

NO. 42414-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

WAYNE BURTON,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. Assignments of Error Page 1

1. Trial counsel's failure to object to inadmissible evidence of marijuana pipes violated Mr. Burton's right to effective assistance of counsel under the Washington Constitution, Article I, Section 22 and the Sixth Amendment to the United States Constitution. Page 1

2. The trial court erred in allowing the State to present inadmissible ER 404(b) testimony regarding alleged incidents involving MBOW over Mr. Burton's motion in limine where the alleged acts occurred after MBOW was eighteen years of age and after the incidents which formed the basis for the charges in Count I, Count II and Count III of the information..Page 1

3. Insufficient evidence was presented to convict Mr. Burton of Incest in the first degree and Incest in the second degree as alleged in the information.Page 1

4. The trial court abused its discretion in sentencing Mr. Burton to an exceptional sentence of two hundred forty months. Page 1

B. Issues Pertaining to Assignments of Error Page 1

1. Did trial counsel's failure to object to evidence of the discovery of marijuana pipes in Mr. Burton's bedroom, which was not the subject of the charges before the jury and would not have been admissible, violate Mr. Burton's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution? (Assignment of Error No. 1)Page 1

2. Whether the trial court erred in allowing the State to present inadmissible ER 404(b) evidence regarding alleged incidents involving MBOW over Mr. Burton's objection where the alleged acts occurred after MBOW reached the age of eighteen and after the incidents which formed the basis for

	the charges in Count I, Count II, and Count III of the information? (Assignment of Error No. 2)	Page 1
3.	Whether sufficient evidence was presented to support a finding of guilt on the charges of Incest in the first degree and Incest in the second degree (Assignment of Error No. 3)	Page 2
4.	Whether the trial court abused its discretion in sentencing Mr. Burton to a term of two hundred forty months which was one hundred twenty months above the top of the applicable sentencing range for a concurrent sentence on all counts. (Assignment of Error No. 4)	Page 2
C.	Statement of the Case	Page 2
1.	Procedural History	Page 2
2.	Facts	Page 4
D.	Argument	Page 15
1.	Mr. Burton's right to effective counsel was violated. As a result of counsel's deficiencies, he did not receive a fair trial.	Page 15
	a. Defense counsel's failure to object to the admission of evidence of the discovery of marijuana pipes in Mr. Burton's bedroom was ineffective assistance of counsel. As a result of counsel's deficiencies, Mr. Burton did not receive a fair trial	Page 16
	b. Defense counsel's failure to request a limiting jury instruction addressing the 404(b) evidence was ineffective.	Page 23
2.	The trial court erred in allowing the State to present inadmissible 404(b) testimony regarding alleged incidents involving MBOW over Mr. Burton's motion in limine where the alleged actions occurred after MBOW reached the age of eighteen and after the incidents which formed the basis for the charges in Count I, Count II and Count III of the information.	Page 24

3.	The trial court violated Mr. Burton’s right to due process when it entered a judgement of conviction for offenses unsupported by substantial evidence.	Page 28
4.	The trial court abused its discretion in ordering a sentence of two hundred forty months	Page 30
a.	The failure to enter findings of fact and conclusions of law regarding an exceptional sentence denies Mr. Burton his constitutional and statutory right to appeal and is a violation of statutory requirements..	Page 31
b.	The exceptional sentence imposed was clearly excessive	Page 33
V.	Conclusion	Page 34

TABLE OF AUTHORITIES

	<u>Page</u>
<hr/> <u>FEDERAL COURT CASES</u> <hr/>	
<i>Michelson v. United States</i> , 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948)	Page 24
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984)	Page 15
<hr/> <u>WASHINGTON STATE CASES</u> <hr/>	
<i>In re Breedlove</i> , 138 Wn.2d 298, 979 P.2d 417 (1999)	Page 32
<i>In Re Personal Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086, <i>cert. denied</i> , 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992), ..	Page 15
<i>State v. Alams</i> 93 Wn.App. 754, 970 P.2d 367 (1999), <i>review denied</i> 138 Wn.2d 1014, 989 P.2d 1142.	Page 21,23
<i>State v. Coe</i> , 101 Wn,2d 772, 684 P.2d 668 (1984)	Page 26
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970)	Page 28
<i>State v. Craven</i> , 67 Wn.2d 982, 841 P.2d 774 (1992)	Page 29
<i>State v. Dawkins</i> , 71 Wn.App 902, 863 P.2d 124 (1993)	Page 19
<i>State v. Demos</i> , 94 Wn.2d 733, 619 P.2d 968 (1980)	Page 17
<i>State v. Ferguson</i> , 100 Wn.2d 131, 667 P.2d 68 (1983)	Page 25, 26
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967, <i>cert denied</i> , 528 U.S. 922 (1999)	Page 17, 25
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)	Page 17
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007) .	Page 18,23,26
<i>State v. Garcia-Martinez</i> , 88 Wn.App. 322, 944 P.2d 1104 (1997)	Page 31

State v. Guzman, 119 Wn.App. 176, 79 P.3d 990 (2003) Page 27

State v. Hendrickson, 129 Wn.2d.61, 917 P.2d 563 (1996) Page 16

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Page 18

State v. Medcalf, 58 Wn.App. 817, 795 P.2d 158 (1990) Page 27

State v. Moore, 8 Wn. App. 1, 499 P.2d 13 (1972) Page 29

State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986) Page 32

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) Page 18-19

State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991) Page 25, 26

State v. Rice, 48 Wn.App 7, 13, 737 P.2d 726 (1987) Page 19, 20

State v. Ritchie, 126 Wn.388, 894 P.2d 1308 (1995) Page 32

State v. Russell, 154 Wn.App. 775, 225 P.3d 478 (2010) Page 19

State v. Salinas, 119 Wn.2d 192, 201 829 P.2d 1068 (1992) . Page 28, 29

State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982) Page 26

State v. Saunders, 91 Wn.App 575, 958 P.2d 364 (1998) Page 16

State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009). Page 17

State v. Simpson, 22 Wn.App. 572, 590 P.2d 1276 (1979) Page 24

State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) . . . Page 19, 26

State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1979) Page 28

State v. Wade, 98 Wn.App. 328, 989 P.2d 576 (1999) Page 19

State v. White, 80 Wn.App 406, 907 P.2d 310 (1995) Page 15

STATUTES

Washington Constitution, Article I, Section 22 Page 31

RCW 9.94A.535 Page 31
RCW 9.94A.585 Page 31,33
RCW 9A.64.020 Page 25, 29

COURT RULES

ER 401 Page 19, 26
ER 402 Page 19, 26
ER 404(b) Page 16,17,19,20,21,22,23,24,25,26,27,28

I. Assignments of Error

1. Trial counsel's failure to object to inadmissible evidence of a marijuana pipe violated Mr. Burton's right to effective assistance of counsel under the Washington Constitution, Article I, Section 22 and the Sixth Amendment to the United States Constitution.
2. The trial court erred in allowing the State to present inadmissible ER 404(b) testimony regarding alleged incidents involving MBOW over Mr. Burton's motion in limine where the alleged acts occurred after MBOW was eighteen years of age and after the incidents which formed the basis for the charges in Count I, Count II and Count III of the information.
3. Insufficient evidence was presented to convict Mr. Burton of Incest in the first degree and Incest in the second degree as alleged in the information.
4. The trial court abused its discretion in sentencing Mr. Burton to an exceptional sentence of two hundred forty months.

II . Issues Pertaining to Assignments of Error

1. Did trial counsel's failure to object to evidence of the discovery of a marijuana pipe in Mr. Burton's bedroom, which was not the subject of the charges before the jury and would not have been admissible, violate Mr. Burton's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution? (Assignment of Error No. 1)
2. Whether the trial court erred in allowing the State to present inadmissible ER 404(b) evidence regarding alleged incidents involving MBOW over Mr. Burton's objection where the alleged acts occurred after MBOW reached the age of eighteen and after the incidents which formed the basis for the charges in Count I, Count II, and Count II of the information? (Assignment of Error No. 2)

3. Whether sufficient evidence was presented to support a finding of guilt on the charges of Incest in the first degree and Incest in the second degree (Assignment of Error No. 3)
4. Whether the trial court abused its discretion in sentencing Mr. Burton to a term of two hundred forty months which was one hundred twenty months above the top of the applicable sentencing range for a concurrent sentence on all counts. (Assignment of Error No. 4)

III. Statement of the Case

A. Procedural History

Mr. Burton was charged by way of amended information of two counts of incest in the first degree and one count of incest in the second degree. CP 22-27; RP 2. The information also alleged a special allegation of domestic violence for all counts and a special aggravating factor of position of trust and a special aggravating factor of ongoing pattern of sexual abuse as to all counts. CP 22-27; RP 2-3. The named victim in this case will be referred to by her initials, MBOW, to protect her privacy and because she was a juvenile at the time of the charged incidents.

Through a motion in limine, the prosecutor sought to admit evidence of MBOW and Mr. Burton's sexual relationship under ER 404(b) after MBOW reached eighteen years of age. RP 31. The theory for the admissibility of the evidence was to show a lustful disposition of Mr. Burton and a sexual desire for MBOW. RP 32. MBOW is Mr. Burton's step daughter and reached 18 years of age in October 2009. Id. One of the anticipated allegations was that in April 2010 Mr. Burton and MBOW participated in oral sex and had sexual

intercourse. RP 33. The prosecution sought to illicit testimony showing the sexual relationship between Mr. Burton and MBOW continued after the she reached eighteen years of age. RP 32, 34.

In arguing the 404(b) motion, defense counsel conceded the proposed evidence showed Mr. Burton had a lustful disposition towards MBOW. RP 35. However, defense counsel argued the evidence should not be presented to the jury because the evidence was extremely prejudicial to Mr. Burton. RP 35.-36. A consensual sexual relationship between the defendant and MBOW after she reached eighteen years of age would fall under the crime of incest. RP 33. In this case DNA evidence was found on Mr. Burton's robe. RP 34. The DNA evidence was obtained after MBOW reached eighteen years of age. It was not possible to determine if the DNA was deposited before or after MBOW's birthday. RP 36. However, the evidence was gathered after MBOW turned eighteen. RP 33.

The trial court made a finding the facts were sufficient to show by a preponderance of the evidence the sexual activities occurred. RP 40. The trial court also found the evidence was admissible to show the Mr. Burton's lustful disposition towards MBOW. Id. Finally, the trial court found the evidence had a very high probative value and the prejudicial value did not outweigh the probative value of the evidence. RP 40.

Mr. Burton was found guilty of all charges and the found the special allegations and aggravating factors applied. CP 51-61. Mr. Burton was

sentenced to a term of two hundred forty months. CP 10. This appeal timely follows. CP 62.

B. Facts

Ms. Burton married Mr. Burton in 1999. RP 264. Ms. Burton had a daughter, MBOW, with her prior husband, Mr. Wade. RP 263-264. Ms. Burton and MBOW initially resided with Mr. Burton in the Shoreline area. RP 265, 286. Ms. Burton moved to Kingston after her mother died. RP 265. MBOW had been residing with Ms. Burton's mother and Ms. Burton did not want MBOW to change schools. RP 265. Mr. Burton stayed behind and traveled to Kingston infrequently, for a total of about six times. RP 266. During a few of the visits MBOW was out of the home for the weekend spending time with her father. RP 288. Mr. Burton did not recall spending time alone with MBOW in 2004. RP 288. Mr. Burton moved to Kingston in 2006. RP 269, 288.

In 2010 Ms. Burton was employed as a paraeducator in the Kingston High School, the same school her daughter MBOW attended. RP 234-532. Ms. Burton was also employed at Country Corners, a convenience store, which was an employment position she shared with Mr. Burton. RP 234. In 2010 MBOW was sometimes alone with Mr. Burton, but Ms. Burton often took MBOW to work with her. RP 235. Ms. Burton testified she brought MBOW to work with her in the evenings because MBOW hacked into Ms. Burton's computer to go on "porno sites about bondage" and accessed Ms.

Burton's cell phone account and sent 440 text messages in ten days. RP 270. On one occasion Ms. Burton saw MBOW accessing bondage sites on the computer while wearing one of Mr. Burton's robes. RP 274. These issues started when MBOW was sixteen years of age. RP 271.

Ms. Burton also caught MBOW flashing Mr. Burton and heard her make comments to him suggesting they have some fun. RP 272. MBOW was chastised for her behavior. Id. Ms. Burton was not concerned that Mr. Burton was acting inappropriately with MBOW, but was concerned about MBOW's behavior and why she was acting out inappropriately. RP 272. MBOW frequently wore Mr. Burton's robes. RP 274. Ms. Burton consulted with the school counselor and changed her password on her computer in an attempt to address MBOW's inappropriate behavior. RP 275.

Ms. Burton testified she was aware Mr. Burton purchased a sex toy for MBOW. RP 235. Ms. Burton approved of the purchase. RP 281. The sex toy was purchased because MBOW had been using Ms. Burton's sex toys. RP 235. Ms. Burton wanted MBOW to leave her sex toys alone. RP 28. Ms. Burton and MBOW decided MBOW should get her own sex toy. RP 314. MBOW picked out the sex toy and Mr. Burton made the purchase. Id.

At trial Ms. Burton described an incident which occurred in 2008. At that time she walked into the living room and found Mr. Burton asleep on the couch and MBOW was sitting on the opposite end of the couch without a shirt on. RP 236. After the incident Ms. Burton asked Mr. Burton to leave the

house. RP 236. Ms. Burton asked Mr. Burton to leave the house to allow her to speak with MBOW to determine what she was doing and to have discussions with her regarding appropriate behavior. RP 236. Mr. Burton returned to the home three to five days later. RP 273. During the time Mr. Burton was out of his residence in November 2008, he resided with his ex-wife, Debbie Burton. RP 256-257. Mr. Burton was allowed to return to the residence because she believed he had not done anything wrong. RP 273. By Ms. Burton's recollection, MBOW never told her that a sexual relationship was occurring between MBOW and Mr. Burton. RP 271. Ms. Burton did not have a concern that a sexual relationship was occurring. RP 271.

In November 2009 MBOW reported allegations of sexual abuse by Mr. Burton to her school counselor. RP 278. Ms. Burton met with MBOW's school counselor to discuss the allegations. RP 279. As a result of the meeting an agreement was reached. RP 279. In that agreement MBOW agreed to settle down, do her school work, stop lying, dress appropriately. RP 279-280. Ms. Burton was aware of behavior modification contracts through her employment. RP 280. Ms. Burton and Ms. Burton created a contract for MBOW dealing with acting appropriately. RP 281. The contract was read to the jury and included a statement MBOW knew she could not lie about allegations Mr. Burton inappropriately touched her. RP 80-81. MBOW told law enforcement she had lied about the allegations. RP 134-135.

Ms. Burton also testified regarding the events of April 9, 2010. RP 282-284. Ms. and Mr. Burton returned home from the overnight shift at the convenience store at about 6:30am. RP 282. Ms. Burton was not feeling well that morning. Id. She told MBOW to get to school and she laid down in her room with the door open. Id. Ms. Burton heard MBOW take a shower and Mr. Burton got dressed for work Id. Both Mr. Burton and MBOW left the house. Id. Ms. Burton was interviewed by Detective Blankenship that day. RP 284. Ms. Burton did not believe she was treated fairly in that interview and filed a complaint against the Detective with the Sheriff's office. Id.

Ms. Burton also testified regarding the difficulties she and Mr. Burton had in their sexual relationship. RP 276-278. Mr. Burton was involved in an accident. The injuries he sustained in that accident, combined with a prior injury, prevented him from having a significant sexual relationship with Ms. Burton. RP 277.

One of Ms. Burton's co-workers was called to the stand to describe statements Ms. Burton made to her regarding contact between MBOW and Mr. Burton. Ms. Spaulding is employed as a paraeducator at Kingston High School and was a co-worker of Ms. Burton. RP 247-248. Ms. Spaulding described a conversation she had with Ms. Burton regarding finding MBOW and Mr. Burton on the couch. RP 248-250. By Ms. Spaulding's recollection, the conversation occurred before Thanksgiving break in 2009. RP 251. Ms. Burton repeated comments Ms. Burton made to her without objection from

defense counsel. Id. Ms. Spaulding was not certain of what was said at that time but generally recalled Ms. Burton indicated something of an inappropriate sexual nature went on between MBOW and Mr. Burton. RP 249-250.

Ms. Jan Johnson also testified during the presentation of the defense case. RP 258-262. Ms. Johnson knew Mr. Burton through her employment as a school bus driver beginning in 2003. RP 259. Mr. Burton and Ms. Johnson were close friends. RP 262. Mr. Burton was a school bus driver as well. RP 259. Ms. Johnson testified of her knowledge of Mr. Burton's living arrangements from 2003 through 2005. RP 256-262. She was aware MBOW , Ms. Burton and Mr. Burton resided together in the Lynwood area. RP 261. Later, MBOW and Ms. Burton moved to Kitsap County while Mr. Burton continued to reside in the Lynwood area. RP 261. Mr. Burton resided by himself for one to two years and during that time he did not make regular visits to Kitsap County. RP 261-262.

Mr. Burton testified at trial. RP 285-328. He provided a history of his residences in conformity with the testimony of Ms Burton. He also testified regarding his employment as a driver for the Everett YMCA. RP 289. Mr. Burton drove for the camp during two summers. During the second summer, MBOW went with him to the camp to volunteer with the hope she could obtain a paid position with the camp. RP 289-290. Mr. Burton was not alone

with MBOW during that time, during the time he worked for the camp. RP 290.

Mr. Burton recalled MBOW obtained a case of head lice. RP 291. Lice was found in MBOW's bed but was not found in the bed Mr. and Ms. Burton shared. RP 291-292. Mr. Burton testified he had a difficult relationship with MBOW and the relationship deteriorated as MBOW grew older. RP 290-291. Mr. Burton usually worked with Ms. Burton at the store. RP 291. Mr. Burton testified MBOW flashed him and mentioned something about giving him a blow job. RP 293. Mr. Burton advised MBOW her behavior was inappropriate and started staying in his bedroom and avoided MBOW. Id. Mr. Burton believed MBOW engaged in that behavior so Mr. Burton would leave her alone which allowed her to access the computer which she was not allowed to do. RP 293-294. MBOW was using the computer to send messages back and forth to people regarding bondage and other sexual activities. RP 299. MBOW's use of the computer was limited in response to her inappropriate use of the computer. RP 299.

In November 2009 MBOW told a school counselor and a friend Mr. Burton had touched her. RP 308. Mr. Burton was questioned by law enforcement in December 2009 regarding the allegations. RP 309. Mr. Burton denied touching MBOW. Id. MBOW told the officers she lied about those allegations and the investigation ended. RP 134-135.

Mr. Burton denied engaging in any sexual intercourse with MBOW, denied engaging in any bondage activity with her and denied fondling her in any way. RP 300. Mr. Burton denied having in sexual contact with MBOW on the evening onf April 8th or the morning of April 9th. RP 314, -315, 317. Mr. Burton also denied viewing any pornography on the morning of April 9th. RP 317. Mr. Burton also denied using any sex toys with MBOW. RP 313. Mr. Burton also discussed the effect his prior injuries has on his ability to engage in sexual activity. RP 300-301. Specifically, those limitations cause him to have back pain and sometimes back spasms if he engages in sexual activity. Id. He is not capable of engaging in vaginal or anal intercourse with MBOW. RP 301. He is not interested in oral sex. RP 301. It is difficult for Mr. Burton to achieve an orgasm. Id. Both Mr. and Ms. Burton took action to stop MBOW from acting in a sexually inappropriate manner around Mr. Burton. RP 301-302.

Mr. Burton and Ms. Burton discovered MBOW was sexually active in January 2010. RP 302. At that time notes MBOW had written to others were discovered and it was discovered MBOW engaged in bondage sex with a young man while she was at her father's residence. Id. A family meeting was held to discuss those issues. MBOW was over eighteen at the time and the boys she was sexually involved with was 15 years old, which was a concern. RP 302. After that meeting Ms. Burton found a link to a picture MBOW sent of her engaged in bondage. RP 302-303. The photograph was found when

Mr. Burton was checking the computer for inappropriate activity for Ms. Burton. RP 304. Additional bondage photos were recovered on the computer. RP 303. The photographs were printed and Ms. Burton took the photographs to the school counselor for suggestions on how to deal with the problem. RP 308.

Mr. Burton wore robes around the house at times. RP 312. Mr. Burton had worn a robe during sexual relations or masturbation in the past. RP 313. The semen found on the robe came from one of those activities. Id.

MBOW's testimony significantly differed from the testimony presented by either Mr. Burton or Ms. Burton. MBOW testified while she was in the seventh grade Mr. Burton asked her to stroke his penis and attempted to bribe her into doing so by offering to allow her to wear his leather jacket. RP 100. MBOW testified Mr. Burton often traveled from Lynnwood to Kingston during the time Mr. Burton lived in Lynnwood. RP 123. According to MBOW she began a sexual relationship with Mr. Burton. Id. The sexual activities started with stroking Mr. Burton's penis, followed by oral sex, followed by sexual intercourse. Id. MBOW recalled the sexual intercourse started when she was in the eighth or ninth grade. RP 101. MBOW also testified Mr. Burton touched her chest, kissed her and sometimes touched her vagina. RP 101-102.

In November 2008 MBOW testified Mr. Burton had her take her shirt off and had her stroke him with her hand. RP 103. MBOW recalled Ms.

Burton happened to walk into the living room where they were sitting and caught Mr. Burton. RP 103. MBOW stated she had a close relationship with her mother and reported the sexual contact. RP 104. According to MBOW, Ms. Burton replied she would have to catch Mr. Burton. Id. At trial MBOW said she had sexual intercourse with Mr. Burton "every night that my mom was working, or every other night". RP 104. MBOW was interested in bondage and researched bondage on the internet. Id. MBOW described participating in sexual intercourse involving bondage at the time of trial. RP 105-106. MBOW reported she had difficulty in recalling specific incidents most of the time because she repressed a lot of the memories. RP 106-107. But she did recall having intercourse with Mr. Burton at some point on a daily basis while Ms. Burton was at work. RP 135-136. During MBOW's testimony she also described an occasion while traveling with Mr. Burton to the YMCA camp, she came into the restroom with Mr. Burton and stroked his penis when they stopped for fuel for the YMCA bus. RP 107.

During the trial MBOW told the jury Mr. Burton would frequently wear a bathrobe before and after they had sexual intercourse. RP 111-112. MBOW also reported having sexual intercourse with Mr. Burton in April 2010, the evening before she made a report to law enforcement and after she reached the age of eighteen. RP 110. MBOW also reported having sexual contact with Mr. Burton the morning she made the report to law enforcement. RP 112. At that time she stated Mr. Burton watched a pornographic video on

his computer and had her stroke and suck his penis. Id. He was wearing a robe at the time. RP 113. MBOW believed Mr. Burton was blackmailing her against her mother with the photographs he had found on her camera. RP 116. MBOW stated Mr. Burton never threatened any physical harm against her. RP 128.

During cross examination MBOW admitted a statement she made to Detective Blankenship was probably not accurate. RP 132. MBOW also admitted she lied in her statement to law enforcement made at the end of 2009. RP 133-134. MBOW told the jury she was convinced to tell law enforcement she made up the allegations of Mr. Burton touching her because she was mad. RP 134-135.

Detective Blankenship was involved in the investigation of MBOW's allegations. RP 64-65. Detective Blankenship asked Mr. Burton about the allegations. RP 68. Mr. Burton denied the allegations. Id. A search warrant of the residence was obtained and executed. RP 72 During the search robes and marijuana pipes were located in Mr. Burton's bedroom. RP 77. No objection was made to that testimony. Id. A total of four robes were taken from the residence. RP 88. Sheets from the bed were seized as well. Id. Detective Blankenship read the behavior modification contract to the jury. RP 80-81.

Detective Gundrum also testified at trial. Detective Gundrum was present at the time Mr. Burton was interviewed by Detective Blankenship. RP

154-156. Detective Gundrum also recalled Mr. Burton denying any sexual activity with MBOW. RP 155. Detective Gundrum also testified as to finding two marijuana pipes in Mr. Burton's bedroom pursuant to the search warrant. RP 157. No objection was made to that testimony. Id. Deputy Swayze also testified at trial. RP 159-164. Deputy Swayze testified MBOW disclosed sexual contact with Mr. Burton to him. RP 162. Megan Inslee, a forensic scientist with the Washington State Patrol Crime Laboratory also testified at trial. RP 169-198. Ms. Inslee performed tests on a pink pair of underpants. RP 180-186. No male DNA was detected on the underpants. RP 181. Ms. Inslee also performed tests on a black pair of underwear. RP 185. No male DNA was detected on the black underwear either. Id. No male DNA was found on the swabs taken during the examination of MBOW. RP 186-187. Those items were sent to another crime lab for an advanced test known as YSTR testing. RP 188. No DNA typing results were obtained from the samples using the YSTR test. Id. One of Mr. Burton's robes was tested as well. RP 189-191. Mr. Burton's DNA was detected on the robe. RP 191. DNA matching the DNA typing profile of MBOW was detected on the robe as well. Id. No test exists to determine if the DNA found originated from biological fluid or skin cells. RP 192. However, Ms. Inslee believed the level of the DNA found suggested MBOW's DNA originated from biological fluid rather than skin cells. Id. In another sample taken from the robe DNA of three individuals was detected. RP 193. The identity of the contributor of the

third DNA found was not determined. RP 193. It is not possible to determine from the tests performed how long the DNA had been on the robe. RP 195. It is possible for DNA to remain on an item for many years. *Id.* Ms. Inslee believed it was unlikely the robe had been washed after the DNA deposits had been made. *Id.* It is also possible for the com-mingled DNA found on the robe to have originated from two separate events not necessarily of a sexual nature. RP 197.

D. Argument

1. Mr. Burton's right to effective counsel was violated. As a result of counsel's deficiencies, he did not receive a fair trial.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn.App 406, 410, 907 P.2d 310 (1995). Assertions of ineffective assistance of counsel are determined with the application of a two part test. To establish a claim of ineffective assistance of counsel a defendant must prove counsel's deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). To prove deficient performance, a defendant must prove the representation fell below an objective standard of reasonableness under professional norms and a reasonable possibility exists that but for counsel's error, the result would have been different. *In Re Personal Restraint of Rice*, 118 Wn.2d at 888-89. The Court starts with the presumption counsel's

representation was effective. *State v. Hendrickson*, 129 Wn.2d.61, 77, 917 P.2d 563 (1996). To establish ineffective assistance of counsel for failure to object, the defendant must show the absence of a legitimate or tactical reason for not objecting, and that the trial court would have sustained the objection if it had been made, and the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn.App 575, 578, 958 P.2d 364 (1998).

a. Defense counsel's failure to object to the admission of evidence of the discovery of marijuana pipes in Mr. Burton's bedroom was ineffective assistance of counsel. As a result of counsel's deficiencies, Mr. Burton did not receive a fair trial.

On two occasions during trial the jury heard that law enforcement discovered marijuana pipes in Mr. Burton's bedroom. Detective Blankenship told the jury marijuana pipes were found in Mr. Burton's bedroom. RP 77. Detective Gundrum testified as to finding two marijuana pipes in Mr. Burton's bedroom. RP 157. Defense counsel did not object to or ask to strike any of the testimony regarding the discovery of the pipe. RP 77, 157. The evidence of the marijuana pipe should have been excluded under ER 404(b) and under relevance grounds. The evidence of the marijuana pipes falls under the category of evidence of other bad acts, specifically a crime of possession drug paraphernalia in addition to the charged offenses. The evidence of the marijuana pipes is improper 404(b) evidence. Under ER 404(b).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b)

The appellate court reviews the trial court's decision to admit evidence for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009).

A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert denied*, 528 U.S. 922 (1999). The trial court has discretion to determine relevancy of evidence. *State v. Demos*, 94 Wn.2d 733, 736, 619 P.2d 968 (1980).

ER 404(b) creates a presumption that evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith. ER 404(b). The trial court is to carefully consider whether proposed evidence sought for admission under ER 404(b) should be allowed. The trial court is to determine whether the evidence of prior bad acts is relevant to prove an element of the crime charged or to rebut a defense. The trial court must begin with the presumption that evidence of prior bad acts is inadmissible. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (2009).

Case law has established a four part test to be used to determine if evidence is admissible pursuant to ER 404(b). The four part test includes the

following: 1) the trial court must find by a preponderance of evidence that the misconduct occurred; 2) identify the purpose for which the evidence is sought to be introduced; 3) determine whether the evidence is relevant to prove an element of the crime charged; and 4) weight the probative value against the prejudicial effect of the evidence. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). The test for admissibility based on relevancy is established by case law. "Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The trial court must make a showing on the record weighing of whether the probative value of the prior bad acts outweigh its prejudicial impact. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). The court must examine "...whether the evidence is relevant and necessary to prove an essential element ingredient of the crime charged.". *State v. Lough*, 125 Wn.2d at 863. As mentioned above, the analysis must be made part of the record: "... a trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors.". *State v. Powell*, 126 Wn.2d at 264. If the proposed evidence is likely to create an emotional response in the jury rather than aid the jury in making a rational decision, there is a danger of unfair prejudice to the Defendant. *State v.*

Powell, 126 Wn.2d at 264 citing *State v. Rice*, 48 Wn.App 7, 13, 737 P.2d 726 (1987) "In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence." *State v. Powell*, 126 Wn.2d at 264 quoting *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The purpose of the rule is to prevent the state from suggesting that a defendant is guilty because he/she is a criminal-type of person who would be likely to commit the crime charged. *State v. Russell*, 154 Wn.App. 775, 225 P.3d 478 (2010). In the case of *State v. Dawkins*, 71 Wn.App 902, 863 P.2d 124 (1993), the court found defense counsel was ineffective for failing to object to ER404(b) evidence. As in the Dawkins case, trial counsel's failure to object constituted ineffective representation.

As previously argued in this brief, in order to prevail on a claim of ineffective assistance of counsel Mr. Burton must establish counsel's performance was deficient. In this case counsel's failure to object to evidence the marijuana pipes was deficient because the evidence would have been excluded under ER 404(b) and or relevance grounds. Any fact which is of consequence to the determination of the matter is relevant. *ER 401*. Irrelevant evidence is inadmissible. *ER 402*. The evidence of the marijuana pipes supports a "forbidden inference" that Mr. Burton has a propensity for unlawful behavior and therefore is more likely to have committed the charged offenses. *State v. Wade*, 98 Wn.App. 328,336, 989 P.2d 576 (1999). In this case the marijuana used was not done in

conjunction with any of the charged acts. It only shows a propensity to engage in unlawful behavior. The evidence of the pipes is not admissible. Whether Mr. Burton possessed marijuana pipes has no bearing on the questions before the jury in this case, namely whether he engaged in sexual activities with MBOW. Evidence of marijuana use only shows a disposition for criminal behavior. This evidence would not have been admitted if a proper objection had been made. The evidence was not relevant to the action, and even if relevant, was more prejudicial than probative. The only possible purpose for admitting the evidence is to show Mr. Burton has a propensity for unlawful behavior which is impermissible under ER 404(b) and the case law cited above.

The failure to object deprived Mr. Burton of a fair trial because the erroneous admission of the evidence led to a conviction in this matter. The second test to show ineffective assistance of counsel is to demonstrate a reasonable possibility exists but for the error of counsel, the outcome of the trial would have been different. *State v. Rice*, supra. In this case the evidence shows that but for the admission of the improper evidence, Mr. Burton would not have been found guilty of the charges. In this case the jury heard through two different witnesses marijuana pipes were found in the Mr. Burton's bedroom. RP 77, 157. This evidence was likely used to conclude Mr. Burton has a problem with drug use engages in unlawful behavior. Either of these conclusions would lead a jury to discredit Mr. Burton's testimony. In

this case the credibility of witnesses was crucial. Mr. Burton and Ms. Burton testified no improprieties between Mr. Burton and MBOW occurred. MBOW testified to the contrary. The outcome of the trial turned on the jury's assessment of MBOW's credibility. In this case there were several reasons to disbelieve MBOW's claims. First, there were no other witnesses to the alleged act and the physical evidence (DNA) could have been the result of non-sexual activity.

Reversal of the conviction is required. It is within reasonable probabilities that had the error not occurred the outcome of the trial would have been materially effected. *State v. Alams* 93 Wn.App. 754, 970 P.2d 367 (1999), *review denied* 138 Wn.2d 1014, 989 P.2d 1142. The evidence was prejudicial to Mr. Burton and likely improperly suggested to the jury that Mr. Burton has a drug problem and or engages in unlawful behavior, therefore he was guilty of the crimes charged in the present case. The information goes to the character of Mr. Burton and portrayed him in a negative fashion that must have influenced the jury.

Since no objection to the admission of the evidence of the marijuana pipes was made, the tests required to determine if evidence is admissible under ER 404(b) were not conducted in this matter. The Court did not establish the purpose for which the evidence was admitted as required. The balancing test required for a 404(b) analysis would have weighed in favor of excluding the evidence of the marijuana pipes. The evidence of the injury

was highly prejudicial as it created an inference that Mr. Burton has a drug problem and or does not follow the law. The evidence is not probative into the establishing the elements of the charged crimes. The evidence had no probative value and was highly prejudicial.

The court did not engage in a balancing test weighing the probative value against the potential for prejudice as required by the rule. *Id.* The issue of whether a marijuana pipe was discovered during the execution of the search warrant was not disputed at the time of trial. However, the Court did not make a finding that the marijuana pipes were discovered during the execution of the search warrant occurred by a preponderance of evidence which is required for the first prong of the ER 404(b) admissibility test as previously outlined. For the reasons outlined above, the trial court would not have admitted the evidence of the marijuana pipes. The evidence was presented to the jury by virtue of defense counsel's ineffective assistance. Defense counsel made no objection to the admissibility of the pipes which was raised twice during the course of the trial.

No legitimate or tactical reasons existed for the failure to object to the evidence of the marijuana pipes. As argued above, the evidence of the marijuana pipes would have been excluded from the trial if an objection had been made. The evidence was not relevant to the elements of the charged crimes, and the evidence was highly prejudicial. The result of the trial would have been different if the evidence had been excluded as previously argued

in this brief. Reversal of the convictions is required. It is within reasonable probabilities that had the error not occurred the outcome of the trial would have been materially effected. *State v. Alams* 93 Wn.App. 754, 970 P.2d 367 (1999), *review denied* 138 Wn.2d 1014, 989 P.2d 1142. In this case reversal is appropriate.

b. Defense counsel's failure to request a limiting jury instruction addressing the 404(b) evidence was ineffective.

The standard of review for claims of ineffective assistance of counsel and pertinent case law to be used to evaluate the claim are previously set forth in this brief and will not be repeated here.

If evidence of bad acts is admitted, a limiting instruction must be given to the jury. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). The jury did not receive an instruction on the proper use of this evidence. In this case no limiting instruction was given. Mr. Kibbe did not have any issues with the State's proposed jury instructions and did not proposed a limiting instruction on any 404(b) evidence presented to the jury. RP 335, 379. Mr. Kibbe did not have any objections or exceptions with the jury instructions submitted to the jury. RP 335. As previously argued, the evidence of the marijuana pipes in Mr. Burton's bedroom was evidence of a prior bad act and falls with ER 404(b). A limiting instruction was necessary to emphasize to the jury evidence of the pipes was not to be used to determine whether Mr. Burton committed the charges he was accused of. Without that instruction

the jury used the evidence to determine Mr. Burton has a propensity for unlawful behavior. The improper evidence is the kind of evidence which cannot be erased from juror's minds because it was "propensity" evidence under 404(b), highly prejudicial and likely to cause the jury to "prejudge" Mr. Burton, which denied him the fair opportunity to defend against the State's case. See *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948). In the case of *State v. Simpson*, 22 Wn.App. 572, 590 P.2d 1276 (1979) the appellate court reversed a conviction based on lack of a limiting jury instruction to address 404(b) issues.

In this matter the outcome of the trial would likely had been different if the jury had received the required instruction informing them they were not to use the testimony of the marijuana pipes to determine Mr. Burton's guilt on the crimes charged. Without that instruction it is likely the jury used the evidence of the pipes improperly.

2. The trial court erred in allowing the State to present inadmissible 404(b) testimony regarding alleged incidents involving MBOW over Mr. Burton's motion in limine where the alleged actions occurred after MBOW reached the age of eighteen and after the incidents which formed the basis for the charges in Count I, Count II and Count III of the information.

In this case evidence of sexual activity between Mr. Burton and MBOW after her eighteenth birthday was presented to the jury. The admissibility of the evidence was argued during motions in limine. RP 31. The prosecutor sought admissibility of the evidence under ER 404(b). A

consensual sexual relationship between Mr. Burton and MBOW after MBOW reached the age of eighteen would not fall under the crime of incest because they had a step parent/step daughter relationship. *RCW 9A.64.020*. It was not possible to determine whether the DNA found on Mr. Burton's robe was deposited before or after MBOW's eighteenth birthday. RP 36, 195. MBOW reached the age of eighteen in October 2009. RP 32. One of the anticipated allegations was that in April 2010 Mr. Burton and MBOW engaged in sexual activities. RP 33. However, in the opinion of the forensic scientist, Ms. Inslee, the robe had not been washed since the deposit found on the robe had been made. Id. The trial court allowed the evidence to be presented to the jury on the theory the evidence showed Mr. Burton's lustful disposition toward MBOW and the evidence was highly probative and the prejudice to Mr. Burton did not outweigh the probative value of the evidence. RP 40.

Appellate courts review a trial court's decision to admit evidence under ER 404(b) for an abuse of discretion. *State v. Foxhoven*, surpa. A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert denied*, 528 U.S. 922 (1999). Lustful disposition is one of the well settled common law exceptions to ER 404(b) *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Ferguson*, 100 Wn.2d 131, 133-134, 667 P.2d 68 (1983). Under the lustful disposition exception, evidence of a defendant's prior sexual misconduct with the same victim is

admissible to show the defendant's lustful disposition towards that victim. *State v. Ray*, 116 Wn.2d at 547, *State v. Ferguson*, 100 Wn. 2d at 133-134. The requirements for a 404(b) analysis have been previously set forth in this brief and will not be repeated here. Even if the evidence shows the defendant has a lustful disposition towards the victim, the evidence still must be evaluated to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). "Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." *State v. Coe*, 101 Wn,2d 772, 780-781, 684 P.2d 668 (1984)(citing *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982)). Evidence must be relevant to be admissible. *ER 402*. Evidence is relevant only if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. *ER 401*.

In this case the evidence of the sexual contact sought to be admitted to show Mr. Burton's lustful disposition towards MBOW occurred after the charged offenses. RP 32,34. Defense counsel objected to the admission of that evidence. RP 35-36. The alleged sexual acts against MBOW merely demonstrate Mr. Burton's general sexual proclivities and are not relevant to the crime charges especially since any consensual sexual activity between Mr. Burton and MBOW would not be a crime after MBOW reached the age

of eighteen. While evidence of a defendant's prior sexual acts against the same victim are admissible to show the defendant's lustful disposition against towards the victim, and ER 404(b) applies to evidence of other acts regardless of whether they occurred before or after the alleged crime, such acts must reveal more than a defendant's general sexual proclivities. See *State v. Medcalf*, 58 Wn.App. 817, 822-23, 795 P.2d 158 (1990); *State v. Guzman*, 119 Wn.App. 176, 182, 79 P.3d 990 (2003). The evidence of the April 2010 contact between Mr. Burton and MBOW was not relevant to the crimes charges and were subsequent to the charges alleged in the information. No crimes were charged, or could be charged, based on the April 2010 acts. The evidence of the April 2010 acts and the DNA evidence, which must have been recent, should not have been admitted into evidence. The evidence was not relevant to the crimes charged and the potential for prejudice was substantial. The jury likely used this evidence to infer that Mr. Burton and MBOW had a longstanding sexual relationship. It is within reasonable probabilities that but for the admission of the evidence the jury would have found Mr. Burton not guilty of the charges. The admission of the evidence was clearly introduction of Mr. Burton's propensity and character which is forbidden by ER 404(b).

The prejudice which resulted from the introduction of the evidence denied Mr. Burton his right to a fair and impartial jury and outweighed the probative value, if any, of the evidence. The State referred to the April 2010

and the DNA testing repeatedly during closing arguments. RP 340, 343-346. The State emphasized these subsequent acts as establishing Mr. Burton's guilt on the offenses charged. The evidence materially effected the outcome by confirming that Mr. Burton had sexual proclivities beyond the norm and that he must have committed the crimes for which he was charged against MBOW even though these acts occurred well after the incidents which formed the basis for the charged offenses and no similar acts could have formed the basis for additional charges from the later date. The Judge abused its discretion in admitting the evidence. The error was of major significance and was not harmless. No limiting instruction regarding this 404(b) evidence was presented to the jury. RP 379.

3. The trial court violated Mr. Burton's right to due process when it entered a judgement of conviction for offenses unsupported by substantial evidence.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201 829 P.2d 1068 (1992). "Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1979) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.,2d 227, 228 (1970)). Mere possibility, suspicion, speculation, conjecture

or even a scintilla of evidence is not substantial evidence. *State v. Moore*, 8 Wn. App. 1, 499 P.2d 13 (1972). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d at 201; *State v. Craven*, 67 Wn.2d 982, 928, 841 P.2d 774 (1992). A claim of insufficiency admits the truth of the State's evidence and inferences that can reasonably drawn therefrom. *State v. Salinas*, 119 Wn.2d at 201; *State v. Craven*, 67 Wn.2d at 928.

Mr. Burton was charged with incest in the first degree in count one, incest in the first degree in count two, and incest in the second degree in count three. The elements of the charges of incest in the first and second degree are set forth in *RCW 9A.64.020* which states as follows:

(1)(a) A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

(b) Incest in the first degree is a class B felony.

(2)(a) A person is guilty of incest in the second degree if he or she engages in sexual contact with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

(b) Incest in the second degree is a class C felony.

(3) As used in this section:

(a) "Descendant" includes stepchildren and adopted children under eighteen years of age;

(b) "Sexual contact" has the same meaning as in RCW 9A.44.010; and

(c) "Sexual intercourse" has the same meaning as in RCW 9A.44.010.

RCW 9A.64.020

In this case Mr. Burton believes the evidence presented was insufficient to establish he committed the crimes of Incest in the first degree or incest in the second degree. The testimony of MBOW was disputed by the testimony of both Ms. Burton and Mr. Burton. MBOW had difficulty in remembering dates of her alleged sexual contact with Mr. Burton. Additionally, MBOW had on two occasions told untrue statements to law enforcement. Additionally, the physical evidence, the DNA evidence, could have been the result of non-sexual activity. The outcome of this case turned on the jury's assessment of the credibility of the witnesses. There were reasons to doubt MBOW's claims. There were no other witnesses to the alleged acts. Secondly, MBOW's testimony was contradicted by the testimony of other witnesses. The State repeatedly referred to the alleged sexual activity occurring after MBOW reached eighteen years of age and the DNA evidence to infer Mr. Burton was guilty of the charges. The outcome of the trial was effected by the erroneous admission of the evidence of sexual acts which occurred after the charged offenses and the DNA evidence which must have been the result of recent activity.

4. The trial court abused its discretion in ordering a sentence of two hundred forty months .

a. The failure to enter findings of fact and conclusions of law regarding an exceptional sentence denies Mr. Burton his constitutional and statutory right to appeal and is a violation of statutory requirements.

Article 1 section 22 of the Washington State constitution guarantees the right to appeal "in all cases" The court has previously held the right to appeal is a fundamental right. *State v. Garcia-Martinez*, 88 Wn.App. 322, 327, 944 P.2d 1104 (1997) Whenever a court imposes an exceptional sentence, the trial court must set forth the reasons for that decision in written findings of fact. RCW 9.94A.535. The statute outlining appellate review of exceptional sentences is found in RCW9.94A.585 which states in pertinent part:

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

(3) Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond.

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

(5) A review under this section shall be made solely upon the record that was before the sentencing court. Written briefs shall not be required and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

RCW 9.94A.585

“[F]or an action to be clearly excessive, it must be shown to be clearly unreasonable, i.e. exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would take. *State v. Ritchie*, 126 Wn.388,393,894 P.2d 1308 (1995) (citing *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)). Without written findings of fact and conclusions of law, it is difficult to determine whether the exceptional sentence imposed by Judge Mills was based on untenable reasons or grounds. In this case the jury did find the aggravating factors of ongoing pattern of sexual abuse and position of trust applied. Because the question of whether Judge Mills' decision was based on untenable reasons becomes unreviewable, Mr. Burton is denied meaningful appellate review.

This court should at least reverse the sentence and remand for re-sentencing. The sentencing court failed to follow requirements for properly sentencing Mr. Burton. Findings of Fact and Conclusions of Law should have been entered but were not. The Court did not satisfy the statutory requirements for the imposition of an exceptional sentence. The failure to enter written findings of fact normally requires remand for entry of findings. *In re Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). The failure to enter findings justifies vacation of a sentence if it results in a complete miscarriage of justice. *Id.* In this case the sentence violated Mr. Burton's constitutional right against cruel and unusual punishment therefore vacation

of the sentence is warranted. This court should at the least vacate and remand Mr. Burton for re-sentencing.

b. The exceptional sentence imposed was clearly excessive

If this Court determines the record of the oral ruling of Judge Mills sufficient to allow a review of the exceptional sentence pursuant to RCW 9.94A.585(4) this Court should find that sentence imposed by Judge Mills was excessive. In this case the applicable standard range was forty six to sixty one months on count I and count II, and forty one to fifty four months on count III. CP 51-52. Mr. Burton was sentenced to one hundred twenty months on count I and one hundred twenty months on count II. CP 51. The sentence on the counts I and II ran consecutively. Id. Mr. Burton was sentenced to a term of sixty months on count III which ran concurrent with counts I and III. Id. Mr. Burton was also sentenced to thirty six months of community custody. Id. Mr. Burton was given the maximum penalty for all counts. Additionally the sentence on two of the three counts ran consecutive rather than concurrent. Presumably the combination of the confinement time and supervision time will not exceed the statutory maximum sentence given the language included in the judgement and sentence. CP 53.

This sentence was excessive for the crimes charged. Although the trial court could exceed the standard sentence range since the jury found two aggravating factors, the sentence of the trial court was excessive. Mr. Burton

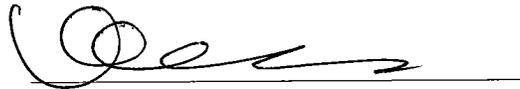
consistently stated no sexual activity occurred between himself and MBOW. As argued previously in this brief there was reason to doubt MBOW's testimony. MBOW's testimony was contradicted by the testimony of Ms. Burton and Mr. Burton.

Given the doubt raised by the testimony, sentencing Mr. Burton to a sentence of two hundred forty months was excessive. This Court should vacate the sentence entered in this matter and remand for sentencing at the very least.

V. Conclusion

Mr. Burton respectfully requests this court to reverse the conviction entered against him in this matter for the reasons stated above.

Respectfully submitted this 30 day of January , 2012.



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NO. 42414-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

WAYNE BURTON,

Appellant.

PROOF OF SERVICE

I, DIANE SYKES-KNOLL, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case delivered as follows:

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Copy of Brief of Appellant Mailed To:

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Copy of Brief of Appellant delivered To:

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DATED this 30th day of January, 2012, at Port Orchard, Washington.



Diane Sykes-Knoll

PORT ORCHARD ASSIGNED COUNSEL

January 30, 2012 - 3:18 PM

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