

FILED

NOV 05 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 25844-1-III

82613-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JONES,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 OCT 31 PM 4:05

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

The Honorable Cameron Mitchell, Judge

BRIEF OF APPELLANT

JOHN DORGAN
ERIC BROMAN
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	5
1. <u>Procedural Facts</u>	5
2. <u>Facts Relevant to Appeal</u>	6
a. <u>CrR 3.5 hearing</u>	6
b. <u>Exclusion of Evidence Proffered by the Defendant.</u>	7
c. <u>Testimony of Kashauna Dixon</u>	11
d. <u>Testimony of Officer Troy Glasgow</u>	13
e. <u>Testimony of Detective Roy Shepherd</u>	13
f. <u>The State's Closing Argument</u>	16
g. <u>Aggravating Circumstance Verdict Form</u>	17
h. <u>Sentencing</u>	17

TABLE OF CONTENTS (CONT'D)

	Page
C. <u>ARGUMENT</u>	18
1. THE EXCLUSION OF DIXON'S CONTEMPORANEOUS SEXUAL BEHAVIOR AND DRUG AND ALCOHOL CONSUMPTION DEPRIVED JONES OF HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO TESTIFY, AND TO CONFRONT HIS ACCUSER.	18
a. <u>The Excluded Evidence Was Relevant And Crucial To Jones' Defense.</u>	18
b. <u>Jones Was Denied His Constitutional Rights To Present A Defense And To Testify.</u>	20
c. <u>Jones Was Denied His Right To Confront His Accuser.</u>	24
d. <u>The Constitutional Errors Were Not Harmless.</u>	25
2. THE TRIAL COURT'S EVIDENTIARY RULINGS WERE INCORRECT UNDER WASHINGTON LAW.	26
a. <u>The Rape Shield Statute Is Inapplicable To Dixon's Contemporaneous Sexual Behavior.</u>	27

TABLE OF CONTENTS (CONT'D)

	Page
b. <u>The Trial Court Erred By Excluding Evidence Of Dixon's Drug And Alcohol Consumption. The Court's "Preponderance" Finding That Jones Was Not Credible Usurped The Jury's Function.</u>	31
3. THE STATE VIOLATED JONES' FIFTH AMENDMENT RIGHTS BY COMMENTING ON HIS PRE-ARREST SILENCE.	35
4. THE STATE IMPROPERLY COMMENTED ON JONES' REFUSAL TO CONSENT TO A WARRANTLESS SEARCH OF HIS BODY FLUIDS.	38
5. THE POSITION OF TRUST SPECIAL VERDICT SHOULD BE REVERSED. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT, THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE, AND THE COURT DID NOT INSTRUCT THE JURY ON THE ELEMENTS OF THE AGGRAVATING CIRCUMSTANCE.	42
a. <u>Essential Elements: The "Position Of Trust" Aggravating Circumstance Is Not A Strict Liability Sentence Enhancement For Blood Relatives.</u>	42
b. <u>The Record Does Not Support The Special Verdict.</u>	49

TABLE OF CONTENTS (CONT'D)

	Page
c. <u>The Trial Court Commented On The Evidence By Instructing The Jury Jones Was In A Position Of Trust.</u>	52
d. <u>The Trial Court Failed To Instruct The Jury On The Elements Of The Position Of Trust Aggravating Circumstance.</u>	54
6. JONES' SENTENCE SHOULD BE REMANDED TO THE SUPERIOR COURT FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDERLYING THE EXCEPTIONAL SENTENCE.	55
7. JONES' SENTENCE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING TO DETERMINE THE COMPARABILITY OF HIS OUT-OF-STATE PRIOR CONVICTION.	56
D. <u>CONCLUSION</u>	58

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Haywood v. Aranda</u> , 143 Wn.2d 231, 19 P.3d 406 (2001)	30
<u>In re Breedlove</u> , 138 Wn.2d 298, 979 P.2d 417 (1999)	56
<u>In re Cadwallader</u> , 155 Wn.2d 867, 123 P.3d 456 (2005)	57
<u>State v. Baxter</u> , 134 Wn. App. 587, 141 P.3d 92 (2006)	52, 53
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1321 (1997)	52, 53
<u>State v. Bedker</u> , 74 Wn. App. 87, 871 P.2d 673, <u>review denied</u> , 125 Wn.2d 1004 (1994)	45, 48, 51
<u>State v. Brown</u> , 48 Wn. App. 654, 739 P.2d 1199 (1987)	19
<u>State v. Brown</u> , 55 Wn. App. 738, 780 P.2d 880 (1989), <u>review denied</u> , 114 Wn.2d 1014 (1990)	48, 51
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002)	54
<u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976)	21

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003)	20
<u>State v. Collins</u> , 69 Wn. App. 110, 847 P.2d 528 (1993)	44, 50
<u>State v. Colquitt</u> , 133 Wn. App. 789, 137 P.3d 892 (2006)	50
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	21, 24, 30
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	25, 35
<u>State v. Fisher</u> , 108 Wn.2d 419, 739 P.2d 683 (1987)	45, 46, 50
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	56
<u>State v. Garibay</u> , 67 Wn. App. 773, 841 P.2d 49 (1992), <u>abrogated on other grounds</u> , <u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996)	43, 46, 48, 51
<u>State v. Gosby</u> , 11 Wn. App. 844, 526 P.2d 70 (1974), <u>aff'd</u> , 85 Wn.2d 758 (1975)	31

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Gregory,</u> 158 Wn.2d 759, 147 P.3d 1201 (2006)	28
<u>State v. Grewe,</u> 117 Wn.2d 211, 813 P.2d 1238 (1991)	45, 48, 50, 51
<u>State v. Griffith,</u> 45 Wn. App. 728, 727 P.2d 247 (1986)	32
<u>State v. Harp,</u> 43 Wn. App. 340, 717 P.2d 282 (1986)	49, 51
<u>State v. Hickman,</u> 135 Wn.2d 97, 954 P.2d 900 (1998)	50
<u>State v. Howe,</u> 116 Wn.2d 466, 805 P.2d 806 (1991)	45
<u>State v. Hudlow,</u> 99 Wn.2d 1, 659 P.2d 514 (1983)	21, 22, 27, 28
<u>State v. Israel,</u> 91 Wn. App. 846, 963 P.2d 897, <u>review denied</u> , 136 Wn.2d 1029 (1998)	31
<u>State v. Keene,</u> 86 Wn. App. 589, 938 P.2d 839 (1997)	35, 36
<u>State v. Kilgore,</u> 147 Wn.2d 288, 53 P.3d 974 (2002)	33

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006)	53
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005)	26, 54
<u>State v. Overvold</u> , 64 Wn. App. 440, 825 P.2d 729 (1992)	45
<u>State v. P.B.T.</u> , 67 Wn. App. 292, 834 P.2d 1051 (1992), <u>review denied</u> , 120 Wn.2d 1021 (1993)	43, 44, 47, 48, 51, 52
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997)	58
<u>State v. Pryor</u> , 56 Wn. App. 107, 782 P.2d 1076 (1989), <u>aff'd</u> , 115 Wn.2d 445 (1990), <u>overruled on other grounds</u> , <u>State v. Ritchie</u> , 126 Wn.2d 388, 894 P.2d 1308 (1995)	48, 51
<u>State v. Quigg</u> , 72 Wn. App. 828, 866 P.2d 655 (1994)	48, 51
<u>State v. Randecker</u> , 79 Wn.2d 512, 487 P.2d 1295 (1971)	31, 33

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Ratliff</u> , 46 Wn. App. 325, 730 P.2d 716 (1986)	44
<u>State v. Reed</u> , 101 Wn. App. 704, 6 P.3d 43 (2000)	22
<u>State v. Sheets</u> , 128 Wn. App. 149, 115 P.3d 1004 (2005), <u>review denied</u> , 156 Wn.2d 1014 (2006)	19, 27, 28
<u>State v. Silva</u> , 119 Wn. App. 422, 81 P.3d 889 (2003)	39, 41
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997)	54
<u>State v. Smith</u> , 148 Wn.2d 122, 59 P.3d 74 (2002)	25
<u>State v. Stevens</u> , 58 Wn. App. 478, 794 P.2d 38, <u>review denied</u> , 115 Wn.2d 1025 (1990)	48, 51
<u>State v. Stuhr</u> , 58 Wn. App. 660, 794 P.2d 1297 (1990), <u>review denied</u> , 116 Wn.2d 1005 (1991)	46, 47, 50, 51
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004)	21

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Vermillion,
66 Wn. App. 332, 832 P.2d 95 (1992) 43, 46, 50

State v. Williams,
136 Wn. App. 486, 150 P.3d 111 (2007) 54

State v. Woodward,
32 Wn. App. 204, 646 P.2d 135,
review denied, 97 Wn.2d 1034 (1982) 33

State v. York,
28 Wn. App. 33, 621 P.2d 784 (1980) 24

FEDERAL CASES

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348,
147 L. Ed. 2d 435 (2000) 49, 54

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531,
159 L. Ed. 2d 403 (2004) 44, 49

Chambers v. Mississippi,
410 U.S. 284, 35 L. Ed. 2d 297,
93 S. Ct. 1038 (1973) 21

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Crane v. Kentucky,
476 U.S. 683, 106 S. Ct. 2142,
90 L. Ed. 2d 636 (1986) 20, 21

Davis v. Alaska,
415 U.S. 308, 94 S. Ct. 1105 (1974) 24

Doyle v. Ohio,
426 U.S. 610, 96 S. Ct. 2240,
49 L. Ed. 2d 91 (1976) 38, 39, 41

Faretta v. California,
422 U.S. 806, 95 S. Ct. 2525,
45 L. Ed. 2d 562 (1975) 23

Gasho v. United States,
39 F.3d 1420 (9th Cir. 1994),
cert. denied, 515 U.S. 1144 (1995) 39

Griffin v. California,
380 U.S. 609, 85 S. Ct. 1229,
14 L. Ed. 2d 106 (1965) 38

Harris v. United States,
536 U.S. 545, 122 S. Ct. 2406,
153 L. Ed. 2d 524 (2002) 49, 54

Miranda v. Arizona,
384 U.S. 436, 16 L. Ed. 2d 694,
86 S. Ct. 1602 (1966) 6, 39

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Neder v. United States,
527 U.S. 1, 119 S. Ct. 1827,
144 L. Ed. 2d 35 (1999) 54

Rock v. Arkansas,
483 U.S. 44, 107 S. Ct. 2704,
97 L. Ed. 2d 37 (1987) 22, 23

United States v. Prescott,
581 F.2d 1343 (9th Cir. 1978) 38, 41

Washington v. Texas,
388 U.S. 14, 18 L. Ed. 2d 1019,
87 S. Ct. 1920 (1967) 21

OTHER JURISDICTIONS

Commonwealth v. Majorana,
503 Pa. 602, 470 A.2d 80 (1983) 29

Commonwealth v. Tillery,
417 Pa. Super. 26, 611 A.2d 1245,
review denied, 616 A.2d 984 (1992) 40

Elson v. State,
659 P.2d 1195 (Alaska 1983) 40

Garcia v. State,
103 N.M. 713, 712 P.2d 1375 (N.M. 1986) 40

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>OTHER JURISDICTIONS (CONT'D)</u>	
<u>Gomez v. State,</u> 572 So.2d 952 (Fla. App. 1990)	40
<u>Hubbard v. State,</u> 271 Ark. 937, 611 S.W.2d 526 (1981)	29
<u>People v. Stephens,</u> 133 Mich. App. 294, 349 N.W.2d 162 (Mich. App. 1984)	40
<u>Reeves v. State,</u> 969 S.W.2d 471 (Tex. Ct. App. 1998), <u>cert. denied</u> , 526 U.S. 1068 (1999)	40
<u>Simmons v. State,</u> 308 S.C. 481, 419 S.E.2d 225 (1992)	40
<u>State v. Colbath,</u> 130 N.H. 316, 540 A.2d 1212 (1988)	18, 28
<u>State v. Finley,</u> 300 S.C. 196, 387 S.E.2d 88 (1989)	29
<u>State v. Perez,</u> 26 Kan.App.2d 777, 995 P.2d 372 (1999)	29
<u>State v. Sherman,</u> 637 S.W.2d 704 (Mo., 1982)	29
<u>Villafranco v. State,</u> 252 Ga. 188, 313 S.E.2d 469 (1984)	29

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
5 K. Tegland, Washington Practice § 403.8 (5th ed. 2007)	31
CrR 3.5	6, 7
ER 403	21, 31
ER 404(b)	2, 8, 10, 26, 33, 34
R. Traynor, The Riddle of Harmless Error (1970)	54
RAP 2.5(a)(3)	26, 38, 53
RCW 9.94A.535	55
RCW 9.94A.535(3)(n)	43
RCW 9.94A.585(6)	44
RCW 9A.44.020	2, 27
RCW 9A.44.020(3)	27, 30
RCW 9A.44.020(3)(d)	27
Sentencing Reform Act (SRA)	43, 44, 57
Tegland, 5A Wash. Pract. <u>Evidence</u> , § 607.12 (5th Ed. 2007)	19

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

U.S. Const. amend. 4	3, 37-39, 41, 58
U.S. Const. amend. 5	1, 3, 22, 35, 37-39, 41, 50, 58
U.S. Const. amend. 6	2, 3, 10, 20, 22, 24, 25, 49
U.S. Const. amend. 14	3, 20, 22
Wash. Const. art. 1, § 22	3, 20
Wash. Const. art. IV, § 16	52

A. ASSIGNMENTS OF ERROR

1. The trial court erred by excluding evidence the complaining witness in a rape prosecution had consensual sex with other men in the course of an all night party during which the appellant also had sexual intercourse with the witness.

2. The trial court erred by excluding evidence the complaining witness consumed cocaine and alcohol during the all night party.

3. The State violated the appellant's Fifth Amendment rights by commenting on the appellant's pre-arrest silence.

4. The trial court erred by admitting evidence that appellant asserted his right not to consent to a warrantless search of his body fluids, and by allowing prosecutorial comment on the assertion of that right.

5. There was insufficient evidence to support the special verdict that appellant used a position of trust to facilitate the crime.

6. The trial court impermissibly commented on the evidence by instructing the jury appellant occupied a position of trust regarding the complaining witness. CP 15.¹

7. The trial court failed to instruct the jury on the essential elements of the "position of trust" aggravating circumstance. CP 15-34 (court's instructions).

¹ A copy of the special verdict form is attached as appendix A.

8. The trial court did not enter written findings of fact and conclusions of law to support the exceptional sentence.

9. The State failed to prove appellant's out of state "burglary" conviction is comparable to a Washington felony for sentencing purposes.

10. The sentencing court erred by imposing an exceptional minimum term sentence above the standard range.

11. The Superior Court erred by entering Judgment.

Issues Pertaining to Assignments of Error

1. In a rape prosecution where the accused raises a consent defense, did the trial court err in ruling Washington's rape shield law, RCW 9A.44.020, bars the defense from offering evidence the complaining witness had consensual sex with other men within hours of sexual intercourse between the accused and the complaining witness?

2. Did the trial court err in excluding the accused's testimony that the complaining witness consumed cocaine and alcohol in the course of an all night party, based on ER 404(b) and the court's determination, rather than the jury's, that the excluded evidence was of doubtful credibility?

3. Did the exclusion of evidence of the complaining witness's contemporaneous sexual behavior and consumption of drugs and alcohol deprive appellant of his right to present a defense under the Sixth and

Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution?

4. Did the exclusion of evidence of the complaining witness's contemporaneous sexual behavior and consumption of drugs and alcohol deprive appellant of his right to testify under the Fifth, Sixth, and Fourteenth Amendments?

5. Did the exclusion of evidence of contemporaneous sexual behavior and consumption of drugs and alcohol deprive appellant of his Sixth Amendment right to confrontation?

6. Does the State impermissibly comment on an accused's pre-arrest silence by eliciting testimony the accused did not contact police to explain the circumstances surrounding the rape allegation, and by subsequently arguing to the jury the failure to contact police equaled consciousness of guilt?

7. Did the State impermissibly penalize appellant for exercising his Fourth Amendment rights by eliciting testimony he did not consent to a warrantless search of his body fluids and by arguing the assertion of this right equaled consciousness of guilt?

8. Is the record insufficient to support a finding appellant used a position of trust to facilitate second degree rape where the totality of evidence consists of the subjective feelings of the 17-year-old complaining

witness that appellant was her "favorite uncle" with whom she was "really close" and whom she "trusted"?

9. Is a houseguest's proximity to a complaining witness who lives in the house insufficient to satisfy the "use to facilitate" element of the position of trust aggravating circumstance?

10. When a "position of trust" aggravating circumstance is submitted to the jury, does the trial court impermissibly comment on the evidence by instructing the jury to determine whether the accused used "his position of trust" to facilitate the crime of conviction?

11. When a "position of trust" aggravating circumstance is submitted to the jury, does the trial court fail to instruct the jury on an essential element by not requiring the jury to determine whether the accused occupied a position of trust?

12. Should appellant's exceptional sentence be remanded to the sentencing court for entry of mandatory findings of fact and conclusions of law regarding the exceptional sentence?

13. Where the State has not offered evidence of the comparability for sentencing purposes of a prior Nevada conviction, should the sentence be remanded to the Superior Court for an evidentiary hearing to determine comparability?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Benton County Prosecutor charged appellant Christopher Jones by amended information with one count of second degree rape with the aggravating circumstance of use of a position of trust to facilitate the crime. CP 35-36.

In the first trial the jury acquitted Jones of first degree rape, but was unable to return a verdict on second degree rape. 2RP 10-12.² In the second trial the jury convicted Jones of second degree rape and by special verdict found Jones had used a position of trust to facilitate the crime. CP 15-16.

The trial court found Jones' standard range to be 146-194 months based on an offender score of six. 2RP 373. The court imposed an exceptional minimum term of 242 months of confinement. CP 6.

This appeal timely follows. CP 88-98.

² "RP" refers to the Report of Proceedings for September 21-22, 2006. "2RP" refers to the Report of Proceedings for September 25, 2006; November 13-16, 2006; and January 10-11, 2007.

2. Facts Relevant to Appeal

The State alleged Jones raped his niece Kashauna Dixon, age 17,³ on June 28, 2005.

a. CrR 3.5 hearing

Prior to the first trial the court held a CrR 3.5 hearing. Richland Police Detective Roy Shepherd testified he investigated the rape allegation against Jones. RP 37-38. Shepherd interviewed Jones in the Benton County jail on February 18, 2006. RP 38. Shepherd said he read Miranda⁴ warnings, after which Jones answered Shepherd's questions. RP 39-43. Shepherd testified Jones denied having sex with Dixon, to which Shepherd responded "well we can collect your DNA." RP 43. Jones said he would not provide a DNA sample to the detective without first consulting an attorney. RP 43-46.⁵

Jones argued his demand to consult an attorney regarding the DNA issue rendered his statements to Shepherd inadmissible. RP 59-61, 63.

³ The Judgment and Sentence indicates Dixon's date of birth is 3/18/88. CP 7. Testifying at trial on November 15, 2006, Dixon said she was 18 years old. 2RP 225.

⁴ Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

⁵ Shepherd subsequently obtained a search warrant and collected a DNA sample from Jones. 2RP 265. The State presented evidence at trial the DNA collected from Jones matched that obtained from swabs of Dixon's genital area. 2RP 177-78.

The Superior court ruled Jones' custodial statements to Shepherd were admissible. RP 65.⁶

b. Exclusion of Evidence Proffered by the Defendant.

Jones asserted a consent defense. 2RP 194-96, 244. He intended to testify he had consensual sex with Dixon in the course of an all night party during which he, Dixon, and others consumed alcohol and cocaine. 2RP 194-96. He also sought to explore these subjects on cross examination of Dixon. 2RP 194-96. Accordingly, his attorney made the following offer of proof before Dixon took the stand during the State's case in chief.

My client's testimony, I'll make a proffer of proof, your Honor, will be that on the night prior at approximately 11:00 p.m. --

THE Defendant: Yeah.

MR. HOLT: -- my client and his niece went to the King City Truck Stop. That at the King City Truck Stop they met with three individuals, two males and one female. That they at that point agreed to party with those people, and by partying I mean consuming alcohol and cocaine, and they took 'em back to the Winslow⁷ residence.

THE DEFENDANT: Yes.

MR. HOLT: At the Winslow residence the two females engaged in dancing for money and sexual intercourse for

⁶ At the time this brief was filed, the formal CrR 3.5 findings had been drafted, but not yet filed.

⁷ On the date of the incident, Dixon lived at "406 Winslow" in Richland with her older brother and Jones. 2RP 226.

money with the three males, at which point there was consensual sexual contact between the three males, the other female and the victim. That this partying lasted from 11:00 that evening until approximately 7:30 or 8:00 the following morning, and that is what happened and that's what my client will testify to. I believe that those facts surrounding this situation directly go to my client's testimony, and I should be able to ask the victim about those specific facts, your Honor, and that's my position.

2RP 196-97.

The Superior Court excluded the proffered evidence for any purpose, ruling the evidence was barred by Washington's "rape shield" statute. 2RP 199, 246. Jones noted his objection to the court's ruling on the grounds it violated his right of confrontation and his right "to present evidence."

2RP 200.

The State then requested an ER 404(b) hearing to exclude all testimony "on dancing or alcohol or drug use." 2RP 200. The court agreed a hearing was necessary. 2RP 201. The trial judge and Jones' attorney had the following exchange regarding the necessity of an ER 404(b) hearing:

THE COURT: Well, this is the reason we have to have a hearing, correct, is to clarify exactly what evidence is being propounded? I think that you can either call your client or other witnesses or you can make an offer of proof.

MR. HOLT: Well, I've made an offer of proof.

THE COURT: You've made a general offer of proof. There seems to be confusion about what the facts are that

you would elicit. I've excluded any sexual conduct or sexual accounts.

MR. HOLT: My further offer of proof, your Honor, would be is that these individuals consumed alcohol and cocaine that night, and that goes directly towards the client -- the victim's ability to recall, to clearly recollect the events and to consent.

THE COURT: Now to be more specific, you are proffering or would proffer evidence that the alleged victim had consumed alcohol.

MR. HOLT: Consumed alcohol and cocaine with my client and three other individuals on -- between 11:00 p.m. on the night prior to this continuing on until approximately 7:30 or 8:00 in the morning.

2RP 202-03.

At this point, without further discussion, the State called Dixon and Detective Shepherd to testify. Dixon denied consuming drugs and alcohol on the night in question and denied going to the truck stop and partying with others. 2RP 207-08. Shepherd testified Jones said nothing about drugs and alcohol when Shepherd interviewed him at the county jail. 2RP 204-05.

Jones then took the stand and described Dixon's participation with Jones and others in an all night party involving the consumption of cocaine and alcohol. 2RP 211-15. He went to a truck stop in Pasco with Dixon and her brother. 2RP 210. At the truck stop they met two hispanic males and procured a quantity of cocaine. The group returned to the house in

Richland and consumed the cocaine. Everyone except for Dixon's brother smoked the cocaine. 2RP 211. Two more cocaine purchases were made and Dixon continued to consume cocaine. She also drank beer. The party went on until 8:00 in the morning. 2RP 212-14.

Defense counsel argued the preponderance of evidence test under ER 404(b) is a low burden. He also argued: "The defendant has testified that what he will testify to he should be allowed to testify in light of his Sixth Amendment right, and, therefore, I ask the court allow this." 2RP 222.

The court excluded the evidence under ER 404(b), reasoning Jones had not met the "threshold" of a preponderance of the evidence. 2RP 222-23. The court's oral ruling indicated the threshold was not met because the trial judge did not believe Jones:

It does require that the court find that there is a preponderance of the evidence that supports the evidence being proffered, and I don't find that that threshold has been met in this case. There is an opportunity apparently for corroboration through others present, and there's been no explanation to the court for the absence of that corroborating evidence.

It was not disclosed at a critical point, critical from the perspective of Mr. Jones to Detective Shepherd. *It would have been significant exculpatory information* that I would have expected Mr. Jones to have provided to Detective Shepherd at the time. So, I'm not persuaded that it is more likely than not that, in fact, the conduct to which he testified did occur.

2RP 222-23 (emphasis added).

In light of the court's evidentiary rulings, Jones did not testify in his trial.

c. Testimony of Kashauna Dixon

Dixon testified that in late June 2005 she lived in a house in Richland with Jones and her older brother.⁸ Dixon's parents did not live at the Richland house. Jones "came to live with" Dixon and her brother one month earlier in late May. Each of the three residents had a separate bedroom. 2RP 224-25.

Jones is Dixon's uncle. 2RP 224. Prompted by the State, Dixon gave the following description of the defendant's presence in her life:

Q. Has the defendant been around through most of your life?

A. Yes.⁹

2RP 224. Dixon also described her feelings about Jones:

Q. Prior to June 28th of 2005, can you tell the ladies and gentleman of the jury what kind of relationship you had with him?

A. We were really close. He was my favorite uncle.

⁸ As of the date of her testimony, Dixon's brother was 19 years old. 2RP 226.

⁹ Dixon's testimony is at odds with information presented by the Department of Corrections in its pre-sentence report (summarized *infra*). Jones was in prison in Washington through most of the 1990's and in Nevada for an unspecified period beginning in 2001.

Q. Did you trust him?

A. Yes.

2RP 224.

Dixon testified she was sleeping until 1:30-2:00 in the afternoon on June 28. 2RP 228, 238. She said she woke up with Jones on top of her. She started screaming, and Jones put his hands around her neck and told her to be quiet. She said she couldn't breathe. 2RP 229-30. Jones said he would kill her if she screamed. 2RP 230. Dixon testified Jones ripped her clothes off, put his penis in her vagina, and ejaculated. 2RP 231-32. Dixon said Jones then "dragged" her roughly across the floor on her knees from the bedroom to the kitchen and told her not to tell anyone. 2RP 232, 240.

After 20 minutes Dixon returned to her bedroom. 2RP 232. Dixon said she was mad and broke her stereo. 2RP 233. She threw a mask against the wall, causing the mask to break. 2RP 233. She called her mother, who came by and took Dixon to Kennewick Hospital. RP 234. Dixon did not clean up the broken mask. 2RP 233.

When asked during cross examination about sleeping until 2 p.m. that day, Dixon responded "That's what teenagers do." 2RP 240.

d. Testimony of Officer Troy Glasgow

Richland Police Officer Troy Glasgow took Dixon's statement at Kennewick General Hospital. 2RP 51, 54. Glasgow endeavored to record Dixon's statement accurately. 2RP 296. Dixon reported Jones offered her a glass of water after the sexual intercourse, which she accepted. 2RP 297-98. Dixon said she threw the glass and broke it. Glasgow's report contained no claim Dixon was dragged by Jones from the bedroom to the kitchen. 2RP 297. Dixon did not tell Glasgow she broke her stereo. 2RP 297-98.

Glasgow obtained a search warrant and searched Dixon's house that same day, June 28. 2RP 57-58, 60. He collected as evidence a bedsheet, a blanket, a pair of white shorts, and a pair of black women's underwear with a pink poodle pattern. 2RP 77. Glasgow did not find broken glass or a broken mask during his search of the residence. 2RP 299.

e. Testimony of Detective Roy Shepherd

Richland Police Detective Roy Shepherd testified Jones was not located on June 28, the day Dixon alleged she was raped. 2RP 251. Shepherd was subsequently notified that police in Center, Texas had contact with Jones on August 28. 2RP 251. During the State's case-in-chief, the deputy prosecutor elicited the following testimony concerning the period from June 28 to August 28:

Q. And so between June 28th of 2005 and what was the date that you were contacted again?

A. August 28th, 2005.

Q. No idea of the whereabouts of the defendant?

A. No.

Q. All right. Had the defendant made any attempt to contact you that you're aware of?

A. No.

Q. Had the defendant made any contact that you're aware of or attempt to contact that you're aware of any members of the Richland Police Department to talk about what happened?

A. No.

2RP 252-53.

During direct examination, Shepherd also testified about Jones' refusal to provide a DNA sample during the interview at the Benton County

Jail:

[D]id you then have a conversation with the defendant about a DNA sample?

A. Yes.

Q. All right, and did you explain the DNA procedure to the defendant?

A. Yes.

Q. Can you tell the ladies and gentleman of the jury what the procedure is to obtain DNA that you were telling the defendant about?

A. It's a -- we use a buccal-swab kit. It's basically a self-contained kit that includes two sterile Q-tip type of devices so that you can swab the inside of the cheeks. It's the easiest way really to collect the DNA. You swab -- take a sample from each side of the cheek, each cheek by just sticking it in, rubbing around for about five seconds, taking the swab out, lettin' it air dry and then packaging it up.

Q. After you explained the procedure to the defendant, did you ask the defendant if he would voluntarily let you take that buccal swab?

A. Yes.

Q. And did the defendant tell you that you could take the swab or did he refuse to allow you to take the swab at that time?

A. He would not allow me to take the swab at that time.

Q. All right. When he refused to allow you to take the swab, did you have to take other means to get the swab?

A. Yes.

Q. And how did you ultimately end up getting the swab?

A. I obtained a search warrant to get the swabs -- the DNA.

Q. A judge of the Benton County Superior Court granted you a search warrant to actually force the defendant to give you the swab; is that right?

A. Yes.

Q. All right. Again, this is all in the context of the conversation you had with the defendant where he claims he had done nothing wrong, correct?

A. Yes.

2RP 263-65.

f. The State's Closing Argument

In closing, the prosecutor emphasized the fact Jones did not contact Shepherd to "clear up" Dixon's rape accusation:

And what did the defendant do after this took place? What did he do? Did he clear-- did he clear up any misunderstanding? No. Did he find Detective Shepherd and say, "Boy, big misunderstanding here. We need to clear this up?" No.

...

[W]hen Detective Shepherd first learned that Center, Texas, had the defendant, did the defendant come right back then? No. He didn't come right back up and say, "Let's clear this up." He didn't call Detective Shepherd and go, "Holy cow, I've got a warrant out for rape for me. I better get to the bottom of this."

2RP 330-31. The prosecutor also emphasized Jones' refusal to provide a DNA sample to Shepherd:

When Detective Shepherd said how about we get some DNA? No. No. No. No.

...

Why did he say no at that point, ladies and gentlemen? You know, you don't have to be real smart to know why. Because he knew. The DNA wasn't gonna lie. The DNA couldn't be manipulated. The family couldn't change the DNA evidence, and he said, "No. You're not gettin' my DNA." Detective Shepherd said, "Yeah, I am," and he did. He got a court order. Nothing voluntary from this man.

2RP 333-34.

g. Aggravating Circumstance Verdict Form

The court provided the jury a special verdict form addressing the aggravating circumstance allegation. CP 15. The jury answered "yes" to this question:

Did the defendant, Christopher Jones, *use his position of trust as Kashauna Dixon's maternal uncle* to facilitate the commission of the current offense?

CP 15 (emphasis added); appendix A.

h. Sentencing

A pre-sentence investigation report was prepared by the Department of Corrections and considered by the sentencing court. According to the PSI, Jones was convicted in Washington in 1991 on five counts of delivering cocaine. CP 87. He received a 104-month sentence and was released to community custody in 1998. CP 87. The PSI reported Jones also had a Nevada "burglary" conviction, for which he was sentenced in 2001 to an indeterminate sentence of 22-96 months. CP 87. The PSI indicates he was released on parole, which was revoked in November 2004. CP 87. The PSI does not indicate when Jones was next released, but his re-incarceration must have been brief because he moved into the house in Richland six months later in May 2005. 2RP 225.

Jones' offender score was counted as six, yielding a standard range of 146-194 months. 2RP 374. The State offered no evidence to ascertain the comparability of Jones' Nevada conviction for sentencing purposes.

The court imposed an exceptional sentence of 242 months. CP 6. The court did not enter written findings of fact and conclusions of law setting forth its reasons for the exceptional sentence.

C. ARGUMENT

1. THE EXCLUSION OF DIXON'S CONTEMPORANEOUS SEXUAL BEHAVIOR AND DRUG AND ALCOHOL CONSUMPTION DEPRIVED JONES OF HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO TESTIFY, AND TO CONFRONT HIS ACCUSER.

Evidence of Dixon's sex with other men and of her drug and alcohol consumption was crucial to Jones' consent defense. By excluding this evidence, the trial court eviscerated Jones' ability to defend himself and deprived Jones of a fair trial under the state and federal constitutions.

- a. The Excluded Evidence Was Relevant And Crucial To Jones' Defense.

When a complaining witness alleges rape, it is obvious that evidence the witness had contemporaneous sex for money with other men during an all-night party is relevant to a consent defense. Justice Souter has characterized a witness's promiscuous behavior a few hours before an alleged rape: "[i]t would, in fact, understate the importance of such evidence in this case to speak of it merely as relevant." State v. Colbath,

130 N.H. 316, 540 A.2d 1212, 1217 (1988). Evidence that Dixon exchanged consensual sex for money with two other men was relevant to show she consented to sex with Jones.

Dixon's drug and alcohol consumption was also relevant to Jones' consent defense and to Dixon's ability to perceive and recall the incident. In excluding this evidence, the trial court acknowledged it "would have been significant exculpatory information". 2RP 223. In State v. Sheets, 128 Wn. App. 149, 115 P.3d 1004 (2005), review denied, 156 Wn.2d 1014 (2006), this court stated the complaining witness's "degree of intoxication had high probative value" in a rape prosecution. 128 Wn. App. at 157. And in State v. Brown, 48 Wn. App. 654, 739 P.2d 1199 (1987), it was error to exclude evidence concerning a witness's contemporaneous drug use:

We hold that the evidence of the young woman's ingestion of LSD and its effect is crucial evidence. With such evidence, the defendants could have argued that the prosecutrix believed she was resisting sexual contact when, in fact, she was not and that her hysterical state at the hospital was drug induced and not the result of rape. Thus, the trial court abused its discretion in excluding it.

48 Wn. App. at 660; see also, Tegland, 5A Wash. Pract. Evidence, § 607.12 (5th Ed. 2007) ("A witness's use of alcohol or other drugs at the time of the events in question is admissible to show that the witness may not remember the events accurately.").

The importance of the evidence excluded by the trial court cannot be overstated. The excluded evidence *was* Jones' defense. Without it, Jones plainly had no means of rebutting Dixon. Had Jones taken the stand, his testimony was restricted to a bland assertion, with no explanation of surrounding circumstances, that his niece consented to sexual intercourse. In light of Dixon's allegations, the jury would obviously require more to consider Jones' testimony as anything other than a tacit admission of guilt. Given this grim terrain, it is not surprising Jones did not testify.

The blanket exclusion of defense evidence also crippled Jones' ability to cross examine Dixon. Her testimony was shielded from serious challenge on the issues of consent and her ability to perceive and recall the incident.

b. Jones Was Denied His Constitutional Rights To Present A Defense And To Testify.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version

of the facts as well as the prosecution's to the jury so it may decide where the truth lies." State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. at 689-690.

The Washington Supreme Court's decisions in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), and State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002), define the expanse of an accused's right to present evidence in his defense. The accused is allowed to present even minimally relevant evidence unless the State can demonstrate a compelling interest for exclusion. Darden, 145 Wn.2d at 612. Instead of applying an ER 403¹⁰ balancing test, once defense evidence is shown to be even minimally

¹⁰ ER 403 provides that relevant evidence is admissible unless its probative value is outweighed by prejudice or has a tendency to confuse the issues, mislead the jury, cause undue delay, or is an unnecessary presentation of cumulative evidence.

relevant, the burden shifts to the State to show a compelling interest in excluding it. If the State cannot do so, the evidence must be admitted. Hudlow, 99 Wn.2d at 15-16; see also, State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest.").

The right to present a defense burns brightest when the accused intends to take the stand. An accused has a fundamental constitutional right to testify in his own defense and to "present his own version of events in his own words". Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 2709, 97 L. Ed. 2d 37 (1987). The right to testify is derived from 14th Amendment due process, 6th Amendment rights to compulsory process and self-representation, and the Fifth Amendment's guarantee against compelled testimony. 107 S. Ct. at 2708-10.

In Rock, the Supreme Court held a per se state exclusion of post-hypnotic testimony violated the defendant's right to testify. The court traced the evolution of law from the common law bar against an accused's testimony, grounded in the defendant's interest in the outcome of the case, to the modern constitutional right. The court explained the right to testify furthers the truth seeking process because important evidence is heard and because a defendant's credibility is adequately tested under cross examination. 107 S. Ct. at 2709.

The right to testify on one's own behalf is one of the rights that "are essential to due process of law in a fair adversary process." 107 S. Ct. at 2708-09 (quoting Faretta v. California, 422 U.S. 806, 819, n.15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). Thus, a State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony". 107 S. Ct. at 2711. The Rock court concluded:

[T]he right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

107 S. Ct. at 2711 (citation omitted).

Jones was denied his constitutional rights to present a defense and to testify in his defense. The court prevented the jury from hearing obviously relevant evidence of Dixon's participation in an all-night cocaine binge and from hearing Dixon exchanged sex for money with other men. The rulings gagged the appellant, barring him from telling his version of what transpired. The trial court effectively annulled Jones' defense without the justification of a compelling State interest. His conviction should be reversed.

c. Jones Was Denied His Right To Confront His Accuser.

The Sixth Amendment guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. The main and essential purpose of confrontation is to afford the opportunity of cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105 (1974). The purpose is to test the perception, memory, and credibility of witnesses. State v. Darden, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. 145 Wn.2d at 620. The right to confront must therefore be zealously guarded. 145 Wn.2d at 620.

The more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters. State v. Darden, 145 Wn.2d at 619. To allow the defendant no cross-examination into an important area is an abuse of discretion. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

The trial court's evidentiary rulings denied Jones his right of confrontation. While the excluded evidence *was* Jones' defense, Dixon's testimony *was* the prosecution. A more essential State's witness could never be. Inquiry into her sexual behavior and her consumption of cocaine

and beer was essential to explore her credibility, motives, memory, and perception. Cross-examination in these areas would fundamentally test the truth of her allegation. Instead of constricting the scope of Jones' cross-examination, the trial court should have allowed the wide latitude mandated by the Sixth Amendment. The denial of Jones' confrontation right corrupted and distorted the fact finding process. His conviction should be reversed.

d. The Constitutional Errors Were Not Harmless.

It is the State's burden to show a constitutional error was harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Under harmless error analysis, a conviction will be upheld only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). When the error involves erroneously admitted evidence, the court examines the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. 148 Wn.2d at 139. Harmless error analysis avoids reversal on "hypertechnical grounds". 148 Wn.2d at 139.

The State cannot carry its burden to show the constitutional errors discussed above were harmless. There were two possibilities at the trial below. Either Dixon's account would be subjected to serious challenge,

or it would not. The jury would hear Jones' description of the all-night sex and cocaine binge or it would not. It cannot be said "any reasonable jury" would reach the same verdict under either scenario. The errors were neither harmless nor hypertechnical. Jones' conviction should be reversed and remanded for a new trial.¹¹

2. THE TRIAL COURT'S EVIDENTIARY RULINGS WERE INCORRECT UNDER WASHINGTON LAW.

The trial court erred by ruling Dixon's contemporaneous sexual behavior was inadmissible under Washington's rape shield statute. The shield statute is inapplicable to Dixon's contemporaneous conduct. The statute establishes a rule of relevance limiting the admissibility of *past sexual behavior*, not contemporary conduct.

The court also erred by excluding Dixon's cocaine and alcohol consumption. The ironclad rule in Washington requires juries, not judges, to determine the credibility of witnesses. ER 404(b) does not empower the

¹¹ To the extent the constitutional claims discussed in this section are deemed raised for the first time on appeal, their consideration by the Court of Appeals is nevertheless appropriate. A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Errors are "manifest" for purposes of RAP 2.5(a)(3) when they have "practical and identifiable consequences in the trial of the case." State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). The practical and identifiable consequences here are that Jones was prevented from defending himself by offering relevant evidence, by testifying, and by confronting his accuser.

trial judge to usurp this fundamental role of the jury under the guise of the court's "preponderance" inquiry.

a. The Rape Shield Statute Is Inapplicable To Dixon's Contemporaneous Sexual Behavior.

Washington's "rape shield" statute, RCW 9A.44.020, bars evidence of "past sexual behavior" to attack a witness's credibility. RCW 9A.44.020(3). The statute *allows* such evidence when it is "relevant to the issue of the victim's consent". RCW 9A.44.020(3)(d).

In applying the shield statute, Washington courts understand the difference between current sexual conduct and past behavior. In State v. Sheets, 128 Wn. App. 149, 115 P.3d 1004 (2005), review denied, 156 Wn.2d 1014 (2006), the defendant was charged with attempted rape. A state's witness under cross examination testified the complaining witness was intoxicated and flirtatious on the night of the incident. The State moved for a mistrial, which the trial court first denied, then granted. This court held it was error to grant the mistrial because the complaining witness's intoxication and flirtatiousness was relevant and admissible under RCW 9A.44.020. The court observed the rape shield statute "does not violate a defendant's constitutional right to confrontation precisely because the statute does not preclude evidence of high probative value". 128 Wn. App. at 157 (citing Hudlow, 99 Wn.2d at 15). The court approved the trial court's initial decision to deny the mistrial, commenting, "[a]s the [trial]

court saw it, [the complaining witness's] conduct on the evening in question was admissible, while her past sexual conduct was not admissible." The Sheets court agreed with the trial court:

Here, Mr. Young's testimony about the victim's uncharacteristic flirtatious behavior on the evening in question barely qualifies as past sexual conduct. Even if the evidence qualifies as past sexual conduct, its prejudicial impact can fairly be described as low.

. . .

[W]e agree with the court's first and only analysis of the issue—the evidence was admissible and not barred by the rape shield statute.

128 Wn. App. at 157-58; see also, State v. Gregory, 158 Wn.2d 759, 787-88, 147 P.3d 1201 (2006) (under shield statute, dispute whether complaining witness was acting as a prostitute on night of alleged rape did not open door to witness's history as a prostitute); Hudlow, 99 Wn.2d at 17-18 (co-defendants allowed to testify rape victims "traded places" with co-defendants, while evidence of victims' history of prior general promiscuity was properly excluded).

Other jurisdictions recognize the commonsense distinction between past and present behavior under rape shield laws. In State v. Colbath, 540 A.2d 1212, the court held it was error to exclude evidence of the complaining witness' sexual advances toward other men hours before the alleged rape. As noted above, Justice Souter commented it would

"understate the importance of such evidence in this case to speak of it merely as relevant." 540 A.2d at 1217; see also, State v. Sherman, 637 S.W.2d 704, 706-07 (Mo., 1982) (Witness's statement she was raped earlier in the evening should have been admitted. "[A]cts, statements, occurrences and the circumstances forming part of the main transaction may be shown in evidence under the *res gestae* rule where they precede the offense immediately or by a short interval of time and tend, as background information, to elucidate a main fact in issue."); State v. Perez, 26 Kan.App.2d 777, 995 P.2d 372 (1999) (error to exclude evidence complaining witness had sex with two others at a party shortly before alleged rape); State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989) (error to exclude defendant's proffered testimony he saw complaining witness having sex with another male on the night in question); Villafranco v. State, 252 Ga. 188, 313 S.E.2d 469 (1984) (error to exclude witness's statement she wanted "to go to the party to get some nookey"); Commonwealth v. Majorana, 503 Pa. 602, 470 A.2d 80 (1983) (witness's sexual activity two hours before alleged rape is not "past sexual conduct" under rape shield law); Hubbard v. State, 271 Ark. 937, 941, 611 S.W.2d 526 (1981) ("sexual conduct between the prosecutrix and a third party is not admissible unless it occurred in such close proximity of time and location to the alleged

rape that it bears on the issue of consent or other material element of the offense").

Contrary to this well reasoned law, the trial court excluded Jones' proffered evidence that Dixon consented to having sex with him and other men in exchange for money in the course of an all-night drug and alcohol binge. The offered evidence pertained to Dixon's contemporaneous conduct, not "past sexual behavior." This evidence, obviously probative and relevant to Jones' consent defense, did not fall within the scope of the rape shield law.¹²

A trial court's ruling on the admissibility of evidence should be reversed when the court abuses its discretion, i.e., when manifestly unreasonable or based upon untenable grounds or reasons. State v. Darden, 145 Wn.2d at 619. The court's exclusion of proffered defense evidence was untenable because it depended on an erroneous interpretation of the shield law. The trial court abused its discretion by excluding the evidence.

¹² The State may be tempted to claim for the first time on appeal that Jones did not comply with the requirement under 9A.44.020(3) that a defendant file a written motion seeking admission of "past sexual behavior" evidence. The argument would lack merit because, as argued here, the evidence proffered by Jones did not consist of "past" sexual behavior. Furthermore, the State waived any procedural objection by failing to raise the issue below. See, e.g., Haywood v. Aranda, 143 Wn.2d 231, 238 n.8, 19 P.3d 406 (2001) (non-jurisdictional, procedural objections are waivable).

b. The Trial Court Erred By Excluding Evidence Of Dixon's Drug And Alcohol Consumption. The Court's "Preponderance" Finding That Jones Was Not Credible Usurped The Jury's Function.

It is well established in Washington "the jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses." State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). "[J]udges determine the competency of witnesses, and juries determine their credibility." State v. Israel, 91 Wn. App. 846, 848, 963 P.2d 897, review denied, 136 Wn.2d 1029 (1998).

Because credibility determinations are reserved for the jury, evidence is not excluded merely because a judge finds a witness potentially not credible. Washington's leading evidence commentator underscores this point in the context of ER 403's probative versus prejudicial balancing requirement:

Rule 403 does not authorize the exclusion of relevant evidence solely because the judge disbelieves the witness or in some other way regards the evidence as unreliable. The notion runs consistently through the rules and the case law that the jurors alone determine credibility.

5 K. Tegland, Washington Practice § 403.8 (5th ed. 2007).

State v. Gosby, 11 Wn. App. 844, 526 P.2d 70 (1974), aff'd, 85 Wn.2d 758 (1975), forcefully applied the rule that jurors alone determine credibility. In Gosby, the credibility of a robbery victim in identifying the perpetrators appeared to be in tatters. She had made a previous erroneous

identification, she had failed to identify a defendant in a lineup, stated she would be unable to identify her assailants, her description of the assailants was imperfect, she failed to positively identify one of the defendants in trial, and her testimony at a preliminary hearing varied from her trial testimony. 11 Wn. App. 845. Nevertheless, the Court of Appeals held the testimony was properly admitted:

The victim's testimony was clearly competent, relevant and material. As with any witness, her credibility was at issue. Under our adversary system, witness credibility is tested by cross-examination and is the subject of fair comment in final argument. . . . [N]either reason nor precedent supports defendants' contention that eyewitness identification testimony should be suppressed because credibility is in issue.

11 Wn. App. 845. The Supreme Court agreed with the Court of Appeals analysis: "[U]ncertainty or inconsistencies in the testimony affects only the *weight of the testimony and not its admissibility.*" 85 Wn.2d at 760 (emphasis added).

A trial court's finding that a child witness was incompetent to testify due to credibility concerns was reversed in State v. Griffith, 45 Wn. App. 728, 727 P.2d 247 (1986). At different times, the child had identified two different perpetrators. The child's answers could have been influenced by suggestive questions and by a suggestive parent. Noting the trial court may have found the child witness incompetent "simply because it disbelieved her testimony," the Griffith court emphasized:

[T]he jury, not the judge, is the sole and exclusive judge of the credibility of witnesses. State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). Moreover, any inconsistency in her testimony *went to credibility and not admissibility*.

45 Wn. App. at 735-36 (emphasis added); see also, State v. Woodward, 32 Wn. App. 204, 208, 646 P.2d 135, review denied, 97 Wn.2d 1034 (1982) ("Any inconsistencies in [child's] testimony went to her credibility and not to admissibility.").

The bedrock principle that a witness's credibility goes to weight, not admissibility, applies to ER 404(b). The rule states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Nothing in this language suggests ER 404(b) inhabits a specialized niche in the law of evidence granting judges authority to determine credibility.

That judges do not make credibility determinations in admitting or excluding evidence under ER 404(b) is implicit in the Supreme Court's holding in State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). In order to admit "other acts" evidence under 404(b), the trial court must find the acts "probably occurred" by a preponderance of the evidence. 147 Wn.2d at 292. Kilgore held trial courts are not required to conduct evidentiary

hearings for the purpose of making "preponderance" findings. The court explained:

Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. As the Court of Appeals observed, the defendant will always have the right to confront the witnesses who testify against him at trial.

147 Wn.2d at 294-95.

Because an evidentiary hearing serves "no useful purpose" under ER 404(b), and because parties "will always have the right to confront the witnesses" who testify to 404(b) facts, it is clear the rule does not deviate from the fundamental principle in Washington that judges determine witness competency, while juries determine their credibility.

The trial court erred by excluding Jones' eyewitness testimony regarding Dixon's drug and alcohol consumption. The evidence was relevant to the issue of consent and to impeach Dixon's ability to perceive and recall the events in question. In excluding the evidence, the court invaded the jury's exclusive function to determine credibility. The court's exercise of authority it did not possess was untenable and an abuse of discretion.

3. THE STATE VIOLATED JONES' FIFTH AMENDMENT RIGHTS BY COMMENTING ON HIS PRE-ARREST SILENCE.¹³

The Fifth Amendment states:

No person . . . shall be compelled in any criminal case to be a witness against himself

The Fifth Amendment protects a defendant before arrest:

The Fifth Amendment right to silence extends to situations prior to the arrest of the accused. An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt.

State v. v. Easter, 130 Wn.2d at 243.

In State v. Keene, a detective called Keene several times to discuss allegations of child sexual abuse. The detective and Keene scheduled an appointment, but Keene called to say "he had missed it." Several phone messages were exchanged, and the detective warned Keene if she did not hear from him she would refer the matter to the prosecuting authority. This evidence was admitted in the State's case-in-chief, and the prosecutor argued in closing "It's your decision if those are the actions of a person who did not commit these acts." 86 Wn. App. at 592. The court held the

¹³ Impermissible comment on the defendant's right to remain silent is a manifest error affecting a constitutional right which may be raised for the first time on appeal. State v. Keene, 86 Wn. App. 589, 592, 938 P.2d 839 (1997).

testimony and argument were impermissible comments on Keene's right to silence. 86 Wn. App. at 594.

Similar to the situation in Keene, the State at Jones' trial highlighted the fact Jones did not "find" or "call" Detective Shepherd. The prosecutor elicited Shepherd's testimony that, after the alleged rape, Jones made no attempt to contact "any members of the Richland Police Department to talk about what happened". 2RP 251-52. The prosecutor's closing argument then urged the jury to find silence equaled guilt:

And what did the defendant do after this took place? What did he do? Did he clear-- did he clear up any misunderstanding? No. Did he find Detective Shepherd and say, "Boy, big misunderstanding here. We need to clear this up?" No.

. . .

[W]hen Detective Shepherd first learned that Center, Texas, had the defendant, did the defendant come right back then? No. He didn't come right back up and say, "Let's clear this up." He didn't call Detective Shepherd and go, "Holy cow, I've got a warrant out for rape for me. I better get to the bottom of this."

2RP 329-30.

The state's enthusiastic focus on Jones' silence reveals the prejudicial impact of this evidence. In order to obtain a conviction, the State had to convince the jury Dixon was credible. Inconsistencies in her statements could have sown seeds of doubt in a rational juror's mind. Dixon testified she was dragged by Jones from the bedroom to the kitchen on her knees,

but she did not make this assertion to Officer Glasgow who took her statement just hours after the incident. Dixon testified she threw a mask against the wall, breaking it. And in her statement to Glasgow she stated she also threw a glass, breaking it as well. When Glasgow searched the house that same day, he observed neither a broken mask nor broken glass. These inconsistencies spoke directly to the material issue of consent. Doubt that Dixon was dragged from the bedroom to the kitchen and doubt she smashed the mask and water glass in anger would necessarily undermine her assertion that Jones forced her to have sexual intercourse.

Thus, the prosecutor moved to shore up Dixon's account with a vigorous attack on Jones' silence. The State urged the jury to equate Jones' silence with consciousness of guilt. The tactic is barred by the Fifth Amendment.

The improper comment dovetailed with the State's attack on Jones' refusal to submit to a warrantless search of his body fluids, discussed in Section C-4 below. Jones' exercise of Fifth Amendment rights (silence) and Fourth Amendment rights (refusal) were used by the State in combination to persuade the jury Jones acted in the manner of a guilty man. Because the State cannot carry its burden to show this constitutional error was harmless beyond a reasonable doubt, Jones' conviction should be reversed.

4. THE STATE IMPROPERLY COMMENTED ON JONES' REFUSAL TO CONSENT TO A WARRANTLESS SEARCH OF HIS BODY FLUIDS.

The State violated Jones' Fourth Amendment rights by presenting evidence and argument focusing on Jones' refusal to provide a DNA sample to Detective Shepherd.¹⁴

In United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978) the Ninth Circuit held it was prejudicial error to admit evidence the defendant refused permission for a warrantless search of her apartment. The court explained a person cannot be penalized for asserting the Fourth Amendment right to refuse consent:

The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. . . . *Nor can it be evidence of a crime.*

581 F.2d at 1351 (emphasis added). Citing Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), and Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), Prescott emphasized it is well established a person may not be penalized for exercising the Fifth Amendment right to silence. 581 F.2d at 1351-52. The court reasoned the same principle applies under the Fourth Amendment:

¹⁴ Although Jones did not object to the refusal evidence on Fourth Amendment grounds, he may raise the issue on appeal. RAP 2.5(a)(3). The practical consequence of the constitutional error was to persuade the jury that Jones conducted himself in the manner of a guilty man in the exercise of his constitutional rights.

Just as a criminal suspect may validly invoke his Fifth Amendment privilege in an effort to shield himself from criminal liability, so one may withhold consent to a warrantless search, even though one's purpose be to conceal evidence of wrongdoing.

. . .

The rule that we announce . . . seeks to protect the exercise of a constitutional right, here the right not to consent to a warrantless entry.

581 F.2d at 1351; accord, Gasho v. United States, 39 F.3d 1420, 1431-32 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995).

Washington courts have not addressed this issue in the Fourth Amendment context. However, the Fifth Amendment principle is firmly established. Citing Doyle, the court in State v. Silva, 119 Wn. App. 422, 81 P.3d 889 (2003), held it was error to admit Silva's post-Miranda silence as evidence of guilt. 119 Wn. App. at 429-30. The court explained the rule in fundamental constitutional terms:

A criminal defendant's assertion of his constitutionally protected due process rights is not evidence of guilt. The State may not, therefore, invite a jury to infer that a defendant is more likely guilty because he exercised his constitutional rights. The inference always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial.

119 Wn. App. at 428-29 (citations omitted).

In light of parallel Fifth Amendment jurisprudence, the Fourth Amendment undoubtedly prohibits comment on an accused's decision to

exercise his constitutional rights. Although not yet addressed in Washington, numerous other jurisdictions have concluded refusal evidence is inadmissible. See, e.g., Elson v. State, 659 P.2d 1195, 1197-99 (Alaska 1983); Gomez v. State, 572 So.2d 952, 953 (Fla. App. 1990); People v. Stephens, 133 Mich. App. 294, 349 N.W.2d 162, 163-64 (Mich. App. 1984); Garcia v. State, 103 N.M. 713, 712 P.2d 1375, 1376 (N.M. 1986); Commonwealth v. Tillery, 417 Pa. Super. 26, 611 A.2d 1245, 1249-50, review denied, 616 A.2d 984 (1992); Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992); Reeves v. State, 969 S.W.2d 471, 493-95 (Tex. Ct. App. 1998), cert. denied, 526 U.S. 1068 (1999).

At Jones' trial, the State sought maximum advantage from Jones' refusal to provide a DNA sample to Detective Shepherd. The prosecutor set the stage with Shepherd's description of the benign procedure for collecting DNA, a mere swab of the inner cheek with a "Q-tip type" device for "about five seconds". 2RP 264. After Shepherd testified Jones "would not allow me to take the swab at that time", 2RP 264-65, the jury was informed how the drama was resolved:

Q. A judge of the Benton County Superior Court granted you a search warrant to actually force the defendant to give you the swab; is that right?

A. Yes.

2RP 265. In case any jurors missed the point, the prosecutor followed up:

Q. All right. Again, this is all in the context of the conversation you had with the defendant where he claims he had done nothing wrong, correct?

A. Yes.

2RP 265. The prosecutor emphasized the issue in closing argument:

Why did he say no at that point, ladies and gentlemen? You know, you don't have to be real smart to know why. Because he knew. The DNA wasn't gonna lie. . . . he said, "No. You're not gettin' my DNA." Detective Shepherd said, "Yeah, I am," and he did. He got a court order. Nothing voluntary from this man.

2RP 334.

Jones was vigorously penalized for exercising his Fourth Amendment rights. United States v. Prescott; Doyle v. Ohio; State v. Silva. The State has the burden to show the constitutional error was harmless.

As previously argued, the refusal evidence went hand in hand with the State's comment on Jones' pre-arrest silence. A rational juror could have doubted Dixon's account in light of inconsistencies, in her statements and between her statements and Officer Glasgow's observations of the interior of her house. Rational doubts arising from these inconsistencies may have been swept away by the State's improper comment on Jones' exercise of Fourth and Fifth Amendment rights. The State cannot satisfy its burden to show the errors were harmless beyond a reasonable doubt.

5. THE POSITION OF TRUST SPECIAL VERDICT SHOULD BE REVERSED. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT, THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE, AND THE COURT DID NOT INSTRUCT THE JURY ON THE ELEMENTS OF THE AGGRAVATING CIRCUMSTANCE.

The record does not support the jury's special verdict finding Jones used a position of trust to facilitate the crime of conviction. It is not surprising such a verdict was returned, however. The jury was not given the benefit of long established caselaw defining the parameters of the "position of trust" aggravating circumstance. Those parameters would have included the principles that a position of trust is not per se established by a familial relationship, nor is it established by a crime victim's subjective feeling of "trust" regarding the accused. In addition, the trial court improperly commented on the evidence by instructing the jury Jones in fact occupied a position of trust. Finally, the trial court failed to instruct the jury on the essential elements of the aggravating circumstance. The special verdict should be reversed.

- a. Essential Elements: The "Position Of Trust" Aggravating Circumstance Is Not A Strict Liability Sentence Enhancement For Blood Relatives.

The "position of trust" aggravating circumstance is defined as follows:

The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(3)(n). The statute establishes two elements. First, the defendant must occupy a "position of trust." Second, the defendant must *use* his position to *facilitate* the commission of the current offense. Washington cases confirm the aggravating factor requires proof of these two essential elements:

When analyzing abuse of trust, the focus is on the defendant: Was the defendant (1) in a position of trust *and* (2) was the position used to facilitate the commission of the offense?

State v. Vermillion, 66 Wn. App. 332, 347, 832 P.2d 95 (1992) (emphasis added), review denied, 120 Wn.2d 1030 (1993); accord, State v. Garibay, 67 Wn. App. 773, 779, 841 P.2d 49 (1992), abrogated on other grounds, State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996); see also, State v. P.B.T., 67 Wn. App. 292, 303, 834 P.2d 1051 (1992) ("Washington law is clear that before an abuse of trust can be used as an aggravating factor, the evidence must indicate that the position of trust was used to facilitate the crime."), review denied, 120 Wn.2d 1021 (1993).

During more than twenty years since enactment of the Sentencing Reform Act (SRA), Washington courts have interpreted and applied the "position of trust" aggravating circumstance. Two decades of common law

have developed these principles.¹⁵ First, the position of trust factor is not a strict liability sentence enhancement for blood relatives, but instead depends on the facts of each case. Second, the focus is on the defendant, not the victim's subjective state of mind. Courts examine the defendant's *position* in relation to the victim and whether the defendant exploited his position to facilitate the crime. Third, a defendant's access to a victim, without more, does not satisfy the "facilitation" element. Fourth, trust enhancements in sexual assault cases are typically applied in situations where the victim is a young, dependent child. In pre-Blakely cases,¹⁶ Washington sentencing judges applied the enhancement where the defendant exercised a caretaking role regarding the victim or, at a minimum, where the defendant exploited the vulnerability of a very young child due to the child's natural tendency to trust. The following summarizes the case law.

The position of trust factor is not a strict liability enhancement for blood relatives, but instead depends on "the duration and the degree" of a given relationship. E.g., State v. P.B.T., 67 Wn. App. 292. In State v. Collins, 69 Wn. App. 110, 847 P.2d 528 (1993), the defendant was

¹⁵ In enacting the SRA, the Legislature envisioned this common law development. RCW 9.94A.585(6); State v. Ratliff, 46 Wn. App. 325, 333, 730 P.2d 716 (1986).

¹⁶ Appellant's counsel is not aware of any published decision analyzing a position of trust circumstance submitted to a jury in the wake of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537 (2004).

convicted of incest involving his daughter. Even in an incest case, the position of trust inquiry depends on the facts:

For example, a parent who has abandoned a child for 5 years may not be in a position of trust or authority when the parent reappears in the child's life. Similarly, adult siblings may or may not be involved in positions of trust. *Therefore, an incest case may or may not present facts which would support an abuse of trust in imposing an exceptional sentence.*

69 Wn. App. at 116 (emphasis added); see also, State v. Grewe, 117 Wn.2d 211, 220, 813 P.2d 1238 (1991) ("[N]ot every crime committed by a parent against a child involves an abuse of a position of trust"); State v. Overvold, 64 Wn. App. 440, 447, 825 P.2d 729 (1992) (factual circumstances regarding father-daughter relationship sufficient to support trust factor, citing State v. Fisher, 108 Wn.2d 419, 427, 739 P.2d 683 (1987); but see, State v. Bedker, 74 Wn. App. 87, 871 P.2d 673, review denied, 125 Wn.2d 1004 (1994) (abuse of trust where defendant raped his four-year-old half brother. "Bedker is M's half brother, someone the victim should have been able to trust."). Requiring case-specific facts to establish the "position of trust" enhancement reflects the everyday reality of human experience that not all family members are trusted or trustworthy. See, e.g., State v. Howe, 116 Wn.2d 466, 471, 805 P.2d 806 (1991) (juvenile, no longer welcome in father's home, prosecuted for burglary after entering the home and removing property).

The focus is on the defendant. Vermillion, 66 Wn. App. at 347; Garibay, 67 Wn. App. at 779. The victim's subjective state of mind is insufficient to establish the trust enhancement. In Fisher, a young child's subjective trust did not establish a "position of trust." Fisher sexually assaulted the five-year-old boy after the boy asked Fisher to accompany him to the restroom at a swimming pool. The boy was usually accompanied to the bathroom by his father or mother. Fisher and the boy had been acquainted for a few days. Given the short duration of the relationship, the Supreme Court stated it was a "close question" whether "the trust relationship in this case" was sufficient to support an exceptional sentence. 108 Wn.2d at 427. The court affirmed Fisher's exceptional sentence on other grounds.

Similarly, the inherent, primal trust extended to a house guest does not confer on the guest a "position of trust." In State v. Stuhr, 58 Wn. App. 660, 794 P.2d 1297 (1990), review denied, 116 Wn.2d 1005 (1991), the defendant was living in the home of his 80-year-old, partially blind murder victim. The court held Stuhr was not in a position of trust because no evidence showed "Stuhr was acting as a caretaker for the victim or had been left alone with him because the victim or his family reposed some particular trust or confidence in Stuhr." 58 Wn. App. at 663-64. In Vermillion, the defendant posed as a home buyer and sexually assaulted

a real estate agent in a vacant house for sale. Although Vermillion wove a web of trust, the enhancement did not apply:

Here, Mr. Vermillion created a condition of trust and confidence, but cannot be said to have been in a position of trust: the length of his relationship with the victims was brief, even fleeting; he was not a care giver; the victims were not particularly vulnerable to trust; and there was no degree of culpability greater than that involved in the commission of the crime itself.

66 Wn. App. at 348.

A defendant's access to a victim, without more, does not satisfy the "facilitation" element of the aggravating circumstance. In Stuhr, the victim invited Stuhr into her home. That fact was insufficient:

[T]here is absolutely nothing to show that Stuhr's status as a houseguest was used to facilitate his commission of this murder; rather, it merely placed him in close proximity to his victim at a time when no one else was in the home. There is no evidence that the murder was planned, or that the defendant inveigled his way into the household to further some hidden purpose to harm Mitchell.

58 Wn. App. at 663; see also, P.B.T., 67 Wn. App. at 304 (citing Stuhr) ("Mere opportunity created by a person's position is not enough from which to conclude that the position of trust facilitated the commission of the crime.").

Trust enhancements in sexual assault cases typically involve young, dependent children. The common thread is that the defendant had a caretaking role regarding the victim, or the child was extremely young and

therefore pre-disposed to trust any adult. See, e.g., State v. Brown, 55 Wn. App. 738, 754, 780 P.2d 880 (1989) (Brown was primary caregiver for ten-year-old rape victim and "used the victim's affection for him and her desire to keep her family intact as a means to perpetuate the abusive relationship"), review denied, 114 Wn.2d 1014 (1990); State v. P.B.T., 67 Wn. App. 292 (sexual assault of twelve to thirteen-year-old by sixteen-year-old senior patrol leader on scouting trip); State v. Grewe, 117 Wn.2d at 221 (attempted statutory rape of eight-year-old girl, Grewe groomed his victim and preyed on the child's "extreme vulnerability" and tendency to trust by luring her into his house to play, thereby establishing a relationship of trust); State v. Quigg, 72 Wn. App. 828, 842-43, 866 P.2d 655 (1994) (seven-year-old victims; Quigg visited almost every day, was a caregiver, and used his position to facilitate sexual abuse); State v. Bedker, 74 Wn. App. 87 (rape of defendant's half brother beginning when victim was four years old); State v. Garibay, 67 Wn. App. at 779-80 (four-year-old victim; "asked the victim to call him 'Poppy'"); State v. Stevens, 58 Wn. App. 478, 501, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990) (victims were three and six; Stevens regularly babysat the children and "abused his position of trust by raping them"); State v. Pryor, 56 Wn. App. 107, 114, 782 P.2d 1076 (1989) (defendant was babysitter to eight-year-old victim), aff'd, 115 Wn.2d 445 (1990), overruled on other grounds, State v. Ritchie,

126 Wn.2d 388, 894 P.2d 1308 (1995); State v. Harp, 43 Wn. App. 340, 717 P.2d 282 (1986) (Harp raped nine and eleven year-old children in his care).

b. The Record Does Not Support The Special Verdict.

The evidence at trial did not support either essential element of the aggravating circumstance. The special verdict should be dismissed with prejudice.

The Sixth Amendment requires the State to prove, and a jury to find beyond a reasonable doubt, all facts necessary to support an exceptional sentence. U.S. Const. amend. 6; Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Consequently, aggravating circumstances are treated as elements of the charged crime for constitutional purposes. Apprendi, 120 S. Ct. at 2364-66; accord, Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 2419, 153 L. Ed. 2d 524 (2002) ("[T]hose facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.").

A conviction or special verdict should be reversed where no rational trier of fact, viewing the evidence in a light favorable to the state, could have found every element of the crime charged beyond a reasonable doubt.

State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The existence of a fact cannot rest in guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). If the reviewing court finds insufficient evidence to prove an element, reversal is required. Hickman, 135 Wn.2d at 103. Retrial following reversal for insufficient evidence is prohibited under the Double Jeopardy clause of the Fifth Amendment. 135 Wn.2d at 103.

The record does not support the "position of trust" element required for the special verdict. The State's minimalist presentation on the subject proved nothing more than Dixon's state of mind: that Jones was her "favorite uncle" whom she "trusted." The State's focus on Dixon, rather than on Jones, failed to establish the position of trust element as a matter of law. A family relationship does not establish a position of trust per se. State v. Collins; State v. Grewe. Mere proof of a person's trusting state of mind also falls short. State v. Fisher; State v. Stuhr, State v. Vermillion.

Other than asking Dixon if Jones had "been around" most of her life, the State avoided the pertinent inquiry: the duration and degree of the relationship. Dixon was never asked about Jones' role in the family, about his participation in family events, about his presence in the family household when she grew up, or about his relationship to her parents. She

was not asked whether Jones had performed a caretaking role at any time in her life. She did not offer a single detail of her interactions with Jones during her lifetime. Only through "guess, speculation, or conjecture" could the jury construct a model of Jones in a "position of trust".

Dixon bore no resemblance to the vulnerable child victims in Brown (age ten), Grewe (eight), Quigg (seven), Garibay (four), Stevens (six and three), Pryor (eight), Harp (eleven and nine), P.B.T. (twelve-thirteen), and Bedker (four-seven). Although by law a minor, Dixon was living in the manner of an adult. She and her brother lived independently in their own home without their parents. Jones had moved in just one month before the June 28 incident. No evidence showed Jones lived there at the request of Dixon's parents or that he exercised authority of any kind. He went to his relatives' house in Richland because he needed a place to stay after his release from a Nevada prison. The only "position" Jones occupied was "houseguest." The record is insufficient to establish a position of trust.

Regardless of Jones' status, the State offered nothing to show he used a position to facilitate the crime of conviction. Like the defendant in Stuhr, nothing in the record suggests Jones "inveigled his way into the household to further some hidden purpose" to harm Dixon. No evidence showed Jones engaged in planning of any kind. Jones' status as a houseguest "merely placed him in close proximity" to Dixon. Stuhr, 58

Wn. App. at 663. Mere opportunity is not enough to establish the defendant used a position of trust to facilitate a crime. P.B.T., 67 Wn. App. at 304. The State failed to prove the second element of the aggravating circumstance.

c. The Trial Court Commented On The Evidence By Instructing The Jury Jones Was In A Position Of Trust.

The jury was given no law to guide its deliberation on the "position of trust" element. Worse, the court instructed the jury unequivocally Jones in fact occupied such a position by virtue of the blood relationship. CP 15 (appendix A). This violated settled Washington law.

Washington's constitution states, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, § 16.). It is thus error for a judge to instruct the jury that matters of fact have been established as a matter of law. State v. Baxter, 134 Wn. App. 587, 592-93, 141 P.3d 92 (2006). A special verdict form which removes a disputed issue of fact from the jury's consideration is "tantamount to a directed verdict." State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997).

The special verdict form instructed the jury Jones occupied a position of trust ("his position"), and it identified the evidence supposedly establishing that status ("Kashauna Dixon's maternal uncle"). With this

first element of the aggravating circumstance determined by the court, the jury was left to deliberate only on the second element: whether the position was used to facilitate the offense. This was obvious error. Becker, at 65.

Judicial comments on evidence are presumed prejudicial. The burden is on the State to show the record affirmatively shows no prejudice could have resulted. State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). The burden is heavy: the State must show that, without the erroneous comment, "no one could realistically conclude that the element was not met." Baxter, 134 Wn. App. at 593. Stated differently,

the burden is not carried, and the error therefore prejudicial, where the jury *conceivably could have determined the element was not met* had the court not made the comment.

134 Wn. App. at 593 (emphasis added).¹⁷

The State cannot meet its heavy burden. The jury heard nothing of Jones' role in the family and nothing of substance describing his role in Dixon's life. No evidence showed Jones had *ever* performed a caretaking role toward Dixon. Jones' status as a former prisoner does not suggest family members would trust him, nor does his status as a houseguest who had moved in one month before. The trial court's erroneous comment on the evidence requires that the special verdict be reversed.

¹⁷ A claim alleging judicial comment on the evidence raises an issue involving a manifest constitutional error and may be raised for the first time on appeal. Levy, 156 Wn.2d at 720; RAP 2.5(a)(3).

d. The Trial Court Failed To Instruct The Jury On The Elements Of The Position Of Trust Aggravating Circumstance.

A trial court errs by failing to accurately instruct the jury as to each element of a charged crime. State v. Williams, 136 Wn. App. 486, 493, 150 P.3d 111 (2007). "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).¹⁸ This rule applies to aggravating circumstance elements because sentence enhancement factors are elements for constitutional purposes. Apprendi, 120 S. Ct. at 2364-66; Harris, 122 S. Ct. at 2419; see also, State v. Mills, 154 Wn.2d 1, 13-15, 109 P.3d 415 (2005) (in felony harassment trial, failure to include reasonable fear element in special verdict instructions was reversible error).

Harmless error analysis applies to the omission or misstatement of an element in jury instructions. Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). The role of the reviewing court is not to "become in effect a second jury to determine whether the defendant is guilty." Neder, 527 U.S. at 19 (quoting R. Traynor, *The Riddle of Harmless Error*

¹⁸ Failure to instruct the jury of every element of a charged offense is an error of constitutional magnitude that may be raised for the first time on appeal. Williams, 136 Wn. App. at 492 n.3.

21 (1970)). Rather, the court examines "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." 527 U.S. at 19.

The special verdict form used in Jones' trial did not instruct the jury on the two elements of the "position of trust" aggravating circumstance. The court omitted the second element and, as argued above, simply instructed the jury the first element was satisfied.

For the same reasons there was insufficient evidence to support the missing element, and for the same reasons the court's comment on the evidence was prejudicial, the failure to instruct was not harmless. The record before the jury "could rationally lead to a contrary finding with respect to the omitted element." The instructional error requires reversal of the special verdict.

6. JONES' SENTENCE SHOULD BE REMANDED TO THE SUPERIOR COURT FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDERLYING THE EXCEPTIONAL SENTENCE.

RCW 9.94A.535 mandates written findings and conclusions for exceptional sentences:

Whenever a sentence outside the standard sentence range is imposed, the court *shall* set forth the reasons for its decision in written findings of fact and conclusions of law.

(Emphasis added). Even when an exceptional sentence is statutorily authorized, the sentencing court must find a substantial and compelling

reason to justify the exceptional sentence. In re Breedlove, 138 Wn.2d 298, 305, 979 P.2d 417 (1999). "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." 138 Wn.2d at 311. The remedy for a trial court's failure to issue findings of fact and conclusions of law is remand for entry of the findings. 138 Wn.2d at 311.

The sentencing court did not enter written findings and conclusions explaining the reasons for Jones' exceptional sentence. The findings and conclusions are necessary for review of the sentence. Assuming, arguendo, the sentence could be affirmed despite the errors discussed, supra, remand for entry of findings and conclusions is required.

7. JONES' SENTENCE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING TO DETERMINE THE COMPARABILITY OF HIS OUT-OF-STATE PRIOR CONVICTION.

For sentencing purposes, prior out of state convictions must be classified according to comparable Washington offenses. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. 137 Wn.2d at 479. If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, "it may be necessary to look

into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense." 137 Wn.2d at 479.

The State bears the burden of proving the comparability of out of state convictions. 137 Wn.2d at 479-80. Facts relied on to impose sentence "must have some basis in the record." 137 Wn.2d at 482. Therefore,

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

137 Wn.2d at 482.

The State's failure to prove the comparability of an out of state conviction may be raised for the first time on appeal. 137 Wn.2d at 484-85. The proper remedy is to remand the sentence to the trial court for an evidentiary hearing to determine the comparability of out of state convictions. In re Cadwallader, 155 Wn.2d 867, 877, 123 P.3d 456 (2005).

Jones' criminal history used to calculate his offender score included what was described in the PSI as a Nevada "burglary". CP 87. The State offered no comparability evidence regarding the Nevada conviction. The

State therefore failed to meet its burden of proof, and remand to the sentencing court for an evidentiary hearing is required.¹⁹

D. CONCLUSION

Jones' conviction should be reversed and remanded for a new trial. The exclusion of evidence of Dixon's contemporaneous sexual behavior and consumption of drugs and alcohol deprived Jones of his fundamental constitutional rights to presents a defense, to testify, and to confront his accuser. In addition, the State exploited Jones' exercise of his Fifth Amendment right to silence and his Fourth Amendment right to refuse consent to a warrantless search of his body.

Jones' sentence should be reversed and remanded for sentencing within the standard range because the evidence does not to support the special verdict. Alternatively, the sentence should be remanded for a new trial on the special verdict because the trial court commented on the evidence and failed to instruct the jury on the elements of the aggravating circumstance.

¹⁹ That the Superior Court imposed an exceptional sentence does not affect the remand requirement. "When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." State v. Parker, 132 Wn.2d 182, 190, 937 P.2d 575 (1997). Because the sentencing court did not enter findings and conclusions supporting the sentence, it cannot be said the sentencing court would have imposed the same sentence with a lesser offender score and standard range.

The sentence should also be remanded for an evidentiary hearing to determine the comparability of Jones' out-of-state prior conviction. Remand is also necessary for entry of written findings of fact and conclusions of law regarding the exceptional sentence.

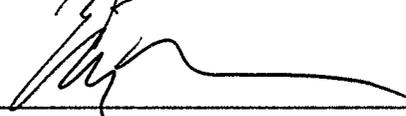
DATED this 31st day of October, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JOHN DORGAN, WSBA No. 21930 *by EB 18487*



ERIC BROMAN, WSBA No. 18487
Office ID No. 91051

Attorneys for Appellant

Appendix A

24844-1-I

JOSIE DELVIN
BENTON COUNTY CLERK

NOV 16 2006

L. FILED



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

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRISTOPHER JONES,

Defendant.

NO. 05-1-00981-4

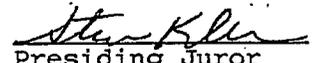
SPECIAL VERDICT FORM
POSITION OF TRUST

We, the jury, answer the question submitted by the court as follows:

QUESTION: Did the defendant, Christopher Jones, use his position of trust as Kashauna Dixon's maternal uncle to facilitate the commission of the current offense?

ANSWER: Yes [Write "yes" or "no"]

DATE: 11/16/06


Presiding Juror

65

FILED
SEP 05 2008
 COURT OF APPEALS
 DIVISION III
 STATE OF WASHINGTON
 By 

IN THE COURT OF APPEALS OF WASHINGTON
 DIVISION THREE

STATE OF WASHINGTON,)	
Respondent,)	NO. 25844-1-III
)	
vs.)	STATEMENT OF
)	ADDITIONAL
CHRISTOPHER JONES,)	AUTHORITY
Appellant.)	
_____)	

Pursuant to RAP 10.8, appellant cites to the following additional authority on the question whether a jury must be instructed on aggravating circumstances and whether the special verdict form was an unconstitutional comment on the evidence: WPIC 300.23 (attached).

DATED this 5th day of September, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



 ERIC BROMAN, WSBA 18487
 Office ID No. 91051
 Attorneys for Appellant


 Washington State
 Courts Home
 Home Search Help

**Welcome to the online source for the
Washington Criminal Jury Instructions**

11A WAPRAC WPIC 300.23

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.23 (2d ed)

Washington Practice Series TM
 Washington Pattern Jury Instructions--Criminal
 Current Through the May 2008 Update

Washington Supreme Court Committee On Jury Instructions, Hon. Patricia H. Aitken, Chair, 2005 Supplement Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S. Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part XVII. Exceptional Sentences--Aggravating Circumstances
 WPIC Chapter 300. Exceptional Sentences--Aggravating Circumstances

WPIC 300.23 Aggravating Circumstance--Abuse of Trust [RCW 9.94A.535(3)(n)]

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the [victim of the offense] [location of the offense] because of the trust relationship. [A defendant need not personally be present during the commission of the crime, if the defendant used a position of trust to facilitate the commission of the crime by others.]

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

[There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between [the defendant] [or] [an organization to which the defendant belonged] and [the victim] [or] [someone who entrusted the victim to the [defendant's] [or] [organization's] care.]

Note on Use

For the aggravating circumstance of an abuse of trust, use the above instruction to supplement the primary statement of this aggravating circumstance, which appears in WPIC 300.02 (Aggravating Circumstance Procedure--Factors Alleged--Unitary Trial) or WPIC 300.06 (Aggravating Circumstance Procedure--Factors Alleged--Bifurcated Trial or Stand-Alone Sentencing Proceeding).

Comment

RCW 9.94A.535(3)(n).

Derivation of statutory language. This particular aggravating circumstance was added to the Sentencing Reform Act (SRA) in 2005. Prior to 2005, the SRA's aggravating factor for abuse of trust had expressly applied to economic cases, and the common law had then extended the factor to apply to non-economic offenses as well. See, e.g., *State v. Fisher*, 108 Wn.2d 419, 427 P.2d 683 (1987). The 2005 act codified this broader application. See generally Laws of 2005, Chapter 68, § 1 (legislative statement that the act's language was designed to codify existing common law aggravating circumstances).

The current statutory aggravating circumstance differs in one regard from the pre-existing common law. The statutory aggravating circumstance applies only if the defendant uses the position of trust to facilitate the offense; the pre-existing common law was not limited in this manner. Compare RCW 9.94A.535(3)(n) with *State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992).

Trust relationship. A defendant abuses a position of trust to facilitate the offense when the defendant uses his or her relationship to the victim, or to the person who entrusted the victim to the defendant's care, to obtain access to the victim or the location of the crime. Compare *State v. Bissell*, 53 Wn.App. 499, 767 P.2d 1388 (1989) (ex-employee's use

FILED**SEP 05 2008**

COURT OF APPEALS
 DIVISION III
 STATE OF WASHINGTON
 By _____

of keys that were entrusted to him in the course of employment supported an exceptional sentence for abuse of trust), with State v. Jackman, 59 Wn.App. 562, 568-69, 778 P.2d 1079 (1989) (exceptional sentence for abuse of trust not supported where record did not establish that the ex-employee was permitted an unusual degree of access to the company because of his status). There is no requirement that a defendant be personally present during the commission of the crime, if the defendant uses a position of trust to facilitate its commission by others. State v. Handley, 115 Wn.2d 275, 285, 796 P.2d 1266 (1990).

The trust relationship necessary for this aggravating circumstance can be between the defendant and the victim or between the defendant and someone, such as a parent, who entrusts the victim's care to the defendant. See, e.g., State v. Garlbay, 67 Wn.App. 773, 779, 841 P.2d 49 (1992), abrogated on other grounds, State v. Moen, 129 Wash.2d 535, 919 P.2d 69 (1996). The trust relationship does not have to be a direct personal relationship between the defendant and the victim. It is sufficient that the victim trusted an organization which assigned some of its functions to the defendant. See, e.g., State v. Harding, 52 Wn.App. 245, 248-49, 813 P.2d 1259 (1991) (employee of an apartment building committed an abuse of trust when he used his master key to enter a tenant's apartment for the purpose of rape).

Courts examine a number of factors, including the length of the relationship, the intensity of the relationship, and the victim's inclination to bestow trust, when considering whether the defendant is in a position of trust. See generally Fine and Ende, 13B Washington Practice, Criminal Law § 3915 (2nd ed.). When the victim is a child, a sufficient relationship of trust was established by the defendant's status as a neighbor, babysitter, parent, or other close relative. State v. Grewe, 117 Wn.2d 211, 218-21, 813 P.2d 1238 (1991) (neighbor); State v. Russell, 69 Wn.App. 237, 252, 848 P.2d 743 (1993) (victim's father); State v. Bedker, 74 Wn.App. 87, 95-96, 871 P.2d 673 (1994) (victim's half-brother); State v. Stevens, 58 Wn.App. 478, 501, 794 P.2d 38 (1990) (baby sitter); State v. Harp, 43 Wn.App. 340, 343, 717 P.2d 282 (1986) (victim's uncle). In contrast, a casual relationship alone does not suffice; the state must prove more than that. State v. Serrano, 95 Wn.App. 700, 713-14, 977 P.2d 47 (1999) (acquaintance and co-worker); State v. Stuhr, 58 Wn.App. 660, 663, 794 P.2d 1297 (1990) (house guest).

Definition of fiduciary. The SRA does not define "fiduciary." The Legislature has defined the term in various civil contexts, but these definitions tend to be specific to those contexts and do not necessarily carry over well to a criminal jury instruction.

Practitioners may need to turn to the case law for guidance in defining "fiduciary" for a particular case. In general, case law indicates that the term encompasses not only those relationships that the law has historically treated as fiduciary in nature, but also other relationships in which one person justifiably expects his or her welfare to be cared for by another. For a discussion of this and other concepts involved in fiduciary relationships, see, e.g., Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 741, 935 P.2d 628 (1997) (extended discussion); Van Noy v. State Farm Mutual Ins. Co., 142 Wn.2d 784, 797-98, 16 P.3d 574 (2001) (a fiduciary is "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking"); Cummings v. Guardianship Services, 128 Wn.App. 742, 755 n.33, 110 P.3d 796 (2005) ("A fiduciary is a person with a duty to act primarily for the benefit of another."); Richards v. Seattle Metro. Credit Union, 117 Wn.App. 30, 33-34, 68 P.3d 1109 (2003) ("A fiduciary is a person who, on account of his relationship with another person, is both authorized to act for the beneficiary and owes a duty of loyalty to the beneficiary.") review denied, 150 Wn.2d 1035, 84 P.3d 1230 (2004).

Presumption of unitary trial. The statutory presumption is that this aggravating circumstance will be presented to the jury during the trial of the alleged crime. RCW 9.94A.537(4).

Cross-reference. For further discussion of this aggravating factor, see Fine & Ende, 13B Washington Practice, Criminal Law § 3915 (2nd ed.).

[Current as of February 2008.]

© 2008 Thomson Reuters/West

11A WAPRAC WPIC 300.23

END OF DOCUMENT

(C) 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

LAW OFFICES OF

NIELSEN, BROMAN & KOCH, P.L.L.C.

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 - Fax (206) 623-2488

WWW.NWATTORNEY.NET

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

OF COUNSEL
K. CAROLYN RAMAMURTI

State V. Christopher Jones

No. 25844-1-III

Certificate of Service by Mail

FILED

SEP 05 2008



COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

On September 5, 2008, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Scott Johnson
Benton County Prosecutors Office
7122 W Okanogan Ave
Kennewick WA 99336-2341

Containing a copy of the statement of additional authority, re Christopher Jones
Cause No. 25844-1-III, in the Court of Appeals, Division III, for the state of Washington.

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

John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

9-5-08
Date