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Court of Appeals
Division II
State of Washington
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No. 51519-9-II

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

STATE OF WASHINGTON, Respondent

v.

JEFFREY BUTTERFIELD, Appellant

APPEAL FROM THE SUPERIOR COURT
OF GRAYS HARBOR COUNTY
THE HONORABLE F. MARK MCCAULEY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Mr. Butterfield's Right To A Fair Trial Was Undermined By A Violation of His Constitutional Right to Effective Assistance of Counsel.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Was Mr. Butterfield's constitutional right to effective assistance of counsel violated where counsel did not utilize the services of an expert witness to explain the effects of psychosis and mental illness on the perceptions and memories of the complaining witnesses?
2. Did Mr. Butterfield receive ineffective assistance of counsel where counsel did not object to highly prejudicial ER 404(b) evidence?

B. The Court Erred When It Incorrectly Instructed The Jury On The Aggravating Circumstances of Aggravated Domestic Violence.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. RCW 9.94A.535 provides the exclusive list of factors that can support a sentence above the standard range. Where the jury instructions and the special verdict forms

do not include a necessary element must the sentence
be vacated and remanded for a standard range
sentence?

C. The Sentencing Court Erred In Entering Finding of Fact 3
and Conclusion of Law 2 For The Exceptional Sentence:

FINDING OF FACT:3 “The jury unanimously found
beyond a reasonable doubt that the defendant
committed each count with the following aggravating
factor: This offense was part of an ongoing pattern of
sexual abuse of the same victim under the age of
eighteen years manifested by multiple incidents over
a prolonged period of time. RCW 9.94A.535(2)(g).”
CP 131-32.

CONCLUSION OF LAW 2: “The jury unanimously
found beyond a reasonable doubt that the defendant
committed the crimes of: Rape of a child in the first
degree (two counts), Rape of a child in the second
degree (two counts), Rape of a child in the third
degree (two counts), and Incest in the first degree
(two counts), and that an aggravating factor was
present on each count. This factor is contained in
RCW 9.94A.535(2)(g).”
CP 132.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. The jury was *not* instructed on the aggravating factor as
quoted in Finding of Fact 3. Did the trial court err when it
found the jury answered “yes” to each of the special
verdicts because the record does not support the finding?

2. Does the trial court's Conclusion of Law 2 rest on an erroneous finding of fact?

D. The Sentencing Court Is Not Authorized To Impose A Criminal Filing Fee and DNA Database Fee on An Indigent Defendant.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. RCW 43.43.7541 as amended prohibits a trial court from imposing a second criminal filing fee and a DNA database fee on an indigent criminal defendant. The Washington Supreme Court held that the statute as amended applies prospectively to indigent criminal defendants whose case is pending on direct review. *State v. Ramirez*, __ Wn.2d __, __ P.3d __, 2018 WL 4499761 at *6 (September 20, 2018). Because Mr. Butterfield has been found indigent must these fees be stricken from Mr. Butterfield's judgment and sentence?

II. STATEMENT OF FACTS

Jeffrey Butterfield's wife, the mother of their five children, left and returned to their home over 20 times, beginning when the

youngest children, A1 and A2, were toddlers¹. RP 440. She was alleged to have suffered from mental illness and drug addiction and accused of physically abusing the children. RP 108-109, 140-41, 293, 442. By the time A1 and A2 were nine years old, their mother left and returned only a few times while she was under the influence of drugs. RP 51, 80.

The children stayed with their father. RP 445. Mr. Butterfield supported his family on his disability checks and utilized the food bank when necessary. RP 41, 194, 220, 207, 336. They moved several times, and at one point, the family was homeless. RP 60, 226, 332. A1 testified she and A2 could not have friends, and “we talked with our hands a lot.” RP 58.

Over the years, Children’s Protective Service workers checked on the family². RP 38, 292, 338. Mr. Butterfield took A1 and A2 to, counseling, and doctor and dentist appointments, and attended their "IEP" meetings. RP 104, 105-106, 296, 299, 444. Both were enrolled in special education classes and received social security benefits. RP 54, 107, 127.

¹ A1 and A2 are pseudonyms in compliance with General Order 2011-1 of Division II of the Court of Appeals.

² Neither party presented any records or testimony from CPS workers about visits, but the witnesses referred to CPS workers.

Seven years after their mother left, CPS removed A1 and A2 from the home after A1 called the food bank requesting food again. RP 84. They were placed with family members and shortly thereafter, were adopted by an adult who worked at their high school. RP 86.

Prior to the adoption, A1 and A2 told a cousin that Mr. Butterfield starved them, physically abused them leaving bruises on their bodies, abandoned them in the woods, shot a gun at one of them, and raped them regularly. RP 120. A1 and A2 later reported they used methamphetamines and alcohol at that time. RP 85-86, 211-212, 241, 302-03.

In April 2006, a detective conducted forensic interviews with them. Both teens denied the accusations against their father. RP 101-104. In July 2006, A1 and A2 were admitted to an inpatient psychiatric facility with psychosis and a diagnosis of schizophrenia. RP 121-122, 288-89.

Ten years later, in 2016, A1 and A2 made another report about their initial claims. RP 94-95, 258. They spoke with a forensic interviewer, and this time, A2 agreed to make a "confrontation" call to her father. RP 260. After obtaining a search

warrant, the call was recorded by police. RP 413-415; Plaintiff's Exhibit 10.

Mr. Butterfield testified that in the phone call he feigned agreement with A2's accusations of abuse. Although he apologized in the call, he reported he humored her because in the past she had cut herself on her arms, legs, and neck. RP 450-51. He said:

If you didn't say the right things, she could hurt someone or herself. And I thought she had the baby in her hand and she was going to hurt the baby. And - and all of my - all I could think of is agreeing with her. If I didn't agree with her, she would hurt the baby.

RP 450. The following day he made a CPS report to check on the welfare of his grandchild. RP 460.

On March 28, 2017, prosecutors charged Mr. Butterfield with two counts of rape of a child first degree, two counts of rape of a child second degree, two counts of rape of a child in the third degree, and two counts of incest in the first degree. CP 1-7. The information was later amended, to correct the dates. CP 64-68. The charges included an accusation that the offenses were part of an "ongoing pattern of physical, psychological and sexual abuse of the same victim, with multiple incidents over a prolonged period of time." The information cited to RCW 9.94A.535 (i). The state gave

notice it would ask for an exceptional sentence outside the standard range upon conviction. CP 64-68. The information did not allege domestic violence. The matter proceeded to a jury trial.

1. Pretrial and Trial Rulings

In pretrial hearings, defense counsel indicated he wanted to use the mental health records of A1 and A2. 11/27/17 RP 43. The purpose was to show the impact mental illness had on the witnesses' ability to perceive, recall, and relate past events accurately. 11/27/17 RP 41. The records were also important to explain Mr. Butterfield's response to A2 during the phone call. 11/27/17 RP 42. Counsel represented that he did *not* need to call an expert regarding A1 and A2's mental health history. 11/27/17 RP 43-44. The court reserved ruling on the matter, waiting for an offer of proof. 11/27/17 RP 45.

At trial, defense counsel made an offer of proof. RP 114. Underscoring the importance of A1's credibility, counsel pointed out to the court the mental health records showed A1 suffered from auditory hallucinations, psychotic features, and psychosis at the time of the initial report and recanting in 2006. RP 114-119. The court ruled:

I don't mind if you ask her some questions about this time, whether or not you were having some mental health problems and whether you were suicidal or different things or whether you were having hallucinations, but you're not to use these documents. I mean you can use what you know from reading these documents, but it's a conversation with her.

... And you have to take her answers as they are.

... I will allow you to question and answer, but these are going to be at your table, not in your hands, and you're not going to act like here's what the diagnosis is. If her answer is, you know, I was having some struggles and I - I did some things to myself, whatever her answers are you have to take it.

RP 117-119.

At trial, A1 agreed she had been diagnosed with psychosis and schizophrenia, but denied hallucinating, and did not remember if it was just her own thoughts. RP 123-24.

A2 testified she too had been hospitalized and diagnosed with delusions, auditory hallucinations, and psychosis. RP 289-290. She did not remember much and denied having treatment, but said she was prescribed "medication for it." RP 289-290.

Defense counsel did not introduce expert testimony to explain the effect of mental illness, psychosis, and hallucinations on memory and perception.

2. Sexual Abuse Testimony

A1 and A2 recounted sleeping in a bed with their father for many years and being forced to have sexual intercourse with him

on at least a daily basis. RP 79, 81, 145, 203, 211. A1 and A2 both reported having to be "lookouts" in multiple environments, while their father had sexual intercourse with the sibling. RP 30, 150. Mr. Butterfield denied the accusations. RP 445-446.

3. Prior Bad Conduct Evidence

The state did not seek to admit prior bad conduct evidence under ER 404(b). During the trial, however, the prosecutor elicited numerous unrelated alleged incidents of physical abuse not charged as crimes. RP 30-31, 36,38, 42, 48-49, 55, 61, 81-82, 85, 109, 182, 193, 196, 211-212, 214-215, 227-228, 335, 340, 341. In the initial questioning, the prosecutor asked A1, "...kind of what it was like in the home at that- at that age, when you were five, just how it was between everybody." A1 answered, "a lot of fighting, arguing" in the home. RP 29. Defense counsel objected, saying:

Your Honor, I object. I think that as this material is very dangerous, should be offered – proof before this kind of evidence is offered. I'm not sure where this is going.

The court responded:

Let's just go question and answer carefully through it, rather than just open-ended questions.

RP 29.

Counsel made no further objections to the allegations by the witnesses of past physical abuse.

4. Jury Instructions For Special Verdicts

The court gave the same special verdict instruction for each charged crime:

If you find the defendant guilty ofthen you must determine if the following aggravating circumstance exists: Whether the crime was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time.

CP 76, 77, 78,79, 80, 82. (Jury Instructions 11, 13, 15,17, 18, 19, 21, 26).

5. Verdict and Sentencing

The jury found Mr. Butterfield guilty on all charges. The jury also answered “yes” to each special verdict as charged:

“the crimes were part of an ongoing pattern of psychological, physical or sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time.”

CP 86-100.

The court imposed an exceptional sentence of 1,520 months. CP 119-120. In its Findings of Facts and Conclusions of Law For An Exceptional Sentence, the court entered Finding of Fact 3:

The jury unanimously found beyond a reasonable doubt that the defendant committed each count with the following aggravating factor:

- This offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(2)(g).

CP 131-132.

The court also entered Conclusion of Law 2:

This offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(2)(g).

CP 131-133. The court imposed a criminal filing fee of \$200 and a DNA database fee of \$100. CP 122. Mr. Butterfield filed a notice of appeal. The trial court signed an order of indigency. CP 137-139.

III. ARGUMENT

A. Mr. Butterfield's Right To A Fair Trial Was Undermined By A Violation of His Constitutional Right To Effective Assistance of Counsel.

The Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 108 L.Ed.2d 674 (1984).

Claims of ineffective assistance of counsel present a mixed question of fact and law and are reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Washington has adopted the *Strickland* standard to determine whether a criminal defendant received ineffective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Under *Strickland*, a defendant who claims ineffective assistance of counsel must first show that defense counsel's representation was deficient, and "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. The defendant is then required to show that that performance prejudiced him. *Grier*, 171 Wn.2d at 32-33.

Prejudice means counsel's errors were so serious, the defendant was deprived of a fair trial, and the result is not reliable. *Id.* The presumption of counsel's performance can be overcome by showing counsel failed to conduct appropriate investigations to determine what defenses were available, or subpoena necessary witnesses to adequately mount the defense. *State v. Jury*, 19 Wn. App. 256, 263-64, 576 P.2d 1302 (1978).

1. Counsel's failure to employ the services of an expert witness to explain the effects of psychosis and mental illness on the perceptions, memories, and suggestibility of the witnesses deprived Mr. Butterfield of an effective defense against the charges.

"In sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel." *Gerstein v. Senkowski*, 426 F.3d 588, 607 (2d Cir. 2005). Where the state's case rests on the credibility of the witness as opposed to physical evidence, failure to call an expert is particularly suspect. *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001).

The issue at trial was the credibility of the testimony of A1 and A2, as there was no physical evidence to substantiate their allegations. The mental health records were provided to defense counsel as part of the discovery materials. At the time of the first allegations (2006) both witnesses suffered from psychosis, hallucinations, and at least one had a diagnosis of childhood schizophrenia. The effects of such severe mental illness on accurate perceptions, interpretations of reality, and fact-based memory was crucial to Mr. Butterfield's defense.

A testifying psychiatric expert was essential to provide the jury with the information to understand and consider the impact of the witnesses' mental illness and perceived isolation on the credibility of their allegations. A1 testified they had no friends and she and A2 spoke to each other "using their hands." During testimony, A2 referred to sexual abuse as "his penis in *our* vagina every single night." RP 217, 224. A1 testified that A2 had to go to a psychiatric facility and because she wanted to be with her, "I basically volunteered to go." RP 123.

A2 testified she loved the actress Cher and, as a child, had a poster picture of her. She testified that in 2006 she believed the picture of Cher spoke to her. RP 278. A2 then contradicted her testimony and said she did not hear voices and did not believe Cher spoke with her. RP 288. A2 also stated while she could not remember if she heard voices she remembered being sexually abused at age two. RP 289-290. Expert testimony addressing the difficulty psychiatric patients have of separating fiction from fantasy and the patient's belief in their hallucinations was crucial to addressing the credibility of the witness accusations.

While courts cannot exhaustively define the obligations of counsel to evaluable attorney performance, where counsel fails to

subpoena necessary witnesses, there is the question of whether the accused received effective assistance of counsel. "The right to effective assistance of counsel is recognized not for its own sake, but for the effect it has on the ability of the accused to receive a fair trial." *State v. Webbe*, 122 Wn. App. 683, 694, 94 P.3d 994 (2004).

In *State v. A.N.J.*, 168 Wn.2d 91, 225 P3d 956 (2010), our Supreme Court held that "depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against the defendant." *Id.* at 112. Here, the charges were of a most serious nature. Whether the charges of abuse made in 2006, when A1 and A2 were actively psychotic to the point of needing hospitalization, were founded in reality was a question.

Whether the later accusations in 2016 were founded on independent memory or were intertwined with the psychosis needed to be addressed by an expert witness. Failing to call an expert witness to address such questions for the jury is not a legitimate trial strategy or tactic. Representation is deficient if, after considering all the circumstances, the performance falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Mr. Butterfield was entitled to have the jury educated on the meaning of

the mental illness symptoms as part of his defense and to test the credibility of the witnesses.

The failure to call an expert witness resulted in prejudice to Mr. Butterfield. Prejudice exists if there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. *Grier*, 171 Wn.2d at 34. Absent expert testimony on psychosis and schizophrenia, the jury had no reason to disbelieve the witnesses' recounting of events or to doubt their credibility: the key issue. Although trial counsel examined A1 and A2 about their mental illness, he was restricted to their answers which, in part, denied having hallucinated.

In assessing whether a defendant has a colorable ineffective assistance of counsel argument, the reviewing Court examines whether the advocacy of the attorney was commensurate with that of a reasonably prudent attorney. *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000). A reasonably prudent attorney would have engaged the services of an expert witness to scientifically explain the psychiatric implications of the diagnoses. Lack of an expert witness deprived Mr. Butterfield of the opportunity to present an affirmative defense that the charged crimes did not occur and the

recounting of events by A1 and A2 were fabrications borne of mental illness.

Violation of the Sixth Amendment constitutional right to effective assistance of counsel requires a reversal of the convictions and a new trial. *State v. Estes*, 193 Wn. App. 479, 495, 372 P.3d 163 (2016).

2. Counsel's failure to object to the prosecutor eliciting irrelevant and highly prejudicial ER 404(b) testimony of alleged prior bad acts deprived Mr. Butterfield of his constitutional right to effective assistance of counsel.

ER 404(b) bars evidence of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. The evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Admission of evidence of other wrongs or acts creates a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. *State v. Russell*, 125 Wn.2d 24, 62–63, 882 P.2d 747 (1994).

Where a defendant's claim of ineffective assistance of counsel is based on his counsel's failure to challenge the admission

of evidence, he must show (1) an absence of legitimate strategic or tactical reasons for supporting the challenged conduct and (2) that the court would have likely sustained an objection to the evidence and (3) the result of trial would have been different had the evidence not been admitted. *State v. McFarland*, 127 Wn.2d 322, 336,337 n.4, 899 P.2d 1251 (1995); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Before trial, defense counsel did not move to exclude propensity evidence. Although the state had not charged Mr. Butterfield with assault of a child, the prosecutor elicited testimony from the witnesses about ongoing physical abuse unrelated to the alleged sexual abuse. At the initial prosecutorial question, defense counsel objected to the material as "very dangerous" and "there should be an offer of proof" prior to the testimony. RP 29. Counsel did not actually request a hearing and did not object again to the substantive testimony.

There was no tactical or strategic reason to concede to admission of the alleged prior bad acts. The alleged incidents were useful only to show Mr. Butterfield as a "criminal type" and did not fit into any category of permissible purposes for admissibility under

ER 404(b). *State v. Brown*, 132 Wn.2d 529, 570, 940 P.2d 546 (1997).

Similarly, the alleged conduct was not relevant to the charges: there was no testimony A1 and A2 were threatened with or received physical punishment if they had not submitted to the alleged sexual abuse. Significantly, even if the alleged prior bad acts passed the low bar of relevancy under ER 403, the testimony should have been excluded because its probative value significantly outweighed the danger of unfair prejudice.

Counsel alluded to the danger of unfair prejudice in his initial objection, contending the material was "very dangerous." The prejudicial effect was very high, an inquiry into the unproven allegations created great risk that the jury would be resistant to believing any of Mr. Butterfield's testimony because he was a criminal type.

At the one objection raised by defense counsel, the court said: "Let's just go question and answer carefully through it, rather than just open-ended questions." RP 29. The court was concerned about the testimony. However, defense counsel did not object again, and though the court may have agreed there should have been an offer of proof, the court did not have to call for an

evidentiary hearing or provide a limiting instruction *sua sponte*.

Russell, 171 Wn.2d at 123-24.

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that no conceivable legitimate tactic explains counsel's performance. *In re Personal Restraint of Caldellis*, 187 Wn.2d 127, 141, 385 P.3d 135 (2016). The relevant question is whether counsel's choices were reasonable. *Grier*, 171 Wn.2d at 34. Here, counsel's choice to not engage a psychiatric expert and his failure to object to irrelevant and unduly prejudicial character evidence deprived Mr. Butterfield of effective assistance of counsel.

B. The Exceptional Sentences On All Counts Should Be Reversed And Dismissed Because The Jury Instructions And The Special Verdicts Omitted An Essential Element Of The Domestic Violence Aggravator And The Trial Court Impermissibly Made A Finding Of Fact Not Supported By The Record.

Departures from sentencing guidelines are authorized by statute. RCW 9.94A.535. The factors that allow the sentencing court to impose an exceptional sentence in excess of the statutory maximum are enumerated and exclusive. RCW 9.94A.535(2), (3).

Other than the fact of a prior conviction or a stipulation, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 435 (2000).

The Sixth Amendment to the United States Constitution and Article I §§ 21 and 22 of the Washington Constitution require that a sentence be authorized by the jury's verdict. Under Washington law, the jury exclusively resolves the factual question whether an aggravating circumstance has been proven beyond a reasonable doubt. *State v. Sage*, 1 Wn.App.2d 685, n.6, 407 P.3d 359 (2017). The failure to submit a sentencing factor to a jury for a finding violates a defendant's right to a jury trial under both state and federal constitutions. *State v. Williams-Walker*, 167 Wn.2d 889, 897, 225 P.3d 913 (2010).

As a preliminary matter, here the information charging the crimes and notice of aggravating circumstance was incorrectly cited and only partially quoted another statutory aggravating factor.

CP 68.

The State does further allege this offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time and will ask for an exceptional sentence outside the standard range upon conviction.

CONTRARY TO RCW 9.94A.535 (i) and against the peace and dignity of the State of Washington.

RCW 9.94A.535(i) does not exist. The written text of the charging document is a partial quotation of only sub-subsection (i) of subsection (h), section (3). The entirety of the statutory aggravating circumstance is:

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.

RCW 9.94A.535(h)(i).

Although the information is incorrectly cited, due process and constitutional guarantees allow that adequate notice to the defendant requires the state to provide notice of intent to prove an aggravating factor that could result in an exceptional sentence prior

to trial. *State v. Siers*, 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012).

While Mr. Butterfield may have been given adequate notice of the state's intent to prove an aggravating factor, the error of an incomplete quoting of the statute resulted in fatally flawed jury instructions and special verdict forms which eliminated an essential finding.

1. The Court's Instructions On The Aggravating Circumstance Were Fatally Flawed And The Exceptional Sentence Must Be Reversed And Dismissed.

The Appellate Court reviews any claimed errors in jury instructions *de novo*. *State v. Sloan*, 149 Wn. App. 736, 742, 205 P.3d 172 (2009). A jury instruction that relieves the State of its burden to prove every element of the crime is an error of constitutional magnitude that may be reviewed for the first time on appeal. *State v. Ridgley*, 141 Wn. App. 771, 779, 174 P.3d 105 (2007).

Here, the court gave the following instruction for each of the charged crimes:

If you find the defendant guilty of ...as charged in Count ...then you must determine if the following aggravating circumstance exists:

Whether the crime was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time.

The WPIC³ for RCW 9.94A.535(3)(h)(i) provides:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:

- (1) **That the victim and the defendant were [family or household members]** [in a dating relationship]; **and**
- (2) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time.

WPIC 300.17 (emphasis added).

Here, the jury was not instructed, nor did the special verdict form require the state to provide beyond a reasonable doubt that the victim and defendant were of the same household. To support an exceptional sentence based on element (2), a finding, beyond a reasonable doubt, of domestic violence must be made by the jury. *State v. Brundage*, 126 Wn. App. 55, 68, 107 P.3d 742 (2005).

The failure to submit a sentencing factor violated Mr. Butterfield's right to a jury trial under both state and federal constitutions and precludes the trial court from imposing an

³ Washington Pattern Jury Instruction.

exceptional sentence. *Williams-Walker*, 167 Wn.2d 889. The exceptional sentence must be reversed and dismissed.

2. The Trial Court Erred When It Entered A Finding of Fact And Conclusion of Law For The Exceptional Sentence, Which Had Not Been Found By The Jury.

As argued above the jury's finding was based on a non-statutory aggravator and must be reversed and dismissed. Without conceding the argument, the trial court's finding for an exceptional sentence is limited to the finding by the jury. *Williams-Walker*, 167 Wn.2d at 897-98.

The restriction on judicial fact-finding applies to enhanced sentencing hearings. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The only permissible 'finding of fact' by the sentencing court "on an exceptional sentence is to confirm that the jury has entered by special verdict it's finding that an aggravating circumstance has been proved beyond a reasonable doubt. Then it is up to the judge to make the legal, not factual, determination whether those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence." *Sage*, 1 Wn.App.2d at 708. (emphasis added).

Here, trial court entered the following based on RCW

9.94A.535(3)(g)⁴:

The jury unanimously found beyond a reasonable doubt that the defendant committed each count with the following aggravating factor:

- This offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(2)(g).

CP 131-132.

The court also entered Conclusion of Law 2:

- This offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(2)(g).

CP 131-133.

The court's finding is not supported by the record. The special verdict forms did not comport with the court's finding, and the court is precluded from making a finding not found by the jury. Similarly, the court's conclusion of law is not supported by the record. The exceptional sentence must be reversed and dismissed.

⁴ The citation is to RCW 9.94A.535(2)(g). That is an incorrect citation as the finding quotes RCW 9.94A.535(3)(g).

C. The Criminal Filing Fee And DNA Database Fees Must Be Stricken From The Judgment And Sentence.

Mr. Butterfield was found indigent for purposes of appeal. At sentencing, the court imposed a DNA fee of \$200 and a Criminal filing Fee of \$100. He was previously convicted of a felony, and his DNA was collected at that time. CP 116.

The State legislature has eliminated these fees for indigent criminal defendants. RCW 43.43.7541. The statute is remedial applies prospectively to cases pending on appeal. *Ramirez*, 2018 WL 4499761 at *6 ("We hold that House Bill 1783, applies prospectively to *Ramirez* because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and Ramirez's case was pending on direct review and thus not final when the amendments were enacted.").

Accordingly, the DNA database fee and the Criminal Filing Fee must be stricken from Mr. Butterfield's judgment and sentence.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Butterfield asks this Court to reverse his convictions and remand for a new

trial based on ineffective assistance of counsel. If this Court determines Mr. Butterfield did not receive ineffective assistance of counsel, he respectfully asks this Court to reverse and vacate the exceptional sentences and remand with instructions to dismiss and to strike the legal financial obligations.

Respectfully submitted this 12th day of October 2018.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

Marie Trombley
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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on October 12, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Grays Harbor County Prosecuting Attorney at appeals@co.grays-harbor.wa.us and to Jeffrey Butterfield/DOC#404550, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362.



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MARIE TROMBLEY

October 12, 2018 - 4:00 PM

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