NO. 44061-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEE McCLURE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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1. The expert's opinion that children are usually abused by close family members was an opinion on Lee McClure's guilt that violated his constitutional right to a jury determination of the facts of the case.

2. The prosecutor's misconduct in closing argument denied Mr. McClure the fair trial he was guaranteed by the Fourteenth Amendment.

3. The State did not prove beyond a reasonable doubt that Mr. McClure knowingly possessed depictions of minors involved in sexually explicit conduct.

4. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination by a preponderance of the evidence that Mr. McClure had one prior conviction for rape of a child in the first degree violated his federal constitutional right to due process and a jury determination of every element of the crime beyond a reasonable doubt.

5. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination by a preponderance of the evidence that Mr. McClure had one prior conviction for rape of a child in the first degree violated his state constitutional rights to due process and a jury determination of every element of the crime beyond a reasonable doubt.

6. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination by a preponderance of the evidence that Mr. McClure had one prior conviction violated his right to equal protection of the law.

7. The order prohibiting Mr. McClure from contact with any minors for the rest of his life violated his fundamental constitutional right to a relationship with his minor son.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the constitutional right to a jury determination of guilt or innocence. U.S. Const. amends. VI, XIV; Const. art I, §§ 21, 22. Mr. McClure and his step-daughter were part of a close family, and he was accused of having sexual intercourse with her and photographing her. In explaining that children often delay reporting sexual abuse, the medical director of a hospital's child abuse department testified that close family members are usually the perpetrators of child sexual abuse. There was little evidence to corroborate the step-daughter's testimony and the jury verdict was based upon its evaluation of witness credibility. Must Mr. McClure's convictions for rape of a child in the second and third degree be reversed because the expert's opinion invited the jury to convict Mr. McClure because he fit the "profile" of a child abuser?

2. The defendant has a constitutional right to a fair trial, and a prosecutor's improper arguments may violate that right. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor committed misconduct by commenting on Mr. McClure's right to a trial and to confront the witnesses against him and by misrepresenting the expert witness's testimony, all in attempt to bolster the complaining witness's credibility. Must Mr. McClure's convictions be reversed where the prosecutor's misconduct in closing argument was so flagrant and ill-intentioned that it could not be cured by timely objections and curative instructions?

3. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 22. Mr. McClure was convicted of possession of depictions of minors engaged in sexually explicit conduct, which require proof the defendant knew he possessed the depictions and knew their nature. The small file of thumbnail images found in the McClure family computer looked like a black piece of paper. It may have been created by a program without the user's knowledge, the normal computer user would not be aware the file was there, and the computer crimes detective could not state for certain when the file was created. Viewing the evidence in the light most favorable to the State, must Mr.

McClure's conviction for knowing possession of depictions be dismissed in the absence of proof beyond a reasonable doubt that he knew the images were on the computer?

4. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt of every fact that authorizes an increase in punishment. Did the sentencing court violate Mr. McClure's constitutional rights by imposing a sentence of life without the possibility of parole based on the court's own finding, by a preponderance of the evidence, that Mr. McClure had a prior conviction for rape of a child in the first degree?

5. The Washington constitutions provides the right to due process of law, the right to a jury trial, and the right to proof beyond a reasonable doubt of every fact that necessary to impose punishment. Const. art. I §§ 3, 21, 22. Did the sentencing court violate Mr. McClure's constitutional rights by imposing a sentence of life without the possibility of parole based on the court's own finding, by a preponderance of the evidence, that Mr. McClure had a prior conviction for rape of a child in the first degree?

6. A statute implicating a fundamental liberty interest violates the Equal Protection Clause of the Fourteenth Amendment if it creates classifications that are not necessary to further a compelling government interest. The government has an interest in punishing repeat offenders

more harshly than first-time offenders, but for some crimes, the existence of prior convictions used to enhance the sentence must be proved to a jury beyond a reasonable doubt, and for others – like those at issue in persistent offender sentencings – the existence of prior convictions used to enhance the sentence need only be proved to a judge by a preponderance of the evidence. Do the persistent offender provisions of the Sentencing Reform Act violate the Equal Protection Clause by providing lesser procedural protections than other statutes whose purpose is the same?

7. A parent has a fundamental liberty interest in a relationship with his child, and the government may not interfere with that relationship absent a compelling reason. U.S. Const. amends. I, XIV; Const. art. 1 § 3. Mr. McClure was convicted of sexually assaulting his teenage step-daughter, and he had a prior conviction for raping a girl under the age of twelve. Did the court order prohibiting Mr. McClure from having any contact with minors for the rest of his life unconstitutionally interfere with his right to a relationship with his minor son?

C. STATEMENT OF THE CASE

Lee McClure and his wife Norma Jean married in September 2005. 3RP 251-52; 8RP 826. The couple lived in Sumner with Mrs. McClure's four children: Elizabeth, Joseph, RH and Adam. 3RP 252. The two older children moved out in 2006 and 2007, and Mr. and Mrs. McClure's son

Aaron Michael, was born in July 2008. 3RP 252, 266; 4RP 320, 322; 8RP 831. Thus, from July 2008 to 2011, the family living in the Sumner home included Mr. McClure, Mrs. McClure, her daughter RH (dob 3/11/95), RH's younger brother Adam H, and Aaron Michael McClure. 4RP 367.

The family was close and enjoyed family night, church activities, and camping. 4RP 338-39, 353-54; 5RP 481; 8RP 849-50, 867. RH and Adam were responsible for their school work and a few household chores, and they were occasionally disciplined by loss of video games, after-school activities, or library books if they did not fulfill these responsibilities. 5RP 455-57, 474; 8RP 845-46. Although Mr. and Mrs. McClure enforced the rules, Mr. McClure was more authoritarian. 4RP 324-25; 5RP 474; 8RP 845.

Mrs. McClure worked full-time except when she was on maternity leave after the birth of Aaron Michael. 8RP 876. Mr. McClure was laid off from his job at a foundry, Tools with Finesse, at the end of 2008, and he stayed home to care for Aaron Michael until he obtained new employment in September 2010. 4RP 349-50; 8RP 841-43.

RH and Adam visited their father and his wife two weekends every month and on alternating holidays. 3RP 253-54; 6RP 614. RH believed that she could choose which parent she wanted to live with when she turned 16. 4RP 463; 5RP 550. When RH and Adam went to stay with

their father on the weekend of RH's 16th birthday, she announced that she was moving in with her father and step-mother. 4RP 374; 6RP 615-16. Mr. H explained he would need to talk to his lawyer first and make arrangements to change the parenting plan, but RH said she would not return to her mother's house. 5RP 551; 6RP 616-17. Her father and step-mother questioned RH, and she told them she did not want to return because she had committed adultery against her mother. 5RP 552; 6RP 617. When he understood that RH meant sexual contact with Mr. McClure, Mr. H. called the police. 6RP 618, 619-20.

The Pierce County Prosecutor charged Mr. McClure with rape of a child in the second degree, rape of a child in the third degree, sexual exploitation of a minor, and possession of depictions of a minor engaged in sexually explicit conduct. CP 48-49.

At trial, 17-year-old RH testified that Mr. McClure had sexual intercourse with her over several years, probably beginning when she was 12 years old. 4RP 367, 377-78, 387, 523-24. In response to leading questions, RH related that her stepfather penetrated her vaginally, anally and orally with his penis, fingers, and sex toys. 4RP 379-85, 392-93, 417-20. She said this usually occurred in the bedroom occupied by Mr. McClure and her mother, but also happened in her bedroom and

occasionally in other parts of the house and in the family's trailer. 2RP 416-17, 421-23. 437.

At trial RH testified she thought the abuse began when she was 12 or 13, but when she reported the abuse to her family and the police on her 16th birthday, RH indicated it had been occurring only over the past year. 8RP 772. She told the physician who later examined her that the abuse had been occurring for two to three years. 8RP 797. At trial RH estimated she had sexual contact with Mr. McClure about once a month, but she said it happened at least five times when she told father and stepmother and include that amount in a written statement she prepared that night. 5RP 467, 500-01, 503-04, 506-07.

RH was only able to describe one specific incident, which occurred in a car when Mr. McClure picked her up after her 9th grade graduation party. 4RP 436; 5RP 469-72. She also related that Mr. McClure took a photograph of her that showed her vagina and others that showed her breasts. 4RP 432-33.

RH was examined by the medical director of the Child Abuse Intervention Department of Mary Bridge Hospital, Yolanda Duralde, who reported RH had a normal physical examination with no evidence of trauma. 8RP 800-02, 804, 806. Over defense objection, Dr. Duralde testified that children often delay reporting sexual abuse because they are

usually abused by people who are close to them and they are afraid of what will happen to their family. CP 47; 1RP 41-42; 8RP 781-82.

Mr. McClure testified that he did not have any form of sexual contact with his step-daughter and did not take the explicit photographs. 8RP 869-70. Mr. McClure left the state after he learned of the police investigation. 3RP 241-42, 260. He explained that he panicked and left Washington because he was worried that RH had told the police about an incident during the 2010 Christmas holiday when RH ran into the living room, pushed him down on the couch, and jumped on top of him. 8RP 871-72, 874, 893-94. 896. Mr. McClure and the children often wrestled in the family room. 8RP 867-68. This time, however, McClure had been wearing pajamas and baggy shorts. 8RP 872. When RH asked Mr. McClure what was in his pocket, he realized he had an erection and left the room in embarrassment. 8RP 872-73.

Mr. McClure was arrested in Missouri and waived extradition. 6RP 648, 656. Mr. McClure's father Carl then retrieved his son's van and its contents from Missouri and gave them to Mrs. McClure. 6RP 709-10, 712, 716. A Pierce County Sheriff's Department detective obtained a search warrant for Carl McClure's home as well as the trailer on Carl McClure's property where Mrs. McClure was then living. 6RP 689, 691, 715. The detective and his colleagues seized two laptop computers, a

computer tower, a flash drive, a USB drive, and a digital camera from the trailer and three external hard drives and three flash drives from Carl McClure's house. 3RP 151; 6RP 692-93.

Computer crimes detective Michael Ames led an examination of the seized items. 3RP 136, 233-34. After spending months searching for images on the computer equipment and camera, the detective found one file that appeared to be a black sheet of paper, but contained 17 thumbnail images showing RH when she was not fully clothed.[1] 3RP 151-52, 165-66, 227. The detective explained that the file was not visible to the normal computer user and was created by the picture management program without the user's knowledge. 3RP 173-74, 181, 224-25. He did not find photos of RH unclothed on the camera or other pieces of computer equipment that were seized. 3RP 234.

Mr. McClure was convicted by a jury as charged. CP 82-85. At sentencing, the court found by a preponderance of the evidence that Mr. McClure had a 1993 Pierce County conviction for rape of a child in the first degree and sentenced him as a persistent offender to life without the possibility of parole for Count 1, rape of a child in the second degree. CP 94-125-30. He received concurrent 60-months sentences for rape of a

[1] The computer also contained numerous images of normal family activities that were easily accessible. 3RP 166-69, 190, 215-16.

child in the third degree and possession of depictions of minors, and a 120-month sentence for sexual exploitation of a minor. CP 88-89, 94.

D. ARGUMENT

1. **Dr. Duralde's expert testimony that sexual abuse of children is usually perpetrated by close family members was an improper opinion that Mr. McClure was guilty.**

The accused has the right to a jury determination of guilt or innocence, and expert witnesses are not permitted to offer a direct or implied opinion that a criminal defendant is guilty. In the course of explaining why children often delay reporting sexual offenses, an expert witness testified that child victims of sexual abuse are usually abused by close family members. RH lived in the same home as Mr. McClure, who was her stepfather, and the prosecutor argued the jury could consider their close family relationship in deciding the case. Mr. McClure's convictions must be reversed because the expert offered an indirect opinion that he was guilty of sexually abusing RH because of their close family relationship.

a. Mr. McClure moved to preclude Dr. Duralde from testifying about delayed reporting. RH was 17 years old when she testified that she had been sexually abused at least once a month over several years. 4RP 367, 389-92; 5RP 523-24. She explained that she told her father about the abuse on the weekend of her 16th birthday because she did not want to live

in the same home with Mr. McClure. 5RP 499-91, 521-22. She testified that she did not tell anyone sooner because she was afraid of how Mr. McClure would react. 5RP 473.

Prior to trial, Mr. McClure moved to prohibit the prosecution from eliciting expert testimony about delay reporting of abuse by children from Dr. Duralde, the physician who examined RH. CP 47; 1RP 41-42, 46-47. The trial court ruled that Dr. Duralde could testify about the reasons for delayed reporting if a proper foundation was laid but could not offer an opinion as to RH's credibility. CP 40; 1RP 53-54.

In discussing delayed reporting of sexual abuse by children, however, Dr. Duralde told the jury that sexual abuse of children is usually perpetrated by family members who are close to the child. 8RP 781. According to the physician, children are naturally confused and worried about what might happen to the family if they report the sexual abuse. She opined that they therefore wait until they feel safe to report sexual abuse. 8RP 781-82. When asked on cross-examination if the age of the child affects the likelihood of delayed reported, Dr. Duralde opined that the determinative factor is not age but how close the child is to the family member. 8RP 810.

b. Witnesses may not offer a direct or implied opinion that the defendant is guilty. The right to a jury trial is "inviolate" in Washington,

and the defendant has the right to have his guilt or innocence determined by a jury. Const. art. I, §§ 21, 22; State v. Montgomery, 163 Wn.2d 577, 590, 813 P.3d 267 (2008). Therefore, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (expert witness's opinion that the complaining witness in a third degree rape case had "rape trauma syndrome" was inadmissible because it communicated the witness's opinion that the alleged victim was telling the truth).

Expert witnesses may express opinions concerning their field of expertise if those opinions will aid the trier of fact. ER 702; Montgomery, 163 Wn.2d at 590. While an expert may normally testify concerning an ultimate fact to be found by the jury, she may not express an opinion "as to the guilt of the defendant, intent of the accused, or the veracity of witnesses." Id. at 519; ER 704. In determining if an expert opinion is an inadmissible opinion on the defendant's guilt, the court must consider "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." Id. (internal quotation marks omitted) (quoting State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

c. Dr. Duralde's testimony that close family members are usually the perpetrators of sexual abuse of children was an improper opinion on Mr. McClure's guilt. The doctor's testimony that the perpetrator of sexual abused against a child is usually a close family member was an improper opinion on Mr. McClure's guilt. The Supreme Court's opinion in Petrich is instructive. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403 (1988). Petrich was convicted of sexually abusing his granddaughter over a period of almost two years. Id. at 568. At trial, a sexual assault center employee testified that in "eighty-five to ninety percent of our cases, the child is molested by someone they already know." Petrich, 101 Wn.2d at 569.

Like Dr. Durante, the witness made this statement in the context of explaining that many child victims delay reporting their crimes. Id. at 576. The Petrich Court found the prejudicial effect substantially outweighed its probative value. Reversing the convictions on other grounds, the court ordered that, on retrial, "expert testimony should be excluded that invites the jury to conclude that because of defendant's particular relationship to the victim, he is statistically more likely to have committed the crime." Id.

Statutory rape convictions were reversed where an employee of a sexual assault center testified that the majority of the children she saw

were abused by "a male parent-figure," normally a biological parent. State v. Maule, 35 Wn. App. 287, 289-90, 667 P.2d 96 (1983). The defendant was charged with molesting his eight-year-old daughter and his five-year-old step daughter, both of whom were living with him. Id. at 288-89. The expert's opinion was offered while the prosecutor was establishing the witness's credentials. This Court determined it was substantive evidence showing the defendant's guilt, that it was highly prejudicial and irrelevant, and reversed the defendant's convictions. Id. at 293. Other cases similarly hold that expert testimony implying guilt based upon the characteristics of known offenders is improper. State v. Braham, 67 Wn. App. 930, 937, 841 P.2d 785 (1993) (expert provides "grooming profile" where some of defendant's behavior consistent with grooming); State v. Steward, 34 Wn. App. 221, 224, 660 P.2d 278 (1983) (expert testimony that live-in or baby-sitting boyfriends more likely to inflict serious injury on young children).

"As a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger or unfair prejudice." Braham, 67 Wn. App. at 936.

Dr. Duralde informed the jury that children's close family members usually commit sexual abuse and that molestation by strangers is extremely rare. As in Petrich, the expert's testimony invited the jurors to conclude that "because of defendant's particular relationship to the victim, he is statistically more likely to have committed the crime." Petrich, 101 Wn.2d at 576. The comments were prejudicial.

The prosecutor exacerbated the prejudice by using Dr. Duralde's opinion to suggest the jury could convict Mr. McClure because of his close relationship with RH. The deputy prosecutor first explained that children are usually abused by family members, who have access and opportunity. 9RP 987. She then pointed out that Mr. McClure was RH's stepfather living in the same house as RH, stating "this is exactly the situation Dr. Duralde is talking about." Id. The prosecutor argued that RH was afraid to tell anyone about the abuse, again as Dr. Duralde described. 9RP 987

> It is often a family member who is the perpetrator because of the access they have, because of the opportunity that they have. On a daily basis the defendant is around R[H]. He's her stepfather. It is normal, not unusual at all, that he would find himself alone with her in the house or taking her someplace. It would actually be odd if he never ended up alone with her. But because of this, because of this circumstance, because he was her stepfather, and they lived in the same house for years, that is exactly the situation that Dr. Duralde is taking about. There's a certain family dynamic. The defendant had very much become part of the

> family. Married to her mother. They have a baby together. She was afraid to say anything to anybody, just as Dr. Duralde said. It's family dynamic.

Id. (emphasis added).

Later the prosecutor again implied that Mr. McClure was guilty because he was RH's stepfather, pointing out he was frequently alone with RH and could easily find a way to have sex with her:

> And that's – that explains why family member are so often the perpetrators of sex crimes against kids, because they have got the access, they've got the opportunity. And the defendant seized the opportunity here.

9RP 1002 (emphasis added).

Dr. Duralde improperly identified a group of people – close family members -- more likely to have sexually abused RH than others. The evidence was highly prejudicial as it was used as circumstantial evidence that Mr. McClure was guilty. See Braham, 67 Wn. App. at 938-39. While the statement explained why children may delay reporting of sexual abuse, the jury certainly did not need an expert witness to tell them that an adult in a close relationship with a child has a greater opportunity to commit the alleged crimes. Id. at 938. Moreover, the doctor's opinion vouched for RH's credibility and corroborates her testimony that Mr. McClure raped her.. See State v. Ciskie, 110 Wn.2d 263, 286, 751 P.2d 1165 (1968). Dr.

Duralde's testimony was highly prejudicial, had little probative value, and should have been excluded.

d. Dr. Duralde's prejudicial testimony requires reversal. Expert testimony that directly or indirectly tells the jury that the defendant is guilty violates the defendant's constitutional right to a jury trial and to due process of law. Demery, 144 Wn.2d at 759. When constitutional error is identified on appeal, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the jury verdict. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986); State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009).

The evidence concerning the two counts of rape of child was not conclusive. The State's evidence consisted of RH's testimony, her reporting of the allegation to her father, her step-mother, the police, and Dr. Duralde, a medical examination that revealed no signs of trauma, and Mr. McClure's flight after learning of the allegations. The jury determination thus turned largely on its evaluation of the witnesses' credibility. This Court cannot be convinced beyond a reasonable doubt that the expert witness's opinion that sexual abuse of children is usually perpetrated by close family members was harmless beyond a reasonable

doubt. Hudson, 150 Wn. App. at 656 (reversing rape conviction due to expert's improper opinion that victim's injuries were caused by nonconsensual sex where case turned on whether jury believed the defendant or the complaining witness). Mr. McClure's convictions for rape of a child in the second and third degree must be reversed and remanded for a new trial. Id.

2. **Prosecutorial misconduct in closing argument denied Mr. McClure's constitutional right to a fair trial.**

In closing argument, the deputy prosecuting attorney commented on Mr. McClure's constitutional right to confront the witnesses against him and misrepresented the evidence. This misconduct was flagrant and ill-intentioned, and Mr. McClure's convictions must therefore be reversed.

a. Misconduct by the prosecutor may violate a defendant's constitutional right to a fair trial. A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting

need for decorum in closing argument. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. Monday, 171 Wn.2d at 676; Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must first decide if the comments were improper and, if so, whether a "substantial likelihood" exits that the comments affected the jury verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id. at 760-61.

b. The prosecutor committed misconduct by commenting on Mr. McClure's exercise of his constitutional rights to be present at trial and confront his accusers. Both the federal and the state constitutions safeguard an accused person's right to confront the witnesses against him. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The Sixth Amendment right to confront witnesses is a fundamental right that applies to the states

by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The right to "face to face" confrontation is "essential to fairness." State v. Jones, 71 Wn. App. 798, 810, 863 P.2d 85 (1993) (citing Coy v. Iowa, 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988)), rev. denied, 124 Wn.2d 1018 (1994).

The right of the accused to be present at trial is also essential to the dignity of the trial and the presumption of innocence. It is "one of the most basic rights guaranteed by the Confrontation Clause, Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), and is "scarcely less important to the accused than the right of trial itself." Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912); see also Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (fundamental right to jury trial).

A prosecutor commits reversible constitutional error when he comments on a specific constitutional right of the defendant. "The State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the State draw unfavorable inferences from the exercise of a constitutional right." Jones 71 Wn. App. at 810; see Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (prosecutorial misconduct during closing argument may infect trial with constitutional error when it "implicate[s] ... specific rights of the

accused"); Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (prosecution prohibited from using defendant's exercise of right to remain silent against him in case-in-chief); State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (prosecutor violated defendant's due process rights by admitting his legal gun collection at death penalty sentencing hearing).

In Mr. McClure's case, the prosecutor commented on his constitutional rights to a trial and to confront witnesses when discussing RH's testimony and demeanor. 9RP 980-81. Seventeen-year-old RH had a very difficult time testifying and was unable to use an adult vocabulary to describe sexual contact. See 4RP 396-98 (court and parties discuss the long pauses in RH's testimony and her inability to look at people in the context of the defendant's objections that the prosecutor's questions of RH were leading); 4RP 379-83 (RH does not use adult words or describe what penetration means), 4RP 439-42 (trial continued for week because RH too ill to continue testifying). The prosecutor argued this was normal and that RH's demeanor demonstrated her credibility. 9RP 979-80. The prosecutor stated:

> So when you're thinking about her testimony specifically, remember these things. She's being asked to talk about something that her stepfather did to her, sexually, in a strange and intimidating environment, from that stand, in front of all of you, other strangers who are present here in

> the courtroom, but also in front of the person who abused her.

9RP 980-81.

This Court addressed analogous misconduct in Jones, where the prosecutor stressed that the defendant was trying to make eye contact with the complaining witness, his girlfriend's daughter, which caused her to cry and break down so that she was unable to return to the courtroom. Jones, 71 Wn. App. at 802, 805, 806. This Court ruled that the prosecutor impermissibly commented on Jones's exercise of his constitutional right of confrontation. Id. at 811-21. The Eighth Circuit similarly held that a prosecutor's argument that the complaining witness in a sexual assault case had to "go through those humiliating sexual assaults and those violent acts perpetrated against her" so that the defense counsel could cross-examine her was egregious misconduct to which his trial counsel should have objected. Burns v. Gammon, 260 F.3d 892, 895-98 (8th Cir. 2001).

It is well-settled that prosecutorial comments on an accused person's fundamental rights infringe the right to a fair trial. See e.g. Burns, 260 F.3d at 896-97 (and cases cited therein); Jones, 71 Wn. App. at 811. Like the comments in Jones and Burns, the prosecutor's argument here asked the jury to draw a negative inference from Mr. McClure's decision to plead not guilty and confront the witnesses against him.

c. The prosecutor committed misconduct by arguing facts that were not in evidence. While a prosecutor is permitted to argue reasonable inferences from the evidence, she may not misstate the evidence or argue facts not admitted at trial. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); RPC 3.4(e). The prosecutor violated this legal principle by misrepresenting the expert witness's testimony in order to excuse RH's inability to describe more than one specific instance of sexual intercourse.

As mentioned above, Dr. Duralde testified about delayed reporting by child victims of sexual abuse. She also stated that most children are unable to relate the dates and times when they were sexually abused. 8RP 794. Dr. Duralde did not, however, testify that most children cannot describe a specific incident of abuse. The prosecutor, however, argued that she did:

> And, again, remember Dr. Duralde explaining that this is typical of kids, to not be able to give specific dates, specific instances, particularly when they occurred over an extended period of time. They're bound to blend together, as they did for [RH].

9RP 982. The prosecutor thus misrepresented her expert witness's testimony in order to bolster RH's credibility.

Dr. Duralde did not testify that it is typical for children to be unable to describe specific instances, as the prosecutor argued. Children much younger than RH are able to describe individual acts of sexual

assault. See State v. Wallmuller, 164 Wn. App. 890, 892, 265 P.3d 940 (2011) (in prosecution for several counts of rape of a child in the first degree and sexual exploitation of a minor, victim described separate acts); State v. Corbett, 158 Wn. App. 576, 583-85, 242 P.3d 52 (2010) (victim in prosecution for four counts of first degree rape of a child described distinct incidents). The prosecutor improperly argued facts that were not in evidence to bolster her witness's testimony. The argument was prejudicial because RH did not describe any particular act that occurred before her 14th birthday to support a conviction for rape of a child in the second degree. See CP 240; RCW 9A.44.076. The prosecutor's argument was misconduct.

d. Mr. McClure's convictions must be reversed. Defense counsel did not object to the prosecutor's reference to Mr. McClure's right to confront witnesses or her misstatement of Dr. Duralde's expert opinions, presumably to avoid highlighting the improper argument. This Court must thus determine if the misconduct was so flagrant and ill-intentioned that no objection or curative instruction would have cured the prejudice. Belgarde, 110 Wn.2d at 508. A comment on the defendant's exercise of his constitutional rights is flagrant misconduct. Similarly, it was flagrant and ill-intentioned for the prosecutor to bolster the credibility of her teenage witness by arguing her difficulty describing the claimed acts of

sexual intercourse with any specificity was normal and exacerbated by the defendant's presence in the courtroom.

Curative instructions were unlikely to erase the prejudice caused by the misconduct. See State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993) (court's strongly-worded curative instruction could not cure prejudice where prosecutor's remarks struck at the heart of the right to a fair trial before an impartial jury and thus could not be cured); State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor elicited defendant's other bad acts in cross-examination of defendant's character witnesses).

The impact of prosecutorial misconduct on jury deliberations is especially prejudicial when the jury's decision rests largely on their determination of the credibility of witnesses. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (reversal due to pervasive prosecutorial misconduct in case that hinged on witness credibility); State v. Venegas, 155 Wn. App. 507, 526-27, 228 P.3d 813 (reversal based upon cumulative impact of several factors, including prosecutorial misconduct, in case that "turned largely on witness credibility"), rev. denied, 170 Wn.2d 1003 (2010).

RH's credibility was the key to this case, and the prosecutor improperly bolstered her credibility by arguing her inability to recount specific instances was normal and her hesitancy was due to Mr. McClure's presence at his trial. Moreover, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Walker, 164 Wn. App. at 737). There is a substantial likelihood the jury was affected by the prosecutor's improper arguments. This Court must reverse Mr. McClure's convictions and remand for a new trial. Reed, 102 Wn.2d at 148; Walker, 164 Wn. App. at 738-39.

3. **Mr. McClure's conviction for possession of depictions of minors must be dismissed because the State did not prove beyond a reasonable doubt that Mr. McClure knowingly possessed the images.**

To convict Mr. McClure of possession of depictions of minor engaged in sexually explicit conduct, the State had to prove beyond a reasonable doubt that he knowing possessed the depictions. The computer crimes detective, however, testified that the computer user would not be aware of the image he located on the family computer after searching for many hours. The State thus did not prove beyond a reasonable doubt that Mr. McClure's possession was knowing, and his conviction must be reversed and dismissed.

a. The State must prove every element of the crime beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. McClure was convicted of possession of depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.070(2). CP 49, 85. The statute prohibits the knowing possession of "any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g)." RCW 9.68A.070(2)(i); CP 49. The definition of "sexually explicit conduct" includes a "depiction of the genitals or unclothed pubic or rectal areas of any minor or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer." RCW 9.68A.011(4)(f). The State was thus required to prove that on February 13, 2011, Mr. McClure knowingly possessed an image that

showed RH's unclothing breasts or her pubic or anal areas. RCW 9.68A.070(2)(i); RCW 9.68A.011(4)(f); State v. Luther, 157 Wn.2d 63, 134 P.3d 205 (2006) (statute does not violate the First Amendment because is contains a "'knowingly' scienter element").

b. The State did not prove beyond a reasonable doubt that Mr. McClure knowingly depicted the images on February 13, 2011. During his "long arduous tedious" examination of an exact copy of Mr. and Mrs. McClure's computer tower's hard drive, Detective Ames located about five small images that looked like a black sheet of paper which contained thumbnail images. 3RP 166, 168. Most contained normal family photographs, but one contained "17 small little thumbnail images," which were images of RH "in various stages of undress." 3RP 166-69; 4RP 432-33. The file path included the term "Squide," which was Mr. McClure's user name. 3RP 170, 217, 221; 8RP 898.

Detective Ames explained that the file was probably created by the Microsoft operating program without the user's knowledge when the photographs were viewed on the computer. 3RP 178-79, 181, 224-25. The file was not visible to a normal computer user, who would be unaware of its creation. 3RP 173-74, 187-88, 227. The detective could not state when the images were created or placed on the hard drive, although the

file "may have" been created by the computer on February 13, 2011. 3RP 226-28.

The crime of possession of depictions of minors requires the defendant to have both knowledge that he possessed the depiction and knowledge of its general nature. State v. Barbaccio, 151 Wn. App. 716, 733-34, 214 P.3d 168 (2009), rev. denied, 168 Wn.2d 1027 (2010); State v. Rosul, 95 Wn. App. 175, 185, 974 P.2d 916, rev. denied, 139 Wn.2d 1006 (1999). Here, there is no doubt that Mr. McClure was in possession of the computer tower, which was kept in the family's living room. 3RP 272-73; 8RP 835-38. Mr. McClure testified, however, that he was not aware the depictions were in the computer. 8RP 869. He did not use the computer to look at photographs and did not know how they got there. 8RP 869, 876, 897-98.

The depictions were in a file that looked like a black piece of paper. The computer crimes detective testified that the normal computer user would not be aware that the depictions were there. While he theorized that the file was placed on the computer without the user's knowledge when someone viewed the photos on the computer, he did not know for certain when that occurred. The State thus did not prove beyond a reasonable doubt that Mr. McClure knowingly possessed the thumbnail depictions.

c. Mr. McClure's conviction for possession depictions of minors must be reversed and dismissed. The State did not prove beyond a reasonable doubt that Mr. McClure knew that the thumbnail images were on the family computer or that he was aware of their content. His conviction for depictions of minors involved in sexually explicit activity must be reversed and dismissed. See State v. Homan, 172 Wn. App. 488, 493, 290 P.3d 1041 (2012) (reversing and remanding for dismissal with prejudice after finding insufficient evidence to support conviction).

4. **The court violated Mr. McClure's Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a life sentence based on the court's finding, by a preponderance of the evidence, that Mr. McClure had a prior conviction for a "strike" offense.**

Mr. McClure was sentenced to life without the possibility of parole based upon the trial court's finding by a preponderance of the evidence that he had a prior conviction for rape of a child in the first degree. The Sixth and Fourteenth Amendments require a jury determination beyond a reasonable doubt of a factual finding that increases the defendant's sentence. Mr. McClure's sentence must be vacated.

a. Under the Sixth and Fourteenth Amendments, a defendant has a right to a jury determination and proof beyond a reasonable doubt of any fact that increases his maximum sentence. The Due Process Clause of the

Fourteenth Amendment requires the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The Sixth Amendment provides the right to a jury in a criminal trial. U.S. Const. amend VI; Blakely v. Washington, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In combination, these constitutional clauses guarantee the right to have a jury find beyond a reasonable doubt every fact essential to punishment – whether or not the fact is labeled an "element." Apprendi, 530 U.S. at 490.

> It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. Arbitrary distinctions between elements and sentencing factors doe not change these constitutional principles.

> [A]ny possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Here, the prior conviction found by the court increased Mr. McClure's sentence to life without the possibility of parole. The prior conviction was thus an element of the offense that must be proved to a jury beyond a reasonable doubt.

b. Mr. McClure's mandatory life sentence was imposed based upon factual findings made by the court by a preponderance of the evidence. Under the Sentencing Reform Act (SRA), the trial court was required to sentence Mr. McClure to life in prison without the possibility of parole based upon a finding by a preponderance of the evidence that he was a "persistent offender." RCW 9.94A.030(37); 9.94A.570.

A "persistent offender" is an offender who is being sentenced for one of several sex offenses, including a rape of a child in the first or second degree, and who has a prior conviction for one of those sex offenses. RCW 9.94A.030(37)(b)(i), (ii). Mr. McClure was convicted of rape of a child in the second degree. CP 82. The court found by a preponderance of the evidence that Mr. McClure had a 1993 conviction for rape of child in the first degree and was therefore a persistent offender. CP 128; 11RP 1081-82. The trial court was thus required to a life sentence, and Mr. McClure is not eligible for parole or any form of early release. RCW 9.94A.570.

c. Mr. McClure had the constitutional right to have a jury determine beyond a reasonable doubt where he committed a prior "strike" offense because it increased his maximum sentence.[2] The jury's guilty verdict for the crime of rape of a child in the second degree supported a sentence of life in prison, but not life without the possibility of parole. See RCW 9A.20.021(1)(a) (maximum term for class A felony life in prison); RCW 9A.44.076 (rape of child in second degree is Class A felony). It was the court's finding by a preponderance of the evidence that he committed a prior "strike" offense that mandated Mr. McClure's sentence. Because the facts used to impose the sentence were not found by a jury beyond a reasonable doubt, Mr. McClure's Sixth and Fourteenth Amendment rights were violated.

The State may argue that the facts that increased Mr. McClure's sentence falls within a "prior conviction exception" to this rule. See Apprendi, 530 U.S. at 489. This argument overlooks important

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[2] The Washington Supreme Court has held prior convictions need not be proved to a jury beyond a reasonable doubt in persistent offender cases. State v. Thiefault, 160 Wn.2d 409, 418, 158P.3d 580 92007); State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); State v. Wheeler, 145 Wn.2d 116, 117, 34 P.3d 799 (2001); State v. Thorne, 129 Wn.2d 736, 781-84, 921 P.2d 514 (1996). However, the Supreme Court recently accepted review of this Court's divided opinion in State v Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012), rev. granted 300 P.3d 416 (2013) (No. 88118-9), and the issue is again before the court.

This Court should independently review this issue in light of the relevant United States Supreme Court precedent. See, e.g., State v. Anderson, 112 Wn. App. 828, 839, 51 P.3d 179 (2002) (Court of Appeals need not follow Washington Supreme Court decisions that are inconsistent with cited United States Supreme Court opinions).

distinctions and developments in United States Supreme Court jurisprudence.

First, the purported exception is based upon a case which has been implicitly overruled, Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). The Apprendi Court recognized that there was no need to explicitly overrule Almendarez-Torres in order to resolve the issue before it, which was an exceptional sentence based upon other factual findings that were not made by a jury beyond a reasonable court. The court stated, "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." Apprendi, 530 U.S. at 489. The Apprendi Court described Almendarez-Torres as "at best an exceptional departure" from the historic practice of requiring the State to prove to a jury beyond a reasonable doubt each fact that exposes the defendant to an increased penalty. Id. at 487.

Justice Thomas, a member of the 5-justice majority in Almendarez-Torres, later changed his mind. His Apprendi concurrence was a dissertation on the historical practice of requiring the State to prove every fact, "of whatever sort, including the fact of a prior conviction," to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas later noted, "a majority of the Court now

recognizes that Almendarez-Torres was wrongly decided." Shepard v. United States, 544 U.S. 13, 27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring).

Even if Almendarez-Torres has precedential value, it is distinguishable on several grounds. First, in Almendarez-Torres, the defendant had admitted the prior convictions. Almendarez-Torres, 530 U.S. at 488. Mr. McClure did not admit his prior convictions. Second, the issue in Almendarez-Torres was the sufficiency of the charging document, not the right to a jury trial or proof beyond a reasonable doubt. See Apprendi, 530 U.S. at 488; Almendarez-Torres, 523 U.S. at 247-48.

Third, Almendarez-Torres dealt with the "fact of a prior conviction." Apprendi, 530 U.S. at 490. But it was not the simple "fact" of the prior convictions that increased Mr. McClure's punishment; it was the "type" of prior conviction that mattered. In order to impose a life sentence as a persistent offender, the State had to prove he had a prior conviction for (1) one of five sex crimes, (2) one of ten crimes with a finding or sexual motivation, (3) an attempt to commit any of those offenses, or (4) a comparable out-of-state crime or comparable former Washington criminal statute. RCW 9.94A.030(37)(b); RCW 9.94A.570.

Fourth, the Almendarez-Torres court noted the fact of prior convictions triggered an increase in the maximum permissive sentence:

"[T]he statute's broad permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within broad statutory ranges. Almendarez-Torres, 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Accordingly, even if Almendarez-Torres were still good law, it would not apply here.

The United States Supreme Court recently held that the defendant was entitled to a jury determination of facts that increased the defendant's potential criminal fine. Southern Union Co. v. United States, ___ U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012). The defendant was convicted of environmental crimes that included a fine of $50,000 for each day of the violation. Southern Union, 132 S. Ct. at 2349. The district court imposed a $38.1 million fine based upon its determination that the violation occurred on each of the 762 days in the charging period; the jury did not make this factual jury determination. Id. The Court concluded the fine could not be based upon the judge's determination of facts, noting "our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentences,' 'penalties,' or 'punishments.'" Id. at 2351.

> The "'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Thus, while judges may exercise discretion in sentencing, they may not "inflict punishment that the jury's verdict along does not allow."

Id. at 2350 (quoting Blakely, 542 U.S. at 303, 304). The Court also noted that Apprendi's "animating principle" is to preserve the historic role of the jury "as a bulwark between the Sate and the accused." Id. at 2351 (quoting Oregon v. Ice, 555 U.S. 160, 168, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009)).

d. Because the life sentence was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range. The jury did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the possibility of parole imposed upon Mr. McClure. The imposition of a sentence not authorized by the jury's verdict requires reversal. State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). Mr. McClure's sentence must be reversed and remanded for the imposition of a life sentence and a minimum term within the standard range.

5. **The Washington Constitution prohibits the imposition of life without the possibility of parole as a recidivist sentence absent a jury determination of the defendant's priors beyond a reasonable doubt.**

Mr. McClure was sentenced to life without the possibility of parole without a jury determination of his prior conviction. The procedure by which this sentence was imposed violated his state constitutional rights to due process and to a jury trial.[3]

a. The Washington Constitution guarantees the rights to due process and a jury trial. Washington's constitution protects a criminal defendant's right to due process in two places. Article I, section 3 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Article I, section 22 outlines specific due process rights in criminal cases, including "a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed."

The right to a jury trial is similarly guaranteed twice in the constitution. In addition to article I, section 22, section 21 emphasizes that "the right of trial by jury shall be inviolate" in our state. Given this language, the right to a jury trial is paramount in this state. "For such a right to remain inviolate, it must not diminish over time and must be

[3] This issue is also before the Washington Supreme Court in State v. Witherspoon, No. 88118-9.

protected from all assaults to its essential guarantees." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Washington courts construe the scope of the right to jury trial under Article I, § 21 in light of the common law in the Territory at the time of the section's adoption. Id. at 645.

b. Washington's due process protections have long required that prior convictions used to support recidivist sentences be proved to a jury beyond a reasonable doubt. Contemporary Washington cases have rejected state due process challenges to the procedure under which persistent offender sentences are currently imposed. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). Treating a persistent offender finding as a mere sentencing factor is in stark contrast to this State's prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). And historically, Washington cases required a jury determination of prior convictions prior to sentencing as a habitual offender. Manussier, 129 Wn.2d at 690-91 (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d

751, 613 P.2d 121 (1980) (deadly weapon enhancement): Furth, 5 Wn.2d at 18.

Washington enacted its first habitual criminal statute in 1903. Laws of 1903, ch. 86; Former RCW 9.92.090; RCW 9A.20.020. It authorized an aggravated sentence only if the prior convictions were found by a jury beyond a reasonable doubt. Furth, 5 Wn.2d at 19. Although the right to a jury determination was omitted from the Laws of 1909, the Supreme Court held that right was inherently constitutionally derived and the Legislature did not have the power to take it away. Id. at 18-19.

> Where previous convictions are charged in an information for the purpose of enhancing the punishment of the defendant, such convictions must be proved beyond a reasonable doubt, since the fact of the prior convictions is to be taken an essential element of the offense charged, at least to the extent of aggravating it and authorizing an increase punishment.

Id. at 11. The 1903 statute was thus declaratory of rights the accused already possessed under common law and reflected the contemporary understanding of the scope of the right to a jury trial. Id. at 19.

The requirement that prior convictions be proved beyond a reasonable doubt was again made clear prior to the adoption of the SRA. State v. Chervenell, 99 Wn.2d 309, 315, 662 P.2d 836 (1983); State v. Holsworth, 93 Wn.2d 148, 159, 607 P.2d 845 (1980) ("The existence of three valid felony convictions is an element of the habitual criminal status

which must be proved by the State beyond a reasonable doubt."). With the enactment of the SRA in 1981, the Legislature abandoned the habitual offender statute and indeterminate sentencing schemes. Under the SRA, prior convictions could be used only for sentencing within the maximum penalty provided at RCW 9A.20.020. Laws of 1981, ch. 137 § 12(9); current RCW 9.94A.030(41), RCW 9.94A.599. For that reason, the Washington Supreme Court was on solid constitutional footing when it concluded proof of validity of a prior conviction was not necessary under the SRA in State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

The SRA did contemplate presenting some sentencing factors to the jury, however, such as allegations that the offense was committed in a particular geographic zone or that the defendant was armed with a deadly weapon. RCW 9.94A.825; State v. Hennessey, 80 Wn. App. 190, 193-94, 907 P.2d 331 (1995). The SRA was thus consistent with Washington's statutory and common law recognition of the right to a jury trial for prior convictions that raised the maximum penalty. When the voters passed the Persistent Offender Accountability Act (POAA), commentators therefore expected that, consistent with due process, the jury would determine prior convictions beyond a reasonable doubt. D. Stiller, "Initiative 593:

Washington's Voters Go Down Swinging," 30 Gonz. L.Rev. 433, 453-55 (1995).

When the Manussier court held that prior convictions under the POAA need only be found by the court by a preponderance of the evidence, Justice Madsen authored a well-reasoned dissent. Manussier, 129 Wn.2d at 685-97 (Madsen, J., dissenting). Judge Quinn-Brintnall has also questioned the Manussier Court's reasoning. State v. Witherspoon, 171 Wn. App. 271, 308-11, 286 P.3d 996 (2012) (Quinn-Brintnall, J., dissenting in part), rev. granted, 300 P.3d 416 (2013). Mr. McClure urges this Court to determine that Washington's due process protections and jury trial guarantees require a jury determination beyond a reasonable doubt of the prior conviction used to elevate his sentence to life without the possibility of parole.

c. Mr. McClure's sentence must be vacated. The jury did not find beyond a reasonable doubt that Mr. McClure had a prior conviction that required he be sentenced to life without the possibility of parole. Mr. McClure's sentence must be vacated and remanded for the imposition of a life sentence with a minimum term within the standard range. See Chevenell, 99 Wn.2d at 319.

6. **The classification of the persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.**

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue. The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. U.S. Const. amend. XIV; Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541; Cf. In re the Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict scrutiny to civil-commitment statute in face of

due process challenge, because civil commitment constitutes "a massive curtailment of liberty").

b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause. Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. Manussier, 129 Wn.2d at 672-73. Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens through which the Court evaluates the issue. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

Our legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first-time offenders. For example, defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146,

52 P.3d 26 (2002). And defendants who have previously been convicted of "most serious" (strike) offense are subject to a significant increase in punishment (life without parole) for a second violation. RCW 9.94A.030(37)(b); RCW 9.94A.570. However, courts treat prior offenses that cause the significant increase in punishment differently simply by labeling some "elements" and others "sentencing factors."

Where prior convictions which increase the maximum sentence available are classified as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

But where, as here, prior convictions which increase the maximum sentence available are classified as "sentencing factors," they need only be proved to the judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143 (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike). Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers "elements," the legislature has never labeled the fact at issue here a "sentencing factor." Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A"); State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996) (purpose of POAA is to "reduce the number of serious, repeat offenders by tougher sentencing").

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the persistent offender context but not in other contexts, because the punishment for the persistent offender is the maximum possible short of death. Thus, it might

be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes – even if the prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the second degree, like Mr. McClure, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030 (37)(b); RCW 9.94A.570; Smith, 150 Wn.2d at 143. This is so despite the fact that the defendant is the same person, the alleged prior conviction is the same, and the alleged prior conviction is being used for precisely the same purpose in either instance: to punish the person more harshly based on his recidivism.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in Skinner, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in Skinner mandated extreme punishment upon a third conviction for an offense of a particular type. Id. at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under Oklahoma's act the extreme punishment was sterilization. Id. The Court applied strict scrutiny to the law, finding that sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. Id. at 541-42. Acknowledging that a legislature's classification of crimes is normally due a certain level of deference, the Court declined to defer in this case because:

> We are dealing here with legislation which involves one of the basic civil rights of man. ... There is no redemption for the individual whom the law touches. ... He is forever deprived of a basic liberty.

Id. at 540-41. The same is true here. Being free from physical detention by one's own government is one of the basic civil rights of man. Hamdi, 542 U.S. at 529. The legislation at issue here forever deprived Mr.

McClure of this basic liberty; it subjected him to life in prison without the possibility of parole. It did so based on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

c. Mr. McClure's sentence should be vacated. As the Supreme Court explained in Apprendi, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." Skinner, 316 U.S. at 542. This Court should hold that the trial judge's imposition of a sentence of life without the possibility of parole, based on the court's finding of the necessary facts by a preponderance of the evidence, violated the equal protection clause. The case should be remanded for resentencing within the standard range.

7. **The order prohibiting Mr. McClure from having contact with any minors violates his constitutional right to a relationship with his minor son.**

The trial court broadly ordered Mr. McClure to have no contact with minors. CP 92; 11RP 1088. The order includes Mr. McClure's son Aaron Michael McClure, born on September 20, 2008, who was four years old at the time of sentencing. 8RP 831. Mr. McClure's case must be remanded for the sentencing court to amend the no contact order because it unconstitutionally limits his contact with his son.

a. The sentencing court may order crime-related prohibitions. The sentencing court may "impose and enforce crime-related prohibitions and affirmative conditions" as provided in the SRA, including no-contact orders. RCW 9.94A.505(8); State v. Armendariz, 160 Wn.2d 106, 114, 156 P.3d 201 (2007). A "crime-related prohibition" is a court order that prohibits conduct directly related to the crime.[4] RCW 9.94A.030(12). The order prohibiting contact must be reasonably related to the offender's crime. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). Thus, the Riles Court struck a sentence provision prohibiting contact with all

[4] Crime-related prohibition is defined by RCW 9.94A.030(10):
"Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

minors because the order was not reasonably connected to the defendant's crime, rape of a nineteen-year-old woman. Id. "It is not reasonable, though, to order even a sex offender not to have contact with a class of individuals who share no relationship with the offender's crime." Id. at 350.

A similar statue addressing conditions of community custody, RCW 9.94B.050(5)(b), authorizes the court to prohibit a sex offender from contact with the crime victim "or a specified class of individuals." This statute, however, does not permit the court to place restrictions on the defendant's contact with his own children when those children are different in age and circumstances than the crime victim. State v. Letourneau, 100 Wn. App. 424, 443-44, 997 P.2d 436 (2000). Such a restriction is neither crime-related nor necessary to protect the defendant's children. Id.

> [T]his does not mean that either the court or the Department has the authority to place restrictions upon an offender's contact with his or her own biological children who are not of similar age or circumstances as a previous victim, where the restriction is neither a crime-related prohibition within the meaning of that statutory term nor otherwise necessary to protect the offender's biological children from the harm of sexual molestation. . . . There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own children to justify such State intervention.

Id. at 443-44.[5]

b. The no contact order violates Mr. McClure's fundamental parenting rights. A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment of his child. Troxel v. Granville, 530 U.S. 57, 64-67, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001); Letourneau, 100 Wn. App. at 438. A parent's liberty interest in his child is "perhaps the oldest of the fundamental liberty interests" recognized by the courts. Troxel, 530 U.S. at 65. The Washington Supreme Court has referred to the bond between a parent and child as "more precious than . . . life itself." In re Myricks, 85 Wn.2d 252, 254, 533 P.2d 841 (1975).

Mr. McClure was sentenced to life in prison, and his constitutional rights will necessarily be limited. But "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Because order prohibiting any contact with minors restricts Mr. McClure's fundamental constitutional right to a relationship with his son, it warrants the most careful review. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009).

[5] Addressing former RCW 9.94A.120(9)(b)(vi), recodified as former RCW 9.94A.700(5)(b), later recodified as RCW 9.94A.050(b). .

Not only does Mr. McClure have a liberty interest in his relationship with his son, Aaron Michael also has a liberty interest in knowing and receiving support from his father. See In re Dependency of MSR, 174 Wn.2d 1, 20, 271 P.3d 234 (2012). Forums like family and juvenile court exist to address Mr. Williams' visitation and contact with his children in a manner that both evaluates Aaron Michael's best interests and protects Mr. McClure's constitutional right to due process. Ancira, 107 Wn. App. at 655; Letourneau, 100 Wn. App. at 442-43.

No contact orders must be reasonably related to the crime for which the offender is sentenced. Warren, 165 Wn.2d at 32 (citing State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). Both the present offenses and Mr. McClure's past crime were against girls. CP 282. There was no evidence Mr. McClure ever offended against any of his own children or that Aaron Michael was in any danger from him. Yet the broadly-worded conditions of community placement prohibits Mr. McClure from having any contact with Aaron Michael until he is 18 years old. To the extent the no contact order forbids any contact with Aaron Michael, it improperly impinges upon Mr. McClure's constitutional rights.

c. The case must be remanded to amend the no contact order to exclude Mr. McClure's son. Where a term included in a sentencing order is found improper, "[t]he simple remedy is to delete the questionable

provision from the order." Riles, 135 Wn.2d at 350. There is no evidence Mr. McClure's minor son is at risk of any harm by contact with his imprisoned father. The no contact order must be amended to exclude Aaron Michael McClure from its coverage. Ancira, 107 Wn. App. at 657; Letourneau, 100 Wn. App. at 444.

D. CONCLUSION

Mr. McClure's convictions must be reversed and remanded for a new trial because (1) the expert witness's testimony invited the jury to convict him based upon his relationship with the complaining witness and (2) the prosecutor committed flagrant and ill-intentioned misconduct in closing argument. The conviction for possession of depictions of minors must be reversed and dismissed because the State did not prove knowing possession beyond a reasonable doubt.

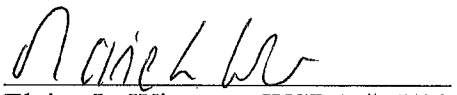
Mr. McClure's sentence of life without the possibility of parole must be vacated because it violates (1) the federal constitutional guarantees of due process and a jury trial, (2) the Washington constitutional guarantees of due process and a jury trial, and (3) the federal constitutional right to equal protection.

In the alternative, this Court should remand for correction of the no contact order that prohibits Mr. McClure from any contact with minors

including his son, in violation of his fundamental right to parent his child.

. DATED this 6th day of June 2013.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 44061-0-II
v.	)	
	)	
LEE McCLURE,	)	
	)	
APPELLANT.	)	

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