No.

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JEREMY THOMAS STEVENS,

Petitioner

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#46905-7-II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Jeremy T. Stevens, petitioner, respectfully requests that this Court accept review of the Court of Appeals decision in case number 46905-7-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Stevens respectfully requests that this Court review the Court of Appeals' decision, affirming the trial court's decision in this case.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on March 1, 2016 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision upholding the convictions when the charges were not supported by evidence as to the alleged occurrence when the state chose to base its charges on specific dates?

2. Did the Court of Appeals err in upholding the efficacy of allowing convictions on an expansive date range for each charge, without a *Petrich* Instruction, when the state had chosen to proceed on specific, identifiable acts occurring on specific identifiable dates?

3. Did the Court of Appeals violate petitioner's due process rights when it upheld an instruction defining "prolonged period of time" that this Court has already concluded is an instruction that is improper?

4. Whether the to-convict instructions allowed for convictions that were inconsistent with the actual charges and the state's decision to elect a specific act for purposes of conviction?

IV. STATEMENT OF THE CASE

A. *Procedural History*

Mr. Stevens was charged with six counts of rape of a child in the first and second degree, all involving SMN. Additionally, he was charged with a single count of child molestation in the third degree and sexual exploitation involving SMS. CP 44-52. After the presentation of the evidence and while preparing instructions outside the presence of the jury, the prosecutor indicated he intended to rely on a single act for each count involving the individuals and the court instructed the jury accordingly. RP 689:18–690:19; CP 174 (Instruction Number 6). It reads as follows:

> In alleging the defendant committed the crimes of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree. The State relies upon evidence regarding a single act constituting each count of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree. To convict the defendant on any count of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree you must unanimously agree that this specific act was proved.

This instruction was given after the state initially offered a "Petrich" instruction, changed its mind, and stated that it would be relying on specific acts for specific counts. RP 711:21–715:3. While the defense conceded the prosecutor could choose to elect, it objected to the "to-convict" instructions covering an expansive time period, as opposed to a single event. RP 715:9–717:4; CP 181-183. (See

attachments 1-3; Instructions 13, 14 & 15). As a result, the defense took exception to the giving of the instruction, as well as objecting to the court's failure to give a *Petrich* instruction[1]. RP 718:12-15.

Almost immediately, the state then began an argument that was virtually at odds with the very election instruction it had proposed and received. RP 725-735. Rather than electing conduct for a particular charge, it argued that counts III and IV were alternatives to counts I and II. RP 734:19–735:18. The defense objected. RP 735:19-21. After hearing argument, the court then allowed the state to argue these as alternatives, describing counts I and III as the "birthday incident" and counts II and IV as the "babysitting incident". RP 747:1-13. Count V was designated as the "fair incident" and count VI as the "pre-Thanksgiving incident". RP 747:18-25. Counts VII and VIII, which involve SMS, correspond to the "fair incident".

During deliberations, the jury sent five separate notes to the court for clarification involving the counts. CP 163-165; 209-10. One of the questions involved the very issue noted above, wherein the jury asked if counts 3, 4, 5, and 6 corresponded to specific incidents, to which the court responded in the affirmative that the jury had to address specific conduct in counts III-VI. CP 163. A subsequent note again demonstrated confusion as to what the state was required to prove as it related to count III (the "birthday incident"). CP 210.

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[1] *State v. Petrich*, 101 Wn.2d 566, 693 P.2d 173 (1984). WPIC 4.25. The *[State] [County] [City]* alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant *[on any count]* of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime). WPIC 4.25.

The jury ultimately found Mr. Stevens not guilty of two counts of rape of a child in the first degree (counts I and II), rape of a child in the second degree as charged in count VI (pre-Thanksgiving incident), as well as child molestation in the third degree as charged in count VII. He was found guilty of rape of a child in the second degree as charged in counts III, IV and V and sexual exploitation as charged in count VIII. The jury also answered "yes" to the special verdict form alleging aggravating factors for counts III-V. CP 205-07. The aggravating factor in this case was that there were multiple instances over a prolonged period of time. CP 259-260. The actual special verdict forms read, "Did the defendant, Jeremy Thomas Stevens, engage in an ongoing pattern of sexual abuse with the victim SMN?" CP 205-07.

Based on the aggravating factor, Mr. Stevens was sentenced above the guideline range to a minimum term of 320 months in prison based on the jury's finding that an ongoing pattern of sexual abuse occurred. CP 245-260. The actual sentencing range was 210-280 months. CP 259.

B. ***Facts***

Jeremy Stevens met SMN when she was a young child. He was a friend of her mother, Shannon Chapman. The friendship evolved into an affair which ended in animosity. It was after the end of this relationship that Mr. Stevens was stung by these allegations, which included allegations that he was having a sexual relationship over an extended period of time with SMN.

Specifically, SMN testified that she began having sex with Mr. Stevens on the day of her 11th birthday in April 2012. RP 361:5-6. She was born on April

28, 1999. RP 173:21-23. The accusations were made to the investigating agency in the spring of 2013 when she was in the eighth grade, just prior to turning 14 years of age, as acknowledged by her step father, Sean Chapman. RP 175:1-25. Prior to this time, beginning in 2012, when she was beginning junior high school, she began to grow apart from her parents, she confided in Mr. Stevens, who then informed the Chapmans. RP 186:1-187:8. No other problems were apparent. RP 187:8-10. The first time Mr. Chapman had any indication that there was anything unusual going on between his step-daughter and Mr. Stevens was around Thanksgiving in 2012, when his wife, Shannon Chapman, mentioned it. RP 187:14-23. It was just after Mr. Stevens became a long haul trucker beginning in the fall of 2012. RP 188:9-13. This was immediately after the Kitsap Fair, when she had stayed at the Stevens' family residence. RP 190:9-12. As Mr. Chapman testified, the last time his step-daughter stayed at Mr. Stevens' residence to babysit was prior to him becoming a trucker. RP 189:19-29.

SMN's statements differed dramatically as to the when and how long the alleged abuse started, saying it lasted over a period of three years, starting on her birthday and the next time happening a couple of weeks later. RP 382:20-24; RP 369:1-6. She referenced her 11th birthday as to when it happened. RP 361:5-6. She remained consistent that the birthday she was referring to was when she turned 11 years of age and she never deviated from that date. RP 411:14-25.

She was, however, consistent that any abuse occurred when Mr. Stevens worked at Waste Management and rented a particular residence known as the Bielmeier residence. RP 414:11-23. Her mother, Shannon Chapman, confirmed

this period of time. RP 265:19-24. Mr. Stevens rented the residence from October 2011 thru May 2013. RP 634:13-15. His belongings were moved out after his then girlfriend, Brandi Jo McKenzie, was found staying in the residence and was kicked out by the Chapmans after an argument including severe name calling. RP 617:16-622:10.

While she testified that there were multiple instances of sexual contact/intercourse, she indicated a few instances that corresponded with specific events. As mentioned above, one was on her birthday and then two weeks later. A subsequent incident corresponded with the Kitsap County Fair, occurring in August of 2012. RP 384-394. Finally she testified as to an incident that occurred around Thanksgiving in 2012, but stated it happened too many times to count when she was visiting him after the fair incident. RP 435:1-10. As noted above, her step-father testified she never stayed with him after the weekend fair.

As it relates to the sexual exploitation charge involving SMS, there was conflicting testimony as to what, if anything happened. SMS was born on June 12, 1998. RP 287:23. Thus, she would have been 14 at the time of the 2012 fair. She met Mr. Stevens thru SMN. RP 292:24. At trial SMS testified that she and SMN stayed at Mr. Stevens' parents' house the night before the fair. RP 303: 12-16. She also testified that Mr. Stevens arrived at approximately 8:00 p.m. that evening and made himself a drink. RP 304:6-24. In actuality, he was working that day and did not arrive until approximately 11:30-12:00. RP 580:19-22. His father met him and he picked up his daughter and left immediately. RP 580:23-581:10. RP 660:10-24. His testimony that he did not stay at the residence was consistent

with Sean Chapman's testimony that he was at the house in the morning when Mr. Stevens arrived and they had a cigarette together. RP 196:3-23.

SMS, however, testified that after Stevens' parents went to bed, she and SMN were alone with Mr. Stevens in the living room of the residence. RP 305:3-24. Mr. Stevens went outside to smoke, followed by SMN, then SMS. RP 309:1-24. She then indicated that Mr. Stevens performed oral sex on SMN while she, at his request, kissed her. RP 310:1-25. After they returned inside she testified that he asked them to "do stuff" and SMN penetrated her with her finger while Mr. Stevens watched. RP 316:1-14. She acknowledged previously stating that he never observed anything. RP 330:15-18. It was also inconsistent with SMN's testimony wherein she stated nothing at all happened inside the residence and the only thing that happened outside with SMS was that she kissed her. RP 396:10-397:9. She further testified that Mr. Stevens never penetrated her in the backyard, but that he rubbed "his tongue on the outside of [her] vagina". RP 394:9-21. The next day (Saturday) they all went to the Kitsap County Fair. RP 398.

SMN testified that the last time there was any sexual contact was prior to Thanksgiving of 2012. RP 399:22-24. However, this was inconsistent with her step-father's testimony that she had no contact with Mr. Stevens after August. RP 189:19-29. It also diverged with Mr. Stevens' testimony that he was at a trucking school during this time period. RP 590:19-22. RP 648:16-652:9. She was consistent that whenever there was sexual contact of any kind Mr. Stevens was working at for Waste Management. RP 415:7-19. Mr. Stevens, however, only

worked at Waste Management from July 7 to August 28, 2012. RP 635:3-4. This was verified by reviewing his employment records. RP 647:15-19.

Mr. Stevens denied all of the allegations. He indicated, with support from his father, that he merely stopped by the house to pick up his daughter on the night prior to the fair as it relates to this allegation. RP 657:17-660:9. He testified that the accusations occurred after having an affair with SMN's mother, which started in July 2012 and ended in August 2012. RP 629:20-633:11. As mentioned above, he testified that he only worked at Waste Management from July to August of 2012 and that he was at the trucking school from October to December of 2012.

Ultimately, he was found guilty of three counts of rape of a child in the second degree, two of which correspond with the birthday incident, but at a different time than what SMN testified. The third conviction is referenced as the fair incident. Additionally, he was found guilty of sexual exploitation of a minor, with SMS as the victim. This was based on the testimony involving the fair incident in August of 2012. Mr. Stevens appealed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner respectfully requests that this Court accept review of this case because the decision is in direct conflict with other cases from the Court of Appeals, as well as decisions from this Court. Specifically, the decision upholding the exceptional sentence conflicts with this court's decision in *State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015),* a decision not even mentioned in the Court's opinion. Additionally, the

decision allowing the state to prove its case by expanding the time frame for the alleged act after making the strategic decision to elect directly conflicts with this court's decisions in *State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1998), State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2002)* and *State v. Rhinehart, 92 Wn.2d 923, 602 P.2d 1188 (1979), State v. Chester, 133 Wn.2d 15, 940 P. 2d 1374 (1997)* and *State v. Alexander 64 Wn.App 147, 822 P.2d 1250 (1990).*

Thus, this Court should accept review pursuant to RAP 13.4(b)(1), (2), and (3).

A. THE COURT SHOULD REVERSE THE CONVICTIONS BECAUSE THERE WAS INSUFFICIENT EVIDENCE INTRODUCED TO SUPPORT A CONCLUSION THAT MR. STEVENS COMMITTED THE ACTS FOR WHICH HE WAS CONVICTED.

As this Court is aware, due process requires the state to prove its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

> Whether, after reviewing 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. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Gallagher*, 112 Wn.App. 601, 612, 51 P.3d 100 (2002) (citations omitted). "A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence." 112 Wn.App. at 613 (citations omitted).

Substantial evidence must exist to support the State's case. *Id.* Substantial evidence is evidence that "'would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.'" *Id.* Thus, to convict Mr. Stevens of the three counts of child rape as alleged in counts III, IV and V, the state was required to prove that Mr. Stevens had sexual intercourse with SMN on the respective instances based on the prosecutor's decision to elect. CP 181-183. And, because the state opted to instruct the jury as to specific instances, it was incumbent on the state to present substantial evidence as to each.

B. THE COURT'S DECISION UPHOLDING THE CONVICTIONS CONFLICTS WITH STATE V. CHESTER AND STATE V. ALEXANDER.

(1) The decision ignores the testimony of the victim as to when the alleged acts occurred.

In addressing the evidence related to counts III and IV, the Court must consider the evidence in relation to the State's decision to elect specific acts to specific charges. As the Court is aware, this instruction was given over defendant's objection and further discussion resulted after the State attempted to deviate from the instruction at the beginning of its argument. Once the prosecutor chose to elect in this situation, which involved multiple acts, it was required that he prove that specific act beyond a reasonable doubt. *State v. Kitchen,* 110 Wn.2d 403, 411, 756 P.2d 105 (1988)(see also *State v. Kier,* 164 Wn.2d 798, 194 P.3d 212 (2008)).

SMN was adamant that any sexual intercourse related to her birthday as referenced in counts III and IV occurred when she was 11 years old, which would have formed the basis for a conviction on counts I and II. At no time did she

testify that he had intercourse with her on her 12th birthday, which forms the basis for the convictions on counts III and IV. And, while she testified that all of the conduct occurred while Mr. Stevens was employed at Waste Management, the undisputed evidence was that he only worked there between July and August 2012, which was several months after SMN's birthday, which is in April. As such, the state failed to prove the elements of counts III and IV beyond a reasonable doubt and the Court should reverse the convictions. The Court of Appeals upheld the convictions because there was conflicting testimony as to the occurrence. Court's opinion at 6-7. However, the testimony from the victim was unwavering as to when it occurred, thus the decision simply ignores the only evidence that addressed the issue.

(2) There was no evidence that the petitioner engaged in sexual intercourse with SMN on the night of the fair (Count V).

Count V was characterized as the "fair incident". Mr. Stevens was charged with rape of a child in the second degree under this count. However, SMN consistently testified that there was no penetration during this time frame: thus, there was no evidence to support a conviction of child rape. Specifically, she testified in response to the prosecution that he never went inside her vagina, only rubbing his tongue on the outside. RP 394:9-15. She confirmed this on cross examination and further indicated that nothing else of a sexual nature occurred. RP 427: 9-19.

Intercourse was defined as:

> ...the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any penetration of the

> vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex, or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 176 (Instruction Number 8).

As there was no evidence as to penetration and the alleged contact is vague as to specifically where the contact occurred, the Court should reverse count V, which charged Mr. Stevens of the crime of rape of a child in the second degree related to the "fair".

(3) The Court's Decision upholding the Conviction for Sexual Exploitation of a Minor conflicts with this Court's Decision in State v. Chester .(Count VIII).

In order to convict Mr. Stevens of the crime of Sexual Exploitation of a Minor, the state was required to prove that Mr. Stevens aided, invited, employed, authorized or caused a minor [SMS] to engage in sexually explicit conduct, knowing that such conduct would be part of a live performance. RCW 9.68A.040(1)(b); CP 196 (Instruction #28).

The testimony as it relates is entirely inconsistent between SMS and SMN. SMS testified that Mr. Stevens told the two "to do something" and she then engaged in digital penetration with SMN. Despite acknowledging that she had previously stated that Mr. Stevens was not present, she testified at trial that he was on the stairs and able to observe. Perhaps more importantly, SMN denies that there was any request "to do something" and they all simply went to bed. Under this situation, there was not enough evidence to prove the charge beyond a reasonable doubt.

Specifically, in *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997), the Washington State Supreme Court held that there must be some affirmative act by the defendant to cause the minor to engage in sexually explicit conduct. As in *Chester*, none is present here. While there is some indication that Mr. Stevens requested that the two do something, there is no request that they engage in sexually explicit conduct. As such, the Court should reverse this conviction. *Cf State v. Stribling*, 164 Wn.App. 867, 267 P.3d 403 (Div. 2, 2011)(reversing conviction where there is no evidence that defendant caused the sexually explicit behavior).

Finally, while SMS changed her testimony as to Mr. Stevens' presence, there is nothing to suggest that he actually witnessed any alleged sexually explicit conduct. In fact, taking her testimony at face value, Mr. Stevens actually questioned them as to whether it happened, stating, "He came down from the stairs. He was, like—he was, like, 'So you guys did it.' And Shania answered 'Yeah.' And that's all I remember at the time." RP 316:17-19. Moreover, SMN completely denies that any sexual conduct occurred or that there was a request. The inconsistencies between her own statement, as well as the complete contradiction with SMN's testimony, compels a reversal of this count. See *State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1990).

In *Alexander*, the Court of Appeals reversed the defendant's conviction because the alleged victim's testimony was so filled with extreme inconsistencies that the jury could not possibly have found the elements of the charge beyond a reasonable doubt. In that case, the alleged victim directly contradicted herself

about whether an incident ever occurred. 64 Wn.App at 589. Her testimony also was contradicted by her mother's as it related to the time frames she was even in contact with the alleged abuser. *Id.*

C. THE COURT SHOULD ACCEPT REVIEW OF THE CONVICTIONS FOR RAPE BECAUSE THE TO CONVICT INSTRUCTIONS ERRONEOUSLY ALLOWED THE STATE TO SEEK A CONVICTION OUTSIDE OF THE ACTS CHARGED, THUS THE DECISION CONFLICTS WITH THIS COURT'S DECISION IN STATE V. KITCHEN AND STATE V. RHINEHART.

"[I]t is fundamental that an accused must be informed of the charge he is to meet at trial and that he cannot be tried for an offense not charged." *State v. Rhinehart 92 Wn.2d 923,928, 602 P. 2d 1188 (1979).* In a multiple acts case, the State must either clearly elect the conduct forming the basis of each charge or the court must instruct the jury to agree on a specific criminal act. *Kier, supra,* at 811. When there is a failure to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error, resulting from the possibility that some of the jurors may have relied on one act or incident and some on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *Kitchen, supra,* at 411.

Here, the state made a proper election. However, the trial court instruction allowed the convictions for each count to be based on conduct that occurred over a two year time period. This caused confusion in the jury as was evidenced by the questions submitted during deliberations, which sought guidance as to whether it had to find a specific act related to each count. CP 163.

Notwithstanding the court's answer in the affirmative, it followed with a second question on the following day, asking the same question as to count III. CP 210.

The Court of Appeals affirmed because it found that time specificity was not important, regardless as to whether the state chose to elect. Court's opinion at 9-10. Moreover, the Court also found that there was conflicting evidence as to when the acts occurred. Court's opinion at 9. However, there was no conflicting evidence and had there been, a *Petrich* instruction would have been required to address the unanimity problem—a problem that, as the court correctly noted, was not required because the state chose to elect specific acts. Court's opinion at 10, fn3. Consequently, the opinion, if it is allowed to stand, allows the state to elect, which then negates the need for a *Petrich* instruction, but allows it the jury to convict based on anything that occurred over an extended period of time without coming to a unanimous verdict. Under this scenario, the state would always elect, so it would never have to be concerned about unanimity.

Based on the jury questions, it cannot be said that their decision to convict was based on the actual charges contrary to *Rhinehart, supra.* Thus this Court should grant the petition pursuant to RAP 13.4(b)(1) and (3), because petitioner's due process rights have been violated and the case conflicts with decisions from this court as noted above.

D. THE COURT OF APPEALS' DECISION UPHOLDING THE EXCEPTIONAL SENTENCE IS DIRECTLY AT ODDS WITH THIS COURT'S DECISION IN STATE V. BRUSH.

Jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Borsheim*, 140 Wn.App. 357, 366, 165 P.3d 417 (2007)(citations omitted).

As previously stated, due process places the burden on the State to prove every element of a crime beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). "A corollary of the due process requirement that a jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return a verdict of not guilty if the State does not carry its burden. This same due process requirement is applicable when the State seeks to enhance a sentence beyond statutory guidelines by use of an aggravating factor." *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

RCW 9.94A.535 sets forth the aggravating factors that the jury may consider in determining a whether an exceptional sentence is appropriate. It provides in relevant part:

> (3) The trial court may impose an aggravated exceptional sentence under the following circumstances:
>
> (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.

RCW 9.94A.535(3)(g).

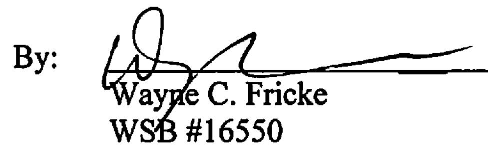
This Court, in *State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015),* addressed this very issue and unanimously held that the instruction misstated the law and constituted reversible error. The Court of Appeals' decision completely ignored this case in reaching its decision—a decision that is completely at odds with *Brush.* Thus, pursuant to RAP 13.4(b)(1) and (3), the court should grant the petition on this issue because it is in direct conflict with *Brush.*

VI. CONCLUSION

Based on the arguments, records and files contained herein, Mr. Stevens respectfully requests that this Court accept review of this matter in whole or in part for the reasons stated.

Respectfully submitted this 15 day of March, 2016.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: 
Wayne C. Fricke
WSB #16550

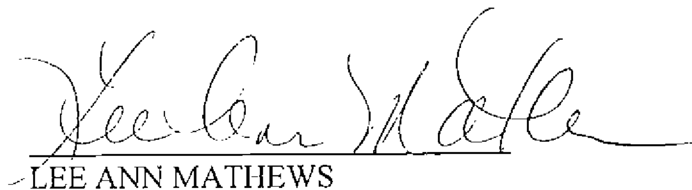
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Jonathan Salamas
Kitsap County Prosecutor's Office
614 Division Street
Port Orchard, WA 98366-4614

Jeremy T. Stevens
DOC #376553
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001-1899

Signed at Tacoma, Washington, this 15th day of March, 2016.



LEE ANN MATHEWS

Filed
Washington State
Court of Appeals
Division Two

March 1, 2016

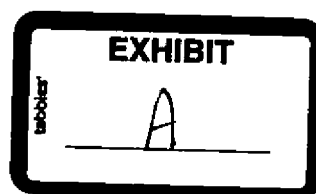
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY THOMAS STEVENS, Appellant.	No. 46905-7-II UNPUBLISHED OPINION

MAXA, J. — Jeremy Stevens appeals his convictions of three counts of second degree child rape regarding a minor named SN and one count of sexual exploitation of a minor regarding a minor named SS. He also appeals his exceptional sentence.

We hold that (1) sufficient evidence supports two of Stevens's second degree child rape convictions based on charges that Stevens raped SN when she was 12 years old, even though SN testified that she was 11 years old when the rapes occurred; (2) sufficient evidence supports the third second degree child rape conviction despite an absence of penetration because there was evidence of oral to genital contact between Stevens and SN; (3) sufficient evidence supports the sexual exploitation of a minor conviction despite conflicting trial testimony; (4) the trial court did not err in giving the to-convict instructions that included a date range for when the rapes occurred even though the State elected to prove each charge with specific conduct; and (5) the special verdict forms for exceptional sentences based on an ongoing pattern of sexual abuse were



proper even though they omitted reference to the requirement that multiple incidents occurred over a prolonged period of time. Accordingly, we affirm Stevens's convictions and sentence.

FACTS

Stevens and SN's mother have been close friends since they were in junior high school. Stevens has known SN since SN's birth on April 28, 1999. Stevens regularly socialized with SN's mother and stepfather. Stevens's father and stepmother, Kerry and Sue Stevens, also were good friends with SN's mother and stepfather and socialized with them.

Birthday and Babysitting Incidents

At some point, SN began babysitting Stevens's young daughter, occasionally spending the night at Stevens's home when he worked late at night. On the night of SN's birthday, Stevens engaged in sexual intercourse with her. The State refers to this incident as the "birthday incident." A few weeks later, SN babysat Stevens's daughter and spent the night. Stevens again had sexual intercourse with SN. The State refers to this incident as the "babysitting incident."

There was conflicting testimony at trial when these incidents occurred. SN explained that the first time they had sexual intercourse was on her 11th birthday, which would have been April 29, 2010. However, she also testified that the incidents occurred when she was in the 6th grade. SN's counselor's testified that SN turned 12 in the 6th grade on April 29, 2011. In addition, SN's stepfather testified that SN was 12 years old when she started babysitting for Stevens.

Fair Incident

On August 24, 2012, the evening before the Kitsap County Fair began, SN and her friend SS (who was a year older than SN) stayed at Kerry and Sue's home. Stevens came to the house

after getting off work and the three of them stayed up after Kerry and Sue went to bed. Stevens and the girls went outside and Stevens performed oral sex on SN in the presence of SS.

Stevens later went upstairs to bed but came down three times, each time explaining that he could not sleep because he was sexually aroused. The third time, he told the girls they should "do stuff." Report of Proceedings (RP) at 316. SS and SN then lay down in the family room and Stevens watched from the stairway as SN touched SS's vagina. After they stopped, Stevens commented, "So you guys did it." RP at 316. SN responded, "Yeah." RP at 316. According to SS, Stevens then wanted SS to have sex with him and SN, but SS refused. The State refers to this incident as the "fair incident."

Disclosure and Charges

The allegations against Stevens came to light in December 2012 when SS told her mother that SN was having sex with Stevens.[1] SS's mother told the SN's mother and stepfather, who initially decided not to report the situation to the police. In April 2013, SN disclosed what had happened to a school counselor, who contacted law enforcement.

The State charged Stevens with two counts of first degree child rape (counts I and II) for the birthday and babysitting incidents based on SN being 11 years old. Alternatively, it charged Stevens with two counts of second degree child rape (counts III and IV) for these same incidents based on SN being 12 years old. The State charged him with two additional counts of second degree child rape for the fair incident (count V) and another incident referred to as the "pre-Thanksgiving incident" (count VI). The State also charged Stevens with attempted third degree

[1] According to SN, the last time she had sexual intercourse with Stevens was before Thanksgiving 2012 and stopped because Stevens went out of state to a trucking school.

child molestation (count VII) and sexual exploitation of a minor (count VIII), both against SS during the fair incident. Further, the State alleged that the four rapes of SN were part of an ongoing pattern of sexual abuse over a prolonged period of time.

Trial and Sentence

At trial, the State elected to rely on single acts for the specific counts. As a result, the trial court instructed the jury that it must unanimously agree that the State proved the specific act for each count. The trial court also instructed the jury that the acts supporting convictions on the various charges could occur over a two-year period. During closing argument, the State identified the specific incident that related to each charge.

The trial court's jury instructions included special verdict forms for the jury to determine whether Stevens committed counts I through V as part of an ongoing pattern of sexual abuse. Stevens did not object to these special verdict forms.

The jury convicted Stevens of three counts of second degree child rape and one count of sexual exploitation of a minor. The jury acquitted Stevens of the two counts of first degree child rape, one count of second degree child rape (the pre-Thanksgiving incident), and attempted third degree child molestation.

The jury also found by special verdict that Stevens committed the second degree child rape offenses as part of an ongoing pattern of sexual abuse. Based on this aggravating circumstance, the trial court imposed an exceptional sentence.

Stevens appeals his convictions and sentence.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

1. Standard of Review

Stevens challenges the sufficiency of the evidence presented for all of his convictions. The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In evaluating a sufficiency of the evidence claim, we assume the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. We defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

2. Second Degree Rape of a Child

a. Birthday and Babysitting Incidents

Stevens claims that the evidence did not support his convictions of second degree rape of a child because SN testified that she was 11 years old when these incidents took place, not 12 years old or older as the second degree rape of a child statute requires. We disagree.

Under RCW 9A.44.076, a person is guilty of first degree child rape when the person has sexual intercourse with another who is under 12 years old, is not married to the victim, and is at least 36 months older than the victim. Second degree child rape involves the same elements except that the victim must be at least 12 years old but less than 14 years old. RCW 9A.44.073.

Here, Stevens relies on SN's testimony that the birthday and babysitting incidents occurred when she was 11 years old. However, there also was evidence that those incidents

occurred when SN was 12. SN testified that she was in 6th grade when Stevens first raped her. Based on her birthdate and enrollment information, the evidence showed that SN turned 12, not 11, when she was in the 6th grade. Further, while Shannon thought that SN started babysitting for Stevens when she was 11 years old, SN's stepfather testified that SN was 12 years old when she started babysitting for Stevens. The jury could have found that SN was mistaken when she stated that the first rape occurred on her 11th birthday.

There also was evidence that the first rape occurred even later than SN's 12th birthday. SN was adamant that the first rape occurred when Stevens was living in what the witnesses referred to as the Bielmeier residence. Stevens testified that he did not move into that residence until October 2011, six months after SN's 12th birthday. SN also admitted at trial that she had stated in an interview with defense counsel that the first rape actually occurred when she was in the 7th grade.[2] And SN testified that the first rape occurred when Stevens worked for Waste Management, and Stevens testified that he worked there only in July and August of 2012. SN was 13 years old at that time.

Stevens also points out that SN's testimony that the first rapes occurred when Stevens was working for Waste Management was inconsistent with her testimony that the first rape occurred on her birthday because Stevens testified that he worked for Waste Management in July and August of 2012. However, the jury could have found that SN was mistaken about the first rape occurring on her birthday or about where Stevens was working when the rapes occurred.

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[2] SN explained at trial that after the interview she figured out that the first rape occurred when she was in the 6th grade.

The jury was presented with conflicting evidence regarding SN's age when the birthday and babysitting incidents occurred. But there was evidence to support the jury's determination that these incidents occurred when SN was 12 years old or older. We defer to the trier of fact's resolution of conflicting testimony. *Homan*, 181 Wn.2d at 106. Accordingly, we hold that sufficient evidence supports Stevens's convictions of second degree child rape during the birthday and babysitting incidents.

b. Fair Incident

Stevens argues that the State failed to prove that he had sexual intercourse with SN during the fair incident at his parents' home. He claims that there was no evidence of penetration and therefore no evidence of intercourse. We disagree.

RCW 9A.44.010(1)(a) defines sexual intercourse as "any penetration, however slight." However, RCW 9A.44.010(1)(c) also defines sexual intercourse as oral to genital contact: "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." Both SN and SS testified that Stevens had oral to genital contact with SN. Therefore, evidence of penetration was unnecessary to prove that Stevens had sexual intercourse with SN.

We hold that sufficient evidence supports Stevens's conviction of second degree child rape during the fair incident.

3. Sexual Exploitation of a Minor

Stevens argues that the State failed to show that he caused the sexual contact between SN and SS and therefore the evidence was insufficient to support his conviction for sexual exploitation of a minor. He argues that there were inconsistencies between the testimony of SS

and the testimony of SN, and therefore the jury could not have found Stevens guilty beyond a reasonable doubt. We disagree.

Under RCW 9.68A.040(b), a person commits sexual exploitation of a minor when that person "[a]ids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance."

SS testified that after Stevens engaged in oral sex with SN, he came down from his bedroom and explained that he could not sleep because he was sexually aroused. He then told SN and SS that they should "do stuff," and then watched as SN touched SS's vagina. RP at 316. He also acknowledged their behavior. This was sufficient evidence to support a finding that he invited the girls to engage in sexually explicit conduct while he watched.

Stevens emphasizes that SS acknowledged that she originally stated that Stevens was not present, and that SN testified that Stevens did not suggest that she and SS do anything and that they all simply went to bed. He cites to *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1990), and argues that the State failed to present sufficient evidence because of these inconsistencies. In *Alexander*, Division One of this court overturned multiple child rape convictions, in part because of extreme inconsistencies in the child victim's testimony at trial. 64 Wn. App. at 157-58. However, the court also held that that the victim's testimony was impermissibly bolstered, the prosecutor's questioning elicited impermissible evidence that the defendant was the abuser, and the prosecutor's attempts to repeatedly instill inadmissible evidence in the juror's minds amounted to misconduct. *Id.* at 153-56. As a result, the court reasoned that "[w]e cannot conclude that a rational jury would have returned the same verdict

had . . . [the] bolster[ed] testimony and the prosecutor's improper remarks been properly excluded." *Id.* at 158.

Alexander does not support the proposition that evidence is insufficient if a victim contradicts her prior statement on an issue or if the testimony of two witnesses conflict. The court simply held under the unique facts of that case that because of the "extreme" inconsistencies in the victim's testimony coupled with other errors, the evidence was too "confused" to allow the jury to find the defendant guilty. *Id.* Therefore, *Alexander* is inapplicable.

SS's testimony provides sufficient evidence that Stevens invited SS and SN to engage in sexually explicit conduct and then watched as they did so. The jury was free to disregard SN's contrary testimony, and once again we defer to the jury's resolution of conflicting testimony. *Homan*, 181 Wn.2d at 106. Accordingly, we hold that sufficient evidence supports Stevens's conviction for sexual exploitation of a minor.

B. TO-CONVICT INSTRUCTIONS

Stevens argues because the State elected to rely on specific incidents to prove the specific counts, the trial court erred in stating in the to-convict instructions that the jury was only required to find that the offenses occurred within a two-year time period. We disagree.

Stevens presents no authority stating that once the State makes an election to rely on specific conduct that it also must rely on a specific date rather than a range of dates. Here, the State expressly identified the specific incidents that related to each charged count. However, as discussed above, there was conflicting evidence as to when the incidents occurred. The time the offense occurred is not an essential element of child rape, and therefore the time of the rape need

not be proved with specificity to sustain a conviction. *See State v. Hayes*, 81 Wn. App. 425, 433, 437, 914 P.2d 788 (1996). Therefore, it was not improper for the trial court to include a date range in the to-convict instructions.

Stevens also suggests that the State failed to make a proper election. He notes that the jury was confused about whether it had to rely on a specific incident for each count of child rape. He notes that during the first day of deliberations, the jury asked, "Do counts 3, 4, 5, & 6 correspond to a specific incident and/or date? i.e. birthday, babysitting, fair, & pre-Thanksgiving?" Clerk's Papers (CP) at 163. The trial court responded, "Yes." CP at 163. The next day, the jury asked, "Does Count 3 refer to the April 28, 2011 birthday only?" CP at 210. The trial court instructed the jury to refer to the answer provided earlier. Stevens argues that because the jury was confused, the possibility exists that they were not unanimous as to the act forming the conviction for each count.

However, the State very clearly told that jury during closing argument that the birthday incident pertained to count I and count III, the babysitting incident pertained to count II and count IV, and the fair incident pertained to count V.[3] Further, the trial court answered the jury's questions, indicating that each count related to a separate incident. We presume the jury followed this instruction absent evidence to the contrary. *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011). Stevens presents no such evidence.

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[3] Because the State elected and chose to argue that each count pertained to a specific incident, the unanimity problem addressed in *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), does not apply here. *See State v. Carson*, 184 Wn.2d 207, 228-29, 357 P.3d 1064 (2015) (State's election of specific acts for each count makes a *Petrich* instruction unnecessary).

We hold that the trial court did not err in including a date range for when the offenses occurred in the second degree child rape to-convict instructions.

C. SPECIAL VERDICT FORMS FOR EXCEPTIONAL SENTENCE

Stevens argues that his exceptional sentence is improper because the trial court's special verdict forms omitted part of the statutory language for the ongoing pattern of sexual abuse aggravating factor. Stevens argues that this omission unfairly relieved the State of its burden of proof.[4] We disagree.

RCW 9.94A.535(3)(g) provides as an aggravating factor that "[t]he 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." The special verdict omitted the phrase "manifested by multiple incidents over a prolonged period of time." CP at 205-07.

However, we review jury instructions in the context of the instructions as a whole. *State v. Saunders*, 177 Wn. App. 259, 270, 311 P.3d 601 (2013). Here, the trial court instructed the jury that "[a]n 'ongoing pattern of sexual abuse' means multiple incidents of abuse over a prolonged period of time. The phrase "'prolonged period of time' means more than a few weeks." CP at 197. Therefore, the special verdict forms necessarily incorporated the "multiple incidents over a prolonged period of time" requirement.

The trial court's aggravating factor instruction and the special verdict forms made it clear that in order to find an "ongoing pattern of sexual abuse" the jury was required to find "multiple

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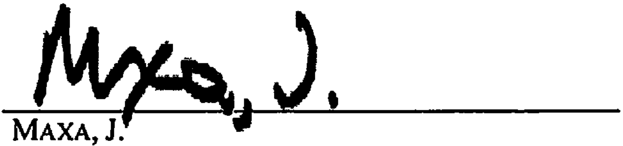
[4] Stevens did not object to the language of the special verdict forms at trial or to the trial court's failure to give his proposed special verdict forms, which included the omitted statutory language. However, the State does not argue that he waived his right to challenge the special verdict forms on appeal, and therefore we do not address this waiver issue.

incidents of abuse over a prolonged period of time." Accordingly, we hold that the trial court's special verdict forms did not relieve the State of its burden of proof.

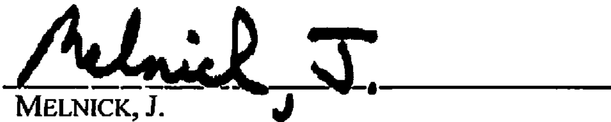
We affirm Stevens's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

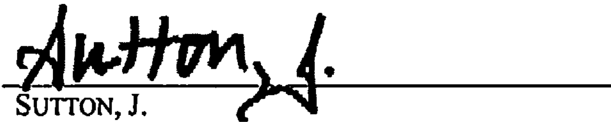


MAXA, J.

We concur:



MELNICK, J.



SUTTON, J.

HESTER LAW OFFICES

March 15, 2016 - 3:31 PM

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