A Well, I mean the disobedience for texting people

REQUESTED BY DEFENDANT

- 1 that were on the no-contact list, you know,
2 e-mailing them, talking to them.
- 3 Q We've seen these, I don't want to hand them all, but
4 the texts, photographs of the texts. How often --
5 you're Mr. Mom. How often would you text Ivy in a
6 normal day when she's at school?
- 7 A We text all the time. She -- back and forth.
- 8 Q Did your other children have cell phones?
- 9 A Oh, yeah. I text them, too.
- 10 Q Okay. So specifically with the rules?
- 11 A Um-hum.
- 12 Q Did they have any relationship to what you
13 discovered on her phone?
- 14 A Yes.
- 15 Q And what did you discover on her phone?
- 16 A T-Mobile has a feature where you can basically keep
17 an eye on your kids, on your children, like Xfinity
18 has where you --
- 19 Q I think you --
- 20 A Yes.
- 21 Q What did you, by using that feature, what did you
22 find out?
- 23 A I found out that Ivy was disobeying the rules.
- 24 Q And she lied to you about that?
- 25 A Continually.

REQUESTED BY DEFENDANT

1 Q So the evening that those rules were drafted, were
2 you angry?

3 A I was upset.

4 Q Do you have a temper?

5 A I do have a temper.

6 Q Does Ivy have a temper?

7 A I think so.

8 Q Jenifer?

9 A Yes.

10 Q So the evening you were drafting those rules, what
11 happened after you wrote the rules? What did you do
12 with them?

13 A After I wrote the rules we were kind of like having
14 a family meeting, I remember. And then I basically
15 had Jenifer go talk to Ivy about these rules.

16 Q Okay. And handing you State's Exhibit No. 6. What
17 is that?

18 A Did you ask me?

19 Q Yeah, I did. What is that?

20 A This is the communication where mom documented that
21 -- where she talked to Ivy about these rules, about
22 understanding or not understanding them.

23 Q Why did you have Jenifer do that rather than
24 yourself do that?

25 A Because Ivy wasn't listening to me, and she didn't

RECORDED BY DEBRA LACOT

1 want to talk to me at the time, you know. So I had
2 her mother deal with it.

3 Q When Ivy said she didn't want to talk to you, did
4 you usually honor that request?

5 A In this situation we had enough. January the 6th I
6 thought that our family had been under, you know,
7 pretty stressful situation. So I just wanted to
8 give her some freedom.

9 Q So January 6 is when the police came to your house?

10 A Yes.

11 Q Okay. And obviously January 8 is after that?

12 A Yes.

13 Q We'll talk about January 6 in a minute. Okay. So
14 you were giving her some space?

15 A Yes.

16 Q Okay. Let me hand you State's Exhibit No. 7.
17 Briefly tell us what that is.

18 A This looks like the letter that Ivy wrote to me
19 following these two pieces, these two, 5 and 6.

20 Q Do you remember if you got that on the same day or
21 not?

22 A I got it either the, you know, after this, and/or
23 the following day, whenever I came back from -- I
24 took Zack to fly R C planes, so I could have got it
25 that day after I got back.

REQUESTED BY DEFENDANT

1 Q There's some pretty strong language in there. Did
2 you allow Ivy to say things like, "Get off your
3 fucking ass?"

4 A It wasn't a common practice, but I did say those
5 things whenever I got angry from time to time. And
6 I didn't want to control the -- I basically wanted
7 to let them, you know, have some freedom and be able
8 to vent, because I knew the situation with the
9 house.

10 Q Okay. Seems like there was a great deal of
11 discussion about basketball and knee pads; is that
12 correct?

13 A Yes.

14 Q Was that a big issue?

15 A That was probably 99 percent of the issue.

16 Q And you were making -- insist that she wear them?

17 A I insisted that she wear them, because she played
18 AAU basketball and she got injured and was out of
19 basketball for two or three weeks. I forget what
20 grade she was in.

21 Q One of those rules, I don't know if you want to read
22 it or not, but one of those rules said something
23 about not allowing teachers or coaches to take her
24 fully in their arms. Do you know that one?

25 A Yes.

RECORDED BY JETBALLAHT

- 1 Q You put in there. "for their own protection."
- 2 A Yes.
- 3 Q What did you mean by that?
- 4 A Well normally from hugging, you know. Hugging, you
5 know, girls hugging adult teachers. Normally it was
6 like a one -- you think it would be from a side type
7 thing. It wasn't, you know, a complete grasp. And
8 one of her teachers was basically accused of a
9 like-type incident, and that's why I thought it was
10 a good practice.
- 11 Q Because she was accused --
- 12 A He was excused for inappropriate touching a student.
- 13 Q That's why you put in, "for their own protection?"
- 14 A Yes.
- 15 Q All right. Let's talk about January 6. Was that --
16 well, we know that some of these text messages are
17 from January 6.
- 18 A Um-hum.
- 19 Q So did you know before January 6 that she was
20 violating the rules about contacting these
21 individuals?
- 22 A Yes.
- 23 Q How long before?
- 24 A She had done it -- she had done it probably for, I
25 would say, four to six months. But I would correct

1 her and she would come in line again. And I would
2 correct her, and she would come in line again. So
3 it was a little penalty. It wasn't a big thing.
4 But then whenever it happened over, you know, after
5 about four, five times when it happened I was like,
6 wait a minute, you know. You're behaving like your
7 little sister or your little brother. You're not
8 setting a good example.

9 Q Okay. When you talked to her about violating the
10 rules before January 6, would she lie to you about
11 whether she had or not?

12 A Now I know she's lied continually.

13 Q Okay.

14 A I didn't know at the time.

15 Q On January 6th did you call your wife and tell your
16 wife not to bring the kids home -- the other two
17 kids home; yes or no?

18 A Yes.

19 Q And do you know approximately what time that was?

20 A I don't know the time. It was sometime in the, I'd
21 say, early afternoon.

22 Q Okay. What time did Ivy normally come home from
23 school?

24 A I don't remember. It's been too long.

25 Q Did it vary?

- 1 A It was pretty much -- you know, like for example, I
2 think if Zack and Bleighn got out at 2:25, she would
3 get out at like 2:10. Like a 15-minute.
- 4 Q So we're going back to January 6. Why did you tell
5 your wife not to bring the other two children home?
- 6 A Because I didn't want them to be exposed to the
7 disobedience anymore. I mean, Ivy and myself, as
8 far as our communication, Bleighn and Zechariah were
9 just basically tired of it. And I said, Take them
10 to Sports Authority. I need to talk to Ivy about
11 the T-Mobile bill, show her where the -- you know,
12 prove it to her basically and then discipline her.
- 13 Q Okay. And you didn't want the kids to see that for
14 why?
- 15 A Because they had been exposed to it.
- 16 Q Exposed to what?
- 17 A The disobedience. She was setting a bad example for
18 her siblings.
- 19 Q Did you have a rope on your bed?
- 20 A There was a rope on my bed, or somewhere in the
21 room. I don't know if it was specifically on the
22 bed or not.
- 23 Q And you heard Zack explain --
- 24 A Yes.
- 25 Q -- pretty well what that rope was for?

- 1 A Yes.
- 2 Q Did he do a good job explaining that?
- 3 A Awesome.
- 4 Q Did you pick Ivy up at school on January 6?
- 5 A Yes, I did.
- 6 Q And were you alone when you picked her up?
- 7 A Yes, yes.
- 8 Q And then when you drove, did you go to your house?
- 9 A Yes.
- 10 Q How long does it take to get from the school to the
11 house?
- 12 A About ten minutes.
- 13 Q And during that ride did you have any discussion
14 with Ivy?
- 15 A Yes, we did.
- 16 Q And what do you remember about that discussion?
- 17 A Basically I was telling her, you know, she was going
18 to be disciplined. I remember telling her that.
19 You know, she said she wanted to live, go live with
20 Maddy. Then I remember -- there was something else.
21 And then she said she wanted to go -- you know, I
22 mentioned, you know, go living with her grandmother
23 back east.
- 24 Q Who brought that up?
- 25 A I did.

1 Q She likes her grandma?

2 A She likes her grandma, yeah.

3 Q How did she respond when you told her that -- was
4 there a discussion about taking her away from
5 basketball? I might have missed that.

6 A Most definitely.

7 Q How did she respond to that?

8 A She responded negatively to it. But I was still
9 trying to -- I didn't want to pull her out of that
10 sport, because I know that was -- it was really
11 important to her. So I was trying to just get her
12 to focus, you know, on listening.

13 Q Okay. At that time she was still a straight A
14 student?

15 A She was -- I think that was -- I mean, she was
16 starting to -- it was starting to teeter off, I
17 think.

18 Q But -- all right. So what happened when you got
19 home?

20 A When we got home I told her to go to my room. And
21 then I think I took off my jacket. I went and
22 headed to the computer in the living room, because I
23 was going to print out the T-Mobile bill. And then
24 I was setting it up trying to get it printed out,
25 and everything got real quiet. Okay. So then I got

JOHN BLACKMON - Direct

1 up and I went into the room and she was gone. Okay.

2 Q Was the sliding door open?

3 A No, it was closed. It was unlocked, but it was
4 closed.

5 Q So it was not locked?

6 A Yes.

7 Q Did you -- what was your -- did you have any concern
8 when she wasn't there?

9 A Yes. I called her mom and told her that Ivy, you
10 know, ran, and that I was going to go look for her.

11 Q What were you concerned about?

12 A I just wanted -- she ran away. So she was out on
13 her own, you know. And I just wanted to make sure
14 she was okay.

15 Q So what did you do?

16 A So I went up, I got in the, I think it was the
17 Expedition, went around the block, didn't see her.
18 Then I came around the block again, and the second
19 time around the block I seen an officer's vehicle
20 there. So then I realized, okay, someone called
21 911. Okay, she's safe. I parked the Expedition,
22 set down on the curb.

23 ~~Q Okay. Did you talk to an officer that night?~~

24 ~~A Yes.~~

25 ~~Q Okay. More than one or just one?~~

← RED BY DEF.

1 ~~A Both of them.~~

2 ~~Q Okay. Did you eventually that night leave the~~
3 ~~house?~~

4 ~~A Yes.~~

5 ~~Q Whose idea was that?~~

6 ~~A Officer Allen asked me if I would move away from the~~
7 ~~house a little bit so my family could get some~~
8 ~~belongings and go stay with family and whenever. He~~
9 ~~said -- I said, Wouldn't it be easier if I just went~~
10 ~~away from the evening? I can grab some things so~~
11 ~~they can stay here and I'll go away.~~

12 ~~Q Did he say that was okay?~~

13 ~~A He goes, That would be probably a more comfortable~~
14 ~~option. So basically I went and got some stuff and,~~
15 ~~you know, headed off.~~

16 ~~Q Stayed with a friend that night?~~

17 ~~A Yeah. He told me not to come back until basically~~
18 ~~Jenifer contacted me the following day, you know.~~

19 ~~Q And did she?~~

20 ~~A Yes.~~

21 ~~Q Okay. And the following day, do you know what day~~
22 ~~of the week that was?~~

23 ~~A That would have been the 7th.~~

24 ~~Q Okay. I know that. But day of the week?~~

25 ~~A Saturday.~~

REQUESTED BY DEFENDANT

JOHN BLACKMON - Direct

1 ~~Q All right. Was there any discussion between you and~~
2 ~~Jenifer on the phone before you came home? Just yes~~
3 ~~or no.~~

4 ~~A Yes.~~

5 ~~Q Anything that we need to know about?~~

6 ~~A Not to, you know.~~

7 ~~Q Did you know what Ivy was complaining about?~~

8 ~~A Regarding?~~

9 ~~Q You. Why the police were called? Did you know why?~~

10 ~~A I didn't know the specifics until after Officer~~
11 ~~Allen and ---~~

12 ~~Q Okay. So Officer Allen explained to you what Ivy~~
13 ~~was saying?~~

14 ~~A Officer Forslof and Officer Allen both talked to me,~~
15 ~~yes.~~

16 ~~Q So when you came back to the house, that was okay~~
17 ~~with Jenifer, as far as you know?~~

18 ~~A Yes.~~

19 ~~Q Okay. And anything --- what happened when you came~~
20 ~~back? Did you have any interactions with Ivy on~~
21 ~~that day, the 7th?~~

22 ~~A Not that day, no.~~

23 ~~Q I'm sure this is a really silly question. But~~
24 ~~anyway, what day were you arrested?~~

25 ~~A On January 11.~~

REQUESTED BY DEFENDANT

JOHN BLACKMON - Direct

1 ~~more emotional and it just you know, whenever~~
2 ~~he you know, we're we're connected.~~

3 Q Was there a time -- I'm going to ask you some
4 personal questions now. Was there a time when you
5 and Jenifer stopped having sex?

6 A Yes.

7 Q And approximately when was that?

8 A I think it was like anywhere -- about the timeframe
9 my dad passed away in 06. It was as close as I can
10 relate it to.

11 Q Okay. Were there stresses in the marriage at that
12 point?

13 A Yes.

14 Q Okay. Scale of one to ten, ten being divorce, one
15 being Ozie and Harriet, where were you guys?

16 A I would say six or seven. I didn't trust her.

17 Q Did that affect your interest in being intimate with
18 her?

19 A It didn't affect my interest, but it didn't work.

20 Q Did you notice any change in her intimacy before you
21 stopped having sex with her?

22 A I didn't relate it to anything. I just -- she would
23 continually show me her back like she wasn't
24 interested.

25 Q Who bought the condoms?

REQUESTED BY DEFENDANT

1 A Jenifer did.

2 Q When? Do you have any idea when that was? There
3 might be an expiration date on it.

4 A She bought the condoms actually about the same time
5 -- I think it was shortly after we bought the new
6 bed, because she thought we were getting back
7 together.

8 Q Was there discussion about getting back together?

9 A We had visited it.

10 Q Did you ever use any of these condoms with your
11 wife?

12 A No.

13 Q Did you ever use -- by the way, does this look like
14 the condoms that she bought? Referring to State's
15 2. State's Exhibit No. 2. Does that look like
16 them?

17 A That looks like them.

18 Q Did you keep them somewhere, or did she keep them
19 somewhere?

20 A She put them there.

21 Q She what?

22 A She put them in the armoire, said that was kind of a
23 private place.

24 Q This picture of cologne case, right, do you know
25 what I'm talking about?

REQUESTED BY DEFENDANT

1 A I know what you're talking about.

2 Q Just pay attention. Did you keep condoms in there?

3 A No.

4 Q Did you even keep that in your house?

5 A That was an old bottle of cologne that I was
6 actually using to scent my truck.

7 Q I guess I have to ask you this: Did you and Jenifer
8 ever have anal sex?

9 A No.

10 Q Do you have a feeling about that?

11 A Completely. Yes.

12 Q And what is that?

13 A Well, after she bought the condoms and we were
14 looking at getting back together, that's what came
15 up.

16 Q Who brought it up?

17 A Jenifer asked me about having anal sex, and that's
18 when things really got broke. That was it.

19 ~~Q Do you have any feelings about whether anal sex is~~
20 ~~appropriate or not?~~

21 ~~A I think it's completely inappropriate. I think it's~~
22 ~~sodomy.~~

23 ~~Q Is it somewhat religious?~~

24 ~~A Yes.~~

25 ~~Q This is probably just a yes or no answer. You heard~~

REQUESTED BY DEFENDANT

1 ~~Zack talk about the pool incident of pantsing.~~

2 ~~A Yes.~~

3 ~~Q Did he describe that accurately?~~

4 ~~A So so. He didn't tell about the times that he~~
5 ~~pantsed me and I pantsed him.~~

6 ~~Q Other than that?~~

7 ~~A Other than that it was pretty accurate.~~

8 ~~Q Okay. I want to get those back from you. Okay.~~

9 Did Ivy get migraine headaches?

10 A All the time.

11 Q That sounds like a nightmare. I mean, a migraine
12 headache all the time?

13 A It was a nightmare.

14 Q How old was she when she began to get them?

15 A I would say possibly second or third grade. In fact
16 never --

17 Q Were they debilitating?

18 A Yes, at sometimes. I mean, that's why she would
19 have to be in a room that's completely dark.
20 Sometimes she would be vomiting from the migraines.
21 You know, it was pretty bad.

22 Q Did you do anything to help her when she had a
23 migraine?

24 A She always came to me to rub her head and her
25 shoulders.

REQUESTED BY DEFENDANT

1 Q Did that seem to help?

2 A Yes.

3 Q Did Jenifer do that, too?

4 A Sometimes.

5 Q And were there times when Ivy rubbed your feet?

6 A There's times when Ivy rubbed her feet, and times
7 when the whole family got together and gave one
8 another foot rubs. Most of the time Ivy rubbed my
9 feet. I would rub her. Zack would rub my feet
10 sometimes. But for the most part Ivy rubbed my
11 feet. And I remember her and mom would rub
12 Bleighn's feet. And mom would rub Bleighn's feet.
13 I think Zack got left out on those.

14 Q Okay. Was there a time that you had a profile on a
15 dating website?

16 A Yes, towards the end.

17 Q When was that?

18 A That was towards the end of our relationship.

19 Q Was there discussion -- were there discussions of
20 divorce?

21 A I think about, I don't know, three, four years
22 before this happened Jenifer would come home from
23 work and she would start by saying she was leaving.
24 You know, first of all it would be, I'm not happy
25 with myself, I'm leaving. And after about a year,

RECORDED BY LEE/MLM

1 18 months of that, beginning -- I listened to it,
2 tried to encourage. Let's go for a walk, let's do
3 this. Let's do something fun. And then it just got
4 so, you know, finally I just told her, Why don't you
5 just get some stuff and go to your mother's, you
6 know. And that's where it started.

7 Q And then that was three, four years ago or more?

8 A Yes.

9 Q Was there ever any discussion if you guys had a
10 divorce, who Ivy would go with?

11 A Towards the end.

12 Q Who would Ivy have gone with?

13 A With mom.

14 Q Why did you join the dating website, or did you?
15 Did you join it?

16 A Well, along with that, what I was just indicating to
17 you about our arguments and stuff, after, I don't
18 know, about two-and-a-half years of that I told
19 Jenifer, I said listen, I want to stay together for
20 the kids. You know, you're the mother of my
21 children. I love you that way, but it's just not
22 working physically, you know. So I said if you find
23 someone, you know, that you're interested in at
24 work, or interested in your life, I'll do -- if I
25 see someone that sees me, then I'm going to start a

1 relationship. And I made it -- I opened the door
2 for both of us. I said, just don't bring anything
3 home.

4 Q So did you have a dating website?

5 A I did. I mean, I had a dating profile.

6 Q Did you ever use it?

7 A No. There was a couple flirtatious messages between
8 me and, I don't know who they were, it was -- it's
9 just -- I think it's B S, you know, dating.

10 Q Dating websites in general?

11 A It's something that would pop up on the right-hand
12 side of Yahoo. I tried to hit E-Harmony, but it's
13 just advertising, marketing. There's no real --

REQ. BY DEF.

14 ~~Q How's the last ten months of your life been?~~

15 ~~A It's been difficult. I mean, January 11 I became a~~
16 ~~rapist. Okay. It doesn't matter what you did. It~~
17 ~~doesn't matter -- it just matters what someone said.~~

18 ~~Okay. I go to the gym. I go anywhere in my life,~~
19 ~~you know, if someone knows me, the word gets passed.~~

20 ~~Q It's been difficult?~~

21 ~~A Yes.~~

22 ~~Q Do you still love your kids?~~

23 ~~A Yes, I love my kids.~~

24 ~~Q Are you concerned about the future for your kids?~~

25 ~~A Yes.~~

1 ~~MR. BROWNE: One moment, Your Honor.~~

2 ~~Q Mr. Blackmon, I don't have any further questions. I~~

3 ~~know Mr. Baldock will. But I don't know if the~~

4 ~~judge wants to go on.~~

5 ~~THE COURT: We've got a few minutes.~~

6 ~~Mr. Baldock, why don't you go ahead and get~~

7 ~~started and we'll reassess in just a few minutes.~~

8 ~~MR. BALDOCK: I'd actually just like to ask one~~

9 ~~if that's okay, unless you want me to use the full~~

10 ~~three.~~

11 ~~THE COURT: Just go as far as you think you can~~

12 ~~get this afternoon, and either then or 4:30,~~

13 ~~whichever occurs first, we'll recess for the day.~~

14 ~~CROSS-EXAMINATION~~

15 ~~BY MR. BALDOCK:~~

16 ~~Q Mr. Blackmon, the one question I was going to ask~~

17 ~~you, and I'll ask you first and then maybe a couple~~

18 afterwards, you didn't get the chance to deny the

19 allegations against you yet. Do you want to take

20 that opportunity to do it now?

21 A I denied that since January 11.

22 Q You want to tell the jury --

23 A 2011.

24 Q You want to tell the jury that you didn't do it?

25 A I didn't do it. I didn't have incest with my

REG. BY DEF.

1 ~~daughter. I didn't rape my daughter. And I did not~~
2 ~~molest my daughter.~~

3 ~~Q Let's talk a little bit about your relationships in~~
4 ~~your family. You described your relationship with~~
5 ~~Ivy as essentially the same as it was with your~~
6 ~~other two kids, Zack and Bleighn; right?~~

7 ~~A Yes.~~

8 ~~Q You heard Ivy testify, you heard Zack testify, and~~
9 ~~Bleighn testify. And Jenifer testified that from~~
10 ~~their perspective you favored Ivy; right?~~

11 ~~A Yes, I did.~~

12 ~~Q Are you disagree with that assessment?~~

13 ~~A I disagree with it, yes, I do.~~

14 ~~Q You heard their description of why they thought you~~
15 ~~treat her differently, that you bought her more~~
16 ~~expensive things, that you took her shopping. Did~~
17 ~~you do those things?~~

18 ~~A Based on her age and her needs.~~

19 ~~Q What do you mean by that?~~

20 ~~A Like she needed a laptop for school. The other two~~
21 ~~were younger, they didn't need a laptop. And she~~
22 ~~played basketball. She needed a biden (phonetic~~
23 ~~spelling) basketball. So they got the same biden~~
24 ~~basketball, but they got it two or three years later~~
25 ~~because that's when they started baseball.~~

REQUESTED BY DEFENDANT

1 ~~A Yes.~~

2 Q Did you consider yourself the head of the household?

3 A I did.

4 Q Did you make that clear to Jenifer and the children?

5 A I provided the -- she was the financial provider,
6 and I was Mr. Mom. That was understood.

7 Q Well, when it came to rules in the house and coming
8 up with the parameters for raising your kids, was
9 that a joint effort between and you Jenifer, or was
10 that mostly you driving that?

11 A I thought it was a joint.

12 Q What was Jenifer's role in that process, then?

13 A She supported me in -- you know, I would talk to her
14 about things, and we would come to a conclusion.
15 And she always let me have the final say. She
16 didn't fight me about that.

17 Q So it was, from your perspective it was a joint
18 venture in that she didn't get in your way and --

19 A No, not that.

20 Q And she agreed with you?

21 A In scripture she was a help mate, and she was a good
22 help me.

23 Q I don't know what that means.

24 A That means she was there to support me.

25 ~~THE COURT: All right, counsel. We're going to~~

1 ~~and from school, to and from, you know, AAU~~
2 ~~basketball, events, things like that.~~

3 Q Your relationship with Ivy, would you agree that it
4 was somewhat controlling?

5 A I think it was controlling with the other four
6 members of my family.

7 Q I'm talking about Ivy.

8 A Okay. I don't think it was any more so than the
9 other four members of my family, the other three
10 members of my family.

11 Q Well, you've had a little bit of time to reflect,
12 some time has passed since you were with your family
13 last. Thinking back, would you agree that perhaps
14 you were a little overbearing with Ivy?

15 A Thinking back, January 11 I moved forward with my
16 life and I started a new life.

17 Q So you haven't thought about this since then?

18 A Actually I know of my innocence, and I've moved
19 forward.

20 Q So are you telling me you cannot or will not answer
21 that question? Were you overbearing in your
22 relationship with Ivy?

23 A I'm saying I answered that question. I was
24 overbearing with four other members of my family.

25 Q Okay.

1 A I was an ass hole.

2 Q Over the top?

3 A Yes.

4 ~~Q Now let's talk a little bit about the product of~~
5 ~~that control and you being an ass hole. The rules.~~
6 ~~Been admitted as State's Exhibit 5, and I'll hand~~
7 ~~you a copy you can refer to as I am. The first rule~~
8 ~~that you wrote is restricting Ivy's contact with~~
9 ~~those three boys from that football game. Correct?~~

10 ~~A Yes.~~

11 ~~Q And this is a rule sheet that you wrote, put~~
12 ~~together in January, January 8th; right?~~

13 ~~A It's a rule that I put on paper at that time, yes.~~

14 ~~Q And it's referring to -- this particular rule is~~
15 ~~rooted in an incident that occurred three months~~
16 ~~earlier; right?~~

17 ~~A That's whenever it became -- that wasn't the~~
18 ~~foundation of it. That was whenever there was a~~
19 ~~point made about it.~~

20 ~~Q But your rule actually refers to that particular~~
21 ~~football game on September 30th. During this period~~
22 ~~Ivy is to have no contact with the three boys as a~~
23 ~~result of their behavioral issues at the away~~
24 ~~Arlington high school football game. So you're~~
25 ~~still fixated on that incident now three months~~

1 ~~later.~~

2 ~~A When you say three months later, what date are you~~
3 ~~referring to?~~

4 ~~Q Well, from September 30 when it occurred to January~~
5 ~~8th when you're still talking to Ivy about that~~
6 ~~football game.~~

7 ~~A September 30th was whenever it became evident that~~
8 ~~she was disobeying me, she was being rebellious, she~~
9 ~~was not listening to me. So at that point in time,~~
10 ~~that's whenever the no contact list was established,~~
11 ~~you know, like I did for Zack. And that's whenever~~
12 ~~that was put in place.~~

13 Q The next rule talks about no male coach or male
14 teacher for their own protection taking Ivy into
15 their open arms. Was there something about Ivy in
16 particular that made you concerned?

17 A No. It was actually a concern for Mr. Maddingly
18 (phonetic spelling), and for the fact that over the
19 years Ivy had had problems with previous AAU
20 coaches, and the only coaches that she didn't have
21 problems with were females and a gentleman named
22 Byron Moss (phonetic spelling). And the only reason
23 he wasn't trashed in my eyes was because he
24 relocated to Texas.

25 Q Explain what you're talking about. ~~I think this is~~

1 ~~new to most of us.~~

2 A I'm saying that over the years Ivy went from team to
3 team to team. Okay. She would play AAU basketball,
4 and she was basically -- she was maturing in
5 basketball very rapidly. So she would come to me
6 with concerns about a particular AAU coach. So I
7 would say, Okay, glean what you can from the coach
8 and we'll move on if you can't work with him. So we
9 would move to a different team.

10 Q So these were her concerns about her coaches?

11 A It's concerns she brought to me, yes.

12 Q So moving her to a different team was your response;
13 right?

14 A It was my response, but it was Ivy's idea.

15 Q When you say concerns, are you talking about
16 concerns, she was concerned they were touching her
17 inappropriately?

18 A No. She was concerned about they were using their
19 children, okay, they were bettering their children
20 off her fundamental skills. So they were using her.
21 You know, they would basically line their children
22 up, if she was on offense, they would put her on
23 their defense because she was an awesome defensive
24 player. There was very few girls that could get by
25 her on defense. Okay. And she was good at offense.

1 She is an awesome basketball player. And the only
2 way to get better at basketball is to up the
3 competition.

4 Q And this was at what age that these problems started
5 emerging?

6 A I don't know what age you're talking about. It was
7 throughout the process.

8 Q Well, you said through AAU basketball she started
9 having problems with these coaches. How old was she
10 when that started happening?

11 A I think she started parks and rec in like the third
12 or fourth grade. I don't know the specifics about
13 it, but then she went to coach Pylon (phonetic
14 spelling) AAU.

15 Q What age?

16 A I don't know the age. I've looked forward. I
17 haven't, you know, basically put myself in this.
18 You know, I've moved forward. I've been living my
19 life for the last ten months in a new relationship.

20 Q I still don't understand, Mr. Blackmon, what any of
21 what you just told us has to do with this rule about
22 Ivy being embraced by male coaches or teachers.
23 What does it have to do with her fundamental
24 basketball skills?

25 A I didn't say it has anything to do with her

1 fundamental basketball skills. I was saying in
2 protection of Mr. Maddingly and the other male
3 coaches, because of her disobedience and her
4 rebellion, since I couldn't trust her actions, I
5 didn't want that taking place. Because
6 Mr. Maddingly had already been accused, he was one
7 of her teachers, and I didn't want anything, you
8 know, moving forward.

9 Q ~~I don't want to beat this point to death, but I~~
10 ~~still don't understand.~~ Are you saying that you
11 were concerned that your daughter, Ivy, might
12 falsely accuse one of her teachers or coaches of
13 doing something improper?

14 A I'm saying I didn't want to put the teacher in the
15 place.

16 Q And this had nothing to do with Ivy specifically?

17 A No.

18 Q Third rule talking about Ivy not being allowed to
19 eat lunch in Mr. Kelly's classroom. Explain that
20 one. What were you so concerned about there?

21 A Well, you had 1200 other students that were able to
22 eat lunch in the cafeteria and eat lunch in a
23 proper, I guess, setting that the other teachers --
24 I mean, the other students were eating lunch in. So
25 I just didn't want her to be side-barred, you know.

1 like someone special. And I wanted her to be with
2 the populous. I thought it would be better for her
3 demeanor. I thought it would be better for her
4 growth and potential.

5 Q Did she explain to you why she didn't like to eat in
6 the crowded noisy lunch room? She explained to you
7 why it was time that she could use to do her school
8 work and study. You knew it was okay with
9 Mr. Kelly, and you still had a problem with it?

10 A Mr. Kelly and I never communicated. She had her
11 studies that she did at home. And I'd actually like
12 you to reword the question if it's okay. I mean, so
13 I can expound on that.

14 Q No, go ahead.

15 A No, I mean, can you ask that question again so I can
16 reiterate?

17 Q Sure. I've told you why she didn't like eating in
18 the cafeteria where it was loud. She told you she
19 used that time in Mr. Kelly's classroom to study,
20 and you knew it was okay with Mr. Kelly, and you
21 still had a problem with Ivy eating in his
22 classroom.

23 A Yes, because also I knew there was other kids that
24 were on the no-contact list that were also
25 potentially eating in that room. And I wanted to

1 basically deteriorate that, you know. I didn't want
2 that to be taking place.

3 Q So making her eat in the cafeteria where all the
4 other students were would solve that problem?

5 A She was with the populous. So it would kind of take
6 away from, you know, the, I guess, the segregation
7 of the, you know, the meeting, or the lunch hour.

8 Q Okay. How many boyfriends did Ivy have junior high
9 through high school up until the point that you were
10 no longer with the family?

11 A I can't answer that.

12 Q Why not?

13 A Because she was lying to me. I don't know who she
14 was seeing or what she was doing.

15 Q Okay. Did you -- did she ever have any open
16 relationships with boys that she told you about?

17 A She told me that there was a crush between Jack
18 Collins and her.

19 Q Okay. Any other boyfriends that she told you and
20 Jenifer about?

21 A She actually had a crush on a boy in, I think it was
22 in either elementary-middle school timeframe.

23 Q I'm talking later. Junior high, freshman year,
24 sophomore year.

25 A Yeah. I don't know.

1 Q So there were no -- as far as you knew, there were
2 no relationships that she had with boys that you
3 approved of, at least?

4 A Not that I approved of, it's just not of my
5 knowledge.

6 Q So if she couldn't have contact with these three
7 boys, she couldn't have contact with male coaches
8 and teachers, she couldn't eat in Mr. Kelly's
9 classroom, who other than you, Mr. Blackmon, were
10 you okay with Ivy talking to? What other males?

11 A Oh, we ran with, you know, a lot of males. I mean,
12 I'd go to her extracurricular basketball function,
13 and she ran with the entire boys basketball team.

14 Q When you were there?

15 A There was Dakota.

16 Q I asked you a question. When you were there?
17 You're talking about situations where you were
18 present?

19 A I was present, yeah. I went and ran with them.

20 ~~Q Okay. I want to ask you a little bit more about~~
21 ~~these rules in kind of, I guess, what you would call~~
22 ~~the preamble to it. So up above the portion where~~
23 ~~it sets forth the ground rules.~~

24 ~~A Pream~~

25 ~~Q I said preamble. I'm talking about the earlier~~

1 ~~portion of the page before you get to the ground~~
2 ~~rules. You have this phrase, As we see Ivy's~~
3 ~~leadership qualities being restored and her focus~~
4 ~~being restored to the list of her academic~~
5 ~~requirements and futuristic goals, this can and will~~
6 ~~be modified to reflect freedoms so Ivy can be~~
7 ~~successful and elevate her lifestyle and quality of~~
8 ~~living.~~

9 ~~What are you talking about there? What had she~~
10 ~~done that was so bad? How had she fallen so far in~~
11 ~~your perspective that this was necessary?~~

12 A ~~Well after about a year of continual disobedience~~
13 ~~and rebellion regarding the rules, I mean, there was~~
14 ~~smack that Ivy had back and forth with me on the~~
15 ~~basketball court, and that's okay. I mean, when~~
16 ~~you're on the basketball court that's different.~~
17 ~~It's like when guys play basketball there's times~~
18 ~~where we fight on the basketball court, but once the~~
19 ~~game is over you shake hands and you go home. It's~~
20 ~~a game. Okay. But when you get off the court and~~
21 ~~there's rebellion, there's retaliation, there's~~
22 ~~disobedience, then this plays into effect.~~

23 ~~Did that answer your question, Mr. Baldock?~~

24 Q ~~I think partly, but I'm still wondering what you~~
25 ~~were referring to when you were talking about her~~

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1 leadership qualities being restored, her focus being
2 restored, her academic requirements and futuristic
3 goals.

4 A Yes. Ivy set her own goals. She was a 4.0 student
5 up until about the time I was removed from the home.
6 Okay. She set her own goals. I did not require a
7 4.0 of any of my children. I just asked them to do
8 their best. That's all I ask from any of my
9 children, their best.

10 Q You said she was a 4.0 student up until about the
11 point that you left the home.

12 A Yes.

13 Q And we already know that at least to a slight degree
14 her grades slipped a little bit; right?

15 A About three or four months, you know, I don't know
16 the timeframe, but I mean into her -- was that her
17 sophomore year?

18 Q Yes.

19 A Okay. Into her sophomore year she was having
20 problems. And I kept trying to tell her -- I kind
21 of played by the "keep it simple stupid," baby
22 steps. I don't know if you guys watch the movies,
23 but I preach that to my kids on and on. Take baby
24 steps. Quit looking at the scoreboard. Quit
25 looking at your report card. Focus on the content.

REQUESTED BY DEFENDANT

REQUESTED BY DEFENDANT

1 Get yourself back on line, you know. Focus on
2 what's being taught to you and your grades and the
3 scoreboard. It will turn around for you.

4 Q I know, Mr. Blackmon, you don't particularly like to
5 look back, as you've told us you've moved on, but do
6 you think maybe any of that had to do with you, the
7 fact that she was slipping off a little bit?

8 A I don't think it was do to she, I think it was do to
9 my entire family. We were under a pretty big load.

10 ~~Q I'm asking about you. You think it had to do with~~
11 ~~you?~~

12 ~~A I think with my entire family had to do with me.~~

13 ~~Q You think maybe it had anything to do with this kind~~
14 ~~of stuff? Exhibit 35, text message you sent to her~~
15 ~~when she's sitting in class at school, Remember who~~
16 ~~and who not you're to be socializing with. If~~
17 ~~someone you're not to socialize with tries to~~
18 ~~communicate with you, I want you to let me know~~
19 ~~Maybe something to do with that?~~

20 ~~A I think that's kind of relevant in the entire~~
21 ~~process with all of my kids.~~

22 ~~Q Okay. Maybe something like this one on January 6,~~
23 ~~again, she's at school: Who did you text around ten~~
24 ~~this morning? After you're checking through her~~
25 ~~phone records.~~

1 ~~A What's the question, Mr. Baldock?~~

2 ~~Q Do you think that the fact that she was struggling~~
3 ~~had anything to do with the degree to which you were~~
4 ~~controlling your daughter?~~

5 ~~A I don't think it had anything more to do with~~
6 ~~controlling my daughter than anyone else in my~~
7 ~~family. We constantly texted like that, you know,~~
8 ~~ever since we got cell phones.~~

9 ~~Q So you were constantly sending Jenifer, Zack, and~~
10 ~~Bleigh accusatory text messages?~~

11 ~~A They're not accusatory. They were rules. Whenever~~
12 ~~Zack was on his no contact list he got the same kind~~
13 ~~of stuff. But he listened.~~

14 ~~Q I'm listening. Go ahead.~~

15 ~~A That was it. He listened.~~

16 ~~Q I thought you said you were telling me to listen.~~

17 ~~A No. I was saying, Zachariah listened to me.~~

18 ~~Q Let's pick up there. So series of text messages on~~
19 ~~January 6. The one I just read about asking her who~~
20 ~~she texted around ten this morning. Exhibit 38~~
21 ~~where were you at lunch. Exhibit 39: Was the kid~~
22 ~~you were texting last night until about midnight in~~
23 ~~Mr. Kelly's room as well, the kid I told you you~~
24 ~~were to stay away from.~~

25 ~~Let's talk about what happened later that day.~~

1 You picked Ivy up from school early; right?

2 A Yes, I did.

3 Q You actually took her out of class, right?

4 A At the end of the day, yes.

5 Q And you met her in the parking lot, and the two of
6 you got into the car, or your truck; correct?

7 A No, no. That's not correct. I went into the
8 school, I checked her out, and then I met her in the
9 office and then we left together.

10 Q Okay. And you've told us a little bit about what
11 happened on the way home.

12 A Yes.

13 Q You were angry with her?

14 A I was upset with her, yes.

15 Q You essentially threatened to send her back east to
16 live with her grandmother?

17 A She was okay with that.

18 Q That was something you suggested?

19 A She acknowledged that. I suggested, she was okay
20 with that.

21 Q Told her she was done with basketball?

22 A I told her if she didn't follow these rules, she was
23 done with basketball.

24 Q With her in the car you called Jenifer and told her
25 to take the kids somewhere else for a little while

- 1 so they wouldn't be at home to witness you
2 disciplining Ivy; right?
- 3 A No. I told her to take them to Sports Authority
4 until I called her, because I had to deal with
5 discipline issue with Ivy.
- 6 Q How is that different from what I just said?
- 7 A It's different from what you just said because I
8 normally sit down and I talked with my children. If
9 I'm upset I don't discipline my children right away.
10 I take a break, you know, so that it's -- so that
11 it's not my anger coming out on their backside.
- 12 Q Is that what you did in this case?
- 13 A Well, I didn't get to do that in this case because
14 she took off.
- 15 Q While you were decompressing and...--
- 16 A Actually I didn't decompress yet. I was trying to
17 print out a T-Mobile bill when she removed herself
18 from the home.
- 19 Q Let's talk about Jenifer's work schedule. It was
20 not uncommon for her to work a schedule at Community
21 Transit such that she was gone early in the morning
22 leaving you to get the kids ready for school and
23 take them to school; right?
- 24 A Yes. ~~I think Zack identified that to a T.~~
- 25 Q And then not uncommon for her, even on those same

1 days to. after some break in the middle of the day,
2 have to go back to work in the evening and at night?

3 A Yes. Yes, sir.

4 Q So you were left with the kids at dinner time as
5 well?

6 A I was left with the kids. You know, I was Mr. Mom,
7 yes.

8 Q Now I want to talk about some things that happened
9 during those occasions when Jenifer was gone,
10 particularly in the evening. That was the time that
11 you and the kids would most often watch movies,
12 right, evenings?

13 A From time to time.

14 Q And we've talked about incidents where you were
15 watching a movie with Ivy while Zack and Bleighn
16 were either watching a movie together, or doing
17 whatever they were doing; right?

18 A Depending on what movies were picked from Red Box.

19 Q How many times did you watch movies with Ivy in your
20 bedroom behind a locked, closed door covering up the
21 gap in the doorjamb when Jenifer was home?

22 A I don't recall. I know it was numerous times.

23 Q When Jenifer was home you would watch movies in your
24 bedroom?

25 A No, no, not when Jenifer was home.

- 1 Q Never?
- 2 A When Jenifer was home? She wasn't home, so yeah.
- 3 Q So this behavior, you and Ivy behind a locked,
4 closed bedroom door doorjamb closed with the
5 moulding never happened when Jenifer was home?
- 6 A Is this a behavior or is this something that we did?
7 You know, I was in the crawl space, I was on the
8 roof, I was in the yard working. So whenever I was
9 done with that, you know, the kids pick a movie, I'm
10 relaxing, watching TV. If it was inappropriate and
11 Zechariah was trying to watch TV, the door got
12 closed and locked. It was actually a sibling
13 rivalry that got the door locked and closed, because
14 Ivy kind of laid down the role to Zechariah early
15 on. That's what initiated the door being locked.
16 So I didn't think anything of it.
- 17 Q So this was Ivy's idea to close and lock the door?
- 18 A Initially it was.
- 19 Q And then covering the gap was Ivy's as well?
- 20 A Yes.
- 21 Q Because she was real concerned about Zack seeing
22 this R-rated movie?
- 23 A Ivy controlled Zack.
- 24 Q Now Jenifer actually confronted you at some point
25 about that activity, about the fact that Bleighn and

- 1 Zack were talking to her about all these times dad
2 was watching movies or doing something with Ivy
3 behind a closed, locked door; right?
- 4 A Actually Jenifer confronted me about, you know,
5 fucking my therapist, she confronted me about
6 fucking every and any other woman.
- 7 Q We'll get to those later. We'll get to this one.
- 8 A As well as that. That was kind of, you know, right
9 into the, you know, mix of things.
- 10 Q And you were angry when she asked you about that;
11 right?
- 12 A No. I told her to call 911 if she had any -- any
13 kind of perceived idea that I was doing something
14 like that, she should call 911 is what I told her.
- 15 Q Why would she call 911? What was --
- 16 A Because I should be arrested and put my ass in jail.
- 17 Q For doing what?
- 18 A For whatever she accused me of.
- 19 Q After she accused of you of that, did you continue
20 your behavior with Ivy behind the closed locked
21 door?
- 22 A Behavior? Ask the question again. I'm sorry.
- 23 Q After she excused you of that, did you continue that
24 behavior with Ivy behind the closed, locked door
25 with the doorjamb blocked?

1 A I continued watching movies in the same fashion that
2 I did before.

3 Q Jenifer also confronted you about condoms that were
4 missing; right?

5 A Um-hum.

6 Q And this was at the point in your relationship with
7 Jenifer when you and she were no longer having sex;
8 right?

9 A That's correct.

10 Q How did you respond to that?

11 A I basically told her I used two of the condoms to
12 pleasure myself, to relieve myself, you know, late
13 at night, and I don't know what happened to the
14 other condoms. Those are the only condoms that were
15 ever in our home. I don't know how many were in the
16 box. She purchased them. And based off of
17 something that she said, she seen on a website, you
18 know, she wanted to experience anal sex. And I was
19 not --

20 Q I'm not asking that. We'll get to that in a second.

21 A I'm saying that's what those condoms were all about.

22 Q Maybe I will ask about that. So you're telling us
23 that she purchased these condoms hoping that you
24 would wear them and have anal sex with her?

25 A That's what it kind of -- after the communication

1 she had with me, that's what it kind of -- how it
2 settled in my brain.

3 Q She just brought this up out of the blue after two
4 or three years of no sexual contact, she said maybe
5 we could try anal sex?

6 A She brought this up off of something she seen on a
7 website off of a profile.

8 Q Let's get back to your explanation for their
9 disappearance. You told Jenifer that you used a
10 couple of them to pleasure yourself. You're talking
11 about masturbation?

12 A I relieve myself, yes. I masturbated twice.

13 Q Wearing a condom?

14 A Yes.

15 Q Why?

16 A Because it was, you know, it was just easier. You
17 know I got up, I was -- you know, I couldn't sleep,
18 relieve myself. I wrapped it in toilet paper the
19 same way she wrapped her tampon in the toilet paper
20 and I threw it in the trash in front of me that's in
21 front of our toilet.

22 Q Did you tell Ivy that you had done that?

23 A No, I didn't.

24 Q Did you tell Ivy about the condom supply?

25 A No, I didn't.

1 Q Did you talk to Ivy about sex?

2 A I asked -- basically I talked to her mother to talk
3 to her about sex.

4 Q That's not my question.

5 A If she brought up something, you know, regarding,
6 you know, like boys or something like that, you
7 know, I would handle it in the, you know, the
8 easiest way, I refer -- I kind of refer it to
9 Jenifer. There's two times specifically I remember
10 talking to Jenifer about sex about talking to, you
11 know, about educating Ivy, you know, for sex.

12 Q I'm talking about, though, direct conversations that
13 you had with Ivy about sex.

14 A No.

15 Q When Ivy was a little bit younger do you remember
16 taking her out of a school sex ed program?

17 A I think Jenifer and I took her out of a sex ed
18 program.

19 Q We know how the decisions were made in your house.
20 This was your decision and Jenifer agreed; right?

21 A Yeah. We agreed, and it depended on who the help
22 mate was at the time.

23 Q Why did you take her out of the sex ed class?

24 A It was something Jenifer and I said it was okay, and
25 Jenifer said she would talk to Ivy about it. So I

1 didn't see a problem with it.

2 Q That didn't answer my question. Why take her out of
3 the class?

4 A I guess you would ask Jenifer that, then. Because I
5 didn't think it was apparent that she needed it.
6 And I thought her parents could, you know,
7 basically, you know, as far as the sex education
8 thing, I thought that would be from, you know,
9 basically mom.

10 Q Okay. So you thought it was better that she learn
11 about that kind of thing in the home as opposed to
12 at school; right?

13 A From her mother, yes.

14 ~~Q Do you remember a point where Ivy was concerned that~~
15 ~~she might be pregnant?~~

16 ~~A I do not, no.~~

17 ~~Q You don't remember ever talking to her about that?~~

18 ~~A No.~~

19 ~~Q What about some concern that you expressed finding~~
20 ~~that Ivy had been shaving her pubic hair? Do you~~
21 ~~remember this?~~

22 ~~A Shaving her pubic hair?~~

23 ~~Q Yes.~~

24 ~~A No.~~

25 ~~Q Do you remember talking to Jenifer about that?~~

- 1 ~~A No, I do not.~~
- 2 Q Let's talk about physical contact with Ivy. You've
3 told us about foot rubs; right?
- 4 A Um-hum.
- 5 Q Did you rub her legs?
- 6 A I rubbed her calves.
- 7 Q Rubbed her back?
- 8 A Rubbed her back, yes.
- 9 Q Her forehead?
- 10 A And her forehead. Actually I rubbed all over her
11 head because her migraines were -- they were, you
12 know, they are horrific.
- 13 ~~Q We've had testimony from Zack, from your boy, about~~
14 ~~an incident in the family swimming pool where you~~
15 ~~pulled Ivy's pants down. Do you remember that~~
16 ~~happening?~~
- 17 ~~A Where I pantsed her?~~
- 18 ~~Q Right.~~
- 19 ~~A Yes, I do.~~
- 20 ~~Q Tell us about that.~~
- 21 ~~A I think Zack completely covered that.~~
- 22 ~~Q He may have, but I want you to.~~
- 23 ~~A Yeah. Basically Ivy pantsed Bleighn. Ivy was~~
24 ~~always kind of picking on Bleighn. So basically~~
25 ~~whenever she continually picked on Bleighn, I picked~~

1 ~~on her. I pantsed her, I pantsed Zack, I pantsed~~
2 ~~Bleighn.~~

3 Q ~~During that incident you pulled all your kids' pants~~
4 ~~down?~~

5 A ~~During all you know, once the pool once we got~~
6 ~~the pool heated, Zechariah, myself, Bleighn, Ivy, we~~
7 ~~kind of lived in the pool. It was a 95-degree pool,~~
8 ~~it was winter time. You could run from the house,~~
9 ~~it was freezing, you know, you could go out there~~
10 ~~and get into like a hot tub. So we would go out~~
11 ~~there and we would throw the cover, you know, like~~
12 ~~back and we would swim from side to side and we~~
13 ~~would play. There was a game we played what was~~
14 ~~the name of it? Basically there was a game we~~
15 ~~played where, you know, you're you close your~~
16 ~~eyes, and you run around trying to get the other.~~

17 Q ~~Marco Polo?~~

18 A ~~Marco Polo. Thank you, Mr. Baldock.~~

19 Q ~~And it was not uncommon that you would pull your~~
20 ~~kids' pants down on those occasions?~~

21 A ~~It wasn't it's not that it was uncommon, it's~~
22 ~~that whenever she was picking on Bleighn, I pantsed~~
23 ~~her.~~

24 Q ~~So on these occasions setting the pool conduct~~
25 ~~aside for a second when you were rubbing Ivy's~~

1 feet, her legs, her back, her head, where in the
2 house would this most often happen?

3 A It would most often happen in our room. And most of
4 the time -- I mean, there were five of us there.

5 Q Did you ever do those kinds of things when it was
6 just you and Ivy?

7 A Ah, yes.

8 Q In the living room?

9 A In the living room it happened a couple times as far
10 as, you know rubbing her feet, because we had the TV
11 set up in there. And then in the bedroom, yes.

12 Q What about in her bedroom?

13 A In her bedroom not her feet. Her head and her
14 shoulders.

15 Q Did you ever get in her bed with her at night?

16 A One time we were watching a movie. I don't know the
17 name of the movie, but I just remember the -- it was
18 about a relationship, the girl got hit by a truck,
19 you know, going through an alley. That was the only
20 time that basically I was rubbing her head and I was
21 -- I was, you know, keeping warm myself.

22 Q Were there other occasions where you were maybe not
23 in bed with her under the covers but on the bed with
24 her after lights out?

25 A I was on the bed sitting, you know, rubbing her

1 head, yes, her head and shoulders.

2 Q Was Bleighn in the room when that happened?

3 A Bleighn was in the room asleep, you know, above us,
4 you know, from time to time. And from time to time
5 she would come down and, you know, talk to us and
6 socialize with us.

7 Q What about times where Ivy was in bed with you and
8 Jenifer, did that happen?

9 A That happened, yes.

10 Q How many times do you think?

11 A I don't have a clue. There were times where
12 basically I woke up, I didn't even know Ivy was in
13 the bed, I woke up and Ivy was kissing me on the
14 cheek saying, Good night, dad, I love you.

15 Q And when that would happen when Ivy was in bed with
16 you and your wife, where would she be in relation to
17 you and Jenifer?

18 A It all -- it changed all the time.

19 ~~Q Mr. Blackmon, I don't have any other questions for~~
20 ~~you. Thanks.~~

21 ~~THE COURT: Mr. Browne, do you have any~~
22 ~~redirect?~~

23 ~~MR. BROWNE: I have no redirect.~~

24 ~~THE COURT: All right. You can step down.~~
25 ~~Thank you.~~