ST

BY

95868-8

Supreme Court No. ____
(COA No. 75279-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN SAGE,

Petitioner.

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

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Jonathan Sage, petitioner here and appellant below, asks this Court to accept review of the published decision by the Court of Appeals dated December 18, 2017, as amended on denial of reconsideration on April 4, 2018, attached as Appendix A and B. RAP 13.3(a)(2)(b); RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. It is well-established that when a person is charged with multiple counts of the same crime committed against the same person at the same time, the court must instruct the jury to find separate and distinct conduct. Without this instruction, there is an untenable risk the defendant is punished twice for the same conduct. The double jeopardy violation does not evaporate when the State sets out evidence in its closing argument because the court instructs the jury not to rely on the attorneys' arguments for the law governing their decisions.

The State charged Mr. Sage with identical, overlapping offenses and the court did not instruct the jury each verdict must rest on separate and distinct conduct. Absent clear jury instructions or uncontroverted evidence each act distinctly occurred, the risk of a double jeopardy violation undermines the verdict. Should this Court grant review where

the published Court of Appeals decision affirmed these multiple convictions despite ambiguous and contested evidence and no clear jury instruction, in a decision that conflicts with cases from this Court and the Court of Appeals,[1] and is contrary to the protections of the double jeopardy clauses of the state and federal constitutions?

2. The right to cross-examine the complaining witness about matters relevant to his credibility is a fundamental constitutional guarantee, essential to the accuracy of the fact-finding process. The court precluded Mr. Sage from questioning a complainant about his affinity for firearms and marijuana, which was relevant to his credibility and bias in the circumstances of this case. The Court of Appeals refused to consider the merits of the claim by labelling the issue as a confrontation clause violation and deeming it waived because the defense did not cite the confrontation clause when objecting.

Should this Court grant review of the published Court of Appeals decision where it creates a new threshold for preserving an error involving an objected-to restriction on the right to cross-examine

---

[1] *See State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011); *State v. Kier*, 164 Wn.2d 798, 194 P.3d 312 (2008); *State v. Carter*, 156 Wn. App. 561, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008).

the complaining witness, in conflict with established precedent and as an issue of substantial public importance?

3. Allegations of uncharged wrongful acts are particularly prejudicial in a case involving charges of sexual offenses with children. The trial court admitted a host of highly prejudicial allegations without meaningfully weighing their probative value against their plain prejudicial effect and without any limiting instruction on how the jury should use this evidence. The inflammatory uncharged allegations included claims Mr. Sage made child pornography, gave a child access to a loaded gun, and encouraged sexual relations between a child and dog. The Court of Appeals' published decision misapplies the test for admitting tenuous, prejudicial evidence of uncharged misconduct, meriting review by this Court due to its effect on the right to a fair trial.

4. A person accused of a crime is presumed innocent and must be accorded the dignity of an innocent person at the trial. When Mr. Sage's accuser hissed at him and assumed a fighting stance mid-trial, the jurors reacted with horror, and Mr. Sage moved for a mistrial. Did the jurors' horrified reaction to the complainant's emotional outburst undermine the fairness of the proceedings, meriting this Court's review?

5. The United States Supreme Court recently clarified that when a judge must authorize additional punishment by weighing the jury's advisory verdict, this judicial fact-finding violates the Sixth Amendment. *Hurst v. Florida*, _U.S. _, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016). A court may impose an exceptional sentence after the jury finds aggravating factors, only after it weighs the evidence and decides substantial and compelling reasons exist for added punishment. Should this Court grant review where *Hurst* demonstrates the judge's additional findings necessary for an exceptional sentence violate the Sixth Amendment?

6. By statute and under *State v. Friedlund*, 182 Wn.2d 388, 341 P.3d 280 (2015), the sentencing judge must enter findings of facts and conclusions of law explaining the factual and legal basis of an exceptional sentence. Here the written findings do not explain any substantial and compelling reasons for imposing an exceptional sentence. Do the court's inadequate findings conflict with its obligation under *Friedlund* and merit review based on the Court of Appeals' confusion over the necessary findings of fact at sentencing?

7. When the State seeks an exceptional sentence, it must give fair notice to the accused of the aggravating circumstances and may

proceed only on the factors charged. The State charged Mr. Sage with several aggravating circumstances under a defined charging period but sought verdicts based on conduct that far exceeded the charging period. Did the court lack authority to impose an exceptional sentence when the jury's verdict reflects conduct not in the charging document?

C. STATEMENT OF THE CASE

Brothers J.M. and E.M. met Jonathan Sage through their mother, Rebecca, who suffered from chronic drug addiction and was largely unable to care for them. RP 335, 363, 407-08. Mr. Sage employed Rebecca for a time and helped her find a place to live when she had no home. RP 349. J.M. and E.M.'s father, Jason, moved away when he met another woman when they were nine and seven years old. RP 434, 526.

Their father Jason resurfaced and initiated efforts to regain custody when J.M. and E.M. were teenagers. RP 336, 343, 435, 511. In the interim, Rebecca had essentially abandoned care of her sons to Mr. Sage, who allowed the boys to live in his home. RP 438, 591, 690.

In 2015, J.M. told police he had sexual contact with Mr. Sage years earlier. J.M. said he initiated the contact with Mr. Sage when he was struggling with his own sexual identity. RP 366-67, 373. He could not keep track of chronological details and recognized he was unable to

described specific incidents. RP 464-65. E.M. said he similarly had sexual contact with Mr. Sage but was also unclear on details of time, place and occurrence. RP 615-16; *see* Amended Mot. Recon. at 6-7.

These allegations arose in the context of a child custody dispute between Rebecca and Jason. RP 336, 343, 484-83, 572, 715-16. Shortly before J.M. and E.M. reported their claims to the police, Jason and his new wife faced an inquiry into their parental fitness by Child Protective Services. RP 458. Jason and his wife Christy used these allegations against Mr. Sage to get a no-contact order and to present to the authorities as they sought custody. RP 450, 458, 714-16, 720.

The State charged Mr. Sage with four counts of rape of a child in the second degree, two counts for J.M. and two for E.M. Each set of counts had identical charging periods. CP 83-87. Because the charged offense required J.M. and E.M. to be a specific age (older than 12 and younger than 14), the prosecution needed to prove specific acts occurring within a nine or 12 month charging period. *Id.* However, the prosecution elicited allegations of a range of identical sexual contact after the charging period ended, under the theory of res gestae and lustful disposition. The court rejected Mr. Sage's objection to the admissibility of this evidence. RP 8-11, 924-66.

Over Mr. Sage's objection, the court admitted other uncharged allegations of highly prejudicial conduct, including unproved claims he made child pornography, encouraged E.M. to have sexual contact with his dog, and kept a gun and ammunition in his home where E.M. could readily access it. CP 149-51, 193-94; RP 8-11, 924-26. However, the court refused to let Mr. Sage question E.M. about the benefits he received from living with his father, such as his father's ready supply of marijuana and firearms. RP 662-65, 668-70, 672-74.

When E.M. was about to testify against Mr. Sage, he stopped in the middle of the courtroom and made a threatening gesture as if preparing to fight Mr. Sage. RP 573-76. Defense counsel immediately objected and described the jurors as looking horrified. *Id.* The prosecutor told E.M. to leave the courtroom. RP 573. Defense counsel moved for a mistrial based on the observable effect E.M.'s behavior had on the jurors' demeanor. RP 574-76. The judge and prosecutor had not watched the jurors' reactions. *Id.* The judge denied the motion and told the jurors to disregard whatever they observed. RP 577.

The jurors convicted Mr. Sage of the charged offenses and found several aggravating factors. CP 27-40. The court weighed those

aggravating factors and imposed an exceptional sentence above the standard range of 420 months to life in prison. CP 25-26.

The Court of Appeals issued a published decision affirming Mr. Sage's convictions and sentence, but remanding to strike several unauthorized conditions of community custody. Slip op. at 1.

D. ARGUMENT

1. The published Court of Appeals decision misapplies double jeopardy law governing multiple identical charges without critical jury instructions, contrary to *Mutch*.

a. The court's instructions failed to explain the mandatory requirement that multiple convictions for the same offense may not be involve the same conduct.

When the prosecution charges a person with several counts of the same offense, during the same period of time, and against the same person, double jeopardy bars multiple convictions. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011); U.S. Const. amend. 5; Const. art I, § 9. To avoid violating double jeopardy, the court must instruct the jury their verdicts must rest on unanimous agreement of separate and distinct conduct. *Mutch*, 171 Wn.2d at 664.

Here, the court did not give the jury this mandatory instruction. Without it, reversal is required unless it was "manifestly apparent" that

the conviction for each count was based on a separate act. *Mutch*, 171 Wn.2d at 664. This Court's review is "rigorous" and it will be "a rare circumstance" where the appellate court should affirm without expressly instructing jurors on the requirement of separate and distinct conduct underlying each conviction. *Id.* at 664-665.

Here, despite well-established law mandating courts instruct the jury the separate and distinct conduct must be the basis for their verdicts when presented with multiple identical charges, the court did not give the jury this instruction. *See, e.g.*, *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007) ("in sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the trial court must instruct the jury 'that they are to find "separate and distinct acts" for each count.'" (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996)); *State v. Carter*, 156 Wn. App. 561, 567, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 934-35, 198 P.3d 529 (2008).

b. Contrary to the published Court of Appeals decision, the prosecution's closing argument does not protect against a double jeopardy violation.

The Court of Appeals ruled that no error occurred because the prosecution's closing argument explained what evidence it desired the jury to rely upon in convicting Mr. Sage. Slip op. at 12.

However, the Court of Appeals' analysis is directly contrary to this Court's rulings in *Mutch* and *Kier*. In *Kier*, this Court ruled the State's closing argument could not rectify the ambiguity of the verdict to avoid violating double jeopardy. 164 Wn.2d at 813. Where the jury instructions permitted jurors to convict Kier based on the same victim, it did not matter that the State's closing argument clearly explained the jury should view the two offenses as involving separate victims. *Id.* This Court ruled the instructions impermissibly allowed for a verdict that violated double jeopardy. *Id.*

This Court applied the same principle in *Mutch*, where there were five identical charges of rape. But unlike *Kier*, everyone in *Mutch* agreed five separate, distinct acts of sexual intercourse occurred. Because no one disputed the separate and distinct conduct at any part of the case, (and instead focused on whether the conduct was consensual), this Court ruled fond no double jeopardy violation even though the court had not given a "separate and distinct" conduct instruction. 171 Wn.2d at 664. But this Court emphasized this case was "rare" and it

rested on the mutual agreement the separate acts actually occurred. *Id.* It is imperative to clearly instruct the jury that its verdicts must rest on separate and distinct conduct to overcome a violation of double jeopardy. *Id.*

Inexplicably, the Court of Appeals relied on the prosecution's closing argument to ascertain the basis of the jury's verdict. Slip op. at 12. It disregarded the sharply contested allegations, where Mr. Sage never agreed any of the acts occurred and pressed the complainants on their admittedly fuzzy memories. The Court of Appeals decision is contrary to *Mutch*.

The Court of Appeals also misapplied its own case law. For example, it relied upon *State v. Hayes*, 81 Wn. App. 425, 914 P.2 788 (1996), to claim its role is to look at the evidence's sufficiency for the multiple convictions. Slip op. at 9 n.25, 12 n.38. But in *Hayes*, the jury was instructed to find an act occurred "on an occasion separate and distinct from that charged" in other counts. 81 Wn. App. at 431 n.9. Thus, *Hayes* does not support the Court of Appeals' claim that it should affirm convictions without critical instructions on the separate and distinct nature of the acts found to support each overlapping conviction.

This published decision sets a confusing precedent. It is contrary to a host of other decisions. *Carter*, 156 Wn. App. at 568; *Berg*, 147 Wn. App. at 934-37; *Borsheim*, 140 Wn. App. at 370-71; *State v. Holland*, 77 Wn. App. 420, 425, 891 P.2d 49 (1995). It encourages other courts to dilute or ignore this Court's case law and discourages courts and prosecutors to provide the critical separate and distinct instructions. It creates a risk of encouraging double jeopardy violations by muddling the law for the jury, rather than according jurors respect and ensuring convictions are based on critical proof of separate and distinct acts by making the law manifestly apparent. This Court should accept review.

2. Mr. Sage was denied a fair trial due to the court's admission of unduly prejudicial uncharged allegations while simultaneously prohibiting him from presenting evidence key to his defense and denying a mistrial following a witness's emotional outburst.

a. The right to a fair trial includes the right to be tried for only the charged offense.

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art.

I, §§ 3, 22. It includes the right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

ER 404(b) categorically bars admission of evidence of uncharged wrongful conduct used to show person acted in conformity with their character *State v. Gresham,* 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli,* 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Uncharged allegations in sex offense prosecutions have a heightened prejudicial effect. *State v. Gunderson*, 181 Wn.2d 916, 924, 337 P.3d 1090 (2014). Courts must be particularly "careful and methodical in weighing the probative value against the prejudicial effect" in a sexual abuse prosecution. *Id.*

b. The prosecution elicited a range of highly inflammatory uncharged allegations that were far more prejudicial than probative, most of which it never even fairly warned the defense it would offer.

ER 404(b) requires advance notice by the prosecution of ER 404(b) evidence to permit the court's mandatory admissibility analysis. *Gunderson*, 181 Wn.2d at 923. Here, the State gave little advance notice of its intent to paint Mr. Sage's character as a repeat offender, belatedly filing an ER 404(b) motion as trial was starting. CP 193.

Among the evidence it elicited, it contended Mr. Sage encrypted his computers to hide child pornography he made of EM, even though the police found no evidence of such videos. CP 196; RP 558, 560, 654. It contended Mr. Sage encouraged deviant sexual behavior between EM and his dog, asserting it was res gestae evidence even though EM did not describe such conduct until the prosecution pressed him to add it. RP 611-14; CP 152-53.

It offered evidence Mr. Sage kept a gun accessible to E.M., which E.M. thought about using. RP 517, 539, 652. But there was no evidence that Mr. Sage had ever threatened anyone or even touched the gun any time. Firearm evidence is particularly prejudicial and should not be offered when it has no material bearing on the charged offenses. *State v. Rupe*, 101 Wn.2d 664, 707-08, 683 P.2d 571 (1984); *State v. Freeburg*, 105 Wn.App. 492, 501, 20 P.3d 984 (2001).

After the discrete charging periods ended, the State claimed Mr. Sage and the complainants engaged in further illegal sexual acts. RP 7-8, 895; CP 165-66. Because this conduct happened after the charged incidents, it was far more likely to constitute propensity evidence or show Mr. Sage's bad character than to demonstrate Mr. Sage's intent or motive at an earlier point in time.

The inflammatory nature of these many allegations painted Mr. Sage as irredeemably deviant and deprived him of a fair trial. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). This Court should grant review due to the court's failure to understand and apply case law strictly curtailing its authority to admit evidence that will encourage jurors to convict a person for reasons other than the charged offenses.

c. *The published Court of Appeals decision manufactures a novel and improper standard for issue preservation when an accused person confronts a testifying witness.*

In assessing whether Mr. Sage was denied his right to meaningfully present a defense by limits on his cross-examination about bias and credibility flaws as guaranteed by the Sixth and Fourteenth Amendments, the Court of Appeals created a novel standard for issue preservation and used it to turn Mr. Sage's clear objection into an unpreserved complaint. Slip op. at 16-17.

Mr. Sage objected to restrictions on cross-examination of his accuser. RP 39-40 (pretrial discussion of limitations on cross-examination of complainant); RP 662-65, 668-70, 672-74 (defense request to question EM about marijuana and firearm in response to prosecution's direct testimony and court ruling).

But the Court of Appeals relied on law it applies for an absent witness's testimony. Slip op. at 16-17 (quoting *inter alia*, *State v. O'Cain*, 169 Wn. App. 228, 240, 279 P.3d 926 (2012); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed.2d 314 (2009). E.M. testified at Mr. Sage's trial, unlike in *O'Cain* and *Melendez-Diaz*. 169 Wn. App. at 236-37. Here, the interplay between the confrontation clause and the compulsory process clause does not arise because E.M. testified.

The Court of Appeals also misapplied *State v. Koepke*, 47 Wn. App. 897, 911, 738 P.2d 298 (1987) to deem the issue unreviewable. Slip op. at 17. *Koepke* states, when an "alleged error may have affected a constitutional right, Mr. Koepke may raise it for the first time on appeal." 47 Wn. App. at 911. It addressed the constitutional claims of confrontation even without a confrontation clause objection in the trial court. But the Court of Appeals cited *Koepke* for the opposite proposition and refused to consider an objected-to restriction on Mr. Sage's right to cross-examine witnesses.

Mr. Sage was unfairly limited in the additional cross-examination of his accuser he sought. The right to due process, the "integrity of the fact-finding process," and right to meaningfully present

a defense are just as critical to the rights underlying cross-examination as is the Confrontation Clause. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

The Court of Appeals created unacceptable and novel hurdles to a person raising fundamental constitutional rights on appeal. Substantial public interest favors review of this published opinion.

d. Mr. Sage was denied his right to appear and defend at trial.

A person accused of a crime has a constitutional right to appear and defend at trial and confront his accusers face to face. *State v. Martin*, 171 Wn.2d 521, 528, 533, 252 P.3d 872 (2011); U.S. Const. amend. 6; Const. art. I, § 22. The jury may not draw negative inferences from the defendant's exercise of this fundamental right and mandatory obligation to appear and defend. *State v. Wallin*, 166 Wn.App. 364, 377, 269 P.3d 1072 (2012).

The courtroom setting must "preserve a defendant's presumption of innocence before a jury." *State v. Jaime*, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). This bedrock requirement of a fair trial includes "the physical indicia of innocence before a jury" and a courtroom setting according the accused person "the appearance, dignity, and self-respect

of a free and innocent man." *Id.* at 861-62, quoting inter alia *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Courtroom conduct that singles out a defendant as particularly dangerous or guilty threatens his or her right to a fair trial. *Id.* at 862.

When EM entered the courtroom, he stopped and faced Mr. Sage, making "an aggressive stare," bending into a fighting stance, and hissing. RP 573, 574, 576. The jurors appeared horrified. RP 574.

The defense immediately objected and the prosecutor asked to talk to his witness. RP 573. The court ordered a recess. *Id.* The court reporter noted EM's unusual conduct. *Id.*

The defense moved for a mistrial because the jurors "horrified" reaction showed they could not put it out of their minds. *Id.* Counsel did not believe Mr. Sage could get a fair trial or be presumed innocent. *Id.*

The judge admitted he was not looking at the jurors and did not see their reactions. RP 576. He denied the mistrial motion and told the jurors to "only consider the evidence produced in Court" when deciding the case. RP 577.

When courtroom conduct prejudices the defendant, the court must decide whether there is an unacceptable threat to the defendant's right to a fair trial. *State v. Lord*, 161 Wn.2d 276, 285, 165 P.3d 1251

(2007). Some misbehavior taints the proceedings and cannot be removed by an instruction to disregard. *State v. Holmes*, 122 Wn.App. 438, 446, 93 P.3d 212, 217 (2004); *see also Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (recognizing court cannot always assume jury will follow court instruction to disregard prejudicial evidence, as "the practical and human limitations of the jury system cannot be ignored").

The jurors demonstrably reacted to the young complainant's display of aggression and outrage toward Mr. Sage. Defense counsel's description of the jurors' horrified faces and her impression that they would not be able to forget what they saw was unrebutted. The case hinged on the credibility of the accusers. Viewed in isolation or with the other evidentiary errors, Mr. Sage was denied a fair trial and this Court should grant review.

3. The judge's factual determination that the aggravating factors were substantial and compelling reasons for imposing an exceptional sentence violated Mr. Sage's right to trial by jury.

The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment, regardless of whether the fact is labeled an

element or a sentencing factor. *Hurst v. Florida*, _U.S. _, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016); U.S. Const. amend. 6, 14; Const. art. I, §§ 21, 22.

Although the jury must find an aggravating factor for a court to impose an exceptional sentence, the jury's finding alone is insufficient and advisory. RCW 9.94A.535; RCW 9.94A.537. The court must also "consider[ ] the purposes" of the SRA and find that the aggravating factor constitutes "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535; RCW 9.94A.537(6).

The court's finding that substantial and compelling reasons justify an exceptional sentence must be based on "factors other than those which are necessarily considered in computing the presumptive range for the offense." *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 683 (1987). It is based on reviewing the purposes of the SRA and deeming the increased sentence consistent with its purposes, and also assessing the State's case to decide whether an exceptional sentence is in the interest of justice. *See State v. Hyder*, 159 Wn.App. 234, 263, 244 P.3d 454 (2011).

In *Hurst*, the Supreme Court ruled that Florida's death penalty procedure violated the Sixth Amendment because, although the jury

had to find aggravating factors, this was advisory and the judge had to weigh the jury's findings before imposing the death penalty. 136 S.Ct. at 620-21. The judge could impose the death penalty only with its own additional fact-based determination. *Id.* at 621-22.

Likewise, the jury's verdict is advisory to impose a sentence above the standard range. The court must also find substantial and compelling reasons to impose an exceptional sentence, under RCW 9.94A.535 and .537, which is a mandatory fact-based judicial determination in addition to the jury's verdict.

Previous decisions have labelled the court's role as addressing a legal question of whether substantial and compelling reasons justify an exceptional sentence. *See e.g.*, *State v. Sulieman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006); *State v. Hughes*, 154 Wn.2d 118, 137 P.3d 192 (2005). But this characterization is incorrect. The court weighs factual issues and no legal standard controls. Such reasons may be "liberally fashion[ed]" but the judge "in an unstructured ad-hoc fashion." Darren Wu, *Exceptional Discretion in Exceptional Criminal Sentences in Washington*, 29 Gonz. L. Rev. 599, 603 (1994). Under *Hurst,* this is judicial findings, required after an advisory jury finding,

and it violates the Sixth Amendment to increase a sentence based on this judicial determination.

4. The trial court's inadequate findings of fact conflict with the requirements in *Friedlund*.

"When a trial court imposes an exceptional sentence, the SRA requires the court to 'set forth the reasons for its decision in *written findings of fact and conclusions of law.*'" *Friedlund*, 182 Wn.2d at 394, quoting RCW 9.94A.535 (emphasis added in *Friedlund*).

Here, the court entered the barest of written findings of fact and conclusions of law. It listed the factors found by the jury and summarily stated, "There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535." CP 26. The reference to the statute does not demonstrate the basis of the court's finding, because RCW 9.94A.535 merely states the court must find substantial and compelling reasons to impose an exception sentence. It does not explain what this finding means.

In *Hyder*, the court's written order identified each aggravating circumstance to be a substantial and compelling reason for justifying an exceptional sentence; said an exceptional sentence "is in the interest of justice and consistent with the purposes" of the SRA; and found this

sentence "is appropriate to ensure that punishment is proportionate to the seriousness of the offense." 159 Wn.App. at 263. The appellate court ruled this explanation satisfied the court's obligation. *Id.*

Unlike *Hyder*, the court's findings do not explain its reasoning. CP 25-26. They do not discuss the purposes of the SRA. CP 26. They do not state the court considered those purposes. *Id.* They do not say that an exceptional sentence was appropriately proportionate as required by the SRA. *Id.* They parrot the bald conclusion that substantial and compelling reasons existed without explanation.

Friedlund mandated written findings because they enable meaningful appellate review and public oversight. 182 Wn.2d at 394-95. The court's summary findings and conclusions do not satisfy their necessary purpose. CP 26. The Court of Appeals misapplied *Friedlund* by affirming conclusory findings that do not provide for appellate review or enable public oversight. Review should be granted.

5. The exceptional sentence must be reversed due to the insufficiency of the aggravating factors.

An accused person's constitutional rights to a jury trial and due process of law require the government to charge and prove to a jury beyond a reasonable doubt any "fact" upon which it seeks to rely to

increase punishment above the maximum sentence otherwise available for the charged crime. *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22.

An accused person is constitutionally entitled to "adequate notice of the nature and cause of the accusations" to prepare a defense. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012); U.S. Const. amends. 6, 14; Const. art. I, § 22. To "mount an adequate defense" for an aggravating circumstance, the prosecution must plainly notify the accused of the factual and legal basis of aggravating factors. *Siers*, 174 Wn.2d at 277; RCW 9.94A.537(1).

The court is authorized to impose an increased sentence only for the aggravating circumstance that has been properly charged and for which the jury has been instructed. *State v. Williams-Walker*, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22.

The State notified Mr. Sage it would seek additional punishment based on three aggravating factors: multiple incidents against the same victim occurred over a prolonged period of time; abuse of a position of trust; and for E.M. alone, the victim was a youth not residing with a

legal custodian and he established or promoted the relationship for the primary purpose of victimization. CP 83-87.

The charging document limited these allegations to a specific time period: for J.M., "between the 1st day of September, 2011 and through the 30th day of June 2012," and for E.M., "between December 19, 2011 through December 19, 2012."CP 83-85, 87.

Yet the jury was not instructed it must base its verdict on conduct within the charging period. CP 61-64 (Instructions 18, 19, 20, 21). The jury was told simply to "determine if any of the following aggravating circumstances exist." *Id.* None of the aggravating circumstances instructions mentioned anything about the time period when these circumstances occurred. CP 61-64.

Due to the court's broad ER 404(b) ruling, the jury heard allegations of behavior long after the charging period ended and after the boys turned 14. The State characterized Mr. Sage's behavior as a "cascade" of sexual abuse far beyond the charging period. RP 761. The instructions did not limit the jury to the charged time period and the evidence before the jury was a cascade of conduct long after the nine or 12 months in the charging periods. CP 61-64; 83-87. No limiting

instruction was given for the ER 404(b) evidence that would curtail its application.

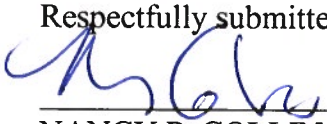
The jury's verdict must reflect unanimous findings of the charged sentencing enhancement. *Williams-Walker*, 167 Wn.2d at 898. Uncharged allegations may not be the basis of a conviction or sentencing enhancement. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); *State v. Recuenco,* 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). This Court should grant review and address whether the jury must limit its verdict for aggravating factors to the allegations charged and for which the accused person received notice.

F. CONCLUSION

Petitioner Jonathan Sage respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 4th day of May 2018.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. JONATHAN SAMUEL SAGE, Appellant.	)	No. 75279-1-I PUBLISHED OPINION FILED: December 18, 2017

VERELLEN, C.J. — Jonathan Sage was convicted of four counts of second degree rape of a child. The trial court did not instruct the jury that it must find each count required a "separate and distinct" act. But because the State clearly elected separate acts for each count in closing argument, testimony supported those separate acts, and the court gave a unanimity instruction, it was manifestly apparent to the jury that the State was not seeking multiple punishments against Sage for the same act. There was no double jeopardy violation.

Sage's challenge to the admission of "other bad acts" evidence fails because the court performed a detailed ER 404(b) analysis and properly concluded the evidence of other bad acts was relevant to the charges.

One victim glared at Sage as he entered the courtroom, and the trial court properly instructed the jury to disregard the behavior. Sage does not establish prejudice, and the trial court did not err when it denied Sage's motion for mistrial.

The State concedes the community custody conditions restricting Sage's daily travel, prohibiting him from possessing drug paraphernalia, prohibiting Internet access, and requiring him to participate in substance abuse treatment are unconstitutionally vague or insufficiently crime related and thus should be stricken. We agree.

After the jury entered special verdict forms unanimously finding the alleged aggravating circumstances were established beyond a reasonable doubt, the trial court concluded those aggravating circumstances were a substantial and compelling reason for imposing an exceptional sentence. Because the judge has no fact-finding role, the sentencing judge was not required to enter any additional findings of fact or conclusions of law.

Therefore, we affirm the conviction and remand with instructions to strike the disputed community custody conditions.

FACTS

Between 2011 and 2014, Jonathan Sage engaged in sexual acts with J.M. and E.M.[1] Sage came into contact with the two brothers because he owned a company at which J.M. and E.M.'s mother worked.

[1] Because the victims in this case were minors, they will be identified by their initials.

Sage took the mother and her two sons into his home after the mother and her husband divorced. They lived with Sage for a few months when the boys were eight and nine years old, and again in 2010. When Sage moved to a home on Cattail Lane in Langley, Washington, the mother, J.M., and E.M. moved into their own home on Whidbey Island. Sage continued his relationship with J.M. and E.M., including hikes and dinners. Sage bought food and clothing for them and took them to doctor's appointments.

In 2011, after J.M. started seventh grade, he and Sage started spending more time together. Around that same time, E.M. began spending more time at Sage's house than at his mother's house. When E.M. was around 11 years old, he often slept over at Sage's house, and Sage would take him to school. E.M. said that by age 12, he and Sage began to drink alcohol together. During that time, E.M. would drink "almost every night."[2]

E.M. testified about his first sexual encounter with Sage at the Cattail Lane house. E.M. was "more inebriated than usual," and he and Sage were watching pornography together.[3] E.M. and Sage touched each other and then went into Sage's bedroom, where Sage had sexual intercourse with him. The first encounter with E.M. happened when he was 12 years old, toward the end of his sixth grade school year. E.M. said after that first time "it was fairly frequent, but I

---

[2] Report of Proceedings (RP) (Apr. 7, 2016) at 600.

[3] RP (Apr. 7, 2016) at 606.

can't remember specifically."[4] E.M. testified, "Alcohol had to be involved really in order to [ ] get me to comply with it, I guess you could say."[5] "[I]n most cases," the sexual encounters between E.M. and Sage involved E.M. sexually touching Sage's dog.[6] Sage instigated those contacts with the dog. E.M. testified that Sage made videos of some of their sex acts, recording them on E.M.'s phone and on Sage's digital camera. The videos would end up on Sage's laptop computer.

By the time J.M. was in seventh grade, he started staying at the Cattail Lane house more often. J.M. testified that around that time, he had sexual intercourse with Sage for the first time. One evening, J.M. saw E.M. drinking alcohol, and J.M. said he also wanted some. It was the first time J.M. had consumed alcohol, and a single drink made him "drunk."[7] Later in the evening, J.M. and Sage went into Sage's home office, where J.M. discussed issues he was having "fitting in" at school.[8] That discussion led to Sage having sexual intercourse with J.M.

Days later, J.M. and Sage had intercourse again. J.M. testified that for the next year, he and Sage had intercourse "a few days a week."[9] During that time, at

---

[4] RP (Apr. 7, 2016) at 610.
[5] RP (Apr. 7, 2016) at 611.
[6] RP (Apr. 7, 2016) at 614.
[7] RP (Apr. 6, 2016) at 372.
[8] RP (Apr. 6, 2016) at 374.
[9] RP (Apr. 6, 2016) at 390.

the Cattail Lane house, J.M. walked in while Sage was having intercourse with E.M. when E.M. was 12 years old.

For most of the 2012-13 school year, Sage lived on Bercot Road in Freeland, Washington with the mother, J.M., and E.M. J.M. was in ninth grade that year, and he testified that he continued to have intercourse with Sage. E.M., who was in eighth grade, testified that he and Sage regularly had intercourse.

Next, Sage moved to a house on Coles Road, where he continued to have intercourse with J.M. and E.M. J.M. also walked in on E.M. and Sage having intercourse at the Coles Road house. E.M. said that when he first started to resist intercourse with Sage, "he would get angry at that."[10]

E.M. testified that during the later period of abuse, he became unhappy.

> At that point, I wouldn't say I was happy. I mean, at that time I started to contemplate suicide more. There was a Smith and Wesson M&P 9, 9 millimeter polymer framed pistol, and there was a very loose lock on it. It's a very tall lock, and I could open the case while the lock was still on it and reach in and pull out the handgun, and the ammunition was there, too. So I knew at any time I could kill myself and I could take him with me, but I decided against it because I was thinking of my own family, biological family.[11]

The father of J.M. and E.M. had limited interaction with Sage and "thought everything was all good and well."[12] In the summer of 2014, the mother asked the father to take custody of J.M. and E.M. because she was being evicted from her home.

---

[10] RP (Apr. 8, 2016) at 650.

[11] RP (Apr. 8, 2016) at 652.

[12] RP (Apr. 7, 2016) at 506.

E.M. and J.M. moved into their father's home. He allowed J.M. and E.M. to continue visiting Sage and allowed E.M. to occasionally spend weekends with him. The father felt Sage was a good mentor and role model for J.M. and E.M.

On December 5, 2014, Sage picked up E.M. from the father's house for a sleepover. That evening, J.M. told his father about the sexual conduct with Sage. The father testified that he decided not to call Sage or drive to Whidbey to retrieve E.M. that evening. He explained, "I didn't think it would be smart to call the police and have them either [ ] pull him over in a traffic stop or come to his house. I knew he owned a firearm and I thought it may result in a hostage situation."[13]

When confronted, Sage justified the sexual abuse, telling the father "people had been doing this for a long time" and it was "strange that it's looked down upon as far as a relationship between a man and a boy."[14] Sage told the father, "You could call the police and have me arrested. But that wouldn't do anyone any good, and a lot of people would lose their jobs."[15]

The State charged Sage with four counts of rape of a child in the second degree. Counts 1 and 2 each alleged that Sage raped J.M. between September 1, 2011 and June 30, 2012. Each count included allegations of two aggravating circumstances that would justify an exceptional sentence under RCW 9.94A.535(3)(g) and RCW 9.94A.535(3)(n).

---

[13] RP (Apr. 7, 2016) at 517.

[14] RP (Apr. 7, 2016) at 521-22.

[15] RP (Apr. 7, 2016) at 521.

Counts 3 and 4 each alleged Sage raped E.M. between December 19, 2011 and December 19, 2012. Those counts included the same aggravating factors as counts 1 and 2 and that Sage "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, contrary to RCW 9.94A.535(3)(j)."[16]

The court gave separate to convict instructions for each count. After each to convict instruction, the court gave a corresponding unanimity instruction requiring that "one particular act" of the charged crime must be proven for each count.[17]

The jury was also instructed "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."[18] But the jury was not instructed that each count required a separate and distinct act.

The jury convicted Sage on all four counts and, by special verdict, found the alleged aggravating circumstances had been established. The court concluded the aggravating circumstances were substantial and compelling reasons to impose an exceptional sentence under RCW 9.94A.535.

Sage appeals his conviction and his exceptional sentence.

---

[16] Clerk's Papers (CP) at 86.

[17] CP at 54, 56, 58, 60.

[18] CP at 45.

ANALYSIS

Double Jeopardy

Sage contends the jury instructions violated his right to be free from double jeopardy because they exposed him to multiple punishments for the same offense.

We review a double jeopardy claim de novo, and it may be raised for the first time on appeal.[19] The constitutional guarantee against double jeopardy protects a defendant against multiple punishments for the same offense.[20] We "may consider insufficient instructions 'in light of the full record' to determine if the instructions 'actually effected a double jeopardy error.'"[21]

Where multiple counts charge the same crime against the same victim occurring during the same time period, juries should be instructed that each count requires proof of a separate and distinct act.[22] But the absence of a separate and distinct act instruction is not fatal; it only creates the *potential* for a double jeopardy violation.[23]

There is no double jeopardy violation where the information, instructions, testimony, and argument make it "'manifestly apparent'" to the jury that the "'State

---

[19] State v. Land, 172 Wn. App. 593, 598, 295 P.3d 782 (2013).

[20] Id. (citing U.S. CONST. amend. V; WASH. CONST. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011)).

[21] State v. Pena Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (quoting Mutch, 171 Wn.2d at 664).

[22] Mutch, 171 Wn.2d at 663.

[23] Id.

[was] not seeking to impose multiple punishments for the same offense.'"[24] "A defendant charged with multiple counts is adequately protected from any risk of double jeopardy when the evidence is sufficiently specific as to each of the acts charged."[25] Courts have also looked to whether the jury was instructed that it must be unanimous on each count and whether "different evidence is introduced to support each count."[26] Courts have acknowledged that a single instruction encompassing multiple counts rather than separate to convict instructions for each count can compound double jeopardy concerns.[27]

Sage contends it was not manifestly apparent that his conviction was based on separate and distinct acts.[28]

Here, the sexual acts occurred at three different houses, sometimes many times per week. J.M. testified in detail about the first time he had intercourse with Sage in the office of the Cattail Lane house. J.M. was almost 13 years old.[29] J.M. testified the second time they had sexual intercourse was in the garage of the

---

[24] Id. (alteration in original) (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

[25] State v. Hayes, 81 Wn. App. 425, 439, 914 P.2d 788 (1996).

[26] Id. at 439-40.

[27] State v. Borsheim, 140 Wn. App. 357, 368, 165 P.3d 417 (2007).

[28] See Mutch, 171 Wn.2d at 665 ("Mutch's case presents a rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found him guilty of five separate acts of rape to support five separate convictions.").

[29] J.M. said he could remember his exact age because he was "looking forward to [his] birthday." RP (Apr. 6, 2016) at 385.

same house several days later. J.M. also described having intercourse with Sage in the living room, Sage's bedroom, and his truck.

In closing argument, the State identified count 1 and walked the jury through the evidence presented at trial:

> *And Count I is focusing on [J.M.]'s first sexual intercourse with Jonathan Sage.* And what did you hear about that from [J.M.]? You heard [J.M.] describe how he was having trouble at school. He was emotional. He saw [E.M.] and the defendant drinking. He drank. He became emotional. The defendant was there to console him. They went in the office. They hugged. Things happened in the chair. They went to the floor. And [J.M.] described how Jonathan Sage, the defendant, had anal intercourse with [J.M.] . . . That was the first time he had ever had sex. He said he lost his virginity then. *That's Count I. That's what I want you to consider to be Count I.*[30]

The State then discussed count 2, describing it as the same elements, same actors, but a distinct event:

> [J.M.] said the second time was roughly a week later, about that much time, in the defendant's finished heated garage, kind of like a room but it was a garage. He talked about that. They again had . . . intercourse in that garage. Again, he was drinking.[31]

E.M. also testified about his first time having sexual intercourse with Sage at the Cattail Lane house. E.M. described how he and Sage were watching pornography together, which led to Sage having intercourse with E.M. E.M. testified the first time stood out in his mind and it was "fairly frequent" after that.[32]

---

[30] RP (Apr. 8, 2016) at 753 (emphasis added).

[31] RP (Apr. 8, 2016) at 754.

[32] "I'd say weekly." RP (Apr. 7, 2016) at 610.

E.M. described incidents where sexual contact with Sage's dog was initiated as a prelude to the sexual intercourse with E.M. E.M. said he also had intercourse with Sage at the Coles Road and Bercot Road houses.

In closing argument, the State discussed counts 3 and 4 and referred to E.M.'s testimony, emphasizing details of his first time having sex with Sage: "At age 12, [E.M.] describes that the first time they ever had sexual contact or intercourse with each other they were sitting on the futon. Mr. Sage suggest[ed] they watch some pornography together."[33] And for count 4, the State noted: "And count IV is again [E.M.]. [E.M.] described that they had sex often in the beginning *after it first started*. Sometimes multiple times a week but at least every week."[34]

Sage counters that J.M. and E.M. had "fuzzy memories" and gave "ambiguous evidence" about the timing and detail of the encounters.[35] But the State presented different evidence to support each count and walked the jury through that evidence in closing: count 1, J.M.'s first encounter in the office, count 2, J.M.'s encounter one week later in the heated garage, and count 3, E.M.'s first encounter on the futon. Even if E.M. vaguely described his subsequent sexual encounters with Sage, none could be confused with E.M.'s first encounter. As argued by the State in closing, E.M.'s first encounter on the futon, count 3, was necessarily separate and distinct from any of his subsequent encounters "after it

---

[33] RP (Apr. 8, 2016) at 759.

[34] RP (Apr. 8, 2016) at 755-56 (emphasis added).

[35] Appellant's Br. at 15.

first started"[36] which the jury may have relied on to support count 4.

After each elements instruction, the court instructed:

> The State of Washington alleges that the defendant committed acts of Rape of a Child in the Second Degree on multiple occasions. To convict the defendant on Count [I, II, III, IV] of Rape of a Child in the Second Degree, one particular act of Rape of a Child in the Second Degree 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 Rape of a Child in the Second Degree.[37]

The trial court did not give a separate and distinct act instruction, but it did instruct the jury to decide each count separately: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."[38]

In view of the prosecutor's election of separate and distinct events in closing, the victim's supporting testimony, the unanimity instructions given, together with separate to convict instructions for each count and the separate consideration instruction, we conclude it was manifestly apparent to the jury that the State was not seeking multiple convictions based on a single act. Sage does not establish a double jeopardy violation.

---

[36] RP (Apr. 8, 2016) at 755-56.

[37] CP at 54, 56, 58, 60.

[38] CP at 45; see Hayes, 81 Wn. App. at 439-40 (reasoning that the lack of a "separate and distinct" act instruction is not dispositive, "so long as the jury is instructed as to the unanimity requirement on each count and different evidence is introduced to support each count."); see Mutch, 171 Wn.2d at 663 (noting that a unanimity instruction helps to protect against a double jeopardy violation if it informs the jury that at least one particular act must be proved beyond a reasonable doubt for each count).

Evidentiary Challenges

(i) Uncharged Conduct

Sage contends the court improperly admitted allegations of uncharged acts, including uncharged acts occurring after the charging periods.

Before trial, the State moved to admit uncharged incidents of sexual behavior under ER 404(b). The State also moved to admit evidence that Sage and E.M. had sexual contact with Sage's dog.

We review the trial court's interpretation of ER 404(b) de novo as a matter of law.[39] If the trial court interprets ER 404(b) correctly, we review the ruling to admit or exclude evidence of misconduct for an abuse of discretion.[40] "A trial court abuses its discretion where it fails to abide by the rule's requirements."[41]

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character."[42]

The trial court must

> "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."[43]

---

[39] State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

[40] Id.

[41] Id.

[42] State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

[43] Id. at 421 (quoting State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

One proper purpose for admission of evidence of prior misconduct is to show a common scheme or plan.[44]

> There are two instances in which evidence is admissible to prove a common scheme or plan: (1) "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan" and (2) where "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes."[45]

Here, the trial court found by a preponderance of the evidence the misconduct in the form of sexual acts beyond the charging period actually occurred, identified the purpose of admitting the evidence, determined the relevance of the evidence to prove an element of the crime, and weighed its probative value against its prejudicial effect. Specifically, the court found the evidence to be "highly probative" because it went to "the heart of the nature of the State's case."[46] The court noted the jury would not likely "give undue prejudicial effect to this evidence."[47]

Sage also argues the trial court erred when it allowed testimony about the uncharged sexual activities with his dog. But the court acknowledged the potential for prejudice and admitted the evidence with specific limitations: "I first will exclude any evidence concerning the defendant having sexual contact with the dog *that did not occur in the context of the defendant also having sexual contact*

---

[44] Id.

[45] Id. at 421-22 (quoting State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995)).

[46] RP (Apr. 5, 2016) at 26.

[47] RP (Apr. 5, 2016) at 27.

with [E.M.]."[48] The court found by a preponderance of the evidence that the sexual contact with the dog did occur. The court concluded the limited evidence was admissible under the res gestae exception because it occurred in the immediate time frame of the instances of sexual abuse and it could also be characterized as part of the common plan, or grooming process,[49] and desensitizing E.M. to sexual acts.[50]

We conclude the trial court correctly applied ER 404(b), and its ruling to admit the evidence of misconduct was not an abuse of discretion.

(ii) E.M.'s Marijuana and Gun Evidence

Sage also contends he was denied the right to impeach his accuser when the trial court granted the State's motion to preclude evidence of E.M.'s marijuana use and access to firearms at his father's house. Sage suggests this evidence would rebut any implication that Sage introduced E.M. to illicit substances and guns. But E.M.'s exposure to those items at his father's house does not make a

---

[48] RP (Apr. 5, 2016) at 27 (emphasis added).

[49] State v. Quigg, 72 Wn. App. 828, 833, 866 P.2d 655 (1994) (grooming is "a process by which child molesters gradually introduce their victims to more and more explicit sexual conduct.").

[50] RP (Apr. 5, 2016) at 30-31; see State v. DeVincentis, 150 Wn.2d 11, 22, 74 P.3d 119 (2003) (evidence admitted under common scheme or plan exception included evidence that defendant walked around his house in front of preteen victims wearing nothing but "bikini or g-string underwear . . . to reduce the children's natural discomfort or negative reaction"); see State v. Krause, 82 Wn. App. 688, 697, 919 P.2d 123 (1996) (evidence of prior uncharged sex abuse of young boys was admissible to show a common scheme or plan to molest young boys).

material element of the crime more or less probable.[51] Neither do they call E.M.'s credibility into question.

Sage suggests his right to confrontation is also implicated. But he waived any confrontation clause arguments by failing to raise them in the trial court. In State v. O'Cain,[52] this court held confrontation clause objections must be raised in the trial court, as confirmed in Melendez-Diaz v. Massachusetts.[53]

> Thus, in Melendez-Diaz, the Supreme Court makes two things clear: (1) a defendant has the obligation to assert the right to confrontation at or before trial, in compliance with applicable trial court procedural rules, and (2) this obligation is part and parcel of the confrontation right itself, the parameters of which are based upon—and dependent upon—defendants being held to their obligation of timely assertion. In short, *the decision clearly establishes that, when a defendant's confrontation right is not timely assert, it is lost.*[54]

In O'Cain, the defendant raised a confrontation clause challenge to the admission of statements made by an absent witness.[55] This court concluded, "Because [the defendant] did not assert his confrontation clause objection at or before trial, he cannot obtain appellate relief on that claim."[56]

---

[51] See ER 401; RP (Apr. 8, 2016) at 674 ("So I would exclude any evidence of the photographs or other evidence of [E.M.] being in possession of a firearm at times other than what he's testified about or the matter that he testified about in his testimony."); RP (Apr. 8, 2016) at 676 ("And moving to the matter of marijuana, if . . . it was part of the res gestae, if you will, of the encounters that the defendant allegedly had with the alleged victims, then I believe I would need to permit that.").

[52] 169 Wn. App. 228, 279 P.3d 926 (2012).

[53] 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[54] O'Cain, 169 Wn. App. at 240 (emphasis added).

[55] Id. at 232.

[56] Id.

In O'Cain, this court also recognized ER 103 is a rule the State is allowed to adopt governing the exercise of confrontation clause objections.[57] Pursuant to ER 103(a)(1), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike is made, stating the *specific ground of objection*."[58] "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial."[59]

Here, Sage failed to argue in the trial court that the confrontation clause supported his request to admit evidence of E.M.'s use of marijuana in other settings and E.M.'s experience with his father's guns. He may not raise the confrontation argument for the first time on appeal.

(iii) Sage's Gun Ownership

Sage argues testimony about guns in his home was unduly prejudicial and should have been excluded.

There was limited testimony about guns in Sage's home. E.M. testified that at one point he contemplated suicide and there was a pistol at Sage's house with a "very loose lock on it."[60] E.M. said he contemplated suicide because he was not happy. E.M.'s father testified, "I knew [Sage] owned a firearm and I thought it

---

[57] Id. at 242-43 ("As noted in Melendez-Diaz, 'States may adopt procedural rules governing the exercise of such [confrontation clause] objections.' Washington's Evidence Rule (ER) 103 is one such rule.") (alteration in original) (quoting Melendez-Diaz, 557 US. at 314 n.3).

[58] Id. at 243.

[59] State v. Koepke, 47 Wn. App. 897, 911, 738 P.2d 295 (1987).

[60] RP (Apr. 8, 2016) at 652.

might result in a hostage situation."[61] But Sage failed to timely object. Sage failed to preserve this claimed error.

(iv) Pornography

E.M. testified that he and Sage would watch pornography together, which would lead to intercourse. Sage argues the evidence that he watched pornography and recorded sex acts with E.M. was unduly prejudicial, but Sage did not object to this testimony at trial. Sage may not raise this claimed error for the first time on appeal.

E.M. testified that Sage made video recordings of their sex acts. During the State's investigation, an Island County detective conducted a forensic examination of Sage's laptop. Sage's counsel and the State addressed the detective's testimony about the laptop and alleged videos of E.M. and Sage during motions in limine. The detective testified that during the investigation, they did not encounter any video recordings of these sex acts, but they found a laptop that was encrypted, therefore, they could not gain access to its files. Sage's counsel agreed to the admissibility of such testimony.[62]

---

[61] RP (Apr. 7, 2016) at 517.

[62] RP at 925-26 (Defense counsel said, "I actually spoke to Detective Wallace and Detective Peabody during interviews, and I have no objection with them testifying to what they've done . . . with computers and things of that nature. What I'm concerned about is them making expert opinion as to why it's encrypted."); see State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009) ("Defense counsel specifically agreed that the State could introduce testimony from [the defendant's roommate] regarding Powell's drug use on the day of the attempted burglary.").

Further, this evidence was germane to the State's theory of the case and the timeline of its investigation. We conclude the evidence's probative value outweighed any potential prejudicial effect and was properly admitted.

Sage's Motion for Mistrial

On the third day of trial, the State called E.M. as a witness.[63] The court reporter documented the following exchange:

> [STATE]: Next witness will be [E.M.], Your Honor. . . .
>
> [COURT]: All right.
>
> (Witness enters the well of the courtroom, leans over, and glares at Defendant while walking in to be sworn.)[64]

Defense counsel objected and moved for a mistrial, characterizing the exchange as

> [E.M.] walked past defense counsel and hissed at the Defendant, bent down, and made an aggressive stare. As best as I could tell, the jurors looked horrified. Their reaction is clear that the stance or that moment is going to live in their minds as opposed to what he testifies to. My client has a right to a fair trial, to be presumed innocent, [ ] and I don't know that he can get a fair trial with this jury after that behavior.[65]

The trial court sustained the objection but denied the motion for mistrial, ruling

> [t]he next witness, who I presume is [E.M.], walked into the courtroom, came through the door of the bar, as it were. And as he did so, turned his head so as to look in the direction of the Defendant. He kind of craned his neck toward the Defendant and appeared to be staring at the Defendant for a couple of seconds.

---

[63] RP at 573.

[64] RP at 573.

[65] RP at 574.

> [Defense counsel] made an objection at that point. And at that point, the Court took a recess without ruling on the objection.[66]

The court also noted, "I personally did not hear any hissing. I did not particularly observe the jurors' reactions except when I looked over at them after hearing the word 'objection' from [defense counsel]. I did not observe personally any untoward reactions on the part of the jury at that point."[67] The court gave a curative instruction agreed to by Sage's counsel.[68]

Sage argues his motion for a mistrial should have been granted because E.M.'s courtroom behavior prejudiced the jury.

We review the denial of a motion for mistrial for abuse of discretion.[69] The trial court should only grant a mistrial "when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried."[70] To determine the effect of the irregularity, we examine: (i) its seriousness; (ii) whether it involved cumulative evidence; and (iii) whether the trial court properly instructed the jury to disregard it.[71]

---

[66] RP at 575-76.

[67] RP at 576.

[68] "Ladies and gentlemen of the jury, I instruct you to disregard the events that occurred just prior to the last recess involving the next witness coming into the courtroom and what you may have observed in that regard." RP (Apr. 7, 2016) at 578.

[69] State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

[70] Id. at 764.

[71] Id.

In State v. Emery, our Supreme Court held the defendant was not entitled to a mistrial because his codefendant's courtroom outbursts that Emery was "lying"[72] were not the type of irregularities that have warranted mistrials in other cases, such as a police officer's sworn testimony about a defendant's past crimes,[73] (ii) the outbursts were consistent with his later testimony, and (iii) the trial court excused the jury and properly instructed it to disregard the outbursts.[74] And in State v. Bourgeois, our Supreme Court held two instances of spectator misconduct, glaring and making gun-mimicking gestures toward witnesses, though serious, did not warrant a new trial.[75]

Here, E.M. entered the courtroom and glared at Sage. The trial court denied Sage's motion for mistrial and entered a detailed ruling on the record. Unlike a verbal outburst or threatening gesture, E.M. glared at Sage. The court gave a curative instruction. E.M. did not repeat the behavior after the trial court instructed the jury to disregard the behavior. We conclude the trial court did not abuse its discretion.

Community Custody Conditions

Sage argues unconstitutionally vague or impermissible community custody conditions must be stricken. The State concedes the following conditions should

---

[72] 174 Wn.2d 741, 750, 278 P.3d 653 (2012).

[73] Id. at 765-66 (discussing State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968)).

[74] Id. at 766.

[75] 133 Wn.2d 389, 411, 945 P.2d 1120 (1997).

be vacated: (i) condition 6 restricting daily travel at the community corrections officer's discretion, (ii) condition 12 prohibiting possession of drug paraphernalia, (iii) condition 15 prohibiting any Internet access, and (iv) condition 18 requiring Sage to participate in substance abuse treatment. We agree these conditions are unconstitutionally vague or insufficiently crime related, and thus should be stricken on remand.

Statement of Additional Grounds for Review

In a statement of additional grounds, Sage argues the absence of the separate and distinct act jury instruction violated double jeopardy. But as discussed, this argument fails. He also makes various arguments about J.M. and E.M.'s credibility, but those determinations are for the trier of fact.

Exceptional Sentence

Sage argues the trial court judge engaged in prohibited fact finding regarding the exceptional sentence, violating his right to trial by jury.

The Sixth Amendment to the United States Constitution guarantees criminal defendants a right to trial by jury. Seventeen years ago, the United States Supreme Court directed that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[76] Thirteen

[76] Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

years ago, the United States Supreme Court reaffirmed the prohibition on judicial fact finding in enhanced sentencing hearings.[77]

A series of statutory amendments and Washington cases have addressed the standards for exceptional sentences consistent with a defendant's constitutional right to jury trial.

RCW 9.94A.537(3) directs that "[t]he facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." RCW 9.94A.537(6) provides that if a jury unanimously finds beyond a reasonable doubt the existence of "one or more of the facts alleged by the state in support of an aggravated sentence," the court may impose an exceptional sentence "*if it finds*, considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence."[78] RCW 9.94A.535 authorizes a court to impose an exceptional sentence *"if it finds* . . . there are substantial and compelling reasons justifying an exceptional sentence."[79]

Washington cases recognize that once the jury by special verdict makes the factual determination whether aggravating circumstances have been proven beyond a reasonable doubt, "[t]he trial judge [is] left only with the legal conclusion

---

[77] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[78] (Emphasis added.)

[79] (Emphasis added.)

of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence."[80] Sage disputes this authority, arguing a judge's determination whether an aggravating circumstance is substantial and compelling necessarily involves factual questions. While the authority he disputes is plentiful and longstanding, a fog lingers.

Despite the seemingly clear delineation of the limited role of the judge to determine whether jury findings are sufficiently substantial and compelling to warrant an exceptional sentence, sentencing judges face uncertainty. Not only do the statutes continue to refer to "findings" to be made by the judge on exceptional sentences,[81] our Supreme Court in State v. Friedlund emphasized that written rather than oral findings of fact by the judge are "essential" for an exceptional sentence.[82]

---

[80] State v. Suleiman, 158 Wn.2d 280, 290-91 & 291 n.3, 143 P.3d 795 (2006) ("In the context of discussions about standard of review, this court has held that whether a court's stated reasons are sufficiently substantial and compelling to support an exceptional sentence is a question of law. [State v. Cardenas, 129 Wn.2d 1, 6 n.1, 914 P.2d 57 (1997);] State v. Chadderton, 119 Wn.2d 390, 399, 832 P.2d 481 (1992); State v. Grewe, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991); State v. Nordby, 106 Wn.2d 514, 418, 723 P.2d 1117 (1986). In contrast, whether an aggravating factor is present in a particular case, in other words, whether a stated reason is supported by the record, is a factual determination. Nordby, 106 Wn.2d at 517-18; see also Cardenas, 129 Wn.2d at 5 (applying a clearly erroneous standard to this question); State v. Fisher, 108 Wn.2d 419, 423, 739 P.2d 683 (1987); State v. Woody, 48 Wn. App. 772, 776, 742 P.2d 133 (1987). Thus, whether a particular aggravating factor is supported by the record is a question of fact, while the question of whether the found factors are sufficiently substantial and compelling is a matter of law.").

[81] RCW 9.94A.535; RCW 9.94A.537(6).

[82] 182 Wn.2d 388, 393-95, 341 P.3d 280 (2015).

The only permissible "finding of fact" by a sentencing judge on an exceptional sentence is to confirm that the jury has entered by special verdict its finding that an aggravating circumstance has been proven beyond a reasonable doubt.[83] Then it is up to the judge to make the legal, not factual, determination whether those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence.

Here, the jury entered special verdict forms setting out specific findings that the aggravating circumstances had been proven beyond a reasonable doubt. The court made "findings of fact" noting that those special verdicts had been entered. Then the judge concluded that the jury findings presented "substantial and compelling" grounds for an exceptional sentence. Notably, at sentencing, the court recited the evidence that supported the jury findings. The court considered the purposes of the Sentencing Reform Act of 1981 and imposed an exceptional sentence, setting forth its written "findings of fact and conclusions of law" for an

---

[83] Whether a jury has entered a special verdict and the contents of the special verdict is normally apparent from the record on appeal, but it is not inappropriate for a judge to identify the process relied on in arriving at a decision. Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994) ("The purpose of findings of fact is to ensure that the decision maker 'has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved' and the appellate court 'may be fully informed as to the bases of his [or her] decision when it is made.' Findings must be made on matters 'which establish the existence or nonexistence of determinative factual matters. The process used by the decision maker should be revealed by findings of fact and conclusions of law.") (alterations in original) (quoting In re LaBelle, 107 Wn.2d 196, 218-19, 728 P.2d 138 (1986)).

exceptional sentence as an appendix to the judgment and sentence.[84] It also found the exceptional sentence was "justified by each and every one of the special verdicts."[85] We conclude the trial court properly analyzed and articulated the basis for the exceptional sentence without engaging in prohibited fact finding.[86]

Finally, Sage argues that the State did not give adequate notice that the aggravating circumstances could be based on acts occurring outside the charging period and that the jury was permitted to find aggravating circumstances without unanimously agreeing the aggravating circumstances occurred within the charging period. But the premise of his argument is inaccurate. Inherent in each of the statutory aggravating circumstances is the requirement that the circumstances were part of the commission of the crime charged.[87] And the jury was instructed

---

[84] Clerk's Papers at 25-26.

[85] RP (May 12, 2016) at 882.

[86] Sage cites the United States Supreme Court decision in Hurst v. Florida, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) in support of his argument that the judge engaged in prohibited fact finding. In Hurst, the Supreme Court held Florida's death penalty procedure violated the defendant's Sixth Amendment right to a jury trial because the jury's findings of aggravating factors were advisory, resulting in prohibited fact finding by the judge. But the Florida statute at issue expressly stated that the jury findings were "advisory." FLA. STAT. § 921.141 (2004). By contrast, under Washington procedure here, the jury exclusively resolves the factual question whether the aggravating circumstances have been proven beyond a reasonable doubt.

[87] Here, the jury answered "Yes" to special verdict form inquiries regarding special aggravating circumstances found in RCW 9.94A.535(3)(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)(j) ("The defendant knew that the victim of the current offense was a youth not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization."), and

they had to be unanimous beyond a reasonable doubt as to each of the aggravating factors. Sage relies on cases that do not apply to these facts, these instructions, and these aggravating circumstance special verdict forms.[88]

We also reject Sage's argument of cumulative error because there were not multiple errors capable of a cumulative impact.

We affirm and remand with instructions to strike community custody conditions 6, 12, 15, and 18.

WE CONCUR:

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

[88] Sage cites State v. Williams-Walker, 167 Wn.2d 889, 897-98, 225 P.3d 913 (2010) (limits exceptional sentence to the findings by the jury) and State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (bars charging under one alternative means but instructing on another).

APPENDIX B

FILED
4/4/2018
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. JONATHAN SAMUEL SAGE Appellant.	No. 75279-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND CORRECTING OPINION

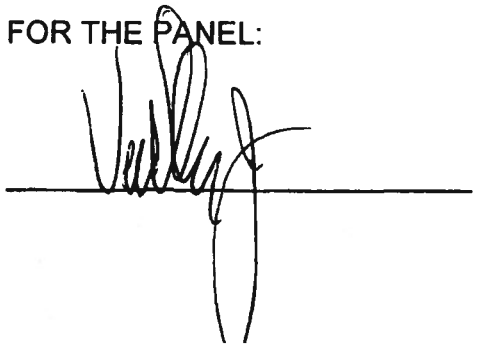
Appellant filed an amended motion for reconsideration of the court's December 18, 2017 opinion. At the request of the court, respondent filed an answer thereto. Having considered the motion and answer, the panel has determined the motion for reconsideration should be denied, but that the opinion should be corrected on page 18 as follows. In the first sentence of the second paragraph, "E.M. testified that Sage made video recordings," change "Sage" to "he." No further changes should be made. Now, therefore, it is hereby

ORDERED that appellant's amended motion for reconsideration is denied.

It is further

ORDERED that the December 18, 2017 opinion shall be corrected as noted above.

FOR THE PANEL:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75279-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Gregory Banks, DPA
Island County Prosecutor's Office
[ICPAO_webmaster@co.island.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 4, 2018

WASHINGTON APPELLATE PROJECT

May 04, 2018 - 4:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75279-1
Appellate Court Case Title:	State of Washington, Respondent v. Jonathan Samuel Sage, Appellant
Superior Court Case Number:	15-1-00078-1

The following documents have been uploaded:

- 752791_Motion_20180504164539D1404458_4827.pdf
  This File Contains:
  Motion 1 - Waive - Page Limitation
  The Original File Name was washapp.050418-10.pdf
- 752791_Petition_for_Review_20180504164539D1404458_4506.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.050418-11.pdf

A copy of the uploaded files will be sent to:

- ICPAO_webmaster@co.island.wa.us
- avi@bmclawyers.net
- greg@washapp.org
- gregb@co.island.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180504164539D1404458