

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 38575-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBIN HYLTON,

Appellant.

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred in rejecting defendant's jury waiver.
2. The trial court erred in excluding defense evidence.
- 3(a). The state erred vouching for the credibility of its witness.
- 3(b). The court erred in permitting such vouching.
- 4(a). The trial court erred in imposing an exceptional sentence above the standard range based on the abuse-of-trust aggravating factor.
- 4(b). The state erred in charging the abuse-of-trust aggravating factor.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether the trial court's refusal to accept Mr. Hylton's *pro se* jury waiver, without inquiry or reasons, was an abuse of discretion under CrR 6.1(a) – since the complete failure to inquire or state any reason constituted a failure to exercise discretion?
2. Whether excluding vicious e-mails of the complainant's mother showing her bias, evidence of her abuse of the complainant, evidence explaining complainant's torn hymen, and the alibi witness's journal entry with a hand-drawn heart, violated state evidentiary rules and the right to present a defense?

3. Whether arguing that its witnesses were “credible,” “believable,” and “telling the truth,” and that the detective could lose her job if she were not telling the truth, constitutes impermissible vouching?

4. The abuse-of-trust aggravating factor was enacted for the first time in 2005 with the “*Blakely*¹ fix” and Mr. Hylton’s crime occurred in 2004. Can that aggravating factor be applied retroactively, when – unlike other aggravating factors which were already on the statutory list of aggravating factors before *Blakely* – this one was listed for the first time in 2005 and, hence, retroactive application would violate state statutory protections and state and U.S. constitutional *ex post facto* clause protections?

5. Do *North Carolina v. Pearce*² and the due process clauses of the state and U.S. constitutions bar the state from seeking, and the judge from applying, a sentence enhancement that was not charged before the first trial and was added after the state suffered two acquittals on related charges?

6. Whether the abuse-of-trust aggravating factor, RCW 9.94A.535(n), is unconstitutionally vague in violation of U.S. CONST. AMEND. VII, XIV and WASH. CONST. ART. 1, §§ 3, 14, 22, given the fact

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

² *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 73 L.Ed.2d 656 (1969).

that the trial court failed to instruct the jury on its two critical elements, *i.e.*, the meaning of “position of trust or confidence” and the nexus required between that position and the crime?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On April 4, 2006, Mr. Hylton was charged with three counts of rape of a child for a series of events occurring in 2004, allegedly directed at “A.A.A.,” as follows:

Count I – Rape of a Child in the Second Degree

... in that defendant on or about and between April 27, 2003, and April 26, 2004, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least thirty six months older than A.A.A., DOB: 04/27/1990, a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant; ...

Count II – Rape of a Child in the Third Degree

...in that the defendant on or about and between April 27, 2003 and April 26, 2004, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least forty eight months older than A.A.A., DOB: 4/27/1990, a person who was at least fourteen years of age but less than sixteen years of age and not married to the defendant; ...

Count III – Rape of a Child in the Third Degree

...in that the defendant on or about and between April 27, 2003 and April 26, 2004, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least forty eight months older than A.A.A., DOB: 4/27/1990, a person who was at least fourteen years of age

but less than sixteen years of age and not married to the defendant; ...

CP:288-90. He was represented by counsel, and released on bond pending trial. *See, e.g.*, Sub Nos. 18, 23.

On May 24, 2007, defense counsel moved to withdraw because Mr. Hylton could no longer pay him: “The defendant can no longer afford my services thereby creating a conflict. Therefore I ask that I be allowed to withdraw from this matter.” Sub No. 43. The court did not immediately enter a ruling on this motion.

On August 28, 2007, the date set for trial, the state moved to file an amended information changing the dates of the crimes. The defense moved to continue. The court granted the motion to file the amended information and denied the motion for continuance. 8/28/07 VRP:23-4. Defense counsel then waived jury, and the court accepted the waiver after instructing Mr. Hylton of his jury rights. *Id.*, VRP:25-31. *See also* CP:274 (defendant’s statement waiving right to jury trial).

The amended information retained the language of Count 1 as it stood in the original Information. On Count 2, however, it changed the date as follows: “...on or about and between April 27, ~~2003~~ **2004** and ~~April 26,~~ **December 31, 2004,**...” On Count 3, it also changed the date:

“...on or about and between April 27, ~~2003~~ **2004**, and ~~April 26,~~
December 31, 2004, ...” CP:275-76.

Mr. Hylton was acquitted on Count 1, rape of a child in the second degree and Count 3, rape of a child in the third degree. 8/29/07 VRP:292 (Count 1), 294 (Count 3). He was convicted only on Count 2, rape of a child in the third degree alleged to have occurred on or around Thanksgiving 2004 (the “Thanksgiving episode”). *Id.*, VRP:293-94.

The trial court then granted a post-trial motion to vacate the conviction. 9/26/07 VRP:18-19. It was based on the fact that relevant, exculpatory, evidence, from witnesses who lived in California and who remembered Mr. Hylton visiting with them for Thanksgiving, 2004, in California at the time of the alleged crime, had come forward now that the amended date of the crime was clear. *Id.*, VRP:3-4. CP:244-61 (Declaration of Julie Miller, stating that during Thanksgiving, 2004, defendant was with her in Idyllwild, CA); CP:233-43 (Declaration of Jay Hylton, defendant’s son, that during Thanksgiving, 2004, father was living with him in Idyllwild; saw his father before he (Jay) left the house Thanksgiving morning); CP:221-32 (Declaration of Brittany Hylton, that she was in Washington for Thanksgiving, 2004, and her father was not there); CP:218-20 (Declaration of Kathy Blair, that she was the bartender at Joann’s Restaurant, acting manager during the Thanksgiving holiday

weekend, served Mr. Hylton as a customer, and remembers a conversation with him because he was staying at the Bluebird and he talked about all the cottages having bird's names, and his name was Robin); CP:202-17 (Declaration of Serjio Tello, that he spent time with Mr. Hylton before and after Thanksgiving holiday; was at weekend party at Jay's house, and remembers that Hylton was there, in California).

The court scheduled a retrial of that single remaining count. The state filed yet another Information, with yet a new set of dates. CP:198-99. It extends the timeline slightly from the prior Amended Information, CP:275-76, as shown here: "...on or about and between April ~~27~~, 26, 2004 and ~~December 31, 2004~~, **January 7, 2005...**" The state then filed another Information, listing yet a different set of dates: "...on or about and between April 26, 2004 and January ~~7~~, **12**, 2005..." Fourth Amended Information [sic, should be Third], CP:182.

Finally, on November 15, 2007, the state filed a Fourth Amended Information, changing the dates again, and adding aggravating factors:

Count I – Rape of Child in the Third Degree

...in that the defendant on or about and between ~~April 26~~, **November 22**, 2004, and ~~January 12, 2005~~, **November 28, 2004**, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least forty eight months older than A.A.A., DOB: 4/27/1990, a person who was at least fourteen years of age but less than sixteen years of age and not married to the defendant; **that, FURTHERMORE, 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 as provided, proscribed, and defined in RCW 9.94A.535(3)(g); and that, FURTHERMORE, the defendant used his position of trust or confidence to facilitate the commission of the current offense as provided, proscribed, and defined in RCW 9.94A.535(3)(n); ...

CP:178-9.

Defense trial counsel moved to withdraw again, still complaining that Mr. Hylton had not paid him and that it created a conflict of interest.

CP:175-6. Mr. Hylton objected, and the trial court denied the motion.

12/06/07 VRP:3-4, 7. Defense counsel then filed a notice of intent to withdraw. CP:169-70. Mr. Hyton again objected. CP:167. Following a colloquy on the issue, the court appointed standby counsel to assist Mr. Hylton who, for the first time, stated that he would proceed *pro se*. 2/28/08 VRP:11; CP:166 (appointing standby counsel).

The trial court respected the prior acquittals on the two other rape charges, and denied a state motion to introduce evidence of those unproven allegations at the subsequent jury trial. 3/12/08 VRP:9-10. Mr. Hylton then moved for a continuance of the upcoming trial date on the ground that he just took over the case and no preparation had been done, 3/12/08 VRP:10-13; 3/13/08 VRP:2-5. The trial court initially denied that

motion. 3/12/08 VRP:13; 3/13/08 VRP:6. Shortly thereafter, however, it did continue the trial. 3/18/08 VRP:25-26.

Mr. Hylton moved to waive jury on March 18, 2008. VRP:3. He then withdrew the request before the end of that hearing. *Id.*, VRP:28. He made the same request again thereafter; he offered the judge a waiver of jury trial at a hearing on May 29, 2008. The court, however, directed Mr. Hylton to take up that issue with the trial judge. 5/29/08 VRP:6.

The trial judge then addressed the jury waiver issue the following day. He denied Mr. Hylton's requested jury waiver. CP:162. That order stated in full: "HAVING BEEN advised by the Court of my right to trial by jury and having had an opportunity to consult with counsel, I do hereby, with the approval of this Court, waive my right to trial by jury ... Denied in OPEN COURT this 30th day of May, 2008." The court made no inquiry of Mr. Hylton before rejecting the waiver, and gave no reason for rejecting it, either. 5/30/08 VRP:10-11.

Mr. Hylton was convicted of the single remaining count of rape of a child in the third degree. CP:119. The jury also answered that he abused a position of trust. CP:118.

II. EVIDENCE PRESENTED AT TRIAL

A. The First Trial, Resulting in Two Acquittals, A Conviction on Count II, and an Order Arresting Judgment

Mr. Hylton was represented by counsel at his first trial on three counts of rape. They all charged rape of the same person, A.A.A., and Counts 2 and 3 charged him with rape on the same dates, even though the dates were changed several times by four amended informations. CP:288-90, 198-9, 182, 178-9.

Mr. Hylton then submitted a jury trial waiver. CP:274. It read in full:

I am the defendant in the above-named case and acknowledge that I have been informed of my right to a jury trial in my case, and I understand that I may waive this right. I have fully discussed this waiver with my attorney and I want to waive my right to a jury trial in this matter.

I UNDERSTAND THAT I HAVE A RIGHT TO A JURY TRIAL AND I HEREBY WAIVE MY RIGHT TO A JURY TRIAL, AND ASK THAT MY CASE BE TRIED BEFORE A JUDGE WITHOUT A JURY.

Id. After colloquy with the court, the waiver was accepted. 8/28/07
VRP:26-31.

The state presented evidence that Mr. Hylton was in a relationship with Gina or Lisa Coward for approximately 6 years. He moved in with Ms. Coward and her two daughters, April (A.A.A.) and Miranda, when

Ms. Coward lived in Winlock, Washington. The children treated Mr. Hylton as a stepfather.³

Ms. Coward testified that when April was 13, she started acting out and seeming fearful of Mr. Hylton and his son. Mr. Hylton, for his part, seemed to favor April over Miranda.⁴

Mr. Hylton moved out in October of 2004 to seek work in California. He returned twice in 2004, once around Thanksgiving and once around Christmas, when April had turned 14. The state presented evidence that during both visits, Mr. Hylton digitally penetrated April's vagina while they watched television in the living room of the family home on an air mattress. The state also presented April's testimony that molestation occurred in other places around ten times during the time that she was 13 years old.⁵

On the other hand, April also testified that the molestation did not start until she was 13½. *Id.*, VRP:164. And she gave conflicting testimony about whether Mr. Hylton's tongue touched her vagina on the Thanksgiving, 2004, incident. *Id.*, VRP:170-71. She concluded her

³ 8/28/07 VRP:188-202 (testimony of Lisa Coward).

⁴ 8/28/07 VRP:107 (April testifies to her age); *id.*, VRP:102 (April testifies that Hylton favors her over her sister); *id.*, VRP:188-202 (testimony of Coward about April's acting out).

⁵ 8/28/07 VRP:52-54 (counselor Brunson testimony about sexual touching that April talked about); *id.*, VRP:113-26 (describing multiple incidents, including the Thanksgiving and Christmas 2004 incidents).

description of these incidents by stating that she got confused by some of the questioning, and that some of the incidents seem to blend together, but she is certain about the third incident, during Thanksgiving, when she, Miranda, and Robin Hylton were on the couch. *Id.*, VRP:175-78.

With regard to all of these dates, though, April clearly testified that the abuse did not start until after her mother's abortion. 8/29/07 VRP:218. It turned out, however, that that abortion occurred in April, 2004. *Id.*, VRP:215. This means that even according to April, any purported molestation began after the dates alleged in Count 1, rape of a child in the first degree.⁶

The state did introduce medical evidence showing that April's hymen was intact during an exam in April, 2002, but appeared torn during an exam in May, 2005.⁷ There was no dispute, however, that April had been a victim of prior sexual abuse at the hands of someone other than Mr. Hylton. 8/28/07 VRP:49-50.

Finally, the state introduced a wiretapped phone call between April and Mr. Hylton in which she confronted him about the allegations. Mr.

⁶ April explained that in May of 2005, she and her mother got into a fight. 8/28/07 VRP:147-49. Lisa said April could go live with her father, meaning Mr. Hylton. Then, for the first time, in the midst of that fight, April told Lisa about the sex abuse. 8/28/07 VRP:198-99 (Lisa Coward testimony). Lisa had April talk to the counselor whom April was already seeing for other issues. *Id.*

⁷ Prior to any of these occurrences, in April of 2002, before April even turned 12, she was seen by a nurse for a genital examination and the nurse characterized that exam as normal. 8/28/07 VRP:78-89.

Hylton did not admit or deny her accusations but said, instead, “We both know what happened.” The defense characterized this as a denial. Mr. Hylton continued, “I can’t talk to you about it until you’re 18.” The state characterized this as a confession. Ex. 3, recording; 8/28/07 VRP:71-78.

The judge acquitted Mr. Hylton of Count 1, rape of a child in the second degree, and Count 3, rape of a child in the third degree. 8/29/07 VRP:292-94. It convicted him of Count 2, rape of a child in the second degree, for what it called the Thanksgiving episode. *Id.*, VRP:293-94.

As discussed above, a post-trial motion to arrest judgment and for a new trial was granted. 9/26/07 VRP:18-19.

B. The Second Trial, Resulting in Conviction on Count II

1. *The Amendments, Rejected Jury Waiver, and Exclusion of Evidence About Lisa Coward’s Abuse of April*

A new trial date was set, and the state changed the dates again. Its new Information charged rape of a child in the second degree, extending the timeline from the Amended Information, CP:275-76, as follows: “...on or about and between April 27, 26, 2004 and ~~December 31, 2004,~~ **January 7, 2005...**] CP:198-9. Then the Fourth Amended Information (should be Third Amended Information) changed the timeline again to: “...on or about and between April 26, 2004 and January 7, 12, 2005...” CP:182. Another Fourth Amended Information switched those dates once

again: “...in that the defendant on or about and between ~~April 26,~~
November 22, 2004, and ~~January 12, 2005, November 28, 2004.~~”
CP:178-9. This document also added the aggravating sentencing factors.

Mr. Hylton, proceeding *pro se*, then told the court that he wanted to waive jury, as he had done for the first trial. 3/18/08 VRP:3. The court rejected the waiver without inquiry or explanation. This is discussed further in Argument Section I(A).

Additionally, Mr. Hylton moved in limine to introduce evidence that Ms. Coward abused the girls and manipulated them through that abuse. He proposed to testify about that conduct himself. The trial court excluded the proffered testimony. 6/2/08 VRP:6-10.

2. April’s Claim and the Hearsay Testimony Corroborating the Claim

At trial, the prosecutor focused on Thanksgiving vacation, 2004. The state began with the medical testimony that in April of 2002, April’s genitals and hymen were normal but in May of 2005, her hymen was torn. 6/2/08 VRP:129-30, 137-46.

In fact, the nurse testified over Mr. Hylton’s hearsay objection that April told her that she was touched in her private areas and that “Robin” did it. *Id.*, VRP:137-46. April’s therapist, Karen Brunson, said the same thing. *Id.*, VRP:165-66.

The direct evidence of the abuse, however, came only from April. She testified that she was born on April 27, 1990, and she described how her mother met Robin Hylton and how they lived together in Winlock. She explained that he acted like a father and the girls began to call him dad. She reported that Mr. Hylton began to favor her, April; that he sometimes walked around the house naked; and that they would watch movies together in the living room while her mother and sister would fall asleep. Then, she stated that once in November of 2004, around Thanksgiving, they were watching movies on the mattress in the living room and Mr. Hylton touched her. Her mother and sister were in the room, but likely asleep. Mr. Hylton allegedly put an arm around her, snuck it up under her shirt, then down into her vagina. She stated that if she were to move as if she were awake, then he would stop. She continued that she was scared to tell and did not want to hurt her family. 6/2/08 VRP:185-99, 213.

April then identified the taped conversation between she and Mr. Hylton. Ex. 1. In the tape, Mr. Hylton apologizes for leaving and for breaking her heart. She demands an apology and a reason; Mr. Hylton responds, "All I can tell you, Amanda, is I love you." April then says that he will "be the next Michael Jackson in this world." Mr. Hylton replies, "I really hope you can find a way to forgive me." *Id.*, VRP:219-23, 213.

On cross-examination, however, April made contradictory statements. Where the medical witnesses testified that penetration causing the tearing they saw would have been painful, she stated that Mr. Hylton's penetration did not hurt. *Id.*, VRP:241. She acknowledged that when she was first interviewed by Det. Brown, she denied that Mr. Hylton had even penetrated her. 6/3/08 VRP:243. She admitted that she made the accusation about Mr. Hylton to her mother for the first time when she was in a fight with her, and her mother was threatening to send her to live with Mr. Hylton in California. *Id.*, VRP: 247.

Mr. Hylton then attempted to ask her about her anger and whether she had worked through those issues, but an objection to the relevance of such testimony was sustained. *Id.*, VRP:246.

3. *The Conflicting Testimony About Where Mr. Hylton Spent Thanksgiving, 2004, and the Excluded Journal Entry on this Point*

A series of witnesses then testified about Mr. Hylton's whereabouts during Thanksgiving, 2004. Lisa Coward's mother, Becky Coward, testified that for Thanksgiving 2004, Mr. Hylton fried a turkey – she remembers because that was the first time she had fried turkey and she did not like it. 6/3/08 VRP:253-55, 261. Other friends and family of Lisa Coward and April also stated that Mr. Hylton came to their family

Thanksgiving in Washington in 2004, and gave varied reviews of the turkey.⁸

April's sister Miranda, however, did not remember Thanksgiving 2004, and could not say whether Mr. Hylton was there with the family or not. 6/3/08 VRP:298.

On the other hand, several members of Robyn's family testified that Mr. Hylton was in California during Thanksgiving of 2004. His son, Jay Hylton, testified that his father was with him for Thanksgiving 2004 in California, from the safety meeting where they worked together doing logging on Monday, until the barbecue on either Friday or Saturday. 6/4/08 VRP:461-66. Mr. Hylton's father testified that he went to Beckie Coward's house on November 25, 2004, for Thanksgiving, and that he knows this because he wrote it in his log book in which he records all of his appointments, but that Robin Hylton was not there. *Id.*, VRP:479-80.

⁸ Lisa Coward's cousin Tom Rathbone remembered that Robin came up to Washington for Thanksgiving 2004, and that they went to Aunt Beckie's house in Winlock where Robin deep fried a turkey. *Id.*, VRP:301-04. He said the turkey turned out great. *Id.*, VRP:311. Deborah Novak testified that she was there for the deep fried turkey on Thanksgiving 2004, also; that there were 10-12 people there total, including Mr. Hylton's parents; and that the turkey did not cook through. *Id.*, VRP:312-14. Mr. Hylton attempted to impeach her with a prior statement, Plaintiff's No. 5, stating that he remembered one Thanksgiving but not specifying which one, but the judge excluded it as improper impeachment. 6/3/08, VRP:314-19. Sarah Eschbach of Chehalis, who later moved in with Lisa, testified that she remembered seeing Lisa and Robin Hylton after she had Thanksgiving dinner at her own house, when they came to pick up her nephew. *Id.*, VRP:322-26. And Lisa, mother of April, testified that Robin Hylton deep fried a turkey for Thanksgiving 2004 and her aunt brought a baked one, and it was upsetting trying to please both her mother and Robin with different turkeys. 6/4/08 VRP:439.

Mr. Hylton's mother said essentially the same thing, although she did not remember whether Robin was there or not. *Id.*, VRP:486-90.

Then there was Julie Miller. She met Robin Hylton for the first time in Idyllwild, California, over Thanksgiving, 2004, at Joanne's Restaurant in Idyllwild. They spent the evening together talking. She remembers because her son was coming back at the beginning of December; she remembers because Robin Hylton interested her; and she remembers because she keeps a journal, which shows that she met Robin then. 6/4/08, VRP:491-93.

The state's objection to the admission of the journal, marked as Ex. 28 (and attached as Appendix A for this Court's convenience) – which did not have any facts written on, just Robin Hylton's name inside of a hand-drawn heart covering Thanksgiving and the Friday next to it – was sustained on the grounds of hearsay and relevance. *Id.*, VRP:494-98.

Mark Wolston, representing Southwest Airlines, then testified that based on Ex. 13, on November 22, 2004, at 7:15 pm, a Robin Hylton flew from Ontario, California to Portland, paying cash. Hylton boarded the flight and "was gated onto the aircraft." On November 28, 2004, at 7:95 a.m., he left Portland for San Jose and connected to Ontario. He arrived at 10:45 am the same day. There was a reservation for a Jan. 1, 2005, Portland-to-California flight that was cancelled and the funds were applied

to a flight on January 11 from Portland to Ontario. Hylton boarded that latter flight. 6/3/08 VRP:263-69. The agent had no way to tell whether the Robin Hylton on those flights was the man on trial. *Id.*, VRP:278.

4. *Lisa Coward's Testimony and the Excluded E-mails Betraying Her Bias*

Lisa Coward, April's mother, explained that Hylton moved in with them and Miranda and April treated him as a father, and that he became a stay-at-home dad while she worked outside the home. She testified that in October of 2004, Robin left to find work in California, but that he flew back up from Idyllwild, California to Portland to go home for Thanksgiving. Lisa said he also returned for Christmas, but the relationship was getting rocky. It ended around January of 2005. In May, 2005, Lisa and April had a heated argument and Lisa said maybe April should live with Robin Hylton. Her daughter then gave her information that upset her, and she had April talk to her therapist about this disclosure. 6/3/08 VRP:331-44.

On cross-examination, Mr. Hylton tried to show that Lisa Coward was biased against him and had a motive to lie, and that she was using the children to get back at him. He did this by offering numerous emails she wrote to him, in which she threatened him and stated that she had other tricks up her sleeve, arguing that they impeached her credibility. The

judge, however, excluded all of them on grounds of hearsay and lack of foundation. *Id.*, VRP:360-89. The specific e-mails that Mr. Hylton identified and began to authenticate were Ex. 15, 16, 17, 25, 26.

5. *Mr. Hylton's Testimony Denying the Crime*

Mr. Hylton himself then testified. He began: "I never did anything inappropriate." *Id.*, VRP:509. He continued that Lisa, or Gina, was verbally abusive the entire 6-7 years that they were together. An objection was sustained, and this answer was stricken. *Id.*, VRP:510-11.

He explained that he moved to California to find work in logging, and that he was down there for Thanksgiving in 2004. He stated that he got paid for working part of that week, and he spent the day before Thanksgiving with his son Jay, with whom he worked doing logging. He met a lady (Ms. Miller) in Joanne's Café and that they had a long and enjoyable conversation. They continued it at the Blue Moon Hotel; she left and came back the next morning. He described spending time with other friends and loggers in California, and says he did not go up to Washington that vacation to save money; instead, he sent money to the family and went up over Christmas. He and Lisa broke up shortly after that. 6/4/08 VRP:511-517.

Finally, Mr. Hylton acknowledged that he was the one on the telephone with April during the wiretapped recording. *Id.*, VRP:535.

6. *The State's Closing Argument Vouching*

The state must have made a decision that this was a credibility case, and that its star witness's credibility needed bolstering. This is clear from closing argument, in which the state vouched for April and her supporters. The prosecutor argued that April "was telling the truth." 6/4/08 VRP:563-64. He said that the detective was "believable," and that she had to be because of her job: "Detective Brown, isn't going to affect her job at all, straight shooter, very credible, very believable." *Id.*, VRP:564. In fact, the prosecutor continued: "If evidence came up that a State's witness lied in trial, you can imagine what the state might then do with that information. Leave that to you." *Id.*, VRP:565. The prosecutor even stated with regard to Sandra Eschbach, "And she's telling us a true story." 6/4/08 VRP:570.

The jury returned a verdict of guilty to the crime and an answer of "yes" to the aggravating factor. *Id.*, VRP:589.

III. SENTENCING

Mr. Hylton was convicted of a single count of rape of a child in the third degree, a Class C felony, RCW 9A.20.021(1)(c), and a level VI offense. RCW 9.94A.515. The crime allegedly spanned November 22, 2004, to November 28, 2004. CP:178. A related bail jumping crime

allegedly occurred on November 28, 2007.⁹ Mr. Hylton was already sentenced on the bail jumping charge at the time of the rape sentencing. Counting the bail jump as a prior conviction, the trial court ruled that Mr. Hylton's offender score on the rape was 1. RCW 9.94A.525(7). His standard range was 15-20 months. RCW 9.94A.510.

The jury, however, returned a finding that Mr. Hylton used a position of trust or confidence to commit the offense, in violation of RCW 9.94A.535(3)(n). The court imposed an exceptional sentence of 50 months. 10/31/08, VRP:16.

SUMMARY OF ARGUMENT

The trial judge rejected Mr. Hylton's jury waiver without inquiry or reasons. CrR 6.1(a) permits the judge to reject a jury waiver. But it requires the judge to exercise discretion in doing so. The judge in Mr. Hylton's case failed to exercise discretion. Argument Section I.

At trial, the court excluded evidence of vicious e-mails from the complainant's mother, Lisa Coward, to Mr. Hylton, revealing her deep bias. It excluded Mr. Hylton's testimony about how Lisa manipulated her child April, the complainant, through abuse. It excluded evidence that could have explained the torn hymen. And it excluded Ms. Miller's non-hearsay November journal entry containing a hand-drawn heart around

⁹ See Information filed in Case No. 08-1-00047-2 on January 24, 2008.

Robin Hylton's name around Thanksgiving, 2004. The trial court's rulings violated state evidence rules and the constitutional right to present a defense. Argument Section III.

Following this close credibility case, the state tried to bolster its witnesses with personal opinions during closing. The prosecutor called his witnesses "credible," "telling the truth," and "believable." This is impermissible vouching and it requires reversal. Argument Section III.

Regarding sentencing, the abuse-of-trust aggravating factor was enacted for the first time in 2005 with the "*Blakely* fix." Mr. Hylton's crime occurred in 2004. That aggravating factor cannot be applied retroactively because – unlike other aggravating factors that were already on the statutory list of aggravating factors before *Blakely* – this one was placed there for the first time in 2005. Hence, retroactive application would violate state statute and state and federal *ex post facto* clause protections. Argument Section IV.

Further, this aggravating factor was not charged before the first trial and was added only after the state suffered two acquittals. The state offered no new evidence to justify an aggravated sentence. A presumption of prosecutorial vindictiveness attaches to the decision to increase sentence for this reason and – since that presumption was not adequately

rebutted – it bars a sentence increase based on this factor. Argument Section V.

Finally, the state must prove two critical elements to support this aggravating factor: the “position of trust or confidence” and a nexus between that position of trust and the crime. They are not self-explanatory and, in this case, there were no instructions defining the concepts. As a result, this aggravating factor was unconstitutionally vague. Argument Section VI.

ARGUMENT

I. THE TRIAL COURT REJECTED MR. HYLTON’S JURY WAIVER WITHOUT INQUIRY OR REASONS; THIS AMOUNTS TO A FAILURE TO EXERCISE THE DISCRETION GRANTED TO IT BY CrR 6.1(a) AND THE FAILURE TO EXERCISE SUCH DISCRETION IS AN ABUSE OF DISCRETION

A. The Trial Court Made No Inquiry of Mr. Hylton Before Rejecting His Jury Trial Waiver

Mr. Hylton moved to waive jury on March 18, 2008. VRP:3. He then withdrew the request before the end of that hearing. *Id.*, VRP:28. He made the same request again thereafter; he offered the judge a waiver of jury trial at a hearing on May 29, 2008. The court, however, directed Mr. Hylton to take up that issue with the trial judge. 5/29/08 VRP:6.

The trial judge then addressed the jury waiver issue the following day. He denied it with an order stating in full: “HAVING BEEN advised

by the Court of my right to trial by jury and having had an opportunity to consult with counsel, I do hereby, with the approval of this Court, waive my right to trial by jury ... Denied in OPEN COURT this 30th day of May, 2008.” CP:162. The court’s full comment on its decision against accepting the waiver is:

THE COURT: ... The last issue we need to deal with in this case is the potential waiver of jury trial. This was I understand filed yesterday. Judge Brosey let this be filed subject to approval by the trial judge. As of yesterday afternoon we didn’t know where – which court this was going to be in. We now know this is going to be in Department 2, so I will be hearing the case.

So the question now is whether I will approve a waiver of jury trial in this type of case. And I am not going to accept a waiver of jury in this case so this matter will go to jury trial. This matter is scheduled for Monday. All right?

So, are there any questions about that?
Anything from the State?

MR. HAYES: No, Your Honor.

MR. HYLTON: I’d just like to say that I believe it’s my right to choose to have a jury or not. I just want to be on record with that.

THE COURT: I understand.

5/30/08 VRP:10-11.

B. The Trial Court Must Exercise Discretion in Deciding Whether to Accept a Jury Waiver

CrR 6.1 states: “Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.” Thus, CrR 6.1 gives the trial court judge the discretion to accept or reject a defendant’s jury waiver.¹⁰

The trial court, however, must exercise discretion. *State v. Rupe*, 108 Wn.2d 734, 753, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988); *State v. Thompson*, 88 Wn.2d 13, 558 P.2d 202 (1977); *State v. Maloney*, 78 Wn.2d 922, 481 P.2d 1 (1971); *State v. Jones*, 70 Wn.2d 591, 424 P.2d 665 (1967).

The judge’s failure to exercise discretion when discretion is called for, however, constitutes an abuse of discretion. *Kucera v. State, Dept. of*

¹⁰ RCW 10.01.060 also allows a criminal defendant to waive the right to jury trial with the court’s consent:

No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.

This section applies to pro se defendants like Mr. Hylton: ““a pro se defendant could waive his right to trial by jury despite language in RCW 10.01.060 that appears to allow waiver only where a defendant is represented by counsel. ... [A] contrary holding would violate the constitutional rights of the pro se defendant because ‘a defendant has the right to have or waive a jury trial and also the right to defend himself in person.’” *State v. Oakley*, 117 Wn. App. 730, 741, 72 P.3d 1114 (2003), *review denied*, 151 Wn.2d 1007 (2004) (relying upon *State v. Adams*, 3 Wn. App. 849, 479 P.2d 148 (1970), *review denied*, 78 Wn.2d 997 (1971) and WASH. CONST. ART. I, §§ 21, 22)).

Transportation, 140 Wn.2d 200, 224, 995 P.2d 63 (2000) (reversing due to failure of trial court to exercise discretion; “The court abused its discretion by failing to exercise discretion.”) (citation omitted); *State v Pettit*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980); *Sanwick v. Puget Sound Title Co.*, 70 Wn.2d 438, 444-45, 423 P.2d 624 (1967). This is true in every jurisdiction of which we are aware.¹¹

C. The Trial Court’s Failure to Inquire of Mr. Hylton or State Reasons for Its Rejection of the Jury Waiver Constitutes a Failure to Exercise Discretion

A trial court fails to exercise discretion when it rejects a jury waiver without inquiry or colloquy and without reasons.

In *State v. Thompson*, the trial court rejected defendant’s proffered jury waiver but, as the Washington Supreme Court said, the trial judge gave “the following reasons: the seriousness of the crime charged; a jury would prevent the appearance of impropriety, lack of fairness, or injustice; the verdict should represent the thinking of the community as represented by 12 jurors; and a jury would free the court from having to weigh the evidence.” *Thompson*, 88 Wn.2d 13, 15. Because those reasons showed

¹¹ *E.g.*, *Lewis v. Clarke*, 108 Cal. App. 4th 563, 133 Cal. Rptr.2d 749, 754 (2003) (“Failure to exercise discretion conferred by law is an abuse of discretion”) (citations omitted); *Fields v. Reg’l Med. Ctr.*, 581 S.E.2d 489 (S.C. Ct. App. 2003), *aff’d in part*, 609 S.E.2d 506 (S.C. 2005) (“failure to exercise discretion is itself an abuse of discretion”); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 832 (9th Cir. 2002), *amended by*, 337 F.3d 1023 (9th Cir. 2003) (“Failure to exercise any discretion is a manifest abuse of discretion ...”); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) (same).

an exercise of informed discretion, the trial court's rejection of the jury waiver was upheld on appeal.

In *State v. Jones*, 70 Wn.2d 591, the trial court also rejected defendant's jury waiver. In that case there were two codefendants; one attempted to waive jury for the first time on the morning of trial, having never mentioned it before, and the other sought to proceed with a jury; and the trial court indicated that the conflicting requests were an attempt to manipulate the system. The court's decision to reject the jury waiver was upheld on appeal.

Thus in these controlling state Supreme Court cases in which a trial court's decision to reject a defendant's jury waiver has been upheld, the trial courts gave good reasons, including: the seriousness of the crime and the need for an appearance of fairness; the conflicting requests of codefendants seeking to manipulate the system; and belated requests.

The trial court in Mr. Hylton's case, however, offered no such reasons – nor could it. This was a Class C felony, not the most serious of crimes. Further, Mr. Hylton's desire to waive jury had been raised twice before, so it was not raised belatedly and not a surprise that he raised it on the day of trial. Additionally, Mr. Hylton was not tried with a codefendant so there was no danger of delay and no suspicion that he was manipulating the system. In fact, Mr. Hylton had waived jury for his first trial and

obtained a favorable result so he was familiar with the process, and there should have been no appearance-of-fairness problem with a continued waiver. Finally, the judge made no inquiry of him and stated no reason, whereas the trial judges in the decisions cited above had done both things.

Mr. Hylton's *pro se* status, alone, even if it were an unstated reason, is not a sufficient reason – because a *pro se* defendant has the exact same right as a represented defendant to waive jury. *State v. Adams*, 3 Wn. App. 849, 852. If that were the basis for the trial court's decision, it “would violate the constitutional rights of the *pro se* defendant because ‘a defendant has the right to have or waive a jury trial and also the right to defend himself in person.’” *State v. Oakley*, 117 Wn. App. 730, 741 (relying upon *State v. Adams*, 3 Wn. App. 849, 852 and WASH. CONST. ART. 1, §§ 21, 22).

II. EXCLUDING VICIOUS E-MAILS SHOWING LISA COWARD'S BIAS, TESTIMONY ABOUT HER ABUSE, EVIDENCE EXPLAINING THE TEAR IN COMPLAINANT'S HYMEN, AND THE DIARY ENTRY WITH THE HEART, VIOLATED THE RIGHT TO PRESENT A COMPLETE DEFENSE

A. There Were No Eye-Witnesses and Little Forensic Evidence, So Witness Bias and Credibility Were Key

There was one act of molestation charged, and the complainant said that it occurred during Thanksgiving of 2004. There were no eye-witnesses or compelling forensic evidence. Thus, the key issue was

whether Mr. Hylton was telling the truth that he did not do it and was not even in Winlock, Washington, on Thanksgiving of 2004, or whether April was telling the truth when she says that he was there.

B. In This Context, the Trial Court Excluded Defense Evidence Concerning the Bias and Credibility of Key State Witnesses and Supporting The Credibility of One Defense Witness

First, prior to trial, Mr. Hylton moved in limine to introduce evidence that Ms. Coward abused the girls and manipulated them through that abuse. He proposed to testify about her this himself. The trial court ruled that Mr. Hylton did not provide a sufficient connection between the general allegations of abuse, and the claim that this caused April to make up the allegations against Mr. Hylton. 6/2/08 VRP:6-10.

Then, the trial court excluded proffered evidence that April had been sexually active with at least one boy and that that would explain the tear in her hymen. 6.2.08 VRP:121-24. Nevertheless, in closing, the state argued that there was nothing that could explain the tear in April's hymen other than penetration by Mr. Hylton.¹²

Next, there was Julie Miller, the woman who met Robin Hylton for the first time in Idyllwild, California, over the Thanksgiving holiday in 2004. She was working a landscaping job down there, and they met at

¹² 6/4/08 VRP:554 (prosecutor argues, "She stated no one else penetrated her vagina between that time. There's absolutely no evidence in the record to support anything to the contrary.").

Joanne's Restaurant in Idyllwild. As discussed above, on page 19, they spent the evening together talking at the restaurant and later at a hotel, and she returned to spend more time with Mr. Hylton the next morning. She testified that she keeps a journal, which shows that she met Robin then. *Id.*, VRP:491-93. That proffered journal page – Ex. 28, attached as Appendix A hereto – does not have any facts written on it, just Robin Hylton's name inside a hand-drawn heart covering Thanksgiving and the Friday next to it. *Id.*, VRP:497-98. The judge nevertheless excluded it as hearsay and irrelevant. *Id.*, VRP:494-98.

The court excluded defense investigator-witness Darryl Carlson, *id.*, VRP:504, for the same reason; Mr. Hylton called him solely to testify about tracking down the journal from storage for Ms. Miller and since the journal was excluded, so was Mr. Carlson. *Id.*, VRP:506-07

Further, on cross-examination, Mr. Hylton tried to show that Lisa Coward had bias against him and a motive to lie, and that she was using the children to get back at him. He did this by offering vicious e-mails she wrote to him, threatening him and saying that she had other tricks up her sleeve. The judge excluded them on grounds of hearsay and lack of foundation. *Id.*, VRP:360-89. The specific e-mails that Mr. Hylton identified and began to authenticate were Exs. 15, 16, 17, 25, 26.

Mr. Hylton then testified, stating: “I never did anything inappropriate.” 6/4/08 VRP:509. He continued that Lisa was verbally abusive while they were together. An objection was sustained, and this answer was stricken. *Id.*, VRP:510-11. The judge thus also excluded proffered defense testimony about Lisa’s abuse and how it coerced April into making her accusations.

C. **Preclusion of Evidence Undermining the Credibility of the Complainant and Her Mother, and Bolstering the Credibility of a California Defense Witness on Mr. Hylton’s Whereabouts at the Time of the Crime, Violated the Right to Present a Defense.**

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (citations omitted). The right cannot be denied where the testimony is critical to the defense and directly relevant to guilt or innocence. *Id.*

Although the right to present a defense is of constitutional magnitude, it is subject to the following limitations: “(1) the evidence sought to be admitted must be relevant; and (2) the defendant’s right to introduce relevant evidence must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.” *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d. 1011 (1997).

The only real question here is whether the evidence that was proffered was relevant, critical, and not overly prejudicial.

1. The Excluded Toxic E-mails and Evidence of Lisa's Abuse of April

The trial court excluded the toxic e-mails on grounds of hearsay and lack of foundation. VRP:360-89. He also excluded evidence that Lisa manipulated April against Robin through her abuse. 6/2/08 VRP:6-10 (pretrial ruling); 6/4/08 VRP:509-11 (Robin's testimony).

The e-mails, however, were not offered for their truth, so they did not fit within the definition of hearsay at all. ER 801(c). In fact, some of them were clearly not "true" – such as the ones containing threats or the phrase indicating that Lisa had other tricks up her sleeve to play against Mr. Hylton. Instead, they were offered to show her bias. The same is true of the evidence of abuse – that was not a statement at all, and hence not hearsay evidence. Instead, it is evidence tending to show Lisa's bias.

True evidence of bias is always admissible. "Bias" includes various factors that can cause a witness to fabricate or slant testimony, such as prejudice, self-interest, or ulterior motives. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important

function of the constitutionally protected right of cross-examination.”¹³

Importantly, evidence that is inadmissible on other grounds may still be admissible for the purpose of showing bias.¹⁴ Thus, the emails should have been admitted even if the state can now point to a state rule barring their admission.

That is doubtful, though: contrary to the judge’s ruling, emails are admissible under state law. E-mails are not downloads from the internet of unauthenticated data compilations. They are direct statements of the sender. Hence, they are not subject to the rules concerning authentication of public records or data compilations found on computers. *Cf. State v. Davis*, 141 Wn.2d 798, 954, 10 P.3d 977 (2000); *State v. Kane*, 23 Wn. App. 107, 111-12, 594 P.2d 1357 (1979). And in this case, Mr. Hylton did not seek admission to prove the matters asserted in the e-mails, such as Lisa having tricks up her sleeve. Hence, they were not hearsay at all, ER 801(c); they were verbal acts, “relevant simply because it was made.” 5B

¹³ *Id.* 415 U.S. at 316-17. *See also, State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009 (2003); *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, *review denied*, 79 Wn.2d 1008 (1971).

¹⁴ *United States v. Abel*, 469 U.S. 45, 55, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (although specific instances of conduct inadmissible under ER 608(b) for purpose of showing “character for untruthfulness,” still admissible to show bias); *United States v. James*, 609 F.2d 36, 46-47 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980); 5A TEGLAND § 607.10 at 331 (“When acts of misconduct or criminal convictions are offered to show bias (as opposed to a general tendency towards untruthfulness), the restrictions in Rules 608 and 609 are inapplicable.”)

TEGLAND, WASHINGTON PRACTICE: EVIDENCE, LAW AND PRACTICE, § 801.10, at 297 (4th ed. 1999). Such statements are not inadmissible hearsay, but admissible nonhearsay. *State v. Miller*, 35 Wn. App. 567, 569, 668 P.2d 606, *review denied*, 100 Wn.2d 1032 (1983).

2. *The Excluded Explanation for the Torn Hymen*

The trial court excluded evidence that April had been sexually active with at least one boy and that that would explain the tear in her hymen. 6/2/08 VRP:121-24. Then, in closing, the state argued that there was no evidence of anything that could explain the tear in April's hymen other than penetration by Mr. Hylton. 6/4/08 VRP:554.

The right to present evidence is especially strong where it would *rebut* evidence introduced by the government from which the jury might infer an element of the crime.¹⁵ Since the proffered evidence would have rebutted the state's argument that there was no other explanation for April's torn hymen, the right to present this proffered evidence is especially strong here.

3. *The Excluded Journal and Heart Picture*

The trial court excluded Julie Miller's 2004 journal (Ex. 28; Appendix A) with its November page showing a heart and the name

¹⁵ See, e.g., *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980).

“Robin” on Thanksgiving and the day next to it, on grounds of hearsay and relevance. *Id.*, VRP:494-98 It excluded the defense investigator completely, because he would have testified about helping Ms. Miller find that journal in storage. *Id.*, VRP:506-07.

The trial court’s ruling depends on the assumption that the journal was offered for the truth of the matter asserted. But all that was asserted was “Robin” in a heart on Thanksgiving Day. That is not a matter asserted for its truth; it is essentially a nonverbal act disclosing a feeling. 5B TEGLAND, § 801.10, at 297 (4th ed. 1999). As discussed above, such verbal acts are not hearsay. *State v. Miller*, 35 Wn. App. 567, 569.

Even if it were considered a statement, it would still be admissible in this case. It is true that diary entries are generally inadmissible when offered for the truth of the matter asserted, as self-serving out of court statements not qualifying as business records. *State v. Coffey*, 8 Wn.2d 504, 112 P.2d 989 (1941). In this case, however, this journal page – if it is considered a statement – was made prior to the time that Ms. Miller had any motive to fabricate and, hence, it is independently admissible for that reason. ER 801(d)(i)(ii). Where conditions are met for introduction of prior consistent statements, the statements are admissible to support the witness’s credibility and for the truth of the matter asserted. *See People v. Crew*, 31 Cal. 4th 822, 842-43, 3 Cal. Rptr.3d 733, 74 P.3d 820 (2003).

The diary-heart page was therefore admissible for this reason, also.

Exclusion of each of these items independently violated state law, and the constitutional right to present a defense. Collectively, exclusion made the entire trial completely one sided to the state's advantage.

III. ARGUING THAT THE DETECTIVE WAS "BELIEVABLE," THAT THE COMPLAINANT WAS "TELLING THE TRUTH," THAT OTHER WITNESSES WERE "TELLING US A TRUE STORY," ETC., IS IMPERMISSIBLE VOUCHING

A. The State's Comments on Credibility in Closing

The state made a series of impermissible arguments vouching for the credibility of April and her supporters. As discussed above, the prosecutor argued that April "was telling the truth." 6/4/08 VRP:563-64. He asserted that the detective was also "believable," and that she had to be because of her job: "Detective Brown, isn't going to affect her job at all, straight shooter, very credible, very believable." *Id.*, VRP:564. He continued: "If evidence came up that a State's witness lied in trial, you can imagine what the state might then do with that information. Leave that to you." *Id.*, VRP:565. He vouched just as much for another witness, Ms. Eschbach, "And she's telling us a true story. For that reason, I'm asking you to return a verdict of guilty." *Id.*, VRP:570.

B. The State's Comments Constitute Vouching

It is impermissible vouching for a prosecutor to argue, as the state did here, that its witnesses are honest, “very credible,” “very believable,” or telling “a true story.” *See generally, Shotwell Mfg. v. United States*, 371 U.S. 341, 386, 83 S.Ct. 448, 9 L.Ed. 2d 357 (1963); *State v. Mendoza-Solorio*, 108 Wn. App. 823, 834-835, 33 P.3d 411 (2001) (“in answer to the prosecutor’s question regarding Mr. Sharpe’s trustworthiness in previous controlled buys, Deputy Brown gave an unequivocal and wide ranging answer: ‘Mr. Sharpe has been extremely honest and reliable to us. Uh, he’s never lied to me as far as I know.’... Deputy Brown improperly invaded the exclusive province of the jury when he vouched for Mr. Sharpe’s veracity before that veracity had been challenged”; statements constitute vouching, but harmless error given the amount of untainted evidence.).¹⁶

“Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness’s veracity, or suggesting that information not presented to the jury supports the

¹⁶ *State v. Papadopoulos*, 34 Wn. App. 397, 399, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983) (“[T]he prosecutor stated that ‘Patty and Theo have testified honestly before you,’ and, later, that ‘[T]he gist of what they have said has been the truth’”; statements were not vouching because “the entire argument in context reveals that the deputy prosecutor merely called the jury’s attention to those facts and circumstances in evidence tending to support the credibility of Mr. and Mrs. Papadopoulos.”); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (finding improper vouching when prosecutor stated, “I think [the witness] was candid. I think he is honest.”).

witness's testimony."¹⁷ The prosecutor's argument that these witnesses were honest, credible, and telling a true story was impermissible vouching of the first type, that is, a personal assurance of veracity.¹⁸

In fact, the prosecutor's argument that Det. Brown risked losing her job if she did not tell the truth has explicitly been denounced as impermissible vouching. *United States v. Weatherspoon*, 410 F.3d at 1146 (arguing that the officers risk losing their jobs if they lie, so they must have "came in here and told you the truth" impermissible vouching); *United States v. Combs*, 379 F.3d 564, 574-76 (9th Cir. 2004) (same).

Vouching is most prejudicial where, as here, the evidence is slim, there is little physical evidence to corroborate the complainant's version, and credibility is critical.¹⁹ The impermissible vouching in this case thus constituted prejudicial error, revealed the deputy prosecutor's ability to

¹⁷ *United States v. Necochea*, 986 F.2d 1273, 1276 (9th Cir.1993), amended by, 1993 U.S. App. LEXIS 7784 (emphasis added). See *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996); *State v. Papadopoulos*, 34 Wn. App. 397, 400 ("A statement by counsel clearly expressing his personal belief as to the credibility of the witness or the guilt or innocence of the accused is forbidden.") (citation omitted). See generally *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996); *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

¹⁸ *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

¹⁹ *Weatherspoon*, 410 F.3d at 1148. See *State v. Boehning*, 127 Wn. App. 511, 523, 111 P.3d 899 (2005) (impermissible prosecutorial bolstering of witness testimony prejudicial, because "jury's verdict turned almost entirely upon the credibility of the complaining witness and the defendant."). See also *United States v. Roberts*, 618 F.2d 531, 533 (9th Cir. 1980).

take advantage of a *pro se* defendant, and requires reversal.²⁰

IV. THIS COURT CANNOT IMPOSE AN EXCEPTIONAL SENTENCE DUE TO ABUSE OF TRUST, BECAUSE THAT AGGRAVATING FACTOR WAS NOT ENACTED UNTIL 2005 WHILE THE CRIME OCCURRED IN 2004, AND IT DOES NOT APPLY RETROACTIVELY

A. Factual Background Concerning the Aggravating Factor Allegation

On September 26, 2007, the state filed a Notice of Aggravating Factors for Purposes of Exceptional Sentence. CP:197. It listed two aggravating factors: (1) that the offense was part of an ongoing pattern of sexual abuse of the same victim, in violation of RCW 9.94A.535(3)(g), and (2) that the defendant used his position of trust or confidence to commit the offense, in violation of RCW 9.94A.535(3)(n). The state's Fourth Amended Information, filed on November 5, 2007, then added the aggravating factor allegations as follows:

... 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 as provided, proscribed, and defined in RCW 9.94A.535(3)(g); and that, FURTHERMORE, the defendant used his position of trust or confidence to facilitate the commission of the current offense as provided, proscribed, and defined in RCW 9.94A.535(3)(n); ...

²⁰ Prosecutorial misconduct in vouching can be raised for the first time on appeal. *State v. Swan*, 114 Wn.2d 613, 661 (prosecutorial misconduct can be raised for first time on appeal if it is flagrant, ill-intentioned and prejudicial).

CP:178-79 (bolding changes from prior Information).

The jury received a special interrogatory about the abuse-of-trust aggravating factor: “Special Verdict Form: “Did the defendant, Robin Douglas Hylton, use his position of trust or confidence to facilitate the commission of the crime of Rape of a Child in the Third Degree as charged?” CP:118. The jury answered “yes,” the state had proven that factor. *Id.* The jury was not given an interrogatory about the other factor.

B. This Aggravating Factor Was Enacted in April of 2005, But the Crime Occurred in 2004

In 2004, at the time of the crime, the SRA gave the power to impose exceptional sentences above the standard range to judges rather than to juries. RCW 9.94A.535 (former). In *Blakely v. Washington*, 542 U.S. 296, the Supreme Court declared that statute unconstitutional. That was on June 24, 2004.

On April 15, 2005, the state legislature responded by enacting Laws 2005, ch. 68, § 3. It rewrote RCW 9.94A.535. It listed the abuse-of-trust aggravating factor for the first time; that factor was not listed in the prior law.

The Fourth Amended Information in this case was filed on Nov. 5, 2007, after *Blakely* and after this “*Blakely* fix” legislation. CP:178-9. However, that Information alleged an aggravating factor occurring before

the *Blakely* fix legislation was adopted, “on or about and between April 26, November 22, 2004, and January 12, 2005, November 28, 2004.” *Id.*

C. ***Pillatos*²¹ Left Open Whether Particular Aggravating Factors Were a Substantive Change From Pre-SB 5477 Law, Making Such Factors Inapplicable Retroactively On Statutory Interpretation and *Ex Post Facto* Grounds; This Case Poses That Question, Because the Abuse-of-trust Factor Was Not on the Old List**

In *Pillatos*, the Washington Supreme Court ruled that SB 5477 in general was procedural, not substantive, and in general did not disadvantage defendants, so some of its provisions could be applied to cases predating that amendment – using statutory interpretation principles. *Pillatos*, 159 Wn.2d at 471-72.

The *Pillatos* decision, however, considered only whether the portion of the statute in front of the Court in that case was procedural or substantive and hence retroactive or prospective under state law. It carefully ruled: “Since at least the relevant portions of LAWS of 2005, chapter 68 are merely procedural, RCW 10.01.040 does not bar their application.” *Pillatos*, 159 Wn.2d at 472. The footnote at the end of this sentence also carefully provides: “Because the entirety of the statute is not before us, we are not rendering a decision about unchallenged portions of the statute.” *Pillatos*, 159 Wn.2d at 472, n.6. *Pillatos* thus left open

²¹ *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007).

whether particular aggravating factors on SB 5477's new list constitute substantive changes to prior law, and hence whether they apply prospectively only.

Mr. Hylton's case presents just that issue. The "abuse-of-trust" aggravating factor charged here was on SB 5477's new list. But it is a substantive change from prior law: under pre-SB 5477 RCW 9.94A.535, it was *not* on the list. It does have a basis in prior case law. *E.g.*, *State v. Grewe*, 117 Wn.2d 211, 220, 813 P.2d 1238 (1991). But it was not contained in the prior legislation.

The fact that it was a non-statutory aggravating factor that might have been permissible under the common law is irrelevant. So was everything else under the sun, because the prior list of aggravating factors was non-exclusive. If all previously possible unlisted aggravating factors could be considered, when comparing the old law with the new one to determine if there were any substantive changes, it would lead to the conclusion that nothing has changed at all – because anything could have been an aggravator before. That makes no sense.

Thus the question, for statutory retroactivity analysis, is whether the amendment is substantive or procedural. Any change in the elements of a crime must be considered substantive. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Aggravating factors are

now considered the functional equivalent of elements for purposes of this analysis. See *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19; *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Since the change in this aggravating factor is substantive, in that it imposes statutory liability now for a factor that was unlisted before, it cannot be applied retroactively to Mr. Hylton under RCW 10.01.040. *Pillatos*, 159 Wn.2d 459, 472-74 (procedural amendment applies retroactively; substantive amendment presumed prospective only).

The same result is compelled by the *ex post facto* clauses of the state and United States Constitutions. The *ex post facto* clause “forbids the application [by the legislature] of any new punitive measure to a crime already consummated.”²² *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 1 L. Ed 648 (1798), described the four categories of laws that violate *ex post facto* clause prohibitions: (1) new laws that make noncriminal behavior, criminal; (2) new laws that inflict punishment upon a person not then subject to that punishment, to any degree; (3) new laws that aggravate the crime by increasing punishment; and (4) new laws that alter the legal rules of evidence. See *Stogner v. California*, 539 U.S. 607, 612-613, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003).

²² *Kansas v. Hendricks*, 521 U.S. 346, 370, 117 S.Ct. 2072, 2086, 138 L.Ed.2d 501 (1997) (citations and quotations omitted); U.S. CONST., art. I, § 10; WASH. CONST. art. 1, § 23.

SB 5477 is certainly disadvantageous to this defendant. Before these new amendments, the SRA did not include abuse-of-trust as a statutory aggravating factor. After the amendments, it did. Further, whether a law retrospectively disadvantages a criminal defendant, for *ex post facto* purposes (as opposed to state statutory purposes), does not depend on whether the law is procedural or substantive. It depends, instead, on whether the law poses a significant risk of increasing the prisoner's punishment, or of creating one of the other *Calder v. Bull* disadvantages. See *Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000). As explained above, adding this new aggravating factor to the statutory list certainly seems to count as a statutory disadvantage.

That result applies to this case, even if SB 5477's addition of this aggravating factor is considered akin to a new sentencing guideline, rather than a new crime. Both the U.S. Supreme Court and the Washington Supreme Court hold that application of new, disadvantageous, sentencing guidelines or policies to acts committed earlier violates the *ex post facto* clause.²³ Applying such SRA guidelines retrospectively to Mr. Hylton would be unconstitutional under this line of cases, also.

²³ *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) (retroactive application of revised guidelines violates the *ex post facto* clause); *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (Florida statute which reduced "gain time" for good conduct and obedience to prison rules was unconstitutional as *ex post facto* law when applied to prisoners whose crimes were committed before the statute's enactment); *In re*

D. It Is Irrelevant That Prior Case Law Recognized a Similar Non-Statutory Aggravating Factor

It is irrelevant that prior case law recognized a similar, though not identical, non-statutory, aggravating factor. As the Comments to the WPIC Pattern Instructions explain, the prior case-law based aggravating factor differed in scope from the statutory aggravating factor added for the first time in 2005:

This particular aggravating circumstance was added to the Sentencing Reform Act (SRA) in 2005. Prior to 2005, the SRA's aggravating factor for abuse-of-trust had expressly applied to economic cases, and the common law had then extended the factor to apply to non-economic offenses as well. *See, e.g., State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987)*. The 2005 act codified this broader application. *See generally* Laws of 2005, Chapter 68, § 1 (legislative statement that the act's language was designed to codify existing common law aggravating circumstances).

The current statutory aggravating circumstance differs in one regard from the pre-existing common law. The statutory aggravating circumstance applies only if the defendant uses the position of trust to facilitate the offense; the pre-existing common law was not limited in this manner. Compare RCW 9.94A.535(3)(n) with State v. Chadderton, 119 Wn.2d 390, 398, 832 P.2d 481 (1992).

Comment to WPIC 300.23, re RCW 9.94A.535(n) (emphasis added).

Thus, the abuse-of-trust statutory aggravating factor has a different scope than did the prior, similar, case-law aggravating factor. For this

Smith, 139 Wn.2d 199, 207, 986 P.2d 131, 135 (1999).

reason, the new statutory aggravating factor is substantively different than its case-law based predecessor.

Further, having a basis in prior case law is not the same as having a basis in prior statutory law, because there are no common law crimes in Washington. *State v. Wissing*, 66 Wn. App. 745, 755, 833 P.3d 425, review denied, 120 Wn.2d 1017 (1992). And sentence enhancement factors are now, post-*Blakely*, considered the functional equivalent of crimes. If a new statutory crime cannot be applied retroactively – even if it were recognized as a wrong under prior case law – then a new statutory aggravating factor cannot be enacted and applied retroactively, either.

V. THIS COURT CANNOT IMPOSE AN EXCEPTIONAL SENTENCE FOR ABUSE OF TRUST, BECAUSE ADDING IT AFTER THE FIRST SET OF ACQUITTALS WITHOUT A NEW FACTUAL BASIS RAISES A PRESUMPTION OF VINDICTIVENESS

Under *North Carolina v. Pearce*, 395 U.S. 711, a judge cannot impose a harsher sentence upon the defendant following retrial unless the increased sentence is based on new and different information arising after the first sentencing. *Id.*, 395 U.S. at 724-26. Where a judge at retrial imposes a harsher sentence, the new evidence supporting it must “affirmatively appear” on the record, and “Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing proceedings.*” *Id.* (emphasis added). If

the record lacks such findings, this Court must presume that the increased punishment has been imposed in retaliation for the defendant's successful exercise of his constitutional rights.

In this case, the abuse-of-trust aggravating factor was charged for the first time after Mr. Hylton was acquitted of two counts of rape and received a new trial on the remaining count. But the factual basis for that allegation was already present in the first trial, and the state has never claimed that it learned any new facts to support this aggravating factor after those acquittals. Since these facts are not new, *North Carolina v. Pearce* bars this Court from using them as a basis for an exceptional sentence.²⁴

VI. THE AGGRAVATING FACTOR INSTRUCTION WAS UNCONSTITUTIONALLY VAGUE

A. The Aggravating Factor, and the Aggravating Factor Instruction

The Special Verdict Form for the aggravating factor asked: “Did the defendant, Robin Douglas Hylton, use his position of trust or confidence to facilitate the commission of the crime of Rape of a Child in

²⁴ See *State v. Ameline*, 118 Wn. App. 128, 75 P.3d 589 (2003) (imposition of exceptional sentence after third trial, following standard range sentences after first two trials, reversed due to *Pearce*, since trial judge failed to identify facts that were not available at first two sentencing hearings justifying the increase).

the Third Degree as charged?” CP: 118. It did not explain how to determine what a position of trust or confidence was.

Instruction No. 11, explaining how to use the Special Verdict Form, did not provide much more guidance. It stated in full:

You will also be given a special verdict form. If you find the defendant not guilty, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no.” If you unanimously have a reasonable doubt as to the question, you must answer “no.” If you unanimously have a reasonable doubt as to this question, you must answer “no.”

Jury Instruction No. 11, CP:135.

It did not define the meaning of “position of trust or confidence,” and it did not describe the nexus between the position of trust and the crime that the state was required to prove.

B. Following *Blakely*, Due Process Protections Against Vagueness and Overbreadth Apply Not Just to Elements of the Crime, But Also to Aggravating Factors

Before *Blakely* was decided, Washington courts held that aggravating sentencing factors were not subject to the sort of due process

protections against vagueness that applied to elements of the crime.²⁵ Since it was assumed that judges knew about the range of sentences typically associated with a crime, any vagueness or subjectivity in aggravating factors was minimized – because judges would know when a circumstance described in an aggravating factor was above and beyond what was ordinarily seen for a particular crime. *See, e.g., State v. Nordby*, 106 Wn.2d 514, 518-19, 723 P.2d 1117 (1986).

Following *Blakely* and *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), however, it is now clear that such aggravating factors are the functional equivalent of elements of the crime. It is also clear that they are subject to jury, not judicial, factfinding.

Hence, the prior Washington decisions holding that aggravating sentencing factors are not subject to due process protections against vagueness must be revisited. The basis for their holdings that such protections are unnecessary – because judges are assigned the task of factfinding on such factors – has disappeared. Following *Blakely*, such factors must be subject to the same due process protections against vagueness and overbreadth as are elements of the crimes themselves.

²⁵ *State v. Jacobsen*, 92 Wn. App. 958, 966, 965 P.2d 1140 (1998), *review denied*, 137 Wn.2d 1033 (1999); *State v. Owens*, 95 Wn. App. 619, 628-29, 976 P.2d 656, *review denied*, 138 Wn.2d 1015 (1999).

C. **The Aggravating Factor Instruction on “Abuse-of-trust” Is Unconstitutionally Vague; It Lacked Definitions to Guide the Jury**

RCW 9.94A.535(n) does not define what “position of trust or confidence means,” and it does not describe the nexus between that position of trust and the crime that the state must prove. Neither did any other instruction.

The Pattern Instruction on this aggravating factor now provides such definitions. It begins with the nexus that the state must prove between crime and factor, and it provides guidance on determining whether a defendant is in a position of trust:

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the [victim of the offense] [location of the offense] because of the trust relationship. [A defendant need not personally be present during the commission of the crime, if the defendant used a position of trust to facilitate the commission of the crime by others.]

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

[There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between [the defendant] [or] [an organization to which the defendant belonged] and [the victim] [or] [someone who entrusted the victim to the [defendant's] [or] [organization's] care.]

WPIC 300.23 (emphasis added). This Pattern Instruction gives guidance on the meaning of a trust relationship, the factors to consider in determining the existence of a trust relationship, and the nexus that must be proven between the trust relationship and the crime. None of those limiting factors were provided to the jury in Mr. Hylton's case.

Yet Washington courts have held that such guidance is necessary to limit the scope of that aggravating factor. The commentary to WPIC 300.23, on this abuse-of-trust aggravating factor, summarizes its limits by reference to pre-*Blakely* case law, reviewing judicial decisions imposing exceptional sentences based on this factor:

Trust relationship. A defendant abuses a position of trust to facilitate the offense when the defendant uses his or her relationship to the victim, or to the person who entrusted the victim to the defendant's care, to obtain access to the victim or the location of the crime. *Compare State v. Bissell*, 53 Wn. App. 499, 767 P.2d 1388 (1989) (ex-employee's use of keys that were entrusted to him in the course of employment supported an exceptional sentence for abuse-of-trust), with *State v. Jackmon*, 55 Wn. App. 562, 568-69, 778 P.2d 1079 (1989) (exceptional sentence for abuse-of-trust not supported where record did not establish that the ex-employee was permitted an unusual degree of access to the company because of his status). ...

The trust relationship necessary for this aggravating circumstance can be between the defendant and the victim or between the defendant and someone, such as a parent, who entrusts the victim's care to the defendant. *See, e.g., State v. Garibay*, 67 Wn. App. 773, 779, 841 P.2d 49 (1992) The trust relationship does not have to be a direct personal relationship between the defendant and the

victim. It is sufficient that the victim trusted an organization which assigned some of its functions to the defendant. *See, e.g., State v. Harding*, 62 Wn. App. 245, 248-49, 813 P.2d 1259 (1991) (employee of an apartment building committed an abuse-of-trust when he used his master key to enter a tenant's apartment for the purpose of rape).

Courts examine a number of factors, including the length of the relationship, the intensity of the relationship, and the victim's inclination to bestow trust, when considering whether the defendant is in a position of trust. See generally Fine and Ende, 13B WASHINGTON PRACTICE, CRIMINAL LAW § 3915 (2nd ed.). When the victim is a child, a sufficient relationship of trust was established by the defendant's status as a neighbor, babysitter, parent, or other close relative. ... In contrast, a casual relationship alone does not suffice; the state must prove more... .

Commentary to WPIC 300.23 (numerous citations omitted).

Judges might be aware of these limiting and definitional state court decisions. But juries are not.

This problem might be remedied by providing an appropriate limiting instruction for the jury. For example, in a challenge to the assault statute on the ground that the use of the word “torture” was unconstitutionally vague, the appellate court upheld the conviction *because the trial court had defined the word torture for the jury.*²⁶

²⁶ *State v. Brown*, 60 Wn. App. 60, 65, 802 P.2d 803 (1990), *review denied*, 116 Wn.2d 1025 (1991), *overruled on other grounds by State v. Chadderton*, 119 Wn.3d 390 (1992) (“the court’s instructions defined the term as ‘the infliction of severe or intense pain as punishment or coercion, or for sheer cruelty.’ Instruction 9. The jury was not left to speculate as to the meaning of this term ...”). It is true that the appellate court in the 1990 *State v. Brown*, 60 Wn. App. 60, decision, went on to state that the word “torture”

No such limiting instruction was given here. As a result, neither “position of trust or confidence” nor the nexus between crime and position of trust were defined for the jury, and as the quotes above show, neither concept is self-defining. In this situation, where the trial court failed to provide the definitional instruction, the abuse-of-trust aggravating factor must be considered unconstitutionally vague in violation of the right to a fair trial and to due process of law.²⁷

CONCLUSION

For all of the foregoing reasons, the conviction should be reversed. Alternatively, the sentence should be vacated and the case should be remanded for imposition of a standard-range sentence.

DATED this 20th day of March, 2009.

Respectfully submitted,



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had a generally accepted meaning and hence was not unconstitutionally vague for that reason. But that was not the holding. The only holding of that case is that the word “torture” was adequately defined.

²⁷ U.S. CONST. AMEND. XIV; WASH. CONST. ART. 1, §§ 3, 14 and 22. *City of Sumner v. Walsh*, 148 Wn.2d 490, 496, 61 P.3d 1111 (2003) (defendant’s standing to challenge element of offense on vagueness grounds); *id.*, 148 Wn.2d at 499 (listing prerequisites to challenge to criminal statute on void-for-vagueness grounds). See *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

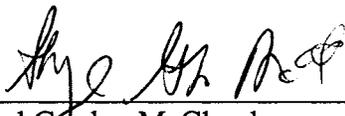
CERTIFICATE OF SERVICE

I certify that on the 2nd day of March, 2009, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Law & Justice Center
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Chehalis, WA 98532

Robin Hylton
c/o Lauren Hylton
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Hemet, CA 92544

09 MAR 23 PM 1:54
STATE OF WASHINGTON
BY _____
CITY _____
COURT OF APPEALS
DIVISION II



Sheryl Gordon McCloud

APPENDIX A

Call Steve-Tow Camaro San Jacinto 2004

Thursday 26 THANKSGIVING 2004 Saturday 28

7 am Caro Work 1.00
 8 am PHARMACY \$33.00 APPROX
 DEPOSIT 15.00
 25.00
 73
 Call Sylvania
 ltr TO Court
 Call Ed
 MBM
 Call Kevin
 Bank → Balance 800
 LOST Pink REG → NEED APPT TO REGISTER
 NON-OPERATE
 Call Ted → TRAILER - until next Sat

2 Chris Mark # AMT Register CAMARO
 3 Rec'd 2 } Guardianship
 4 VRC DMO #90.00 }
 5 Penalty/Registration } WAIVER / FEES for shopping
 6

7 Collections → FRANCHISES TAX BOARD
 VRC → 888 355 6877
 notes DMO 916 657 8120 *mailed 9-21-04 29th 30th SEPT
 FAX 916 845 6614 *TOWED 8-25-04 9-25 2EHJ3992004
 *given as gift to 9-26
 9 Siroky Cowboy VIN# 1G1FP21SGHL39957
 2520 John John

July 7	August 8	September 9	October 10	November 11	December 12
W M T W T F S S 27 1 2 3 4	W M T W T F S S 31 *	W M T W T F S S 36 1 2 3 4 5	W M T W T F S S 40 1 2 3	W M T W T F S S 45 1 2 3 4 5 6	W M T W T F S S 49 1 2 3 4 5
28 5 6 7 8 9 10 11	32 2 3 4 5 6 7 8	37 6 7 8 9 10 11 12	41 4 5 6 7 8 9 10	46 8 9 10 11 12 13 14	50 6 7 8 9 10 11 12
29 12 13 14 15 16 17 18	33 9 10 11 12 13 14 15	38 13 14 15 16 17 18 19	42 11 12 13 14 15 16 17	47 15 16 17 18 19 20 21	51 13 14 15 16 17 18 19
30 19 20 21 22 23 24 25	34 16 17 18 19 20 21 22	39 20 21 22 23 24 25 26	43 18 19 20 21 22 23 24	48 22 23 24 25 26 27 28	52 20 21 22 23 24 25 26
31 26 27 28 29 30 31	35 23 24 25 26 27 28 29 36 30 31	40 27 28 29 30	44 25 26 27 28 29 30 31	49 29 30	53 27 28 29 30 31