

FILED

FEB 16 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290581-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JONATHAN JAMES MCLANE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 07-1-00170-4

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

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STATEMENT OF RELEVANT FACTS

The State of Washington charged the defendant with five counts of Rape of a Child in the First Degree and one count of Child Molestation in the Third Degree, which proceeded to trial in 2007. (CP 3). See, *State v. McLane*, 149 Wn. App. 1007 (Div III, 2009)¹. On November 6, 2007, the jury returned verdicts of guilty on counts 1, 4, 5, and 6. (CP 123-26; RP 11/6/07, 994-95). The jury was then asked to deliberate on the aggravating factors which were submitted separately. (RP 11/6/07, 997-99). The jury found all twelve aggravating factors, three factors for each of the four counts on which the defendant was convicted. (CP 130-35; RP 11/6/07, 1022-1024).

At sentencing, a scrivener's error was discovered on one of the special verdict forms. (RP 12/13/07, 2-3). The court did not consider the jury's verdict on that form based on that error. (RP 12/13/07, 22). The defendant was sentenced to 340 months on each of Counts I, IV, and V, beyond the standard range of 240 to 318 months, and set the maximum sentence as life. (RP 12/13/07, 23). The defendant was also sentenced to 60 months on Count VI as the maximum possible sentence for a Class C felony. (RP 12/13/07, 22-23). The court also ordered the defendant to serve a term of 36 to 48 months of community custody. (RP 12/13/07, 23).

¹ *State v. Jonathan James McLane* Unpublished Opinion No. 26758-0-III is designated as "CP 2-17."

The defendant appealed this sentence to Division III of the Court of Appeals. The Court of Appeals affirmed his conviction in Unpublished Opinion No. 26758-0-III issued February 26, 2009, and remanded for resentencing on Count V and clarification of the sentence on Count VI. (CP 2-17). The Supreme Court of Washington denied his petition for review No. 82958-6 on September 9, 2009. McLane, 166 Wash.2d 1027, 217 P.3d 337 (Table).

On April 8, 2010, the defendant filed a Sentencing Memorandum, arguing that the court should not consider the aggravating factors as found by the jury in resentencing the defendant. (CP 37-40). On April 29, 2010, the argument was heard by the Benton County Superior Court, and the defendant was resentenced. (CP 76-85, 100). This appeal follows. (CP 88).

ARGUMENT

1. THE DEFENDANT'S MOTION REGARDING THE AGGRAVATING FACTORS WAS NOT TIMELY MADE.

The defendant was found guilty November 6, 2007. (CP 76; RP 11/6/07, 994-995). The defendant was sentenced on December 13, 2007. (RP 12/13/07, 22-23. The defendant did not file the sentencing memorandum until April 8, 2010. (CP 37-40). Pursuant to CrR 7.8, a motion regarding relief from judgment should be made within a

reasonable time. For relief due to mistakes, inadvertence, surprise, excusable neglect, irregularity, or newly discovered evidence, the motion should be made within one year after entry of the judgment. CrR 7.8(b). The motion was not timely filed.

2. THE DEFENDANT CANNOT RAISE THIS ISSUE FOR THE FIRST TIME ON APPEAL.

The defendant was given the opportunity, but had no objection to the instructions regarding the aggravating factors before they were presented to the jury. (RP 11/6/07, 1011). Nor was the issue raised at the time of the defendant's first appeal. (CP 2-17).

A. The burden is on the defendant to establish that an exception to the general rule should be made, an exception which is rarely allowed.

Pursuant to RAP 2.5, the only errors which may be raised for the first time on appeal aside from jurisdiction and insufficient evidence are manifest errors affecting a constitutional right. To meet the exception in RAP 2.5(a), there must be actual prejudice shown and the trial court record must be sufficiently developed to determine the merits of the constitutional claim. *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). The defendant must show that the claimed error had practical and identifiable consequences in the trial. *State v. Israel*, 113 Wn. App. 243, 54 P.3d. 1218 (2002). An Appellate Court should review claims

raised for the first time on appeal if they 1) are of constitutional magnitude, 2) are manifest, and 3) affected the outcome. *State v. Lynn*, 67 Wn. App. 339, 342-346, 835 P.2d 251 (1992) and *State v. Naillieux*, 241 P.3d 1280 (2010).

The defendant has the burden to make the required showing that an unpreserved error was a manifest error affecting a constitutional right. *State v. Nguyen*, 165 Wn.2d 428, 197 P.3d 673 (2008). The defendant fails on all three counts.

B. The claimed error is not of a constitutional magnitude.

As stated in *State v. Lynn*, 67 Wn. App. at 342-343, RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Almost any alleged error can be phrased in constitutional terms. However, every alleged error in a criminal case is not assumed to be of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). The *O'Hara* Court stated that the asserted claim should be assessed to determine whether, if correct, it implicates a constitutional interest as compared to another form of trial error. *Id.* As the *Lynn* Court stated, permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials

and is wasteful of the limited resources of prosecutors, public defenders and courts. *Id.* at 344.

RAP refers to a manifest error affecting a constitutional right. RAP 2.5(a) (Emphasis added). It does not say manifest error affecting a constitutional right in civil cases and any right in a criminal case. Here, there is no error. The defendant requests that the trial court give definitions for aggravating factors when no definitions exist, or when the facts clearly meet the definition as it was given.

C. The error is not manifest.

If this Court determines the alleged error is of constitutional magnitude, it must also be manifest. *State v. Gordon*, 153 Wn. App. 516, 535, 223 P.3d 519 (2009). A manifest error is an error that is unmistakable, evident, or indisputable. *State v. Nguyen*, 165 Wn.2d 428, 197 P.3d 673 (2008).

The defense counsel was given more than adequate time to review the proposed instructions, and failed to object to the instructions as they were given to the jury. The aggravating factor Invasion of Privacy has no definition, so it would be an absurd result that failure to give a definition for that factor is an evident error.

D. In any event, the instruction did not affect the defendant's constitutional rights.

1. The test for a manifest error affecting a constitutional right under RAP 2.5 is different than the test for harmless error after an instructional error is given.

The language used in RAP 2.5 (a)(3) is “manifest error affecting a constitutional right. . . .” (Emphasis added). This results in a requirement that the defendant make a plausible showing that the claimed error had practical and identifiable consequences in the trial. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). The defendant must show actual prejudice as a result of the claimed error. *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001).

This is a different standard than a harmless error analysis regarding an instructional error. As stated in the Supreme Court’s opinion in *Bashaw*, in the later situation, the issue is whether the Court can conclude that the instructional error was harmless. *State v. Bashaw*, 169 Wn.2d 133, 148, 234 P.3d 195 (2010). The Supreme Court in *Bashaw* declined to speculate whether the error would have changed the result. *Id.* Under RAP 2.5 (a)(3), the defendant must affirmatively point out in the record how the error had practical and identifiable consequences.

2. The defendant has failed to demonstrate any actual prejudice.

There was no prejudice whatsoever to the defendant. The defendant has not suggested any way he suffered actual prejudice or

affirmatively pointed to any place in the record where the failure to give a definition of aggravating factors prejudiced him.

3. Any error was harmless.

If the Court finds that it was error to fail to provide additional definitions, this error was harmless, as the facts as found by the jury would have matched the definitions of the aggravating factors. This is discussed in additional detail below.

3. THE COURT APPROPRIATELY CONSIDERED THE DEFINITIONS OF THE AGGRAVATING FACTORS WHEN RESENTENCING THE DEFENDANT.

The defendant has moved the Court to vacate the aggravating circumstances as found by the jury and indicated that the jury was improperly instructed in this case. In support of this motion, the defendant has cited *State v. Gordon*, 153 Wn. App. 516, 223 P.3d 519 (2009) and *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987).

In *Gordon*, the defendants were convicted of Murder in the Second Degree, and the jury found the aggravating circumstances of deliberate cruelty and particularly vulnerable victim. The defendants appealed, alleging that the jury was not properly instructed on the aggravating factors. The jury was given on the name of the aggravating circumstance, and was not provided any additional definition. Division I of the Court of

Appeals agreed with the defendants, and reversed the findings which allowed for an exceptional sentence. *State v. Gordon*, 153 Wn. App. 516. Specifically, the Court of Appeals held that the additional definitions could have meant that the jury would not have been able to find the aggravating factors, changing the result of the case. *Id* at 536-37.

The circumstances of this case are clearly different than the circumstances found in *State v. Gordon*. In the case at bar, the aggravating circumstances alleged by the State and found by the jury were not the same aggravating factors as were at issue in *Gordon*. Here, the offenses were alleged to be aggravated by a pattern of abuse (RCW 9.94A 535(3)(g)), an abuse of trust (RCW 9.94A 535(3)(n)), and an invasion of privacy (RCW 9.94A 535(3)(p)). The definitions of these three aggravating factors are found in the Pattern Jury Instructions for criminal cases, WPIC 300.16, 300.23, and 300.25. (Appendices A, B, and C).

With regards to the aggravating factor of Invasion of Privacy, the WPIC recommends that no supplemental definition is required. The cases defining when an invasion of privacy has occurred do not provide further definition except that it does not apply in First Degree Burglary. See, comment to WPIC 300.25, attached. In this case, there is no supplemental definition which would have changed the jury verdict, and therefore the jury was properly instructed.

With regards to the aggravating factor of Pattern of Abuse, the definition states that it is multiple incidents of abuse over a prolonged period of time, which means more than a few weeks. In this case, the jury was instructed that a pattern of abuse occurs over a prolonged period of time. The jury was not told that it means more than a few weeks. However, in this case any error would be harmless, as the jury found the defendant guilty of four counts, spanning a number of years. Therefore, the jury was properly instructed, and no additional definition would have changed the outcome of the verdict.

With regards to the aggravating factor of abuse of trust, the definition is lengthier. However, the lower court considered this, and disregarded the aggravating factors alleging abuse of trust.

The defendant cites *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987), for the proposition that the aggravating factor of Pattern of Abuse is inapplicable in cases where multiple crimes are charged. (Appellant's Brief, 5). However, the facts of *Fisher* vary considerably from the facts of this case. In *Fisher*, only two instances of contact occurred between the defendant and the victim. *Fisher*, at 421. The *Fisher* Court concluded that the counting of both of these offenses in the offender score accounted for the Pattern of Abuse aggravating factor. In this case, as the defendant concedes, the specific time periods of the charges the State filed

encompassed multiple acts. (Appellant's Brief, 5). The aggravating factor is not accounted for in calculating the offender score in this case as it was in the *Fisher* case.

CONCLUSION

The defendant received a fair trial. The jury was properly instructed, and the court correctly imposed an exceptional sentence in accordance with the jury's finding of aggravating circumstances. The defendant failed to raise the issue in a timely manner. If error did occur, such error was harmless. The defendant's sentence should be affirmed.

RESPECTFULLY SUBMITTED this 15th day of February 2011.

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APPENDIX A

11A WAPRAC WPIC 300.16



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11A WAPRAC WPIC 300.16

WPIC 300.16 Aggravating Circumstance—Ongoing Pattern of Sexual Abuse [RCW 9.94A.535(3)(g)]

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.16 (3d Ed)

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Washington Pattern Jury Instructions--Criminal
2008 Edition Prepared by the Washington Supreme Court Committee On Jury
Instructions, Hon. Sharon S. Armstrong, Co-Chair, Hon. William L. Downing, Co-
Chair

Part XVI. Exceptional Sentences—Aggravating Circumstances
WPIC CHAPTER 300. Exceptional Sentences—Aggravating Circumstances

**WPIC 300.16 Aggravating Circumstance—Ongoing Pattern of Sexual Abuse
[RCW 9.94A.535(3)(g)]**

An "ongoing pattern of sexual abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

Note on Use

For the aggravating circumstance of an ongoing pattern of sexual abuse, use the above instruction to supplement the primary statement of this aggravating circumstance, which appears in WPIC 300.02 (Aggravating Circumstance Procedure—Factors Alleged—Unitary Trial) or WPIC 300.06 (Aggravating Circumstance Procedure—Factors Alleged—Bifurcated Trial or Stand-Alone Sentencing Proceeding).

Comment

RCW 9.94A.535(3)(g).

This aggravating circumstance was codified as part of the Sentencing Reform Act in 1987. The aggravating circumstance had previously existed as a part of the common law. See, e.g., *State v. Daniels*, 56 Wn.App. 646, 654–55, 784 P.2d 579 (1990).

The cases discussing a “prolonged period of time” have not set a minimum length of time. Compare *State v. Atkinson*, 113 Wn.App. 661, 671–72, 54 P.3d 702 (2002), review denied, 149 Wn.2d 1013, 69 P.3d 874 (2003) (domestic violence abuse occurring over period of 7 to 10 months, during which time at least three incidents of abuse required the victim to seek medical attention, was sufficient to establish an ongoing pattern of abuse); *State v. Bell*, 116 Wn.App. 678, 684, 67 P.3d 527, review denied, 150 Wn.2d 1023, 81 P.3d 120 (2003) (with respect to an offense occurring in July of 2001, the court stated that “whether the abuse began in September 2000, Christmas 2000, or spring 2001, the abuse was prolonged”); and *State v. Daniels*, 56 Wn.App. 646, 784 P.2d 579 (1990) (multiple beatings within the five-month charging period was sufficient to support a pattern of abuse over a prolonged period); with *State v. Barnett*, 104 Wn.App. 191, 16 P.3d 74 (2001) (two weeks is not sufficient to prove a pattern of sexual abuse over a prolonged period of time for purposes of the domestic violence aggravating circumstance at former RCW 9.94A.390(2)(h)); and *State v. Quigg*, 72 Wn.App. 828, 841, 866 P.2d 655 (1994) (sexual abuse over a period of three days is insufficient to demonstrate an ongoing pattern).

The statutory presumption is that this aggravating circumstance will be presented to the jury during the trial of the alleged crime. RCW 9.94A.537(4). However, the court may find it necessary to bifurcate the proceedings if the state seeks to offer evidence as to the aggravating circumstance that would not be admissible as to the charged offense. (Note: A bill is pending in the 2008 Legislature that could affect this point. See SB 6933.)

For further discussion of this aggravating factor, see Fine and Ende, 13B Washington Practice: Criminal Law With Sentencing Forms § 3908 (2d ed.). [*Current as of February 2008.*]

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APPENDIX B

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11A WAPRAC WPIC 300.23

WPIC 300.23 Aggravating Circumstance—Abuse of Trust [RCW 9.94A.535(3)(n)]

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.23 (3d Ed)

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Part XVI. Exceptional Sentences—Aggravating Circumstances
WPIC CHAPTER 300. Exceptional Sentences—Aggravating Circumstances

**WPIC 300.23 Aggravating Circumstance—Abuse of Trust [RCW 9.94A.535
(3)(n)]**

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the [victim of the offense] [location of the offense] because of the trust relationship. [A defendant need not personally be present during the commission of the crime, if the defendant used a position of trust to facilitate the commission of the crime by others.]

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

[There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between [the defendant] [or] [an organization to which the defendant belonged] and [the victim] [or] [someone who entrusted the victim to the [defendant's] [or] [organization's]

care.]

Note on Use

For the aggravating circumstance of an abuse of trust, use the above instruction to supplement the primary statement of this aggravating circumstance, which appears in WPIC 300.02 (Aggravating Circumstance Procedure—Factors Alleged—Unitary Trial) or WPIC 300.06 (Aggravating Circumstance Procedure—Factors Alleged—Bifurcated Trial or Stand-Alone Sentencing Proceeding).

Comment

RCW 9.94A.535(3)(n).

Derivation of statutory language. This particular aggravating circumstance was added to the Sentencing Reform Act (SRA) in 2005. Prior to 2005, the SRA's aggravating factor for abuse of trust had expressly applied to economic cases, and the common law had then extended the factor to apply to non-economic offenses as well. See, e.g., State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987). The 2005 act codified this broader application. See generally Laws of 2005, Chapter 68, § 1 (legislative statement that the act's language was designed to codify existing common law aggravating circumstances).

The current statutory aggravating circumstance differs in one regard from the pre-existing common law. The statutory aggravating circumstance applies only if the defendant uses the position of trust to facilitate the offense; the pre-existing common law was not limited in this manner. Compare RCW 9.94A.535(3)(n) with State v. Chadderton, 119 Wn.2d 390, 398, 832 P.2d 481 (1992).

Trust relationship. A defendant abuses a position of trust to facilitate the offense when the defendant uses his or her relationship to the victim, or to the person who entrusted the victim to the defendant's care, to obtain access to the victim or the location of the crime. Compare State v. Bissell, 53 Wn.App. 499, 767 P.2d 1388 (1989) (ex-employee's use of keys that were entrusted to him in the course of employment supported an exceptional sentence for abuse of trust), with State v. Jackmon, 55 Wn.App. 562, 568–69, 778 P.2d 1079 (1989) (exceptional sentence for abuse of trust not supported where record did not establish that the ex-employee was permitted an unusual degree of access to the company because of his status). There is no requirement that a defendant be personally present during the commission of the crime, if the defendant uses a position of trust to facilitate its commission by others. State v. Handley, 115 Wn.2d 275, 285, 796 P.2d 1266 (1990).

The trust relationship necessary for this aggravating circumstance can be between the defendant and the victim or between the defendant and someone, such as a parent, who entrusts the victim's care to the defendant. See, e.g., State v. Garibay, 67 Wn.App. 773, 779, 841 P.2d 49 (1992), abrogated on other grounds, State v. Moen, 129 Wash.2d 535, 919 P.2d 69 (1996). The trust relationship does not have to be a direct personal relationship between the defendant and the victim. It is sufficient that the victim trusted an organization which assigned some of its functions to the defendant. See, e.g., State v. Harding, 62 Wn.App. 245, 248–49, 813 P.2d 1259 (1991) (employee of an apartment building committed an abuse of trust when he used his master key to enter a tenant's apartment for the purpose of rape).

Courts examine a number of factors, including the length of the relationship, the intensity of the relationship, and the victim's inclination to bestow trust, when considering whether the defendant is in a position of trust. See generally Fine and

Ende, 13B Washington Practice: Criminal Law With Sentencing Forms § 3915 (2d ed.). When the victim is a child, a sufficient relationship of trust was established by the defendant's status as a neighbor, babysitter, parent, or other close relative. State v. Grewe, 117 Wn.2d 211, 218–21, 813 P.2d 1238 (1991) (neighbor); State v. Russell, 69 Wn.App. 237, 252, 848 P.2d 743 (1993) (victim's father); State v. Bedker, 74 Wn.App. 87, 95–96, 871 P.2d 673 (1994) (victim's half-brother); State v. Stevens, 58 Wn.App. 478, 501, 794 P.2d 38 (1990) (baby sitter); State v. Harp, 43 Wn.App. 340, 343, 717 P.2d 282 (1986) (victim's uncle). In contrast, a casual relationship alone does not suffice; the state must prove more than that. State v. Serrano, 95 Wn.App. 700, 713–14, 977 P.2d 47 (1999) (acquaintance and co-worker); State v. Stuhr, 58 Wn.App. 660, 663, 794 P.2d 1297 (1990) (house guest).

Definition of fiduciary. The SRA does not define “fiduciary.” The Legislature has defined the term in various civil contexts, but these definitions tend to be specific to those contexts and do not necessarily carry over well to a criminal jury instruction.

Practitioners may need to turn to the case law for guidance in defining “fiduciary” for a particular case. In general, case law indicates that the term encompasses not only those relationships that the law has historically treated as fiduciary in nature, but also other relationships in which one person justifiably expects his or her welfare to be cared for by another. For a discussion of this and other concepts involved in fiduciary relationships, see, e.g., Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 741, 935 P.2d 628 (1997) (extended discussion); Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 797–98, 16 P.3d 574 (2001) (a fiduciary is “a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking”); Cummings v. Guardianship Services of Seattle, 128 Wn.App. 742, 755 n.33, 110 P.3d 796 (2005) (“A fiduciary is a person with a duty to act primarily for the benefit of another.”); Richards v. Seattle Metropolitan Credit Union, 117 Wn.App. 30, 33–34, 68 P.3d 1109 (2003) (“A fiduciary is a person who, on account of his relationship with another person, is both authorized to act for the beneficiary and owes a duty of loyalty to the beneficiary.”) review denied, 150 Wn.2d 1035, 84 P.3d 1230 (2004).

Presumption of unitary trial. The statutory presumption is that this aggravating circumstance will be presented to the jury during the trial of the alleged crime. RCW 9.94A.537(4).

Cross-reference. For further discussion of this aggravating factor, see Fine and Ende, 13B Washington Practice: Criminal Law With Sentencing Forms § 3915 (2d ed.).

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APPENDIX C

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WPIC 300.25 Aggravating Circumstance—Invasion of Privacy [RCW 9.94A.535(3)
(p)]

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.25 (3d Ed)

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Part XVI. Exceptional Sentences—Aggravating Circumstances
WPIC CHAPTER 300. Exceptional Sentences—Aggravating Circumstances

**WPIC 300.25 Aggravating Circumstance—Invasion of Privacy [RCW
9.94A.535(3)(p)]**

(The committee believes that no further explanation of this aggravating
circumstance is required.)

Note on Use

For the aggravating circumstance involving an invasion of privacy, use the
applicable bracketed clause from WPIC 300.02 (Aggravating Circumstance
Procedure—Factors Alleged—Unitary Trial) or WPIC 300.06 (Aggravating
Circumstance Procedure—Factors Alleged—Bifurcated Trial or Stand-Alone
Sentencing Proceeding).

Comment

RCW 9.94A.535(3)(p).

This aggravating circumstance was added to the Sentencing Reform Act in 2005. The accompanying legislative history indicates that the statutory language was designed to codify existing common law aggravating factors. Laws of 2005, Chapter 68, § 1. Nonetheless, the language used by the Legislature deviates from the common law phrase.

Under the common law, an exceptional sentence could be predicated upon a violation of the victim's "zone of privacy." Exceptional sentences predicated upon a violation of the victim's zone of privacy have been affirmed in rape cases. See, e.g., *State v. Lough*, 70 Wn.App. 302, 336, 853 P.2d 920 (1993), affirmed 125 Wn.2d 847, 889 P.2d 487 (1995) (rape in victim's living room); *State v. Delarosa-Flores*, 59 Wn.App. 514, 799 P.2d 736 (1990) (rape in victim's home); *State v. Falling*, 50 Wn.App. 47, 55, 747 P.2d 1119 (1987) (victim raped in her bedroom). In first degree burglary cases, this aggravating factor has been held improper, because invasion of privacy is inherent in that crime. *State v. Lough*, 70 Wn.App. at 302; *State v. Post*, 59 Wn.App. 389, 400-02, 797 P.2d 1160 (1990), affirmed on other grounds 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992); but see *State v. Hicks*, 61 Wn.App. 923, 929-30, 812 P.2d 893 (1991) (zone of privacy can be aggravating factor for rape, even though defendant was also convicted of burglary).

The statutory presumption is that this aggravating circumstance will be presented to the jury during the trial of the alleged crime. RCW 9.94A.537(4).

For further discussion of this aggravating factor, see *Fine and Ende*, 13B Washington Practice: Criminal Law With Sentencing Forms § 3917 (2d ed.). [*Current as of February 2008.*]

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MEGAN A. BREDEWEG,

Appellant.

NO. 290581

DECLARATION OF SERVICE

I, **PAMELA BRADSHAW**, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of Respondent's Brief on February 15, 2011.

Dennis W. Morgan
Attorney at Law
120 W. Main Avenue
Ritzville, WA 99169-1408

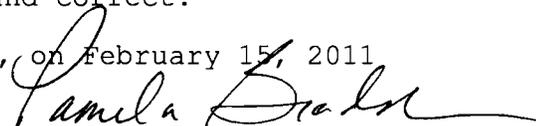
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on February 15, 2011


PAMELA BRADSHAW