

**FILED**

**FEB 23 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29169-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**ROOSEVELT MILLER,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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Dennis W. Morgan    WSBA #5286  
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## **ASSIGNMENTS OF ERROR**

1. The trial court failed to conduct an appropriate comparability analysis with regard to Roosevelt Miller's 1987 Oregon conviction for first degree sodomy.

2. First degree sodomy, as defined by ORS § 163.405(1), is a multi-faceted crime and does not comport with any single sex offense under Washington Law.

3. The prosecuting attorney committed misconduct in closing and rebuttal argument.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Is first degree sodomy, as defined in ORS § 163.405(1), comparable to a single, specific Washington sex offense?

2. In the absence of a comparability analysis should Mr. Miller's offender score be reduced to zero and the case remanded for resentencing?

3. Did the deputy prosecutor commit misconduct when he argued to the jury that they should hold Mr. Miller accountable and/or to send a message to the community?

## STATEMENT OF THE CASE

Tiffanie Tracy was sixteen (16) years old in September 2009. Her birthday is October 2, 1992. (4/6/10 RP 111, ll. 14-15).

Tiffanie was attending Kennewick High School in the Life Skills program. She also works at Bruchi's cleaning tables and washing dishes. (4/6/10 RP 112, ll. 7-15; RP 135, ll. 1-2; RP 136, ll. 4-6).

The Life Skills program is aimed at transitioning developmentally disabled individuals into the community. The hope is that they will have a job and be self supporting. (4/6/10 RP 136, ll. 9-25).

Ms. Tracy has taken tests to determine her IQ and her developmental capabilities. (4/6/10 RP 139, ll. 9-21).

The Vineland Adaptive Behavioral Scales (Vineland) measures communication skills, daily living skills and socialization. These categories have sub-categories. (4/6/10 RP 141, ll. 2-11).

The sub-categories on the communication skills scale for Ms. Tracy are as follows:

Receptive language	4 years 6 months
Expressive language	5 years 9 months
Written language	8 years 6 months

(4/6/10 RP 141, ll. 12-19; RP 142, ll. 19-25).

The daily living skills sub-categories and Ms. Tracy's scores are as follows:

Personal skills	5 years 7 months
-----------------	------------------

Academic skills 8 years 5 months

School/community 5 years 0 months

(4/6/10 RP 143, ll. 5-17; RP 144, ll. 2-6).

Finally, on the socialization category the sub-categories with Ms.

Tracy's scores are follows:

Interpersonal relations 3 years 6 months

Play and leisure time 5 years 10 months

Coping skills 5 years 6 months.

On March 25, 2010 Ms. Tracy was again tested on the Vineland.

The differences in her scores follow:

Communication skills:

Receptive language 6 years 3 months

Expressive language 6 years 10 months

Written language 7 years 0 months

Daily livings skills:

Personal 5 years 2 months

Academic 6 years 11 months

School/community 3 years 0 months

Socialization skills:

Interpersonal relations 3 years 0 months

Play and leisure 3 years 0 months

Coping skills 3 years 8 months

(4/6/10 RP 146, ll. 6-18; RP 148, ll. 17-25; RP 149, ll. 1-5; ll. 17-19)

The IQ test that was administered to Ms. Tracy is the Wechsler Adult Intelligence Scale. Ms. Tracy's scores were:

Verbal	67
Performance	77
Full Scale	69.

Ms. Tracy is considered mentally retarded. (4/6/10 RP 152, ll. 16-19; RP 153, l. 21 to RP 154, l. 3).

Cheryl Garvey, a school psychologist acquainted with Ms. Tracy, opined that she functions at the level of a seven (7) or eight (8) year old. (4/6/10 RP 135, ll. 1-2; RP 150, ll. 16-19).

Ms. Garvey was also of the opinion that Ms. Tracy is not good at making decisions favorable to herself. She is not emotionally mature enough to have a boyfriend. (4/6/10 RP 137, ll. 18-23; RP 157, l. 22 to RP 158, l. 1).

John Rannow is Ms. Tracy's teacher in the Life Skills program. In his opinion Ms. Tracy acts like a four (4) or five (5) year old child around adults. (4/6/10 RP 164, l. 14; RP 165, ll. 7-10; RP 166, ll. 20-22).

Donna Tracy, Ms. Tracy's stepmother, described how she has trouble processing information. She does what she's told; but is socially dependent, trusting and always wants to color or play. (4/6/10 RP 177, ll. 10-13; ll. 16-17, ll. 20-24; RP 179, ll. 18-20; RP 180, ll. 10-17).

During the month of September 2009 Ms. Tracy met Mr. Miller on one of her midnight walks after she snuck out of the house. The next day

she went to visit him at his apartment. (4/6/10 RP 114, ll. 2-10; RP 115, ll. 12-16; RP 116, ll. 12-23; RP 125, l. 23 to RP 126, l. 10).

Mr. Miller allegedly asked Ms. Tracy to be his girlfriend. She came back to his apartment on a Saturday. During this visit Mr. Miller touched her “boobs” and vaginal area. He licked her “boobs” and put his finger in her vagina. (4/6/10 RP 117, ll. 3-6; RP 118, ll. 1-20; RP 119, ll. 4-19).

On a third visit Mr. Miller again licked her boobs and vagina. He also placed his finger and his penis inside her vagina. She did not want this to happen. However, she never told Mr. Miller to stop. (4/6/10 RP 120, ll. 1-6; RP 132, ll. 1-10).

Mr. Miller was interviewed by Detective Littrell of the Kennewick Police Department. The interview was recorded. Mr. Miller stated that he believed that Ms. Tracy was seventeen (17) years old. He admitted he was aware of her disability and that he knew what he did was wrong. (4/6/10 RP 184, ll. 24-25; RP 185, ll. 7-8; RP 187, ll. 17-20; CP 238 *et seq*).

An Information was filed on September 25, 2009 charging Mr. Miller with second degree rape under RCW 9A.44.050(1)(b). (CP 1)

Mr. Miller’s first jury trial ended in a mistrial on February 4, 2010. (2/4/10 RP 300, l. 9 to RP 303, l. 17).

During the jury selection process at Mr. Miller’s first trial defense counsel noted that there were no minorities on the panel. (2/1/10 RP 19, ll. 17-24; RP 20, ll. 2-11).

Prior to jury selection at the second trial defense counsel again raised the issue concerning a need for minority representation in the venire. The trial court scheduled a review hearing on the selection process. (3/11/10 RP 81, ll. 16-23; RP 83, ll. 7-11).

Josie Devlin, the Benton County Clerk, testified about the selection process. The master jury list is computer generated using a random system known as the Mersenne twisted algorithm. (3/25/10 RP 84, ll. 22-23; RP 85, ll. 1-5).

Ms. Devlin had no independent knowledge of the demographics concerning the Benton County population. She had no knowledge of the demographics concerning Benton County voters. (3/25/10 RP 85, ll. 10-13).

The Office of the Administrator of the Courts provides the master jury list to each county. This list is based upon registered voters, individuals with a driver's license and/or an identification card. The technology involved with the selection process is copyrighted and owned by Court-house Technologies. (3/25/10 RP 85, ll. 14-19; RP 86, ll. 3-7).

Defense counsel objected to the introduction of an internet printout on Benton County demographics. The objection was sustained. (3/25/10 RP 88, l. 25 to RP 89, l. 18).

Ms. Devlin could not determine any relationship that might exist between the master jury list and Benton County demographics since nei-

ther race nor sex is included in the information. (3/25/10 RP 90, ll. 4-17; RP 91, ll. 7-16).

There was one Afro-American in the jury venire at Mr. Miller's second trial. (4/5/10 RP 90, ll. 14-22).

Detective Littrell's interview with Mr. Miller was played at trial. It was later admitted as an Exhibit and a transcript was filed with the Clerk. (4/6/10 RP 192, l. 9 to RP 214, l. 17; RP 215, ll. 6-10; CP 238).

During closing argument the deputy prosecutor argued that the jury must hold Mr. Miller accountable. In his rebuttal argument he urged the jury to send a message. The jury found Mr. Miller guilty of second degree rape. (CP 218; 4/7/10 RP 255, ll. 10-16; RP 271, ll. 20-24).

Judgment and Sentence was entered on May 20, 2010. The trial court determined that Mr. Miller's offender score was three. This was based upon a conviction in Oregon for first degree sodomy on August 4, 1987. (CP 316).

Mr. Miller filed his Notice of Appeal on June 15, 2010. An Amended Notice of Appeal was filed on June 17, 2010. (CP 329; CP 333).

On July 12, 2010 Mr. Miller filed a Motion to Modify his Judgment and Sentence with regard to the offender score. He later withdrew the motion. (CP 336).

## SUMMARY OF ARGUMENT

The trial court's failure to conduct a comparability analysis on the Oregon conviction requires a re-sentencing hearing.

The deputy prosecutor's argument to the jury was prejudicial. Mr. Miller is entitled to a new trial.

## ARGUMENT

### A. Comparability Analysis

RCW 9.94A.525 states, in part:

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1)...

(2)...

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. . . .

Mr. Miller was charged with second degree rape under RCW 9A.44.050(1)(b).

RCW 9A.44.050(1) defines second degree rape, in part, as follows:

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

- (a)...
- (b) When the victim is incapable of consent by reason of being physically helpless or mentally incompetent... .

It does not appear from the record that the State presented any documentation to the sentencing court concerning Mr. Miller's first degree sodomy conviction in Oregon.

ORS § 163.405(1) states:

A person who engages in deviate sexual intercourse with another person...commits the crime of sodomy first degree if:

- (a) The victim is subjected to forcible compulsion by the actor;
- (b) The victim is under twelve years of age;
- (c) The victim is under sixteen years of age and is the actor's brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor's spouse;
- (d) The victim is incapable of consent by reason of mental defect, mental incapacity or physical helplessness.

ORS § 163.305(1) defines "deviate sexual intercourse" as meaning:

... Sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another.

The Oregon statute prohibits oral and anal sex. There is no single equivalent statute in the RCWs that matches ORS § 163.405(1) in its entirety.

It appears that RCW 9A.44.050(1)(a) equates to ORS § 163.405(1)(a).

RCW 9A.44.050(1)(b) matches up with ORS § 163.405(1)(d).

RCW 9A.44.073(1), defining rape of a child in the first degree, contains additional elements which do not compare with ORS § 163.405(1)(b).

RCW 9A.44.073(1) defines first degree child rape as follows:

A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and is **not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.**

(Emphasis supplied.)

On the other hand, ORS § 163.405(1)(c) contain elements which differentiate it from RCW 9A.64.020(1)(a) defining the crime of first degree incest.

RCW 9A.64.020(1)(a) provides:

A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as *an ancestor*, descendant, brother, or sister of either the whole or the half blood.

(*i.e.*, lack of age requirement; not limited to oral or anal sex)

The State did not present any underlying factual predicates to indicate which section of ORS § 163.405(1), if any, was violated.

RCW 9.94A.360(3) [now RCW 9.94A.525(3)] provides that out-of-state convictions are classified according to comparable Washington offenses. The sentencing court does this by comparing the elements of potentially comparable offenses. *State v. Ford*, 137 Wn. 2d 472, 479, 973 P. 2d 452 (1999). If there is a comparable offense, the courts must determine whether it is a Class A, B or C felony. *State v. Weiland*, 66 Wn. App. 29, 32, 8031 P. 2d 749 (1892); *see also: State v. Morley*, 134 Wn. 2d 588, 606, 952 P. 2d 167 (1998). The critical determination is under what Washington statute could the defendant be convicted if he or she had committed the same acts in Washington. *State v. McCorkle*, 88 Wn. App. 485, 495, 945 P. 2d 736 (1997), *aff'd* 137 Wn. 2d 490, 973 P. 2d 461 (1999). The purpose of RCW 9.94A.360(3) is to ensure that defendants with equivalent prior convictions are treated the same way regardless of whether those prior convictions were incurred in Washington or elsewhere. *Weiland*, 66 Wn. App at 34.

*State v. Bush*, 102 Wn. App. 372, 377-78, 9 P. 3d 219 (2000).

The State did not give the trial court an opportunity to conduct the required comparability analysis. It is completely unknown what acts Mr. Miller may have committed in the State of Oregon which would suffice to determine if the State of Washington has a comparable offense.

In *State v. Ford*, 137 Wn. 2d 472, 973 P. 2d 452 (1999) the Court conducted a comprehensive evaluation of the State's burden of proof in connection with out-of-state convictions. It held at 479:

If the elements are not identical or if the Washington statute defines the offense more

narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.

The Clerk's papers and transcripts reflect that no comparability analysis was done by the sentencing court. It does not appear that the sentencing court had any information to conduct a comparability analysis.

"The best evidence of a prior conviction is a certified copy of the judgment." *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P. 2d 179 (1994).

As the *Ford* Court noted at 480:

The above underscores the nature of the State's burden under the SRA. It is not overly difficult to meet. The State must introduce evidence of some kind to support the alleged criminal history, including the classification of out-of-state convictions. The SRA expressly places this burden on the State because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove." *In re Personal Restraint of Williams*, 111 Wn. 2d 353, 357, 759 P. 2d 436 (1988).

Even though Mr. Miller did not object to the inclusion of the Oregon conviction in his offender score, he has the right to raise the issue on appeal in accord with the basic principles of due process. *See: State v. Bresolin*, 13 Wn. App. 386, 396, 534 P. 2d 1394 (1975); *State v. Herzog*, 112 Wn. 2d 419, 426, 771 P. 2d 739 (1989); *State v. Ford, supra*, 484-85;

Fourteenth Amendment to the United States Constitution; Const. art. I, §  
3.

**B. Closing Argument**

During closing argument the prosecuting attorney stated:

And that's why ladies and gentlemen, I am asking you to find him guilty. He had sex with this girl who was unable to consent.

Your task is to get this right. I know this is –I know you're going to do the very best job you can in coming to the right decision. You want to serve justice, and sometimes there are competing interests. You have the defendant on one side. You have the need to try to hold people accountable on another side. Your task is to get this right, and the right verdict is to find him guilty.

(4/7/10 RP 255, ll. 7-16).

Then, in his rebuttal argument the deputy prosecutor stated:

Ladies and gentlemen, this was a kid; this was a child. He took advantage of her.

You need to send a message to the defendant saying, “We’re going to hold you accountable. You can’t do that.” That is why you should find him guilty.

(4/7/10 RP 271, ll. 20-24).

Defense counsel did not object to either portion of the deputy prosecutor’s argument.

“Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect”. *State v. Russell*, 125 Wn. 2d 24, 85, 882 P. 2d 747 (1994) (citations omitted). “Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Stith*, [*State v. Stith*, 71 Wn. App. 14, 19, 856 P. 2d 415 (1993)].

*State v. Pastrana*, 94 Wn. App. 463, 478, 972 P. 2d 557 (1999).

The underlying facts of Mr. Miller’s case are fraught with emotional content. The deputy prosecutor improperly used this emotional content when he asked the jury to hold Mr. Miller **accountable**, to **send a message** to him, to do justice, and to make the **right** decision.

There appears to be opposing caselaw on the “sending a message” issue. The two cases of critical importance are *State v. Bautista-Caldera*, 56 Wn. App. 186, 783 P. 2d 116 (1989) and *State v. Greer*, 62 Wn. App. 779, 815 P. 2d 295 (1991).

The *Greer* Court declined to find prosecutorial misconduct based upon the argument that: “I’d ask you to send a clear message out from this box into the community that these two defendants are accountable.”

*State v. Greer, supra, 786.*

On the other hand, the *Bautista-Caldera* Court found the following argument to be improper, but not prejudicial:

*[D]o not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you’re ready to believe them and [e]nforce the law on their behalf.*

*State v. Bautistra-Caldera, supra, 195.*

It is Mr. Miller position that the statements made by the deputy prosecutor during closing and rebuttal arguments were calculated to appeal to the jury’s passion and prejudice. There was no need for such an emotional argument.

## CONCLUSION

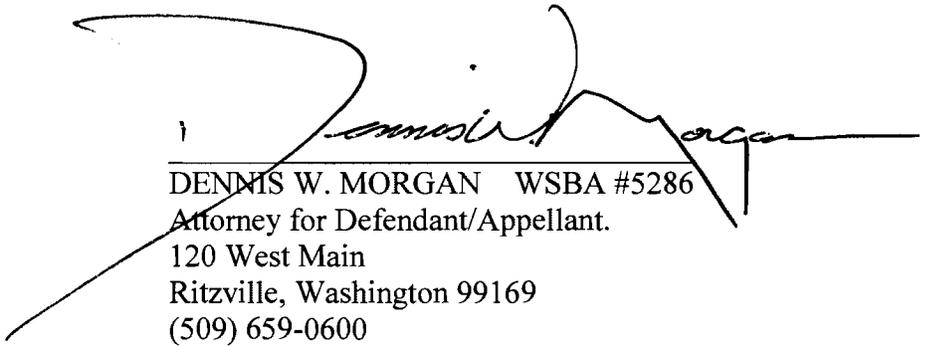
Prosecutorial misconduct in closing and rebuttal argument requires reversal of Mr. Miller’s conviction and remand for a new trial. He was prejudiced by the argument.

The lack of a comparability analysis concerning the Oregon first degree sodomy conviction requires reversal of Mr. Miller’s sentence and

remand for a hearing concerning comparability. *See: State v. Ford, supra,*  
485.

DATED this 22<sup>d</sup> day of February, 2011.

Respectfully submitted,



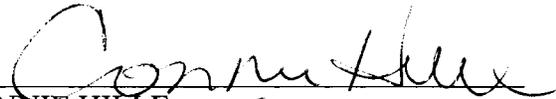
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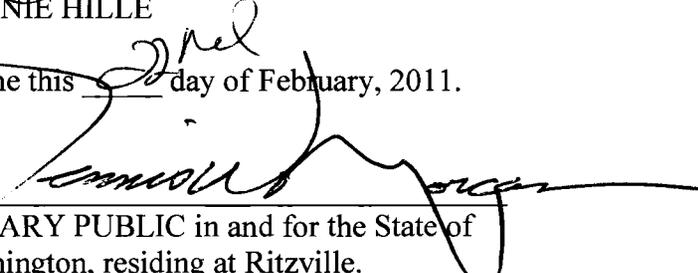
ROOSEVELT MILLER #935078  
Airway Heights Correction Center  
PO Box 2049, Unit TB-37U  
Airway Heights, WA 99001

Containing a copy of the *APPELLANT'S BRIEF*.

  
\_\_\_\_\_  
CONNIE HILLE

SUBSCRIBED AND SWORN to before me this 2nd day of February, 2011.

DENNIS W. MORGAN  
Notary Public  
State of Washington  
My Commission Expires  
December 28, 2013

  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington, residing at Ritzville.  
My commission expires: 12/28/2013.

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**STATE OF WASHINGTON,**

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**ADDITIONAL STATEMENT OF AUTHORITIES**

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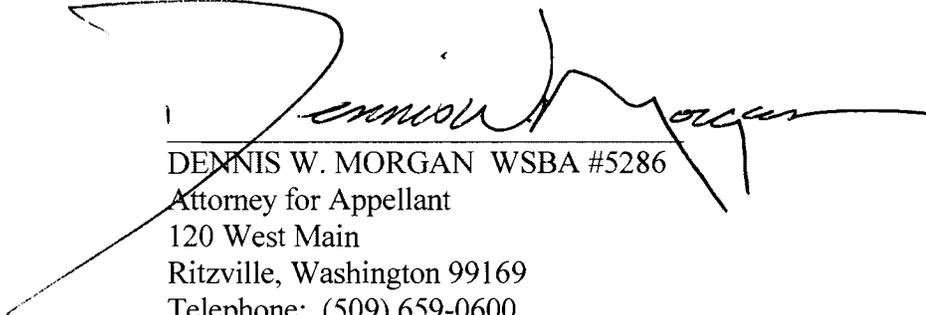
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COMES NOW, ROOSEVELT MILLER, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

*State v. Hunley, slip opinion 39676-9 (May 17, 2011)*  
(constitutional due process requires a prosecuting attorney to establish a defendant's criminal history at sentencing by more than mere assertions or argument).

DATED this 19<sup>th</sup> day of May, 2011.

Respectfully submitted,



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ADDITIONAL STATEMENT OF AUTHORITIES