

NO. 44709-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

REBECCA JEAN BALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00270-1

BRIEF OF RESPONDENT

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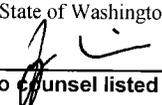
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED January 20, 2014, Port Orchard, WA 
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in holding that the Defendant had failed to demonstrate insanity by a preponderance of the evidence when the record did not demonstrate that the Defendant was insane under Washington Law?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Rebecca Jean Bale, was charged by information filed in Kitsap County Superior Court with one count of child molestation in the first degree. CP 1. The Defendant filed a “Motion for Acquittal by Reason of Insanity.” CP 67. A hearing was held on this motion, and the judge ultimately ruled that the Defendant had failed to prove by a preponderance of the evidence that she was unable to tell right from wrong or that she was unable to perceive the nature and quality of her acts. CP 10-11. A bench trial on stipulated facts was then held, and the trial court found the Defendant guilty of the charged offense. CP 12, 15. The trial court then imposed an exceptional sentence below the standard range, based on the Defendant’s mental health issues. CP 26; 36-37.¹ This appeal followed.

B. FACTS

The 8 year old victim in this case, K.B., lived with her mother in an apartment in Bremerton. CP 17-18. The Defendant lived in an upstairs apartment in the same complex and occasionally left candy for K.B. CP 18. On February 15, 2012, the Defendant asked K.B.'s mother if K.B. could come up to her apartment for some candy. CP 18, 20. The mother agreed, and K.B. went to the Defendant's apartment. CP 18, 20.

When the Defendant and K.B. went into the Defendant's apartment, the Defendant closed and locked the door behind them. CP 20. The Defendant told K.B. to sit on the couch, and K.B. did so. CP 20. The Defendant then told K.B. to "sit back" on the couch, but K.B. said that she did not want to do so. The Defendant then pushed K.B. back on the couch. CP 20. The Defendant then removed her own pants and K.B. saw the Defendant's genitalia, as the Defendant was not wearing any underwear. CP 21. The Defendant then pulled K.B.'s pants down to her knees, but K.B. pulled them back up. CP 21. The Defendant then pulled K.B.'s pants down a second time, but K.B. stood up and again pulled up her pants. CP 21. K.B. told the Defendant to let her go and ran to the door. CP 21. The Defendant told her to come back, but K.B. ran down the stairs to her home. CP 21. The Defendant then came downstairs and sat

¹ The State has not filed an appeal on the issue of the exceptional sentence.

outside of the door to K.B.'s apartment. CP 21. K.B. told her mother that the Defendant had forced her into a chair and had attempted to pull her pants off. CP 18. K.B.'s mother called the police. CP 18.

Bremerton Police officer Lawrence Green arrived at the apartments and contacted K.B.'s mother. CP 18-19. After being advised of the situation, Officer Green went to the Defendant's apartment to question her about the allegations. CP 18. Officer Green knocked on the Defendant's door several times and announced himself as a police officer. Id. After several moments, the Defendant answered the door, wearing only a bathrobe. Id. Officer Green asked the Defendant for some identification, and the Defendant advised that she did not have any identification and that her name was "Lisa Paske." Id. When Officer Green ran that name, however, he found that there were no records for that name. Id. Officer Green asked the Defendant for her real name and the Defendant again said her name was Lisa. Id. Officer Green believed that the Defendant's behavior indicated she was not being truthful, and he noticed some mail on the Defendant's floor with the name "Rebecca Bale." Id. When Officer Green ran that name he found that physical description of "Rebecca Bale" matched the Defendant. Id.

Officer Green then Mirandized the Defendant and asked her about giving candy to the little girl. CP 18. The Defendant denied knowing any

little girl. Id. Officer Green asked the Defendant about the little girl that had just been in her apartment, and the Defendant continued to deny knowing any little girl. Id. When Officer Green advised the Defendant that he had seen her knocking on the little girl's apartment several minutes earlier, the Defendant changed her story and suddenly remembered the girl, but she denied that the little girl had been in her apartment. Id. After further questioning, however, the Defendant admitted that the little girl had been in her apartment. Id. The Defendant said she was giving the girl some cereal and that they were sitting on the couch watching the movie "Pirates of the Caribbean." Id. The Defendant denied trying to remove the girl's pants, and said "I did not touch her." Id. Later, however, the Defendant said she did it, but then quickly changed her story and denied doing anything wrong. Id. Officer Green then specifically asked the Defendant why she had pushed the girl on the couch and attempted to pull her pants down, and the Defendant said that she had done this but that she did not touch the girl. CP 18-19. The Defendant, however, again quickly changed her story and said she had not done anything. CP 19.

After being charged the Defendant filed a "Motion for Acquittal by Reason of Insanity." CP 67. At the hearing on this motion the Defendant presented testimony from Dr. Mark Whitehill, who is a psychologist and sex offender treatment provider. RP (11/28) 4. Although Dr. Whitehill

stated that he had testified “well over 100 times,” he explained that it was “fairly rare” for him to testify about whether someone was legally insane. RP (11/28) 4. Dr. Whitehill testified that he met with the Defendant and that the Defendant told him that she received messages from the television while she was watching the movie “Pirates of the Caribbean.” RP (11/28) 11. The Defendant further stated that the message she received was to “rape, pillage, and plunder.” RP (11/28) 11. The Defendant decided that she couldn’t pillage and plunder, but she thought she might be able to perpetrate a rape, so she had K.B. come to her apartment where she closed and locked the door and tried to place her hand down the child’s pants and underpants. RP (11/28) 12.

Dr. Whitehill testified that the Defendant had been previously diagnosed as suffering from a “schizoaffective disorder, bipolar type,” and Dr. Whitehill believed that was an accurate diagnosis. RP (11/28) 14.

With respect to the issue of insanity, Dr. Whitehill acknowledged that it was his opinion that the Defendant was able to tell right from wrong, and thus she did not meet that prong of Washington’s insanity test. RP (11/28) 34-35. Dr. Whitehill, however, testified that in his opinion the Defendant was insane because she was unable to perceive the nature and quality of her act. RP (11/28) 27-28. In explaining this conclusion, Dr. Whitehill testified that with respect to the word “quality” (in the phrase

“nature and quality”) the Defendant suffered from delusional beliefs, and that she was “unable to recognize either the legal consequences of her behavior, or the level of harmfulness of her behavior.” RP (11/28) 28.

With respect to the term “nature” in the phrase “nature and quality,” Dr. Whitehill testified that if “nature” is defined as to know what one is doing, then there was evidence that the Defendant did know what she was doing in the sense that she understood that it was a child that she was attempting to engage sexually. RP (11/28) 28-29. Thus Dr. Whitehill agreed with the conclusion of the State’s expert who had found that the Defendant knew what she was doing. RP (11/28) 29-30. Dr. Whitehill further acknowledged that the Defendant was able to perceive that the victim was a little girl and that she was attempting to molest a little girl. RP (11/28) 35-36. Dr. Whitehill also specifically conceded that the Defendant was able to perceive her physical acts and that the Defendant “knew the physical nature of the act.” RP (11/28) 37, 39, 45.

The State’s expert, Dr. Ray Hendrickson, testified that the Defendant “certainly had the capacity to know what she was doing at the time.” RP (11/28) 56. Thus, Dr. Hendrickson testified, “I think she certainly was able to perceive the nature of the act, meaning she knew what she was doing.” RP (11/28) 57. With respect to the “quality” of her acts, Dr. Hendrickson explained in his report and testimony that

although it was apparent that the defendant had some impairment in this respect, he could not say definitively that she was unable to perceive the quality of her acts. RP (11/28) 58-61. Rather, it appeared that the Defendant was “conflicted” about the ramifications of her actions under her delusional belief system and in the real world. RP (11/28) 58-61; CP 63. Dr. Hendrickson was able to state that he was “reasonably convinced” that the Defendant’s ability to rationally foresee the consequences of her actions was significantly limited. CP 64.

The trial court issued an oral ruling on the insanity issue on November 30, 2012. RP (11/30) 2. The trial court explained that Dr. Whitehill’s position was that the Defendant was unable to appreciate the harmfulness of her acts or the impact the acts would have on the child, while Dr. Hendrickson was of the opinion that he could not reach a definitive conclusion regarding whether the Defendant was able to perceive the quality of her act. RP (11/30) 2-3. The trial court then explained,

Putting these two doctors’ opinions together against the legal definition of “unable” as defined in the case law, I think particularly the *Jamison* case, the standard of “unable” is incapable, not merely a limited capacity, so the defendant must be under circumstances that they have lost contact with reality so completely that they are beyond the influence of the law, and I think in Washington it almost requires a psychotic break or something of that sorts. Significant impairment is not enough to meet the definition

of “unable.”

Dr. Hendrickson agrees that she had significant impairment in her perceptions, but he could not conclude she was unable to understand what was going on. And you know, looking at the testimony, I think it's apparent that she knew there were going to be consequences to her. She went down to the girl's apartment after the girl ran out, she waited there, she lied to law enforcement about knowing the girl, and if she was operating under the delusion that the act was justified to prevent harm to herself or to her family, I don't believe her – I believe her acts would have been different immediately following the attempted molestation, and so I have concluded she was able to perceive the nature of her acts as well as the quality of the acts. She had not lost contact with reality so completely that she was beyond the influences of law or social mores, and I will find she was able to perceive this.

And I think under the law in Washington, there is a continuum, it's not a black and white definition, but it's a continuum, and in this case the defense has not proven by a preponderance of the evidence that she was unable to perceive the nature and quality of the acts. And while she may be found to have had significant impairment, it was not to the level of unable to perceive, so based on that I am denying the motion[.]

RP (11/30) 3-5.

The trial court also entered written findings of fact and conclusions of law in which the court noted that the Defendant has failed to prove by a preponderance of the evidence that she was unable to perceive the nature and quality of her acts. CP 11.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE DEFENDANT HAD FAILED TO DEMONSTRATE INSANITY BY A PREPONDERANCE OF THE EVIDENCE BECAUSE THE RECORD DID NOT DEMONSTRATE THAT THE DEFENDANT WAS INSANE UNDER WASHINGTON LAW.

Bale argues that the trial court erred in denying her motion for acquittal on grounds of insanity. App.'s Br. at 5. This claim is without merit because the trial court below correctly found that the record did not demonstrate insanity by a preponderance of the evidence. Rather, the undisputed testimony showed that the defendant was able to tell right from wrong and was able to perceive the nature of her acts. The trial court, therefore, did not err in denying the Defendant's motion.

A trial court's denial of a motion for an insanity acquittal is a determination of fact. *State v. Sommerville*, 111 Wn.2d 524, 533, 760 P.2d 932 (1988). A reviewing court is limited to considering only whether the lower court's conclusions of fact are supported by substantial evidence. *Sommerville*, 111 Wn.2d at 534. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Sommerville*, 111 Wn.2d at 534; citing *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987).

In the present case the trial court concluded that the Defendant was able to tell right from wrong and was able to perceive the nature and quality of her acts. As substantial evidence supports the trial court's conclusion, the Defendant has failed to show any error.

1. Washington uses the M'Naghten insanity test, a rigorous test that requires a defendant to be completely unable to perceive the nature and quality of her act. A mere limitation in a defendant's ability to perceive nature and quality, even a significant limitation, is insufficient to demonstrate insanity under the Washington test.

Since 1975, the Washington test for insanity has been codified in RCW 9A.12.010 and states as follows:

To establish the defense of insanity, it must be shown that:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He was unable to perceive the nature and quality of the act with which he is charged; or

(b) He was unable to tell right from wrong with reference to the particular act charged.

(2) The defense of insanity must be established by a preponderance of the evidence.

RCW 9A.12.010.

In addition, Washington applies the M'Naghten insanity test very rigorously. *State v. McDonald*, 89 Wn.2d 256, 571 P.2d 930 (1977). Furthermore, Washington courts (even after 1975) have consistently held that,

“It [the insanity defense] is available only to those persons who have lost contact with reality so **completely** that they are beyond any of the influences of the criminal law.”

State v. Jamison, 94 Wn.2d 663, 665, 619 P.2d 352 (1980) (emphasis in original); *See also, Crenshaw*, 98 Wn.2d at 797 (same quote); *McDonald*, 89 Wn.2d at 272 (same quote); *State v. Rice*, 110 Wn.2d 577, 601, 757 P.2d 889 (1988) (same quote).

The Washington Supreme Court has also explained that the statute requires more than a mere showing that a defendant is significantly limited in his or her ability to perceive. Rather, the statute requires that a defendant “be **unable** to perceive the nature and quality of the charged act.” *Jamison*, 94 Wn.2d. at 665 (emphasis in original).

In *Jamison*, the defendant relied upon the testimony of a clinical psychologist who testified that defendant was “significantly limited in his ability to perceive the nature and quality of the acts for which he was charged.” *Jamison*, 94 Wn.2d at 665. On cross-examination, however, the psychologist said he could not conclude that defendant was completely unable to perceive the nature and quality of these acts. *Jamison*, 94 Wn.2d at 665. The trial court, the Court of Appeals, and the Supreme Court all held that this evidence was insufficient to support a jury instruction on insanity. The Supreme Court specifically held that this testimony did not

meet the statutory criteria, noting that,

“RCW 9A.12.010(1)(a) requires that defendant be unable to perceive the nature and quality of the charged act. The psychologist testified that defendant was significantly limited in his ability to so perceive. **Being limited, even significantly, does not equate with the statutory standard of being unable to perceive. Unable means incapable, not merely possessed of a limited capability.**

We have held that the requirement for application of the insanity defense is very rigorous. It is available only to those ‘who have lost contact with reality so completely that they are beyond any of the influences of the criminal law.’ The trial judge was correct when he ruled that the testimony wholly failed to meet the statutory test.”

Jamison, 94 Wn.2d at 665 (citations omitted) (emphasis added). Thus, based on the plain language of the statute and the caselaw interpreting that statute, there can be no question that the Washington insanity test is a rigorous test that (under the first prong) requires a defendant to be completely unable to perceive the nature and quality of her act. A defendant who has a limitation in his or her ability to perceive nature and quality, even a significant limitation, is simply not insane under the Washington test.

Although the Washington insanity statute does not define the concept of “nature and quality,” a common sense reading of the plain language of the statute demonstrates that a defendant is considered insane if she is unable to perceive what it is that she is physically doing (that is, the nature and quality of his act).

Because numerous jurisdictions around the country use the M’Naghten test, Washington courts have routinely looked to other authorities for assistance in interpreting the contours of the modern insanity statute. *See, e.g., State v. Crenshaw*, 98 Wn.2d at 794-805(examining the meaning of the word “wrong” as used in the M’Naghten test and examining authorities from around the country on this issue).²

Although the Washington Supreme Court has not previously specifically addressed the definition of “nature and quality,” other authorities from around the country have examined that phrase and have concluded that the phrase “nature and quality of the act” deals solely with the issue of whether a defendant is able to perceive the *physical* nature and quality of his acts. For example, Wharton’s Criminal Law discusses the two M’Naghten prongs of “nature and quality” and “wrongfulness” and states that these concepts have been explained as follows:

The first portion relates to an accused who is psychotic to an extreme degree. It assumes an accused who, because of mental disease, did not know the nature and quality of his act; he simply did not know what he was doing. For example, in crushing the skull of a human being with an iron bar, he believed that he was smashing a glass jar. The latter portion of M’Naghten relates to an accused who knew the nature and quality of his act. He knew what he was

² No Washington court has ever held that “nature and quality” as used in RCW 9A.12.010 differs from its use in the M’Naghten test (which has been adopted in numerous other states).

doing; he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong.

2 Charles E. Torcia, Wharton's Criminal Law § 101 at 17 (15th ed.1994).³

Similarly, noted scholar Wayne Lafave has explained that the phrase “nature and quality” has been typically held to mean that “the defendant must have understood the physical nature and consequences of the act,” and that, by way of example, this requires merely that “an accused must have known that holding a flame to a building would cause it to burn, or that holding a person's head under water would cause him to die.” Wayne Lafave, 1 Substantive Criminal Law § 7.2 (2d ed. 2003). Lafave has also noted that this understanding of the phrase has long been held. *Id.*

Other courts have also held that a defendant has failed to satisfy the “nature and quality of the act” prong of the insanity defense when the evidence shows that a defendant was in fact aware that he was committing a violent act against a human being (as opposed to acting under some delusion that prevented him from understanding the physical nature and

³ See also, “Filling in the holes of the insanity defense: the Andrea Yates case and the need for a new prong,” 10 Va. J. Soc. Pol'y & L. 383, n 53 (2003)(noting that “**A person who does not know the ‘nature and quality’ of her actions is one who, because of severe mental illness, cannot even understand what she is physically doing or what people/objects she is acting upon.** Examples include someone who takes an axe to the head of another person thinking that the head was actually a pumpkin, or someone who squeezes the throat of another person thinking that she was squeezing a doll. *This aspect of the insanity standard is not controversial*”(emphasis added).

quality of his acts). For instance, the Pennsylvania Supreme Court has held that,

“For the Commonwealth to meet its burden of demonstrating that a defendant is legally sane, it most certainly does not have to demonstrate that he or she has a “rational appreciation as well of all the social and emotional implications” or the ability “to measure and foresee the consequences” of the act. As this Court stated long ago in adopting the M’Naghten test in this Commonwealth, “to the eye of reason, every murderer may seem a madman, but in the eye of the law he is still responsible... [T]o constitute a sufficient defense on this ground there must be an entire destruction of freedom of the will...” *Commonwealth v. Mosler*, 4 Pa. 264, 268 (1849). **Contrary to appellant's position, legal sanity is not demonstrated by a murderer's appreciation of the social and emotional implications of the killing nor by his ability to measure and foresee all of the consequences of that act, but rather is demonstrated by the murderer's knowledge that he or she has killed and the knowledge that it was wrong.**

Commonwealth v. Banks, 521 A.2d 1, 15 (Pa., 1987) (emphasis added).
See also, People v. Skinner, 704 P.2d 752, 760 (Cal. 1985) (Where the California Supreme Court explained that when the evidence showed that

the defendant knew that he was committing an act of strangulation that would, and was intended to, kill a human being, the evidence supported the trial court's findings that this defendant was aware of the nature and quality of his homicidal act).⁴

A recent Washington opinion also shows that experts in Washington, at least anecdotally, understand full well that nature and quality means the physical nature and quality of an act. *See, State v. Chanthabouly*, 164 Wn.App. 104, 262 P.3d 144 (2011). In *Chanthabouly*, expert witnesses for the State and defense disagreed about whether the defendant could tell right from wrong. Both agreed, however, that the defendant was able to perceive the nature and quality of his act based upon the fact that the evidence showed that the defendant “knew he was shooting a human being at the time of the act and that the victim could be harmed by this act.” *Chanthabouly*, 164 Wn.App. at 118 n.9.

In sum, Washington employs the M’Naghten insanity test, which requires that a defendant be unable to perceive the nature and quality of his or her act or be unable to tell that the act is right or wrong. Furthermore, the plain language of Washington’s insanity statute as well as the wealth of scholarship from around the country shows that the

⁴ The United States Supreme Court had also recently discussed the M’Naghten test and explained that the “nature and quality” prong “asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing.” *Clark v.*

concept of “nature and quality” means the “physical” nature and quality of the acts.

2. *The Model Penal Code insanity test (which does not include the concept of “nature and quality”) is less rigorous than the M’Naghten test and requires only a showing lacks a “substantial capacity” to “appreciate” the wrongfulness of his actions.*

In the middle part of the 20th Century a number of courts and legislatures decided to adopt the Model Penal Code (MPC) insanity test which was less stringent than the M’Naghten test. Unlike insanity law in Washington (which requires a complete inability to perceive the nature and quality of the charged acts), the MPC test requires only a showing that a defendant lacks a “substantial capacity.” Specifically, the American Law Institute, in its Model Penal Code, sets forth the following standard:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks substantial capacity either to appreciate the criminality [wrongfulness] of his or her conduct or to conform his or her conduct to the requirements of the law.

Model Penal Code § 4.01(1). In addition the Commentary to the Model Penal Code explains that its use of the term “wrongfulness” allows for the inclusion of such concepts as “moral wrongfulness.”⁵

Arizona, 548 U.S. 735, 747, 126 S. Ct. 2709 (2006).

⁵ Specifically, the Commentary to the Model Penal Code explains that states are free to choose

In short, the language of the Model Penal Code and its commentaries clearly demonstrates that the MPC test contains three concepts not found in the Washington Insanity test: namely that,

- 1) Insanity requires only a lack of substantial capacity, not a complete lack of ability;
- 2) The word “appreciate,” which requires an awareness of the “significance” of an act; and
- 3) “Wrongfulness,” which includes the issue of a defendant’s “appreciation of the moral wrongfulness” of the act.

Washington, however, continues to use the M’Naghten insanity test.

3. The Model Penal Code Insanity Test Has Been Rejected in Washington

The Model Penal Code insanity test, however, is not the law in Washington. Prior to the 1975 insanity statute the Washington Supreme Court was asked several times to adopt the Model Penal Code test in place of Washington’s long used M’Naghten test. Each time, however, the Supreme Court rejected the Model Penal Code test. *See, e.g., State v. White*, 60 Wn.2d 551, 593, 374 P.2d 942 (1962) (rejecting the Model

between the term “criminality,” meaning legal wrongfulness, and the term “wrongfulness,” which includes legal and moral wrongfulness. Model Penal Code and Commentary at 164, 169. *See also, State v. Wilson*, 700 A.2d 633, 639 (Conn. 1997)(noting that “The history of the Model Penal Code indicates that “wrongfulness” was offered as a choice so that any legislature, if it wishes, could introduce a “moral issue” into the test for insanity,” citing MPC Commentary at 164 and A.L.I., 38th Annual Meeting, Proceedings (1961) p. 315).

Penal Code insanity test); *State v. Collins*, 50 Wn.2d 740, 752, 314 P.2d 660 (1957) (rejecting several alternative insanity tests including the Model Penal Code’s insanity test).

Furthermore, when the Legislature revamped the criminal code in 1975 it specifically considered a proposal to adopt several of the portions of the Model Penal Code insanity test, yet rejected the MPC test. *See, e.g., State v. Allert*, 58 Wn. App. 200, 207, 791 P.2d 932 (1990) *citing* D. Boerner, *Sentencing in Washington* § 9.12(c)(3), at 9-26 (1985)(stating that the legislature in 1975 “considered and rejected” Model Penal Code §4.01 as an insanity defense standard).

Furthermore, the legislative history from the 1975 enactment of the insanity statute shows that the Legislature specifically considered several of the Model Penal Code’s insanity test provisions, yet rejected them. *See* CP 265-66 (G. Golob and G. Mooney⁶, Revised Criminal Code Training & Seminar Manual (WSCJTC 1976)).⁷

⁶ Washington courts have frequently cited Golob & Mooney’s criminal code manual as a source of the legislative history for the 1975 criminal code. *See, e.g., State v. Saylor*, 36 Wn. App. 230, 235, 673 P.2d 870 (1983); *State v. Bergeron*, 105 Wn.2d 1, 14, 711 P.2d 1000 (1985); *State v. Jackson*, 87 Wn. App. 801, 811, 944 P.2d 403 (1997)(specifically referring to Golob & Mooney’s manual to explain what provisions of the Model Penal Code’s accomplice liability rules were specifically adopted or rejected by the legislature).

⁷ For instance the Orange Code’s proposed insanity test (which was based in part on the Model Penal Code’s insanity test at §4.01) used such phrases as “lacks substantial capacity,” “appreciate,” and “appreciate criminality.” As outlined above, these concepts come directly from the Model Penal Code’s insanity test. The other proposed code considered by the Legislature (the “Prosecutor’s Code”) proposed the M’Naghten test,

In short, there is no dispute that the Washington insanity test is governed by RCW 9A.12.010 and that the Washington legislature has rejected the Model Penal Code's insanity test.

Finally, although the Legislature rejected the Model Penal Code's test and chose instead to adopt RCW 9A.12.010 as the test for the insanity defense, later acts show that the Legislature was sympathetic to the argument that concepts such as a defendant's ability to "appreciate the wrongfulness" of an act should play a role in criminal cases. What the Legislature chose to do, however, was to not include these concepts in the statutory definition of the insanity *defense*, but to create a *mitigating circumstance* that would take account of a defendant's ability to appreciate the wrongfulness of his acts. Thus, the Legislature created RCW 9.94A.535.

Under RCW 9.94A.535 a court, at sentencing, may consider a number of mitigating circumstances when determining the appropriate sentence for a crime. The statute specifically outlines a number of these mitigating circumstances. One of these, RCW 9.94A.535(e) [formerly, RCW 9.94A.390(1)(e)] states that the court may impose an exceptional

which the Legislature eventually adopted with minor changes. For an explanation of the "Orange Code," see *State v. Warfield*, 103 Wn. App. 152, 158, 5 P.3d 1280 (Div. 2, 2000) (Explaining that "When the Legislature enacted the Washington Criminal Code, 'it had before it a precursor code known colloquially as the Orange Code and officially as the proposed Revised Washington Criminal Code....' *State v. Thomson*, 71 Wn. App. 634,

sentence downward when:

“The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.”

The language of this statute, of course, is drawn directly from the Model Penal Code insanity test. The Washington Supreme Court has explained that the mitigating circumstances outlined in RCW 9.94A.535 are often referred to as “failed defenses,” and that “the mitigating circumstances enumerated in RCW 9.94A.390 represent failed defenses.” *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Further, “these ‘failed defense’ mitigating circumstances include . . . mental conditions not amounting to insanity . . . RCW 9.94A.390(1)(e) (capacity to appreciate wrongfulness of conduct was significantly impaired).” *Jeannotte*, 133 Wn.2d at 851. Finally, the Supreme Court noted that,

By allowing failed defenses to be treated as mitigating circumstances, the Legislature recognized there may be “circumstances that led to the crime, even though falling short of establishing a legal defense, that justify distinguishing the conduct” from that in other similar cases.

Jeannotte, 133 Wn.2d at 851, *citing Hutsell*, 120 Wn.2d at 921 (quoting *Boerner*, *supra*, at 9-23).

The existence of RCW 9.94A.535(e) and its use of the Model Penal Code’s language as a mitigating factor further reinforces that fact

643, 861 P.2d 492 (1993)).

that the Legislature has chosen to draw a clear line of demarcation between the insanity defense in Washington and the Model Penal Code's insanity test. While the Washington Legislature chose to reject the MPC test as the test for an insanity defense, it nevertheless allowed that the concepts in the MPC test could be used in one narrow aspect of Washington law, namely in a defendant's request that a court (as opposed to a jury) impose an exception sentence. Thus, the Model Penal Code's insanity test is of no relevance to a jury's determination of guilt in Washington, as the Legislature (and the Courts before it) specifically rejected the Model Penal Code's insanity test.

4. The Evidence in the Present Case

In the present case it was undisputed that the Defendant was able to tell right from wrong, as even the defense expert acknowledged that the Defendant was able to tell right from wrong. RP (11/28) 34-35. It was also undisputed that the Defendant knew what she was doing and was able to perceive that that the victim was a little girl and that she (the Defendant) was attempting to molest the victim. RP (11/28) 28-30, 35-36. Thus the evidence clearly established that the Defendant was able to perceive the "nature" of her acts. This fact alone demonstrates that the Defendant was not insane under Washington law.

As outline above, the Washington insanity test requires a showing

that the Defendant was “unable to perceive the nature **and** quality of the act with which [she] is charged.” RCW 9A.12.010 (emphasis added). The language of this prong of the insanity test is clear and is in the conjunctive: The defendant, at the time of commission of the act, must have been unable to perceive the nature of her actions and must have been unable to perceive the quality of her actions. If the defendant was able to perceive either, then the defendant has failed to establish the threshold statutory elements of the first prong of the M’Naghten test. As the evidence was undisputed that the Defendant in the present case was able to perceive the “nature” of her actions, she has failed to meet her burden of showing insanity.⁸

Even if the court were required to find that the Defendant had a limited ability to perceive, or was to assume for the sake of argument that the Defendant was unable to perceive the “quality” of her acts, this would amount, at best, to a limited ability to perceive the “nature and quality” of her acts. A limited ability to perceive, however, is insufficient to substantiate an insanity defense. *Jamison*, 94 Wn.2d at 665; *Wicks*, 98

⁸ The Defendant argues that a defendant can be found insane if the defendant is unable to perceive the “nature” of her acts **or** is unable to perceive the “quality of her acts. App.’s Br. at 6 (emphasis added). This claim, however, is contrary to the plain language of the statute which does not use the word “or.” Furthermore, the Washington Supreme Court has made it clear that a defendant must show a complete inability to perceive nature and quality. “Being limited, even significantly, does not equate with the statutory standard of being unable to perceive. Unable means incapable, not merely possessed of a limited capability.” *Jamison*, 94 Wn.2d at 665.

Wn.2d at 622. Accordingly, the trial court appropriately ruled that the Defendant had failed to prove that she was insane under Washington law.

In addition, the trial court also looked to the Defendant's actions and noted that the Defendant's actions demonstrated an ability to perceive the "quality" of her actions. Specifically, the trial court noted that the Defendant went to K.B.'s apartment after K.B. had fled, and that the Defendant lied to law enforcement. RP (11/30) 4. These actions, which again were undisputed, demonstrated that the Defendant clearly had some ability to perceive that there were consequences to her actions and showed that the Defendant had not lost contact with reality so completely as to be beyond the influence of the law. RP (11/30) 4.

Given the evidence presented below, the trial court properly determined that while the Defendant had failed to show that she was insane under Washington law. Rather, the Defendant had demonstrated that her "capacity to appreciate the wrongfulness of her conduct was significantly impaired." CP 37. While this was insufficient to warrant a finding of insanity, this finding did authorize the trial court to impose a mitigated exceptional sentence pursuant to RCW 9.94A.535, and the trial court properly imposed an exceptional sentence downward on this basis. CP 36-37.⁹

⁹ *Clark v. Arizona* raises one additional point that must be addressed. In *Clark*, the

Finally, as the credibility of witnesses is always an issue for the finder of fact, the trial court was free to determine that Dr. Whitehill's testimony regarding the Defendant's ability to perceive the "quality" of her actions was not credible. Stated another way, a Defendant is not entitled to an acquittal merely because he or she is able to produce an expert that opines that the Defendant was insane. To the contrary, a finder of fact is always allowed to weigh the credibility of that expert's testimony as he or she sees fit. In the present case the trial court ultimately looked at the Defendant's actions and found that those actions were inconsistent with a complete inability to perceive the nature and quality of her actions. Rather, the trial court found that the Defendant's actions were consistent with the actions of someone who was able to perceive that her actions would have consequences. As this weighing of the evidence and the witness's credibility was entirely within the trial court's prerogative, the

Supreme Court explained that "in practical terms, if a defendant did not know what he was doing when he acted, he could not have known that was performing the wrongful act charged as a crime." *Clark*, 548 U.S. at 753-54. The Supreme further explained that it has been "long-accepted" that the cognitive incapacity (unable to perceive nature and quality) is a subset of the morally incapacitated (unable to tell right from wrong). *Clark*, 548 U.S. at 754. Washington courts have reached a similar conclusion. For instance, in *State v. Thomas*, 8 Wn.App. 495, 500-01. 507 P.2d 153 (1973) the court explained that an "accused's proof that he did not know the nature and quality of his act is a means of proving that he did not know it was wrong." The court went on to note that the phrase "nature and quality" is sometimes omitted altogether; "the underlying theory is that if the accused did not know the nature and quality of his act, he would have been incapable of knowing it was wrong." *Thomas*, 8 Wn.App. at 501. The testimony of the defense expert in the present case (that the defendant was insane under the "nature and quality" prong yet was able to understand that his act was wrong) is impossible according to the US Supreme Court and *Thomas*. This seeming conundrum, however, is explained by the fact the defense expert is not employing a true M'Naghten test. Thus, the seemingly

Defendant has failed to show any error. Rather, the trial court's findings that the Defendant was able to perceive the nature and quality of her acts was supported by substantial evidence. Nothing more is required.

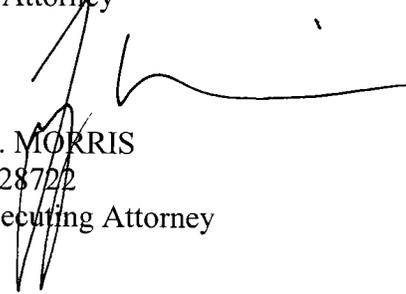
IV. CONCLUSION

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

DATED January 20, 2014.

Respectfully submitted,
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anomalous result is easily explained.

KITSAP COUNTY PROSECUTOR

January 20, 2014 - 10:59 AM

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