NO. 46328-8-II

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

STATE OF WASHINGTON, Respondent

v.

LARRY DEAN WEATHERMAN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00014-8

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Larry Weatherman was charged by information with six counts of Incest in the First Degree for separate and distinct incidents that happened between July 27, 2002, and September 4, 2005. CP 1-4. Each count contained the domestic violence special allegation and notified Mr. Weatherman that the State would be seeking an exceptional sentence based on the aggravating factors that (1) he used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense and (2) 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. CP 1-4; RCW 9.94A.535(3)(n), (h)(i). The case proceeded to trial before The

Honorable Suzan Clark, which commenced on April 21, 2014, and concluded on April 24, 2014, with the jury's verdict. RP 10-472.

The jury found Mr. Weatherman guilty as charged to include the special allegation and the two aggravating circumstances and the trial court sentenced him to an exceptional sentence of 300 months. RP 490; CP 133-148, 186-203. In imposing the exceptional sentence, Judge Clark remarked, "[i]t's a real disturbing case for the Court. I was in practice 27 years before taking the bench and I've dealt with a lot of cases involving incest. This is the worst case of that type that I've seen. . . ." RP 488. Mr. Weatherman filed a timely notice of appeal. CP 207-08.

II. STATEMENT OF FACTS

The State adopts Mr. Weatherman's factual history as it appears in his Brief of Appellant (Br. of App.) from pages 3 to 6 as it is an accurate summary of the testimony presented. The State will supplement that summary with additional facts. Additionally, Mr. Weatherman's summary of his witnesses' testimony appears to be a fair summary. Br. of App. at 7-8.

When the police made contact with N.W. regarding her disclose of Mr. Weatherman's sexual abuse, Deputy Fred Harrison had hours to observe N.W's demeanor. RP 111. He testified that as he asked her questions, "she would break down into tears and she would have to

recompose herself at times to continue writing a statement or answering questions." RP 111. In addition, pursuant to his investigation, Deputy Harrison sought the assistance of Pierce County Sheriff's Department to execute a search warrant to obtain a picture of Mr. Weatherman's penis in order to corroborate N.W.'s description of it in her written statement. RP 115. Mr. Weatherman was located in Pierce County at that time. RP 115. N.W. testified that because of the sexual abuse perpetrated on her by Mr. Weatherman that she was able to observe his penis and described it as basically not normal because the foreskin appeared to only be properly cut on one side. RP 210-11. When she was shown images of Mr. Weatherman's penis at trial, she indicated that she recognized the images as his penis, but remarked that the foreskin issue was more pronounced when the penis was erect. RP 211-213. Mr. Weatherman confirmed during his testimony that his penis had, and the admitted photographs showed, an unusual characteristic related to its foreskin. RP 387-88.

N.W. also testified that when Syndee left the home at which Mr. Weatherman resided that she (N.W.) was required to take on Syndee's role by making Mr. Weatherman's breakfast, packing his lunch for work, making dinner, sharing his bed, and taking baths and showers together. RP 150. During one of those baths, Mr. Weatherman told N.W. how he wished he could have a child with her. RP 158-59.

N.W. explained that when she would attempt to leave Mr. Weatherman's home he would attempt to make her feel guilty by stating things, "[w]ell you don't love me anymore. You don't love me and I'm just going to shoot myself with 100 units of insulin." RP 152. When angry, he would also call her names, particularly "slut." RP 177.

Specific incidents of abuse that were corroborated in part by other witnesses included a time when Mr. Weatherman went into N.W.'s room and had sexual intercourse with her, which resulted in N.W. crying and J.W. running into her room to console her after Mr. Weatherman left. RP 160-61, 331, 335, 348-49. Another specific incident with corroboration involved a time in which N.W.'s little sister, NA.W. visited. RP 172-73, 251. On that occasion, NA.W. remembered that N.W. was called into Mr. Weatherman's bedroom, was in there with Mr. Weatherman for about an hour, and during that time period she heard crying and moaning noises coming from a female voice. RP 251-53. NA.W. testified that when N.W. finally came out of the bedroom she looked kind of scared, sad, and was crying a little bit. RP 253. While the abuse was so frequent and for such a duration to be basically innumerable, N.W. was able to recall during the time period charged that on separate occasions Mr. Weatherman had ejaculated inside her vagina, and on her face, back, and stomach. RP 169-71.

C. ARGUMENT

I. THE TRIAL COURT DID NOT DENY THE DEFENDANT A FAIR TRIAL BECAUSE EVEN THOUGH IT ERRED IN APPLY THE RAPE SHIELD STATUTE TO EXCLUDE THE PROFFERED EVIDENCE, A PROPER BASIS EXISTS IN THE RECORD TO EXCLUDE THE EVIDENCE, AND EVEN ASSUMING EXCLUSION WAS IMPROPER THERE IS NO REASONABLE PROBABILITY THAT THE EVIDENCE WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL.

"Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion." *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) ("The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.") (citations omitted). A trial court abuses its discretion when it "applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Slocum,* 183 Wn.App. 438, 449, 333 P.3d 541 (2014).

That said, a reviewing court can affirm the trial court's evidentiary rulings "on any grounds the record and the law support." *State v. Grier*, 168 Wn.App. 635, 644, 278 P.3d 225 (2012) (citing *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004)). Thus, a trial court may misapply the

rape shield statute to exclude evidence, but the determination to exclude evidence "may be sustained on any proper basis within the record and will not be reversed simply because the trial court gave a wrong or insufficient reason for its determination." *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992) (citation omitted) (holding the trial court erred when it applied the rape shield statute to evidence of sexual abuse but that the trial court did not err in excluding said evidence). Nonetheless, if a trial court's evidentiary ruling is in error, and there is no basis in the record to sustain the ruling, reversal will only be required "if there is a reasonable possibility that the testimony would have changed the outcome of trial." *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

When a trial court excludes evidence, it is incumbent on the party who sought to admit the evidence to make an offer of proof regarding the substance of the evidence. ER 103(a)(2); *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978) (quotation omitted) (holding it is the duty of the party offering evidence "to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling"). "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is

admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (citations omitted). A formal offer of proof, however, is not necessary when the substance of the excluded evidence is apparent. *Id.* at 539.

a. Rape Shield Statute

Under the rape shield statute, RCW 9A.44.020, evidence of a victim's past sexual behavior, broadly speaking, is generally inadmissible. By its plain language the rape shield statute only applies to offenses charged under chapter RCW 9A.44, "trafficking pursuant to RCW 9A.40.100, [] any of the offenses in chapter 9.68A," and "an attempt to commit, or an assault with an intent to commit any such crime." RCW 9A.44.020(1), (3). Incest in the First Degree is a crime pursuant to RCW 9A.64.020(1)(a). Because RCW 9A.64.020 is not addressed by the rape shield statute, the statute does not apply when the offense charged is Incest in the First Degree.

Furthermore, the rape shield statute is consistently applied to preclude evidence of prior sexual behavior of the victim because the evidence often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent. *Markle*, 118 Wn.2d. at

438; *State v. Carver*, 37 Wn.App. 122, 124, 678 P.2d 842 (1984). Sexual abuse, however, is not the type of evidence contemplated by the rape shield statute, i.e., being sexually abused does not amount to being engaged in sexual behavior, especially where there is no alleged "misconduct" on the victim's part and consent is not at issue. *Markle*, 118 Wn.2d at 438; *Carver*, 37 Wn.App. at 125-26; Br. of App. at 15-16.

Consequently, Mr. Weatherman is correct that the trial court erred when it ruled that the rape shield applied to evidence related to his prosecution under RCW 9A.64.020(1)(a) and misapplied the rape shield statute when it found that the sexual abuse evidence that Mr. Weatherman sought to introduce was precluded by the rape shield statute. Nonetheless, as argued below, the determination to exclude the evidence can be sustained on a proper basis within the record.

b. General Evidentiary Principles of Relevance, Probative Value, and Prejudice

Evidence is relevant if it has a tendency to make the existence of any consequential fact more or less probable. ER 401; *State v. Suttle*, 61 Wn.App.703, 710–11, 812 P.2d 119 (1991) (citation omitted) ("In determining relevance, (1) the purpose for which the evidence is offered must be of consequence to the outcome of the action and (2) the evidence must tend to make the existence of the identified fact more probable.").

Relevant evidence, however, may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." ER 403. A trial court's evaluation of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to confuse the issues or mislead the jury under ER 403 is reviewed "with a great deal of deference, using a 'manifest abuse of discretion' standard of review." *State v. Luvene*, 127 Wn.2d. 690, 706-07, 903 P.2d 960 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994)).

While under the Constitution, States' have "broad latitude . . . to establish rules excluding evidence from criminal trials" a criminal defendant's "constitutional right to a meaningful opportunity to present a complete defense limits this latitude." *State v. Donald*, 178 Wn.App 250, 263, 316 P.3d 1081 (2013) (citation and internal quotations omitted). "An evidence rule abridges this right when it infringes upon a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve." *Id.* Similarly, a defendant's right to present a defense is limited. *Id.* For instance, a defendant's right to present a defense is "subject to reasonable restrictions and must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id* at 263-64 (quoting *State v.*

Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)); *Aguirre*, 168 Wn.2d. at 362-63 (Holding the scope of the right to present a defense "does not extend to the introduction of otherwise inadmissible evidence."). For example, straightforwardly, a "criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (citation omitted). A violation of a defendant's right to present a complete defense is subject to harmless error analysis. *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Id.*

When a defendant seeks to introduce evidence of prior sexual abuse of the victim, as a threshold matter, that evidence must be relevant. *State v. Hancock*, 46 Wn.App 672, 679, 731 P.2d 1133 (1987) (*aff'd State v. Hancock*, 109 Wn.2d 760, 748 P.2d 611 (1988)). Evidence of prior sexual abuse of the victim "may be relevant to show, among other things, a motive for fabrication, . . . , [] to rebut the inference that the victim would not have knowledge of sexual acts and terminology unless the defendant were guilty as charged," or where the prosecution submits physical evidence of penetration and the past abuse involved penetration. *Id.* (citing *State v. Peterson*, 35 Wn.App. 481, 484, 667 P.2d 645 (1983));

State v. Kilgore, 107 Wn.App. 160, 181-82, 26 P.3d 308 (2001); *See State v. Horton*, 116 Wn.App. 909, 68 P.3d 1145 (2003). When balancing those relevant reasons to admit evidence of prior sexual abuse of the victim against the potential of unfair prejudice to the trial process and to the victim, courts should consider that evidence of prior abuse can:

> mislead the jury by focusing attention on the child. When a child has been abused in the past, the jury might infer that the child either willingly participated in the current abuse or provoked it, especially if the child is older. Conversely, despite that it is not uncommon for a child to be abused by more than one person, the jury may doubt that any child could be so unfortunate. The evidence can affect the victim by forcing the child to testify about two traumatizing events, rather than one. This could discourage the reporting of abuse.

Kilgore, 107 Wn.App. at 180-81.

Here, the evidence that N.W. was previously sexually abused by her step-brother and that her step-brother was convicted for the conduct was properly excluded as the evidence was not relevant. On the other hand, any evidence of N.W. denying Mr. Weatherman abused her, or evidence of her failure to disclose abuse at his hands was relevant to the case, and Mr. Weatherman was allowed by the trial court to ask N.W. about these topics. RP 74, 76-77. Mr. Weatherman's offer of proof on the evidence for which he complains he was improperly prohibited from presenting is as follows:

[MR. WEATHERMAN]: First, there's sexual abuse of the complaining witness by others, right? There -- her stepbrother, Michael Baker, was -- pled guilty to a sexual abuse charge against her when -- that allegedly occurred when she was fourteen years of age. . . .

JUDGE CLARK: So you want to bring that in for what purpose?

[MR. WEATHERMAN]: . . . I think it goes to her credibility, number one, and because she was interviewed by then-Officer Paul Prather, who was the, I guess -- I think you would call him the main investigating officer in that case. At that time, his testimony would be that he would have asked her if anyone else was engaging in any kind of sexual behavior with her when she was fourteen years old, and his -- he said that would be his normal course of events; he would have asked.

And in this case, there was no report of anyone else sexually abusing her while, in fact, based upon her interview by the Defense, it would appear that she was being sexually abused by [] her stepfather . . . so she didn't report, basically my -- our position, any abuse on the part of her father at that time when she had the opportunity to do so, which either goes to credibility or that she's confabulated this early -- early allegations of abuse that -- allegedly occur before then that the State wants to introduce as part of its case in chief under this [lustful] disposition. . . ."

And the Michael Baker also has another aspect of -- of a motive to falsify because after Michael Baker was convicted, a couple of years later, he moved in with my client and his then and still wife, and the mother of Michael Baker. He moved in with them, and after that, she -- there was no contact because there was a no-contact order in place between Michael Baker and [N.W.], and we think that that could have angered her to some degree and given her a potential motive to falsify.

RP 56-58, 63.

Following the above offer of proof, and offers of proof on evidence not subject to this appeal, the trial court granted the State's motion to exclude evidence of N.W.'s past sexual behavior to include evidence of her being sexually abused by her step-brother. RP 74, 77. The trial court also, at first, seemingly ruled that Mr. Weatherman would not be able to question N.W. about her failure to assert allegations against him but then stated "the Defense still has the ability to argue that because clearly the report didn't happen. I mean, we know the date that the actual report happened. Whether she had opportunities to, you can ask on -- you know, did you walk by a phone on this date? Did you know how to dial 911?" RP 74. The final exchange between Mr. Weatherman and the trial court about the evidence at issue on appeal made clear that he would be able to explore the area of N.W.'s failure to disclose:

> [MR. WEATHERMAN]: So where I'm . . . left at is the potential retraction and I can argue, based on the way the evidence comes out, that she had the opportunity to disclose and perhaps obviously didn't, but not actually bring that out --
>
> JUDGE CLARK: Right.
>
> [MR. WEATHERMAN]: -- through the officer. . . .

RP 76-77.

The evidence of sexual abuse perpetrated by N.W.'s step-brother against N.W. was properly excluded because it was not relevant to an

issue at trial. Mr. Weatherman attempted to argue that this sexual abuse was relevant on the issue of N.W.'s credibility, whether she was confabulating, and that it provided a motive to fabricate Mr. Weatherman's abuse[1], but did so with only conclusory statements and without information or argument to support each theory of relevancy. RP 56-58, 63. His offer of proof was lacking. *Markle*, 118 Wn.2d at 438 ("The defense had sought to introduce testimony by [defendant's son] that he had sexually abused one of the complainants in order to establish an anger motive for the child to fabricate her allegations against [defendant]. The trial court allowed defense counsel several opportunities to make a satisfactory offer of proof before finally ruling to exclude any mention of sexual abuse by [defendant's] son. The record confirms the trial court's determination that defense counsel was unable to support the theory of fabrication."). Regardless, however, of any offer of proof, evidence that N.W. was sexually abused by her step-brother—he was convicted of his crimes—does not make it more or less likely that N.W. was telling the truth about what Mr. Weatherman did to her. On the other hand, the danger of jury confusion or of unfair prejudice as identified by *Kilgore* such as the jury inferring the victim willingly participated in the abuse or

[1] It appears, on appeal, that Mr. Weatherman has abandoned the theories that the evidence was relevant because it tended to show confabulation or a motive to fabricate. Br. of App. at 16-17.

disbelieving that a victim could be so unlucky as to be abused by more than one person, was very real.[2] 107 Wn.App. at 180-81.

On the issue of N.W.'s non-disclosure of Mr. Weatherman's sexual abuse at the time of the investigation into her step-brother, for one, it does not appear that Mr. Weatherman's offer of proof to the trial court fully aligns with the explanation of the potential evidence on appeal. *Compare* RP 56-58 ("Officer Paul Prather['s] . . . testimony would be that he would have asked her if anyone else was engaging in any kind of sexual behavior with her when she was fourteen years old, and his -- he said that would be his normal course of events; he would have asked. And in this case, there was no report of anyone else sexually abusing her. . . .") *with* Br. of App. at 12-13 ("The offer of proof was as follows: . . . (4) that the investigating officer had interviewed [N.W.] about her claims of abuse, (5) that the investigating office had asked if anyone else had sexually abused her, and (6) that she had denied any sexual abuse by any other person."). Common sense dictates that while evidence of a person's routine or habit can be admissible, such evidence is not as weighty as evidence that a person recalls asking a question and getting a specific answer. ER 406.

Additionally, the court specifically allowed Mr. Weatherman to ask N.W. about having the opportunity to disclose his sexual abuse of her

[2] See the jury's second question to the court regarding the sexual abuse of N.W. by her step-father. CP 132.

and her failure to do so. RP 74, 76-77. Nonetheless, Mr. Weatherman chose not to question N.W. on issues surrounding her failure to disclose his sexual abuse of her. RP 214-225. Leaving aside that fact, because N.W. was frequently sexually abused over a seven year period and only first reported the abuse about six years after it stopped, it is obvious that when N.W. was younger she either failed to report the sexual abuse, affirmatively denied the abuse, or both. Consequently, the probative value of the non-disclosure evidence was minimal. Thus, to the extent that the trial court cabined the testimony on the issue of non-disclosure by requiring Mr. Weatherman to cross-examine N.W. rather than allowing him to call Officer Prather, it did not err.

Ultimately, the trial court erred in applying the rape shield statute to the proffered evidence, but as explained above, the exclusion of the sexual abuse evidence can be sustained on a proper basis within the record. Moreover, contrary to Mr. Weatherman's claims, he was allowed by the trial court to explore N.W.'s failure to disclose through the cross-examination of her. To the extent that the exclusion of any evidence was in error, however, said error did not deny the defendant a fair trial or his right to present a defense because Mr. Weatherman called witnesses to offer evidence that N.W.'s accusations and testimony were not credible, and was still able to, and did in fact, argue at length that N.W. was not

credible. RP 266-305, 356-359, 366-67, 360, 434-443. Consequently, if any error occurred it should be reviewed under the common evidentiary ruling standard that reversal is only required if there is a reasonable possibility that the testimony would have changed the outcome of trial. Here, there is not a reasonable probability that had the jury known that N.W. was sexual abused by her step-brother that they would have acquitted Mr. Weatherman for the sexual abuse he perpetrated on N.W. years later.

II. MR. WEATHERMAN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE COURT PROPERY INSTRUCTED THE JURY ON THE LAW AND MR. WEATHERMAN COULD NOT BE PREJUDICED AS A RESULT OF A PROPER INSTRUCTION.

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant's. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel provided ineffective

representation, and (2) that counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show by a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009) (quoting *State v. Barnes*, 153 Wn.2d. 378, 382, 103 P.3d 1219 (2005)). Juries are presumed to follow the instructions of the court. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) (citing *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976)).

During deliberation, juries may submit questions to the trial court. CrR 6.15(f). Whether to answer the question or give further instructions to the jury is within the discretion of the trial court. *State v. Langdon*, 42 Wn.App 715, 718, 713 P.2d 120 (1986); *State v. Jasper*, 158 Wn.App. 518, 542, 245 P.3d 228 (2010), *aff'd*, 174 Wn.2d 96, 271 P.3d 876 (2012). When a trial court decides to answer a question, however, that answer

cannot prejudice a defendant when the answer is neutral and conveys no affirmative information. *Langdon*, 42 Wn.App at 718 (holding that there was no prejudice "because the court's instruction was neutral, simply referring back to the previous instructions"); *State v. Johnson*, 56 Wn.2d 700, 709, 355 P.2d 13 (1960) (holding the communication with the jury was not prejudicial when the court's response was "merely a refusal to communicate the information requested"); *Jasper*, 158 Wn.App at 542 (holding there was no prejudice when the court responded, "[p]lease re-read your instructions and continue deliberating. No further instructions will be given to this question.").

Here, Mr. Weatherman complains that his attorney was ineffective for requesting that the trial court answer the jury's question by telling them to refer to the instructions given instead of answering "yes," but makes no complaint that the jury instructions were improper. CP 132. It is hard to believe that an attorney conducts himself in a manner that falls below an objective standard of reasonableness when he requests that the jury refer to proper instructions on the law. But even if that request was not the best option tactically, Mr. Weatherman cannot show prejudice given that (1) the jury was properly instructed on the law; (2) juries are presumed to follow the instructions; and (3) the trial court's answer to their question was neutral and conveyed no additional information that

could prejudice Mr. Weatherman. CP 132. Consequently, Mr. Weatherman cannot show that but for his trial counsel's request that the outcome of the case would have been different.

III. THE TRIAL COURT PROPERLY SENTENCED MR. WEATHERMAN TO AN EXCEPTIONAL SENTENCE BECAUSE THE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY DID NOT INHERE IN THE CRIMES FOR WHICH HE WAS CONVICTED.

RCW 9.94A.535, a portion of the 1981 Sentencing Reform Act (SRA), permits a trial court to sentence one convicted of a crime above the standard range imposed under sentencing guidelines—an exceptional sentence—provided a jury finds certain aggravating circumstances. RCW 9.94A.535(3); *State v. Allen*, --- Wn.2d ----, 341 P.3d 268, 277 (2015); *State v. Manlove*, --- Wn.App. ----, --- P.3d ----, 2015 WL 1212496 at 3. "The legislative intent of the SRA's exceptional sentence provision is to authorize courts to tailor the sentence, as to both the length and the type of punishment imposed, to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." *Id.* at 4 (citing *State v. Davis*, 146 Wn.App. 714, 719–20, 192 P.3d 29 (2008)).

Here, the State charged Mr. Weatherman with six counts of Incest in the First Degree each with a special allegation of domestic violence and provided notice that it sought a sentence above the standard range based

upon the following aggravating circumstances: "The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. RCW 9.94A.535(3)(n). 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. RCW 9.94A.535(3)(h)(i)." CP 1-4.

While it is true, as Mr. Weatherman contends, that the relationship between an Incest defendant and his victim will necessarily satisfy the relationship contemplated by the special allegation of domestic violence, the existence of that relationship is not an aggravating fact or circumstance. Br. of App. at 22-23; RCW 10.99.020(3), 9.94A.535(3)(h). Rather, that fact is a predicate finding in order to consider the ongoing pattern of abuse over a prolonged period of time aggravating circumstance and that is exactly how this case was charged. RCW 9.94A.535(3)(h); CP 1-4. In other words, the aggravator does not inhere in the crime itself, as it is possible to commit the crime without establishing the aggravator because the crime of incest can consist of a single act of sexual intercourse between a defendant and victim, and does not require that an ongoing pattern of abuse over a prolonged period of time be proven. This possibility distinguishes the present case from *State v. Cardenas*, cited by Mr. Weatherman, where the court held that it was not possible to commit

the crime of vehicular assault without also causing severe injuries to the victim and, thus, reversed the defendant's exceptional sentence based on a severe injury aggravator. 129 Wn.2d 1, 6-9, 914 P.2d 57 (1996); Former RCW 46.61.522(2); *See also State v. Pappas*, 176 Wn.2d 188, 197-198, 289 P.3d 634 (2012) (discussing when an aggravating circumstance is inherent in the offense charged). Consequently, Mr. Weatherman's exceptional sentence was properly based on the two aggravating circumstances found by the jury.

D. CONCLUSION

For the reasons argued above, Mr. Weatherman's convictions and sentence should be affirmed.

DATED this 23rd day of March, 2015.

Respectfully submitted:

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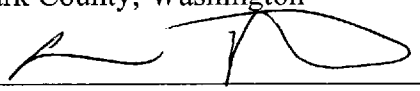
By: 

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Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: abby.rowland@clark.wa.gov

A copy of this document has been emailed to the following addresses:

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