

NO. 42414-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

WAYNE BURTON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 10-1-00387-6

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED June 5, 2012, Port Orchard, WA

Original electronically filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court abused its discretion in admitting evidence of the Defendant's uncharged sexual abuse of the victim pursuant to ER 404(b) when the evidence demonstrated that the Defendant had a lustful disposition toward the victim and the probative value of the evidence outweighed the danger of unfair prejudice?

2. Whether the Defendant's claim of ineffective assistance of counsel is without merit when: (1) the Defendant cannot show that trial counsel's failure to object was not a legitimate trial strategy (designed to not highlight the evidence at issue); and (2) the Defendant has failed to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different?

3. Whether the Defendant's claims of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, the evidence was sufficient to permit a rational trier of fact to find the essential elements of the charged crimes beyond a reasonable doubt?

4. Whether the trial court abused its considerable discretion by imposing an exceptional sentence after the jury had found that a statutory aggravating factor applied to the Defendant's crimes?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Wayne Burton, was charged by amended information filed in Kitsap County Superior Court with two counts of incest in the first degree and one count of incest in the second degree. CP 22. All three counts also included special allegations that: the crime was committed against a family or household member; that the offenses were committed as part of an ongoing pattern of sexual abuse; and that the Defendant used his position of trust to commit the offenses. CP 22. A jury found the Defendant guilty of the three charged offenses and found that all of the special allegations had been proven. CP 51; App.'s Br. at 3. The trial court imposed an exceptional sentence. CP 51. This appeal followed.

### **B. FACTS**

The charged offense alleged that the Defendant had sexual contact with his stepdaughter, M.B.O.W., when the victim was between 15 and 18 years old. CP 39. Count I was alleged to have involved an instance where the Defendant tied the victim's hands with electrical tape and then engaged in sexual intercourse with her. CP 39. Count II involved an instance where the Defendant used nylon to tie the victim's hands and legs and then had sexual intercourse with her. CP 39. Count III involved an instance where the victim had her shirt off and was stroking the Defendant's penis while the two were

sitting on a couch. CP 39.

Prior to trial the State sought, pursuant to ER 404(b), to admit evidence of acts of sexual acts between the Defendant and the victim. CP 37-

39. Specifically, the State explained that the evidence would show that:

In this case, the defendant and victim started having a sexual relationship when she was in seventh grade. The defendant first started attempting to bribe the victim to do sexual favors for him by offering to allow her to wear his leather jacket. He would require her to “stroke” his penis. This continued for several years. The defendant would touch her breasts, French kiss her and rub her vaginal area.

The defendant began having sexual intercourse with the victim when she was 15 or 16. This continued past her 18th birthday. The last incident that she recalled occurred the day before she reported this abuse. She was 18 at the time. On April 8, 2010, she was in her parent’s bed and asked the defendant if they could just cuddle. The defendant snapped at her and she stroked him first. He then got on top of her and had vaginal and anal intercourse with her. On April 9, 2010, the defendant was viewing porn on his computer. The victim took a shower and began getting ready for school. The defendant asked her to sit next to him and she stroked the defendant’s penis and gave the defendant oral sex. The defendant ejaculated in her mouth and the victim went to the kitchen to drink some grape juice to get the taste out of her mouth.

She also remembers an incident that occurred when she was 15 or 16 in Mount Vernon. The defendant was driving a bus full of kids to a horse camp. The defendant stopped at a gas station and convinced the victim to stroke him in the restroom. The victim was able to stop the incident by telling the defendant she heard someone coming.

The victim indicates that the defendant usually takes his clothes off and walks around the house in his bathrobe. During many of the prior sexual incidents, the defendant was

wearing the bathrobe before and after the sexual contact. She also indicated that the defendant and the victim had sex several days a week over the last several years. Recently, the defendant has been forcing the victim to have sex with him by telling her that she will get in trouble for having sex with her boyfriend who was 2 years younger than her if she refuses. He also has naked pictures of the victim that the victim sent out over the internet. He frequently tells the victim that she will get in trouble for sending these photos over the internet unless she has sex with him.

Megan Inslee from the Washington State Patrol Crime lab tested the defendant's bathrobes for both the victim and defendant's DNA. She found a mixed sample of the defendant's sperm with the victim's DNA on the bathrobe.

CP 38-39. The State argued that this evidence of the Defendant's prior sexual contact with the same victim was admissible to show that the Defendant had a lustful disposition towards the victim. CP 38, *citing State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Guzman*, 119 Wash.App. 176, 182, 79 P.3d 990 (2003).

The defense conceded that evidence regarding prior sexual contact with the same victim has generally been found to be admissible. RP 35. The defense also conceded that the proposed evidence in the present case did demonstrate a lustful disposition toward the victim. RP 35. The defense, however, argued that the evidence should not be admitted because the prejudicial value of the evidence was too high. RP 35.

After hearing argument on the proposed evidence, the trial court gave the following ruling,

Well, I am satisfied that based upon the state's presentation, and given that it's presented that this is in fact the testimony that would be offered by the alleged victim, that assuming that is the case, she would testify to the same, that there is a preponderance of the evidence in this case of sexual acts as described by the prosecutor in its summary. So I am making that specific finding that there is a preponderance of the evidence that these acts occurred. The purpose, under 404(b), would be to show lustful disposition, and I don't believe there's any argument that the case law specifically allows for that in cases such as that which is charged.

Finally, the question is whether or not the prejudicial value outweighs the probative value. It is prejudicial certainly, but I do believe the probative value is also very high as well in light of the charge, and it does show the lustful disposition. So, I am finding that this evidence is admissible under 404(b) and that the prejudicial value doesn't outweigh the probative value. So that's my determination on that.

RP 40.

At trial, M.B.O.W. testified that her birth date was October 8, 1991. Sometime prior to the beginning of seventh grade M.B.O.W. moved to a home on Jefferson Road in Kingston, Washington, where she lived until approximately 6 months after her 18<sup>th</sup> birthday. RP 96-97. M.B.O.W.'s mother, Karen Burton and the Defendant (M.B.O.W.'s stepfather) also lived at the Jefferson Road residence. RP 96-97.

Around the time that M.B.O.W. was in the seventh grade the Defendant began to have sexual contact with her. RP 99-100. M.B.O.W explained that initially the Defendant asked her to touch his penis but she declined. RP 100. The Defendant also offered to give her a leather jacket, but M.B.O.W. declined. RP 100.

Later, however, the Defendant did have sexual contact with M.B.O.W. RP 100. M.B.O.W. described that in a number of instances the Defendant would grope her chest and have her stroke his penis. RP 101. The Defendant would also “french” kiss M.B.O.W., and on some occasions he would touch her vagina. RP 101-02. These events usually took place while M.B.O.W.’s mother was working a graveyard shift at a gas station mini-mart. RP 102.

When M.B.O.W. was 15 or 16 the sexual contact increased to sexual intercourse. RP 101-02. M.B.O.W. described that eventually the Defendant was having sexual intercourse with her almost every night (or every other night) that her mother was working. RP 104.

In one specific instance around November of 2008, the Defendant and M.B.O.W. were sitting on a couch while M.B.O.W.’s mother was asleep in bedroom. RP 103. The Defendant had M.B.O.W. take off her shirt and she was stroking the Defendant’s penis. RP 103. M.B.O.W.’s mother then

walked into the room. RP 103. An argument ensued and the Defendant was kicked out of the house for several days. RP 103. The Defendant, however, was allowed to move back into the house, and the sexual contact continued. RP 104. M.B.O.W. explained that the frequency of the sexual contact slowed a little bit, as the Defendant was careful so that M.B.O.W.'s mother wouldn't catch them. RP 104. M.B.O.W. also testified that on several occasions she told her mother about what was going on, but that her mother responded by saying "I have to catch him." RP 104.

At trial M.B.O.W. also described several specific instances of sexual contact in more detail. For instance, she described that in one instance the Defendant taped her hands together and taped them to the bed frame above her head. RP 105. The Defendant then had sexual intercourse with her. RP 106. M.B.O.W. explained that this event took place before she turned 18. RP 105-06.

On another occasion the Defendant tied M.B.O.W.'s arms and legs to the bed frame using some sort of nylon and then had sexual intercourse with her. RP 106. This instance also took place before M.B.O.W. turned 18. RP 106.

In April of 2010 M.B.O.W. eventually reported the abuse to law enforcement. RP 108. M.B.O.W. explained that the night before she made

the report she had had sexual intercourse with the Defendant. RP 110. Her mother had gone to work and while she was gone the Defendant had had her stroke his penis. RP 110. The contact then shifted to vaginal and anal intercourse. RP 110. M.B.O.W. also testified that the Defendant put on a bath robe after he had had intercourse with her that night. RP 112. M.B.O.W. testified that over the course of her contacts with the Defendant they frequently had vaginal and anal intercourse, and M.B.O.W. explained that she preferred anal sex since the Defendant had a “tendency not to use a condom and I was afraid of getting pregnant.”

The following day M.B.O.W. told a friend named “Lily” about what had been taking place. RP 108. This friend told M.B.O.W. that she would report the abuse if M.B.O.W. didn’t tell the school officer about what had taken place. RP 108. M.B.O.W. then reported the abuse to a school resource officer and went to a hospital for a sexual assault examination. RP 109. M.B.O.W. also spoke with Detective Blankenship of the Kitsap County Sheriff’s Office about the abuse. RP 64-65, 109. M.B.O.W. also told the Detective about a sex toy that the Defendant had purchased for her. RP 109.

Detective Blankenship applied for, and obtained, a search warrant for the Defendant’s home. RP 65. In the subsequent search, Detective Blankenship located and seized several bathrobes, a marijuana pipe, and the “sex toy” described by M.B.O.W. RP 77-79. At trial, the Defendant

acknowledged that he purchased the sex toy for M.B.O.W. RP 313.

A bathrobe seized from the Defendant's room was later tested by Megan Inslee, a forensic scientist at the Washington State Patrol Crime Laboratory. RP 169. Several areas of "white staining" were found on the inside of the bathrobe, and a swab was collected from one of those areas. RP 190. Further testing revealed the presence of sperm and a mixed DNA profile containing a male component and a female component. RP 190-91. The male DNA component matched the DNA typing profile of the Defendant. RP 191. The female component matched the DNA typing of M.B.O.W. RP 191.

### **III. ARGUMENT**

**A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEFENDANT'S UNCHARGED SEXUAL ABUSE OF THE VICTIM PURSUANT TO ER 404(B) BECAUSE THE EVIDENCE DEMONSTRATED THAT THE DEFENDANT HAD A LUSTFUL DISPOSITION TOWARD THE VICTIM AND THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED THE DANGER OF UNFAIR PREJUDICE.**

The Defendant argues that the trial court abused its discretion in admitting evidence or prior bad acts pursuant to ER 404(b). App.'s Br. at 24. This claim is without merit because the trial court properly admitted the evidence under the lustful disposition exception to ER 404(b).

A trial court's ER 404(b) determination is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Under ER 404(b), evidence of prior bad acts is inadmissible to prove character in order to show conformity with them. ER 404(b); *State v. Kilgore*, 147 Wn.2d 288, 291-92, 53 P.3d 974 (2002). But such evidence may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. ER 404 (b); *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995); *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

In order to admit evidence of previous bad acts, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence, (2) identify the purpose for admitting the evidence, (3) find the evidence materially relevant to that purpose, and (4) balance the probative value of the evidence against any unfair prejudicial effect. *Kilgore*, 147 Wn.2d at 292, 53 P.3d 974.

Regarding this last factor, Washington courts have noted that a trial judge has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997)(citing *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996)). In addition, courts will generally find that probative value is substantial in cases where there is very little proof that sexual abuse has

occurred, particularly where the only other evidence is the testimony of the child victim. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014, 180 P.3d 1291 (2008); *State v. Russell*, 154 Wn. App. 775, 785, 225 P.3d 478 (2010). Furthermore, a trial court's balancing of probative value against prejudicial effect is reviewed for an abuse of discretion. *Sexsmith*, 138 Wn. App. at 506, 157 P.3d 901. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Under Washington law, evidence of a defendant's prior acts of sexual abuse against the same victim is routinely held to be admissible as evidence of a defendant's lustful disposition toward the victim. *See, State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991) ("This court has consistently recognized that evidence of collateral sexual misconduct may be admitted under Rule 404(b) when it shows the defendant's lustful disposition directed toward the offended female"); *State v. Guzman*, 119 Wn. App. 176, 79 P.3d 990 (2003) (rejecting evidence that such evidence was unfairly prejudicial).

In the present case the Defendant conceded that the proposed evidence demonstrated a lustful disposition towards the victim and that such evidence was generally admissible. RP 35. Although the Defendant argued that the danger of prejudice was too high, the trial court disagreed. RP 40. As the trial court's ruling was consistent with well-established caselaw regarding the

lustful disposition exception to ER 404(b), the Defendant has failed to show that the trial court abused its discretion in admitting the evidence at issue.

In addition, the State alleged a statutory aggravating factor that the offenses were committed as part of an ongoing pattern of sexual abuse. CP 22. Thus, the uncharged instances of abuse were clearly relevant to this aggravating factor. Furthermore, RCW 9.94A.537 provides that facts supporting aggravating circumstance shall be presented to the jury and that evidence regarding the aggravating factor of an ongoing pattern of sexual abuse “shall be presented to the jury during the trial of the alleged crime.”

For all of these reasons, the Defendant has failed to show that the trial court abused its discretion in admitting the evidence at issue.

**B. THE DEFENDANT’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT BECAUSE: (1) THE DEFENDANT CANNOT SHOW THAT TRIAL COUNSEL’S FAILURE TO OBJECT WAS NOT A LEGITIMATE TRIAL STRATEGY (DESIGNED TO NOT HIGHLIGHT THE EVIDENCE AT ISSUE); AND (2) THE DEFENDANT HAS FAILED TO SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL’S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT.**

The Defendant also argues that he received ineffective assistance of

counsel at trial because his trial counsel failed to object to the brief testimony regarding marijuana pipes. App.'s Br. at 16. This claim is without merit because the Defendant cannot show that trial counsel's failure to object was not a legitimate trial strategy (designed to not highlight the evidence at issue), nor can he show that but for counsel's failure to object there is a reasonable probability that the result of the trial would have been different had the evidence not been admitted

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Furthermore, if defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. *Strickland*, 466 U.S. at 687; *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

In the present case two officers did mention that marijuana pipes were seized from the bedroom shared by the Defendant and Karen Burton, but the mention of the pipes was brief and no more information was provided regarding where exactly the pipes were found in the bedroom and no information was provided regarding whose pipes they were. RP 77, 157. In addition, there was no testimony that the pipes had ever been used nor was there any actual marijuana recovered.

Given this brief and somewhat ambiguous testimony, it could have been counsel's legitimate trial strategy to avoid objecting to these remarks because an objection would have highlighted the remarks in the minds of the jury. As such, defense counsel's failure to object to these brief comments cannot form the basis of an ineffective assistance claim. This is especially true in light of the strong presumption that counsel's representation was effective.<sup>1</sup>

In addition, the Defendant's ineffective assistance of counsel claim must fail because he cannot show prejudice. In order for his claim to prevail the Defendant must demonstrate that the result of the trial would have been different had the evidence not been admitted. As the brief comments at issue

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<sup>1</sup> The Defendant's claim regarding his counsel's failure to request a limiting instruction must also fail, as trial counsel could have legitimately believed that a limiting instruction would have unnecessarily highlighted the evidence. A limiting instruction, of course, would not have been required if an objection to the testimony had been raised and the testimony had

only mentioned that marijuana pipes were found in room the Defendant shared with another, and because there was no mention that actual marijuana was found, the Defendant simply cannot show that result of the trial would have been different had the evidence not been admitted. In this day an age where marijuana (let alone a marijuana pipe without any actual marijuana in it) is becoming increasingly ubiquitous, it cannot be reasonably concluded that such brief testimony about the mere presence of marijuana pipes would somehow shock and appall a jury into finding a defendant guilty of multiple count of incest when it would other reach a contrary finding.

In short, the Defendant's claim of ineffective assistance must fail because he cannot show that trial counsel's failure to object was not a legitimate trial strategy designed not to draw attention to or highlight the evidence at issue, nor can he show that but for counsel's failure to object there is a reasonable probability that the result of the trial would have been different had the evidence not been admitted.

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been stricken.

**C. THE DEFENDANT'S CLAIMS OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO PERMIT A RATIONAL TRIER OF FACT TO FIND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES BEYOND A REASONABLE DOUBT.**

The Defendant next claims that the evidence was insufficient to support his conviction. App.'s Br. at 28. This claim is without merit because, viewing the evidence in a light most favorable to the State, the evidence was sufficient to permit a rational jury to find that the State had proved the essential elements of the charged offenses.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A

reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

In the present case, the Defendant's sole argument regarding the sufficiency of the evidence is a claim that the testimony of M.B.O.W. was not credible. App.'s Br. at 30. As outlined above, however, credibility determinations are for the trier of fact and are not subject to review. *Camarillo*, 115 Wn.2d at 71. The Defendant's claims, therefore, must fail. M.B.O.W.'s testimony outlined all of the elements of the charged offense, and the Defendant has not claimed otherwise. Thus, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the Defendant guilty of the charged offenses. That is all the law requires.

**D. THE TRIAL COURT DID NOT ABUSE ITS CONSIDERABLE DISCRETION BY IMPOSING AN EXCEPTIONAL SENTENCE AFTER THE JURY HAD FOUND THAT A STATUTORY AGGRAVATING FACTOR APPLIED TO THE DEFENDANT'S CRIMES.**

The Defendant next claims that the trial court abused its discretion in imposing an exceptional sentence. App.'s Br. at 30. This claim is without merit because the jury's finding of an aggravating factor authorized the trial court to impose any sentence up to the statutory maximum and the Defendant

has failed to show that the trial court abused its considerable discretion when the Defendant's abuse of the victim occurred repeatedly over a period of years.

Pursuant to RCW 9.94A.537(6), when an aggravating factor is found by the jury, the trial court is authorized to impose an exceptional sentence up to the statutory maximum sentence. A jury's finding that any single aggravating factor was proved establishes the facts legally essential to expose the defendant to the statutorily-authorized sentence for the crime committed. *State v. Williams*, 159 Wn.App. 298, 316, 244 P.3d 1018 (2011). In addition, once a jury finds that a statutory aggravating factor applies, a trial court is authorized to sentence the defendant to a term of confinement up to the statutory maximum and does not “*need to make any additional findings* in order to constitutionally impose such a sentence.” *Williams*, 159 Wn.App. at 318 (emphasis in original), *citing Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Furthermore, although written findings and conclusion are required when a trial court imposes an exceptional sentence, this Court has held that failure to enter the findings is harmless when the trial court's oral ruling was sufficiently clear to facilitate effective appellate review, such as when the court states the that exceptional sentence is based on an aggravating factor found by the jury. *State v. Bluehorse*, 159 Wn.App. 410, 423, 248 P.3d 537

(2011)(although trial court failed to enter written findings regarding the exceptional sentence, the error was harmless because trial court stated that jury's finding of the gang aggravator supported imposition of an exceptional sentence). In addition, when the trial court makes an oral statement of this nature, a remand for entry of written findings and conclusions is unnecessary. *Bluehorse*, 159 Wn.App. at 423.

In the present case the jury found that the offenses were committed as part of an ongoing pattern of sexual abuse. CP 22. At sentencing the trial court addressed the Defendant and offered, among other things, the following explanation of her sentence,

I believe that you have greatly affected your daughter – your stepdaughter forever. She was a young teenager, and this activity went on for a long time. And, in fact, it was evidenced by the special verdict form as the jurors determined that the crimes were part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time. That is what the jury found.

So this child – that is all that she was. She was a child and was subjected to your sexual abuse time and time and time again, year upon year upon year. It just went on and on, and one can only imagine how that would affect her psyche, and how it would affect her impressions of men and women, relationships with men in the future. It's all going to be impacted because of your selfish acts. That is all I can say. It is your selfishness. You put yourself before your daughter.

RP (7/22/2011) 13-14.

This statement from the trial court, which specifically quotes the aggravating factor found by the jury, is sufficiently clear to facilitate effective appellate review, and any error in failing to enter written findings was harmless given the detailed oral ruling from the court. Furthermore, a remand for entry of written findings is unnecessary since it would clearly be nothing more than a mere formality.

The Defendant finally argues that the trial court abused its discretion by imposing an exceptional sentence that was clearly excessive. App.'s Br. at 33. This claim is without merit, however, since the jury's finding of an aggravating factor authorized an exceptional sentence and the Defendant has failed to show that the judge abused its discretion by imposing the exceptional sentence given the specific facts of this case.

The length of an exceptional sentence will not be reversed as clearly excessive absent an abuse of discretion. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) (citing *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)). A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or an action no reasonable judge would have taken. *Oxborrow*, 106 Wn.2d at 531. Stated another way, a sentence is clearly excessive if "no reasonable person would impose it." *State v. Creekmore*, 55 Wn.App. 852, 863, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990); *see also*, *State v. Ross*, 71 Wn.App. 556,

569, 861 P.2d 473 (1993).

In the present cast the Defendant has not cited to any authority that would indicate that the superior court abused its discretion when it entered the exceptional sentence. Furthermore, the record (when viewed as a whole) clearly demonstrates that the trial court did not abuse its considerable discretion by imposing the sentence that it did. To the contrary, as the trial court outlined, the victim in the present case was subjected to the Defendant's sexual abuse "time and time and time again, year upon year upon year." Given these facts, the Defendant has failed to show that the trial court abused its considerable discretion in imposing the sentence it did.

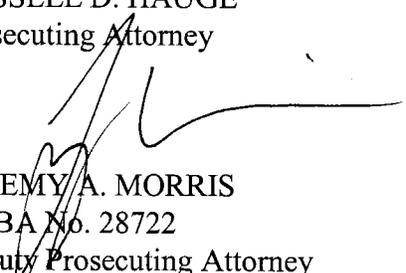
#### **IV. CONCLUSION**

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED June 5, 2012.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

# KITSAP COUNTY PROSECUTOR

## June 05, 2012 - 12:25 PM

### Transmittal Letter

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Case Name: State v. Wayne Burton

Court of Appeals Case Number: 42414-2

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