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NO. 57691-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

84982-0

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court acted within its discretion in denying the defendant's motion to continue, made at the beginning of trial, when the court had previously granted numerous motions to continue and the case had been pending for nearly two years.

2. Whether the defendant has failed to show that the trial court erred in denying his counsel's motion to withdraw given that the motion was made in the middle of trial.

3. Whether the defendant has failed to establish that he had an irreconcilable conflict with his attorney when his attorney's complaint concerned payment of fees and there is no evidence of any breakdown in communication between the defendant and his attorney during the trial.

4. Whether the trial court acted within its discretion in denying the defendant's last-minute motion to recess the trial for three to seven weeks.

5. Whether the defendant has failed to establish that he suffered any prejudice by the trial court's denial of his motion to recess the trial.

6. Whether the trial court properly included the defendant's two prior felonies in his offender score.

7. Whether the trial court had the authority to impose a minimum term exceptional sentence under RCW 9.94A.712.

B. STATEMENT OF THE CASE

1. Substantive Facts

In September of 2002, thirteen-year-old R.T. and her mother moved to the Seattle area. RP 117-18, 163-65.¹ A few weeks later, defendant Oliver "Skip" Weaver saw R.T. and her cousin as they walked by his used car lot. RP 165-67. Though he had never met R.T. before, Weaver called the girls over and offered R.T. a job washing cars and cleaning his house, which was located on the lot. RP 119, 166-67. R.T. accepted the job offer and began working for Weaver a few times a week. RP 122, 170-71.

A few months later, on December 8, 2002, Weaver picked up R.T. at her home after school and drove her to his house. RP 172. R.T. began cleaning in the kitchen. RP 173. Initially, Weaver's wife was home with their baby, but they left, leaving R.T. alone with Weaver. RP 173-74. Weaver then told R.T. to clean upstairs. RP 174. While R.T. worked in a room upstairs, Weaver

¹ The report of proceedings for the trial and sentencing consists of 3 volumes of sequentially numbered pages and is referred to as "RP." There are three pre-trial hearings designated as RP (8/4/04), RP (8/19/04) and RP (2/11/05).

approached her from behind, put a gun against her head and said that he would kill her if she did not obey him. RP 176-80.² Weaver then pulled R.T.'s pants down and raped her. RP 176-80.

Fearful of Weaver, R.T. did not report the rape. RP 181. However, her mother noticed a change in R.T.'s behavior around this time. RP 123. R.T. stopped doing her homework; she no longer behaved like the happy girl that her mother once knew. RP 124. In January of 2003, R.T. stopped working for Weaver, telling her mother she did not want to go there anymore. RP 125.

In February 2003, concerned that she was pregnant after missing her period, R.T. disclosed the rape to a friend. RP 185-86. The friend, in turn, informed the school security guard, who then contacted the police. RP 185-87. R.T. then disclosed to her mother that Weaver had raped her and that she might be pregnant. RP 128, 186.

A doctor confirmed that R.T. was about approximately 11 weeks pregnant. RP 129, 188-89, 215. R.T. subsequently underwent an abortion. RP 93-94, 130-31, 189. A fetal sample was collected, along with biological samples from Weaver and R.T. RP 94-97, 242-53. DNA analysis of the fetal tissue revealed that

² R.T. later got a closer look at the gun and thought it was a BB gun. RP 180.

Weaver's DNA profile was consistent with the male contributor to the fetus. RP 277-83. A forensic scientist reported that the probability that Weaver was *not* the father was one in 240 million. RP 283-84.

2. PROCEDURAL FACTS

On March 14, 2003, the State charged Weaver with one count of second-degree rape of a child. CP 1. The State later added a second count of second-degree rape by forcible compulsion. CP 41-42. The State gave notice that it would seek an exceptional sentence based upon the aggravating circumstance that the offense resulted in the pregnancy of a child victim of rape. CP 180-81.

After nearly two years of delays, trial occurred in February of 2005, and a jury found Weaver guilty on both counts as charged. CP 39-40. The jury also returned a special verdict, finding the aggravating circumstance. CP 38.

Weaver was subject to indeterminate sentencing under RCW 9.94A.712. The court imposed the maximum sentence of life and a minimum term exceptional sentence of 250 months. CP 74-78. Additional relevant facts are set forth below.

C. ARGUMENT

Weaver groups together several claims concerning his motions to continue and his attorney's motion to withdraw. The State addresses each of these claims separately given that each claim of error involves the denial of a separate motion, particular and sometimes unusual facts relevant to the motion at issue, and a separate court ruling. As demonstrated below, the trial court acted well within its discretion in denying the motions.

**1. THE TRIAL COURT PROPERLY DENIED
WEAVER'S MOTION TO CONTINUE.**

Weaver claims that the trial court erred by refusing to consider his motion to continue made at the beginning of trial. In fact, the court considered Weaver's reasons for a continuance and ultimately denied the motion. This decision, made after numerous previous continuances had been granted, was within the court's discretion. Moreover, Weaver has not shown how he suffered any prejudice. This court should reject Weaver's claim of error.

a. Relevant Facts

As noted above, nearly two years passed between the filing of charges and the beginning of trial. During this time, Weaver was represented by at least four different attorneys. First, attorney Lisa Leone briefly represented Weaver. RP 69; CP 142. Unhappy with her performance, Weaver retained attorney John Crowley in April of 2003. RP 69; CP 140-41. While Crowley represented Weaver, a trial date was set for October 7, 2003. CP 143-44. That date was continued multiple times, each time at the defense request. CP 145-48.

Then, in February of 2004, Weaver hired attorney Peter Friedman. CP 150-51. When attorney Friedman entered the case, the court indicated that it would not grant further continuances of the case; nonetheless, Weaver continued to obtain numerous continuances of the trial date. CP 152-55.

In June of 2004, a warrant issued for Weaver when he left the omnibus hearing after being ordered to remain. RP (8/19/04) 4; RP 77; CP 157-58. In July of 2004, Friedman then withdrew as counsel. CP 159. Around this same time, Weaver was arrested on the warrant and posted bail. RP (8/19/04) 4.

Though Weaver represented that he was arranging for new counsel, after numerous delays and inaction, the court ordered a public defender to represent Weaver. RP (8/4/04) 2-15; RP (8/19/04) 2-20; CP 160. A month later, on September 13, 2004, privately retained attorney David Gehrke began representing Weaver. CP 135, 161-63. Gehrke obtained numerous continuances of the case for five months. CP 136-38,164. Gehrke retained the services of the same private investigator who had worked on the case for Weaver's previous attorneys. CP 69-70, 316, 319.

The case was finally set for trial on Monday, February 14, 2005. On Friday, February 11, 2005, attorney Gehrke, claiming that he was not prepared for trial, moved for a continuance before Criminal Presiding Judge Ronald Kessler.³ RP (2/11/05) 1-2. Judge Kessler denied the motion.⁴ Id.

³ Before Judge Kessler and in his trial memorandum, attorney Gehrke stated that he needed to interview witnesses - a claim he did not later repeat. RP (2/11/05) 1-2; RP 7-8. A defense investigator had already interviewed many of the State's witnesses. RP 8, 34-35. Instead, before Judge Armstrong, Gehrke acknowledged that he had reviewed the interviews and that, other than the DNA evidence, the case was not complicated. RP 7-8.

⁴ Weaver has not assigned error to the denial of this motion, perhaps because Judge Kessler had granted several prior motions to continue. See CP 139, 164.

The following Monday, after being sent out for trial, attorney Gehrke renewed his motion for a continuance before Judge Sharon Armstrong. RP 7; CP 32-33. Gehrke acknowledged that he was familiar with R.T.'s expected testimony and had reviewed an interview of her by the defense investigator. RP 7-8. Instead, he based his request on a need to prepare for the DNA evidence and indicated that he wanted to consult with a DNA expert. RP 7-8. The prosecutor objected to the continuance and suggested that the parties could conduct pretrial motions and then recess so counsel had time to prepare. RP 12-13. Judge Armstrong indicated that Judge Kessler had warned her that a motion for a continuance might be renewed and that she should deny it or send it back to Judge Kessler. RP 9, 13. Judge Armstrong then suggested that they discuss the witnesses, figure out the schedule and determine if there was a solution to the "preparation issue." RP 13.

The judge and attorneys proceeded to discuss the expected witnesses; during this discussion, attorney Gehrke demonstrated that he was very familiar with the substance of the expected testimony of State's witness, discussed a number of possible defense witnesses and made numerous pretrial motions. RP 14-55. With respect to a defense DNA witness, Gehrke indicated that

he needed to consult with one, and that whether he would call his own expert would depend upon the State's expert's testimony. RP 31.

After this discussion, attorney Gehrke renewed the motion to continue, and the court denied it, commenting that "there's been a long history of manipulation by the defendant in this case and I'm not going to be part of it." RP 56.

b. Argument

Weaver's primary argument on this issue is that Judge Armstrong erred by refusing to exercise any discretion in considering the motion to continue. Appellant's Opening Brief at 9-12. He cites to Judge Armstrong's statement that she had been instructed by the criminal presiding judge to deny the motion or refer it back to him. In fact, the record makes clear that Judge Armstrong did entertain the motion. She questioned Weaver's counsel on why the continuance was requested. RP 7-8. She then instructed counsel to discuss the schedule of witnesses to "see if there's a remedy to this preparation issue." RP 13. After an extensive discussion of the witnesses and pretrial motions, Judge Armstrong denied the motion to continue, commenting that "there's

been a long history of manipulation by the defendant in this case and I'm not going to be part of it." RP 56. She did not refuse to consider the motion.⁵

Judge Armstrong's decision to deny the continuance was well within her discretion. The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The trial court in exercising its discretion considers various factors including diligence, due process, the need for an orderly procedure, the possible impact on the trial and whether prior continuances have been granted. State v. Early, 70 Wn. App. 452, 457-58, 853 P.2d 964 (1993). After one continuance has been granted, the moving party is required to make a stronger showing in support of subsequent motions to continue. State v. Staten, 60 Wn. App. 163, 172-73, 802 P.2d 1384 (1991). With respect to cases involving sex

⁵ In any event, it would not have been error for Judge Armstrong to decline to revisit the issue given that the same motion had brought before a different judge just one court day earlier. See, e.g., King County LR 7(b)(6) ("No party shall remake the same motion to a different Judge without showing by affidavit what motion was previously made, when and to which Judge, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another Judge"). When Weaver brought the motion to continue again, he did not suggest that there had been any new developments since Judge Kessler had denied the motion. Under such circumstances, it is not error for a superior court judge to decline to reconsider a motion previously denied by another judge.

crimes against minors, a trial court should not continue the trial date unless it finds that there are substantial and compelling reasons for the continuance and that the benefit of the postponement outweighs the detriment to the victim. RCW 10.46.085.

The Washington Supreme Court has held that an erroneous failure to grant a continuance may deprive a defendant of a fair trial and due process of law. Downing, 151 Wn.2d at 274. Whether the denial of a continuance rises to the level of a constitutional violation requires a case-by-case inquiry. Id.

The appellate court reviews the trial court's decision under an abuse of discretion standard. Downing, 151 Wn.2d at 272. In order to justify reversal, the appellant must make a clear showing that: (1) the trial court's decision was manifestly unreasonable, or exercised on untenable grounds, and (2) the appellant has been prejudiced or the result of the trial would likely have been different had the continuance been granted. Id. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); State v. Picard, 90 Wn. App. 890, 898, 954 P.2d 336 (1998).

Here, the trial court clearly acted within its discretion in denying Weaver's motion to continue. Weaver had obtained multiple continuances of the case, resulting in a delay of nearly two

years. His most recent attorney had been on the case for six months. The motion was made on the first day of trial. When pressed to provide a specific reason for yet another continuance, attorney Gehrke provided little specifics, other than his desire to consult with a DNA expert "a little bit." RP 9. The prosecutor appropriately noted that such consultation could be done as the trial proceeded. RP 13. The court did not abuse its discretion in denying Weaver's motion for a continuance under these circumstances.

Weaver makes no attempt to show how he was prejudiced by the denial of this motion. As the trial developed, it was revealed that Weaver had already retained a DNA expert and that this expert had reviewed the Washington State Patrol forensic scientist's file in the case and conducted a site visit of the laboratory. RP 298, 302-03. Attorney Gehrke subsequently made arrangements to interview forensic scientist Beverly Himick prior to her trial testimony and proceeded to aggressively cross-examine her. RP 154, 286-95.

Nor does Weaver point to any evidence that attorney Gehrke was unprepared for trial. When the attorneys discussed the likely witnesses and pretrial motions during the first day of trial, it was readily apparent that Gehrke was familiar with the expected

testimony of the witnesses and prepared to litigate a variety of pretrial motions. See RP 14-55. A private investigator had interviewed the key witnesses. RP 8, 35, 38, 141-43. Throughout the trial, Gehrke aggressively cross-examined the State's witnesses, frequently attempting to point out alleged inconsistencies with prior statements. RP 137-46, 193-201, 258-63. Weaver does not and cannot show that the results of the trial would have been different if the continuance had been granted.

**2. THE TRIAL COURT PROPERLY DENIED
WEAVER'S ATTORNEY'S MOTION TO
WITHDRAW.**

Weaver contends that the trial court committed reversible error when it denied his attorney's motion to withdraw because, Weaver now claims, there was an irreconcilable conflict. There is no support in the record for the notion that such a conflict existed. Attorney Gehrke moved to withdraw after becoming concerned that he would not be paid by Weaver. Because trial had begun, the court had the authority to deny the motion, one that Weaver did not even join in. Moreover, as the trial proceeded, there is no evidence that there was *any* breakdown in communication between Gehrke

and Weaver; instead, the two continued to strategize and plot Weaver's defense.

a. Relevant Facts

In the middle of jury selection, attorney Gehrke moved to withdraw, claiming a "conflict of interest." RP 65. During a closed hearing without the prosecutor present, Gehrke explained that he was concerned about being paid. He stated that he had received two-thirds of his retainer when he began representing Weaver. RP 70. Weaver also provided some bonds, apparently as collateral, which were placed in Gehrke's safe-deposit box. RP 71. Weaver had told Gehrke that similar bonds had been redeemed for \$35,000 back in 1995. RP 73. Gehrke had his investigator research the bonds and determined that, though they were real, they were practically worthless. RP 72-75. Gehrke complained that he had done cases for free before which he characterized as "understandable" though "not acceptable." RP 74. He expressed anger towards Weaver – "I don't want to be with him...." RP 74. Gehrke acknowledged that he had no proof that Weaver had deliberately tried to defraud him. RP 75.

Weaver responded, indicating that Gehrke had called him the previous night demanding \$27,500 because the bonds were no good. RP 78. Weaver acknowledged that he had not fully paid Gehrke and described several efforts that he was making to pay Gehrke, including an offer to turn over the deed to his house and/or several cars, including a Porsche or Land Rover. RP 78-82. Weaver explained that the bonds were from his grandfather's estate and that he had previously cashed several in. RP 78-82. Weaver indicated that he wanted the case to go forward "with an understanding that my attorney is doing his job." RP 82.

The court then summarized:

You agree that you owe Mr. Gehrke money. You deny that the bonds were given to him in an attempt to defraud him. You are attempting to secure payment for his legal fee. You do not want him to withdraw. You have concerns that some of the witnesses have not been pulled together.

RP 83.

The court invited the prosecutor back in, summarized the issue, indicated that she was inclined to deny the motion and that she intended to contact the Office of Public Defense to determine if they had funds to cover Gehrke. RP 86. The court then denied the motion. RP 89. The issue never came up again during the trial.

b. Argument

When a criminal case has been set for trial, CrR 3.1(e) authorizes withdrawal of an attorney only with "written consent of the court, for good and sufficient reason shown." Good cause justifying withdrawal may include an attorney's conflict of interest, irreconcilable conflict, or a complete breakdown of communication between attorney and client. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). This court reviews the trial court's decision denying counsel's motion to withdraw for an abuse of discretion. State v. Hegge, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989).

For the first time on appeal, Weaver claims that he had an irreconcilable conflict with attorney Gerhke. The record does not support this claim. An irreconcilable conflict between attorney and client occurs when the breakdown of their relationship from irreconcilable differences results in the complete denial of counsel. In re Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). In examining the extent of the conflict, the court examines the extent and nature of the breakdown in the relationship and its effect on the representation actually provided. In re Stenson, 142 Wn.2d at 724.

The factors that the court considers are: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. Id. None of these factors supports Weaver's claim that he had an irreconcilable conflict with attorney Gehrke.

With respect to the extent of the conflict, Gehrke moved to withdraw, not because of an irreconcilable conflict, but because he was upset that some bonds provided as collateral appeared to be worthless. It was a conflict over fees. Weaver cites no authority for the notion that such a dispute qualifies as an irreconcilable conflict. In fact, courts in other jurisdictions have rejected the notion that a conflict of interest exists when there is a dispute over legal fees.

The Second Circuit has explained:

[W]e never have held that failure to pay fees or an attorney's motion to withdraw for his client's failure to pay, without more, gives rise to a conflict of interest and decline the invitation to do so here. There is little question that a defendant's failure to pay fees may cause some divisiveness between attorney and client, but we presume that counsel will continue to execute his professional and ethical duty to zealously represent his client, notwithstanding the fee dispute.

United States v. O'Neil, 118 F.3d 65, 71 (2nd Cir. 1997) (holding no conflict of interest where, prior to beginning of criminal trial, law firm sued defendant for legal fees); see also Caderno v. United States,

256 F.3d 1213, 1218-19 (11th Cir. 2001) (rejecting claim that attorney had conflict of interest because defendant had not paid his legal fees).

The fact that Gehrke expressed frustration with Weaver does not establish an irreconcilable conflict. In Stenson, Stenson and his defense attorneys disagreed over a variety of issues, and matters became so heated that defense counsel requested to be removed from the case and stated that he could not stand the sight of Stenson. In re Stenson, 142 Wn.2d at 729. The Washington Supreme Court rejected the claim that there was an irreconcilable conflict. The Court noted that there was not a total breakdown in communication and that counsel had continued to meet with Stenson. 142 Wn.2d at 730-31. The Court further observed that the effects of the breakdown appeared negligible and there was no evidence that the representation had been inadequate. 142 Wn.2d at 729-30.

Here, there is no evidence of *any* breakdown in communication between Gehrke and Weaver. Weaver did not join in Gehrke's motion or indicate that he wanted Gehrke off the case. After the closed hearing, Weaver expressed no complaints to the court about Gehrke. In fact, as trial progressed, Gehrke and

Weaver communicated and strategized throughout the trial. See, e.g., RP 159-62, 268-70, 316-17. Despite any concerns about payment, Gehrke continued to use his investigator to track down information that he hoped would be helpful to Weaver's defense.⁶ RP 316. The record does not support Weaver's claim that there was an irreconcilable conflict.

The second factor is the adequacy of the inquiry. The trial court conducts an adequate inquiry when it allows the defendant and counsel to express their concerns. State v. Varga, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004); In re Stenson, 142 Wn.2d at 731. Though Weaver claims that the court's inquiry was insufficient, the court heard from both Gehrke and Weaver at length about Gehrke's concern about payment. RP 69-85.

The third factor is the timeliness of the motion. Attorney Gehrke's motion to withdraw was made after trial began, in the middle of jury selection. "[W]here the request for change of counsel comes during the trial, or on the eve of trial, the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain

⁶ In fact, it is not clear that the payment issue continued unresolved. At the hearing, Weaver described efforts that he was making to pay Gehrke, and, given that the issue was not raised again, Gehrke ultimately may have been paid to his satisfaction.

new counsel and therefore may reject the request." In re Stenson, 142 Wn.2d at 732 (quoting United States v. Williams, 594 F.2d 1258, 1260-61 (9th Cir.1979)). Allowing counsel to withdraw in this case would have caused a significant delay while new counsel prepared for trial. This factor supports the trial court's denial of the motion to withdraw. See In re Stenson, 142 Wn.2d at 732.

Considered together, these factors support the trial court's decision to deny Gehrke's motion to withdraw. There was no irreconcilable conflict between Weaver and his counsel.

**3. THE TRIAL COURT PROPERLY DENIED
WEAVER'S MOTION TO RECESS THE TRIAL FOR
SEVERAL WEEKS.**

Weaver claims that the trial court erred by failing to grant his request to recess the trial while he attempted to obtain documents that would purportedly indicate that he was sterile. The court did not abuse its discretion in denying the motion given that: (1) the claim of sterility was first asserted near the end of trial, (2) the documents that Weaver had provided were inconsistent with his claim that he was sterile, and (3) the requested recess would have been up to seven weeks. Moreover, Weaver has not shown any prejudice; though the trial court invited him to present any

documentation supporting his claim of sterility in a post-trial motion, Weaver has yet to produce such evidence.

a. Relevant Facts

In the middle of trial, attorney Gehrke first gave notice that Weaver claimed to be sterile. RP 159. According to Gehrke, on the way to court that day, Weaver's friend inquired of Gehrke when he was going to offer evidence that Weaver was sterile. RP 159. Weaver then claimed that he told Gehrke that he was sterile at their first meeting, though Gehrke informed the court he did not remember it. RP 159. According to Weaver, after an adult onset of German measles and mumps in the 1980s, he was tested and determined to be sterile. RP 162, 320. Gehrke told the court that he was working to get records to confirm this claim. RP 160.

Ultimately, Weaver provided an adoption report from May of 2000 to support his claim. RP 268-69, 316, 325. The court reviewed the report and noted that there was nothing about sterility. RP 316. Instead, the report indicated that Weaver's wife had had three pregnancies and that Weaver had offered to undergo a vasectomy. RP 316. Gehrke responded: "I saw that paragraph too, and I asked my client about that. He says the pregnancies

were in vitro, that the vasectomy comment was misspoken." RP 316. He indicated that his investigator was seeking additional documents and requested a recess of several hours. RP 317. The court granted that request. Id.

After the recess, Gehrke discussed a new report that he had received from a fertility laboratory concerning Weaver. RP 318-19. It reported a normal sperm count, though only two motile sperm. RP 319. While Gehrke represented that the doctor had indicated that Weaver could not "impregnate anyone today," he acknowledged that this did not establish that Weaver was sterile at the time of the rape. RP 319-20.

Gehrke moved for a continuance in order to obtain more records. RP 320-21. Gehrke represented that the records were in storage and that it would take three to seven weeks to get them. RP 320.

The court denied the motion, noting that the material provided by Weaver did not support the notion that he was sterile.

It was the defendant's expectation that this report would document that he was sterile at the time they sought to adopt a child. This preplacement report, which is an adoption investigation report, was filed May 19, 2000. And I want to read from it. And while the defendant appears to have an explanation why

this isn't accurate, it nevertheless is information that I placed a great deal of significance on.

It says at Page 2, "They are a couple who has experienced three pregnancy losses, the last one being seven months ago. They've undergone some fertility testing, which has not provided many answers. Though not now using contraception, they are both agreeable to use contraception for a year if a baby is placed with them through adoption. However, Skip," meaning the defendant, "suggested he get a vasectomy to permanently protect Kristin from further physical and emotional losses."

The way I read this information is that there were three pregnancies. It says nothing about in vitro fertilization. And it's hard for me to understand why the defendant would offer to get a vasectomy if he were already sterile.

So we don't have information even from 2000 that would indicate the defendant is sterile. And most significantly, we certainly have no information from the time of this incident.

But what is important here is the fact that all this information is very late developing. This kind of a defense is one that needs to be affirmatively disclosed early on in the life of a case. This case has been assigned for trial as early as September 2003, and it would have needed to be disclosed to the prosecutor well before trial.

As I indicated earlier in this case, Mr. Gehrke is a well-experienced trial attorney. If a client had disclosed to him that he was sterile, which would obviously be a very significant defense in the case and would tend to disprove the State's case, it is inconceivable to me he simply would have forgotten that fact. And so I'm assuming that Mr. Gehrke got this information on the 17th of February.

The defendant has done, in my view, a great deal of manipulation in this case. And that is why the case is being tried so long after it was originally set for trial.

I'm going to deny this... motion for a continuance. We'll go forward, we'll finish the case. If there is indeed information which corroborates the defendant's view and it's presented to the Court as part of a post-trial motion, we can look at the motion at that time. But as of today, I see no good cause for continuing the trial.

RP 325-27.

Despite the trial court's invitation to present information concerning Weaver's alleged sterility in a post-trial motion, no information was ever provided to the court. Indeed, at the sentencing hearing, held six weeks later, there was no suggestion that such documentation would ever be forthcoming.

b. Argument

The decision to grant or deny a motion for a continuance or recess rests with the sound discretion of the trial court. Downing, 151 Wn.2d at 272; State v. Mays, 65 Wn.2d 58, 61, 395 P.2d 758 (1964). The appellate court will not disturb the trial court's decision unless the appellant establishes the decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons. Downing, 151 Wn.2d at 272.

The trial court acted well within its discretion in denying the motion to recess the trial. The motion was made at the end of trial, and the request was for a recess of up to seven weeks. The basis for the continuance was a last minute claim that Weaver was sterile at the time of the crime. The report that Weaver produced did not support this claim; instead, it indicated that Weaver's wife had been pregnant three times and that he had offered to undergo a vasectomy. The court did not abuse its discretion in denying this request.

Moreover, Weaver cannot show any prejudice. Though the court invited him to provide evidence supporting his sterility claim in a post-trial motion, he has never done so. If any documents supporting his sterility claim existed, he certainly could have presented them at sentencing, held six weeks later. This court should reject this claim of error.

4. THE COURT PROPERLY DETERMINED WEAVER'S OFFENDER SCORE.

For the first time on appeal, Weaver claims that the court erred by including his two prior felonies in his offender score,

claiming they wash out. This claim fails. Weaver's criminal history, set forth in the State's presentence report and not objected to by Weaver, includes several misdemeanor convictions that prevented Weaver's felonies from washing out. He is not entitled to be re-sentenced.

At sentencing, the State provided the court with a presentence report listing Weaver's criminal history. RP 371-72; CP 182-91. The report identified two felony convictions: a 1981 second-degree burglary conviction and a 1985 second-degree burglary conviction. CP 190. The report also listed five misdemeanor convictions dated 1978, 1987, 1988, 1993, and 1996. Id. At sentencing, Weaver did not dispute his criminal history set forth in the State's presentence report. Instead, he acknowledged that he had criminal history dating from his "younger days" and requested that the court impose the minimum confinement time. RP 378-80.

Accordingly, the court properly included Weaver's two prior burglaries in his offender score. A sentencing judge may rely on facts that are "admitted, acknowledged, or proved... at the time of sentencing." RCW 9.94A.530(2). "Acknowledgement includes not objecting to information included in the presentence reports." Id.;

State v. Grayson, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005).

Because Weaver did not object to the criminal history information in the State's presentence report, the court was entitled to rely upon it.

Under RCW 9.94A.525(2), Weaver's burglary convictions would have washed out if he had spent ten years in the community without committing any crime that resulted in a conviction. Given Weaver's misdemeanor history, his prior burglaries did not wash out and were properly included in his offender score.

On appeal, Weaver does not discuss the State's presentence report or the misdemeanor convictions listed therein. Instead, he argues that Appendix B of the judgment and sentence, which lists only his felony convictions, contains all "pertinent criminal history" and that the lack of any misdemeanor convictions therein indicates that the court did not find that they exist.

Appellant's Opening Brief at 26.

This argument is contrary to the plain wording of the form and the record in this case. Contrary to Weaver's claim, Appendix B does not purport to list all criminal history. That form purports to list only "criminal history used in calculating the offender score..." CP 81. Not surprisingly, it lists the felony convictions used to calculate the offender score. Weaver's misdemeanor convictions

do not count in his offender score, and, therefore, were not included.

Moreover, there is no evidence that the court made any distinction between Weaver's felony convictions and his misdemeanor convictions. The information supporting Weaver's felony convictions, which Weaver concedes were found by the court, was the same as that supporting his misdemeanor convictions. As the transcript of the sentencing hearing reveals, there was no dispute about Weaver's criminal history. Nothing in this record supports Weaver's suggestion that the sentencing court found his felony convictions, but not his misdemeanor convictions.

The case primarily relied upon by Weaver, State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), is easily distinguishable. In Ford, the trial court failed to conduct a comparability analysis of the defendant's foreign convictions before including them in his offender score. The defendant had not affirmatively agreed that they were comparable and, in fact, argued they should not be counted as "convictions." The State orally asserted that the defendant's California convictions would be classified as felonies under comparable Washington law but provided no information to

support that claim. Under these circumstances, the Court held that a re-sentencing hearing was required:

[C]lassification is a mandatory step in the sentencing process under the SRA. RCW 9.94A.360(3) ("Out-of-state convictions for offenses *shall be classified* according to the comparable offense definitions and sentences provided by Washington law.") (emphasis added). Thus, while unchallenged *facts and information* are acknowledged by the defendant and may be properly relied upon by the court to support a determination of classification, under the statutory scheme classification of out-of-state convictions is a process unto itself, entirely distinct from the acknowledged existence of any fact which informs the court's conclusions.

137 Wn.2d at 483. The court further explained that "the sentencing court must engage in some comparison of the elements and any conclusion must be supported by evidence in the record.

Conclusory argument by the State is an insufficient basis upon which to determine classification." 137 Wn.2d at 483 n. 4.

Unlike the issue of comparability, which involves a legal analysis of the various elements of the crimes, the determination of whether a crime washes is a factual question that can be answered by the existence and dates of the defendant's criminal convictions. Here, the facts of Weaver's prior misdemeanor convictions were set forth in the State's presentence report and acknowledged by Weaver by his failure to object. Absent some indication by Weaver

that he was contesting these facts, the trial court was entitled to rely upon the information provided by the State.

Finally, even if this court determines that remand is necessary, the proper remedy is to remand for an evidentiary hearing to allow the State to prove Weaver's offender score by a preponderance of evidence. In re Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 485. In Ford, though the court vacated the defendant's sentence, it permitted the State to seek the same sentence on remand because the defendant had not put the sentencing court on notice of the specific defects claimed. 137 Wn.2d at 485-86; State v. Rivers, 130 Wn. App. 689, 705-07, 128 P.3d 608 (2005), rev. denied, 158 Wash.2d 1008 (2006). Here, because the State provided information concerning Weaver's criminal history and Weaver raised no objection, at any new sentencing hearing, the State may seek to prove that his felony convictions do not wash out.

5. THE TRIAL COURT HAD THE AUTHORITY TO IMPOSE THE MINIMUM TERM EXCEPTIONAL SENTENCE.

Weaver insists that the trial court erred when it imposed an exceptional sentence, claiming that there was no authority to obtain

a jury finding on the aggravating circumstance. This argument fails because a jury finding on the aggravating circumstance was not required when the court imposed a minimum term exceptional sentence under RCW 9.94A.712. Such a sentence is authorized if the judge finds an aggravating circumstance by a preponderance of the evidence. Here, Judge Armstrong clearly agreed that the aggravating circumstance was established -- she found that it was a substantial and compelling reason to impose an exceptional sentence. Accordingly, this court should affirm Weaver's sentence.

Weaver was subject to sentencing under RCW 9.94A.712, the indeterminate sentencing scheme for defendants convicted of specified sex crimes. That statute requires that the trial court impose an indeterminate sentence consisting of a minimum and a maximum term. RCW 9.94A.712(3). The maximum term is the statutory maximum sentence for the offense. Id. The court sets the minimum term within the standard range unless there are aggravating circumstances justifying an exceptional sentence. Id.

In this case, the State gave notice that it would seek an exceptional sentence based upon the aggravating circumstance that the offense resulted in the pregnancy of a child victim of rape. CP 180-81. In Blakely v. Washington, 542 U.S. 296, 124 S. Ct.

2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court held that a defendant has a Sixth Amendment right to a jury determination of aggravating circumstances that authorize an increase in maximum punishment of a determinate sentence. At the time of trial in this case, the Court of Appeals was split on whether Blakely required a jury finding of an aggravating circumstance supporting a minimum term exceptional sentence under RCW 9.94A.712. Compare State v. Clarke 124 Wn. App. 893, 103 P.3d 262 (2004) (holding that Blakely did not apply), aff'd, 156 Wn.2d 880, 134 P.3d 188 (2006) with State v. Borboa, 124 Wn. App. 779, 102 P.3d 183 (2004) (holding that Blakely did apply), rev'd, 157 Wn.2d 108, 135 P.3d 469 (2006).

At the time of trial, in February of 2005, the law was unsettled, and the State sought and obtained a jury finding on the aggravating circumstance in this case - that the defendant's offense resulted in the pregnancy of a child victim of rape. CP 38, 71. At sentencing, the court found that the aggravating circumstance was a substantial and compelling reason to impose an exceptional sentence. CP 71. Though Weaver's standard range was 95 to 125 months, the court imposed a minimum term sentence of 250 months. CP 75, 78.

Since Weaver's sentencing, the Washington Supreme Court has clarified that a jury finding is not constitutionally required before the court can impose a minimum term exceptional sentence under RCW 9.94A.712. In May of 2006, the Washington Supreme Court held that "Blakely does not apply to an exceptional minimum sentence imposed under RCW 9.94A.712 that does not exceed the maximum sentence imposed." State v. Clarke, 156 Wn.2d 880, 886, 134 P.3d 188 (2006). In Weaver's case, Blakely does not apply because his minimum term exceptional sentence of 250 months does not exceed his maximum term of life.

Accordingly, even assuming that Weaver is correct that the trial court lacked the authority to seek the exceptional sentence finding from the jury,⁷ his exceptional sentence remains valid because no jury finding was required before the trial court could impose the sentence. Instead, the trial court was required to find by a preponderance of the evidence that there was an aggravating circumstance that provided a substantial and compelling reason justifying an exceptional sentence. Former RCW 9.94A.535. There

⁷ The State would acknowledge that the Washington Supreme Court's recent decision in State v. Pillatos, ___ Wn.2d ___, P.3d ___, 2007 WL 178188, *3 (2007) would support Weaver's argument on the issue of whether the court had the inherent authority to obtain a jury finding on the aggravating circumstance.

can be no question that the court so found in Weaver's case. In announcing the sentence, the court explained:

The sentence I'm imposing is an exceptional sentence, and it is based on the severity of the crime. Mr. Weaver saw a young girl walking down the street, invited her to work for him, for his family and at his business, in a process that we would all recognize as grooming. Ultimately he forcibly raped her with a handgun, what she believed was a handgun, pointed at her head. She became pregnant and at a very young age had to elect to terminate her pregnancy. And the effects on her have been profound and truly terrible.

RP 381. The court went on to find that this aggravating circumstance was a substantial and compelling reason to impose an exceptional sentence. CP 71. Given these facts, the exceptional sentence should be affirmed.

To the extent that there was any error in not requesting an express judicial finding of the aggravating circumstance, such an error was harmless. See State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) (sentencing errors subject to harmless error analysis). The aggravating circumstance -- that R.T. became pregnant and underwent an abortion -- was never disputed at trial. Instead, Weaver disputed that he raped R.T. and suggested that the DNA evidence indicating that he was the father was untrustworthy. See RP 351-63. If the trial judge did not believe

that the aggravating circumstance had been proven, it is improbable that the court would have found it to be a substantial and compelling reason to impose an exceptional sentence, let alone impose a sentence double the top end of the standard range. Weaver's request that this court reverse his minimum term exceptional sentence should be denied.

D. CONCLUSION

For all the foregoing reasons, Weaver's convictions and sentence should be affirmed.

DATED this 27th day of February, 2007.

Respectfully submitted,

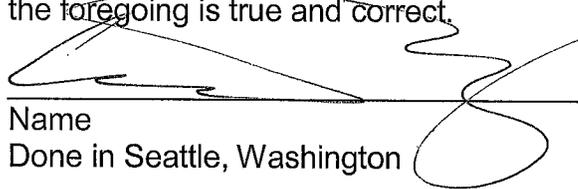
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. OLIVER WEAVER, Cause No. 57691-7-I, in the Court of Appeals, Division I, 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.


Name
Done in Seattle, Washington

02/27/2007
Date

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