

66574-0

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NO. 665740

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SWEET,

Appellant.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
FILED

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

The Honorable Ronald Kessler, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence, under ER 404(b), of acts of ill temper and violence committed against persons other than the alleged victim, L.A.

2. The prosecutor's misconduct in using the ER 404(b) evidence improperly denied Mr. Sweet a fair trial.

3. The trial court erred in denying Mr. Sweet's motion for mistrial.

4. There was insufficient evidence to support Mr. Sweet's convictions for sexual exploitation of a minor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in admitting evidence of anger at and physical violence toward L.A.'s mother and brothers for the purpose of explaining L.A.'s delay in reporting abuse, where the defense never challenged her credibility for the delay or for her earlier recantation?

2. Did the trial court err in admitting the audio recording of Mr. Sweet's anger at L.A.'s brother merely because L.A. overheard the incident, where the defense did not challenge L.A.'s

credibility for her delay in reporting her accusations?

3. Did the prosecutor's misconduct in using evidence of acts of violence and bad temper for purposes other than to explain L.A.'s delay in reporting deny Mr. Sweet a fair trial?

4. Did the trial court err in denying a mistrial after the prosecutor read a past recorded recollection of a state's witness, which stated untruthfully, and violated ER 609 and the court's motion in limine, that Mr. Sweet had been in and out of jail for child abuse?

5. Where there as no evidence that Mr. Sweet knowingly failed or refused to protect L.A. from sexual exploitation by another or that he was her "legal guardian," was the evidence insufficient to support his convictions for sexual exploitation of a minor?

C. STATEMENT OF THE CASE

1. Procedural history

The King County Prosecutor's Office charged appellant Kenneth Sweet by third amended information with four counts of rape of a child in the first degree, four counts of rape of a child in the third

degree and two counts of sexual exploitation of a minor. CP 152-162. Mr. Sweet's stepdaughter L.A. was the alleged victim in all counts. CP 152-162. Mr. Sweet was charged with fourth degree assault against J.S, in a separate count which was severed for trial; Mr. Sweet ultimately entered a plea of guilty to this charge. CP 138-147; 152-162. The information also alleged, for all of the rape of a child counts, the aggravating factors that Mr. Sweet abused his position of trust and that there was an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time. CP 152-162.

Mr. Sweet was convicted of all counts by jury verdict after trial before the Honorable Ronald Kessler. 56-90. Judge Kessler imposed terms within the standard range. CP 216-227, 228-230.

Mr. Sweet filed a timely notice of appeal. CP 258-270.

2. Trial testimony

Kenneth Sweet married Penny Arneson in 2000. RP 364. Ms. Arneson and her four children, including L.A., moved into Mr. Sweet's house in Redmond, Washington. RP 361-36. Mr. Sweet and Ms. Arneson

had three children together. RP 363, 369-370. The family's life was sometimes chaotic; Ms. Arneson worked long hours away from home and Mr. Sweet worked from a home office. RP 367.

One of their sons died from an injury from a toy. RP 369. The family moved to a larger home in Carnation, Washington after being awarded a substantial settlement from the toy manufacturer. RP 105, 370-372.

When L.A. was 15 years old, she told friends that her stepfather had had sex with her and that she did not want to go home that evening. RP 196, 261, 266. She exchanged a number of text messages with Mr. Sweet that evening in which he told her that she needed to meet up with him immediately and then that his life would be over if she did not come home, that he would do anything she wanted if she would come home, and that he felt like killing himself.¹ RP 641-642; 262. In one of the text messages he said that "[b]eing a good person will not keep me from spending the rest of my life in

¹ Some text messages were recovered from L.A.'s phone and the phone of a friend which she borrowed when her phone stopped working. RP 636, 640. No deleted messages were recovered. RP 644.

jail if anyone repeats the things she says when mad at me." RP 642. Two of her friends recalled seeing messages from Mr. Sweet saying that if L.A. wanted him to pick her up, he expected 30 minutes of sex with her. RP 192-195, 259-260. L.A. testified at trial that she could not recall such a message and no such messages were recovered. RP 530.

L.A. spent the night with one of the friends and the next morning sent a text message to her mother. RP 402 Her mother took her to Overlake Hospital where the staff interviewed L.A. about her accusations and collected evidence. RP 268, 534. A vaginal swab collected at the hospital revealed sperm which DNA testing showed had a very high probability of matching Mr. Sweet's DNA. RP 208-209, 238.

L.A. told the staff at Overlake and the police who interviewed her that Mr. Sweet had had sex with her over the past two weeks. RP 282-283, 318-319, 608. She also told the social worker and psychiatric intervention specialist that she had taken a bottle of ibuprofen several days earlier but had then made herself throw up. RP 283. The psychiatric interventionist noted that L.A. was worried about

Mr. Sweet and thought he would cry when arrested.
RP 284.

L.A. had told a boyfriend, in late 2007, that her stepfather had sexually abused her; the boyfriend told her she should get the authorities involved, but L.A. did not do this. RP 175-177.

A video which was said to have been found on the hard drive of a computer linked to a camera security system for the house in Carnation showed two instances of what was described as Mr. Sweet having sex with L.A. in the media room of the house.² RP 167-168, 170, 328-335. Another video

² The computer was found by Ms. Arneson's nephew in the crawlspace of the house after the police had searched the house. RP 328-329, 613, 645. The police said they created an image of the hard drive of the computer and used this duplicate for analysis. RP 600-601, 630-631. The first detective to examine the hard drive found nothing on it. RP 600. Approximately one year later, Chuck Pardee, a forensic examiner for the prosecutor's office, examined "a hard drive from the King County Sheriff's Office that contained an image of another two devices"-- two hard drives taken from one computer. RP 645. It was Mr. Pardee who recovered the two videos. RP 647-648. Mr. Pardee never saw either the actual computer or the original hard drives. RP 668. Thus, while Mr. Pardee could testify that he was confident that he made an exact copy of the hard drive he received, he apparently had no way of determining if this was an exact copy of the hard drive taken from a computer found in Mr. Sweet's house. RP 647.

showed him rubbing L.A.'s back as she lay on a couch in the family room. RP 620.

L.A. also told the staff at Overlake Hospital that Mr. Sweet had abused her when she was 10 or 11 years old; she said he "tried to do stuff" and was "totally gross." RP 319. She told the police that same day that Mr. Sweet had fondled her but that there was no penetration at this earlier time. RP 540-541.

Allegations of sexual abuse had surfaced in 2006 when L.A. talked to friends at school and one of the children told her police-officer father. RP 477-481, 468-470. A police detective and CPS interviewed L.A. at school in 2006, but she said that she had lied. RP 118-120, 127-131. Although the detective spoke with Mr. Sweet and Ms. Arneson at that time, they conducted no further investigation. RP 132-133, 393-397.

L.A. testified at trial that when she was 10 or 11 years old, in the 4th grade, Mr. Sweet would lie beside her when they watched movies and put his fingers in her vagina. RP 497-501. According to L.A., it happened once or twice a week. RP 501. She also testified that Mr. Sweet would get into the

shower with her once or twice a month and touch her and put his mouth on her vagina. RP 503-504. He stopped after the death of her brother. RP 506.

L.A. testified that she had felt frightened when confronted by the principal, CPS and the police after her first disclosure in 2006, and frightened that they would go to her house and talk to Mr. Sweet. RP 509-511.

When the family moved to Carnation, according to L.A., Mr. Sweet took her shopping and treated her better than he treated the other children. RP 512-516. He bought her a self-tanning machine, which she very much wanted, and would spray her with it when they were in the sauna. RP 516. During those spray tanning sessions, he would put his mouth on her vagina. RP 516-518. They had sexual intercourse for the first time in the media room; Mr. Sweet looked at his watch to determine 10 minutes.³ The second time they had intercourse was in the bathroom and then the family room late at night and possibly another time in the media room RP 522-525. On one occasion, Mr. Sweet bribed her

³ This can be seen on the videotape on the file of February 1, 2009. RP 658.

to have sex with him so she could go hang out with some kids her mother did not approve of. RP 523.

The issue for the jury, defense counsel argued, was whether the evidence to convict supported convictions for the counts not shown on video tape, including the counts which L.A. had initially recanted. RP 730-733.

To convince the jury and over defense objection, the state was permitted to introduce testimony by Penny Arneson and her sons Anton (18 years old), Ben (14) and Johnny (12) that Mr. Sweet had a volatile temper and got angry several times a day. RP 361, 375, 410-411, 439, 452, 463-463. According to these witnesses, Mr. Sweet would yell and sometimes get physical with the boys and would punish them. RP 439, 454. Although the witnesses testified that he did not get angry, or certainly as angry, with L.A., or punish her and that he treated her as special, the state elicited from L.A. that hearing the others get yelled at caused her fear that she might get yelled at as well if she did not do as Mr. Sweet asked her to do. RP 442, 489-494.

Neither Ms. Arneson nor L.A.'s brothers ever saw any evidence of sexual abuse. RP 446, 456.

3. Evidence of bad temper and violence towards others

Prior to trial, defense counsel objected to the state's introducing evidence of alleged violent behavior by Mr. Sweet against L.A.'s mother and brothers as not relevant to the charged crimes. RP 67-68. Counsel indicated that the defense was not going to impeach L.A. with her prior recantation. RP 68-70. The court ruled, nevertheless, that the evidence could be admitted to explain L.A.'s delay in reporting. RP 71. The court limited evidence to violence L.A. actually observed. RP 72.

The court later admitted the audio portion of the incident between Mr. Sweet and L.A.'s brother which formed the basis of the fourth degree assault charge, because L.A. had overheard Mr. Sweet from the next room. RP 340-343. The court gave a limiting instruction when the audio clip was played, instructing the jurors that they could consider the clip only for the impact it had on L.A. RP 605.

4. Prosecutor's arguments

The prosecutor began opening statement by telling the jurors that L.A. lived in a home with violence and yelling; that she

remembers the family being quite poor when she was younger, and she remembers the violence and the yelling between not only the defendant and her mother, but her mother, as well -- yelling that would bring the police -- violence towards her mother that would spill over, spill over to her brothers and herself.

L.A. remembers, as do her brothers, a temper possessed by the defendant that behind the closed doors of the Arneson and Sweet household would be something that none of you would want to see. The temper would actual go from 0 to 60 with the slightest provocation -- provocation that really would make no sense, and exploding in front of the children, and exploding in front of Penny Arneson.

RP 104-105. This description was not tied to a delay in reporting. It was only near the end of opening statement that the prosecutor briefly alluded to L.A.'s delay in reporting:

but L.A, who continued to witness the defendant's violence towards her mother, continued to witness the defendant's violence towards her brother and sister, did not come forward right away.

RP 109.

In closing, the prosecutor argued repeatedly that L.A. saw Mr. Sweet as a volatile and physically abusive to her mother and brother and that her home was filled with violence. RP 715-717, 720, 722, 723. These arguments, again, were not tied to a

claim that they caused her delay in reporting or recantation.

Ladies and gentlemen, L.A. did not have that kind of a home [where she could feel safe and loved]. Her home was something quite different. It was a place where violence was common, yelling and screaming was the norm. It was a place where her trust was violated, a place where her body was not her own.

RP 715.

. . . . We presented evidence that L.A. saw this man as volatile and physically and verbally abusive man -- abusive to her mother and her three brothers.

RP 717.

Now despite all of the contacts that she [L.A.'s mother] has had with CPS, the abuse has been unleashed on her and her boys by the defendant -- the yelling and the screaming in the house. . . . Penny Arneson never left the defendant . . .

RP 720-721.

Again in closing, the prosecutor argued only briefly that she recanted because "she is 12 and she is scared, and she repeatedly saw her brothers and her mothers brutalized by this man, and she constantly lived in fear," and noted that L.A. felt "scared" because she was being interrogated "as if she had done something wrong." RP 722.

5. Motion for mistrial

The defense moved to suppress the one page of notes of the Overlake Hospital sexual assault nurse, Victoria Waddleton, which were not provided to counsel until mid-trial shortly before Ms. Waddleton was to testify. RP 299-302. The court denied the motion. RP 302. Then when Ms. Waddleton was called as a witness, she was permitted to read her notes as past recollection recorded. RP 317-318. The notes included a statement that L.A. "reports that he [Mr. Sweet] was in and out of jail a couple of times for child abuse." RP 319.

After the testimony, the defense moved for a mistrial on the grounds that counsel had only had the opportunity to speak briefly to Ms. Waddleton and had not had the opportunity to look at the docket for Mr. Sweet's 2000 and 2001 fourth degree assault charges, which had been dismissed. RP 344, 346. They involved Penny Arneson and not the children. RP 347. The statement about being in and out of jail violated a motion in limine, ER 609 and was not accurate and was a serious violation. RP 345-346.

The court acknowledged that it would have excluded the evidence, but denied the motion for a mistrial. RP 349, 350-351.

The court gave a curative instruction indicating to the jury that there was no evidence that Mr. Sweet had been arrested and the statement that he had been in and out of jail should be disregarded entirely. RP 35.

D. ARGUMENT

- 1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MR. SWEET'S BAD TEMPER AND ACTS OF VIOLENCE AGAINST OTHERS WHERE THE DEFENSE DID IMPEACH L.A. WITH HER DELAY IN REPORTING OR EARLIER RECONTATION AND THE PROSECUTOR USED THE EVIDENCE TO ARGUE THAT MR. SWEET HAD A BAD CHARACTER.**

The trial court erred in admitting evidence of Mr. Sweet's having a bad temper and committing physical violence towards L.A.'s mother and brothers. Although such evidence was potentially admissible to explain L.A.'s delay in reporting or her earlier recantation, because the defense did not argue that L.A. was not credible either because of a delay in reporting or her earlier recantation, the evidence was not relevant or admissible. State v. Fisher, 165 Wn.2d 727, 746, 202 P.2d 937 (2009).

Defense counsel clearly indicated prior to any trial testimony being offered that the defense did not intend to impeach L.A. with her recantation, RP 66-69, and did not make an issue of her delay in reporting or her recantation during trial. Specifically, the defense made no opening statement and did not cross-examine witnesses or argue in closing that L.A. was not credible either because she recanted or delayed in reporting abuse. Counsel argued only that each count was separate and that L.A. was inconsistent in her reports of whether or not there was penetration for the earlier incidents. RP 729-733.

Under ER 404(b), evidence of prior bad acts is never admissible to show that a defendant is acting in conformity with his character in committing the charged crime or that he had a propensity to commit the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); ER 404(b). "Once a thief, always a thief, is not a valid basis to admit evidence." State v. Holmes, 43 Wn. App. 397, 400, 171 P.2d 766 (1986). Even though evidence of prior bad acts may be admissible under ER 404(b) for other purposes "such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity or absence of mistake or accident," it is presumptively inadmissible. Courts must not only presume that ER 404(b) evidence is inadmissible, the court must also resolve any doubts about admissibility in favor of exclusion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

To overcome the presumption of inadmissibility, the proponent of the evidence must establish that the evidence is necessary to prove an essential fact of the crime. State v. Barragan, 102 Wn. App. 754, 758, 9 P.3d 942 (2002); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

As set out in State v. Salterelli, 98 Wn.2d 358, 361-362, 655 P.2d 697 (1982), before 404(b) evidence may be admitted, the court must identify the purpose for the evidence; the court must find that the purpose is relevant to prove an essential element and of consequence to the particular action; and the court must find that the probative value of the evidence outweighs its prejudicial impact. Salterelli, at 361-362.

Here, the ER 404(b) evidence was evidence of verbal and physical abuse of others, not L.A. It was admitted for the sole purpose of explaining L.A.'s delay in reporting her accusations of sexual abuse by Mr. Sweet. RP 71. While this can under appropriate circumstances be a valid grounds for admitting such evidence, the evidence of physical violence towards others is admissible only where the defense actually makes an issue of the delay:

[T]he trial court allowed the evidence of physical abuse if defense counsel made an issue of Melanie's delayed reporting. The trial court's ruling made sense given Fisher was not on trial for or charged with physical abuse. **Only if defense counsel made an issue of Melanie's delayed reporting did the physical abuse become relevant to the determination of whether sexual abuse occurred.** The trial court did not err in ruling the evidence of physical abuse of Melanie, Brett and Brittany was admissible conditioned upon the defense making an issue of Melanie's delayed reporting.

State v. Fisher, 165 Wn.2d at 746 (emphasis added).

As in Fisher, the ER 404(b) evidence should have not been admitted unless and until the delay in reporting or recantation was attacked by the defense. Neither of these things occurred. Accordingly, the ER 404(b) evidence was admitted in error. The error was overwhelmingly and unfairly

prejudicial. The evidence served no relevant purpose; there was no challenge to L.A.'s credibility based on her delay in reporting or her recantation. The evidence served only to persuade the jury that Mr. Sweet was the type of person who would commit the crimes charged, the impermissible inference under ER 404(b). The error in admitting the evidence should require reversal of Mr. Sweet's convictions. Even though the state had direct evidence of two charges, the defense challenge at trial was centered on the other charges and the evidence of those counts rested mainly on the inferences.

2. THE PROSECUTOR'S MISCONDUCT IN NOT LIMITING THE STATE'S USE OF THE ER 404(B) EVIDENCE TO THE PURPOSE FOR WHICH IT WAS ADMISSIBLE, DENIED MR. SWEET A FAIR TRIAL.

The state did not wait until the defense challenged L.A.'s credibility because of either her delay in reporting or her recantation, but began opening statement with a lengthy description of punishment and physical violence which was not tied to any legitimate trial issue. The prosecutor began the presentation of the case with a description of violence and yelling in the home "that would spill

over to her and her brothers and herself," would "bring the police" and that none of the jurors "would want to see." RP 104-105. The prosecutor described Mr. Sweet as having "an explosive temper at the slightest provocation." RP 105.

Even though the defense did not make an issue either of the recantation or the delay in reporting, in closing argument, the prosecutor once again returned to the theme of violence, emphasizing that L.A. did not have a safe or loving home. RP 715. The prosecutor noted only briefly, later in the argument, that this was one of the reasons why L.A. had recanted earlier. RP 715-717, 720, 722-723.

As in Fisher, the evidence was not limited to the purpose for which it was admitted. The prosecutor clearly emphasized Mr. Sweet's character for temper, and violence and the violent nature of family life, to convey to the jury a sense that they should convict to vindicate L.A., her mother and siblings and because Mr. Sweet deserved being convicted:

By preemptively introducing the evidence, the prosecuting attorney did not use the evidence for its proposed purpose. Instead of using the evidence to rebut a defense argument that Melanie's delay in reporting the sexual abuse means that she

is not credible, the prosecuting attorney used the evidence to generate a theme through the trial that Fisher's sexual abuse of Melanie was consistent with his physical abuse of all of his stepchildren and biological children, an impermissible use of the evidence.

Fisher, at 747-748,

As in Fisher, the physical violence was equated to the sexual abuse as part of Mr. Sweet's character, and the jury "was left with the wrong impression that it must convict Fisher to obtain justice for the harm caused . . . [to all of the children]" and there was a substantial likelihood the prosecutor's misconduct affected the jury, meriting a new trial. Fisher, at 749.

The trial court erred in admitting the evidence until such time as it became relevant and the prosecutor erred in using the evidence improperly. These errors can be overcome only by a new trial.

3. THE TESTIMONY THAT MR. SWEET HAD BEEN IN AND OUT OF JAIL FOR CHILD ABUSE WAS UNTRUE, IMPROPER UNDER ER 609 AND A VIOLATION OF THE COURT'S RULING IN LIMINE; THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION IN LIMINE ONCE THIS TESTIMONY WAS READ TO THE JURY.

The trial court erred in denying a defense motion for mistrial after the past recorded recollection of Nurse Waddleton was read and it

contained the statement that L.A. "reports that he [Mr. Sweet] was in and out of jail a couple of times for child abuse." RP 319. This evidence was excluded by a motion in limine and by ER 609, and it was simply untrue. RP 344-347.

Mr. Sweet's past criminal conduct had been excluded, RP 345, and did not involve children. RP 346-347. It involved two fourth degree misdemeanor assaults, which had been dismissed, and did not involve a crime of dishonesty. See ER 609; RP 346-347. The court agreed that the evidence would have been excluded if it had been brought to the court's attention. RP 349-350.

The irregularity in admitting the statement was overwhelmingly prejudicial. As recognized by the court in State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), where the court reversed a conviction for second degree assault with a deadly weapon because of an inadvertent statement indicating that the defendant had been convicted of a prior crime involving a stabbing. The court in Escalona held that a prior conviction for having "stabbed someone" was inherently prejudicial and of the type likely to impress. It was likely to

impress because it was logically if not legally relevant to the issue of whether the defendant committed a similar crime. Escalona, at 256. The court reversed even though the trial court struck the statement and instructed the jury to disregard it. The Escalona court noted that:

While it is presumed that juries follow instructions, see [State v.] Weber [99 Wn.2d 158, 659 P.2d 1102 (1983)], no instruction can "remove the prejudicial impression [created by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

State v. Escalona, at 256. Similarly, in State v. Wilburn, 51 Wn. App. 832, 755 P.2d 842 (1988), the court reversed a conviction based on a reference to the defendant's prior criminal act, in violation of a motion in limine. The court held that such an error cannot be cured by an instruction where the defendant's credibility is a central issue in the case.

Under Escalona and Wilburn, a mistrial should have been granted. The irregularity was serious, it was not cumulative of other properly admitted evidence, and it could not be cured by an instruction. Weber, 99 Wn.2d at 158.

Defense counsel had opposed the admission of notes which surfaced shortly before Nurse Waddleton testified, well into the trial. The trial court erred in denying the defense motion for mistrial once it became clear that the reference to being "in and out of jail for sex abuse" was improper. As in Escalona, the jury heard that L.A. stated that Mr. Sweet had been in jail for charges similar to the charges for which he was on trial. The reference to jail associated Mr. Sweet with criminality and robbed him of the presumption of innocence. Holbrook v. Flynn, 475 U.S. 560, 567, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986) (as a matter of due process of law, every person accused of a crime is entitled to the presumption of innocence); State v. Stanford, 128 Wn. App. 280, 286, 115 P.2d 368 (2005) (introduction of booking photo associated the defendant was criminality).

The unfair prejudice of the evidence, which robbed Mr. Sweet of the presumption of innocence and implied he had been convicted of similar crimes, or crimes against children, in the past, should require reversal of his convictions.

Although it appears that, due to the late disclosure of the notes and perhaps the unanticipated introduction of the notes in their entirety, the defense inadvertently overlooked the statement about Mr. Sweet having been in jail for child abuse, the prosecutor should not have sought to submit the notes without redaction. The statement included in the notes about jail was not admissible under ER 404(b) or ER 609 and had been excluded by motion in limine. Moreover, it is hard to imagine a much more unfairly prejudicial statement. Whether brought before the jury by error, by prosecutorial misconduct or ineffective trial counsel -- or a combination of these factors -- once the statement was heard by the jurors, a mistrial should have been granted. It was constitutional error and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

4. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. SWEET OF SEXUAL EXPLOITATION OF A MINOR AS HE WAS CHARGED AND THE JURY INSTRUCTED.

RCW 9.68A.040, provides that a person is guilty of sexual exploitation of a minor if the person:

(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

(b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

The state charged Mr. Sweet with sexual exploitation of a minor, under RCW 9.68A.040(1)(c), alleging that he "being a legal guardian/parent of L.S. . . ., a person under 18 years of age, did permit the said person to engage in sexually explicit conduct, knowing that the conduct would be photographed." CP 152-162. The charging document did not include the statutory language of (1)(c) "or person having custody or control of a minor," electing to use only the "parent or legal guardian" language.

The jury was instructed that it had to find, beyond a reasonable doubt, that (1) ". . . the defendant, being a legal guardian or parent of L.A.", (2) "did permit L.A. to engage in sexually

explicit conduct knowing that the conduct would be photographed." CP 114-115.

Because there was insufficient evidence that Mr. Sweet was L.A.'s legal guardian or that he "permitted" her to be photographed, his convictions for sexual exploitation of a minor should be reversed and dismissed.

As a matter of state and federal constitutional law, a conviction cannot be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the enhancement." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616P.2d 628 (1980).

Here the evidence was insufficient in two regards. First, under the authority of State v. Chester, 133 Wn.2d 15, 940 P.2d 137 (1997), there was insufficient evidence to meet the "did permit" element. In Chester, the court determined that the "aim of subsection (c) of the sexual exploitation statute is to prohibit a parent from allowing a child to be exploited under subsection (a) or (b) of the statute." For that reason, the "permit"

language in CW 9.68A.030(1)(c) does that not refer to "passive conduct," because "if a parent, or stepparent, were actively involved in causing the exhibition or sexually explicit conduct, then the parent would be subject to the terms of subsection (2) or (b)." Chester, 133 Wn.2d at 23. Therefore, the Court, in Chester held that "RCW 9.68A.(1)(c) [should be interpreted] to prohibit a parent's knowing failure or refusal to protect his or her child from sexual exploitation **by another**." Chester, at 23-24 (emphasis added),

Because there was no allegations or proof of the involvement of any person other than Mr. Sweet, the evidence was insufficient to support his convictions for sexual exploitation of a minor. Chester, supra.

Further, it was undisputed at trial that Mr. Sweet was a stepparent of L.A., not her parent. "Legal guardian" was not defined by the statute. In State v. Ducote, 167 Wn.2d 697, 222 P.2d 785 (2009), the court held that a "stepfather" was not in the class of people protected by DSHS as part of their general duties, and had no standing to sue for negligent investigation.

A cause of action for negligent investigation against DSHS does not exist at common law and is not explicitly stated in RCW 26.44.050. Instead, it is a cause of action implied through the Bennett [Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990)] test. The Bennett test looks to the language of the statute to determine to whom an implied remedy is available. In this instance, a cause of action for negligent investigation under RCW 26.44.050 is limited by RCW 26.44.010 to parent, custodians, guardians and children.

Thus, the Court's decision in Ducote rests on the conclusion that "legal guardian" does not necessarily include "stepfather." Here there was no evidence that Mr. Sweet was L.A.'s "legal guardian," and so the evidence of sexual exploitation of a minor was insufficient for that reason as well.

Because the evidence was insufficient, Mr. Sweet's convictions for sexual exploitation of a minor should be reversed and dismissed.

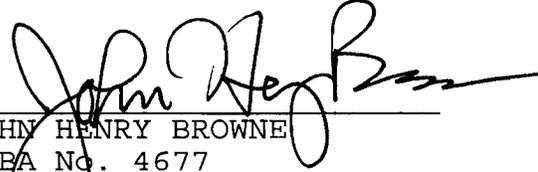
E. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and his case remanded for retrial. On remand, his convictions for sexual

exploitation of a minor should be dismissed.

DATED this 31 day of August, 2011

Respectfully submitted,



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

STATE OF WASHINGTON

Respondent.

v.

KENNETH SWEET,

Appellant.

No. 66574-0-I

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be served by ABC Legal Messengers a copy of the attached "Opening Brief of Appellant" upon the following counsel of record:

Sean P. O'Donnell
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and mailed a copy U.S. Regular Mail, postage prepaid to:

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DATED at Seattle, Washington, this 2nd day of September , 2011.

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