

NO. 46323-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

HAROLD SPENCER GEORGE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 13-1-01810-3

No. 13-1-01811-1

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. CHILD MOLESTATION IN THE FIRST DEGREE CASE¹
 - a. Does substantial evidence support the findings of fact and conclusions of law?
 - b. Should this Court uphold the trial court's verdicts on all three of his convictions where all three are supported by sufficient evidence?
2. FAILURE TO REGISTER AS A SEX OFFENDER CASE
 - a. Did the trial court abuse its discretion in not excluding a witness?
 - b. Were defendant's statements to police properly admitted?
 - c. Where the defendant failed to object to Detective Hickman's comment regarding defendant's credibility, has defendant failed to show that the alleged error is a manifest error of constitutional magnitude that can be raised for the first time on appeal?
 - d. Does substantial evidence support the findings of fact and conclusions of law?
 - e. Should this Court uphold the trial court's verdict where it is supported by sufficient evidence?

¹ These two cases were consolidated by the Court. To comply with RAP 10.3, the State has combined the briefs for COA #46326-1-II and COA 46323-7-II into one complete brief.

B. STATEMENT OF THE CASE.

1. Child Molestation in the First Degree Case

a. Procedure

The State charged Harold George Spencer ("defendant") with three counts of child molestation in the first degree, one count of violation of a protection order, and one count of furnishing liquor to a minor on May 3, 2013. CP 369-371. The child molestation charges were severed from the other two counts for trial. 1 RP 43-44.

The case was called for trial on February 6, 2014. 1 RP 3. Defendant waived his right to a jury trial. 2 RP 83. At trial, the State called Det. Gary Sanders, 2 RP 116-130, Dr. Yolanda Duralde, 2 RP 132-145, A.Q. 3 RP 155-253, T.K., 3 RP 254-277, Mary Moran-George, 3 RP 278 - 310, and Kim Brune, 3 RP 313 - 322. Defendant testified in his own defense. 3 RP 324 - 399.

The trial court found defendant guilty of three counts of child molestation in the first degree. 4 RP 486. Based on defendant's convictions, the State dismissed the counts of violation of a protection order and furnishing liquor to a minor. CP 439-441. Defendant was sentenced to 180 months to life in prison on April 11, 2014. CP 480-495.

b. Facts²

Mary Moran-George has a son, T.K., and a daughter, A.Q., whose date of birth is November 3, 2001. CP 506. Moran-George met the defendant while he was incarcerated in prison. CP 506. They were married over the telephone while he was in prison. CP 506. Upon his release, defendant, Moran-George and the children lived together, first at his mother's house then at a home they purchased in Graham, Washington. CP 506.

During the period between January 1, 2008 and September 1, 2012, while the family was living together at the house in Graham, defendant took A.Q. into the master bedroom and locked the door. CP 507. Behind the locked bedroom door, defendant would remove A.Q.'s pants and panties and lay her on the bed. CP 507. He would then remove his clothing. CP 507. The defendant would then rub his penis back and forth on A.Q.'s vagina until he ejaculated. CP 507. This happened on at least five occasions. CP 507.

² These facts are taken from the Finding of Fact and Conclusions of Law entered by the trial court on April 11, 2014, CP 505-509.

2. Failure to Register as a Sex Offender Case

a. Procedure

The State charged defendant with one count of failure to register as a sex offender on May 3, 2013. CP 523. The case was called for trial on February 18, 2014. Feb.18, 2014 RP 583.³ Defendant waived his right to a jury trial. Feb. 18-2 RP 664. There was a CrR 3.5 hearing regarding defendant's statements to police. Feb. 18, 2014 RP 608- 48.

At trial, the State called Officer Anita Dillon, Feb. 18-2 RP 670 - 677, Detective Alec Wrolson, Feb. 18-2 RP 679-682, Detective Oliver Hickman, Feb.18-2 RP 683-717, and Officer Andrea Shaw, Feb. 18-2 RP 718-741. The trial court found defendant guilty of failure to register as a sex offender. 8 RP 779. Defendant was sentenced to 12 months in jail. CP 580-594.

b. Facts⁴

In 1992, defendant was convicted of one count of attempted rape of a child in the first degree, a felony sex offense which required defendant to register as a sex offender. CP 596. In 1999, defendant was convicted of one count of communicating with a minor for immoral purposes, again, a felony sex offense which required defendant to register

³ The transcripts in these cases switch from Volume Number to Date and then back to Volume Number.

⁴ These facts are taken from the Findings of Fact/Conclusions of Law entered by the trial court on April 11, 2014. CP 592-602.

as a sex offender. CP 596. Defendant knew of his requirement to register as a sex offender and had registered employment and addresses a number of times with the Pierce County Sheriff's Department. CP 596-597. He last registered a new residence in Graham, Washington new on July 12, 2010. CP 596.

During an investigation into the whereabouts of defendant's step son, T.K., Officer Dillon contacted defendant on April 22, 1013, and learned that defendant was not living at the Graham, Washington residence, but had been staying with a friend in Tacoma. CP 597-598.

On April 23, 2013, someone left a tip on Offender Watch about defendant being in violation of the sex offender registration laws. CP 598. Detective Hickman contacted defendant on May 2, 2013. CP 598. Defendant said that his wife had a restraining order against him that prevented him from living at his Graham, Washington residence. CP 598-599. Defendant admitted he had been staying with a friend and then had been living in his car. CP 599. Defendant said he did not know he could register as a transient. CP 599.

C. ARGUMENT.

1. CHILD MOLESTATION IN THE FIRST DEGREE CASE

a. Substantial evidence supports the findings of Fact and Conclusions of Law.

"A challenge to the sufficiency of the evidence presented at a bench trial requires [the Court] to review the trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions." *State v. Homan*, 172 Wn. App. 488, 490, 290 P.3d 1041, 1042 (2012) *review granted*, 177 Wn.2d 1022, 303 P.3d 1064 (2013), *citing State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). *See also State v. Carlson*, 143 Wn. App. 507, 519, 179 P.3d 371 (2008) ("A trial court's decision following a bench trial is reviewed for whether its findings support its conclusions of law."). Unchallenged findings of fact are verities on appeal. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002). Whether the trial court's findings support its conclusions of law is reviewed de novo. *State v. Dancer*, 174 Wn. App. 666, 300 P.3d (2013); *see also State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

Pursuant to RAP 10.3(g), "A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associate issue pertaining thereto." Defendant does not list by number which finding he claims was made in error. Defendant assigns error to the quote "on at least five occasions the defendant took A.Q. into the master bedroom and locked the door." BOA at 19. This quote appears to be from finding of fact IV. CP 507. Defendant does not assign error on any other portion of finding IV or any of the other findings of fact or conclusions of law. The Court should decline to review this argument as defendant does not comply with RAP 10.3(g).

Assuming arguendo that the Court reviews this argument, the finding is supported by substantial evidence. A.Q. testified that the molestation happened five times when asked to give an estimate. 3 RP 182. In addition to A.Q.'s testimony, A.Q.'s brother T.K. also testified that he saw A.Q. and defendant go into the master bedroom on four or five occasions with the door locked. 3 RP 266. There is substantial evidence to support this finding of fact.

- b. There is sufficient evidence to support all three of defendant's convictions for child molestation in the first degree.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In

considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. See *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A defendant may be convicted only when a unanimous jury concludes beyond a reasonable doubt that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). To convict a criminal defendant in cases where multiple acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. *Petrich*, 101 Wn.2d at 572.

In multiple acts cases, either the State must elect the particular criminal act upon which it will rely for conviction, or the trial court must

instruct the jury that all of them must agree that the same underlying criminal act has been proven beyond a reasonable doubt. *State v. Hayes*, 81 Wn. App. 425, 430-31, 914 P.2d 788 (1996). In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence clearly delineates specific and distinct incidents of sexual abuse during the charging periods. *Hayes*, 81 Wn. App. at 431. Multiple count sexual assault charges have been affirmed under Washington case law even where the State relied on “generic” child testimony. *Hayes*, 81 Wn. App. at 435. In addition,

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

State v. Brown, 55 Wn. App. 738, 746-747, 780 P.2d 880 (1989). To account for this, the victim's testimony must sufficiently describe a single episode for each offense. *Id.* at 749.

In *Hayes*, the victim testified that the defendant “put his private part in mine” at least “four times” and some “two or three times a week” during the charging period. 81 Wn. App. at 435. The defendant argued that such generic testimony was insufficiently specific to sustain a multiple count conviction. The court was unwilling to hold that generic testimony is insufficient to sustain a conviction of a child molester, because doing so would risk unfairly immunizing from prosecution offenders who subject young victims to multiple assaults. *Hayes*, 81 Wn. App. at 438.

The *Hayes* court adopted a three-part test to balance the due process rights of the accused against the inability of the young accuser to give extensive details regarding multiple alleged assaults. The alleged victim must (1) describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed; (2) describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution; and (3) be able to describe the general time period in which the acts occurred. *Hayes*, 81 Wn. App. at 438.

The *Hayes* court held that the victim’s generic testimony was sufficiently specific to sustain each of the four counts charged. Her testimony that he “put his private part in mine” along with her description

of the usual course of conduct satisfied the first prong; her testimony that he did this at least “four times” and up to “two or three times a week” satisfied the second prong; and her testimony that the incidents occurred during the charging period satisfied the third prong. *Hayes*, 81 Wn. App. at 438-39.

The *Hayes* court also held that a defendant is not deprived of his or her due process right to present a defense when a child victim's testimony fails to indicate specific dates. 81 Wn. App. at 441. As long as the jury is correctly instructed on the unanimity requirement, the evidence need only be sufficiently specific under the three-part test described above. *Hayes*, 81 Wn. App. at 425.

To convict defendant of child molestation in the first the degree, the State proved that defendant unlawfully and feloniously had sexual contact with A.Q., and that he was at least 36 months older than A.Q., who was less than 12 years old and not married to the defendant and not in a state registered domestic partnership with the defendant. RCW 9A.44.083.

Defendant argues that the time period is insufficient, the evidence of three instances is insufficient, and the evidence is insufficient that molestation occurred. Defendant also makes a number of arguments regarding motives and recantations. However, those arguments go to

A.Q.'s credibility and the trial court was in the best position to evaluate the testimony of the witnesses. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

First, defendant did not assign error to any of the findings of fact other than the statement that defendant took A.Q. into the master bedroom on at least five occasions and locked the door. *Supra*, section a. As defendant did not challenge the majority of the trial court's findings, they are verities on appeal. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002). The trial court found that "The defendant rubbed his penis back and forth on A.Q.'s vagina until he ejaculated." CP 507. In addition, the trial court found that this occurred "during the period between January 1, 2008 and September 1, 2012." CP 507. As these findings are verities on appeal, defendant's arguments regarding the sufficiency of the evidence with regard to the molestation and the time period should be dismissed. However, the State will answer each argument in turn to show that regardless, there was sufficient evidence to rebut each argument and support each element of the charge.

Defendant was born on February 18, 1978. CP 506. A.Q. was born on November 3, 2001. CP 506; 3 RP 158. This shows that defendant

was more than 36 months older than A.Q. In addition, defendant was married to Mary Moran-George, A.Q.'s mother. CP 506. Defendant was not married to A.Q. or in a state registered domestic violence partnership. CP 506. At the time of the trial, A.Q. was 12 years old and was less than twelve during the period between January 1, 2008 and September 1, 2012. CP 506-507. Defendant does not dispute any of these points in his brief and there is sufficient evidence for each.

With regard to evidence of sexual contact, A.Q. testified that defendant would take her to the master bedroom and lock the door. 3 RP 172. Defendant would take off A.Q.'s pants and panties and lay her on the bed. 3 RP 172-173. Defendant would place a pillow on her face. 3 RP 174. Defendant would take his pants and underwear off. 3 RP 175. Defendant would then get on top of her and rock back and forth. 3 RP 176. His penis would be touching her private part where pee comes out [vagina]. 3 RP 177. Defendant did not penetrate A.Q.'s vagina, but his penis would rock back and forth on the outside for a couple of minutes. 3 RP 178. Sometimes a warm liquid would come out of defendant's penis onto A.Q.'s stomach and he would wipe it off with a shirt or a towel. 3 RP 179-180. This is sufficient evidence that defendant had sexual contact with A.Q.

The trial court found defendant guilty of three counts. A.Q. testified that this happened on a weekly basis. 3 RP 181. A.Q. said that it happened more than two times, but was not sure when asked if it happened more than three times. 3 RP 181. A.Q. thought that it happened five times. 3 RP 182. Upon cross examination, A.Q. testified that three times was an estimate. 3 RP 211. A.Q.'s brother T.K. also testified that he saw A.Q. and defendant go into the master bedroom on four or five occasions with the door locked. 3 RP 266. A.Q. would sometimes be crying when they came out of the room. 3 RP 266. This is sufficient evidence to support the trial court's finding of guilty for three counts.

With regard to the time period, A.Q. thought that the crimes occurred when she was in the fourth grade and that she was ten or possibly nine years old. 3 RP 182. A.Q. was 12 at the times of her testimony in February of 2014 and in the sixth grade. 3 RP 158. Working backward in time, that would place the crimes most likely in 2011 or 2012. This is sufficient evidence that the crimes occurred between January 1, 2008 and September 1, 2012.

In looking at the above evidence, this is very similar to the facts in *Hayes*, 81 Wn. App. at 438-39. The *Hayes* court found evidence similar to that adduced in this trial to be sufficient to uphold convictions for multiple counts of sexual abuse. In the case at bar, there is sufficient

evidence to uphold defendant's three convictions for child molestation in the first degree. Defendant's convictions should be affirmed because, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt.

2. FAILURE TO REGISTER AS A SEX OFFENDER CASE

- a. The court did not abuse its discretion by not excluding a witness.

Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or of untenable reasons. *State v. Smith*, 137 Wn. App. 431, 436, 153 P.3d 898 (2007). The factors to be considered in deciding whether to exclude evidence as a sanction are:

- (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the [opposing side] will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Hutchinson, 135 Wn.2d at 882-883.

In this case, the State learned that Officer Dillon had written a report about the case as she was talking to witnesses about trial. Feb.18, 2014 RP 595. The State requested a copy of the report and received it that afternoon. Feb.18, 2014 RP 595. The State immediately sent a copy of the report to defense counsel. Feb.18, 2014 RP 595. Defense counsel received it via email the next day. Feb. 18, 2014 RP 599.

The substance of Officer Dillon's report was contained in Detective Hickman's report and was not entirely new information. Feb. 18, 2014. RP 595. Officer Dillon was on the State's original witness list. Feb.18, 2014 RP 603; CP 618. Officer Dillon's contact with defendant was also noted in the declaration of probable cause. Feb.18, 2014 RP 605; CP 524. The trial court noted that there was no prejudice caused by the discovery of the new report because the information was contained in the declaration of probable cause, which was filed on May 3, 2013, and she was also listed as a witness on December 17, 2013. Feb.18, 2014 RP 605-606. The trial court offered to allow defense counsel time to interview officer prior to the CrR 3.5 hearing. Feb.18, 2014 RP 606. The trial court did not abuse its discretion in refusing to exclude Officer Dillon as a witness.

b. Defendant's statements to the police were freely, knowingly, and voluntarily made.

"The Fifth Amendment right to *Miranda* warnings attach only when a custodial interrogation begins." *State v. France*, 121 Wn. App. 394, 399, 88 P.3d 1003 (2004), citing *State v. Templeton*, 148 Wn.2d 193,

208, 59 P.3d 632 (2002). "The Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation..." *State v. Stewart*, 113 Wn.2d 462, 478, 780 P.2d 844 (1989). The United States Supreme Court in *Miranda* defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been...deprived of his freedom in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). "'Interrogation' involves some degree of compulsion. *Miranda* was concerned with protecting the privilege against self-incrimination during 'incommunicado interrogation of individuals in a police-dominated atmosphere.'" *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995)(citing *Miranda v. Arizona*, 384 U.S. at 445, 86 S. Ct. at 1612). The Fifth Amendment right to counsel cannot be invoked by a person who is not in custody. *State v. Warness*, 77 Wn. App. 636, 641, 893 P.2d 665 (1995). Furthermore, the need for *Miranda* protection does not exist except in a custodial interrogation situation and the right cannot be invoked before it exists. *Id.*

A person is seized when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Officers may speak to a person who may be a suspect without

implicating *Miranda* as long as that person remains free to leave if he refuses to cooperate. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Whether the officer has probable cause to arrest a suspect is irrelevant to whether the officer was required to administer *Miranda* warnings if the suspect's freedom of movement has not been curtailed to the extent associated with formal arrest. *Berkemer*, 468 U.S. at 442.; see, e.g., *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, review denied, 119 Wn.2d 1012 (1992). But, there is no court requirement that a suspect be given *Miranda* warnings when probable cause has been reached if there is no formal arrest. *Id.*; *State v. Short*, 113 Wn.2d 35, 40-41, 775 P.2d 975 (1989).

Statements which are freely given are voluntary and if they are likewise spontaneous, unsolicited, and not the product of custodial interrogation, they are not coerced within the concept of *Miranda*. *State v. Miner*, 22 Wn. App. 480, 483, 591 P.2d 812, 815 (1979). A defendant's incriminating statement that is not in response to an officer's question is freely admissible. *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, 790 (1992), as modified (Feb. 18, 1992); *State v. Bradley*, 105 Wn.2d 898, 904, 719 P.2d 546 (1986).

This Court reviews the trial court's findings of fact from a CrR 3.5 hearing to determine if they are supported by substantial evidence. *State v.*

Broadway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Appellate courts review de novo whether the trial court's conclusions of law are properly derived from its findings of fact. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012). Unchallenged findings of facts following a CrR 3.5 hearing are verities on appeal. *Id.*

In this case, defendant was contacted by law enforcement on two separate occasions. On April 22, 2013, defendant was contacted by Officer Dillon during an investigation into the whereabouts of his step-son T.K.. CP 563; Feb 18.-2 RP 642. Defendant was not placed in handcuffs. CP 563, Feb. 18-2 RP 641. Defendant was not placed under arrest at any time on April 22, 2013. CP563-564; Feb. 18-2 RP 646. During the course of this contact, Officer Dillon learned that defendant was not staying at his Graham residence, but was staying with a friend in Tacoma. CP 563. Feb. 18-2 RP 644, 649.

With regard to this contact, defendant was not in formal custody nor was his freedom curtailed. He was not placed in handcuffs and was not arrested at any point. After the contact was over, Officer Dillon drove away leaving defendant free. This was not a custodial interrogation that required *Miranda* warnings. Officer Dillon was seeking information about the whereabouts of defendant's stepson. Defendant's statements were made voluntarily during a non-custodial interview.

Defendant was subsequently contacted by Detective Hickman on May 2, 2013. CP 564; Feb. 18, 2014 RP 612. Defendant was in custody

and in handcuffs. CP 564; Feb.18, 2014 RP 613. Upon being contacted, Detective Hickman told defendant he was being contacted because he failed to change his registered address. CP 564; Feb.18, 2014 RP 613. Defendant said that he did not know what to do because he had a restraining order against him and he could not live at this house where he registered. CP 564; Feb.18, 2014 RP 613. At this point, Detective Hickman read defendant his *Miranda* rights. CP 564; Feb.18, 2014 RP 613-614. After his *Miranda* rights were read to him, defendant voluntarily answered questions about where he was living. CP 564-565; Feb.18-2 RP 614.

With regard to defendant's first statement⁵ made prior to his *Miranda* rights, the statement was made prior to Detective Hickman asking defendant a question. This was a voluntary, spontaneous statement not made in response to custodial interrogation. See *State v. Miner*, 22 Wn. App. 480, 483, 591 P.2d 812, 815 (1979). Detective Hickman had just introduced himself and told defendant why he was there when defendant started speaking. As defendant offered this statement prior to a question, it was freely admissible.

⁵ Defendant does not challenge the statements made post-*Miranda*.

- c. Defendant waived the issue regarding detective Hickman's comment by failing to object at trial and fails to demonstrate that the issue rises to manifest error of constitutional magnitude.

Pursuant to RAP 2.5(1), the defendant cannot raise an error for the first time on appeal unless the appellant demonstrates that the error is manifest and is truly of constitutional dimension. *State v. Kirkman* 159 Wn.2d 918, 926, 155 P.3d 125 (2007). To be manifest as required by RAP 2.5(a)(3), a showing of actual prejudice is required. *Id.* at 935. There must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court. *Id.* The Court will not assume the alleged error is of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Only if the defendant can demonstrate that the error is both constitutional and manifest, does the burden shift to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011).

The testimony of an investigating officer, if not objected to at trial, does not necessarily give rise to a manifest constitutional error. *Kirkman*, 159 Wn.2d at 938. "Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact." *Id.* The defendant does not argue that Detective Hickman's comment is an explicit

witness statement on an ultimate issue of fact. The Court should decline to address this issue.

Even if defendant could show that this comment rose to the level of a manifest constitutional error, in this case, the error is harmless. First, Detective Hickman's comment was about defendant's credibility regarding whether defendant could register as a transient. Feb. 18-2 RP 697. This comment was based on the fact that defendant had registered to change his address several times. Feb. 18-2 RP 698. Each time defendant registered he received a pamphlet about changing his registration. Feb. 18-2 RP 698. This is not an ultimate issue on defendant's guilt, especially because defendant's defense at trial was that he was not actually homeless and was merely staying at a friend's house or in his car temporarily. Feb.18-2 RP 669; VIII RP 765; BOA at 37. Defendant cannot show that this comment was prejudicial given the evidence adduced at trial and his defense.

d. Substantial evidence supports the Findings of Fact and Conclusions of Law.

The State previously outlined its legal argument regarding substantial evidence in the beginning section of this argument. *See* Section 1, a, *supra*.

Again, defendant fails to challenge a specific finding of fact by number. The Court should decline to review this argument as defendant does not comply with RAP 10.3(g).

Defendant assigns error to the quote "[t]he defendant moved out of the 230th Street address prior to March 29, 2013." BOA at 42. This quote is from finding of fact V. CP 597. Assuming arguendo that the Court reviews this argument, the finding is supported by substantial evidence, although the date of March 29, 2013, is more precise than the actual testimony. However, the charging period for the offense was during the period between March 29, 2013, and May 2, 2013. This is reflected in finding of fact III and XV.

Officer Dillon contacted defendant on April 22, 2013. Feb. 18-2 RP 671. During this contact, defendant stated that he was staying with a friend. Feb. 18-2 RP 676. Detective Hickman received a tip that defendant was separated from his wife and was living at a friend's house in Tacoma. Feb. 18-2 RP 689. Detective Hickman contacted defendant's wife and after that conversation he believed that defendant was not living in that house. Feb. 18-2 RP 689-690. Detective Hickman contacted defendant on May 2, 2013. Feb. 18-2 RP 690. Defendant told Detective Hickman that he separated from his wife about two weeks ago. Feb. 18-2 RP 694. Defendant moved out of his house when he separated from his wife. Feb. 18-2 RP 694. Defendant stayed at a friend's house in Tacoma for a couple of nights, but the majority of the time he had been staying primarily in his car. Feb. 18-2 RP 694.

Defendant also assigns error to the quote "admitted he had not been living at the Graham address and claimed he had been staying with his

friend in Tacoma. His friend was able to confirm this information and provide an address to Officer Dillon." This quote is from finding of fact X. CP 598. Defendant is correct that this evidence only came up during the 3.5 hearing. However, this is a harmless error as defendant told Detective Hickman that he stayed at a friend's house in Tacoma for a couple of nights, but the majority of the time he had been staying primarily in his car. Feb. 18-2 RP 694. The defendant does not challenge the remainder of finding of fact X.

Defendant also assigns error to the quote "was clearly not living at the Graham address and had not been for at least 2 weeks." This quote is from finding of fact XIV. CP 599. Assuming arguendo that the Court reviews this argument, the finding is supported by substantial evidence. Defendant told Detective Hickman that he separated from his wife about two weeks ago. Feb. 18-2 RP 694. Defendant moved out of his house when he separated from his wife. Feb. 18-2 RP 694. Defendant stayed at a friend's house in Tacoma for a couple of nights, but the majority of the time he had been staying primarily in his car. Feb. 18-2 RP 694. There was a restraining order preventing defendant from living in the house. Feb. 18-2 RP 693. The defendant does not challenge the remainder of finding of fact XIV.

e. There is sufficient evidence to support Defendant's conviction for Failure to Register as a Sex Offender

The State previously outlined its legal argument regarding sufficiency of the evidence in the beginning section of this argument. *See* Section 1, b, *supra*.

To convict defendant of failure to register as a sex offender, the State proved that defendant did unlawfully, feloniously, having been convicted of a felony sex offense, did knowingly fail to comply with the registration requirements of RCW 9A.44.130 when required to do so.

Again, defendant only assigned error to a small amount of quotations from the findings of fact in this case. Defendant does not challenge the majority of the trial court's findings of fact. As defendant did not challenge the majority of the trial court's findings, they are verities on appeal. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002).

As these findings are verities on appeal, defendant's arguments regarding compliance with the requirements and that he knowingly failed to comply with the requirements should be dismissed. However, the State will answer each argument in turn to show that, regardless, there was

sufficient evidence to rebut each argument and support each element of the charge.

The trial court found that defendant was previously convicted of attempted rape of a child in the first degree, a felony sex offense, in 1992. CP 596; Feb. 18-2 RP 725. In addition, defendant was convicted of felony communicating with a minor for immoral purposes, a felony sex offense, in 1999. CP 596; Feb. 18-2 RP 727. Pursuant to these sex offenses, defendant had a duty to register as a sex offender. CP 596; Feb. 18-2 RP 730. Upon his release from prison and when he registered with the Pierce County Sheriff's Department, the defendant indicated that he understood the requirements of the registration law. Feb. 18-2 RP 731. On July 12, 2010, defendant updated his registration to reflect a house in Graham, Washington. CP 596; Feb. 18-2 RP 740.

Officer Dillon contacted defendant on April 22, 2013. Feb. 18-2 RP 671. During this contact, defendant stated that he was staying with a friend. Feb. 18-2 RP 676. Detective Hickman received a tip that defendant was separated from his wife and was living at a friend's house in Tacoma. Feb. 18-2 RP 689. Detective Hickman contacted defendant's wife and after that conversation he believed that defendant was not living in that house. Feb. 18-2 RP 689-690. Detective Hickman contacted defendant on May 2, 2013. Feb. 18-2 RP 690. Defendant told Detective Hickman that he separated from his wife about two weeks ago. Feb. 18-2

RP 694. Defendant moved out of his house when he separated from his wife. Feb. 18-2 RP 694. Defendant stayed at a friend's house in Tacoma for a couple of nights, but the majority of the time he had been staying primarily in his car. Feb. 18-2 RP 694. During the period between March 29, 2013 through May 2, 2013, defendant did not update his registration address. CP 599; Feb. 18-2 RP 740. Defendant was clearly not living at the Graham address, and had not been for at least two weeks. CP 599.

In the case at bar, there is sufficient evidence to uphold defendant's conviction for failing to register as a sex offender. Defendant's conviction should be affirmed because, viewing the evidence in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.

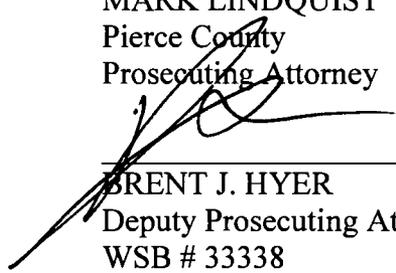
D. CONCLUSION.

The Court should uphold the convictions of both of these cases as sufficient evidence was introduced to support three counts of child molestation in the first degree, and one count of failure to register as a sex offender. Defendant had not shown that the trial court abused its discretion in failing to exclude a witness. Defendant has not shown that the trial court should have suppressed his statements to law enforcement.

Defendant has not shown that Detective Hickman's comment was an error of constitutional magnitude, or if it was, that it was not harmless. The Court should affirm defendant's convictions in both of these cases.

DATED: March 4, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

Certificate of Service:

The undersigned certifies that on this day she delivered by ES mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.5.15 Cherita
Date Signature

PIERCE COUNTY PROSECUTOR

March 05, 2015 - 9:44 AM

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