Supreme Court No. 101602-6
(COA No. 82920-3-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CORNELIUS RED RITCHIE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Cornelius Ritchie, petitioner, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

The State's case against Mr. Ritchie rested entirely on contradicted, internally inconsistent witness testimony. Mr. Ritchie was prohibited from questioning these witnesses about circumstances that tended to show their bias and mendacity, with no compelling reason for its exclusion.

In this published decision, the Court of Appeals sidelined *Hudlow's*[1] two-part balancing test by limiting

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[1] *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *State v. Jennings*, 199 Wn.2d 53, 65, 502 P.3d 1255 (2022) (The *Hudlow* balancing test requires consideration of the State's interest in excluding evidence, balanced against the defendant's need for it).

it to cases of "unique, aberrant, new, or not generally applicable rules of evidence or procedure." Op. at 12. Believing concerns about a fair trial are "not as paramount when the rule being applied is a well-established, commonly utilized rule," the Court of Appeals limited review of the trial court's exclusion of evidence in Mr. Ritchie's cross-examination of the State's witnesses under an evidentiary abuse of discretion standard. Op. at 19, 21.

The Court of Appeals also found the prosecutor's reference to prejudicial, excluded ER 404(b) evidence in closing was not error, and condoned other acts of misconduct. And because Mr. Ritchie went to trial rather than accept the State's plea offer to a class C non-strike offense, Mr. Ritchie will die in prison—a

result the Court of Appeals found was not unconstitutionally cruel under a *Fain*[2] analysis.

C. ISSUES PRESENTED FOR REVIEW

1. This Court should accept review because the Court of Appeals' decision diminishes the established method for assessing whether excluded evidence violates a person's right to present a defense by limiting its application to "unique aberrant, new, or not generally applicable rules of evidence." This decision conflicts with this Court's jurisprudence, from *Hudlow* through *Jennings,* which uses this method to protect a person's constitutional right to present a defense, regardless of the evidentiary rule. RAP 13.4(b)(1),(3).

2. The Court of Appeals refused to find the prosecutor's misstatement of the evidence,

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[2] *State v. Fain,* 94 Wn.2d 387, 617 P.2d 720 (1980).

disparagement of counsel, and inflammatory argument were misconduct. This Court should accept review because this misconduct deprived Mr. Ritchie of a fair trial. RAP 13.4(b)(1),(3).

3. Mr. Ritchie was sentenced to die in prison under the Persistent Offender Accountability Act (POAA) for a second-degree assault conviction that did not result in physical harm. The Sentencing Reform Act (SRA) ranks second-degree assault with the same degree of seriousness as second-degree robbery, which is no longer a strike offense. Few other jurisdictions in the country include this offense in their harshest recidivist statutes. Mr. Ritchie otherwise faced a sentence of 63-84 months for this offense – a sentence which the prosecutor believed was appropriate, but only if Mr. Ritchie gave up his trial right. This Court should accept review because Mr. Ritchie's mandatory

death-in-prison sentence for assault in the second degree is disproportionate and constitutes cruel punishment under Article I, section 14. RAP 13.4(b)(3).

4. Mr. Ritchie's Sixth and Fourteenth Amendment rights were violated when the judge, not the jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

The State charged Mr. Ritchie with three counts of second-degree assault with a deadly weapon, harassment, and fourth-degree assault based on allegations made by Deborah Garibay, Amanda Duran, and Cody Chapin. CP 242-43; RP 690-91. The jury

deadlocked in the State's first effort to prove its case, but convicted Mr. Ritchie in a second trial. CP 205-06.

1. Mr. Ritchie's GPS bracelet tracks and reports his speed and location for each minute of the day.

In December 2019, Mr. Ritchie was on community custody and wore a GPS monitoring device. RP889. His GPS bracelet collected and recorded data about his speed and location for every minute of the day. RP1135-36, 1165. It established that on December 18, 2019, he was in the vicinity of the Lochsloy Store between 2:10 and 2:22 p.m. RP1163.

Mr. Ritchie left the parking lot of the Lochsloy Store at 2:22 p.m. and traveled northeast on Highway 92 for three minutes, and then returned to the Lochsloy Store at 2:25 p.m. The GPS data showed he never exceeded the 55 m.p.h. speed limit at any time. RP921-22, 1382.

The GPS data showed Mr. Ritchie left the Lochsloy Store at 2:27 p.m. and did not return anytime that afternoon. RP922-93.

2. The State's witnesses make allegations against Mr. Ritchie that conflict with the GPS data establishing his location and movement.

Garibay claimed she owned the trailer behind the Lochsloy store and stayed there "every now and then." RP1259-60. Garibay sometimes said she and Mr. Ritchie were in a relationship and lived together; other times she said they never dated. RP820, 1423.

Garibay claimed that on December 18, 2019 at around 4:00 p.m., she was talking on her cell phone in the trailer when Mr. Ritchie barged inside, grabbed her phone, and smashed it against the outside of the trailer. RP1222-23; 1291-92.

Garibay claimed she was hit from behind with a baseball bat and repeatedly hit and kicked while

chased to the middle of the parking lot where two strangers helped her get into their car. RP1225-30.

The people who claimed to help Garibay that day were Amanda Duran and Cody Chapin. RP1230. Chapin and Duran were living in their car. RP1006. They said they arrived at the Lochsloy parking lot sometime "toward the evening," between 4:00- 5:00 p.m. RP1048-51; 1400. Though Duran later claimed she meant sometime between 3:30 and 4:30 p.m., she was adamant there was no chance they were at the store between 2:00 or 2:30 in the afternoon. RP1050-53.

As Chapin, Duran, and Garibay sped out of the parking lot, they claimed the man followed them in a small black truck Garibay claimed belonged to her, and engaged in a high speed chase of over 60-90 m.p.h. RP1025-26, 1057-58; 1232-34; 1280 1340.

Chapin claimed the black truck slammed the rear of their car, pushed them into oncoming traffic, and almost caused them to crash into a semi-truck that they forced off the road. RP1382. Chapin claimed a State Trooper was right behind the semi-truck, but did not notice them. RP1383-84.

Chapin drove to his friend's house who lived nearby. RP1343. Someone from the house took Garibay to the nearby fire station where she arrived at 4:54 p.m., and was then taken to the hospital. RP874; RP1239.

Duran and Chapin showed up shortly after, and were "amped up" as they told an officer their story. RP867. Duran and Chapin claimed not to know the name of "the lady" they rescued. RP724. However, they were able to provide the deputy with Mr. Ritchie's name. RP882.

Duran and Chapin could not provide any identifying information about their own vehicle, including their own license plate number. RP882. But Duran was able to provide the officer a near complete license plate number for the black truck. RP882.

Garibay said the car was "wrecked" from being rammed by the pick-up. RP1290. But Duran and Chapin said there was no damage to their car, "other than maybe scratches." RP1395-96, 885. Chapin did not make the car available for police to take pictures or to otherwise document the car's condition. RP882.

The State did not collect evidence of the phone Garibay claimed Mr. Ritchie smashed against the trailer. RP710. The deputies recovered no bat or other weapon. RP710. There was no surveillance footage of an incident. RP686, 712. The store employee working that day saw nothing. RP686. No effort was made to

find the State Troopers or other drivers affected by the high speed chase. RP880.

3. The witnesses' claims about Garibay's purported injuries are contradicted by the hospital records.

At trial Garibay claimed Mr. Ritchie broke her teeth. RP 1272. Garibay testified that she required assistance to walk and even to get out of bed to the go to the bathroom at the hospital. RP 1296. Garibay claimed she could not see. RP1242. She denied being prescribed any pain medication, claiming, "I don't take pain pills. I don't do those at all." RP1297.

The hospital records tell a different story. Testing revealed no issue with Garibay's vision, and no sign of internal or external injury. RP830. The nurse observed no broken teeth or any other injury. RP 844-45. The nurse observed Garibay walking to and from the bathroom without assistance. RP837. Garibay was

given pain medication and released that night. RP 776, 832-33, 1299.

4. The witnesses provide conflicting information about their relationship to each other, which Mr. Ritchie is prohibited from thoroughly examining.

Garibay, Duran and Chapin claimed to be complete strangers on December 18, 2019. RP1007. No officer provided Garibay with Duran or Chapin's names or any identifying information about them. RP719-20. The officer who interviewed Duran and Chapin did not know Garibay's name and could not have provided it to them. RP884.

Garibay, Duran, and Chapin all provided different explanations for how they came to know each other after this incident. Garibay claimed the officer gave her Duran and Chapin's information at the hospital, and she called them when she was released. RP 1298.

Duran testified Garibay contacted Duran and Chapin on Facebook after being in a coma in the hospital for four days. RP1116. Chapin, on the other hand, claimed Duran called Garibay at the hospital the night of the incident. RP1406, 1411.

Though they told law enforcement they were strangers the night of the claimed incident, one of the responding officers found them together in a social setting in April 2020 when he responded to a complaint about trespassers. RP722-23. Garibay told the deputy "She hadn't been staying at the location;" but was there to tell Duran and Chapin to call the prosecutor. RP723. Garibay later denied telling the officer this. RP1299. She claimed she was there to help Duran and Chapin move. RP1230. Duran and Chapin also testified Garibay was there to help them move. RP1105, 1407.

Pre-trial, the prosecutor moved to exclude evidence of the "nature of . . . law enforcement contact," which was to evict Duran and Chapin from where they had been trespassing. 3/22/21 RP40-43. Mr. Ritchie argued the nature of this law enforcement contact was critical because Garibay provided different explanations for why she was with Duran and Chapin that day, which was relevant to the jury's assessment of her honesty. 3/22/21 RP41. Additionally, the evidence was that Chapin and Duran were not moving, but rather were being evicted, which "goes to their credibility and to the nature of their relationship." RP35-36. The court excluded evidence that Duran, Chapin and Garibay were caught trespassing and were being evicted on April 20. RP37.

The Court of Appeals found the trial court did not abuse its discretion under ER 403, and refused to apply

the method for assessing whether this exclusion of evidence violated Mr. Ritchie's right to present a defense. Op. at 12-19.

5. The prosecutor argues the jury can consider inflammatory, stricken evidence and maligns defense counsel.

The prosecutor elicited that a deputy observed Garibay had "wounds or bruises" a few days after the December 18 incident, in violation of the court's pre-trial ruling prohibiting reference to other allegations. RP951. The court struck this testimony. RP981-82; 984. However, over Mr. Ritchie's objection, the prosecutor argued in closing that Garibay's bruises showed up later. RP1498.

The prosecutor also accused Mr. Ritchie's counsel of misstating the evidence at trial, equating these purported misstatements to the repeated contradictions of Garibay, Chapin, and Duran, again

over defense objection. Op. at 23-24. The Court of Appeals found there was no misconduct. Op. at 19-25.

6. Because Mr. Ritchie exercises his trial right, his convictions result in a mandatory sentence of life without parole.

The State's second-degree assault charges constituted a third strike for Mr. Ritchie. RP301. The State's plea offer was "at least a felony with a 60-month recommendation." RP303. Mr. Ritchie rejected the offer because he maintained his innocence. RP303.

The standard range for the second-degree assault offenses based on Mr. Ritchie's offender score would have been 63-84 months. CP72. However, the court was required to sentence him to life without the possibility of parole for these convictions. 7/14/21 RP7; CP43. The Court of Appeals found this sentence did not violate article I, section 14. Op. at 30.

E. ARGUMENT

1. The Court Of Appeals' published decision sidelines this Court's jurisprudence protecting a person's right to present a defense.

A person's right to defend against the State's accusations is guaranteed by the state and federal constitutions. U.S. Const. amend. VI, XIV; Const. arts. I, § 3, 22; *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Hudlow*, 99 Wn.2d at 14. The right to present a defense encompasses the right to confront and cross-examine adverse witnesses to expose any bias. *State v. Orn*, 197 Wn.2d 343, 352, 482 P.3d 913 (2021).

In *Hudlow*, this Court found, "the integrity of the truthfinding process and defendant's right to a fair trial . . . should be the factors considered by the trial court in exercising its discretion to admit or exclude" evidence. 99 Wn.2d at 14. *Hudlow* accordingly adopted

the method of balancing the defendant's right to produce relevant evidence versus the state's interest in limiting the prejudicial effects of that evidence. *Hudlow*, 99 Wn.2d at 16.

This balancing test has been applied to a court's decision to exclude or admit evidence for a range of evidence rules, including ER 401 and ER 403. *See, e.g., State v. Jennings*, 199 Wn.2d 53, 65, 502 P.3d 1255 (2022) (though there was no error in the trial court's evidentiary ruling under ER 401 and ER 403, this Court additionally conducted *Hudlow*'s balancing test).

Likewise, in *Orn*, this Court reviewed the trial court's evidentiary ruling under ER 403 and held the defendant's constitutional right to present a defense was violated because the defendant's need to present the evidence greatly outweighed any purported state interest. 197 Wn.2d at 356–59.

Mr. Ritchie argued under *Hudlow* and *Orn* that the court's limitation of his questioning of Garibay, Duran, and Chapin about an incident in which they were found together by law enforcement deprived him of a critical means of challenging their credibility on a central aspect of his defense. Br. of App. at 30-43. This evidence was certainly at least minimally relevant, and the State could offer no compelling basis for its exclusion. *Id.*

The Court of Appeals acknowledged the "two-step analytical test" from *Hudlow,* but held it only applied only to "unique, aberrant, new, or not generally applicable rules of evidence or procedure." Op. at 12-13.

The Court of Appeals determined that because the "trial court's ruling was nothing more than a standard application of ER 403" and the trial court correctly found the excluded evidence was not "highly

probative," this was the end of the inquiry and Mr. Ritchie's constitutional right to cross-examination was not violated. Op. at 19.

The Court of Appeals' opinion is in direct conflict with this Court's longstanding jurisprudence, most recently re-affirmed in *Jennings,* that the reviewing court must balance a person's right to present relevant evidence against the State's interest in limiting the prejudicial effects of the evidence. 199 Wn.2d at 65–66. This Court should accept review. RAP 13.4(b)(1),(3).

2. The Court of Appeals condones and minimizes repeated prosecutorial misconduct.

The prosecutor violated the court's pre-trial rulings by arguing the jury should consider inflammatory evidence the court had stricken. The prosecutor also disparaged defense counsel and inflamed the jury. This prosecutorial misconduct is

impermissible and this Court should accept review. RAP 13.4(b)(1), (3).

a. *The prosecutor argued the jury could consider excluded ER 404(b) evidence.*

It is misconduct for a prosecutor to argue evidence that was excluded by the trial court's previous rulings. *State v. Fisher,* 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009).

The trial court excluded Garibay's additional allegation of an assault by Mr. Ritchie. 3/22/21 RP78. The prosecutor deliberately violated this court's pre-trial ruling by eliciting excluded evidence that on December 25, Garibay "visually . . . had some wounds or bruises." RP951. The court struck the officer's statement because it violated the court's pre-trial ruling. RP970, 981-90.

However, in closing argument, the prosecutor argued the jury should consider the stricken evidence about bruising:

> [A] person who has been beaten like that, of course your body is going to hurt, and you are going to know your body is going to hurt and are going to think that's because you're bruised. **And later you see bruises**. You're like yeah, I had bruises.

RP1498 (emphasis added).

The court overruled Mr. Ritchie's objection, and admonished counsel for objecting "time and time again." RP1498. But this was a critical misstatement in rebuttal that was an entirely impermissible reference to evidence the court had previously stricken.

The prosecutor's argument eviscerated the court's previous exclusion of this highly prejudicial testimony and was misconduct. *Fisher*, 165 Wn.2d at 748-49. This misconduct prejudiced Mr. Ritchie because this reference to stricken testimony inflamed

the jury by telling them Mr. Ritchie abused Garibay on another occasion, encouraging conviction based on an impermissible propensity theory, even if jurors doubted her claims in this trial.

b. *The prosecutor's additional misstatements of the evidence disparaged defense counsel.*

In *State v. Warren,* it was improper for the prosecutor to argue a "number of mischaracterizations" in defense counsel's argument were "an example of what people go through in a criminal justice system when they deal with defense attorneys." 165 Wn.2d 17, 29, 195 P.3d 940 (2008). It was also improper to argue defense counsel's closing was a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." *Id.*

In Mr. Ritchie's case, the State wrongly disputed there was no evidence of video cameras as argued by

Mr. Ritchie in closing, and that defense counsel's "mistake" about the evidence should be considered like any other mistake a witness could make at trial. RP1500-01. The trial court overruled Mr. Ritchie's objection. *Id.*

Having been permitted to use defense counsel as an example of mistakes, the prosecutor claimed defense counsel made an additional misstatement about the evidence, and equated this to the "types of mistakes" witnesses make "before and after they testify." RP 1501.

The use of defense counsel as an example of unreliability which the State compared to its own witnesses' many misstatements was baseless, and an improper personal attack on defense counsel. Any purported misstatement on the part of counsel is not a basis to argue for conviction.

The prejudicial effect of a prosecutor's improper comments must be considered "in the context of the total argument . . ." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Here the prosecutor primed the jury to distrust defense counsel by warning them in closing, "I expect defense to come up and **lawyer all the language"** used by witnesses, and that the witnesses "don't have to be **lawyered that way."** RP1477-78 (emphasis added). Though not objected to, this argument sowed distrust for defense counsel.

The State chose to prosecute Mr. Ritchie based entirely on unbelievable, contradictory witness testimony. The prosecutor's effort to equate the weaknesses' claims with defense counsel's purported misstatements improperly attacked counsel's credibility, which was especially problematic because Mr. Ritchie's entire defense turned on his attorney's

aggressive cross-examination of these witnesses. This was prejudicial misconduct.

c. *The prosecutor's argument that Mr. Ritchie's regular presence at the trailer was evidence of an abusive relationship was flagrant and ill-intentioned misconduct.*

The State's GPS data showed the State knew Mr. Ritchie spent nights at the Lochsloy Store, which refuted Garibay's claim it was her trailer and Mr. Ritchie had no right or reason to be there. RP 924-28.

At the end of rebuttal, the prosecutor urged the jury to consider Mr. Ritchie's purportedly unauthorized presence at the trailer as evidence he was in an abusive relationship with Garibay, arguing,

> . . . the fact that the defendant is apparently staying at [Garibay's] trailer overnight while she is in Everett **without her knowledge,** and claiming it as his own, are **you telling me this is not an abusive relationship under those circumstances?** I mean, really? Bold as brass in here telling you, 'well, it's my trailer.'

RP1503 (emphasis added).

These final words impermissibly claimed there was on-going abuse. It also made the unsubstantiated allegation that Mr. Ritchie stayed in the trailer unbeknownst to Garibay. This was ill-intentioned because even though the State tried to keep this GPS data from the jury, the State's own evidence established Mr. Ritchie openly and regularly stayed there. This misconduct deprived Mr. Ritchie of a fair trial. RAP 13.4(b)(1),(3).

3. A mandatory life sentence without the possibility of parole for the offense of assault in the second degree violates Article I, § 14.

Article I, § 14 bars infliction of cruel punishment and is interpreted more broadly than the Eighth Amendment's prohibition of punishment that is both cruel and unusual. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014).

When considering whether a punishment is unconstitutionally cruel, courts rely on "evolving standards of decency that mark the progress of a maturing society," as determined by "an assessment of contemporary values concerning the infliction of a challenged sanction." *State v. Campbell*, 103 Wn.2d 1, 31, 691 P.2d 929 (1984) (quoting *Trop v. Dulles*, 356 U.S. 89, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)).

To determine whether a punishment is grossly disproportionate, courts utilize four factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Moretti*, 193 Wn.2d 809, 819, 446 P.3d 609 (2019) (citing *Fain,* 94 Wn.2d at 397).

These factors establish Mr. Ritchie's offense of assault in the second degree is unconstitutional because it is grossly disproportionate.

a. *The range of conduct penalized by second-degree assault makes it over-inclusive.*

A person becomes a "persistent offender" after being convicted of three felonies defined as "most serious offense[s]." RCW 9.94A030(37). Second-degree assault is a "most serious offense." RCW 9.94A.030(32)(b).

In *Witherspoon,* four justices highlighted the robbery statute—formerly a "most serious offense"—includes a broad range of conduct, including a "means of brutal assault or—as in Witherspoon's case—by an 'implied threat' that the victim seems to have regarded as more confusing than frightening." 180 Wn.2d 905 (J. McCloud, concurring/dissenting).

The Legislature later echoed *Witherspoon's* concurrence/dissent's concerns and removed robbery in the second degree as most serious offense. *State v. Jenks*, 197 Wn.2d 708, 714, 487 P.3d 482 (2021). Under the SRA, second-degree assault has a seriousness level of IV, which is the same as second-degree robbery. RCW 9.94A.515. No other "most serious offense" has such a low seriousness level, with the exception of vehicular assault. RCW 9.94A.030(32); RCW 9.94A.515.

Like robbery, second-degree assault includes a broad range of conduct, that could include a "means of brutal assault," 180 Wn.2d at 905, or as the jury found in Mr. Ritchie's case, committed by mere intent to inflict bodily injury, or touching or striking that is harmful or offensive, with a car as a "deadly weapon," regardless or injury. RCW 9A.36.021(1)(c); CP 242-43.

For instance, the conduct at issue in the second-degree assaults in *Moretti* was far more substantial than the allegations in Mr. Ritchie's case. These second-degree assault convictions were against multiple victims that resulted in serious injury, or also involved a home invasion. 193 Wn.2d at 830-31.

Here, even if true, the witnesses' claims about Mr. Ritchie assaulting them while driving on a public road went unremarked and unreported by a State Patrol Officer or any other driver. RP880. No one was injured, and there was no damage to any car. The State's GPS evidence established Mr. Ritchie did not exceed the speed limit. RP921-23; 929-30. It is notable that Garibay's allegations of what would have been a serious physical assault resulted only in a conviction for a misdemeanor.

Finally, even the prosecutor did not believe the charged assault deserved a death-in-prison sentence, because she offered to reduce the second-degree assault charges pre-trial. RP300-03. This shows the offense is over-inclusive.

b. *The POAA's legislative purpose does not support a death-in-prison sentence for second-degree assault.*

The POAA's legislative history indicates its purpose is "deterrence of criminals who commit the 'most serious offenses.'" *Witherspoon*, 180 Wn.2d at 888. For the reasons stated above, the broad range of conduct encompassed by second-degree assault does not achieve the stated goal of removing the most dangerous offenders from society. Moreover, it is highly unlikely that the Legislature envisioned a life sentence based upon the unreliable, incredible allegations for the conduct alleged here.

c. *Washington's death-in-prison sentence for second-degree assault is uniquely harsh.*

In *Witherspoon,* all nine justices agreed this factor weighed in favor of disproportionality because "outside of Washington, there are only three states in which a conviction of second degree robbery as a 'third strike' offense triggers a mandatory sentence of life without parole." 180 Wn.2d at 888, 907.

The same is true here. Washington has one of the harshest habitual offender statutes in the nation. The majority of States' persistent offender statutes do not impose *mandatory* life without parole based on three felony convictions. The majority of recidivist statutes increase punishment, offer a court discretion in imposing a life sentence, or offer some opportunity for release in a person's lifetime. For instance, only seven states impose life without parole based on a third conviction for second-degree assault: Georgia,

Massachusetts, Mississippi, North Carolina, South Carolina, Wisconsin, and Wyoming. Ga. Stat. Ann. § 17-10-7(b); Ma. Stat. 279 §25; Miss. Code § 99-19-83; N.C. Gen. Stat. Ann. §14-7.7.1, 7.12; S.C. Stat. § 17-25-45; Wis. Stat. Ann. § 939.62; Wyo. Stat. § 6-10-201(b)(3).

Compared to other jurisdictions, Washington's penalty of mandatory life without parole based is disproportionately harsh.

d. *Death-in-prison for a second-degree assault conviction is disproportionate to other punishments in the same jurisdiction.*

The mandatory penalty imposed as a result of a conviction for second-degree assault—which here resulted in no injury— is far different in degree from aggravated murder, the offense the legislature has deemed deserving of the greatest punishment. *Witherspoon*, 180 Wn.2d at 908.

Had Mr. Ritchie been sentenced for the second-degree assault convictions under the SRA's standard sentencing guidelines, taking into account his offender score of 9+, he would face a sentence of 63-84 months for this conviction. RCW 9.94A.510, .515; CP 72. If the court found a harsher sentence was warranted because Mr. Ritchie's criminal history resulted in some of the felony offenses going unpunished, it could impose an exceptional sentence for up to ten years in prison. RCW 9.94A.535(2)(c); RCW 9A.20.020(1)(b).

Under our State's laws, a discretionary sentence of up to ten years based on Mr. Ritchie's conduct of conviction and criminal history is disproportionate to the mandatory death-in-prison sentence.

e. *This Court should accept review.*

Mandatory death-in-prison is cruel punishment when based on second-degree assault because the

punishment is disproportionate to the crime. This Court should accept review. RAP 13.4(b)(3).

4. The trial court deprived Mr. Ritchie of his rights to a jury trial and due process when it imposed a sentence over the maximum term based on prior convictions that were not found by the jury.

Mr. Ritchie's sentence as a persistent offender deprived him of his Sixth and Fourteenth Amendment rights to due process and to a jury trial and should be vacated.

The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be convicted if the State proves every element of the crime beyond a reasonable doubt.

Alleyne v. United States, 570 U.S. 99, 104, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *Blakely v. Washington,* 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

This principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant. *Alleyne,* 570 U.S. at 103, 108*; Blakely*, 542 U.S. at 304. *Blakely* held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard range based upon facts that were not found by the jury beyond a reasonable doubt. 542 U.S. at 304-0.

Most recently, in *Alleyne,* the Court ruled the facts underlying the imposition of a mandatory

minimum sentence must be found beyond a reasonable doubt by a jury, finding "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 550 U.S. at 103.

Mr. Ritchie was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase his sentence. This Court should accept review because the court's additional fact finding violates due process and the Sixth Amendment. RAP 13.4(b)(3).

F. CONCLUSION

Based on the foregoing, Mr. Ritchie respectfully requests this that review be granted pursuant to RAP 13.4(b).

In compliance with RAP 18.17, this document contains 4,968 words.

DATED this 4th day of January, 2023.

Respectfully submitted,

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APPENDIX

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FILED
12/5/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CORNELIUS RED RITCHIE, Appellant.	DIVISION ONE No. 82920-3-I PUBLISHED OPINION

DWYER, J. — Cornelius Ritchie appeals from the judgment entered on a jury's verdict finding him guilty of three counts of assault in the second degree, one count of felony harassment, and one count of assault in the fourth degree. Ritchie contends that the trial court committed an error of constitutional magnitude by excluding evidence that two testifying witnesses had been illegally occupying property when encountered by law enforcement four months after the incident leading to Ritchie's arrest. Ritchie further contends that the prosecutor committed misconduct during closing argument, that his persistent offender sentence is cruel and unusual, and that the trial court violated his right to a jury determination of his prior convictions. Finding no error, we affirm.

I

Ritchie resided in a trailer in the parking lot behind the Lochsloy store, located on Highway 92 between Lake Stevens and Granite Falls in Snohomish County. In the afternoon of December 18, 2019, Ritchie was involved in an

altercation with Deborah Garibay, the owner of the trailer in which he resided. According to Garibay, while outside of the trailer, Ritchie hit her in the head once with a baseball bat, knocking her to the ground. Ritchie then tossed the baseball bat and struck Garibay several more times with his fists. Garibay attempted to run, but Ritchie pursued her, still attempting to hit her.

Amanda Duran and Cody Chapin were sitting in their car in the Lochsloy store parking lot. Duran and Chapin saw Ritchie pursuing Garibay and decided to intervene. Chapin got out of the car and confronted Ritchie. In response, Ritchie threatened to kill both Chapin and Duran. Duran remained in the car but shouted at Ritchie that she had mace that she would use if Ritchie did not stop his pursuit of Garibay. Ritchie responded that he did not care and would "eat" the mace. Duran then told Ritchie that if he was a man, he would walk away. Ritchie stopped at that point and walked back to the trailer.

Garibay got into the back seat of Chapin's vehicle. According to Duran and Chapin, Garibay asked Chapin to drive her to her truck, which was parked in another part of the lot. Chapin attempted to oblige. However, Ritchie reached the truck first, took the keys that Garibay had left inside the vehicle, and started the vehicle.

Chapin drove out of the parking lot and onto Highway 92, heading toward Granite Falls. Ritchie followed in Garibay's truck. According to Chapin, Duran, and Garibay, the vehicles were traveling well in excess of the 55 miles-per-hour speed limit. Ritchie used the truck to ram the back of Chapin's vehicle. Chapin asserted that this caused him to cross the center line and force a semi-truck off

the road. However, Chapin claimed that his car was not seriously damaged during this chase. Law enforcement could neither confirm nor rule out that the vehicles had contacted one another because they were never able to inspect Chapin's vehicle.

Ritchie stopped following Chapin's vehicle after Chapin turned onto Crooked Mile Road. Once on Crooked Mile Road, Chapin pulled into the driveway of a friend's house. Chapin, Duran, and Garibay then got out of the vehicle and entered the house. Soon thereafter, Chapin's friend escorted Garibay to the nearby Granite Falls Fire Department in order to seek medical attention. Duran and Chapin later followed on foot.

Garibay arrived at the fire station at approximately 5:00 p.m. Fire department personnel contacted the Snohomish County Sheriff's Office; Deputies William Kleckley and Joseph Dunn responded. Upon arrival, Deputy Kleckley observed Garibay secured in an ambulance cot and appearing "very distraught." Deputy Kleckley spoke with Garibay briefly, before he and Deputy Dunn obtained a joint statement from Chapin and Duran. Garibay was taken to the hospital via ambulance; Deputy Kleckley followed in order to further speak with her. Deputy Dunn remained at the fire station while waiting for Duran and Chapin to complete their written statement.

Garibay was seen at the emergency room by forensic nurse examiner Sherri Weyker. Initially, Weyker asked Garibay to provide her with a narrative of the events that led to her hospital visit. Weyker recorded this information in her report before conducting a medical examination. Garibay reported that she felt

some tenderness on her head and some pain on her left flank. Weyker observed some slight bumps on Garibay's head, but did not make note of or photograph them as they were not visibly a sign of injury. Weyker did not observe any bruises aside from a small unrelated bruise on Garibay's right breast. Deputy Kleckley obtained a written statement from Garibay at the hospital.

The State charged Ritchie with three counts of assault in the second degree based on the use of a deadly weapon for ramming Chapin's vehicle, one count of felony harassment for threatening to kill Chapin, and one count of assault in the fourth degree for his altercation with Garibay.[1] Ritchie was originally tried in March 2021. The jury in that trial could not reach a verdict, and the trial court declared a deadlock and discharged them. Ritchie was tried a second time in May 2021.

At trial, defense counsel's theory of the case was that the events described by Garibay, Duran, and Chapin had never occurred. To support his theory, defense counsel sought to introduce testimony from Deputy Kleckley about an occasion in April 2020, four months after the events for which Ritchie was charged, when he witnessed Chapin, Duran, and Garibay together. On that occasion, Deputy Kleckley was dispatched to a property in Granite Falls to serve a trespass notice on two individuals – Chapin and Duran. When he arrived, Deputy Kleckley encountered Garibay, who told him that she was there to relay information from the prosecutor about upcoming court dates.

[1] Ritchie was also charged with a second count of harassment, six counts of violation of a court order, and taking a motor vehicle without permission. The State voluntarily dismissed all of these counts.

In ruling on the admissibility of defense counsel's proffered evidence, the trial court found that the encounter itself was relevant to the credibility of Garibay, Chapin, and Duran, who had previously reported that they were not acquainted before the events in December 2019. However, the trial court questioned the relevance of the reason for Deputy Kleckley's presence, i.e., that Deputy Kleckley was there to conduct an eviction of trespassers. Defense counsel asserted that the evidence was relevant, but admitted that he thought "the value [of the evidence] is marginal" and was "not crucial to the defense case." The trial court ruled that "any probative value" regarding Chapin's and Duran's unlawful occupation of the property was "grossly outweighed by the danger of unfair prejudice." The trial court did, however, permit defense counsel "to go into the fact that Ms. Garibay was contacted in the presence of these individuals."

During the second trial, Deputy Kleckley, Duran, Chapin, and Garibay all testified about the April 2020 encounter. Deputy Kleckley testified that when he encountered Garibay in April 2020, Garibay reported that she was there to tell Chapin and Duran to contact the prosecutor regarding upcoming court dates. In her own testimony, Garibay insisted that she did not say this and, to the contrary, had informed Deputy Kleckley that she was there to help Chapin and Duran move. Chapin and Duran similarly testified that Garibay was there to help them move and that they had asked for Garibay's help that morning.

The jury convicted Ritchie on all counts. Because he had previously been convicted of at least two most serious offenses, Ritchie was sentenced under the

Persistent Offender Accountability Act of the Sentencing Reform Act of 1981[2] (POAA). Ritchie was sentenced to life in prison without the possibility of parole on the three counts of assault in the second degree, 60 months imprisonment on the count of harassment, and 364 days imprisonment on the count of assault in the fourth degree, to be served concurrently.

II

Ritchie asserts that the trial court erred by excluding evidence that Duran and Chapin were trespassing on the day that Deputy Kleckley saw them with Garibay. He contends that this purported error violated his right to confront the witnesses against him (phrased as the right to present a defense) and, thus, reversal is required. Because the fact that Duran and Chapin were trespassing in April 2020 had only the most minimal, tangential relevance to the charges against Ritchie, we disagree.

When a criminal defendant asserts that an evidentiary ruling has violated his constitutional right "to present a defense," we engage in a two-part analysis. First, we review the trial court's ruling for an abuse of discretion, applying the evidentiary rule or evidentiary statute at issue. State v. Arndt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). Second, we consider de novo whether there has been a violation of the defendant's Sixth Amendment rights. Arndt, 194 Wn.2d at 797.

A

For evidence to be admitted at trial, it must be relevant. ER 402.

[2] Ch. 9.94A RCW.

Evidence is relevant if it tends to prove or disprove the existence of a fact of consequence to the outcome of the case. State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

To be sure, the relationship between Duran, Chapin, and Garibay was relevant to Ritchie's defense. For this reason, the trial court properly permitted defense counsel "to go into the fact that Ms. Garibay was contacted in the presence of these individuals" in April 2020. And defense counsel did elicit testimony from Duran, Chapin, Garibay, and Deputy Kleckley regarding the April 2020 encounter. Deputy Kleckley testified that he saw Duran, Chapin, and Garibay together; Chapin and Duran testified that they had contacted Garibay about needing her assistance that same day; and Deputy Kleckley and Garibay gave conflicting testimony regarding Garibay's statements to the deputy during the encounter. The *only* evidence the trial court excluded was the evidence that Chapin and Duran were trespassing on the day that Deputy Kleckley encountered them.

The trial court correctly determined that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Trespassing is not probative of dishonesty in and of itself. Defense counsel even admitted that the nature of the encounter had very little relevance, stating that "the value is marginal" and the

evidence "is not crucial to the defense case." This is especially so when defense counsel was able to discredit the testimony of the witnesses in a multitude of other ways.

That Chapin and Duran were trespassing in April 2020 had no bearing on Ritchie's guilt or innocence. Accordingly, the trial court did not abuse its discretion by declining to admit this evidence pursuant to ER 403.

B

The second step in our analysis requires us to examine whether the trial court's ruling, despite being a proper application of the evidentiary rules, nonetheless runs afoul of either the state or federal constitutions.[3] There has been some confusion as to what this second step entails. It is not the case, as Ritchie would have us hold, that phrasing an evidentiary ruling as a constitutional claim provides a means for an end run around the Rules of Evidence. See State v. Lizarraga, 191 Wn. App. 530, 553, 364 P.3d 810 (2015). Nor is the second step analysis merely a repetition of the analysis undertaken at step one. Rather, we articulate what has remained the underlying concern of the courts in deciding "right to a defense" cases: whether there is a unique or aberrant rule that results in the defendant having a lesser Sixth Amendment right than that possessed by citizens in other jurisdictions or persons charged with a different crime in the

[3] Ritchie asserts that the trial court violated his right under the state and federal constitutions to "present a defense." Neither the state nor the federal constitutions mention any such right. Ritchie's argument is more appropriately classified as a violation of the right to confront the witnesses against him, which is specifically enumerated in both the federal and state constitutions. U.S. CONST. amend. VI; CONST. art. I, § 22.

same jurisdiction. Review of the relevant case law tells us that this is so.

1

The notion of a "right to present a defense" has its origins in the United States Supreme Court's seminal decision in Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In Chambers, Gable McDonald confessed in a sworn writing to the murder of a police officer, a crime for which Leon Chambers had been charged. McDonald also orally admitted to the crime in the presence of at least three witnesses. But McDonald later repudiated his confession. Chambers, 410 U.S. at 287-88. At trial, Chambers attempted to elicit evidence of McDonald's written confession and his three oral admissions. Chambers, 410 U.S at 289. Initially, Chambers requested to be allowed to call McDonald as an adverse witness. Chambers, 410 U.S at 291. The trial court allowed Chambers to call McDonald; however, due to an antiquated Mississippi common law rule requiring that the party calling a witness vouch for the veracity of that witness's testimony, the trial court denied Chambers the ability to treat McDonald as a hostile witness in order to impeach his testimony should he repeat his repudiation of the written confession. Chambers, 410 U.S at 291. As a result, Chambers was unable to question McDonald concerning his written confession and challenge his testimony should he reassert his repudiation.

Chambers then sought to introduce testimony from the lay witnesses before whom Chambers uttered his admissions. Chambers, 410 U.S at 292. The State objected to the proffered testimony as hearsay. The trial court sustained this objection because Mississippi's evidence rules did not at that time

recognize statements against penal interest as an exception to the prohibition against hearsay. Chambers, 410 U.S at 292. Thus, Chambers was unable to put McDonald's confession in front of the jury, challenge McDonald's repudiation of the confession, or present witnesses to testify to his admissions and that the repudiation was not credible. Chambers, 410 U.S at 294. In truth, the rulings gutted Chambers' defense.

As the Supreme Court noted,

> In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's 'party witness' or 'voucher' rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity.

Chambers, 410 U.S. at 294.

In deciding the case, the Supreme Court first held that Mississippi's antiquated rule prohibiting Chambers from cross-examining a witness he called to testify (McDonald) violated his right to confront the witnesses against him. Chambers, 410 U.S at 295. The Court held that whether a witness was "against" the defendant did not depend on the technicality of who called the witness to testify but, rather, depended on whether the witness's testimony inculpated the defendant. Chambers, 410 U.S at 297. McDonald's repudiation of his confession so inculpated Chambers. Chambers, 410 U.S at 297.

The Court held that the trial court's error in denying the opportunity to confront McDonald was further compounded by its refusal to allow Chambers to call the three lay witnesses to McDonald's oral admissions as trial witnesses.

Chambers, 410 U.S at 298. Although the Court did not strike down Mississippi's hearsay rule, it held that such rules may not be applied "mechanistically to defeat the ends of justice" "where constitutional rights directly affecting the ascertainment of guilt are implicated." Chambers, 410 U.S at 302.

In sum, because Mississippi's rules prohibited Chambers from calling witnesses whose testimony was fundamental to the determination of guilt or innocence, even proper application of those rules violated Chambers' Sixth Amendment rights, incorporated against the states through the Fourteenth Amendment due process clause, to present witnesses in his favor and to confront witnesses against him. Chambers, 410 U.S at 302.[4]

One year later, the Supreme Court revisited the right to confront witnesses. See Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In that case, the defendant, charged with burglary, sought to cross-examine the state's primary witness about the fact that the witness was on probation for a burglary conviction as a juvenile offender. By doing so, Davis sought to demonstrate that the witness "acted out of fear or concern of possible jeopardy to his probation." Davis, 415 U.S. at 311. However, the trial court excluded any mention of the witness's probationary status, relying on a statute and a juvenile procedural rule that barred the introduction of juvenile adjudications as evidence in a court of general jurisdiction unless used for sentencing purposes. Davis, 415 U.S. at 311. Thus, when the witness testified

[4] See also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.").

that he had no reason to fear law enforcement and had never previously been questioned by law enforcement, Davis was unable to confront the witness and discredit that testimony. Davis, 415 U.S. at 313-14. Davis was subsequently convicted of burglary and grand larceny. Davis, 415 U.S. at 314.

The Supreme Court reversed the conviction. Noting the importance of the witness's testimony in securing Davis's conviction, the Court held that the defendant's right to confrontation was violated by the trial court's application of the statute and rule so as to exclude evidence of the witness's probationary status. Davis, 415 U.S. at 317-18. With all evidence of the witness's juvenile adjudication excluded, defense "counsel was unable to make a record from which to argue *why* [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." Davis, 415 U.S. at 318. Notably, the defendant would not have been so restricted in presenting his defense had the witness's conviction not been in juvenile court. Thus, Davis's Sixth Amendment right to confrontation was restricted in a way that did not generally apply either to other Alaskan defendants or to defendants in other states. The Court held that, on the facts presented, the defendant was completely denied the "right of effective cross-examination" and, accordingly, his right to confrontation was violated. Davis, 415 U.S. at 318.

2

Seminal Washington cases interpreting the Sixth Amendment rights to cross-examination and compulsory process have been similarly concerned with unique, aberrant, new, or not generally applicable rules of evidence or procedure.

Indeed, the two-step analytical test outlined in Arndt and refined in State v. Jennings, 199 Wn.2d 53, 502 P.3d 1255 (2022), has its origins in State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983). Hudlow concerned the implications of Washington's adoption of a rape shield statute, passed by the legislature in 1975. 99 Wn.2d at 6; LAWS OF 1975, 44th Leg.,1st Ex. Sess. ch. 14, § 1. Rape shield statutes were an advent of the mid-1970s, and Washington was one of the first states to enact one.[5]

In Hudlow, the court held that the exclusion of evidence sought to be admitted by the defendant is justified when there is a compelling state interest for the exclusion. 99 Wn.2d at 16. The court further noted that the rape shield statute serves multiple compelling state interests, including achieving just trials based on truth-finding rather than based on prejudice against rape victims premised on their prior sexual activity, and encouraging rape victims to report the crimes committed against them. Hudlow, 99 Wn.2d at 16. Accordingly, when evidence of a victim's sexual history is of little relevance, the state's compelling interests outweighed the need for the evidence's introduction. Hudlow, 99 Wn.2d at 16. On the other hand, when the proffered evidence is of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Hudlow, 99 Wn.2d at 16. While, 40 years later, Washington's rape shield statute is accepted as a well-established aspect of our existing evidentiary rules and its facial

[5] Rape shield statutes, 1 Wharton's Criminal Evidence § 4:41 (15th ed.).

constitutionality is beyond question, that was not yet evident at the time Hudlow was decided.

Similar concerns were recently at play in State v. Chicas Carballo, 17 Wn. App. 2d 337, 486 P.3d 142, review denied, 198 Wn.2d 1030 (2021). Therein, we were concerned with evidence that had been excluded pursuant to ER 413. Chicas Carballo, 17 Wn. App. 2d at 345. ER 413 was a newly promulgated evidentiary rule, adopted by the Supreme Court in September 2017, 189 Wn.2d 1120, prohibiting the introduction of evidence concerning a person's immigration status unless certain procedural requirements are met. ER 413(a). This rule was all but unique in the United States, as, at the time, only one other state had a similar evidence rule. See CAL. EVID. § 351.3.[6]

In Chicas Carballo, the trial court prohibited the defendant from questioning the codefendant's girlfriend, the only live witness to the crime, concerning her immigration status due to his failure to follow the procedures set forth in ER 413, which had gone into effect a month before trial. 17 Wn. App. 2d at 347. We reversed, holding that "rules that impose procedural requirements cannot be wielded as a sword by the State to defeat the constitutional rights of an accused in a criminal trial." Chicas Carballo, 17 Wn. App. 2d at 349. The evidence sought to be admitted was highly probative, given that the witness had been threatened with deportation if she did not cooperate in the police investigation. Thus, no state interest could have outweighed its value to the truth

[6] California's statute was repealed by its own terms as to criminal matters in 2022. Currently the only other state with a rule similar to ER 413 is Pennsylvania. See PA. EVID. R. 413.

seeking function.[7] This was particularly so because the state had suffered no prejudice whatsoever as a result of the defendant's failure to follow the newly minted rules of procedure. Chicas Carballo, 17 Wn. App. 2d at 350-51.

3

Ultimately, the pertinent concern is whether both parties receive a fair trial. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). As Chambers, Davis, Hudlow, and Chicas Carballo all demonstrate, that concern is heightened when a new or antiquated rule appears to threaten the defendant's right to a fair trial. The concern is not as paramount when the rule being applied is a well-established, commonly utilized rule that has been applied time and again without any demonstrated detriment to the fairness of proceedings. Such is the case with rules such as ER 403, a version of which is accepted in every court in this nation and which have been utilized in one form or another for many decades.

Recognizing that there is room for wide application of established rules of evidence within the boundaries of the constitution, the United States Supreme Court has noted that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Our Supreme Court has recognized similar

[7] Indeed, 48 other states had perceived no state interest compelling enough to have adopted a similar rule.

limitations to the same right. State v. Orn, 197 Wn.2d 343, 352, 482 P.3d 913 (2021) (ER 403 serves "a permissible purpose" under constitution); accord Jennings, 199 Wn.2d at 63.

"At its core, the constitutional right to present a defense ensures the defendant has an opportunity to defend against the State's accusations." Jennings, 199 Wn.2d at 66. But "the Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Kentucky v. Stincer, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)). Accordingly, when the defendant has an opportunity to present his theory of the case, the exclusion of some aspects of the defendant's proffered evidence will not amount to a violation of the defendant's constitutional rights. Jennings, 199 Wn.2d at 66. To be sure, "[t]he ability of the defendant to achieve through other means the effect that the excluded examination allegedly would have produced is a factor indicating that his right to confrontation was not violated." United States v. Drapeau, 414 F.3d 869, 875 (8th Cir. 2005).

4

Here, Ritchie's theory of the case was that Duran, Chapin, and Garibay were not credible witnesses and that Garibay was using her friends to fabricate a story and frame Ritchie. Evidence that Duran, Chapin, and Garibay were seen together—months after the events at issue—was properly deemed relevant to that defense theory. Indeed, Ritchie was able to elicit testimony about the April

2020 encounter from multiple witnesses during trial. Furthermore, one of the witnesses opined that Duran, Chapin, and Garibay were now "best friends" "for the rest of our lives." However, the fact that Duran and Chapin were trespassing in April 2020 does not tend to prove that the three people were engaged in a conspiracy to frame Ritchie.

Furthermore, evidence that Duran and Chapin were trespassing was not essential to demonstrating a lack of credibility in the testimony of Duran, Chapin, or Garibay. Defense counsel was able to attack the credibility of these witnesses in a myriad of ways including the following:

- Introducing global positioning system (GPS) data[8] showing Ritchie's whereabouts on the afternoon of December 18, 2019, demonstrating that the events did not occur at the time(s) claimed by the witnesses;
- Introducing GPS data showing Ritchie's speed of movement, which tended to demonstrate that the vehicle in which he was traveling did not exceed the speed limit, contrary to the witnesses' testimony;
- Eliciting testimony from Chapin that his car sustained no damage, even though he claimed to have been struck at over 60 miles per hour;
- Eliciting testimony from Duran and Chapin that the events testified to by them could not have lasted more than half an hour, leaving approximately two hours of the afternoon unaccounted for;
- Eliciting testimony from Garibay that Ritchie did not pull on her hair, contrary to Duran and Chapin's testimony;

[8] Ritchie was wearing a GPS monitor as a condition of his probation for a prior conviction.

- Eliciting testimony from Garibay that she did not ask Chapin to drive her to her truck, contrary to Duran and Chapin's testimony;
- Eliciting testimony from Weyker that all of Garibay's teeth were intact, contrary to Garibay's testimony;
- Eliciting testimony from Weyker that Garibay had no visible bumps on her head, despite Garibay's claim that she had been hit with a baseball bat;
- Eliciting testimony from Weyker that Garibay had no trouble walking to and from the restroom, contrary to Garibay's testimony at trial;
- Eliciting testimony from the responding deputies that they do not share contact information among witnesses, contrary to Garibay's claim that she learned of Chapin's and Duran's names from law enforcement;
- Eliciting testimony from Garibay contrary to what she told Deputy Kleckley concerning why she was with Chapin and Garibay in April 2020;
- Questioning Chapin about his refusal to identify the friend at whose house he parked on the date of the incident;
- Questioning Duran and Chapin about prior inconsistent statements related to the time of day the incident occurred;
- Questioning Duran, Chapin, and Garibay about the number of times Ritchie struck the back of Chapin's vehicle (and receiving a different answer from each witness);
- Confronting Garibay with her prior inconsistent statements concerning

the nature of her relationship with Ritchie.

Because Ritchie was able to attempt to discredit Garibay, Duran, and Chapin in all of these ways, introducing evidence that Duran and Chapin were illegally occupying property in April 2020 would have added nothing of value to Ritchie's defense. In other words, the evidence excluded was not highly probative evidence, the exclusion of which could give rise to a constitutional violation. Rather, the trial court's ruling was nothing more than a standard application of ER 403. The trial court's evidentiary ruling did not violate Ritchie's rights under ER 403, the Sixth Amendment, or article I, section 22.

III

Ritchie next asserts that the prosecutor committed misconduct during closing argument and that this misconduct deprived him of a fair trial. The State counters that no misconduct occurred and, if it did, Ritchie has failed to demonstrate any prejudice. We agree with the State.

A defendant claiming prosecutorial misconduct has the burden to prove that the prosecutor's conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury." Fisher, 165 Wn.2d at 747.

When reviewing a prosecutor's statements during closing argument, we view the statements in the context of the entire argument. Fisher, 165 Wn.2d at 747. The prosecutor has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence."

State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006) (citing State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). References to evidence outside the record constitute misconduct. Fisher, 165 Wn.2d at 747 (citing State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). Additionally, it is misconduct to denigrate the role of defense counsel. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). However, "[i]f defense counsel failed to request a curative instruction, the court is not required to reverse." Fisher, 165 Wn.2d at 747 (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

A

Ritchie alleges that the prosecutor committed misconduct in two distinct ways. First, Ritchie asserts that the prosecutor committed misconduct by referencing excluded evidence. In her closing argument, the prosecutor argued:

> So she goes to the hospital for medical treatment, and she is complaining of pain, she's shaky, she's crying, she's got the headache, the whole bit, and her body hurts. And a person who has been beaten like that, of course your body is going to hurt, and you are going to know your body is going to hurt and are going to think that's because you're bruised. And later you see bruises. You're like yeah, I had bruises.

Defense counsel objected to this argument. In response, the trial court stated, "This is argument. The jury has been instructed time and time again that this is argument. Proceed, please." The prosecution concluded this line of argument by stating, "But the fact is no one should be surprised Sherri Weyker did not yet observe bruises on Deborah Garibay from these events."

Ritchie asserts that this argument was a reference to the testimony of Deputy Edgar Smith concerning evidence of an incident on December 25, which the trial court had stricken from the record. Had this been the only testimony about bruising, Ritchie's argument might have merit. But it was not. Early in the trial, the prosecution asked forensic nurse Weyker whether she observed any bruises on Garibay during her examination. Weyker indicated that she had not. Later, the prosecution asked follow up questions about the lack of bruises:

> Q Let's talk a little bit about bruising. If somebody is -- well, I guess, how long would it take for a bruise to show up if somebody is struck?
> A That can vary on the individual.
> Q Is there any sort of, I guess, a set time frame that we could put on something like that?
> A No.
> . . . .
> Q Based on your medical experience, would you expect bruises to have shown up by the time that you are speaking with Ms. Garibay about these events?
> A I've done hundreds of cases. And there's a lot of times where they're reporting assault or injury where we do not see physical bruising, that it hasn't shown up visibly by the time I see a patient.

Moreover, during her testimony, Garibay denied that she told Weyker that she had no bruises:

> Q And you had no bruises, correct?
> A Not true.
> Q Ma'am, you were specifically asked if you had any bruises, and you told Ms. Weyker no; isn't that correct?
> A Not true. I don't believe so.

When viewed in context of the entire trial, we cannot say that the prosecutor committed misconduct by referencing bruises. Both before and after the statement to which the defense objected, the prosecutor referenced Weyker's

testimony that bruises might not show up right away. The prosecutor made no reference to Deputy Smith or anyone else viewing bruises on Garibay after the date of the incident. Rather, the argument advanced was that Garibay may have observed bruises on herself. Given Garibay's testimony on cross-examination, the prosecutor's argument was in reference to evidence that had not been excluded. It was thus not improper.

B

Similarly, the prosecutor's argument that Ritchie and Garibay were in a "toxic relationship" was not misconduct. First, unlike the other statements that Ritchie alleges constitute misconduct, Ritchie did not object to this statement. This argument is therefore considered waived unless the prosecutor engaged in misconduct so flagrant and ill-intentioned that no instruction to the jury could have cured the prejudice. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

In reviewing the record, there was evidence presented at trial concerning an earlier incident in which Ritchie broke Garibay's phone. There was evidence that Garibay had assaulted Ritchie, causing him injuries. There was also evidence that Garibay had reported to Nurse Weyker that Ritchie was her boyfriend. The prosecutor's description of the relationship between Ritchie and Garibay as "toxic" was a reasonable inference from the evidence presented at trial. Thus, contrary to Ritchie's argument, the prosecutor describing Ritchie and Garibay as being in a "toxic relationship" was not a flagrant and ill-intentioned instance of misconduct. No entitlement to appellate relief is demonstrated.

C

Ritchie next argues that the prosecutor committed misconduct by impugning defense counsel. Ritchie points to several statements made by the prosecutor during her rebuttal argument that seized on a misstatement by defense counsel during his closing argument. Specifically, the prosecutor argued during her closing argument:

> And so, [the witnesses] do their best to recount what happened, but the emotions and the feelings of it all affect that ability to recount and how they recount what happened. And everybody can have a slip of the tongue, or make a mistake, or say the wrong thing at any time. You don't have to be under the stress of giving testimony, you don't have to be under the stress of immediately just having this event happen to you to screw up.
>
> And I know that because the lawyers have done it in this trial. And we practice, and we prepare, and we have training, and we have experience, and we talk in front of people all the time. And, surely, we have our own thoughts and feelings about what ought to happen at the end of this trial.
>
> Nonetheless, Mr. Wackerman said, "well, Mr. Turim talked about the cameras on the store." That was the last witness, the defense investigator. He said absolutely nothing about video cameras at the store. Zero. There was nothing. And you were here and you observed it. And then you heard the argument, right? Anybody can mess anything up at any time. We don't seize upon Mr. Wackerman's mistake and say well, David Turim just must not have testified.

Defense counsel objected to this line of argument. In response, the trial court once again admonished the jury that counsel's arguments were not evidence. The prosecutor continued:

> In argument, Mr. Wackerman also said that Ms. Garibay had testified they turned onto Getchell Road.
> . . . .

> You're aware that nobody testified they turned onto Getchell Road. They all testified it was Crooked Mile Road, right? You can make these types of mistakes, and witnesses do before and after they testify.

Had the prosecutor argued that defense counsel was deliberately misstating the facts, that might have constituted misconduct. But the record does not demonstrate this. Instead, the prosecutor noted that defense counsel had made some inadvertent misstatements of fact in his closing argument, and that this was consistent with the notion that anyone can make mistakes when recounting events. This argument rested on the implication that defense counsel was otherwise honest – the exact opposite of impugning him. It was not misconduct for the prosecutor to make this argument.

D

Finally, the prosecutor's argument that she expected "defense to come up and lawyer all the language that was used by the victims variously to describe the events" and that the witnesses' testimony does not "have to be lawyered that way" also did not constitute misconduct. This argument was in reference to testimony by Duran and Chapin that they did not have a cell phone at the time of the incident, although they did have a device that could be used to make calls when connected to a wi-fi signal. When viewed in context, the prosecutor's statement about "lawyering" language was an argument that the witnesses did not need to have used precise language in order to be credible. This is not akin to arguments using words like "crock," "bogus," and "sleight of hand" that imply that defense counsel is lying. See State v. Lindsay, 180 Wn.2d 423, 433-34, 326 P.3d 125 (2014); State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43

(2011). The prosecutor's comments were a legitimate trial tactic and did not constitute misconduct.

E

Even if the prosecutor had committed misconduct in her closing argument, Ritchie would still not be entitled to the relief he seeks. To obtain reversal, the defendant must demonstrate not only that the prosecutor committed misconduct, but also that the misconduct was prejudicial. Fisher, 165 Wn.2d at 747. While Ritchie objected to some of the statements that he alleges constitute misconduct, he neither requested a curative instruction nor moved for a mistrial. "Defense counsel's failure to move for a curative instruction or a mistrial at the time strongly suggests the argument did not appear [irreparably prejudicial] in the context of the trial." State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993). Furthermore, the trial court instructed the jury several times that counsels' arguments were not evidence. The jury is presumed to have followed that instruction. Warren, 165 Wn.2d at 29.[9] In the absence of flagrant misconduct—and there was none—no entitlement to appellate relief is demonstrated.

IV

Ritchie further asserts that the imposition of a mandatory life sentence

[9] Ritchie also contends that his conviction should be reversed due to cumulative error. The cumulative error doctrine applies where a trial is affected by several errors that standing alone may not be sufficient to justify reversal. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine requires reversal where a combination of such errors denies the defendant a fair trial. Greiff, 141 Wn.2d at 929. However, where there are few or no errors, and the errors, if any, have little or no effect on the outcome of the trial, reversal is not required. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Because there was no error at Ritchie's trial, his convictions are not subject to reversal for cumulative error.

without the possibility of parole under the POAA violated the state and federal constitutional guarantee against cruel and unusual punishment, as the punishment was grossly disproportionate to the offense of assault in the second degree. We disagree.

A

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Similarly, the Washington Constitution protects against cruel punishment. CONST. art. I, § 14. Our Supreme Court has held that article I, section 14 is more protective that the Eighth Amendment. State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). Accordingly, if a sentence does not violate the Washington Constitution, we need not engage in an analysis under the Eighth Amendment.

In determining whether a sentence is cruel under our state constitution, we examine four factors: "(1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction." State v. Rivers, 129 Wn.2d 697, 712-13, 921 P.2d 495 (1996) (citing State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980)).[10]

[10] The State contends that the Supreme Court analyzed these factors as they relate to second degree assault in State v. Moretti, 193 Wn.2d 809, 446 P.3d 609 (2019). This is not accurate. Moretti involved a facial challenge to the POAA based on the age of the offender at the time of a first strike conviction. 193 Wn.2d at 814. Furthermore, although all three of the offenders were convicted of assault in the second degree, those convictions were secondary to class A felonies. Moretti, 193 Wn.2d at 831. Here, second degree assault was the offense with the highest seriousness level under the Sentencing Reform Act for which Ritchie was convicted.

B

The first factor is the nature of the offense. Assault in the second degree is designated as a "most serious offense." RCW 9.94A.030(32)(b). It is also designated as a "violent offense." RCW 9.94A.030(58)(a)(viii). Additionally, assault in the second degree is a crime against persons, not an "'entirely passive, harmless, and technical violation'" of a statute. Gonzalez v. Duncan, 551 F.3d 875, 886 (9th Cir. 2008) (28 years to life for failure to timely update sex offender registration was cruel and unusual) (quoting People v. Carmony, 26 Cal.Rptr.3d 365, 372 (2005)). Courts have rarely, if ever, found a sentence of life without parole for an adult offender to be grossly disproportionate to violent offenses against persons. Norris v. Morgan, 622 F.3d 1276, 1293 (9th Cir. 2010) ("[W]e are aware of no case in which a court has found a defendant's term-of-years sentence for a non-homicide crime *against a person* to be grossly disproportionate to his or her crime.").

Ritchie seizes on this factor, pointing out that the legislature has amended the definition of "most serious offense" to remove robbery in the second degree from the list. LAWS OF 2019, ch. 187, § 1. Notably, however, this was the *only* offense that the legislature removed from the list of "most serious offenses." LAWS OF 2019, ch. 187, § 1. The legislature has amended RCW 9.94A.030 several times since then and not once has it deigned to remove any other offenses from the list. Although assault in the second degree is listed at the same level of seriousness for sentencing purposes as robbery in the second degree, so is vehicular assault, which also remains on the list of "most serious

offenses." RCW 9.94A.030(32)(p), .515. It is reasonable that the legislature would be far more concerned with crimes against persons, than with crimes primarily against property. Indeed, as the State points out, the original version of Senate Bill 5288 amending RCW 9.94A.030 proposed removing assault in the second degree from the list of "most serious offenses," but the legislature ultimately rejected this proposal. ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019). We will not second guess the legislature's judgment.

Additionally, Ritchie's claim that the State's offer of a lower sentence during the plea bargaining process indicated that the State considered second degree assault to be a minor offense for which a life sentence was unwarranted is unfounded. The State's interest at the plea bargaining stage is not necessarily to obtain a sentence that it believes to be the most just but, rather, to "persuade the defendant to forgo his right to plead not guilty." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). It has long been accepted that "a State may encourage a guilty plea by offering substantial benefits" including a greatly reduced sentence, "in return for the plea." Corbitt v. New Jersey, 439 U.S. 212, 219, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978). To hold that a sentence was cruel simply because the State had once offered a lower sentence as part of a guilty plea offer "would contradict the very premises that underlie the concept of plea bargaining itself." Bordenkircher, 434 U.S. at 365. Ritchie's decision to decline the plea offer was his choice, and his decision does not render his sentence unconstitutionally cruel.

C

The second factor we consider when determining whether a sentence is cruel under our state constitution is the legislative purpose of the POAA. The Supreme Court has on multiple occasions recognized that "the purposes of the persistent offender law include deterrence of criminals who commit three 'most serious offenses' and the segregation of those criminals from the rest of society." Rivers, 129 Wn.2d at 713; accord Witherspoon, 180 Wn.2d at 888. These goals are served by Ritchie's sentence. This is especially so given that Ritchie has in fact been convicted of not just three but nine most serious offenses.

D

Third, we consider the punishment the defendant would have received in other jurisdictions. Under persistent offender statutes across the country, mandatory life sentences are the exception rather than the rule.[11] In this regard, Washington is in the minority. "But even if they would have received shorter sentences in some other jurisdictions, 'this factor alone is not dispositive.'" State v. Moretti, 193 Wn.2d 809, 833, 446 P.3d 609 (2019) (quoting Witherspoon, 193 Wn.2d at 888).

E

The fourth and final factor we consider is the punishment imposed for similar offenses in the same jurisdiction. Following Washington's abolition of the death penalty, life without the possibility of parole is the harshest sentence that

[11] States with persistent offender statutes that impose mandatory life without parole are Georgia, Massachusetts, Mississippi, North Carolina, South Carolina, and Wyoming. GA. CODE ANN. § 17-10-7; MASS. GEN. LAWS CH. 279 § 25; MISS. CODE ANN. § 99-19-83; N.C. GEN. STAT. § 14-7.12; S.C. CODE ANN. § 17-25-45; WYO. STAT. ANN. § 6-10-201.

an offender may receive. Moretti, 193 Wn.2d at 833. But the POAA imposes a mandatory life sentence without the possibility of parole on *all* persistent offenders convicted of a "most serious offense." RCW 9.94A.570.

Considering these factors as a whole, Ritchie's sentence of life in prison without the possibility of parole does not violate article I, section 14 of the Washington Constitution, nor does it violate the Eighth Amendment. No Washington court has held that a life sentence under the POAA for a violent felony offense is unconstitutional, and we decline to do so today.

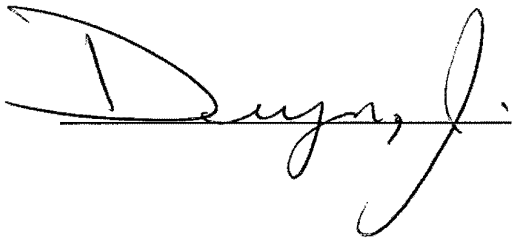
V

Ritchie lastly asserts that the trial court erred by imposing a sentence under the POAA because the existence of his previous strike offenses was not found by a jury. This argument is without merit.

In Apprendi v. New Jersey, the United States Supreme Court held that "[*o*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (emphasis added). The Washington Supreme Court has clarified that when a prior conviction is an element of the offense, it too must be found by a jury. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). But prior convictions that warrant a sentence under the POAA are not an element of the offense. As the court held in Witherspoon, "under the POAA, the State must prove previous convictions by a preponderance of the evidence and the defendant is not entitled to a jury determination on this issue." 180 Wn.2d at 894;

accord State v. McKague, 159 Wn. App. 489, 517, 246 P.3d 558, aff'd, 172 Wn.2d 802, 262 P.3d 1225 (2011). Ritchie was not entitled to a jury determination of the existence of his prior convictions.

Affirmed.



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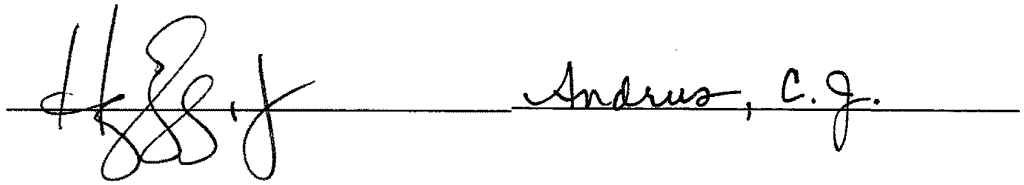

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