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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38179-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WESLEY JAMES LONG,

Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's motion in limine-based on the marital privilege set forth in RCW 5.60.060(1) prohibiting disclosure of confidential communications- to exclude the testimony of Ms. Swiger-Long about receiving uncharged, threats from Mr. Long.
2. The trial court erred when it denied the defendant's motion in limine-based on ER 403 -to exclude the testimony of Ms. Swiger-Long about receiving uncharged, threats from Mr. Long.
3. The trial court erred when it failed to balance probative value versus prejudicial effect on the record before admitting evidence of uncharged threats by the defendant as required by ER 403.
4. The trial court erred when it granted the state's motion to allow testimony by Ms. Swiger-Long-based on ER 404(b)'s exception allowing proof of motive-about receiving uncharged threats from the defendant.
5. The trial court erred when it denied the defendant's motion to sever counts 1,2, 3 and 7 from counts 4, 5 and 6 contrary to CrR 4.4.
6. The trial court erred when it entered its judgment and sentence and stated: "Sentences-Counts II and III [misdemeanor convictions] are ordered to run concurrent to each other but consecutive to Count I" [felony].

7. The trial court erred in violation of the Sixth and Fourteenth Amendments when it denied the defendant's objection to the consecutive sentence that the court imposed instead of imposing concurrent sentences arising out of closely related facts.

8. The trial court erred when it entered its Order Modifying Judgment and Sentence and Warrant of Commitment *Nunc pro Tunc*.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it allowed the prosecutor to introduce evidence of uncharged, alleged threats of death made by the defendant to his spouse contrary to RCW 5.60.060(1)'s ban on disclosure of confidential communications where the defendant-husband was charged with two counts of violation of a order- domestic violence based on other non-threatening contacts? (Assignment of Error 1).

2. Whether the trial court erred when it denied the defendant's motion in limine to exclude the testimony of Ms. Swiger-Long concerning receiving threats from Mr. Long based on ER 403 and failed to balance probative value with prejudicial effect on the record as required by that rule? (Assignments of Error 2 and 3).

3. Whether the trial court erred when it granted the state's motion to allow Ms. Swiger-Long to testify about receiving threats from Mr. Long based on motive pursuant to ER 404(b)? (Assignment of Error 4).

4. Whether the trial court erred pursuant to CrR 4.4 when it denied the defendant's motion to sever counts 1,2,3 and 7, involving a December 2006 burglary to the Swigers' residence, from counts 4,5 and 6 alleging a 2007 burglary and two Violations of a Court Order involving the defendant's wife, Ms. Swigert-Long? (Assignment of Error 5).
5. Whether the trial court erred when it sentenced the defendant on two misdemeanor counts for Violation of a Court Order (1/30/07 and 2/17-2/28/07) to be served concurrently to each other but consecutively to one count of a felony for possession of stolen property in the second degree (12/18/07-12/25/07); arising out of closely connected facts? (Assignments of Error 6, 7 and 8).

B. Statement of the Case.

Statement of Procedure

This case involves a burglary committed by Willian Storm and John Crooks of the Swiger residence in December 2006. The state maintains that Mr. Long orchestrated the crime but was in Olympia, Washington at the time the break- in of his in-laws residence was committed. Storm plead guilty to residential burglary; Crooks with possession of stolen property in the first degree pursuant to cooperation agreements. CP 199.

Mr. Long was eventually charged with burglary in the First Degree

(count I) (principal or accomplice), unlawful possession of a firearm (count II); and residential burglary (count IV)(principal or accomplice) and theft in the third degree (count V) arising out of the Swiger incident. CP 280-87 (eighth amended information).

Mr. Long was also charged in the same proceedings with Violation of a Court Order on January 30, 2007 (count VI); residential burglary on January 30, 2007 (count VII) (principal or accomplice) and Violation of a Court Order in February 2007 (count VIII) all involving his wife Ms. Swiger-Long and all alleging domestic violence. CP 280-87 (eighth amended information). Ms. Swiger-Long was also alleged to be the victim of the theft charge-DV (count V) for items taken during the Swiger burglary in December 2006.

During the trial an eighth amended information was filed. CP 280. The defendant was found guilty of Count VI (Violation of a Court Order-DV) and count VIII (Violation of a Court Order)-DV).¹ CP 280-87. Prior to sentencing a ninth amended information was filed containing three

¹ The eighth amended information alleged eight counts as follows: Count I- Burglary in the First Degree (No Unanimous Verdict); Count II- Unlawful Possession of a Firearm in the Second Degree (Dismissed by court Order); Count III- Unlawful Possession of a Firearm in the second degree (Not guilty); Count IV- Residential Burglary (No Unanimous Verdict); Count V- Theft in the third degree (No Unanimous Verdict); count VII- Residential Burglary (Not Guilty) CP 317-22).

counts. CP 411. Counts II and III re-alleged Violations of a Court Order-DV that he was previously convicted of by the jury.

Subsequently, Mr. Long plead guilty to Possession of Stolen Property in the Second Degree (count I). CP 411. On February 1, 2008 he was sentenced to 18 months imprisonment for the felony charge. CP 451. Twelve month concurrent sentences were imposed on the two Violation of Court Order-DV convictions. These convictions were ordered to run consecutive to the felony conviction for a total of 30 months. A notice of appeal was filed on the same date. CP 461.

Selected Testimony

According to William A. Storm, known as “Billy”, several weeks before Christmas 2006 he had a conversation with Mr. Long while John Clayton Crooks (Clay) was present about getting Storm’s box of tools returned to him. The tool box was at Long’s wife’s parent’s house. RP 484. The conversation was about Mr. Long’s in-law’s residence, the layout of the house and that they were out of state for the holidays. RP 483, 496. Apparently, Mr. Long described the area and its location, it’s address, and that the residence was not equipped with an alarm. id.

Storm testified: “...he [defendant] was going to be going to Utah. His wife wasn’t coming with him. There was nobody home at her parent’s house, and that’s where my stuff was and if I wanted to get it back, I could

break into the house and get it. And he told me everything. But he wasn't—he wasn't able to get it for me.” RP 485-6.

Storm added: “He just told me if I was going to do it, just that I could get away with it pretty much. Told me they were out of state and told me and Clay about it, and we went and did it.” RP 487.

According to Storm, Mr. Long advised him of “an old musket there...that was worth a lot of money...” RP 488. Long mentioned, “old coins and stuff that he collected”, lap-top computers “computers”, “a big-screen TV”, “jewelry”. RP 489-90.

According to Storm, after the burglary was committed, he called the defendant to determine if his wife had advised Long about the Swiger's residence being burglarized. He placed the call in order to determine whether the police were aware of the crime. RP 492.

Storm affirmed that after the burglary Mr. Long-along with his wife- “...was trying to get the stuff back that we took—that we sold—that we stole and sold.” RP 515. Previously, Long had telephoned Storm and advised him that his wife knew that Storm had broken into the house, that the police knew by this time, that his in-laws had returned “and not to go back there...” RP 547.

John Clayton Cooks, referred to as Clay, testified that he along with his roommate Billy used methamphetamine extensively throughout this

period. VI RP 628-29. Mr. Long would hang out at Clay's house and he got to know him. RP 635-6. In December 2006, "a week or two before Christmas" he had occasion to drive the defendant to Gig Harbor. At that time the defendant and he had a "brief" conversation about Mr. Long's family leaving on vacation and their house being vacant. RP 636.

Clay testified that he was advised: "Just that it would be a quick, easy come-up,² and that it would be for sure that nobody would be there..." RP 637. Clay testified that Mr. Long said in essence: "He said that they would be gone; that, you know, it--nobody would be there, and that we could do it. There was a lot of stuff there." RP 645.

Over objection, Crooks continued testifying that he was aware of a conversation between the defendant and Billy Storm. He stated: " So Billy had talked to him and had got more information about, you know, how to--the ins and outs of what we had to do to do the job." RP 647. Crooks was told that there was a sign for an alarm but that it did not work, "money in a closet upstairs", "that there was possibly guns, laptops, computer stuff". RP 648.

The burglary was committed, according to Crooks, "The day before

² Crooks testified that a "come up" or a "good come up" was: "But a quick come up would be something easy to do, quick job, where you'd make, you know, some easy money." VI RP 646.

Christmas Eve.” About 2:00-3:00 a.m. on December 23, 2006. RP 650.

Christina Swiger-Long testified that she was the daughter of Patricia and Willard Swiger. VII RP 900. She was married to the defendant, Wesley James Long. RP 902. After Thanksgiving in 2006 she filed for divorce. RP 903 She obtained two restraining orders and a protection order. id.

Swiger-Long testified about the custody issues in the pending divorce. She then testified to three alleged threats made by Mr. Long concerning these custody issues. (See testimony and the trial court’s instruction, *infra* at 14-15).

Swiger-Long testified that she lived in Utah for five years before marrying the defendant in 1995. They had been married for 17 years by the time of the trial. RP 916. She moved to Washington, filed for divorce for the first time and lived with her parents. RP 917-8.³ When their son Austin was six and a half Mr. Long moved to Washington and resided

³ In February 2003 Ms. Long filed for divorce in Kitsap County Superior Court case No. 03-3-00228-9. VIII RP 1030. The defendant moved to Washington and began living with Ms. Long and their son A.T.L. age 5 in June 2003. CP 99. In April 2005 Ms. Long again filed for divorce under Kitsap County Superior Court Cause No. 05-3-00425-3. VIII RP 1031. Ms. Long and the defendant started living together again in October or November 2005 and resided together until December 2006. RP 1032.

with them in her house at Manchester Court in Port Orchard. RP 920-1. She finally filed for divorce after Thanksgiving in 2006. Mr. Long was removed from the residence by the police on December 14 pursuant to the protection order. RP 927.⁴

The defendant was accused of violating this order on the same day that he was evicted from Ms. Long's residence at Manchester Court. He allegedly called Ms. Long and sent her a text message. CP 101. Mr. Long plead guilty to violating this Order in Kitsap County District Court case No. 17830002 on March 5, 2007. Id.

The next day the defendant continued to call Ms. Long and leave messages. At one point he spoke to a Kitsap County Deputy Sheriff and insisted that he be allowed to speak to Ms. Long. He also plead guilty to this violation under the same case number on March 5, 2007.

Between December 15 and 21st over one hundred Qwest cellular

⁴ Ms. Long obtained a Temporary Order for Protection on December 14, 2006 in Kitsap county Cause No. 06-2-02903-0 prohibiting the defendant from having contact with her or with their son A.T.L. CP 100. This was the third order she attempted to obtain in December. VIII RP 1032-35. On December 21, 2006 this Order was made permanent for one year and no contact was extended to include A.T.L.. This order was silent about possession of personal property. It is this order that the defendant is currently charged with two additional violations in this case. (Mr.Long plead guilty to violating this order several times in Kitsap County District Court.)

telephone calls were placed from the defendant's cell phone to Ms. Swiger-Long's cell phone or her residential land line. However, by December 22nd Ms. Swiger-Long agreed to meet Mr. Long at the Manchester Court residence and proceed from there to Ms. Long's brother's house in Olympia to spend Christmas. RP 935, CP 102.

In spite of the no contact order on December 24th she met Mr. Long at her Manchester Court home at about 4:00 p.m. RP 945. When he arrived at her home Mr. Long's cell phone rang. Ms. Swiger-Long testified that he said it was Billy Storm. RP 947. Storm appeared outside her residence before she and Mr. Long left for Olympia. RP 949. At that time she advised Long that Billy Storm's tool box was at her parents' house. Id.

Then, on Christmas day she received a telephone call that her parents house had been burglarized. RP 954. She and her brother left from Olympia to Port Orchard; although the defendant wanted to accompany them. RP 954. When she arrived the house "was in shambles." RP 955. Three to four laptops and computers that she used in her business were missing. RP 960. Her personal and business documents had been taken off the top of a dresser and dumped on top of a bed. RP 955; ex. 24.⁵

⁵Ms. Long advised that some of the items taken from her parents' residence was her property: "specifically, a Toshiba laptop computer, a Compaq laptop computer, a 2004 Sony 15" notebook computer, and a Sony Vio desktop missing from the burglary [w]as hers." CP 103.

Swiger-Long testified that she told the police that she thought that the defendant was in Utah. RP 961. She then had additional contact with the defendant during the latter part of January 2007- before her house was broken into on the 30th- in an attempt to retrieve her parents stolen property in conjunction with the defendant. RP 968-74, 988-95.

By January 30th Ms. Swiger-Long was not having contact with the defendant and was not returning his telephone calls. VIII RP 996. Mr. Long was released from the Kitsap County Jail on that date. Id. She testified that she received at least five telephone calls from the defendant on that date while she was at work at her second job as a waitress. RP 999. In addition, the defendant left multiple messages on her home phone and cell phone. id., exs. 77, 78. Her Manchester home was burglarized while she was at work on January 30, 2007. (Count VII). CP 322.

Swiger-Long testified that during February 2007 she received a letter from the defendant when the order for protection was still in effect. VIII RP 1022-23; ex. 94. She testified that she received a second letter in February from the defendant. RP 1024, ex. 88 (2/19/07).⁶

⁶ Mr. Long is accused of having substantial contact with Ms. Long on January 30, 2007 (count VI). CP 107-08. Ms. Long received two letters in February 2007: one was dated February 17 and the other February 19th (count VIII alleged contact between February 17 and February 28 2007).

C. Argument

I. THE TRIAL COURT ERRED WHEN IT GRANTED THE PLAINTIFF'S MOTION TO ALLOW TESTIMONY OF THREATS OF VIOLENCE BY THE DEFENDANT.

The state argued in its Trial memorandum:

“(2) That Ms. Long may testify regarding threats received by the defendant as the defendant has no marital communications privilege in these communications to Ms. Long [FN 4];” CP 220.⁷

FN 4 cited *State v. Moxley*, 6 Wn.App. 153, 154, 491 P.2d 1326 (1972) (husband's threat to kill his wife was not privileged) (*overruled on other grounds by State v. Thornton*, 119 Wn.2d 578, 835 P.2d 216 (1992)). The defendant had previously filed its Amended Defense Motions in Limine to “Limit testimony of Christina Long, defendant's spouse, to facts specifically relating to charges filed alleging she is the victim.”⁸ CP 182.

CP 109, 285.

⁷ The threats sought to be admitted by the prosecutor were included in the prosecutor's memorandum and stated:

“(3) That Ms. Long may testify regarding the content of any communications received in violation of the Temporary Order for Protection and/or the Order for Protection, as these communications were not “induced by the marital relationship,” and are therefore not covered by the marital communication privilege; “ CP 220.

⁸According to Karl B. Teglund, 5A *Washington Practice* 197-8 (5th ed. 2007) “The husband-wife privilege is actually two different rules– (1) the rule protecting confidential communications between spouses, and (2) the rule barring one spouse from testifying against the other.” The former

Specifically the state argued for inclusion of the following:

“After she told the defendant that she wanted to get a divorce, Thanksgiving of 2006, his threats to her were along the lines of that he better get 50/50 custody of Austin. Otherwise, neither she nor her parents would have any custody, and his family would have a hundred percent, even if it meant getting rid of her, even if that meant going to prison. She interpreted his as threats to her life.

When she asked him for clarification, asked him a question, Why are you threatening me, he would say, These are not threats. These are promises. That was repeated twice in person, according to her – this was prior to December 14 – when they were on, I believe, a couch in the residence on Manchester, according to her, and then another time over the phone, when he was calling, ostensibly, from Utah. So those are the specific threats

I would , I guess, reserve my response on relevance and 404(b). But again, this is – she’s competent, I believe, because this is part of that totality of the integrated crime.” I RP 23.

The defense argued in part: “We do strongly object to the wholesale admission of other violations of protections order, as it has absolutely no relevance to the crimes charged. It’s overly prejudicial, in particular the allegations that Mr. Long had contact with Mr. – with Ms. Long on December 14 and 15. He’s already been found guilty of those charges in District Court, and they have no relevance in this trial.” I RP 26.

is referred to as the *husband-wife privilege* while the latter is call the testimonial privilege or *a rule of incompetency*. “The privilege rule protects only confidential communications between spouses. By contrast, the rule of incompetency totally prevents a spouse from testifying, on any subject, upon the objection of the other.” (footnote numbers and citations omitted).

After hearing argument that Mr. Long's alleged threats to Ms. Long "between Thanksgiving of 2006 and December 18, 2006" should be admitted, the trial court granted this motion. I RP 24.

Ms. Swiger-Long testified about the custody issues in the pending divorce and "[That] he told me that if he couldn't have 50/50 with my son, that he would permanently take care of me, basically...." VII RP 905. She testified over objection that "I took it as that he would kill me, I guess. Yeah. I don't know." id.

Ms. Swiger-Long testified that there was a conversation about the difference between a threat and a promise. She informed the jury: " Well, I referred to it as a threat to him. And he came back and said on two different occasions that that was not a threat. It was a promise." RP 906.

The jury was advised of Ms. Swiger-Long's testimony regarding alleged threats made by Mr. Long. RP 909. The court cautioned the jury:

"Members of the Jury, Ms. Long's testimony regarding threats is offered solely to explain why she took certain actions and the Defendant's motives, if any, and you are not to consider it for any other purposes." Id.

What was referred to as a "third reiteration of a threat" was testified to as: "...He reiterated it again. Told me that if he didn't have 50/50 and that if I didn't give him what he wanted, that I would be taken

care of. You, know, he would get it either way, I guess. It was reiterated that way.” RP 915.

The privilege for confidential communications between husband and wife is contained in RCW 5.60.060. That statute provides in pertinent part as follows:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by or to the other during marriage. But his exception shall not apply to a civil action or proceedings by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian, nor to a proceedings under chapter 70.96 A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse of a person sought to be detained under chapter 70.96A, 70.96 B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

The trial court erred because *Moxley* did not address competency and did not mention that concept. I RP 21. *Moxley* held that the rule applies to a couple who were married but separated, as in the case at bench. 6 Wn. App. 153.

In *State v. Webb*, 64 Wn.App. 480, 824 P..2d 1257, *review denied*, 119 Wn.2d 1015 (1992) the defendant conversed with his wife while they

were separated and after she had filed for dissolution of the marriage. Webb allegedly said to his wife on the telephone before she left for the weekend: “Don’t be surprised when you get back; there is (sic) a few surprises waiting for you.” *id* at 482. Webb was later charged with second degree burglary and second degree malicious mischief for damaging property in his wife’s apartment.

Webb held that admission of the statement as rebuttal testimony to the defendant’s testimony- that he entered his wife’s apartment without criminal intent- was harmless error. The ruling resulted in harmless error based on the evidence against Webb and given that the result of the trial would not have been different without this evidence. The court cited conflicting authority for the issue of “...whether a threat by one spouse against the other spouse aimed at coercing the other spouse into complying with the will of the threatening spouse constitutes a communication made in reliance on the marriage relationship.”*id.* at 488. ⁹

Mr. Long’s attorney argued at the time: “The Defendant has not been charged with threatening his wife with anything. He’s been charged with violating a protection order on January 30 and then violating again in

⁹*State v. Richards*, 182 W.Va.664, 668-69, 391 S.E.2d 354 (1990) supports allowing the testimony; whereas *Cavert v. State*, 158 Tenn. 531, 544, 14 S.W.2d 735 (1929) supports the privilege and exclusion.

February, nor are the threats relevant at all to the burglary.” I RP 21.

In the case at bench, there is support that Mr. Long’s statements were based on the premise stated in *State v. Thorne*, 43 Wn.2d 47, 55, 260 P.2d 331 (1953): his communication was induced by the marital relationship and that “ the greatest benefits will flow from the relationship only if the spouse who confides in the other can do so without the fear that at some later time what has been said will rise up to haunt the speaker.”

Ms. Swiger-Long concluded her direct examination by testifying that she and the defendant had a second child who was conceived on Christmas Day 2006. The date of conception of their second child- during marriage- was after any alleged threats were made to her between December 14-18, 2006 and when the couple was at her house. RP 1026, 74.

The prosecutor argued that Ms. Swiger-Long’s testimony should be admitted based on the concept of “Totality of the integrated incident”. Apparently this phrase originated in *State v. Briley*, 53 N.J. 498, 507, 251 A.2d 443, 446 (1969) and was cited in *State v. Thompson*, 88 Wn.2d 518, 523, 564 P.2d 315 (1977) (*overruled on a different point by State v. Thornton*, 119 Wn.2d 578, 835 P.2d 216 (1992)).¹⁰ CP 220.

¹⁰*State v. Thornton*, supra, overruled two of the state’s leading cases although on different grounds: (*State v. Moxley and State v.*

In *State v. Thompson* a divided Washington Supreme Court allowed Thompson's wife to testify to facts surrounding the murder of a third person and to communications by the defendant in spite of RCW 5.60.60(1). The court rationalized use of this testimony because the defendant was charged with second degree murder of a third party and with the second degree assault of his wife from 5:00 p.m. August 6, 1974 to about 7:00 a.m. on August 7th when he discovered his wife's infidelity.

Thompson quoted *State v. Briley* at 507 as follows:

“If there is a single criminal event in which she and others are targets or victims of the husband's criminal conduct in the totality of the integrated incident and formal charges are made against the husband for some or all the offenses committed (one of which charges is for an offense against the spouse), the wife should be a competent and compellable witness against her husband at the trial of the cases regardless of whether they are tried separately or in one proceedings. And, in this connection, it should be immaterial that the offense against the wife does not reach the same dimensions of criminality as it does against the third-party victim.”

State v. Thompson, 88 Wn.2d at 523 (citing and quoting *State v. Briley*, 251 A.2d at 507 (Briley approached a car within which the victim and Briley's wife were preparing to leave. He killed the male with a shotgun

Thompson, supra). Thornton held that RCW 5.60.060(1) is not a bar to the testimony of one spouse against whom any crime was committed by the other spouse and is not limited to just crimes of personal violence.

and then chased his wife and beat her with the weapon. Briley was charged with murder of the victim and assault and battery of his wife). However, it should be noted that *Briley* supports the defendant's argument here because Briley's wife testified where she was the victim of a charged crime arising out of the same incident.

Thompson and *Briley* are distinguishable from the case at bench. Here, the defendant's communications to his wife were about custody issues regarding their son. These privileged communications were made weeks and months before any alleged burglary of Mr. Long's his wife's residence or of her parent's residence. These uncharged communications only have a connection to the charges of violation of a court order and should have been excluded.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED ALLEGED THREATS BY THE DEFENDANT PURSUANT TO ER 404 (b).

Notwithstanding that the trial court admitted the defendant's alleged threats¹¹ to Ms. Long based on "privilege" it also admitted the same threats pursuant to ER 404(b) when the prosecutor argued that their admission was necessary to show motive. I RP 32, 36-7. The prosecutor stated: "The evidence of his threats to her regarding custody of

¹¹ The threats that are referred to in this argument are the same that are set forth in the preceding argument.

A.T.L. is relevant for his motive in committing each burglary.” CP 123.

The defendant had moved the court in its amended defense motions in limine to prohibit the state from introducing or referring to evidence of “Uncharged Incidents of Violating a Court Order” based on ER 402, 403 and 404(b). CP 183. The defense also argued “There is no relevance, and the prejudice to the Defendant in that – in such testimony would weigh in favor of excluding it.” I RP 24.¹²

The defendant’s argument was similar to his argument concerning exclusion of the testimony based on privilege and was that Mr. Long was not charged with making any threats to Ms. Long. It was argued to the trial court:

“This – taken in context, you have an upset husband being told that his marriage is going to end and fearful that he would be deprived of time with his child. And that does not equate with, I’m going to go burglarize my in-law’s house. It is just very highly prejudicial information that should not be admitted under Evidence Rule 404(b).”
I RP 35-6.

The trial court ruled with regard to the December 14th contact:

“The threat, such as it may be characterized that we’ve just discussed, may

¹²See also the defendant’s motions in limine asking the court to:
“1. Limit testimony of Christina Long, defendant’s spouse, to facts relating to charges alleging she is the victim of the crime. Basis: Marital Privilege. RCW 5.60.060(1).” CP 179; II RP 98.

be admitted for the purpose of motive. It will be accompanied with a protective instruction limiting the scope and the reasons for its admission.” I RP 36.

The second threat was prior to December 14th when “...Ms. Long would ask the Defendant why he was threatening her, and the Defendant again advised that he was not threatening her and never would do so; that instead he was saying – what he was saying were promises.” I RP 36. The trial court simply stated: “The same ruling.” I RP 37.

Evidentiary Rules

ER 404(b) entitled “Other Crimes, Wrongs, or Acts states:

“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.”

ER 403 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.”¹³

¹³ER 401 states:

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

The trial court never did balance probative value against prejudicial effect on the record during the extended ER 404(b) arguments. I RP 31-50. After a recess, balancing was brought to the trial court's attention by the prosecutor as a "housekeeping-type issue". The court then stated on the record its balancing test.¹⁴

According to Karl B. Teglund 5 *Washington Practice* 603-08 (5th ed. 2007) in his section entitled "Balancing probative value against prejudice" the following admonishments appear:

"Evidence that is otherwise admissible under Rule 404(b) should be excluded under Rule 403 if its probative value is outweighed by the danger of unfair prejudice. [footnotes and citations omitted]...In order to justify admission of the evidence, the court must articulate a balancing of

probable than it would be without the evidence.

ER 402 states:

"All evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable to courts of this state. Evidence which is not relevant is not admissible."

¹⁴THE COURT: No. That's appropriate. I have considered each of the prejudicial instances that would impact Mr. Long. I find that it's necessary to introduce the evidence, because it is not for the cumulative or effect or providing character or the action in conformity but with regard to motive, with regard to the opportunity, specifically for those identified crimes." I RP 55.

value is substantially outweighed by unfair prejudice.

Thirdly, before admitting evidence of other crimes, wrongs, or acts the trial court must determine not only the logical relevancy of the evidence, but also determine whether its probative value outweighs its potential for prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 361-63, 655 P.2d 697 (1982); *State v. Kelly*, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); *State v. Herzog*, 73 Wn.App. 34, 48-50, 867 P.2d 648, *review denied*, 124 Wn.2d 1022 (1994).

The standard for review of the trial court's determination is an abuse of discretion standard. *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Balancing of probative value versus prejudicial effect must be conducted on the record. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). In the case at bench there was no balancing conducted on the record to determine whether the probative value of evidence of alleged threats outweighed its prejudicial effect where a key witness for the prosecution- Ms. Swiger-Long- stated that Mr. Long threatened to kill her in uncharged incidents concerning the issue of child custody proceedings.

Nor did the trial court consider other methods of proof and/or other evidence at the prosecutor's disposal such as evidence of hundreds of other telephone contacts to Swiger-Long by Mr. Long. For instance,

exhibit 76 was a chart of telephone calls to Christina from 12/01/06 to 1/11/07. VIII RP 1118. Exhibit 78 was a chart of telephone calls to Christina from 4:30 to 11:00 on January 30, 2007. RP 1123. Exhibit 79 was a chart of telephone calls from 4:30 p.m. to midnight on January 30, 2007. RP 1125. The total telephone calls from Mr. Long's cell phone were 2,199 calls, which included 65 calls to Mr. Storm from 12/21/06 to 12/24/06. as shown in exhibit 77. RP 1113, 1122.

See generally, *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) (“Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted..”) Teglund at 5 *Washington Practice* 605, n. 4.

The errors committed by including testimony of uncharged threats prejudiced the accused by their admission as argued by the defendant. The error was prejudicial because within reasonable probabilities, the outcome of the trial- where Mr. Long was only convicted of two counts of violating a court order- would have been materially affected had the error not occurred. *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980).

III. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SEVER COUNTS I, II, III AND VII FROM COUNTS IV, V AND VI .

The defendant moved to sever counts 1,2,3 and 7 from counts

4,5 and 6 in the third amended information. CP 45.

The prosecutor argued in its motions in limine: “This case involves, in part, a burglary committed by William Storm and John Crooks at the behest of the defendant.” CP 199. Storm admitted burglarizing the Swiger home with Mr. Crooks. He claimed that Mr. Long asked them to break into the Swiger home, but he denied that any guns were taken.” I RP 78.

The alleged motive was part of the prosecutor’s theory of the case:

“We’re talking about the idea of custody and the defendant’s family breaking up as the motive. Clearly, when he’s making threats to Ms. Long in the context of the custody – impending custody battle and then we have evidence that after the temporary order is issued on December 14, giving her temporary custody, that at that time or shortly thereafter is when he tells Billy Storm, according to Billy Storm, that, in fact, he should go do the burglary and gives him the final information to do that. And the burglary occurs at her parents’ place. That is powerful evidence of motive.” I RP 32-33.

CrR 4.4(b) entitled Severance of Offenses states as follows:

“The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with the consent of the defendant, the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.”¹⁶

¹⁶ The counterpart to this rule is CrR 4.3(a). *State v. Russell*, 125 Wn.2d 24, 62-3, 882 P.2d 747 (1994) states: “Prejudice may result from

CrR 4.3 states:

“(a) **Joinder of Offenses.** Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.”

Standard of Review

A defendant has the burden of proof when he seeks severance. This is the burden of demonstrating that a trial of the counts together or combined would be manifestly prejudicial so that it would outweigh any concern for judicial economy. *State v. Cotten*, 75 Wn.App. 669, 686, 879 P.2d 971, *review denied*, 126 Wn.2d 1004 (1994). A trial court’s refusal to sever the counts under CrR 4.4(b) is reviewed for an abuse of discretion. *State v. Cotten*, *supra* at 686-87.

The trial court erred and the joined counts should have been severed for the following reasons:

There is no common scheme or plan involving Multifarious charges

joinder if the defendant is embarrassed in the presentation of separate defenses, or if use of a single trial invites the jury to cumulate evidence to find guilt or infer criminal disposition. *State v. Watkins*, 53 Wn.App. 264, 268, 766 P.2d 484 (1989).” (citing *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934 (1972), *overruled on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)).

According to *State v. Russell*, 125 Wn.2d at 63, the trial court must consider “the admissibility of evidence of other charges even if not joined for trial.” (citing *State v. Smith*, 74 Wn.2d at 755-56 and *State v. York*, 50 Wn.App. 446, 451, 749 P.2d 683 (1987), *review denied*, 110 Wn.2d 1009 (1988)).

The crimes for which the defendant is charged are not a part of a common scheme or plan.¹⁷ There are counts that allege crimes against the Swigers (counts I and II) and there are crimes that allege the victim to be Ms.Swiger- Long (counts III, IV, V and VI). Although the combined victims are related by blood, the alleged motives for the crimes are not the same.

The prosecutor alleged that the crimes against the Swigers was

¹⁷ At the time the motion to sever was filed the third information was in effect. It alleged as Count I: Burglary in the First Degree (DV) of the Swiger residence between December 18-25, 2006; Count II Residential burglary (DV) between December 18 and December 25, 2006 of the same residence; Count III Theft in the Third Degree (DV) between December 18-25, 2006; Count IV Violation of a Court Order [Felony] (DV) on January 30, 2007; Count V Residential Burglary (DV) on January 30, 2007; Count VI Violation of a Court Order [Felony] (DV) on February 17-28, 2007; Count VII Intimidating a Witness between March 2-20, 2007. (this count was ultimately dismissed by the court prior to testimony). All counts asserted special allegations of aggravating circumstances and multiple current offenses going unpunished contrary to RCW 9.94A.535(2)(c).

based on the perceived role they played in getting the protective order against the defendant and getting him evicted from their daughter's residence on Manchester Court in Port Orchard. Also, the crimes against Mr. And Mrs. Swiger were alleged to have occurred at the defendant's behest involving the credibility of multifarious witnesses; while the crimes involving the no contact order presented a different defense and involved the defendant personally and alone.

The alleged contact with his wife on January 30th over the cell phone was when the defendant was asking for her help to retrieve some personal items inside the Manchester residence on the day he was released from jail. CP 107. There is no connection between an alleged, attempt to contact his estranged wife in February 2007 and an alleged motive to orchestrate the burglary of her parents home one month earlier in December 2006. There is no common scheme or plan linking these sporadic charges.

The defense argued at the time of hearing in its memorandum in support of motion to Sever offenses:

“Evidence that Ms. Long had a protection order against her husband would not be admissible regarding the burglary of the Swiger's home. Nor would evidence that Mr. Long had been convicted of violating a court order before. The fact that Mr. Long had bailed out of jail on January 30, 2007 has no relevance to the burglary that occurred on Christmas Eve. The fact that Mr. Long may have called

his wife on January 30, 2007 has no relevance to the burglary on Christmas Eve....” CP 55-6.

There is a disparity in the strength of the evidence

The evidence of the alleged burglaries was not strong. *State v. Russell*, supra at 125 Wn.2d at 63 (“...a trial court must consider the strength of the State’s evidence on each count.”) There is a high risk of prejudice to Mr. Long by trying the alleged burglary to the Swiger’s residence with the two no contact violations combined with the alleged burglary to Ms. Swiger-long’s residence. Several of the alleged co-conspirators retracted their statements or have denied that the defendant was involved in the Swiger burglary. Much, if not all, of this testimony is by alleged accomplices and is suspect.¹⁸

Also, much of the evidence in the alleged no contact violations and the January 30, 2007 burglary of her residence comes from Swiger-Long who is biased against the defendant (counts IV, V and VI). Her testimony would prejudice the defendant in the alleged burglary charge involving her parent’s residence where there were no independent, eye witnesses. Finally, there was no fingerprint evidence in either of the separated, burglary locations i.e, Seabeck in Silverdale and Manchester in

¹⁸See instruction No. 7 which is the standard instruction on cautioning the jury about exercising great caution concerning accomplice testimony. CP 340; 11 *Washington Practice* WPIC 6.05.

Port Orchard areas.

The defenses are antagonistic to each other

The defendant's assertion of alibi defenses to the several burglaries is not the same evidence or defense as a denial of the no-contact orders. The jury was likely to transfer any suspicion of the defendant on the uncertain burglary charges to the no contact violations involving Ms. Long (See generally, *State v. Russell*, *supra* at 63, in determining whether the potential for prejudice requires severance, the trial court should consider "the clarity of the defenses to each count.").

The antagonistic defenses involve the defendant's right to testify about one series of crimes (burglaries) and then exercise his right to remain silent on another series of charges (no contact violations). In fact the defendant did not testify. It was stated in *State v. Russell*, *supra* at 65:

"A defendant's desire to testify only on one count requires severance only if a defendant makes a "convincing showing that [he] has important testimony to give concerning one count and a strong need to refrain from testifying about another".

(citing *State v. Watkins*, *supra* at 270; *State v. Weddel*, 29 Wn.App. 461, 467, 629 P.2d 912, *review denied*, 96 wn.2d 1009 (1981)).

Finally, according to *State v. Gatalski*, 40 Wn.App. 601, 606, 699 P.2d 804, *review denied*, 104 Wn.2d 1019 (1985) "A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent

feeling of hostility engendered by the charging of several crimes as distinct from only one.”

IV. THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO CONSECUTIVE SENTENCES AND WHEN IT DENIED THE DEFENDANT’S MOTION FOR RECONSIDERATION OF SENTENCES.

Mr. Long was only found guilty by jury verdict of two counts of violation of a court order-domestic violence. CP 319-22 . Thereafter, the prosecutor filed a ninth amended information which included a new count of possession of stolen property in the second degree contrary to RCW 9A.56.140(1) and to RCW 9A.56.160(1)(a). CP 411. The ninth amended information re-alleged the two counts of violation of a court order that the defendant was previously found guilty of by jury verdict but did not include any other counts that were tried to the jury. CP 412-13. Also, the final amended information did not include any allegations of aggravated circumstances as the previous informations had.¹⁹ During the trial, the jury had not been asked and did not find any aggravating circumstances. II RP 119.

¹⁹A special allegation previously alleged in all counts- except violation of court orders-domestic violence RCW 9.94A.535(2)(c) which states: “The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:...(c) The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.”

property in the second degree. CP 415-422. The prosecutor agreed to recommend “18 months concurrent and concurrent with district court sentences.”CP 417.

The trial court sentenced Mr. Long to 18 months imprisonment for Count I; where his standard range was 14 to 18 months. And the trial court sentenced him to 365 days or 12 months confinement for Counts II and III for Violation of a Court Order on January 30, 2008 and on February 17-28, 2007 respectively. These misdemeanor convictions were ordered to run concurrently with each other but consecutively to Count I for a total confinement of 30 months. CP 449-51. The judgment and sentence stated: “Sentences-Counts II and III are ordered to run concurrent to each other but consecutive to Count I.” CP 462.

The court stated at sentencing on January 11, 2008 the reasons for a consecutive sentence:

“The end result is but a token for the criminal activity that was involved. Storm and Crooks would not have known of your in-law’s house, had you not been involved with them, had you not talked to them. There would have been no need for you to try to have stopped them, as the evidence suggested, if they had not been given the information that they acted on. You’re responsible for that. It put in place a series of events that led to this crime. And a conviction for Possession of Stolen Property in the Second Degree doesn’t really address the criminal activity, the breach of trust or abuse of trust, and the sophistication and utilization of people who were addicted to accomplish a purpose.

With regard to the crime of Possession of Stolen Property in the Second Degree, standard range is 14 to 18 months. I impose 18 months of confinement.

With regard to the Violation of No Contact Order Gross Misdemeanor, there are two convictions for that. I impose 365 days. That's a gross misdemeanor. Those sentences will be served concurrently.

The Violation of Court Order – you need to understand another violation of court order is a felony.

THE DEFENDANT: Yes, sir.

THE COURT: It will be prosecuted, I assume as a felony and would probably be prosecuted as vigorously and aggressively as the underlying charge.

Because I find that the convictions – the convictions that are not representative of the course of criminal conduct, I find that the Violation of Court Order Gross Misdemeanors will be served consecutively to the 18 months for the Possession of Stolen Property in the Second Degree.

I will ask that the prosecutor prepare findings and conclusions that would justify – or that are consistent with my ruling. For purposes of those being served consecutively means after 18 months. But I want to make it clear that the violation of court orders are – those two are to be served concurrently, so it will be 18 months plus 12 months.”1/11/08 RP 23-25.

Standard of Review

Generally, a sentencing court's decision of whether sentences for two or more offenses are to run concurrently or consecutively is discretionary. The standard of review is the abuse of discretion standard, i.e. either discretion was manifestly unreasonable or it was exercised on untenable grounds or for untenable reasons. *State v. Batten*, 16 Wn.App. 313, 556 P.2d 551 (1976). Constitutional challenges are reviewed de novo.

State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

The defense objected to consecutive sentences and filed its written Objection to Consecutive Sentences on January 17, 2007, the date the judgment and sentence was entered. CP 429, 449. Mr. Long's attorney argued in part:

“The real facts doctrine requires a sentencing court base the defendant's sentence on the defendant's current conviction, criminal history and circumstances of the crime. *State v. Coates*, 84 Wn.App. 623, 626P.2d 507(1997); *State v. Tierney*, 74Wn.App. 346,350, 872 P.2d 1145 (1994). The court may not base an exceptional sentence on facts wholly unrelated to the current offense or facts that would elevate the degree of the crime charged above that of the charged crime. *Tierney* 74 Wn.App. 346, 872 P.2d 1145. The sentencing court may consider facts that establish elements of an additional uncharged crime when those facts are part and parcel of the current offense. *Tierney*,74 Wn.App. 352, 872 P.2d 1145, *State v Van Buren*, 112 Wn.App. 585,600-601, 49 P.3d 966 (2002).”

Here, however, the court relied on the belief that Mr. Long had committed the elevated crime of Residential Burglary, in spite of the fact that Mr. Long only plead guilty to Possession of Stolen Property in the Second Degree. The plea agreement did not stipulate to consideration of facts beyond those that Mr. Long admitted.” CP 429-30.²⁰

(*State v. Tierney*, cert. denied, 115 S.Ct. 1149 (1995) (*State v. Coats*, review denied, 132 Wn.2d 1003 (1997)).

²⁰Long entered an *Alford* plea to possession of stolen property in the second degree. *North Carolina v. Alford*, 440 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970); CP 421.

entered an order denying the defendant's motion for reconsideration of sentence on February 1, 2008. CP 447. At the same time the judgment and sentence were entered. CP 449.

Consecutive sentences may only be imposed by the trial court pursuant to a finding of an exceptional sentence. The defense argued that imposition of a consecutive sentence constitutes an exceptional sentence.

CP 431. RCW 9.94A.589 (1)(a) (former RCW 9.94A.401) states:

“(1)(a) Except as provided in (b) or (c) of this subsection, whenever someone 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 for the purpose of the offender score...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....”²¹

RCW 9.94A.537(3) states further:

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

²¹RCW 9.94A.535 states: “The court may impose a sentence outside the standard 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.”

The defense argued in its objection to consecutive sentences: “In this case, there was no jury verdict or special interrogatory finding aggravating circumstances. The defendant has not waived his right to a jury. Not only is the jury finding of aggravated circumstances mandated by the above cited statute, it is constitutionally mandated under the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).” CP 414.

The trial court’s refusal to initially sever the unrelated counts at the inception of the trial impacted and affected the ultimate sentence where Mr. Long was sentenced “with three offenses in one sentencing hearing by a statute mandating concurrent sentences.” CP 414[B].

The trial court abused its discretion when it ran the two misdemeanor convictions consecutively to the felony conviction. The court abused its discretion because it based its sentence on the defendant’s alleged involvement in other criminal activity, of which he was either acquitted or the jury was unable to reach a verdict. Consequently, the trial court based its reasons for a consecutive sentence on untenable grounds and/or for untenable reasons. This court should reverse the defendant’s sentence because of this abuse of discretion.

In *State v. Langford*, 67 Wn.App. 572, 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007, cert. denied, 510 U.S. 838 (1993)

Langford's conviction for unlawful display of a weapon was ordered to run consecutive to his conviction as an accomplice to second degree felony murder, first degree assault and second degree assault. Langford and his son each stabbed a different person with a knife. The appellate court affirmed the trial court's sentence and held that even though RCW 9.94A.400(1)²² mandates concurrent sentences the Sentencing Reform Act of 1981 applies to felony sentences only. RCW 9.94A.010. Therefore, the court reasoned the SRA does not limit the trial court's discretion to impose a consecutive sentence for a misdemeanor conviction. *id.* At 587-8.

The defense argued at the time of sentencing: "Our position is that when you have one sentencing and one of the offenses in the sentencing is a felony, the Sentencing Reform Act applies. And under RCW 9.94A.530, the sentences must be concurrent unless the court – the jury finds exceptional – aggravating factors warranting an exceptional sentence." 2/01/08 RP *cf. State v. Whitney*, 78 Wn.App. 506,517, 897 P.2d 374, *review denied*, 128 Wn.2d 1003 (1995) (sentences for a felony conviction of failure to remain at the scene of an accident with an injured person and driving while license suspended/revoked were ordered to run consecutively when arising out of the same vehicular accident).

²² RCW 9.94A.401 has been recodified as RCW 9.94A.589, *supra* at p. 36.

State v. Song, 50 Wn.App. 325, 748 P.2d 273 (1988), cited in *Langford* at 74 Wn.App.at 352, has reasoned that the rule of lenity should not apply where there was no ambiguity in a particular statute.²³ Yet, closer examination reveals that there is an ambiguity in the SRA itself regarding judicial discretion to order misdemeanor convictions consecutive to felony convictions. This would especially be the case where the convictions arose out of the same course of events, as argued by the prosecutor throughout the trial: “This is an integrated incident. What we’re talking about here all occurs within an approximate one-month span.” I RP 12.

Contrary to *Song* is *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982). That case was a prosecution for three counts of promoting prostitution, one count for each prostitute allegedly employed over a period of weeks at the same location. RCW 9A.88.080. The Court of Appeals held that on remand- on another issue- the trial court must impose concurrent sentences if a guilty verdict was returned on more than one count. id. at 687-88.

²³*Song* was based on RCW 9.92.080 with regard to concurrent/ consecutive sentences outside of the SRA; but not with regard to the issue of ambiguity. The defense noted: “Though RCW 9.92.080(3) does allow courts to impose consecutive sentences, that statute no longer applies to felony offenses on or after July 1, 1984. RCW 9.92.900.” CP 431.

Chief Justice Reed, writing for a majority court and after the SRA was enacted, observed:

“The rule of lenity is a canon of statutory construction which applies when a penal statute is ambiguous as to whether the legislative body intended to impose multiple punishment. *Albernaz v. United States*, 450 U.S. 333, 67 L.Ed.2d 275, 101 S.Ct. 1137 (1981). It forbids courts to proliferate sentences when the legislature has been silent. It “is designed to prevent multiple judicial punishment for a single legislative offense- to preclude substantive double jeopardy.” *Twice in Jeopardy*, supra at 316.”

(citing and quoting *Twice in Jeopardy*, 75 Yale L.J. 262 (1965)).

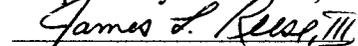
Here, the rule of lenity should apply because the SRA is silent with regard to whether or not misdemeanor convictions arising out of facts that are closely connected to the current offense should be run consecutively or concurrently. And as noted RCW 9.92.080 does not apply to felonies.

D. Conclusion

This court should reverse the defendant’s convictions for two counts of Violation of a Court Order-Domestic Violence. In the alternative, this court should reverse the trial court’s consecutive sentences and remand for re-sentencing Mr. Long to concurrent felony and misdemeanor convictions.

Dated this 15th day of April 2009.

Respectfully Submitted,



James L. Reese, III

WSBA #7806

Court Appointed Attorney

TITLE IV. RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

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.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(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.

[Amended effective September 1, 1992.]

RULE 405. METHODS OF PROVING CHARACTER

(a) **Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

[Amended effective September 1, 1992.]

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

RULES FOR SUPERIOR COURT

8. **Application for a Name Change:** If I apply for a name change, I must submit a copy of the application to the county sheriff of the county of my residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If I receive an order changing my name, I must submit a copy of the order to the county sheriff of the county of my residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

Date: _____

 Defendant's signature

(h) **Verification by Interpreter.** If a defendant is not fluent in the English language, a person the court has determined has fluency in the defendant's language shall certify that the written statement provided for in section (g) has been translated orally or in writing and that the defendant has acknowledged that he or she understands the translation.

[Amended effective September 1, 1983; July 1, 1984; September 1, 1986; September 1, 1991; March 19, 1993; September 1, 1995; November 7, 1995; January 2, 1996; September 1, 1996; April 8, 1997; March 9, 1999; September 1, 1999; December 28, 1999; December 26, 2000; April 16, 2002; August 6, 2002; August 3, 2004; August 2, 2005; April 11, 2006; August 1, 2006.]

RULE 4.3 JOINDER OF OFFENSES AND DEFENDANTS

(a) **Joinder of Offenses.** Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

- (1) Are of the same or similar character, even if not part of a single scheme or plan; or
- (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

(b) **Joinder of Defendants.** Two or more defendants may be joined in the same charging document:

- (1) When each of the defendants is charged with accountability for each offense included;
- (2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
- (3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
 - (i) were part of a common scheme or plan; or
 - (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

(c) [Reserved].

(d) [Reserved].

(e) **Improper Joinder.** Improper joinder of offenses or defendants shall not preclude subsequent prosecution on the same charge for the charge or defendant improperly joined.

[Amended effective September 1, 1986; September 1, 1995.]

RULE 4.3.1 CONSOLIDATION FOR TRIAL

(a) **Consolidation Generally.** Offenses or defendants properly joined under rule 4.3 shall be consolidat-

ed for trial unless the court orders severance pursuant to rule 4.4.

(b) **Failure to Join Related Offenses.**

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(4) Entry of a plea of guilty to one offense does not bar the subsequent prosecution of a related offense unless the plea of guilty was entered on the basis of a plea agreement in which the prosecuting attorney agreed to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

(c) **Authority of Court To Act on Own Motion.** The court may order consolidation for trial of two or more indictments or informations if the offenses or defen-

dants could have been joined in a single charging document under rule 4.3.

[Formerly CrR 4.3A, adopted effective September 1, 1995. Renumbered as CrR 4.3.1 effective April 3, 2001.]

RULE 4.3A CONSOLIDATION FOR TRIAL [RENUMBERED]

[Renumbered as 4.3.1 effective April 3, 2001.]

RULE 4.4 SEVERANCE OF OFFENSES AND DEFENDANTS

(a) Timeliness of Motion—Waiver.

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(b) **Severance of Offenses.** The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

(c) Severance of Defendants.

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

(i) the prosecuting attorney elects not to offer the statement in the case in chief;

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

(3) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

(4) The assignment of a separate cause number to each defendant of those named on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for severance.

(d) **Failure to Prove Grounds for Joinder of Defendants.** If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

(e) **Authority of Court to Act on Own Motion.** The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

[Amended effective December 28, 1990.]

Comment

Supersedes RCW 10.46.100.

RULE 4.5 OMNIBUS HEARING

(a) **When Required.** When a plea of not guilty is entered, the court shall set a time for an omnibus hearing.

(b) **Time.** The time set for the omnibus hearing shall allow sufficient time for counsel to (i) initiate and complete discovery; (ii) conduct further investigation of the case, as needed; and (iii) continue plea discussions.

(c) **Checklist.** At the omnibus hearing, the trial court on its own initiative, utilizing a checklist substantially in the form of the omnibus application by plaintiff and defendant (see section (h)) shall:

(i) ensure that standards regarding provision of counsel have been complied with;

(ii) ascertain whether the parties have completed discovery and, if not, make orders appropriate to expedite completion;

(iii) make rulings on any motions, other requests then pending, and ascertain whether any additional motions, or requests will be made at the hearing or continued portions thereof;

(iv) ascertain whether there are any procedural or constitutional issues which should be considered;

(v) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference; and

(vi) permit defendant to change his plea.

(d) **Motions.** All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. Checklist

RCW 5.60.060

Who are disqualified — Privileged communications.

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

(3) A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

(4) Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

(6)(a) A peer support group counselor shall not, without consent of the law enforcement officer or firefighter making the communication, be compelled to testify about any communication made to the counselor by the officer or firefighter while receiving counseling. The counselor must be designated as such by the sheriff, police chief, fire chief, or chief of the Washington state patrol, prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding officer or firefighter, a witness, or a party to the incident which prompted the delivery of peer support group counseling services to the law enforcement officer or firefighter.

(b) For purposes of this section, "peer support group counselor" means a:

(i) Law enforcement officer, firefighter, civilian employee of a law enforcement agency, or civilian employee of a fire department, who has received training to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity; or

(ii) Nonemployee counselor who has been designated by the sheriff, police chief, fire chief, or chief of the Washington state patrol to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity.

(7) A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate.

(a) For purposes of this section, "sexual assault advocate" means the employee or volunteer from a rape crisis center, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

(b) A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed.

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

(a) For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by RCW 26.44.030(12). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

[2008 c 6 § 402; 2007 c 472 § 1. Prior: 2006 c 259 § 2; 2006 c 202 § 1; 2006 c 30 § 1; 2005 c 504 § 705; 2001 c 286 § 2; 1998 c 72 § 1; 1997 c 338 § 1; 1996 c 156 § 1; 1995 c 240 § 1; 1989 c 271 § 301; prior: 1989 c 10 § 1; 1987 c 439 § 11; 1987 c 212 § 1501; 1986 c 305 § 101; 1982 c 56 § 1; 1979 ex.s. c 215 § 2; 1965 c 13 § 7; Code 1881 § 392; 1879 p 118 § 1; 1877 p 86 § 394; 1873 p 107 § 385; 1869 p 104 § 387; 1854 p 187 § 294; RRS § 1214. Cf. 1886 p 73 § 1.]

Notes:

Rules of court: Cf. CR 43(g).

Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901.

Intent -- 2006 c 259: "The legislature intends, by amending RCW 5.60.060, to recognize that advocates help domestic violence victims by giving them the support and counseling they need to recover from their abuse, and by providing resources to achieve protection from further abuse. Without assurance that communications made with a domestic violence advocate will be confidential and protected from disclosure, victims will be deterred from confiding openly or seeking information and counseling, resulting in a failure to receive vital advocacy and support needed for recovery and protection from abuse. But investigative or prosecutorial functions performed by individuals who assist victims in the criminal legal system and in other state agencies are different from the advocacy and counseling functions performed by advocates who work under the auspices or supervision of a community victim services program. The legislature recognizes the important role played by individuals who assist victims in the criminal legal system and in other state agencies, but intends that the testimonial privilege not be extended to individuals who perform an investigative or prosecutorial function." [2006 c 259 § 1.]

Findings -- Intent--Severability -- Application -- Construction -- Captions, part headings, subheadings not law -- Adoption of rules -- Effective dates -- 2005 c 504: See notes following RCW 71.05.027.

Alphabetization -- Correction of references -- 2005 c 504: See note following RCW 71.05.020.

Recommendations -- Application -- Effective date -- 2001 c 286: See notes following RCW 71.09.015.

Severability -- 1997 c 338: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1997 c 338 § 74.]

RCW 9.92.080

Sentence on two or more convictions or counts.

(1) Whenever a person while under sentence of felony shall commit another felony and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms: PROVIDED, That any person granted probation pursuant to the provisions of RCW 9.95.210 and/or 9.92.060 shall not be considered to be under sentence of a felony for the purposes of this subsection.

(2) Whenever a person is convicted of two or more offenses which arise from a single act or omission, the sentences imposed therefor shall run concurrently, unless the court, in pronouncing sentence, expressly orders the service of said sentences to be consecutive.

(3) In all other cases, whenever a person is convicted of two or more offenses arising from separate and distinct acts or omissions, and not otherwise governed by the provisions of subsections (1) and (2) of this section, the sentences imposed therefor shall run consecutively, unless the court, in pronouncing the second or other subsequent sentences, expressly orders concurrent service thereof.

(4) The sentencing court may require the secretary of corrections, or his designee, to provide information to the court concerning the existence of all prior judgments against the defendant, the terms of imprisonment imposed, and the status thereof.

[1981 c 136 § 35; 1971 ex.s. c 295 § 1; 1925 ex.s. c 109 § 2; 1909 c 249 § 33; RRS § 2285.]

Notes:

Applicability – 1984 c 209: See RCW 9.92.900.

Effective date – 1981 c 136: See RCW 72.09.900.

RCW 9.94A.535

Departures from the guidelines.

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).
- (z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.
- (ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.
- (aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

[2008 c 276 § 303; 2008 c 233 § 9; 2007 c 377 § 10; 2005 c 68 § 3; 2003 c 267 § 4; 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4. Prior: 1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.]

Notes:

Reviser's note: This section was amended by 2008 c 233 § 9 and by 2008 c 276 § 303, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

RCW 9.94A.537

Aggravating circumstances — Sentences above standard range.

(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) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) 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.

(4) 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 jury has been impaneled solely for resentencing, or 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.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), 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.

(6) 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.

[2007 c 205 § 2; 2005 c 68 § 4.]

Notes:

Intent – 2007 c 205: "In *State v. Pillatos*, 150 P.3d 1130 (2007), the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." [2007 c 205 § 1.]

Effective date – 2007 c 205: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 27, 2007]." [2007 c 205 § 3.]

Intent – 2005 c 68: "The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. The legislature does not intend to alter how mitigating facts are to be determined under the sentencing reform act, and thus intends that mitigating facts will be found by the sentencing court by a preponderance of the evidence.

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the

RCW 9.94A.589

Consecutive or concurrent sentences.

(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.

[2002 c 175 § 7; 2000 c 28 § 14; 1999 c 352 § 11; 1998 c 235 § 2; 1996 c 199 § 3; 1995 c 167 § 2; 1990 c 3 § 704. Prior: 1988 c 157 § 5; 1988 c 143 § 24; 1987 c 456 § 5; 1986 c 257 § 28; 1984 c 209 § 25; 1983 c 115 § 11. Formerly RCW 9.94A.400.]

Notes:

Effective date -- 2002 c 175: See note following RCW 7.80.130.

Technical correction bill -- 2000 c 28: See note following RCW 9.94A.015.

Severability -- 1996 c 199: See note following RCW 9.94A.505.

H

AMENDMENT (XIV)

ss.1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, 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 laws.

AMENDMENT VI

Jury trial for crimes, and procedural rights

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.

J

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DIVISION II

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STATE OF WASHINGTON
BY _____

DEPUTY

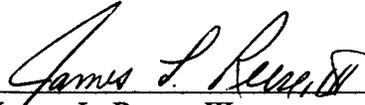
PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

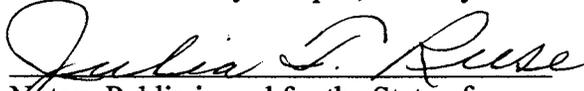
That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 15th day of April, 2009, he deposited in the mails of the United States of America, postage prepaid the original and one (1) copy of Appellant's Brief in State of Washington v. Wesley James Long, No. 38179-6-II, to the office of David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, Washington 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Wesley James Long, 2267 W. 710 N., Provo, Utah 84601.



James L. Reese, III

Signed and Attested to before me this 15th day of April, 2009 by James L. Reese, III.



Notary Public in and for the State of
Washington, residing at Port Orchard.
My Appointment Expires: 04/04/13