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NO. 36278-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES CLAY SPINKS,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it admitted evidence that the defendant had committed similar offenses against the same complaining witness in the past.

2. The trial court violated the defendant's right to an impartial jury under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment, when it twice allowed the state to elicit evidence that in the opinion of one of the witnesses the defendant was guilty.

3. The trial court violated RCW 9.94A.535 & 9.94A.537, Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment when it imposed an exceptional sentence without notice or findings to support the sentence.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it admits evidence that the defendant had committed similar offenses against the same complaining witness in the past when that evidence is more unfairly prejudicial than probative and when the jury would not have convicted had this evidence been excluded?

2. Does a trial court violate a defendant's right to an impartial jury under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment, if it twice allows the state to elicit evidence that in the opinion of one of the witnesses the defendant was guilty?

3. Does a trial court violate RCW 9.94A.535 & 9.94A.537, Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment when it imposed an exceptional sentence without entering findings of fact to support the sentence and when the state failed to file a notice of intent to seek an exceptional sentence?

STATEMENT OF THE CASE

Factual History

On December 25, 2006, 34-year-old Helen Turner was living at 1110 Brandt Road in Vancouver and had been for a number of years. RP 162. Her only source of income came from social security disability payments. *Id.* After getting up early that morning Ms Turner made preparations to spend the day with her daughter, who had spent the night with an aunt. RP 171. After making those preparation she then fell asleep on the couch watching television. RP 172-173. At about 7:00 that morning she awoke to find the defendant James Spinks knocking at the front door. *Id.* Ms Turner and the defendant had known each other for about eight months and had been involved in an on again, off again romantic relationship. RP 162-163. In the past the defendant had spent a number of nights at her house although he had never lived there and did not have a key to the front door. RP 11. According to Ms Turner their relationship had soured when the defendant physically abused her on a number of prior occasions. RP 162. In fact, on October 16th she had called the police and had him arrested after he came to her house, got into an argument with her, and hit her leaving bruises on her face. RP 169-170. Although they still had contact after this incident, she had told him not to come back over to her house. RP 163.

When Ms Turner opened the door on Christmas day she did not invite

the defendant into the house. RP 174-175. After a brief conversation at the door they got into an argument and, according to Ms Turner, the defendant grabbed her arm and drug her out into the middle of the street, injuring her knees as they scraped along the road. RP 175-176. Once in the street, she took a cell phone out of her pocket to call the police. RP 176-178. When she did, the defendant grabbed it and threw it to the ground breaking it. *Id.* Ms Turner then ran across the street to a neighbor's house and knocked on the door for help. RP 178. This house belonged to Heidi and Kasey Jones. RP 120-121. When Mrs. Jones answered the door she asked if she needed to call the police. RP 123-124. Ms Turner stated that she did not, but did ask if Mr. Jones would come over to her house and make the defendant leave. *Id.* Mr. Jones agreed and went back into the house to get dressed so he could go and help Ms Turner. RP 139-140. While this was happening Ms Turner and Mr. and Mrs. Jones could all see the defendant standing over by the front door to Ms Jones house. RP 131, 139-140, 178-180.

After about five or ten minutes Mr. Jones got his clothes on and returned to his front door. RP 139-141. As he did, he and his wife, along with Ms Turner looked over and saw smoke coming out of Ms Turner's house. RP 126, 145, 179. They also saw the defendant walking quickly down the street. RP 127, 143-144, 179. Upon seeing this Mrs. Jones used her cell phone and called 911 for assistance. RP 127. Not knowing whether

or not there was anyone else in the house, Mr. Jones and another neighbor ran over to Ms Turner's house. RP 145-146. Mr. Jones, who had a fire extinguisher with him, crawled through the house looking for anyone who might be present. RP 146. As he crawled down the hallway, he saw that the door to Ms Turner's bedroom was open a few inches and that the end of her bed was on fire. RP 146-148. As he pushed open the door and used his extinguisher, the fire "sort of exploded." *Id.* At this point Mr. Jones exited the house. *Id.* At no point in time did Ms Turner, Mrs. Jones, or Mr. Jones see the defendant enter or exit Ms Turner's house. RP 120-135, 135-154, 161-186.

Within a few minutes of the "911" call the firemen arrived and put out the fire, which had been burning intensively in the master bedroom, having started at the foot of the bed. RP 206-208. The police also arrived, found the defendant a few block away, and arrested him. RP 105-111. Once at the police station the defendant admitted that he had got into a physical confrontation with Ms Jones and grabbed her cell phone and broke it. *Id.* However, he denied ever entering her house and setting a fire. RP 109. In fact, a later investigation by the Vancouver Fire Marshal was able to exclude any electrical device as being the source of the fire. RP 221, 243. His investigation also ruled out the use of any type of accelerant to start the fire. 241. Rather, given the burn pattern and the source of fuel in the room, he

believed that the fire had started at the foot of the bed when some source of open flame had ignited the mattress and bed spread. RP 225. Although sources such as candles could provide the necessary open flame to start such a fire, Ms Turner denied having had any candles lit in her bedroom. RP 231, 241, 243. However, the fire marshal did state that an ignition source such as a candle would have been completely consumed in the fire. RP 240-241.

Procedural History

By information amended information filed April 13, 2007, the Clark County Prosecutor charged the defendant James Clay Spinks with one count of first degree arson, one count of residential burglary, one count of fourth degree assault, and one count of interfering with the reporting of a domestic violence offense. CP 26-27. The first three counts included an allegation that the defendant had committed the offense against a “family or household member.” However, the information did not include any further allegation of aggravating facts under RCW 9.94A.535(2)(h) specifically or RCW 9.94A.535(2) generally.

Just prior to trial the court called this case for a hearing under ER 404(b) to determine the admissibility of alleged prior bad acts by the defendant, and CrR 3.5 to determine the admissibility of the defendant’s alleged statements during custodial interrogation. At the former hearing the state called Helen Turner, who testified to the extent of her relationship with

the defendant and to a number of alleged prior instances in which the defendant had assaulted her. Following her testimony and argument by counsel, the trial court found that (1) the state had proved by a preponderance of the evidence that the alleged incidents had occurred, and (2) the facts surrounding the prior incidents were admissible under ER 404(b) to show “the context of their relationship.” RP 32. The court granted the defense a continuing objection to the admission of this evidence. RP ??.

Following its ruling on the ER 404(b) motion, the state called two police officers who testified that they had read the defendant his *Miranda* warnings prior to asking him questions about the case, and that the defendant had acknowledged and waived his right to silence and to an attorney. RP 40-43, 65-74. After this testimony and brief argument by counsel, the trial court ruled that the defendant’s statements had been voluntarily made after a knowing and intelligent waiver of his *Miranda* rights. RP 45, 74. Thus, the court ruled them admissible at trial. *Id.*

After the ER 404(b) hearing and the CrR 3.5 hearing, the court called the case for trial before a jury. RP 100. During this trial the state called nine witnesses, including Helen Turner, the two interrogating officers, the fire marshal, and Heidi and Kesey Jones, Ms Turner’s two neighbors. RP 103-258. These witnesses testified to the facts contained in the preceding *Factual History*. In addition, during the trial, the court, over defense objection,

allowed the state to play the tape of Ms. Jones “911” call to report the fire.

RP 114. The text of this call included the following question and answer.

THE OPERATOR: Did you say smoke and flames?

MS JONES: Yes. The smoke is pouring out of the house. The guy – it was a domestic. The lady came over here to use the phone and he started the house on fire.

RP 115.

Later during the trial the state elicited the following statement from Officer Doug Keldsen as to why he had been called to the scene:

A. Okay. Responded to the call. The complainer, the person that had called 911, referred that the fire was – there was a fire at the house, that it was set intentionally, and there was a description of the person – the suspect and direction of travel.

RP 188.

Although the court stated that this evidence was only being admitted to “show why [the officer] responded” and not for the truth of the matter asserted, the court never did explain why this was at all relevant to any issue at trial. RP 188.

In addition, over defense objection the court also allowed the state to elicit claims from Helen Turner that the defendant had previously physically abused her and that on one occasion on October 16th, just one and one-half months before her house burned, the defendant had come to her house, got into an argument with her, and had assaulted her and left her with a bruised

face. RP 169-170. During trial the court allowed the state to introduce a photograph that the police had taken showing the bruise that resulted from the defendant's assault on October 16th. *Id.*

Following the testimony at trial the court instructed the jury, and counsel presented argument. RP 285-300, 306-328. The jury then retired for deliberation and later returned verdicts of "guilty" on all counts. CP 82-85. The jury also returned special verdicts that the defendant had committed the crimes in Counts I, II, and III against a family or household member as had been defined by the court. CP 86-88.

At a later sentencing hearing, the court exercised its discretion under the burglary anti-merger statute and determined that the defendant's offender score was one concurrent point for the first two counts. RP 4-16-07 4-16. Thus, the court calculated the defendant's standard range as 26 to 34 months on the arson charge and 6 to 12 months on the burglary charge. RP 4-16-07 4-8.¹ The court then imposed sentences of 30 months on Count I and 10 months on count II. CP 98. However, without specifically declaring an

¹The judgment and sentence erroneously lists the offender score as "0" points, and erroneously lists the standard range on the arson charge as 15 to 20 months (which is not the correct range even if the offender score had been 0 points). Just why this error occurred is unclear since the transcript of the sentencing hearing is clear in showing that the trial court found the correct offender score to be 1 point and the range on the arson charge to be 26 to 34 months.

exceptional sentence or entering written findings, the court ordered the sentences to run consecutively. CP 98, 105. The defendant thereafter filed timely notice of appeal. CP 120-134.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ADMITTED EVIDENCE THAT THE DEFENDANT HAD COMMITTED SIMILAR OFFENSES AGAINST THE SAME COMPLAINING WITNESS IN THE PAST.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham’s treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). As the court stated in *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), “[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.”

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the

right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: “This is not the problem. Alberto [the defendant] already has a record and had stabbed someone.” *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which constituted the majority of the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v.*] *Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the

statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed the same time of crime with which he is now charged. The case at bar presents another example of this unfair prejudice. In fact the evidence presented in this case exceeded that in the three cases cited, particularly when considering that (1) in the case at bar the trial court allowed the state to elicit multiple convictions and prior bad acts of a similar nature, and (2) the complaining witness in the case before the jury was the same complaining witness in the prior convictions and bad acts. Under these circumstances there was no way for the jury to overcome the overwhelming inclination to do just what they were not supposed to do: assume that the defendant had committed a crime in the case before it because the defendant had committed the same crime against the same complaining witness on prior occasions.

In the case at bar the trial court did not really undertake an analysis concerning the necessity of admitting the defendant's prior offenses against the same complaining witness. Rather, following argument on this issue, the

court merely noted that this evidence was necessary so the jury could understand the “context of [the parties’] relationship.” RP 32. Just what this means exactly is hard to determine. However, it is not evidence that proves “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” or any other legitimate purpose under ER 404(b). Indeed, the sole purpose to admit the defendant’s prior assaultive conduct toward the complaining witness was merely to prove that the defendant had a bad character and acted in conformity with that bad character. Thus, the trial court abused its discretion when it admitted the defendant prior bad acts.

In the case at bar, the defendant in his statements to the police did not deny committing a fourth degree assault or interfering with the domestic violence reporting. However, the defendant denied that he had either entered the house or the complaining witness or set anything on fire in her bedroom. In fact, although the witnesses put the defendant in the front yard of the house, no witness ever saw him enter or exit. In fact, the amount of time that passed between Helen Turner knocking on her neighbor’s door and the group seeing that the house was on fire was so short that the fire might well have been accidentally started prior to the defendant’s arrival at the scene or could have been intentionally set by Ms Turner prior to the defendant’s arrival. Under these circumstances, it is likely that without the admission of the

improper evidence of prior bad acts, the verdict of the jury would have been acquittal. Thus, the defendant is entitled to a new trial.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT TWICE ALLOWED THE STATE TO ELICIT EVIDENCE THAT IN THE OPINION OF ONE OF THE WITNESSES THE DEFENDANT WAS GUILTY.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.' " (Citations omitted.) 5A K.B. Tegland, *Wash.Prac., Evidence Sec.* 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact.

To the expression of an opinion as to a criminal defendant's guilt

violates his constitutional right to a jury trial, including the independent determination of the facts by the jury.

State v. Carlin, 40 Wn.App. 701 (some citations omitted).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that “[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wash.2d 312, at page 315, 427 P.2d

1012, at page 1014 (1967), said:

Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. To the proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).

To the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

State v. Haga, 8 Wn.App. At 491-492. *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

Unlike *Haga*, in which the jury had to "infer" the ambulance driver's opinion as to the defendant's guilt, in the case at bar, the jury twice heard Heidi Jones' opinion that the defendant was guilty. The first instances occurred when the court allowed the jury to hear Mrs. Jones "911" call. The

text of this call included the following question and answer.

THE OPERATOR: Did you say smoke and flames?

MS JONES: Yes. The smoke is pouring out of the house. The guy – it was a domestic. The lady came over here to use the phone and he started the house on fire.

RP 115.

Later during the trial the state elicited the following statement from Officer Doug Keldsen as to why he had been called to the scene:

A. Okay. Responded to the call. The complainer, the person that had called 911, referred that the fire was – there was a fire at the house, that it was set intentionally, and there was a description of the person – the suspect and direction of travel.

RP 188.

Both of these pieces of evidence reveal Mrs. Jones opinion that the defendant was guilty of the crime charged, in spite of the fact that neither she nor any other witness had seen the defendant either enter or exit Ms Turner's house. Indeed, Ms Turner and Mrs. Jones had been on the Jones' front porch from the time Ms Turner knocked on the door. Both of them had an unobstructed view of Ms Turner's front door. Thus, by twice allowing the state to elicit the fact that in Mrs. Jones opinion the defendant was guilty, the court denied the defendant his right to have the jury decide the case on the facts and not on inadmissible opinion. Since there was no other evidence that the defendant had committed this offense, it is more likely than not that the

jury would have returned a verdict of acquittal had the court properly excluded this evidence upon the defendant's objection. As a result, the erroneous admission of this evidence entitles the defendant to a new trial.

III. THE TRIAL COURT VIOLATED RCW 9.94A.535 & 9.94A.537, WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE WITHOUT NOTICE OR FINDINGS TO SUPPORT THE SENTENCE.

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 held that under the Sixth Amendment “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The court subsequently clarified this rule in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and held that the term “prescribed statutory maximum” meant the “standard range” for the offense not the “statutory maximum” for the offense. These two cases left open the question whether or not it was still possible to impose an exceptional sentence under the Washington Sentencing Reform Act, particularly for those exceptional sentences which were reversed for *Apprendi* and *Blakely* violations.

In *State v. Hughes*, 154 Wn.2d 119, 110 P.3d 192 (2005), the Washington Supreme Court addressed this question. In this case, the state argued that the trial court had inherent authority to empanel sentencing juries

for those exceptional sentences reversed under *Apprendi* and *Blakely* even though the RCW 9.94A did not establish a procedural basis for such actions. The state also argued that errors under *Apprendi* and *Blakely* could be harmless beyond a reasonable doubt under appropriate facts. The defense responded that (1) *Apprendi* and *Blakely* made Washington's statutory scheme for imposing exceptional sentences unconstitutional on its face, (2) that no inherent judicial authority existed to establish procedures for empaneling sentencing juries, and (3) the failure to submit aggravating factors to the jury constituted a structural error that could never be harmless beyond a reasonable doubt. The Washington Supreme Court agreed with each of the defense arguments.

The Washington State Legislature responded to the decision in *Hughes* by amending the SRA to provide for jury determinations of aggravating factors justifying exceptional sentences upward. LAWS OF 2005, ch. 68 (amending RCW 9.94A.530 and RCW 9.94A.535, and adding RCW 9.94A.537 (effective April 15, 2005)). Sections (1) and (2) of this statute provide as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be

proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(1)-(2).

The statute did not address the issue of what type of "notice" the state must provide. However, subsection (3) of the statute does establish the procedures for implementing the statute. This subsection states:

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

RCW 9.94A.537(3).

As the statute states the "aggravating circumstances under RCW 9.94A.535(3)(a) through (y), *shall be presented to the jury during the trial of the alleged crime.*" (emphasis added). In the case at bar the state charged the defendant with first degree arson, residential burglary, fourth degree assault, and interfering with reporting a domestic violence offense. Neither the amended information nor any other document in the file put the defendant on notice that the state would be seeking an exceptional sentence in this case.

Neither did any other type of notice inform the defendant what aggravating circumstances the state would seek to prove.

Finally, in the case at bar the jury was not asked to return any special verdicts other than the special verdicts finding that the defendant had committed the offenses against a family or household member. However, under RCW 9.94A. 535(2)(h), this finding does not constitute a recognized aggravating factor without at least one of three further findings. This subsection states:

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

RCW 9.94A. 535(2)(h).

In this case the court calculated the defendant's offender score at one point by exercising its discretion to treat the arson and the burglary as two separate crimes under the burglary anti-merger statute. *See In re Connick*, 142 Wn.2d 444, 28 P.3d 729 (2001); *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999). Thus, on an offender score of one point, the defendant's standard

range on count I was from 26 to 34 months in prison and the standard range was from 6 to 12 months on Count II. The court imposed a standard range sentence of 30 months on count I and 10 months on count II. However, instead of ordering the sentences to run concurrently as is required under RCW 9.94A.589(1)(a). This statute provides as follows:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. *Sentences imposed under this subsection shall be served concurrently.* Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a).

The two exceptions mentioned in this statute under subsections (b) and (c) deal with situations in which the court sentences a defendant on two or more serious violent offenses (subsection (b)) and sentences for unlawful possession of a firearm (subsection (c)). Neither of these exceptions applies to the facts of the case at bar. Thus, under RCW 9.94A.589(1)(a), the court only had authority to impose consecutive sentences by declaring an exceptional sentence under RCW 9.94A.535. As was just argued, this

section cannot be used to justify the exceptional sentence because the state did not give notice of intent to seek an exceptional sentence under RCW 9.94A.537, and the jury did not return special verdicts on facts sufficient to impose an exceptional sentence under RCW 9.94A.535. Consequently, the trial court erred when it imposed consecutive sentences in the case at bar.

The imposition of the exceptional sentence in the case at bar not only exceeded the court's authority under the applicable sentencing statutes, it also violated the defendant's constitutional right to notice under Washington Constitution, Article 1, §§ 3 and 21, and United States Constitution, Sixth and Fourteenth Amendments. The following presents this argument.

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, a charging document must contain "[a]ll essential elements of a crime" so as to give the defendant notice of the charges and allow the defendant to prepare a defense. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This right to adequate notice is also part and parcel of the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. *State v. Sullivan*, 143 Wn.2d 162, 19 P.3d 1012 (2001). Thus, a defendant may only be convicted of the crime charged, or a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987); *State v. Taylor*, 90 WnApp. 312, 950 P.2d 526 (1998). As this Division of the Court

of Appeals has previously stated:

Generally, the State must give the accused notice of the charge he will face at trial. An accused cannot be convicted of an uncharged or inadequately charged offense. A jury may, however, find an accused guilty of a lesser degree offense when the State charges the accused with a higher degree of a multiple degree offense. In such instances, the State does not have to notify the defendant that he may be convicted of the lesser included offense.

State v. Taylor, 90 Wn.App. at 322 (citations omitted).

This constitutional principle is also adopted in by statute in RCW 10.61.010, which states as follows:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010.

These principles also apply to the imposition of sentencing enhancements based upon the existence of specific facts such as the commission of a crime within a particular protected area (school zone enhancement under RCW 69.50.435), the use of a firearm in the commission of a crime (firearm enhancement under RCW 9.94A.533(3)), the use of a deadly weapon during the commission of an offense (deadly weapon enhancement under RCW 9.94A.533(4)), and the existence of prior convictions for the same offense (elevating harassment to a felony under

RCW 26.50.110).

For example in *State v. Theroff*, 95 Wn.2d. 385, 622 P.2d 1240 (1980), the prosecutor filed an information charging the defendant with two counts of first degree murder. At the same time, the state filed a “notice” informing the defendant that it would seek to enhance his sentence under RCW 9.41.025 (firearm enhancement) and RCW 9.95.040 (deadly weapon enhancement). The state later filed an amended information adding a third count of felony murder. The jury eventually returned a verdict that the defendant was guilty to Second Degree Murder. The jury also returned a special verdict that the defendant was armed with a firearm during the commission of the offenses. The court later sentenced the defendant and included a firearms enhancement.

On appeal, the defendant argued in part that the inclusion of the firearms enhancement in his sentence violated his constitutional right to notice and due process because the enhancement was not alleged in either the original or amended informations. The state responded that the separate filing was sufficient to put the defendant on notice that the state would be seeking the sentence enhancement. The Washington Supreme Court rejected the state’s argument. Initially, the court stated:

A separate notice of intention to seek an enhanced penalty under RCW 9.41.025 and 9.95.040 was served and filed with the first information. This was not done with the amended information. In

State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972), we determined that intention to charge under RCW 9.41.025 should be set forth in the information. In *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975), Justice Hamilton writing for the court, said:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040, or both, due process of law requires that the information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. Failure of the State to so allege precludes reliance upon the statutes by the trial court or the Board of Prison Terms and Paroles.

We do not propose to recede from these holdings. Rather, we again emphasize the necessity of prosecuting attorneys uniformly adhering to the announced rule. Preferably, compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding, i. e., firearms and/or deadly weapons.

(Citations omitted.)

State v. Theroff, 95 Wn.2d at 392.

The court then went on to note that it was specifically adopting the quoted language from *State v. Frazier*. The court held:

We adopt the above language in this case. It is the rule in this state clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information. Our concern is more than infatuation with mere technical requirements. As we said in *Frazier, supra* 81 Wn. at 634, 503 P.2d 1073:

The inclusion of this separate issue in the information and verdict will give the appellant notice prior to trial that, if convicted, and if the jury finds the facts causing the aggravation are correct, she will have no possibility of probation. Her decision to enter a plea of guilty to a lesser charge if the

prosecutor and court in their discretion would so accept it, is only one of the practical consequences that follow from receipt of notice at a time while alternative courses of action on her part are still available to her.

Because the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant. The conviction is otherwise affirmed and the case remanded to the trial court for resentencing consistent with this opinion.

State v. Theroff, 95 Wn.2d at 392-393.

In *Theroff*, the defendant did not allege that he did not have actual notice of the state's claim that the enhancement applied. By contrast, in the case at bar the defendant did not have notice of the state's claim that it would seek an exceptional sentence. In any event, in *Theroff* the information and amended information both failed to allege the firearm enhancement. Absent such an allegation in the information, the court could not impose the enhancement without violating the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Sixth Amendment. Similarly, in the case at bar, neither the information nor any other document alleged the existence of aggravating factors sufficient to put the defendant on legal notice that he would be subject to anything other than the applicable standard range were he found guilty. Thus, in this case, as in *Theroff*, the imposition of an exceptional sentence absent the state having put the defendant on any type of notice that it would seek an exceptional sentence

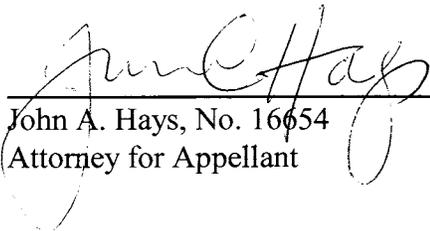
also violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

CONCLUSION

The defendant is entitled to a new trial based upon the court's error in allowing the state to elicit prejudicial evidence of prior bad acts and improper opinions of guilt. In the alternative, the defendant's exceptional sentence should be vacated with instructions to impose a standard range sentence.

DATED this 5th day of October, 2007.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9.94A.535

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6).

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the

offense is a response to that abuse.

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered By A Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

RCW 9.94A.537

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.589

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and

is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 404

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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

STATE OF WASHINGTON,
Respondent,

vs.

JAMES CLAY SPINKS,
Appellant,

CLARK CO. NO: 06-1-02477-0
APPEAL NO: 36278-3-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON
COUNTY OF CLARK } vs.

CATHY RUSSELL, being duly sworn on oath, states that on the 5TH day of October, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

JAMES CLAY SPINKS-DOC #309595
WASH STATE CORRECTION CENTER
P.O. Box 900
SHELTON, WA. 98584

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 5th day of OCTOBER, 2007.

[Signature]
DONNA BAKER

SUBSCRIBED AND SWORN to before me this 5th day of OCTOBER, 2007.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009