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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

NO. 39538-0-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

BY  DEPUTY

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STATE OF WASHINGTON, Respondent

v.

JACK DANIEL VESS II, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT A. LEWIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01195-0

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BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of the facts as set forth by the defendant. Where additional information is necessary, it will be supplied in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is the refusal of the trial court to grant a mistrial. Specifically, the documentation indicates that the defendant claims that his rights were violated when a witness for the State had made unsolicited comments that were considered to be in violation of a Motion in Limine.

The unsolicited information came from a State's witness by the name of Michael Raymond (RP 91). Mr. Raymond indicated that he had had a prior relationship with the alleged victim for approximately three years and that they had a child in common. (RP 92). He testified that when the events occurred that were the substance of this criminal trial, the alleged victim contacted him and he described for the jury her demeanor (on the phone) and also what she had indicated. Part of the preliminary questioning of Mr. Raymond went as follows:

QUESTION (Deputy Prosecutor): What did she tell – what did she say to you on the phone?

ANSWER (Mr. Raymond): She said my dad raped me.

QUESTION: Okay. That was one of the first things that she said?

ANSWER: Yes.

QUESTION: Where was she? Do you know where she was when she made this call?

ANSWER: She was leaving his house.

QUESTION: Okay. So she was just leaving his house?

ANSWER: She left his house about a half hour after the phone call, because she had no reception.

QUESTION: Okay. So she told you she had tried to call you earlier but there was no reception?

ANSWER: No. I'd been up there before. I know there's no reception.

THE COURT: Sir, I do need you to testify in response to the question. Listen to the question asked and answer that question. Don't add things the question doesn't call for. Your next question.

QUESTION (Deputy Prosecutor): So she had called you and told you she had left her father's house?

ANSWER: Yes.

QUESTION: And did she tell you where she was?

ANSWER: Yes.

QUESTION: Where was she?

ANSWER: At the time, she was in Gladstone.

QUESTION: Okay. Did she tell you where she was going?

ANSWER: She didn't specify where exactly she was going.

QUESTION: Why did she call you? Did she tell you why she was calling you?

ANSWER: Because I knew about her past and –

MR. BARRAR (Defense Attorney): Objection, Your Honor. Move to strike. Ask the jury be excused.

THE COURT: I'm sorry?

MR. BARRAR: Need discussion, either sidebar or –

THE COURT: All right. Apparently – first of all, I'm granting the motion to strike. And you should disregard the response as unresponsive to the question. I do need you to step out for a moment, apparently, and close your notepads and don't discuss the case among yourselves or with anyone else.

-(RP 95, L24 – 97, L16)

In this first example, the witness does not provide any real information, but it does alert the parties to pre-trial motions that had been brought. (RP 33).

Once this first statement is made, the jury is excused from the courtroom and explanations are provided to the court as to the concerns about non-responsive answers by this particular witness. The defense attorney made it clear that there had been a prior rape of the complaining

witness by the defendant and that that would be excluded by agreement of the parties. (RP 98). After that explanation, the court then talks to this witness, Mr. Raymond, and indicates to him as follows:

THE COURT: All right. Well, I did grant the motion to strike. And so –

I do need you, sir, to be sure to listen to the questions that have been asked and to answer only those questions. Don't volunteer things that the question doesn't call for. For example, if somebody asks you, did you know something from your own personal knowledge and you don't, because you weren't there or don't, then that's the answer you want to give, is no. If you're asked – being asked what someone said, then if they said it to you, then it may or may not be admissible. Answer that question as best you can.

Don't speculate or add assumptions. There's been a specific prohibition against witnesses talking about past sexual contacts between Mr. Vess and his daughter. And so you're not to discuss those even if you're aware of them. Is that all clear to you?

THE WITNESS: Yes, sir.

MR. BARRAR (Defense counsel): Your Honor, may I question this witness briefly? I have just a feeling he might be a little hostile, and I want to make sure that he's not.

THE COURT: Question him about what?

MR. BARRAR: My concern is that he was instructed not to talk about this prior incident and he did anyway. And if that's the case, I would like to know that.

THE COURT: Well, I – he talked about what he talked about. There isn't any reference to the contact between Mr. Vess and his daughter in his statement that he knew she was upset because of her past.

MS. BANFIELD (Deputy Prosecutor): If I could clarify something, the question wasn't what – did you know she was upset. The question was, do you know why she called you. So it's – actually, his response wasn't non-responsive. I do still understand what your fear was, but she called him – he wasn't allowed to finish because he was – would be able to comfort her because he knew about past behavior that had gone on. But I just wanted to clarify. It wasn't why she was upset.

MR. BARRAR: Thank you.

THE COURT: All right. Are you clear enough on the limits of what you're supposed to be doing here?

THE WITNESS: Yes, sir.

THE COURT: All right. Bring in the jury, then.

-(RP 98, L13 – 100, L5)

Even after that admonition, the witness, apparently on his own, embellishes testimony and indicates as follows:

QUESTION (Deputy Prosecutor): Okay. But you were talking on the phone with her as she was driving?

ANSWER: Yes.

QUESTION: And during the time that you were talking on the phone, did she tell you what happened, what had made her so upset?

ANSWER: Yes.

QUESTION: Okay. Can you tell us?

MR. BARRAR (Defense Counsel): Asked and answered, Your Honor.

THE COURT: Overruled.

QUESTION (Deputy Prosecutor): Can you tell us what she told you.

ANSWER: She told said that my father raped me again.

QUESTION: Okay.

MR. BARRAR: Objection, Your Honor.

QUESTION: And –

MR. BARRAR: Objection, Your Honor. I move for mistrial.

THE COURT: All right. Ladies and gentlemen, apparently I need to deal with another issue. I need you to step out. Close your notepads completely. Don't discuss the case among yourselves, or with anyone else.

-(RP 102, L12 – 103, L8)

At this point, the defense is now moving for a mistrial. There is an indication too that this witness “had an attitude since he got up there. And this is the result of it”. (RP 103, L24-25).

The court went on to listen to argument by both sides and indicated as follows:

THE COURT: I note your objection and your motion for a mistrial. I deny the motion for a mistrial at this point. The second reference – the first reference was nonspecific. The second reference was more specific. However, it was brief.

I would not recommend that we give a cautionary instruction about it. But if you wish one, I will give one. I think that would only highlight the problem. Because it occurred and we can move ahead with it, I'm not going to grant a mistrial at this time.

However, I will advise – and I understand the State did not deliberately elicit this testimony. This apparently was a deliberate request by this witness to inject error into this. However, I would strongly urge you, if there are witnesses who need to be counseled further and areas of testimony that skirt the issues that we're talking about, that we avoid them. Because if the conduct occurs again for whatever reason, I'll have no choice but to grant a mistrial.

MS. BANFIELD (Deputy Prosecutor): Understood.

THE COURT: Mr. Raymond

THE WITNESS: Yes, sir.

THE COURT: I should hold you in contempt and place you in custody. It appears to me you deliberately violated my order. I'll determine whether or not that should occur after the trial's concluded. But you'll need to reappear after the trial is concluded, and I'll determine what sanction, if any, should be given for your direct violation. I can tell you, if you mention the subject again, I will place you in custody. Is that clear enough for you?

THE WITNESS: Yes, sir.

THE COURT: You're very close to making us all start this trial over again, including putting this woman that you say you have such a good relationship though this process all over again, because you can't seem to abide by whatever everybody tells you. It better not happen again. Clear?

THE WITNESS: Yes, sir.

THE COURT: Bring the jury back in.

-(RP 104, L14 – 106, L3)

As the court indicated he did not believe that it was prejudicial to the defendant, noting that it was a brief comment.

The State is aware that the parties had agreed to not allow this subject in, but also notes that this type of testimony, that is, allegation of prior sex abuse against the same victim, has been found to be admissible in previous cases.

RCW 10.58.090 provides in part:

1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

...

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of “sex offense.”

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

(a) The similarity of the prior acts to the acts charged;

(b) The closeness in time of the prior acts to the acts charged;

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

(e) The necessity of the evidence beyond the testimonies already offered at trial;

(f) Whether the prior act was a criminal conviction;

(g) Whether the 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; and

(h) Other facts and circumstances.

The State submits that if there were any prejudice that could possibly be shown, it is tempered by the fact that this could be considered relevant evidence in the State's case in chief. Nonetheless, the State is aware that the parties agreed that it would not be used and thus, this is a violation of a motion in limine. It is also obvious that the violation of motion in limine was not done by anything that the State did, but was the result of a witness that, for whatever reason, wasn't paying attention to admonitions by the court.

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). An abuse of discretion occurs "only 'when no reasonable judge would have reached the same conclusion.'" State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (*quoting State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). Denial of a motion for mistrial will be overturned only when there is a substantial likelihood the prejudice affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The court "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" Hopson, 113 Wn.2d at 284 (*quoting State v. Mak*,

105 Wn.2d 692, 701, 718 P.2d 407 (1986)). The objectionable testimony is examined “against the backdrop of all the evidence.” State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). “[T]he trial judge is best suited to determine the prejudice of a statement.” *Id.*

The mere possibility of prejudice is insufficient to warrant a new trial. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). “Only errors affecting the outcome of the trial will be deemed prejudicial.” Mak, 105 Wn.2d at 701.

Because the trial court is in the best position to determine if an irregularity at trial caused prejudice, the Appellate Court reviews the decision to grant or to deny a mistrial for an abuse of discretion. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). An irregularity at trial is not prejudicial unless there is a reasonable probability that the trial's outcome would have differed if the error had not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). In determining the effect of an irregularity at trial, the Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Bourgeois, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997). The Appellate Court must decide whether the record reveals a substantial likelihood that the trial irregularity affected the jury verdict, thereby denying the defendant a fair trial. State v. Hicks,

41 Wn. App. 303, 313, 704 P.2d 1206 (1985) (*citing* State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984)). A “strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). The improper admission of evidence is harmless if the evidence is of minor significance in reference to the overall evidence as a whole. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

The State submits that this trial irregularity was harmless and of minor significance in reference to the overall evidence in the case.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of prosecutorial misconduct in the State’s closing argument. The claim is that the argument was an attempt to impermissibly shift the burden of proof to the defendant, thus denying him a fair trial. The claim appears to be that the State, in discussing DNA evidence, indicated that the defense had not presented any alternate explanation for the scientific information and thus that argument was improper.

In discussing this in the defendant's brief, they only make mention to a small portion of the closing argument made in this case. (RP 697, L15-23). Yet, the entire discussion concerning the scientific evidence indicates, not that the State was attempting to shift responsibilities of proving something, but to explain the nature of the DNA evidence that the State had produced.

(Portion of closing argument by Deputy Prosecutor)... So for instance, you heard – the most unemotional and detailed and concrete evidence that you heard (inaudible) the scientific evidence, the DNA evidence. This evidence is – it can't be more clear. You heard from the supervisor from the Washington State Patrol, and she explained to you that this evidence was examined and tested by her. And she, in fact, was the supervisor of the DNA lab.

You heard that she found that only 1 in 2,700 individuals could be a contributor to this match. And Dominique Vess happened to be one who had this marker. So defense counsel noted during questioning that aren't there times when there's one in a gazillion, when there's a complete match? And, yeah, there are times that there is one in a gazillion, and it's a complete match.

Not in a situation where we know there's a mixture. Here we know that there's three different pieces of DNA, one that they can identify as the defendant's and one that they can identify as Ms. Vess, and then this other one they don't have someone's DNA to match it with. So they have two that they know match. So yeah, one in a gazillion. But the fact that our DNA evidence is 1 in 2,700 doesn't make it any less significant. And she was very clear, this is significant. Do you know how many people are in that house? Six people. 1 in 2,700 could fit that – could contribute to that profile. I don't think there's that many people in Yacolt. We were in a house of six people. I don't

think they have even close to that many neighbors. There was a house of six people. 1 in 2,700. Very significant.

So just because you can say well, maybe – well, maybe there's another person out there that can match these contributors. Well, maybe. Well, there's been no evidence presented to show that there was someone out there. There's been no other person claiming – that falls into that category that has been raped by Jack Vess. There's been no other person in that house or anywhere near there who's claiming on that's night to have had sexual intercourse with Jack Vess.

This evidence was found on his penis after somebody claimed they had been raped. And that person just happened, from 1 out of 2,700 people, to match. To be a marker of that DNA. That is significant. So reasonable doubt. Just because it's not one in a gazillion, just because it's 1 in 2,700, that doesn't create reasonable doubt. So you can't just throw reasonable doubt out there.

-(RP 696, L9 – 698, L6)

The defense made no objection to this argument. One of the reasons for that, was contained in the nature of the closing argument by the experienced defense attorney. Because of the nature of the allegation of sexual intercourse at a time of physical helplessness or mental incapacity, they were raising questions about the validity of the charging based on the evidence. (RP 731-732). Further, the defense was zeroing in on the concept that the evidence producing the DNA results may have been contaminated or of little, or no, value.

Now, was there sex? Was there intercourse? What evidence do you have that there was intercourse? She says there was. He says there wasn't. The only two people in the room. So the State, again, has the burden of proving beyond a reasonable doubt was there intercourse. The evidence that they have of intercourse is one little piece of evidence.

Now, counsel makes a second argument that we've been – I made a big argument about the swabs that came from Oregon Health University Hospital, that the deputy that received them did not know who he got them from. Well, the fact is there was no evidence on those swabs. There was nothing on them.

The sexual assault nurse told you that, you know, this is something they do to collect evidence. When there's an allegation of intercourse. It's done all the time, because it's a very powerful tool. It's very demeaning to the victim, it's not fun to go through, but they put the victim through it because if there's a rape, they expect to find evidence. They didn't find any evidence here. They didn't find a lick of evidence there. Nothing.

What they found was a small amount, by the expert's own opinion – a small amount of what's called a mixed sample of a swab of his penis. The mixed sample contained – and she didn't say contain Dominique, Jack, and somebody else, basically she said these people could not be excluded. They could not exclude Dominique, they could not exclude Jack and they could not exclude a third party.

How did that get there? Could have been a variety of ways. Could have been through intercourse. Could have also been from using a towel to dry off the next day after the shower that somebody else had who maybe was the third person on that sample. I mean, I'm not pulling this stuff out of the air. This is what's called a mixed sample.

A true match would be 1 in 8 zeros. That's a true match. We don't have that. We have 1 in 2,700. 2,700 is a lot of people. But that's in the whole population of the world.

We're not talking about just people in Yacolt. Statistically, every 2,700<sup>th</sup> person has the same thing. So when you take the fact that it could have been due to some type of innocent transfer, it could have been brought there by the third party in the mixed sample from use of a towel after showering, clothing, could be a variety – and it could have been from sex. Okay?

So given all those options, are you willing to find a person guilty beyond a reasonable doubt? I submit to you, you can't. You just can't do it. Why else can't you do it? If she was truly being raped that night, the police officer hit the nail right on the head, why didn't you call 911? Why did you drive all the way to Milwaukie? You've got a cell phone, you're making calls, if you truly were raped why didn't you call 911? Well, the answer is because I don't want to go through this. Maybe. There's that word. Maybe. Maybe it was consensual sex.

-(RP 737, L7 – 739, 15)

The defense attorney also was attempting to discredit the information as it relates to the rape but leaving it to the jury for the question of incest.

Incest? Tossup. It's a tossup. You've got to be convinced beyond a reasonable doubt that there was actual intercourse. None of his DNA was found on her vagina, cervical swabs, anal swabs. And I can't stress that enough. These aren't fun things. But they do them because they expect to find evidence. They didn't find anything. They found a little bit of something that could not exclude her in a mixed sample with another person.

This isn't the strong case they want you to believe it is. I'm going to leave you with that. You took an oath to follow the law. And the law says, if you have a reasonable doubt as to any element of the charge, you must find the defendant not

guilty. You don't have any discretion there. If you find there is reasonable doubt as to any particular element, that doesn't mean that one element is strong and one element is weak, they kind of balance each other out.

You've got to do each one, you've got to do your job. I know you will, because we took a long time picking this jury, and you all said you would. And I don't want you to get all caught up in the passion and the prejudice and the emotion of this case. Because that will eat you alive. Set that aside, look at the evidence, try not to judge people. Look at the evidence. It's icky, it's disgusting, you feel bad, your heart goes out to people, families, individuals. It stinks, the whole thing. But we've all got to job to do.

Did they prove their case? No way on the rape, incest is up to you. I submit to you that the State has not proved beyond a reasonable doubt that they had intercourse. So I'm going to ask you to find Mr. Vess not guilty. Thank you.

-(RP 743, L15 – 744, L21)

To establish prosecutorial misconduct, an appellant must prove that the prosecutor's conduct was improper and that this improper conduct prejudiced his right to a fair trial. "Prejudice on the part of the prosecutor is established only where 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). The Appellate Court reviews a prosecutor's comments during closing argument in the context of the total argument, "the issues in the case, the evidence addressed in the argument, and the

jury instructions.” Dhaliwal, 150 Wn.2d at 578; State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

A defendant's failure to object to an improper remark by the prosecutor constitutes a waiver of that error unless the remark is “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); State v. Dixon, 150 Wn. App. 46, 207 P.3d 459 (2009).

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (*citing State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. Carver, 122 Wn. App. at 306 (*quoting Dhaliwal*, 150 Wn.2d at 578). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Carver, 122 Wn. App. at 306 (*citing Dhaliwal*, 150 Wn.2d at 578). If defense counsel fails to object to the prosecutor's statements, then reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

-(State v. Jackson, 150 Wn. App. 877, 883, 209 P.3d 553 (2009))

A prosecutor may commit misconduct if he mentions in closing argument that the defense did not present witnesses or explain the factual basis of the charges, or if he states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997); State v. Traweek, 43 Wn. App. 99, 106-07, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991).

Here, the prosecutor did not commit misconduct. Instead, she explained that the jury was the sole judge of credibility and outlined numerous reasons why it should find the State's witnesses more credible than not. The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *See Fleming*, 83 Wn. App. at 215; *Traweek*, 43 Wn. App. at 106-07. The prosecutor in this case clearly explained to the jury that the State had the burden of proof. She did not imply that the defendant was required to provide evidence nor that the jury should find him guilty based on his decision to present or not present a case.

The jury instructions permit such comparison for credibility purposes. They read:

“You are the sole judges of the credibility of each witness. ... In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; *the reasonableness of the witness's statements in the context of all the other evidence*; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.”

-(CP 40 – Court’s Instructions to the Jury, part of instruction #1).

The defendant does not challenge this jury instruction or argue why it should be impermissible for a jury to base credibility determinations on “the reasonableness of the witness's statements in the context of all the other evidence.”. He has not demonstrated prosecutorial misconduct on this basis.

#### IV. RESPONSE TO ASSIGNMENTS OF ERROR NOS. 3 AND 4

The third and fourth assignments of error raised by the defendant are claims that imposition of the Persistent Offender Sentencing Accountability Act (POAA) violated some of the defendant’s constitutional rights, and in particular, he should have had a right to a jury

trial to make the determination of whether or not he was a persistent offender. For example, the defendant makes claim that a jury was necessary to find beyond a reasonable doubt facts that increase the defendant's maximum possible sentence. Also, the defendant claims that prior case law has not considered the issue of prior convictions under Apprendi. Finally, he claims that the court erred in classifying him as a persistent offender because this became a "sentencing factor" rather than an "element" and thus violated the defendant's right to equal protection.

The State submits that all of these arguments have recently been explored by the Appellate system and have upheld the rulings by our trial court down the line.

In State v. Rudolph, 141 Wn. App. 59, 168 P.3d 430 (2007), Division II discussed a conviction for First Degree Robbery, where the trial court had sentenced him to life without parole under the Persistent Offender Accountability Act (POAA). The defendant argued that the POAA sentencing procedures were unconstitutional because they allowed the trial court to make factual findings about prior convictions rather than requiring a jury to make those findings. Division II first discusses this in terms of the constitutionality of the POAA and how it relates to Apprendi and Blakely.

“Citing Blakely, 542 U.S. 296, Rudolph argues that Washington's POAA sentencing procedures are unconstitutional because they allow the trial court to make factual findings about prior convictions, which increase punishment, rather than requiring a jury to make these findings. The State responds that we have already resolved this issue contrary to Rudolph's position in State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018 (2006), in which we held that the POAA is a recidivism statute not subject to Blakely analysis. We decline to reverse Ball and, instead, adhere to our previous holding that POAA sentencing procedures are not subject to Blakely”

-(State v. Rudolph, 141 Wn. App. at 63-64)

Division II continues in its discussion that:

“The United States Supreme Court’s subsequent decision in Blakely excludes the fact of prior convictions from its constitutionally based jury trial requirement in Apprendi for facts that increase the penalty beyond what the court could impose without additional factual findings. Blakely, 542 U.S. at 313. Therefore, Blakely does not affect Wheeler’s [State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001)] holding that imposing a life sentence without parole under the POAA is constitutional.

-(State v. Rudolph, 141 Wn. App. at 65)

Our Supreme Court has “repeatedly rejected similar arguments and held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.” State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580

(2007) (citing In re Personal Restraint of Lavery, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005)); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996 (2002); State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), accord Almendarez-Torres, 523 U.S. 224; 118 S. Ct. 1219; 140 L. Ed. 2d 350 (1998).

Division II has also addressed some of the defendant's contentions in State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005). In the Ball case, the defendant sought review of a decision convicting him of four counts of Child Molestation and sentencing him under the Persistent Offender Act. The Court of Appeals affirmed the trial court's decision which held that the POAA was neither an exceptional sentence statute subject to a Blakely analysis, nor was it an enhanced sentence statute. The POAA was an act pertaining to recidivism and was constitutional. As indicated by the Judges in Division II:

"Michael Wayne Ball was convicted of four counts of child molestation. Ball had two previous convictions for first degree statutory rape. The State requested that the trial court sentence Ball under the Persistent Offender Accountability Act (POAA). The court reviewed Ball's previous convictions and found them to be "strikes" under the POAA. Ball appeals his sentence of life without the possibility of release. We hold that the POAA is neither an exceptional sentencing statute subject to a Blakely analysis nor is it an enhanced sentence statute. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The POAA is an act pertaining to recidivism. The POAA under chapter 9.94A RCW is constitutional. It

permits a sentencing court to employ a preponderance standard, and the court is not required to submit the matter to a jury. We affirm.”

-(State v. Ball, 127 Wn. App. at 957)

## “II. Application of Blakely to Persistent Offender Statute

Ball argues that under Blakely, 542 U.S. 296, the trial court had to submit the question of whether he was a persistent offender to the jury to be found beyond a reasonable doubt.

Blakely does not apply to sentencing under the POAA. Blakely specifically was directed at exceptional sentences under RCW 9.94A.535, "Departures from the guidelines." Blakely followed Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), where the Supreme Court held that:

[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Apprendi, 530 U.S. at 490 (emphasis added).

Ours is not an exceptional sentencing situation. The "persistent offender" is not listed in RCW 9.94A.535, but in RCW 9.94A.030(32) and is found in RCW 9.94A.570. The POAA does not increase the penalty for the current offense.

Ball also asserts that this is a sentence enhancement statute. He is wrong. RCW 9.94A.533 addresses sentence enhancements which is entitled "Adjustments to standard sentences." These enhancements concern firearm enhancements, drug enhancements (e.g. school zones), etc. Only one "adjustment" refers to prior offenses, vehicular homicide may be enhanced for prior offenses. RCW 9.94A.533(7). The POAA is not listed or referred to in this section. We hold that it is not an enhancement of the sentence for the crime committed. Our Supreme Court has

held that the POAA is a sentencing statute. State v. Thorne, 129 Wn.2d 736, 778, 921 P.2d 514 (1996). This sentencing statute is for recidivism, and the rationale is entirely different from that of either exceptional sentences or sentence enhancements. Our Supreme Court has declined to extend Appendi to recidivism statutes. State v. Wheeler, 145 Wn.2d 116, 124, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996 *cert. denied sub nom. Sanford v. Washington*, 535 U.S. 1037, 152 L. Ed. 2d 654, 122 S. Ct. 1796 (2002).

Wheeler answers many of Ball's contentions. It reiterated that (1) the POAA statute was constitutional, (2) the convictions need not be charged in the information, (3) the sentence need not be submitted to a jury, and (4) it need not be proved beyond a reasonable doubt. Wheeler, 145 Wn.2d at 120. The court also specifically held that, "[a]ll that is required by the constitution and the statute is a sentencing hearing where the trial judge decides by a preponderance of the evidence whether the prior convictions exist." Wheeler, 145 Wn.2d at 121 (citing former RCW 9.94A.110 (2000) (now recodified as RCW 9.94A.500)). That procedure is precisely what occurred in Ball's case. Our Supreme Court reaffirmed Wheeler in State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004)"

-(State v. Ball, 127 Wn. App. at 960)

This analysis has recently been approved in the Supreme Court in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). Magers was making the same type of arguments that our defendant is making at this time. The Supreme Court was quite clear in its decision:

"Insofar as the latter argument is concerned, the Court of Appeals has held that Blakely does not apply to sentencing under the POAA, Blakely being specifically directed at exceptional sentences. State v. Ball, 127 Wn. App. 956, 957, 959-60, 113 P.3d 520 (2005). We agree with this

conclusion and determine that Blakely has no application to the instant case.

It is well settled that Blakely does not apply to sentencing under the POAA. See State v. Ball, 127 Wn. App. 956, 959-60, 113 P.3d 520 (2005) (ruling that Blakely does not apply to the POAA). In reaching this conclusion, the Ball court noted that Blakely specifically addresses exceptional sentences, whereas the POAA is directed at recidivism. *Id.* Our Supreme Court is in accord. See State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001) (holding Apprendi does not require that prior convictions used to establish persistent offender status be submitted to a jury and proved beyond a reasonable doubt); State v. Smith, 150 Wn.2d 135, 141, 75 P.3d 934 (2003) (“the United States Supreme Court has never held that recidivism must be pleaded and proved to a jury beyond a reasonable doubt”).”

-(State v. Magers, 164 Wn.2d at 194)

The State submits that the arguments being made by the defendant have previously been made and rejected by the Appellate courts. Blakely does not apply to a sentence under the POAA because the statute does not pertain to departures from the sentencing guidelines and does not increase the penalty for the current offense. Instead, the POAA is itself a sentencing statute, designed to address recidivism. State v. Ball, 127 Wn. App. at 960. As the Ball court further noted, the Washington Supreme Court has not extended the rule in Apprendi to recidivism statutes. Ball, 127 Wn.2d at 960 (citing State v. Wheeler, 145 Wn.2d 116, 124, 34 P.3d 799 (2001)). The Wheeler court held that the POAA is constitutional and

that the convictions used to impose a POAA sentence need not be charged in the Information, submitted to a jury, or proved beyond a reasonable doubt. Wheeler, 145 Wn.2d at 120.

The jury in our case found that the defendant had committed the crimes that he was charged with (Rape in the Second Degree and Incest in the First Degree). Based on the nature of the convictions and the defendant's prior history (the prior history was set forth in some detail with certified copies of convictions that were attached and incorporated into the Felony Judgment and Sentence (CP 63)), the trial court properly determined that he was a candidate under the Three Strikes Law and subsequently sentenced him to life without possibility of parole.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 23 day of Feb, 2010.

Respectfully submitted:

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