

FILED
Court of Appeals
Division II
State of Washington
7/22/2020 3:27 PM

No. 54136-0-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MR. CARSON
Appellant.

BRIEF OF APPELLANT

Suzanne Lee Elliott, WSBA # 12634
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711
suzanne-elliott@msn.com

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR..... 1

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT 10

 1. THE TRIAL COURT ERRED IN GIVING INSTRUCTION 16. ... 10

 2. THE TRIAL ABUSED ITS DISCRETION WHEN IT DENIED
 CARSON’S REQUEST FOR PUBLIC FUNDS 14

 3. THE TRIAL COURT ERRED IN DENYING CARSON’S
 MOTION FOR NEW COUNSEL FOR SENTENCING FOR AN
 IMPROPER REASON..... 17

 4. THE TRIAL COURT ERRED IN FAILING TO ENTER
 FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT
 THE EXCEPTIONAL MINIMUM TERM OF IMPRISONMENT
 IMPOSED..... 19

V. CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

| | |
|--|----|
| <i>City of Kirkland v. O'Connor</i> , 40 Wn. App. 521, 522, 698 27 P.2d 1128 (1985)..... | 13 |
| <i>In re Det. Of R.W.</i> , 98 Wn. App. 140, 144, 988 P.2d 1034 (1999)..... | 11 |
| <i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)..... | 10 |
| <i>State v. Clayton</i> , 32 Wash. 2d 571, 202 P.2d 922 (1949) | 12 |
| <i>State v. Cross</i> , 156 Wn.2d 580, 607, 132 P.3d 80 (2006)..... | 18 |
| <i>State v. Cunningham</i> , 96 Wn.2d 31, 34, 633 P.2d 886 (1981) | 16 |
| <i>State v. Faucett</i> , 22 Wn. App. 869, 875, 593 P.2d 559 (1979)..... | 11 |
| <i>State v. Friedlund</i> , 182 Wash. 2d 388, 394, 341 P.3d 280, 282 (2015).... | 20 |
| <i>State v. Hampton</i> , 184 Wn.2d 656, 670, 361 P.3d 734 (2015) | 18 |
| <i>State v. Jackman</i> , 156 Wn.2d 736, 743, 132 P.3d 136 (2006)..... | 10 |
| <i>State v. Jacobsen</i> , 78 Wn.2d 491, 495, 477 P.2d 1 (1970) | 10 |
| <i>State v. Levy</i> , 156 Wn.2d 709, 723, 132 P.3d 1076 (2006)..... | 10 |
| <i>State v. Morden</i> , 87 Wash. 465, 467–68, 151 P. 832, 833 (1915) | 12 |
| <i>State v. Rohrich</i> , 149 Wn.2d 647, 654, 71 P.3d 638 (2003) | 16 |
| <i>State v. Sage</i> , 1 Wash.App.2d 685, 708, 407 P.3d 359, <i>review denied</i> , 191 Wn.2d 1007 (2018) | 20 |
| <i>State v. Stenson</i> , 132 Wn.2d 668, 734, 940 P.2d 1239, 1272 (1997)..... | 18 |
| <i>State v. Svalesson</i> , 195 Wash. 2d 1008, 458 P.3d 790 (2020)..... | 1 |
| <i>State v. Young</i> , 125 Wn.2d 688, 691, 888 P.2d 142, 144 (1995)..... | 16 |

Statutes

| | |
|--------------------|----|
| RCW 9.94.670 | 14 |
| RCW 9.94A.505..... | 14 |

| | |
|------------------------------|----|
| RCW 9.94A.535..... | 20 |
| RCW 9.94A.537(6)..... | 20 |
| RCW 9.94A.670(2)(a)-(f)..... | 14 |
| RCW 9.94A.670(3)..... | 14 |

I. ASSIGNMENTS OF ERROR

1. The trial court erred giving Instruction 16.¹ CP 62.
2. The trial court erred in denying Carson's request for public funds to obtain a statutorily required evaluation when Mr. Carson met gateway criteria for a Special Sex Offender Sentencing Alternative [SSOSA].
3. The trial court erred when it used an improper reason to refuse to grant Carson's request to appoint new counsel before sentencing.
4. The trial court erred in failing to enter findings of fact and conclusions of law to support the exceptional minimum term of imprisonment imposed.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the jury was instructed that that no corroboration of the victim's allegations was necessary for the jury to convict Carson, was that instruction an unconstitutional comment on the victim's credibility and was the harm increased by the fact the state introduced the contents of Carson's cell phone, essential oils and a vibrator as corroborating evidence?
2. Did the trial court abuse its discretion in denying Carson's request for public funds for a SOSSA evaluation by predetermining it would be an unreasonable

¹ This issue is pending in the Washington State Supreme Court. *State v. Svaieson*, 195 Wash. 2d 1008, 458 P.3d 790 (2020).

expenditure of public funds because regardless of the results of the evaluation the trial court would not grant a SOSSA primarily because the victim opposed a SSOSA?

3. Did the trial court abuse its discretion when it denied Carson's request for new counsel because in the trial court's view its hand-picked counsel was not performing deficiently?

4. Did the trial court err in imposing an exceptional minimum term without making written findings that the term was supported by the purposes of the Sentencing Reform Act?

III. STATEMENT OF THE CASE

Kevin Mr. Carson was charged with two counts of criminal misconduct: Count 1, First Degree Rape of a Child, in violation of RCW 9A.44.073, and Count 2, First Degree Child Molestation, in violation of RCW 9A.44.083. Both crimes were alleged to have occurred between May 16, 2015 and August 28, 2018. The alleged victim, Mr. Carson's step-granddaughter A.M.B., was 6 on the date the charges were filed. CP 5-6. Mr. Carson is married to Dawn Carson who is the biological mother of Charles Bartholomey, A.M.B.'s father. A.M.B.'s mother is Morgan Cooksey. Although she and Charles are not legally married, they had lived together as husband and wife since A.M.B.'s birth.

A.M.B. and her parents did not live far from Mr. Carson and Dawn and she had been visiting and staying overnight with her grandparents since birth. RP 689. Charlie, Morgan and A.M.B. had even lived with Mr. Carson and Dawn in the winter of 2016 and again in the winter of 2017. RP 689. A.M.B. lived alone with her grandparents for a month in the summer of 2017. RP 690. And she stayed with her grandparents twice when her parents went on vacation. *Id.*

Dawn worked outside the home but Mr. Mr. Carson was disabled and did not work regularly. RP 691. When A.M.B. was visiting and Dawn had to work, Mr. Mr. Carson was home with the child. RP 692.

On August 27, 2018 A.M.B. returned home to her parents after spending five days Mr. Carson and Dawn. RP 688. Upon her return she told her mother that Mr. Carson had been sexually abusing her.

She proceeded to tell me that she had watched a video with adults that were naked that her Pop Pop had showed her and she was then made to touch him, touch his penis, and then he did the same to her.

RP 493.

Her parents immediately took A.M.B. for a forensic medical examination by Dr. Adebimpe Adewusi, a forensic interview conducted by

Rachel Petke,² and later to counseling with Kim Jacobwitz. A.M.B. repeated her allegations to these investigators including that her grandfather used a that vibrated on her and put oil on her vagina. A.M.B. also told these witnesses that her grandfather showed her a video of “teenagers” having sex. RP 423-25.

When the allegations were reported to law enforcement, the police searched Kevin’s home. During the search the police seized a vibrator, essential oils and Kevin’s phone. RP 723-25. The phone contained adult pornographic images. RP 660-68, 727-28.

By the time of trial, A.M.B. was 7. She testified and described the sexual contact. RP 401-406. She stated that grandfather abused her more than once. RP 404. A.M.B.’s parents, Dr. Adewusi, Ms. Petke and Ms. Jacobowitz also testified about A.M.B.’s generally consistent statements to them.³

Mr. Carson testified and denied the abuse. RP 770-794.

When it came time to instruction the jury, the State proposed an instruction that stated: “Instruction No. 16: In order to convict a person of the crime of child molestation in the first degree or rape of a child in the first degree

² The videotape of this interview was played for the jury but the court reporter did not transcribe it. A pretrial transcription was filed CP 139-208.

³ Prior to trial the court found these hearsay statements were reliable under factors set forth in RCW 9.44.120. CP 136-140.

as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated.” CP 62.

The defense objected and pointed out that the State had presented corroborating evidence. RP 753. The State argued the instruction should be given because:

Bottom line, if you give this instruction in this case under these facts, based on the case law, it's going to be upheld. So the Supreme Court affirmed this type of instruction claiming -- granted, it was a long time ago, but that's still good law. The appellate courts in Malone and Zimmerman and in Chenoweth all upheld this different -- slightly different form but the same general instruction. And in Chenoweth they actually denied review. That was the Supreme Court saying, look, this is settled; we don't need to take it up. So there is a long body of case law supporting this kind of instruction, and Chenoweth explained why, you know, because these crimes are different, it's not going to have eyewitnesses and things of that nature that you are going to have with other types of crimes. So in these instances it's kind of fair to tell juries, like, it's not a legal requirement there be other things. It's -- it makes even more sense in the child sex context.

RP 753-54. The defense objected. RP 752-53.

The Court ruled: “This is an accurate statement on the law; it's not a comment on the evidence. It conforms with the evidence as the -- the major issue here is, in fact, credibility and corroboration.” RP 755. The Court gave the instruction as proposed by the State. CP 62.⁴

⁴ The Washington Pattern Criminal Jury Instructions (WPIC) do not include a corroboration instruction and the Washington Supreme Court Committee on

In closing the State argued that:

Counsel says there was no corroboration in this case. That's where I spent, you know, 15 minutes-plus in my first closing argument talking about. There is corroborating evidence. The law says there doesn't have to be. In fact, the testimony of one compelling person can be enough to create an abiding belief. Here we do have very compelling testimony in that video we watched. I would say that creates a body of belief. And when you consider it with the other evidence that supports the fact he did this to her, it's an even stronger abiding belief that this happened.

RP 872.

The jury convicted Mr. Casonas charged. CP 81-83. The jury also found that Mr. Carson had abused his position of trust when he had committed these offense. CP 82.

Mr. Carson asked for the appointment of new counsel. C.P. 89-90. This request was heard in open court with the prosecutor present. The trial court granted the request because trial counsel was a potential witness in a related bail jumping charge filed against Mr. Carson during the pretrial proceedings but severed from the sexual abuse charges. RP 141-43. When new counsel was appointed, the judge said:

Jury Instructions has explicitly recommended against such instruction, finding corroboration to really be a matter of sufficiency of the evidence. See *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), *review granted, cause remanded*, 157 Wn.2d 1012, 138 P.3d 113 (2006).

I got it right here in the red book. The red book works. We'll go with Mr. Sowder. James Sowder is appointed for sentencing and that's it.

RP 880.

On October 15, 2019, Mr. Sowder filed a motion to withdraw and for substitution of counsel. CP 89. His declaration accompanying the motion stated that Mr. Carson had asked him to withdraw because Mr. Carson did not believe Sowder had time to properly prepare for his sentencing. Sowder stated that he had a first-degree murder trial commencing before Kevin's sentencing and that would take precedence over this case. *Id.*

The trial court held a hearing on the motion. At the hearing Sowder said

No, I just -- they asked me to withdraw. I told them -- I just -- the wife wrote that long letter, and I didn't like the letter, wrote my response and I articulated what I saw as issues on appeal, but it's going to take a while to articulate them. And (inaudible), but they sent me a couple calls to withdraw, and his wife started her thing, and I thought, well, I got -- I'm not applying for this job. I've got enough things to do and complicated cases. So if he doesn't want me as his attorney, then I don't need to be here.

RP 890.

Mr. Carson said, "I have the letter." RP . In the letter Mr. Carson said that Sowder had told both him and his wife he was "too busy" and "doesn't get paid enough to put the proper time in to do his job effectively." Supp. C.P. _____, Sub. 122 Letter from Mr. Carson filed 10/18/19. The judge first directed Mr. Carson to permit the State to read the letter.

After reading the letter, the judge asked Mr. Carson if he had anything to say. Mr. Carson said “No, Sir.” RP 890. The State said:

The State doesn't take a position on whether or not there is a basis for -- to determine that there's been a breakdown in communication. I'll defer to the Court on that determination. Obviously, if the Court makes that finding, a new attorney would be appropriate. If the Court finds something less than just people not getting along so well, then I guess the attorney would stay.

RP 891.

The Court denied the motion and said:

So what I see in the file in terms of findings are that the defendant and his wife do not like the rate at which Mr. Sowder is preparing the file. I don't know that I've seen anyone go to more length than Mr. Sowder in preparing a case for appeal and notifying somebody of issues for appeal. In fact, I don't think -- I don't think I've seen counsel do as thorough a job in doing that. I try cases all the time, all year, that's what we do.

RP 892

There's nothing deficient in this attorney's work that's been brought to my attention.

RP 893

So if I didn't have confidence in him, I wouldn't have appointed him. I knew that there was difficulty at the end of the case with what the results were. I knew you were not happy with that. That's -- that's what happens when people get convicted. That's normal. That's why I picked Mr. Sowder because I know he's wise and learned in this area, so I think he's perfect for the job. We'll keep him on.

RP 894.

Mr. Carson asked the court to approve funds for a SSOSA evaluation. CP 94-97. His lawyer told the court that the defense had located a state certified treatment provider who would provide an evaluation even though Mr. Carson had testified that he had not abused A.M.B. *Id.*

The funding request was not confidential. The State at first said that it took no position on the request for funds. RP 925. The State appeared to concede that denying Mr. Carson the funds for such an evaluation would be an abuse of discretion. But the State argued that it would strongly object to a SOSSA sentence and noted that if Mr. Carson abandoned his trial testimony denying the abuse while in treatment he could be charged with perjury. The State's remedy was to argue:

I think a court legally could deny the request to get the eval if -- or to give a long detailed explanation that basically says no. Even assuming the best evaluation outcome, the Court wouldn't be giving a SSOSA and all the reasons for it. That I think is the only way that a court could deny the request (inaudible) the evaluation up front. Obviously, the much more conservative approach would be to just let the evaluation go forward. But like I said, I'm not taking an official position. I'm just hypothetically speaking.

RP 926.

The sentencing judge analyzed the factors for a SSOSA sentence in RCW 9.94A.670(4) without the benefit of the evaluation. RP 927-931. After reviewing the factors the court said:

I don't think it makes sense at this point to expend state resources based on my comments just now addressing all six factors under

9.94A.670(4). It would not make sense to expend state resources where -- I'm not sure the information. . . would give to change those factors, in particular the victim's opinion.

RP 932-33.

The Court sentenced Mr. Carson to a determinate minimum term of 180 months in prison, an exceptional minimum term, based upon the abuse of trust finding. CP 246-264.

IV. ARGUMENT

1. THE TRIAL COURT ERRED IN GIVING INSTRUCTION 16.

Judicial comments on the evidence are prohibited by Art. 4, §16 to prevent the jury from being influenced by the trial court's opinion of the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). When a comment occurs, it is presumed prejudicial and the prosecution must show that the defendant was not prejudiced, "unless the record affirmatively shows that no prejudice could have resulted." *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). This Court reviews a challenged jury instruction de novo. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

Credibility determinations are for the trier of fact and cannot be reviewed upon appeal. See e.g. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus a court should not provide instructions which "point up," "underline" or "buttress" one party's theory over another. See *State v.*

Carpenter, 78 Wn.2d 92, 101, 457 P.2d 1004 (1969). For example, it violated Article 4, § 16, where a judge gave the jury an instruction on how much weight to give to certain evidence. *In re Det. Of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) (telling jury that "great weight" should be given regarding a defendant's prior history of mental illness). It was also a violation when an instruction to the jurors that the defense being raised was "easily fabricated, easy to prove, and hard to disprove." *State v. Thompson*, 132 Wn.124, 125-26, 231 P. 461 (1924). And it was a violation to instruct the jury to "be slow to believe that any witness has testified falsely in the case." *State v. Faucett*, 22 Wn. App. 869, 875, 593 P.2d 559 (1979); see also, *State v. Mellis*, 2 Wn. App. 859, 470 P.2d 558 (1970)(proper to refuse instruction rape charge is easily made and hard to disprove; instruction would be unconstitutional comment on the evidence).

These instructions are improper because they have "the effect of focusing the attention of the jurors" on one particular part of the state's case as if it was more important. *R.W.*, 98 Wn. App. at 144. In addition, the jury, not the judge, "is the sole judge of the weight of the testimony," so that it is improper when the judge "instructs the jury as to the weight that should be given certain evidence." *Id.*

The State will likely argue that the instruction did not express an opinion as to the truth or falsity of the alleged victim or as to the weight to give to her

testimony See e.g. *State v. Clayton*, 32 Wash. 2d 571, 202 P.2d 922 (1949) But Instruction 16 cannot be read in isolation. In Instruction 3 the Court told the jury: “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 60. Thus, the judge singled out one instance of “lack of evidence” and expressly told the jury that it could not question A.M.B.’s accusation based upon the lack of corroboration. Read in conjunction with Instruction 3, Instruction 16 is a comment on the credibility of A.M.B. Moreover, the judge’s comments here clarify that Instruction 16 bolstered A.M.B.’s credibility. He said the instruction directly addressed the primary issue in this case – credibility.

Finally, in the early 1900s there was considerable legal debate regarding the need for corroboration in sexual assault cases. The common law required corroboration for conviction. In 1907 the Legislature adopted a statute that embodied the common law. See *State v. Aker*, 54 Wash. 342, 348, 103 P. 420, 422 (1909). But by 1913, the Legislature repealed a statute that embodied this common law and adopted statutory predecessor to RCW 9A.44.020(1) specifically abandoning the common law. *State v. Morden*, 87 Wash. 465, 467–68, 151 P. 832, 833 (1915). Since at least 1913, if the jury believes the victim, a sexual assault convictions may rest on the victim’s uncorroborated testimony. While a non-corroboration instruction might have seemed essential a century ago, given the common law history and much different attitudes about sexual

assault, no modern jury would be under the misapprehension that the State is required by law to corroborate the statements of the victim.

Even if there was some lingering concern that jurors might speculate on corroboration, that concern does not justify Instruction 16. In *City of Kirkland v. O'Connor*, 40 Wn. App. 521, 522, 698 27 P.2d 1128 (1985), the Court disapproved of an instruction given solely based upon the trial court's concerns about "speculation" by jurors about the absence of certain evidence. In that DUI prosecution, the judge was concerned that the jury might speculate why that evidence had not been admitted, so he instructed the jury, "[y]ou are not to draw any conclusions or inferences whatsoever from the absence of a breathalyzer test result in this case nor are you to speculate on the reasons for the absence of such a test result." 40 Wn. App. at 522-23. The Court of Appeals reversed noting that the trial court gave the instruction in "reacting to its apprehension of widespread public knowledge about breathalyzers and speculation by jurors" about why such evidence might not be admitted sometimes. *Id.* The Court said the while the "desire to avoid confusion" was commendable, the content amounted to a comment on the evidence because "it was possible that the jury understood the instruction to mean it was not to consider that the evidence might be insufficient without a breathalyzer test result." *Id.* As a result, the instruction "prohibited the jury from considering a

lack of evidence about a material element of the charge" and it was therefore was a comment upon the evidence. *Id.*

The Court must presume the error was harmful. While the State may try and argue that presumption does not apply, this Court should reject such attempt. As the trial judge stated when he approved Instruction 16, the only issue was whether the jury should believe A.M.B. or Carson.

This Court should reverse and remand for a new trial.

2. THE TRIAL ABUSED ITS DISCRETION WHEN IT DENIED CARSON'S REQUEST FOR PUBLIC FUNDS FOR A SOSSA EVALUATION.

The Washington Legislature has authorized trial court discretion to order psychosexual evaluations to determine a defendant's eligibility for SSOSA—a special sentencing option for qualifying defendants. The Legislature developed the special sentencing provision for first time sex offenders, RCW 9.94A.505 (2)(a)(vii), to prevent future crimes and protect society. RCW 9.94.670.

To be eligible for a SSOSA sentence, a defendant must have no prior convictions for any other felony sex offenses, no prior adult convictions for a violent offense, the offense did not result in substantial bodily harm to the victim, the defendant had an established relationship and the defendant's standard sentence range is less than eleven years. RCW 9.94A.670(2)(a)-(f). If the defendant meets those qualification, the judge may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670(3).

The evaluation must include (at a minimum): The offender's version of the facts and the official version of the facts; the offender's offense history; (iii) An assessment of problems in addition to alleged deviant behaviors; (iv) The offender's social and employment situation; and (v) Other evaluation measures used. The certified examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum: (i) Frequency and type of contact between offender and therapist; (ii) Specific issues to be addressed in the treatment and description of planned treatment modalities; (iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; (iv) Anticipated length of treatment; and (v) Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances. RCW 9.94A.670.

The statute states that that only “*after receipt of the reports*” may the court consider whether the offender and the community will benefit from use of this alternative. RCW 9.94A.670(4). And only then may the Court give great

weight to the victim's opinion whether the offender should receive a treatment disposition. *Id.*

Whether expert services are necessary for an indigent defendant's adequate defense lies within the sound discretion of the trial court. *State v. Young*, 125 Wn.2d 688, 691, 888 P.2d 142, 144 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981). A decision is based on untenable grounds or made for untenable reasons if it was reached by applying an incorrect legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The trial judge abused his discretion because he failed to follow the correct statutory procedure. The statute requires an evaluation by a state certified evaluator. Only after receiving that evaluation may the court grant or deny the alternative sentence. And, the sequential procedures in the statute make sense. The statute embodies the Legislative decision that SSOSA decisions can be made only after an expert weighs in on the defendant's circumstances and amenability to treatment. By limiting the trial judge's consideration of the victim's wishes until after such an evaluation is completed, the statute appears to presume that the victim will decide to agree or oppose the alternative only after the all parties have being informed of the evaluator's

conclusions. Indeed, the evaluation might contain facts and circumstances critical to the victim's concerns unknown to him or her.

Further the trial court abused his discretion because he stated that any evaluation it "didn't make any sense to expend state resources" in a case where he was "not sure the information would change" his evaluation of the factors and the victim's opinion. The Supreme Court has warned against suggesting that the SSOSA option is only available to those offenders who can afford the initial evaluation because it does not give effect to the intent of the Legislature. Nor is it reasonable to conclude that the Legislature intended to create a special sentencing provision only for sex offenders with personal means. *Young*, 125 Wn.2d at 697. But here the sentencing judge did just that. Had Mr. Carson had the resources, he could have obtained the evaluation with his own money regardless of the victim's wishes and may well have presented information otherwise unknown to the sentencing judge that would have changed the judge's sentencing decision.

This Court should not approve of a procedure that denies Mr. Carson the ability to demonstrate that a SOSSA was appropriate and proper.

3. THE TRIAL COURT ERRED IN DENYING CARSON'S MOTION FOR SUBSTITUTE COUNSEL FOR SENTENCING FOR AN IMPROPER REASON.

A criminal defendant dissatisfied with appointed counsel may seek the substitution of counsel. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239,

1272 (1997). When reviewing a trial court's refusal to appoint new counsel, the appellate considers “(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006), *overruled on other grds*, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). This Court reviews the trial court’s decision for an abuse of discretion. *State v. Hampton*, 184 Wn.2d 656, 670, 361 P.3d 734 (2015).

Mr. Carson’s motion was timely. And, the trial court conducted a brief inquiry into the matter. But the trial court’s inquiry was an abuse of discretion because it focused on the trial court’s personal assessment of defense counsel’s skills rather than on the extent of the conflict between counsel and defendant.

The trial court’s ruling violated the appearance of fairness doctrine. The appearance of fairness doctrine requires judges to not only be impartial, but also appear impartial. *State v. Martinez*, 76 Wash.App. 1, 8, 884 P.2d 3 (1994), *review denied*, 126 Wn.2d 1011, 892 P.2d 1089 (1995). The reviewing court considers how the proceedings would appear to a reasonably prudent and disinterested person. *State v. Brenner*, 53 Wn.App. 367, 374, 768 P.2d 509 (1989).

The judge’s decision here did not appear to be impartial. He stated that he had handpicked Sowder because he knew him. He stated that Mr. Carson’s complaints could not overcome his view that Sowder was competent. His

statements appear to lack partiality because it appears that he denied the motion because *his* judgment in appointing Sowder overcame any objections by the defendant valid or not.

The proper question before the court was whether Carson's concerns about appointed counsel ability to properly prepare his case for sentencing. The issue was not whether Sowder was competent or whether judge thought Sowder was competent. Even highly competent counsel can have a caseload that prevents them from adequately preparing for trial. Carson's concerns are borne out by the record. On the first date set for sentencing, November 6, 2019, Sowder moved to continue. RP 896-905.

Thus, the trial judge abused his discretion in refusing to appoint new counsel.

4. THE TRIAL COURT ERRED IN FAILING TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT THE EXCEPTIONAL MINIMUM TERM OF IMPRISONMENT IMPOSED.

The standard sentencing range for Mr. Carson's convictions 120 to 160 months incarceration. CP 215. But here the jury returned a special verdict finding that Mr. Carson "abused his position of trust." CP 82, 84. The trial court relied on that verdict to impose an exceptional sentence of 180 months in prison. CP 246-267.

Washington cases recognize that the sentencing court is precluded from fact finding regarding proof of aggravating factors and is "left only with the

legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.” *State v. Sage*, 1 Wn.App.2d 685, 708, 407 P.3d 359, *review denied*, 191 Wn.2d 1007 (2018), the court's determination that substantial and compelling reasons justify an exceptional sentence must be set forth in writing. RCW 9.94A.535.

The trial court, however, did not enter written findings or conclusions that “considering the purposes of [the SRA], that the facts found are substantial and compelling reasons justifying an exceptional sentence.” See RCW 9.94A.537(6). Thus, sentence must be vacated and remanded. *State v. Friedlund*, 182 Wn.2d 388, 394, 341 P.3d 280, 282 (2015). His written order states:

The Court finds, based upon the jury special verdict , that the defendant abused a position of trust or authority under RCW 9.94A.535(3)(n). The court finds substantial and compelling reasons to justify an exceptional sentence upward on Counts 1 and II. The exceptional sentence is not supported by the required findings, and it must be vacated.

CP 263. But this simply a recitation of the jury’s findings and not an analysis of what specific facts at this trial justified increasing Mr. Carson’s sentence by 5 years beyond the bottom of the standard range. And, at the sentencing hearing the judge did not articulate any reason why, based upon the facts found, the purposes of the SRA supported an additional five years incarceration.

This Court should reverse and remand for a resentencing.

V. CONCLUSION

This Court should reverse Carson's conviction because Instruction 16 was improper and prejudicial. This Court should reverse Carson's sentence because the trial court should have granted his motion for substitute counsel, should have granted Mr. Carson request for funds for a SSOSA evaluation and failed to articulate a basis for the exceptional sentence imposed.

DATED this 22nd day of July, 2020.

Respectfully submitted,

/s/ Suzanne Lee Elliott
Suzanne Lee Elliott, WSBA #12634
Attorney for Kevin Carson

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where indicated and First-Class United States Mail, postage prepaid, one copy of this brief on the following:

Clark County Prosecuting Attorney Prosecuting Attorney's Office
Via this Court's Filing Portal

And to

Mr. Kevin Carson
#418483
Coyote Ridge CC
P.O. Box 769
Connell WA 99326

7/22/20
Date

/s/ Suzanne Lee Elliott
Suzanne Lee Elliott

LAW OFFICE OF SUZANNE LEE ELLIOTT

July 22, 2020 - 3:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54136-0
Appellate Court Case Title: State of Washington, Respondent v. Kevin Carson, Appellant
Superior Court Case Number: 18-1-02757-8

The following documents have been uploaded:

- 541360_Briefs_20200722152443D2159517_8233.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Kevin Carson AOB .pdf

A copy of the uploaded files will be sent to:

- cntypa.generaldelivery@clark.wa.gov
- greg@washapp.org
- rachael.rogers@clark.wa.gov
- richard@washapp.org
- wapofficemai@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Suzanne Elliott - Email: suzanne-elliott@msn.com
Address:
705 2ND AVE STE 1300
SEATTLE, WA, 98104-1797
Phone: 206-623-0291

Note: The Filing Id is 20200722152443D2159517