

FILED

NOV 30 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No-29250-9-III

COURT OF APPEALS, DIVISION THREE  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
*Respondent*

vs.

MIGUEL RAFAEL ZEPEDA MANCILLA  
*Appellant*

---

**BRIEF OF APPELLANT**

Andrea Burkhart, WSBA #38519  
Attorney for Appellant  
Burkhart and Burkhart, PLLC  
PO Box 946  
Walla Walla, WA 99362  
Tel: (509) 529-0630  
Fax: (509) 525-0630

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## **I. INTRODUCTION**

Miguel R. Zapeda-Mancilla, a twenty year old man, was convicted and sentenced to over seventeen years in prison based on a consensual romantic and sexual relationship with G.B. G.B. was only thirteen, but she told him she was older.

At trial, defense counsel did not object to a motion in limine by the State to exclude evidence of G.B.'s drug use during the time period in question. Counsel failed to cross-examine G.B. on her ability to accurately recall events. Counsel also failed to request jury instructions on the lesser offense of third degree statutory rape for two of the four charged counts, even though evidence presented at trial supported an instruction on all four counts. A jury subsequently found Zapeda-Mancilla guilty of two counts of second degree rape of a child and two counts of third degree rape of a child.

At sentencing, the trial court refused to impose an exceptional sentence downward, relying on impermissible bases including his decision to stand trial. The court then sentenced Zapeda-Mancilla to 17.5 years in prison; he will be 38 years old when he is released, at which time he will be deported to Mexico.

Zapeda-Mancilla's constitutional rights were violated both at trial when he received ineffective assistance of counsel and at sentencing when the court denied his request for an exceptional sentence on impermissible bases. These errors have significantly prejudiced Zapeda-Mancilla and resulted in a punishment that is draconian relative to the nature of the offense. The judgment and sentence should be vacated, the convictions reversed, and the case remanded for a new trial.

## **II. ASSIGNMENTS OF ERROR**

1. Counsel for Zapeda-Mancilla rendered ineffective assistance when he failed to object to the State's Motion in Limine to exclude evidence of the victim's drug use.
2. Counsel for Zapeda-Mancilla rendered ineffective assistance when he failed to request instructions on the lesser offense of third degree rape of a child for Counts 1 and 2.
3. The trial court erred in denying Zapeda-Mancilla's Motion for Downward Departure from the Standard Sentencing Guidelines.
4. The trial court erred in refusing to impose an exceptional sentence downward on the basis that Zapeda-Mancilla took his case to trial.
5. The trial court erred in holding that a minor's "willing participation" can never be a valid mitigating circumstance for sentencing purposes in a statutory rape conviction.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether counsel for Zapeda-Mancilla rendered ineffective assistance when:

- (a) Counsel did not object to the State's Motion in Limine to exclude evidence of G.B.'s drug use during the relevant time period;
- (b) The evidence consisted primarily of G.B.'s testimony and Zapeda-Mancilla's testimony;
- (c) G.B.'s testimony and Zapeda-Mancilla's testimony often conflicted or directly contradicted the other;
- (d) Counsel did not request instructions on third degree rape of a child for Counts 1 and 2;
- (e) There was evidence at trial that G.B. made declarations as to her age before she and Zapeda-Mancilla engaged in any sexual intercourse; and
- (f) There was contradicting evidence at trial that G.B. either told Zapeda-Mancilla she was 15 years old or told him she was 18 years old.

2. Whether the trial court erred in denying Zapeda-Mancilla's Motion for Downward Departure when:

- (a) The court identified at least two factors weighing against an exceptional sentence—Zapeda-Mancilla's decision to stand trial and G.B.'s inability to consent to sexual intercourse as a matter of law;
- (b) All of the evidence produced at trial showed that the sexual encounters between Zapeda-Mancilla and G.B. were consensual;
- (c) G.B. initiated some of the sexual encounters; and
- (d) Zapeda-Mancilla and G.B. were relatively close in age and maturity.

#### IV. STATEMENT OF THE CASE

Miguel R. Zapeda-Mancilla turned 20 years old on September 26, 2009. RP 281.<sup>1</sup> Socially and mentally, however, he was younger—he had not finished high school, often hung out, skateboarding, with his friends, and lived at home with his mother and seven siblings. RP 281, 282-3. He visited the Yakima transit center daily where a large group of young adults, about 22-23 people between the ages of 18 and 22, hung out. RP 283. He had no criminal history, apart from a misdemeanor conviction for third degree malicious mischief for tagging, and he had an offender score of zero. CP 163, 164; 7/26/2010 RP 12.

Zapeda-Mancilla met G.B in the fall of 2009. RP 283. G.B. told him she was eighteen years old, and she appeared to be seventeen or eighteen. RP 284, 288-89, 291. They dated, and called each other boyfriend and girlfriend. RP 287. Three times during the month of November they engaged in consensual sexual intercourse. RP 285.

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<sup>1</sup> Although the volumes containing the verbatim report of proceedings for the trial are sequentially numbered, the single volume for the sentencing hearing does not follow the same sequential scheme. Accordingly, I will refer to the trial transcript as “RP” and the sentencing transcript as “7/26/2010 RP,” *i.e.*, the date of the sentencing hearing.

On December 3, 2009, Zapeda-Mancilla was arrested by Yakima city police. RP 219. He freely discussed his and G.B.'s relationship with police officers, stating that he believed she was seventeen or eighteen years old. RP 219-220. In actuality, she was thirteen. RP 230. Several days later, on December 8, 2009, Zapeda-Mancilla was charged with five counts of second degree rape of a child.<sup>2</sup> CP 1-2. Zapeda-Mancilla pled not guilty to the charges, and asserted his right to be tried by a jury. CP 9-12.

### **Trial**

At trial, the State's primary witness, and the source of most of the evidence introduced to prove the charges against Zapeda-Mancilla, was G.B. Prior to its opening statement, the State brought a motion in limine to exclude a long list of evidence relating to G.B., including her mental health issues, her criminal conviction for malicious mischief, her gang ties, her runaway history, and her drug use. RP 166.

In assessing the admissibility of the evidence, the court engaged in the following colloquy with defense counsel:

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<sup>2</sup> After the State rested its case-in-chief on June 3, 2010, one of the five charged counts was dismissed in response to a defense motion to dismiss for insufficient evidence. RP 276-77.

THE COURT: Gang ties [...] I'm assuming you're not going into areas of inquiry to bring it out.

MR. RABER: No.

THE COURT: That's agreed.

The runaway history, does that play any part?

MR. RABER: I don't know that that's directly relevant to this.

THE COURT: That's agreed.

The fact that she had active warrants at the time?

MR. RABER: I don't, no.

THE COURT: Okay. That's agreed.

The fact that she is currently in a treatment facility—let's combine the two, the substance abuse issues and the treatment facility. I will simply make the comment that if there is—that would be interesting. There is [sic] multiple incidents alleged. Perhaps affecting her ability to recall accurately the situation would be one thing. As far as bringing it up in any other context, Mr. Raber?

MR. RABER: I don't know that either of those two, the substance abuse or her being in a treatment facility, has any relevance here, at least until she testifies.

RP 166-68. Defense counsel agreed to exclude all of the above-listed evidence against G.B., and the court granted the State's motion in limine. RP 168.

### **Testimony of G.B.**

At trial, G.B. testified that she met Zapeda-Mancilla for the first time at a Halloween party—October 31, 2009. RP 231-32. Her friends introduced them; they talked for less than an hour. RP 232-33. G.B. and her friends were kicked out of the party around 1:00 or 2:00 a.m., and headed to a bar in downtown Yakima. RP 232. G.B. testified that she met up with Zapeda-Mancilla outside the bar and they decided to go to another friend's house. RP 255-56. She went on to state that, at the friend's house, she and Zapeda-Mancilla kissed and had sexual intercourse. RP 235-36.

Zapeda-Mancilla later testified that he did not meet G.B. or have sexual intercourse with her on Halloween. RP 282, 299. He did not meet her for the first time until November 2009 at the Yakima transit center. RP 282.

G.B. testified that she met Zapeda-Mancilla for the second time three weeks after Halloween at the transit center. RP 238. During the interim, between their first and second meetings, they did not contact or communicate with each other, did not know each others' last names, and did not have each others' telephone numbers. RP 238. At one point, G.B. did seek out and obtain Zapeda-Mancilla's telephone number. RP 238.

With regard to her age, G.B. testified that on two separate occasions she told Zapeda-Mancilla that she was 15 years old. RP 261. Although she claimed she told this to Zapeda-Mancilla when they were at the transit center; G.B. did not say whether this was before or after they had engaged in sexual intercourse for the first time. RP 261-62. On the second occasion, G.B. testified that on November 29th or 30th she told Zapeda-Mancilla that she was 15 years old. RP 259.

Over the course of her testimony, G.B. stated that she and Zapeda-Mancilla had sexual intercourse a total of four times—October 31, 2009; November 27, 2009; December 1, 2009; and December 3, 2009. RP 240, 244, 250. G.B. considered herself to be in love with Zapeda-Mancilla. RP 264.

### **Jury Instructions and Verdict**

The Court instructed the jury as to four counts of statutory rape. RP 322. Each count alleged sexual intercourse between Zapeda-Mancilla and G.B occurring on October 31, 2009; November 27, 2009; December 1, 2009; and December 3, 2009. On Counts 1 and 2, the jury was instructed only on Second Degree Rape of Child; the court gave instructions on Second Degree, as

well as the lesser offense of Third Degree, Rape of a Child, for Counts 3 and 4.

During deliberations, the jury submitted an inquiry to the court: "Why is there no option of 3<sup>rd</sup> Degree on question 1 & 2 Counts?" CP 118. The court provided little substantive response. CP 118. The jury returned verdicts convicting the defendant on Counts 1 and 2 of Second Degree Rape of a Child and on Counts 3 and 4 of Third Degree Rape of a child. CP 117-123.

### **Sentencing**

On July 26, 2010, Zapeda-Mancilla was sentenced in Yakima County Superior Court. 7/26/2010 RP 1. Before imposition of his sentence, the court heard a motion from Zapeda-Mancilla requesting a downward departure from the standard sentencing range. 7/26/2010 RP 3-13; CP 124-125. Zapeda-Mancilla argued that G.B. was not only a willing participant, but also an initiator of some of the sexual contact, and that the proposed sentence was grossly disproportionate to the crime committed. CP 124-125. The State opposed Mr. Zapeda-Mancilla's motion on the basis that a thirteen-year-old girl, a minor under the age of consent, "can never really be a *willing* participant." CP 128.

The court denied Zapeda-Mancilla's motion for an exceptional sentence downward on the basis that a minor can never consent to sexual intercourse (*i.e.* be a willing participant), that Zapeda-Mancilla had taken his case to trial, a fact that distinguished him from a similar case in which the court had imposed an exceptional sentence, and that there were no other compelling reasons for imposing an exceptional sentence. 7/27/2010 RP 16, 18, 19. The court then sentenced Zapeda-Mancilla to 17.5 years in prison. 7/27/2010 RP 19.

## **V. ARGUMENT**

### **A. ZAPEDA-MANCILLA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL THAT PREJUDICED HIS CONSTITUTIONAL RIGHTS**

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

“To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.” *State v.*

*Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Where the record shows an absence of conceivable *legitimate* trial tactics or theories explaining counsel's performance, such performance falls "below an objective standard of reasonableness" and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In short, unreasonable trial tactics justify reversal. *Grier*, 150 Wn. App. at 633.

1. Counsel did not object to the exclusion of G.B.'s drug use despite its significant probative value and assistance to the jury in evaluating her credibility

The Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington Constitution give a criminal defendant the right to confront and cross-examine adverse witnesses as to relevant evidence. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). All relevant evidence is admissible, provided its probative value is not substantially outweighed by the

danger of unfair prejudice. ER 401; ER 403. Evidence of a witness's drug use, where there is a "reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial," is relevant and admissible to impeach the witness's credibility. *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991); *see also State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994) (witness's use of drugs and alcohol and possible experience of drug-induced hallucinations on the night of the charged crime was admissible); *State v. Clark*, 48 Wn. App. 850, 743 P.2d 822 (1987) (evidence of defendant's use of marijuana was admissible "for an assessment of his memory of events and his overall credibility").

Where the record does not support an inference that counsel's performance is a legitimate trial tactic, counsel's failure to object to or limit the admission of key evidence in spite of a founded basis for objecting constitutes deficient performance. *See State v. Reichenbach*, 153 Wn.2d at 131. In *Reichenbach*, a prosecution for possession of methamphetamine, the State moved to admit a baggie of methamphetamine, its most important piece of evidence. 153 Wn.2d at 131. Defense counsel failed to object to the baggie's admissibility despite serious questions surrounding the validity of

the search leading to its discovery. *Id.* The appellate court found counsel's failure to challenge its admissibility could not be explained as a legitimate trial tactic and constituted deficient performance. *Id.*

Here, the State's key evidence consisted of G.B.'s testimony—without it, the State would not have been able to prove every element of its case. Yet the veracity and reliability of G.B.'s testimony, and her ability to accurately recall and relate events, are called into serious question by her history of substance abuse during the time period about which she testified. Considering the factual discrepancies in the evidence and the fact that only G.B. and Zapeda-Mancilla testified about the events in question, counsel's failure to impeach G.B.'s perception and recollection is inexplicable. As in *Reichbach*, the record is devoid of any legitimate trial tactic explaining this omission.

The issue of who said what, when was absolutely critical to Zapeda-Mancilla's defense because he relied upon the protection of RCW 9A.44.030. Under that statute, a defendant establishes an absolute defense to a statutory rape charge if he shows by a preponderance of the evidence that the victim told him she was over sixteen years old. Zapeda-Mancilla testified that G.B. told him

she was 18. RP 284. This failure to vigorously dispute the State's evidence, particularly in a "he said, she said" dispute over the facts, constitutes deficient performance.

Furthermore, the defendant was prejudiced by counsel's deficient performance. Without all of the facts before it, the jury had no way of knowing whether G.B.'s testimony was reliable and, therefore, lacked critical information to assess whether the State had met its burden of proof beyond a reasonable doubt. Indeed, G.B.'s own father testified that she had told Zapeda-Mancilla that she was 16 or 19 years old. RP 301-02. G.B., on the other hand, told different people different things at different times. RP 263-64. Had the jury known that G.B.'s confusion over what happened was likely the result of her drug use during that time, it is highly probable that her testimony would have been discounted and a different result reached.

2. Counsel failed to request a jury instruction on third degree statutory rape for Counts 1 and 2

A defendant is entitled to a jury instruction on a lesser crime or inferior degree where appropriate and requested. *State v Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984). A crime is an inferior degree when (1) the statutes for both the charged offense and the

proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (citing to *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)).

In addition, Washington statute permits a jury, upon an information consisting of different degrees, to find the defendant guilty of any degree inferior to the degree charged. RCW 10.61.003. Specifically, the court in *State v. Dodd*, 53 Wn. App. 178, 765 P.2d 1337 (1989), held that third degree statutory rape is a crime of inferior degree to second degree statutory rape.

Because Zapeda-Mancilla was charged with second degree statutory rape, he was entitled to an instruction on third degree statutory rape because G.B.’s testimony established that she told him she was 15 years old. Notwithstanding supporting evidence, defense counsel failed to request an inferior degree instruction on Counts 1 and 2.

Washington courts use three themes “to gauge whether a tactical decision not to request a lesser included offense instruction

is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial." *Grier*, 150 Wn. App. at 640-41.

In *Grier*, the court looked at each of the above three themes and found that trial counsel's failure to request instructions on manslaughter, a lesser included offense of the charged offense of second degree murder, was not an objectively reasonable tactical decision. *Id.* at 641. First, the sentencing range for second degree murder was 123-220 months in prison, while the sentencing ranges for manslaughter were significantly less. *Id.* The higher penalty the defendant faced under a conviction for second degree murder, and counsel's decision to take an all or nothing approach, thereby abandoning the chance that the defendant would receive a significantly lower sentencing range, created an unreasonably high risk. *Id.* Additionally, the court noted that "the 'all or nothing' defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt." *Id.* at 642 (quoting *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004)). Where the evidence against

the defendant is overwhelming, however, asking the jury to acquit on insufficient evidence is unreasonable. *Id.* at 643.

In the present case, G.B. testified that she told Zapeda-Mancilla she was 15 years old on two different occasions. RP 261. G.B. testified that on one occasion she told this to Zapeda-Mancilla when they were at the transit center, but did not say when this occurred, or whether this was before or after they had engaged in sexual intercourse. RP 261-62. Zapeda-Mancilla also testified that G.B. told him her age when they were at the transit center before they had ever engaged in sexual intercourse, though he could not recall when she told him this. RP 291-92. Accordingly, there was evidence in the record that G.B. made declarations as to her age prior to all instances of sexual intercourse.

Since an instruction on inferior degrees was supported by the evidence, counsel's failure to request instructions on Counts 1 and 2 was not reasonable. First, there are significant differences in the penalties for second and third degree statutory rape, 210-280 months versus 60 months. Second, the defense's theory of the case was the same for both degrees—that G.B. had told Zapeda-Mancilla she was older than she really was. Third, the defendant had already admitted to having sexual intercourse with G.B.

Evidence of some kind of guilt was thus overwhelming; by failing to give a lesser instruction, defense counsel forced the jury to either acquit a man who had confessed to sexual intercourse with a minor or convict him of the charged degree. These three circumstances created an unreasonably high risk for Zapeda-Mancilla, one that could have been alleviated by a lesser instruction.

Zapeda-Mancilla was prejudiced by counsel's deficient performance. During deliberations, the jury submitted an inquiry to the court, asking why there was no option of third degree statutory rape for Counts 1 and 2. CP 118. The jury's question indicates that it was entertaining the option of convicting Zapeda-Mancilla of the inferior degree on all four counts, and may have done so had it been given further guidance by the court. Defense counsel's "all or nothing" approach to Counts 1 and 2 unreasonably precluded the possibility that Zapeda-Mancilla would be subject to a significantly lower sentencing range. Thus, Zapeda-Mancilla was unfairly prejudiced by counsel's actions.

**B. THE TRIAL COURT ERRED IN DENYING ZAPEDA-MANCILLA'S MOTION FOR AN EXCEPTIONAL SENTENCE BECAUSE IT RELIED ON IMPERMISSIBLE BASES IN MAKING ITS DECISION**

Under Washington's Sentencing Reform Act (hereinafter referred to as the "SRA"), sentencing courts may impose exceptional sentences below the standard sentencing range where there are "substantial and compelling reasons" to do so. RCW 9.94A.535. A sentencing court's denial of a defendant's motion for an exceptional downward sentence may be reviewed on appeal. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997). Specifically, appellate courts may review the sentencing court's denial of an exceptional sentence where the sentencing court either (1) refused to exercise its discretion at all or (2) relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *Garcia-Martinez*, 88 Wn. App. at 330.

A court refuses to exercise its discretion at all if it refuses categorically to ever impose an exceptional sentence, whereas a court relies on an impermissible basis if, for example, it takes the position that no drug dealer should ever receive an exceptional sentence or bases its decision on the defendant's race, religion, or

exercise of a constitutional right. *State v. Khanteechit*, 101 Wn. App. 137, 139 FN2, 5 P.3d 727 (2000) (citing to *Garcia-Martinez*, 88. Wn. App. at 330); *see also State v. Montgomery*, 105 Wn. App. 442, 17 P.3d 1237 (2001).

1. The trial court penalized Zapeda-Mancilla's exercise of the right to stand trial

A court's imposition of a penalty for a defendant's exercise of his legal rights violates due process. *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363-64, S.Ct. 663, 54 L.Ed.2d 604 (1978). A court may not subject a defendant to more severe punishment as a consequence of his exercise of the constitutional right to stand trial. *Montgomery*, 105 Wn. App. at 446.

A sentencing court commits reversible error when there is evidence that its sentencing decision was influenced by the defendant's exercise of his right to stand trial. *See United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (sentencing court remarked that defendant had "a lot to lose" by going to trial); *United States v. Hutchings*, 757 F.2d 11, 13 (2d. Cir), *cert. denied*, 472 U.S. 1031, 105 S.Ct. 3511, 87 L.Ed.2d 640 (1985) (sentencing

court remarked the defendant “was clearly and unquestionably guilty, and there should have been no trial”).

In *Montgomery*, the defendant was sentenced to prison for rape of a child in the first degree and child molestation in the first degree—a sentence which rendered him eligible to apply for special sex offender sentencing alternatives (“SSOSA”). *Montgomery*, 105 Wn. App. at 443. The trial court denied the defendant’s request for SSOSA citing as its primary reason the defendant’s decision to take the case to trial and his unwillingness to acknowledge that he had a problem. *Id.* at 446 FN8. Although the appellate court ultimately affirmed *Montgomery*’s sentence on other grounds, it held that the trial court had committed error when it denied the defendant’s request based on his decision to take the case to trial. *Id.* at 446.

Similarly, in *United States v. Hutchings*, 757 F.2d 11, 13 (2nd Cir. 1985), the trial judge stated that the trial had been a “total waste of public funds and resources ... there was no defense in this case. This man was clearly and unquestionably guilty, and there should have been no trial.” The appellate court remanded the case, not only because of the trial court’s speech, but also because the record lacked an “unequivocal statement by the judge as to

whether [the defendant's] decision to go to trial was or was not considered in imposing sentence." *Id.* at 14.

In the present case, by discussing Zapeda-Mancilla's decision to stand trial, the sentencing court revealed that his decision to exercise his constitutional right to a trial influenced its decision not to impose an exceptional sentence. In responding to the sentencing motion, the court first stated "Now, most of these cases, and I'm certainly not commenting on that nor even factoring it in, but most of these cases, that's what plea bargains are all about [...] for whatever reason [...] you decided to roll the dice, and that didn't go your way." 7/26/2010 RP 17. Several minutes later, in comparing Zapeda-Mancilla's case to a similar case cited by defense counsel, the court noted:

[I]n that case, the defendant pled guilty. The defendant didn't go to trial and put the person—have to go through the experience on the stand. I mean, those things, again, Mr. Zapeda, you have an absolute right to go to trial and you exercised that right. But a jury didn't make findings that you thought they were going to, bottom line. And I don't find that the Clemons case is persuading to this court in that regard.

7/26/2010 RP 18.

The sentencing court's comments on Zapeda-Mancilla's decision to stand trial contradict its claim that his exercise of this

constitutional right was not a factor in its sentencing decision. At least two things were clear from the judge's remarks: (1) for the court, plea bargaining is the default, and trial is the exception; and (2) Zapeda-Mancilla was guilty, but chose to gamble anyway, unnecessarily putting the victim through the pain of a trial.

7/26/2010 RP 18. The implication of the court's remarks is that Zapeda-Mancilla wasted the court's time and made the victim pointlessly suffer. In addition, the court's focus on Zapeda-Mancilla's decision to stand trial as a factor that set him apart from the similarly situated defendant in *State v. Clemens*, 78 Wn. App. 458, 898 P.2d 324 (1995), and its refusal to apply the facts of *Clemens* to the case on that basis, further supports the notion that the sentencing court was influenced by Zapeda-Mancilla's taking the case to trial in denying his request for an exceptional sentence.

Moreover, the court failed to make any unequivocal statement on the record denying that Zapeda-Mancilla's exercise of a constitutional right influenced its decision. Accordingly, the sentencing court committed reversible error and the sentence should be reversed and remanded.

2. The trial court abused its discretion by finding that, as a matter of law, “willing participant” is never a mitigating circumstance for a defendant convicted of statutory rape

In enacting the SRA, and specifically, the exceptional sentence provision, the legislature intended “to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case.” *State v. Davis*, 146 Wn. App. 714, 720-21, 192 P.3d 29 (2008) *review denied* 166 Wn.2d 1033, 217 P.3d 782 (citing to *In re Smith*, 139 Wn. App. 600, 603, 161 P.3d 483 (2007)). The legislature recognized that not all individual cases fit the predetermined structuring grid. *Id.* The SRA’s express purpose is to ensure that the punishment imposed on a defendant is commensurate with the punishment imposed on others committing similar offenses; to ensure that the punishment is proportionate to the seriousness of the criminal offense and the offender’s criminal history; and to promote respect for the law by providing just punishment. RCW 9.94A.010(1), (2), (3).

In making a sentencing decision, sentencing courts may consider mitigating circumstances enumerated in the SRA, as well as other factors, provided that they are consistent with the purposes of the SRA and are supported by the evidence. See

*Davis*, 146 Wn. App. at 720. One such mitigating circumstance identified by the legislature is where to a significant degree the victim was an initiator, willing participant, aggressor, or provoker of the incident. RCW 9.94A.535 (1)(a).

For purposes of determining an appropriate sentence for defendants convicted of statutory rape, minors can be “willing participants” in sexual intercourse. *Clemens*, 78 Wn. App. at 464, 468, 469. The *Clemens* court explained that “the willing participation of the victim merely provides evidence regarding the culpability of the defendant for sentencing purposes; it does not excuse the acts of the defendant.” *Id.* at 468. In *Clemens*, the defendant, an 18-year-old male, had sexual intercourse with a 14-year-old female. *Id.* at 461. Evidence at trial showed that the sexual intercourse was consensual, the defendant knew the girl’s age, the girl was an initiator and willing participant, the defendant and the girl were relatively close in age and maturity, and there was no evidence that the defendant planned the sexual contact. *Id.* at 460-61, 466. Ultimately, the appellate court held that the exceptional downward sentence, 12 months instead of 15 to 20 months, was justified by the circumstances.

As in *Clemens*, the sexual intercourse between Zapeda-Mancilla and G.B. was consensual—there was no evidence produced at trial suggesting otherwise. Furthermore, G.B. was an initiator in some circumstances; the two were relatively close in age and maturity; and there was no evidence that Zapeda-Mancilla ever planned the sexual contact—to the contrary, G.B. testified that “it just happened.” RP 243.

Despite a notable similarity between the circumstances here and the circumstances found in *Clemens*, the sentencing court refused to consider “willing participant” as a mitigating factor.

7/26/2010 RP 16. The trial court merely stated:

I have to decide [...] whether [G.B.] was the willing participant that the case law speaks about, because I certainly also absolutely agree with Ms. Hanlon, and that is she couldn't have consented because of her age, period. That's what the law says.

7/26/2010 RP 16. No more was said on the subject of “willing participant.”

Not only did the sentencing court misstate the law regarding consideration of “willing participant” in cases of statutory rape, but it also indicated that, categorically, the court would never impose an exceptional sentence on defendants convicted of statutory rape on

the basis of “willing participant,” which is, as a matter of both case law and statute, a valid mitigating circumstance and one specifically identified by the legislature as worthy of the court’s consideration. Furthermore, in refusing to consider “willing participant” and in differentiating Zapeda-Mancilla from the defendant in *Clemens*, the court imposed greater punishment on Zapeda-Mancilla than others committing similar offenses. The court’s decision constituted an abuse of discretion and should be reversed.

## **VI. CONCLUSION**

Multiple errors at the trial court and sentencing court levels require that Zapeda-Mancilla’s convictions and sentences be reversed and remanded. At trial, defense counsel’s failure to object to a motion excluding evidence of G.B.’s drug use and to request inferior degree instructions on Counts 1 and 2 constituted deficient performance that prejudiced the defendant and violated his right to effective assistance of counsel. At sentencing, the court’s reliance on impermissible bases in denying Zapeda-Mancilla’s request for an exceptional downward sentence—(1) Zapeda-Mancilla’s exercise of a constitutional right and (2) the categorical denial of the mitigating circumstance “willing participant” for defendants convicted of statutory rape—was an abuse of discretion and

reversible error. As a result of the trial court's abuse of discretion, Zapeda-Mancilla's sentence is grossly disproportionate to the nature of his offense. Zapeda-Mancilla respectfully requests that this court vacate his sentence and his convictions, and remand the case to the trial court for further proceedings.

Respectfully submitted this 29<sup>th</sup> day of November, 2010.

  
Andrea Burkhart, WSBA #38519  
Attorney for the Appellant

**CERTIFICATE OF MAILING**

I certify that on Nov. 29, 2010, I mailed a true and correct copy of the foregoing Brief of Appellant by depositing the same in the United States mail, postage prepaid, addressed as follows:

Yakima County Prosecutor  
ATTN: James Hagarty  
128 N. 2nd Street, Room 211  
Yakima, WA 98901-2639

Miguel Rafael Zepeda Mancilla  
DOC #: 341742  
Airway Heights Corrections Center  
11919 W. Sprague Ave.  
P.O. Box 1899  
Airway Heights, WA 99001-1899

  
Andrea Burkhart, WSBA #38519