NO. 46328-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LARRY DEAN WEATHERMAN,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to allow him to present relevant, exculpatory evidence that the complaining witness had previously denied that the defendant abused her.

2. Trial counsel's failure to ask the court to instruct the jury that it had to be unanimous on each count denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment,

because the jury's question on unanimity demonstrated that it did not understand this constitutional requirement.

3. The trial court erred when it based an exceptional sentence in part on a finding that the defendant committed the offenses upon a family or household member because that fact is inherent in the crime of incest.

Issues Pertaining to Assignment of Error

1. In a case charging incest does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow the defense to present relevant, exculpatory evidence that the complaining witness had previously denied that the defendant sexually abused her?

2. Does a trial counsel's failure to ask the court to instruct a jury that it has to be unanimous on each count charged deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if a jury sends out a question during deliberation that demonstrates that it does not understand the requirement for unanimity on each count, and when the court would have given the instruction and the jury would not have convicted?

3. Does a trial court err if it bases an exceptional sentence upon multiple convictions for incest in part upon a finding that a defendant committed the offenses upon a family or household member when that fact is inherent in the crime of incest?

STATEMENT OF THE CASE

Factual History

N.W. was born on September 5, 1985, to Tracy Shanks and Defendant Larry Dean Weatherman. RP 118, 226-227[1]. The defendant also has a younger son by the name of J.W.. RP 326. Sometime when N.W. was very young Ms Shanks and the defendant ended their relationship and separated, after which Ms Shanks denied the defendant any access to their daughter. RP 226-227. During that period of time the defendant had a drug and alcohol problem. RP 234-235. As a result, N.W. has no memories of her father until she was 11-years-old. RP 121-122.

After N.W.'s 11th birthday she asked her mother if she could meet her father. RP 124-125. In fact she had previously asked a number of questions about him. *Id.* Upon learning from mutual friends that the defendant was clean and sober and living in an Oxford House, Ms Shanks eventually agreed to let N.W. meet her father. RP 124, 228-231. Thereafter the defendant and N.W. were reintroduced to each other. RP 124. Following their first meeting the defendant began to exercise visitation rights with both N.W. as he already did with J.W.. RP 125, 231.

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[1]The record on appeal includes three continuously numbered volumes of verbatim reports of the trial held over five days during the second half of April in 2014, and the sentencing hearing held in May of 2014. They are referred to herein as "RP [page #].".

At about this time the defendant moved out of the Oxford House where he was residing and moved into a duplex with his girlfriend Syndee. RP 269. He had met her during recovery while she was living at an Oxford House for women. RP 267. They married in 1998. RP 269. Eventually N.W. and her brother J.W. began overnight visits with their father and Syndee, which led to visits every other weekend. RP 231, 270-272. After living in the duplex for about a year the defendant and Syndee moved to an apartment on 83rd Street in Vancouver behind a Safeway, where they lived for about a year. RP 283-286. Thereafter they moved into a manufactured home also in Clark County. RP 143-144, 293. N.W. and her brother J.W. had many overnight and weekend visits with the defendant and Syndee at the last two of these three residences. RP 232-233, 293.

Once she entered highschool N.W. began living part time with the defendant and Syndee and part time with her mother Tracy. RP 295-298. She also spent a great deal of time during the week at the defendant and Syndee's home. RP 231. According to Syndee she did not have a good relationship with N.W., and in 2003 when N.W. was 17 or 18-years-old Syndee separated from the defendant and spent about six months living in Yelm. RP 148-150, 296-298. N.W. was living with the defendant during this period of time. *Id.* Eventually Syndee and the defendant reconciled and she moved back into the family home. RP 300-302. The next year in 2004

N.W., who was 19-years-old at the time, moved to Norway to marry a man she met online. RP 155-156. Although she eventually returned to the United States for good she never lived in a home with the defendant after the first time she left for Norway at 19-years-old. RP 180.

Seven years after moving out of her father's home N.W. had occasion to provide an affirmation for her mother to use in her divorce from her current husband. RP 181. In that affirmation N.W. claimed for the first time that the defendant had sexually abused her from the time she was 12-years-old up to the time she moved to Norway at 19-years-old. *Id.* After that Affirmation was filed in her mother's divorce proceeding a Clark County Deputy Sheriff came and took a detailed statement from her. RP 183. In that statement she claimed that the first instance of sexual abuse occurred on Halloween night when she was 12-years-old. RP 126-129. On that evening she had gone to a party with the defendant, Syndee and her brother at the Church her father and stepmother attended. RP 129-133. After the party she and the defendant were in his van waiting for Syndee and J.W. to come out when the defendant reached over and fondled her vaginal area. *Id.*

According to N.W., this began a pattern of sexual abuse over the next seven years that ran the gamut from the initial fondling, to digital penetration, to penile penetration, to oral sex and then to anal penetration. RP 133-152. N.W. claimed that for the six or eight months after Syndee moved to a

separate address her father had some form of intercourse with N.W. almost every other day. RP 150. She also claimed that the defendant took a number of photographs and videos of the two of them having sex, but eventually destroyed the photos and videos upon her demand. RP 163-164. Although she claimed that the defendant repeatedly told her he would stop sexually abusing her, the abuse only stopped when she moved to Norway. RP 159-163.

Procedural History

By information filed January 10, 2013, the Clark County Prosecutor charged the defendant Larry Dean Weatherman with six counts of incest occurring between July 27, 2002, and September 4, 2005. CP 1-4. This information also alleged the following aggravating facts for each count: (1) "that this crime was committed by one family or household member against another," (2) that the "defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense," and (3) that the "offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time." *Id.*

This case eventually came to trial in the latter half of April of 2014. RP 1. In pretrial motions the state moved to (1) admit N.W.'s claims of sexual abuse occurring prior to July 22, 2002, which were not included in the

charging period because they were outside the statute of limitations, and (2) to preclude any evidence of any other sexual conduct involving N.W. as inadmissible under the rape shield statute. CP 70, 75-80. Following argument the court granted the first motion. RP 82-83. The defense then addressed the state's second motion by making an offer of proof that included the following evidence it intended to elicit during trial: (1) that N.W. had been molested by her step-brother while living in the defendant's home, (2) that her step-brother had been prosecuted for this conduct, (3) that N.W. had given a statement to the police during their investigation of the matter, (4) that the investigating officer had interviewed her about her claims of abuse, (5) that the investigating officer had asked if anyone else had sexually abused her, and (6) that she had denied any sexual abuse by any other person. RP 57-65, 70-73. Following argument the court granted the state's second request and barred the defense from calling any witnesses or attempting in any way to elicit this evidence. RP 74.

The case then proceeded to trial with the state calling four witnesses, including N.W. and her mother. RP 107, 117, 225, 248. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History, *supra.* The defense then called six witnesses, including Syndee Weatherman, J.W., a family friend by the name of Judy Maxwell, and the defendant. RP 266, 325, 356, 364, 366, 370. During their testimony both

Syndee and J.W. testified to their close proximity to both the defendant and N.W. during N.W.'s periodic overnight visits and to the fact that neither saw any of the inappropriate conduct N.W. claimed had occurred. RP 266-325, 325-356.

In addition, Syndee Weatherman testified that she did remember the Halloween party N.W. had described during her testimony, that Syndee was present the entire time, and that at no point were N.W. and the defendant in the van alone. RP 276-278. Melissa Porter testified that not long after the allegations of abuse were revealed she allowed N.W. to move in with her for a couple of months. RP 357-358. According the Ms Porter one night she and N.W. were speaking when N.W. revealed that she had lied about her claims of sexual abuse and that she had made them because she hated Syndee and wanted to do anything she could to destroy their relationship. RP 358-360.

Following the reception of evidence the court instructed the jury with the defense taking exception to the court's refusal to give its proposed modified version of WPIC 1.02 defining reasonable doubt. CP 107-131; RP 395, 400-413. The state then presented its closing arguments. RP 413-434. During the state's rebuttal, the defense objected to the state's argument that "[the defendant] took her virginity." RP 443. The defense further moved that the jury be instructed to disregard the comment. *Id.* The court sustained the objection and instructed the jury as requested. *Id.* The defense then objected

a second time during rebuttal argument and moved for a mistrial when the prosecutor stated: "and now defense counsel wants his daughter to have to change her name." RP 444. The court overruled this motion. *Id.* In fact the defense had argued that N.W.'s failure to seek a name change was evidence that put her claims of abuse into question. RP 440-441.

Following argument the jury retired for deliberation. RP 445-446. During the deliberation the jury sent out a paper with five questions on it. CP 132. The first question was"

> If we find one count unanimous do all additional counts have to be unanimous."

CP 132.

In discussing this first question the court commented to counsel that the answer to this question was obviously "yes." The court stated the following on this issue:

> JUDGE CLARK: Thank you. Please be seated. Counsel, the jury sent out a five-part question. Five separate questions is probably a better way to put it, um, about 1:45. The first question is, if we find five count – if we find one count unanimous, do all additional counts have to be unanimous? ***And, the answer to that is yes.*** And, it's whether you want me to tell them yes or whether you want me to refer to the instructions they've been given.

RP 457 (emphasis added).

Instead of asking the court to answer this question with a "yes" as the court offered, the defendant's attorney asked the court to respond with "refer

to the instructions." RP 457-462; CP 132. As a result, that is how the court responded. CP 132.

Following these added instructions by the court the jury retired for further deliberations. RP 462. The jury later returned verdicts of "guilty" to each count, along with special verdicts that (1) that the defendant and N.W. were "members of the same family or household," (2) that the defendant committed the offenses using a "position of trust to facilitate the commission of the crime[s]", and that (3) the crimes were "part of a pattern of psychological, physical , or sexual abuse of the victim . . . manifested by multiple incidents over a prolonged period of time." CP 133-148.

The court later sentenced the defendant to 100 months one each count on a standard range of 77 to 103 months on each count. CP 186-206. However, based upon the three aggravators the jury found, the court ordered that Counts I, II and III run consecutively for a total sentence of 300 months in prison. *Id.* The defendant thereafter filed timely notice of appeal. CP 207-208.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT REFUSED TO ALLOW HIM TO PRESENT RELEVANT, EXCULPATORY EVIDENCE THAT THE COMPLAINING WITNESS HAD PREVIOUSLY DENIED THAT THE DEFENDANT ABUSED HER.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, a defendant charged with a crime has the right to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis,* 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because

the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar the defense made an offer of proof of evidence it wanted to present on the issue of N.W.'s delayed reporting of her claims of abuse and her denial of any abuse by the defendant. The offer of proof was as follows: (1) that N.W. had been molested by her step-brother while living in the defendant's home, (2) that her step-brother had been prosecuted for this conduct, (3) that N.W. had given a statement to the police during their investigation of the matter, (4) that the investigating officer had interviewed

her about her claims of abuse, (5) that the investigating officer had asked if anyone else had sexually abused her, and (6) that she had denied any sexual abuse by any other person. RP 57-65, 70-73. Pursuant to a state's motion *in limine*, the court ruled that this evidence was inadmissible under RCW 9A.44.020, the rape shield statute. As the following explains, this ruling was in error and it denied the defendant his constitutional right to present relevant, exculpatory evidence.

Under RCW 9A.44.020, evidence of a "victim's prior sexual behavior is generally not admissible on the issue of credibility and may only be admitted on the issue of consent in limited circumstances." Subsection (2) of this statute states:

> (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

RCW 9A.44.020(2).

The trial court's error in this case was twofold in applying the rape-shield statute to prevent the defense from presenting the evidence outlined in its offer of proof. The first error was in the court's failure to recognize that

RCW 9A.44.020 by its very terms does not apply when a defendant is charged with a crime under RCW 9A.66 such as incest because the rape shield statute, by its very language, limits its application to offenses charged under RCW 9A.44 with two exceptions. The first and third sections of the rape shield statute note the following on this issue:

> (1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.
>
> . . .
>
> (3) In any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior . . .

RCW 9A.44.020(1)&(3) (in part).

As these two portions of the statute indicate, the legislature's purpose in adopting this statute was to create a rule of evidence in prosecutions under "this chapter", which is RCW 9A.44 and the two exceptions noted, which are trafficking charges under RCW 9A.40.100 and offenses under RCW 9.68A. In the case at bar the state charged the defendant with incest under RCW 9A.64.020. In fact, there are only three crimes enumerated under RCW 9A.64. They are bigamy, incest and child selling. *See* RCW 9A.64.010, .020 and .030. Consent is not a defense to any one of these offenses and the victim's prior sexual history has never been relevant to either prosecuting or

defending these offenses as they often have been relevant for prosecuting or defending many of the sex crimes defined under RCW 9A.44.

The second error the trial court made in this case was in its failure to recognize that even if RCW 9A.44.020 did generally apply in prosecutions for incest under RCW 9A.64.020, the rape shield statute by its terms would not apply to exclude the evidence the defense sought to introduce. The reason is that the rape shield statute only acts to exclude evidence of the alleged victim's "past sexual behavior," not her status as a victim of sexual abuse. The specific, qualifying language of the first part of section two of the statute states:

> (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible . . .

RCW 9A.44.020(2).

The statute is clear that the evidence at issue is the alleged victim's "past sexual behavior." Although the word "behavior" is not defined in this statute, its general meaning is "the manner of conducting oneself." *See* Webster's New Collegiate Dictionary, p. 101 (1977). Black's Law Dictionary expands on this view and gives the following definition for the word "behavior."

> Manner of having, holding, or keeping one's self; manner of behaving, whether good or bad; conduct; manners; carriage of one's self, with respect to propriety and morals; deportment.

Black's Law Dictionary, p. 141 (6th ed.1990)

The common definition for the word "behavior" found in Webster's as well as the definition found in Black's both indicate that the meaning of "behavior" involves the sum of one's voluntary actions over time. Thus, under RCW 9A.44.020(2), the application of the statute is limited to those instances in which the court is dealing with a defense attempt to introduce evidence of the alleged victim's "prior manner of conducting herself sexually" or "prior manner of sexual deportment." Under no definition for "behavior" does this include a person's prior status or experience as the victim of a sexual offense committed by another person. Thus, evidence of N.W.'s status as the victim of her step-brother's sexual crime against her was in no way evidence of her "past sexual behavior." As a result, in this case the trial court erred when it found that RCW 9A.44.020 applied to prevent the defense from eliciting evidence that N.W. had been the victim of a prior sexual assault perpetrated by her step-brother and that she had denied to the police that any other person had committed a sexual crime against her.

In this case the trial court's ruling prohibiting the defense from eliciting evidence that N.W. had previously been interviewed by the police when her step-brother committed a sexual crime against her and had denied

that any other person had offended against her was error. In addition, as the following explains, it was an error that caused prejudice. In this case the only evidence the state presented that the defendant committed the crimes alleged was through the claims of N.W.. There was no physical evidence to support this claim. The allegation was made almost seven years after the fact. The crimes were allegedly repeated in a home with other people present on many occasions. One witness came forward and testified that N.W. had admitted that the allegations were false.

With this type of case, the credibility of the complaining witness is the central issue before the jury. The evidence that the trial court excluded went directly to that issue and would more likely than not have been sufficient to convince the jury that the state had failed in its burden of proving its claim beyond a reasonable doubt. Thus, the exclusion of this evidence denied the defendant a fair trial under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's convictions and remand for a new trial.

II. TRIAL COUNSEL'S FAILURE TO ASK THE COURT TO INSTRUCT THE JURY THAT IT HAD TO BE UNANIMOUS ON EACH COUNT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE JURY'S QUESTION ON UNANIMITY DEMONSTRATED THAT IT DID NOT UNDERSTAND THIS CONSTITUTIONAL REQUIREMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to request that the trial court answer "yes" to the first question the jury gave to the court after it began its deliberation. This question was: "If we find one count unanimous do all additional counts have to be unanimous?" CP 132. The trial court in this case ruled that the answer to this question was an unequivocal "yes." The court then gave the parties the option of having the court answer "yes" or simply refer the jury back to the original instructions. The court stated:

> JUDGE CLARK: Thank you. Please be seated. Counsel, the jury sent out a five-part question. Five separate questions is probably a better way to put it, um, about 1:45. The first question is, if we find five count – if we find one count unanimous, do all additional counts have to be unanimous? ***And, the answer to that is yes.*** And, it's whether you want me to tell them yes or whether you want me to refer to the instructions they've been given.

RP 457 (emphasis added).

Defendant's counsel asked the court to take the second option and simple refer the jury back to the original instructions. They granted this

request. Defendant now argues that no reasonably prudent attorney would ever ask for this option under the facts of this case. Two arguments support this conclusion. First, by the time the jury sent out the question the court had already read the instructions to the jury, the jury had been given a written copy of those instructions, and the jury had deliberated for a period of time. In spite of the statements on unanimity in those instructions, and in spite of the jury's time to review those instructions, the jury's question unequivocally demonstrates that it did not understand the unanimity requirement on each separate count.

Second, this case involved the allegation of six separate offenses committed many years previous involving a complaining witness who was unable to pinpoint any specific allegation in time and place with one exception, which was the first allegation of abuse. That claim was tied to a specific date and a unique set of circumstances. Thus, it would not be unusual for a jury to all agree that the one specific offense had been proven while not being able to come to a unanimous decision that other general claims of abuse had been proven. With these two circumstances present no reasonable defense attorney would fail to ask the court to answer the jury's first question with a resounding "yes." There is no conceivable tactical reason for not taking this option and by not taking it defense counsel's conduct fell below the standard of a reasonably prudent attorney.

In this case trial counsel's failure also creates "a probability sufficient to undermine confidence in the outcome" of the jury's verdicts on all of the counts except the first given the specificity on the first claim and the lack of specificity on the remaining claims. This conclusion is supported by the fact that this case devolved down solely to an issue of credibility between the testimony of the complaining witness and the testimony of the defendant. As a result, trial counsel's failure to request that the court answer "yes" to the jury's first question denied the defendant effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result this court should reverse the defendant's convictions on all of the counts except for the first and remand for a new trial.

III. THE TRIAL COURT ERRED WHEN IT BASED AN EXCEPTIONAL SENTENCE IN PART ON A FINDING THAT THE DEFENDANT COMMITTED THE OFFENSES UPON A FAMILY OR HOUSEHOLD MEMBER BECAUSE THAT FACT IS INHERENT IN THE CRIME OF INCEST.

To impose a sentence longer than the standard range, a jury or court must (1) find an aggravating factor that was necessarily not considered in establishing the standard range, and (2) that factor must be one that distinguishes the offense from others in the same category. *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986). The decision in *State v. Cardenas*, 129 Wn.2d 1, 6-7, 914 P.2d 57 (1996), illustrates the principle that the court

cannot base the imposition of a sentence outside the standard range upon a fact that itself constituted an element of the charged offense or was inherently in the charged offense.

In *Cardenas, supra*, the defendant was convicted of vehicular homicide. The court then imposed an exceptional sentence based upon the fact that the victims of the offense had suffered serious injuries. On appeal, the Washington Supreme Court reversed the exceptional sentence, holding that the infliction of serious injury was an element of the offense and that as such, the legislature had already considered it when determining the standard range. Thus, the court held that the existence of the same fact could not justify imposition of a sentence in excess of the standard range. The court held:

> Although particularly severe injuries may be used to justify an exceptional sentence, the injury must be greater than that contemplated by the Legislature in setting the standard range. The offense of which Cardenas was convicted, vehicular assault, contains the element of serious bodily injury, defined as "bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Michel's injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range. Consequently, the severity of injuries suffered cannot justify an exceptional sentence.

State v. Cardenas, 129 Wn.2d at 6-7 (citations omitted).

In the case at bar, the jury convicted the defendant of six counts of incest under RCW 9A.64.020(1). Section (1) of this statute states:

> (1)(a) A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.
>
> (b) Incest in the first degree is a class B felony.

RCW 9A.64.020(1).

As is apparent under the plain language of this statute, the gravamen of the offense is to "engage[] in sexual intercourse" with a person who is "an ancestor, descendant, brother, or sister of either the whole of the half blood." Thus, for this offense to apply the defendant and the victim must be related by "whole or the half blood."

Under RCW 10.99.020(3), any two people who are directly related by the whole or half blood are also "family or household members. The relevant portion of this statute states:

> (3) "Family or household members" means . . . persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren."

RCW 10.99.020(3).

The conclusion that follows from a review of these statutes is that it is impossible to commit the crime of first degree incest as that crime is defined in RCW 9A.64.020(1) without committing it against a "family or household member" as that phrase is defined in RCW 10.99.020(3). Thus, under the RCW 9.94A and the decision in *Cardenas*, the trial court erred

when it imposed an exceptional sentence based in part upon an aggravating fact that the defendant committed it against a family or household member because the legislature already took that fact into consideration when determining the standard range of the offense at issue.

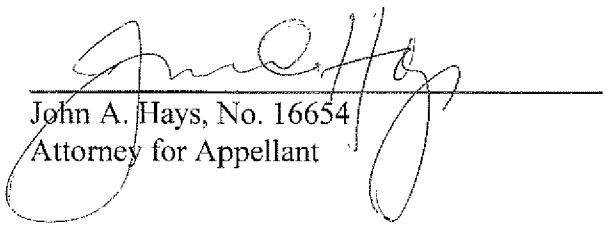
In the case it bar it is true that the jury also found two other aggravating facts (abuse of position of trust and multiple events over a long period of time). However, the trial court did not indicate at sentencing that it would have imposed the same exceptional sentence based solely upon the remaining aggravating facts. Thus, in the case at bar the appropriate remedy is to vacate the sentences and remand for a new sentencing hearing.

CONCLUSION

The trial court's exclusion of relevant, admissible exculpatory evidence denied the defendant a fair trial and trial counsel's failure to request an appropriate response to a jury question denied the defendant effective assistance of counsel. As a result this court should reverse the defendant's convictions and remand for a new trial. In the alternative, this court should vacate the sentences and remand with instructions to resentence the defendant without reference to the aggravating fact that was inherent in the commission of the offenses.

DATED this 12th day of December, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9.94A.525(2)(h)
Departures from the Guidelines

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

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

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

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

. . .

(2) Aggravating Circumstances - Considered and Imposed by the Court. The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

. . .

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

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

(ii) The offense occurred within sight or sound of the victim's or the

offender's minor children under the age of eighteen years; or

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

RCW 9A.44.020
Testimony – Evidence – Written motion – Admissibility

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent, except where prohibited in the underlying criminal offense, only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

RCW 9A.64.020
Incest

(1)(a) A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

(b) Incest in the first degree is a class B felony.

(2)(a) A person is guilty of incest in the second degree if he or she engages in sexual contact with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

(b) Incest in the second degree is a class C felony.

(3) As used in this section:

(a) "Descendant" includes stepchildren and adopted children under eighteen years of age;

(b) "Sexual contact" has the same meaning as in RCW 9A.44.010; and

(c) "Sexual intercourse" has the same meaning as in RCW 9A.44.010.

RCW 10.99.020
Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Agency" means a general authority Washington law enforcement agency as defined in RCW 10.93.020.

(2) "Association" means the Washington association of sheriffs and police chiefs.

(3) "Family or household members" means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

(4) "Dating relationship" has the same meaning as in RCW 26.50.010.

(5) "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:

(a) Assault in the first degree (RCW 9A.36.011);

(b) Assault in the second degree (RCW 9A.36.021);

(c) Assault in the third degree (RCW 9A.36.031);

(d) Assault in the fourth degree (RCW 9A.36.041);

(e) Drive-by shooting (RCW 9A.36.045);

(f) Reckless endangerment (RCW 9A.36.050);

(g) Coercion (RCW 9A.36.070);

(h) Burglary in the first degree (RCW 9A.52.020);

(i) Burglary in the second degree (RCW 9A.52.030);

(j) Criminal trespass in the first degree (RCW 9A.52.070);

(k) Criminal trespass in the second degree (RCW 9A.52.080);

(l) Malicious mischief in the first degree (RCW 9A.48.070);

(m) Malicious mischief in the second degree (RCW 9A.48.080);

(n) Malicious mischief in the third degree (RCW 9A.48.090);

(o) Kidnapping in the first degree (RCW 9A.40.020);

(p) Kidnapping in the second degree (RCW 9A.40.030);

(q) Unlawful imprisonment (RCW 9A.40.040);

(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);

(s) Rape in the first degree (RCW 9A.44.040);

(t) Rape in the second degree (RCW 9A.44.050);

(u) Residential burglary (RCW 9A.52.025);

(v) Stalking (RCW 9A.46.110); and

(w) Interference with the reporting of domestic violence (RCW 9A.36.150).

(6) "Employee" means any person currently employed with an agency.

(7) "Sworn employee" means a general authority Washington peace officer as defined in RCW 10.93.020, any person appointed under RCW 35.21.333, and any person appointed or elected to carry out the duties of the sheriff under chapter 36.28 RCW.

(8) "Victim" means a family or household member who has been subjected to domestic violence.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **Larry Dean Weatherman,** **Appellant.**	**NO. 46328-8-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this day, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
   Clark County Prosecuting Attorney
   1013 Franklin Street
   Vancouver, WA 98666-5000
   prosecutor@clark.wa.us

2. Larry Dean Weatherman, No.727669
   Coyote Ridge Corrections Center
   P.O. Box 769
   Connell, WA 99326

Dated this 12th day of December, 2014, at Longview, WA.

Diane C. Hays

HAYS LAW OFFICE

December 12, 2014 - 3:32 PM

Transmittal Letter

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Case Name: State v. Larry Weatherman
Court of Appeals Case Number: 46328-8

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