

**FILED**

AUG 03 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 292509

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

MIGUEL RAFAEL ZEPEDA MANCILLA,

Appellant.

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BRIEF OF RESPONDENT

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David B. Trefry WSBA #16050  
Special Deputy Prosecuting Attorney  
Attorney for Respondent

JAMES P. HAGARTY  
Yakima County Prosecuting Attorney  
128 N. 2<sup>nd</sup> Street, Room 329  
Yakima, WA 98901-2621

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Counsel was ineffective for failure to object to exclusion of the information pertaining to the victims prior drug use.
2. Counsel was ineffective for failure to request lesser included instruction.
3. The trial court erred when it did not grant appellant's motion for an exceptional sentence below the standard range.
4. The trial court erred when it did not grant an exceptional sentence downward.
5. The trial court erred when it held "willing participation" can never be a basis for an exceptional sentence down.

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1-2 Lopez received effective representation.
- 3-4 The trial court properly sentenced the defendant.
5. There was no err; if it was err, it was harmless.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

## III. ARGUMENT.

The issues raised by Mancilla are controlled by clearly settled case law, are of a factual nature or were well within the discretion of the trial court. The Court of Appeals should dismiss this appeal.

## **RESPONSE TO ASSIGNMENT OF ERROR 1-2.**

Appellant claims trial counsel failed to object to the exclusion of information regarding the victim's prior substance abuse. However the ruling by the court clearly shows that counsel in effect reserved his client's rights with regard to this issue until the victim testified. The court stated this information would not come in without further consideration by the court.

Trial counsel was an effective advocate by insuring the court did not issue a blanket order prior to hearing the actual testimony of the witness. This is the preferred method to insure Mancilla's right to present his defense was preserved while at the same time fleshing out whether there was even a need to present information which could be looked upon by a jury as an attack on this young female victim. Obviously appellant did not want the victim to appear too sympathetic to the jury.

THE COURT: Okay. That's agreed.  
The fact that she is currently in a treatment facility -- let's combine the two, the substance abuse issues and the treatment facility. I will simply make the comment that if there is -- that would be interesting. There is multiple incidents alleged. Perhaps affecting her ability to recall accurately the situation would be one thing. As far as bringing it up in any other context, Mr. Raber?

MR. RABER: I don't know that either of those two, the substance abuse or her being in a treatment facility, has any relevance here, at least until she testifies.

THE COURT: All of the above that we have just talked about are agreed. The defense is not planning on going into those areas of inquiry with the understanding that if something comes up before testimony, before we head there, let's get a sidebar in and make sure we're all on the same page before we bring it out in front of the jury.

(RP 167-68)

While this tactic did not result in an acquittal of for Mancilla the actions of trial counsel did result in convictions for lesser included offenses on two of the counts. This attorney's actions are supported by Personal Restraint of Stenson, 142 Wn.2d 710, 734-36, 16 P.3d 1 (2001) which addresses the actions an attorney with regard to his or her actions at trial:

The Ninth Circuit has stated that "appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense." United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987) (citing Henry v. Mississippi, 379 U.S. 443, 451, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965) (counsel's deliberate choice of strategy is binding on his client)).

Washington law also affords trial counsel great leeway:

"We note, with increasing concern, that it seems to be standard procedure for the accused to quarrel with court-appointed counsel, or to develop an undertone of studied antagonism and claimed distrust, or to be reluctant to aid or

cooperate in preparation of a defense. This appears to be done in order to argue on appeal that the accused was deprived of due process alleging he was represented by incompetent counsel."

State v. Piche, 71 Wn.2d 583, 589, 430 P.2d 522 (1967) (quoting State v. Keller, 65 Wn.2d 907, 908, 400 P.2d 370 (1965)). The Piche court went on to say:

To assure the defendant of counsel's best efforts then, the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off-indeed, in some instances, whether to interview some witnesses before trial or leave them alone-he will lose the very freedom of action so essential to a skillful representation of the accused.

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court and jury which in retrospect may seem important to the defendant; nor is he obliged to obtain a written waiver or instructions from the defendant as to each and every turn or direction the accused wants his counsel to take.

. . . For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment.

State v. Piche, 71 Wn.2d at 590.

Appellant has failed to meet his burden of proof. He was effectively represented at the trial court level. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987):

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. See, e.g., State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). To that end Justice O'Connor articulated the following 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

See also State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 93 L. Ed. 2d 301 (1986); State v. Sardinia, 42 Wn. App. 533, 713 P.2d 122 (1986);

The Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. Strickland, at 688.

Regarding the first prong, scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness. See Strickland, at 689. To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.* (Italics ours.) Strickland, at 694.

The analysis in Darden is applicable State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002);

The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible. *Id.* at 16, 659 P.2d 514. However, relevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. *Id.* (citing *People v. Redmon*, 112 Mich. App. 246, 315 N.W.2d 909, 913-14 (1982)). (Footnote omitted.)

The information appellant claims should have been allowed is clearly not admissible under ER 401,402 or 403. The information about the past drug use or abuse by the victim is inflammatory and prejudicial. It is equally clear the information is not relevant. It did not "have any tendency to make the existence of any fact that is of consequence to the determination of the rape

of the under aged victim more probable or less probable than it would be without the evidence.” In this case the appellant admitted both to officers and in his testimony that he had sex with the victim. The fact that there was a sexual relationship was not an issue. The defense put forth a valid defense, one allowed by law. The jury just did not believe the defense.

As indicate in State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982):

Defendant next claims he was deprived of a fair trial because his trial counsel was ineffective. The test in Washington is whether "[a]fter considering the *entire record*, can it be said that the accused was afforded an *effective representation* and a *fair and impartial trial*". State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); see also State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.

This case, as it played out at trial, demonstrates that counsel was effective. The jury returned “lesser” verdicts on two counts. As counsel stated at the sentencing hearing;

The jury, I feel, had some questions about this, too. The question the jury sent back was regarding why they couldn't have a choice of Third Degree Rape of a Child on those two counts, certainly indicated to me that they were thinking of finding him guilty of third degree rape on those counts as well, if they could have. But unfortunately they couldn't. (RP 13)

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2000):

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *Strickland*, 466 U.S. at 689. **If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.** State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). (Emphasis mine.)

Appellant must meet both prongs of the Strickland test and he cannot. His counsel was competent.

State v. Armstrong, 69 Wn. App. 430, 435, 848 P.2d 1322 (1992):

We hold, therefore, that when a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right. A criminal defendant is entitled to a fair trial from the state, including due process. He is not denied due

process by the state when such denial results from his own act, nor may the state be required to protect him from himself.

Further, there is no record of prior drug use that could be objected to in this record. Therefore this court has no record upon which to rule if this information was relevant or not. The only indication that there was some sort of history of drug use is the statement made by the Deputy Prosecutor, which apparently trial counsel had knowledge of. Other than that the record is devoid of any indication that this was something which affected the victim's ability to recall what happened. Nor did trial counsel while cross-examining the victim elicit any testimony about the inability of the victim to recall what occurred. She did state on cross that she told appellant that she was fifteen. There was no motion out of the presence of the jury to set any record for this court to consider. Therefore once again there is nothing upon which this court can make a determination.

Appellant states "Had the jury known that G.B.'s confusion over what happened was likely the result of her drug use during that time..." (Appellant's brief at 14) However, there is no citation to any record to support this claim. Appellant has not presented this court with any record upon which a determination may be

made. The only indication anywhere is the brief mention by counsel before trial in the motions in limine. (RP 167-68)

The alleged information which supposedly the judge ruled inadmissible and to which trial counsel allegedly did not object does not exist in any form in the record before this court.

Therefore this court should refuse to consider this allegation, State v. Garcia, 45 Wn. App. 132, 724 P.2d 412 (1986), “[a] party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issue. State v. Jackson, 6 Wn. App. 510, 516, 676 P.2d 517, aff’d, 102 Wn.2d 689, 689 P.2d 76 (1984).” State v. Alexander, 70 Wn. App. 608, 611-12, 854 P.2d 1105 (1993): “The appellant has the burden of perfecting the record so that the court has before it all the evidence relevant to the issue.” In re Marriage of Haugh, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). Accordingly, we accept the findings as verities on appeal.” (Footnote omitted.)

The sum total of the “record” regarding this alleged prejudicial error is;

MS. HANLON: I have motions about some negative things about my victim that I want to make motions in limine on tomorrow morning. She had warrants at the time of the police contact, runaway history. She only has one

malicious mischief third, which I don't believe comes in. She's in a treatment facility. I don't think that's relevant. We can address those tomorrow if you'd like. (RP 166)

...

THE COURT: Okay. That's agreed.

The fact that she is currently in a treatment facility -- let's combine the two, the substance abuse issues and the treatment facility. I will simply make the comment that if there is -- that would be interesting. There is multiple incidents alleged. Perhaps affecting her ability to recall accurately the situation would be one thing. As far as bringing it up in any other context, Mr. Raber?

MR. RABER: I don't know that either of those two, the substance abuse or her being in a treatment facility, has any relevance here, at least until she testifies.

THE COURT: All of the above that we have just talked about are agreed. The defense is not planning on going into those areas of inquiry with the understanding that if something comes up before testimony, before we head there, let's get a sidebar in and make sure we're all on the same page before we bring it out in front of the jury.

(RP 167-68)

State v. Cox, 109 Wn. App. 937,943, 38 P.3d 371 (2002):

Moreover, RAP 10.3(a)(5) requires parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The purpose of the rule and related rules "is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the

factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority." Hurlbert v. Gordon, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992). Mr. Cox has failed to provide more than a single sentence in his brief, and that without legal authority. We are not required to construct an argument on behalf of appellants. State v. Wheaton, 121 Wn.2d 347, 365, 850 P.2d 507 (1993). Therefore, we additionally treat this issue, if any, as waived.

The claim by appellant that counsel was ineffective because of a failure to request lesser offenses on the first two counts also does not meet the law set forth above. It is unequivocal that there was a legal basis for the lesser degrees could not factually be allowed for these two counts. If the facts set for the during a trial will not allow a lesser included offense there is no error on the part of trial counsel by not request they be included. It is clear from the discussion had between the court and both attorneys that the inclusion of the lesser counts was considered for all four remaining charges. However, it is apparent based on the testimony of both the appellant and the victim that there was not factual basis for the use of the lesser offense for counts one and two.

This court need only review the verbatim report from pages 308 through 314 to see that the use of the lesser offense was fully

and completely discussed and in fact trial counsel states the following; MR. RABER: "Right. However, because of the testimony that she gave, I think we're entitled to a lesser included." (RP 309) This statement does not limit the request to just two counts. What then follows is a discussion between the court and counsel as to what factually would support the inclusion of these lesser offenses. The final result is the court determines that factually there is only a basis to allow the lesser offense for counts one and two. (RP 308-14) Both the witnesses stated that the discussion of age did not occur until after the first two acts of sexual intercourse had occurred. Therefore it was reasoned that the lesser counts could only be used with regard to those charges where there was no "dispute" that the defendant was not informed that the victim was, fifteen or sixteen or eighteen, depending on what version of the testimony was believed by the jury.

This court should also note that the use of the lesser offenses in this manner was apparently looked upon by trial counsel as advantageous;

MR. RABER: Looking at this from my perspective with respect to the lesser included on Counts 4 and 5, I think it makes it very confusing for the jury. Therefore, I like it. (RP 313)

One can only presume that counsel believed that this confusion would allow his argument to the jury that confusion was doubt and therefore there was no proof beyond a reasonable doubt.

Once again appellant has not met his burden. The actions of his counsel were not deficient. They were the actions of a well seasoned trial attorney doing his job in a case that was factually, to say the least, difficult.

This issue was not raised at the time of trial; in fact as indicated above trial counsel apparently wanted the possible confusion this instruction would add. This is the colloquy regarding instructions;

THE COURT: Does the state have any objections or exceptions to the

court's proposed instructions?

MS. HANLON: No, your Honor.

THE COURT: Does the defense?

MR. RABER: No, your Honor.

THE COURT: All right. Thank you. (RP 317)

This court recently in State v. Nunez slip opinion No. 28259-7-III (2011), discussed the ability of an appellant to raise an alleged error regarding jury instruction for the first time on appeal. Regarding the issue of reviewing this type of error for the first time on appeal this court indicated;

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As pointed out in Scott, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused "'in order that the trial court may have the opportunity to correct any error.'" Id. at 686 (quoting City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)).

...

As explained in O'Hara:

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error.

...

Instructional error is not automatically constitutional error.

(Nunez slip opinion 4-7.)

This court in its analysis of the question raised in Nunez also discussed the very issue raised by appellant, the use of a lesser offense instruction. The decision in Nunez was as follows;

Because we are satisfied that the claimed instructional error was not manifest constitutional error, we will not review it for the first time on appeal. (Id at page 15)

This ruling is applicable in the case presently before this court. Appellant not only did not object to the use of these instructions his attorney states on the record that he believes the confusion that they will cause will be advantageous for his client, the appellant herein.

**RESPONSE TO ALLEGATIONS 3-5.**

The testimony at trial set forth the following facts;

Q. Did you ask the defendant who that female was or about that female?

A. Yes.

Q. Okay. And what did he tell you about that female?

A. That he knew her as Gabby.

Q. Did you ask about a last name for the female?

A. I did.

Q. What did he respond?

A. He didn't know. He knew her as Gabby.

Q. Did you inquire about their relationship status?

A. Yes.

Q. What did you ask, if you remember?

A. Is that your girlfriend or who is she?

Q. And how did he respond?

A. That at one time they were but not no more. They were just friends.

Q. At one time they were girlfriend, boyfriend?

A. Boyfriend, girlfriend, correct.

Q. Okay. Did he tell you when that was that they were – that she was his girlfriend?

A. Um, I'd have to refer to my report.

...

A. According to my report, I asked Miguel if Gabby was his girlfriend.

...

A. They were boyfriend and girlfriend for about five months, which lasted about – they were boyfriend and girlfriend for five months ago, which lasted about four months from that day.

(RP 212-14)

According to this information the victim was thirteen at the time they first started “dating” and having sex.; Officer Posada:

Q. Did you ask him how long he had been with Gabrielle?

A. Yes, I did.

Q. And what did he respond?

A. He said he had been with her for three months.

Q. Did you ask him if he had been -- what else did you ask him?

A. I asked him if he was in a sexual relationship with her, having sex with her. He said, yes.

Q. Okay. And did you ask him how often he had sex with her?

A. I did. My followup question was how often he had sex with her, and he said about two times a week. I said, two times a week for the last three months? And he said, yes.

Q. Okay. Did you ask about their living arrangement, if they lived together or not?

A. I did. I asked him if they were living together, and he said, no, they were not.

Q. And did you ask about, I guess, if she would come to the house or he would go to her house or anything like that?

A. Yeah. I asked him if she would come over to his house. He said, yeah, she would come over to his house. That's when I asked if they were living together. He said, no.  
(RP 217-18)

It is interesting to note that appellant changed his story about long he has known the victim from one officer to the next.

As testified to by Officer Escamilla "According to my report, he indicated his date of birth was September 26th of 1989."  
(RP 212)

The day the victim testified was on June 3, 2010, she stated that she was thirteen. The two were stopped together on December 3, 2009. (RP 171) She testified as follows; Can you tell the jury what your date of birth is, Gabby. A. 9-25-96. Q. You will be in eighth grade soon. A. Monday. Q. On Monday?  
(RP 230) She stated she met appellant at a party October 31, 2009, he approached the victim. (RP 232)

The Victim admits on the stand that she was at parties and going to bars and picking up beer. (230-34) She is admonished not to state that she and appellant sat around and got high. This was for the benefit of the defendant. (RP 227) She stated that she had sex with appellant on this first night/day "Q. And did one of you start touching the other person at all? A. Yeah. He touched me

first.” (RP 235-236) RP 240-42 testifies that she was living with defendant at his parents’ house and had sex on November 27, 2009. Then again on December 3 2009 Oral sex again (RP 244) “Q. Okay. And what makes you believe that there was oral sex? A. Because I sucked his penis. Q. Okay. Can you tell me how that started? A. He placed my head down there, and I just started sucking.” (RP 242) (Emphasis mine.)

December 1<sup>st</sup>, Oh, God. He said if I'm a sex freak, and I said yes. Then I asked him if he was one, and he said yes. And then we had sex after that. (RP 248) (RP 251) Q. Was this similar to the other times – A. Yes. Q. -- or different? A. Yes, very similar.

The claim that appellant believed the victim was old enough to participate in this sexual relationship is battered by the following line of questions;

- Q. Okay. Were these incidents something that you kept secret or did you share these with other individuals?  
A. Only my foster sister. That's about -- that's the only person that I told.  
Q. Was there a reason you didn't tell others?  
A. Because he said if -- because I said in my head if they know, they will charge him, and at that point I didn't want him to go to jail. Sorry.  
Q. Okay.  
A. Yeah.  
Q. That's okay.  
A. Yeah.  
Q. You didn't want him to go to jail?

A. Nu-huh.  
Q. Did you talk about that being a consequence or not?  
A. Um, yeah, because I knew it was going to be a long time, and I cared about him.  
Q. When did you talk to him about that being a consequence?  
A. It was like on a Tuesday or Wednesday.  
Q. Okay. Do you remember which week or which month?  
A. Nu-huh. I believe it was in November.  
Q. Was this before or after you had intercourse?  
A. After.  
Q. And how many times had you had intercourse before you had this discussion?  
A. Once.  
Q. Did you -- what did he say to you about the consequences or your concern?  
A. He said, just keep it down, on the down low, because of the cops and everything, and I agreed to it.  
Q. Okay. Keep it on the down low?  
A. Yeah.  
Q. What does that mean to you?  
A. It means like don't tell anybody. His parents knew but nobody else knew except my foster sister.  
(RP 251-2)

On cross examination the victim stated that she discussed her age with appellant on or about November 12 or 13<sup>th</sup>. During cross examination the following was elicited by defense counsel as to how old the victim told Miguel she was;

Q. (By Mr. Raber) Did Miguel ever ask you how old you were?  
A. Um, he asked me if I was thirteen.  
Q. How old did you tell him you were?  
A. Fifteen.  
Q. How old?  
A. Fifteen.

On redirect the victim stated that the conversation came up because Miguel had spoken to her father who told appellant that the victim was thirteen years old. (RP 260) Appellant further questioned the victim as to her age asking is she was “lying” about being fifteen, she stated she indicated she was not lying that she was in fact fifteen. This same conversation occurred again at a later date between the appellant and the victim. Further the victim agreed on redirect that she told Officer Posada at the time of the appellants arrest that on the day that appellant was told by the victims father that she was thirteen that appellant told the victim that they needed to keep the relationship on the “down low” regarding her age and his age and that he knew that it was illegal to date the victim. (RP 263-4, 265-66)

There is no record of the victim stating that she was seventeen or eighteen. Each time that trial counsel asked this question it was objected to and there was a motion to strike, which removed that information from the official record before the jury and this court.

The court expressed great concern with regard to the sentence that had to be imposed. Appellant states the court improperly used the defendant’s exercise of his right to trial by

jury to impose the sentence it imposed. It is the position of the State that the court was indicating it felt that perhaps the best result would have occurred, with regard to sentencing, if the appellant had worked out some sort of deal. The court was not further punishing Mancilla for exercising his right to trial but instead was pointing out that the worst part of her job was the imposition of a harsh sentence.

The trial court judge stated the following;

You know, one of the toughest parts of my job at times, and it's right now, because the legislature puts a standard range into effect, hopefully taking into account exactly some of the things that we've been speaking of. And that range, again, because of the number of counts, is very high, and yet it's not my job to second guess what the law -- what the legislature puts into effect for the law.

It's my job to follow the law unless I find that there are compelling reasons to not do so and that are covered by statute. And I can't find that in your case, Mr. Zapeda, to be blatantly honest. And because I can't find that, you are facing a very harsh consequence for your behavior.  
(RP 18-19)

There is no need for any party to speculate as to whether the court used the fact that appellant went to a jury trial as a factor in denying the exceptional sentence downward, the court stated;

Now, most of these cases, and I'm certainly not commenting on that nor even factoring it in, but most of

these cases, that's what plea bargains are all about. That's what leads to resolution in these cases, is that there is some things for the State to consider.

(Sent. RP 17)

The one case that can be cited as supportive of the use of “willing participant” as a mitigating factor has been severely limited. State v. Clemens, 78 Wn. App. 458, 898 P.2d 324 (Wash.App. Div. 2 1995)

The other reference to a jury trial was when the court was distinguishing this fact pattern from that set forth in Clemens. Here the court once again affirms appellant’s absolute right to take a matter to jury, what the judge was doing was pointing out the factual difference between the two cases.

But I also note in that case, the defendant pled guilty. The defendant didn't go to trial and put the person -- have to go through the experience on the stand. I mean, those things -- again, Mr. Zapeda, you have an absolute right to go to trial and you exercised that right. But a jury didn't make findings that you thought they were going to, bottom line. And I don't find that the Clemons case is persuading to this Court in that regard, based upon the facts that were presented here.  
(Sent. RP 18)

It would appear the court did fully and completely take into consideration all that was before it and determined that the only possible course was a standard range sentence. The position of

Mancilla that the court was somehow punishing him for taking the case to a jury trial is not born out by the statements of the court nor in the sentence imposed. The court imposed the lowest sentence legally possible and ran those sentences concurrently. (Sent. RP 19)

The allegations that the court did not consider the mitigating factor, “willing participant” or that the court improperly used the defendant’s act of taking his case to trial are not born out by the record. The Clemens case has never been followed by any published opinion. It was distinguished and then not followed by the very court that decided the case. In State v. Khanteechit, 101 Wn. App. 137, 140-41, 5 P.3d 727 (2000) the very court that decided Clemens states the following:

Finally, the court rejected defense counsel's characterization of the minor as a 'willing participant', citing and distinguishing State v. Clemens. There we affirmed the use of the 'willing participant' mitigating factor in an exceptional sentence, but only because the perpetrator and the victim were relatively close in age, and the victim, not the perpetrator, initiated the contact. In contrast, this case involves sexual contact between a 38-year-old and a 13-year-old, and 'the evidence ... indicated Mr. Khanteechit initiated the contact and somewhat pursued [the minor].' The court concluded that '[t]his case is startlingly different from [Clemens].'

The trial court based its refusal to impose an exceptional sentence on its understanding of the facts and its review of relevant case law, ultimately concluding that 'neither the top end nor the bottom end is appropriate' for Khanteechit. There is nothing in the record to even suggest that the court either refused to exercise its discretion or relied on any impermissible basis in rejecting the request for an exceptional sentence. And although Khanteechit takes issue with the trial court's findings that the minor suffered harm and that he initiated the sexual contact, his criticisms go only to the judgment the trial court exercised. This is not a proper subject for appeal.

Khanteechit also argues that he is entitled to appeal his standard range sentences because the trial court 'incorrectly determine[d that] the law does not recognize a given mitigating factor,' namely, the 'willing participant' factor. But although the court did not cite the statutory section that defines that factor, there is no basis for his contention that the court was unaware of it. Indeed, the court focused on *Clemens*, which clearly dealt with RCW 9.94A.390(1)(a), to see how that factor had been used in other circumstances. There was no error.

It is also of note that Clemens has been cited for the proposition that "courts presume minors lack capacity to consent to sexual relations because they are too immature to rationally or legally consent." State v. Hughes, 166 Wn.2d 675, 683, 212 P.3d 558 (2009)

The sentencing memorandum submitted by the State and reviewed by the sentencing judge reviews the case law cited by

appellant. The trial court was able to consider the actual case that supported the proposition that “willing participant” could be used as a basis for mitigation. The trial court here correctly reviewed and distinguished that case. (CP 126-32) (Sent. RP 1-20) The review of the applicable law in the context of the facts presented was appropriate and thorough. The actions of the court were appropriate.

The statement by appellant that the “implication” of the courts remarks regarding the trial is that appellant “wasted the court’s time and made the victim pointlessly suffer” are specious. (Appellant brief at 23) Appellant then states the court “refused” to apply the facts of Clemens to the case are without basis. The court can read for itself the words spoken by the trial court. That court took into consideration Clemens and found that it was not applicable.

The standard for this court to determine whether the trial court’s decision to not grant an exceptional sentence was set out in State v. Khanteechit, 138-39, supra;

RCW 9.94A.210(1) states that '[a] sentence within the standard range for the offense shall not be appealed.' That standard is not, however, an absolute prohibition of the right to appeal. <sup>[1]</sup> Where, as here, a defendant has requested an

exceptional sentence below the standard range, we may review the decision if the court either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence. <sup>[2]</sup> '[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.' <sup>[3]</sup>

<sup>[1]</sup> *State v. Garcia-Martinez*, 88 Wash.App. 322, 328-29, 944 P.2d 1104 (1997), review denied, 136 Wash.2d 1002, 966 P.2d 902 (1998).

<sup>[2]</sup> *Id.* at 330, 944 P.2d 1104. A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances, i.e., it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. *Id.*

<sup>[3]</sup> *Id.*

This court can readily see that the actions of the trial court were not an abuse of the discretion of the court. The facts in this case did not support an exceptional sentence downward based on the analysis set forth in Clemens. The action of the trial court were proper.

Appellant's statement that Clemens and this case are "notably similar" is unfounded. As set forth above the facts are

clear, appellant was seven years older than the victim. The victim states that appellant was the initiator of most of the actions. This was not a chance encounter where on one occasion the victim came to the appellant and initiated these sexual acts. This was an ongoing act. There were, dependant on the statements of the victim and the appellant upwards of thirty sexual acts between them, of which only five were charged and only four were pleaded and proved. The cases are factually distinguishable and that is what the court did.

Appellant states the court “refused” to consider the willing participant. This is incorrect the court did consider it. What the court found and has been supported by the State Supreme Court when it cited Clemens for the proposition that “courts presume minors lack capacity to consent to sexual relations because they are too immature to rationally or legally consent.” State v. Hughes, 166 Wn.2d 675, 683, 212 P.3d 558 (2009)

This passage cited by appellant in his brief at page 26 to mean the court did not consider this mitigating factor means just the opposite, the court did take this into consideration it found the cases factually distinguishable and also found, as did our Supreme court that persons of this age can not by law consent;

And yet, what I have to decide is whether this truly does qualify as a mitigating factor to go below those standard ranges; whether Gabriel Berg was the willing participant that the case law speaks about, because I certainly also absolutely agree with Ms. Hanlon, and that is she couldn't have consented because of her age, period. That's what the law says.(Sent. RP 16)

#### IV. CONCLUSION

This appeal has no merit. Mancilla has shown no error that would allow this court determine that counsel was ineffective.

There is nothing in the record to support the allegation by appellant that counsel failed to properly object to any drug use history.

Trial counsel is allowed to determine the tactics at trial and he did so. Further, most of the information appellant now says should have been admitted is not admissible under any of the rules of evidence.

The record clearly supports the actions of trial counsel with regard to the allegation regarding lesser included offenses. There is no error when there is no factual possibility that the lesser offenses could have been committed.

The court fully and completely considered the mitigating factor presented by Mancilla at sentencing. The court however, in

its discretion, found this factor was not applicable. That was not a violation of the court's discretion.

Further, the action throughout the sentencing procedure were without error. The assignments of error raised in this appeal were factual in nature, well within the trial courts discretion, or clearly controlled by settled law.

The actions of the trial court should be upheld, and this appeal should be dismissed.

Respectfully submitted this <sup>August</sup> 3<sup>rd</sup> day of July 2011

A handwritten signature in black ink, appearing to read "David B. Trefry". The signature is written in a cursive style with a large, looping initial "D".

David B. Trefry WSBA # 16050  
Special Deputy Prosecuting Attorney  
Yakima County, Washington

**FILED**

AUG 03 2011

COURT OF APPEALS  
DIVISION III  
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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON

Respondent,

Vs.

MIGUEL RAFAEL ZEPEDA MANCILLA,

Appellant

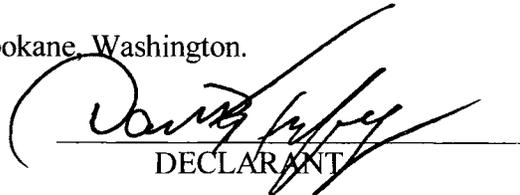
NO. 29250-9-III

DECLARATION OF MAILING

I, David B. Trefry state that on August 3, 2011, I sent a copy of the Respondent's Brief to: Andrea Burkhart, Burkhart and Burkhart, PLLC, by agreement of the parties at Andrea@BURKHARTANDBURKHART.com and by first class mail to Miguel Rafael Zepeda Mancilla DOC #341742, Airway Heights Correctional Facility, P.O. Box 1899, Airway Heights, WA 99001-1899

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this <sup>3rd</sup> 21<sup>st</sup> day of August, 2011 at Spokane, Washington.

  
DECLARANT