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NO. 52358-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATHAN CHAVEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

OPENING BRIEF OF THE APPELLANT

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A. INTRODUCTION

The trial court permitted the jury to hear that Nathan Chavez had sexual intercourse with an age-appropriate person ten years ago, when he was a teenager. This evidence did not satisfy ER 404(b), was more prejudicial than it was probative, and only demonstrated to the jury that Mr. Chavez had a propensity to commit bad acts.

The government also asserted Mr. Chavez violated his position of trust when he committed some of his crimes because he was a trustee or treasurer at his church. No evidence was offered at trial that the witness whose trust Mr. Chavez was said to violate was even aware Mr. Chavez held a position of authority, nor was evidence offered he abused this trust to commit his crimes.

By failing to instruct the jury it must find separate and distinct acts in order to find Mr. Chavez guilty and then submitting the exact same instruction for two of the charged crimes, Mr. Chavez's right to be free from double jeopardy was violated.

And at sentencing, the court used the special allegation and the free crimes doctrine to impose an exceptional sentence. But the court based its sentence on facts not found by the jury and a misreading of the free crimes doctrine and a new sentencing hearing is required.

B. ASSIGNMENTS OF ERROR

1. The court erred by allowing prior act evidence to be heard for the jury in violation of ER 404(b), ER 402, and ER 403.
2. The government failed to present sufficient evidence of tampering with a witness.
3. The government failed to present sufficient evidence of the special allegation of abuse of trust.
4. The trial court improperly relied on facts not found by the jury to find the government established sufficient evidence of the abuse of trust allegation.
5. The convictions for counts two and three submitted to the jury violate double jeopardy, requiring dismissal of one of the charges.
6. The court erred when it relied on the abuse of trust doctrine to impose an exceptional sentence.
7. The court erred when it relied on the “free crimes” doctrine to impose an exceptional sentence.
8. The findings of fact entered in support of the court’s exceptional sentence were entered in error because they were not based on the jury’s findings, with the exception of finding of fact 6.

9. The court violated Mr. Chavez's right to marriage and family when it prohibited him from having contact with his own children on his release from prison.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court abuses its discretion when it allows the prosecution to introduce prior act evidence that does not fall into an exception to ER 404(b). The court allowed the prosecution to introduce evidence of an incident occurring ten years prior to the charged acts, finding it was part of a common scheme or plan for Mr. Chavez to have sex with children. But the similarities between the incident between two teenagers of similar age and the charged crimes could not be described as a common scheme or plan. With insufficient evidence of a non-propensity purpose, the prejudicial effect of the evidence required its exclusion. Is there a reasonable probability the erroneous admission of this evidence affected the jury's verdict, requiring reversal?

2. The government violates Mr. Chavez's Fourteenth Amendment right to due process and his rights under Article 1, Section 3 of the state constitution when it fails to present sufficient evidence of a charged crime. To prove tampering with a witness, the government must establish Mr. Chavez attempted to induce the witness to withhold

testimony. Where the evidence failed to establish this essential element, is dismissal required?

3. A jury must find beyond a reasonable doubt all facts used to impose an exceptional sentence not based on criminal history in order to satisfy Mr. Chavez's Fourteenth Amendment right to due process. In order to establish Mr. Chavez used his position of trust to commit his crimes, the government was required to establish Mr. Chavez was in a position of trust and that this position of trust was used to facilitate the charged offenses. Where the prosecution failed to establish both of these elements, is dismissal of the special allegation required?

4. Due process and the Sixth Amendment require any fact increasing the standard range for a crime to be submitted to the jury. Must this Court dismiss the special allegation used to authorize a sentence above the standard range where the court relied on facts not submitted to the jury to prove the special allegation to find the prosecution's evidence of the special allegation sufficient?

5. A violation of the Fifth Amendment's double jeopardy clause occurs where the verdict rests on evidence that is not separate and distinct. To avoid violating double jeopardy, the jury must be instructed that their verdicts must rest on unanimous agreement of

separate and distinct conduct. The court's instructions to the jury for counts two and three contain the exact same language. The jury was not instructed their verdicts must rest on separate and distinct conduct. Because the jury's verdict violated double jeopardy, must this Court vacate one of these verdicts?

6. A court's sentencing authority is restricted by statute, Fourteenth Amendment's due process protections, the Sixth Amendment right to jury determinations of all factual issues, and the Eighth Amendment prohibition on cruel punishment. The trial court imposed an exceptional sentence based on the allegation Mr. Chavez committed an abuse of trust and under the free crimes doctrine. Where there was insufficient evidence of abuse of trust and no evidence the legislature intended the free crimes doctrine to apply where an offender score exceeds the standard range only because of statutory multipliers, did the court exceed its authority by imposing an exceptional sentence?

7. The Sixth Amendment requires that where a trial court makes findings of fact in addition to those made by the jury to support an exceptional sentence, a new sentencing hearing is required. The trial court made substantial findings of fact not contained in the special interrogatory submitted to the jury. Because the court made findings to

support the exceptional sentence not found by the jury, is a new sentencing hearing required?

8. While a trial court may impose crime-related conditions at sentencing, they must be reasonably necessary to accomplish the essential needs of the state and public order. Where a court infringes on the right to marriage and family, these conditions are subject to strict scrutiny. Here, the court allowed Mr. Chavez to have contact with his children while in prison, but not on his release. Because this restriction is not reasonably necessary to accomplish the state and public order, must it be stricken to allow Mr. Chavez his right to parent his children?

D. STATEMENT OF THE CASE

As a teenager, Nathan Chavez hung out with a group of other teens that included L.L., who was in the same social and age group, although slightly younger. RP 369.¹ They usually met up at a friend's house who had a trampoline, where kids gathered to watch television, play games, and listen to music. RP 370.

One day, Mr. Chavez arrived at the house when no one else was there except L.L., who was sitting in her car. RP 370. The two of them

¹ The record is largely sequential, except for one volume. When referring to the non-sequential volume, citations will include the date of the proceedings. All other citations will be to the page number only.

agreed to go four-wheel driving on the off-road trails nearby. RP 371. After they drove for a while, L.L. stated they had sexual intercourse, although Mr. Chavez denied this ever happened. RP 374. Although Mr. Chavez made no such threat, L.L. felt compelled to engage in sexual intercourse before Mr. Chavez would take her back to town. RP 373. Mr. Chavez stated they were romantic, but denied intercourse. RP 505.

Thirteen years later, the prosecution asked the court to allow the jury at Mr. Chavez's trial for rape of a child in the third degree, child molestation in the third degree, and tampering with a witness to hear this evidence. CP 296. The prosecution asserted this prior incident demonstrated Mr. Chavez engaged in a common scheme or plan to "obtain his objective of sexual intercourse with a child." CP 297. This plan included paying special attention to the complainants, before supplying them with alcohol, and then separating them from their friends. *Id.* The prosecutor argued the sexual acts "consistently" took place in his vehicle in secluded areas. *Id.* Over objection, the court permitted the prosecution to use this evidence, finding it satisfied ER 404(b). RP 8, 13. The court also found the probative value did not outweigh the prejudicial effect of the propensity evidence. RP 12.

The prosecution charged Mr. Chavez with four counts of rape of a child in the third degree, one count of child molestation in the third degree, and one count of tampering with a witness. CP 223-27. Two complainants alleged Mr. Chavez had sexual intercourse with them when they were fourteen and when he was an adult. *Id.* The tampering charge related to an incident where Mr. Chavez's brother Jesse was alleged to have given his friend a phone.² *Id.* Three counts of rape and the child molestation charge included the special allegation Mr. Chavez abused a position of trust when he committed these offenses. *Id.*

H.W. met Mr. Chavez at church. RP 85. She stated she reached out to him about babysitting his children. RP 89. They talked briefly about babysitting before their conversations became flirtatious. RP 90. Then, on New Year's Eve, H.W. said she agreed to leave a party to meet with Mr. Chavez. RP 97. They drove his white Toyota sports car to a cul-de-sac where they ultimately had sexual intercourse. RP 99, 100. H.W. stated they had intercourse two more times. The first took place in her bedroom when she said Mr. Chavez came in through her bedroom window. RP 108, 112. The third time took place at his house

² Nathan and Jesse Chavez share a last name. To avoid confusion, Jesse Chavez will be referred by his first name only.

when she told her mother she was going out for a run. RP 116-17, 125. A fourth incident took place in the back of Jesse's truck when a group of people were returning from a bonfire party at either Jesse's or Mr. Chavez's house. RP 181-82. H.W. had too much to drink to remember this incident. RP 133. Two other witnesses alleged Mr. Chavez molested H.W. while she was intoxicated and while both she and Mr. Chavez were lying down in the back of the truck. RP 191, 333.

Mr. Chavez was responsible for counting the money collected during the Sunday services. RP 467. According to documents filed with the state, Mr. Chavez was listed as the treasurer for the church. RP 413. He was also described as a trustee. RP 467. Either way, H.W. testified she was unaware Mr. Chavez held any special position at the church and was like the other people, attending church and talking to others. RP 88, 140. At best, she described him as an usher. RP 140. Based on this position, the government charged the special allegation of abuse of trust for all of the charges related to H.W.'s allegations. CP 223-27.

The government also asserted Mr. Chavez engaged in sexual intercourse with M.C., when she was fourteen. CP 226. M.C. alleged Mr. Chavez engaged in sexual intercourse the first time when they were returning from a gathering at Slab Camp, an area outside of Sequim

where people would gather. RP 212, 220. Two trucks drove all of the people at the gathering back to town, one driven by Mr. Chavez and the other by his brother. RP 216. M.C. stated in the period of time between when they left Slab Camp and when everyone met in town a short time later, sexual intercourse occurred between her and Mr. Chavez. RP 220. She stated the second incident occurred when they went off-road driving together, after leaving a party. RP 229.

Some time later, David Buckley stated he was hanging out with friends when his friend Jesse came up to him and gave him an iPhone. RP 343. Mr. Buckley and Jesse were good friends and Jesse knew Mr. Buckley's phone was broken. RP 599. Jesse just started working at a new job and frequently gave gifts to his friends, especially to his girlfriend and to Mr. Buckley, who was his best friend. RP 644.

The two friends went back to Jesse's home to set the phone up because they knew there was a good Wi-Fi connection there. RP 348. While setting up the phone, Mr. Chavez stepped out onto the porch, where Jesse and Mr. Buckley were sitting. *Id.* Mr. Chavez asked Mr. Buckley if H.W. and M.C. were still his friends. Mr. Buckley said, "Not really, sort of." RP 350. Mr. Chavez then asked Mr. Buckley if he

could “get them to stop lying.” *Id.* Mr. Chavez finished the conversation by saying, “you can help me, I can help you.” *Id.*

Mr. Chavez moved to dismiss the special allegation of abuse of trust. RP 459. The court found there was sufficient evidence, based on Mr. Chavez’s role in the church, for which he had been given notice, and because of his inquiries into whether H.W. would babysit for him. RP 463. The prosecution never argued the babysitting theory, instead focusing only on Mr. Chavez’s role with his church. RP 680-81, 684, 726, 729.

The jury convicted Mr. Chavez of three counts of rape of a child in the third degree, child molestation in the third degree, and tampering with a witness. RP 789-90. The jury acquitted him of one count of rape of a child. *Id.* The jury also found the government proved the special allegations, except with respect to the child molestation charge. *Id.*

Mr. Chavez had a standard range of 60 months. CP 65. The court determined an exceptional sentence was warranted. CP 85. The court found there were “three different kinds of crimes,” and “three different victims,” justifying an exceptional sentence. RP 846. The court made extensive findings of fact, well beyond those found by the jury. CP 82-85. The court imposed a sentence of 137 months, in

addition to the maximum allowed community supervision. CP 67-68.

Also, the court only permitted Mr. Chavez to have contact with his children during the term of his imprisonment. CP 80.

E. ARGUMENT

1. The court erred when it allowed the prosecution to introduce evidence of an event that allegedly occurred ten years before the charged crimes.

The court abused its discretion when it allowed the prosecution to introduce evidence of a sexual encounter Mr. Chavez had with a person near to his own age when he was in high school, approximately ten years prior to the charged allegations. Mr. Chavez committed no crime when he engaged in this sexual encounter. And the similarities between the incident and the charged crimes were not so substantial they could be described as a common scheme or plan. Without sufficient evidence of a non-propensity purpose, the prejudicial effect of the evidence required its exclusion. Because there is a reasonable probability the erroneous admission of this evidence affected the jury's verdict, this Court should reverse Mr. Chavez's convictions.

a. Exclusion of potentially prejudicial evidence is particularly important in sex offense cases.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). “ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character.” *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). “ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime.” *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Evidence of prior misconduct may be admissible for other purposes, depending on relevance and the balancing of its probative value and danger of unfair prejudice. *Gresham*, 173 Wn.2d at 420. “ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403.” *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is excludable if its probative value substantially outweighs the danger of unfair prejudice. *Saltarelli*, 98 Wn.2d at 361.

“A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is

particularly important in sex cases, where the prejudice potential of prior acts is at its highest.” *Id.* at 363. Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion he must be guilty. *Id.* In cases where the charge involves a sexual act against a child, evidence of uncharged sex acts against another child strongly creates “the impression of a general propensity for pedophilia.” *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986).

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). When determining admissibility under ER 404(b), the trial court must find the alleged misconduct occurred by a preponderance of the evidence; identify the purpose for admission; determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). In considering whether evidence is admissible under ER 404(b), doubtful or close cases should be resolved in favor of the accused. *Wade*, 98 Wn. App. at 334; *State v. Kennealy*, 151 Wn. App. 861, 886, 214 P.3d 200 (2009). The prosecution has the burden of

demonstrating the prior misconduct evidence is admissible under ER 404(b). *DeVincentis*, 150 Wn.2d at 17.

“If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion.” *State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); *Foxhoven*, 161 Wn.2d at 174. Further, a court’s decision is manifestly unreasonable if it is “outside the range of acceptable choices, given the facts and the applicable legal standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

b. The prior incident that occurred when Mr. Chavez was in high school was not part of an overarching plan, but a distinct act involving random similarities with some of the crimes charged.

The prosecution alerted the court it intended to introduce evidence of an incident from when Mr. Chavez was in high school, alleging, “the Defendant followed a consistent plan with each in order to obtain his objective of sexual intercourse with a child.” CP 297. The prosecutor argued Mr. Chavez’s common scheme or plan “begins with compliments and paying special attention to the victim followed by

supplying the alcohol for the invariable party.” *Id.* After getting the child intoxicated, “he proceeds to separate them from the pack to have sexual intercourse.” *Id.* The prosecutor also argued that “[c]onsistently he violates these children in his vehicle or the vehicle of another and he tends to gravitate to Slab Camp, Hurricane Ridge, or secluded wooded areas where they are less likely to get caught.” *Id.*

But to be admissible, evidence of a defendant’s prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time. *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). A common scheme or plan exists where an accused devises a plan and repeats it to perpetrate separate but very similar crimes. *Id.* at 855. The commonalities with a prior occurrence need not be unique, but they must be “markedly and substantially similar” indicating, “the defendant has developed a plan and has again put that particular plan into action.” *Gresham*, 173 Wn.2d at 422. Prior opportunistic crimes do not qualify. *State v. Slocum*, 183 Wn. App. 438, 442, 456, 333 P.3d 541 (2014).

The court allowed the prosecution to use this prior act as evidence of a common scheme or plan. RP 13. The court found the

evidence adhered to a plan and was “clearly relevant” and the evidence established “a plan or design to rape.” RP 11-12. The court also found the probative value outweighed any unfair prejudice. *Id.*

What happened between Mr. Chavez and L.L. ten years earlier was not similar to what the government charged here. Mr. Chavez and L.L. were both teenagers in high school. RP 369. Unlike the witnesses in this case, the age difference between Mr. Chavez and L.L. did not make their encounter illegal. RCW 9A.44.079. And while the conduct may have occurred after Mr. Chavez and L.L. went driving his four-wheel drive truck, this did not make it so similar to the other incidents to be able to describe it as a common scheme or plan to have “sexual intercourse with a child.” *See Slocum*, 183 Wn. App. at 455 (“Slocum simply seized opportunities when no one was watching.”)

In fact, what happened between Mr. Chavez and L.L. did not resemble any of the incidents from trial. Importantly, there was not a significant age difference between Mr. Chavez and L.L. In addition, while the prosecution argued there was a common scheme by Mr. Chavez to isolate the complainants from their friends at parties, most of the incidents described at his trial did not occur that way. None of the incidents involving H.W. involved such a scheme. Instead, she alleged

she snuck out of a New Year's party the first time, saw him at her house on the second occasion, and left her house for their third encounter. The last encounter took place in the back of a truck, with other persons around. And while the incidents involving M.C. may have occurred during drives from where a group got together for a party, this similarity is not so great that it can be described as a common scheme or plan. At best, it was a crime of opportunity, distinguishable from those cases "where the defendant had a design for getting a victim physically isolated from possible witnesses." *Slocum*, 183 Wn. App. at 455. "The fact that a defendant molests victims when no one is close enough to see what is going on is too unlike a strategy for isolating a victim; it is not evidence of a plan." *Id.*

Whatever happened between Mr. Chavez and L.L. occurred ten years before his charges. This is a significant lapse in time, which this Court should conclude eroded the commonality between the acts. *Lough*, 125 Wn.2d at 860. In addition, these acts did not have the "high level of similarity" required to qualify as a common scheme or plan. *DeVincentis*, 150 Wn.2d at 19. Further, the interaction did not demonstrate "conduct created by design," and was instead an

opportunistic act. *State v. Sexsmith*, 138 Wn. App. 497, 505, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014, 180 P.3d 1291 (2008).

And when the similarities do not rise to the level of a common scheme or plan, but rather demonstrates more than one opportunistic act, reversal is required. *Slocum*, 183 Wn. App. at 455. In *Slocum*, the prosecution sought to admit evidence Slocum sexually abused the complainant's mother and aunt when they were young. *Id.* at 445-46. The trial court allowed the testimony as evidence of Slocum's "plan or design to molest children." *Id.* at 452. This Court held admission of several of the prior incidents was manifestly unreasonable because there were insufficient similarities to the charged crime. *Id.* at 455-56. W.N. was much younger than her mother and aunt when the touching began, and W.N. alleged ongoing molestation over several years, instead of isolated incidents of her mother and aunt. *Id.* at 454. The prosecution argued the molestation always occurred when Slocum was alone with the girls and could be assured of privacy. *Id.* But this Court said, "Slocum simply seized opportunities when no one was watching." *Id.* at 455. This Court explained: "The fact that a defendant molests victims when no one is close enough to see what is going on is too unlike a strategy for isolating a victim; it is not evidence of a plan." *Id.*

Importantly, what happened between Mr. Chavez and L.L. was not rape of a child. They were both in high school. RP 369. She was sixteen and not fourteen like the witnesses in this case. RP 368. Nothing suggests Mr. Chavez pursued L.L. or took any other steps to isolate her from her friends. RP 370. They found themselves alone at a friend's house and decided to go four wheel driving together. *Id.* He did not supply her with alcohol or otherwise act to reduce her inhibitions. And while L.L. testified Mr. Chavez's advances were not welcome, even this differed from the testimony of the other witnesses, who did not believe they were forced to have intercourse with Mr. Chavez. RP 160, 233.

As in *Slocum*, this evidence did not establish a common scheme or plan. The similarities between the incidents are not so similar they establish a common scheme or plan. For this reason, the court erred in admitting the evidence of the prior acts with L.L. and finding the probative value of the evidence outweighed its prejudicial effect. Instead, this Court should find the evidence was irrelevant, except to show Mr. Chavez's propensity for committing sexual misconduct.

c. *The error was not harmless as it improperly bolstered the prosecution's case.*

In determining whether improper admission of prior act evidence requires reversal, the inquiry is not whether there is sufficient evidence to convict without the inadmissible evidence. *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Rather, the question is whether there is a reasonable probability the outcome of the trial would have been different without the inadmissible evidence. *Id.* at 857.

The improperly admitted evidence provided a cornerstone for the prosecution's case that Mr. Chavez had a common scheme or plan to have sex with children. With no eyewitnesses to most of the incidents and multiple accounts of the remaining one, this case centered on credibility. *Gower*, 179 Wn.2d at 858. Framing Mr. Chavez, who testified, as a child rapist since he was a teenager made him appear to be a long-term danger to the community and uncut his credibility. This error in allowing the jury to hear about what happened with L.L. was not harmless. *Id.* This Court should reverse Mr. Chavez's convictions.

2. The government failed to establish all the essential elements of the crime of tampering with a witness, requiring dismissal of this charge.

The prosecution bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of

the crimes it charged against Mr. Chavez. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). The fundamental right to due process is violated where a conviction is based on insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const, amend. XIV; Const, art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

This Court may only affirm a conviction if, after viewing the evidence most favorable to the prosecution, it can conclude a rational trier of fact could have found sufficient evidence of the element beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

a. The government did not establish Mr. Chavez attempted to induce a witness to testify falsely.

The prosecution charged Mr. Chavez with one count of tampering with a witness. CP 226. In relevant part, a person is guilty of tampering with a witness if they have reason to believe the person is about to be called as a witness in an official proceeding and attempt to induce the witness to withhold testimony. RCW 9A.72.120(1)(a).

At trial, Mr. Chavez's brother Jesse testified he replaced his friend's broken iPhone with a new one. RP 343. This occurred after the

government charged Mr. Chavez. *Id.* Mr. Buckley was with some friends when Jesse gave him the phone. RP 348. The two went over to Jesse's house to use his Wi-Fi to set up the phone. *Id.* While they were there, Mr. Chavez came outside. *Id.* He asked Mr. Buckley if H.W. and M.C. were still his friends. *Id.* Mr. Buckley told him "not really, sort of." RP 350. Mr. Chavez then asked him if he could "get them to stop lying." RP 350. He then said, "you can help me, I can help you." RP 350. No evidence was introduced that Mr. Chavez asked Mr. Buckley to alter his testimony or to talk a witness into testifying falsely.

When evaluating the sufficiency of the evidence for the charge of witness tampering, this Court examines the meaning of the words used by the individual and the context in which they were used. *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). Where the literal words do not contain a request to withhold testimony, an express threat, or a promise of any reward, and the context does not allow for such an inference, reversal is required. *Id.* at 84.

In *Rempel*, the defendant instructed the witness to drop the charges and if she did not, his life would be ruined. 114 Wn.2d at 83. Because the defendant did not actually request the witness withhold her testimony, the Court reversed. *Id.* at 85; *cf. State v. Williamson*, 131

Wn. App. 1, 6, 86 P.3d 1221 (2005) (sufficient evidence where the defendant specifically asked the witness to take back her statement).

Like *Rempel*, there was no suggestion Mr. Buckley should withhold his testimony or induce any other witness to do so. Instead, Mr. Chavez only asked Mr. Buckley to convince his friends to “stop lying.” RP 350. And whether this statement was connected to a suggestion that friends help each other is inconsequential. It cannot be implied from the totality of the statements made by Mr. Chavez, or the gift given to Mr. Buckley by Mr. Chavez’s brother, that he intended to tamper with a witness. Viewed in the light most favorable to the prosecution, this is insufficient evidence of tampering.

b. This Court must reverse Mr. Chavez’s conviction for tampering with a witness for insufficient evidence.

Where there is insufficient evidence of an element of a crime, reversal is required. *Green*, 94 Wn.2d at 221; *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citations omitted). The prosecution failed to prove the crime of tampering and this Court must reverse Mr. Chavez’s conviction.

3. The government failed to prove the special allegation of abuse of trust.

Mr. Chavez's constitutional right to a jury trial and to due process require the government to charge and prove to a jury beyond a reasonable doubt any "fact" which it seeks to rely on to increase punishment above the maximum sentence otherwise available for a crime. *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); U.S. Const. amends. VI, XIV; Const. art. I, § 3, § 21, § 22.

a. There was insufficient evidence Mr. Chavez abused his position within his church to commit the charged crimes.

The first four counts charged that Mr. Chavez violated his position of trust when committing these crimes. CP 224-25. This required the government to prove that during the commission of the crime, Mr. Chavez used his position of trust, confidence or fiduciary responsibility to facilitate the commission of the offense. RCW 9.94A.535(3)(n).

For this sentencing allegation to be sufficient, this Court must first find Mr. Chavez was in a position of trust and then conclude that this position of trust was used to facilitate the charged offenses. *State v.*

Garnica, 105 Wn. App. 762, 772, 20 P.3d 1069, 1074 (2001) (citing *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673 (1994)). Because the evidence did not establish Mr. Chavez used a position of trust to facilitate the commission of any of the charged offenses, dismissal of the special allegation is required.

The prosecution argued Mr. Chavez's role as treasurer or trustee of his church was sufficient to establish this special allegation. RP 680-81, 684, 726, 729. Mr. Chavez was a trustee or treasurer for the church and was responsible for counting the offerings given during the church's weekly services. RP 413, 467. The church listed him as its treasurer on documents registered with the state. RP 414. There was no other evidence that suggested Mr. Chavez held any other position of trust within the church. He played no role in Sunday School, youth group, or any other youth-related activities. He did not give sermons, nor have any formal role in the services. RP 562.

Mr. Chavez met H.W. when she started going to the church he attended. RP 85. The prosecutor asked H.W. whether she ever saw Mr. Chavez "do anything at the church as far as serve or anything." RP 88. She replied, "No, just like come to church, attend, talk to people." *Id.* Mr. Chavez was just a regular member of the church, who happened to

be an usher. RP 140. There was no evidence to suggest H.W. was even aware of Mr. Chavez's role as trustee or treasurer.

Mr. Chavez moved to dismiss this special allegation. RP 459.

The prosecution argued Mr. Chavez's position of trust within his church provided the basis for this aggravator. The court did not analyze this question the same way the prosecution did, instead focusing on whether Mr. Chavez's discussion with H.W. about potentially babysitting his children placed him in a position of trust. RP 462. The court concluded it was Mr. Chavez's position in the church and his inquiry into whether H.W. wanted to babysit his children that justified the aggravated sentence. *Id.*

There was no evidence Mr. Chavez used his position in the church to facilitate the commission of a crime. H.W. regarded Mr. Chavez as a regular member of the church, who attended church and talked to people. RP 88. Mr. Chavez's position in the church had nothing to do with H.W. There is no indication Mr. Chavez used his church role to facilitate a relationship with H.W. and was inconsequential to his relationship with H.W. As such, it does not satisfy the elements of RCW 9.94A.535(3)(n).

b. *The court relied on improper facts to determine Mr. Chavez abused a position of trust, by focusing on a theory the government did not rely on or provide notice of to Mr. Chavez.*

Understanding the prosecution failed to present sufficient evidence Mr. Chavez's role at the church established a position of trust with H.W., the court focused on the solicitation Mr. Chavez made to see if H.W. would babysit his children. RP 462. The court relied on the commentary in the jury instructions to reach this conclusion, quoting that "when the victim is a child, a sufficient relationship of trust was established by the defendant's status as a neighbor, babysitter, parent or other close relative." *Id.* (quoting commentary for WPIC 300.23).

The mere solicitation to babysit does not place a person in a position of trust. There is a substantial difference between the potential inquiry into babysitting, and the cases involving rape committed by babysitters. *See State v. Stevens*, 58 Wn. App. 478, 481, 794 P.2d 38 (1990). Likewise, cases where this Court has affirmed a sentence based on this enhancement involve circumstances where there was an actual relationship of trust used to commit the charged crimes. *See State v. Grewe*, 117 Wn.2d 211, 218–21, 813 P.2d 1238 (1991) (neighbor); *State v. Russell*, 69 Wn. App. 237, 252, 848 P.2d 743 (1993) (father); *Bedker*, 74 Wn. App. at 95–96 (half-brother); *State v. Harp*, 43 Wn.

App. 340, 343, 717 P.2d 282 (1986) (uncle). Nothing about Mr. Chavez's suggestion H.W. could babysit his children put him in a similar position. This Court should not find it does.

In contrast, casual relationships do not establish this enhancement. *See State v. Serrano*, 95 Wn. App. 700, 713–14, 977 P.2d 47 (1999) (acquaintance and co-worker); *State v. Stuhr*, 58 Wn. App. 660, 663, 794 P.2d 1297 (1990) (house guest). Like these cases, the solicitation to babysit was at best a casual conversation not rising to the level required to prove abuse of trust. H.W. reached out to Mr. Chavez to babysit for him. RP 89. They met to talk but did not spend much time talking about babysitting. RP 90. Mr. Chavez never offered H.W. a position as a babysitter. RP 90. There is no suggestion Mr. Chavez ever exercised any other authority over H.W.

This was also an improper finding by the court. Any fact that increases the standard range for a crime must be submitted to the jury. *Alleyne*, 570 U.S. at 103; *Blakely*, 542 U.S. at 308. The prosecution never submitted this theory to the jury. The jury was not asked whether Mr. Chavez's offer to hire H.W. as a babysitter put him in a position of trust. The only way to know whether the jury relied on this theory is to look to their findings. *State v. Williams-Walker*, 167 Wn.2d 889, 901,

225 P.3d 913 (2010). Because they do not support the court's conclusion, this Court must find the trial court's reliance on this theory was improper.

c. Dismissal of the special allegation of abuse of trust and a new sentencing hearing is required.

This Court should hold there was insufficient evidence to support the special allegations of position of trust. Mr. Chavez's position as trustee or treasurer of his church had nothing to do with his relationship with H.W., who seemed unaware he even played a special role at the church. RP 88. Even if she had been, there was no evidence Mr. Chavez used his position in the church to facilitate the charged offenses. *Garnica*, 105 Wn. App. at 772; *Bedker*, 74 Wn. App. at 95.

Nor should this Court find the solicitation to babysit sufficient. First, the prosecution never proffered this as a theory, instead relying throughout the case on Mr. Chavez's position in the church. Even if it survives a *Blakely* challenge, the inquiry about babysitting fails factually. H.W.'s relationship with Mr. Chavez was at best tenuous and transient at this point and their discussion about babysitting was very brief. *Serrano*, 95 Wn. App. at 714. H.W. only briefly discussed babysitting and never did babysit. There was never an employer

relationship between H.W. and Mr. Chavez. This is an insufficient basis for an abuse of trust special allegation.

This Court should therefore hold the government failed to establish the special allegation of abuse of trust beyond a reasonable doubt and order these allegations stricken.

4. The overlapping convictions in count 2 and 3 of the information for the same offense violate double jeopardy requiring dismissal of one of the two counts.

To avoid double jeopardy, the trial court must instruct the jury that their verdicts must rest on unanimous agreement of separate and distinct conduct. *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). Because it is not “manifestly apparent” Mr. Chavez’s convictions for counts 2 and 3 were based on separate and distinct conduct, reversal of these convictions is required. *Id.*

a. The double jeopardy clause prohibits multiple convictions for the same offense.

The constitutional protection against double jeopardy prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *Mutch*, 171 Wn.2d 646; U.S. Const. amend. V; Const. art. I, § 9. If a person is convicted of offenses

that are identical both in fact and in law, the multiple convictions violate the right to be free from double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

This prohibition is strictly and rigorously protected by our courts. *Mutch*, 171 Wn.2d at 664. When charges are identical, such as those involving the same offense, same complaining witness, and same time period, courts must pay special attention to ensure no double jeopardy violation occurs. *Id.* To prevent such multiple convictions from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes each charged offense. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991). This is especially true for sexual offenses, where this Court has held the trial court must instruct the jury “that they are to find ‘separate and distinct acts’ for each count.” *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007) (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996)); *State v. Carter*, 156 Wn. App. 561, 567, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 934-35, 198 P.3d 529 (2008).

This requires the court to instruct the jury that each crime requires proof of a different act. *Mutch*, 171 Wn.2d at 663 (citing *Borsheim*, 140 Wn.App. at 367). The jury must be provided

“sufficiently distinctive ‘to convict’ instructions or an instruction that each count must be based on a separate and distinct criminal act.” *Id.* at 662 (citing *Carter*, 156 Wn. App. at 567; *Berg*, 147 Wn. App. at 934-35). Where the jury is not instructed to find separate and distinct acts, double jeopardy may be violated. *Mutch*, 171 Wn.2d at 662-63; *Carter*, 156 Wn. App. at 568 (reversing three counts of rape in same charging period due to lack of “separate and distinct” jury finding); *Berg*, 147 Wn. App. at 934-37 (same holding for two counts of rape); *Borsheim*, 140 Wn. App. at 370-71 (same holding for multiple counts of rape of a child in same charging period but only one “to convict” instruction); *State v. Holland*, 77 Wn. App. 420, 425, 891 P.2d 49 (1995) (reversing convictions for two counts of child molestation where it was impossible to conclude all twelve jurors agreed on the same act to support each conviction); *but see State v. Sage*, 1 Wn. App.2d 685, 698, 407 P.3d 359, 366 (2017), *cert. denied*, 18-7146, 2019 WL 888194 (U.S. Feb. 25, 2019).

In the absence of proper jury instructions, reversal is required unless it was “manifestly apparent” the conviction for each count was based on a separate act. *Mutch*, 171 Wn.2d at 664. Review is “rigorous” and it will be “a rare circumstance” where the appellate

court should affirm despite deficient jury instructions. *Id.* at 664-665. And while Division One of this Court recently held this error can be cured by examining the prosecution's election in their closing argument, this holding is inconsistent with prior rulings from Washington's Supreme Court. *Cf. State v. Kier*, 164 Wn.2d 798, 813, 194 P.3d 312 (2008) with *Sage*, 1 Wn. App.2d at 698. In *Kier*, the Supreme Court held that the prosecution's closing argument could not rectify the ambiguity of the verdict to avoid violating double jeopardy. 164 Wn.2d at 813. Where the jury instructions permitted jurors to convict Kier based on the same victim, it did not matter that the prosecutor's closing argument clearly explained the jury should view the two offenses as involving separate victims. *Id.* The Court ruled the instructions impermissibly allowed for a verdict in violation of double jeopardy. *Id.*

Even in *Mutch*, where all of the parties agreed that five separate, distinct acts of sexual intercourse occurred, the court emphasized such an outcome was "rare" and rested on the mutual agreement that the separate acts actually occurred. 171 Wn.2d at 664. Unlike *Mutch*, where the defense was based on consent, no such agreement took place here as Mr. Chavez actively denied any of the sexual offenses took

place. Under these circumstances, it is imperative the court clearly instruct the jury that the verdict must rest on separate and distinct conduct in order to overcome a double jeopardy violation. *Id.*

b. The jury instructions failed to protect against double jeopardy.

The jury instructions for counts two and three were similar to those ruled inadequate in *Mutch, Carter, and Borsheim*. CP 204-05. Mr. Chavez was charged with two identical counts of the same crime, with the same complainant occurring over the same time period. *Id.* The wholly overlapping nature of the charges permitted the jury to convict Mr. Chavez of two offenses based on the same conduct. This violates double jeopardy.

And although the jury was instructed to decide each count separately, this does not cure the double jeopardy violation. CP 197. This is the same instruction provided to the jury in *Mutch, Carter, and Borsheim*. *Mutch*, 171 Wn.2d at 662-63; *Carter*, 156 Wn. App. at 564-65 & n.4; *Borsheim*, 140 Wn. App. at 364. In each case, the court found this instruction was inadequate to cure the potential double jeopardy violation because it does not explain the underlying conduct must be different. *Id.*

Instead, the to-convict instructions for the second and third counts mirror each other. CP 205-05. There is no difference with dates, names, or locations. *Id.* It is impossible to distinguish the crimes from the jury instructions.

These to-convict instructions were similar to those provided in *Mutch*, *Carter*, and *Borsheim*. *Mutch*, 171 Wn.2d at 662; *Carter*, 156 Wn. App. at 564 & n.2; *Borsheim*, 140 Wn. App. at 364-65. As in those cases, the jury was never instructed it was required to use separate and distinct acts to convict Mr. Chavez of each offense. These instructions therefore exposed Mr. Chavez to multiple convictions for the same act.

c. The overlap in the instructions and charges violates double jeopardy and requires reversal of the two convictions.

In *Mutch*, the Court explained it strictly requires jurors to predicate their verdicts on separate acts. 171 Wn.2d at 665. Manifestly apparent jury instructions directing verdicts based on separate and distinct acts must be provided. *Id.* If not, it will be only the rare case where the record sufficiently shows the jurors premised their verdicts on separate and distinct acts beyond a reasonable doubt. *Mutch*, 171 Wn.2d at 664-65 & n.6.

This “rare” circumstance occurred in *Mutch* due to the clarity of the specific offenses charged and absence of any challenge to each act's

occurrence by the defense. *Id.* at 665. Mutch was accused of five distinct acts of rape during one episode. *Id.* The defense agreed each act occurred but argued the complainant consented. *Id.* This verdict unmistakably reflected five separate and distinct offenses. *Id.*

Unlike *Mutch*, Mr. Chavez vigorously denied he ever engaged in a sexual act with H.W. Nonetheless, the instructions did not make it manifestly apparent that separate and distinct acts of sexual intercourse had to form the basis of a guilty verdict on each count. CP 204-05. This is not the “rare circumstance” presented in *Mutch*. It is inconsequential the prosecutor laid out separate and distinct evidence for each charge. *Sage*, 1 Wn. App.2d at 698. It simply cannot cure the double jeopardy violation.

Mr. Chavez’s right to be free from double jeopardy was violated. A double jeopardy violation results in the dismissal of any conviction that violates the constitution. *See State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). One of Mr. Chavez’s two convictions based on the exact same language must be reversed and vacated due to the double jeopardy violation. *Id.* at 657; *Berg*, 147 Wn. App. at 935.

5. Mr. Chavez is entitled to resentencing because the court relied on improper factors when it imposed an exceptional sentence.

a. Sentencing courts have limited authority to impose sentences above the standard range.

A court's sentencing authority stems strictly from statute and is further restricted by the constitutional protections of due process, the right to jury determinations of all factual issues, and the prohibition on cruel punishment. *State v. Cawyer*, 182 Wn. App. 610, 616, 330 P.3d 219 (2014); *see Blakely*, 542 U.S. 296; *State v. Bassett*, 192 Wn.2d 67, 78-79, 428 P.3d 343 (2018); *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012); U.S. Const. amends. VI, VIII, XIV; Const. art. I, § 3, § 14, § 22.

Courts are generally required to impose standard range sentences. *State v. Law*, 154 Wn.2d 85, 93, 110 P.2d 717 (2005). When a judge imposes sentences for several current offenses, the terms generally must be concurrent. RCW 9.94A.589(1)(a). To impose consecutive sentences for current offenses, the court must comply with the exceptional sentencing provisions of RCW 9.94A.535.

Standard range sentences presumptively apply because they are based on the legislature's assessment of the appropriate punishment for certain offenses and are adjusted for a person's criminal history. *State*

v. Amo, 76 Wn. App. 129, 133, 882 P.2d 1188 (1994). A judge's belief the standard range is insufficient punishment is not a basis to depart from the standard range. *State v. Pascal*, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987).

To impose a sentence above the standard range, any factual determination justifying this sentence other than a prior conviction must be found by the jury and proven beyond a reasonable doubt. *See Hayes*, 182 Wn.2d at 562.

b. The trial court imposed an exceptional sentence based on improper factors.

While the court did not dismiss the abuse of trust doctrine as grounds to depart from the standard range, the court instead decided it would "go more in regard to the real facts of this case and how it came about." RP 846. The court found there were "three different kinds of crimes," and "three different victims." RP 846. The court determined it would use this as a basis for giving Mr. Chavez consecutive sentences. RP 846. The court determined it would impose the maximum allowed by the standard range, but run each sentence consecutively "because of the aggravators under the situation and basically because of the free crimes doctrine." RP 846.

- i. The abuse of trust doctrine was an improper basis for imposing an exceptional sentence.

The court imposed an exceptional sentence because the jury found the existence of an aggravating factor, that Mr. Chavez abused his position of trust to commit the crimes against H.W. CP 84. This Court should also hold this was an improper basis for imposing an aggravated sentence, as argued above in section three. It also violates *Blakely*, as the court relied on facts not found by the jury to justify the exceptional sentence. *Williams-Walker*, 167 Wn.2d at 902.

For a sentencing allegation to be sufficient, this Court must first find Mr. Chavez was in a position of trust and then that this position of trust was used to facilitate the charged offenses. *Garnica*, 105 Wn. App. at 772; *Bedker*, 74 Wn. App. at 95. Because the evidence did not establish Mr. Chavez used a position of trust to facilitate the commission of any of the charged offenses, this is an improper basis for departing from the standard range.

- ii. Mr. Chavez did not benefit from the “free crimes” doctrine because his offender score was elevated by multipliers.

The trial court also used the “free crimes” doctrine to justify departing from the standard range, which this Court should find does not apply. When Mr. Chavez was convicted, he had no scorable history.

CP 64. All of his points come from current offenses. CP 65. And rather than scoring each current offense as a single point, the legislature determined Mr. Chavez’s sex offense convictions should triple score. RCW 9.94A.525(17). Without this triple scoring, Mr. Chavez’s offender score would still be within the sentencing grid, with a range of 46-60 months. RCW 9.94A.510. Using the multiplier means Mr. Chavez was punished for his offenses, which were factored in when determining his offender score.

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
LEVEL	13m	17.5m	24m	30m	36m	42m	53m	58.5m		
VI	12+-14	15-20	21-27	26-24	31-41	36-48	46-60	57-60	60-60	60-60

In an unpublished opinion, this Court recently recognized that a trial court must weigh the use of multipliers for the “free crimes” aggravating factor because the use of a multiplier to increase a person’s offender score means the offenses are being counted in a person’s offender score. *See State v. Phelps*, 2 Wn. App.2d 1051; 2018 WL 1151975, *4 (2018) (unpublished, cited as non-binding authority under GR 14.1); *see generally State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

In *Phelps*, this Court reversed an exceptional sentence imposed based on the “free crimes” aggravator where the defendant’s offender

score for taking a motor vehicle without permission was elevated to 19, largely because his prior six convictions for similar offenses counted as three points each. *Phelps*, 2018 WL 1151975 at *3. Without the multiplier, his offender score was 6. The current offenses were punished because it was the nature of those offenses that triggered the multiplier, leaving Phelps with an offender score of 19. *Id.* at *4.

This can be contrasted with *France*, where the defendant was convicted of nine counts of felony harassment and had six prior convictions, giving him an offender score of 15. 176 Wn. App. at 466. The court imposed an exceptional sentence based on two aggravating factors: an officer of the court was a victim and some of the current offenses were not punished under the standard range. *Id.* at 472-73. This Court upheld this exceptional sentence, in part because no multipliers increased the offender score and the standard range accounted for only three of the nine offenses of conviction.

Here, the trial court misconstrued the nature of the unpunished offenses, incorrectly believing offenses would go unpunished because Mr. Chavez's offender score exceeded nine. This misperception was based on the court's failure to understand the multiplying effect of sex

offenses and the legislature's decision to increase the standard range where a person is convicted of multiple current sex offenses.

A court abuses its discretion when it misapplies the law or fails to understand the scope of its discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Here, the court did both, and this undermines the exceptional sentence imposed.

- iii. This Court should vacate the exceptional sentence because it was based on improper grounds.

Where an exceptional sentence is not legally justified by the aggravating factor or is based on an improper reason, the exceptional sentence should be vacated. *Hayes*, 182 Wn.2d at 567. Here, the court misunderstood the nature of Mr. Chavez's offender score, incorrectly believed some offenses were unpunished, was unaware of the multiplier used to account for the offenses in the offender score, and relied on facts not found by the jury. This Court should vacate the exceptional sentence and order a new sentencing hearing.

6. The trial court erred when it made additional findings of fact in support of Mr. Chavez's exceptional sentence not made by the jury in its special interrogatories.

In the alternative, a new sentencing hearing is required because the court based its sentence on facts not determined by the jury. CP 82.

This error requires a new sentencing hearing. *State v. Perry*, ___ Wn. App.2d ___, 431 P.3d 543, 550 (2018); *Hayes*, 182 Wn.2d at 562.

In *Perry*, this Court held that where the trial court makes findings of fact in addition to those made by the jury to support an exceptional sentence, a new sentencing hearing is required. 431 P.3d at 547. In *Perry*, the only question the jury was asked was “Did the victim’s injuries substantially exceed the level of bodily harm necessary to constitute bodily harm, as defined in Instruction 8.” *Id.* at 551. The *Perry* trial court made substantial findings of its own. *Id.*

Here, the only question the jury was asked was “Whether the defendant used his position of trust to facilitate the commission of the crime.” CP 216-17. Nevertheless, the court made extensive findings about the facts of the case, including H.W.’s involvement in the church, Mr. Chavez’s role in the church, her inquiries about babysitting, and who within the church was told about this incident. CP 83-85. These findings included where Mr. Chavez met H.W., her attendance at church and baptism, Mr. Chavez’s role in the church as usher and trustee, the development of the relationship between Mr. Chavez and H.W., and H.W.’s decision not to tell church leadership about the relationship. CP 83. The court made additional findings that Mr.

Chavez was able to gain H.W.'s trust, build rapport with her, and arrange to drive her to a secluded area and rape her. CP 84. The court further found Mr. Chavez molested H.W. when she was intoxicated. CP 85. None of these findings were submitted to a jury or part of the jury's findings.

These findings were improper as they were not based on a jury finding. RCW 9.94A.537(6) provides:

If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction *if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons* justifying an exceptional sentence.

(Emphasis added).

The plain language of RCW 9.94A.537(6) restricts the trial court to decide only whether the facts found by the jury are substantial and compelling reasons for an exceptional sentence. *Perry*, 431 P.3d at 557. The trial court may not make additional findings of fact not made by the jury. *Id.* And when the trial court made additional findings that were not based on the jury's special verdict, it went beyond deciding

whether the facts found by the jury were substantial and compelling reasons for an exceptional sentence. *Id.*

These additional findings beyond what the jury found by special verdict also violate the requirement a jury find all facts used to enhance a sentence. *Perry*, 431 P.3d at 557 (citing *Blakely*, 542 U.S. 296; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)) (Other than the fact of a prior conviction, any fact increasing the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.)

In fact, Washington's law is clear. In *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006), the Court stated:

In sum, the *Hughes*³ court concluded that after *Blakely*, the required underlying factual bases for the aggravating factor were factual findings that had to be determined by a jury. The trial judge was left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.

Similarly, in *State v. Sage*, this Court held:

The only permissible “finding of fact” by a sentencing judge on an exceptional sentence is to confirm that the jury has entered by special verdict its finding that an aggravating circumstance has been proven beyond a reasonable doubt. Then it is up to the judge to make the legal, not factual, determination whether those

³ *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).

aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence.

1 Wn. App.2d at 709.

The trial court made additional findings of fact not made by the jury here. CP 83. Because this Court cannot determine whether the trial court based its legal conclusion to impose the exceptional sentence solely on the jury's finding by special interrogatory, it cannot be satisfied the trial court would have imposed the same sentence based on the jury findings alone. *See State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003); *see also State v. Nysta*, 168 Wn. App. 30, 54, 275 P.3d 1162 (2012); *State v. Moses*, 193 Wn. App. 341, 365, 372 P.3d 147 (2016). Reversal of Mr. Chavez's sentence and remand for resentencing on the aggravating factor found by the jury is required.

Perry, 6 Wn. App.2d at 559.

7. The court deprived Mr. Chavez of his right to familial association by limiting contact with his children to the time of his imprisonment.

RCW 9.94A.505(9) authorizes a court to impose crime-related prohibitions as sentencing conditions. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). However, conditions interfering with fundamental rights, like the right to a parent-child relationship, must be "sensitively imposed" so they are "reasonably necessary to accomplish

the essential needs of the State and public order.” *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (internal quotation marks omitted) (quoting *Warren*, 165 Wn.2d at 32).

The trial court placed no restriction on Mr. Chavez’s ability to see his children while in custody but requires approval by probation or a treatment provider before allowing him to see any persons under 16 on his release from prison. CP 80. This is a significant restraint on Mr. Chavez’s fundamental right to have a family and children. *Warren*, 165 Wn.2d at 34 (interference with right to marriage and the care, custody, and companionship of one’s children is subject to strict scrutiny).

There is no evidence Mr. Chavez is a danger to his own children. Conditions preventing Mr. Chavez from seeing his family are not reasonably necessary to accomplish the government’s needs. *See State v. Letourneau*, 100 Wn. App. 424, 427, 997 P.2d 436 (2000). In *Letourneau*, the Court of Appeals struck a condition requiring Letourneau to be supervised during contact with her children because even though she had been convicted of sexual crimes against children there was no proof she was known to molest her own children. *Id.*

The Ninth Circuit also recognizes that a person who commits sexual acts against children should not be presumed to also be likely to

commit acts against their own children. *United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012). In *Wolf Child*, the sentencing court imposed conditions of community custody that forbade Mr. Wolf Child from contacting minors or adults who have minor children without regard for his affected family relationships. *Id.* at 1087. The Ninth Circuit recognized, “Not all sex offenders are the same; nor are all who plead to a particular type of sex offense.” *Id.* at 1094. Proof Wolf Child had abused other children did not support a finding that he would harm his own children. *Id.* at 1094, 1099. The restriction against contact between Mr. Wolf Child and his children was lifted. *Id.* at 1103.

By restricting Mr. Chavez from having a relationship with his children without approval, the sentencing court unconstitutionally interfered with Mr. Chavez’s right to marriage and to parent. This Court should order this condition stricken.

F. CONCLUSION

A new trial is required because the court abused its discretion by allowing the jury to hear propensity evidence.

Dismissal of the charge of tampering is required because the prosecution failed to establish Mr. Chavez attempted to induce the witness to withhold testimony. Dismissal of the special allegation of

abuse of trust is required because the prosecution failed to present sufficient evidence of abuse of trust.

Vacation of one of either count two or three is required because Mr. Chavez's conviction for both counts violated double jeopardy.

If this court does not order a new trial, Mr. Chavez is entitled to a new sentencing hearing and to have the condition restricting him from contact with his children on release stricken.

DATED this 1st day of April 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52358-2-II
)	
NATHAN CHAVEZ,)	
)	
Appellant.)	

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