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NO. 37153-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH HARPER,  
Appellant.

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

Spokane County Cause No. 17-1-04571-32

The Honorable John O. Cooney, Judge

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BRIEF OF APPELLANT

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Prosecutorial misconduct deprived Mr. Harper of his Sixth and Fourteenth Amendment right to a fair trial.
2. Mr. Harper was prejudiced by prosecutorial misconduct during closing argument.
3. The prosecutor's misconduct was flagrant and ill-intentioned.

**ISSUE 1:** A prosecutor commits misconduct by misstating the law to the jury during argument. Did the prosecutor at Mr. Harper's trial commit misconduct by incorrectly informing the jury that it did not need to conclude that Mr. Harper had intended to injure the alleged victim in order to find him guilty of first-degree assault?

**ISSUE 2:** A prosecutor commits misconduct by "testifying" to "facts" that have not been admitted into evidence during closing argument. Did the prosecutor commit misconduct at Mr. Harper's trial by telling the jury that his psychological diagnosis means that he is a "difficult person" when no evidence to that effect had been admitted at trial?

4. The trial court erred by admitting evidence of uncharged misconduct that was inadmissible under ER 404(b).
5. Mr. Harper was prejudiced by the improper admission of evidence that was inadmissible under ER 404(b).

**ISSUE 3:** ER 404(b) bars the admission of evidence of uncharged misconduct when offered "to show action in conformity therewith." Did the trial court err by admitting evidence of extensive uncharged property damage by Mr. Harper when the state chose not to file any charges based on that alleged conduct and the only potential relevance of the evidence was to encourage an improper propensity inference?

6. The cumulative effect of the errors at Mr. Harper's trial deprived him of his Sixth and Fourteenth Amendment right to a fair trial.
7. The cumulative effect of the errors at trial requires reversal of Mr. Harper's convictions.

**ISSUE 4:** The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. Harper’s convictions when those errors worked together to encourage the jury to convict based on improper considerations and a misstatement of the law?

8. The trial court erred in finding Mr. Harper’s prior conviction for second degree robbery was a most serious offense.
9. The trial court exceeded its statutory authority when it found Mr. Harper to be a persistent offender and imposed a sentence of life without the possibility of parole.
10. The trial court erred in failing to find the Legislature's 2019 amendment to the Persistent Offender Accountability Act (POAA) applied to Mr. Harper’s sentencing.

**ISSUE 5:** Amendments to existing statutes apply prospectively to cases pending on appeal when the “triggering event” for the statute occurs after it becomes effective. Did the trial court err by concluding that a 2019 amendment eliminating second degree robbery from the offenses that qualify for a persistent offender sentence did not apply to Mr. Harper’s case when it became effective before the “triggering event” of his sentencing?

**ISSUE 6:** Amendments to existing statutes apply retroactively where the amendment reduces the maximum punishment for an offense. Did the trial court err by concluding that a 2019 amendment eliminating second degree robbery from the offenses that qualify for a persistent offender sentence did not apply to Mr. Harper’s case when it reduces the maximum punishment for that offense?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Joseph Harper was a heavy user of methamphetamine. RP 486, 840. At least three psychological experts concluded that he suffered from a methamphetamine-induced psychosis, causing him to genuinely believe that local women, including his estranged wife, were in danger of being subjected to sex trafficking and rape. RP 869, 873, 934, 953, 955; CP 14.

Specifically, Mr. Harper believed that his wife was being subjected to sex trafficking and assault during her work at Dairy Queen. RP 812-13, 869, 873. One day, after he believed that God had told him to go and save his wife, Mr. Harper ran to the Dairy Queen, flagged down police, and asked them to go inside and help his wife. RP 388, 812-15.

After determining that Mr. Harper's wife was not truly at risk, the police left. RP 394-96. But Mr. Harper still believed she was in danger. RP 817. He thought that his wife had not told the police the truth because they had questioned her in front of her abusers. RP 816.

After unsuccessfully soliciting the help of the police, Mr. Harper believed that he needed to take matters into his own hands. RP 817-18. He banged on the Dairy Queen windows. RP 818. He got into his wife's car and drove erratically through the Dairy Queen parking lot, purposefully hitting some cars in the process. RP 818-21. Specifically, he thought that a

white van with Idaho plates was there to traffic his wife to Idaho. RP 818-19. Believing that that would be impossible if he destroyed the van, he hit the van intentionally with his wife's car. RP 818-19.

Mr. Harper frantically drove back and forth across the street to a convenience store parking lot too. RP 819-21. He believed that he needed to take any action necessary to get the attention of his wife, other citizens, and the authorities, in order to save her. RP 821-22.

Again, psychologists – included one who testified for the state – believed that Mr. Harper's delusional beliefs were genuine. RP 869, 873, 934, 953, 955; CP 14.

When Kelly Krebs pulled into the convenience store and asked Mr. Harper what he was doing, Mr. Harper felt threatened. RP 554, 821. Mr. Harper slowly backed into Mr. Krebs's car and then drove back across the street to the Dairy Queen parking lot. RP 555-56.

Mr. Krebs took out a stun gun and "sparked" it at Mr. Harper. RP 557. Then he got out of his car and followed Mr. Harper on foot, videotaping his actions and telling him that he was going to be put in jail. RP 557-58, 581. Mr. Harper tried to drive around Mr. Krebs to continue what he was doing, and Mr. Krebs eventually went back across the street. RP 821.

But Mr. Krebs thought that Mr. Harper was trying to hit him with his car. RP 559-62. Even so, he continued videotaping Mr. Harper and taunting him. RP 561. Mr. Krebs did not run away when Mr. Harper drove near him again later. RP 568.

Eventually, the police showed up again. RP 823. Mr. Harper attempted to direct them toward the Dairy Queen to get them to “save” his wife. RP 823. But, once the officers approached Mr. Harper, he delusionally believed them to be demons and sped off in the car. RP 823.

After being chased by the police, Mr. Harper crashed the car and was taken to the hospital. RP 709, 823-25.

At the hospital, Mr. Harper did not believe that the medical staff was trying to help him or that the hospital was real. RP 829-30. He thought that they were trying to hurt him and to harvest his organs. RP 829-31. Mr. Harper told them that he did not think they were real and that he did not want their help. RP 830.

Finally, when a medical worker tried to insert an IV, Mr. Harper grabbed him by the throat to prevent it from happening. RP 604.

The state charged Mr. Harper with taking of a motor vehicle for taking his estranged wife’s car, first-degree assault for allegedly driving toward Mr. Krebs, attempting to elude the police, and third-degree assault for grabbing the medical worker by the neck. CP 1-2.

At trial, Mr. Harper objected to the admission of evidence regarding his erratic driving and the property damage he caused in the Dairy Queen and convenience store parking lots. RP 468. He pointed out that the state had not charged him with any crime for those actions and that the evidence was not relevant to any of the charges against him. RP 468.

But the court admitted the evidence over his objection. RP 470-71 477-78, 500, 506-07, 509, 533, 539. The court reasoned that the evidence was admissible to show that Mr. Harper had exerted unauthorized control over his wife's car. RP 471. The court also appeared to accept the state's argument that the evidence that Mr. Harper had committed those uncharged acts was relevant to show that he had acted intentionally when he committed the offenses with which he was charged. *See* RP 469.

Accordingly, numerous witnesses were permitted to testify regarding the property damage Mr. Harper caused to the cars in the parking lots and a trash can belonging to the Dairy Queen. RP 477-78, 500, 506-07, 509, 533, 539. The court also allowed witnesses to testify that the employees inside the Dairy Queen were afraid for their safety because of Mr. Harper's uncharged misconduct. RP 522-23, 526, 529.

Also over Mr. Harper's objection, the court allowed the state to introduce photographs showing the extent of the uncharged damage that

Mr. Harper had caused and videos showing the reaction of the people inside the Diary Queen. RP 506-07, 529, 545, 570-71; Ex. 3, 4, 9-17.

Mr. Harper testified at trial. RP 811-62. He admitted to taking his wife's car and to driving away from the police but explained that he had thought that his actions were necessary to protect his wife and himself. RP 818-19, 823-24. He claimed that he had never tried to hit Mr. Krebs with the car but had been trying to go around him. RP 821. He said that he did not remember the medical worker whose neck he had allegedly grabbed but explained that he had felt like he needed to fight for his life while he was at the hospital and that he did not want any medical treatment while he was there. RP 831-32.

During closing argument, the prosecutor told the jury that it did not need to find that Mr. Harper had intended to hurt Mr. Krebs in order to find him guilty of first-degree assault:

[I]t is not necessary to inflict bodily harm and the actor, *meaning Mr. Harper, doesn't need to actually intend to inflict bodily injury. What he intends to do is to create in another apprehension and imminent fear of bodily injury, which is what you witnessed there.* And so based upon their interaction, ladies and gentlemen, ....Mr. Harper did intend to assault Mr. Krebs that night, and the State has proven that beyond a reasonable doubt.  
RP 1052 (emphasis added).

During trial, the state elicited evidence that Mr. Harper had been diagnosed with Antisocial Personality Disorder. RP 932-33, 947-48. The

court barred any testimony, however, regarding the details of the diagnosis or the reasons behind it. RP 947-48.

Even so, the state argued during closing that experts had concluded that Mr. Harper was a psychologically “difficult person”:

But what you also have to understand is that across five separate evaluations, the other consistent has been the antisocial personality diagnosis.

...

Antisocial personality, a difficult person, difficult to deal with. And that's what we've got here, a difficult person who didn't want to have to deal with the break-up of his marriage ... RP 1054.

The jury found Mr. Harper guilty of each charge. CP 160-63. Mr. Harper was sentenced as a persistent offender to a period of life in prison without the possibility of release based on the conclusion that he had two prior convictions for “strike” offenses, one of which was a conviction for second-degree robbery. CP 296, 300.

This timely appeal follows. CP 309.

## **ARGUMENT**

### **I. PROSECUTORIAL MISCONDUCT DEPRIVED MR. HARPER OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor’s misconduct warrants reversal, the court looks at its

prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during closing argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Even absent an objection below, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Id.* at 707.

The prosecutor committed misconduct during closing argument at Mr. Harper's trial by misstating the law to the jury on a critical legal issue and "testifying" to "facts" that encouraged an improper propensity

inference and which had not been admitted into evidence. This misconduct requires reversal of Mr. Harper's convictions.

**A. The prosecutor committed misconduct at Mr. Harper's trial by misstating the law to the jury on the critical issue of the intent element of First-Degree Assault.**

In order to convict Mr. Harper of First-Degree Assault against Mr. Krebs, the state was required to prove beyond a reasonable doubt that he had intended to inflict great bodily harm. RCW 9A.36.011.

This was the primary issue for the jury regarding that charge (the most serious charge in the case) because, though video footage purported to show Mr. Harper driving toward Mr. Krebs, Mr. Harper adamantly denied that he had intended to hit Mr. Krebs or to cause him any harm. RP 821.

The requirement that the jury hold the state to its burden of proof regarding the intent element of the first-degree assault charge was particularly important given that Mr. Harper had admitted to intentionally hitting Mr. Krebs's car earlier during the interaction. RP 843. Without the application of the element requiring proof of intent to inflict substantial bodily harm, the jury could have incorrectly concluded that that admission provided proof of guilt on the first-degree assault charge.

Even so, the prosecutor told the jury during closing argument that conviction was required even if Mr. Harper did not intend to inflict injury:

...it is not necessary to inflict bodily harm and the actor, *meaning Mr. Harper, doesn't need to actually intend to inflict bodily injury. What he intends to do is to create in another apprehension and imminent fear of bodily injury, which is what you witnessed there.* And so based upon their interaction, ladies and gentlemen, ... Mr. Harper did intend to assault Mr. Krebs that night, and the State has proven that beyond a reasonable doubt.  
RP 1052.

The prosecutor committed misconduct by misstating the law to the jury during argument at Mr. Harper's trial. *State v. Allen*, 182 Wn.2d 364, 373–74, 341 P.3d 268 (2015) (*citing State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008)); RCW 9A.36.011.

In fact, the jury *was* required to find beyond a reasonable doubt that Mr. Harper intended to inflict not only injury, but great bodily harm in order to convict him of first-degree assault. RCW 9A.36.011. The prosecutor's argument was improper. *Allen*, 182 Wn.2d at 373–74.

Mr. Harper was prejudiced by the prosecutor's improper argument. As noted above, the "prestige associated with the prosecutor's office" lent "special weight" to the prosecutor's argument and increased the risk that the jury would rely on the prosecutor's statement of the law over that of Mr. Harper. Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

The interplay between the intent element of the general definition of assault and the specific intent element of assault in the first degree was

likely the most complex legal issue in the jury's instructions. The prosecutor's significant misstatement of the law was the last thing the jury heard on that complicated issue before deliberations, making it particularly likely that the jury applied that mischaracterization in finding Mr. Harper guilty. *See RP generally.*

Mr. Harper's entire defense to the first-degree assault charge was that he had not intended to hurt Mr. Krebs. In order to receive a fair trial, Mr. Harper needed to the jury to properly apply the intent element of that charge. There is a substantial likelihood that the prosecutor's improper misstatement of the law on that exact issue affected the outcome of Mr. Harper's trial. *Glasmann*, 175 Wn.2d at 704.

The prosecutor's misconduct requires reversal even though defense counsel did not object below. The elements of first-degree assault are "a well-established rule," which had been available to the prosecutor for decades. *State v. Sundberg*, 185 Wn.2d 147, 153, 370 P.3d 1 (2016). As is the caselaw regarding a prosecutor's duty to correctly characterize the law for the jury during closing. The improper arguments were flagrant and ill-intentioned because they directly violated case law and professional standards that were available to the prosecutor at the time of the improper conduct. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct at Mr. Harper’s trial by misstating the law regarding the intent element of first-degree assault to the jury during closing. *Sundberg*, 185 Wn.2d at 153; *Allen*, 182 Wn.2d at 373–74. Mr. Harper’s first-degree assault conviction must be reversed. *Id.*

**B. The prosecutor committed misconduct at Mr. Harper’s trial by “testifying” to “facts” that had not been admitted into evidence.**

Part of Mr. Harper’s defense required expert psychological testimony regarding his drug-induced psychosis. *See* RP 865-917. In rebuttal, the state provided evidence from its own expert who testified, *inter alia*, that Mr. Harper had been diagnosed with Antisocial Personality Disorder (APD). RP 932-33, 947.

When the prosecutor attempted to delve deeper into the meaning of that diagnosis, however, the court sustained Mr. Harper’s objection, barring the testimony. RP 947-48.

Even so, the prosecutor argued during closing that Mr. Harper’s APD diagnosis meant that he was a “difficult person” who is “difficult to deal with.” RP 1054. The prosecutor argued, specifically, that the diagnosis and Mr. Harper’s allegedly “difficult” nature made him more likely guilty of the charges against him. RP 1054.

The prosecutor committed misconduct by arguing “facts” that had not been admitted into evidence. *See State v. Jones*, 144 Wn. App. 284,

293, 183 P.3d 307 (2008). The prosecutor’s claim that Mr. Harper’s APD diagnosis meant that he was a “difficult person”– made absent any evidence to that effect in the record – was improper. *Id.*

The prosecutor also committed misconduct by encouraging the jury to make an improper propensity inference. *See State v. Fisher*, 165 Wn.2d 727, 748, 202 P.3d 937 (2009). The argument that Mr. Harper’s APD diagnosis made him a “difficult person” explicitly invited the jury to conclude that he had a psychological predilection for criminal behavior and was, accordingly, more likely guilty of the charges against him. That was also improper. *Id.*

There is a substantial likelihood that the prosecutor’s improper argument affected the outcome of Mr. Harper’s trial. *Glasmann*, 175 Wn.2d at 704.

First, as noted above, the “prestige associated with the prosecutor’s office” likely lead the jury to lend special credence to the prosecutor’s assessment of the meaning of Mr. Harper’s diagnosis as it related to the case. Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706). The fact that the argument was tied to the conclusions reached by multiple psychological experts also lent the improper argument the air of scientific weight. The prosecutor told the jury, in short, that experts in forensic

psychology had determined that Mr. Harper was a “difficult person” and that that meant he was more likely to commit crimes. Mr. Harper was prejudiced by the prosecutor’s improper argument. *Glasmann*, 175 Wn.2d at 704.

The prosecutor’s improper argument was also flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707. Again, the prosecutor had access to longstanding case law prohibiting the introduction of “facts” outside the evidence into closing argument. *See e.g. Jones*, 144 Wn. App. at 293. Indeed, the court reminded the prosecutor immediately before the improper argument that Mr. Harper’s APD diagnosis had been admitted, but that the details behind that diagnosis had been excluded from evidence. RP 1054.

The argument was also designed to have an “inflammatory effect on the jury,” such that the prejudice could not be cured by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012). The prosecutor’s improper argument requires reversal of Mr. Harper’s conviction even absent an objection below. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing “facts” that had not been admitted into evidence

during closing. *Jones*, 144 Wn. App. at 293. Mr. Harper's convictions must be reversed. *Id.*

**II. THE TRIAL COURT ERRED BY ADMITTING EXTENSIVE EVIDENCE OF UNCHARGED MISCONDUCT THAT WAS INADMISSIBLE UNDER ER 404(B).**

Mr. Harper hit several cars in the Dairy Queen parking lot and ran into a trash can in an attempt to drive toward the building itself. RP 818-21. He also struck Mr. Krebs's car during an altercation preceding the alleged assault. RP 843. But the prosecution chose not to charge him with malicious mischief or any other offense related to damage to that property. *See* CP 1-2.

Nonetheless, the court admitted lengthy testimony about Mr. Harper's uncharged conduct, over his objection. RP 477-78, 500, 506-07, 509, 533, 539. The court also admitted (over Mr. Harper's objection) that the people inside the Dairy Queen building were afraid because of his erratic behavior. RP 522-23, 526, 529. The court went so far as to allow the state to introduce photographs showing the extent of the uncharged damage that Mr. Harper had caused and videos showing the reaction of the people inside the Dairy Queen. RP 506-07, 529, 545, 570-71; Ex. 3, 4, 9-17.

None of that evidence was admissible under ER 404(b) because it was not relevant to any element of the charges against Mr. Harper but

nonetheless encouraged the jury to make an improper propensity inference.

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b).<sup>1</sup> This rule must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Before admitting evidence of prior bad acts by the accused, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *Slocum*, 183 Wn. App. at 448.

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<sup>1</sup> Interpretation of an evidentiary rule is a question of law, reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Trial court evidentiary rulings are generally reviewed for abuse of discretion. *Fisher*, 165 Wn.2d at 745. A trial court abuses its discretion by failing to abide by the requirements of the rules of evidence. *Id.*

Doubtful cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-78, 181 P.3d 887 (2008).

ER 404(b) reflects a long-standing policy against character evidence because “it is said to weigh too much with the jury and to so overpersuade them....” that the accused must be guilty of a particular offense if he has been shown to have a propensity toward that type of misconduct. *Slocum*, 183 Wn. App. at 456 (quoting *Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948)).

The prohibition on propensity evidence under ER 404(b) “does not discriminate between the good and the bad in its safeguards.” *State v. Arredondo*, 188 Wn.2d 244, 272, 394 P.3d 348 (2017) (Gonzalez, J., dissenting). This is because:

The protection of the law is due alike to the righteous and the unrighteous. The sun of justice shines alike ‘for the evil and the good, the just and the unjust.’ Crime must be proved, not presumed.” For this reason, we have adopted rules prohibiting the introduction of character evidence because it incites the “deep tendency of human nature to punish” a defendant simply because he or she is a bad person, a “criminal-type” deserving of conviction.

*Id.* at 272-73 (quoting *People v. White*, 24 Wend. 570, 574 (N.Y. 1840));

1A John Henry Wigmore, *Evidence in Trials at Common Law* § 57, at

1185 (Tillers rev. 1983); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

Nonetheless, evidence of uncharged crimes or misconduct may be admissible to prove, *inter alia*, “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

When applying these exceptions, however, the Supreme Court has admonished against using them as “magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names,” without conducting meaningful analysis into whether each exception truly applies to the facts of any given case. *State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982) (*quoting United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir.1974)).

Evidence of uncharged misconduct is not admissible, for example, to prove motive, intent, etc. when those factors are not actually in dispute at trial. *See e.g. State v. Powell*, 126 Wn.2d 244, 262, 893 P.2d 615 (1995).

The evidence of Mr. Harper’s uncharged actions in the parking lot was not admissible for any proper purpose. The court held that it was admissible to demonstrate that Mr. Harper had exerted control over his ex-wife’s car, but Mr. Harper readily admitted to driving the car during his testimony. RP 470-71. That element of that offense was never in dispute.

As outlined below, the evidence was not admissible under any of the other exceptions to the ER 404(b) bar on evidence of uncharged misconduct. The trial court erred by admitting lengthy testimony, videos, and photographs depicting uncharged property damage allegedly caused by Mr. Harper. *Gunderson*, 181 Wn.2d at 923; *Slocum*, 183 Wn. App. at 448; *McCreven*, 170 Wn. App. at 458; *Saltarelli*, 98 Wn.2d at 364. Mr. Harper's convictions must be reversed. *Id.*

**A. The evidence of Mr. Harper's uncharged property damage was not admissible as *res gestae* evidence.**

*Res gestae* or "same transaction" evidence can be admissible to "complete the story of the crime." *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989); *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004). Such evidence must constitute "a link in the chain of an unbroken sequence of events surrounding the charged offense ... in order that a complete picture be depicted for the jury." *Id.* (quoting *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

*Res gestae* evidence involving other crimes or bad acts must also still relevant to a material issue at trial and meet the other requirements of ER 404(b). *Id.* The evidence remains inadmissible to show that the accused has acted in conformity with his/her allegedly bad character. *Id.*

The evidence regarding the uncharged property damage by Mr. Harper was not part of an “unbroken sequence of events.” Nor was the evidence necessary to “complete the story” of the allegations supporting the charges. *Id.* A recitation only of the allegations for which Mr. Harper was charged would not have made the case confusing or incomplete for the jury. It would only have encouraged the jury to convict or acquit based only on the evidence supporting those actual allegations.

The admission of the extensive evidence of uncharged misconduct in Mr. Harper case was not necessary as *res gestae* of the charges. *Id.* That exception to ER 404(b) did not apply to the facts of this case. *Id.*

**B. The evidence of Mr. Harper’s uncharged property damage was not admissible to show intent.**

“Intent” refers to the “state of mind with which an act is done” or “what the defendant hopes to accomplish when motivated to take the action.” *Arredondo*, 188 Wn.2d at 262 n. 7 (*quoting Powell*, 126 Wn.2d at 261).

Evidence of uncharged misconduct is only admissible to prove intent when “proof of the doing of the charged act does not itself conclusively establish intent.” *Powell*, 126 Wn.2d at 262. In sex cases, for example, in which proof of the alleged act is sufficient to prove the required intent, evidence of other uncharged sex offenses is not admissible

to prove intent because intent is not at issue. *Id.*; *See also Saltarelli*, 98 Wn.2d at 365–66; *State v. Bowen*, 48 Wn. App. 187, 194–95, 738 P.2d 316 (1987), *abrogated on other grounds by State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

Rather, to constitute valid evidence of intent, “there must be a logical theory other than propensity that demonstrates how the prior act connects to the intent required to commit the charged offense.” *Arredondo*, 188 Wn.2d at 276 (Gonzalez, J., dissenting) (*citing* Wigmore § 192 at 1857).

In Mr. Harper’s case, the only alleged offenses that took place in the parking lot were the car theft and the first-degree assault against Mr. Krebs. The state did not offer any logical theory connecting the property damage to the other cars to either of those offenses.

Rather, the state’s theory appeared to be that Mr. Harper had intentionally damaged the cars and trash can so he must have intentionally assaulted Mr. Krebs. *See* RP 469. This amounts to exactly the type of propensity inference that ER 404(b) prohibits. The fact that the propensity inference related to a propensity to act with intent does not change the analysis.

The introduction of lengthy evidence of uncharged allegations against Mr. Harper at trial cannot be justified based on the ER 404(b) exception for evidence proving intent. *Id.*

**C. The evidence of Mr. Harper’s uncharged property damage was not admissible to show motive.**

The term “motive” is defined as “cause or reason that moves the will.” *Arredondo*, 188 Wn.2d at 262 n. 7 (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)). In other words, motive looks to “what prompted the defendant to take criminal action.” *Id.*; *See also Saltarelli*, 98 Wn.2d at 365 (defining motive as “an inducement, or that which leads or tempts the mind to indulge a criminal act”).

It is not at all clear how the uncharged property damage could provide a motive for him to engage in other (charged) incidents. *See Saltarelli*, 98 Wn.2d at 365. The ER 404(b) evidence was not relevant in his case to demonstrated “what prompted the defendant to take criminal action.” *Id.*; *Arredondo*, 188 Wn.2d at 262 n. 7.

The introduction of vast evidence of uncharged allegations against Mr. Harper at trial cannot be justified based on the ER 404(b) exception for evidence proving motive. *Id.*

**D. Mr. Harper was prejudiced by the improper admission of extensive evidence of uncharged misconduct.**

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *Gunderson*, 181 Wn.2d at 926. Improperly admitted evidence is only harmless if it is “of little significance in light of the evidence as a whole.” *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002)).

The analysis does not turn on whether there was sufficient evidence to convict. *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Rather, “the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence.” *Id.*

The improper admission of evidence results in unfair prejudice to the accused when it encourages the jury to convict based on an improper propensity inference. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

Mr. Harper was prejudiced by the improper admission of extensive evidence of uncharged property damage. The evidence was, by no means, “of little significance in light of the evidence as a whole.” *Fuller*, 169 Wn. App. at 831. Instead, it constituted a significant portion of the testimony

and exhibits admitted in the state's case-in-chief. RP 477-78, 500, 506-07, 509, 522-23, 526, 529, 533, 545, 539, 570-71; Ex. 3, 4, 9-17.

The evidence of uncharged property damage explicitly encouraged the jury to conclude that Mr. Harper had a tendency to commit crimes and was, accordingly, more likely guilty of the offenses with which he was charged. The prejudice is compounded when combined with the prosecutor's improper argument that Mr. Harper's APD diagnoses provided proof that he was a "difficult person," which also invited the jury to make an improper propensity inference against Mr. Harper.

There is a reasonable probability that the improper admission of extensive testimony regarding uncharged misconduct – all of which was inadmissible under ER 404(b) – materially affected the outcome of Mr. Harper's trial. *Gunderson*, 181 Wn.2d at 926. The error requires reversal of Mr. Harper's convictions.

**III. THE CUMULATIVE EFFECT OF THE ERRORS AT MR. HARPER'S TRIAL DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV.

In Mr. Harper's case, the cumulative effect of the errors at trial requires reversal of his convictions. Taken together, the errors exposed the jury to extensive, highly prejudicial evidence and improper prosecutorial argument encouraging the jury to make an improper propensity inference. The prosecutor's improper argument misstating the intent element of first-degree assault worked in combination with these other errors to invite the jury to find Mr. Harper guilty of that most serious offense even if the state had not proved each element beyond a reasonable doubt. Taken together, these errors deprived Mr. Harper of a fair trial by seriously undercutting his opportunity to hold the state to its burden of proof and to have the jury consider his guilt or innocence based only on the proper evidence of the offenses with which he was charged..

Even if this court determines that each error, standing alone, does not require reversal, the cumulative effect of the errors at Mr. Harper's trial deprived him of a fair trial and requires reversal. *Id.*

**IV. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY SENTENCING MR. HARPER AS A PERSISTENT OFFENDER AFTER THE LEGISLATURE'S DETERMINATION THAT HIS PREDICATE OFFENSE OF SECOND-DEGREE ROBBERY SHOULD NOT LONGER QUALIFY AS A "STRIKE" WENT INTO EFFECT.**

Mr. Harper was sentenced as a persistent offender to a period of life in prison without the possibility of release based on the conclusion that he had two prior convictions for "strike" offenses. CP 296, 300. By the

time of his sentencing hearing, however, one of those prior convictions – for second-degree robbery – had been stricken from the list of “strike” offenses by the legislation that had already taken effect. Laws of 2019, ch. 187, § 1.

The sentencing court exceeded its authority by sentencing Mr. Harper as a persistent offender. Whether applied prospectively or retroactively, the amendment eliminating second-degree robbery as a “strike” offense requires remand of Mr. Harper’s case for sentencing within the standard range.

The Sentencing Reform Act (SRA) provides that a persistent offender shall be sentenced to life imprisonment without the possibility of release. RCW 9.94A.570. A “persistent offender” is one who has been convicted in Washington of a felony considered a most serious offense and who has been convicted on two or more prior separate occasions of felonies considered most serious offenses. RCW 9.94A.030(38)(a). The statute contains a list of felonies that are considered most serious offenses at RCW 9.94A.030(33).

In April 2019, the legislature approved an amendment to the statute, removing second degree robbery from the list of most serious (or “strike”) offenses. Laws of 2019, ch. 187, § 1. The amendment became effective on July 28, 2019. *Id.* This amendment was enacted as part of an

effort to remedy unfairly harsh outcomes of the Persistent Offender Accountability Act (POAA). Tom James, *Inmates Left Out of Washington's "Three Strikes" Reforms*, *The Columbian* (May 21, 2019).

With the enactment of this amendment, Mr. Harper no longer has two prior convictions for most serious “strike” offenses. The sentencing court exceeded its authority by nonetheless sentencing him to a period of life without the possibility of parole under the POAA.

**A. The legislative amendment eliminating second degree robbery as a “strike” offense applies to Mr. Harper’s case because it went into effect before his sentencing, which constitutes the “triggering event.”**

The question of whether a new (or newly-amended) statute applies to a case pending on direct appeal depends on whether the “triggering event” for the statute occurred before or after the statute went into effect. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018); *State v. Jefferson*, 192 Wn.2d 225, 247, 429 P.3d 467 (2018).

A statute applies prospectively to all cases pending on direct appeal whenever the “triggering event” takes place after the statute is enacted. This is true even if the triggering event originates in a situation that existed before the statute was enacted. *In re Flint*, 174 Wn.2d 539, 547, 277 P.3d 657 (2012).

The Supreme Court has explicitly held that statutes pertaining to sentencing have a triggering event of the sentencing, itself, not of the underlying offense:

... when a new statute concerns a postjudgment matter like the sentence or revocation of release... then the triggering event is not a “past event” but a future event. In such a case, *the new statute or court rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred.*

*Jefferson*, 192 Wn.2d at 247 (citing *State v. Pillatos*, 149 Wn.2d 459, 471, 150 P.3d 1130 (2007) (emphasis added)).

Similarly, in *Ramirez*, the Supreme Court held that amendments to statutes involving legal financial obligations (LFOs) applied prospectively to all cases pending on direct appeal because they pertained to costs, which are part of sentencing. *Ramirez*, 191 Wn.2d at 747.

Here, the “triggering” or precipitating event for the amendment removing second degree robbery from the list of “strike” offenses was Mr. Harper’s sentencing, which took place after the amendment became effective. The change in the statute should be applied to his sentence. Mr. Harper’s 2005 robbery in the second-degree conviction should not be included as a strike offense. Mr. Harper’s case must be remanded to the trial court for resentencing within the standard range.

**B. In the alternative, the legislative amendment eliminating second degree robbery as a “strike” offense must be applied retroactively because it is remedial in nature and demonstrates legislative determination that no purpose is served by sentencing persons as persistent offenders based on predicate offenses of second degree robbery.**

In the alternative, if This Court determines that the legislative amendment eliminating second degree robbery as a “strike” offense does not apply prospectively to Mr. Harper’s case, the amendment must nonetheless be applied retroactively because it is remedial in nature and demonstrates that there is no purposes served by sentencing a person to life in prison without the possibility of parole based on part on that predicate offense.

Generally, statutes are construed to apply only prospectively unless a contrary intent appears. *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). However, where a statute is remedial and would be furthered by retroactive application, the presumption is reversed. *Id.*

The Supreme Court has made clear that when the Legislature reduces the maximum punishment for a crime, that reduction is presumed to apply to all cases. *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994). This is because, when the Legislatures downgrades an entire crime without substantially altering its elements, it has concluded that the specific criminal conduct deserves more lenient treatment. *Id.* at 687.

When the Legislature has reassessed the culpability of criminal conduct in this way, the sentencing court must give the change retroactive effect. *Id.*

Accordingly, the legislative reduction in the penalty for a crime creates a presumption that there is no purpose in executing the harsher penalty of the old law in pending cases. *Heath*, 85 Wn.2d at 198.

In announcing this principle, the *Heath* Court unanimously affirmed that a newly enacted statute granting a judge authority to stay a license revocation penalty, imposed post-conviction, applied retroactively. *Id.* at 196.

The *Heath* Court articulated two reasons for this ruling. First, the statute in question was remedial, creating a presumption of retroactivity. *Id.*

Second, and more pertinently, the statute reduced the penalty for the crime. *Id.* at 197-98. The Court noted that when the Legislature reduces the penalty for a crime:

... the legislature is presumed to have determined that the new penalty is adequate and that *no purpose would be served by imposing the older, harsher one*. This rule has even been applied in the face of a statutory presumption against retroactivity, and the new penalty applied in all pending cases.

*Heath*, 85 Wn.2d at 198 (emphasis added).

The same is true here. The Legislature substantially downgraded the penalty for an entire crime by striking second degree robbery from the

list of “strike” offenses. Prior to July 2019, a person who committed Mr. Harper’s offense faced a mandatory sentence of life without the possibility of parole. After July 2019, a person who committed the same offense would receive a sentence of 20-26 years, and under no circumstances could the person receive a sentence of life without the possibility of parole. The elements of the crime itself have not changed, yet the punishment is substantially reduced. That is precisely the “fundamental reevaluation of the value of punishment” of which the Supreme Court spoke in *Wiley* and *Heath*.

The Legislature’s removal of second-degree robbery from the list of “strike” offenses applies retroactively to Mr. Harper’s case because it represents a legislature determination that no purpose is served by its qualification of a strike. Mr. Harper’s case must be remanded for sentencing within the standard range.

**C. RCW 9.94A.345 does not apply to the reduction in punishment as occurred here.**

RCW 9.94A.345, also known as the “timing statute,” was enacted in 2000 to apply only to the calculation of offender scores and to determine the eligibility for sentencing alternatives. Laws of 2000, ch. 26, § 1-2.

RCW 9.94A.345 provides that “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.”

RCW 9.94A.345 was accompanied by an explicit articulation of legislative intent - the statute was “intended to cure any ambiguity that might have led to the Washington Supreme Court's decision in *State v. Cruz*” the year before, a case that dealt with retroactivity in the calculation of offender scores.<sup>2</sup> *See generally State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999), *superseded by statute*.

By this plain language, RCW 9.94A.345 applies only to offender score calculation and eligibility for sentencing alternatives. The statute is silent about its possible application to a change in the POAA. The statute explicitly articulates the Legislature's intent about the circumstances to which it should apply. *But see Matter of Gronquist*, 192 Wn.2d 309, 314 n.2, 429 P.3d 804 (2018) (“We apply the SRA applicable at the time of Gronquist's offenses. RCW 9.94A.345. However, we do not intend to

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<sup>2</sup> “RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court's decision in *State v. Cruz*, Cause No. 67147-8 (October 7, 1999). A decision as to whether a prior conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives.” Laws of 2000 c 26 § 1.

imply that the result would be different pursuant to the current version of the SRA.”).

Calculating an offender score is an individualized determination for sentencing, whereas the amendment at issue here, Senate Bill 5288, eliminating second degree robbery as a strike offense, is not individualized to the offender or captured by this statute. *Compare* RCW 9.94A.345 to Laws of 2019, ch. 187, § 1.

Because on its face RCW 9.94A.345 does not apply to the classification of an offense as a most serious offense, it does not preclude application of the current definition of “most serious offense” to Mr. Harper’s case.

**D. The saving statute is also inapplicable to Mr. Harper’s sentence.**

Washington's general saving statute, RCW 10.01.040, was enacted over a century ago to prevent modifications to the penal code from causing the outright frustration of prosecutions.

The statute provides in part:

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its

enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040 has many exceptions and interpretations, and is to be narrowly construed; it is not applicable to declarations of legislative will that reclassify and downgrade the culpability of criminal offenses. *See State v. Ross*, 152 Wn.2d 220, 239-40, 95 P.3d 1225 (2004); *Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at 198.

The Supreme Court has never overruled *Heath* or this principle. On the contrary, the Court has continued to reference this rule in analyzing the boundaries and exceptions of the general saving clause. *See Ross*, 152 Wn.2d at 239-40; *Wiley*, 124 Wn.2d at 687.<sup>3</sup> The savings statute at RCW 10.01.040 is inapposite to Mr. Harper's sentencing issue.

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<sup>3</sup> The Court of Appeals offered a negative critique of *Heath* in *State v. Kane*, 101 Wn. App. 614, 614-19, 5 P.3d 741 (2000). The *Kane* Court held a new statute amending eligibility criteria for a Drug Offender Sentencing Alternative (DOSA) did not apply retroactively to the defendant. *Id.* at 607. The trial court had relied on *Heath* when it found Mr. Kane eligible for the DOSA, which the appellate court deemed erroneous, reasoning that the general savings statute was not at issue in *Heath*. *Id.* at 615-16.

But *Kane's* reasoning applies to a different set of law and facts. *Heath*, *Wiley*, and *Ross* all discuss circumstances of legislative will reclassifying the culpability of a criminal act with a lower sentence as an exception to the general savings clause. *Kane*, quite differently, addresses the expansion of the eligibility of sentencing alternatives for certain drug offenses - it does not involve a declaration of diminished culpability from the legislature, only an expansion of access to treatment options.

**E. This Court should decline to follow Division II’s recent decision in *Jenks* because it conflicts with the Supreme Court’s established rule.**

Recently, Division II issued a decision finding that the 2019 legislative amendments did not apply retroactively, relying on the savings statute. *State v. Jenks*, 12 Wn. App. 2d 588, 459 P.3d 389 (2020). On its face, that statute would seem to require a court to have sentenced the defendant based on the law at the time of his offense. But the Supreme Court's decision in *Zornes* specifically held this statutory limitation is contrary to the common law principles addressed above. *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970). As a consequence, this statute, being in derogation of the common law, must be strictly construed. *Id.*, citing *Marble v. Clein*, 55 Wn.2d 315, 347 P.2d 830 (1959).

The decision in *Jenks* also brushes other prior decisions of the Supreme Court aside. *Jenks*, 12 Wn. App. 2d at 594-97. *Jenks* reasons that *Wiley* did not really mean what it said and goes on to claim *Wiley* failed to properly analyze the issue by failing to address RCW 10.01.040. *Id.*

Regardless of whether the Court of Appeals agrees with the thoroughness of the analysis or the conclusions reached by the Supreme Court in *Kane*, *Wiley*, and *Heath*, the Court of Appeals is bound to follow the Supreme Court's decisions. As the Supreme Court recognized, “even if we had not cited authority for our holding, the Court of Appeals is not

relieved from the requirement to adhere to it.” *In re Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012). Thus, whether the *Jenks* court believes *Wiley's* analysis is complete or not, it was required to follow it.

Division II’s opinion in *Jenks* starts with the assumption RCW 10.01.040 applies and then dismisses the Supreme Court's decisions to the contrary as anomalous, isolated exceptions, or new rules. *Jenks*, 12 Wn. App. 2d at 594-97. Yet each of the Supreme Court's decisions reached the same conclusion: reductions in punishment apply to all cases.

As *Zornes* held, statutes such as RCW 10.01.040 and RCW 9.94A.345, which purport to limit application of legislative changes, have limited reach. 78 Wn.2d at 19-20. Because they are in derogation of the common law, statutes which restrict application of changes in the law must be narrowly construed. 78 Wn.2d at 13.

The *Jenks* decision turns the analysis on its head. The Division II treats the statute as the rule rather than the exception. The Court then faults Mr. Jenks for failing to identify an exception to the rule's application. *Jenks*, 12 Wn. App. 2d at 594-97. The *Jenks* court gives the statute the broadest interpretation rather than the narrow interpretation *Zornes* requires.

The *Jenks* court commits the same error in its application of RCW 9.94A.345. That statute is meant to apply only to the calculation of the

offender score and the determination of eligibility for sentence alternatives. Laws of 2000, ch. 26, § 1. The court, however, dismisses this limitation, saying a general statement of legislative intent cannot override the plain language of the statute. *Jenks*, 459 P.3d at 395. While that may be true of other legislative materials, here the statement of intent is part of the law itself. Thus, the plain language includes the statute's limits on its own reach and it cannot simply be ignored.

The Supreme Court's long-established case law recognizes a legislative reduction in punishment is a fundamental reevaluation of the appropriate punishment for an offense. That requires application to all previous and pending cases. The legislative determination that a prior or current second-degree robbery conviction should not subject a person to life imprisonment must apply to Mr. Harper. This Court should decline to follow Division II's decision in *Jenks*.

Mr. Harper is entitled to reversal of his sentence and remand for resentencing within the standard range.

### **CONCLUSION**

Prosecutorial misconduct deprived Mr. Harper of a fair trial. The trial court erred by admitting extensive evidence of uncharged "bad acts," which was inadmissible under ER 404(b) and which encouraged the jury

to make an improper propensity inference. Whether considered individually or cumulatively, these errors require reversal of Mr. Harper's convictions.

In the alternative, the trial court erred by sentencing Mr. Harper as a persistent offender when the legislature had downgraded one of his predicate offenses to no longer qualify as a "strike." Mr. Harper's case must be remanded for sentencing within the standard range.

Respectfully submitted on July 22, 2020,



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Joseph Harper/DOC#880763  
Washington State Penitentiary  
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney  
SCPAappeals@spokanecounty.org

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on July 22, 2020.



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Skylar T. Brett, WSBA No. 45475  
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**LAW OFFICE OF SKYLAR BRETT**

**July 22, 2020 - 11:42 AM**

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