COA No. 30732-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT MARTINEZ, JR., Appellant.

BRIEF OF APPELLANT

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C. The court's counting as a strike Mr. Martinez's conviction for an offense committed prior to the effective date of the Persistent Offender Accountability Act (POAA) violated the ex post facto prohibition.

D. Mr. Martinez's prior California conviction for second degree robbery was not comparable to a Washington conviction for second degree robbery and should not have been counted as a strike.

Issues Pertaining to Assignments of Error

1. Did the court err by admitting prejudicial hearsay evidence based on the excited utterance exception, thus warranting a new trial? (Assignment of Error A)

2. Did the court err by prohibiting evidence of prior consensual sex between Ms. Harris and Joe Villareal and examination of the State's lab expert as to findings regarding Mr. Villareal under RCW 9.94A.020(3)(a) and ER 404(b)? (Assignment of Error B).

3. By counting as a strike Mr. Martinez's conviction for a California second degree robbery committed prior to the effective date of the POAA, did the court violate the ex post facto prohibition? (Assignment of Error C).

4. Did the court err by determining the conviction for a California second degree robbery was comparable to a Washington conviction for second degree robbery and thus counted as a strike for purposes of the POAA? (Assignment of Error D).

II. STATEMENT OF THE CASE

Mr. Martinez was charged by information with count 1 – second degree rape, count 2 – second degree assault, and count 3 – unlawful imprisonment. (CP 1). The State filed a persistent offender notification. (CP 44). In a pretrial motion pertaining to RCW 9A.44.020, the rape shield statute, the court barred "the admission of, or allusions to any prior consensual sexual activities

involving the alleged victim Patricia L. Harris and any other person." (CP 209; 1/19/12 RP 101-04; 1/25/12 RP 307).

Ms. Harris and Mr. Martinez had a relationship since 2003 where they had children together. (1/24/12 RP 252, 272; 1/25/12 RP 401). He had been in prison before the incident on May 14, 2010, and came back to the Clarkston area two days before. (*Id.*).

On May 14, Ms. Harris was having a barbeque at her Clarkston house for Mr. Martinez's birthday. (1/24/12 RP 252). A friend, Kevin Holm, was there all day. (*Id.*). Mr. Martinez showed up. (*Id.* at 253). Mr. Holm took him to get alcohol. (*Id.* at 296). He was fairly intoxicated and upset with her because she had not kept in contact with him while he was in jail. (*Id.* at 253). Mr. Martinez felt Ms. Hall had "done him dirty." (*Id.*). His anger caused her some concern, so she asked Mr. Holm to stay. (*Id.*). Mr. Martinez left, whereupon Mr. Holm did as well. (*Id.* at 254).

Mr. Martinez came back. Ms. Harris thought it was her friend, Amber Grimm, who was going to stop by. (1/24/12 RP 255). She saw it was Mr. Martinez, who pushed his way in to talk about things. (*Id.*). He was upset and getting angry. She was crying and scared. (*Id.*). He wanted to have sex, but she did not. (*Id.* at 256). Ms. Harris told him she was having her period, but Mr. Martinez

said he was going to take it and did not want it that way anyway as he wanted anal sex. (*Id.*).

He took her by the hair and dragged her into the bedroom. (1/24/12 RP 256). She struggled as he ripped her clothes off. (*Id.*). She said Mr. Martinez had both hands around her neck. (*Id.*). Ms. Harris identified the post to a lip ring that had been ripped out. (*Id.*). She said he raped her anally. (*Id.* at 257, 277). The phone rang and startled Mr. Martinez. (*Id.*). Someone knocked on the door; it was Ms. Grimm. (*Id.* at 258).

Wrapped in a blanket, Ms. Harris answered the door. (1/24/12 RP 258). She stepped out and had a cigarette with Ms. Grimm. (*Id.* at 260). Mr. Martinez joined them at the door and told Ms. Grimm he fucked up. (*Id.*). The women came in at one point with Mr. Martinez still saying Ms. Harris had done him dirty. (*Id.*). With Ms. Grimm there, he went into the kitchen and grabbed a knife. (*Id.*). Ms. Harris told Ms. Grimm he had raped her. (*Id.*). Mr. Martinez came back out and threatened to kill himself. (*Id.* at 261). With him at the house, Ms. Harris felt she was not free to leave and get away. (*Id.*). Ms. Grimm got a call from Doug Wassmuth and Mr. Martinez got on the phone. (*Id.* at 262). He dressed, grabbed

his backpack where he put in the knife and some beer, and left. (*Id.* at 263)

Another friend, Nick Elsoto, arrived and took Ms. Harris to St. Joseph's Hospital. (1/24/12 at 263). She told hospital personnel she had been raped. (*Id.*). Ms. Harris testified she asked for care and was "probably" frantic, crying, and scared. (*Id.* at 264). She was shook up while talking to a police officer who arrived. (*Id.*). She talked to a doctor and a rape kit was done hours later. (*Id.* at 265). Ms. Harris thought Mr. Martinez had gone to Spokane and then to Los Angeles. (*Id.* at 269). He regularly kept in contact with her during that time following the May 14 incident. (*Id.*). On cross examination, Ms. Harris admitted she had consensual anal sex with Mr. Martinez the day before, May 13. (*Id.* at 277, 281, 293).

Over defense objection, Ms. Grimm testified that Ms. Harris whispered she had been raped by Mr. Martinez. (1/25/12 RP 316-19). Ms. Grimm kept asking him to leave, but he told her and Ms. Harris he was going to keep them hostage and they were not going to leave. (*Id.* at 324). Ms. Grimm felt she and Ms. Harris were not free to leave. (*Id.*). A friend, Ryan Williams arrived at the house after Mr. Martinez left. (*Id.* at 325-26). Another friend, Nick, took

Ms. Harris to the hospital. (*Id.* at 326). Ms. Grimm did not go and instead went to see her boyfriend, Mr. Wassmuth, who was working at Lancer Lanes Casino, with Mr. Williams. (*Id.* at 327).

Mr. Martinez showed up at Lancer Lanes and talked to Mr. Wassmuth. (1/24/12 RP at 328). He asked him and Mr. Williams to take him out back and beat him up for what he did. (*Id.*).

Nyla Roach was a registered nurse in emergency at St. Joseph's Regional Medical Center in Lewiston. (1/25/12 RP 334). She testified that Ms. Harris said she was anally raped in her home. (*Id.* at 336, 337). A doctor took the rape kit swabs. (*Id.* at 338).

Mr. Wassmuth had been friends with Ms. Harris for 3½ years and was her roommate. (1/25/12 RP 343). On May 14, 2010, he got a text from her that said help me. (*Id.* at 344). He called, but got no answer so he called Mr. Williams and Ms. Grimm. (*Id.* at 345). Mr. Wassmuth talked to Mr. Martinez, who told him he had fucked up and should kill himself. (*Id.* at 346-47). Mr. Wassmuth told him multiple times to go back to the motel and sleep it off. (*Id.* at 347). Mr. Williams and Ms. Grimm came down to Lancer Lanes and told him what they had seen and heard. (*Id.* at 348). Mr. Martinez then arrived at Lancer Lanes and eventually left saying he was going to the river to kill himself. (*Id.* at 349). Mr.

Wassmuth called the police and showed them the "help me" text. (*Id.* at 352). Mr. Martinez called him the next day and said he had hurt Ms. Hall. (*Id.* at 353, 355).

Clarkston Police Sergeant Josh Daniel saw the "help me" text from Ms. Harris to Mr. Wassmuth. (1/25/12 at 361). He tried to find Mr. Martinez at the Sunset Motel, but he could not locate him. (*Id.* at 368, 371). Mr. Martinez was later arrested in California. (*Id.* at 371).

Joseph Canas and the pastor from his church picked up Mr. Martinez from the prison in Walla Walla. (1/25/12 RP at 375-76). The day after the incident, he met with Mr. Martinez, who told him he had got real drunk the night before and had hurt Ms. Hall. (*Id.* at 378).

Clarkston Police Officer Danny Combs saw Ms. Harris at St. Joseph's. (1/25/12 RP 384, 385). She was distraught. (*Id.* at 386).

Clarkston Police Officer Jeremy Foss was dispatched to St. Joseph's on May 14, 2010, for a sex offense call. (1/24/12 RP 218-19). He contacted Ms. Harris, who was upset about something that had happened about two hours before. (*Id.* at 220). The officer testified Ms. Harris told him Mr. Martinez had anally raped her. (*Id.*

at 230). A warrant was issued for Mr. Martinez and he was arrested in California some time later. (*Id.* at 246).

Dr. Matthew Lisne, a physician at St. Joseph's, saw Ms. Harris on May 14, 2010, regarding a sexual assault. (1/26/12 RP 458). She said she was raped and penetrated rectally. (*Id.* at 460). He collected swabs from outside and inside the rectal area and gave them to the nurse for drying before being given to the police. (*Id.* at 461).

Dr. Michael Lin, WSP DNA analyst, said Mr. Martinez was a potential contributor of DNA from the anal swab extracts. (1/26/12 RP 474-75). Dr. Lin said the profile matching Mr. Martinez would not be expected to occur more frequently than one in 500 male individuals, not a phenomenal number. (*Id.* at 475-76). Outside the presence of the jury upon examination by defense counsel, Dr. Lin testified a major profile on the DNA matched that of Joe Villareal.(*Id.* at 476-77). The defense had no questions for Dr. Lin as to the DNA match for Mr. Villareal because of the court's order barring any evidence of consensual sexual activities involving Ms. Harris and any other person. (*Id.* at 477; CP 209).

Mr. Martinez testified in his own defense. (1/25/12 RP 401). He had been in prison for about 20 months before returning to the

Clarkston area on May 12, 2010. (*Id.*). He got really drunk on May 14, the day of the barbeque for his birthday. (*Id.* at 407). Mr. Holm had given him a ride to the liquor store. (*Id.* at 406). Mr. Martinez was at Ms. Harris's house on May 12, 13, and 14. (*Id.* at 405). He left several times during the day on March 14 and returned around 8 or 8:30 p.m. (*Id.* at 408). Ms. Harris let him in and they had consensual anal sex as it was a preference. (*Id.* at 409). After having sex, they had a verbal dispute because Ms. Harris did not want to be with him anymore. (*Id.* at 414-16). She hit him with a frying pan. (*Id.* at 416). They scuffled. (*Id.*). He is six-four; Ms. Harris is five-four. (*Id.* at 417). When he told people he had fucked up, he meant he had hit her. (*Id.* at 420). He never said she done him dirty. (*Id.* at 427). He did not recall going to Lancer Lanes. (*Id.* at 428). He did not threaten to kill himself. (*Id.* at 431).

There were no objections or exceptions to the court's instructions to the jury. (1/26/12 RP 481, 483). The jury convicted Mr. Martinez of second degree rape and unlawful imprisonment and found him not guilty of second degree, but convicted him of fourth degree assault. (1/26/12 RP 546-47; CP 249, 250).

The court sentenced Mr. Martinez to life in prison without the possibility of release for the second degree rape and 364 days for

the fourth degree assault and 60 months for unlawful imprisonment, with the latter two terms running concurrently with the life term. (CP 325; 3/27/12 RP 78-79). This appeal follows.

III. ARGUMENT

A. The court erred by admitting prejudicial hearsay evidence based on the excited utterance exception, thus warranting a new trial.

Over defense hearsay objections, the court determined the first few minutes of Officer Foss's contact with Ms. Harris at St. Joseph's when she indicated Mr. Martinez raped her, were admissible under the excited utterance exception. (1/24/12 RP 228-29). Likewise, the court also found Ms. Harris's statement to Amber Grimm that Mr. Martinez had raped her was admissible under the exception as well. (1/24/12 RP 318). The court erred.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801 (a), (c). Hearsay is inadmissible unless there is an exception. ER 802. The hearsay rule is designed to keep out unreliable evidence, that is, statements made out of court are considered unreliable as they are not subject to cross examination or the jury's scrutiny. *State v. Young*, 160 Wn.2d 799, 822, 161 P.3d 967 (2007).

But there are exceptions based on the circumstances when they were made that show the reliability of the inherently unreliable statements. *Young*, 160 Wn.2d at 822-23. The excited utterance exception in ER 803(a)(2) is one:

> A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The reason for it was explained in *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992):

> [U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control. The utterance of a person in such a state is believed to be a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock, rather than an expression based on reflection or self-interest.

Here, the startling event or condition was the rape. (4/19/12 RP 262-67). The touchstone of reliability is that the utterance of a person in such a shocked state must have been a spontaneous and sincere response to the perceptions produced by the shock. And there is a temporal proximity element that must be sufficient to show that the declarant was indeed under this shocked state so as to be spontaneous. *See State v. Sharp*, 80 Wn. App. 457, 909

P.2d 1333 (1996); *State v. Davis*, 141 Wn.2d 798, 845, 10 P.3d 977 (2000) (time between event and statement "sufficiently slight").

With respect to Ms. Grimm's testimony, the evidence was that Ms. Harris came outside and smoked a cigarette with her, conversed intelligently and coherently, and had knowledge of what was going on. (1/24/12 RP 318). Ms. Harris was not in a shocked state at all, but was in control. Although the trial court is usually accorded deference in its evidentiary decisions, none should be when the excited utterance exception is at issue. *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995). There is no inherent reliability in Ms. Harris' statement that Mr. Martinez raped her. Instead of a spontaneous response, she had time to reflect and protect her self-interest in having him out of her life. (CP Ms. Harris's statement was not an excited utterance and thus bears no indicia of reliability to take it out of the hearsay prohibition. *Chapin*, *supra*.

Ms. Harris's statement to Officer Foss was made 1½ to 2 hours after the incident. (1/24/12 RP 220). She was upset or excited, and was rocking. (*Id.* at 223-24). But this was not enough even for the trial judge, who allowed the State to ask further questions in an attempt to show an excited utterance. (*Id.*). After

this attempt, the court excused the jury and asked questions of Officer Foss himself as the foundation laid by the State was insufficient. (*Id.* at 226). The court then ruled that the first few minutes of the officer's colloquy with Ms. Harris clearly fell within the excited utterance exception, but the remainder of the interview did not. (*Id.* at 228-29). The ruling, however, makes a distinction without a difference because the evidence showed Ms. Harris's demeanor was the same throughout. (*Id.* at 227). She had no difficulty communicating or intelligently responding. (*Id.* at 227-28). In these circumstances, there was no "sufficiently slight" attenuation between the event and her statement to the officer. *Davis*, 141 Wn.2d at 845. Moreover, there was nothing in the record to show a change in Ms. Harris's state to justify application of the excited utterance exception for the first few minutes of her talk with Officer Foss, much less the rest of it. The court erred by allowing Officer Foss to testify Ms. Harris told him Mr. Martinez raped her.

Its decision was legally incorrect and is not accorded deference in any event. *Brown*, 127 Wn.2d at 758. Even so, a decision based on an incorrect legal analysis or error of law is an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

An evidentiary error that does not violate the constitution requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Here, the case against Mr. Martinez boiled down to "he said-she said." The court's admission of hearsay statements to bolster Ms. Harris's credibility was improper and materially affected the trial. Combined with the defense's inability to proffer evidence of her motive to get Mr. Martinez out of her life, the evidence was unduly prejudicial and warrants the granting of a new trial. *Id.*

B. The court erred by prohibiting evidence of consensual sex between Ms. Harris and Joe Villareal and inquiry of the State's lab expert as to findings regarding Mr. Villareal under RCW 9.94A.020(3)(a) and ER 404(b)?

RCW 9.94A.020(3)(a) provides:

> (3) In any prosecution for the crime of rape . . . evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores common to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:
>
> (a) A written pretrial motion shall be made by

> the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

Mr. Martinez made that pretrial motion and offer of proof. (CP 142-45). He asked for an order allowing (1) testimony about past consensual sex with Ms. Harris on May 13, 2010; (2) testimony about a sexual encounter with Joe Villareal on May 13 or 14, 2010; and (3) examination of the State's lab expert as to findings regarding Joe Villareal. (CP 142). The relevancy of the evidence was this:

> Defendant believes that on May 14, 2010 after consensual sex, they became embroiled in a dispute precipitated by the alleged victim's actions, and then she in anger or by premeditated planning, used such happening to have him falsely arrested for rape and second degree assault as well as unlawful imprisonment, so she could prevail in the dispute and have him incarcerated to remove him from her life. Defendant would also admit that he may have been somewhat impaired by alcohol and drug intoxication, and upon being falsely accused of rape and other crimes responded poorly to a difficult situation.
>
> The Defendant asserts that testimony concerning the above reference[d] past sexual behavior between the alleged victim and Defendant, Robert Martinez, Jr., as well as that between alleged victim and Joe M. Villareal are both extremely germane and relevant to the limited issue of motive of the

> alleged victim to falsely accuse Defendant of the crimes set out in the criminal information file[d] herein. Furthermore, any exclusion at trial of said evidence proposed by Defendant would result in denial of substantial justice to the Defendant by preventing him as a practical matter from presenting his actual defense and defense theories at trial. (CP 144-45).

highly prejudicial to the alleged victim, and barred by RCW 9A.44.020 and ER 404(b), the court ordered:

> The Court bars the admission of, or allusions to any prior consensual activities involving the alleged victim, Patricia L. Harris is barred by application of RCW 9A.44.020, commonly known as "the Rape Shield Statute." Further, the Rules of Evidence, specifically ER 404(b) prohibit the admission [of] evidence of "other acts" to prove the character of a person "in order to show action in conformity therewith." Evidence of prior consensual sexual activities between the Defendant and the alleged victim clearly falls within the prohibition of this rule. (CP 208-09).

Although evidence of prior consensual sex between Mr. Martinez and Ms. Harris was barred, testimony came in that she did have consensual sex with him on May 13, 2010. (1/24/12 RP 277, 281, 293). Evidence that a major profile on the DNA matched Mr. Villareal did not come in. (1/26/12 RP 476-77). The offer of proof with evidence of Ms. Harris's motive for fabricating her accusations against Mr. Martinez also did not come in. By prohibiting this evidence, the court did not give Mr. Martinez the opportunity to

present his defense theory as it did not run afoul of RCW 9.94A.020(3)(a) or ER 404(b).

Mr. Martinez sought to admit evidence of Ms. Harris's relationship with Mr. Villareal only on the limited issue of her motive to false accuse him of the crimes as shown in the offer of proof. (CP 143-45). RCW 9.94A.020(3)(a) does not prohibit such evidence of motive. Furthermore, evidence of motive is not barred by ER 404(b) that prohibits the admission of "other acts" evidence to prove the character of a person "in order to show action in conformity therewith." ER 404(b) by its very language permits the admission of such evidence to show proof of motive. That is precisely what the defense sought to do here. The court erred by barring evidence of Ms. Harris's relationship with Mr. Villareal and any examination of the State's lab expert as to DNA findings regarding Mr. Villareal as both went to motive and were not prohibited by the rape shield statute or ER 404(b).

The court's erroneous decision on this evidentiary ruling materially affected the trial's outcome. But for the error, Mr. Martinez was prevented from fully presenting his defense and theory of the case. *Hamlet*, 133 Wn.2d at 327. On the second degree assault count, the jury found him guilty of the lesser

included offense of fourth degree assault. Without the proof of motive proffered by Mr. Martinez, however, the jury did not get the full story behind the alleged rape and unlawful imprisonment. With this backdrop, there can be little doubt that Mr. Martinez's defense was so prejudicially restricted by the erroneous ruling as to materially affect the trial's outcome. He should be granted a new trial. *Id.*

C. The court's counting as a strike Mr. Martinez's prior California conviction for an offense committed prior to the effective date of the POAA violated the ex post facto prohibition.

Mr. Martinez was convicted on January 19, 1993, for second degree robbery in California. (CP 290). The POAA was passed by Washington voters in November 1993 by Initiative 593. Defense counsel made this argument:

> [N]umerous times during the handling of this case I had referred to the [POAA] statutes and the finding statutes and it included unfortunately that all the acts asserted as strike offenses by the State would qualify as strike offenses. However, in revisiting the [POAA] statute and visiting our ex post facto constitutional article, it would appear to me that allowing the State to go back and to apply retroactively instead of prospectively the POSA statues to crimes that were committed prior to its adoption by the voters of this state was really basically an ex post facto statute. Now in [*Angehrn*] my reading of the statute or that case I mean in

> [*Angehrn*] was that every one of the offenses involved in that case occurred after passage of [POAA]. The issue there was they were arguing that it was ex post facto to ever go back from the current offense backward and in effect enhance punishment on the new offense or the current offense by considering the past crimes that had already been committed and punished for. And that in essence that was ex post facto law by virtue of the logic that you increase significantly the punishment on the new offense or the current offense by considering the past crimes that had already been punished. The Courts, including the State, have not bought into that argument. I think there's some merit to it by I get stuck with what the Courts decide. More importantly, I might point out, that Division III has never come down with a case that clearly adopts the position that it's not a violation of ex post facto to apply [POAA] to a case in a conviction that occurred prior to the adoption of the statute. Now, our Court may well, if it gets to that type of case, issue such a ruling because they have denied certain on a couple occasions but I'm cognizant as the Court is cognizant the new makeup of the Court is somewhat different than what it used to be and so I raise this issue because I want to preserve that for appeal and the appellate paperwork that I drafted up has that in there. (3/27/12 RP 73-74).

The court determined that using the 1993 California second degree robbery conviction as a strike did not violate ex post facto laws:

> And, and while I do note that the California conviction was on January 19 of '93, and that the persistent offender sentencing act didn't come into effect until November of '93, that one was, did predate the statute, the key analysis is simply did the persistent offender

> sentencing act increase the punishment for any crime that was committed by you prior to the enactment of the statute and it did not. Whatever you got for your California conviction, you've already done our time on that. And that law, the three strikes and you're out law in Washington, didn't do anything to increase your punishment under that California conviction. And since it did not, it does not violate the ex post facto law. In point of fact, in '99, as pointed out by the state in the guilty plea statement, you were fully informed of the existence of that statute then. So you knew that if you ever got convicted, or had been put on notice, maybe you didn't know but you were definitely put on notice, that if you ever got convicted of another offense that constituted a most serious violent offense under Washington State law, that would be your third strike and if it happened in Washington, the Court would have to give you life without the possibility of release. (3/27/12 RP 78).

The ex post facto clause, U.S. Const., art. 1, § 10, bars application of a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648 (1798). A law violates the ex post facto clause if it (1) is substantive, not merely procedural; (2) is retrospective (applies to events occurring before the enactment); and (3) disadvantages the person affected by it. *In re Personal Restraint of Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991); Const. art. 1, § 23. Statutes usually operate prospectively to give fair warning that a violation will result in

specific consequences. *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007).

In general, Washington courts have held there is no ex post facto problem when a sentencing statute directs the use of an offender's prior convictions to enhance the sentence for a crime committed after the statute goes into effect. *See, e.g., State v. Angehrn*, 90 Wn. App. 339, 952 P.2d 195, *review denied*, 136 Wn.2d 1017 (1998), *cert. denied*, 528 U.S. 833 (1999) (rejecting ex post facto challenge to POAA because mandatory life sentence triggered only upon third conviction for a most serious offense, and statute was enacted before defendant's third most serious offense); *In re Williams*, 111 Wn.2d 353, 363, 759 P2d 436 (1988) (use of prior juvenile convictions to determine sentence for adult crime did not constitute additional punishment for the prior conduct).

This case affords Division III the opportunity to squarely address the issue raised by Mr. Martinez whether a prior conviction predating the effective date of the POAA can be counted as a strike without violating the ex post facto prohibition. The POAA is substantive, is retrospective as it applies to events occurring before its enactment, and disadvantages the person affected by it. *Powell*, 117 Wn.2d at 185. All the elements for finding an ex post facto

violation are present here. Accordingly, the California conviction should not count as a strike and the case must be remanded for resentencing.

D. The court erred by counting as a strike Mr. Martinez's conviction for a California second degree robbery because it was not comparable to a Washington conviction for second degree robbery and should not have counted as a strike for purposes of the POAA.

A certified copy of Mr. Martinez's January 19, 1993 California conviction for second degree robbery was furnished to the court. (CP 290). He pleaded guilty to a violation of California Penal Code § 211. Defense counsel argued:

> I would say at this point I can't disagree that under our law the robbery in California would be considered a strike offense. Unfortunately, I've read all those cases and done the research and a dozen times read the definitions and I have to agree with the State's position on that . . . (3/27/12 RP 74).

Although counsel felt the California crime was comparable, the issue was nonetheless raised and decided by the court. (*See* 3/27/12 RP 71, 77). The assignment of error has been made on appeal to preserve that issue, but the Washington Supreme Court has addressed it and decided on November 21, 2012, that second

degree robbery in California is comparable to Washington's second degree robbery for persistent offender purposes. *State v. Sublett*, 2012 Wash. LEXIS 797 (November 21, 2012).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Martinez respectfully urges this court to (1) reverse his convictions and remand for new trial or (2) remand for resentencing.

DATED this 3rd day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 3, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Robert Martinez, Jr., # 792711, Stafford Creek C. C., 191 Constantine Way, Aberdeen, WA 98520; and Benjamin C. Nichols, Asotin County Prosecutor, PO Box 220, Asotin, WA 99402.

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