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No. 51777-9-II

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

STATE OF WASHINGTON

Appellant/Cross-Respondent

vs.

CORY TAYLOR PRATT

Respondent/Cross-Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Scott Collier
Superior Court No. 16-1-02135-2

RESPONDENT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the state's motion *in limine* to exclude testimony by Dr. Kirk Johnson regarding parasomnia.

2. The trial court erred in finding that prior to June 23, 2016 MB had never met the defendant. FOF 1.11, CP 69.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the defense proposed expert testimony about the phenomena of parasomnia or sexsomnia, did the trial court err by applying the standard for admissibility for diminished capacity? (Assignment of Error 1)

2. Did the trial court's exclusion of proposed expert testimony violate Mr. Pratt's constitutional right to present evidence when an alternative theory of the defense was that if sexual contact occurred, it was non–volitional conduct while unconscious? (Assignment of Error 1)

3. When there was testimony by Sarah Jackson that MB and Mr. Pratt had met at a previous family gathering, did the court error by finding in his trial findings that they had never met?

III. STATEMENT OF THE CASE

A. Procedural History

Cory Pratt, respondent and cross-appellant, was charged by an information filed October 27, 2016 with Child Molestation in the first degree, RCW 9A.44.083. CP 4.[1] An amended information was filed on

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[1] The numbering system for the Clerk's Papers used in this brief is from the Second Amended Index.

Because both parties prepared different versions of the VRP, the following format will be used in this brief.
RP I will refer to Volume I, which has pretrial hearings held June 13, July 12, July 1, July 19, August 4, September 19 2017, and the first day of trial held October 2, 2017.

RP II will refer to Volume II, which covers trial proceedings held October 2 and October 3, 2017.

September 28, 2017 which added a second count of attempted child molestation in the first degree, RCW 9A.44.083 and 9A.28.020. CP 38.

Mr. Pratt was examined by Dr. Kirk Johnson to investigate whether he suffered from any sleep disorder, specifically "sexsomnia." His report, however, was apparently never filed at the time, although there was discussion of it being filed under seal. RP I 49-55; CP 26-37. The state moved *in limine* to exclude any testimony by Dr. Johnson about whether Mr. Pratt suffered from any sleep disorder, and also to exclude any testimony about the phenomena of persons acting out sexually while asleep. CP 18-25; RP I 56-59. The court ultimately granted the motion and excluded the testimony. RP I 65-66, 71; CP 41.

The case proceeded to trial to the court after Mr. Pratt waived jury. CP 40. At the conclusion of the bench trial, the court found Mr. Pratt guilty on count I and dismissed Count II on double jeopardy grounds. RP III 393-94. The court subsequently entered findings of fact and conclusions of law to support its verdict. CP 68-71.

Mr. Pratt requested consideration of SSOSA for sentencing at a hearing held November 29, 2017 and the case was continued to allow a revision of the report previously prepared by Dr. Kirk Johnson on the sleep disorder issue to address the issue of sex offender treatment

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RP III will refer to Volume III, which covers trial proceedings held October 3, the first part of the sentencing hearing held November 29, 2017 and the conclusion of the sentencing hearing held January 17, 2018.

RP IV will refer to the verbatim report of proceedings of the sentencing hearings held November 29, 2017, January 5, 2018 and January 17, 2018. This VRP has page numbers which may be duplicative of Volume III.

amenability. RP IV 323, 327. A hearing was held January 5, 2018 after all parties had received Dr. Johnson's supplemental report. CP 84. The state objected to the court's consideration of SSOSA on two grounds: That it was not available where the defendant had denied liability, and because Mr. Pratt did not have an "established relationship" to the complaining witness other than the alleged molestation. RP IV 348-349. While acknowledging that the relationship was "tenuous" the court granted the request to utilize SSOSA. RP IV 360; CP 98-100.

The sentencing was completed at a hearing held on January 17, 2018. The court suspended a sentence of 57 months, and required service of a 12 month jail sentence as a condition of the suspended sentence. CP 101-115. The court also entered findings concerning its use of the SSOSA alternative. CP 98-100. Mr. Pratt filed a timely notice of appeal. CP 116. The state filed a notice of motion for discretionary review with respect to the SSOSA sentence.

B. Pre-Trial Hearing on Expert Testimony by Dr. Johnson

The court held a hearing on whether Dr. Johnson's testimony would be allowed in the defense case. The topic of his testimony would be the phenomena of "sex-somnia", or the commission of sexual acts while the actor is asleep. The prosecutor argued that this was a type of diminished capacity defense, so that the defense would have to prove there was a recognized disorder, that the defendant had the disorder, and that it prevented the formation of the requisite criminal intent. RP I 52 -54.

Defense counsel pointed out that the testimony would point out there was a recognized medical condition for sleep disorders and activity that happened while a person was asleep. RP I 60. The trial court noted that what the report did not say was whether this disorder affected the formation of intent. RP I 61. The court granted the motion *in limine* to exclude the testimony.

C. Trial Testimony

Sarah Jackson held a birthday party for her daughter Haley at her home in Vancouver. Among the attendees was her step–niece MB, the complaining witness. RP I 129-131. MB's sisters were also in attendance at the party. RP I 136-37. The girls who attended the party slept in a large 10 person tent pitched on the property. The property had a slope, but not enough for people to slide around while sleeping in the tent. RP 141-144.

Cory Pratt is the nephew of Ms. Jackson's husband, Troy Howington. RP I 129, 171. His daughter, Taylor, was also invited to the birthday party. Taylor had asked her dad, Cory, to sleep inside the tent nearby her. RP I 148, 160. Troy Howington, Haley's dad, also thought it would be a good idea for an adult to sleep with the girls in the tent. RP I 188. When the girls were laying out the air mattresses in preparation for sleep, Mr. Howington had seen the place where Taylor had wanted her dad, Cory, to sleep. RP I 192.

When the girls had all gone to bed in the tent, Troy Howington, Mr. Pratt, and Sarah Jackson all drank some beer and smoked some

marijuana. Troy also wanted to walk around the neighborhood and play a computer game called Pokemon-Go. Cory Pratt accompanied him as he went around the neighborhood. RP I 178-180. They got back from the walk around 5 AM and stayed up until 5:30. RP I 183. They may have smoked some more marijuana before they went to bed. RP I 184.

Ms. Jackson had been asleep when Mr. Howington and Mr. Pratt returned from their walk. She woke up briefly when Mr. Pratt passed through the room carrying his blankets out to the tent and when her husband came to bed. RP I 148 or so.

MB, who was 12 years old at the time of the trial, attended her cousin's sleepover. She awoke at some point during the night to find someone touching her. She rolled over. While she did not look the person in the face, she saw his arm and was "pretty sure" she knew who had been touching her. RP II 227, 230-31. She told the police she had not opened her eyes while this was happening. RP II 253. When she did, she could see an arm, the door of the tent, and a light on in the nearby house. RP II 253.

She was touched on her crotch. She was rubbed by the person's hand. She had been on her back and then rolled on her side, and was now facing away from the person. She was then touched on her lower back. She thought it was Mr. Pratt who was touching her. RP II 235.

She did not wake up when he came into the tent, and he did not say anything to her. RP II 239. Mr. Pratt was in the tent when she woke up later than morning. RP II 241. Exhibit 3 at trial was her drawing of the

positions of the people in the tent. RP II 242. The next morning, she tried to tell two of the other girls what had happened, but Mr. Pratt popped his head back into the tent so she did not. RP 240.

Later that day, she called her grandmother and told her what had happened. She ultimately told her mom and her dad. She was worried that her parents would be upset. RP II 248. She did not recall having trouble sleeping after this incident, but had had bad dreams about it. RP II 250.

The video of MB's forensic interview was admitted as Exhibit 8 at trial and played for the trial court. During the interview, she told the examiner her parents had told her she was abused. RP II 276-77. She woke up and Cory Pratt was touching her in "her area", what her mom called her "crotch." The touching was over her clothes. RP II 281-823. When she woke up, she was on her back. Mr. Pratt was facing toward the wall, lying on his stomach. He started scooting closer to her bed. RP 283-85. After she scooted away, he stopped, and then reached for her arm. She pulled away and he started to rub her leg, and then touched her bottom. RP II 287-88. When he touched her "area", it tickled. He was rubbing her when he touched her. RP II 288-289. He did not say anything while this was happening. RP II 297.

MB told the forensic investigator during her interview that Cory had spent the night in the tent because his daughter would not sleep without him. RP II 294. When he left the tent that morning, she was scared

because she thought he might have been touching the other girls or his daughter. RP II 295.

She had not met Cory before the birthday party. It was the first time she could remember seeing him or his daughter. She did not talk to him then next day, or at least tried not to do so. RP II 293, 296.

Sarah Jackson observed that MB was on the phone to her grandmother the next morning. She seemed "secluded" and withdrawn the next day, and was waiting for someone to pick her up. RP 158, 163, 167. She heard about MB's accusation from MB's mother Jennifer. She and Troy called Cory the same day they heard about the accusation. RP I 168-169.

Jennifer B[2]. is MB's mother. She had not met Mr. Pratt, and had not had conversation with him. She noted, however, that MB had attended extended family functions without her, as on this occasion, when MB's grandmother, Donna Jackson, took MB and her sisters to the birthday party. RP II 201, 203. Jennifer testified that MB had no sleep problems before the incident at the sleepover, but did have some afterward, which lasted for several months. RP II 208-09.

Kathleen Davidson was MB's other grandmother. She received several calls from MB on the second day of the birthday party. MB was anxious and scared. Ms. Davidson told MB to tell her parents what MB told her. RP II 214, 217.

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[2] Like the state, counsel is adopting the practice of not naming the parents fully to protect MB's privacy.

Donald B. was MB's father. He had not met Mr. Pratt nor spoken to him. He did not think MB had met him before the day of the birthday party for Haley. He called the police after MB told him and his wife what she had told her grandmother about the events at the birthday party. RP II 258, 260.

The state also introduced a statement made by Mr. Pratt to Deanna Watkins, a police investigator with the Clark County Children's Justice Center. Exhibit 1 at trial was the recorded interview itself, and Exhibit 5 was a transcript of the same interview. RP I 103, 104. Mr. Pratt had told her that he had been notified about MB's accusation by his uncle Troy Howington, and that the substance of the accusation was trying to rub MB's crotch. RP I 107.

After the girls went to bed in the tent at the birthday party for his niece Haley, Mr. Pratt and Troy Howington left the house and had played Pokemon-Go until about 5 AM. He came back and went to sleep in the tent where all the younger party–goers were sleeping, his daughter among them. RP I 109-110. The girls had gone to bed around 10 PM or 11 PM. When he got into the tent he climbed into his sleeping bad and went to sleep. He and the girls were awakened by a crow that was cawing. RP I 115-117.

He may have met MB at previous occasions when Troy and Sarah had get–togethers with their parents but it was at the beach, and he was not sure MB had been there. At the second day of the party he tried to strike

up a conversation when he was sitting nearby to MB, but she seemed withdrawn. RP I 117-119. There had been nothing at the party about their interaction which would make her mad at him and he had no contact that could be construed as deliberate touching such as tickling or wrestling. RP I 120, 122.

After the state rested, RP II 300, Mr. Pratt testified in his own defense. He took his daughter Taylor to a birthday party for Haley, the daughter of his uncle Troy Howington and Sarah Jackson. RP 312. He and Taylor had stayed there the night before the party, and returned the next day to help with setting up. RP II 317. The girls at the party were swimming, and later there was a bonfire and cooking marshmallows. RP II 317-318. After the girls went to sleep in the tent, he and Troy went around the neighborhood playing Pokemon-Go. They had some beers and smoked some marijuana. RP II 319-320.

He went to sleep in the tent because his daughter had asked him to do that. RP II 327-328. When it was time for bed, he went out to his car and got his mattress, sleeping bag and pillow and walked through the house to the tent. It was already essentially daylight. He was asleep in 15 minutes. RP II 323, 327. He did not touch MB or any other child. RP II 324, 325. MB was within an arm's reach, however. RP II 336. His drawing of where people had been arranged in the tent was admitted as trial exhibit 10. RP II 346-47.

The people in the tent were awakened by a crow. His daughter and her friend Kristine were awake . RP 324-25. His daughter gave him a hug, and wanted to go swimming again. RP II 324.

He did not specifically recall meeting MB's parents, but remembered a barbecue at the beach at Frenchman's Bar where he had played volleyball with her dad. He had no negative interactions with them. He did not recall meeting MB before the sleepover, and had no significant interaction with her at the birthday party. There was no reason why she would be mad at him. RP II 343-44.

D. Sentencing Hearings

The sentencing was continued from November 29, 2017 to January 5, 2018 to allow the defense to present an evaluation by Dr. Kirk Johnson in aid of a recommendation for sentencing under RCW 9.94A.670, the SSOSA statute. A presentence investigation had been conducted. CP 45-53. Both sides filed sentencing memoranda. CP 55-57; 58-67; 95-97.

The prosecutor argued that SSOSA should not be granted because Mr. Pratt did not have an established relationship or connection with MB that pre–existed the charged incident and because Mr. Pratt had not admitted liability. RP IV 348-349. Defense counsel argued that the familial relationship between Mr. Pratt and MB furnished the necessary connection between them. RP IV 353-354. He also argued that Mr. Pratt was amenable to treatment. RP IV 354-57. After inquiring from Mr. Pratt

about his willingness to engage in treatment, the court granted the request for a SSOSA disposition. RP IV 358-360.

At the subsequent sentencing hearing, on January 17, 2018 the court signed the judgment and sentence suspending the sentence and requiring Mr. Pratt to serve a 12 month jail sentence. RP IV 370; CP 101-115.

IV. ARGUMENT AND AUTHORITY IN SUPPORT OF REVERSAL FOR NEW TRIAL

A. The trial court erred by excluding expert testimony about the phenomena of sexsomnia.

Defense counsel indicated that Mr. Pratt's defense was a general denial, but also wanted to offer testimony through Dr. Kirk Johnson about the phenomena of sexsomnia, a subset of a larger set of behaviors called parasomnia, which are abnormal behaviors that occurs during the non–rapid eye movement part of the sleep cycle. Dr. Johnson report, (Sept.,12, 2017) page. 4; Supp. CP____.[3] Sexsomnia involves persons engaging in sexual activity while asleep, and is related to sleepwalking. Since most jurors would not be familiar with the concept, this would be a useful topic for expert testimony under ER 702.

This court reviews the trial court's evidentiary rulings for abuse of discretion. *State v. Clark*, 187 Wn. 2d 641, 389 P.3d 462 (2017). A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its

[3] Dr. Johnson's report referenced a study by DS Rosenfeld and AJ Elhajar in the June 1998 publication, Archives of Sexual Behavior at 269-78.

decision for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is based on untenable grounds "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990).

Expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702.

An act committed while a person is unconscious or asleep cannot be the basis for criminal liability. *State v. Deer,* 175 Wn. 2d 725, 287 P. 3d 539, 551 (FN 6) (2012); *State v. Utter,* 4 Wn. App. 137, 139, 479 P.2d 946 (1971).

In the present case, the alternative theory of the defense was that if Mr. Pratt had touched MB in the tent, he did so while he was asleep. If he did touch her while he was asleep, as part of a parasomnia, then he could not be held liable for the touching. The thrust of the expert testimony would have been to help the fact finder (in this case, the trial court) understand how a person could act out in this way while asleep. The average person would not necessarily be familiar with this phenomena.

The trial court applied the wrong legal standard to the proposed expert testimony. The trial court concluded that this testimony had to be shoe-horned into the legal concept of "diminished capacity." Diminished capacity "allows a defendant to undermine a specific element of the

offense, a culpable mental state, by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished." *State v. Clark, supra* at 650; *State v. Gough* , 53 Wn. App. 619, 622, 768 P.2d 1028 (1989). The trial court erroneously concluded that because Dr. Johnson could not specifically state that Mr. Pratt was in fact subject to a type of parasomnia, his testimony was not relevant for *any* purpose.

Here, however, Mr. Pratt was not arguing he had any mental disorder, and was not specifically trying to undermine any mental element of the crime. He merely wanted the trier of fact to be aware of the phenomena of sexsomnia, because it would explain how he could be touching MB in a way that might be deemed for his sexual gratification while at the same time he was unconscious or asleep. The defense of general denial was not inconsistent with the alternative defense of lack of volition due to unconsciousness. The proposed testimony of Dr. Johnson was thus relevant to the defense of lack of volition or unconsciousness.

The trial court abused its discretion here because it was using the wrong legal standard, the standard of admissibility for evidence concerning "diminished capacity." Even if the proposed testimony did not meet the standards for diminished capacity, it was nevertheless relevant to establish the alternative defense of lack of volition. This court should reverse the conviction and remand for a new trial.

B. The exclusion of the proposed expert testimony by Dr. Johnson violated Mr. Pratt's rights under the Sixth Amendment and Art. I §22 to present a defense.

Where a trial court excludes relevant defense evidence, the court must determine as a matter of law whether the exclusion violated the constitutional right to present a defense. *State v. Clark, supra* at 649, *State v. Jones* , 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

In *Jones*, the trial court excluded the defendant's testimony in a prosecution for rape that the sexual encounter had occurred at a party where alcohol and cocaine were consumed and that the intercourse was consensual. The trial court barred this testimony under the rape shield statute, RCW 9A.44.020 (2). The Supreme Court reversed, holding that excluding this testimony violated the Sixth Amendment right to present evidence. While noting that there was no absolute right to present evidence, here the evidence regarding the context of the party was highly relevant and there was no compelling state interest in excluding it.

In the present case, the exclusion of the proposed testimony of Dr. Johnson similarly violated Mr. Pratt's constitutional right to present evidence in support of the alternative defense theory of the case. As the *Clark* court noted, even if evidence was not admissible for the purposes of establishing diminished capacity if that defense had not been affirmatively pleaded, it could still be relevant for other purposes. *Clark*, 187 Wn. 2d at 653. The relevant other purpose was to show a person can perform non–volitional actions while asleep.

This court should hold that the exclusion of the proposed testimony of Dr. Johnson violated Art. I, §22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution, reverse the conviction, and remand for a new trial.

V. ARGUMENT AND AUTHORITY IN SUPPORT OF AFFIRMANCE OF SSOSA SENTENCE

A. The trial court did not abuse its discretion in sentencing Mr. Pratt under the SSOSA alternative.

Granting a SSOSA sentence is entirely at a trial court's discretion, so long as the court does not abuse its discretion by granting or denying a SSOSA on an impermissible basis. *State v. Osman,* 157 Wn.2d 474, 482 n. 8, 139 P.3d 334 (2006); *State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011). The state is permitted to appeal a sentencing order to determine if the trial court abused its discretion in entering the order. *State v. Willlhoite*, 165 Wn. App. 911, 263 P.2d 994 (2012).

A trial court abuses its discretion when its decision is manifestly unreasonable, when it exercises its decision on untenable grounds, or when it makes its decision for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is based on untenable grounds "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990). "[D]iscretion is abused only where it can be said no reasonable man would take the view adopted by the trial court."

State v. Blight, 89 Wn. 2d 38, 41, 569 P.2d 1129 (1977); *State v. Hays*, 55 Wn.App. 13, 776 P.2d 718 (1989).

The trial court clearly applied the correct legal standard in this case. The SSOSA statute requires that the offender must have had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime. RCW 9.94A.670. The trial court utilized this standard. CP 99. Consequently, the state's first quarrel with the court's sentencing order boils down to whether there was a sufficient factual basis for the application of this statute.

1. The trial court's findings that there was an established relationship or connection between Mr. Pratt and MB were supported by substantial evidence.

The trial court's factual findings must be supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair–minded person of the truth of the stated premise. *State v. Russell*, 180 Wn. 2d 860, 330 P.2d 151 (2014), quoting *State v. Reid*, 98 Wn. App. 152, 988 P.2d 1038 (1999). The reviewing court cannot substitute its judgment for that of the trial court. *Ridgeview Properties v. Starbuck*, 96 Wn. 2d 716, 720, 638 P.2d 1231 (1982). Even where the evidence conflicts, a reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings. *State v. Black*, 100 Wn.2d 793, 676 P.2d 963 (1984); *North Pacific Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn.App. 228, 232, 628 P.2d 482 (1981).

The state argues, in essence, that because the evidence was conflicting regarding the existence of a relationship or connection between Mr. Pratt and MB, therefore none existed. The state argues that since the trial court did not find there was an abuse of trust aggravator, RCW 9.94A.535 (3)(n), there was no relationship or connection at all. State's Brief at 23. This argument should be rejected, since the SSOSA statute does not require a trust or caregiver relationship to have existed between the defendant and a victim. Had it required that strong a connection, the statute would read quite differently.

Although the evidence was conflicting regarding the degree of Mr. Pratt's acquaintanceship with MB and her family, there was substantial evidence to support the existence of a "connection" or relationship between Mr. Pratt and MB other than the alleged molestation at the birthday party. Mr. Pratt recalled being at a barbecue where he had played volleyball with MB's father, Donald. RP II 343-44. He thought that he might have met MB at previous occasions when Troy and Sarah had get–togethers with their parents but it was at the beach, and he was not sure MB had been there. Sarah Jackson, the hostess of the party, testified that MB and Mr. Pratt *had* met before the birthday party because "Cory had been around a lot" and had been invited to many such family get–togethers and birthday parties in the past. RP I 135. She noted that MB's parents had not always come to the birthday parties she held for her daughter, so Mr. Pratt and the parents of MB may have had only a "hi and bye"

acquaintanceship with each other. RP I 136. Jennifer B., the mother of MB, testified that MB had attended family functions without her. RP II 201. She and Sarah Jackson had been step–sisters for 20 years. RP II 201. Richard B., MB's father also admitted they had been to several previous birthday parties at Sarah Jackson and Troy Howington's house. RP II 258. As noted in the state's brief, however, Richard B. and Jennifer B. denied knowing Mr. Pratt. MB also denied meeting Mr. Pratt before the night of the party. RP II 200, 258, 251.

The trial court's written findings noted the family connection between Mr. Pratt and MB's family which was through his uncle Troy Howington and his wife, Sarah Jackson, who was related to MB's family. That fact was supported by the testimony of both. The trial court's finding that Mr. Pratt "knew of" MB was supported by his testimony and by that of Sarah Jackson, based on the fact that he had been at previous birthday parties given for her daughter which MB had attended. The trial court's finding that there was a "connection" was also supported by the fact that both Mr. Pratt and his daughter and MB were both invited to Haley's birthday party, held at Sarah Jackson and Troy Howington's house. Richard B., MB's father had admitted that MB had been at previous birthday parties at the Jackson/Howington house. Finally, there was some contact between the two at the party, even if tenuous, other than the alleged molestation. Mr. Pratt tried to engage her in conversation on the

second day of the party, although she "tried not to" talk with him. RP II 293, 296, 344.

Very few Washington cases have discussed the meaning of the statutory phrase "established relationship or connection". Two that have arose in a completely different factual context than the present case. In one, *State v. Landseidel*, 165 Wn. App. 886, 269 P.3d 347 (2012), the defendant was charged with attempted rape of a child in the second degree, and communicating with a minor for immoral purposes as a result of a police "sting" operation involving an internet chat room. The supposed minor person in the chat room was a police officer posing as a minor. The defendant argued that his wife was a "victim" of the offense because their relationship had suffered harm as a result of his internet misuse, and since he had an "established relationship" with her, he qualified for SSOSA. The state agreed he had an "established relationship" but argued his wife was not a "victim" of this particular crime. The Court of Appeals agreed, reasoning that "victim" in this context was limited to the person against whom the crime was committed, even if that was a fictitious person. 269 P. 3d at 350.

The other case that discussed the statutory phrase "established relationship or connection" was State v. *Willhoite*, 165 Wn. App. 911, 268 P.3d 994 (2012). *Willhoite* was a prosecution for possession of child pornography. Willhoite had no relationship of any kind with any of the children depicted in the electronic images stored on his computer. He

argued in the trial court that there were no "victims" for his offense since there was nothing in the record about harm suffered by any of the children depicted in the images. The trial court granted the SSOSA disposition, and the state appealed.

The Court of Appeals reversed the sentence. The court reasoned that since the record established that Willhoite had no relationship of any kind with any of the children depicted in the images, he did not meet the statutory "relationship or connection" condition. The absence of a discernable victim did not eliminate the requirement, in the view of the court.

Neither of these cases furnishes any guidance to this court in reviewing the trial court's determination that Mr. Pratt had an "established relationship or connection" to MB, since in neither case was there an actual victim with whom to have a relationship or connection and it was not disputed the defendants had not met any alleged victim in the flesh.

In the present case , the trial court recognized that there was a connection between MB and Mr. Pratt, through their extended family network. Mr. Pratt's child Taylor was a friend of Haley, his niece, as was MB. There had been birthday parties previously to which Mr. Pratt and his daughter had been invited, as MB and her parents had been. Ms. Jackson and Mr. Howerton and their daughter were like the hub of a wheel, with Mr. Pratt's family and MB's family forming two of the spokes connected

to the hub, but disparate from each other. It was only through this family based social connection, at the center of which were Sarah Jackson and Mr. Howerton, that Mr. Pratt and MB were in the same location at the same time. In other words, but for the established family connection, the alleged offense would never have occurred.

The trial court's findings were supported by substantial evidence and should be upheld on appeal. To the extent that the evidence was conflicting, *Black* and *North Pacific Plywood* require this court to consider whether the evidence *most favorable* to the prevailing party supports the challenged findings. It does.

2. The trial court did not abuse its discretion in determining that Mr. Pratt was amenable to treatment and entering the SSOSA disposition.

The SSOSA statute, RCW 9.94A.670, has a list of requirements that a defendant must meet in order to qualify for the alternative.

> (2) An offender is eligible for the special sex offender sentencing alternative if:
> (a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the crime to which the offender is pleading guilty. This alternative is not available to offenders who plead guilty to the offense charged under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and *State v. Newton*, 87 Wash.2d 363, 552 P.2d 682 (1976);
> (b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;
> (c) The offender has no prior adult convictions for a violent

> offense that was committed within five years of the date the current offense was committed;
> (d) The offense did not result in substantial bodily harm to the victim;
> (e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and
> (f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

The State only argues here that Mr. Pratt did not meet the requirements of subsection (e). As argued above, the trial court correctly found that there was a relationship or connection between Mr. Pratt and MB through their shared extended family ties, without which the circumstances leading to the alleged offense could not have occurred. The state's argument that the legal prerequisites for the sentence were not met should be rejected.

The state also argues that the court abused its discretion in imposing the SSOSA sentence for three reasons: (1) Persons who deny liability should not be granted a SSOSA sentence, (2) the trial court did not make an explicit finding that the sentence would be a benefit to the community and (3) Mr. Pratt, as a person who denied liability by demanding a trial, would not be amenable to treatment. None of these arguments are well taken, and should likewise be rejected.

The statute does not prohibit persons who assert their right to a trial from seeking a sentence under SSOSA. Had the legislature intended that *only* persons who pleaded guilty would qualify, it would have said so specifically. The use of the phrase "if the conviction results from a guilty plea" in subsection 2(a) contemplates there may be some other method of

conviction other than a plea of guilty. Otherwise, the "if" clause would be superfluous. Persons who deny liability are thus not categorically excluded from SSOSA, and this is not a basis for arguing that the trial court abused its discretion in performing an act the statute allows.

The state next argues that the court abused its discretion because it did not enter a formal finding that the use of SSOSA would benefit the community in Mr. Pratt's case. While the statute says that the court must "consider" community benefit, nothing in subsection 4 requires a formal "finding" by the court. *State v. Hays*, 55 Wn. App. 13, 15, 776 P.2d 718 (1989).

The state's third argument, which dovetails to some extent with its first argument, is that Mr. Pratt was not amenable to treatment because he had asserted his right to trial and denied liability and that therefore the trial court abused its discretion.

As the prosecutor points out, the statute states that even an *admission* to liability does not by itself constitute amenability to treatment. RCW 9.94A.670 (4). The converse is true as well, however, as Dr. Johnson's report to the court points out:

> Although [Mr. Pratt] denies the offense that he has now been convicted of, this does not in and of itself mean he is not amenable to treatment. Amenability is primarily related to an individual's capacity to benefit from treatment. Although targeting denial would typically be an initial treatment goal, even those in denial can benefit from cognitive behavioral treatment programs (CBT). CBT based programs are cognitive in nature and primarily depend on an individual's ability to learn as opposed to admit to anything in particular. *Note that on the most widely used risk instrument (STATIC 99R) denial is not identified as a risk factor.*

That is because research does not associated denial with increased community risk. Report at 9. (emphasis added) CP 85-94.)

Dr. Johnson's report also noted that Mr. Pratt's scores on the STATIC-99R testing instrument placed him in the low-moderate risk category. CP 92, page 8 of report. He further opined that "Mr. Pratt does appear to be at a level of risk that would allow for community based sex offender treatment." CP 93, Report at 9.

The prosecutor also argues that Mr. Pratt was not amenable to treatment because of arguments or statements made by defense counsel during the sentencing hearing. Defense counsel characterized the offense conduct as being "at the low end of the scale." RP IV 357. The trial court implicitly agreed. RP IV 358. At the very end of his presentation, defense counsel also requested that if the court rejected the SSOSA disposition, it should, in the alternative, sentence below the guideline range for the offense. RP IV 357.

Amongst other things, the court is supposed to consider whether the "alternative is too lenient in light of the extent and circumstances of the offense." RCW 9.94A.670 (4). Such advocacy by defense counsel concerning the nature of the offense does not support the prosecutor's argument that Mr. Pratt was not amenable to treatment nor that the court abused its discretion in granting the sentence.

In summary, the trial court had the benefit of Dr. Johnson's report to assist it in making the determination regarding amenability to treatment. The court noted it valued Dr. Johnson's expert opinion and had relied

upon it in the past. RP IV 359. The court was likewise aware that MB's family was opposed to granting SSOSA. The trial judge thus made a fully informed decision and took into consideration the factors required by the SSOSA statute. The decision was not based on untenable grounds or untenable reasons, and was not an abuse of discretion. Assuming this court does not grant a new trial as requested in Part IV in respondent's brief, this court should affirm the SSOSA sentence handed down by the trial court.

VI. CONCLUSION

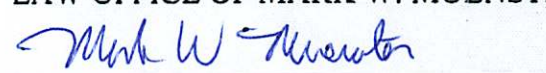
The trial court erred in excluding testimony by Dr. Johnson concerning the phenomena of sexsomnia. Most jurors would not be familiar with this phenomena, and under ER 702, it would have assisted the trier of fact in understanding a fact in issue, namely whether Mr. Pratt had acted volitionally if he touched MB during his sleep. Despite the prosecutor and trial court's attempts to shoehorn the testimony into the concept of "diminished capacity", it was not offered solely on that basis because parasomnia is a medical condition, not a mental disorder or defect. The proposed testimony was relevant because a physical act committed while unconscious cannot be a basis for criminal liability. This court should reverse the conviction and remand for a new trial based on the exclusion of this proposed expert testimony.

The trial court did not abuse its discretion in utilizing the SSOSA statute to sentence Mr. Pratt. The trial court properly found that there was

a relationship or connection between Mr. Pratt and MB. There was no other statutory requirement which prohibited the use of the SSOSA statute. The trial court did not abuse its discretion in concluding that Mr. Pratt was amenable to treatment, despite the fact that he had asserted his constitutional right to a trial. Assuming this court does not grant a new trial, it should affirm the trial court's decision to utilize the SSOSA statute in sentencing Mr. Pratt.

Dated this 9th day of NOVEMBER, 2018

LAW OFFICE OF MARK W. MUENSTER



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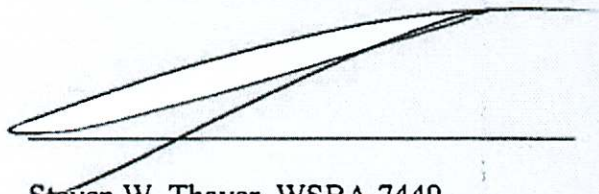

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