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

OPENING BRIEF OF APPELLANT

JOHN HENRY BROWNE
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the state to introduce portions of Mr. Blackmon's testimony from a prior trial while limiting the defense's right to present other portions of the testimony, including the portion of the prior testimony in which Mr. Blackmon denied committing the crimes with which he was charged, in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article 1 sections 3, 9, and 22 of the Washington Constitution and ER 106.

2. The prosecutor committed misconduct in eliciting testimony which commented on Mr. Blackmon's right to confront the witnesses against him (that the witness was having a hard time testifying in Mr. Blackmon's presence), in violation of his rights under the Sixth and Fourteenth Amendment and Article 1, section 22 of the Washington Constitution.

3. Comments by state's witnesses on Mr. Blackmon's guilt denied him his rights under the Sixth and Fourteenth Amendments and Article 1, sections 21 and 22 to a jury trial based on the evidence against him.

4. The trial court erred in denying Mr. Blackmon's motion for mistrial after the complaining witness violated a very clear and specific motion in limine excluding references to former trials in the case.

5. The prosecutor compounded the error in the complaining

witness's reference to a former trial by referring to a "trial" transcript very shortly afterwards.

6. The prosecutor's argument in closing rebuttal argument that the jurors had to either believe the state's witnesses were lying or that the defendant was guilty denied him the presumption of innocence and his right to a jury trial, in violation of his rights under the Sixth and Fourteen Amendments and Article 1, sections 21 and 22 of the Washington Constitution.

7. Cumulative trial error denied Mr. Blackmon a fair trial.

8. The trial court erred in imposing an exceptional sentence on Mr. Blackmon in violation of RCW 9.94A.537(1) and United States v. Alleyne, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in denying the defense motion that if any of Mr. Blackmon's prior testimony was admitted that all of it should be?

2. Did the trial court err in allowing the state to choose which portions of Mr. Blackmon's prior testimony it wanted admitted, but excluding portions the defense asked to be introduced, including Mr. Blackmon's denial that committed the alleged crimes?

3. Did the prosecutor's eliciting from a state's witness that she was having a hard time testifying in Mr. Blackmon's presence constitute an

unconstitutional comment on his exercise of his state and federal constitutional rights to confront the witnesses against him?

4. Were statements by two police witnesses that I.B. was "a very scared teenage girl" and her demeanor was "something we commonly associate with a defensive posture" and that Marysville Police Officer Mark F. said his daughter's friend "has been molested by her father" improper comments on the credibility of witnesses and Mr. Blackmon's guilt?

5. Did the trial court err in denying a mistrial and a new trial where the testimony of the complaining witness that she had been in trial before violated a motion in limine and was unfairly prejudicial to Mr. Blackmon?

6. Did the prosecutor's misconduct in referring to a "trial" transcript shortly after the reference to a trial by the complaining witness deny Mr. Blackmon a fair trial?

7. Did the prosecutor commit misconduct by telling the jurors that they had to believe either that the state's witnesses were lying or that Mr. Blackmon was guilty?

8. Did cumulative trial error deny Mr. Blackmon a fair trial?

9. Did the trial court err in imposing an exceptional sentence where no notice was provided to Mr. Blackmon that the state would seek

an exceptional sentence or the aggravating factors it would rely on as is statutorily and constitutionally required?

C. STATEMENT OF THE CASE

1. Procedural history

The Snohomish County Prosecutor's Office charged John Blackmon, by fifth amended information, with two counts of child molestation in the second degree, one count of rape of a child in the third degree and two counts of child molestation in the third degree. CP 263-264. The state did not provide notice that it would be seeking an exceptional sentence in the information or by way of any other pleadings or oral notice. CP 263-264, 296-298.

The first two trials on the charges resulted in mistrials after the juries were unable to reach unanimous verdicts. RP(verdicts) 1; CP 288 The jury deliberated for all or part of five days before convicting Mr. Blackmon at the third trial before the Honorable Michael Downes. RP(verdicts) 7; CP 142-146. During the course of deliberations, the jury had inquired:

> 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]

CRP 173.

[1] The facts and the issues in this case should be viewed in light of the fact that two juries were unable to reach a verdict and a third obviously had difficulty as well.

On September 9, 2013, Judge Downes imposed judgment and sentence sentencing Mr. Blackmon to an exceptional sentence structured by making Count V run consecutively to the other four counts. CP 3-18. The following day, the court entered an amended judgment and sentence which included Findings of Fact and Conclusions of Law for Exceptional Sentence:

> Substantial and compelling reasons exist to impose an exceptional sentence in this case because the imposition of a standard range sentence on all counts would result in no punishment being imposedfor one of them. A failure to impose punishment on each count in this case would be unjust. An exceptional sentence is imposed pursuant to RCW 9.94A.535(2)(c). Count V shall be served consecutive to Counts I, II, II and IV.

CP 20-36. At sentencing, the prosecutor did not ask for an exceptional sentence and expressly declined to ask for one when invited to do so by Judge Downes. RP (motions and sentencing) 21-24.

Counsel for Mr. Blackmon filed a timely Notice of Appeal which erroneously appealed from the September 9, 2013 judgment and sentence. CP 2-19. On February 8, 2014, This Court granted counsel's Motion for Extension of Time to File Notice of Appeal. The state filed a timely Notice of Cross-Appeal. CP 1.

2. Trial testimony

John and Jennifer Blackmon lived in a three-bedroom ranch-style house in Marysville, Washington for most of the twenty years of their

marriage. RP 61, 75. Their three children, I.B, who was eighteen at the time of trial, Z.B, who was fifteen, and B.B, who was thirteen, were born in Marysville and grew up in that house. RP 59, 262. Unfortunately, a pipe burst in the house in August 2008 and it flooded and significantly damaged the house. RP 75, 285-286. John Blackmon undertook the repairs, but the house remained in disarray even at the time of trial with the carpets ripped out, walls removed, furniture and belongings boxed up and only the bathroom connected to the master bedroom usable. RP 75-79, 287-289, 625. Because of the damage to the living room and the boxes there, the family used the bed in the master bedroom to sit on to watch movies and sometimes even ate dinner on the bed. RP 289, 684. The house was so chaotic and embarrassing to I.B. that she said at one point she felt like killing herself. RP 78.

John Blackmon worked at Bangor, Costco, Boeing and for twelve years at Microsoft before becoming "Mr. Mom" and staying home to care for the children and work on repairing the house. RP 62. Jennifer Blackmon drove a bus for Community Transit; she worked a split shift during the week which took her away from home in the early morning hours when the children were getting ready for school and then later in the afternoon until early evening. RP 81. On weekends she worked a shift that including evening hours.

In the early years, the Blackmons lived a happy, if sometimes chaotic life with lots of affection and hugging. RP 106. Around the time that Jennifer Blackmon started working for Community Transit, however, the Blackmons began having marital difficulties. RP 160. Jennifer, in particular, talked to her children about this over the years, about her and John not having sex and about her fears that John was having an affair. RP 71-72, 219, 221, 226. John talked about these things as well. RP 279-280. Jennifer was suspicious when John made trips to Home Depot and even suspicious that he was having an affair with his therapist. RP 111, 115, 526, 708, 711. She showed the children when she found a dating website on the computer that he had visited. RP 179. In fact, the Blackmons argued so vehemently that B.B. found it difficult to sleep; and, for whatever reason, I.B. suffered from severe migraine headaches. RP 107, 698-700.

The family did continue to be affectionate at times, and give each other back and foot rubs. RP 106, 300, 630. Rubbing I.B.'s shoulders, head and back helped relieve her headaches; Jennifer and John both gave these rubs, but mostly John did. RP 107. Sometimes this took place in I.B.'s bedroom. RP 302.

Added to these difficulties, I.B. was in high school and chaffing against the rules her father made for her. Both John and Jennifer

Blackmon had played basketball in high school and I.B. had a special talent and love of that game too. RP 70. I.B. and John had been close when I.B. was growing up, in large part because of their shared love of sports and basketball. RP 66, 68, 104, 271. As I.B. grew older, however, she wanted more freedom to do things with friends and wear make-up and wanted her father to interfere less with basketball; they fought often. RP 25, 105; RP 184-196, 272, 274-275. There was a particular tension because Mr. Blackmon wanted I.B. to wear knee pads and she disliked knee pads and was unwilling to wear them. RP 147. I.B. thought the knee pads restricted her ability to play and made her feel awkward because no one else wore them. RP 429-430.

One particular incident escalated the tension between I.B. and her father. Mr. Blackmon had taken I.B., her best friend M.F. and Z.B. to a football game in Arlington, in fall 2011. RP 5, 7. Mr. Blackmon had gone to get hot chocolate for Z.B. and saw I.B. and M.F. in line at the concession stand surrounded by some boys they knew from school. RP 10, 382, 874-875. One of the boys had taken M.F.s's money and was teasing her about it; another of the other boys was doing something which M.F. described as putting his arms under hers while standing behind her and pretending his arms were hers. RP 10, 12, 27-29, Mr. Blackmon felt this boy and another were "gyrating" in a way that was totally

inappropriate. RP 12, 29, 383. After seeing this, Mr. Blackmon determined that these three boys and M.F. would be on I.B's "no-contact list." RP 14, 383-385. I.B. had a crush on one of the boys she was forbidden to see. RP 384.

When I.B. continued to text and phone people on her no-contact list, Mr. Blackmon took away other privileges and began threatening to make her stop playing basketball. RP 385-387, 391-392, 507, 516-517.

Shortly after high school resumed after winter break, around January 3, 2011, I.B. told M.F. that her father was being "a butt" and had done something really awful. RP 16-17, 394. Under intense questioning from M.F., I.B. said that he had touched her inappropriately. RP 18-19, 394-395, 397. M.F., whose father was a police officer and whose mother worked at the 911 call center, became very concerned and insisted that someone be told. RP 4, 8. I.B. begged her not to tell anyone, and M.F. reluctantly agreed to wait two days before she told. RP 21. M.F. did tell her mother Brenda F. that afternoon after school, however. RP 22, 38. Mrs. F. agreed to wait for a short time before telling her husband, who was a mandatory reporter. RP 41, 52. She talked to I.B. and Jennifer Blackmon and gave them an opportunity to do something before reporting the allegations to her husband. RP 41, 52, 89,

I.B. told her mother too, but nothing further was done. RP 89-84,

87. I.B. felt that perhaps her mother would be in trouble if she told. RP_. Her mother said she was afraid she wouldn't be believed and would never see her children again. RP 87.

In the meantime, Mr. Blackmon had become angrier and more concerned that I.B. was not only breaking the rules, but also lying about doing so. RP 404-406. He had looked at her T-Mobile bill and could see that she was receiving calls from boys she was not supposed to be having contact with. RP 89, 409. He was also concerned that I.B was eating lunch in one of her teacher's rooms – Mr. Kelly. RP 135, 407-408, 410. On January 6, 2011, he picked I.B. up from school and called his wife and asked her to pick up the younger children and take them somewhere so they would not have to witness the scene of I.B. being disciplined and her disobedience. RP 90-91; 411.

When I.B. and Mr. Blackmon got home, he went into the living room to print a copy of the T-Mobile bill and I.B. ran to a neighbor's house claiming that her father was going to kill her. RP 94-95, 416. She said that he was very angry and aggressive, took off his jacket and drank a lot of water; there was a new rope on the bed in his bedroom.[2] RP 190-193, 412-415. One of the neighbors called the police. RP 93-95, 732. An

[2] Z.B. explained that the rope was something he and his father planned to tie knots in and put down a drain pipe so that it could be pulled back and forth if the drain clogged. RP 651.

officer came and interviewed I.B. and her mother, but neither said anything about sexual abuse. RP 108, 735-740, 741. The officer told I.B. that parents have a right to discipline their children; she felt that this officer was not helpful to her. RP 418.

Mr. Blackmon agreed to stay away from home for twenty-four hours to allow things to calm down. RP 109; 741. I.B. urged her mother to get a divorce, as she had urged her in the past, and to not let him return, but Jennifer Blackmon agreed that he could return after the twenty-four hours. RP 112-113, 423. When he returned, he gave I.B. a list of rules she had to follow and had Jennifer confirm with I.B. that she understood the rules. RP 114, 119-130, 424-428, 432. I.B. also responded defiantly in writing. RP 149, 436-440. She said she had one of her points be that he was not to touch her anymore, but removed this at the request of her mother. RP 150-151, 442.

The following day, M.F. told her father and her father reported the allegations to the Marysville police. RP 839. Detective Cori Shackleton interviewed M.F. and then interviewed I.B. at school. RP 442-445, 840-844. A short time later, Detective Shackleton went to the house in Marysville and arrested Mr. Blackmon. RP 155, 157, 852. I.B. agreed that she had done some research on the statutes and hot-lines and other resources because she knew that M.F. would tell her father and her father

would report the allegations. RP 445-446, 548. I.B. went with an advocate for a medical checkup, but declined to be examined. RP 457-462.

After Mr. Blackmon was arrested and removed from the house, everything got better for I.B.: she moved away from the house to live with her mother and siblings, she didn't have to listen to her parents quarrel anymore and she did not have to follow a set of rules. RP 33-34. She testified at trial that she had been manipulated, that she no longer cared about her father, that she neither thought about him nor missed him and that she now played better basketball. RP 464.

Detective Shackleton then interviewed Jennifer Blackmon and both Z.B. and B.B. I.B. asked to talk to Detective Shackleton further five days later and provided a written statement. RP 456. Over the next two years I.B. talked many, many times to Det. Shackleton, the trial prosecutor and a therapist, who helped I.B. prepare to testify. RP 297, 563-570.

I.B. described the first incident of touching as taking place in the living room before the "flood," after her mom and younger siblings had gone to bed.[3] RP 303-306. According to I.B., her father first rubbed her

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[3] I.B. was keeping journals throughout the time she alleged sexual abuse, but she did not mention any sexual activity in the journals. RP 400-401. Further, when Detective Shackleton asked her about the first time, I.B. started talking about the condition of the house. RP 550. She also told Shackleton that she could not remember the second time because of how often it took place. RP 552.

vagina over her underwear with his hands down the front of her shorts. RP 307. He then had her go remove her underwear and return with just her shorts on. RP 308-309. She was unable to provide details about the second time beyond saying that it happened again in the next two weeks and a lot before she was fourteen years old, sometimes three or four times a week. RP 311, 329. She said that she had been shaving her pubic hair and her father asked her to continue doing this; later he asked her to let it grow so he could trim it, but she said no. RP 323-325. I.B. had not said anything about this until several months earlier after the last hearing; she revealed this to the prosecutor, her advocate, her therapist and her mother and reiterated it in a defense interview. RP 326-327; CP 209-217. Her mother then said Mr. Blackmon trimmed her public hair. RP 163; CP 260.

I.B. described Mr. Blackmon touching her with his mouth on her chest and vagina. RP 333-334. During the time she was from fourteen to sixteen years old, he would lie behind her and put his penis between her butt cheeks and rub. RP 335-337. This happened more than once and he used a condom although his penis was never inside her body. RP 337. He placed the condoms in a shoe box and said he would burn them later. RP 338. I.B. also described a time when her period was late and she worried that she might be pregnant. RP 341. She told her father and, according to I.B., they used an already-used pregnancy test stick of her

mother's and she "peed on it" four or five times.[4] RP 342-347, 390. When the pregnancy test was analyzed, however, the Washington State Patrol Crime Lab was unable to find sufficient DNA material to analyze. RP 762, 765-766. Similarly, the Lab was unable to find any semen on I.B.'s sheets, mattress pad or blankets, even though I.V. reported that touching had taken place there. RP 366, 751, 755, 758, 777.

I.B. described a time when she said she rubbed Mr. Blackmon's penis while he was lying on his bed; this was the only time, she said, that anything came out of his penis. RP 348-349, 354-355. She said that Mr. Blackmon touched her when her mother was in bed too, asleep. RP 359. The touching also occurred when they said they were watching movies and locked the younger children out and covered the crack around the door frame which was there because molding had been removed. RP 361-364. She refused to put her mouth on his penis, RP 378, and declined to watch porn when she saw some on the computer when she caught him off-guard watching. RP 369-374.

I.B. said that shortly after school began and basketball practice started in 2011, she had decided she did not want to have sexual contact with her father any more. RP 379-381.

During the course of the many interviews other details emerged.

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[4] Initially I.B. said that they used the sealed, unused test. RP 477, 480.

Jennifer Blackmon described watching pornography with her husband and him trimming her public hair with his trimmer.[5] RP 160, 162 -163. She also said that used the pill for birth control, but that eight months before the allegations, Mr. Blackmon asked her to purchase condoms in case they wanted to start being intimate again. RP 165. She purchased them, but they were never used. RP 166. According to Jennifer, when she checked later, some were missing. RP 166. She said that when she confronted Mr. Blackmon, he said he used them to "pleasure" himself and to avoid a mess. RP 167. She claimed that when she checked later, more condoms were missing. RP 167. Jennifer also reported that she had purchased a pregnancy test at some earlier time. RP 237, 239. Neither in her first statement to Detective Shackleton nor in subsequent contacts, however, had she mentioned condoms, pregnancy test or the trimmer. RP 242. She first mentioned these things around the second time she testified in the case. RP 243.

B.B. and Z.B. also reported that I.B. and their father watched movies in the bedroom with the door shut and locked. RP 174-175, 631-635; 686-687. They were told that this was because the movies were inappropriate for them. RP 174-177, 638. They also reported that the

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[5] Jennifer Blackmon admitted on cross examination that she had made false statements under penalty of perjury in her declarations filed in the divorce proceedings. RP 217-218.

crack around the door frame after the molding was removed was covered so they could not see in while I.B. and her father watched these movies. RP 181-182. Z.B. was clear, however, that they had done many activities together with his father, and that he loved and missed his father; he was also clear that he had never seen anything inappropriate between his father and I.B. RP 623, 642-643, 664-665. Z.B. had told Detective Shackleton that the movies took place every once in a while, twice or once a month. RP 663. B.B. also said that one time she was in the upper bunk and felt the bed below shake; in a couple of minutes her father got up and left the room. RP 694. She had, however, said in her initial statement to Detective Shackleton that her father was never in their bedroom except to yell at I.B. and never to sleep there; B.B. said nothing about the bed shaking. RP 717-718. In her prior testimony she said the bed was shaking for an hour. RP 716.

Jennifer Blackmon had testified earlier that when she questioned I.B. when Z.B. and B.B. told her about the movies she watched with her father, I.B. had said it was no big deal. RP 215-216. At some point a portion of the wall between the kitchen and the master bedroom was removed and there was no privacy in the bedroom after that time. RP 185. At trial, I.B. testified that the wall came down in October 2011. RP 299. She had testified earlier in a prior hearing that the wall was down for the

whole four years. RP 495-496.

Over defense objection, the trial court permitted the state to introduce portions of Mr. Blackmon's trial testimony from the first trial while limiting the defense's ability to introduce the portions which it wished to introduce.[6] RP 812-813, 817, 821. The defense had asked that the testimony either not be admitted or be admitted in its entirety. CP 182; RP(7/1/13) 6-7. The state introduced the testimony from him through Detective Shackleton. RP 871. She read Mr. Blackmon's statement that I.B. had not been a leader in the summer or fall of 2011 and was given a no-contact list as a result. RP 873. Mr. Blackmon had explained that this approach had helped Z.B. at an earlier time when he got into trouble. RP 873. He described the incident which gave rise to the list as the football game in which I.B. and M.F. were in a group of boys and one of the boys was "gyrating" behind M.F. and another was doing the same at her side. RP 874-875. I.B. was told that she could not socialize with M.F. or the three boys until she heard further. RP 878-879. Mr. Blackmon described the tension between him and I.B. as good, competitive tension from playing basketball together. RP 878.

Detective Shackleton read Mr. Blackmon's testimony that he

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[6] The defense had asked that either all of the testimony be admitted or none of it. CP 182,184-185; RP (7/1/13) 6-7. The trial court denied that request and limited the portions that the defense proposed should be admitted. RP 820, 822-823.

watched movies with I.B. which Z.B. and B.B. could not watch, and that they blocked the light around the door where the molding had been removed. RP 880-882. Mr. Blackmon explained that Z.B. tried very hard to watch the movies. RP 882-883.

Mr. Blackmon's testimony describing being upset to discover that I.B. was texting back and forth with people she was not supposed to be contacting was read. RP 886. He described making a list of rules and asking his wife to talk to I.B. and make sure that she understood them; he also described receiving the responding letter from I.B. RP 886-887. According to Mr. Blackmon in his testimony, the rules and controversy over knee pads was 99% of the issue. RP 888. He explained that I.B. had been injured and unable to play for two or three weeks at an earlier time and he did not want her to suffer another injury to her knees. RP 888. He expressed concern that the girls on the team hugged their coaches and one coach had already been accused of being inappropriate with a student; he did not feel that intimate hugging was appropriate between players and coaches. RP 889. With regard to his asking his wife to keep the younger children away from home on January 6, 2011, Mr. Blackmon explained that he did not want Z.B. and B.B. to be exposed to I.B.'s disobedience. RP 891. He intended to talk to I.B. about her T-Mobile usage and then discipline her. RP 891. He agreed, in the selected part of his testimony,

with Z.B.'s explanation that the rope was for clearing a clogged pipe. RP 892.

Mr. Blackmon was quoted in his description of Jennifer's turning her back on him and explanation that she bought the condoms to use for anal sex, but they never used them. RP 896-897, 900. He described I.B.'s migraine headaches and her wish when she had them to have her head and shoulders rubbed. RP 900-901. He said that when Jennifer had said she was going to leave during the last three or four years, he had said she should go to her mother's and leave him and the kids. RP 901.

Mr. Blackmon said, in his former testimony, that he had started a new life after January 11, 2011, and agreed that he had been an "asshole" and overbearing before that time. RP 904-905. He was trying to move forward. RP 904.

The defense was not allowed to introduce the portion of the transcript where Mr. Blackmon denied committing the offenses with which he was charged, and other parts of the testimony which the defense sought to introduce under ER 106. RP 820, 822-823. Specifically, the trial court excluded the portion of Mr. Blackmon's testimony where he indicated his nervousness in testifying and his general introductory testimony that he had "thirteen plus" years of education, that he had been in the military for six years. RP 819. SuppCP 128, transcript of prior

testimony at 1-2. The court excluded testimony of how he met his wife Jennifer, RP 819, SuppCP 128 transcript at 3-4; and about his talking to both officers on the night I.B. ran away, how he volunteered to the be one who left the house that night and how he waited until his wife contacted him before he returned. RP 820; SuppCP 128 transcript at 34-36. The court excluded Mr. Blackmon's testimony that he did not know what I.B. was concerned about when she went to the neighbors until after speaking with the officers. RP 820; SuppCP 128 transcript at 36. The court excluded Mr. Blackmon's prior testimony that he felt anal sex was inappropriate. RP 822; SuppCP 128 transcript at 40. Most importantly, the court excluded Mr. Blackmon's testimony that he had denied the allegations since January 11, the date of his arrest, and that he didn't commit the crimes, and that he did not treat I.B. differently that the others; he explained that when I.B. got more expensive things such as a laptop, it was because she was older and needed them. RP 822; SuppCP 128 transcript at 45-46.

3. Closing argument

In the initial closing argument, the state emphasized in detail Mr. Blackmon's testimony introduced through Detective Shackleton from the first trial and argued that, in these statements, Mr. Blackmon corroborated the circumstantial evidence of his guilt: His description of the decline in

his relationship with his wife, his acknowledgement that his wife's purchased condoms, his acknowledgment that the condoms were never used, his claim that he used the condoms to masturbate, his acknowledgment that he went to I.B.'s bedroom to rub her head for migraines while B.B. slept, his request that the younger children not be brought home and other details of the January 6, 2012 incident. RP 984-988.

In rebuttal closing argument, the prosecutor told the jury:

> 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.

4. Improper comments and testimony

During the direct examination of I.B.'s best friend M.F., the prosecutor asked her, "I'm going to ask you some questions about that conversation or that interaction with I.B. But before I do, I want to ask you this: Why is it that you are so upset now?" M.F. answered, "It's really hard to talk about what happened and to see him. It's really hard." RP 16.

Officer David Allen described I.B. as a "very scared teenage girl," and described her posture as "something we commonly associate with a defensive posture." RP 736-737.

Detective Cori Shackleton testified that she got a call from Marysville Police Officer Mark F. that his daughter's friend "has been molested by her father." RP 839.

5. Reference to prior trial

When asked about a prior statement that she had testified earlier for two weeks, I.B. responded, "I means that I was in trial or, like, in a hearing like this one for two weeks." RP 582-583. Defense counsel moved for a mistrial because this violated a motion in limine and prejudiced the defense. RP 591. The trial court denied the motion, finding the comment "innocuous," even though it had been agreed not to mention the prior trial. RP 592, 595.

Almost immediately, when the jury was brought back into the courtroom, the prosecutor referred to an exhibit, "That's a trial transcript – excuse me – a transcript of a hearing that occurred in October of 2012." RP 587.

6. Motion for new trial or arrest of judgment

Prior to sentencing, the defense moved for an arrest of judgment or new trial on four grounds: (1) that Mr. Blackmon was not given an

opportunity to testify in his own behalf; (2) that the trial court erred in denying a defense motion for mistrial after I.B. referred to a former "trial": (3) that the state was permitted to introduce portions of Mr. Blackmon's prior testimony without allowing it to be admitted in its entirety; and (4) that cumulative error denied Mr. Blackmon a fair trial. CP 82-123, 126-127, 128-129. The trial court denied the motions on each claim. RP(sentencing) 5-12. While the court agreed that there was a motion in limine directing that no witness mention that there was a prior trial, defense counsel had not moved for a mistrial until a break after the use of the word "trial," and that the prejudice was minimal in light of the number of times in which "prior testimony" was mentioned. RP(sentencing) 9-10. The trial court also declined to revisit its earlier ruling on the admissibility of Mr. Blackmon's testimony from the first trial. RP 11.

D. ARGUMENT

1. 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; THIS VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, ARTICLE 1 SECTIONS 3, 9 AND 22 AND ER 106.

The trial court improperly allowed the state to introduce portions of Mr. Blackmon's testimony from the first trial while limiting his right to

have his remaining testimony presented as well, particularly the exculpatory portion of his testimony where he denied committing the crimes with which he was charged. This violated long-standing authority that a party may not present evidence on a matter and then prevent the other side from presenting rebutting evidence on the same matter and the rule that "fairness" under ER 106 generally requires presentation of the entire recorded statement if any portion of it is admitted. Because it was Mr. Blackmon's prior testimony at issue, the limitation on his right to introduce portions of it helpful to the defense implicated his state and federal constitutional rights to testify or not to testify at trial and to present evidence on his own behalf. This violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as under Article 1, sections 3, 9, and 22 of the Washington Constitution.

The court in basing its ruling, in large measure, on the fact that Mr. Blackmon could have taken the stand to testify if he chose to, overlooked the fact that ER 106 addresses both the unfair prejudice of taking statements out of context and the unfairness of delaying the opportunity to correct any false impression given by the presentation of only a portion of the whole. RP 785, 793. The 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 defendant 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). For this reason, the trial court's error was constitutional.

One of the most basic and long-standing rules of the conduct of trials is that a party may examine a witness and present evidence on a subject introduced by the opposing party. In State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), the court said:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after only part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

ER 106 incorporates the Gefeller rule with regard to the introduction of "a writing or recorded statement." It provides that where a part of a writing or recorded statement is introduced "an adverse party may require the party at that time to introduce any other part . . . which ought in fairness to be considered contemporaneously with it."

The Notes of the Federal Rules of Evidence Advisory Committee to FRE 106 (the same as the Washington rule) indicate that this rule addresses two issues: (1) "the misleading impression created by taking

matters out of context," and (2) "the inadequacy of repair work when delayed to a point later in the trial." Robert H. Arsonson, The Law of Evidence in Washington (2nd ed. 1995), at 106-1.

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).

Where, as here, the recorded statement is the prior testimony of the defendant, constitutional rights under the state and federal constitution are implicated. In United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981), as in this case, the prosecutor was allowed to use selected portions of the defendant's testimony against him at a second trial. The appellant court noted that "[i]f the Government is not required to submit all of the relevant portions of prior testimony which further explains selected parts which the Government has offered, the precluded parts may never be admitted." Walker, 652 F.2d at 713-714. The court held that this situation forces the defendant "to take the stand in order to introduce the omitted exculpatory portions of the confession which is a denial of his right against self-incrimination." Id.; United States v. Marin, 669 F.2d 73, 85 n. 6 (2nd Cir. 1982) (adopting the same conclusion).

The court in United States v. Glover, 101 F.3d 1183, 1192 (7th Cir.

1996), rev'd on other grounds, 531 U.S. 198 (2001):

> [where] the defendant is confronted with a dilemma of allowing the jury to hear an incomplete picture of the evidence, or of waiving his Fifth Amendment privilege not to testify in order to correct the mistaken impression created by the incomplete evidence.

For that reason, assessing "fairness" under ER 106 requires "sensitive[ity] to the defendant's right to present evidence on his own behalf, as well as his right not to testify." Id. (citing United States v. Sutton, 801 F.2d 1346, 1369-70 (D.C.Cir. 1986) (because the defendant had a constitutional right not to testify, excluded portions of recorded conversations were necessary to rebut the government's case).

Here, the court denied the defense motion to either exclude the evidence or introduce it in its entirety. RP 818. Although the court did admit some portions requested by the defense, the court excluded the portion in which Mr. Blackmon denied committing the crime and other requested portions. RP 821-823. Since the prosecutor relied on Mr. Blackmon's statements in closing, and argued that Mr. Blackmon corroborated the commission of the crime, RP 984-988, the omission of the portion where he denied wrongdoing was particularly prejudicial. State v. Dorrell, 758 F.2d 434-435 (9th Cir. 1985) (portions of a confession may be excluded if the exclusion neither "distorts the meaning of the statement, or excludes information substantially exculpatory of the

declarant," citing United States v. Kaminski, 692 F.2d 505, 522 (8th Cir, 1982)). The court excluded the portion of the testimony where Mr. Blackmon testified that he did not approve anal sex, which was relevant to an admitted portion that his wife purchased the condoms for anal sex. RP 896-897, 900. The court allowed the state to introduce evidence that Mr. Blackmon admitted that he was "an asshole" and overbearing, but excluded testimony that would have humanized him: how he met his wife, his six years of military service, his volunteering to leave the house rather than put his family to the burden of leaving, and his alleged special treatment of I.B. as being related to her need for a laptop and other things younger children don't need. See SuppCP 128. The trial court unfairly limited Mr. Blackmon under the rationale for ER 106, and unconstitutionally placed him in the unfair position of having to choose between exercising his constitutional right not to testify and his constitutional right to appear, defend and present evidence at trial. His conviction should be reversed for this reason.

2. COMMENTS BY STATE'S WITNESSES ON MR. BLACKMON'S GUILT DENIED HIM HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE 1, SECTIONS 21 AND 22 TO A JURY TRIAL BASED ON THE EVIDENCE AGAINST HIM.

Two state's witnesses, Officer David Allen and Detective Cori

Shackleton, essentially gave their opinions that Mr. Blackmon was guilty of crimes against I.B.. Officer Allen went beyond describing her demeanor and offered his opinion that when he contacted her after she ran away, that she was "very scared" and that the way she was seated was something police "associate" with a defensive posture. RP 736-737.

Detective Shackleton repeated that Marysville Police Officer Mark F. told her his daughter's friend "has been molested by her father," a direct and specific comment on guilt. RP 839. Since such comments violate a defendant's right to a jury trial based on the evidence against him, these comments were constitutional error which can be raised for the first time on appeal.

It is well-settled law that a witness may not express an opinion on another witness's credibility nor give an opinion as to the guilt or innocence of the accused. ER 608(a); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Sutherby, 144 Wn.2d 755, 759, 30 P.3d 1278 (2001); State v. Jones, 117 Wn.2d 89, 91, 68 P.3d 1153 (2003), State v. O'Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 505 (2007). Such testimony invades the province of the jury and denies the accused his or her right to a jury trial. State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005); Sutherby. 144 Wn.2d at 617. This can

constitute a manifest constitutional error which can be raised for the first time on appeal even if not objected to at trial. Thach, at 312.

Here, Officer Allen's testimony went beyond a mere description of demeanor and suggested that police have a means of telling when someone has been forced to assume a defense posture. This necessarily implies that they have been attacked and are responding to an attack. Officer Shackleton's testimony was a direct report of an opinion, also by an officer, that Mr. Blackmon had molested his daughter, as charged at trial. This was a direct and unambiguous comment on guilt.

These comments, alone and when considered along with other improperly-admitted evidence should require reversal of Mr. Blackmon's convictions.

3. THE TRIAL COURT ERRED IN DENYING MR. BLACKMON'S MOTION FOR MISTRIAL AFTER I.B. VIOLATED A MOTION IN LIMINE EXCLUDING REFERENCES TO PRIOR TRIALS.

It was undisputed that the trial court properly granted a motion in limine excluding references to the fact that there were prior trials in the case. RP 592; RP(7/1/14) 26-27 ("trials won't be mentioned"). And even though there were many references to testimony from prior hearings and prior statements during trial, the parties were careful not to tell the jury that there were prior trials. Then when asked about an earlier statement in which she

said she had testified previously for two weeks, I.B. responded, "It means that I was in trial or, like, in a hearing like this one for two weeks." RP 582-583. Defense counsel moved for a mistrial because this violated a motion in limine and prejudiced the defense. RP 591. The trial court denied the motion, finding the comment "innocuous," even though it had been agreed that the witnesses would not mention the prior trial. RP 592, 595; RP(sentencing) 7-8.

The trial court erred; the testimony was improper and unfairly prejudicial. As the United States Supreme Court noted in Stewart v. United States, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961), 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 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).

4. THE PROSECUTOR'S MISCONDUCT IN ELICITING A COMMENT ON MR. BLACKMON'S RIGHT TO CONFRONTATION, IN REFERRING TO A DOCUMENT AS A "TRIAL TRANSCRIPT" AND IN IMPROPERLY TELLING THE JURY THAT THEY HAD TO DECIDE EITHER THAT THE STATE'S WITNESSES WERE LYING OR MR. BLACKMON WAS GUILTY DENIED HIM A FAIR TRIAL.

The prosecutor committed misconduct in three different regards.

First, he elicited testimony from M.F. that her difficulty in testifying was because she had to see Mr. Blackmon while doing so. RP 16. The prosecutor asked her, "I'm going to ask you some questions about that conversation or that interaction with I.B.. But before I do, I want to ask you this: Why is it that you are so upset now?" She answered, "It's really hard to talk about what happened and to see him. It's really hard." RP 16. This commented on Mr. Blackmon's right to confront witnesses and appealed to the passion and prejudices of the jurors.

Second the prosecutor referred 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. This underlined for the jury the fact that there had been a prior trial. The prosecutor's "excuse me. . . " did not eliminate that inference or prejudice. RP 587.

Third, the prosecutor improperly told the jurors in rebuttal closing argument that their choice was to find the state's witnesses were lying or the defendant guilty. This is an improper statement of the law which denies the accused the presumption of innocence to which he is entitled.

> 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.

When a prosecutor fails to act in the interest of justice, a prosecutor commits misconduct. This denies the accused a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1935) (the remarks of the prosecutor are reversible error if they impermissibly prejudice the defendant).

Where there is a "substantial likelihood" that a prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Moreover, multiple incidents of a prosecutor's misconduct that, when combined, materially affect the verdict, deny the accused a fair trial and require a new trial. State v. Case, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); State v. Henderson, 100 Wn, App. 794, 805, 998 P.2d 907 (2000).

a. Testimony about right of confrontation

Article 1, section 22 explicitly guarantees persons accused of crimes exercise of their right to a fair trial. These rights are guaranteed by the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution as well. Asking the jury to find a defendant guilty for exercise of these trial rights is

constitutional error.

> The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove it allegations while respecting the defendant's individual rights.

Mitchell v. United States, 526 U.S. 314, 330, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (applying the rule against negative inference from exercise of constitutional rights to sentencing); 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). A comment is improper comment where it "naturally and necessarily" causes the jury to focus on the defendant's exercise of a constitutional right. State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Comments "naturally and necessarily" focus on the

exercise of a constitutional right "when they either explicitly or implicitly direct the jury's attention to the defendant's acts which are the result" of the exercise of the right. Id.

Deliberately eliciting that M.F. was emotional and having a difficult time testifying because she had to be in the presence of Mr. Blackmon, improperly asked the jurors to convict based on the fact that Mr. Blackmon has a constitutional right under Article 1, section 22 to confront the witnesses against him face-to-face. The testimony focused the jury's attention of Mr. Blackmon's presence in the court room where he confronted M.F. This constitutional error was not harmless beyond a reasonable doubt, Easter, supra, and should result in a new trial from Mr. Blackmon.

b. Reference to trial transcripts

For all of the reason cited about why the reference to the prior trial was error, the prosecutor's subsequent reference to a trial transcript contributed to that prejudice and constituted misconduct.

c. Improper closing argument

Here the prosecutor told jurors that they had two options: to believe that the state's witnesses were "fabricating" their testimony as part of a giant conspiracy or to believe Mr. Blackmon was guilty. As a matter of long-established law, this is misconduct and reversible error even if not

objected to at trial.

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (citing State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (citing In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)), Fifth and Fourteenth Amendments. And a prosecutor commits misconduct by arguing to the jury that in order to convict the defendant, the jury would have to find that the state's witnesses were lying. 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. at 213-214.

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. Belgarde, supra.

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

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

The errors at trial cumulatively as well as individually denied Mr. Blackmon a fair trial and should require reversal of his convictions. The case was very close. Two out of three juries were unable to reach a verdict and the third jury deliberated for almost five days. And that jury initially sent inquiries from which one could infer that they were close to being able to reach a verdict on some counts. Under these circumstances the reference to a prior trial, the opinion evidence as to guilt, the comment on the right to confrontation and the improper closing argument cumulatively denied Mr. Blackmon a fair trial.

The combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

The cumulative error in this case should require reversal of Mr. Blackmon's convictions.

6. THE TRIAL COURT ERRED IN IMPOSING AN EXECEPTIONAL SENTENCE WHERE NO NOTICE WAS PROVIDED PRIOR TO TRIAL THAT THE STATE WAS SEEKING AN EXCEPTIONAL SENTENCE AND BECAUSE THE COURT'S REASON FOR IMPOSING AN EXCEPTIONAL SENTENCE WAS ERRONEOUS.

Although Mr. Blackmon had no notice that the state intended to seek an exceptional sentence and the state expressly declined to recommend an exceptional sentence, the trial court nevertheless imposed one. CP 20-36, 263-264, 296-298; RP (motions and sentencing) 21-24. The court structured the exceptional sentence by imposing Count V (child molestation in the third degree) to run consecutively to the other four counts; this added 60 months to Mr. Blackmon's sentence. CP 20-36.

This violated the Sentencing Reform Act and Mr. Blackmon's state

and federal constitutional rights to due process of law. RCW 9.94A.527 (1) requires that the state give notice, "prior to trial or entry of a guilty plea" that it is seeking an exceptional sentence.[7] RCW 9.94A.535 provides that "a departure from the standards . . . governing whether sentences are to be served concurrently or consecutively is an exceptional sentence."

Further, the Supreme Court held in State v. Siers, 174 Wn.2d 269, 277, 274 P.3d 358 (2012), that while aggravating factors are not functional equivalents of elements which must be charged in the information, due process requires that notice of the aggravating factors be given prior to trial. See also State v. Shafer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993) (the defendant must receive notice prior to trial of aggravating factors).

Because there was no notice prior to trial that the state, or the court, would be seeking an exceptional sentence and no notice of the aggravating factors which would form the basis of the exceptional sentence, Mr. Blackmon's exceptional sentence should be reversed and remanded.

Moreover, two recent decisions by the United States Supreme

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[7] RCW 9.94A.537(1) provides that "At any time prior 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.

Court dictate that aggravating factors which increase the statutory minimum or maximum are elements of the crime which must be submitted to a jury. Alleyne v. United States, 570 U.S. ___, 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013); Burrage v. United States, No. 12-7515 (filed January 27, 2014). Here the sentence of 176 months exceeded the statutory maximums for any of the crimes charged. CP 20-23. Moreover, these factors were not submitted to the jury.

Under the statute and Washington constitutional law the sentence was illegal. It was also illegal as a matter of federal constitutional law as recently determined by the United States Supreme Court.

E. 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 20th day of March, 2014.

Respectfully submitted,

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