No. 44351-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

JOEL R. ALEXANDER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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A. Statement of Facts

K.J.O. is a minor male with a date of birth of March 20, 2001. RP at 17. On March 9, 2012, Sunshine Beerbower, his mother, called 911 and requested an officer to contact her residence in Elma, Washington. RP at 40. Beerbower had reviewed K.J.O.'s Facebook page and found disturbing messages / chats from a 34 year old male called Joel Alexander. RP at 40

On March 19, 2012, Detective Brearty assumed the identity of the victim's Facebook account profile and Yahoo email account from K.J.O.'s mother Sunshine Beerbower. On March 19, 2012, at approximately 1340 hours, Detective Brearty sent his first assumed identity message on Facebook to the Joel Alexander that was already messaging / chatting with the victim. Alexander replied stating "hey." RP at 44-50.

On March 19, 2012, at approximately 1444 hours, Alexander sent the victim a photo of his erect penis within Facebook messaging / chats. Detective Brearty asked Alexander if the penis photo he just sent was his. Alexander replied,"Ya you like it?" RP at 63-64.

Alexander also instructed the victim how to delete Facebook messages, Alexander also asked the victim for his user and password so he could do it for the victim. Joel Alexander told the victim to delete the messages each time because Alexander doesn't want anyone seeing the conversations. RP at 64-65.

From March 19 to April 12, 2012, Alexander continued to have sexually explicit chats with Detective Brearty, in the guise of 10-year old K.J.O. Alexander sent numerous sexually explicit images to the victim. These photos included images of Alexander's genitals and of him masturbating, as well as photos depicting the genitals of underage boys. Alexander instructed the victim on how to masturbate, including using a hairbrush for anal stimulation. RP at 71, 77-80, 89-91, and 99.

Alexander began to talk to the victim about meeting, saying, "Me and u can secretly be more than friends" Detective Brearty stated, "scared of mom," Alexander replied, "Scared about what, she won't know nothing, keep deleting these messages and will be fine." Detective Brearty asked Alexander, "how will I get out to see it" Alexander replied, "At the races in Elma we will sneak away, I will come stay down there, maybe get her to let u go bowling without her or does she ever let u like ride Ur bike to town by yourself?" RP at 82-83.

On April 12, 2012, Alexander told the victim while in Facebook chat that he (Alexander) will be driving his truck this weekend so he can see the victim. Alexander also stated, "Tell me how Sunday goping to go" Detective Brearty replied, "gonna go for a bike ride to the park and gonna be in the bathroom probably naked cause I like it and feels good hope come in and find me. My bike will be outside so you should no Im there. Nervous you wont like me" Alexander replied, "there's bathroom stalls? Oh, I will like you" Detective Brearty replied that there is a bathroom on

10th street and "its away from the ball fields and stuff, kinda private" Describing what would happen when they met, Alexander wrote "so hug and kiss and suck each other and my dick inside you...just like the brush, but gets better and feel great once in." Alexander also wrote "need you to remind me in the morning when you message me to get lube." RP at 110-115.

On April 14, 2012, Detective Brearty followed the appellant from his mother's residence in Snohomish, WA all the way to Elma, WA. RP at 119. Alexander exited at the SR 12 from SR 8 exit into Elma; it's the first official exit off SR 8 for Elma. Detectives' followed Alexander not losing sight of him or his vehicle, Alexander followed Main Street into Elma and turned onto Young Street through town to 10th St. Alexander turned right onto 10th Street and followed it to the restrooms at the 10th \St. Park. RP at 119-20.

Alexander parked his blue Ford truck with Washington license, B97833R, at the asphalt parking lot adjacent to the white with green trim restrooms. These are the restrooms and Elma Park that Detective Brearty has had conversations with while on Facebook Chat with Alexander for several weeks now. Alexander parked and exited his truck and tried one of the doors, the door did not open; either locked or occupied. Alexander got back into his truck and drove away. Alexander then traveled to the Elma Lanes (Bowling Alley) backed his truck in the first stall in front of the front doors and entered. RP at 120-22.

On April 15, 2012, at approximately 1100 hours, Joel Alexander left the Elma Lanes Bowling Alley for the Smith-Murrey (10th St.) Park in Elma Washington. Surveillance units followed Alexander with additional surveillance pre-posted in Elma and around the city park. Alexander arrived at the parking lot and attempted to contact the 11 year old victim inside the boy's restroom. Alexander was arrested for attempted rape of a child. Alexander had a tube of "KY" brand lubricant on his person at the time of arrest. RP at 123-125.

B. Procedural History

The defendant was charged by Information on May 3, 2012 with one count of attempted rape of a child in the first degree contrary to RCW 9A.29.020 and 9A.44.073. CP at 1-2. The defendant was found guilty as charged on October 24, 2012. CP at 42. The defendant was sentenced to life without the possibility of parole under RCW 9.94A.570 on December 10, 2012. CP at 3-11.

C. Jury Instructions

The trial court provided standard pattern jury instructions, which informed the jurors of the law as it relates to attempted rape of a child in the first degree. CP at 36-41. The appellant did not object to these instructions.

Using WPIC 100.02 and WPIC 44.10, the "to convict" instructions were given as follows:

INSTRUCTION No. 4.

To convict the defendant of the crime of attempted rape of a child in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 15, 2012, the defendant did an act that was a substantial step toward the commission of rape of a child in the first degree;

(2) That the act was done with the intent to commit rape of a child in the first degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION No. 5.

A person commits the crime of rape of a child in the first degree when the person has sexual intercourse with a child who is less than twelve years old, who is not married to the person, and who is at least twenty-four months younger than the person.

CP at 38-39.

With respect to instructing the jury with a definition of a "substantial step," the court used WPIC 100.05, as follows:

INSTRUCTION No. 10.

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

CP at 39.

D. Sentencing

Based on Exhibit 2, the trial court found that the appellant had been convicted in 1999 of two counts of rape of a child in the second degree, and the defendant was sentenced to life in prison without the possibility of parole as a persistent offender. CP at 3-11.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. RCW 9A.28.020 Was Constitutionally Enacted.

Challenges to the constitutionality of legislation are reviewed de novo. The party challenging the legislation bears the burden of showing the legislation is unconstitutional. Alexander challenges that Laws of 2001, 2nd sp. s. Ch. 12 violates Article II, Section 19 of the Washington Constitution which reads, "No bill shall embrace more than one subject, and that shall be expressed in the title".

It is well established that this challenge raises two distinct issues: (1) does the bill embrace more than one subject, and (2) is the subject expressed in the title of the bill. *State ex rel. Citizens v. Murphy*, 151 Wn. 2d 226, 249, 88 P.3d 375 (2004). While violation of either issue is sufficient to declare the relevant provisions of the bill unconstitutional, due to their failure to inform the public of their substance, Article II, Section 19 is liberally construed in favor of upholding the challenged legislation. The challenger of the legislation must establish the bills

unconstitutionality beyond a reasonable doubt. *City of Fircrest v. Jensen*, 158 Wn.2d 384, 392, 143 P.3d 776 (2006).

"The single-subject requirement seeks to prevent grouping of incompatible measures as well as pushing through unpopular legislation by attaching it to popular or necessary legislation." *Pierce County v. State*, 144 Wn.App. 783, 818, 185 P.3d 594 (2008) citing *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wash.2d 359, 368, 70 P.3d 920 (2003). To determine if the bill embraces more than one subject, the court must first determine whether the title of the enactment is general or restrictive. *City of Burien v. Kiga*, 144 Wash.2d 819, 825, 31 P.3d 659 (2001). "If the title is general, the bill may constitutionally include all matters that are reasonably connected with it and all measures that may facilitate the accomplishment of the purpose stated." *Pierce County*, 144 Wn.App. at 818 citing *Amalgamated Transit*, 142 Wash.2d at 209.

"A general title is broad, comprehensive, and generic as opposed to a restrictive title that is specific and narrow." *Kiga*, 144 Wash.2d at 825, 31 P.3d 659. An example of a general title would be: an act relating to sex offenders or an act relating to the amendment or repeal of statutes.

A restrictive title selects a particular part of a subject as the subject of the legislation. *State v. Stannard*, 134 Wash.App. 828, 836, 142 P.3d 641 (2006). An example of a restrictive title would be: an act relating to the distribution of proceeds from the sale of public land or shall criminals convicted of class A felonies be subject to community supervision for life.

Restrictive titles tend to deal with issues that are subsets of an over arching subject. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash.2d 622, 633-34, 71 P.3d 644 (2003).

The title of the bill challenged by Appellant reads" AN ACT Relating to the management of sex offenders in the civil commitment and criminal justice systems . . . [and] prescribing penalties..." Laws of 2001, 2nd sp. s. Ch. 12. The title is much like that in *Pierce County v. State*, it identifies the purpose and general areas of law in which the bill will provide regulation and is therefore a general title. Therefore the statute satisfies the constitutional requirement that it contain the subject in the title.

The provision of the bill being challenged is reasonably connected with the title of the act or a measure to facilitate the accomplishment of the stated purpose. Certainly the classification of offenders convicted of attempted sex offenses facilitates the accomplishment of the stated purpose of the bill, managing sex offenders in the criminal justice system.

The second provision under Article II, Section 19 is whether the enactment's subject is stated in the title. If the title of the act gives notice that would lead to an inquiry into the body of the act or indicate the scope and purpose of the law to an inquiring mind as it relates to the challenged section, then the statute is constitutional. *Amalgamated Transit*, 142 Wash.2d at 217, 11 P.3d 762; *Brewster Pub. Sch. v. Pub. Util. Dist. No. 1 of Douglas County*, 82 Wash.2d 839, 846, 514 P.2d 913 (1973). There

must be a clear and serious conflict between the title and the challenged portion before the court will hold the statute unconstitutional for violating the subject-in-title requirement. *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wash.2d 359, 368, 70 P.3d 920 (2003). The amendment in question changed the classification of a sex offense conviction. The title clearly indicates that the amendments will relate to sex offenders and the criminal justice system and the challenged portion falls squarely within that subject.

B. The "Substantial Step" Jury Instruction Was Proper.

Alexander next argues that the trial court relieved the State of the burden to prove every element of attempted murder because it gave an erroneous instruction on the definition of the term "substantial step." He argues that the instruction was erroneous (1) because it used the word "indicates" rather than "corroborates," and (2) because it did not instruct the jury that a substantial step must show the purpose to commit the specific crime charged. However, this exact argument has been decided by this court in *State v. Davis*, 174 Wash.App. 623, 300 P.3d 465 (2013) *review denied*, 178 Wash.2d 1012, 311 P.3d 26 (2013). The appellant only argues that *Davis* was decided incorrectly, but does not provide any new authority to support this contention.

" 'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.' " *State v. Aguirre*,

168 Wash.2d 350, 363–64, 229 P.3d 669 (2010) (quoting *Keller v. City of Spokane*, 146 Wash.2d 237, 249, 44 P.3d 845 (2002)) (emphasis omitted) (internal quotation marks omitted). The Court reviews alleged error in jury instructions de novo. State v. Sibert, 168 Wash.2d 306, 311, 230 P.3d 142 (2010).

1. Use of Word "Indicates" Was Not Error.

Alexander argues that the trial court erred by giving a jury instruction stating that a "substantial step" is conduct that "strongly indicates" a criminal purpose, rather than "strongly corroborates," relieving the State of its burden to show independent evidence of Alexander's intent. Brief of Appellant at 15-16. Because the Supreme Court has not mandated use of the word "corroborates," and because there is no authority that the State must show independent evidence of intent, this should be rejected. *State v. Davis*, 174 Wash. App. 623, 635, 300 P.3d 465, 470 review denied, 178 Wash. 2d 1012, 311 P.3d 26 (2013).

The trial court gave the jury Washington Pattern Jury Instruction: Criminal 100.05: "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP at 39. But Alexander argues that this instruction is erroneous because it differs from the language approved in *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978). The *Workman* court approved the instruction that a substantial step "must be strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wash.2d at 452, 584 P.2d 382.

Alexander argues that using the word "indicate" instead of "corroborate" relieved the State of the burden of providing independent, corroborating proof of Alexander's intent. But *Workman* did not require that courts use the exact wording provided in that case. Rather, the *Workman* court held that "it would be proper for a trial court to include" language that a substantial step must be "strongly corroborative of the actor's criminal purpose." *Workman* at 452 (emphasis added). The *Workman* court did not hold that such an instruction was mandatory, let alone that it must be given in those exact words.

In fact, the trial court in *Workman* instructed the jury only that a substantial step must be more than mere preparation, without mentioning that the conduct should indicate or corroborate a criminal purpose. *Workman* at 449. The *Workman* court upheld this instruction as proper. *Id.* at 449. A trial court does not err by failing to use the exact language approved in *Workman* because *Workman* itself upheld the failure to use such language. *State v. Davis*, 174 Wash. App. at 636.

Moreover, (as in *Davis),* Alexander cites no legal authority for his argument that the instruction here relieved the State of its burden to provide "some independent evidence of intent, which must then be corroborated by the accused's conduct" (nor does he attempt to explain what this proposition means, as a practical matter). Br. of Appellant at 15-16. Alexander's only authority on this point is a dictionary definition of the word "corroborate." Alexander uses this definition, in conjunction

with *Workman*, to effectively add a new element to all attempt crimes. But no Washington court has recognized such an element, nor does Workman support Alexander's reading of it. *Davis* at 636-37.

This Court has already found that "[n]ot only is [the] proposed 'independent evidence' element unsupported by any legal authority, it contradicts settled Washington case law regarding evidence of intent. Washington law holds that the intent to commit a crime may be inferred 'if the defendant's conduct and surrounding facts and circumstances plainly indicate such intent as a matter of logical probability.'" *Id.* at 637; *See State v. Cordero*, 170 Wash.App. 351, 368, 284 P.3d 773 (2012).

2. Use of Words "A Criminal Purpose" Was Not Error.

Alexander also argues that the substantial step instruction was erroneous because the instruction required that a substantial step indicate "a criminal purpose," relieving the State of its burden to show that Alexander intended to commit the crime charged, as opposed to some other crime. Because the jury instructions as a whole made clear that the substantial step had to be toward rape of a child in the first degree, this argument should be rejected.

Alexander relies on *State v. Roberts*, 142 Wash.2d 471, 14 P.3d 713 (2000), for this argument, but *Roberts* is inapposite. In *Roberts*, the trial court instructed the jury that a person was accountable for the conduct of another when the person was an accomplice in the commission of "a crime." *State v. Roberts*, 142 Wash.2d at 510. The court held that this was

error; an accomplice must have knowledge of the crime he or she is charged with aiding, not merely knowledge of "a crime." *Roberts* at 513. Such an instruction effectively removed the mens rea of "knowingly" from accomplice liability, erroneously making an accomplice strictly liable for crimes of which he had no knowledge. *Roberts* at 510–11.

The substantial step instruction here similarly stated that a substantial step must strongly indicate "a criminal purpose," rather than the specific criminal purpose of committing first degree murder. But the Court does not review the adequacy of jury instructions in isolation; the jury instructions are reviewed as a whole. *State v. Prado*, 144 Wash.App. 227, 240, 181 P.3d 901 (2008). And the "to convict" instruction for attempted rape of a child in the first degree made clear that the substantial step had to be toward rape of a child in the first degree, rather than toward an unspecified crime.

According to the rape of a child in the first degree"to convict" instruction, to find Alexander guilty, the jury had to find that "the Defendant did an act that was a substantial step toward the commission of rape of a child in the first degree." CP at 38-39. The jury was further required to find that "the act was done with the intent to commit rape of a child in the first degree." CP at 38-39. Reading the instructions as a whole, there is no danger that the jury believed that Alexander's substantial step had to indicate only the purpose to commit any crime, as opposed to the specific crime of rape of a child in the first degree. This is more than

distinguishable from *Roberts*, in which there was apparently no instruction clarifying that Roberts had to have knowledge of the crime charged. *Id.* at 510–11.

C. The Appellant Was Properly Sentenced as a Persistent Offender.

Alexander next argues that the trial court violated his constitutional rights when it sentenced him as a "persistent offender" under RCW 9.94A.570 because the judge, not a jury, determined the existence of his prior convictions through a preponderance of the evidence. Brief of Appellant at 18. This argument also fails. The Washington Supreme Court has repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes. See, e.g., *State v. Thiefault*, 160 Wash.2d 409, 418, 158 P.3d 580 (2007); *In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 256–57, 111 P.3d 837 (2005); *State v. Smith*, 150 Wash.2d 135, 143, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004).

1. The Defendant Was Not Entitled to a Jury Determination Regarding His Prior Convictions.

Taken together, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution "entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (internal citation and quotation omitted). Although the right to a jury trial and the prosecution's burden of proof beyond a

reasonable doubt are "constitutional protections of surpassing importance," *Apprendi*, 530 U.S. at 476, 120 S.Ct. 2348, the Supreme Court has decided that these protections do not apply to determining the existence of prior convictions. *See Almendarez–Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); see also *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added); *U.S. v. O'Brien*, 560 U.S. 218, 130 S.Ct. 2169, 2174, 176 L.Ed.2d 979 (2010) (recognizing exception carved out by *Almendarez–Torres*).

Our Supreme Court continues to follow this federal constitutional rule:

> This court has repeatedly ... held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.

State v. Thiefault, 160 Wash.2d 409, 418, 158 P.3d 580 (2007) (citation omitted); see also *State v. Roswell*, 165 Wash.2d 186, 193 n. 5, 196 P.3d 705 (2008) (recognizing the "prior conviction exception" of *Almendarez–Torres*). Until such time as our Supreme Court overrules itself, the Court is bound by its holding on the issue before us here. *State v. Burkins*, 94 Wash.App. 677, 701, 973 P.2d 15 (1999) review denied, 138 Wash.2d 1014, 989 P.2d 1142 (1999) (citing *State v. Hairston*, 133 Wash.2d 534, 539, 946 P.2d 397 (1997)).

Although Alexander acknowledges *Almendarez–Torres*, he asserts that it "is a building whose entire foundation has been removed. It is not necessary to wait for someone to announce that the building is unsafe: the building has already collapsed." Brief of Appellant at 30. Alexander asserts that the *Almendarez–Torres* analysis does not apply to cases such as this. Brief of Appellant at 26-30. In essence, this is a disguised request for the Court to disregard the United States Supreme Court's interpretation of the Sixth Amendment right to a jury trial in *Almendarez–Torres*, *Apprendi*, and their progeny and its refusal to date to extend the right to a jury trial to proof of prior convictions in sentencing hearings conducted under recidivist statutes like the "Persistent Offender Accountability Act" (POAA), chapter 9.94A RCW.

The Supreme Court has cautioned expressly against such a practice:

> We [the United States Supreme Court] do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court *the prerogative of overruling its own decisions*."

Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (emphasis added) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). Adhering to this well-settled principle, the Ninth Circuit has confirmed that the Supreme Court has chosen not to overrule

Almendarez–Torres "and [instead has] unmistakably carved out an exception for 'prior convictions.' " *United States v. Pacheco–Zepeda*, 234 F.3d 411, 414 (9th Cir.2000) (quoting *Apprendi*, 530 U.S. at 488–92, 120 S.Ct. 2348), cert. denied, 532 U.S. 966, 121 S.Ct. 1503, 149 L.Ed.2d 388 (2001).

Similarly, in 2003 the Washington Supreme Court definitively held that neither the United States Constitution nor the Washington Constitution requires a jury, rather than a judge, to find the existence of prior convictions beyond a reasonable doubt. *State v. Smith*, 150 Wash.2d 135, 143, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004). Consistent with its holding in *Smith*, the Supreme Court declined to review this Court's decision in *State v. Rudolph*, in which the Court also followed *Almendarez–Torres* in holding:

> (1) existing case law does not give Rudolph the right to have a jury decide whether he is the same defendant who committed the crimes resulting in his prior convictions used as strike offenses to establish his persistent offender status under the POAA and, thus, subject him to life imprisonment without parole for his new crime;
>
> (2) identity is a fact so "intimately related to [the] prior conviction," under *Jones*, as to be virtually inseparable from the finding of the existence of a prior conviction;
>
> (3) the *Almendarez–Torres* fact-of-the-prior-conviction exception to the *Apprendi/Blakely* jury-trial requirement necessarily includes identity; and
>
> (4) thus, *Apprendi* and *Blakely* do not require a jury to decide the identity component of the fact of a prior conviction. Therefore, the sentencing court may, as it did here, find by a preponderance of the evidence that the perpetrator of the present crime is the same person as the perpetrator of a prior crime used as a strike offense for POAA sentencing purposes.

State v. Rudolph, 141 Wash.App. 59, 71–72, 168 P.3d 430 (2007), review denied, 163 Wash.2d 1045, 190 P.3d 54 (2008).

2. The Defendant's Prior Convictions Were Not Elements of the Crime at Issue in the Case at Bar.

Alexander details the two circumstances that elevate a prior conviction to an element. First, when conduct is made criminal due to the existence of a prior conviction, giving the example of unlawful possession of a firearm under RCW 9.41.040. *See State v. Summers*, 120 Wn.2d 801, 846 P.2d 490 (1993). Second, a prior conviction becomes an element when it elevates a crime from one category of offense to another. *State v. Roswell*, 165 Wash.2d 186, 196 P.3d 705 (2008) (defendant's charge of communication with a minor for immoral purposes became a felony due to his prior conviction for a felony sex offense). Contrary to Alexander's arguments, neither of these situations apply in the case at bar.

Alexander does not argue that this case falls into the first scenario, and obviously prior convictions are not required to make attempted rape of a child in the first degree a crime.

While Alexander's prior convictions subject him to sentencing as a persistent offender pursuant to RCW 9.94A.570, they did not change the categorization of his current offense.

Alexander erroneously states that Washington has recognized four categories of offenses: "infractions, misdemeanors, felonies, and capital crimes." Brief of Appellant at 20. Further, the appellant urges this Court

to view a persistent offender sentence as "another tier of offenses more serious than class A felonies, but ineligible for the death penalty." Brief of Appellant at 21.

In Washington, "[c]rimes are classified as felonies, gross misdemeanors, or misdemeanors." RCW 9A.04.040. Felony offenses are further classified into three classes: A, B, and C. RCW 9A.20.021. The legislature has established maximum sentences for these felony classifications "[u]nless a different maximum sentence for a classified felony is specifically established by a statute of this state." RCW 9A.20.021(1).

In this case, the appellant was convicted of attempted rape of a child in the first degree. The completed crime of rape of a child in the first degree is a class A felony. RCW 9A.44.073. An attempt to commit rape of a child in the first degree is also a class A felony. RCW 9A.28.020(3)(a). There is nothing transformative about the appellant being subject to persistent offender sentencing. Alexander's crime remains a class A felony. The legislature has not created the separate tier of offenses suggested by the appellant.

It is the same with a "capital offense." Even though aggravated first degree murder can be punished with the death penalty pursuant to RCW 10.95.030, it is still classified as a class A felony. RCW 10.95.020.

The appellant cites to *State v. Thomas* to support the proposition that life without parole versus life with parole is constitutionally

significant. Brief of Appellant at 21. However, *Thomas* specifically referenced a persistent offender case, holding "*Rivers* did not have an *Apprendi* problem since the aggravators in the three strikes context are prior convictions and are therefore excepted under from the *Apprendi* rule. See *Rivers*, 129 Wash.2d at 714–15, 921 P.2d 495 (citing *State v. Lee*, 87 Wash.2d 932, 937, 558 P.2d 236 (1976)). Thus, a sentence of life without parole is an increased sentence as compared to life with the possibility of parole in *capital cases*." *State v. Thomas*, 150 Wash. 2d 821, 848, 83 P.3d 970, 984 (2004) (emphasis added).

The appellant has not provided this Court any authority that is persuasive, let alone controlling, on this issue. Therefore, the appellant's prior convictions are not elements. There is no "more serious tier of offense" than a class A felony, regardless of the authorized punishment.

3. The *Allenye* Decision Does Not Overrule *Almendarez-Torres* and Does Not Apply in the Case at Bar.

The State briefly presents the facts and procedural history of *Allenye:*

> Alleyne and an accomplice devised a plan to rob a store manager as he drove the store's daily deposits to a local bank. By feigning car trouble, they tricked the manager to stop. Alleyne's accomplice approached the manager with a gun and demanded the store's deposits, which the manager surrendered. Alleyne was later charged with multiple federal offenses, including robbery affecting interstate commerce, 18 U.S.C. § 1951(a), and using or carrying a firearm in relation to a crime of violence, § 924(c)(1)(A).
>
> Section 924(c)(1)(A) provides, in relevant part, that anyone who "uses or carries a firearm" in relation to a "crime of violence" shall:

> "(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."
>
> The jury convicted Alleyne. The jury indicated on the verdict form that Alleyne had "[u]sed or carried a firearm during and in relation to a crime of violence," but did not indicate a finding that the firearm was "[b]randished." App. 40.
>
> The presentence report recommended a 7–year sentence on the § 924(c) count, which reflected the mandatory minimum sentence for cases in which a firearm has been "brandished," § 924(c)(1)(A)(ii). Alleyne objected to this recommendation. He argued that it was clear from the verdict form that the jury did not find brandishing beyond a reasonable doubt and that he was subject only to the 5–year minimum for "us[ing] or carr[ying] a firearm." Alleyne contended that raising his mandatory minimum sentence based on a sentencing judge's finding that he brandished a firearm would violate his Sixth Amendment right to a jury trial.

Alleyne v. United States, 133 S. Ct. 2151, 2155-56, 186 L. Ed. 2d 314 (2013)

In *Harris v. United States*, the United States Supreme Court held that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) The Court then granted certiorari in the *Allenye* case to consider whether that decision should be overruled. 568 U.S. ——, 133 S.Ct. 420, 184 L.Ed.2d 252 (2012).

Harris drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. In

Allenye, the Court concluded that this distinction is inconsistent with the decision in *Apprendi v. New Jersey*, and with the original meaning of the Sixth Amendment. They held that "[a]ny fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt...[m]andatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury." *Alleyne v. United States*, 133 S. Ct. at 2155 (internal citations omitted).

In a footnote, the Court specifically addressed *Allenye's* potential impact on *Almendarez-Torres*. "In *Almendarez–Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today." *Alleyne v. United States* at 2160.

At this time, neither the Washington Supreme Court nor the United State Supreme Court have chosen to overrule the exception that has been drawn for prior convictions. The appellant has not provided adequate authority or argument for this Court to ignore its own precedent nor that of the higher courts.

III. CONCLUSION

For all the reasons presented above, the State respectfully requests that the appeal be denied and that the original verdict and sentence be affirmed in this matter.

DATED this 22nd day of January, 2014.

Respectfully Submitted,

By: _____

KATHERINE L. SVOBODA
Senior Deputy Prosecuting Attorney
WSBA # 34097

GRAYS HARBOR COUNTY PROSECUTOR

January 23, 2014 - 2:36 PM

Transmittal Letter

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