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Court of Appeals  
Division II  
State of Washington  
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N NO. 52358-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent

v.

NATHAN CHAVEZ,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

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## A. ARGUMENT IN REPLY

This Court should hold a new trial is required because of the trial court's error in allowing the jury to hear propensity evidence from ten years prior about an incident only remotely similar to the charged offenses. In addition, this Court should hold there was insufficient evidence of witness tampering and that dismissal of this charge is required. Likewise, the government presented insufficient evidence of abuse of trust, requiring dismissal of this aggravating factor.

In the alternative, a new sentencing hearing is required. At sentencing, the trial court relied on improper factors. Despite the prosecution's argument to the contrary, it is not sufficient that factors justifying the exceptional sentence could have been relied on by the court, which Mr. Chavez does not concede occurred. Additionally, Mr. Chavez recognizes the prosecution's concession on whether he should be allowed to have contact with his own biological children and makes no further argument on this issue.

**1. A new trial is required to correct the court's error in allowing an unrelated incident from more than ten years ago to be heard by the jury.**

The prosecution argues an act from when Mr. Chavez was a teenager was part of a common plan of his to have sex with underage

persons. Brief of Respondent at 15, CP 297. This Court should hold otherwise and find that the trial court erred when it allowed the jury to hear evidence of an event that took place ten years before the charged crimes. Because this error was not harmless, Mr. Chavez asks this Court to order a new trial.

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). Where it is likely that the evidence heard by the jury will result in a conviction based on the defendant's propensity to commit a crime rather than proof of the underlying fact, ER 404(b) requires exclusion of the evidence. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). This is especially important in sex crime cases, where the prejudicial effect of prior acts is the highest. *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

In arguing that this Court should not reverse Mr. Chavez's conviction, the prosecution urges this Court to distinguish the facts of this case from *State v. Slocum*, where the Court of Appeals reversed under similar circumstances. Brief of Respondent at 16; *see also Slocum*, 183 Wn. App. 438, 456, 333 P.3d 541 (2014). But, the primary

relationship between the earlier incident and the current offenses was the same fact that the Court of Appeals made clear was insufficient in *Slocum*: that Mr. Chavez took opportunistic advantage of being alone with the persons alleging he had sex with them. *Id.*

Unlike the charged crimes, there was not a significant age difference in the prior act. And even though the prosecution continues to argue Mr. Chavez had a design to separate L.L., H.W. and C.M. from their friends and other witnesses, most of the incidents at trial were not described this way. L.L. and Mr. Chavez were never with other people before their alleged incident. None of the incidents with H.W. involved such a scheme either. 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 incident with H.W. took place in the back of a truck, with other people around. The incidents involving M.C. may have occurred during drives from a party, but this does not establish a common scheme or plan. Instead, 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.

The prior act with L.L. was simply not part of a common scheme to have “sexual intercourse with a child.” CP 297. Mr. Chavez and L.L. were social peers in roughly the same age group. RP 369. Nothing suggests Mr. Chavez pursued L.L. or took any other steps to isolate her from her friends. RP 370. It was also not per se illegal for them to have intercourse with each other. RCW 9A.44.079. There was a significant period of time between the incidents, which erodes the commonality between the acts. *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The acts did not have the “high level of similarity” required to qualify as a common scheme or plan. *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). 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). 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.

This Court should hold that the trial court erred when it allowed the jury to hear about an act from when Mr. Chavez was a teenager, ten years prior to the charged offenses. This evidence was highly prejudicial and unquestionably affected the outcome of the case. *State v. Gower*, 179 Wn.2d 857, 857, 321 P.3d 1178 (2014). The improperly admitted framed Mr. Chavez, who testified, as a child rapist since he was a teenager and a long-term danger to the community, undercutting his credibility. This error was not harmless. *Gower*, 179 Wn.2d at 858. Mr. Chavez's convictions should be reversed.

**2. Because the government failed to establish all the elements of witness tampering, this charge should be dismissed.**

The prosecution argues it presented sufficient evidence of witness tampering. Brief of Respondent at 24. This Court should hold otherwise and dismiss this charge.

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). Reversal is required 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. *Id.* at 84.

The prosecution attempts to distinguish this case from prior cases where this Court held that requests to drop charges is insufficient to sustain a conviction for witness tampering. Brief of Respondent at 28. But like this case, other cases this Court has examined have found insufficient evidence of witness tampering in similar circumstances. In *Rempel*, the defendant asked the witness not to testify because, if she did, 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.

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. There was never a request for a witness to refrain from testifying or otherwise withhold testimony. And whether this statement was connected to a suggestion that friends help each other is inconsequential. It cannot be implied from the statements made by Mr. Chavez or the gift given to Mr. Buckley by Mr. Chavez’s brother that Mr. Chavez intended to tamper with a witness. Viewed in the light

most favorable to the prosecution, this is insufficient evidence of tampering.

**3. Dismissal of the aggravating factor of abuse of trust is required.**

The government argues there was sufficient evidence to find the aggravating factor of abuse of trust. Brief of Respondent at 30. This Court should hold otherwise, dismiss the aggravating factor and order the trial court to resentence Mr. Chavez within the standard range.

To prove abuse of trust, the government must establish 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 this position of trust was used to facilitate the charged offenses. *State v. Garnica*, 105 Wn. App. 762, 772, 20 P.3d 1069 (2001).

Mr. Chavez's role as treasurer or trustee of his church was insufficient to establish this special allegation. RP 680-81. But when asked about his relationship to the church, H.W. never considered that he held any position of trust, stated when asked whether she ever saw Mr. Chavez "do anything at the church as far as serve or anything," she

replied, “No, just like come to church, attend, talk to people.” RP 88.

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.

The government confuses evidence alleging Mr. Chavez established a relationship with H.W. with abuse of trust. RCW 9.94A.535(3)(n). Getting H.W. to trust him is not the same as abusing a position of trust. In its brief, the government cites to Mr. Chavez’s “association with the church” as sufficient to prove the aggravating factor. Brief of Respondent at 36. This mistakes the clear requirement that a person abuse a position of trust, confidence or fiduciary responsibility with a relationship that might include trust because both H.W. and Mr. Chavez attended the same church. RCW 9.94A.535(3)(n). It is insufficient to only establish H.W. trusted Mr. Chavez because of his relationship to the church: it must be because he abused his position of trust to commit the crime. Because there is insufficient evidence of this factor, dismissal of the aggravating factor and resentencing is required.

In addition, because the government did not address the potential for babysitting as an additional way to prove this element, it is

not addressed here. Nevertheless, this continues to be an insufficient basis, under the facts and procedures of this case, to establish the aggravating factor. *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, 308, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Because it was relied on by the trial court to justify an exceptional sentence, a new sentencing hearing is required.

**4. Principles of double jeopardy require dismissal of either count two or three of the information.**

The prosecution argues double jeopardy was not violated because the evidence presented to the jury made it manifestly apparent that counts two and three were separately charged acts. Brief of Respondent at 36. This Court should find otherwise and hold that dismissal of one of the two counts is required.

The government relied on *State v. Noltie* in asking this court to find no double jeopardy violation. Brief of Respondent at 37 (citing *Noltie*, 116 Wn.2d 831, 835, 809 P.2d 190 (1991)). But as the government observes, the jury in *Noltie* was specifically instructed that the conduct in the second counts was separate from the incident proved in the first count. *Noltie*, 116 Wn.2d at 849.

And here, it is not manifestly apparent the jury convicted Mr. Chavez of separate acts. Mr. Chavez was charged with two identical counts of the same crime, with the same complainant occurring over the same time period. The wholly overlapping nature of the charges permitted the jury to convict Mr. Chavez of two offenses based on the same conduct.

This Court should instead rely on *State v. Kier*, where the Washington Supreme Court held that the prosecutions attempt in closing arguments to rectify the ambiguity of the instructions could not avoid the violation of double jeopardy. 164 Wn.2d 798, 813, 194 P.3d 312 (2008).

And while the prosecution argues that the jury instruct to consider all counts separately cures the double jeopardy issue, this is inconsistent with other holdings from this Court and the Supreme Court. This is the same instruction the court provided to the jury in other cases examined by this Court and the Supreme Court. *See State v. Mutch*, 171 Wn.2d 646, 662-63, 254 P.3d 803 (2011); *State v. Carter*, 156 Wn. App. 561, 564-65 & n.4, 234 P.3d 275 (2010); *State v. Borsheim*, 140 Wn. App. 357, 364, 165 P.3d 417 (2007). 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.

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 is not the rare case. 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. Mr. Chavez's right to be free from double jeopardy was violated. Mr. Chavez asks this Court to order dismissal of one of the two counts that violate this principle. *See State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

**5. A new sentencing hearing is required because the trial court relied on improper factors at sentencing.**

The prosecution does not argue the sentencing court relied on improper factors, but asserts it was proper because the trial court was

only relying on the factors to structure the sentence. Brief of Respondent at 42. The prosecution then argues that even if this was in error, that resentencing is not required because the trial court would have imposed the same sentence anyway under permissible factors. *Id.* at 43.

These arguments should be rejected. Courts are required to impose the standard range, except under limited circumstances. *State v. Law*, 154 Wn.2d 85, 93, 110 P.2d 717 (2005). To impose consecutive sentences for current offenses, the court must comply with the exceptional sentencing provisions of RCW 9.94A.535. Because the trial court did not comply with these provisions, a new sentencing hearing is required.

In addition, the factors the court relied on were improper. *Blakely* requires a trial court to only rely on facts found by the jury to justify an exceptional sentence, except for rare circumstances. *State v. Williams-Walker*, 167 Wn.2d 889, 902, 225 P.3d 913 (2010). Because there was insufficient evidence Mr. Chavez was in a position of trust and then used this position to facilitate the charged offenses, there was insufficient evidence of this charge. *Garnica*, 105 Wn. App. at 772; *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673 (1994).

And because Mr. Chavez did not benefit from the “free crimes” doctrine this was also an insufficient justification from departing from the standard range. Mr. Chavez had no scorable history when he was convicted of these crimes. CP 64. 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. 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.

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. *State v. Hayes*, 81 Wn. App. 425, 456, 914 P.2d 788 (1996). 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.

B. CONCLUSION

Mr. Chavez asks that this Court order a new trial because of the trial court's error in allowing the jury to hear propensity evidence. Mr. Chavez also asks this court to dismiss the witness tampering charge and the special allegation of abuse of trust because insufficient evidence of these charges was presented to the jury.

Mr. Chavez also asks this Court to dismiss either court two or three for double jeopardy purposes and, if a new trial is not ordered, order resentencing because of the court's reliance on improper factors at sentencing.

Mr. Chavez also agrees with the government that his no-contact order with his biological children should be modified.

DATED this 15th day of July, 2019.

Respectfully submitted,

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

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

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

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