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DIVISION II

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STATE OF WASHINGTON
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NO. 37211-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GERALD WILLIAM JOHNSON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The state's actions eliciting evidence that the defendant's wife believed that the defendant was guilty and that the complaining witness was telling the truth violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment.

2. Trial counsel's failure to object when the state elicited irrelevant, prejudicial evidence that the defendant's wife believed the complaining witness and believed that the defendant was guilty denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

3. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to allow him to present relevant, exculpatory evidence.

4. The trial court violated Washington Constitution, Article 4, § 16, when it gave a jury instruction that commented on the evidence.

5. The trial court's imposition of an exceptional sentence based upon its own findings of fact violated the defendant's right under United

States Constitution, Sixth Amendment to have a jury determine all facts necessary for imposition of punishment and this error was not harmless beyond a reasonable doubt.

Issues Pertaining to Assignment of Error

1. Does the state deny a defendant a fair trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment if it elicits evidence in its case-in-chief that the defendant's wife believed that the defendant was guilty and that the complaining witness was telling the truth?

2. Does a trial counsel's failure to object when the state elicits irrelevant, prejudicial evidence that the defendant's wife believed the complaining witness and believed that the defendant was guilty deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the exclusion of that improper evidence would have resulted in an acquittal?

3. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow the defendant to present relevant, exculpatory evidence?

4. Does a trial court violate Washington Constitution, Article 4, § 16, if it gives a jury instruction that comments on the evidence?

5. Does a trial court's imposition of an exceptional sentence based upon its own findings of fact violate a defendant's right under United States Constitution, Sixth Amendment to have a jury determine all facts necessary for imposition of punishment if that violation is not harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

Factual History

In 1999, the defendant Gerald Johnson, his wife Stacy, and a number of children they both had from previous marriages were living in the Iron wood Apartments in Vancouver, Washington. RP 109-112, 440-442.[1] During that year they became acquainted with the Pheifle family, who also lived at Ironwood. *Id.* This family included mother Mary, her husband Greg Pfeifle, and a number of Mary's children from prior relationships by the name of Tasha, Angelia, Brandon, and Nikaela. *Id.* Tasha was born on 5/1/87, and Angelia was born on 11/11/91. RP 121-124. Within a short time after meeting, the families, by Mary's description, became "best friends." RP 109-112, 148, 171. They spent time in each other's homes, each couple's children spent time in the other couple's home, and both families would go out together to recreational facilities during weekends. RP 109-112, 114-145, 273-276, 445-448; CP 58-59. In fact, once a year for a number of years both families, with assorted cousins, aunts, uncles, grandparents and others, would

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[1]The record herein includes eight continuously numbered volumes of verbatim reports, referred to herein as "RP" with the indicated page number. The record also includes the video-taped testimony of a witness who was unavailable for trial. Although the record shows that it was played for the jury, the court transcriber did not give a verbatim report of this testimony. However, it is preserved for the record in the form of a transcription filed with the clerk. See Deposition of Robert Sutton. CP 56-91.

go on a week long tent camping trip during the summer. *Id.*

In May of 2002, Mary and her husband had a baby boy they named Christian. RP 113. Sometime later in that year, the defendant and his family moved out of the Ironwood apartments and moved in with the defendant's grandmother, who also lived in Vancouver. RP 113, 232-233, 403. A while later, Mary and her family moved to a house in Vancouver on Snowberry Street. RP 145. They then moved to another house in Vancouver on 97th Circle by Padden Parkway. RP 146. All during these times, both families kept in close contact, continued doing weekend activities together, continued camping out together in the summer, and continued considering each other as "best friends." RP 109-112, 114-145, 273-276, 445-448; CP 58-59.

On November 11, 2004, which was Mary's birthday, she happened to be in the living room of her home with her daughter Tasha, when she saw one hundred dollars in Tasha's purse. RP 137-138. When she asked about it, Tasha said that the defendant had given it to her so she could buy a cell phone. *Id.* After some further conversation, Tasha told her mother that the defendant and she were "in love" with each other, that they had been sexually active for a couple of years, and that when she became 18-years-old, the defendant was going to divorce his wife and marry her. RP 137-143, 208-210. Following this conversation, Mary decided to take Tasha to her father's house in Portland where Tasha would live periodically. RP 208-211. While

driving, Mary called the defendant and asked him about the $100.00 and confronted him about what Tasha had said. RP 137-142. According to Mary, during this conversation, the defendant admitted that he was "in love" with Tasha and wanted to marry her when she came of age. *Id.* According to the defendant, he made no such statement, although he did tell Mary that he had loaned the money to Tasha. RP 533-535.

According to Tasha, her illicit relationship with the defendant had started when both families lived at the Ironwood Apartments after one occasion in which the defendant had asked her to give him a kiss as he was going to work. RP 186-188. She claimed that on a number of occasions thereafter, while both families still lived at the Ironwood Apartments, she and the defendant would kiss and fondle each other's genitals over each other's clothing. RP 188-192. She also claimed that this conduct also occurred during day trips that the families took together, and that finally, during one night when they were on one of their annual summer camping trips, she and the defendant had sexual intercourse. RP 193-208. According to Tasha, from 2002 to 2004, she and the defendant had sexual intercourse many times when they could find the occasion to be alone together. RP 208-216. These assignations would sometimes occur in the defendant's work truck, which Tasha claimed he drove over to her house off Padden Parkway every morning. RP 213-216. Tasha also stated that they never used birth control

and she never became pregnant. RP 233. She also claimed that the defendant had a "purplish mole" that was clearly visible on the side of his penis. RP 239.

In addition, according to Tasha's little sister Angelia, on two occasions while she was staying with the defendant and his wife Stacy when they were living with the defendant's grandmother, the defendant touched her between her legs in an inappropriate manner. RP 277-284. The defendant, for his part, denied ever having any type of sexual relationship with Tasha, ever touching her in an inappropriate manner, ever desiring to marry her, or ever touching Angelia in an inappropriate manner. RP 526-530.

Procedural History

By information filed February 11, 2005, the Clark County Prosecutor charged the defendant Gerald W. Johnson with one count of second degree child molestation against Tasha, one count of communication with a minor for immoral purposes with Tasha, and one count of first degree child molestation against Angelia. CP 1-2. The state alleged that all of this conduct occurred between May 1, 1999 and April 30, 2001. *Id.* Following the filing of the information, the defense moved to dismiss count II, arguing that the crime was charged outside the statute of limitations. CP 4. The court agreed with this argument and dismissed count II with prejudice. CP 15.

After a number of agreed continuances, the case was eventually called

for trial before a jury. RP 3. During this trial, the state called five witnesses with two of those witnesses being recalled for further testimony. RP 84, 108, 179, 263, 363, 372, 384. These witnesses included Mary Pfeifle, her daughters Tasha and Angelia, and her husband Greg. *Id.* The defense then called eight witnesses, with the state then recalling three of its witnesses in rebuttal. RP 245, 402, 418, 431, 440, 479, 522, 541, 547, 551; CP 56. These witnesses testified to the facts mentioned in the preceding *Factual History*. See Factual History.

In addition, during its case-in-chief, the state recalled Mary Pfeifle and her daughter to testify concerning an incident a day or two after Tasha made her allegations against the defendant. RP 363, 384. According to Mary and Tasha, a day or two after Tasha first made her allegations, the defendant's wife Stacy Johnson came over to stay at their house, that she had been drinking, that while she was at their house she got into a confrontation with Tasha, and that Tasha told her that the defendant had a "purplish mole" on his penis and that he masturbated in an unusual way. RP 365-369, RP 384-388. According to Mary, Tasha, and Mary's husband, who also claimed to have been witness to this conversation, the defendant's wife became very upset when Tasha made these claims, and that within a few hours she tried

to commit suicide.[2] RP 365-369, 372-378, 389-391. At no point during this evidence from these three witnesses did the defense ever object that it was all inadmissible hearsay, that it was all irrelevant, or that it constituted an attempt by the state to introduce evidence that the defendant's wife believed he was guilty. RP 363-396.

At the beginning of the third day of trial after Tasha had finished her testimony, the defense provided copies of some of the defendant's employment records to the state. RP 293-303. When doing so, the defense explained that Tasha's claims during her testimony concerning how often the defendant had been available to take her to school and other places when they lived at the Ironwood Apartments, and her claims of the defendant's daily availability when she lived in the house off Padden Parkway were much more specific than they previously had been. *Id.* Thus, the defendant's employment records had now become relevant to rebut this testimony. *Id.* The state objected that the defense had not previously provided this information as part of discovery, and that the court should exclude it in its entirety. *Id.* The court granted the motion to exclude, although it did so on the basis that the court thought the evidence irrelevant. RP 303.

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[2]In fact, the state had not even endorsed Mary's husband as a witness in the case and claimed that it had just found out about this alleged confrontation between Tasha and the defendant's wife. RP 377-378,

As its first witness in its case-in-chief, the defense called a physician's assistant by the name of Kenneth Netzel. RP 245. Mr. Netzel had been a corpsman for 12 years in the military and had also worked as a paramedic in Clark County. RP 245-249. He then went to the University of Washington Medical School and became a physician's assistant. *Id.* Following his retirement from the Air Force at the rank of Major, he went to work as a physician's assistant at the Memorial Urgent Care Clinic, where he had worked for the past ten years. *Id.* His experience included a dermatological rotation at the University of Washington Medical Center. RP 254-255. According to Mr. Netzel, he had examined the defendant's genitalia, and he found no evidence that he had any type of mole or lesion on his penis. RP 249-251. Neither did he find any type of scarring to indicate that there ever had been a mole or lesion on his penis that had been removed. *Id.* From his examination of the defendant, he was able to testify to a degree of medical certainty that the defendant did not have any type of lesion on the side of his penis and never did have one. RP 260.

During its case-in-chief, the defense also called the defendant's wife Mary Johnson to testify. As part of her testimony, she stated that her husband did not have a mole on his penis, and that she had never had a conversation about such a thing with Tasha. RP 448-449. Following her evidence on direct, the state repeatedly cross-examined her on the fact that following

Tasha's initial allegations, she had gone over to stay at the Pfeifle's house and that after talking with Tasha, she had tried to commit suicide. RP 451-458. The state also elicited the fact that Stacy had been the person who first called the police. This cross-examination went as follows:

> Q. Wasn't it your intent after your second conversation with Tasha to indeed take your life?
>
> A. Yes.
>
> Q. Thank you. Now, that same day, you said you came in contact -- sorry.
>
> That same day, yes or no, you came into contact or saw law enforcement arrive at Tasha -- or, sorry, at Mary Pfeifle's home –
>
> A. Yes.
>
> Q. -- isn't that correct?
>
> Isn't it correct that it was in relation to the investigation of this matter --
>
> A. Yes.
>
> Q. -- isn't that correct?
>
> Isn't it further correct that based on what you knew at the time, in fact, you were the one who had called law enforcement to come to that home; isn't that correct?
>
> A. Yes.

RP 457-458.

At no point during these portions of the cross-examination did the defense ever object that the evidence of this conversation and the attempted

suicide and the call to the police was inadmissible hearsay, that it was all irrelevant, or that it constituted an attempt by the state to argue to the jury that the defendant's wife believed he was guilty. *Id.*

Following the close of the defendant's case, the court allowed the state to call Mary Pfeifle, Greg Pfeifle and Tasha Walker as rebuttal witnesses. RP 541, 547, 551. During this rebuttal, each one of these witnesses repeated his or her testimony on direct that a few days after Tasha had made her allegations, the defendant's wife came to stay at their house, that Tasha told her that the defendant had a purple mole on his penis, and that Tasha described and demonstrated how the defendant masturbated. RP 541-546, 547-550, 551-552. In addition, during her testimony, she claimed that the defendant's wife told her that she knew that she was telling the truth about the defendant. RP 551-552. During direct examination by the state, Tasha testified as follows on this point:

> Q. Okay. Now, what I'd like you to do is complete the picture for the jury. What is it that was asked of you and why did you make -- give those descriptions?
>
> A. I was asked if this really occurred, say something and prove to her that only somebody that has seen his penis would know.
>
> And I told her about his mole contact, I don't know what it is. And she started freakin' out, told me that I was right, she believed me, she was sorry she didn't believe me.
>
> She asked me if I knew how he masturbated because he has his own technique. I showed her, and she started crying and flipped out

> even more and told me I was right.
>
> Q. Now, you specifically referenced a second conversation just before she attempted suicide.
>
> A. Yes.
>
> Q. And for purposes of what she said to you, do you have a recollection of that?
>
> A. She told me that she was sorry that she didn't believe me, she's sorry that this happened, that I wouldn't have to deal with her anymore, she was going to take care of it, "Aunt Stacy loves you."

RP 551-552.

These were the last words of evidence the jury heard in this case. RP 552. The defense made no objection to this evidence that it was not proper rebuttal, or that it constituted improper opinion evidence on the credibility of a witness and on the guilt of the defendant. *Id.* Much less did the defense move for a mistrial. *Id.*

After this testimony, the court instructed the jury, with the defense objecting that the following instruction constituted a comment on the evidence in violation of Washington Constitution, Article 4, § 16. RP 557.

> In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

CP 107.

Following instruction, the state presented what has been transcribed into approximately 24 pages of closing argument. RP 557-582. The state

devoted approximately four to five of these pages to an argument that the confrontation at the Pfeifle's house showed that the defendant's wife believed he was guilty. RP 572-576. The following is an except from part of this argument:

> Here's a woman who's been married to a man for five and a half years and just because some other woman says, He molested my wife (sic), she up and leaves him, either goes to the family of the victim and sits there with them to sop, drink, whatever terminology you want to use, stays with them.
>
> Who calls the police and reports, That man did this crime? Defendant's own wife. Who did that? The woman who left him and then engaged in a conversation –

RP 572-573.

The following is another except from the state's closing argument:

> But the night she hears a description of her husband's penis and the way apparently he masturbates, she decides and ends up in the hospital (sic).

RP 576.

Following the end of the state's initial closing, the defense presented its arguments. RP 582-617. The state then presented rebuttal argument in which it repeated its argument that the defendant's guilt could be inferred from his wife's attempted suicide after her confrontation with Tasha. RP 622-623. The prosecutor stated:

> Now, Greg Pfeifle. Here is another person who is being maligned for basically being in court because he was never contacted by anybody. And the statement that I would put to you is this is

> smoke and mirrors.
>
> The facts that he gave you were confirmed by the Defense's witness, the wife of the defendant. What did she confirm to you? She stayed there -- we went back and forth about living, okay. I spent the night a number of nights from mid-November to the end of December. Oh, if it's not living for you, staying, what-have-you, she's spending the night there, taking comfort from these people.
>
> And what does he do? He tells you, I took her to the hospital because she tried to commit suicide. What does she tell you? Guess what? I tried to commit suicide.
>
> The problem is in the middle, because she doesn't want to tell you what she heard. That is the State's position. And I submit to you it makes sense.

RP 622-623.

Following the state's rebuttal argument, the jury retired for deliberations. RP 625-626. The jury later returned a verdict of guilty on Count I. CP 111. However, the jury was unable to return a verdict on Count III and the court later dismissed that charge. CP 222-223. After the jury returned its verdict on Count I, the court gave the jury instructions on deciding the aggravating factor the state had alleged in the information. CP 115-120. Counsel then presented argument, and the jury later returned a special verdict that the state had proven that the defendant had "engaged in an ongoing pattern of sexual abuse of the same victim. . . ." CP 115-120; RP 646-656.

The court later sentenced the defendant to an exceptional sentence of

60 months in prison on a standard range of from 15 to 20 months. RP 253-269. However, the court did not base the sentence in excess of the standard range upon the jury's finding. RP 724. Rather, the court based the sentence upon its own factual finding, as argued by the state, that the defendant had spent time "grooming" the victim. *Id.* The state's argument on this issue went as follows:

> So when I say that, I think what we have here is what is pretty clearly the grooming behaviors that we had during the time period, and that would be what I'd ask the Court to consider.
>
> Now, when I say the grooming behaviors, this is not a defendant -- this -- this speaks now to -- when -- when you get by the facts here, and the Court -- I -- I -- I -- I mean, we spent a number of days with Your Honor, and we had a defense put on by the defendant of general denial, he offered an expert up about the identification issue because it became a big issue.

RP 705-706.

The state then went on to emphasize this argument, stating as follows concerning its claims of grooming:

> The jurors heard that testimony because it went to a defense. The grooming behaviors here speak to a gentleman who specifically selected out here Tasha for the time period specified and continued that conduct.
>
> Now -- now, why is that important when you look at the danger he poses to the community? Because this is not the first sex offense that the defendant has been convicted of. It's the first felony sex offense. And that's why earlier when I highlighted, yes, we are at a zero and we agree we're at a zero, but we also have convictions here for the Court's consideration.

RP 707.

The trial court adopted this finding as the justification for the imposition of the exceptional sentence. The court held:

> For the record, I do find that there is grooming behavior involved in the abuse of this particular victim. Because of the nature of the pattern of the time that was alleged and the events that occurred and what she testified to, there's no other way to -- no other -- nothing else you can conclude, that she was groomed, given her tender age.
>
> I am therefore adopting the State's recommendation, and the reasons for it, in toto. I think the defendant does pose a danger to young people in this community, young women in this community, now and in the future, and therefore I'm going to adopt it.

RP 724.

After imposition of sentence, the defendant filed timely notice of appeal. RP 270.

ARGUMENT

I. THE STATE'S ACTIONS ELICITING EVIDENCE THAT THE DEFENDANT'S WIFE BELIEVED THAT THE DEFENDANT WAS GUILTY AND THAT THE COMPLAINING WITNESS WAS TELLING THE TRUTH VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial, no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77,

612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

> The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

In *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

As the court mentioned in *State v. Black*, *supra*, the trial court denied the defendant an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence. In the case at bar, the state repeatedly elicited identical, improper opinion evidence. This occurred during the state's case-in-chief when it recalled Mary Pfeifle, her husband, and Tasha to testify that within days of Tasha making the allegations against the defendant, the defendant's wife left him and came over to the Pfeifle house to stay. Then, when Tasha told the defendant's wife what the defendant had done and when she gave a specific description of the defendant's penis and his method of masturbating, the defendant's wife attempted to committed suicide. This evidence is relevant for only one purpose: to convey to the jury that the defendant's wife believed Tasha was telling the truth and that the defendant was guilty. Why else would she leave her husband and then attempt to commit suicide when Tasha gave her evidence that proved her husband was guilty?

The state exacerbated this error when it repeatedly cross-examined the defendant's wife on the issue of her attempted suicide. The state then further exacerbated this error when it specifically elicited the fact through three rebuttal witnesses that the defendant's wife had told them that she believed

Tasha was telling the truth and that her husband was guilty. This occurred during the following questioning:

> Q. Okay. Now, what I'd like you to do is complete the picture for the jury. What is it that was asked of you and why did you make -- give those descriptions?
>
> A. I was asked if this really occurred, say something and prove to her that only somebody that has seen his penis would know.
>
> And I told her about his mole contact, I don't know what it is. And she started freakin' out, told me that I was right, she believed me, she was sorry she didn't believe me.
>
> She asked me if I knew how he masturbated because he has his own technique. I showed her, and ***she started crying and flipped out even more and told me I was right.***
>
> Q. Now, you specifically referenced a second conversation just before she attempted suicide.
>
> A. Yes.
>
> Q. And for purposes of what she said to you, do you have a recollection of that?
>
> A. ***She told me that she was sorry that she didn't believe me, she's sorry that this happened, that I wouldn't have to deal with her anymore, she was going to take care of it, "Aunt Stacy loves you."***

RP 551-552 (emphasis added).

Finally, in closing the state argued at length that the defendant must be guilty because his wife believed him to be guilty. The following is an except from part of this argument:

> Here's a woman who's been married to a man for five and a half years and just because some other woman says, He molested my wife

> (sic), she up and leaves him, either goes to the family of the victim and sits there with them to sop, drink, whatever terminology you want to use, stays with them.
>
> Who calls the police and reports, That man did this crime? Defendant's own wife. Who did that? The woman who left him and then engaged in a conversation –

RP 572-573.

Why did the state point out to the jury that it was the defendant's own wife who first called the police? The answer is that the state was arguing to the jury that the defendant must be guilty because his wife believed him to be guilty. The state then went on to hammer this point into the mind of the jury when it argued the follows:

> But the night she hears a description of her husband's penis and the way apparently he masturbates, she decides and ends up in the hospital (sic).

RP 576.

The only relevance to the defendant's wife's attempted suicide was that she believed that Tasha was telling the truth and that the defendant was guilty. The state repeated this theme in rebuttal argument when it stated the following:

> Now, Greg Pfeifle. Here is another person who is being maligned for basically being in court because he was never contacted by anybody. And the statement that I would put to you is this is smoke and mirrors.
>
> The facts that he gave you were confirmed by the Defense's witness, the wife of the defendant. What did she confirm to you?

> She stayed there -- we went back and forth about living, okay. I spent the night a number of nights from mid-November to the end of December. Oh, if it's not living for you, staying, what-have-you, she's spending the night there, taking comfort from these people.
>
> And what does he do? He tells you, I took her to the hospital because she tried to commit suicide. What does she tell you? Guess what? I tried to commit suicide.
>
> The problem is in the middle, because she doesn't want to tell you what she heard. That is the State's position. And I submit to you it makes sense.

RP 622-623.

The evidence of guilt in the case at bar was equivocal at best. There was no physical evidence to support Tasha's claims that the defendant had sex with her. In addition, in spite of her claims that they had repeatedly engaged in intimate behavior with many, many other people near them on many different social occasions, not a single person saw or suspected this activity. Finally, and most problematic for the state's case, was the issue of the purple lesion on the side of the defendant's penis. Tasha unequivocally testified that it was there every time she saw his penis over a number of years. However, the expert evidence of Kenneth Netzel flatly contrasted this claim when he testified that to a medical certainty the defendant did not have such a growth on his penis and there was no evidence that he ever had one. It is interesting to note that in spite of Tasha's allegations, and in spite of Mr. Netzel's examination and testimony, the state never did call its own medical

expert to rebut Mr. Netzel's testimony.

Given a case with such equivocal evidence on the issue of guilt, there should be little question that the error in allowing the state to repeatedly elicit improper opinion evidence on the credibility of the complaining witness and on the guilt of the defendant, and then repeatedly argue that this evidence proved guilt, denied the defendant a fair trial. The defendant argues that this error was of constitutional magnitude and the state has the burden of proving the error harmless beyond a reasonable doubt, which it cannot do in this case. However, even were the less rigorous standard to apply, the defendant is entitled to a new trial because it is more likely than not that these errors were prejudicial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE THAT THE DEFENDANT'S WIFE BELIEVED THAT THE DEFENDANT WAS GUILTY AND THAT THE COMPLAINING WITNESS WAS TELLING THE TRUTH DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper

functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state, in its case-in-chief, in cross-examination, and in closing, elicited evidence that the defendant's wife

believed that he was guilty and that the defendant's wife believed that the complaining witness was telling the truth. The following presents this argument.

As was mentioned in Argument I, under the right to a fair trial embodied in Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment, no witness whether a lay person or expert may give an opinion as to the credibility of a witness or the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin, supra.* The state repeatedly violated this rule when it elicited evidence that the defendant's wife believed that Tasha was telling the truth and that the defendant was guilty. The state elicited this evidence in its case-in-chief, when it cross-examined one of the defendant's witnesses, and when it called three separate witnesses in rebuttal. The state then repeatedly argued to the jury that the defendant was guilty because his wife believed him to be guilty. There is no possible tactical reason for a defense attorney to fail to object to evidence like this which is at the same time irrelevant, improper, and grossly prejudicial. Thus, trial counsel's failure to object fell below the standard of a reasonable prudent attorney.

In addition, as was previously argued, the evidence in this case was equivocal at best, with no direct evidence to support the state's claims of

abuse. Thus, it is more likely than not that had the defense attorney properly objected to the inadmissible opinion evidence on credibility and guilt, the jury would have returned a verdict of acquittal. Thus, trial counsel's failure in this case caused prejudice. As a result, the defendant is entitled to a new trial based upon the violation of his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO ALLOW HIM TO PRESENT RELEVANT, EXCULPATORY EVIDENCE.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis,* 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained

discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

Under ER 401, "relevant evidence means evidence having any

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony or an exhibit can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951).

In the case at bar, the state presented evidence through Tasha that while both families lived at the Ironwood apartments, the defendant repeatedly gave her rides to school, and that when her family lived off of Padden Parkway, the defendant came over daily in his work truck for coffee in the morning. According to the defense, these allegations, which Tasha made during trial, were much more specific than the allegations she had previously made. Thus, the defense sought to introduce the defendant's employment records to rebut these claims and show that the defendant was working during the times she claimed he was having contact with her. The state objected to this evidence but not on the basis that it was irrelevant. Rather, the state objected on the basis that the defense had not given the state these records as part of discovery.

The state's failure to argue that the records were inadmissible because they were irrelevant is not hard to understand because the records were highly

relevant. They would have shown that contrary to Tasha's claim that the defendant stopped by every morning for coffee when she lived off Padden Parkway, the defendant was actually at work at another location. Thus, the trial court's ruling excluding the records as irrelevant was clearly in error and constituted an abuse of discretion. However, the trial court's ruling excluding this evidence was more than an abuse of discretion. Rather, it prevented the defendant from presenting relevant, exculpatory evidence in violation of his right to do so under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Since this was an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). As was already argued previously in this brief, the state cannot meet this burden because of the equivocal nature of the state's evidence and the lack of evidence to corroborate Tasha's claims. In such circumstances, the admission of further evidence to attack Tasha's credibility such as the evidence the court

improperly excluded would more likely than not have changed the verdict from one of conviction to one of acquittal. Thus, the error was not harmless beyond a reasonable doubt and the defendant is entitled to a new trial.

IV. THE TRIAL COURT'S INSTRUCTION THAT THE JURY COULD CONVICT ON THE UNCORROBORATED EVIDENCE OF THE COMPLAINING WITNESS COMMENTED ON THE EVIDENCE AND VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 16.

Under Washington Constitution, Article 4, § 16, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement made by the court in front of the jury constitutes an impermissible "comment on the evidence" if a reasonable juror hearing the statement in the context of the case would infer the court's attitude toward the merits of the case, or would infer the court's evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

> The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. at 250-51.

The courts of this state "rigorously" apply the prohibition found in Article 4, § 16, and presume prejudice from any violation of this provision. *State v. Bogner*, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

> Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, "[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment". *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

State v. Lane, at 838-839.

In the case at bar, the trial court violated this constitutional provision when, over defense objection, it gave instruction No. 13. This instructions stated the following:

Jury Instruction No. 13

> In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

CP 107.

In a recent case, *State v. Zimmerman*, 130 Wn.App. 170, 121 P.3d 1216 (2005), this court addressed both the advisability and the legitimacy of

a similar, though not identical, instruction. In that case, the defendant appealed his conviction for first degree child molestation, arguing in part that the trial court violated Washington Constitution, Article 4, § 16, when it gave an instruction that the statements of the complaining witness need not be corroborated in order to sustain a conviction. In rejecting this argument, the court felt bound by a 1949 decision of the Washington Supreme Court. This court noted the following on this issue:

> The Washington Supreme Court in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949), also held that such an instruction was not an improper comment on the evidence. The instruction challenged in *Clayton* provided:
>
> > You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.
>
> 32 Wn.2d at 572, 202 P.2d 922. The Supreme Court held that the trial court expressed no opinion as to the truth or falsity of the testimony of the alleged victim or as to the weight that the court attached to her testimony, but properly submitted the questions involving credibility and weight of the evidence to the jury. *Clayton*, 32 Wn.2d at 573-74, 202 P.2d 922.

State v. Zimmerman, 130 Wn.App. at 181-182.

Although this court affirmed the conviction in *Zimmerman*, it did express grave concerns about such an instruction. The opinion in

Zimmerman ends with the following:

> We observe, however, that the Washington Pattern Criminal Jury Instructions (WPIC) do not contain the challenged corroboration instruction. We also note that the Washington Supreme Court Committee on Jury Instructions recommends against such an instruction:
>
> > The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.
>
> 11 WPIC, § 45.02, cmt. at 561 (2nd ed.1994). Although we share the Committee's misgivings, we are bound by *Clayton* to hold that the giving of such an instruction is not reversible error.

State v. Zimmerman, 130 Wn.App. at 182-183.

The case at bar is distinguishable from *Clayton* and *Zimmerman* in that the text of the instruction in the case at bar does make an incorrect statement at law, unlike the text of the instruction in *Clayton*. The following addresses this distinction.

The distinction between the decision in *Clayton* and the case at bar lies in the language of the two instructions. In *Clayton*, the trial court was careful in the instruction to specifically tell the jury that the issue of credibility was a question of fact for the jury to determine, not for the judge. This occurred in the second half of the instruction, wherein the court stated:

> That is, the question is distinctly one for the jury, and if you

> believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

State v. Clayton, 32 Wn.2d at 572.

The absence of this second half of this instruction in the case at bar left the jury to infer that the trial court was favorably commenting on the credibility of the complaining witness, and was implying that the jury should believe her testimony and convict the defendant. Thus, the instruction in the case at bar, unlike the instruction in *Clayton*, constituted a comment on the evidence in violation of Washington Constitution, Article 4, § 16.

The instruction in the case at bar also suffers from a defect that did not occur in either *Clayton* or *Zimmerman*: the court's use of the instruction in the case at bar gave undue emphasis and importance to the testimony of one witness. This emphasis and preference had the effect of unduly giving the impression that the court favored the testimony of one witness, thus implying to the jury that the court favored the testimony of the complaining witness and desired that the jury return a verdict of guilty. As the following examination of the decision in *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971), explains, even an instruction that correctly states the law can, by its language, create undue emphasis and thus violate Washington Constitution, Article 4, § 16. The following examines this case.

In *State v. Music*, *supra*, the defendant was charged with first degree murder with the state seeking the death penalty. The charge arose out of an incident in which the defendant, who was one of four people in a car, shot and killed the decedent while trying to rob him. At trial, two co-defendants who had pled to second degree murder testified that the defendant had been the one with the rifle and the one who did the shooting. In fact, the defendant did not seriously dispute guilt. However, he did claim that (1) he was not guilty by reason of mental defect, and (2) that even if guilty, a sentence of life in prison was more just than a sentence of death.

At the end of the trial, the defense proposed an instruction that informed the jury of the process under which a person sentenced to life in prison would undergo before possibly being released on parole. The state also proposed a similar instruction. The defense additionally proposed an instruction that explained the steps that would first occur before a defendant acquitted by reason of mental defect could be considered for release. Both the defendant's proposed instructions and the state's proposed instruction were correct, balanced statements of the law on the issues addressed. However, the trial court refused to give either the defendant's instructions or the state's instruction, holding that they would put undue emphasis on two of the four alternatives the jury had to decide: (1) not guilty, (2) guilty with death sentence imposed, (3) guilty with life in prison imposed, or (4) not

guilty by reason of mental defect. Following conviction and imposition of the death sentence, the defendant appealed, arguing in part that the trial court erred when it refused to give the defendant's two instructions or the state's proposed instruction.

The Washington Supreme Court rejected this argument, quoting from its previous decision in *State v. Todd*, 78 Wn.2d 361, 474 P.2d 542 (1970). The court held:

> However, both [the defendant's first and the state's] proposed instructions, in our judgment, suffer from the same vice which convinces us that the trial court was correct in refusing their adoption:
>
> > This argument * * * leads us to what we consider the most serious vice of an instruction of this kind. It sets a standard where none has been set by the legislature and thus places undue emphasis upon one factor which the jury, whether or not it should do so, is bound to take into account. All other factors come before the jury in the form of evidence or of their own experience and knowledge. By instructing the jury concerning the possible minimum sentence which the defendant might serve, the court suggests to the jury that it should give great weight to that possibility in reaching its verdict.
>
> *Todd, supra*, 78 Wn. 2d at 375, 474 P.2d at 550. It is obvious that appellant's proposed instruction No. 9 – relating to the consequences of a verdict of not guilty by reason of mental irresponsibility – suffers from the same type of defect as that described in the *Todd* opinion.

State v. Music, 79 Wn.2d at 709-710.

The jury instruction in the case at bar suffers from the same defect as did the instructions in *Music* and *Todd*: by using it "the court suggests to the

jury that it should give great weight to that possibility in reaching its verdict." As the decision in *Zimmerman* suggests, this court obviously has grave concerns about using instructions commenting that the testimony of a complaining witness in a sex charge does not have to be corroborated. While this court obviously felt compelled by *Clayton* to allow the use of the disfavored instruction, neither the decision in *Clayton* nor this court's decision in *Zimmerman* should control the decision in the case at bar. Here, what is clear is that by using this same instruction, the court did what Washington Constitution, Article 4, § 16 forbids: it suggested to the jury that the court found the evidence of the complaining witness credible and believed the jury should convict.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown, supra*. In this case, the lack of corroborating evidence, which itself suggested the use of the erroneous instruction, demonstrates the weakness in the state's case. This equivocal evidence was further weakened by the evidence of the state's expert, which flatly contradicted Tasha's claims concerning the existence of a purple mole on the defendant's penis. This type of evidence, unsupported by any corroborating evidence, does not meet the "overwhelming evidence of guilt" standard for overcoming non-constitutional errors. Much less does it meet the "harmless

beyond a reasonable doubt" standard. Thus, the defendant is entitled to a new trial.

V. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED UPON ITS OWN FINDINGS OF FACT VIOLATED THE DEFENDANT'S RIGHT UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT TO HAVE A JURY DETERMINE ALL FACTS NECESSARY FOR IMPOSITION OF PUNISHMENT AND THIS ERROR WAS NOT HARMLESS.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that under the Sixth Amendment "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The court subsequently clarified this rule in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), , and held that the term "prescribed statutory maximum" meant the "standard range" for the offense not the "statutory maximum" for the offense. These two cases left open the question of whether or not it was still possible to impose an exceptional sentence under the Washington Sentencing Reform Act, particularly for those exceptional sentences which were reversed for *Apprendi* and *Blakely* violations.

In *State v. Hughes*, 154 Wn.2d 119, 110 P.3d 192 (2005), the Washington Supreme Court addressed this question. In this case, the state

argued that the trial court had inherent authority to empanel sentencing juries for those exceptional sentences reversed under *Apprendi* and *Blakely* even though the RCW 9.94A did not establish a procedural basis for such actions. The state also argued that errors under *Apprendi* and *Blakely* could be harmless beyond a reasonable doubt under appropriate facts. The defense responded that (1) *Apprendi* and *Blakely* made Washington's statutory scheme for imposing exceptional sentences unconstitutional on its face, (2) that no inherent judicial authority existed to establish procedures for empaneling sentencing juries, and (3) the failure to submit aggravating factors to the jury constituted a structural error that could never be harmless beyond a reasonable doubt. The Washington Supreme Court agreed with each of the defense arguments.

Following the court's decision in *Hughes*, two things happened. First, the legislature adopted new procedures for imposing exceptional sentences in light of *Apprendi* and *Blakely*. Second, the United States Supreme Court accepted review in *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 2551, 165 L.Ed.2d 466 (2006), in order to review that portion of the Washington Supreme Court's decision in *Hughes* wherein the court held that *Apprendi* and *Blakely* errors could never be harmless beyond a reasonable doubt. In that case the court abrogated this finding in *Hughes* and held that errors in failing to submit aggravating factors to the jury could well be

harmless beyond a reasonable doubt in the same manner that failing to include all of the elements of the crime in a "to convict" instruction could be harmless beyond a reasonable doubt.

Following entry of the decision in *Recuenco,* the Washington Supreme Court issued its opinion in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 140 (2007), which addressed, *inter alia*, the harmless error analysis for cases with *Blakely* errors. In *Womac,* a jury convicted the defendant of homicide by abuse, second degree felony murder, and first degree assault against his four-month-old son. The trial court, pre-*Blakely*, imposed an exceptional sentence based upon findings of particular vulnerability and abuse of position of trust. The defendant then appealed, arguing that sentencing him on the felony murder and first degree assault charges along with the homicide by abuse violated double jeopardy. While the appeal was pending, the United States Supreme Court issued its decision in *Blakely* and the Washington Supreme Court issued its decision in *Hughes*. Based upon these cases the Court of Appeals rejected the state's harmless error analysis and remanded for sentencing within the standard range. The court also provisionally ordered dismissal of the convictions on the felony murder and assault charges.

At this point the defendant obtained review from the Washington Supreme Court on issues concerning his conviction. The court then ordered

further briefing to address whether, in light of the decision in *Recuenco*, the Court of Appeals acted properly when it remanded the case for resentencing within the standard range. The parties complied with this request, with the state arguing that given the undisputed age of the victim, the trial court's failure to submit the aggravating factors of particular vulnerability and abuse of position of trust was harmless beyond a reasonable doubt. In addressing this issue, the court first performed the following analysis on the *Recuenco* decision.

> In *Recuenco*, the United States Supreme Court abrogated *Hughes*, holding failure to submit a sentencing factor to the jury is not structural error and may be subject to harmless error analysis. The Court held, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury" may be subject to harmless error analysis, observing, "[o]nly in rare cases has this Court held that an error is structural, and thus requires automatic reversal." The Court concluded we erred in *State v. Recuenco* by relying on *Hughes* for the proposition that a *Blakely* error can never be harmless. In light of *Washington v. Recuenco*, we must now determine whether the Court of Appeals properly remanded for resentencing Womac within the standard range.
>
> In *Recuenco* the United States Supreme Court opined "[i]f ... Washington law does not provide for a procedure by which [Recuenco's] jury could have made a finding pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation in this particular case was not harmless." Following this reasoning, Womac argues, "[b]ecause state law does not and did not provide for a jury to be empaneled to make the factual findings necessary to support the exceptional sentence in this case, the error cannot be said to be harmless beyond a reasonable doubt."

State v. Womac, 160 P.3d at 49-50 (citations and footnotes omitted; brackets

in original).

Based upon the court's statement in *Recuenco* and the fact that Washington did not have a statutory scheme in place for juries to find aggravating factors at the time of the defendant's trial, the court found that the error in failing to submit the two aggravating factors to the jury was not harmless beyond a reasonable doubt. The court held:

> As explained by *Hughes,* former RCW 9.94A.535 "explicitly direct[ed] the trial court to make the necessary factual findings" to support an exceptional sentence "and d[id] not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand." *Hughes* also declared,"no procedure is currently in place allowing juries to be convened for the purpose of deciding aggravating factors either after conviction or on remand after an appeal." Our recent decision in *State v. Pillatos* confirmed "trial courts do not have inherent authority to empanel sentencing juries."
>
> Furthermore, the new sentencing provisions, Laws of 2005, chapter 68 (providing for a procedure whereby facts supporting aggravated circumstances are proved to a jury beyond a reasonable doubt), do not apply to Womac. *Pillatos* held the new sentencing provisions apply only to "pending criminal matters where trials have not begun or pleas not yet accepted." As Womac correctly observes, even if the new sentencing provisions applied to him, RCW 9.94A.537(1) permits the imposition of an exceptional sentence only when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range; and it is too late for the State to comply with that requirement. In addition, RCW 9.94A.537(2) requires a jury to find the existence of facts supporting aggravating circumstances, and as discussed above, state law does not authorize impaneling a new jury to make such findings.
>
> Accordingly, we hold that because there was no legal procedure whereby Womac's jury could have made the findings necessary to support his exceptional sentence, the error was not harmless.

State v. Womac, 160 P.3d at 50 (citations omitted; brackets in original).

In the case at bar, the state, under the new statutory scheme for alleging aggravating factors, did allege a single aggravating factor. The trial court, pursuant to the same procedural scheme created by the legislature, submitted this one aggravating factor to the jury following the entry of the jury's verdict of guilty on the original charge. The jury then returned a special verdict, finding that the state had proven beyond a reasonable doubt, that the defendant had "engaged in an ongoing pattern of sexual abuse of the same victim. . . ." CP 115-120; RP 646-656. The defense does not find fault with the procedures the state and the court used in obtaining this special verdict.

In this case, the court later sentenced the defendant to an exceptional sentence of 60 months in prison on a standard range of from 15 to 20 months. However, the court did not base the sentence in excess of the standard range upon the jury's finding. Rather, the court based the sentence upon its own factual finding, as argued by the state, that the defendant had spent time "grooming" the victim. The state's argument on this issue went as follows:

> So when I say that, I think what we have here is what is pretty clearly the grooming behaviors that we had during the time period, and that would be what I'd ask the Court to consider.
>
> Now, when I say the grooming behaviors, this is not a defendant -- this -- this speaks now to -- when -- when you get by the facts here, and the Court -- I -- I -- I -- I mean, we spent a number of

> days with Your Honor, and we had a defense put on by the defendant of general denial, he offered an expert up about the identification issue because it became a big issue.

RP 705-706.

The state then went on to emphasize this argument, stating as follows concern its claims of grooming:

> The jurors heard that testimony because it went to a defense. The grooming behaviors here speak to a gentleman who specifically selected out here Tasha for the time period specified and continued that conduct.
>
> Now -- now, why is that important when you look at the danger he poses to the community? Because this is not the first sex offense that the defendant has been convicted of. It's the first felony sex offense. And that's why earlier when I highlighted, yes, we are at a zero and we agree we're at a zero, but we also have convictions here for the Court's consideration.

RP 707.

The trial court adopted this finding as the justification for the imposition of the exceptional sentence. The court held:

> For the record, I do find that there is grooming behavior involved in the abuse of this particular victim. Because of the nature of the pattern of the time that was alleged and the events that occurred and what she testified to, there's no other way to -- no other -- nothing else you can conclude, that she was groomed, given her tender age.
>
> I am therefore adopting the State's recommendation, and the reasons for it, in toto. I think the defendant does pose a danger to young people in this community, young women in this community, now and in the future, and therefore I'm going to adopt it.

RP 724.

Under the statutory scheme the legislature adopted following *Blakely*, the trial court does not have to impose an exceptional sentence even if the jury found an aggravating factor that would support imposition of an exceptional sentence. On this point, Washington's sentencing methodology has not changed from the adoption of the sentencing reform act. Thus, in the case at bar, the trial court was not required to impose an exceptional sentence even though the jury did enter a finding to support imposition of an exceptional sentence. However, while the court was free to ignore and not use the jury's finding of an aggravating factor, what the court should not have done was to make its own finding of fact on a separate aggravating factor. This is precisely what the court did in this case when it based imposition of the exceptional sentence on its own finding of "grooming" as opposed to the jury's finding of "ongoing sexual abuse." Thus, the trial court's imposition of an exceptional sentence based upon its own finding of fact violated the defendant's right to a jury determination of the facts necessary to support the sentence imposed as is guaranteed under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment.

In the case at bar, the error in the court relying upon the aggravating factor of "grooming" is not harmless beyond a reasonable doubt. Unlike a finding of particular vulnerability, which can arise from the undisputed age of the victim, and unlike a finding of abuse of position of trust and authority,

which can arise from the undisputed relationship between the victim and the defendant, the issue of grooming is a question of nuance and shading, particularly given the equivocal nature of the evidence on the issue of "grooming" in this case. For example, it does not appear that the defendant manipulated a social relationship in order to gain access to the victim in this case, such as a defendant does when he forms a relationship with an adult in order to thereby gain access to the children who live with that adult.

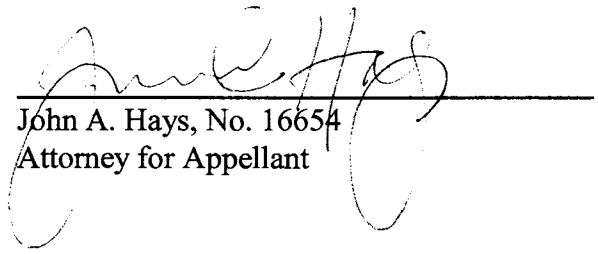
Under these circumstances, it is far from certain that the jury would have found the aggravating factor of "grooming" proven beyond a reasonable doubt. Consequently, the trial court's error in basing the exceptional sentence in this case on its own finding of "grooming" is not harmless beyond a reasonable doubt. As a result, this court should vacate the sentence, and remand for sentencing within the standard range.

CONCLUSION

The court's repeated admission of evidence that the defendant's wife believed the complaining witness was telling the truth and that the defendant was guilty violated the defendant's right to a fair trial, as did the trial court's refusal to allow the defense to introduce relevant, exculpatory evidence. Thus, the defendant is entitled to a new trial. In the alternative, the defendant is entitled to be resentenced because the trial court's imposition of an exceptional sentence based upon an aggravating factor other than the one the jury found violated the defendant's rights under United States Constitution, Sixth Amendment.

DATED this 30th day of August, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

WASHINGTON CONSTITUTION
ARTICLE 4, § 16

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

JURY INSTRUCTION NO. 13

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **JOHNSON, Gerald W.** **Appellant**	**CLARK CO. NO: 05-1-00400-2** **APPEAL NO: 37211-8-II** **AFFIDAVIT OF MAILING**

STATE OF WASHINGTON)
) vs.
COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the **2nd day of SEPTEMBER, 2008**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

GERALD W. JOHNSON #293995
STAFFORD CREEK CORRECTIONS CTR.
191 CONSTANTINE WAY
ABERDEEN, WA 98520

and that said envelope contained the following:
1. BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING

DATED this 2ND day of SEPTEMBER, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 2nd day of SEPTEMBER, 2008.

HEATHER CHITTOCK
MY COMMISSION EXPIRES
NOVEMBER
4
2009
STATE OF WASHINGTON
NOTARY PUBLIC

Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009

John A. Hays
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1402 Broadway
Longview, WA 98632
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