67558-3

67558-3

NO. 67558-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent and Cross-Appellant,

v.

OLIVER WEAVER,

Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT AND CROSS-APPELLANT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
And Cross-Appellant

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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D. STATEMENT OF THE CASE

1. THE TRIAL AND FIRST SENTENCING

In December of 2002, defendant Oliver Weaver raped 13-year-old R.T. State v. Weaver, 140 Wn. App. 349, 351, 166 P.3d 761 (2007), rev'd, 171 Wn. 2d 256, 251 P.3d 876 (2011). R.T., fearful of Weaver, did not report the rape until she discovered that she was pregnant. Id. She aborted the fetus, and DNA testing confirmed that Weaver was the father. Id. at 351-52.

The State charged Weaver with one count of second-degree rape of a child and one count of second-degree rape by forcible compulsion. CP 5-6. The State gave notice that it would seek an exceptional sentence based upon the aggravating circumstance

that the offense resulted in the pregnancy of a child victim of rape. CP 15-16. In February of 2005, a jury found Weaver guilty on both counts and found the aggravating circumstance. CP 165-67.

At sentencing, the court treated the two convictions as the same criminal conduct, and the court calculated Weaver's offender score as two, based upon his two prior second-degree burglary convictions. CP 20. Weaver was subject to indeterminate sentencing under RCW 9.94A.507 (former RCW 9.94A.712). On both counts, the court imposed the maximum sentence of life and a minimum term exceptional sentence of 250 months. CP 23.

2. THE FIRST APPEAL

On appeal, Weaver claimed that (1) the trial court erred by failing to grant him a continuance of trial, (2) the State failed to meet its burden in proving his offender score, and (3) the trial court lacked authority to impose an exceptional sentence. See Appellant's Opening Brief dated December 19, 2006, State v. Weaver, No. 57691-7-I.[1] In his reply brief, Weaver conceded this

[1] The transcripts of the first trial and the briefing from the first appeal are not currently part of the record in this appeal. The State has filed a motion to supplement the record with this material.

last issue and acknowledged that "the exceptional sentence is permitted pursuant to [former] RCW 9.94A.712." Appellant's Reply Brief dated April 2, 2007 at 12, State v. Weaver, No. 57691-7-I.

This Court affirmed Weaver's convictions and sentence. Opinion, State v. Weaver, No. 57691-7-I. Weaver petitioned for review raising two issues: the calculation of his offender score and the denial of the continuance. Petition for Review, State v. Weaver, No. 57691-7-I. On July 8, 2009, the Washington Supreme Court granted Weaver's petition in part and remanded to the Court of Appeals for reconsideration of the offender score issue. CP 32. Upon remand, Weaver attempted to raise a new issue: that his convictions for second-degree rape of a child and one count of second-degree rape violated double jeopardy. CP 35. This Court affirmed Weaver's sentence and refused to consider the double jeopardy claim. CP 35.

Weaver petitioned for review again, and the Supreme Court granted the petition. With respect to the offender score issue, the court held that Weaver had not acknowledged his criminal history and remanded the case to the superior court for resentencing. CP 34-35. The court observed that the Court of Appeals had

properly declined to rule on the double jeopardy issue, but indicated that Weaver could raise the issue at his resentencing. CP 35.

3. THE SECOND SENTENCING

Prior to resentencing, Weaver filed a brief requesting a continuance and indicating that he intended to raise numerous issues challenging his convictions and exceptional sentences, including a challenge to the "special verdicts on counts one and two." CP 99-103. The State objected, arguing that the only issues properly before the trial court were Weaver's criminal history and double jeopardy. Supp. CP ___ (Sub No. 234). Prior to the hearing, the trial court indicated to the parties that it would not continue the hearing and would not hear Weaver's motions. RP 4.

At the resentencing, the State again argued that Weaver's offender score was two based upon his two prior burglaries. The State provided the computer dockets for Weaver's misdemeanor criminal history in order to establish that his prior felony convictions did not wash out. CP 48-49, 70-87; Ex. 6-9. At the hearing, Weaver objected to the proof of his misdemeanors because there were no judgment and sentences. RP 5-6. The trial court accepted

the computer dockets as proof of Weaver's misdemeanor convictions and determined his offender score to be two. RP 16.

Weaver also argued that his two convictions violated double jeopardy and asked the court to vacate one count. CP 134-36. The State argued that the two convictions did not violate double jeopardy but acknowledged that they constituted the same criminal conduct under RCW 9.94A.589. CP 48-49, 97-98. With little explanation, the court held that the two convictions violated double jeopardy. RP 16-17. After some debate over whether a count should be vacated, the court decided to not impose sentence on the second-degree rape of a child count. RP 17-26, 36-40.

Weaver then argued that the court could not impose an exceptional sentence on the second-degree rape conviction because it was unclear that the jury's finding of the aggravating circumstance applied to that count. RP 23-25. The court rejected this argument, noting that there was only one instance of rape and only one pregnancy that resulted from both crimes. RP 23.

The trial court reimposed the same sentence on the second-degree rape conviction: a maximum sentence of life and a minimum term exceptional sentence of 250 months. RP 37; CP 40.

E. ARGUMENT ON CROSS-APPEAL

1, THE TRIAL COURT ERRED BY HOLDING THAT WEAVER'S CONVICTIONS VIOLATED DOUBLE JEOPARDY.

The trial court erred by holding that Weaver's convictions for second-degree rape and second-degree rape of a child violated double jeopardy. The crimes are not the same in law; both have unique elements. In a thorough and well-reasoned opinion, Division II recently held that convictions for first-degree rape based upon forcible compulsion and second-degree rape of a child do not violate double jeopardy. This Court should join in that holding and remand for the trial court to impose sentence on Weaver's second-degree rape of a child conviction.

A defendant's conduct may violate more than one criminal statute, and double jeopardy is only implicated when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The Washington Supreme Court has set forth a three-part test for determining whether multiple punishments were intended by the legislature. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005). First, the court examines the language of the relevant statutes to determine

whether the legislation expressly permits or disallows multiple punishments. Id. at 771-72. Should this step not result in a definitive answer, the court then turns to the two-part "same evidence" or "Blockburger"[2] test, which asks whether the offenses are the same "in law" and "in fact." Id. at 772. If each offense includes an element not included in the other, then the offenses are not the same in law under this test. Calle, 125 Wn.2d at 777. Finally, if applicable, the court considers the merger doctrine. Freeman, 153 Wn.2d at 772-73.

Here, the relevant statutes do not expressly permit punishment for the same act, and therefore, the crimes must be analyzed under the same evidence test. State v. Hughes, 166 Wn.2d 675, 682, 212 P.3d 558 (2009). The crimes are the same in fact because they were based upon the same act. However, the crimes are not the same in law because each crime has an element not included in the other. The crime of second-degree rape, as charged, required evidence of forcible compulsion. CP 5-6. The crime of second-degree rape of a child required proof that the victim was 12 or 13 years old and the defendant was at least three

[2] United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

years older than the victim. CP 5. Accordingly, the crimes are not the same in law.

In his briefing to the trial court, Weaver cited State v. Hughes, supra, as support for his claim that the two convictions violated double jeopardy. CP 135-36. Like Weaver, Hughes was convicted of second-degree rape of a child and second-degree rape. However, Hughes's second-degree rape conviction was based upon a different alternative means. The State did not allege forcible compulsion; instead, Hughes was convicted under the alternative means that the victim was unable to consent by reason of being physically helpless or mentally incapacitated. Id. at 682. After reviewing the elements of the crimes, the Supreme Court concluded that they were the same in law and that convictions for both crimes violated double jeopardy. Id. at 683-84. Though the elements of the crimes "facially differ[ed]," the court emphasized that "both statutes require proof of nonconsent because of the victim's status." Id. at 684.

In this case, Weaver's second-degree rape conviction was based upon the alternative means of forcible compulsion, which has nothing to do with the victim's status. Division II recently held that this distinction was significant under a double jeopardy

analysis. In State v. Smith, 165 Wn. App. 296, 266 P.3d 250 (2011), the court held that convictions for second-degree child rape and first-degree rape based upon forcible compulsion did not violate double jeopardy. The court first observed that the crimes were not the same in law because their elements differed. Id. at 320. The court then distinguished Hughes, explaining, "Hughes concerned second degree child rape and non-forcible compulsion second degree rape. But where forcible compulsion is a requirement of the rape offense compared to a rape offense without a forcible compulsion element, there is no clear legislative intent that multiple convictions from the same act of intercourse cannot stand." Id. at 322-23. The court concluded, "To hold that the legislature intended to treat forcible rape and rape based on a victim's inability to consent as equivalent, without some clear expression of that legislative intent, would fail to acknowledge profound distinctions between statutory elements of force and victim status." Id. at 323.

Under the logic of Smith, the trial court erred by holding that Weaver's convictions for second-degree rape and second-degree rape of a child violated double jeopardy. This Court should remand

to the trial court with instructions to impose sentence on Weaver's second-degree rape of a child conviction.[3]

F. ARGUMENT ON APPEAL

1. IF WEAVER'S CONVICTIONS VIOLATE DOUBLE JEOPARDY, THE TRIAL COURT SHOULD VACATE ONE CONVICTION.

Weaver complains that the trial court included his second-degree rape and second-degree rape of a child convictions in the judgment and sentence, although the court had held that the multiple convictions violated double jeopardy. The State has appealed that ruling, and if this Court reverses the trial court's double jeopardy decision, this issue is moot. Otherwise, the State agrees that the trial court should vacate the second-degree rape of a child conviction and amend the judgment and sentence to avoid any reference to that conviction. State v. Turner, 169 Wn.2d 448, 160 P.3d 40 (2007).

[3] The State has already agreed that Weaver's convictions constitute the same criminal conduct, and, therefore, Weaver's offender score and sentence on the second-degree rape conviction will remain unaffected.

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2. WEAVER'S CHALLENGES TO THE EXCEPTIONAL SENTENCE AGGRAVATING CIRCUMSTANCE ARE TOO LATE AND WITHOUT MERIT.

In this appeal of his resentencing hearing, Weaver offers several new arguments challenging the aggravating circumstance supporting his exceptional sentence. He argues that (1) the trial court lacked statutory authority to submit the aggravating circumstance to the jury at his 2005 trial, (2) the aggravating circumstance does not apply to the crime of second-degree rape of a child, (3) the jury instructions did not ensure that the jury unanimously found the aggravating circumstance for a particular count, and (4) the jury instruction failed to advise the jury that they did not need to be unanimous to answer "no" to the special verdict. Weaver made only one of these arguments in his first appeal, the claim that the trial court lacked authority to submit the aggravating circumstance, and he then abandoned it. Because the propriety of the exceptional sentence aggravating circumstance was not at issue at the resentencing hearing, this Court should hold that Weaver may not raise these issues now. Should this Court choose to address these challenges, it should reject them as meritless for the reasons set forth below.

a. Weaver May Not Challenge The Aggravating Circumstance In His Second Appeal.

This is Weaver's *second* appeal, and it is an appeal of his 2011 resentencing hearing. Weaver's challenges to the aggravating circumstance were not pursued in his first appeal, and the case was remanded for the resentencing hearing in order to address issues about Weaver's criminal history. Weaver cannot assert new claims of *trial* error that were not properly before the trial court at the resentencing hearing. This Court should dismiss Weaver's claims of error.

State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) controls Weaver's claim. In Barberio, the trial court imposed exceptional sentences on Barberio's two convictions. In his first appeal, Barberio succeeded in having one conviction reversed; however, he did not challenge the exceptional sentences. Id. at 49. After the trial court again imposed an exceptional sentence on the remaining count, Barberio challenged the exceptional sentence in his second appeal. Id. at 49-50.

The Washington Supreme Court upheld this Court's dismissal of the appeal. The court first cited RAP 2.5(c)(1), which provides: "If a trial court decision is otherwise properly before the

appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." Id. at 50. However, the court limited this rule as follows:

> This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

Id. The court held that Barberio could not challenge the exceptional sentence in his second appeal because at the resentencing hearing the trial court did not independently reconsider the grounds for the exceptional sentence. Id. at 51-52.

The appellate courts have repeatedly reaffirmed the rule in Barberio. Most recently, the Supreme Court has held that even an intervening change in the law does not create an exception to this rule. State v. Kilgore, 167 Wn.2d 28, 35-43, 216 P.3d 393 (2009).

The Supreme Court has further recognized that a resentencing hearing that is ordered to correct an offender score does not reopen challenges to the basis for an exceptional sentence. In State v. Rowland, __ Wn.2d __, 272 P.3d 242 (2012), the defendant was convicted of first-degree murder in 1991, and

the trial court found the deliberate cruelty aggravating circumstance and imposed an exceptional sentence. More than 15 years later, a resentencing hearing was required due to an error in the defendant's offender score.

At the new sentencing hearing, the defendant attempted to challenge his exceptional sentence under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the judge, not a jury, had found the aggravating circumstance. Rowland, 272 P.3d at 243. The trial court rejected the argument, did not reconsider the factual findings supporting the exceptional sentence, and imposed the same exceptional sentence. Id. at 244. The Supreme Court held that the trial court properly rejected the Blakely challenge because the resentencing hearing did not reopen a challenge to the exceptional sentence:

> The trial court on remand did not redecide the justification for the exceptional sentence, and the change to Rowland's standard range left the justification intact. In essence, no new exceptional sentence was imposed since only the standard range was corrected.

Rowland, 272 P.3d at 244.

Similarly, in this appeal of his 2011 resentencing hearing, Weaver cannot challenge the procedures employed and the jury

instructions given in his 2005 trial. Weaver did not pursue these issues in his original appeal, and the case was remanded for resentencing due to an offender score issue. The issues about Weaver's criminal history did not reopen possible challenges to the exceptional sentence aggravating circumstance. In this case, as in Rowland, the trial court did not reconsider the basis for the aggravating circumstance and reimposed the same exceptional sentence. Because the propriety of the trial procedures and jury instructions were not properly before the trial court at the resentencing hearing, this Court should dismiss Weaver's claims of error.

Nevertheless, should this Court choose to address the various challenges Weaver now makes to his exceptional sentence, it should reject them as meritless. Each claim is discussed below.

b. The Trial Court Could Impose The Exceptional Sentence Regardless Of The Jury Finding.

Weaver argues that he is entitled to reversal of his exceptional sentence because the trial court lacked statutory authority to submit the aggravating circumstance to the jury. He notes that the legislature did not amend the Sentencing Reform Act

to allow for a jury finding of an aggravating circumstance until after his trial. He argues that the jury finding in his case is not valid because the Washington Supreme Court held that, prior to the effective date of these amendments, the trial court lacked authority to submit aggravating circumstance to the jury. State v. Doney, 165 Wn.2d 400, 198 P.3d 483 (2008).

Weaver made this claim in his first appeal and then abandoned it, admitting that the jury finding was not required. Appellant's Reply Brief dated April 2, 2007 in State v. Weaver, No. 57691-7-I. This concession was proper; Weaver's challenge to his exceptional sentence fails because a *jury* finding of the pregnancy aggravating circumstance was not required in order to justify imposition of the exceptional sentence.

The flaw in Weaver's argument is due to the fact that he was subject to indeterminate sentencing under RCW 9.94A.507. That statute requires the sentencing court to impose a maximum term consisting of the statutory maximum and an exceptional sentence or standard range minimum term. RCW 9.94A.507(3). The trial in this case occurred after the United States Supreme Court's decision in Blakely, and the State, in the exercise of caution, requested a jury finding on the aggravating circumstance. RP(trial)

328-31. However, this jury finding was not legally required. After Weaver's trial, the Washington Supreme Court held that a defendant does not have a constitutional right to a jury finding for an aggravating circumstance supporting a minimum term exceptional sentence under RCW 9.94A.507. State v. Clarke, 156 Wn.2d 880, 886-92, 134 P.3d 188 (2006).

Accordingly, the trial court was entitled to rely upon the fact that Weaver impregnated R.T. without any jury finding.[4] In this case, there is no question that the judge found that Weaver caused her to become pregnant. At the first sentencing hearing, the judge stated:

> The sentence I'm imposing is an exceptional sentence and it is based upon the severity of the crime. Mr. Weaver saw a young girl walking down the street, invited her in to work for him, for his family and at his business, in a process we would all recognize as grooming. *Ultimately he forcibly raped her with a handgun, what she believed to be a handgun, pointed at her head. She became pregnant and at a very young age had to terminate her pregnancy.* And the effects on her have been profound and truly terrible.

RP(trial) 381 (emphasis added). The trial court found that R.T.'s pregnancy was a substantial and compelling reason to impose an

[4] The fact that R.T. was pregnant was never in dispute. The defense was identity: that Weaver was not responsible for the pregnancy. Supp. CP ___ (Sub No. 157); RP(trial) 351-63.

exceptional sentence and imposed a minimum term exceptional sentence double the top end of the standard range. CP 16, 37-40. In light of these facts and the trial court's finding, Weaver's challenge lacks merit.

c. The Aggravating Circumstance Applies To Second-Degree Rape Of A Child.

Weaver also argues that the pregnancy aggravating circumstance does not apply to the crime of second-degree rape of a child, claiming that the facts of the aggravator are also elements of the crime.[5] This claim is incorrect; the pregnancy aggravating circumstance requires more than just the elements of second-degree rape of a child. Moreover, it is obvious that the legislature intended that this aggravating circumstance apply to child rapes, and Weaver's interpretation runs clearly contrary to legislative intent.

The relevant aggravating circumstance is that "[t]he offense resulted in the pregnancy of a child victim of rape." RCW 9.94A.535(3)(i); former RCW 9.94A.535(2)(k). Contrary to Weaver's claim, this aggravating circumstance requires more than proof that

[5] Should this Court affirm the trial court's dismissal of Weaver's second-degree rape of a child conviction, this issue would be moot.

the victim was a child. It requires proof that as a result of the rape, the victim became pregnant. The premise of Weaver's claim is simply inaccurate.

The authorities cited by Weaver are inapposite. In State v. Stubbs, 170 Wn.2d 117, 124-31, 240 P.3d 143 (2010), the Supreme Court held that particularly severe injuries could not justify an exceptional sentence on a first-degree assault conviction because an element of the crime was proof of great bodily harm, and therefore, severe injuries were already contemplated by the legislature in setting the standard range. See also State v. Ferguson, 142 Wn. 2d 631, 648, 15 P.3d 1271 (2001) (holding that exposing another person to HIV with intent to do bodily harm leaves no room for an additional finding of deliberate cruelty as justification for an exceptional sentence.).

Here, the legislature did not contemplate, when setting the standard range for the offense of child rape, that the victim would necessarily become pregnant. Rather, it is obvious that the legislature enacted this aggravating circumstance to allow for additional punishment when the child victim also became pregnant. This aggravator applies to child rapes.

d. The Special Verdict Instruction Properly Stated The Requirement For Jury Unanimity.

Weaver makes two challenges to the special verdict jury instruction relating to unanimity: (1) he claims that the special verdict jury form did not ensure that the jury unanimously found that the aggravating circumstance applied to a particular count, and (2) citing State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), he argues that the special verdict jury instruction failed to advise the jury that they did not need to be unanimous to answer "no" to the special verdict.

As discussed above, the jury finding of the aggravating circumstance was not required in order to justify Weaver's exceptional sentence, and, therefore, any possible error in the jury instructions with respect to the aggravating circumstance is harmless.

In addition, under RAP 2.5(a)(3), neither claim is preserved on appeal because Weaver did not raise them when discussing the jury instructions. RP(trial) 328. In his briefing, Weaver does not attempt to explain why he can raise these issues for the first time

on appeal.[6] As discussed below in addressing the merits of the claims, Weaver cannot show that either asserted error had practical and identifiable consequences in the trial of the case. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). This Court should hold that they are not preserved.

Assuming Weaver may raise the issues, his first complaint is that the special verdict form did not ensure that the jury unanimously found the aggravating circumstance with respect to a particular count. He notes that the verdict form asked "Did the defendant impregnate R.T. as a result of the commission of the crime in either count one *or* count two." CP 165 (emphasis added).

However, as the trial court observed when Weaver's counsel raised this issue at the resentencing hearing, the two convictions were based upon the same act of intercourse. It is not possible that

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[6] With respect to the Bashaw issue, there is a split of authority in the Court of Appeals as to whether a Bashaw claim presents a constitutional issue that can be raised for the first time on appeal. Divisions II and III have held that a defendant may not assert a Bashaw claim for the first time on appeal. State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011); State v. Nunez, 160 Wn. App. 150, 157-63, 248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011). Judges in Division I are split on the issue. State v. Morgan, 163 Wn. App. 341, 350, 261 P.3d 167 (2011); State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011). The Washington Supreme Court has accepted review of Nunez and Ryan, consolidated the two cases, and will likely resolve this split of authority. In the meantime, this Court should hold that Weaver cannot raise this issue for the first time on appeal.

a juror might have believed that R.T. became pregnant as the result of the second-degree rape of a child but did not become pregnant during the second-degree forcible rape. Given the facts of this case, the jury must have unanimously found the aggravating circumstance on each count.

Weaver also raises a Bashaw challenge to the special verdict instruction. However, the aggravating circumstance jury instructions in Weaver's case do not contain the same error that was present in Bashaw. In Bashaw, the special verdict form for the sentencing enhancement affirmatively told the jury that it must be unanimous to answer no. In holding that this instruction was incorrect, the Supreme Court stated that it was reaffirming the rule that it had previously adopted in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003): that a nonunanimous jury decision on a special verdict is a final determination that the State has failed to meet its burden of proof. Bashaw, 169 Wn.2d at 146.

In Weaver's case, the jury was instructed with the instruction used and approved in Goldberg. This instruction stated only that the jury needed to be unanimous to answer "yes."

> In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a

reasonable doubt as to the question, you must answer "no".

CP 183. In Goldberg, the Washington Supreme Court held that this same instruction did not require unanimity for a negative answer. 149 Wn.2d at 893. Accordingly, Weaver's Bashaw claim is without merit.

e. The Remedy Is Retrial On The Aggravating Circumstance.

Weaver suggests that he is entitled to resentencing without the aggravating circumstance should he prevail on any of his challenges to his exceptional sentence. This is incorrect. RCW 9.94A.537(2) provides, "In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing." This statute permits the State to reprove aggravating circumstance at a new sentencing hearing. Should this Court conclude that Weaver is entitled to relief, the Court should remand for a new sentencing hearing on the aggravating circumstance.

3. THE TRIAL COURT PROPERLY DETERMINED WEAVER'S OFFENDER SCORE.

Finally, Weaver challenges his offender score, claiming that the State failed to adequately prove his prior misdemeanor convictions. Citing out-dated authority, Weaver argues that the State was required to prove that the computer dockets of Weaver's misdemeanor convictions were the best evidence available, and that the State failed to do so. In fact, the Supreme Court has recognized that the evidence offered by the State in this case is sufficient to prove the existence of misdemeanor convictions.

At sentencing, the State alleged that Weaver had the following convictions:

CONVICTION	COURT	DATE
Second-degree burglary	Pierce County Superior Court	6/10/81
Second-degree burglary	Thurston County Superior Court	3/19/85
Driving While License Suspended	Seattle Municipal Court	1/27/87
Driving While License Suspended	Seattle Municipal Court	2/8/90
No Valid Driver's License	Ferndale Municipal Court	3/4/94
Driving While License Suspended	Seattle Municipal Court	5/6/96

CP 70-87.

The prosecutor provided judgment and sentences for the burglary convictions and the computer dockets for the misdemeanor convictions. Id. The State alleged that Weaver's offender score was two, based upon the two prior burglary convictions; Weaver's misdemeanor convictions prevented the burglary convictions from washing out. CP 48-49.

At the sentencing hearing, Weaver argued that the dockets provided by the State were not sufficient evidence for the court to find the existence of his misdemeanor convictions. RP 5-6. The prosecutor explained that Seattle Municipal Court and Ferndale Municipal Court retain judgment and sentences for "a very short period of time," but that they kept their computer dockets indefinitely. RP 10. The trial court accepted these dockets as proof of Weaver's convictions, noting that the information on the dockets was also consistent with Weaver's DOL driver's license. RP 16.[7]

On appeal, citing State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) and State v. Chandler, 158 Wn. App. 1, 240 P.3d 159 (2010), Weaver argues that the State was required to establish that the computer dockets were the best evidence available and the

[7] The dockets contain the same name, birthdate, address and driver's license number as Weaver's driver's license. Sentencing Ex. 1, 6-9.

prosecutor's statement about the availability of judgment and sentences for the crimes was insufficient to do so. Weaver's argument is seriously flawed, given that the authority he cites was subsequently disavowed by the Washington Supreme Court in In re Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010). In light of Adolph, the dockets submitted in Weaver's case were clearly sufficient to establish the existence of his prior misdemeanor convictions.

In Adolph, the defendant argued that the State did not sufficiently prove his prior DUI conviction because the State had not provided a certified copy of the judgment and sentence or explained why it was unavailable. Id. at 566. The Supreme Court acknowledged that Lopez provided support for this argument because that opinion stated that "the State may introduce other comparable evidence only if it is shown that the writing is unavailable for some reason other than the serious fault of the proponent." Id. at 566 (quoting Lopez, 147 Wn.2d at 519). However, the Adolph court declined to follow Lopez, explaining that "[a] close look at the Lopez language reveals that this latter statement resulted from confusion generated by calling a certified copy of a judgment the 'best evidence' of a prior conviction and is,

in fact, the product of a misapplication of the so-called best evidence rule." Adolph, 170 Wn.2d at 566-67. The court examined the best evidence rule, explained that it did not apply to proof of a conviction, and concluded that "a certified copy of the judgment is not required to prove the existence of a conviction." Id. at 567-68.

Instead, the court held that "other comparable documents of record or transcripts of prior proceedings" are admissible to establish criminal history. Id. at 568 (quoting State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). The court recognized that the State's burden of proof was satisfied by evidence that bears some "minimum indicia of reliability." Adolph, 170 Wn.2d at 569. The court then concluded that Adolph's DOL driving record abstract and DISCIS criminal history were sufficient to prove his prior DUI conviction. Id. at 569-70.

Weaver does not discuss or attempt to distinguish Adolph. The evidence submitted in this case to prove Weaver's misdemeanor convictions was the same as that offered in Adolph: the computer dockets from the misdemeanor court. While the State was not required to satisfy the best evidence rule, the prosecutor

offered an understandable and undisputed reason for why the computer dockets were offered rather than the judgment and sentences: Weaver's convictions were over 10 years old, and the courts no longer had the documents.

For the first time on appeal, Weaver complains that the dockets do not clearly show whether they are for a crime or a traffic infraction. In fact, the dockets identify the crime and even cite to the relevant municipal code ordinance. For example, the three Seattle Municipal Court dockets refer to the crime as "License; Driver, Susp. Revoked" and cite to SMC 11.56.320, the relevant citation for driving while license suspended. The trial court did not err in concluding that the State had proven the existence of Weaver's misdemeanor convictions.

G. CONCLUSION

For the reasons cited above, this Court should reverse the trial court's order dismissing Weaver's second-degree rape of a child conviction and remand for sentencing on that count. The

Court should affirm the judgment and sentence in all other respects.

DATED this 16th day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent and Cross-Appellant
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT AND CROSS-APPELLANT, in STATE V. OLIVER WEAVER, Cause No. 67558-3-I, in the Court of Appeals, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

C Brame
Name

9/20/12
Date

Done in Seattle, Washington