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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
DEPUTY

NO. 37670-9-II

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

STATE OF WASHINGTON, Respondent

v.

TIMOTHY HARRISON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER A. BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00942-6

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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I. STATEMENT OF THE FACTS

The State accepts, for the most part, the statement of facts as set forth by the Appellant. Where additional information is needed, it will be supplemented in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court denied the defendant speedy trial under CrR 3.3.

On November 21, 2007 the first Scheduling Order was entered by the court (CP 106). This particular document indicated that trial was scheduled on January 14, 2008 with a readiness hearing on January 10, 2008.

On the date of the readiness hearing, January 10, 2008, the State indicated to the trial court that the doctor who treated the alleged victim was not available during the time of the initial trial setting (February 6, 2008, RP 444). The defense attorney indicated that his client objected to a set over of the trial. Counsel and the Judge then began looking at potential trial dates to accommodate everyone's schedule. After some discussion with counsel, the court decided to use the commencement date of January 10. (February 6, 2008, RP 447). The court then made the determination

that the trial would commence on March 10, which would be within 60 days of the January 10 setting. (February 6, 2008, RP 450). The defense attorney at that time also indicated that he wasn't available on March 10. The court went ahead and made the determination that it would be appropriate to keep that setting.

Under CrR 3.3(f)(2), the trial court may continue the case when "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense". The appellate system reviews a trial court's decision to grant a CrR 3.3 continuance for an abuse of discretion. State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). The appellate system reviews the application of the speedy trial rules de novo. State v. Nelson, 131 Wn. App. 108, 113, 125 P.3d 1008, review denied, 157 Wn.2d 1025 (2006). Objections to a trial date on speedy trial grounds must be made within 10 days after notice of the trial date is given CrR 3.3(d)(3). Any party who fails, for any reason, to move for a trial date within the time limits of CrR 3.3 loses the right to object. CrR 3.3(d)(3); State v. Carney, 129 Wn.2d 742, 748, 119 P.3d 922 (2005); State v. Bobenhouse, 143 Wn. App. 315, 322, 177 P.3d 209 (2008).

The discussion with the defendant at the time of the March setting does not indicate that he is objecting to the setting but that he wants to make sure that an attorney is available to assist him. Mr. Barrar, the

attorney representing him at that time indicated that his schedule was completely full and he could not do it and another attorney would be obtained. As the defendant indicated “So I would like to proceed with this matter as soon as possible and get to trial. So whenever is convenient for I guess my attorney, whoever he may be –” (February 6, 2008, RP 452, L7-10).

The State submits that the defendant has not raised objection to the setting within the 10 days. In the event that the court feels that he has, the trial court, which was mindful of his time limits, set at January 10 and set the trial within 60 days of that particular setting. Further, that there were adequate grounds (missing witness), unavailability of attorneys, to justify the court’s discretion in granting the set over.

Another way of looking at it is that the first setting for the January trial was not objected to by the defendant and therefore the commencement date for the new timeframe would be that January date.

The appellate court reviews a trial court’s decision to grant a continuance for abuse of discretion. State v. McKinzy, 72 Wn. App. 85, 87, 863 P.2d 594 (1993). On appeal, the defendant must establish both that the court abused its discretion and that he suffered prejudice. State v. Torres, 111 Wn. App. 323, 330, 44 P.3d 903 (2002). Although a defendant has a constitutional right to a speedy trial, this right does not mandate trial

within 60 days. Torres, 111 Wn. App. at 330. Our Supreme Court in State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005) further elaborated on the duty of a defendant who is complaining about a violation of his speedy trial. “We will not disturb the trial court’s decision unless the appellant or petitioner makes a clear showing...that the trial court’s discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons (quoting State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Flinn, 154 Wn.2d at 199.

The Flinn court further indicates that allowing counsel time to prepare for trial is a valid basis for continuance, citing State v. Cambell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984). It also stated that scheduling conflicts may be considered in granting of continuances and cited State v. Heredia-Juarez, 119 Wn. App. 150, 153-155, 79 P.3d 987 (2003).

In our situation, the parties were not disputing the unavailability of the expert. The defense was not complaining that the doctor was unavailable, but rather that the defendant didn’t want to continue the trial beyond a time that had already passed. There has been absolutely no showing that the defense has suffered any type of prejudice because of the set over.

Finally, the defense became aware that this was a three strikes case. The State submits that that would be an adequate ground for the

defense attorney to want to have a better look at the case prior to going to trial. The trial court has not abused its discretion and the attorney felt it incumbent on him to review this case in more detail prior to going to trial. Further, the defendant maintained that he wanted his day in court and this caused consternation to the defense attorney because his dockets in early March were already full. Nevertheless, the court set the trial date on March 10th with a clear understanding that he anticipated it would be going to trial on that date.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the court erred in allowing evidence under ER 404(b). The claim is that this was inappropriate under the circumstances and prejudiced the outcome of the defendant's trial.

Prior to testimony from the complaining witness, an offer of proof was made as to other prior acts of assault against her by the defendant. She described these four instances. One of those dealt with strangulation, one with assault on her pelvic bone, one assault where her ribs were injured, and one where her mouth was injured. (RP 46). The complaining witness discussed these matters with the trial court in this offer of proof. (RP 47-52).

After hearing the offer of proof the court made the following observations:

THE COURT: The ER 404(b) permits the use of prior so-called bad acts not to show propensity but rather for other relevant purposes, one of which could be to show the effect on the alleged victim here as to her state of mind.

Her state of mind is significant in a kidnapping case to show whether or not she, in fact, was in fear of the defendant. There – this is a classic situation of the State having to prove legitimate fear on her part, and the best way to do that is to show prior injuries.

The probative value is extremely high. The prejudice – the danger of undue prejudice, that is, being used for improper purposes such as propensity, does not greatly outweigh the probative value.

So the objection's overruled.

And if the Defense requests it, I'll give an appropriate instruction telling the jury just exactly how they can use that evidence.

So 404(b) evidence is admissible.

-(RP 54, L25 – 55, L20)

The Court of Appeals reviews a court's decision to admit evidence for abuse of discretion. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under ER 404(b), evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith”. However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (ER 404(b)). Purpose for admitting evidence under ER 404(b) is not exclusive. State v. Cook, 131 Wn. App. 854, 129 P.3d 834 (2006). The appellate court reviews a trial court’s ruling under ER 404(b) for manifest abuse of discretion, and will not overturn the decision unless no reasonable judge would have ruled as the trial court did. State v. Mason, 160 Wn.2d 910, 933-934, 162 P.3d 396 (2007).

To admit evidence of prior bad acts, the court must 1) find by a preponderance of the evidence that misconduct occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In our case, the defense made it quite clear that the question here was one of the credibility of this complaining witness. (RP 54, 342-352).

This is similar to the situation found in State v. Grant, 83 Wn. App. 98, 108, 920 P.2d 609 (1996), where the victim’s credibility was a central

issue at trial. In Grant, evidence of prior acts of violence were admissible in a criminal case where domestic violence is alleged in order to assist the jury in assessing the victim's credibility. In Grant the crime victim changed her story after initially denying that she was assaulted by the defendant. The trial court admitted evidence on the defendant's prior assaults on the victim under ER 609(a). On appeal, Division I of the Court of the Appeals held that evidence was admissible under ER 404(b), reasoning that evidence of prior acts of violence toward the victim helps the jury to assess the credibility of the victim at trial and understand why the victim told conflicting stories. The court held that evidence of prior assaults could be properly admitted under ER 404(b) for purposes of assessing the victim's credibility. Grant, 83 Wn. App. at 109. Similarly in State v. Wilson, 60 Wn. App. 887, 890, 808 P.2d 754 (1991), the appellate court held that evidence of physical abuse was relevant to rebut the evidence presented by other witnesses that sexual abuse did not occur and in State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006) the court held that when an alleged victim acts inconsistently with a disclosure of abuse, such as failing to timely report the abuse, evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act. Cook, 131 Wn. App. at 851.

The discussion in State v. Magers, 164 Wn.2d 174, 189 P.3d 126

(2008) helps illuminate this entire issue:

The State also contends that the Court of Appeals erred when it concluded that the evidence that Magers had been in custody for fighting and that he was arrested for domestic violence was not admissible on the issue of the victim's credibility. The trial court admitted this evidence based on its determination that it was admissible pursuant to ER 404(b) to assist the jury in assessing the victim's credibility. ER 404(b) provides 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. 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.

To justify the admission of prior acts under ER 404(b), there must be a showing that the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect. State v. DeVries, 149 Wn.2d 842, 848-49, 72 P.3d 748 (2003) (citing State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

The State relies on State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), to support its contention that evidence of prior acts of violence is admissible, in a criminal case where domestic violence is alleged, in order to assist the jury in assessing the victim's credibility. In Grant, the crime victim changed her story after initially denying that she was assaulted by the defendant. The trial court admitted evidence of the defendant's prior assaults on the victim under ER 609(a). On appeal, Division One of the Court of Appeals held that the evidence was admissible under ER 404(b), reasoning that evidence of prior acts of violence

toward the victim helps the jury assess the credibility of the victim at trial and understand why the victim told conflicting stories.

Magers relied upon a decision of Division Two of the Court of Appeals, Cook, 131 Wn. App. 845, with regard to the admission of evidence under ER 404(b). In Cook, the court indicated that evidence of past acts of violence by the defendant toward the victim is admissible to assess the victim's state of mind only. In Cook, the victim recanted earlier statements to the police that the defendant, the victim's boyfriend, had assaulted her. The trial court admitted evidence of the defendant's past violence toward the victim with a limiting instruction to the jury to consider the evidence introduced to assess the credibility of the victim. On appeal, Division Two agreed with the reasoning of Division One in Grant that a defendant's prior acts of domestic abuse against the alleged victim are admissible under ER 404(b), but only "to [assist the jury in assessing] the victim's state of mind at the time of the inconsistent act," not "for the generalized purpose of assessing the victim's credibility." Cook, 131 Wn. App. at 851. The court explained that instructing the jury to assess the evidence in terms of the victim's credibility would put emphasis on the husband's prior conduct, suggesting that it is more likely that he had a propensity to act violently against the victim. The court went on to say that if the jury is instructed to assess the evidence in terms of the victim's state of mind, the jury would focus on the state of mind rather than the defendant's propensity to abuse the victim. The Court of Appeals' decision here was consistent with the decision in Cook, the court indicating that the evidence of prior domestic violence is admissible only to enable the jury to assess the victim's state of mind, not her credibility.

We agree with the rationale set forth by the court in Grant, at least insofar as evidence of prior domestic violence is concerned. As Karl B. Tegland has observed in his handbook on Washington evidence, "[i]n prosecutions for crimes of domestic violence, the courts have often admitted evidence of the defendant's prior acts of domestic violence

on traditional theories.... Recently, however, the courts have occasionally been persuaded to admit such evidence on less traditional theories, tied to the characteristics of domestic violence itself.” 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence Ch. 5, at 234 (2007-08). Tegland discussed the admission of such evidence in his evaluation of Grant.

[T]he defendant was charged with assaulting his wife[.] [T]he defendant's prior assaults against his wife were admissible on the theory that the evidence was “relevant and necessary to assess Ms. Grant's [the victim's] credibility as a witness and accordingly to prove that the charged assault actually occurred.” ... “The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.” *Id.* at 234-35 (fourth alteration in original) (quoting Grant, 83 Wn. App. at 106, 108).

We adopt this rationale and conclude that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim. Here, evidence that Magers had been arrested for domestic violence and fighting and that a no-contact order had been entered following his arrest was relevant to enable the jury to assess the credibility of Ray who gave conflicting statements about Magers's conduct.

-(Magers, 164 Wn.2d at 184-186)

In our case, the trial court had an offer of proof and balanced the probative value of the evidence against the high potential for prejudice and found the probative value tipped the scale. The court also ruled that the defense could have a limiting instruction if it wished to have one. The pattern of domestic violence is admissible to rebut an inference that the

complaining witness's inconsistent statements and conduct call into question her credibility of what occurred during the time of the crime. Grant, 83 Wn. App. at 108. The State submits that this was a proper use of Evidence Rule 404(b) and that there was no error demonstrated in this record.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error is a claim of ineffective assistance of counsel. The claim is that the trial counsel was ineffective in allowing the 404(b) evidence to be admissible and for not requesting a limiting instruction on how the evidence was to be used and ineffective in not preserving the defendant's speedy trial.

A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution. See, e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *Id.* Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). As indicated in State v. Neff, 163 Wn.2d 453, 181 P.3d 819 (2008), judicial scrutiny of counsel's performance must be highly deferential and the defendant must overcome the presumption, that under the circumstances, the challenged action might be considered sound trial strategy. Neff, 163 Wn.2d at 466. Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73.

The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

The State submits that the actions of the defense attorney at the time of trial clearly demonstrate trial tactics and strategy on his part. As indicated in the offer of proof, previously referred to, the question was specifically an issue of credibility of the complaining witness. His cross-examination of the various witnesses centered specifically on that

particular issue. Further, he honed in on this very issue (lack of credibility) heavily in his closing argument. He began his closing argument by indicating:

In opening statement I talked to you again about they have the burden of proof and their only witness is not credible.

-(RP 342, L23-25)

And that's what we have here, we have a witness who is also the alleged victim who has told some lies, who has some severe inconsistencies in her stories.

And at what point are you willing to hang your verdict on that frayed rope?

There's nothing else, nothing else placing Mr. Harrison at the scene of that beating. There's no eye witnesses, there's no physical evidence, there's nothing. All we have is the testimony of Kristin Crots (complaining witness).

-(RP 343, L18 – 344, L3)

The defense attorney continues on in this vein:

Now, one inference you can draw from that is that she's afraid of him. That's one inference.

The other competing inference is that she told a lie, and she doesn't want to come back into the system and have to defend that lie. Maybe she's afraid of him, and maybe she told a lie. Their both competing inferences for the same piece of evidence, a frayed piece of rope.

You cannot discount – okay, and then secondly, let's look at her – her statement here.

“I, Kristin Crots, am writing this letter on behalf of Timothy Harrison.

“On May 22nd, Timothy and I had an argument that resulted in me lying to the police, telling them that Timothy had forced me into the car.

“That statement is not true. I willingly and on my accord got into the car with Timothy.

“The reason for me making the first statement was because I was extremely angry at Timothy and was trying to get back at him.

“I truly apologize for making statements that were untrue and getting him in trouble.”

Okay. That says that she lied to the police. But now she wants to tell you, well, I wrote it because he asked me and his mom asked me.

Well, one thing that does tell you is she's willing to lie. She's willing to lie. She lied. And how are you going to hang a prosecution, a conviction on somebody willing to lie?

Now, remember, it's not about her getting beat up. She got beat up. It's who beat her up. And what evidence has the State presented from an independent source to say that he did it? Nobody. They've got nothing.

Because all the evidence that they could have got was in the hands of Christina Crots (sic).

If she really wanted to come clean that night, she could have told the true story. She could have said, you know, okay, here's what's going on. I'm working as an escort. He's maybe involved in it. There's another party may be involved in it.

These are their names. These are the dates. This is the money. Here's the phone calls, here's the cell phone records, here's the towers. This is where we were.

Okay, here's the story, now go out and corroborate all that stuff.

And they could. But, no, she didn't do that. She wanted to withhold information so she could control the situation.

Well, you can't have it both ways, you can't be believed unequivocally (sic), if that's the right word, on one hand, and be deceptive, misleading and lying on the other hand, and then come into a court of law, raise your right hand, and say, oh, I lied before, but believe me now.

Think of that frayed rope. Think at what point do you not trust that rope anymore? I submit to you we're way past that with her. She wasn't honest with the police. She wasn't period.

She lied in this written statement. She lied at the hospital every time she went in. She lied to get him back to the hospital by her own testimony. I mean, her life is all lies.

-(RP 344, L21 – 347, L13)

If there is any question about the approach that the defense attorney is taking, he clearly dispels that by indicating, "And you can point at lie, lie, lie, lie, lie that she told. At what point do you no longer trust that frayed rope?". (RP 352, L2-4).

The State submits that the approach here by the defense attorney does not rely on the inadmissibility of 404(b) evidence or any type of prior activities by the defendant as it relates to this complaining witness. He is saying that everything she has told to the authorities and to the jury is a fabric of lies. Further, he doesn't want a limiting instruction to be given

because he wants this evidence and information to be used against her and not watered down by a jury instruction. A trial court need not give a limiting instruction absence a party's request. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Where a party fails to request a limiting instruction, the appellate courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to prevent reemphasis on the damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

The Appellant in his brief (Page 26) claims that the trial attorney did not object to the 404(b) evidence. In fact, this was all part of the offer of proof and there was some objection being raised at that point. However, as indicated, the central thrust of the defense was not that there was any truthfulness to this, but rather that the complaining witness was lying about everything. The other claims of ineffective assistance concerning the failing to request a limiting instruction and a right to speedy trial violation have previously been addressed.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error is a claim of cumulative errors which affected the verdict.

A defendant may be entitled to a new trial when error cumulatively produced at trial were fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by, 123 Wn.2d 737, 879 P.2d 964 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332.

The State submits, as previously set forth, that there was no error that requires the use of the cumulative evidence rule.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 5

The fifth assignment of error raised by the defendant is a claim that the trial court erred in counting a prior Oregon First Degree Sodomy conviction as comparable to a Rape in the Second Degree in the State of Washington.

The Appellate Court reviews a trial court's offender score calculation de novo. State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004). A foreign conviction may be calculated into a defendant's offender score if it is legally comparable to a Washington crime. State v. Bunting, 115 Wn. App. 135, 140, 61 P.3d 375 (2003). If a foreign statute is broader than the comparable Washington statute, the court may look at the defendant's conduct underlying the prior crime, as evidenced by the

Information or the Judgment, to determine if the acts constitute a Washington crime. Ortega, 120 Wn. App. at 172.

In our situation, the defendant in the appellate brief has acknowledged that the Oregon definition of various aspects of Sodomy in the First Degree are different from, and broader than, Washington's definitions. (Brief of Appellant Page 39).

If that is the situation, then the court is allowed to review the Oregon documentation to determine whether or not it is comparable to the elements of the Washington crime.

At the time of sentencing on April 24, 2008, the trial court entered into a discussion with the parties concerning the use of the Sodomy conviction from the State of Oregon as a predicate crime under our Three Strikes laws. The court was provided Exhibit No. 2, which set forth the Judgment, Indictment, and other documentation concerning the Sodomy conviction. A copy of Exhibit No. 2 is attached hereto and by this reference incorporated herein.

The court looked at the elements of the Sodomy First Degree and also looked at the elements of Rape in the Second Degree in the State of Washington. (RP 378-380). The court then reviewed the Indictment from the State of Oregon (RP 381, L2-5) and determined that it fit all of the

elements of Rape in the Second Degree in the State of Washington. (RP 382-383).

When this court reviews Exhibit 2 from the sentencing, it will note that the first documents (the Judgment) finds the defendant guilty of Sodomy in the First Degree and sentences him to six years in prison. The second document is the Indictment for Violation in the State of Oregon, Multnomah County. Count 3 was the count for Sodomy in the First Degree and it indicates that it was committed as follows:

The said defendant, between December 24, 1987 and January, 1988, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, by forcible compulsion, engage in deviant sexual intercourse with Jessica Rydman, by causing the sex organs of the said Timothy Harrison to come into contact with the anus of the said Jessica Rydman, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

-(Sentencing Exhibit No.2, second document, Indictment)

The actually activity therefore that the defendant engaged in was forcible sexual intercourse. In the State of Washington, RCW 9A.44.050 is the definition for Rape in the Second Degree and it too requires forcible compulsion and engaging in sexual intercourse. The actual code provisions from both Washington and Oregon are provided in the Appellant's Brief on Page 37-38.

To classify an out of state conviction according to the comparable offense provided by Washington law, the court must compare the elements of the out of state offense with the elements of the comparable Washington crimes. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the court may look at the record to determine whether the defendant's conduct would have violated the comparable Washington statute. State v. Farnsworth, 133 Wn. App.1, 18, 130 P.3d 389 (2006).

The State submits that is exactly what our trial court did. The Judge compared the elements, determined that the Oregon statute was broader and looked at the underlying documentation to support the actual conduct that the defendant committed. The actual conduct that he committed in the State of Oregon is comparable to our Rape in the Second Degree. The discussion by the Appellant in his brief concerning mental capacities is irrelevant to this entire argument.

Another claim as part of this assignment of error is that the persistent offender sentence must be reversed because the Oregon constitution does not require unanimous jury verdict. This matter has previously been discussed and disregarded in State v. Gimarelli, 105 Wn. App. 370, 20 P.3d 430 (2001). The issue raised in that case was that the

Oregon convictions, though valid in Oregon and under the United States Constitution, would nevertheless not be honored in the State of Washington because it depended on a less than unanimous verdict. Division II rejected this argument specifically holding that Oregon convictions, even without the unanimous jury verdict, are valid under the Full Faith and Credit Clause of the Federal Constitution. Grimarelli, 105 Wn. App. at 379.

The Appellant in our case has provided absolutely no justification for overturning the Grimarelli decision. His only comment is “The Grimarelli decision is incorrect”. (Appellant’s Brief, Page 42). The State submits that is not justification for any action to be taken.

VII. RESPONSE TO ASSIGNMENT OF ERROR NO.6

The sixth assignment of error is a claim that the Three Strikes Statute constitutes cruel and unusual punishment. A legislative enactment is presumed constitutional and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt. Caminiti v. Boyle, 107 Wn.2d 662, 732 P.2d 989 (1987); State v. Conifer Enters., 82 Wn.2d 94, 508 P.2d 149 (1973).

The Supreme Court has previously upheld the constitutionality of the persistent offender accountability act (POAA), which is also known as

Three Strikes. In the three companion cases dealing with this the Supreme Court looked at all of the constitutional issue affecting this, including cruel and unusual punishment. In State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), the Supreme Court rejected challenges based on substantive and procedural due process including claims of cruel and unusual punishment. In State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996), the Supreme Court rejected challenges based on the prohibition of cruel and unusual punishment found in the State and Federal Constitutions. In State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996) the Supreme Court rejected challenges based on bill of attainder, cruel and unusual punishment, separation of powers, and equal protection. As indicated in State v. Rivers, “Under the Persistent Offender Accountability Act, all defendants who are convicted of a third “most serious offense” receive sentences of life imprisonment without possibility of parole. The offenses which are the basis for the convictions and sentence in this appeal are serious, violent offenses, which the people of this state have determined call for serious punishment”. (Rivers, 129 Wn.2d at 714).

Both Rivers and Thorne go through an analysis of State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980) and the four factors to be considered in analyzing claims of cruel punishment. In each of the cases, the court has determined that the Three Strikes law is not cruel and unusual punishment.

The nature of the offense in our case is Assault in the Second Degree based on an assault involving domestic violence with a specific finding by the jury. The legislative purpose behind that statute was to prevent and diminish the ongoing spread of domestic violence in our communities. Punishment the defendant would receive in other jurisdictions is comparable to the added implementation of the domestic violence matter but also the fact that the defendant has previously committed Sodomy in the First Degree, Assault in the First Degree, and Attempt to Commit Murder. Further, the defendant has cited no statistics or analysis concerning what other jurisdictions would normally do. The fourth criteria is that the punishment is meted out for other offenses in this jurisdiction. The State submits that this would be comparable because of the domestic violence finding and the prior nature of the defendant's convictions.

VIII. RESPONSE TO ASSIGNMENT OF ERROR NO. 7

The seventh assignment of error raised by the defendant is a claim that he had a right to jury determination concerning the Three Strikes finding.

This matter has previously been resolved in State v. Farnsworth, 133 Wn. App. 1, 130 P.3d 389 (2006).

The United States Supreme Court specifically excluded findings of prior convictions from its Blakely holding that juries must decide aggravating facts supporting a sentence above the standard range. State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005). Thus, judges may decide whether a defendant had a prior conviction. Hughes, 154 Wn.2d at 137; see also In re Personal Restraint of Lavery, 154 Wn.2d 249, 257, 254, 111 P.3d 837 (2005) (whether a defendant has a prior conviction need not be presented to a jury and proven beyond a reasonable doubt); State v. Wheeler, 145 Wn.2d 116, 121, 34 P.3d 799 (2001) (court need only find, by the preponderance of the evidence, that a prior conviction existed).

A trial court judge may calculate a defendant's offender score without violating Farnsworth's constitutional right to a jury trial. As long as the trial court determines that the relevant facts in a foreign court's record have been proven beyond a reasonable doubt, Lavery, 154 Wn.2d at 258, the trial court must conduct a comparability analysis and include a prior foreign conviction in calculating the defendant's offender score. Farnsworth, 133 Wn. App. at 16.

The State submits that the trial court followed the advice set forth in the Farnsworth case and made its determination in an appropriate fashion. This was not a question for a jury, but a question for a judge. State v. Ford, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999). The

determination as to whether a prior out of state or federal conviction is comparable to a Washington conviction is a matter for the sentencing court and is not a jury question. The courts have consistently held that the existence of a prior conviction need not be presented to a jury. State v. Smith, 150 Wn.2d 135, 141-143, 75 P.3d 934 (2003); State v. Wheeler, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). Again, the Appellant in his argument wants the court to determine that previously established case law was “incorrectly decided” and thus should be re-looked at. (Appellant’s Brief, Page 48). He does this with absolutely no showing of how it is wrongly decided or what would justify the overturning of established case law.

IX. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 17 day of Feb, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINZIE, WSBA#7869
Senior Deputy Prosecuting Attorney

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

1988 MAY 23 11 30 AM

STATE OF OREGON

Case # C 88-02-32142

v

DA # 362974

TIMOTHY HARRISON,

JUDGMENT

Defendant,

MAY 26 1988

1. HEARING DATE May 16, 1988	2. DISTRICT ATTORNEY Charles Ball 3	3. DEFENSE ATTORNEY Jasper Ambers 2	4. REPORTER CTA 126.007
---------------------------------	--	--	----------------------------

5. DEFENDANT IS IN CUSTODY ON RECOGNIZANCE ON SECURITY RELEASE

6. It is adjudged that DEFENDANT has been convicted of his/her plea of: 1, 3
 GUILTY NO CONTEST NOT GUILTY and Judgment of Guilty
 NOT GUILTY and VERDICT of GUILTY of the CRIME OF: CT. I - PROMOTING PROSTITUTION
& CT. III - SODOMY IN THE FIRST DEGREE

7. IT IS FURTHER ADJUDGED THAT: the Defendant is sentenced to: 5 Yrs. (CT. I)
On COUNTS I and II:
 A term of imprisonment for an indeterminate period, the maximum not to exceed 6 Yrs. (CT. II)
Defendant is committed to the legal and physical custody of the Oregon State Corrections
Division, with credit for all time served on the within case. (Ct. I runs concurrently w/Ct. II)
 A term of imprisonment for _____; Defendant is committed to the custody of the Director
of Corrections, Multnomah County, Oregon, with credit for all time served on the within case.

8. Sentence to run CONCURRENTLY with CONSECUTIVE to that imposed in (list the case
number(s) that apply): _____.

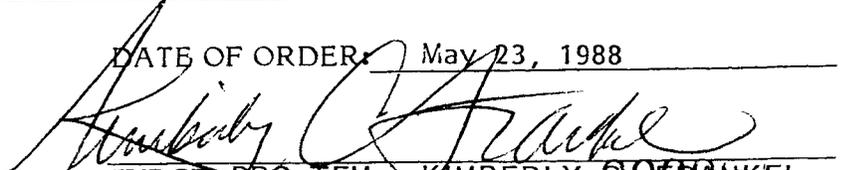
~~XXXXXX~~ *No contact directly or indirectly, by phone, mail or in person with Jessica
Rydman, or any females in the Y.W.C.A. Program or Our New Beginnings Program.
~~xxxxxx charges are hereby dismissed xxxxxxxx~~

10. Imposition Execution of sentence is suspended and the defendant is placed on probation
for a period of _____ years, subject to the standard conditions and any special conditions indicated
on the Special Probationary Conditions attached hereto, said probation to be to:
 Oregon State Corrections Division
 Probation/Parole Division, Multnomah County, Oregon
 Bench Probation

11. Defendant is: Ordered to pay restitution in the amount of \$ _____, subject to the
Restitution Conditions attached hereto. Sentenced to pay a fine in the amount of \$ _____.
 Sentenced to pay costs/attorney fees in the amount of \$ _____. Sentenced to pay
a Probation Fee of \$ _____ per month beginning _____. Sentenced to pay
a Victims Compensation Fee of \$ _____. Victims Compensation Fee is hereby waived.

12. Security on Appeal is set at \$ _____.

- Distribution:
- White - Court File
- Blue - District Attorney
- Green - Corrections
- Yellow - Defense Attorney
- Pink - Sheriff
- Goldenrod - Judge

DATE OF ORDER: May 23, 1988

 JUDGE PRO-TEM KIMBERLY O'DONNEL

2

FILED

dg

FEB 25 1988

**In The Circuit Court of the State of Oregon
For Multnomah County**

**CIRCUIT COURT
MULTNOMAH COUNTY, OREGON**

THE STATE OF OREGON,

Plaintiff,

vs.

TIMOTHY HARRISON,

121666

Defendant.

- C 88-02-32142
- DA 362974 SECRET
- PPB 88-14431

INDICTMENT FOR VIOLATION OF

- ORS
- 167.012 (1)
 - 167.017 (2)
 - 163.405 (3)

ENTERED IN REGISTER
FEB 26 1988
PL

The above-named defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime s of Count 1 - PROMOTING PROSTITUTION, Count 2 - COMPELLING PROSTITUTION, and Count 3 - SODOMY IN THE FIRST DEGREE committed as follows:

COUNT 1

The said defendant, between December 24, 1987 and January, 1988, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, with intent to promote prostitution, induce and cause Jessica Rydman to engage in prostitution, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

COUNT 2

As part of the same act and transaction alleged in Count 1 herein, the defendant is accused by the Grand Jury of Multnomah County, Oregon, by this indictment of the crime of

COMPELLING PROSTITUTION

committed as follows:

The said defendant, between December 24, 1987 and January, 1988, in the County of Multnomah, State of Oregon, did unlawfully and knowingly use force and intimidation to compel Jessica Rydman to engage in prostitution, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

COUNT 3

As part of the same act and transaction alleged in Counts 1 and 2 herein, the defendant is accused by the Grand Jury of Multnomah County, Oregon, by this indictment of the crime of

SODOMY IN THE FIRST DEGREE

committed as follows:

The said defendant, between December 24, 1987 and January, 1988, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, by forcible compulsion, engage in deviate sexual intercourse with Jessica Rydman, by causing the sex organs of the said Timothy Harrison to come into contact with the anus of the said Jessica Rydman, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

Dated February 25, 1988, at the City of Portland, in the County afore-said.

Witnesses

Examined Before the Grand Jury:

Derryl Dick
Roosevelt Harrison

_____ A TRUE BILL
Vera D. Davis
/s/ VERA D. DAVIS
Foreman of the Grand Jury

MICHAEL D. SCHRUNK
District Attorney

By *John K. Hoover* Deputy
/s/ John K. Hoover, OSB 72125

Security Amount \$ 20,000 + 50,000 + 20,000 (per Judge Ellis)

K.V. JOHNSON (76189)

RECEIVED
CIRCUIT COURT
MULTNOMAH COUNTY

1988 MAY -6 PM 12:09

ENTERED
MAY - 9 1988
IN REGISTER BY PM

**In The Circuit Court of the State of Oregon
For Multnomah County**

THE STATE OF OREGON,

Plaintiff,)

No. C 88-02-32142
DA 362974

v.)

TIMOTHY HARRISON,

Defendant.)

ORDER DENYING DEFENDANT'S
MOTIONS AND TRIAL ORDER

On April 12, 1988, this matter came before the court for hearing on defendant's motions and trial of the above defendant on the charges of Count 1 - PROMOTING PROSTITUTION, Count 2 - COMPELLING PROSTITUTION, and Count 3 - SODOMY IN THE FIRST DEGREE, before the Honorable Kimberly C. Frankel, the plaintiff appearing by Karon V. Johnson, Deputy District Attorney, and the defendant appearing in person and with his attorney, Jasper L. Ambers.

After hearing the statements of respective counsel, and being fully advised in the premises, the court adopts the FINDINGS OF FACT as set out on record herein. Now, therefore,

IT IS ORDERED that defendant's motions be and the same are hereby denied.

Whereupon, a jury was duly empaneled and sworn, and after receiving evidence and hearing the arguments of counsel, and after due deliberation, the jury returned its verdicts which found said defendant GUILTY as charged on Counts 1 and 3 and NOT GUILTY on Count 2.

IT IS FURTHER ORDERED that said verdicts be received and entered in the records of this court and cause, and that the jury be discharged from further consideration of this case.

IT IS FURTHER ORDERED that the Corrections Department of the State of Oregon/Client Diagnostic Center be requested to conduct a presentence investigation of said defendant and submit a report to this court.

ORDER DENYING DEFENDANT'S MOTIONS AND TRIAL ORDER

KVJ:FR:jl:an

Jasper L. Ambers
Attorney at Law
716 N. Alberta
Portland, Oregon 97217

Pol. File No.

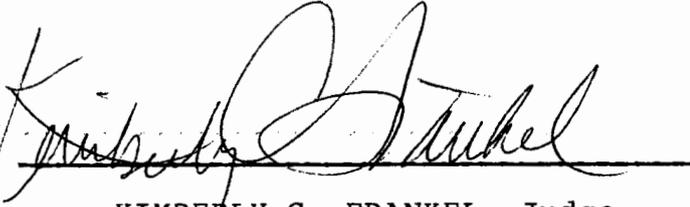
PPB 88-14431

000048

IT IS FURTHER ORDERED that the within matter be continued for imposition of sentence to May 16, 1988 at 9:00 a.m.

Stenographic notes of this proceeding were recorded on audio cassette tape Nos. 125114, 125115, 125116, 125117 and 125118.

Dated: _____.

A handwritten signature in cursive script, appearing to read "Kimberly C. Frankel", is written over a horizontal line.

KIMBERLY C. FRANKEL, Judge

SUBMITTED BY
Karon V. Johnson, OSB 76189
Deputy District Attorney
600 Multnomah County Courthouse
Portland, Oregon 97204

000049

RCWs > Title 9A > Chapter 9A.44 > Section 9A.44.050

[9A.44.045](#) << [9A.44.050](#) >> [9A.44.060](#)

RCW 9A.44.050
Rape in the second degree.

(1) A person is guilty of rape in the second degree when, under circumstances not constituting first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is a person with a developmental disability and the perpetrator is a person married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is a defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim;

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

[2007 c 20 § 1; 1997 c 392 § 514; 1993 c 477 § 2; 1990 c 3 § 901; 1988 c 146 § 1; 1983 c 118 § 2; 1979 ex.s. c 14 § 5. Formerly RCW 9.79.180.]

Notes:

Effective date -- 2007 c 20: "This act is necessary for the immediate preservation of the public health, safety, or support of the state government and its existing public institutions, and it shall take effect immediately [April 10, 2007]." [2007 c 20 § 4.]

Short title -- Findings -- Construction -- Conflict with federal requirements -- Part captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

Index, part headings not law -- Severability -- Effective dates -- Application -- 1997 c 392: See notes following RCW 74.39A.009.

<p>Inside the Legislature</p> <ul style="list-style-type: none"> ★ Find Your Legislator ★ Visiting the Legislature ★ Agendas, Schedules and Calendars ★ Bill Information ★ Laws and Agency Rules ★ Legislative Committees ★ Legislative Agencies ★ Legislative Information Center ★ E-mail Notifications (Listserv) ★ Students' Page ★ History of the State Legislature
<p>Outside the Legislature</p> <ul style="list-style-type: none"> ★ Congress - the Other Washington ★ TV Washington ★ Washington Courts ★ OFM Fiscal Note Website



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RCWs > Title 9A > Chapter 9A.44 > Section 9A.44.010

Beginning of Chapter << 9A.44.010 >> [9A.44.020](#)

RCW 9A.44.010 Definitions.

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, hc and

(b) Also means any penetration of the vagina or anus however slight, by an object, when one person by another, whether such persons are of the same or opposite sex, except when penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of on the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person purpose of gratifying sexual desire of either party or a third party.

(3) "Married" means one who is legally married to another, but does not include a person separate and apart from his or her spouse and who has filed in an appropriate court for legal for dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which prevents understanding the nature or consequences of the act of sexual intercourse whether that conc produced by illness, defect, the influence of a substance or from some other cause.

(5) "Physically helpless" means a person who is unconscious or for any other reason is pl to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, implied, that places a person in fear of death or physical injury to herself or himself or anothe fear that she or he or another person will be kidnapped.

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact the words or conduct indicating freely given agreement to have sexual intercourse or sexual cont

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide ed welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or orga recreational activities to frail elders or vulnerable adults, including a provider, employee, temp employee, volunteer, or independent contractor who supplies services to long-term care facil required to be licensed under chapter [18.20](#), [18.51](#), [72.36](#), or [70.128](#) RCW, and home health home care agencies licensed or required to be licensed under chapter [70.127](#) RCW, but not consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or be or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and § means a person with a developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1) (c) or (e) and (c) or (e), means any proprietor or employee of any public or private care or treatment facility supervises developmentally disabled, mentally disordered, or chemically dependent persons

(12) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44 means a person with a "mental disorder" as defined in RCW 71.05.020.

(13) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A. means a person who is "chemically dependent" as defined in RCW 70.96A.020(4).

(14) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person himself or herself out to be, or provides services as if he or she were: (a) A member of a health profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or license chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or the state.

(15) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself qualified to provide.

(16) "Frail elder or vulnerable adult" means a person sixty years of age or older who has a mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also means a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age with a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

[2007 c 20 § 3; 2005 c 262 § 1; 2001 c 251 § 28. Prior: 1997 c 392 § 513; 1997 c 112 § 37; 1994 c 271 § 302; 1988 c 146 § 3; 1988 c 145 § 1; 1981 c 123 § 1; 1975 1st ex.s. c 14 § 1. Formerly RCW 9.79.140.]

Notes:

Effective date – 2007 c 20: See note following RCW 9A.44.050.

Severability – 2001 c 251: See RCW 18.225.900.

Short title – Findings – Construction – Conflict with federal requirements – Part captions not law – 1997 c 392: See notes following RCW 74.39A.009.

Intent – 1994 c 271: "The legislature hereby reaffirms its desire to protect the children from sexual abuse and further reaffirms its condemnation of child sexual abuse that takes place causing one child to engage in sexual contact with another child for the sexual gratification causing such activities to take place." [1994 c 271 § 301.]

Purpose – Severability – 1994 c 271: See notes following RCW 9A.28.020.

Severability – Effective dates – 1988 c 146: See notes following RCW 9A.44.050.

Effective date – 1988 c 145: "This act shall take effect July 1, 1988." [1988 c 145 § 26.]

Savings – Application – 1988 c 145: "This act shall not have the effect of terminating or modifying any liability, civil or criminal, which is already in existence on July 1, 1988, and is not an offense committed on or after July 1, 1988." [1988 c 145 § 25.]

