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No. 36498-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

TEDDY ROOSEVELT SIBLEY,

Appellant.

---

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

---

BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Teddy Sibley and Kara Jo Finley were involved in a romantic relationship. One evening, the two were involved in an argument which resulted in Ms. Finley being hospitalized. Mr. Sibley was charged with several counts of assault. Ms. Finley did not testify at trial.

Ms. Finley's recorded testimonial statements in an open line phone call were admitted at trial over Mr. Sibley's objections. Mr. Sibley is entitled to reversal of his convictions and remand for a new trial for a violation of his right to confrontation.

Mr. Sibley was convicted of second degree assault and two counts of fourth degree assault arising out of one uninterrupted episode involving Ms. Finley. Imposition of the fourth degree assault convictions violated double jeopardy and Mr. Sibley is entitled to have those convictions stricken.

Finally, the imposition of a life term of imprisonment without the possibility of parole violates Mr. Sibley's right to a jury trial, right to proof beyond a reasonable doubt and his right to equal protection.

## B. ASSIGNMENTS OF ERROR

1. In violation of Mr. Sibley's rights under the Confrontation Clause of the United States and Washington Constitutions, the trial court erred in admitting the recorded testimonial statements of Kara Jo Finley.

2. In violation of double jeopardy, the trial court erred in entering convictions for second degree assault and two counts of fourth degree assault for a single assaultive episode involving Ms. Finley.

3. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of a qualifying prior conviction violated Mr. Sibley's right to equal protection.

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

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Confrontation Clause of the United States and Washington Constitutions bars the admission of a declarant's testimonial out of court statements whose primary purpose is to create a substitute for trial testimony. Kara Jo Finley's recorded statements

made during an argument with Mr. Sibley were made with the primary purpose of memorializing for the police the events as they occurred for later use in Mr. Sibley's prosecution. Did the trial court err in admitting the recorded statements in violation of the Confrontation Clause, requiring reversal of Mr. Sibley's convictions and remand for a new trial?

2. Multiple convictions for assault that arise out of a single course of conduct involving the same victim violate the Double Jeopardy Clauses of the United States and Washington Constitutions. Mr. Sibley was convicted of one count of second degree assault and two counts of fourth degree assault of Ms. Finley which arose out of a single course of conduct. Is Mr. Sibley entitled to remand for the trial court to strike the fourth degree assault convictions which violate double jeopardy?

3. 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 more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for

specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions ‘elements,’ requiring they be proven to a jury beyond a reasonable doubt, and in other instances 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 where 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?

4. 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. Sibley’s Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, thus elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

#### D. STATEMENT OF THE CASE

Teddy Sibley and Kara Jo Finley had been involved in a tempestuous on-off romantic relationship. RP 469. Mr. Sibley was the father of Ms. Finley's two young sons. RP 469. On March 22, 2018, Ms. Finley was allowing Mr. Sibley to stay at her residence so he could see his sons. RP 471.

On that date, Jacqueline Finley, Kara Jo Finley's sister-in-law, received a call from Ms. Finley. RP 471. Jacqueline Finley hung up and redialed Kara Jo Finley's number. RP 472. Jacqueline Finley could hear the voices of Mr. Sibley and Kara Jo Finley in the background of the call. RP 472. Jacqueline Finley also heard a baby crying. RP 472. Based upon what she heard, Jacqueline Finley called the police and drove to Kara Jo Finley's house. RP 472-73.

When Jacqueline Finley arrived at Kara Jo Finley's home she met Mr. Sibley on the front porch. RP 474. Jacqueline Finley saw Kara Jo Finley lying on the floor just inside the door. RP 474-76. Despite Mr. Sibley's demand that Jacqueline Finley leave, she continued to argue with Mr. Sibley. RP 474-75.

Jacqueline Finley drove to a neighbor's house and again called the police. RP 477. She returned the house and saw Kara Jo Finley's

daughter from a prior relationship, 13 year-old Zalisa, who appeared to be loading items into a car. RP 479. Mr. Sibley got into the car and drove away with his sons in the car with him. RP 482-83.

Mr. Sibley was stopped by the police at a nearby gas station. RP 618-20. Mr. Sibley was arrested for an outstanding warrant and also for driving with a suspended license. RP 617-23.

Kara Jo Finley was taken to the hospital in Colville where she was treated for fractures of her left tibia and fibula. RP 891.

Unbeknownst to Jacqueline Finley, when she left her house to go to Kara Jo Finley's, her daughter, 16 year-old Elizabeth, heard the open phone line and heard yelling and crying. RP 533. She recognized the voices as Kara Jo Finley and Mr. Sibley. RP 533. Elizabeth Finley took her cellphone and recorded about 12 minutes of the phone call. RP 534. Elizabeth Finley later told her mother about the recording, who provided it to the police. RP 535.

Elizabeth Finley's recording was sent to the Federal Bureau of Investigations (FBI) crime laboratory in Portland. RP 613-14. Justin Lazenby, a digital evidence forensic examiner cleaned up the audio file of Elizabeth Finley's recording and enhanced the voices. RP 597-99.

Mr. Sibley was subsequently charged with two counts of second degree assault, two counts of fourth degree assault (one involving Kara Jo Finley, one involving Zalisa), two counts of first degree kidnapping, one count of felony harassment, a count of interfering with reporting, one count of reckless endangerment, and one count of third degree driving while license suspended. CP 120-26.

Prior to trial, the State sought admission of the recording of the phone call. CP 33-34, 61-63, 287 (Exhibit 40), 290 (Exhibit 88); RP 248-62. The State contended that the recording did not violate the Privacy Act, and since it dealt with an emergency, it did not violate the Confrontation Clause. CP 33-34; RP 249-59. Mr. Sibley objected to the admission, arguing among other reasons why the recording should not be admitted, that it violated Mr. Sibley's right to confrontation under *Crawford v. Washington*.<sup>1</sup> RP 252-58. The trial court agreed to admit the recording:

Now, this is maybe a little closer question than it appears at first glance. Because I think the -- the weight of authority under 9.73 would say that this is one of those emergent circumstances, because I think we look at it in the eye of the caller. And everything that I'm hearing -- again, without having been there or seeing any of the tapes or -- listening to any of the tapes or seeing any -- photographs -- are that this is the complaining witness

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<sup>1</sup> 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

making a recording of a conversation or communication,  
wire communication, of an emergency nature -- fire,  
medical emergency, crime.

...  
So, -- [it] will be admissible.

RP 259-62. The recording and the enhanced recording were admitted and played for the jury. CP 287 (Exhibit 40), 290 (Exhibit 88); RP 537, 598-600, 610.

At the conclusion of the trial, Mr. Sibley was acquitted of the one of the second degree assault counts, and found guilty of the lesser degree offense of fourth degree assault. CP 209. He was also acquitted of the kidnapping counts and the interfering count. CP 212, 217-20. Mr. Sibley was convicted of the remaining second degree assault count, and all of the remaining counts. CP 210-11, 213-16, 221-25.

At sentencing, the trial court found that Mr. Sibley had two prior qualifying convictions, found him to be a persistent offender, and imposed a life without the possibility of parole sentence. CP 231-35; RP 1193-95.

E. ARGUMENT

**1. Ms. Finley’s recorded testimonial statements were admitted in violation of the Confrontation Clause.**

*a. Admitting testimonial hearsay statements in the absence of cross-examination violates the Confrontation Clause.*

The Sixth Amendment to the United States Constitution guarantees an accused person the right to confront adverse witnesses. U.S. Const. Amends. VI. “The Confrontation Clause . . . is binding, and we may not disregard it at our convenience.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325, 129 S.Ct. 2527, 174 L Ed. 2d 314 (2009). The Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 53-54.

A claim of a violation of the confrontation clause is reviewed *de novo*. *State v Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

*b. Ms. Finley’s statements on the audio recording were testimonial.*

A statement is testimonial if made to establish or prove some fact or if a reasonable person in the declarant’s position would anticipate that his or her statement would be used against the accused in investigating or prosecuting a crime. *Crawford*, 541 U.S. at 51-52;

*State v. Hart*, 195 Wn.App. 449, 459, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017).

A testimonial statement “is designed to establish or prove some past fact, or is essentially a weaker substitute for live testimony at trial.” *State v. Wilcoxon*, 185 Wn.2d 324, 334, 373 P.3d 224 (2016). Such a statement is “the functional equivalent of in-court testimony.” *Id.* A statement is testimonial when, “in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.” *Ohio v. Clark*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015) (alteration in original), *quoting Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) “[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individual’s statements and actions and the circumstances in which the encounter occurred.” *Id.* at 360.

Statements not made to law enforcement are testimonial when their primary purpose is as a substitute for trial testimony. *State v. Scanlan*, \_\_\_ Wn.2d \_\_\_, 2019 WL 3484283, at \*6 (8/1/2019).

Under the primary purpose test, courts objectively evaluate the circumstances in which the encounter

occurs, as well as the parties' statements and actions. *Bryant*, 562 U.S. at 359, 131 S.Ct. 1143. The Court has variously declared that a statement is testimonial if its primary purpose was "to establish or prove past events potentially relevant to later criminal prosecution," *Davis*, 547 U.S. at 822, 126 S.Ct. 2266, "to investigate a possible crime," *id.* at 830, 126 S. Ct. 2266, "to create a record for trial," *Bryant*, 562 U.S. at 358, 131 S.Ct. 1143, or to "creat[e]" or "gather[ ] evidence for ... prosecution," *Clark*, 135 S. Ct. at 2181, 2183. "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 135 S. Ct. at 2180 (alteration in original) (quoting *Bryant*, 562 U.S. at 358, 131 S.Ct. 1143).

*Id.*

Whether a statement is admissible as an exception to the hearsay rule is of no moment to the confrontation clause. *See Crawford*, 541 U.S. at 61 (even hearsay with an applicable exception is inadmissible in violation of the clause if it is *testimonial* hearsay). A Confrontation Clause analysis is separate from analysis under the rules of evidence. *Crawford*, 541 U.S. at 51.

Ms. Finley's phone call to her sister-in-law was essentially a call for help; Ms. Finley impliedly asked that the police be called to intervene. Under the primary purpose test, Ms. Finley's describing what was happening was a memorialization of the events unfolding

thus, they were the functional equivalent of in-court testimony against Mr. Sibley, and as such testimonial and inadmissible.

The trial court noted this point and questioned the prosecutor about it:

THE COURT: And to the extent that -- *she's obviously recording for the purpose of memorializing what occurs -- for law enforcement, presumptively* -- and there are statements on there which implicate Mr. Sibley. Why wouldn't that implicate *Crawford*.

RP 256 (emphasis added). The State's answer did not address the confrontation issue, instead noting Ms. Finley's statements were excited utterances and there was an on-going emergency. RP 256-57.

Ms. Finley's primary purpose in phoning Jacqueline Finley during her argument with Mr. Sibley was to memorialize the events happening for the police and that her statements would be used against Mr. Sibley in investigating or prosecuting a crime arising out of the actions on that night. *Scanlan*, \_\_\_ Wn.2d \_\_\_, 2019 WL 3484283, at \*6. Plainly her statements were testimonial and their admission violated Mr. Sibley's right to confrontation. *Clark*, 135 S.Ct. at 2180.

c. *Washington's Privacy Act does not create an exception to the Confrontation Clause.*

The trial court relied on RCW 9.73.030 and the Privacy Act to find the recording was admissible and did not violate the Confrontation Clause. RP 259-60. The court was persuaded that the portion of the Act dealing with recordings of an emergency nature that deal with threats authorized admission. RP 259-60. But, the Privacy Act is not a statutory basis for *admission* of statements, it is one of *exclusion*. The trial court's reliance on the Privacy Act failed to appreciate and overcome the violation of Mr. Sibley's rights to confrontation.

The Privacy Act bars the recording of conversations absent the consent of all parties. RCW 9.73.030(1). The statute provides an exception to this rule where:

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

RCW 9.73.030(2). But this merely excuses the recording of the phone call in the absence of consent of all the parties. It is not an exception to the hearsay rule nor does it provide a basis for ignoring the Confrontation Clause.

The court also relied upon *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and that portion dealing with on-going emergencies. But *Davis* and its progeny deal with whether a statement is testimonial and applies only to police interrogations. The recording here was of private parties and the police were not involved, hence *Davis* did not provide a basis to admit the recording. The proper test was the primary purpose test which the trial court did not use in analyzing this issue. *Clark*, 135 S. Ct. at 2180.

*d. The error in admitting Ms. Finley's statements was not harmless.*

Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error test. *Lilly v. Virginia*, 527 U.S. 116, 139-40, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009). A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *Chapman v.*

*California*, 386 U.S. 18, 21–22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967);  
*State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Ms. Finley did not testify at trial, thus very little is known of what occurred that night. The record establishes she suffered injuries as evidenced by the testimony of Jacqueline Finley, the police officers and physicians that examined and treated her. How she came to have those injuries is only established by her statements on the recording. For example, during closing argument, the prosecutor stressed the importance of the recording:

And we know that this was harmful or offensive because she was crying -- You heard her voice in the 9-1-1 call, how hysterical she was, and she repeatedly said, "I'm in pain." This was harmful or offensive. And you heard her voice even in the call that Summer Finley recorded, high pitched, but trying to talk to this man, trying to placate him, -- at the same time, -- scared, fearful.

RP 1081.

Ms. Finley's recorded statements provided a critical part of the evidence against Mr. Sibley. The State cannot prove beyond a reasonable doubt that Mr. Sibley's convictions were not attributable to the court's error in admitting these recorded statements. The error was not harmless and Mr. Sibley's convictions must be reversed and remanded for a new trial.

**2. The second degree assault conviction and fourth degree assault convictions constituted a single course of conduct, thus imposition of the fourth degree assault convictions violated double jeopardy.**

The jury found and the trial court imposed a second degree assault conviction and two fourth degree assault convictions for the episode involving Kara Jo Finley. Since all of these convictions involve the same victim and arise out of a single course of conduct, imposition of all three convictions violates double jeopardy. This Court must strike the two assault four convictions.

*a. Multiple punishment for the same offense violates double jeopardy.*

Under the Double Jeopardy Clause of the Fifth Amendment, no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend V.<sup>2</sup> Washington Constitution article I, section 9 similarly guarantees that, “No person shall ... be twice put in jeopardy for the same offense.” “The federal and state [double jeopardy] provisions afford the same protections and

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<sup>2</sup> The Double Jeopardy Clause of the Fifth Amendment was made applicable to the states through the due process clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), *overruled on other grounds sub nom. Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

are identical in thought, substance, and purpose.” *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006) (alteration in original) (internal quotation marks omitted), quoting *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000). Thus, the Double Jeopardy Clauses protect a defendant against multiple punishments or repeated prosecutions for the same offense. *United States v. Dinitz*, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

“[I]n order to resolve whether double jeopardy principles are violated when a defendant is convicted of multiple violations of the same statute, a court must determine what “unit of prosecution” the legislature intends to be the punishable act under the statute.” *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728, 732 (2005). The unit of prosecution for a crime may be an act or a course of conduct. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225-26, 73 S.Ct. 227, 97 L.Ed. 260 (1952); *State v. Root*, 141 Wn.2d 701, 710, 9 P.3d 214 (2000).

If the Legislature fails to define the unit of prosecution for an offense, or its intent is unclear, under the rule of lenity any ambiguity must be “resolved against turning a single transaction into multiple

offenses.” *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998), quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-22.

Violations of double jeopardy are reviewed *de novo*. *State v. Villanueva–Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014).

*b. Imposition of multiple convictions for second degree assault and fourth degree assault that constituted a single course of conduct violates double jeopardy.*

Assault is “a course of conduct crime,” rather than a separate act offense. *Villanueva-Gonzalez*, 180 Wn.2d at 982. Multiple convictions for assault that arise out of a single course of conduct violate double jeopardy. *Villanueva-Gonzalez*, 180 Wn.2d at 984-85. Multiple assaultive acts involving the same parties and occurring in a short time frame are considered a single assault. *Id.* at 985. This “helps to avoid the risk of a defendant being ‘convicted for every punch thrown in a fistfight.’ ” *Id.*, quoting *State v. Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999).

In *Villanueva-Gonzalez*, the defendant was convicted of one count of second degree assault and one count of fourth degree assault. The defendant’s girlfriend returned from a night out and went into their children’s bedroom. *Villanueva-Gonzalez*, at 978. *Villanueva-Gonzalez* told her to get out of the bedroom. *Id.* When the girlfriend did not

comply, he pulled her out of the room. *Id.* He then hit her head with his forehead, breaking her nose and causing blood to run down her face. *Id.* Mr. Villanueva-Gonzalez grabbed his girlfriend by the neck and held her against a piece of furniture so that it was difficult for her to breathe. *Id.* Mr. Villanueva-Gonzalez was convicted of second degree assault based on the head butt and fourth degree assault based on strangulation. *Id.* at 978-79.

On appeal, Mr. Villanueva-Gonzalez argued the two convictions arose out of a single course of conduct, thus imposition of the two convictions for the same offense violated double jeopardy. *Villanueva-Gonzalez*, 180 Wn.2d at 979. Finding the definition of assault ambiguous, the Supreme Court applied the rule of lenity and held that “assault should be treated as a course of conduct crime until and unless the legislature indicates otherwise.” *Id.* at 984. The Court refused to adopt a bright-line rule for determining when multiple acts of assault constitute one course of conduct, instead taking a number of factors into account, including:

The length of time over which the assaultive acts took place,

Whether the assaultive acts took place in the same location,

The defendant's intent or motivation for the different assaultive acts,

Whether the acts were uninterrupted or whether there were any intervening acts or events, and

Whether there was an opportunity for the defendant to reconsider his or her actions.

*Villanueva-Gonzalez*, 180 Wn.2d at 985. “[No] one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors.” *Id.*

*c. The two convictions for second degree assault were the result of a single course of conduct.*

The record established the assault took place in the same place, in a relatively short period of time; approximately 15-30 minutes. Mr. Sibley's intent appears to be the same and there was no intervening period, the actions appearing to occur in a single uninterrupted time frame. There appears from the record there was no opportunity for Mr. Sibley to reconsider his actions. Thus, as in *Villanueva-Gonzalez*, the assaults arose out of a single course of conduct.<sup>3</sup>

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<sup>3</sup> Mr. Sibley foresaw this issue pretrial and, citing *Villanueva-Gonzalez*, noted the multiple charged counts of assault arising out of the same incident and involving the same victim raised double jeopardy concerns. RP 181-88.

The record established the assault took place in the same place, in a relatively short period of time; approximately 15-30 minutes. Mr. Sibley's intent appears to be the same and there was no intervening period, the actions appearing to occur in a single uninterrupted time frame. There appears from the record there was no opportunity for Mr. Sibley to reconsider his actions.

Mr. Sibley's actions are extremely similar to the facts of

*Villanueva-Gonzalez*:

Applying those factors to this case, we find that Villanueva-Gonzalez's actions constituted one course of conduct. First, the assaultive actions for which he was charged—head butting the victim and then grabbing her neck and holding her against some furniture—took place in the same location. Second, the record implies (although does not clearly state) that the actions took place over a short time period, and there is no indication in the record of any interruptions or intervening events. Similarly, there is no evidence that would suggest that he had a different intention or motivation for these actions or that he had an opportunity to reconsider his actions. Based on the evidence in the record before us, we conclude that Villanueva-Gonzalez's actions constituted a single course of conduct.

*Villanueva-Gonzalez*, 180 Wn.2d at 985-86.

Given the similarity between *Villanueva-Gonzalez* and Mr. Sibley's actions, imposition of all three assault convictions which arose out of a single course of conduct violated double jeopardy.

*d. Mr. Sibley is entitled to vacation of the fourth degree assault convictions involving Kara Jo Finley.*

When a court finds convictions for two offenses violate the double jeopardy proscription against multiple punishments it must vacate one of the convictions. *State v. Turner*, 169 Wn.2d 448, 463–66, 238 P.3d 461 (2010); *State v. Davis*, 177 Wn.App. 454, 465 n.10, 311 P.3d 1278 (2013), *review denied*, 179 Wn.2d 1025 (2014). Thus, since the two fourth degree assault convictions violate double jeopardy, this Court must vacate these fourth degree assault convictions.

**3. The classification of the Persistent Offender finding as an “aggravator” or “sentencing factor,” rather than as an “element,” deprived Mr. Sibley of the 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, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 541 U.S. 909 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

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). 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 *Roswell* 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 neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the United States Supreme Court has said “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 v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court has also 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). Beyond its failure to abide by 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.

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes (CMIP). *Id.* at 191. The Court found that in the context of this and related offenses,<sup>4</sup> proof of a prior conviction functions as an “elevating element,” i.e., it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. *Id.* at 191-92. Thus, *Roswell* found it significant that the fact altered the maximum possible penalty from one year to five. *See* RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross

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<sup>4</sup> Another example of this type of offense is violation of a no-contact order, which is a misdemeanor 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).

misdemeanor unless the person has a prior conviction, in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to *Blakely*, the “maximum punishment” is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In all other circumstances “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3<sup>5</sup> would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See Washington Sentencing Guidelines Commission, *Adult Sentencing Manual 2008*, III-76. The “elevation” in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the “elements” of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which

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<sup>5</sup> Because the offense is elevated to a felony based upon a conviction of a prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have a score lower than 3.

actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, 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), *abrogated by, Apprendi*, 530 U.S. at 476-77. 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 Persistent Offender Accountability Act (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 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.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person’s only felony and thus results in a “maximum sentence” of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for

immoral purposes.” 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction - the prior offense merely alters the maximum punishment to which the person is subject. *Id.* So, too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Because 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. The trial court violated Mr. Sibley’s right to equal protection.

**4. The judicial finding that Mr. Sibley had suffered a qualifying conviction which rendered him a Persistent Offender violated his rights to a jury trial and to due process.**

The Due Process Clause of the Fourteenth Amendment 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. amend. VI. 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 v. United States*, 570 U.S. 99, 111-15, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77; *State v. Allen*, 192 Wn.2d 526, 534, 431 P.3d 117 (2018).

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 or the mandatory minimum. *Alleyne*, 570 U.S. at 112-15; *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. *Id.* at 304-05; see *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

In *Alleyne*, the Supreme Court ruled the facts underlying the imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury, ruling that “the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum.” 570 U.S. at 111.

Finally, the Supreme Court has recognized that the jury’s traditional role in determining the degree of punishment included setting fines, and concluded that under *Apprendi*, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. *Southern Union Co. v. United States*, 567 U.S. 343, 359, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrarily labeling facts as “sentencing factors” or “elements” was meaningful. “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. A judge may not impose punishment based on judicial findings. *Alleyne*, 570 U.S. at 112-15; *Blakely*, 542 U.S. at 304-05.

As noted above, the Washington Supreme Court has embraced this principle in *Roswell*: 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.” *Roswell*, 165 Wn.2d at 192; *see also Allen*, 192 Wn.2d at 534. And since the prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* does not apply. *Id.* at 193 n.5. Thus, under *Alleyne*, *Blakely*, *Apprendi* and *Roswell*, the judicial finding of Mr. Sibley’s prior conviction and the fact he qualified as a persistent offender violated his right to due process and right to a jury trial.<sup>6</sup>

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<sup>6</sup> *But see Allen*, 192 Wn.2d at 537 (“It remains true that proof of a prior conviction does not require trial-like procedures or proof beyond a reasonable doubt.”); *State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014) (“Like *Blakely*, nowhere in *Alleyne* did the Court question *Apprendi*’s exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise. Accordingly, *Witherspoon*’s argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported.”).

F. CONCLUSION

For the reasons stated, Mr. Sibley asks this Court to reverse his convictions and remand for a new trial. Alternatively, he would ask that two of his fourth degree assaults be stricken. Finally, Mr. Sibley asks that his life imprisonment without the possibility of parole sentence be reversed and remand for imposition of a standard sentence.

DATED this 12<sup>th</sup> day of August 2019.

Respectfully submitted,

*s/Thomas M. Kummerow*

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 36498-4-III
v.	)	
	)	
TEDDY SIBLEY,	)	
	)	
Appellant.	)	

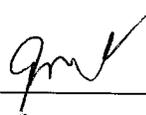
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