70955-1

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NO. 70955-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN PATRICK BLACKMON,

Appellant.

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

The Honorable Michael Downes, Judge

REPLY BRIEF OF APPELLANT

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STATUTES, RULES, AND OTHER AUTHORITY:

A. ARGUMENT IN REPLY

1. MR. BLACKMON'S OPENING BRIEF SETS OUT THE FACTS RELEVANT TO THE ISSUES ON APPEAL.

Counsel for Mr. Blackmon set out, in the Opening Brief of Appellant, the "fair statement of the facts and procedure relevant to the issues presented for review," with reference to the record "for each factual statement," required by RAP 10.3(5). AOB 5-22. Such a full statement of facts is essential to evaluating the prejudice of the errors identified on appeal. The case was close and the jury's assessment of the credibility of the witnesses critical; two prior juries were unable to reach a decision after trial, and the jury that convicted Mr. Blackmon deliberated over five days before doing so.[1] RP(verdicts) 1, 7; CP 142-146, 173, 288.

Respondent's "Facts of the Crimes" at Brief of Respondent (BOR) 2-4, sets out facts only from I.B.'s testimony, with general references to the record at the end of each of the three long paragraphs presented. This portion of Respondent's brief should be read in light of the fuller

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[1] Moreover, during the course of deliberations, the jury indicated at one point that it might also be deadlocked:

> If the jury reaches agreement on some counts but not other counts, what is the process? What information do we have to provide on the unresolved counts? What would happen next?[1]

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presentation of facts set out in Appellant's Opening Brief.

2. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE MR. BLACKMON'S TESTIMONY FROM A PRIOR TRIAL WHILE LIMITING THE DEFENSE'S RIGHT TO PRESENT OTHER PORTIONS OF THE TESTIMONY.

Mr. Blackmon is challenging, in this appeal, the trial court's exclusion of portions of his testimony from an earlier trial. Mr. Blackmon is challenging the exclusions under the rule of completeness of ER 106 and the general rule of State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), that a party cannot prevent the other side from presenting rebuttal evidence on a matter it introduces at trial. Moreover, the issue has a constitutional dimension: because it is Mr. Blackmon's prior testimony at issue, the exclusion of portions of it helpful to the defense implicates his state and federal constitutional rights to testify or not to testify at trial and to present evidence on his own behalf. As trial counsel argued, when a defendant waives the right to remain silent and testifies at trial, he does so with the understanding that he will be able to testify fully. By allowing some but not all of the former testimony, the court puts the defendant in a different position; he must either be satisfied with the presentation of less than all of his testimony or waive his right not to testify in order to clarify what the state has chosen to present. RP 805.

In its brief, Respondent misconstrues the record and the trial

court's ruling on the issue. Respondent states that the defense objected to reading the entire transcript of the former trial. BOR at 8. In fact, defense counsel noted "a couple of little things that I would want out," including a subject which had been excluded for the current trial and some hearsay commentary from the attorneys, but "with those few exceptions which I can delineate for the Court, I wouldn't have objection." RP 500.

Respondent also asserts that "the trial court considered defendant's right to either testify or not testify," citing pages 805-808, 811-818. At those pages, defense counsel noted that a defendant waives his privilege against self-incrimination and testifies with the understanding that the jury will consider all of his testimony and subsequently presenting just a portion of his testimony forces him to either testify again or accept that the jury will not hear all of his testimony:

> When a defendant in a criminal case takes the stand . . . he makes it with the understanding that the jury is going to be entitled to consider all of this testimony. . . . In this case, he's forced, assuming what the court ends up doing is letting the state pick and choose which portions of the statements they now want the jury to consider, he's forced to now be put in a different position . . . a position that forces him to either be stuck with that picking and choosing or forego his privilege and testify in order to clarify these points . . . . .

RP 805. What is omitted is that the court decided that introducing only part of the prior testimony did not implicate Mr. Blackmon's right to testify or not testify:

So it does appear to me that to the degree the State argues that this isn't really any different than any other statement made by a defendant, that argument is pretty well-taken.

Certainly, criminal defendant report in the situation frequently of having allegedly made statement or made statements either to the police or to other people that come in.

And then they have to decide, Well, now what do I do? Do I testify to try to rebut that or block that, or do I stand on my right not to testify? And that's much the same circumstance that we have here.

RP 817.

Under the authority of United States v. Walker, 652 F.2d 708. 713 (7th Cir. 1981); United States v. Glover, 101 F.3d 1183 (7th Cir. 1996, reversed on other grounds, 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001), and United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986), the defendant's right to testify or not at trial is implicated in the admission of his or her prior testimony and should be a part of the consideration of what in "fairness" should be presented to the jury:

> Glover is correct that, in assessing whether "fairness" under Rule 106 requires the admission of additional evidence offered by a criminal defendant, a district judge should be sensitive to the defendant's right to present evidence on his own behalf, as well as his right not to testify. See id. [Walker, 652 F.2d at 713-614]. (noting that defendant was powerless to remedy distorted picture of his prior testimony without relinquishing his right not to take the stand); see also United States v. Sutton, 801 F.2d 1346, 1369-70 (D.C.Cir 1086) (because defendant had constitutional right not to testify, excluded portions of recorded conversation were necessary

to rebut government's case, and should have been admitted).

Glover, 101 F.3d at 1192. In Glover, the court held that the appellant failed to make his case in light of these requirements of the law; and, in Sutton, the court held that the error in not admitting further evidence was harmless. In Walker, the court reversed. But the rule of law from these cases is that the error in excluding evidence of former testimony can be constitutional error and that the trial court should consider the defendant's right to testify or not testify in determining what in fairness should be admitted. The trial court did not do this in Mr. Blackmon's case.

The Washington and other authority cited by Respondent does not hold to the contrary; these cited cases involved the introduction of statements to the police rather than prior trial testimony and involved statements implicating other people. State v. Larry, 108 Wn. App. 894, 908-910, 34 P.3d 241 (2001), for example, is a case involving the admission of a non-testifying codefendant's statement at trial, and the Court of Appeals affirmed that that codefendant did not have the right to introduce an excluded portion of his statement saying that the other defendant had previously robbed the same Burger King restaurant. In State v. Simms, 151 Wn. App. 677, 214 P.3d 919 (2009), aff'd, 171 Wn.2d 244, 250 P.3d 107 (2011), the issue was whether the defendant was entitled to introduce evidence of a prior statement to the police at the hospital that

someone had robbed him and hit him with a hammer after the officer testified at trial that Simms gave him another name and said he did not have identification because he was from the sovereign state of Alaska. In United States v. Velasco, 953 F.2d 1467 (7th Cir. 1992), the court held that the defendant's prior statement that he knew that the box he placed in the trunk of the car contained cocaine did not entitle him to introduce evidence that he implicated three other people and a co-defendant.

Larry and Velasco were cases where the statements were redacted to preserve the rights of confrontation of a codefendant pursuant to Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1020, 20 L. Ed. 2d 476 (1968). In Larry, the court noted that the redacted statement included several exculpatory and remorseful statements and did not exclude any "substantially exculpatory" information. Larry, 108 Wn. App. at 910.

In fact, in Washington under ER 106, absent undue prejudice under an ER 403 analysis, "fairness" ordinarily requires that the adverse party be permitted to introduce the entire remainder of the writing. Walker v. Bangs, 92 Wn.2d 854, 601 P.2d 1279 (1997).

Here, the trial court overlooked the fact that it is improper to force a defendant to choose between constitutional rights – the right not to testify and the privilege against self-incrimination or the right to appear and defend and present evidence in his own behalf. State v. Michielli, 132

Wn.2d 229, 937 P.3d 587 (1997) (improper to force a defendant to choose between his right to a speedy trial and effective assistance of counsel). The trial court erred in excluding portions of Mr. Blackmon's prior trial testimony, including portions in which he denied committing the crimes. This error should require reversal of his convictions.

3. COMMENTS BY STATE'S WITNESSES ON MR. BLACKMON'S GUILT DENIED HIM CONSTITUTIONAL TRIAL RIGHTS.

Two police officer witnesses gave opinions implying that Mr. Blackmon was guilty of crimes against I.B. Officer Allen went beyond describing I.B.'s demeanor and offered his opinion that she was "a very scared teenage girl" and that the way she was seated was something police "associate" with "a defensive posture." RP 736-737. Given that Officer Allen had responded to a call on behalf of I.B., this later testimony in particular implied a specialized knowledge leading to a determination that she had been attacked by Mr. Blackmon and was in a defensive posture. Detective Shackleton repeated that Marysville Police Officer Mark Froland told her his daughter's friend "had been molested by her father," a direct and specific comment on guilt. RP 839.

Respondent does not dispute that manifest constitutional error can be raised for the first time on appeal or that improper opinions as to guilt invade the province of the jury and violate the defendant's right to a fair

trial. BOR 18-19. Respondent argues instead that the statements were not opinions as to guilt, were admissible to show why the officers did what they did and were harmless error. BOR 18-20.

The statement that I.B. was a "very scared teenage girl," and certainly that she was in a position the police associate with a "defensive posture" went beyond a simple description of demeanor and were unnecessary for any purpose at trial, except to imply that Mr. Blackmon was guilty. A repetition of hearsay of an Edmonds officer and his daughter that her friend I.B. had been molested by her father, was not admissible for any legitimate purpose at trial. All this testimony was improper testimony as to guilt and its admission constituted non-harmless constitutional error. Neither State v. Iverson, 126 Wn. App. 329, 108 P.3d 799 (2005), nor State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), the cases cited by Respondent, BOR at 20, hold otherwise.

In Iverson, the issue was whether the state properly introduced evidence that the woman who answered the door gave her name and the name given was the name on a protection order at issue at trial. The court held that this evidence was relevant to explain why the officer continued his investigation at the house. Iverson, 126 Wn. App. at 337. In Lillard, the defendant complained of testimony that card holders were called and asked if they had used credit cards at issue. The court held that this

evidence was relevant to show how the officer conducted the investigation. Lillard, 122 Wn. App. at 437. These cases conflict to some degree with the decision in State v. Aaron, 57 Wn. App. 277, 280-281, 787 P.2d 949 (1990), where the court held that evidence is not admissible for a non-hearsay purpose unless that non-hearsay purpose was at issue at trial; and that, in cases involving what officers did in the course of an investigation, it is usually sufficient to say they acted on "information received." But, most importantly here, the giving of a name in Iverson or the card holders report that they had not used their cards were not opinions as to guilt. They were hearsay statements which, if used as substantive evidence, helped establish guilt. In contrast, the statements here were opinions as to guilt, and inadmissible for any legitimate purpose. The improper opinions as to guilt by the two officers denied Mr. Blackmon a fair trial; and, at the least, contributed substantially to the cumulative error in the case.

4. THE TRIAL COURT ERRED IN DENYING MR. BLACKMON'S MOTION FOR MISTRIAL AFTER I.B. VIOLATED A MOTION IN LIMINE.

Respondent agrees that the trial court granted a motion in limine excluding reference to the prior trials in Mr. Blackmon's case, BOR at 22-23. Respondent agrees that although there were references to prior hearings and statements, until I.B. testified that she had been in a trial, or "a hearing

like this" for two weeks, no one had testified that there had been a prior trial or trials. BOR 23. Respondent asserts only that this violation "was not so serious as to deprive the defendant of a fair trial." BOR at 26.

This overlooks the opinion of the United States Supreme Court in Stewart v. United States, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961), that, on learning that there have been prior trials, the jury might speculate that a defendant is testifying in a second or third trial because he had been convicted after not testifying in the earlier trials; and, in this way, would be asking the jury to draw a negative inference from the defendant's failure to testify. Here, the jury might well have speculated – particularly since Mr. Blackmon's former testimony was introduced but he did not testify further at the current trial – that he exercised his right not to testify at the current trial because he had been convicted after testifying at former trials. This improperly allowed the jury to draw adverse inferences from the exercise of the right to remain silent at trial. State v. Rupe, 101 Wn.2d 669, 705, 683 P.2d 571 (1984) (state may not ask the jury to draw a negative inference from the mere exercise of a constitutional right); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (improper to ask the jury to infer guilt from the exercise of the right to remain silent).

Particularly when considered in light of the prosecutor's reference to "trial" testimony shortly after I.B.'s reference to being in trial, the jury

almost surely understood that the case was on retrial and speculated about the significance of that. Since the jury did not know the results of the earlier trial, they may have speculated that there had been a prior conviction which had been reversed on appeal. Given the closeness of the case as evidenced by the two hung juries, the jury notes and the five days of deliberation before the conviction, the error should now require reversal of Mr. Blackmon's conviction. State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987) (mistrial should have been granted given the seriousness of the irregularity, the weakness of the state's case and the fact that a curative instruction would not have cured the error).

5. THE PROSECUTOR'S MISCONDUCT DENIED MR. BLACKMON A FAIR TRIAL.

In this appeal, counsel for Mr. Blackmon have identified three types of misconduct by the prosecutor: (1) eliciting from M.F. that her difficulty in testifying was because she had to do so in front Mr. Blackmon, RP 16; (2) referring to a document as a "trial transcript" very shortly after defense counsel had moved for a mistrial because of the testimony that there had been a prior trial, RP 587; and (3) improperly telling the jurors in rebuttal closing argument that their choice was to find the state's witnesses were lying or the defendant guilty. RP 1021-1022.

Respondent agrees that constitutional error can be raised for the first time on appeal where "there is substantial likelihood [that] the instances of misconduct affected the jury's verdict." BOR 26-28 (citing State v. Thorgerson, 172 Wn.2d 438, 442-443, 258 P.3d 43 (2011)). And agrees that the error can be raised on appeal where "the remark is so flagrant and ill-intentioned" that it could not have been obviated by an admonition by the judge. BOR at 28 (citing Thorgenson, at 443). Those tests are met in this case.

a. Comment on right to confrontation

Respondent argues that asking the jurors to draw a negative inference from Mr. Blackmon's exercise of his right to confront witnesses is not a manifest constitutional error or flagrant and ill-intentioned because M.F. "was present, testified under oath, was subject to cross examination by defendant, and the jury had opportunity to observe" her demeanor. BOR 29-30. Respondent also quotes defense counsel's attempt to mitigate the prejudice by eliciting from M.F., on cross-examination, that she knew Mr. Blackmon was required to be present in the courtroom. BOR 30.

What Respondent fails to acknowledge is the substantial authority holding that it is misconduct to ask the jury to draw an adverse inference from the exercise of a constitutional right in general and the right to

confrontation in particular. Mitchell v. United States, 526 U.S. 314, 330, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (the prosecution must carry its burden of proof while respecting the rights of the accused); Griffin v. California, 380 U.S. 609, 611, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (improper argument that guilt could be inferred from not taking the stand and testifying); State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006); State v. Rupe, 101 Wn.2d 669, 705, 683 P.2d 571 (1984) (the legal ownership of guns). Specifically, the state may not ask the jury to draw adverse inferences merely because a defendant exercised his right under Article 1, second 22, to confront witnesses face-to-face. State v. Wallin, 166 Wn. App. 364, 373, 209 P.3d 1072 (2012) (while the state may question about the opportunity to tailor testimony if there is evidence of tailoring, the state may not ask about this merely because the defendant has the right to be in the courtroom).

As noted by the court in State v. Charlton, 90 Wn.2d 657, 661-662, 585 P.2d 142 (1978), a prosecutor is "unquestionably aware" of fundamental rights of defendant and aware of case law finding it misconduct to call the jury's attention to the exercise of those rights in a manner which suggests that the defendant is suppressing testimony by exercising rights. The court held such misconduct was flagrant and ill-intentioned. Id. Here, that was the precise inference – that M.F. was

having difficulty testifying fully because Mr. Blackmon was exercising his right to confront her. This was misconduct that was not cured by the fact that M.F. was present and subject to cross examination. Although defense counsel attempted to remove some of the prejudice, the fact remains that the jurors were not going to be able to set aside M.F.'s testimony that she was upset by having to confront Mr. Blackman. The jurors were asked essentially to hold it against Mr. Blackmon that he was upsetting this young witness because she had to testify in his presence. This was constitutional error and penalized Mr. Blackmon for exercising his right to confront the witnesses against him.

b. Reference to prior trial

Respondent argues that the prosecutor's reference to a trial transcript was "neither improper nor prejudicial." BOR 31. This should not be well-taken.

Given the fact that the case had been tried twice before, the parties were in the difficult situation of needing to make use of prior testimony in a way that did not alert the jurors to the fact that two prior juries had considered the evidence. The defense asked that the prior testimony be referred to as from a prior hearing rather than a trial and the court granted the motion. RP 591-582, 595.The prosecutor was aware of this, and his reference exacerbated I.B.'s prior reference to having been in a prior trial

and unfairly prejudiced Mr. Blackmon's right to a fair trial. Id.

c. Improper rebuttal argument

In closing rebuttal argument the prosecutor told the jurors they had two options: essentially find that I.B. and other state's witnesses were lying or the things Mr. Blackmon was accused of really happened:

> It should be abundantly clear to you at this point . . . that through the presentation of evidence in this case, you have been presented with two different options. Two very different options.
>
> Either this was an elaborate, brilliantly constructed and perfectly executed fabrication designed by I.B. to get rid of her dad, and along the way enlisting the help of her mother and siblings and best friend and police officers, or it really happened.

RP 1021-1022 (emphasis added). Respondent argues that this is not an argument that either the witnesses are lying or Mr. Blackmon was guilty, because the trial prosecutor did not expressly refer to finding Mr. Blackmon guilty. BOR at 332-33. This is not a credible characterization of the prosecutor's argument; the clear import of the argument was that either I.B. and other witnesses were lying when they testified against Mr. Blackmon or what they described really happened and Mr. Blackmon was guilty as charged.

Nor was this argument an attack on Mr. Blackmon's theory that I.B. had decided to tell a lie about her father for various reasons. BOR at 34. Saying it was not a lie did not require saying that there were two

options, it was either an elaborate lie or the truth. As a matter of long-established law, this is misconduct and reversible error even if not objected to at trial.

It is well-established that a prosecutor commits misconduct by arguing to the jury that either the state's witnesses were lying or the defendant was guilty. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); State v. Riley, 69 Wn. App. 349, 353 n.5, 848 P.2d 1288 (1993); State v. Fleming, 83 Wn. App. 209, 213-215, 921 P.2d 1076 (1996).

Most importantly, in Fleming, the court reversed the defendant's conviction due to the prosecutor's misconduct for this reason, that the argument misstates the law, the jury's role at trial and the burden of proof. The court noted that contrary to the prosecutor's argument, the jury had to acquit unless it had an abiding belief in the testimony of prosecution witnesses:

> The prosecutor's argument misstated the law and misrepresented both the role of the jury and burden of proof. The jury would not have to find D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened . . . it was required to acquit.

Fleming, 83 Wn. App. at 214. Further, the Fleming court reversed even

though there was no objection at trial because the misconduct continued even after the issue had been decided: "We note that this improper argument was made over two years after the opinion in Casteneda-Perez, supra. We therefore deem it to be flagrant and ill-intentioned." Id.

Mr. Blackmon's convictions should be reversed because of the misconduct by the prosecutor in this case.

6. CUMULATIVE TRIAL ERROR DENIED MR. BLACKMON A FAIR TRIAL.

The errors in this case, both individually and cumulatively, denied Mr. Blackmon a fair trial. See AOB at 38-39.

7. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE WHERE NO NOTICE WAS PROVIDED PRIOR TO TRIAL THAT THE STATE WAS SEEKING AN EXCEPTIONAL SENTENCE.

The United States Supreme Court, in Alleyne v. United States, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013), held that "any fact that increases the mandatory minimum [for a crime] is an 'element' that must be submitted to the jury." Justice Thomas, writing for the majority explained "that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." Alleyene, 133 S. Ct. at 2161. The Court was careful to distinguish the creation of a new crime

from judicial discretion "in selecting a punishment 'within limits fixed by law'." Alleyene, 133 S. Ct. at 2161 n.2. A new crime is created where a fact "both alters the legally prescribed range and does so in a way that aggravates the penalty." Id.

> Nothing in this history suggests that it is impermissible for judges to exercise discretion –taking into consideration various factors relating to the offense and the offender – in imposing a judgment within the range prescribed by statute.
>
> Id. at 2163 (emphasis in original).

The Alleyene court held: "The essential point is that the aggravating factor produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.*, at 2162-2163. The Court explained that "[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." Id.

Here, Mr. Blackmon clearly received exceptional sentences which increased the mandatory minimums for each of his convictions based on the aggravating factor that "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94.535(2)(c). This factor

increased the mandatory minimum to above the top of the standard range and aggravated the penalties for conviction. This factor converted each of Mr. Blackmon's charged crimes from child molestation in the second and third degree and rape of a child in the third degree to the new crimes of aggravated child molestation in the second and third degree and aggravated rape of a child in the third degree. Each had as an essential element of multiple current offenses resulting in an offender score which results in some of the current offenses going unpunished. This element was not charged and that is fatal to a finding of guilt of the aggravated crimes.

Washington requires "all essential elements of a crime ... must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The essential elements rule is grounded in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation."); Wash. Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him."); State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712, 714 (2013). Essential elements include

statutory and nonstatutory elements. Kjorsvik, 117 Wn.2d at 101-102.

Even when a defendant does not challenge the sufficiency of a charging document until appeal, the necessary elements must appear in some form, or by fair construction, on the face of the document. Kjorsvik, 117 Wn.2d at 105-106. If the defendant satisfies this first prong of the test, "we presume prejudice and reverse without reaching the question of prejudice." State v. McCarthy, 140 Wn.2d 420, 425, 998 P.2d 296 (2000) (citing Kjorsvik, at 105-106). Under this test, prejudice must be presumed in Mr. Blackmon's case.

Further, Mr. Blackmon asserts that State v. Edvalds, 157 Wn. App. 517, 237 P.3d 368 (2010), was wrongly decided. RCW 9.94A.537(1) provides that "At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard range. The notice shall state aggravating factors upon which the requested sentence will be based." This statute is unambiguous and does not provide for any exceptions. It is for the legislature not the court to create an exception. See, e.g., State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), and State v. Frampton, 95 Wn.2d 469, 637 P.2d 922 (1981) (holding that it is for the legislature and not the courts to provide an exception for convening juries after a guilty plea in a capital case).

As the Alleyene Court explained, notice serves the important goal of enabling "the defendant to predict the legally applicable penalty from the face of the indictment." Alleyene, at 2162-2163. The trial court erred in imposing an exceptional sentence for which Mr. Blackmon had no notice and which the prosecutor did not seek.

B. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and remanded for retrial. At the least, his illegal sentence should be reversed and remanded for a sentence within the standard range.

DATED this 2nd day of July, 2014.

Respectfully submitted,

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