70291-2

70291-2

NO. 70291-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HITT,

Appellant.

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Courts

Constitutional Provisions

Statutes

Rules

Other Authorities

A. SUMMARY OF ARGUMENT

Robert Hitt knocked repeatedly on the front door of a home looking for money for a taxi ride home and beer. When no one answered, he presumed no one was home and entered through a side window. He was surprised to come across multiple residents inside the home. He took their cell phones to prevent them from calling the police and intended to rob them. The police arrived after he had gathered six residents in one room. While he may be guilty of robbery and burglary, he should not have been found guilty of five counts of kidnapping and two special allegations of sexual motivation. The latter allegations were supported primarily by improperly admitted propensity evidence. The convictions and lifetime sentence should be reversed on these and other grounds.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by admitting evidence of a prior offense as evidence of a common scheme or plan in violation of Evidence Rule 404.

2. The trial court abused its discretion by concluding "That the evidence of the defendant's rape of JSN has a significant degree of similarity to the current allegations to be considered by the jury as evidence of a common scheme or plan." CP 424.

3. The trial court abused its discretion by concluding "The probative value of the evidence of the defendant's rape of JSN is exceptionally strong because of all the commonalities between the events and the probative value is[1] substantially outweighed by the prejudicial effect. Whatever prejudice the defendant might experience is not unfair prejudice."

4. The trial court found, "There are a number of similarities between the two crimes which include..." and then listed purported similarities. This finding, including but not limited to the listed similarities, is not supported by substantial evidence. CP 423-24.

5. The trial court abused its discretion by failing to analyze whether the prior offense evidence was admissible for purposes of motive or intent yet allowed the jury to consider it for those purposes.

6. The trial court abused its discretion in entering conclusion three, to the extent it conflates common scheme or plan, motive and intent and is not supported by the court's findings of fact. CP 424.

7. The State failed to prove beyond a reasonable doubt each of the elements of kidnapping with regard to counts two, three, four, six and seven, violating Mr. Hitt's constitutional due process rights.

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[1] Counsel presumes the word "not" was inadvertently omitted from the court's conclusion. *Compare* CP 424-25 *with* RP 300-01.

8. The trial court's instruction defining the burden of proof misstated the law and diluted the State's burden of proof.

9. The cumulative effect of trial errors denied Mr. Hitt his constitutional right to a fair trial.

10. The imposition of a life without the possibility of parole sentence based upon the trial court's determination, by a preponderance of the evidence, that Mr. Hitt had a prior conviction that qualifies as prior offense under RCW 9.94A.030(37)(b)(ii) violated his right to due process and a jury determination of every element of the crime beyond a reasonable doubt.

11. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination, by a preponderance of the evidence, that Mr. Hitt had a prior conviction that qualifies as prior offense under RCW 9.94A.030(37)(b)(ii) violated his right to equal protection of the law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of a prior offense is presumptively inadmissible to show action in conformity. The State bears a substantial burden to demonstrate admissibility for another purpose, and the trial court must analyze the admissibility on the record, resolving doubtful cases in favor of exclusion. The evidence may be admitted to show the charged actions

were part of a common scheme or plan only if there are marked similarities between the incidents showing they were the result of design. Did the trial court abuse its discretion in admitting evidence of a prior conviction for a different crime against a different victim for purposes of common scheme or plan where the prior offense and current charge lacked marked similarities?

2. Did the trial court abuse its discretion by only analyzing admissibility of the prior offense evidence for the purpose of common scheme or plan but allowing the jury to consider it also for purposes of motive and intent?

3. As charged, the State was required to prove that in gathering the women Mr. Hitt had the specific intent to use them as a shield or hostage or to further robbery. Where there was no evidence of use as a hostage or shield for five of the counts and the general verdict does not assure the jury did not return a verdict based on this alternative means, should the court reverse those convictions?

4. The jury must decide whether the prosecution met its burden of proof, not search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." Did the court misstate and dilute the burden of proof

in violation of due process by focusing the jury on whether it believed the charge was true?

6. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Hitt denied a fundamentally fair trial?

7. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt of every fact that authorizes an increase in punishment. Did the sentencing court violate Mr. Hitt's constitutional rights by imposing a sentence of life without the possibility of parole based on the court's own finding, by a preponderance of the evidence, that Mr. Hitt had a prior conviction that qualifies as prior offense under RCW 9.94A.030(37)(b)(ii)?

8. Was Mr. Hitt's right to procedural due process under the state constitution violated when the court made a finding by a preponderance of the evidence that Mr. Hitt had a prior conviction that qualifies as prior offense under RCW 9.94A.030(37)(b)(ii)?

9. A statute implicating a fundamental liberty interest violates the Equal Protection Clause if it creates classifications that are not necessary to further a compelling government interest. The government has an interest in punishing repeat offenders more harshly than first-time

offenders. However, for some crimes, the existence of prior convictions used to enhance the sentence must be proved to a jury beyond a reasonable doubt, and for others—like those at issue in the Persistent Offender Accountability Act (POAA)—prior convictions used to enhance the sentence need only be proved to a judge by a preponderance of the evidence. Does the POAA violate the Equal Protection Clause?

D. STATEMENT OF THE CASE

Robert Hitt spent the evening of March 4, 2012 and into early the next morning drinking at a bar in north Seattle. Pretrial Exhibit 4 at 4:40-5:05, 5:28-51; Pretrial Exhibit 6, p.7-8. When he left the bar, he was approached by a woman who wanted to sell him methamphetamine. Exhibit 103 (#6636) at 35:35-30; *see* RP 431-32, 900.[2] He accepted, and used up the cash he had on him. Exhibit 103 (#6636) at 35:30-38. Impaired and in need of cab fare to return home, Mr. Hitt approached the darkened, first home he encountered. Exhibit 103 (#6636) at 22:29-39; Exhibit 103 (#6920) at 2:58-3:10; *see* RP 898, 900. He knocked on the front door repeatedly but no one answered. RP 604-05, 1102-03; Exhibit 103 (#6636) at 21:09-15, 22:09-31, 24:50-55, 25:59-26:05, 31:03-07, 33:34-40, 47:34-38. Thinking no one was inside, Mr. Hitt threw a rock

[2] The consecutively-paginated volumes of the trial verbatim report of proceedings are referred to as "RP." The remaining volumes, including the transcripts of voir dire, are referred to by the first date transcribed, for example "3/13/13 RP."

through a side window and entered. Exhibit 103 (#6636) at 21:09-15, 24:50-57, 47:26-30; Exhibit 103 (#6920) at 2:58-3:03.

As it turned out, eight young women lived in the residence and were sleeping when Mr. Hitt entered. *E.g.*, RP 393-94, 397, 485-93, 110-01. He panicked and a highly disorganized series of events ensued. *E.g.*, Exhibit 103 (#6636) at 25:05-40; RP 579-81, 727, 853 (Hitt acted erratically and did not seem to have planned what he was doing).

Mr. Hitt went upstairs and E.H. opened her bedroom door. RP 493-97. He panicked and ran into her open doorway. RP 497-98. While he paced, E.H. asked him what he was doing. RP 499, 501. Mr. Hitt told E.H. he was going to rob her and asked who else was in the house. RP 500. When she told him there were seven others, Mr. Hitt wrapped her wrists together with electrical tape and they went to E.C.'s room. RP 500-01, 505-07. Mr. Hitt poked his head in, did not see E.C., put a small knife to E.H.'s neck and led her around to the other rooms to collect the other roommates. RP 506-15, 527, 530, 692, 821-25. At the other rooms, E.H. told her roommates they were being robbed and to come out and/or Mr. Hitt told the women to come out of their rooms or he would hurt E.H. RP 508-15, 522-26, 530-31, 533-34, 691-94, 922-25, 1109. He gathered six women in K.B.'s upstairs bedroom and had them lay face down on the ground; he took two of the women's cell phones so they could not call the

police. RP 514-15, 522, 526, 528, 530, 534-35, 536-37, 615, 619, 665, 693, 695-97, 717-18, 826, 829-30, 930-31. He wrapped their hands behind their back with the remaining electrical tape, including E.H. who had been able to undo her initial wrapping. RP 537-42, 544-47, 624-26, 699-701. When Mr. Hitt ran out of electrical tape, he asked the women for more. RP 553-54. K.B. pointed him to a roll of duct tape in her drawer. RP 556. When he went to tape K.B.'s hands, her bulky, fleece top frustrated him and he told her to remove it, which she did at least to her waist, and Mr. Hitt finished taping her hands while she lay face down on the floor like the others. RP 561-66, 594-96, 652-53, 860-61, 942, 1039-40, 1119-20, 1129-31.[3] Two other roommates were overlooked in their rooms and were able to call the police. RP 399-404, 415, 534, 606, 610-11, 715, 792-93. Responding to the calls, the police ascended the stairs after Mr. Hitt completed binding K.B. RP 423-28, 568-69, 654-56. He came out of the room and cooperated with the police, saying "I'm just here to rob them." RP 423-28, 480-81, 878-79, 1046, 1057, 1094.

Mr. Hitt immediately informed the police that he had made a mistake, he had only intended to get cab and beer money, he never intended to hurt anyone, and he had no idea that any people—let alone eight—were inside when he entered. *E.g.*, Exhibit 103 (#6636) at 21:00-

[3] Mr. Hitt apparently thought it was just a sweater, but it turned out to be a one piece pajama outfit. RP 561-62, 564-66, 671, 966-67.

48:00; Exhibit 103 (#6920) at 2:58-3:20; RP 432. Nonetheless, the State charged Mr. Hitt with one count of first degree burglary (RCW 9A.52.020), six counts of first degree kidnapping premised on intent to hold as a hostage or shield and to facilitate robbery (for each woman taken into K.B.'s bedroom) (RCW 9A.40.020(1)(a)(b)), and two counts of first degree robbery (for each of the cell phones) (RCW 9A.56.200(1)(a)(i) & 9A.56.190). CP 1-7. The State added a special allegation of sexual motivation to the burglary charge and to the kidnapping charge pertaining to K.B. *Id.* (citing RCW 9.94A.835). The State further charged that each of the counts was committed while armed with a deadly weapon, the knife. *Id.* (citing RCW 9.94A.825 & RCW 9.94A.533(4)).[4]

The State could offer only very limited evidence to support the sexual motivation allegations: First, at one point, while following E.H. upstairs into K.B.'s room, Mr. Hitt touched her on her backside. RP 535-36, 591-92. Second, as discussed, while securing the women's wrists, K.B.'s bulky "onesie" was pulled down to her waist to assist with taping her wrists. RP 594-96, 838-40, 971. K.B. was facing away from Mr. Hitt and then was immediately told to return face down on the floor. RP 596-97, 860-61. Otherwise, Mr. Hitt did not treat K.B. any differently than the

[4] The State withdrew an initially-charged aggravator that the instant offenses occurred shortly after being released from confinement (RCW 9.94A.535(3)(t)). CP 1-7; RP 1369 *see* CP 96.

other women. RP 975-76. At trial, the women testified Mr. Hitt did not remove anyone else's clothing, make any sexual advances, say anything sexualized, act interested in the women, or do anything else overtly sexual. RP 578, 581, 591-92, 596-97, 669-76, 675, 729-30. In fact, he told the women he was only there to rob them. RP 582-83, 607, 623-24, 653, 671, 828-29, 1112, 1126.

Over Mr. Hitt's pretrial objection, the State was allowed to admit evidence of his only felony conviction to support the sexual motivation element. *E.g.*, CP 14-30, 49-60, 199, 422-25; RP 236-64, 276-306, 389-91.[5] Ten years earlier, Mr. Hitt pled guilty to the rape of a sandwich delivery worker he had summoned to his apartment. CP 69-75. The jury heard testimony from the victim, Jessica Nickerson Sewell, and was allowed to consider evidence of this prior crime to determine whether the instant offenses were sexually motivated. RP 1165, 1180-1208.[6]

The jury convicted Mr. Hitt of all nine counts, including the sexual motivation special allegations. CP 249-66, 409-21, 426. The sexual motivation verdicts counted as Mr. Hitt's second strike for a sex offense. CP 413; 4/19/13 RP 29; RCW 9.94A.030 (defining "persistent offender"). He was sentenced to life imprisonment on counts one and three. CP 413;

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[5] The trial court's written findings and conclusions admitting the evidence is attached as Appendix A.

[6] The limiting instruction, CP 199, is attached as Appendix B. The oral instruction given prior to Ms. Sewell's testimony, RP 1180, is attached as Appendix C.

4/19/13 RP 43. Additional facts are presented in the relevant argument sections below.

E. ARGUMENT

1. The admission of Mr. Hitt's prior conviction for rape to prove the State's sexual motivation special allegation where evidence of sexual motivation was ambiguous violated Evidence Rule 404(b) in several regards.

Propensity evidence has no place in a criminal trial. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule has no exceptions. *Id.* at 421. It is designed to prevent the State from suggesting once a rapist, always a rapist or once a criminal, always a criminal. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

Accordingly, the state bears a "substantial burden" to show admission of a prior offense is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). Evidence of a prior act may be admissible for purposes other than propensity, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). But, before a trial court admits evidence of prior misconduct under ER

404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *E.g.*, *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17.[7] Close cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P3.d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

An evidentiary error is reviewed for an abuse of discretion. *Gresham*, 173 Wn.2d at 419. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds, or if the court fails to adhere to the requirements of an evidentiary rule. *Thang*, 145 Wn.2d at 642; *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Mr. Hitt objected to the admission of the prior act, a rape against an entirely independent victim from over a decade before the current charges. *E.g.*, CP 14-30 (motion in limine); *see* RP 238-57, 285-90, 1271-72. The State argued it was relevant to the alleged sexual motivation

[7] Mr. Hitt did not contest that the prior act could be proved by a preponderance of the evidence. CP 19.

special verdict. *E.g.*, CP 49-60; RP 258-64, 276-82.[8] The trial court analyzed its admission as a common scheme or plan, but allowed the jury to consider it for purpose of common scheme or plan, motive or intent.[9]

a. The trial court abused its discretion in determining the prior rape showed evidence of a common scheme or plan where the two crimes lack marked similarities.

The prior rape and the instant breaking and entering do not bear such marked and significant similarities that they manifest a design by Mr. Hitt. A "common plan or scheme may be established by evidence that the [d]efendant committed markedly similar acts of misconduct against similar victims under similar circumstances." *Lough*, 125 Wn.2d at 852 (emphasis added). The State argued below that the prior misconduct was relevant to show Mr. Hitt had devised a plan that he used repeatedly to commit the prior misconduct and the instant offenses. *See, e.g.*, CP 49-60; RP 261-62, 264, 276-79; *Lough*, 125 Wn.2d at 855.[10] To admit the prior

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[8] "'Sexual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.535(3)(f). To prove the special allegation, the State must set forth "identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification." *State v. Halstien*, 122 Wn.2d 109, 120, 857 P.2d 270 (1993).

[9] *Compare* CP 422-25 (Findings of Fact and Conclusions of Law); RP 236-38 (material before the court), 292-306 (oral ruling), 389-91 (affirming ruling on Hitt's request to reconsider) *with* CP 199 (jury instruction "limits" consideration to common scheme or plan, or motive or intent); RP 1180 (before Sewell's testimony, court informs jury it may only be considered for determining whether State met burden on motive); RP 1238, 1254-60 (argument on limiting instruction).

[10] The other type of "common plan" that may be admissible is "where several crimes constitute constituent parts of a plan in which each crime is but a piece of the

act for this purpose, the State was required to prove Mr. Hitt's "previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design." *Lough*, 125 Wn.2d at 860 (emphasis added). Put otherwise, "the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." *Id.* Plainly then, random similarities are not enough. *DeVincentis*, 150 Wn.2d at 18.

Many of the trial court's findings as to similarities are unsubstantiated and the sum total of the court's findings do not add up to marked, significant similarities. The court found the events strikingly similar because "Neither . . . was well thought out and [both] appear to be impulsive." CP 423 (FF 5a). First, if true, the impulsivity logically proves the absence of a plan or scheme. Moreover, directly rebutting a finding of similarity, the 2001 rape shows planning not evidenced in the current offense: On the night of the incident in 2001, Mr. Hitt called and ordered a sandwich from Jessica Sewell's sandwich shop to be delivered

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larger plan. . . . A simple example would be a prior theft to acquire a tool or weapon to perpetrate a subsequently executed crime." *Lough*, 125 Wn.2d at 855.

to his apartment, he used a different name for the order, and Ms. Sewell had delivered to his apartment before. *See* RP 1201. When Ms. Sewell arrived, Mr. Hitt immediately lured her into the apartment, closed the front door, and put a knife to her throat, such that Ms. Sewell was aware of Mr. Hitt's sexual intent from the time she entered the apartment. CP 20; RP 245-46; *see* RP 1202-03. Ms. Sewell testified at the instant trial that, in 2001, Mr. Hitt did not "appear to be disorganized in his plan for a sexual assault." RP 1202-03. In contrast, the burglary victims described Mr. Hitt as "scatter brained," the events appeared "unplanned," he had no prior connection to the residence or victims, there was no evidence he targeted a home of females, he brought no implement to assist him in breaking and entering, the victims thought Mr. Hitt was robbing them, and the only acts arguably supporting the sexual motivation allegations came after Mr. Hitt had been inside the house for some time.[11]

The trial court also found marked similarity deriving from unsurprising, random overlap. For example, the finding that "Both crimes occurred in residences[,]" CP 423 (FF 5b), ignores the abundant commonality of a sex offense occurring in a residence. It further ignores the obvious distinctions between the locations—one was Mr. Hitt's apartment, the other the victims' residence; one occurred after an invited

[11] CP 9-11, 20; *see, e.g.*, 398, 435, 497, 513, 535-36, 561-65, 591-92, 606, 659-60, 722-23, 727-28, 802, 861, 850-53, 884 (confirmed by trial testimony).

entry, the other after breaking and entering; in one the victim was alone with Mr. Hitt and in the other there were eight women present in the residence. Another insignificant overlap is that "In both instances, the victims were young, college age females." CP 423 (FF 5e). A 19 or 20-year-old female victim is hardly "significant" for a sex offense. Moreover, Mr. Hitt was only 23 years old at the time of the 2001 offense and still a young 34 during the instant offense. CP 9. His proximity in age hardly makes the similarities significant.

The trial court found persuasive that "In both incidents the defendant threatened to 'slit throats.'" CP 423 (FF 5d). Here, the distinctions overrun any similarity. Ms. Sewell asked Mr. Hitt if he was going to kill her, and he specifically told her "no." RP 1197. In the instant offense, Mr. Hitt repeated the threat to kill or stab. CP 9-11.

Likewise, the trial court found significant that Mr. Hitt expressed "repeated concern about being caught by police." CP 423 (FF 5j). But in 2001, Mr. Hitt discussed Ms. Sewell calling the police only after he had already completed the offense. RP 296-97; *see* RP 1196. In the case at bar, Mr. Hitt was preoccupied with the women calling the police from the outset and even threatened to harm them if they did. Threats were absent from this aspect of the 2001 offense. Even the State conceded the distinctions in this regard, arguing Mr. Hitt's concern over the police

showed he had learned from the 2001 incident. RP 1293. That is contrary to the concept of marked similarity.

Next, the trial court found "In both events the victims offered the defendant money in order to get away from Mr. Hitt." CP 423 (FF 5g). First, this goes to the victims' response to the acts, not Mr. Hitt's scheme or plan. Also, the victims' motives for doing so in each case are distinct: Jessica Sewell offered Mr. Hitt money because he told her he wanted to run away; the women in the case at bar thought it would appease Mr. Hitt because he was robbing them. *E.g.*, RP 258, 1199-1200, 1203.

Two independent findings regarding disrobing are largely repetitive, lending the impression there was more overlap between the events than is accurate. CP 423 (FF FF 54h, i) (finding "In both incidents Mr. Hitt ordered a victim to disrobe themselves, which both did" and "In both incidents a female victim was naked from at least the waist up."). Disrobing, moreover, is so essential to a sexual offense that it lacks the "abnormal factor" that must tie the acts together. *State v. Wade,* 98 Wn. App. 328, 335, 989 P.2d 576 (1999) (quoting WIGMORE, § 302).

The court also stretched the evidence of dissimilarities to find commonality. For example, the court hypothesized that "In both the 2001 incident and the 2012 incidents, Mr. Hitt is lonely and despondent and then decides his needs, wants, desires are going to be met in another

fashion." CP 424 (FF 5l). But watching pornography is different from talking with a woman who rejects him and interacting with another woman he finds attractive. *See id.* These variances do not constitute "such a concurrence of common features" between the two acts. *Lough*, 125 Wn.2d at 856. The similarities do not amount to "markedly similar acts of misconduct [committed] under similar circumstances." *State v. Hecht*, No. 71059–1–I, __ Wn. App. __, 2014 WL 627852, *5 (Feb. 18, 2014).[12]

The trial court claimed to have considered the dissimilarities between the two events, but those far outweigh the similarities. In 2001, Mr. Hitt lured a woman to his apartment under false pretenses with an apparent plan—even if it was not well planned. Presently, however, Mr. Hitt knocked on the front door, asking permission to enter. Thinking the house was empty, he broke in through a window. Again, he had no means to accomplish that break in, so he wrapped a rock in his sweater and then climbed through the window. Pretrial Exhibit 13; RP 240-41, 244-45, 257; *see* RP 1184. He was familiar with Ms. Sewell, whereas nothing on

[12] By way of distinction, in *Hecht* this Court found marked similarities where several witnesses testified that for several days a week over several years the accused drove through the same specific area of downtown, which area was a known gathering place for prostitutes to meet their customers; the accused picked up individuals in that area several times; he drove them to the same location—his office; he engaged in similar sexual acts with them; he paid in cash; he drove them back to and dropped them off at the location where he picked them up; and where the prostitutes were each dependent upon cash for same reason. 2014 WL 627852, at *5. That level of marked similarity simply is not present here.

the outside of the home indicated eight women lived there. *See, e.g.*, RP 240-41; Exhibits 1, 3, 46, 48. Further bearing on the distinctions, his interactions with Ms. Sewell took place at 7:30 or 8 p.m. He entered the women's residence at 3:30 a.m. *See* CP 50; RP 1183-84.

Even more obviously, Ms. Sewell was the sole target of the 2001 offense. Here, however, there were eight women in the house and no sign any or all of them were specifically targeted.

Another significant distinction is that Ms. Sewell knew Mr. Hitt's intentions were sexual from the outset. CP 20; RP 245-46; 1202-03. Mr. Hitt asked her for sexual favors immediately, and never bound her. CP 51. In fact, Mr. Hitt eventually ejaculated and semen was collected as part of the evidence. CP 51. That evidence does not exist here; in fact, Mr. Hitt never acted in an overtly sexual manner.[13] Even when he had the opportunity to look at or touch one of the victim's bare upper body, he instead ordered her back on the floor face down and continued to bind her as he had the others. *E.g.*, CP 54. Indeed, he repeatedly told the women he was only going to rob them, and when they were concerned that K.B.'s pajamas were pulled down, he explicitly assured them "It's not like I am going to rape her or anything." RP 582-83, 607, 623-24, 653, 671, 726,

[13] *E.g.*, RP 242, 250, 290; *see* RP 578, 591-92, 596-97, 671-72, 675, 726, 729-30, 860-61, 1130-32 (confirmed by trial testimony).

828-29, 839, 957-58, 976, 1112, 1126, 1230.[14] He explained, "I'm just taking off your clothes to tape, like to tape you up." RP 1230.

DeVincentis provides a poignant example of where evidence of a common scheme or plan actually suffices. There, the adult defendant targeted 10 to 13 year old girls that were known to him—his daughter's friend, the friend of a next-door neighbor. 150 Wn.2d at 22. He invited the children into his home. *Id.* at 13, 15, 22. While these girls were in his home, DeVincentis paraded around wearing only a bikini or g-string. *Id.* Eventually, he asked the children to give him massages. *Id.* Later, he would ask the children to take their clothes off too. *Id.* at 14, 22. He then "had the girls masturbate him until climax." *Id.* While the trial court properly admitted this prior markedly similar act, it excluded other acts of child sexual abuse that lacked these similarities. *Id.* at 16, 23.

Mr. Hitt's trial court was not so scrupulous. Here, the two incidents lacked "[s]ufficient repetition of complex common features" that would compel an inference that each is a "separate manifestation[] of the same overarching plan, scheme, or design." *State v. Burkins*, 94 Wn. App. 677, 689, 973 P.2d 15 (1999). The degree of similarity was not substantial as required by *DeVincentis*.

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[14] Mr. Hitt's statements to police were consistent. *E.g.*, Pretrial Exhibit 4 at 25:05-27:24; Pretrial Exhibit 6, pp.27-29.

b. Separately, by failing to analyze whether the prior act was admissible as proof of motive or intent but allowing the jury to consider it for those purposes, the trial court failed to adhere to the rule's requirements.

Admission of the prior act was an abuse of discretion on an additional basis. The trial court failed to adhere to the requirements of the rule by allowing the jury to consider the prior act to show motive or intent without analyzing whether it was admissible for those purposes. *Neal*, 144 Wn.2d at 609.

In admitting evidence of prior acts, the court must identify the lawful, non-propensity purpose for and relevance of that evidence, and the evidence must only be used for that purpose. *Fisher*, 165 Wn.2d at 745; *DeVincentis*, 150 Wn.2d at 17. The trial court here only considered whether the evidence showed a common scheme or plan. RP 292-306, 389-91. Significantly, the court did not consider whether the prior act showed motive or intent for the current offenses. Yet, the court held the evidence admissible for those purposes and allowed the jury to consider Jessica Sewell's testimony as evidence of Mr. Hitt's motive and intent in the instant offenses. CP 199; RP 1180. "A careful and methodical consideration of relevance . . . is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Because the trial court abdicated

that duty with regard to the motive and intent purposes, admission on that basis was an abuse of discretion. *See Neal*, 144 Wn.2d at 609 (abuse of discretion not to follow rule).

c. Had the court conducted the necessary analysis, it would have found the prior conviction for a different crime against a different victim cannot be used to show motive or intent in the instant case.

Even if the trial court had analyzed the prior offense to determine whether it was relevant for purposes of motive or intent, it would have concluded the evidence was inadmissible for either purpose.

"[T]he State may not show motive by introducing evidence that the defendant committed or attempted to commit an unrelated crime in the past." *State v. Fuller*, 169 Wn. App. 797, 829, 282 P.3d 126 (2012). Motive means "[a]n inducement, or that which leads or tempts the mind to indulge a criminal act." *Saltarelli*, 98 Wn.2d at 365 (quoting Black's Law Dictionary 1164 (4th rev. ed. 1968)). Thus for example, in *Saltarelli*, our Supreme Court held that the trial court erred in admitting evidence of a prior attempted rape at a trial for rape against another woman. 98 Wn.2d at 359. The trial court had found that the similarity of the two events supported admitting it for purposes of motive and intent in the current rape trial. *Id.* at 363. But the court failed to explain how the similarity made the prior event relevant to the defendant's motive in the instant case. *Id.*

"It is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost 5 years later." *Id.* at 365. Likewise, it is unclear how a prior rape conviction is relevant to whether ten years later Mr. Hitt broke into a home for purposes of sexual gratification except under a prohibited propensity theory.

State v. Baker, on the other hand, demonstrates use of a prior act as evidence of motive without requiring an improper propensity conclusion. *State v. Baker*, 162 Wn. App. 468, 259 P.3d 270 (2011). There, the court properly allowed the State to introduce evidence of a hostile relationship with and prior assaults by strangulation of the same victim, to show the defendant's possible motive for the instant assaults by strangulation, which came only months after the prior assaults. *Id.* at 473-74.

In a similar vein, courts have found that evidence of gang affiliation is admissible to show a gang-related motive in the charged case. *State v. Yarborough*, 151 Wn. App. 66, 83-84, 210 P.3d 1029 (2009) (citing cases). For example, gang affiliation evidence is admissible to show the defendant had a motive to commit murder by extreme indifference against a rival gang member. As this Court reasoned, "[T]hat Yarbrough belonged to a gang and perceived Simms to be associated with a rival gang is relevant to establish an inducing cause for Yarbrough to act with extreme indifference by shooting at Simms only a few days after the

two gangs had a prior altercation." *Id.* at 84. The gang-related evidence was not admitted to show the defendant was a criminal, but that there was ill will between the defendant and the victim in what might otherwise appear as a random shooting. *Id.*

Except under a propensity theory, Mr. Hitt's singular act of sexual misconduct against an invited guest in 2001 cannot be used to show his motive in the instant breaking and entering was sexual gratification. Beyond once a criminal, always a criminal, that logic would allow the jury to infer once a sexual offender, always a sexual offender.

The evidence is likewise inadmissible to show intent. "Intent" is the "mental state with which the criminal act is committed." *State v. Tharp*, 27 Wn. App. 198, 208, 616 P.2d 693 (1980). Intent only relates to whether Mr. Hitt acted with the requisite mens rea for the crimes charged, not to whether there was sexual motivation. The kidnapping charges required intent to abduct and specific intent to use the women as a shield or hostage or to commit robbery. CP 207, 213, 217, 221, 225, 229, 233; *State v. Garcia*, No. 88020-4, __ Wn.2d __, 318 P.3d 266, 271-74 (Feb. 13, 2014). As to burglary, the relevant intent was "intent to commit a crime against person or property therein." CP 204, 206; RP 1278-79 (intent to commit robbery or kidnap). With regard to robbery, the State charged intent to commit theft. CP 239, 241. Mr. Hitt's sexual motivation

was not relevant to these elements. CP 424 (conclusion 4). Therefore, the probative value, if any, is minimal while the prejudice is high. The evidence should not have been admitted for the purpose of intent.

d. Any of these errors requires reversal for a new trial.

An erroneous ruling requires reversal if it is reasonably probable that the error affected the outcome. *State v. Gower*, No. 88207-0, __ Wn.2d __, 2014 WL 554468, *3 (Feb. 13, 2014). This analysis "does not turn on whether there is sufficient evidence to convict without the inadmissible evidence." *Id.*

The State's proof of the special sexual motivation allegations depended upon admission of Mr. Hitt's prior rape conviction. The trial court explicitly recognized the weakness of the State's other evidence. RP 243-44.[15] Generally speaking, prior acts evidence is highly probative if there is "very little proof" the charged crime occurred. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P3.d 901 (2007). Because the focus of the State's sexual motivation case was on Mr. Hitt's prior conviction for a different crime against a different victim, it is reasonably probable that the

[15] The court iterated, that "He [the prosecutor] wants to get this extra evidence in because it may persuade the jurors that some of his other activity that might look perhaps a little ambiguous, might have a different purpose. His process was interrupted, whatever that was in current offense. So, what he really intended to do is kind of up in the air right now."

evidence affected the verdict. *See Fuller*, 169 Wn. App. at 831-32 (improperly admitted evidence not harmless where State focused on it).

It is also reasonably probable that the jury was swayed by the improperly admitted evidence. As stated, the potential for prejudice is at its highest in sex cases. *Saltarelli*, 98 Wn.2d at 363. "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." *Id.* (quoting Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 333-34 (1956)). Moreover, Jessica Sewell was allowed to testify extensively about the 2001 incident, detailing a completed act of rape that was not even threatened in the case at bar. RP 1181-1208 (Hitt forced her to perform oral sex on him and he ejaculated in her mouth).

The case should be remanded with instructions to exclude the evidence of prior misconduct. *Gresham*, 173 Wn.2d at 433-34.

2. Five convictions should be reversed because the State failed to prove beyond a reasonable doubt the alternative means of kidnapping in the first degree.

"When alternative means of committing a single offense are presented to a jury, each alternative means must be supported by substantial evidence in order to safeguard a defendant's right to a unanimous jury determination." *Garcia*, 318 P.3d at 271.

Our Supreme Court recently interpreted the shield or hostage alternative means in *Garcia*. 318 P.3d at 271-74. The Court started from the proposition that kidnapping in the first degree requires intent beyond abduction in particular because kidnapping in the second degree is intentional abducting without more. *Id.* at 272-73. Thus, the specific intent elements of kidnapping in the first degree must be narrowly interpreted to effectuate the Legislature's "graduated scheme." *Id.*; *cf. State v. Johnson*, 92 Wn.2d 671, 676, 600 P.2d 1249 (1979) (discussing construction of kidnapping statute such that it requires conduct independent from that incident to other offenses and divided into distinct degrees). The Court also looked to definitions of "hostage" from other jurisdictions. *Garcia*, 318 P.3d at 273. It found that "hostage" is commonly defined as someone "held as security for the performance, or forbearance, of some act by a third person." *Id.* (citing authority). "[T]he person held as a hostage cannot be the person from whom performance or an act is requested, meaning the hostage must be held to coerce someone else to act." *Id.*.

With regard to "shield," the essence is the use of another as physical protection against the actions of a third party. The Court looked to an Arizona case, which comported with the Court's interpretation in *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012).

Garcia, 318 P.3d at 273 (citing *State v. Stone*, 122 Ariz. 304, 309, 594 P.2d 558 (Ct. App. 1979)). The term "shield" implies "'the holding or detaining of a person by force as defense or potential protection against interception, interference, or retaliation by law enforcement personnel.'" *Id.* (quoting *Stone*, 122 Ariz. at 309 and noting that in *Glasmann*, the defendant positioned a woman between himself and several police offers). The *Garcia* Court also referred with approval to a New Jersey case where the defendants used the victim as cover while attempting to exit a bank they had robbed. *Id.* (citing *State v. Kress*, 105 N.J. Super. 514, 521-22, 253 A.2d 481 (1969)).

With this background in mind, the *Garcia* Court held that "proof of first degree kidnapping under the hostage/shield means requires proof that the defendant intended to use the victim as security for the performance of some action by another person or the prevention of some action by another person." *Garcia*, 318 P.3d at 273. Critically, "there must be some intent to use the victim as protection for the perpetrator." *Id.* at 274. "Anything less would collapse the distinction between first and second degree kidnapping." *Id.*

Applying this definition, the Court found the evidence insufficient to support the hostage or shield alternative. *Id.* The Court rejected the lower court's reasoning that Mr. Garcia, who came across Wilkins while

actively trying to avoid being arrested or killed by people he perceived to be chasing him, abducted the victim in order to prevent her from notifying the police. *Id.* at 270, 274. The Supreme Court found the reasoning speculative and illogical. *Id.* at 274. Rather, it held the evidence insufficient because there was no evidence admitted that "Garcia intended to hold Wilkins as security for the performance, or forbearance, of some act by a *third person*. No demands were made on third persons." *Id.* Moreover, the defendant did not use Ms. Wilkins as a shield because "[h]e did not physically put Wilkins between himself and others trying to pursue him." *Id.*

As in *Garcia*, here there is no evidence Mr. Hitt used any of the women as a shield to protect himself from a third party. Mr. Hitt did not place any of the women between him and some third-party menace. When the police arrived at the home and went upstairs, Mr. Hitt alone came out of the room in which he had gathered the women. He did not bring any of the women with him or otherwise use them as protection against the police.

The definition of hostage fits only with Mr. Hitt's conduct towards one of the women. Mr. Hitt arguably used E.H. as a means to coerce the performance of the other women. He took E.H. around to the other women and threatened to harm E.H. if the others did not come out of their

rooms and gather in the upstairs room. Thus, the State sufficiently proved kidnapping of E.H. under this alternative. But Mr. Hitt did not hold any of the other women "for the performance, or forbearance, of some act by a third person." *Garcia*, 318 P.3d at 274. He did not use them "as security for the performance of some action by another person or the prevention of some action by another person." *Id.* at 273-74.

Because the jury delivered only a general verdict, this Court presumes the insufficiency error requires reversal. *State v. Rivas*, 97 Wn. App. 349, 353, 984 P.2d 432 (1999). It is impossible here to rule out the possibility that the jury relied on the hostage/shield alternative. *Id.* at 351-52; *Garcia*, 318 P.3d at 274. As in *Garcia*, because the evidence of the hostage/shield alternative was insufficient as to counts two, three, four, six and seven, the convictions for those counts must be reversed. 318 P.3d at 274-75. If the State elects to retry Mr. Hitt on those counts, it cannot rely on the hostage/shield alternative means. *Id.* at 275.

3. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge diluted the State's burden of proof in violation of Mr. Hitt's due process right to a fair trial.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added)

(quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 195 (instruction # 3). By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741. This Court should consider the issue even though Mr. Hitt did not

object at trial. *See id.* at 757; *see* CP 160-88 (erroneous language not proposed by Hitt).

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury's role. *Id.* at 764. However, the error was harmless because the "belief in the truth" theme was not part of the court's instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the "belief in the truth" language almost twenty years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle* the issue before the court was whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the court did not decide whether the "belief in the truth" phrase minimizes the State's burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22.

The erroneous instruction diluted the burden of proof. *Emery*, 174 Wn.2d at 741 (error where jury told its job is to search for the truth). Because the State was not held to the standard of proof beyond a reasonable doubt, Mr. Hitt was denied his constitutional right to a fair trial. His convictions should be reversed and the matter remanded.

4. Cumulative trial errors denied Mr. Hitt his constitutional right to a fair trial.

As discussed, the above trial errors each require reversal of Mr. Hitt's convictions. To the extent this Court disagrees, the Court should hold the aggregate effect of these trial court errors denied Mr. Hitt's right to a fundamentally fair trial, and reverse on that basis.

Under the cumulative error doctrine, even where no single trial error merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Mr. Hitt's convictions should be reversed.

5. The sentencing court violated Mr. Hitt's Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a life sentence based on the court's finding, by a preponderance of the evidence, that Mr. Hitt had previously been convicted of a 'strike' offense.

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

The Due Process Clause and right to a jury trial together guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment—whether or not the fact is labeled an "element." U.S. Const. amends. VI, XIV; *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). It violates the constitution "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. The government must submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. *Descamps v. United States*, __ U.S. __, 133 S. Ct. 2276, 2285-86, 186 L. Ed. 2d 438 (2013);

Alleyne v. United States, __ U.S. __, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013); *see Washington v. Recuenco*, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) ("we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt"). Here, the prior conviction found by the court increased Mr. Hitt's sentence to life without the possibility of parole and was thus equivalent to an element of the offense which was required to be proved to a jury beyond a reasonable doubt. *E.g.*, *Alleyne*, 133 S. Ct. at 2155.

b. Because a prior 'strike' offense was used to increase Mr. Hitt's maximum sentence to life without parole, the constitution entitles him to have a jury determine beyond a reasonable doubt that he committed the offense.

Absent the court's finding, by a preponderance of the evidence, that Mr. Hitt committed a "strike" offense, he would not have been subject to a sentence of life without the possibility of parole. The jury verdicts reached below do not support a life sentence standing alone. *See* CP 410 (setting forth standard range sentences based on jury verdict). Because the facts used to impose the life sentence were not found by a jury beyond a reasonable doubt, Mr. Hitt's Sixth and Fourteenth Amendment rights were violated.

Any argument that there is a "prior conviction exception" to the rule overlooks important distinctions and developments in United States Supreme Court jurisprudence. *See Apprendi*, 530 U.S. at 489. First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).[16] In *Apprendi*, the Court recognized that there was no need to explicitly overrule *Almendarez-Torres* in order to resolve the issue before it. However, the Court reasoned, "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489. The *Apprendi* Court described *Almendarez-Torres* as "at best an exceptional departure" from the historic practice of requiring the State to prove to a jury beyond a reasonable doubt each fact that exposes the defendant to an increased penalty. *Apprendi*, 530 U.S. at 487.

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[16] Mr. Hitt recognizes that the Washington Supreme Court has declined to apply *Apprendi* in the context of prior conviction enhancements until the United States Supreme Court explicitly overrules *Almendarez-Torres*. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001). Mr. Hitt respectfully contends the time to do so has arrived and urges this Court to take the first step. *See, e.g.*, *State v. Anderson*, 112 Wn. App. 828, 839, 51 P.3d 179 (2002) (Court of Appeals need not follow Washington Supreme Court decisions that are inconsistent with cited United States Supreme Court opinions). Moreover, the Washington Supreme Court accepted review of this issue in *State v. Witherspoon*, 177 Wn.2d 1007, 300 P.3d 416 (2013) (oral argument heard Oct. 22, 2013).

A member of the 5-justice majority in *Almendarez-Torres*, Justice Thomas has since retreated from the majority holding. His *Apprendi* concurrence noted extensively the historical practice of requiring the State to prove every fact, "of whatever sort, including the fact of a prior conviction," to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas noted, "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard v. United States*, 544 U.S. 13, 27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring). Moreover, although the continuing validity of *Almendarez-Torres* was not before the Court in *Alleyne*, Justice Thomas further emphasized his retreat from the holding in authoring *Alleyne*. *Alleyne*, 133 S. Ct. at 2155, 2160 n.1.

Even if *Almendarez-Torres* has precedential value, it is distinguishable on several grounds. First, in *Almendarez-Torres*, the defendant had admitted the prior convictions. *Apprendi*, 530 U.S. at 488. Mr. Hitt did not admit his prior convictions. Second, the issue in *Almendarez-Torres* was the sufficiency of the charging document, not the right to a jury trial or proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 488; *Almendarez-Torres*, 523 U.S. at 247-48. Third, *Almendarez-Torres* dealt with the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490. Here, the simple "fact" of the prior convictions did not increase Mr.

Hitt's punishment; rather, it was the "type" of prior conviction that mattered. *See* RCW 9.94A.030(37); RCW 9.94A.570. Fourth, the *Almendarez-Torres* court noted the fact of prior convictions triggered an increase in the maximum permissive sentence. 523 U.S. at 245. Here, in contrast, the alleged prior conviction led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Thus, the constitutional concern here resembles *Alleyne*, in which the Court held that any fact that increases a mandatory minimum sentence must be proved as an element, more than *Almandarez-Torres*. *Alleyne*, 133 S. Ct. at 2155.

Judge Quinn-Brintnall of this Court has recognized that Supreme Court precedent requires the State to prove prior "strike" offenses to a jury beyond a reasonable doubt. *State v. Witherspoon*, 171 Wn. App. 271, 308-15, 286 P.3d 996 (2012), *review granted* 177 Wn.2d 1007; *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011) (Quinn-Brintnall, J., concurring in part and dissenting in part), *aff'd on other grounds*, 172 Wn.2d 802 (2011). This Court, like Judge Quinn-Brintnall, should follow United States Supreme Court precedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

c. In the alternative, under the traditional *Mathews* procedural due process analysis, proof to a jury beyond a reasonable doubt is required to confine an accused to life without parole under our State constitution.

Alternatively, this Court should hold that a procedural due process analysis under *Mathews v. Eldridge* requires that a POAA sentence be imposed only if the prior offenses are found by a jury beyond a reasonable doubt. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. A procedural due process claim requires the court to balance three factors. *Mathews*, 424 U.S. 319. First, the court must consider the private interest at stake. *Id.* Second, the court looks to the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures. *Id.* Third, the court regards the government's interest in maintaining the existing procedure. *Id.*

The accused has a strong private interest at stake in persistent offender proceedings. Where a proceeding may result in confinement, the private interest at stake is the most elemental of liberty interests—liberty. It is "almost uniquely compelling." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Thus, significant

procedural safeguards are required when a person's freedom is at issue. *See, e.g.*, *Turner v. Rogers*, __ U.S. __, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011) (confinement for civil contempt requires (1) notice that ability to pay is critical to the proceeding; (2) a form eliciting relevant financial information; (3) opportunity to respond to questions about financial status; and (4) an express judicial finding regarding that defendant has the ability to pay); *Addington v. Texas*, 441 U.S. 418, 433, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (involuntary civil commitment requires proof by clear and convincing evidence).

The private interest in avoiding a term of life without parole—the harshest punishment except for death—is greater than in most situations involving loss of freedom. Thus, the punishment at issue here weighs heavily in favor of additional procedural safeguards.

Nonetheless, the current procedure—judicial factfinding by a preponderance of the evidence—creates a significant risk of error. A preponderance of the evidence is a mere more likely than not finding. A heftier standard is required when significant interests are at stake. *E.g.*, *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691-92 (9th Cir. 2010) (requiring a clear and convincing standard to protect the "significant liberty interests" implicated by an involuntary medication order); *Addington*, 441 U.S. at 433. Furthermore, "it is presumed, that juries are

the best judges of facts." *Georgia v. Brailsford*, 3 U.S. 1, 4, 3 Dall. 1, 1 L. Ed. 483 (1794). Juries are well-equipped to evaluate documentary evidence, witness testimony, and expert opinion. The possibility of even occasional error under the current procedure argues in favor of a higher standard of proof and the empanelment a jury.

These procedures would also benefit the government and its two significant interests in ensuring the accuracy of POAA proceedings. First, prosecutors have a duty to act in the interest of justice, and thus cannot seek the wrongful imposition of life without parole. Second, the State's scarce resources should not be wasted incarcerating people for life if they do not qualify as persistent offenders.

In sum, the *Mathews* balancing test shows that prior strike offenses must be proved to a jury beyond a reasonable doubt in POAA cases to comport with article I, section 3. *Mathews*, 424 U.S. at 333.

d. Because the life sentence was not authorized by the jury's verdicts, the case should be remanded for resentencing within the standard range.

The imposition of a sentence not authorized by the jury's verdict requires reversal. *State v. Williams-Walker*, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, despite overwhelming evidence of firearm use). The jury did not find beyond a reasonable doubt the facts necessary to

support the sentence of life without the possibility of parole imposed upon Mr. Hitt. His sentence should be reversed and remanded for the imposition of a standard-range sentence.

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

a. Strict scrutiny applies to the classification at issue because a fundamental liberty interest is at stake.

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

The liberty interest at issue here, physical liberty, is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. *Accord Hamdi*, 542 U.S. at 529. Thus, strict scrutiny applies to the classification at issue. *Skinner*, 316 U.S. at 541; *cf. In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict

scrutiny to civil-commitment statute in face of due process challenge, because civil commitment constitutes "a massive curtailment of liberty").

b. Under any standard of review, the classification at issue here violates the Equal Protection Clause.

Nonetheless, Washington courts have applied rational basis review to equal protection claims in the sentencing context. *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

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

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

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

Where prior convictions that increase the maximum sentence available are classified by judicial construct as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury in order to punish a current conviction for violation of a no-contact order as a felony. *Oster*, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. *State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010).

But where, as here, a prior conviction that increases the maximum sentence available is classified judicially as a "sentencing factor," our state only requires they be proved to the judge by a preponderance of the evidence. *Smith*, 150 Wn.2d at 143. Just as the Legislature has never labeled the facts at issue in *Oster*, *Roswell*, or *Chambers* "elements," the Legislature has never labeled the fact at issue here a "sentencing factor." Instead, in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. *See* RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A"); *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996) (purpose of POAA is to "reduce the number of serious, repeat offenders by tougher sentencing"), *abrogated by Blakely*, 542 U.S. at 303.

For example, if a person is alleged to have a prior conviction for first degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes—even if the prior conviction increases the sentence by only a few months. *Roswell*, 165 Wn.2d at 192. But if the same person with the

same alleged prior conviction for first degree rape is instead convicted of first degree burglary with sexual motivation, as was the case here, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37)(b); RCW 9.94A.570; *Smith*, 150 Wn.2d at 143.

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the persistent offender context but not in other contexts, because the punishment in the former context is the maximum possible (short of death). Thus, while it might be reasonable for the Legislature to determine that the greatest procedural protections apply in the three strikes context but not in others, it makes no sense to say that the greater procedural protections apply only where the necessary facts only marginally increase punishment.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in *Skinner*, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in *Skinner* mandated extreme punishment upon a third conviction for an offense of a particular type. *Id.* at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under Oklahoma's act the extreme

punishment was sterilization. *Id.* The Court applied strict scrutiny to the law, finding that sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. *Id.* at 541-42. Acknowledging that a legislature's classification of crimes is normally due a certain level of deference, the Court declined to defer in this case because:

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

Id. at 540-41. The same is true here. Being free from physical detention by one's own government is one of the basic civil rights of man. *Hamdi*, 542 U.S. at 529. The legislation at issue here forever deprived Mr. Hitt of this basic liberty based on proof by only a preponderance of the evidence, to a judge and not a jury.

As the Supreme Court explained in *Apprendi*, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." *Apprendi*, 530 U.S. at 476. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn."

Skinner, 316 U.S. at 542. This Court should hold that the trial judge's imposition of a sentence of life without the possibility of parole, based on the court's finding of the necessary facts by a preponderance of the evidence, violated the equal protection clause. The case should be remanded for resentencing within the standard range.

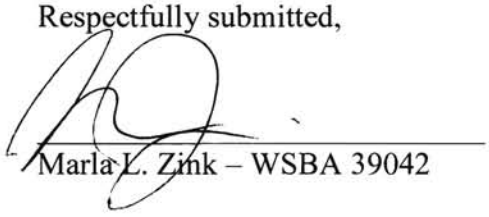
F. CONCLUSION

Mr. Hitt is entitled to a new trial on several grounds. First, the court improperly admitted evidence of an incomparable prior conviction where its common scheme or plan analysis was flawed and the motive and intent analysis was lacking entirely. Separately, five of the kidnapping convictions should be reversed because there was no evidence Mr. Hitt had the specific intent to use anyone other than E.H. as a hostage or shield. Third, by focusing the jury on an abiding belief in the truth of the charge, the court diluted the State's burden of proof and misstated the law. Even if not independently, these errors cumulatively denied Mr. Hitt a fair trial.

If the convictions stand despite these errors, the lifetime sentence should be vacated on the constitutional bases set forth above.

DATED this 19th day of March, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042

Washington Appellate Project
Attorney for Appellant

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ROBERT DOUGLAS HITT, Defendant.	No. 12-1-01438-4 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: ER 404(b)

THE ABOVE-ENTITLED CAUSE having come on for trial from before the undersigned judge in the above-entitled court; the State of Washington having been represented by Deputy Prosecuting Attorney Emily Petersen; the defendant appearing in person and having been represented by his attorneys Mark Adair and Anita Paulsen; the court having reviewed the following items of evidence: The certification for determination of probable cause number King County case number 01-1-09775-6 SEA, the guilty plea form and judgment and sentence under cause number 01-1-09775-6 SEA, a transcript of the defense interview with JSN, the certification for determination of probable cause under case number 12-101438-4 SEA, briefing and argument of counsel, and after fully considering the four part balancing test approved by the

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

Washington State Supreme Court in State v. Foxhoven, 161 Wn.2d 168 (2007), the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On October 29, 2001, the defendant raped JSN
2. Evidence of the prior misconduct is being offered by the State on the issues of motive, intent and as evidence of a common scheme or plan.
3. The proffered evidence is relevant to the issue of the defendant's motive and intent.
4. Motive and intent are relevant in this case in light of the fact that two of the charges carry allegations of sexual motivation.
5. There are a number of similarities between the two crimes which include
    a. Neither of the events was well thought out and appear to be impulsive.
    b. Both crimes occurred in residences.
    c. In both incidents the defendant used a knife to gain the compliance of his victims.
    d. In both incidents the defendant threatened to "slit throats."
    e. In both incidents the victims were young, college age females.
    f. Both crimes occurred after the defendant ingested alcohol and some sort of mind-altering drug.
    g. In both events the victims offered the defendant money in order to get away from Mr. Hitt.
    h. In both incidents Mr. Hitt ordered a victim to disrobe themselves, which both did.
    i. In both incidents a female victim was naked from at least the waist up.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

j. In both cases the defendant expressed repeated concern about being caught by police.

k. In both cases Mr. Hitt expressed repeated self-loathing about his involvement in the incident.

l. The incident with JN was preceded by Mr. Hitt watching pornography on the television. In the present incident, Mr. Hitt had been at Teddy's Bar talking with a young woman who had a boyfriend and rejected him. After leaving Teddy's Mr. Hitt purchased methamphetamines from a woman he found attractive. In both the 2001 incident and the 2012 incidents, Mr. Hitt is lonely and despondent and then decides that his needs, wants, desires are going to be met in another fashion.

m. The Court considered the dissimilarities of the two crimes as well.

CONCLUSIONS OF LAW

1. The Court finds by a preponderance of the evidence that the prior sexual misconduct by the defendant did occur.
2. That the evidence of the defendant's rape of JSN has a significant degree of similarity to the current allegations to be considered by the jury as evidence of a common scheme or plan.
3. Common scheme or plan is relevant because it serves as evidence of the defendant' s motive and intent as alleged in the aggravating factor, specifically whether the defendant was acting with sexual motivation as alleged by the State in counts 1 and 3.
4. Sexual motivation or sexual intent is not an element of any of the charged offenses.
5. The probative value of the evidence of the defendant's rape of JSN is exceptionally strong because of all the commonalities between the events and the probative value is

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

substantially outweighed by the prejudicial effect. Whatever prejudice the defendant might experience is not unfair prejudice.

May 21, 2013

HONORABLE JEFFREY RAMSDELL

Presented by:

Emily Petersen, WSBA #36664
Deputy Prosecuting Attorney

Mark Adair, WSBA # 2463
Attorney for Mr. Hitt

Anita Paulsen, WSBA #
Attorney for Mr. Hitt

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

APPENDIX B

No. 7

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of Jessica Sewell. Her testimony may be considered by you only for the purpose of deciding whether the defendant's prior conduct is part of a common scheme or plan, or as evidence of the defendant's motive or intent with respect to conduct charged by the state in this case. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

APPENDIX C

THE COURT: Is there any objection to Number 27?

MR. ADAIR: No objection.

THE COURT: Then, let's just admit Number 27 now. We will save the detective from having to take the stand again.

MS. PETERSEN: Thank you.

THE COURT: Are we ready for the jury at this point, counsel?

MS. PETERSEN: Yes.

THE COURT: Good morning, folks. Please be seated. Counsel, if you would like to call your next witness.

MS. PETERSEN: Yes, your Honor. Are you going to read the stipulation?

THE COURT: I am going to read the first one now, the scope of her testimony. Ladies and gentlemen, you are about to hear testimony from Ms. Jessica Sewell. This testimony is admitted only for a limited purpose. The testimony may be considered by you only for the purposes of determining whether the State has met its burden of proof with regard to motive as relevant to Counts I and III as charged, and it may not be considered for any other purpose.

MS. PETERSEN: The State calls Jessica Sewell.

JESSICA SEWELL

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70291-2-I
v.	)	
	)	
ROBERT HITT,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ROBERT HITT 840918 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MARCH, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710