NO. 42538-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHARLES TEWEE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

The Honorable John Nichols, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The admission of an out-of-court statement identifying the appellant as the alleged perpetrator violated the "hue and cry" doctrine.

2. The trial court erred in admitting an out-of-court statement identifying the appellant as the alleged perpetrator under the medical diagnosis and treatment exception to the hearsay rule.

3. There was insufficient evidence to support the special verdict that the appellant used a position of trust to facilitate the crime.

4. The trial court erred in entering the following finding of fact in support of an exceptional sentence:

> The defendant used his position of trust or confidence to facilitate the commission of the current offense.

Clerk's Papers 518.

5. The trial court erred in including the appellant's Oregon conviction for unauthorized use of a motor vehicle in calculating his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the hue and cry exception to the hearsay rule, testimony is limited to the fact of disclosure by the victim; the identity of the perpetrator as well as details of the assault are not admissible. Where testimony by a

deputy sheriff admitted under the hue and cry exception exceeded that doctrine when the deputy disclosed that the complaining witness identified her uncle—Charles Tewee—as the perpetrator, is the appellant entitled to reversal of his conviction for first degree child molestation and remand for a new trial? (Assignment of Error 1)

2. Out-of-court statements may be admissible if made for the purpose of medical diagnosis or treatment. Generally, a statement identifying the perpetrator of injuries is not admissible absent evidence the identity was necessary for medical treatment or diagnosis. Where a counselor testified the declarant identified her perpetrator but the State did not provide any evidence showing identity was relevant to treatment or diagnosis, did the trial court err in admitting the out-of-court statement regarding identity? (Assignment of Error 2)

3. Is the record insufficient to support a finding appellant used a position of trust to facilitate child molestation where the totality of evidence is that the appellate is the uncle of the complaining witness and was a houseguest in the house in which the complaining witness lived? (Assignments of Error 3 and 4)

4. Did the trial court err when it found that the appellant's

Oregon conviction for unauthorized use of a vehicle was comparable to a Washington felony offense and included the offense in the offender score calculation where the Oregon crime is broader than its Washington counterpart? (Assignment of Error 5)

C. STATEMENT OF THE CASE

1. Procedural facts:

The Clark County Prosecuting Attorney charged Charles Tewee by amended information on May 4, 2011 with rape of a child in the first degree (Count 1), and child molestation in the first degree (Count 2). Clerk's Papers (CP) 257. The information alleged that the offense occurred between January 1 and February 28, 2010, and that A.B. is the complaining witness. CP 257. The State also alleged that Mr. Tewee abused a position of trust in committing the offense. RCW 9.94A.535(3)(n). CP 257. The State filed notice of intent to seek an exceptional sentence on September 24, 2010. CP 3.

Trial commenced on May 16, 2011, the Honorable John Nichols presiding. At the beginning of trial, defense counsel moved *in limine* to exclude evidence of A.B.'s statement regarding disclosure of the molestation to Clark County Deputy Sheriff Cindy Bull, Jennifer Lastiri, and A.B.'s

friend, N.J. 1RP at 128. A.B., who was eleven years old at the time of the alleged incident, does not fall within the scope of the child hearsay rule. RCW 9A.44. 1RP at 129. The State moved to admit the testimony under the "hue and cry/fact of disclosure" exception to the hearsay rule. 1RP at 129-32. Defense counsel objected to the fact of disclosure testimony on the basis that the statements were not made within a reasonable time after commission of the offense alleged. 1RP at 148, 149. The State argued that the offense occurred in January or February, 2010, and that A.B. disclosed the incident by March 18, 2010. 1RP at 150. The court allowed the hue and cry testimony. 1RP at 150.

Defense counsel also moved to review A.B.'s entire treatment file used by her counselor, Amy Baggett. 1RP at 157. The court had previously conducted an *in camera* review of the entire treatment file and determined that two pages in the file "touched upon the abuse," which were provided to defense counsel. 1RP at 157. The court denied counsel's renewed request for access to the entire file. 1RP at 157. Defense counsel also objected to Ms. Baggett's anticipated testimony regarding A.B.'s statements to her during treatment under the medical diagnosis exception to the hearsay rule, which the court denied. 1RP at 154, 157.

The jury found Mr. Tewee guilty of child molestation in the first degree as alleged in Count 2. CP 330. He was acquitted of Count 1. CP 328. 4Report of Proceedings [RP] at 504.[1] The jury found Mr. Tewee used a position of trust to gain access to the victim. 4RP at 505; CP 331. The court denied the defense's request for a new trial or arrest of judgment. 4RP at 512.

The court found that Mr. Tewee's offender score was "9," with a standard range of 149 to 198 months. 4RP at 546; CP. The court found a 2003 Oregon conviction for unauthorized use of a motor vehicle was comparable to the Washington offense of taking a motor vehicle and assigned 1 point to his offender score for the conviction. 4RP at 544.

The court imposed an exceptional minimum sentence of 220 months based on the jury's finding that Mr. Tewee "used his position of trust or confidence to facilitate the commission of the current offense." 4RP at 555; CP 518.

Timely notice of appeal was filed August 31, 2011. CP 527. This appeal follows.

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[1]The record of proceedings consists of five volumes:
1RP—September 30, October 12, October 19, November 2, December 14, 2010, January 13, March 3, March 17, and March 21, 2011, hearings;
2RP—May 17, 2011, jury trial,
3RP—May 17, 2011, jury trial,

2. **Testimony at trial:**

Charles Tewee is the uncle of the complaining witness, A.B. 2RP at 243. Nicole Antone is A.B.'s mother, and her father is Brian Baker. 2RP at 243. A.B., who was born November 27, 1998, initially lived with her mother and then lived at her grandmother's house in Vancouver, Washington. 2RP at 183, 195, 201, 243. When her parents were together, Mr. Tewee frequently stayed in their house. 2RP at 258, 259.

A.B. and her brother M.B. subsequently went to live with their grandmother, Linda Antone, in Vancouver. 2RP at 201, 232, 239. While she lived there, A.B. would sleep in her grandmother's bed while M.B. would sleep on the living room floor. 2RP at 194, 223. Mr. Tewee would often stay at the house, sleeping on the couch. 2RP at 194.

Brian Baker stated that Mr. Tewee and A.B. had a typical uncle and niece relationship and would often play around and wrestle. 2RP at 261, 262. In March, 2010, A.B. and her brother M.B. went to live with her father and his girlfriend, Jennifer Lastiri. 2RP at 178. Ms. Lastiri has one child, N.J. 2RP at 185. After A.B. came to live with her father, Ms. Lastiri noted that A.B. was not doing well in school, having difficulty with other children

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4RP—May 18, 2011, jury trial, July 6, 2011, and August 31, 2011, sentencing; and Voir dire—May 16, 2011; and opening statements—May 17, 2011

at school, and was defiant. 2RP at 178-79. Ms. Lastiri thought that "it would be best to have her have somebody to talk to," and made an appointment for her to go to counseling. 2RP at 178-79, 182. Mr. Baker stated that after she went to live with him, she was defiant and had been living in an unstable environment. 2RP at 246.

A.B. testified that in 2010, when she was eleven years old, she was sleeping in bed with her grandmother, who was watching television. 2RP at 196, 223. She stated that she thought it was February, but on cross examination said it could have been February, but that she was not sure of the month. 2RP at 226. A.B. stated that she got up from bed to get a glass of water. 2RP at 197. M.B. was sleeping on the living room floor and Mr. Tewee was sleeping on the couch. 2RP at 197, 200. A.B. testified that when she went to get a glass of water, Mr. Tewee asked her to give him a hug. 2RP at 197. She stated that it was common for her to hug him. 2RP at 197. She said that he put her on top of him and touched her vagina with his hand underneath her underpants. 2RP at 198, 199-200. She "moved away from him" and got a glass of water and went to bed. 2RP at 199. She stated that the next day she went into the garage and that her uncle came out and said he was sorry and not to tell anyone and that he could get into big trouble. 2RP

at 200. She stated that she told N.J. about the incident about three weeks later and also told Jennifer Lastiri. 2RP at 202. A.B. stated that she also told a counselor about the incident. 2RP at 203. A.B. stated that she wanted to live with her father. 2RP at 231.

Following an incident at her brother's birthday party at her father's house in March, 26, 2010, in which her uncle and an aunt arrived at the party, she went to live with her father. 2RP at 215, 216. She stated that when he got to the party her uncle asked for a hug and she tried to kick him away. 2RP at 216. Her father called the police. 2RP at 217.

Despite this, she went back to live with her grandparents in June, 2010, along with her brother and Mr. Tewee, and stayed there until August, 2010. 2RP at 204, 233. In August, 2010, Child Protective Services became involved and she was placed with her father. 2RP at 218.

N.J. she testified that A.B. told her that she had been molested and told her not to tell anyone. 2RP at 174. N.J. stated that she told her mother. 2RP at 174. Jennifer Lastiri, N.J.'s mother, testified that she asked A.B. if anyone "had touched her in a way," and that A.B. said 'yes.' 2RP at 180, 181.

N.J. stated that Mr. Tewee and A.B. treated each other like brothers

and sisters, teased each other, and wrestled and tickled each other. 2RP at 176.

Detective Cindy Bull, a deputy with the Clark County Sheriff's Office, stated that on March 30, 2010, she spoke with A.B. She testified that A.B. told her about "an inappropriate contact with her uncle." 2RP at 274.

Counselor Amy Baggett met with A.B. in March, 2010. 3RP at 292. She stated that A.B. told her that "a couple" of months prior to the initial intake assessment she hugged her uncle good night and that he had penetrated her vaginal area with his finger. 2RP at 292-93. After the initial intake assessment, Ms. Baggett had A.B.'s father come back into the room, notified him of what A.B. told her, and then reported the incident to Child Protective Services. 3RP at 294.

Linda Antone testified that when A.B. was staying at her house, she did not get up at night, and did not get water at night. 3RP at 337, 360. She stated that A.B. slept in the bed next to the wall and that if she had gotten up at night to get water, she should have noticed it. 3RP at 337.

Mr. Tewee said that he often gave A.B. a hug before she went to sleep. 3RP at 406. He denied ever touching her in a sexual manner. 3RP at 407.

D. ARGUMENT

1. MR. TEWEE'S RIGHTS WERE VIOLATED WHEN TESTIMONY BY DETECTIVE BULL EXCEEDED THAT ALLOWED BY THE HUE AND CRY DOCTRINE

At the beginning of trial, defense counsel objected to evidence of M.G.'s disclosure of the molestation under the hue and cry/fact of disclosure exception to the hearsay rule. 1RP at 148, 149. The court allowed the State to introduce hue and cry testimony from N.J., Jennifer Lastini, and Deputy Sheriff Cindy Bull. 1RP at 150. Deputy Bull testified that A.B. told her about "an inappropriate contact with her uncle." 2RP at 274.

The limited exception under the hue and cry doctrine bars testimony regarding the alleged perpetrator. The hue and cry doctrine is an exception to the hearsay rule and allows the State to introduce evidence in sexual assault cases that the victim made a timely complaint to someone after the assault. *State v. Murley,* 35 Wn.2d 233, 236-37, 212 P.2d 801 (1949); *State v Ackerman*, 90 Wn.App. 477, 481, 953 P.2d 816 (1998). The rule excludes details of the complaint, including the identity of the offender and the nature of the act, and only admits evidence that will establish whether or not a complaint was timely. *Murley*, 35 Wn.2d at 237. The fact of complaint evidence "is not hearsay because it is introduced for the purpose of bolstering

the victim's credibility and is not substantive evidence of the crime." *State v. Bray*, 23 Wn.App. 117, 121, 594 P.2d 1363 (1979). Evidence of when a witness complains is admissible because one of the underlying questions in a sexual offense case is the credibility of the victim. *Murley*, 35 Wn.2d at 237; *State v Alexander*, 64 Wn.App. 147, 152, 822 P.2d 1250 (1992).

In applying the hue and cry rule, a witness' testimony about what the victim told them may include only the general nature of the act. *State v. Ragan*, 22 Wn.App. 591, 597, 593 P.2d 815 (1979) (allowing testimony by a witness who said the victim reported that he was raped by a man); *State v Fleming*, 27 Wn.App. 952, 958-59, 621 P.2d 779 (1980) (allowing testimony from witness that victim reported she was raped).

Here, the testimony of Detective Bull adduced by the State exceeded the hue and cry exception. When Detective Bull testified regarding A.B.'s hue and cry, she testified that A.B. hold her "[a]bout an inappropriate contact with her uncle." 2RP at 274. This testimony exceeded the hue and cry exception.

Moreover, Det. Bull's testimony under the hue and cry exception was not harmless. An erroneous evidentiary ruling is reversible if there is a reasonable probability that the error materially affected the outcome of the

trial. *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997). Testimony about the identity of the perpetrator under the hue and cry exception may be harmless error. *State v Ferguson*, 100 Wn.2d 131,136, 667 P.2d 68 (1983). In this case, Detective Bull's testimony reinforced to the jury the claims that Mr. Tewee molested A.B. The error was compounded by the fact that the testimony came from a deputy sheriff.

It was substantially through this testimony that the jury gained any corroboration of A.B.'s claim. There was no physical evidence, and no indirect evidence of abuse, such as any precocious knowledge of sexual activity. See *State v Swan*, 114 Wn.2d 613, 623, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). This testimony undoubtedly made a significant impression on the jury.

Because the child's out-of-court claims admitted under the hue and cry rule was particularly pivotal in this case, the admission of the evidence of identity created reversible prejudice. See *Traver v. State*, 568 N.E.2d 1009, 1013-14 (Ind.1991) (admission of child statements in absence of required foundation was reversible error because the sum of the hearsay testimony was a significant part of the evidence at trial). The testimony tended to corroborate the child's allegation factually, and materially affected the

outcome, more likely than not. See *State v. Hancock*, 46 Wn. App. at 678 (test for reversible error in admitting child statements in sex case is whether "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected").

Based on the foregoing, this Court should reverse Mr. Tewee's conviction.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY STATEMENTS FROM A.B.'S COUNSELOR THAT WAS NOT FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT.

Statements made for the purpose of medical diagnosis or treatment are admissible as an exception to the hearsay rule under ER 803(a)(4). Here, the trial court abused its discretion when it admitted A.B.'s out-of-court statements to counselor Amy Baggett without a foundation that the statements were necessary for medical diagnosis or treatment.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802. Hearsay is admissible at trial if it is a statement "made for purposes of medical diagnosis or treatment."

ER 803(a)(4). ER 803(a)(4) provides:

> Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

To be admissible under this exception, the court must determine whether a statement was made for purposes of medical diagnosis or treatment. The statements must satisfy a two-prong test: (1) whether the declarant's motive in making the statement was consistent with the purposes of promoting treatment, and (2) whether the content of the statement was such as is reasonably relied on by a physician in treatment or diagnosis. *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989). For the statement to be admissible, the declarant's apparent motive must be consistent with receiving treatment and the statements must be information on which the medical provider reasonably relies to make a diagnosis. *State v. Fisher*, 130 Wn. App. 1, 14, 108 P.3d 1262 (2005).

This Court reviews the trial court's admission of a statement under ER 803(a)(4) for abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001).

As a general rule, statements identifying the perpetrator are not

relevant to diagnosis or treatment. *State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). Statements of blame or attribution of guilt are generally inadmissible, while statements regarding causation fall under the medical hearsay exception. *State v. Perez*, 137 Wn. App. 97, 106, 151 P.3d 249 (2007).

An exception to this general rule is that statements identifying a perpetrator may be admissible when the victim is a child for two reasons. *Perez,* 137 Wn.App. at 106. First, children's statements of causation of their injuries are often inseparable from statements attributing fault. *Id* Second, learning the identity of the perpetrator may be essential to removing the child from danger. *Id.* However, even under this exception, the two foundational requirements and the reason for the exception remain intact. The statements are only admissible if the declarant's motive was consistent with promoting treatment and the provider reasonably relied on the statements. *State v Carol M.D.*, 89 Wn. App. 77, 85, 948 P.2d 837 (1997), rev'd and remanded for reconsideration on other grounds sub. nom. *State v. Doggett*, 136 Wn.2d 1019, 967 P.2d 548 (1998).

The first prong of this test is not met, however, when the patient did not seek medical treatment. When a child has not sought medical treatment,

the State must present affirmative evidence the child understood her statements would further diagnosis and treatment. *Carol M.D.*, 89 Wn. App. at 86.

Here, the State failed to present such evidence. A.B. did not seek medical treatment; she was taken to see Ms. Baggett by her father due to concerns that A.B. was defiant, had behavioral issues, and had been living in unstable circumstances. 2RP at 246. The State presented no evidence that Ms. Baggett, who saw A.B. during an initial intake assessment, had discussed with A.B. the importance of telling the truth or providing accurate information. In addition, there is no evidence that Ms. Baggett told A.B. that she might have medical problems that could only be resolved if she provided truthful information.

In addition, Ms. Baggett did not testify that the name of the perpetrator was necessary for counseling, nor did she testify as to what type of information she uses when counseling children. Furthermore, Ms. Baggett did not testify that the identification of the perpetrator was related to any counseling in this case. See 3RP at 289-94.

Under these facts, the State did not come close to meeting its burden under *Carol M.D.* Because there is insufficient evidence of a motivation

consistent with seeking medical diagnosis or treatment, A.B.'s statements to Ms. Baggett should not have been admitted under the medical hearsay exception. Nonetheless, over objection from defense counsel, the counselor testified that A.B. told her that she was digitally penetrated by her uncle. 3RP at 292-93.

Evidentiary errors by the trial court are reviewed under the harmless error standard. *State v Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Under this standard an error cannot be harmless where, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id.* The admission of A.B.'s out-of-court statement identifying Mr. Tewee as the perpetrator was not harmless. Her identification of Mr. Tewee to Ms. Baggett was additional evidence that contradicted Mr. Tewee's defense by implicating him as the perpetrator. The evidence added credence to the State's theory of the case that Mr. Tewee's denial of the incident was false and that A.B.'s allegation that she was molested was accurate and truthful. Consequently, the error was not harmless and Mr. Tewee's conviction must be reversed.

3. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE AGGRAVATING FACTOR OF ABUSE OF TRUST

The record does not support the jury's special verdict finding that Mr. Tewee used a position of trust to facilitate the offense. The "position of trust" aggravating circumstance is defined as follows:

> The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
>
> RCW 9.94A.535(3)(n).

RCW 9.94A.535 requires that the defendant be in a "position of trust," and that the defendant must use his position to facilitate the commission of the current offense. The record does not support either of these aggravating factors.

Washington law provides that the focus, when considering a claim of abuse of trust, is whether the defendant (1) in a position of trust and (2) was the position used to facilitate the commission of the offense. *State v. Vermillion*, 66 Wn. App. 332, 347, 832 P.2d 95 (1992), review denied, 120 Wn.2d 1030 (1993); accord, *State v Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996); see also, *State v P.B T.*, 67 Wn. App. 292, 303, 834 P.2d 1051 (1992) review denied, 120 Wn.2d 1021 (1993).

The position of trust factor is not a strict liability enhancement for blood relatives, but instead depends on "the duration and the degree" of a

given relationship. See, *State v. P.B.T.*, 67 Wn. App. 292.

In *State v Grewe*, 117 Wn.2d 211, 220, 813 P.2d 1238 (1991), the Supreme Court held that not every crime committed by a parent against a child involves an abuse of trust. "Washington law is clear that before an abuse of trust can be used as an aggravating factor, the evidence must indicate that the position of trust was used to facilitate the crime." *Grewe*, 117 Wn.2d at 220. *State v. P B T*, 67 Wn. App. at 303 (citing *State v Stevens*, 58 Wn. App. 478, 500, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990)). "Mere opportunity created by a person's position is not enough from which to conclude that the position of trust facilitated the commission of the crime." *P B T.*, 67 Wn. App. at 304 (citing *State v Stuhr*, 58 Wn. App. 600, 663, 794 P.2d 1297 (1990), review denied, 116 Wn.2d 1005 (1991).

In *State v Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673 (1994), a case involving statutory rape and rape of a child, the court held that "[w]hen analyzing abuse of trust, the focus is on the defendant. The inquiry is whether the defendant was in a position of trust, and further, whether this position of trust was used to facilitate the commission of the offense."

Here, Mr. Tewee did not use his position as A.B.'s uncle to facilitate the crime. His friendly relationship with her, described as a typical

uncle/niece relationship, merely gave him the opportunity to commit the crime alleged by the State. Absent any evidence that Mr. Tewee affirmatively acted to facilitate the crime based on a position of trust, the mere fact that of an uncle/niece relationship or the fact that this relationship gave him the opportunity to commit the crime cannot support an exceptional sentence.

The record does not support a finding of abuse of trust and Mr. Tewee's sentence should be reversed and remanded for imposition a sentence within the standard range. A defendant's access to a victim, without more, does not satisfy the "facilitation" element of the aggravating circumstance. See *P.B.T*, 67 Wn. App. at 304 ("Mere opportunity created by a person's position is not enough from which to conclude that the position of trust facilitated the commission of the crime."). Trust enhancements in sexual assault cases typically involve young, dependent children. The common thread is that the defendant had a caretaking role regarding the victim, or the child was extremely young and therefore pre-disposed to trust any adult. See, e.g., *State v P B T.*, 67 Wn. App. 292 (sexual assault of twelve to thirteen-year-old by sixteen-year-old senior patrol leader on scouting trip); *State v Grewe*, 117 Wn.2d at 221 (attempted statutory rape of eight-year-old girl, Grewe groomed his victim and preyed on the child's "extreme vulnerability"

and tendency to trust by luring her into his house to play, thereby establishing a relationship of trust). Nothing in the record suggests Mr. Tewee manipulated his way into the household to further some hidden purpose to harm A.B. No evidence showed Mr. Tewee engaged in planning of any kind. His status as a houseguest merely placed him in close proximity to A.B. Mere opportunity is not enough to establish the defendant used a position of trust to facilitate a crime. *P.B.T.*, 67 Wn. App. at 304.

The evidence at trial did not support either essential element of the aggravating circumstance and the special verdict should be dismissed with prejudice.

4. MR. TEWEE'S OREGON CONVICTION FOR UNAUTHORIZED USE OF A VEHICLE IS NOT COMPARABLE TO A WASHINGTON OFFENSE AND SHOULD NOT BE USED TO CALCULATE HIS OFFENDER SCORE

Where a defendant's criminal history includes one or more foreign conviction, the Sentencing Reform Act requires the foreign conviction be classified "according to the comparable offense definitions and sentences provided by Washington law." *State v. Ford*, 137 Wn.2d, 472, 480, 973 P.2d 452 (1999). If the foreign crime is not comparable to a Washington

felony, it cannot be used in offender score calculation. *State v. Lavery*, 154 Wn.2d 249, 256, 111 P.2d 837 (2005).

A two-part test is applied to determine whether a foreign conviction is comparable to a Washington offense and, therefore, whether the defendant could have been convicted in Washington had he committed the same crime here. *Morley*, 134 Wn.2d at 607. Under the two-part test, foreign convictions are included in the offender score if they are either legally or factually comparable. *Id.*

Oregon's unauthorized use of a motor vehicle is neither legally nor factually comparable to the applicable Washington taking a motor vehicle without owner's permission. *State v Jackson*, 129 Wn.App. 95, 107, 117 P.3d 1183 (2005).

ORS 164.135(1)(a) provides:

> (a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner;
>
> (b) Having custody of a vehicle, boat or aircraft pursuant to an agreement between the person or another and the owner thereof whereby the person or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, the person intentionally uses or operates it, without consent of the owner, for the person's own purpose in a manner constituting a gross deviation from the agreed purpose; or

(c) Having custody of a vehicle, boat or aircraft pursuant to an agreement with the owner thereof whereby such vehicle, boat or aircraft is to be returned to the owner at a specified time, the person knowingly retains or withholds possession thereof without consent of the owner for so lengthy a period beyond the specified time as to render such retention or possession a gross deviation from the agreement.

(2) Unauthorized use of a vehicle, boat or aircraft is a Class C felony.

(3) Subsection (1)(a) of this section does not apply to a person who rides in or otherwise uses a public transit vehicle, as defined in ORS 166.116 (Interfering with public transportation), if the vehicle is being operated by an authorized operator within the scope of the operator's employment.

(a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner[.]

RCW 9A.56.070, which codifies the offense of taking a motor vehicle without permission in Washington, provides:

(1) A person is guilty of taking a motor vehicle without permission in the first degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away an automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, and he or she:

(a) Alters the motor vehicle for the purpose of changing its appearance or primary identification, including obscuring, removing, or changing the manufacturer's serial number or the vehicle identification number plates;

(b) Removes, or participates in the removal of, parts from the motor vehicle with the intent to sell the parts;

(c) Exports, or attempts to export, the motor vehicle across state lines or out of the United States for profit;

(d) Intends to sell the motor vehicle; or

(e) Is engaged in a conspiracy and the central object of the conspiratorial agreement is the theft of motor vehicles for sale to others for profit or is engaged in a conspiracy and has solicited a juvenile to participate in the theft of a motor vehicle.

(2) Taking a motor vehicle without permission in the first degree is a class B felony.

The Oregon statute carries a significantly broader range of circumstances that could lead to conviction than Washington's statute. It is possible to commit the Oregon offense without violating the Washington offense. *Jackson*, 129 Wn. App. At 107. Mr. Tewee is entitled to be resentenced using an offender score of "8" because his ORegon conviction for unlawful use of a motor vehicle was improperly included in his offender score.

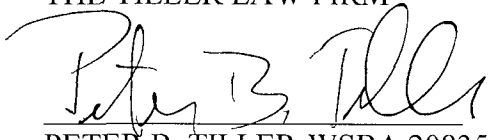
E. CONCLUSION

For the foregoing reasons, Mr. Tewee respectfully requests this Court reverse his conviction and remand for new trial.

In the alternative, the exceptional sentence should be reversed and his case remanded to the trial court with instructions to resentence him within the corrected standard range.

DATED: March 16, 2012.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on March 16, 2012, that this Opening Brief was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Ms. Anne Cruser, Deputy Prosecutor, P.O. Box 5000, Vancouver, WA 98666-5000 and to the appellant, Mr. Charles Tewee, DOC #983694, W.C.C, PO Box 900, Shelton, WA 98584 true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 16, 2012.

PETER B. TILLER

EXHIBIT A

STATUTES AND RULES OF EVIDENCE

RCW 9A.44.083

Child molestation in the first degree.

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

RCW 9.94A.535

Departures from the guidelines.

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing

whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

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

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

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

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

RULE ER 803
HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. (Reserved. See RCW 5.45.)

(7) Absence of Entry in Records Kept in Accordance With RCW 5.45. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept I accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. (Reserved. See RCW 5.44.040.)

(9) Records of Vital Statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, tattoos, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an

interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. Statements in a document in existence 20 years or more whose authenticity is established.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History.
Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among his associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a finaljudgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the

judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family, or General History, or Boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(b) Other Exceptions. (Reserved.)