

FILED

NOV 09 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29058-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JONATHAN JAMES MCLANE,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
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120 West Main
Ritzville, Washington 99169
(509) 659-0600

FILED

NOV 09 2010

COURT OF APPEALS
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STATE OF WASHINGTON

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ASSIGNMENTS OF ERROR

1. The trial court did not have authority to impose an exceptional sentence when Jonathan James McLane was resentenced following his prior appeal.
2. The trial court's Conclusion of Law 1 is not justified under current case law. (CP 100; Appendix "A")

ISSUE RELATING TO ASSIGNMENTS OF ERROR

1. In the absence of specific jury instructions defining aggravating factors for a jury may an exceptional sentence be imposed when a criminal defendant is required to be resentenced based upon the State's concession to prior sentencing errors?

STATEMENT OF CASE

A jury found Mr. McLane guilty of three counts of 1st° child rape and one count of 3rd° child molestation. (CP 123; CP 124; CP 125; CP 126; Appendices "B"; "C"; "D";"E").

The jury returned special verdicts finding aggravating factors of abuse of a position of trust, invasion of privacy, and a pattern of sexual abuse. (CP 130; CP 131; CP 132; CP 133; CP 134; CP 135; Appendices "F"; "G"; "H"; "I"; "J";"K").

Judgment and Sentence was originally entered on December 13, 2007. An exceptional sentence of 340 months was imposed on Counts I, IV and V. The maximum sentence of 60 months was imposed on Count VI. Mr. McLane filed a Notice of Appeal on January 11, 2008. The State conceded sentencing errors and the Court of Appeals issued a Mandate on February 24, 2010. (CP 1; CP 7).

Mr. McLane was resentenced on April 29, 2010. The trial court imposed the same exact sentence as in the original sentencing. (CP 76).

Mr. McLane argued at the resentencing hearing that the aggravating factors should be disregarded based upon *State v. Gordon*, 153 Wn. App. 516 (2009).

The trial court examined the aggravating factors and agreed that abuse of a position of trust was not established and/or inappropriate. (RP 15, ll. 19-24).

The trial court then determined that even though the jury did not have any definitions of the other aggravating factors there was sufficient evidence to uphold its determination. The Court found that any error was harmless. (RP 14, l. 17 to RP 15, l. 9; RP 34, l. 23 to RP 35, l. 2).

Mr. McLane filed his Notice of Appeal on May 18, 2010. (CP 88).

SUMMARY OF ARGUMENT

A trial court may not impose an exceptional sentence when a jury has not been provided the necessary instructions defining the alleged aggravating factors.

ARGUMENT

“Failure to instruct on the specific legal standard defining an aggravating factor is a manifest error affecting a constitutional right.” *State v. Gordon, supra.*, 521.

The trial court did not define any of the aggravating factors for the jury. Instruction 18 is the special verdict instruction for the aggravating factors. (CP 127; Appendix “L”)

WPIC 300.16 defines “ongoing pattern of sexual abuse.” It states:

An “ongoing pattern of sexual abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

Count I involves a time frame of June 1, 2006 to September 1, 2006. Count IV covers the period January 1, 2007 through January 31, 2007. Count V encompasses the period from January 1, 1998 to December 31, 2000. (CP 3).

As the *Gordon* Court noted at 534-35:

...[A]ggravating factors are elements of the crime for purposes of instructing the jury on exceptional sentencing. ...

A failure to adequately instruct the jury on the elements of an aggravating factor for an exceptional sentence is manifest error affecting a constitutional right that may be argued for the first time on appeal. ...

...

Because the lack of instruction is a manifest error affecting a constitutional right, we examine the effect the error had on defendant's trial according to the harmless error standard.

The jury was given no guidance as to the steps they needed to take to determine the existence of an "ongoing pattern of sexual abuse." Multiple incidents occurred during the respective time periods set forth in Counts I and IV (CP 4-6; CP 11-12).

Count V encompasses an even more extended time period and also involves multiple incidents.

A unanimity instruction was given to the jury. Instruction 13 specifically outlined the jury's duty in determining guilt. (CP 117; Appendix "M").

If each of the acts forming the pattern of abuse. ... [lead] to separate convictions, the aggravating factor cannot be applied. In such a case, the multiple acts would be taken into account in the offender score. On the other hand, the factor can be applied even though the defendant was convicted on mul-

multiple counts, if each count was based on multiple acts of sexual abuse.

See: 13B Wash. Prac, Criminal Law, Fine and Ende, § 3908.

The State elected to charge specific time periods. By electing the specific time periods, each of which encompass multiple acts, they sought to increase Mr. McLane's exposure to increased sentencing by the sexual offense multiplier. *See:* RCW 9.94A.525 (17).

Based upon the lack of a jury instruction defining "ongoing pattern of sexual abuse", as well as the multiplier increasing the offender score, Mr. McLane contends that this particular aggravating factor is inapplicable in his case.

As the Court stated in *State v. Fisher*, 108 Wn. 2d 419, 425-26, 739 P. 2d 683 (1987):

Pursuant to the SRA's provision on sentencing for multiple current convictions, the trial court took into account *Fisher's* simultaneous convictions of two counts of indecent liberties in determining *Fisher's* criminal history, in order to compute his offender score and the presumptive sentencing range. By considering the multiplicity of *Fisher's* convictions, the trial court already accounted for the multiple incidents underlying those convictions. Therefore, it was not justified in citing *Fisher's* commission of multiple incidents with the same victim as a reason for imposing an exceptional sentence. This constituted the consideration of a factor which is necessarily accounted for in computing the presumptive range, and thus it was improper. ...

WPIC 300.25 does not provide a definition of “invasion of privacy.” Nevertheless, the Comment to WPIC 300.25 states:

Under the common law, an exceptional sentence can be predicated upon a violation of the victim’s “zone of privacy.” Exceptional sentences predicted upon a violation of the victim’s zone of privacy have been affirmed in rape cases. [Citations omitted.] In first degree burglary cases, this aggravating factor has been held improper, because invasion of privacy is inherent in that crime. [Citations omitted.]

There does not appear to be any case law addressing “invasion of privacy” since it was added as an aggravating circumstance to the SRA in 2005. *See*: Laws of 2005, Chapter 68, § 1.

Mr. McLane contends that a difference exists between “zone of privacy” and “invasion of privacy.” By adopting the phrase “invasion of privacy” Mr. McLane asserts that the Legislature changed the meaning of “zone of privacy.” A sexual offense is necessarily an “invasion of privacy.”

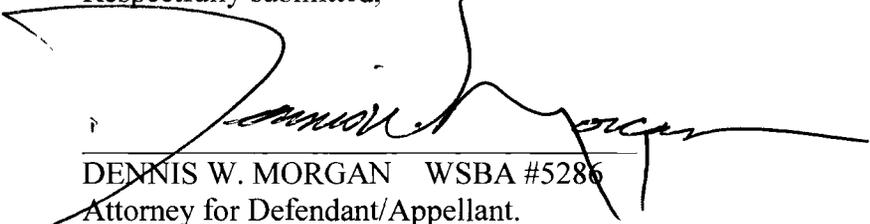
CONCLUSION

The trial court erred in imposing an exceptional sentence. The absence of jury instructions defining aggravating circumstances precludes their application upon resentencing based upon *State v. Gordon, supra*.

Mr. McLane’s sentence should be reversed and the case remanded for sentencing within the standard range.

DATED this 8th day of November, 2010.

Respectfully submitted,



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APPENDIX "A"

CONCLUSIONS OF LAW

1. Given the jury verdicts and findings of aggravating circumstances, a sentence of 340 months is appropriate.

APPENDIX "B"

JOSIE DELVIN
BENTON COUNTY CLERK

NOV 06 2007 ^{pm}

FILED

JUDGMENT DOCKET
NO 07-9-02082-9

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JONATHAN JAMES MCLANE

Defendant.

NO. 07-1-00170-4

VERDICT FORM A

We, the jury, find the defendant Jonathan James McLane

Guilty

of the crime of

(Write in "not guilty" or "guilty")

Rape Of A Child In The First Degree as charged in Count 1.

DATE: 11/6/07

Lasham J. Scott
Presiding Juror

0-00056

APPENDIX "C"

JOSIE DELVIN
BENTON COUNTY CLERK

NOV 06 2007

FILED ^{pu}

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JONATHAN JAMES MCLANE

Defendant.

NO. 07-1-00170-4

VERDICT FORM D

We, the jury, find the defendant Jonathan James McLane

Guilty of the crime of
(Write in "not guilty" or "guilty")

Rape Of A Child In The First Degree as charged in Count 4.

DATE: 11/16/07

Jasha M. Scott
Presiding Juror

APPENDIX "D"

JOSIE DELVIN
BENTON COUNTY CLERK

NOV 06 2007

FILED *pr*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

NO. 07-1-00170-4

Plaintiff,

vs.

VERDICT FORM E

JONATHAN JAMES MCLANE

Defendant.

We, the jury, find the defendant Jonathan James McLane

Guilty

of the crime of

(Write in "not guilty" or "guilty")

Rape Of A Child In The First Degree as charged in Count 5.

DATE: 11/6/07

Lorha M. Gato
Presiding Juror

0-00054

APPENDIX "E"

NOV 06 2007

FILED A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

NO. 07-1-00170-4

Plaintiff,

vs.

VERDICT FORM F

JONATHAN JAMES MCLANE

Defendant.

We, the jury, find the defendant Jonathan James McLane

Guilty

of the crime of

(Write in "not guilty" or "guilty")

Child Molestation In The Third Degree as charged in Count 6.

DATE:

11/6/07

Lasham J. Goto
Presiding Juror

APPENDIX "F"

NOV 06 2007

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JONATHAN JAMES McLANE,

Defendant.

NO. 07-1-00170-4

SPECIAL VERDICT FORM 3-B
PATTERN OF SEXUAL ABUSE

We, the jury, return a special verdict by answering as follows:

QUESTION: Were the crimes of Rape of a Child in the First Degree (Count 5) or Child Molestation in the Third Degree (Count 6) as charged in Counts 5 or 6 part of an ongoing pattern of sexual abuse of the same victim, Cynthia McLane, who was under the age of 18 years as manifested by multiple incidents over a prolonged period of time?

ANSWER: Count 5 yes [Write "yes" or "no"]

ANSWER: Count 6 yes [Write "yes" or "no"]

DATE: 11/6/07

Jasha Mygale
Presiding Juror

APPENDIX "G"

NOV 06 2007

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

NO. 07-1-00170-4

Plaintiff,

vs.

SPECIAL VERDICT FORM 3-A
PATTERN OF SEXUAL ABUSE

JONATHAN JAMES McLANE,

Defendant.

We, the jury, return a special verdict by answering as follows:

QUESTION: Were the crimes of Rape of a Child in the First Degree or Child Molestation in the Third Degree as charged in Counts 5 or 6 part of an ongoing pattern of sexual abuse of the same victim, Makayla McLane, who was under the age of 18 years as manifested by multiple incidents over a prolonged period of time?

ANSWER: Count 1 yes [Write "yes" or "no"]

ANSWER: Count 4 yes [Write "yes" or "no"]

DATE: 11/6/07

Jasha M. Scott
Presiding Juror

APPENDIX "H"

NOV 06 2007

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

NO. 07-1-00170-4

Plaintiff,

vs.

SPECIAL VERDICT FORM 2-B
INVASION OF PRIVACY

JONATHAN JAMES McLANE,

Defendant.

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the offenses of Rape of a Child in the First Degree or Child Molestation in the Third Degree by the defendant, Jonathan James McLane, involve an invasion of Cynthia McLane's privacy at the time of the commission of the crimes of Rape of a Child in the First Degree (Count 5) or Child Molestation in the Third Degree (Count 6) as alleged in Counts 5 or 6?

ANSWER: Count 5 yes [Write "yes" or "no"]

ANSWER: Count 6 yes [Write "yes" or "no"]

DATE: 11/16/07

Sasha M. [Signature]
Presiding Juror

APPENDIX "I"

JOSIE DELVIN
BENTON COUNTY CLERK

NOV 06 2007

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JONATHAN JAMES McLANE,

Defendant.

NO. 07-1-00170-4

SPECIAL VERDICT FORM 2-A
INVASION OF PRIVACY

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the offenses of Rape of a Child in the First Degree by the defendant, Jonathan James McLane, involve an invasion of Makayla McLane's privacy at the time of the commission of the crimes of Rape of a Child in the First Degree as alleged in Counts 1, or 4?

ANSWER: Count 1 yes [Write "yes" or "no"]

ANSWER: Count 4 yes [Write "yes" or "no"]

DATE: 11/16/07

Josha M. Scott
Presiding Juror

APPENDIX "J"

NOV 06.

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JONATHAN JAMES MCLANE,

Defendant.

NO. 07-1-00170-4

SPECIAL VERDICT FORM 1-B
POSITION OF TRUST

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant, Jonathan James McLane, use his position of trust, confidence, or fiduciary responsibility to facilitate the commission of Rape of a Child in the First Degree (Count 5) or Child Molestation in the Third Degree (Count 6) with Cynthia McLane, as charged in Counts 5 or 6?

ANSWER: Count 5 yes [Write "yes" or "no"]

ANSWER: Count 6 yes [Write "yes" or "no"]

DATE: 11/16/07

Laoham Yeddo
Presiding Juror

APPENDIX "K"

JOSIE DELVIN
BENTON COUNTY CLERK

NOV 06 2007

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

NO. 07-1-00170-4

Plaintiff,

vs.

SPECIAL VERDICT FORM 1-A
POSITION OF TRUST

JONATHAN JAMES McLANE,

Defendant.

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant, Jonathan James McLane, use his position of trust, confidence, or fiduciary responsibility to facilitate the commission of Rape of a Child in the First Degree with Makayla McLane, as charged in Counts 1 or 4?

ANSWER: Count 1 yes [Write "yes" or "no"]

ANSWER: Count 4 yes [Write "yes" or "no"]

DATE: 11/6/07

Lashan M. Scott
Presiding Juror

APPENDIX "L"

Robert [Signature]
Judge 11-6-07

JOSIE DELVIN
BENTON COUNTY CLERK

NOV 06 2007

FILED

INSTRUCTION NO. 18

Based upon your verdicts in this case there are some additional facts that the parties need to have you resolve. Your verdicts have found the defendant to be guilty of three counts Rape of a Child in the First Degree and one count of Child Molestation in the Third Degree. Your verdicts establish the existence of those facts and circumstances, which are the elements of those crimes.

The prosecuting attorney has alleged the existence of certain aggravating factors related to these offenses and this defendant, for each of the offenses for which the defendant was found guilty. Specifically, the prosecuting attorney alleges that the defendant's conduct constituted an ^{POSITION} ~~Abuse~~ of Trust, Invasion of Privacy, and Pattern of Sexual Abuse.

Keep in mind that these allegations are not evidence that aggravating factors exist. The filing of an allegation is not evidence that the aggravating factors are true. Your decisions as jurors must be made solely upon the evidence presented during the trial.

To these additional allegations, the defendant has entered a denial. This denial means that you, the jury, must decide whether the State has proven the aggravating factors beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists. The defendant has no duty to call witnesses, produce evidence, or testify.

The defendant is presumed to be innocent of the aggravating factors. The presumption of innocence continues throughout the entire trial. The

presumption means that you may not find the existence of the aggravating factors unless you conclude at the end of your deliberations that the evidence has established the existence of the aggravating factors beyond a reasonable doubt.

The jury must determine whether any of the following additional allegations exist for each count:

Position of Trust: The defendant used his position of trust to facilitate the commission of each offense(s).

Invasion of Privacy: Each offense(s) involved an invasion of privacy of the named victims.

Pattern of Sexual Abuse: Each offense(s) was part of an ongoing pattern of sexual abuse of the named victim, who was under the age of 18 years manifested by multiple incidents over a prolonged period of time.

The State has the burden of proving the existence of these aggravating factors beyond a reasonable doubt. In order for you to find the existence ^a of these allegations in this case, you must unanimously agree that the aggravating factors have been proved beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. It is your duty as a jury to determine if the State has proved any of the aggravating factors beyond a reasonable doubt in this case based upon the evidence presented to you

APPENDIX "M"

INSTRUCTION NO. 13

The State alleges that the defendant committed acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant on any separate count of Rape of a Child in the First Degree, one particular act of Rape of a Child in the First Degree within the time period set forth within that count's instruction must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree within the time period required in each count.