

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

NO. 45907-8-II

STATE OF WASHINGTON

Respondent,

vs.

AARON WILLIAMSON

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

BRIEF OF RESPONDENT

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Date: September 16, 2014

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A. RESTATEMENT OF ISSUES PRESENTED

Mr. Williamson was charged with Indecent Liberties with Forcible Compulsion. Both Mr. Williamson and the victim, his stepdaughter, testified. He married the victim's mother when the victim was 4 years old. His 3 year old daughter now lives with Mr. Williamson and her mother. He admitted to committing indecent liberties on her from when she was age 4 until she left the home at age 18. A jury found him guilty as charged. Prior to sentencing he stipulated to anally penetrating her twice when she was 4 or 5 years old. He was denied a SSOSA and sentenced to 17 years incarceration. He now appeals both his conviction and his sentence and raises three issues:

1. Evidence or prior sex offenses are admissible to show lustful disposition and the limiting instruction was adequate.
2. There was no prosecutorial misconduct.
3. The exceptional sentence was supported by the stipulated aggravating factors.

B. STATEMENT OF THE CASE

I. Procedural Facts

On August 19, 2013, Mr. Williamson was charged by information with Indecent Liberties (Forcible Compulsion), a Class A felony. CP 1-2.

A jury trial was held on December 16-18, 2013, and Mr. Williamson was found guilty. CP 42.

A Pre-Sentence report was ordered. The report was filed on January 14, 2014. CP 50-62.

On January 17, 2014, Mr. Williamson was sentenced to an exceptional sentence of 17 years based on aggravators stipulated to by defendant. CP 95-107.

Mr. Williamson timely appealed. CP 109.

II. Substantive Facts

The State charged Aaron Williamson with committing one count of indecent liberties by forcible compulsion against his stepdaughter L. CP 1. The State further alleged the aggravating circumstance that the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 manifested by multiple incidents over a prolonged period of time. CP 1-2.

i. **Pretrial**

Before trial, the State sought to admit evidence that Williamson committed prior acts of sexual misconduct against L. over a 14-year period starting in California when L. was four years

old and continuing in Washington. RP¹ 21-25; CP 111. The State argued the purpose of admitting this evidence under ER 404(b) was to show Williamson's lustful disposition towards L. RP 22-25. According to the State, the evidence was relevant to prove the sexual gratification aspect of the sexual contact element and the forcible compulsion element of indecent liberties. RP 24-25. The State commented that the court could "give a limiting instruction to say that this evidence is only being introduced for the purposes of assisting the jury in determining whether or not the element of sexual contact and forcible compulsion was met." RP 25.

Defense counsel argued the lustful disposition purpose for admitting the evidence was inapplicable because Williamson admitted he inappropriately touched L. on the day of the charged event and on prior occasions. RP 26-27, 29-30; CP 15-16. Counsel requested exclusion of the California incidents because their prejudicial effect outweighed their probative value. RP 27-28; CP 14-15. Counsel raised no objection to the Washington incidents. RP 27-28.

The Prosecutor argued that the evidence of prior sex offenses was necessary to show defendant's lustful disposition

¹ The verbatim report of proceedings is referenced as follows: RP – three consecutively paginated volumes consisting of 12/16/13, 12/17/13, 12/18/13, 1/17/14.

toward the victim in case Mr. Williamson changed his mind about testifying and also to support the aggravator issue at sentencing. RP 32-34.

The court excluded the California evidence as too prejudicial, but admitted the Washington evidence for the purpose of showing lustful disposition. RP 34-38.

ii. Trial Testimony

L. started living with Williamson, her stepfather, when she was about four years old. RP 257. The family moved from California back to Washington around 2005. RP 257, 259. According to L., Williamson had often inappropriately touched her, or tried "to do more," at least a couple times a month in the years leading up to the charged offense. RP 260-61. He would touch her breasts, try to put his hand down her pants, or brush his hand against her butt. RP 261. Sometimes she told him to stop. RP 261-62. There were times that he did not stop and would "try to continue even more." RP 262. Sometimes she did not tell him to stop for fear that he would get mad or "maybe all of a sudden force himself even more on me." RP 262. She recalled a tickling incident where he tried to pull her pants down. RP 262-63. He also came into her room one night and caressed the side of her body. RP 263-64. She

told him "no" on this occasion and he stopped before it progressed. RP 264. On other occasions, she eventually let him take topless photos of her because she was afraid he would get mad or persist until she gave in. RP 264-65.

L. described the event that formed the basis for the indecent liberties charge as follows. In 2011, a short time after Williamson's wife gave birth by caesarian section,² Williamson crawled into L.'s bed and said, "I don't want to hurt mom. Is it okay if we pull your pants down a little so I can get some physical relief? I don't want to go in you but I just want to get some physical relief." RP 266-69. L. said "no." RP 267. He said, "Oh, come on" and, reaching around her, tried to put his hands under her sweatpants. RP 267. He succeeded in putting his hand partway down, but then she put her hand on his to stop him from going further or pulling down her pants.³ RP 267. He applied a little more force and got down to her pubic hairline. RP 267. She tried to use both hands to get him to stop and kept telling him "no" and "stop." RP 267, 269-70. He used a good amount of force. RP 270. She turned away from him so he "wouldn't get down any further." RP 267. After resisting, he either pulled his hand out or she pulled his hand out. RP 357. She rolled

² RP 266.

³ At some point he told her to pull down her pajama bottoms. RP 268. She told him no. RP 268.

around to prevent him from touching her further until he eventually left the room. RP 270-71. She was 17 years old at the time. RP 256, 266-67.

L. told her mother about this event about two years later, in March 2013.⁴ RP 272. Her mother decided that they should talk to the pastor. RP 285. L. talked to the pastor and told him what happened. RP 274-75, 278. She did not tell him anything about Williamson forcing her hand down her pants. RP 279. The pastor suggested L. and her mother go talk to the police and said he was going to confront Williamson. RP 285.

L. met with Detective Garrett a month after speaking with the pastor. RP 279, 286. She did not say anything to the detective about trying to pull Williamson's hand away, or that she resisted, or that any force was used. RP 282. She did say she stopped him from going further. RP 283. She told the detective that she did not want charges filed. RP 276. L. later changed her mind about filing charges when she realized that Williamson was still going to be around her little sister.⁵ RP 276, 289.

⁴ At trial, L. could not remember whether she said anything to her mother about Williamson trying to push his hand down her pants. RP 278.

⁵ L.'s sister, A., was two years old at the time of trial. RP 256.

L. met with the prosecutor a couple of times. RP 275. On cross examination, defense counsel elicited that the prosecutor told her about the different types of charges that could be filed, including the charge of indecent liberties by forcible compulsion. RP 276-77. The prosecutor also explained to her what "forcible compulsion" meant and that it was a necessary element of the crime. RP 277, 290-91. It was only at that point that L. mentioned about struggling with Williamson. RP 291. On redirect, the prosecutor elicited that in talking with her, he never told or suggested to her what she needed to say. RP 288. They had a conversation about what charge fit the circumstances, and the prosecutor explained what charges could or could not be filed based on their conversation. RP 292-93.

Williamson testified in his own defense. He acknowledged to having sexual feelings towards L., describing an incident in 2007 where he moved his hand toward her vagina while wrestling and tickling her before stopping himself. RP 305, 308, 334. The same scenario played itself out a year later, except this time he groped her on the outside of her pants over her vaginal area. RP 309. She told him to stop and he did, apologizing. RP 309. He later stated in therapy that he had been grooming her for sex. RP 310.

As L.'s body developed, Williamson lusted after her. RP 333-34. There were times that he tried to watch her getting undressed by looking into her bedroom window. RP 311. His lust was escalating. RP 336. In her junior year of high school, Williamson gave L. a massage and touched the top of her breast. RP 312. He acknowledged that having L. pose for topless photographs in 2010 was part of the grooming process. RP 313-14, 316, 338. Williamson was filled with self-loathing. RP 339. His sexual frustration and lust were building up. RP 343.

In 2011, before his youngest daughter A. was born, there were three incidents where Williamson went into L.'s bedroom and initiated or attempted to initiate sexual contact. RP 317. On the first occasion, he asked her to remove her panties for his gratification. RP 317-18, 341. She declined and nothing further happened. RP 318, 341.

The next day, he climbed under the sheets and asked to snuggle with her. RP 318-19. She said it was okay. RP 319, 341. As he pulled her towards him, his hand was on her stomach and then went underneath her pajama bottoms. RP 319, 342. When his hand reached her pubic line she pulled his hand out and said "no." RP 319,325. He scooted away and acted like his feelings were hurt.

RP 319. He did not force his hand down her pants. RP 325. He did not try to keep his hand in the area when she pulled on it. RP 325. He would have kept going if she had allowed it. RP 325. The intentional part, as he described it, "was when I realized that my hand went below into her, her pants or her pajama bottoms." RP 324. On cross-examination, he denied that L. resisted and turned away to prevent him from going further down her pubic line. RP 347. The prosecutor asked, "She's not being truthful?" RP 347. Williamson answered "no." RP 347.

The following day, Williamson again asked to snuggle with L. RP 320. She said "no" and he left her bedroom. RP 320. In the summer of 2011, Williamson asked L. to have sex with him. RP 320-21. She declined and he walked away. RP 321. At this point Williamson realized he needed serious help. RP 321.

After L. told her mother, Williamson was confronted on the issue by the pastor, Williamson's wife, his mother and his sister during a meeting. RP 326, 348. He admitted to molesting L. RP 327. L. did not want to prosecute. RP 327. The pastor told him to report the matter. RP 349. Williamson was told at the meeting to turn himself into the police. RP 327. He went to the sheriffs office

and confessed.⁶ RP 328. He wanted to hold himself accountable.⁷ RP 329. On the stand, he again admitted to touching L. inappropriately, but denied using force. RP 348.

A jury convicted as charged. CP 42. Instead of proceeding to a bifurcated trial, Williamson stipulated to the charged aggravator. RP 439- 50. Among the underlying facts, Williamson stipulated to sexually abusing L. starting when she was four years old. RP 442, 444, 449.

iii. Sentencing

The offense of indecent liberties by forcible compulsion is subject to an indeterminate sentence, with a minimum and maximum term. CP 95; RCW 9.94A.507. Based on Williamson's offender score of zero, the standard range for the minimum term of the offense is 51-68 months. RP 448; CP 98. The maximum term is life. CP 98. The State sought a minimum exceptional sentence of 18 years confinement. RP 466-67. The State explained that L. had a valid concern about needing to protect her younger sister until she was old enough to get out of the house. RP 466. The State continued: "we did the math, and I think we came up with

⁶ L. spoke with Detective Garrett after Williamson confessed to the authorities. RP 276.

⁷ ⁸ The deputy testified that Williamson admitted to asking L. to pull down her panties while cuddling. RP 323-34, 240. Williamson felt guilt over his feelings towards her and explained that he wanted to take responsibility for what he had done. RP 240-41.

something around eighteen years, and then with credit for time served, and Good Time, would require him to serve enough time in the Department of Corrections until the little sister is old enough to graduate high school and get out of the house and, you know, fend for ... herself." RP 466.

A community corrections officer recommended an exceptional sentence of at least 13 years in confinement on the rationale that a sentence of that length would give the younger child a chance to mature to the point where she could speak up if anything inappropriate happened. RP 469-70. The court commented "but if it was thirteen years then, with good time and all that ... " RP 470. The corrections officer responded, "Correct. Now, sex offenders don't get the full amount of Good Time and Earned Time. I believe he'll get like ten percent. So he won't get as much as the offender. But still we want to take that into consideration. Thirteen is our minimum of what we're asking for." RP 470. The corrections officer was also fine with the State's recommendation of 18 years. RP 470.

L., speaking on her own behalf, wanted to have Williamson sentenced to 13 or 14 years so that her younger sister could grow

up without being groomed and be old enough to complain if something happened. RP 471, 473.

Williamson requested a Special Sex Offender Sentencing Alternative (SSOSA) or, in the alternative, a standard range sentence. RP 475-76; CP 55-94. Williamson's evaluator, Dr. Jensen, supported a SSOSA. RP 485-87. Dr. Jensen told the court that there was no indication that Williamson had experienced any deviant urges or thoughts about his younger daughter. RP 488. This was fairly typical for incest offenders, as they often develop a fixation on one child in the family. RP 488. In addition, stepdaughters are sexually assaulted at a much higher rate than biological daughters. RP 488. The structure of the SSOSA, with its attendant supervision requirements, would pose a minimal risk of offense to Williamson's biological daughter. RP 488.

The court returned to the prosecutor, asking "when you were doing the math and stuff, you took eighteen years and you came up with okay, when you take out Good Time and everything, it might be thirteen or fourteen years, I guess, or something?" RP 489. The prosecutor responded, "Well, I think Good Time is ten percent. You know, so ... " RP 489. The court asked "Is ten percent the number we'd be working with, with this offense? Because you

said it was different for a sex offense? Okay." RP 489. The prosecutor answered, "It's a serious violent sexual offense. And unlike some less serious offenses, it is a ten percent Good Time situation." RP 489.

The court then gave Williamson a chance to speak before imposing sentence. RP 489. Williamson apologized to L., said he was taking the steps needed to change, and would have no unsupervised contact with his younger daughter. RP 489-90. The court clarified that the younger daughter, A., was a little over two and half years old at present. RP 490.

The court explained its sentencing decision considered the following factors:

- Seeking a reasonable sentence. RP 490-91.
- Length of abuse. RP 491.
- Consequences to victim. RP 491
- Severity of the abuse. RP 492.
- Obliviousness or acceptance of the abuse by the victim's mother. RP 492.
- Victim's basis for finally reporting the abuse was concern for younger sister. RP 492-93.
- DOC and Prosecutor's rationale for their lengthy sentence recommendations. RP 493.
- Uniformity of victim's, DOC's, and State's sentencing recommendation. RP 493.
- Stipulated aggravating factor. RP 493.

- Inappropriateness of 68 month upper limit of standard range for this case. RP 493.

The court imposed an exceptional sentence of 17 years minimum term of confinement, with a maximum term of life. RP 494; CP 98-99. The court explained, "The way I figure it, seventeen years, less Good Time, based on how old [A.] is at this point in time gets her roughly to eighteen years of age, or so. And that's one of the factors I'm taking into account." RP 493.

This appeal followed. CP 109.

C. ARGUMENT

1. Evidence of prior sex offenses are admissible to show lustful disposition and the limiting instruction was adequate.

Mr. Williamson argues the trial court gave an ER 404(b) limiting instruction that allowed the jury to consider evidence of prior bad acts for a propensity purpose. Despite the fact that Mr. Williamson testified to improper sexual contact with his stepdaughter (RP 309.), to voyeurism when L was topless (RP 311), and to "grooming" her for later consensual sex with him (RP 310), he now disingenuously asserts that his was a "he said, she said" case that could have gone either way.

a. Lustful Disposition Evidence is not excluded under ER 404(b)

The State sought to have the evidence of prior sex offenses admitted to demonstrate the lustful disposition of Mr. Williamson toward the victim. RP 21-26. Defense counsel requested exclusion of the California incidents because their prejudicial effect outweighed their probative value. RP 27-28; CP 14-15. Counsel raised no objection to the Washington incidents. RP 27-28.

The court excluded the California evidence as too prejudicial, but admitted the Washington evidence for the purpose of showing lustful disposition. RP 34-38.

ER 404(b) only prohibits admission of evidence of a person's prior misconduct when it is offered for the purpose of demonstrating the person's character and action in conformity with that character. Even when evidence of a person's prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person's character and action in conformity with that character. The other purposes for which evidence of prior misconduct are admitted are not, then, "exceptions." *State v. Gresham*, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). This includes the purpose of demonstrating the defendant's "lustful disposition" toward the victim. In that circumstance, the

purpose of the evidence is not to demonstrate the defendant's character but to demonstrate the nature of the defendant's relationship with and feelings toward the victim. In that way, such evidence is probative of motive and intent and provides context to the crime. *Gresham* at 430 quoting *State v. Cox*, 781 N.W.2d 757, 768 (Iowa 2010).

Mr. Williamson's argument that the evidence of prior sex offenses comes under ER 404(b) and that the limiting instruction was therefore flawed, is incorrect

"Lustful disposition" evidence is not under ER 404(b). This appeal is meritless and should be denied.

b. Was the limiting instruction flawed?

Even if the evidence of prior sex offenses had been subject to ER 404(b), and even if it should have had a different limiting instruction, any error was harmless. Mr. Williamson asserts that because the limiting instruction the court gave did not state the purpose for which the ER 404(b) evidence was admitted and did not inform the jury that the evidence could not be used for concluding the defendant had a particular character and has acted in conformity with that character, that it was erroneous.

The State proposed the limiting instruction in this case and defense counsel affirmatively agreed with it. CP 130; RP 378. The instruction reads:

Evidence has been admitted in this case regarding the defendant's commission of previous sex offenses. The defendant is not on trial for any act, conduct, or offense not charged in this case.

Evidence of prior sex offenses on its own is not sufficient to prove the defendant guilty of the crime charged in this case. The State has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crime charged.

Mr. Williamson cites to *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012) for support. However *Gresham* is distinguishable. In *Gresham*, the Supreme Court concluded that the admission of the defendant's prior conviction was not harmless error. 173 Wn.2d at 434. There, the remaining admissible evidence consisted solely of the victim's testimony and the victim's parents' corroboration that the defendant had an opportunity to molest the victim. *Gresham*, 173 Wn.2d at 433. Given the remaining evidence, the *Gresham* court held that "there is a reasonable probability that absent this highly prejudicial evidence of Gresham's prior sex offense ... the jury's verdict would have been materially affected." 173 Wn.2d at 433–34. Here, Mr. Williamson testified to

fondling the victim numerous times over many years before the crime charged. The evidence of the crime charged was overwhelming and the evidence of previous sex offenses did not materially affect the verdict.

Because the admission of a defendant's evidence of other crimes is not an error of constitutional magnitude, the admission is harmless if there is a reasonable probability that the outcome of the trial would not have been materially different had the error not occurred. *State v. Kidd*, 36 Wn.App. 503, 507, 674 P.2d 674 (1983).

c. Counsel was not ineffective.

Defense counsel was not ineffective for agreeing to the proposed limiting instruction since the evidence was not admitted under ER 404(b) and the instruction was adequate to preclude the jury from using it improperly.

2. There was no Prosecutorial Misconduct.

a. Standard of Review

“Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Brett*, 126 Wn.2d 136, 174–75, 892 P.2d 29 (1995) (citing *State v. Hughes*, 106 Wn.2d

176, 195, 721 P.2d 902 (1986)). The defendant bears the burden of showing that the comments were improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). In the past, our court has also stated that if the defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). When applying this standard, we have noted that courts should “focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

b. The prosecutor's cross examination of Mr. Williamson did not constitute misconduct

Mr. Williamson argues that the prosecutor committed misconduct by asking him whether the victim was being untruthful. RP 347.

Mr. Williamson admitted on cross examination to improperly touching the victim on several occasions. R 342-344.

His testimony differed in the details of the last encounter from that of the victim and the prosecutor asked him if the victim

was being untruthful. RP 347. Counsel did not object to the prosecutor's question.

Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Barrow*, 60 Wn.App. 869, 876, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991).; *State v. Ziegler*, 114 Wn.2d 533, 789 P.2d 79 (1990).

It is clear from the brevity of the prosecutor's questioning in the record that the prosecutor's question was simply a clarification of Mr. Williamson's belief.

Mr. Williamson did not preserve this issue for appeal and he has failed to show that the prosecutor's question was either flagrant or ill-intentioned. This appeal is meritless and should be denied.

c. The prosecutor's closing arguments did not constitute misconduct.

Mr. Williamson argues that the prosecutor committed misconduct during closing argument in several ways:

1. Incorrectly stated that a member of the clergy is a mandatory reporter of child abuse, and

2. Argued the integrity of his office to contradict Defense's theory of overcharging.

Defense counsel did not object to these statements during closing or rebuttal.

1. Mandatory Reporter Statement

Mr. Williamson argues the prosecutor misstated the law when he said in closing argument that the pastor was a mandatory reporter. This is incorrect.

RCW 26.44.030(1) names a large number of mandatory reporters, including social service counselors and excluding only those who receive their information via a privileged communication.

Whether a communication is confidential under clergy member privilege turns on the communicant's reasonable belief that the conversation would remain private. RCW 5.60.060(3).

Confidentiality is a necessary factor in establishing a testimonial privilege. *State v. Martin*, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999). Statutory privilege protecting communications between penitent and member of clergy may be vitiated by presence of third person during communication, unless presence of the third person is necessary for the communication to occur, or the third person is another member of the clergy. RCW 5.60.060(3). *Id.*

Mr. Williamson testified that he recounted everything he did with the victim in a meeting on March 18, 2013, with the pastor, the pastor's wife, his mother, and his sister. RP 326-28.

Mr. Williamson's pastor was a mandatory reporter under RCW 26.44.030 because he was serving as a social counselor and the meeting was not confidential.

The prosecutor's argument that Mr. Williamson was motivated to self-report his inappropriate touching of the victim by his fear his pastor would report him was proper.

In addition, the statement that the pastor was a mandatory reporter was not objected to and thus denied the court the opportunity to correct the error. Any perceived prejudice from the statement could have easily been cured by a jury instruction. Mr. Williamson has not shown this statement, even if incorrect was flagrant or ill-intentioned.

This argument is without merit and the appeal should be denied.

2. Overcharging Response

Defense counsel accused the State of overcharging Mr. Williamson in closing Argument. Counsel argued that forcible compulsion was not raised until after the victim met with the

prosecutor to discuss the issues involved. RP 414-16. The main focus was on whether forcible compulsion had occurred. Defense counsel argued that either the victim or the prosecutor exaggerated the extent of Mr. Williamson's actions:

The charge itself. I mentioned earlier, overcharged. It is not in your job description to decide why the prosecuting attorney's office chose to file the charge that it filed. It is not something in your job description or something you're tasked to do, to ask or consider why other offenses may not have been charged more appropriately. RP 411

"I think it's possible Ms. Wynn has convinced herself that there was force. Possible that Ms. Wynn has exaggerated that incident a little bit. Maybe well intended. Many of us might do the same thing when we learn that there's just this one charge and here's what we have to prove. Well, that doesn't really fit with what happened to me. So we stretch things a little bit." RP 416

In the State's rebuttal, the prosecutor made two statements regarding overcharging. The first was when he explained how proper charging decisions often required several interviews with the witnesses to get a complete story. RP 425-26. The second:

Well, I'll tell you what. You decide the case based upon the facts. But if you think that Scott Rosekrans, as your elected prosecuting attorney is railroading people, I am up for reelection next year and you can turn me out to pasture. I mean, if you think that I'm out to get people. That this case is going to put me in the Governor's chair. If you don't think I'm doing job don't

hold it against the law, hold it against me. Vote me out of office. RP 430.

The prosecutor's statements were a reasonable response to defense's argument questioning the accuracy of the charge. The prosecutor did not, as Mr. Williamson argues, place "the prestige of his office and his personal integrity on the line." The prosecutor did not say anything more than, if you think I mischarged, you can vote against me at the next election. This is not placing his personal integrity or the office's prestige on the line

Mr. Williamson did not preserve this issue for appeal and he has failed to show that the prosecutor's question was either flagrant or ill-intentioned. This appeal is meritless and should be denied.

d. There was no cumulative error or prejudice

Mr. Williamson argues that all of these now claimed, but unpreserved, prosecution errors caused incurable prejudice.

A defendant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).. In determining whether the misconduct warrants reversal, we consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005). We review a prosecutor's remarks during closing argument in the context of

the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). We presume that the jury followed the court's instructions. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994).

As shown above, there were no errors and thus, no accumulation of prejudice was possible. This argument is without merit and the appeal should be denied.

e. Defense Counsel was not ineffective.

Mr. Williamson argues his defense counsel was ineffective for failing to object to the Prosecutor's misconduct.

Defense counsel's failure to object to a prosecutor's closing argument will generally not constitute deficient performance because lawyers "do not commonly object during closing argument 'absent egregious misstatements.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993)). But, this does not mean that all failures to object are decidedly reasonable under *Strickland v. Washington*. 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance. *State v. Gentry*, 125 Wn.2d

570, 643–44, 888 P.2d 1105 (1995)(it is prosecutorial misconduct if conduct is both improper and prejudicial).

Here, we have shown above that none of the Prosecutor's remarks constituted misconduct.

Even if the court decides there was some misconduct, it was harmless because the evidence against Mr. Williamson was overwhelming. He confessed to years of inappropriate conduct with his stepchild. The only issue in this trial was whether there was forcible compulsion. Both sides eloquently argued their side of the case. The jury weighed the testimony of the witnesses and determined Mr. Williamson was guilty.

The Defense Counsel effectively argued Mr. Williamson's case. This argument is without merit and the appeal should be denied.

3. The court properly imposed an exceptional sentence.

Mr. Williamson argues his sentence was clearly excessive and based on improper consideration of early release.

a. Standard of Review

Appellate review of an exceptional sentence is limited by statute. An exceptional sentence must be reversed if the reasons for the exceptional sentence are not supported by the record or if

those reasons do not justify an exceptional sentence. *RCW 9.94A.210(4)*. If the reasons are supported by the record, and justify an exceptional sentence, then, to reverse an exceptional sentence, we must find “that the sentence imposed was clearly excessive or clearly too lenient”. *RCW 9.94A.210(4)(b)*.

The length of an exceptional sentence should not be reversed as ‘clearly excessive’ absent an abuse of discretion. *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995).

Action is excessive if it “goes beyond the usual, reasonable, or lawful limit.” Thus, for 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 have taken. *State v. Oxborrow*, 106 Wn.2d 525, 531, 530, 723 P.2d 1123 (1986).

b. The sentence was reasonable.

Mr. Williamson argues that his sentence was based on the assumption he would earn good time in prison and that was an untenable basis.

A sentencing court cannot consider the possibility of early release for good time credit when imposing an exceptional sentence. *State v. Wakefield*, 130 Wn.2d 464, 477-78, 925 P.2d 183 (1996). However, a trial court's reliance on the availability of good

time credits when imposing an exceptional sentence does not automatically result in a reversal of the sentence. If overwhelming aggravating factors exist to justify an exceptional sentence, the sentence will be upheld even if the trial court improperly relied on the possibility of good time credits. *Id.* at 478, quoting *State v. Fisher*, 108 Wn.2d 419, 429-30, 739 P.2d 683 (1987).

In applying harmless error analysis to sentencing hearings, a trial court allegedly considers information it should not have. In these cases, we simply look at the remaining, unchallenged information to see whether it independently supports the sentencing court's decision. *State v. Brown*, 178 Wn.App. 70, 80, 312 P.3d 1017 (2013).

The Presentencing Report from DOC lists the aggravating factors to which Mr. Williamson stipulated as:

1. Sexual abuse started around age four or five and continued until age 17 when (LW) moved out of the home.
2. Anal penetration occurred between the ages of 4 and 5 on at least two separate occasions.
3. Fondling of breast, buttocks, and pubic areas occurred several times a month, both over and under clothing for a period of 13 years.

Given the above stipulations, the following aggravating factors, as outlined in the Sentencing Guidelines Manual, apply to this case:

1. "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance."

2. "The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years, manifested by multiple incidents of a prolonged period of time."
3. "The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense."
CP 52.

Clearly, the sentencing recommendations of DOC, the prosecutor, and the victim were all intended to protect the young daughter living in the home. The court accepted this as the yardstick of its sentence. The court stated "I basically agree with DOC's assessment and their PSI. And so what the sentence is going to be is, it's going to be seventeen years. The way I figure it, seventeen years, less Good Time, based on how old Amelia is at this point in time gets her to roughly eighteen years of age, or so."

Here, the aggravating factors are overwhelming and support the exceptional sentence.

Mr. Williamson's sentence was appropriate to his crime and the sentence acts to protect the remaining child. This appeal is without merit and should be denied.

D. CONCLUSION

The State respectfully requests that this Court deny Mr. Williamson's appeal and order him to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 16th day of September, 2014.

SCOTT ROSEKRANS,
Jefferson County
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Thomas A. Brotherton", written over a horizontal line.

By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Wendy M. Davis, certify that on this date: *9/16/14*

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the brief, using the Court's filing portal, to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on September 16, 2014.


Wendy M. Davis
Legal Assistant

JEFFERSON COUNTY PROSECUTOR

September 16, 2014 - 4:02 PM

Transmittal Letter

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