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Court of Appeals
Division III
State of Washington

No. 29899-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BUNCH

Appellant.

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

The Honorable Judge Michael Cooper

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 280-1207
Fax (509) 299-2701
Wa.Appeals@gmail.com

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A. SUMMARY OF ARGUMENT

Richard Bunch was convicted of first-degree kidnapping, luring, first-degree rape, first-degree rape of a child (predatory), and first-degree child molestation (predatory). His conviction for first-degree child molestation should be reversed because the jury was not instructed that it had to be unanimous as to which of the multiple acts established the crime. Alternatively, the child molestation conviction should be reversed since the jury was not instructed that it had to unanimously find an act supporting this crime that was separate and distinct from the child rape offense. Reversal and vacation of this conviction is necessary, because, given the argument presented and other instructions to the jury, it was not “manifestly apparent” that the jury found separate and distinct acts to support each crime.

Next, the matter should be remanded for resentencing because Mr. Bunch’s offenses constituted the same criminal conduct. Furthermore, the trial court erred by imposing an indeterminate exceptional sentence on bases not supported by the law or the record. Wherefore, Mr. Bunch respectfully requests that this Court reverse, dismiss count five, and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The court erred by failing to give a “multiple acts” jury unanimity instruction.

2. The court erred by failing to give a “separate and distinct acts” jury instruction.
3. The court erred by entering a conviction for child molestation in violation of Mr. Bunch’s right to a unanimous jury verdict.
4. The court erred by entering a conviction for child molestation in violation of double jeopardy.
5. The court erred by refusing to count any of Mr. Bunch’s offenses as the “same criminal conduct” for calculation of the defendant’s offender score.
6. The court erred by refusing to impose concurrent sentencing.
7. The court erred by enhancing Mr. Bunch’s standard sentencing range for first-degree rape to be 318 months to life based on the age of the child, and then also imposing an exceptional, consecutive sentence based on the same age of the child.
8. The court erred by imposing an exceptional sentence that was indeterminate.
9. The court erred by imposing an exceptional sentence based on a high offender score that should not be upheld.
10. The court erred by failing to enter written findings of fact and conclusions of law to support the exceptional sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the defendant was denied his right to a unanimous jury verdict and/or placed in double jeopardy because (a) the jury was not required to unanimously agree on the specific act(s) that established child molestation and (b) it was not manifestly apparent that the jury convicted the defendant of child molestation and child rape based on separate and distinct acts.

Issue 2: Whether the defendant’s multiple convictions constituted the same criminal conduct for sentencing purposes because each offense involved the same victim, same time, and same intent.

Issue 3: Whether the court erred by running the defendant's indeterminate sentences for luring, child rape and child molestation consecutively to his indeterminate sentence for first-degree rape based on a factor that was already considered in calculating the standard range (age of the child) and a high offender score that should now be significantly reduced.

D. STATEMENT OF THE CASE

On July 19, 2008, then 9-year-old L.J. was at a barbeque across the street from Central Washington University in Ellensburg, WA, with her family. (RP 195, 221-22, 254, 269, 277, 293) She and her 12-year-old brother R.J. were bored, so they and their 10-year-old friend D.K. went across the street to the CWU Japanese gardens. (RP 192, 195-96, 223-24, 254-55, 270-71, 278, 446-48)

While the children were playing in the gardens, a man joined them whom the children did not know. (RP 199, 225, 256-58, 306-08, 344, 381) A short while later, D.K. asked R.J. to show him to the bathroom, and the man promised to watch L.J. while the boys were gone. (RP 198-99, 226-27, 258-59, 308, 311, 381) After the boys left, the man offered to show L.J. a birds nest, but she never saw it. (RP 198-99) Instead, the man pulled L.J. by her arm into a corner of the garden, pushed her down behind some bushes, held her to the ground, covered her mouth so she could not scream, told her to "shut up," said he wouldn't hurt her, and then proceeded to assault her. (RP 200-01, 203, 312, 314-16, 344, 346, 348, 382-83, 385)

The man pulled down L.J.'s pants and panties, licked the girl's genitals, rubbed his penis between her legs, licked her face, stuck his tongue in her mouth, and penetrated her vagina with his finger in a painful manner that caused her to bleed. (RP 200-05, 282-83, 316-19, 344, 346-47, 355, 382-88, 392) R.J. and D.K. returned to the garden after being gone approximately five minutes, R.J. found the man standing naked over his crying sister, and R.J. yelled for the man to leave. (RP 204, 227-29, 246, 259-61, 320, 392)

The man ran away, L.J. put her clothes on, and the children ran back to the barbeque to tell their parents and an off-duty detective what had happened. (RP 205, 230, 246, 271-72, 279-81, 293-96, 300-01, 321. 383) L.J. was then taken to a hospital where a sexual assault nurse examined her and collected evidence for a rape kit. (RP 205-06, 283, 285, 296, 302, 323-24, 340-43, 349-56, 362-63, 529) L.J. explained the details of the assault to an investigating officer at the hospital and to a child forensics interviewer three days later. (RP 205-08, 303-05, 313, 378)

Three months later, the forensics lab that had analyzed L.J.'s rape kit contacted law enforcement, reporting that it had a positive DNA match for Richard Bunch based on saliva swabs taken from L.J.'s face. (RP 429-33, 478-93, 506, 533) Shortly thereafter, R.J. and D.K. identified Mr. Bunch as the perpetrator from a police photo montage. (RP 232, 240-43,

245, 249, 263-66, 411-12, 414-15, 417-18, 436-40) L.J. then viewed a photo montage and indicated that the perpetrator was either Mr. Bunch or one other individual. (RP 210-13, 218, 422-23)

Mr. Bunch was charged by second amended information with (I) kidnapping, (II) luring, (III) first-degree rape, (IV) first-degree rape of a child (predatory), and (V) first-degree child molestation (predatory). A jury trial commenced on March 8, 2011, during which testimony was heard from the following witnesses: L.J., R.J., D.K., L.J.'s father Kevin Johnson, L.J.'s mother Patty Johnson, off-duty detective Darren Higashiyama, nurse Pamela Clemons, child forensics interviewer Lisa Larrabee, Mr. Bunch's then-employer Dominic Nicandri of Gordon Trucking, forensics scientist Amy Smith, Mr. Bunch's then-girlfriend Susan Keene, Verizon Wireless executive Faud Dadabhoy, and law enforcement officers Brian Pinger, Jeffrey Saint John, Jason Bethone-Koch, and Brian Melton

Mr. Bunch was convicted as charged of all five counts. Defense counsel requested that the counts be counted as one for the same criminal conduct (CP 342), but the trial court counted the offenses separately (RP 638). The court did find that the kidnapping and first-degree rape counts merged. (RP 634) The court then found that Mr. Bunch had an offender score of 17, and it established the standard range for the first-degree rape

as 318 months to life,¹ the standard range for the first-degree child rape (predatory) as 318 months to life, and the standard range for the first-degree child molestation (predatory) as 300 months to life. (RP 638)

Mr. Bunch was sentenced to the following concurrent sentences: count 2 Luring (12 months), count 4 Child Rape (318 months to life) and count 5 Child Molestation (300 months to life). (CP 346-47) The court then ordered that these sentences would run *consecutive* to the first-degree child rape sentence of 318 months to life. (CP 346; RP 638-39) In pertinent part, the court wrote in Mr. Bunch's judgment and sentence:

"Pursuant to RCW 9.94A.535(2), the court finds the multiple offenses committed would not be adequately punished unless the court exceeds the standard range, hence ct 4, 5 and 2 are consecutive to count 3 to reflect that the victim of the crime was a 9 year old child."

(CP 346) In its oral ruling, the court justified this exceptional sentence by stating:

"The rape of a child, child molestation, luring will all be consecutive to the rape...in the first degree... I am doing a consecutive sentence. I specifically find that if there were an adult victim you would get 318 to life. The fact that it's a child adds to the gruesomeness and tragedy of the whole thing and to not sentence you to the fact that it's a child quite frankly allows the rape of a child first degree to go unpunished. So I'll sentence you to both."

(RP 639)

Mr. Bunch timely appealed. (CP 356)

¹ The standard range listed in Mr. Bunch's judgment and sentence for first-degree rape was 240 to 318 months. (CP 345)

E. ARGUMENT

Issue 1: Whether the defendant was denied his right to a unanimous jury verdict and/or placed in double jeopardy because (a) the jury was not required to unanimously agree on the specific act(s) that established child molestation and (b) it was not manifestly apparent that the jury convicted the defendant of child molestation and child rape based on separate and distinct acts.

The jury was not instructed that it must rest its verdict for count 5 (child molestation) on unanimous agreement of any one particular act that was alleged by the State. Furthermore, the defendant was placed in double jeopardy since it was not clear that he was convicted of multiple offenses – i.e. child molestation and child rape – based on separate and distinct acts. The remedy for either the unanimity or double jeopardy violation is to reverse and vacate the first-degree child molestation conviction.

Criminal defendants have the right to a unanimous jury verdict, which requires that jury members unanimously conclude that the defendant committed the criminal act with which he is charged. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled on other grounds by*, *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988); U.S. Const. Amend. VI; Wash. Const. Art. I, §22. That is, the “jury must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct.” *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007).

Generally, a unanimity instruction will be required to guarantee a unanimous jury verdict if the prosecution alleges “several acts... and any one of them could constitute the crime charged.” *Kitchen*, 110 Wn.2d at 411. In multiple acts cases, the State must either elect the specific act it will rely upon for the conviction, or the court must instruct the jury that it must unanimously agree that a specific criminal act has been proven beyond a reasonable doubt. *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009). Failure to so elect or instruct in a multiple acts case constitutes constitutional error. *Id.* at 893. “The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Id.* (quoting *Kitchen*, 110 Wn.2d at 411).

Beyond jury unanimity, double jeopardy principles protect a defendant from multiple punishments for the same offensive act. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). Being of constitutional magnitude, this issue may be raised for the first time on appeal. *Id.* In *State v. Ellis, infra*, the court explained the difference between unanimity and double jeopardy contentions as follows:

“[A contention] asserting that all jurors must agree on the same act underlying *any given count* has to do with jury unanimity and the right to jury trial. [A contention] asserting that the jury could not use the *same act as a factual basis for more than one count* has to

do with the right against double jeopardy; at least in the context here, to use one act as the basis for two counts is to convict twice for the same crime.”

State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993) (emphasis added).

Generally, where one or more acts are alleged that could each lead to convictions on multiple counts, “jury instructions...[are] lacking for their failure to include a ‘separate and distinct’ instruction...” so as to protect against a double jeopardy violation. *Mutch*, 171 Wn.2d at 663. Where jury instructions are so lacking, it must be manifestly clear to a jury that the State is not seeking to impose multiple punishments for the same offense, else the defendant’s right to be free from double jeopardy is violated. *Borsheim*, 140 Wn. App. at 367 (internal citation omitted); *Mutch*, 171 Wn.2d at 663-64.

When considering a possible double jeopardy violation, the Court looks to the evidence, arguments and instructions and conducts a review that is “rigorous” and “among the strictest.” *Mutch*, 171 Wn.2d at 664. Based on this review, unless it is “manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act, there is a double jeopardy violation.” *Id.* (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

In *Borsheim*, the court agreed with the defendant that “[none of the jury instructions] specifically state[d] that a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count.” *Borsheim*, 140 Wn. App. at 365. The court further found that the jury was properly instructed as to the need for jury unanimity regarding which act formed the basis for any given count, but the instructions “[did not] convey the need to base each charged count on a ‘separate and distinct’ underlying event.” *Borsheim*, 140 Wn. App. at 367. “Similarly, although [the jury was instructed] that ‘a separate crime is charged in each count,’ neither this instruction, nor any other, informed the jury that each ‘crime’ required proof of a different act.” *Id.* Thus, since it was not manifestly clear to the jury that the State was not seeking multiple punishments for the same offense, the court reversed for the double jeopardy violation and vacated three out of four of Borsheim’s child rape convictions. *Id.* at 371.

Here, Mr. Bunch was convicted of first-degree child rape, which occurs upon sexual intercourse with a child (RCW 9A.44.073), and he was convicted of first-degree child molestation, which occurs upon sexual contact with a child (RCW 9A.44.083). Sexual intercourse occurs upon

penetration of the vagina; sexual contact includes any touching of these same sexual parts. RCW 9A.44.010(1) and (2).

The jury was instructed in this case that it had to reach a unanimous verdict. (CP 224) But the jury was never instructed that it had to be unanimous as to which particular act formed the basis for first-degree child molestation. See *Borsheim*, 140 Wn. App. at 367; *Bobenhouse*, 166 Wn.2d at 894; *Kitchen*, 110 Wn.2d at 411. It was alleged that Mr. Bunch touched outside L.J.'s vagina with his hand, rubbed between her legs with his penis, licked L.J.'s genitalia and pushed his fingers into her vagina. Each of these acts could establish first-degree child molestation. Yet, jury unanimity was not required in this multiple acts case as to which act or acts unanimously led to conviction.

Furthermore, the jury was offered "to-convict" instructions for both first-degree child rape (CP 239) and first-degree child molestation (CP 242). But the jury was never instructed that it had to base each charged count on a "separate and distinct" underlying event. *Borsheim*, 140 Wn. App. at 367; *Mutch*, 171 Wn.2d at 663. The jury could have found that the defendant penetrated L.J.'s vagina with either his fingers or tongue and that either of these acts was the same underlying event that also constituted the "sexual contact" necessary to establish first-degree

child molestation. Without proper instructions, the risk is that Mr. Bunch was punished twice for the same offense.

Finally, the record in this case did not make it “manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act...” *Mutch*, 171 Wn.2d at 664. The State argued its theory of the case to the jury based on the defendant’s entire alleged course of conduct over an approximate five-minute time frame. But the State never set forth the separate and distinct acts that would establish one crime over the other. Significantly, the State did not identify the specific and distinct acts that would support the elements of first-degree child rape verses first-degree child molestation. Similarly, the instructions did not require separate and distinct acts to be found by the jury. Thus, it cannot be said that it was “manifestly apparent” to the jury that the State was not seeking multiple punishments for the same offensive acts.

Based on the unanimity and/or double jeopardy violations, Mr. Bunch’s conviction of first-degree child molestation should be reversed and vacated. *Kitchen*, 110 Wn.2d at 411; *Mutch*, 171 Wn.2d at 664; *State v. League*, 167 Wn.2d 671, 223 P.3d 493 (2009).

Issue 2: Whether the defendant’s multiple convictions constituted the same criminal conduct for sentencing purposes because each offense involved the same victim, same time, and same intent.

Mr. Bunch was convicted of kidnapping, luring, first-degree rape, first-degree child rape and first-degree child molestation. However, these counts involved the same criminal conduct and furthered the other crime(s); the crimes were committed over a relatively short period of time, each count involved the same victim, and the crimes were perpetrated with the same criminal intent – forcible sexual gratification. Therefore, the counts constituted the same criminal conduct and should have been sentenced as one offense under the most serious charge rather than separately counted or consecutively sentenced.

If two or more crimes constitute the same criminal conduct, the current offenses are counted as one crime and the sentences are served concurrently. RCW 9.94A.589(1)(a); *State v. French*, 157 Wn.2d 593, 612-14, 141 P.3d 54 (2006). To constitute “same criminal conduct” for purposes of sentencing, two or more criminal offenses must involve (1) the same criminal intent, (2) the same time and place, and (3) the same victim. RCW 9.94A.589(1)(a). If any of these elements is missing, the multiple offenses do not encompass the same criminal conduct, and the trial court must count each offense separately in calculating the offender score. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 160 (1987). This

Court reviews a trial court's decision on "same criminal conduct" de novo. *State v. Torngren*, 147 Wn. App. 556, 562, 196 P.3d 742 (2008).

Here, all three sex offenses clearly involved the same victim: L.J. Moreover, the offenses all occurred at the same time, over approximately a five-minute span while L.J.'s brother and friend were in the bathroom. And, the offenses all occurred at the same place: in the bushes at the CWU Japanese gardens. The only remaining issue under the "same criminal conduct" test is whether the offenses had the same criminal intent.

When examining intent, the focus is "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This often includes an examination of "whether one crime furthered the other and if the time and place of the two crimes remained the same." *Id.*

To illustrate, in *State v. Dolen*, the defendant was convicted of both child rape and child molestation based on "continuous sexual behavior over a short period of time." 83 Wn. App. 361, 365, 921 P.2d 590 (1996). The Court held that the victim, time and place were all the same. *Id.* at 365. Moreover, the defendant's crimes involved the "same objective criminal intent—present sexual gratification." *Id.* Specifically, the Court found the same criminal intent in that "the child molestation furthered the child rape." *Id.* That is, "the inappropriate rubbing and touching of the

child led to the penetration of the child’s vagina.” *Id.* Thus, the Court held that the two offenses should have been considered the “same criminal conduct” for purposes of sentencing. *Id.*²

Similarly, in *State v. Palmer*, the defendant was convicted of multiple counts of rape after he assaulted the victim, threatened her, forcibly performed oral sex on her, and subsequently removed his own clothes and committed genital/genital rape. *State v. Palmer*, 95 Wn. App. 187, 192, 975 P.2d 1038 (1999). The Court noted that the initial offense was committed “in preparation for the penile/vaginal rape which immediately followed the oral rape.” *Id.* at 191. The Court likened the case to *State v. Walden*, *supra* FN2, finding that the criminal intent was the same between the defendant’s two rapes that were committed in furtherance of one another. *Id.* at 192. The Court noted that Palmer’s renewed threats or possible time to reflect between the two rapes did not alter this analysis. *Id.* The crimes constituted the “same criminal conduct” for sentencing purposes. *Id.*³

² Citing *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) (“the court held that child rape and attempted child rape committed by forced masturbation and fellatio followed by attempted anal intercourse, in quick succession, involved the same criminal intent—sexual intercourse.”)

³ *C.f. French*, 157 Wn.2d at 613-14 (“The rapes and molestation at issue here occurred on several occasions throughout a five-year span. Unlike the cases mentioned above, where the rapes occurred within minutes of each other, the rapes here occurred over several years, making any temporal connection tenuous at best. In addition, as the State argues, the criminal intent for each crime is distinct... French had significant time during the

Here, the offenses involved the same time, place and victim. The only remaining issue is criminal intent. In that regard, this case is like *Palmer, Dolen and Walden*, above. The luring, kidnapping, child molestation and rape were all committed sequentially rather than over a period of hours, days or even years (*c.f., French, supra*). The luring led to the kidnapping, which led to the child molestation, which led to the rapes. Each crime furthered the next with the ultimate criminal intent being the same – sexual gratification of the defendant.

Given that there was no change in criminal intent, time, place or victim, the trial court should have found that the offenses encompassed the same criminal conduct and sentenced accordingly. Mr. Bunch's offender score should be reduced from seventeen to ten, based on counting the luring (1 point), child molestation (3 points), child rape (3 points) and rape (3 points) as the same criminal conduct. Even if this Court finds that only some of these crimes constituted the same criminal conduct, Mr. Bunch's offender score should still be reduced appropriately for those offenses that encompass the same criminal conduct, and current offenses should be sentenced concurrently according to RCW 9.94A.589(1)(a).

course of the sexual abuse to pause and reflect upon his actions. The rapes at issue here were sequential, not continuous or simultaneous.”)

Issue 3: Whether the court erred by running the defendant's indeterminate sentences for luring, child rape and child molestation consecutively to his indeterminate sentence for first-degree rape based on a factor that was already considered in calculating the standard range (age of the child) and a high offender score that should now be significantly reduced.

The court erred by ordering an exceptional, indeterminate sentence in this case. The court had already accounted for the age of the child when it enhanced the defendant's standard range for first-degree rape from 240-318 months, to 318 months to life. Thus, the age of the child cannot also therein support an exceptional sentence. Furthermore, to the extent the court may have ordered an exceptional sentence based on Mr. Bunch's high offender score of 17, based on the belief that certain crimes might otherwise go unpunished, resentencing is required to determine if this basis still exists following the recalculation of Mr. Bunch's offender score, as set forth in Issue 2 above.

Generally, current offenses are to be served concurrently pursuant to RCW 9.94A.589(1)(a). But, if supported, the trial court can either impose an exceptional concurrent sentence or consecutive sentences as an exceptional sentence. *State v. Batista*, 116 Wn.2d 777, 791, 808 P.2d 1141 (1991). For instance, the court may impose an exceptional sentence where it finds that "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c); 13B Wash.

Prac., Criminal Law § 3910. “A sentence outside the standard sentence range shall be a determinate sentence.” RCW 9.94A.535.

“Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” RCW 9.94A.535. “This requirement is mandatory.” *State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537 (2011) (citing *State v. Hale*, 146 Wn. App. 299, 306, 189 P.3d 829 (2008)). Unless the trial court’s oral opinion and the hearing record are “sufficiently comprehensive and clear that written facts would be a mere formality,” remand for entry of written findings and conclusions is required. *Id.*

This Court “determine[s] the appropriateness of an exceptional sentence by answering three questions: (1) whether evidence in the record supports the sentencing judge's reasons, under the clearly erroneous standard of review; (2) whether those reasons justify departure from the standard range as a matter of law; and (3) whether the sentence is clearly too excessive or too lenient, under the abuse of discretion standard of review.” *State v. Zatkovich*, 113 Wn. App. 70, 75, 52 P.3d 36 (2002); RCW 9.94A.585(4). “In determining whether an aggravating factor legally supports departure from the standard sentencing range, [this Court] employ[s] a two-part test:

“(1) The trial court may not base an exceptional sentence on factors the legislature necessarily considered in establishing the standard sentencing range; and

“(2) the aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.”

Zatkovich, 113 Wn. App. at 79 (citing *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)).

Whereas some findings may support an aggravated exceptional sentence, other findings instead enhance the standard sentencing range. Like in this case, where a person is convicted of first-degree rape and the court finds that the victim was a child less than 15-years-old, the minimum term shall be raised to either the maximum of the standard range for the offense or 25 years, whichever is greater. RCW 9.94A.507(3)(c)(ii); *State v. Rice*, 159 Wn. App. 545, 569-70, 246 P.3d 234, *review granted*, 2011 WL 3658914 (2011).

Here, Mr. Bunch's standard sentencing range for first-degree rape was initially listed as 240 to 318 months. (CP 345) *See* RCW 9A.44.040; RCW 9.94A.525(17). But, presumably based on the fact that L.J. was under 15-years-old, Mr. Bunch's standard range for this count was actually enhanced to 318 months to life, consistent with RCW 9.94A.507(3)(c)(ii) (setting minimum term as maximum of standard range

or 25 years, whichever is greater). (CP 347; RP 638-39)⁴ To the extent the trial court used this same fact that had already enhanced the standard range (the age of the child), and thereby also imposed an exceptional sentence based on that same age finding, the exceptional sentence is erroneous as a matter of law. The “trial court may not base an exceptional sentence on factors the legislature necessarily considered in establishing the standard sentencing range.” *Zatkovich*, 113 Wn. App. at 79.

It is not clear from the inadequate written findings whether any other basis would support an exceptional sentence. Only a notation was made on the judgment and sentence regarding the basis for the consecutive sentences (CP 346), rather than the required formal entry of findings and conclusions. And the oral ruling focused on the age of the child, ensuring that whatever sentence is imposed accounted for Mr. Bunch’s crimes against this nine-year-old. (RP 638-39) As noted above, the age of the child cannot support an exceptional sentence in this case. Accordingly, remand for written findings and conclusions would aid the further review of this issue.

Regardless, to the extent the trial court may have based an exceptional sentence on Mr. Bunch’s high offender score, this basis would no longer justify an exceptional sentence. Mr. Bunch’s offender score

⁴ Mr. Bunch’s judgment and sentence incorrectly listed the standard range including enhancements as 240 to 318 months (CP 345), but the court actually sentenced Mr. Bunch based on a standard range of 318 months to life (CP 347; RP 638-39).

should be reduced by three points for every current sex offense that constituted the same criminal conduct and one point if luring constituted the same criminal conduct, bringing him closer to the maximum sentencing range scheme with an offender score as low as 10. In other words, upon remand for resentencing, the “high offender score” basis would not likely pass the “clearly erroneous” standard for this exceptional sentence.

Finally, Mr. Bunch’s exceptional sentence is erroneous as a matter of law because it imposes consecutive *indeterminate* sentences. Exceptional sentences are required to be determinate (RCW 9.94A.535), so, if the exceptional sentence is affirmed or re-imposed, the sentence must be corrected to be determinate.

F. **CONCLUSION**

The jury unanimity and/or double jeopardy violations should result in reversal and dismissal of the first-degree child molestation count. In addition, the matter should be remanded for resentencing because the offenses constituted the “same criminal conduct.” Finally, the trial court erroneously imposed an indeterminate, exceptional sentence. Wherefore, Mr. Bunch respectfully requests that this Court reverse, dismiss count five, and remand for resentencing.

Respectfully submitted this 29th day of March, 2012.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 29899-0-III
vs.)
RICHARD BUNCH) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 29, 2012, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Richard Duane Bunch
#1043417
ELY State Prison
PO Box 1989
Ely, NV 89301

Having obtained prior permission from Kittitas County Prosecutor's Office, I also served Christopher Herion at chris.herion@co.kittitas.wa.us by e-mail.

Dated this 29th day of March, 2012.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 280-1207
Fax: (509) 299-2701
Wa.Appeals@gmail.com