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NO. 35427-0-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ALAN JENKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

OPENING BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION

Alan Jenks was charged with the robbery of a convenience store in Spokane. The store clerk claimed the suspect displayed what appeared to be a firearm and left the store with specific items: a case of beer, a pack of cigarettes, and a small amount of cash from the register. Mr. Jenks was identified by the clerk and charged with the crime a few days later.

The trial was full of errors. Mr. Jenks was barred from presenting critical evidence to the jury, including information regarding another suspect, as well as details regarding the store clerk's credibility. The court also erroneously instructed the jury on expert testimony and committed other trial errors, all of which were preserved by defense counsel.

Due to the court's multiple errors, Mr. Jenks did not receive the fair trial to which he is constitutionally entitled. For these reasons, reversal and a new trial are required. In the alternative, Mr. Jenks's life sentence should be vacated, so that he can be resentenced within the standard range.

B. ASSIGNMENTS OF ERROR

1. The court erred when it erroneously permitted a fact witness to testify that Alan Jenks was the sole suspect in the robbery investigation.

2. The trial court erred when it instructed the jury on expert witness testimony, where the police analyst was never qualified as an expert witness and no notice of expert testimony was provided.

3. The court erred in excluding other suspect evidence, in violation of Mr. Jenks's right to present a defense under the Sixth Amendment.

4. The court erred when it excluded relevant ER 608(b) impeachment evidence pertaining to the sole eyewitness, Jeffrey Davila, the store clerk.

5. The court erroneously admitted irrelevant and unauthenticated social media exhibits 44 and 45, over objection.

6. The court erred when it refused to issue a curative instruction to remedy a police witness's violation of the court's pre-trial orders.

7. Mr. Jenks's trial lacked the constitutionally required appearance of fairness, due to the court's comments in violation of the Code of Judicial Conduct prohibition against ex parte communications.

8. The cumulative effect of the above errors violated Mr. Jenks's constitutional right to a fair trial.

9. The trial court deprived Mr. Jenks of the equal protection guaranteed by the Fourteenth Amendment and article I, section 12, when the court, and not a jury, found the facts necessary to sentence him as a persistent offender.

10. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of qualifying prior convictions violated Mr. Jenks's rights to a jury trial and due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Criminal Rule 4.7 requires the State to notify the defense if it intends to present expert testimony. The court must also qualify an expert witness pursuant to ER 701 or 702, due to the witness's special training, education, or expertise. Here, the State did not provide notice of an expert, but the court permitted the criminal analyst to provide

opinion evidence, and instructed the jury on expert testimony sua sponte. Where the trial court permitted unauthorized opinion testimony and erroneously instructed the jury on expert testimony, is reversal required?

2. Evidence or argument that another person committed the charged offense is admissible if there is evidence tending to connect the person to the offense. It violates the right to present a defense to restrict the defense from offering relevant evidence that casts doubt on the prosecution's case. By excluding evidence that another individual was the perpetrator, did the court violate Mr. Jenks's right to present a defense?

3. ER 608(b)(1) provides for inquiry on cross-examination into specific instances of untruthfulness to impeach the credibility of the witness being cross-examined. Did the trial court err when it excluded cross-examination of the complainant on the grounds the proposed impeachment evidence was too remote in time, and because the complainant was not criminally charged?

4. As the proponent of social media evidence (ex. 44 and 45), the State was obligated to prove the photographs were authentic and relevant. Did the trial court abuse its discretion when it admitted

photographs represented as pictures of Mr. Jenks's girlfriend, when no nexus was presented to support this suggestion, and where the court denied defense counsel's request for a curative instruction?

5. The appearance of fairness and impartiality is a critical constitutional right guaranteed by article I, section 22 and the Sixth and Fourteenth Amendments. This fundamental aspect of a fair trial is viewed objectively to determine whether a reasonable person would question the court's impartiality. Was Mr. Jenks denied a fair trial by the appearance of unfairness when the trial court stated it had consulted the appellate court before ruling on defense objections in violation of the Code of Judicial Conduct, and identified the appellate judge he spoke to as: "I'll just say it's a prosecutor."

6. Reversal of a conviction may be required due to the cumulative effect of several trial court errors. Where several trial errors occurred that cumulatively deprived Mr. Jenks of a fair trial, is reversal required?

7. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington constitution require that similarly situated people be treated

the same with regard to the legitimate purpose of the law. With the purpose of punishing recidivist criminals more harshly, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled prior convictions "elements," requiring they be proven to a jury beyond a reasonable doubt, and in others has termed them "aggravators" or "sentencing factors," permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

8. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Jenks's Sixth and Fourteenth Amendment rights violated when the judge, not the jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his

punishment from the otherwise-available statutory maximum to life without the possibility of parole?

D. STATEMENT OF THE CASE

1. The Robbery of Zip Trip Store

Just after midnight on December 7, 2014, Jeffrey Davila was working the graveyard shift at a Zip Trip convenience store in Spokane. RP 168. Davila had not always worked such a thankless job; he had previously worked as a police officer in Culver City, California, until he was forced to resign. RP 33-36 (disciplinary history resulted in Davila's resignation from police force).

According to Davila, he observed a man walk into the store and walk straight back to the beer cooler, and return to the register with an 18-pack of Budweiser. RP 170. The man told Davila that he would take the beer, as well as the money from the register. Id. The man lifted his shirt to reveal the handle of what appeared to be a firearm tucked into his waistband. Id. Davila complied, giving the man the contents of the cash register, which totaled approximately $50, including small change. Id. at 171.

Davila later said the man was wearing all dark clothing, including a baseball hat pulled low over his brow, gloves, and red sweats

or boxer shorts. Id. The man also had a teardrop tattoo under his right eye and a mole under his left eye, as well as a tattoo on his neck, which included a cursive letter "M." Id. at 181-82, 266. Davila described the man as a white male between 5'5" and 5'6". RP 176.

After coming around to Davila's side of the counter and taking a pack of cigarettes from the wall, the man told Davila not to tell anyone about the robbery and he left the store. RP 174-75. The man made a threatening gesture toward Davila by running his finger across his throat, but he never removed the gun from his waistband. Id. The man fled with the beer, the cigarettes, and the cash. Id.

Following the robbery, a Spokane Police Department analyst took Davila's description and compared it with men in the police department database. Id. at 222-23. When the analyst entered the height, race, and facial markings described by Davila, the analyst got a peculiar result – apparently, the robber could be only one person in the entire region – Alan Jenks. Id. at 222-24, 230. The analyst tried to confirm this result by researching social media accounts in which Mr. Jenks appeared, as well as comparing the result to the store surveillance video. Id. 224-26. Based on the analyst's search, Spokane officers executed a search warrant of Mr. Jenks's residence. Id. at 238, 283.

Following an investigation, the State charged Mr. Jenks with first degree robbery. CP 1-2.[1]

2. Pre-trial motions

During pretrial proceedings, Mr. Jenks raised concerns regarding the State's apparent intention to have fact witnesses offer opinion evidence as to whether Mr. Jenks was the person in the surveillance video, or whether the clothing and other items seized in the execution of the search warrant "matched" the items shown in the video. RP 7-8. Mr. Jenks argued, and the State agreed, that such testimony would invade the province of the jury. Id. The State did not give notice during this discussion of opinion testimony – nor at any other time – that it would seek to present expert testimony at trial.

The State moved in limine to exclude alternate suspect evidence, even though Mr. Jenks proffered that a neighboring business had been robbed just two weeks earlier. Id. 38-42. The description of the robber of the café next door was quite similar, and the same detective had concluded Mr. Jenks was not a suspect in the café robbery.

[1] Mr. Jenks was originally charged with a second count of unlawful possession of a firearm, as to a Remington rifle seized from his residence during the execution of a search warrant. CP 1-2. This count was dismissed pursuant to Mr. Jenks's pre-trial motion, because the rifle was inoperable. RP 27

Id. The trial court excluded alternate suspect evidence as too speculative. RP 43-45.

The State also moved to exclude evidence of Davila's past as disgraced police officer. Id. at 33. Although the State agreed that Davila seemed to have resigned for disciplinary reasons, the court ruled that under ER 608(b), the information on Davila was too remote in time, and moreover, Davila was not charged with a crime. RP 37-38.

Mr. Jenks requested that his persistent offender status be determined beyond a reasonable doubt, by a jury, rather than by a judge. CP 23; RP 54-55. Mr. Jenks acknowledged contrary Washington law, but continually renewed his request, citing federal due process. RP 54-55. The court denied his motion. Id. at 54-55.

3. Jury Instructions and Verdict

During the course of the trial, the State requested that the jury be instructed on the inferior degree offense of robbery in the second degree. RP 317. Mr. Jenks objected to this instruction, but the court gave it anyway, after calling the Court of Appeals to seek advice. Id. at 322.

The court said it consulted by phone with someone identified as "one of my colleagues at Division III, not going to say who it was, I'll just say it's a prosecutor. I hope that doesn't give it away." RP 322.

The court then informed the parties that it had decided to instruct the jury on the inferior degree offense, over Mr. Jenks's objection. RP 322, 325. The same appellate consultation led the trial court to instruct the jury, sua sponte, that the criminal analyst testifying for the State should be considered an expert witness. RP 323. This was the State witness who determined Mr. Jenks was the only possible perpetrator, following a brief computer search of the Spokane region and Facebook. Id. at 225.

Mr. Jenks was convicted of robbery in the first degree. CP 73. The court noted its "frustration" with its lack of discretion under the Persistent Offender Accountability Act (POAA), but sentenced Mr. Jenks to a life sentence without the possibility of parole. RP 424-26.

E. ARGUMENT

1. The trial court erred when it permitted criminal analyst Thomas Michaud to provide opinion testimony and when the court erroneously instructed the jury on expert testimony, despite the fact that Michaud was not an expert.

a. The State must disclose expert witnesses during discovery to "meet the requirements of due process."

CrR 4.7 governs the exchange of discovery in a criminal action. State v. Pawlyk, 115 Wn.2d 457, 471, 800 P.2d 338 (1990). The underlying purpose of the rule is "to provide adequate information for

informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process. Id. (internal citations omitted).

This rule requires the prosecutor to disclose to the defense "any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney." CrR 4.7(a)(2)(ii). The State's failure to comply with this rule can violate a defendant's constitutional right to a fair trial. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993); U.S. Const. amend. XIV; Const. art. I, § 3.

Trial courts are granted broad discretion to elect the appropriate sanction for a deputy prosecutor's violation of the discovery rule. State v. Oughton, 26 Wn. App. 74, 79, 612 P.2d 812 (1980). Sanctions may range from dismissal of the charges to sanctions against the prosecuting attorney, where failure to disclose an expert appears willful. CrR 4.7(h)(7).

Although the parties here engaged in robust pre-trial motion practice, at no time did the State serve notice of its intent to call analyst Thomas Michaud as an expert witness. CP 15-19, 20-23, 24-37, 39-41, 42-48 (State and defense trial briefing and motions in limine). Nor did

the State refer to Michaud's name in its detailed statement of probable cause. CP 3-7.

b. The court erroneously permitted Thomas Michaud to provide opinion testimony as an expert, thus, encouraging the jury to give improper deference to this fact witness.

Mr. Michaud, who identified himself as a criminal intelligence analyst for the Spokane Police Department, testified that he spent less than an hour searching a limited database that included prior offenders in the counties immediately surrounding Spokane. RP 223-24. Although Michaud stated that he his role was to "support" and "assist" detectives, he had earned a masters degree in criminal justice as he worked for the department. RP 219, 221. There was no indication, however, that Michaud's occupation doing simple social media searches, or what he conceded was his "support role" qualified him as an expert. RP 220-21.

During pre-trial motion practice, Mr. Jenks moved to exclude police witnesses from testifying as to their opinions on whether Mr. Jenks was the individual in the surveillance video, or as to whether the clothing seized pursuant to the search warrant was a "match" to that of the suspect. RP 7-8. Defense counsel argued such opinion testimony would invade the province of the jury. RP 7-8. The court agreed, excluding witnesses' opinions that identified Mr. Jenks as the person in

the video, or his clothing as that in the video. RP 16. At no time during this discussion, or at any other time, did the State notify the defense or the court that it would attempt to qualify Michaud as an expert, or as a witness with special training or experience.

Yet at trial, the court permitted Michaud to testify that when he entered the search terms dictated by the store clerk's physical description of the robber, Michaud's search returned a result of only one suspect – just the defendant himself. RP 223. "It identified him." Id.

This improper and unduly prejudicial opinion testimony violated the pre-trial order excluding improper opinion testimony, to which Mr. Jenks had a standing objection. RP 7-8, RP 16.

c. The court erred when it gave a sua sponte expert witness jury instruction over Mr. Jenks's objection.

The trial court erroneously instructed the jury, sua sponte, that Michaud was an expert witness, over Mr. Jenks's objection. CP 59; RP 314-16, 322-24, 326-27.

While practical experience alone may be sufficient to qualify a witness as an expert, the subject upon which the witness is expected to offer an opinion must be within the witness's area of expertise and must be helpful to the jury. State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970

P.2d 313 (1999) (superseded by statute on other grounds). It may not be based on "conjecture and speculation." Id. (quoting Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wn.2d 50, 104, 882 P.2d 703 (1994)). When these conditions are not satisfied, police testimony is not admissible as expert testimony under ER 702. Farr-Lenzini, 93 Wn. App. at 462.

Thus, if the State wished to have Michaud, an analyst, present expert opinion testimony, it was required to comply with discovery rule CrR 4.7(a)(2)(ii). Only if the State had provided the defense with notice of the witnesses who it expected to provide expert opinions, and the specific subjects of those opinions, could the defense effectively challenge whether the testimony complied with ER 702. Yet the trial court's ruling permitted the State to bypass its discovery obligations, surprise the defense with unsupported opinion testimony from Michaud, and obtain a jury instruction to that effect.

The court decided to instruct the jury on expert testimony after both sides rested; thus, the defense was given no opportunity to challenge whether Michaud's "expert" testimony was within his area of expertise and helpful to the jury. RP 314-16. Mr. Jenks objected to the instruction: "I'm concerned because identification tends to be the key

issue and we have a guy who finds one name …" Id. The trial court seemed to agree with the defense, indicating that Michaud hardly seemed to be an expert, musing: "He's an expert in finding one name…" RP 316-17.

After taking a short recess, including the consultation with "one of my colleagues at Division III," the court decided to nonetheless give the expert witness instruction, WPIC 6.51.[6] This was error.

d. Reversal is required.

When the trial court improperly instructs the jury, reversal is required where the defendant can show prejudice. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). When Mr. Jenks objected to the instruction, he explained that identification was the key issue at trial, and Michaud had testified to finding only one name; moreover, Michaud was not qualified as an expert. RP 315-17. Because defense counsel was not on notice that Michaud was offering an expert opinion, defense counsel did not make objections, or raised objections on different grounds, from those he would have. In addition, when defense

[6] As to the jurist consulted in the Court of Appeals, the court stated, "I won't say who, but it's a prosecutor." RP 323. Mr. Jenks would respectfully ask that this judicial officer from Division III recuse himself on appeal.

counsel elicited information from Michaud, he did so unaware that the court would later instruct the jury that Michaud was an expert witness. CP 59.

Courts must take special care to distinguish between expert testimony and non-expert testimony provided by police witnesses, due to the concern that "an agent's status as an expert could lend him unmerited credibility when testifying as a percipient witness…" United States v. Torralba-Mendia, 784 F.3d 652, 658 (9th Cir. 2015) (quoting United States v. Vera, 770 F.3d 1232, 1242 (9th Cir. 2014)). This is why clarification is necessary where officers offer both lay and expert witness testimony at trial. "'If jurors are aware of the witness's dual roles,' the jury 'must be instructed about what the attendant circumstances are in allowing a government case agent to testify as an expert.'" Vera, 770 F.3d at 1242 (quoting United States v. Freeman, 498 F.3d 893, 904 (9th Cir. 2007)).

Such confusion between a witness's expert opinion and lay opinion is certain to occur where, as here, Michaud was not in fact qualified as an expert, but the court nonetheless gave an expert witness instruction. This situation exemplifies the Ninth Circuit's concern that a jury will give improper deference to a police witness's testimony as an

expert in matters for which he is not, in fact, qualified to offer expert testimony. See Vera, 770 F.3d at 1246 (had court instructed jury that the officer's lay opinion testimony was "not based on scientific, technical, or other specialized knowledge," it would have deterred jury from viewing his opinions as having the "imprimatur of scientific or technical validity.").

There is good reason for the discovery requirements of CrR 4.7, and for the requirements of expert qualification under ER 701 and 702.[7] These rules prevent situations like this – where the State gains an unfair advantage over the defendant by eliciting testimony from a lay witness, who the court retroactively instructs the jury is an expert. The trial court caused this injustice by instructing the jury sua sponte on expert testimony. This Court should reverse.

2. The trial court violated Mr. Jenks's right to present a defense when it excluded evidence of another suspect.

Mr. Jenks proffered evidence that showed another individual may have committed the robbery of the convenience store. RP 39-42. Jenks argued that there were reports that another suspect with a similar description was wanted in connection with an unsolved robbery of the

coffee shop next door, just two weeks earlier. Id. Jenks argued the police believed there was a connection between the crimes, but that the coffee shop had not been robbed by Jenks. Id. (Jenks was not charged for the "Jitters" café robbery).

Because there was a sufficient nexus between the two individuals, and because evidence of this alternate suspect tended to create a reasonable doubt as to Jenks's guilt, the court's exclusion of the evidence violated Jenks's constitutional right to present a defense.

a. The Sixth and Fourteenth Amendments guarantee an individual the tools necessary for counsel to present an effective defense.

The Sixth and Fourteenth Amendments and Article I, Sections 3 and 22 of the Washington Constitution require an accused be given a meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22; State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v.

[7] Michaud was never specifically qualified as an expert witness under either ER 701 or ER 702.

Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Defendants have the right to present evidence that might influence the jury's determination of guilt. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Absent a compelling justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Crane, 476 U.S. at 690-91 (quoting United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

A trial court's decision to exclude evidence is typically reviewed for abuse of discretion. State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). However, an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. Id. A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Courts must safeguard the right to present a defense "with meticulous care." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (internal quotations omitted). Defense evidence need only be

relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. If evidence is relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process. Jones, 168 Wn.2d at 720; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). "[E]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Courts must consider "other suspect" evidence against this backdrop of the defendant's constitutional right to present a defense. Such evidence alleges that a specific person other than the accused committed the charged crime. State v. Ortuno-Perez, 196 Wn. App. 771, 778, 385 P.3d 218 (2016). "The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime." Franklin, 180 Wn.2d at 381 (quoting State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932)). "[S]ome combination of facts or circumstances must point to a

nonspeculative link between the other suspect and the charged crime." Id. As this Court summarized, "the threshold analysis for 'other suspect' evidence involves a straightforward, but focused, relevance inquiry, reviewing the evidence's materiality and probative value for 'whether the evidence has a logical connection to the crime.'" Ortuno-Perez, 196 Wn. App. at 790 (quoting Franklin, 180 Wn.2d at 381-82).

Courts must focus their inquiry on whether the proffered evidence tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the other suspect's guilt. Franklin, 180 Wn.2d at 381. There is no per se rule against admitting circumstantial evidence of another person's motive, ability, or opportunity to commit the crime. Id. at 373. Rather, "if there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted." Id.

b. The court improperly excluded evidence and argument that an alternate suspect may have committed the robbery of the convenience store.

Ruling in accordance with the State's motion in limine, the court excluded evidence of an alternate suspect in the robbery of the Zip Trip market. CP 47; RP 43-45. The court ruled the evidence of another suspect was too speculative and the nexus between the robbery of the convenience store and the café too tenuous. RP 43. The court made two

findings – that the language used by the two suspects was too generic ("hand over your money or you won't get hurt" or "it's not your money"), and that the methodologies of the robbers differed (the café robber used a mask, while the Zip Trip robber did not). RP 43-45. The court's analysis in light of Franklin and Ortuno-Perez was incorrect.

The defense did not need to prove that someone other than Mr. Jenks robbed the Zip Trip store, but rather that there was evidence of another person's ability to have committed the crime which tended to create reasonable doubt as to Mr. Jenks's guilt. Franklin, 180 Wn.2d at 381. Mr. Jenks had a good faith basis to cross-examine the officers about the robbery of the café – particularly Detective Barrington, who was also investigating that unsolved crime and would have testified that Jenks was not charged with it. RP 42.

Further, Mr. Jenks should have been permitted to argue in closing that the police were still pursuing another suspect in connection with the café robbery, in response to the State's argument in closing, "Who else could it have been?" RP 348. Mr. Jenks was prevented from answering that critical question, due to the court's erroneous ruling on other suspect evidence.

The Supreme Court in Franklin emphasized the proper inquiry is "whether the evidence offered tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the guilt of the third party beyond a reasonable doubt." 180 Wn.2d at 381 (no per se standard). The trial court's ruling excluding alternate suspect evidence conflicts with this clear rule, where the other evidence established an adequate nexus and was relevant.

c. Reversal is required because the State cannot show the error was harmless beyond a reasonable doubt.

Violation of the right to present a defense is constitutional error. Jones, 168 Wn.2d at 724; Franklin, 180 Wn.2d at 382. Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724. Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. The State cannot meet its burden.

This was a one-eye-witness case, where the store clerk was focused on what he believed to be a loaded firearm. Given the weaknesses in the State's case and the cumulative error, as discussed

below, the exclusion of the other suspect evidence was not harmless beyond a reasonable doubt.

This Court should reverse Jenks's conviction and remand for a new trial. Franklin, 180 Wn.2d at 383; Ortuno-Perez, 196 Wn. App. at 801-02.

3. The trial court erroneously excluded critical ER 608 evidence relevant to the sole eye-witness's credibility.

The court erred when it excluded critical impeachment evidence related to store clerk Jeffrey Davila, the only eye-witness to the robbery. Information that Davila had been removed from his previous occupation as a police officer was relevant to his honesty and his credibility as a witness; it was also the only source of impeachment. RP 33-37.

a. A criminal defendant may impeach the credibility of a witness with evidence of the witness's reputation for untruthfulness and with cross-examination about specific instances of untruthfulness.

ER 608 authorizes impeachment of a witness's credibility through evidence of the witness's reputation for untruthfulness, as well as through cross-examination of that witness regarding specific instances of untruthfulness. ER 608 provides, in pertinent part:

> (a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1)

> the evidence may refer only to character for truthfulness or untruthfulness,
>
> ...
>
> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness. ...

A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion but the balance must tip in favor of the defendant in a close case. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

b. The trial court abused its discretion when it erroneously excluded impeachment evidence pertaining to Jeffrey Davila's honesty and credibility.

Mr. Jenks sought to cross-examine store clerk Jeffrey Davila regarding Davila's previous career as a police officer in California. RP 33-37. Jenks was prepared to confront Davila with the disciplinary action which resulted in his being forced to resign from the Culver City Police Department in 2006 – less than ten years before the robbery of the convenience store. Id.

The trial court excluded the evidence, stating Davila's purported misconduct as an officer was too remote in time, and "he was never charged with anything." RP 37. Although the court distinguished the matter from State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), the court's ruling was in error.

In York, the trial court excluded reference to the employment background of the State's primary officer in an investigation. 28 Wn. App. at 34. As with Davila, certain paperwork "irregularities" had led to the officer's termination from a neighboring state's sheriff's department. Id. Although the trial court excluded the subject as a collateral matter, this Court reversed, stating, "The importance of [the officer's] testimony cannot be overstated. He was the only witness to have allegedly seen York sell the marijuana." Id. at 35. As in York, Davila was the only witness testifying to have seen the suspect rob the store; the importance of this witness cannot be overstated. The trial court's concern that Davila had never been criminally charged is without merit; neither was the officer in York charged. Id.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347

(1974). Mr. Jenks sought to impeach the credibility of Davila by cross-examination into specific instances of untruthfulness and misconduct that occurred approximately eight years earlier, while Davila was employed as a police officer.[10]

Pursuant to ER 608(b), specific instances of the witness's past conduct, probative of credibility, may be inquired into during cross-examination of the witness. State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996). "Any fact that goes to the trustworthiness of the witness may be elicited if it is germane to the issue." York, 28 Wn. App. at 36. Specific prior acts of fraud or deception are generally admissible to establish a witness's untruthfulness. See, e.g., State v. Johnson, 90 Wn. App. 54, 71, 950 P.2d 981 (1998).

A trial court abuses its discretion when it excludes evidence of specific instances of untruthfulness when that evidence is the only means of impeachment. "Failing to allow cross-examination of a State's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct is the only available impeachment." State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). Here, Davila,

[10] Davila resigned from the force due to misconduct in 2006; the robbery of the convenience store was in 2014. RP 33-34.

as the complaining witness, was clearly crucial, and there was no alternative impeachment evidence, other than the excluded evidence of his disciplinary records, indicating his history of untruthfulness. Davila was the sole witness to the robbery – a factor favoring admission of the material. Clark, 143 Wn.2d at 766.

Cross-examination into Davila's prior acts of untruthfulness while a disgraced police officer in California was the only evidence available to impeach his credibility. Exclusion of that evidence was an abuse of discretion.

c. The remedy is reversal.

Where a trial court abuses its discretion, reversal is required unless the error is harmless. State v. Gresham, 173 Wn.3d 405, 425, 269 P.3d 207 (2012). The erroneous exclusion of evidence requires reversal where, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

Here, in a one-witness identification case, Davila's identification of Mr. Jenks was critical. Because the case turned on the credibility of Davila alone, the error likely affected the outcome. Reversal is required.

4. The trial court erred by admitted improperly authenticated Facebook images purporting to show the hat used in the robbery.

Over objection, the trial court admitted the State's exhibits 44 and 45, through analyst Michaud. These exhibits purported to be photographs of Mr. Jenks and a woman, taken from a Facebook page that Michaud claimed belonged to Jenks's girlfriend. RP 227-28.

a. Evidence must be properly authenticated before it is admitted at trial.

Before evidence can be admitted at trial, the proponent bears the burden of showing the evidence is what it purports to be. ER 901; In re Det. of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015). This Court reviews the court's admission of evidence for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Authentication is "the act of proving that something ([such] as a document) is true or genuine, esp[ecially] so that it may be admitted as evidence." Sublet v. Maryland, 113 A.3d 695, 709 (Md. 2015) (quoting Black's Law Dictionary 157 (10th ed. 2014)). Authentication prior to admission is "an inherent logical necessity," not "an[] artificial principal of evidence." Id. (quoting 7 J. Wigmore, Evidence § 2129 (Chadbourn

Rev. 1978)) (emphasis and alteration in original). It is integral to establishing the matter's relevancy. Id.

The trial court acts as a critical gatekeeper for authentication because jurors presume extensive information from a physical exhibit, including matters that might simply be implied or might simply be of logical possibility. Sublet, 113 A.3d at 709. Social networking communications present significant issues for authentication because authorship can be easily concealed, accounts can be hacked, individuals may be impersonated, and host companies do not always respond fully to requests for authentication and cannot assure veracity. See, e.g., Sublet, 113 A.3d at 711-14; Mississippi v. Smith, 136 So.3d 424, 432-33 (Miss. 2014); Connecticut v. Eleck, 23 A.3d 818, 822-23 (Conn. App. Ct. 2011); Griffin v. Maryland, 19 A.3d 415, 421-22 (Md. 2011).

"The potential for fabricating or tampering with electronically stored information on a social networking site, . . .poses significant challenges from the standpoint of authentication of printouts of the site." Griffin, 19 A.3d at 422. The ease of fabrication by those accused of crimes, by alleged victims, and by others, requires courts to engage in particular scrutiny of social media evidence. E.g., Smith, 136 So.3d at 433; Eleck, 23 A.3d at 824 (proponent of Facebook evidence must show

that communications derive from particular individual and not just from his or her profile or account).

b. The court erred when it admitted the Facebook exhibits in the absence of proper authentication.

Michaud stated that the Facebook pictures showed Jenks's alleged girlfriend wearing a Chicago Bulls cap resembling the one depicted in the surveillance video. RP 227 ("an associate that I believed was his girlfriend"). Mr. Jenks objected and moved to strike, asking the court to instruct the jury. Id. The court refused the defense request to issue a curative instruction, permitting the State to immediately publish the two photographs, and stating only that the defense had a "standing objection." RP 229.[11]

The State did not present a witness or records from Facebook to authenticate the exhibits, nor was the alleged girlfriend called as a witness to authenticate the photographs.

The State's admission of these unauthenticated Facebook photographs allowed Michaud to bootstrap them onto his flawed

[11] Mr. Jenks objected due to lack of foundation for the suggestion that the holder of the Facebook account was Jenks's girlfriend, and due to the violation of the court's pre-trial order regarding the Chicago Bulls cap. RP 16, 228-29. The court stated, "Move to strike, it's granted." RP 228. This fell far short of instructing the jury to disregard the objectionable testimony.

identification procedure – the selection of one photograph. RP 224-25 (Michaud testified he was trained to "trust but verify" by using social media sites like Facebook). The court's subsequent decision to instruct the jury that Michaud was an "expert" with "special training" compounded the error, legitimizing the conclusory and unscientific research methods. See supra, Sec. 1.

The State did not prove the authenticity of these photographs through Michaud. Although the court was asked to strike the discussion of the Chicago Bulls cap in the admitted photograph, this bell could not be un-rung. Mr. Jenks timely requested a curative instruction, but the court refused to give one, saying, "my mindset is it draws a circle so, we'll address that later." RP 228.

When the defense returned to the request for an instruction regarding the testimony about the Bulls cap, the court again refused. RP 261. The court stated, "Moving to strike is a misnomer." Id. The court indicated that unless the trial error is "really extraordinary," the court believed that issuing a curative instruction to jurors "just draws a big red circle around something we're asking them to not pay attention to." Id. The court denied defense counsel's request to issue a curative instruction

regarding the highly prejudicial testimony regarding the photograph of the woman in the Chicago Bulls cap. Id.

"Once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury." Gresham, 173 Wn.2d at 424-25 (even if defense counsel proposes an incorrect instruction, burden is on court to issue proper cautionary jury instructions). Despite the defense request, the court never instructed the jury to disregard the testimony about the cap. RP 261.

c. Reversal is required.

Evidentiary error is prejudicial if the admission affected the outcome within reasonable probabilities. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The trial court admitted unauthenticated photographs showing an unidentified female wearing a Chicago Bulls cap, which the State's witness testified resembled the cap worn in the robbery. The court then told jurors that the criminal analyst who informed them of the cap's similarity was an "expert" with special training. Because the error affected the outcome, this Court should reverse.

5. Mr. Jenks was denied a fair trial when the court's comment compromised the appearance of fairness and impartiality.

a. A criminal defendant has a due process right to a trial before an unbiased and impartial judge.

Due process guarantees a fair trial free from bias or partiality.[12] Impartial means the absence of bias, either actual or apparent. State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). The right to a fair hearing prohibits actual bias and "'the probability of unfairness.'" Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (quoting In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)).

"The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). Public confidence in the administration of justice requires the appearance of fairness and actual fairness. State v. Dugan, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). The appearance of impartiality is judged from an objective perspective to determine if the court or system's impartiality reasonably might be

questioned by a reasonable person. In re Marriage of Davison, 112 Wn. App. 251, 256, 48 P.3d 358 (2002) (quoting Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

Because a fair trial in a just tribunal is a basic due process right, "every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Murchison, 349 U.S. at 136 (quoting Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927)). Although this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties [,...] to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Id. (quoting Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)).

Mr. Jenks assigns error based upon the violation of his due process right to a fair trial, which can be raised for the first time on appeal. RAP 2.5(a)(3); State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46

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[12] Const. art. I, § 22; U.S. Const. amends. VI, XIV. A fair trial is the most critical right afforded to criminal defendants. Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("No right ranks higher than the right of the accused to a fair trial.").

(2014). The constitutional due process challenge raised here is distinct from the "appearance of fairness doctrine," which is related to due process concerns, but is not constitutional in nature. City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978).

b. The court's comments as to his conference with this Court violated Mr. Jenks's right to trial before an impartial judge and infringed upon the right to appeal.

During oral argument on the proposed jury instructions, the court asked both parties to conduct legal research and try to reach a resolution on the remaining disputed instructions – primarily, the defense objections to the expert witness/specialized training instruction and the lesser included instruction of second degree robbery. RP 319-21. The prosecuting attorney told the court that he would "probably call Brian" to seek legal advice, and after the short recess, confirmed to the court that appellate prosecutor, Mr. O'Brien, had been contacted.[13] RP 322.

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[13] The court thus asked the State to contact the appellate prosecutor: "Will you chat with either Mr. O'Brien or somebody, somebody with a bigger brain than all of us, that can tell us if there's people – one of our colleagues that enjoys reading case law all day and see if they can tell us that we're committing error on the lesser included here." RP 320-21 (emphasis added).

During the same recess, the trial court conducted legal research, as well. RP 322. In addition to looking at case law and commentary, the court said the following in open court:

> Counsel, let me tell you what I've done … Since I was waiting around, I picked up the phone and called one of my colleagues at Division III, not going to say who it was, I'll just say it's a prosecutor. I hope that doesn't give it away. Anyway, I'll go through the instructions and tell you what we're going to do.

RP 322-23 (emphasis added).

The court then proceeded to inform the parties of its decision on the proposed jury instructions, included the two disputed by the defense. Following the phone conference with Division III – the judge who the court identified as a prosecutor – the trial court decided both disputed instructions against Mr. Jenks. RP 323, 325.

The court conducted an ex parte conference with this Court midtrial, essentially seeking an advisory opinion regarding jury instructions. RP 320-21 (court sought to clarify whether "we're committing error on the lesser included here").

The Washington Code of Judicial Conduct (CJC) states that a judge may consult on pending matters with other judges, or with retired judges involved in a mentoring program. CJC 2.9, Ex Parte

Communications, Comment 5 (amended Sept. 1, 2013). Such consultations "must avoid ex parte discussions of a case … with judges or retired judges who have appellate jurisdiction over the matter." Id. at Comment 5. It offends the appearance of fairness for a trial court to ask for advice on a pending case from the same appellate court which will ultimately be asked to review a matter on appeal. Here, the court's actions served to notify Mr. Jenks that the trial court's rulings had been insulated or pre-approved by this Court, chilling the right to appeal.

Finally, the trial court's identification of the Division III jurist as a prosecutor added to the appearance of impropriety and apparent bias. RP 322. In seeking advice from a "prosecutor" and then revealing it in the courtroom, the court failed to "weigh the scales of justice equally between contending parties." Murchison, 349 U.S. at 136. The record reveals that Mr. Jenks, as well as all observers in this open courtroom, ascertained from the court's comments that both the State and the court were being advised by senior prosecutors. RP 322. Mr. Jenks's concerns about the court receiving advice from "a prosecutor" were well-founded, as the court immediately ruled against the defense, after being advised by phone by this Court. RP 323-25.

c. This Court should reverse.

"The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." Madry, 8 Wn. App. at 70. The right to an impartial judge is among the "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 & n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The court's appearance of bias, as well as the chilling of Mr. Jenks's right to appeal in violation of the Code of Judicial Conduct, undermines the fairness and integrity of this trial. Reversal is compelled.

6. The cumulative effect of the above errors denied Mr. Jenks a fair trial.

The due process clauses of the federal and state constitutions provide a criminal defendant the right to a fair trial. U.S. Const. amend. 14; Const. art. I, § 3, 22. The cumulative effect of trial court errors may result in an unfair trial and require reversal, even if each error on its own is harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The cumulative effect of the above trial court errors requires reversal of Mr. Jenks's conviction, in the event this Court concludes that each error examined on its own would otherwise be harmless, or that

some error was improperly preserved. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). This Court has discretion under RAP 2.5(a)(3) to review any inadequately preserved errors and determine if the cumulative effect of incompetent evidence denied the defendant his constitutional right to a fair trial. Id.

In this case, each of the above errors requires reversal, but if but if this Court disagrees, then certainly the cumulative prejudice of the individual errors together denied Mr. Jenks a fair trial. This Court must therefore reverse.

7. The classification of the persistent offender finding as an aggravator or sentencing factor, rather than an element, deprived Mr. Jenks of equal protection of the law.

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, our Supreme Court has declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proved to a jury. State v. Witherspoon, 180 Wn.2d 875, 891-94, 329 P.3d 888 (2014); State v. Langstead, 155 Wn. App. 448, 454-57, 228 P.3d 799, rev. denied, 170 Wn.2d 1009, 249 P.3d 624 (2010).

However, the Washington Supreme Court has held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).[15] While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of "much confusion," the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it "actually alters the crime that may be charged," and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed "sentencing factors," is incorrect.

First, in addressing arguments that one act is an element and another merely a sentencing fact, the U.S. Supreme Court has said that

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[15] In Roswell, the Court considered the crime of communication with a minor for immoral purposes (CMIP), finding proof of a prior conviction functions as an "elevating element," in that it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime. 165 Wn.2d at 191-92. The Roswell Court found this logic applied to felony no-contact order violations, which are misdemeanors unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

"merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. In Recuenco II, the Court noted:

> Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S Ct. 2546, 165 L.Ed.2d 466 *(*2006) (Recuenco II). Beyond its failure to abide the logic of Apprendi, the distinction Roswell draws does not accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

Further, more recently in Alleyne v. United States, the U. S. Supreme Court ruled the facts underlying the imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury. 570 U.S. 99, 103, 133 S.Ct. 2160, 186 L.Ed.2d 314 (2013). The Court found that "facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." Id. at 108.

The Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the penalty for the substantive crime: see RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an element in certain circumstances and an aggravator in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore

where an equal protection challenge is raised, the court will apply a "rational basis" test. Id.

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the POAA as follows:

> to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a Class B felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an

"element" and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an "aggravator" and need only be found by a judge by a preponderance of the evidence.

The recidivist fact here operates in the precise fashion as in Roswell; this Court should hold there is no basis for treating the prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another. This Court should strike Mr. Jenks's persistent offender sentence as violative of his right to equal protection and remand for entry of a standard range sentence.

8. The trial court deprived Mr. Jenks of his right to a jury trial and his right to due process when it imposed a sentence over the maximum term based on prior convictions that were not found by the jury.

Mr. Jenks's sentence as a persistent offender deprived him of his Sixth and Fourteenth Amendment rights to due process and to a jury trial and should be vacated.

The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. It is

axiomatic a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Alleyne, 570 U.S. 99; Blakely, 542 U.S. at 300-01; Apprendi, 530 U.S. at 476-77.

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant. Alleyne, 570 U.S. at 103, 108; Blakely, 542 U.S. at 304. Blakely held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. 542 U.S. at 304-05. Likewise, in Ring, the Court found Arizona's death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey's "hate crime" legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only a preponderance of the evidence. 530 U.S. at 492-93. More recently, in Alleyne, the Court ruled the facts

underlying the imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury, finding "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 550 U.S. at 103.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S., at 476. Ring pointed out the dispositive question is one of substance, not form. "If a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

Mr. Jenks was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase his sentence.

F. CONCLUSION

Mr. Jenks's conviction should be reversed because the trial court violated his right to present a defense, permitted the jury to have access to excluded evidence, and failed to properly issue curative instructions to remedy its errors. In the alternative, Mr. Jenks's life sentence should be vacated and a standard range sentence entered. The case should be remanded for further proceedings.

DATED this 20th day of June, 2018.

Respectfully submitted,

s/ Jan Trasen

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JAN TRASEN (41177)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35427-0-III
	)	
ALAN JENKS,	)	
	)	
APPELLANT.	)	

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[X] ALAN JENKS 871491 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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Washington Appellate Project
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Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

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