

NO. 34350-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DONALD BETTS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 04-1-03534-3

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BRIEF OF RESPNDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On July 19, 2004, the State charged DONALD BETTS, defendant, with two counts of second degree rape (counts I and II), first degree burglary (count III), third degree theft (count IV), and fourth degree assault (count V). CP 1-5. On June 29, 2005, the State amended the information, charging second degree robbery in count IV. CP 18-20.

Trial began on November 7, 2005, before The Honorable Rosanne Buckner. RP 4. The trial court conducted a 3.5 hearing and ruled that defendant's statements were admissible. RP 11-50.

On November 18, 2005, the jury found defendant guilty as charged in counts I-III and IV. CP 169 (Judgment and Sentence); CP 102, 104,

106, 109 (Verdict Forms). The jury found defendant not guilty on count IV, second degree robbery. CP 107-08.

On January 27, 2006, the trial court sentenced defendant, a persistent offender, to life in prison without parole on counts I and II, 89 months on count III (first degree burglary), and 365 days in jail on count V (fourth degree assault). CP 169-84.

2. Facts

Heather Burns met defendant approximately 1 to 1½ years before the rape. RP 299. She met him at her neighbor, Mike Smith's, house. RP 299. Mike and Heather, good friends, live across the street from one another. RP 299-300. Defendant was married and had a child. RP 301. He lived next door to Mike. RP 301. When defendant moved away, Heather did not even notice. RP 304. About two weeks prior to the rape, which occurred on June 6, 2004, Heather saw defendant again. RP 304. Defendant would drive into Heather's driveway and honk his horn. RP 305. Heather and defendant engaged in small talk for 5 to 10 minutes. RP 305. She was not attracted to him, nor did she invite him into her house. RP 305. Two or three days later, he did the same thing, this time asking her if she wanted to go out to lunch and asking her if she wanted a boyfriend. RP 307. Heather declined. RP 307. Over the next week, defendant continued to pull into her driveway and honk. RP 306.

Heather thought this behavior was strange and did not ever invite defendant into her house. RP 308. Defendant's behavior made her uncomfortable. RP 308. At one point, Heather gave defendant her phone number thinking that it would stop him from coming by so much. RP 310. However, three days before the rape, Heather checked her caller ID and saw that defendant called her twelve times that day. RP 311. Heather then had defendant's calls blocked. RP 309.

The afternoon preceding the rape, defendant saw Heather in her front yard and walked across the street toward her. RP 312. He was angry that Heather had blocked his calls and then told her that nobody disrespects him that way. RP 312. He then asked her what she was doing that night. RP 312. Heather lied and said she had plans to go to Seattle. RP 312. Defendant was angry when he left. RP 313.

Heather went out with her cousins that night. RP 314. Heather had consumed 4 drinks over the course of 5 hours and was not drunk.¹ RP 315. When she got home, she went over to Mike's, not knowing defendant would be there. RP 316-17. When Heather saw defendant, she did not feel comfortable or safe. RP 317. She asked Mandy to walk her home. RP 317. A few minutes later, Mike and defendant followed them

¹ Contrary to defendant's brief, none of the witnesses admitted to being intoxicated on the night in question, although they do admit to having consumed some alcohol. RP 315 (Burns), 439 (Chase), 632 (M. Smith), 666 (Joyner). However, Terry Chase testified that Mike Smith was drunk that night. RP 439. Heather showed no signs of intoxication in the emergency room. RP 517.

over to Heather's. RP 319. Defendant had been drinking and Heather was not comfortable with him in her house. RP 319. He had never been inside her house before. RP 319. Heather, Mike, and defendant were standing in her kitchen. Mandy had gone out for a cigarette. RP 320.

When Heather, feeling uncomfortable, asked defendant to leave, he back-handed her on the side of her face. RP 320. The force of the blow knocked Heather to the floor. RP 321. Defendant told Heather that "no bitch disrespects him like that." RP 321. Heather asked Mike to get defendant out of her house. RP 322. Defendant began chasing Heather around her kitchen table, but Mike was able to get him to leave. RP 322. Defendant was upset as he left, yelling and calling Heather a "bitch." RP 322. He repeated that no one disrespects him like that. RP 322.

Shortly after everyone left Heather's house, defendant knocked on the door. RP 325. Heather looked out the window and saw it was defendant. RP 325. Heather called Mandy to come back over. RP 325. When Mandy came over, defendant told her that he hit Heather because she had disrespected him. RP 326. In front of Mandy, defendant told Heather, "You won't disrespect me like that, bitch. I'm ex-military. You can't mess with me." RP 673. Mandy coaxed defendant away from Heather's house. RP 327; 674. Mandy had noticed that Heather was kind to defendant, but that she appeared intimidated by him. RP 679.

Ten or fifteen minutes later, defendant returned to Heather's home for the third time. RP 328. Heather was scared that defendant was back,

pounding on her door. RP 328-29. She did not call the police because defendant had previously warned her that no one calls the cops on him. RP 329. Heather opened the door, but kept the screen door shut and locked. RP 329, 330. Defendant told her that he wanted to apologize for hitting her. RP 329. She told him to leave several times. RP 330. Defendant kept insisting he wanted to shake her hand and make amends and that he would then leave. RP 330. Heather gave in, unlocked the screen door and opened it just far enough to put her hand out. RP 330-31. Instead of shaking her hand as promised, defendant opened the door and entered Heather's house, uninvited. RP 331.

Once inside, defendant said he wanted to have sex with Heather. RP 331. Heather was scared, but told defendant that that was not going to happen. RP 331. Heather told him to leave. Defendant said he was not leaving until she had sex with him and that she could either give it to him willingly or he would take it. RP 332.

Defendant told Heather to take her pants off. RP 335. When she refused, he removed her clothing and bent her over the kitchen counter. RP 446-338. While pinning her down, defendant penetrated her vagina with his penis. RP 339. Heather was in pain and very scared. RP 339.

Defendant then took Heather to a bedroom where he raped her a second time. Defendant threatened her, making her get on top of him. RP 342. His penis again penetrated her vagina. RP 343.

Heather told defendant she had to go to the bathroom. RP 344. Defendant allowed this, telling her to make it quick. RP 344. She put on some clothing she found in the bathroom, while defendant stood outside the door in the hallway. RP 344. Heather told defendant she wanted a cigarette. RP 345. Defendant said she could, but told her to make it quick because he was not done with her yet. RP 345. Heather was able to escape by running across the yard and jumping over a fence. RP 349. She ran to a neighbor three or four houses down and called 9-1-1. RP 349.

When Heather appeared at her neighbor, Stanley Lehman's house, Mr. Lehman noticed she was scared, shaking, and near tears. RP 464. She told him she had just been raped. RP 464. After calling 9-1-1, she tearfully called her mom. RP 466. She was shaking so badly that Mr. Lehman offered her a blanket, but she said she was not cold. RP 465-66.

The police arrived in about 10 minutes. RP 352. After making her statement, Heather's mother took her to the hospital for an examination. RP 354. Heather reported to the emergency room doctor what defendant had done to her, including hitting her. RP 511. Defense counsel attempted to establish that had the assault occurred as the witnesses described, there would be more signs of injury to Heather's face. RP 515. However, the doctor testified that the injuries to Heather were not inconsistent with what she had reported. RP 515 and 517. Heather was distraught during her sexual assault examination. RP 527.

Around the time Heather was making her 9-1-1 call, Mike Smith was returning from Steilacoom. RP 623. From his porch, he saw defendant's van parked in Heather's driveway and saw that Heather's front door was open. RP 624. Given that he had seen defendant hit Heather earlier, and that defendant had been told to leave, he was concerned when he saw defendant's van there. RP 624. Mike went inside to put some shoes on to go over to Heather's. RP 624, 625. As he was going over there, he saw defendant's van speeding down the road. RP 624. About 20 minutes later, defendant called Mike and out of the blue stated that Heather was asleep. RP 629. Mike already knew that Heather was not home because he had searched her house for her. RP 626-27. When Mike mentioned that police cars just went by his house, defendant told Mike not to tell the police where he lived. RP 630.

Deputies went to defendant's house. RP 553-54. They saw someone inside, but no one answered the door even after they knocked 3 times. RP 554. When deputies announced they would open the door if he didn't, defendant answered the door. RP 555-56. Defendant was advised of his Miranda rights. RP 556. Defendant initially denied having sex with Heather, but admitted to "consensual" sex after learning that she was on the way to the hospital to get checked out. RP 559-60. Defendant claimed that Heather called him often and that he returned to her house at her request. RP 560.

Although defendant told police that the sex was consensual, witness after witness testified how Heather felt about defendant: That defendant was “creeping her out”, that he continually called her and she wanted it to stop; that she thought it was weird how defendant was contacting her; that he was creepy and that he made her uncomfortable; that victim wanted nothing to do with defendant; that she was scared of him, that he had been bothering her and that she did not want to be around him. RP 546; RP 597, RP 605; RP 615; RP 664.

When police asked defendant, during his taped statement, if he slapped Heather, defendant did not immediately deny it. Ex #47, page 10. Instead, he talked about Mandy and then said that Heather had said something “out of line” to him. Ex #47, page 10. Defendant then changed his story and said that the conversation did not concern him and that it was Mike that Heather had said something disrespectful to. Ex #47, page 11. When defendant finally answered the question, he denied hitting Heather. Ex #37, page 11. Defendant then said that he had actually tried to protect Heather from “these dudes”. Ex #47, page 11.

In contrast to defendant’s taped statement, Mike Smith heard defendant tell Heather, “No bitch is ever going to tell me no.” RP 619. He witnessed defendant strike Heather, knocking her to the ground. RP 620. Mandy came in while Heather was still on the floor. RP 671. Terry Chase saw defendant right after the assault and noticed defendant was

excited. RP 432. Defendant proudly told him that he had “just knocked this bitch out.” RP 432-34.

When detectives confronted defendant about calling Mike Smith after raping Heather, defendant denied making the call. Ex #47, page 16. Later in the statement, defendant admitted he did call Mike Smith. Ex #47, page 18.

Defendant also told police that he had been back in town only three to four days prior to his arrest. Ex #47, page 3. However, defendant’s neighbor testified defendant had been back in the neighborhood for “a couple of months” prior to the rape. RP 612. Defendant would stop by there frequently. RP 612. Heather, who did not have a relationship with defendant, had noticed his return 2 weeks prior to the rape. RP 306.

The jury found defendant guilty of both counts of second degree rape, burglary in the first degree, and fourth degree assault. RP 857-58, CP 102-06, 109. The jury found defendant not guilty on count IV, second degree robbery. RP 858, CP 107-08.

C. ARGUMENT.

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407,

cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). Improper comments are not deemed prejudicial unless “there is a *substantial likelihood* the misconduct affected the jury’s verdict.” State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99

Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

First, defendant claims the prosecutor committed misconduct in rebuttal argument. Brief of Appellant (BOA) at 18. In the defense closing argument, defendant argued that the State's witnesses, especially Heather, her friends, and relatives were biased and therefore not credible. RP 819-37. In his rebuttal, the prosecutor responded:

If her friends are going to come in and perjure themselves, get their stories straight, conspire, there are a lot of details that they have to get. They have to get together. They have to keep them straight. And I submit to you they would come up with more information than they have provided.

RP 843.

This statement did not prompt an objection from the defense. RP 843. Therefore, the issue is waived unless defendant can show that the remark was so flagrant and ill-intentioned that the prejudicial effect could

not have been cured by an instruction. State v. McKenzie, 157 Wn.2d at 52. A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. See State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), aff'd, 120 Wn.2d 925, 846 P.2d 1358 (1993). It is not misconduct for a prosecutor to make arguments regarding a witnesses' veracity that are based on inferences from the evidence. See State v. Rivers, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999).

There was nothing improper about the argument in the present case. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). Defense counsel began his closing argument by reminding the jurors that they are the sole judges of the credibility of the witnesses. RP 819. Throughout his argument, he attacked the credibility of Heather. RP 820-37. Defense counsel implied that Heather's friends and relatives would try to "make things worse" than they are because they were biased. RP 825, 832-33.

The prosecutor's argument was a fair response to defense counsel's attack on the bias and credibility of the State's witnesses.

"It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory." As an

advocate, the prosecuting attorney is entitled to make a fair response to the argument of defense counsel.

State v. Brown, 132 Wn.2d 529, 567, 940 P.2d 546 (1997) (quoting and citing State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)).

In presenting this issue to this Court, defendant has not argued the facts as they appear in the record. Defendant argues: “[I]t was flagrant, prejudicial misconduct for the prosecutor **to tell the jury it had to find that Ms. Burns and all of the friends who testified were lying and indeed perjuring themselves in order to acquit.**” BOA at 18 [emphasis added]. This mischaracterizes the record. The prosecutor merely stated that “if” the witnesses had perjured themselves, there would be signs of it. RP 843. The prosecutor’s argument merely supports the credibility of the witnesses and discredits defendant’s argument that they were biased because they are friends and relatives. There was no statement about the jury having to make any sort of a finding of lying or perjury in order to acquit.

Defendant further incorrectly claims that the prosecutor told the jury that defendant’s defense “required them to find that” Heather had “some nefarious *motive* to lie.” BOA at 23 [italics in original]. The prosecutor, arguing that Heather was a credible victim, actually told the jury that Heather had no reason to lie about being raped. RP 797.

Defendant's entire argument and analysis in support of a claim of prosecutorial misconduct regarding perjury is based on facts not supported by the record. Defendant's claim must fail.

Defendant next argues that the prosecutor committed misconduct in his initial closing argument by arguing (1) that Heather had no reason to lie; (2) that testimony about defendant wanting to make Heather his prostitute and force her to perform sexual acts had the ring of truth; and (3) stating that the truth is that defendant is guilty. BOA at 22. Again, these statements did not prompt any objection from defendant at trial. Defendant cites no authority that a prosecutor is limited to credibility arguments in rebuttal and only after defendant has raised such an issue. In fact, at trial, "counsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985); see also State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983). Further, a prosecutor may make inferences in closing argument, so long as they are supported by the evidence. State v. McKenzie, 157 Wn.2d at 57 (not misconduct in child rape case for prosecutor to call defendant a "rapist" where use of the word was a reasonable inference from the evidence) (citing State v. Buttry, 199 Wash. 228, 250 90 P.2d 1026 (1939) (not prejudicial to designate defendant as a murderer or killer where evidence indicates that he is)).

Defendant cites to State v. Casteneda-Perez, 61 Wn. App. 354, 810 P.2d 74 (1990), as authority for the proposition that it is "misleading and

unfair to make it appear that an acquittal requires the conclusion' that the prosecution's witnesses are lying." Br. of Appellant at 18. In Castendeda-Perez, however, the defendants were challenging questions asked by the prosecutor of the defendants on cross-examination. Id. at 357-364. The prosecutor asked the defendants if the officers involved in the case were lying. Id. In the present case, the prosecutor did not ask any witness if another witness was lying. Essentially, the prosecutor's argument to the jury was that they had to either believe Heather or defendant's statements to detectives, since their respective testimony was markedly different. The prosecutor argued from the evidence at trial that the truth is that defendant is guilty. This was not misconduct. This claim is without merit.

Thirdly, defendant contends that the prosecutor made emotional appeals to the jury that amounted to misconduct. BOA 26-27. At the end of his initial closing argument, the prosecutor stated:

The defendant is presumed innocent. When you begin your deliberations, you will see that the light of truth has cast away the shadows of the presumption of innocence, and what you will be left with hopefully is a picture of the real truth. And that truth is that this defendant is guilty. What I'm going to ask you to do is to have the courage and strength and the fortitude to look this defendant in the eye and tell him he is guilty of the crime of rape, the crime of burglary, the crime of robbery, and the crime of assault.

RP 816-817. This argument prompted no objection from defendant at trial. Without citing any authority, defendant claims that the prosecutor "clearly told the jury that the failure to convict would mean... that they

were cowardly and weak.” BOA at 27. However that interpretation is not supported by the entire argument. Rather the argument is telling the jury that the truth is that defendant is guilty and that therefore the State asks them to have the strength to do their duty and find him guilty.

Defendant has failed to meet his burden of showing that this statement was flagrant and ill-intentioned.

At the end of his rebuttal argument, the prosecutor stated:

Ladies and gentlemen of the jury, the evidence in this case is overwhelming. This defendant assaulted her. He committed the crime of burglary. He committed two counts of rape. He committed a count of robbery. **If you are convinced beyond a reasonable doubt that he is guilty** of all these crimes and you do otherwise, you are allowing him to steal not just her money, but justice to the community as well.

RP 848 [emphasis added]. Defense counsel objected, “Object to that, Your Honor. That’s inappropriate.” RP 848. The trial court overruled the objection. RP 848. The prosecutor went on:

I’m asking you to render a verdict which represents the truth, and that is a verdict of guilty.

RP 848.

Comments calculated to appeal to the jury’s passion and prejudice and encourage it to render a verdict on facts not in evidence are improper. State v. Pastrana, 94 Wn. App. 463, 478, 972 P.2d 557 (1999) (citing State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993)). In Pastrana, the prosecutor told the jury, “You are going to tell this community whether or

not shooting a gun out a vehicle on the freeway at another moving vehicle and killing somebody is first degree murder or if it is not.” Pastrana at 479. This Court held that, viewed in the context of the whole argument, the prosecutor’s statement did not amount to misconduct. Id.

Similarly, in State v. Greer, 62 Wn. App. 779, 815 P.2d 295 (1991), the prosecutor stated, “I ask you to send a clear message out to the community that these two defendants are accountable.” Greer at 786. Because the remarks must be read in context, the court held that the argument did not amount to an appeal to the jury to decide the case on an improper basis. Greer at 792-92.

Here, the prosecutor merely told the jury that if the State met its burden of proof (“if you are convinced beyond a reasonable doubt he is guilty”), then it would be a travesty of justice to render a verdict of not guilty. There was no mention of sending a message to the community or any appeal to the jury to decide the case on an improper basis. Defendant has failed to meet his burden in establishing the impropriety of the remarks.

Even if this Court finds that one of the claimed remarks was error, defendant has failed to show he was prejudiced by the error. Defendant asserts that this affected the verdict in this “very close, credibility case.” BOA at 27. This was not a close case. Almost every aspect of the incident was corroborated by other witnesses:

(1) The defense was consent, however, witness after witness testified to the fact that Heather was repulsed by defendant, making consent very unlikely. RP 306-08, 546, 597, 605, 612, 664.

(2) The vicious assault in Heather's kitchen was witnessed by Mike Smith; defendant confessed it to Mr. Chase; and Heather had a mark on her face from it. RP 619, 432, 526, respectively.

(3) There was no motivation for Heather to make the accusation falsely.

(4) Others witnessed defendant angrily calling Heather a "bitch" on or near the day of the rape. RP 432, 619, 673.

(5) Defendant lied to police about how long he had been back in the area. Ex #47, page 3.

(6) Defendant's statement was full of inconsistencies and he was evasive in many of his answers. Ex #47.

(7) Defendant initially lied to police and denied having sex with Heather. RP 559.

(8) After the rape, defendant told Mr. Smith not to tell police where he lived. RP 630.

(9) Defendant told police Heather had not written him any love letters, then almost immediately told detectives that his wife found out about his claimed affair with Heather because she found a note to him from Heather. Ex #47, page 5.

Defendant has not demonstrated any impropriety, nor can he show prejudice in a record with such overwhelming evidence.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO STRIKE THE JURY PANEL DUE TO DETECTIVE WRIGHT'S PRESENCE IN THE COURTROOM BECAUSE (1) DEFENDANT DID NOT PRESERVE ERROR WITH A TIMELY OBJECTION (2) THE DETECTIVE MERELY ASSISTED THE PROSECUTOR IN THE EXERCISE OF PEREMPTORY CHALLENGES AND (3) THE DETECTIVE'S CREDIBILITY WAS NOT AT ISSUE.

The court may order witnesses excluded to keep them from hearing the testimony of other witnesses. ER 615. The rule provides:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615. Subsection three includes investigative agents designated to assist the prosecution. U.S. v. Cueto, 611 F.2d 1056 (Fifth Cir. 1980). Violation of this rule will not result in reversal of a conviction unless the defendant can show substantial prejudice. Id. at 1061. Questions concerning the exclusion of witnesses and the violation of ER 615 are within the broad discretion of the trial court and will not be disturbed, absent manifest abuse of discretion. State v. Schapiro, 28 Wn. App. 860, 867, 626 P.2d 546, overruled in part on other grounds by State v. Fry, 30 Wn. App. 638, 638 P.2d 585 (1981).

At the start of the trial, the prosecutor introduced Detective Wright to the court and requested permission to have the detective present for all phases of the trial. RP 8. Detective Wright was seated next to the prosecutor at counsel table. RP 8; 83. Defense counsel conceded he has no “specific reason to object.” RP 8. However, he did object on the grounds that Detective Wright could be a witness. RP 8. Relying on U.S. v. Cueto, 611 F.2d 1056, the trial court ruled that Detective Wright could be present and assist the prosecution throughout the trial. RP 9.

After jury selection was completed and all of the peremptory challenges exercised, but before the jury was sworn, defendant moved to strike the entire panel. RP 263-266. His objection was based on the fact that Detective Wright having assisted the prosecutor in making his challenges of the jurors would, he argued, bolstered the detective’s credibility with the jury. RP 274, 277. RP 266. However, the detective did not question the jurors and, while the prosecutor did confer with him, the decisions were made by the prosecutor. RP 266. This was consistent with the court’s order that the detective could assist the prosecutor throughout the trial. RP 9. The trial court denied defendant’s motion to strike the panel. RP 278.

On appeal, defendant claims that it was unfair for the detective to assist in selecting the very jurors who would be assessing his credibility when he testified. BOA at 29-30. However, Detective Wright’s credibility was not an issue in the trial. He testified two times. RP 584-

588; 727-746. The first time, his testimony consisted of laying the foundation for the taped statement he took from defendant. RP 584-87. Since the statement was recorded, there was no issue as to what took place or what was said. Defendant did not cross-examine Detective Wright. RP 588. The second time Detective Wright was called to testify, he testified about what he did in the course of the investigation, i.e. who he interviewed, etc. He also testified to a prior inconsistent statement by one of the State's witnesses. RP 727-745. Again, defendant asked no questions on cross-examination. RP 746. Similarly, defendant did not raise the issue of Detective Wright's credibility in closing argument. RP 818-838.

Defendant's claim fails for several reasons. First, defendant failed to object in a timely fashion, thus depriving the trial court the opportunity to correct the alleged error. Defendant waited until the jury selection was completed before voicing any objection. RP 263, 266. This deprived the trial court of the opportunity to correct any error and allowed the complained about conduct to continue. Further, at the time of the objection, counsel objected on grounds that conferring with the detective during jury selection unfairly bolstered the detective's credibility. RP 274, 277. He did not argue that there had been a due process violation, thus failing to preserve the issue for review. See State v. Wixon, 30 Wn. App. 63, 78, 631 P.2d 1033, review denied, 96 Wn.2d 1012 (1981) (hearsay

objection not preserved for appeal where counsel objected to testimony on relevancy grounds and no hearsay objection was made).

Second, defendant fails to address Cueto, upon which the trial court relied. Instead, he relies on Anderson v. Frey, 715 F.2d 1304 (8th Cir. 1983), cert. denied, 454 U.S. 1057 (1984), which is clearly distinguishable. The Anderson case did not involve a detective or other law enforcement officer assisting the prosecutor in court during jury selection. It involved the agents of a law enforcement agency going into the community and actually choosing who would be on the jury panel from which the jury would be selected. Anderson at 1306. That is quite different than conferring with the prosecutor regarding the exercise of peremptory challenges on an already existing panel. The trial court did not abuse its discretion.

In support of this claim, defendant further argues that Detective Wright's "investigation was at issue." BOA at 33. This conclusion is not supported by the record. Detective Wright was not even cross-examined by defendant. RP 588, 746. Nor was there substantial, if any, testimony elicited from other witnesses in an attempt to impeach the investigation. Defendant's unsupported claim must fail.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF DEFENDANT'S OUT OF COURT STATEMENT TO POLICE AS TO WHY HEATHER WOULD MAKE A FALSE ACCUSATION AGAINST HIM.

“Relevant evidence” is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Relevant evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403. The admission and exclusion of relevant evidence is within the sound discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). The trial court’s decision will not be reversed absent a manifest abuse of discretion. Id.

On the day of the incident, deputies first took a statement from Heather Burns. RP 550-51. Deputies then contacted defendant. RP 553-56. After hearing both sides, deputies asked defendant if he were aware of a reason for Heather to falsely accuse him. RP 560; 566. Defendant claimed that there was another individual, a white male named Terry, who had been bugging Heather and maybe that was why she made up the rape allegation. RP 566. Defense counsel objected to this testimony at trial. RP 560-61. On appeal, defendant baldly claims this statement is

“prejudicial, irrelevant, and misleading,” but he fails to explain how.

BOA 35.

While it is improper *during trial* to ask a witness to comment on the credibility of another witness, that is not what occurred here. See State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994). Here, police were trying to get to the bottom of conflicting stories. The participants were acquaintances. Defendant’s illogical response attempting to blame another was very probative of his state of mind soon after the rape. He seems to be acknowledging that someone was bugging Heather and blames Terry. The fact that he is prevaricating in his attempt to blame Terry becomes obvious because it makes no sense that Heather would accuse defendant of rape if she were upset with Terry.

The cases relied upon by defendant are all cases involving the examination of witnesses at trial. Here, the court admitted an out of court *statement* made by defendant on the day of the incident, well before trial. RP 553-66. Defendant was not being cross-examined and asked to opine about the credibility of witness testimony. Defendant has presented no authority demonstrating that a defendant’s out of court statement regarding the motivation of individuals involved in an incident is inadmissible. There was no manifest abuse of discretion. Defendant’s unsupported claim fails.

4. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

Under the cumulative error doctrine, a defendant may be entitled to a new trial or reversal where errors cumulatively produced a trial that is fundamentally unfair. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine is employed where “the combined effect of an accumulation of errors ... may well require a new trial.” State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). The defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). As argued above, there was no prejudicial error in the proceedings below. Assuming, arguendo, that error occurred, it was not of such magnitude as to warrant a retrial or reversal. Defendant’s claims under the cumulative error doctrine thus fail.

5. THE TRIAL COURT DID NOT ERR IN SENTENCING DEFENDANT AS A PERSISTENT OFFENDER BECAUSE DEFENDANT HAS TWO CURRENT CONVICTIONS FOR SECOND DEGREE RAPE AND A PRIOR COMPARABLE COLORADO CONVICTION FOR A SEX OFFENSE.

A person convicted of second degree rape is a “persistent offender” if that person has, before the commission of the current offense, been

previously convicted of an out of state offense that is comparable to attempted first or second degree rape. RCW 9.94A.030(33)(b). A “persistent offender” shall be sentenced to life in prison without possibility of parole. RCW 9.94A.570. “Defendants with equivalent prior convictions are to be treated the same way, regardless of where their convictions occurred.” In Re PRP of Lavery, 154 Wn.2d 249, 254, 111 P.3d 837 (2005) (citing State v. Villegas, 72 Wn. App. 34, 38-39, 863 P.2d 560 (1993)).

The Washington Supreme Court has developed a two-part test to determine whether foreign convictions are comparable to Washington strike offenses. State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998). First, the court must compare the elements of the crimes. Id. at 605-06. This has been labeled “legal comparability.” Lavery at 255. Specifically, the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. Id. at 606.

If the elements of the foreign conviction are comparable to the elements of a Washington strike offense *on their face*, the foreign crime counts toward the offender score as if it were the comparable Washington offense.

Id. [Emphasis added.]

Until recently, part two of the test was applied if the elements of the foreign crime and Washington crime were not substantially similar. Morley at 606. In that instance, the sentencing court would evaluate

defendant's conduct as evidenced by the indictment or information to determine if the conduct itself violated a comparable Washington statute. Id. at 606. This has been labeled "factual comparability." Lavery at 255. Because this analysis goes beyond the fact of conviction and relies on facts that were neither admitted, stipulated to, nor proven to a finder of fact, it "proves problematic." Lavery at 258. See Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

As will be shown below, defendant's Colorado conviction for attempted first degree sexual assault is legally comparable to Washington's crime of attempted second degree rape. Therefore, part two of the test would not be applicable.

In Lavery, the defendant had a prior conviction for federal bank robbery, a general intent crime. Lavery at 255. The court held that federal bank robbery was not comparable to Washington's second degree robbery because Washington requires the specific intent to steal as an essential element. Id. Washington's definition is narrower than the federal crime's definition. Id. at 256. Thus, the Lavery court concluded:

Because the elements of federal bank robbery and robbery under Washington's criminal statutes are not **substantially similar**, we conclude that the federal bank robbery and second degree robbery in Washington are not legally comparable.

Id. [Emphasis added].

The standard of review on legal comparability is de novo since is it a question of law. State v. Beaver, 148 Wn.2d 338, 344, 60 P.3d 586 (2002).

Here, defendant has the following adult criminal history:

<u>CRIME</u>	<u>DATE OF CRIME</u>	<u>JURISDICTION</u>
Att'd Sexual Assault	09/19/91	Denver, CO
Vehicular Assault	02/11/94	Denver, CO
Assault 4 (X2)	07/02/02	Pierce Co, WA
Assault 4	05/16/03 (Sentencing)	Pierce Co, WA

CP 170.

The jury convicted defendant, inter alia, of two counts of second degree rape. CP 169. Defendant has a prior conviction for a sexual offense from Colorado, which makes him a persistent offender because Colorado's conviction for criminal attempt first degree sexual assault is comparable to Washington's conviction for attempted second degree rape. RCW 9.94A.030(33)(b); C.R.S. 18-2-101; C.R.S. 18-3-402; RCW 9A.28.020 and RCW 9A.44.050.

At sentencing, the State presented certified copies of defendant's Judgment of Conviction from the State of Colorado. Ex #6.²

In 1991, as today, a person is guilty of an "attempt" in Washington when, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW

² The exhibits admitted at sentencing were not numbered consecutively to the trial exhibits. For purposes of this section, exhibits referred to were admitted at sentencing on January 19, 2006 and January 27, 2006.

9A.28.020(1). The Colorado “attempt” uses similar language, which is set forth in the table below:

Attempt (Washington) RCW 9A.28.020(1) ³	Attempt (Colorado) CRS 18-2-101 ⁴
Intent to commit a specific crime. Does any act which is a substantial step toward the commission of that crime.	Acting with the kind of culpability otherwise required for commission of an offense. Engages in conduct constituting a substantial step toward the commission of the offense. Substantial step is any conduct, whether act, omission, or possession which is strongly corroborative of purpose of completing offense.

In order to violate the Colorado “attempt” statute a person “must act with the kind of culpability otherwise required for commission of the underlying offense and must engage in the conduct which constitutes the substantial step with the further intent to perform acts which, if completed, would constitute the underlying offense.” People v. Frysig, 628 P.2d 1004, 1015 (1981). Therefore, in Colorado, a jury would be required to find that a defendant had a purpose to complete the commission of first degree sexual assault, as an element of attempted first degree sexual assault. Id. It can fairly be stated, therefore, that the “attempt” statutes

³ See CP 140 for text of statute.

⁴ See CP 130 for text of statute.

from Washington and Colorado are substantially similar and, therefore, comparable.

Although defendant claims that the Colorado attempt statute is broader than the Washington statute because it includes an omission, defendant fails to show that a sexual assault could be committed by “omission.” See Lavery, 154 Wn.2d 249 (crimes not legally comparable where federal definition of crime broader than Washington definition, whereby a person could be convicted of federal bank robbery without having been guilty of second degree robbery). Defendant cannot show how an omission could amount to a forcible rape in Colorado, which is the only way to determine that the Colorado statute is more narrow than Washington’s. Indeed, it is difficult, if not impossible, to imagine any scenario where a individual could be convicted of an attempted forcible rape by *omission*. The inclusion of the word omission in the Colorado attempt statute does not defeat comparability in this instance because the crux of the analysis is not whether there is a difference in wording, but whether defendant could be convicted of the foreign crime and not be guilty of the Washington crime. That cannot be done in this case. Defendant’s sentence should be affirmed.

The underlying crime of first degree sexual assault in Colorado is comparable to the Washington offense of second degree rape. That particular statute referenced in the amended charging document (CRS 18-3-402(1)(a)) is violated when a person “knowingly inflicts sexual intrusion

or sexual penetration on a victim” and that the person “causes submission of the victim through the actual application of physical force or physical violence.”

The comparable crime of second degree rape is committed in Washington when a person engages in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050. This was also the case in 1991, when defendant committed his Colorado offense. The following table compares the elements of second degree rape in Washington and first degree sexual assault in Colorado:

Rape 2 (Washington) RCW 9A.44.050 ⁵	Sexual Assault 1 (Colorado) CRS 18-3-402 ⁶
Engages in sexual intercourse	Knowingly inflicts sexual intrusion or sexual penetration
With another person	On a victim (defined as a person by CRS 18-3-401(7))
By forcible compulsion	Causes submission through the actual application of physical force

It is well settled that “intent” is not an element of second degree rape. State v. Brown, 78 Wn. App. 891, 899 P.2d 34 (1995), State v. Walden, 67 Wn. App. 891, 841 P.2d 81 (1992). Colorado therefore requires an element of “knowing” infliction of sexual intrusion/penetration that Washington does not. Because the Colorado statute is therefore

⁵ See CP 141 for text of statute.

⁶ See CP 137 for text of statute.

narrower than the Washington statute, comparability is not affected. See Lavery at 255-56.

The definitions of “sexual intrusion” and “sexual penetration” are found in CRS 18-3-401. Because sexual intercourse, sexual intrusion and sexual penetration are defined by statute, a table again becomes helpful:

Sexual intercourse (Washington) RCW 9A.44.010(1), (2) ⁷	Sexual intrusion/penetration (Colorado) CRS 18-3-401(5), (6) ⁸
Ordinary meaning OR Penetration of vagina or anus by an object when committed on one person by another, except when done for medically recognized treatment ** NOTE ** a finger (and presumably other parts of the body) is “an object.” <u>State v. Tili</u> , 139 Wn.2d 107, 111 (1999) OR Sexual contact (touching of the sexual or intimate parts of a person done for the purpose of gratifying the sexual desire of either party or a third party) between persons involving the sex organs of one person and the mouth or anus of another	Sexual intercourse, OR Any intrusion by an object or any part of a person’s body, except the mouth, tongue or penis, into the genital or anal opening of another person’s body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse OR Cunnilingus, fellatio, analingus, or anal intercourse

⁷ See CP 143 for text of statute.

⁸ See CP 138 for text of statute.

Thus, any act in Colorado which would qualify as “sexual penetration” or “sexual intrusion”, would also qualify as “sexual intercourse” in Washington.

The Colorado element of “actual application of physical force or physical violence” is not defined by statute. See CP 138. However, Colorado has determined that the term “physical force” does not require further definition. People v. Johnson, 671 P.2d 1017 (Colo. Ct. App.) (1983). The table below shows the comparability of the force elements in both states.

<p style="text-align: center;">Forcible compulsion Washington RCW 9A.44.010(6)⁹</p>	<p style="text-align: center;">Actual application of physical force or physical violence Colorado CRS 18-3-402(1)(a)¹⁰</p>
<p>Physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that he or she or another person will be kidnapped.</p>	<p>The actor causes submission through the actual application of physical force or physical violence.</p>

Because the plain meaning is used for the Colorado element, it is comparable to “physical force which overcomes resistance”, which is Washington’s “forcible compulsion.” Therefore, it cannot be said that submission caused “through the actual application of physical force or

⁹ See CP 144.

¹⁰ See CP 137.

violence” would not be the equivalent of “physical force which overcomes resistance.”

As the foregoing comparisons illustrate, defendant’s prior conviction for “criminal attempt 1st degree sex assault” is legally comparable to Washington’s attempted second degree rape (a strike offense) because the criminal statutes are substantially similar. Therefore, the trial court did not err in sentencing defendant as a persistent offender on his current second degree rape convictions.

6. THE COURT DID NOT VIOLATE
DEFENDANT’S CONSTITUTIONAL RIGHTS
BY FINDING THAT HE HAD PRIOR
CONVICTIONS; THE “FACT OF A PRIOR
CONVICTION” EXCEPTION IN APPRENDI
INCLUDES THE DETERMINATION OF THE
IDENTITY OF THE PERSON CONVICTED.

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court expressed the rule that: “**other than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (Emphasis added). Apprendi did not overrule the Court’s earlier decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), which held that a defendant did not have a right to a jury trial on facts of recidivism, specifically, prior convictions. The Court further clarified in Jones v. United States, 526 U.S. 227, 249,

119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), that facts of prior conviction were distinguishable from other factors increasing a sentence, which would have to be found by a jury because a “prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” The Supreme Court specifically applied the rule of Apprendi to the SRA in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Both Apprendi and Blakely exclude “the fact of a prior conviction” from the proscription against using judicially determined facts to impose sentences beyond the statutory maximum. See Blakely, 124 S. Ct. at 2536 (quoting Apprendi, 530 U.S. at 490).

In a post-Apprendi/pre-Blakely case, the Washington Supreme Court held that neither the federal nor state constitution requires prior convictions to be proved to a jury beyond a reasonable doubt. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004). The court noted that the “United States Supreme Court has never held that recidivism must be pleaded and proved to a jury beyond a reasonable doubt.” Id. at 141. Post-Blakely, Washington courts have determined that a persistent offender sentence is constitutional even though the relevant statutes permit a sentencing court to determine prior convictions by a preponderance standard, without submitting the matter to a jury. State v. Rivers, 130 Wn. App. 689, 694-697, 128 P.3d 608 (2005); State v. Ball, 127 Wn. App. 956,

960-61, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018, 132 P.3d 734 (2006).

In Rivers, a defendant contended that after Blakely, “a jury must find beyond a reasonable doubt that he was convicted of two prior most serious offenses.” Rivers, 130 Wn. App. at 694. The Court of Appeals, Division I, rejected this argument finding that the issue was controlled by the Washington Supreme court decisions in State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1559, 152 L. Ed. 2d 482 (2002) and State v. Smith, 150 Wn.2d 135, 75 P.3d 934, cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004). The court did not find that the decision in Blakely undermined the rationale of Wheeler or Smith, as Blakely specifically excluded its application to prior convictions. Rivers, 130 Wn. App. at 695. This court should follow Rivers and find that this issue is controlled by Smith. Defendant is not entitled to a jury determination regarding his criminal history.

Defendant seeks to avoid the application of Almendarez-Torres, Wheeler, and Smith as well as ignore the express exclusions made for prior convictions in Apprendi and Blakely, by arguing that the “fact of a prior conviction” is somehow distinct from the fact of to whom that conviction belongs. Defendant asserts that the issue of identity of a convicted person must be submitted to a jury even though the existence of prior conviction does not. The State submits that the “fact of a prior

conviction” includes within it the determination of the identity of the person convicted.

The analysis of the Supreme Court in Almendarez-Torres depended greatly on the fact that the subject matter of the statute at issue was recidivism. Almendarez-Torres, 523 U.S. at 230. At issue was a federal statute authorizing increased punishment for a deported alien’s illegal return if the alien’s initial deportation had been subsequent to a conviction for an aggravated felony. Almendarez-Torres argued that the constitution required that his recidivism be treated as an element of his offense. The court rejected his claim, commenting that recidivism, that is consideration of an offender’s prior record, was typically a sentencing factor rather than an element of a crime. Id. at 243-247. The court noted that while some states afforded a jury determination on the issue of prior convictions, the practice was not uniform and that “nowhere” to the court’s knowledge, did the practice rest “upon a federal constitutional guarantee.” Id. at 246-247. The court’s focus on “recidivism” is important because the very term presupposes that the court is considering whether a particular person has offended again before imposing sentence. Thus, the decision in Almendarez-Torres addressed whether the constitution required that a particular offender’s criminal history had to be pleaded and proved to a jury before the court could use it to increase punishment; the court concluded it did not.

Another obvious indication that the “fact of a prior conviction” includes the identity of the person convicted is the number of times that criminal defendants have raised this issue in the courts, hoping to succeed on a claim that the Sixth Amendment (or a state constitutional provision) requires a jury determination on this fact. The Washington Supreme Court rejected the claim pre-Apprendi in State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997) (The SRA does not provide for a jury trial when prior convictions are used to increase the penalty faced by a defendant.). The court again rejected it, post-Apprendi, in State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1559, 152 L. Ed. 2d 482 (2002). The court rejected it once again, post-Ring v. Arizona¹¹, in State v. Smith, 150 Wn.2d 135, 75 P.3d 934, cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004). The Court of Appeals has now rejected the argument post-Blakely. See State v. Rivers, *supra*. When Mr. Manussier, Mr. Wheeler, Mr. Smith, and Mr. Rivers were standing before the court for sentencing, only their respective prior convictions had any relevance to the sentencing court. The State has no interest in proving, and the trial court has no interest in considering, the existence of prior convictions unless they belong to the person standing before the court for sentencing. If the State tried to admit evidence that

¹¹ 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)

some other person had been previously convicted of a crime, any of these defendants could have challenged the evidence on relevance grounds and had it excluded. The defendants would not need to assert a constitutional basis to support their argument; the rules of evidence would suffice. It is only because the “fact of a prior conviction” includes within it the determination that it is a “prior conviction” of the recidivist offender standing before the court that a constitutional analysis is warranted. Various criminal defendants continue to reassert a Sixth Amendment claim every time the United States Supreme Court issues a new case applying Apprendi. However, as long as Almendarez-Torres remains as valid authority, the answer remains the same: prior convictions, including the identity of the person convicted, need not be proved to a jury beyond a reasonable doubt.

The State must prove the defendant’s criminal history by a preponderance of the evidence. RCW 9.94A.500(1). Here, the unchallenged certified copies were sufficient to establish the existence and nature of the prior convictions. See State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). Defendant’s name and date of birth on the Colorado judgments of conviction match the name and date of birth on the current judgment and sentence. Ex #6, 11; CP 169. Additionally, the trial court admitted a copy of defendant’s Washington Driver’s License containing defendant’s full name, photo, and date of birth. Ex #1.

Further, at sentencing, the trial court admitted into evidence as Ex #10 the transcript of defendant's unredacted taped statement to detectives. RP 882-83. In the statement, defendant repeatedly refers to his obligation to register as a sex offender in the State of Colorado. Ex #10, page 2, 4. He also admitted to a sexual assault against a woman in 1991, which is consistent with the jurisdiction and year of the prior conviction at issue. Ex #10, page 20 [emphasis added]. When detectives asked if that is what his registration requirement was for, defendant responded, "Yes sir. And it's **first degree, criminal attempted sexual assault.**" Ex #10, page 20. He also told detectives that he **pleaded guilty** and served prison time. *Id.*

Moreover, because defendant failed to allege, under oath, that he was not the person named in the documents, this evidence was also sufficient to establish identity. *State v. Ammons*, 105 Wn.2d 175, 189-90, 713 P.2d 719 (1986); *State v. Cabrera*, 73 Wn. App. 165, 169 n.3, 868 P.2d 179 (1994).

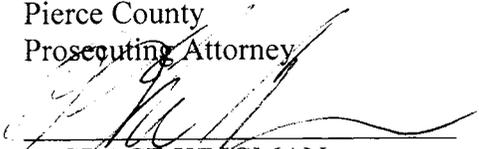
The evidence clearly established, by a preponderance of the evidence, that the prior convictions belonged to the defendant. The court acted properly in making the determination that the prior convictions belonged the defendant, and the defendant did not allege that any of the convictions were not his. The trial court's sentence should be affirmed.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to affirm defendant's convictions and sentence.

DATED: December 15, 2006.

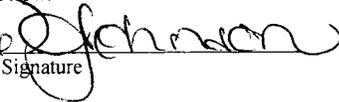
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/15/06 
Date Signature

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