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Supreme Court No. _____

(Court of Appeals No. 64100-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD APPLGATE,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

This Court has never determined the requirements for a valid waiver of the constitutional right to a public trial. This case presents an opportunity to do so.

The trial court conducted a portion of voir dire outside the public courtroom on its own motion. It did not conduct a Bone-Club analysis on the record. It did not identify a compelling interest in closure, stating only that jurors who “wished to be questioned privately” would be questioned in chambers because “that is a lot easier than shuffling all of the [other] jurors out.” It did not explain the importance of public access, or balance that interest against the unidentified interest in closure.

Petitioner Ronald Applegate did not propose closure. His attorney spoke to him off the record and told the court that he and his client did “not object” to the in-chambers questioning. The Court of Appeals held that this representation constituted a waiver of the right to a public trial.

The Court of Appeals imported the waiver rule from the 12-person jury context and applied it here. But it takes more to waive many other rights. An express statement by the defendant himself is required to waive the right to a jury, and the same is true for a waiver of the right to counsel. In the latter context, there must also be an indication – usually achieved through a colloquy – that the defendant understands the dangers

and disadvantages of waiving counsel. It is unclear where the public-trial right lies on this “waiver spectrum.” This Court should grant review to decide this issue.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Ronald Applegate, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in State v. Applegate, No. 64100-0-I (Slip Op. filed August 8, 2011). A copy of the opinion, which was published in part, is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. This Court has never definitively resolved the question of what constitutes a valid waiver of the right to a public trial. In this case, the trial court conducted a portion of voir dire in chambers without identifying a compelling interest in closure, showing a serious and imminent threat to that interest, or entering findings and conclusions. Neither party had requested closure; the court simply stated that any juror who “wished to speak privately” could be questioned in chambers. Although trial counsel told the court he had spoken with Mr. Applegate and that Mr. Applegate did not object, the court did not address Mr. Applegate directly and Mr. Applegate himself did not expressly waive his right to a public trial. The Court of Appeals nevertheless held Mr. Applegate “affirmatively waived” his right to a public trial. Should this Court grant review to address the

issue of what constitutes a valid waiver of the right to a public trial? RAP 13.4(b)(3), (4).

2. A defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. Here, Mr. Applegate was convicted of six counts of second-degree rape of a child, aggravated by both "domestic violence" and "an ongoing pattern of sexual abuse." Where one of the elements of the "domestic violence" aggravator is "an ongoing pattern of physical, psychological or sexual abuse," and the State's theory for both aggravators was that Mr. Applegate repeatedly raped his stepdaughter and niece, do the convictions for both aggravating factors violate double jeopardy, requiring vacation of the lesser-included "ongoing pattern of sexual abuse" aggravator? RAP 13.4(b)(3).

4. The ex post facto clause prohibits retrospective application of an amendment that aggravates a crime or increases the punishment for a criminal act. In 1988-89, when Mr. Applegate committed his crimes, the domestic violence aggravating factor did not exist. The legislature added it to the SRA in 1996. Do Mr. Applegate's six convictions for rape of a child aggravated by domestic violence – and the enhanced sentence based thereon – violate the constitutional prohibition on ex post facto laws? RAP 13.4(b)(3).

5. A legislative amendment should not be applied retroactively unless (a) the legislature clearly intended retroactive application, (b) the amendment is curative, or (c) the amendment is remedial. Did the trial court improperly apply the domestic violence aggravator to Mr. Applegate where the statute contains no statement of intent for retroactive application, and the amendment adding the aggravator is substantive, rather than curative or remedial? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

In 2005, Ronald Applegate was convicted of six counts of rape of a child in the second degree, each with three aggravating factors. CP 63. An exceptional sentence was imposed, but the Court of Appeals reversed and remanded for a new trial on the aggravating factors only. CP 56. The State alleged that both the “domestic violence” and “ongoing pattern of sexual abuse” aggravators applied to each count. 2 RP 66.¹

Prior to jury selection, the defense attorney asked how the court was going to explain the unique nature of the case. 1 RP 25. The Court responded:

That would be by way of the advance oral instruction that has been proposed. I do have the proposed advanced oral instruction. It does seem appropriate. Any jurors who wish to speak privately, we can address that. I still don't know if we have a verdict on the

¹ There are three volumes of reports of proceedings in this case: 1 RP (Second Amended Verbatim Report of Proceedings for 8/10/09), 2 RP (8/11/09 and 8/12/09), and 3 RP (8/27/09).

Momah and Frawley cases from the Supreme Court. I don't think we do. I would expect to follow the Momah line of cases.

Is there any objection, Mr. Nelson or Mr. Setter or any member of the public present in the courtroom, if an individual juror wishes to speak about some of the issues perhaps raised in the questionnaire or in voir dire that we take the public session into a less open setting? That is a lot easier than shuffling all of the jurors out.

1 RP 25-26. The defense attorney stated, "I leave it entirely to the Court's discretion." 1 RP 26. The prosecutor responded, "Well, this is not a matter that's addressed entirely to the Court's discretion. ... The public would be excluded under the circumstances." 1 RP 26. The prosecutor noted that at that time there was a member of the public in the courtroom. 1 RP 27. He suggested that the issue be tabled until the point at which it became necessary to address it. 1 RP 27.

The court agreed that the matter could be addressed later. The judge further stated, "Under Momah, as I recall, it didn't even state that the factors need to be specifically addressed...." 1 RP 27.

Toward the end of voir dire, the court stated that several jurors expressed a desire to answer some questions privately. 1 RP 116. The court noted it was unlikely that most of them would make it onto the jury anyway, due to their high juror numbers. However, one person with a low number – Number 2 – had indicated she wished to answer questions 10A and 11 in private. 1 RP 116.

The court said, "Counsel, if you do wish to inquire along those lines I would suggest we meet in chambers." 1 RP 118. The court then stated:

Is there any member of the jury panel or any member of the public who is present who has an objection to our speaking with juror No. 2 I guess in my office? It would be a public proceeding. Any member of the public that is available to come in I will have the outer door open for that purpose. Is there any objection from anyone in the courtroom? Counsel, I evaluated the factors set forth by case law and I think all those factors have been met.

1 RP 118. The prosecutor stated, "Except the record doesn't reflect that the defendant has no objection to that process or defense counsel." 1 RP 118. The Court responded, "That's the next question I'm going to ask, that in terms of I believe the five factors set forth or referred to as the [Bone-Club] factors I believe those have been met. Mr. Nelson, do you or your client have any objection to ...". Defense counsel interrupted and said, "No" 1 RP 119. The court inquired, "Are you speaking for yourself and for your client?" The attorney clarified, "I'm not speaking for my client. I'm speaking for myself as his counsel. I don't know if he heard." 1 RP 119.

The court told counsel he could step into chambers to discuss the issue with Mr. Applegate. After a sidebar, counsel said, "For the record, I have talked it over with Mr. Applegate. He has no objection and I have

no objection to going back into chambers and asking these questions without the public hearing.” 1 RP 119.

Juror 2 was then questioned in chambers, and she ultimately served on the jury. 1 RP 120-22, 71263. After trial, the jury returned a special verdict form finding each aggravating factor existed for each count. CP 32-34. The court imposed an exceptional sentence of 120 months. CP 9.

On appeal, Mr. Applegate argued his right to a public trial was violated by the court’s conducting in-chambers voir dire without performing the required steps set forth in State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The Court of Appeals affirmed, holding Mr. Applegate “waived” his right to a public trial when his attorney stated Mr. Applegate did not object. The court also rejected Mr. Applegate’s due process, double jeopardy, and ex post facto arguments.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

- 1. This Court should grant review to address the question of what constitutes a valid waiver of the right to a public trial.**

The Court of Appeals recognized that the trial court held a portion of voir dire outside the public courtroom without identifying a compelling interest in closure, without showing a serious and imminent threat to the unnamed interest, and without entering findings and conclusions. Slip Op. at 6-10. The court also recognized that normally this deprivation of the

constitutional right to a public trial would require reversal. Slip Op. at 7. But it held that Mr. Applegate “explicitly waived his public trial right” through his attorney’s representation that two had spoken and neither objected to in-chambers voir dire. Slip Op. at 10.

Notably, the only citation the Court of Appeals provides for this proposition is a quotation about waiver requirements where the right at stake was not the public-trial right but the right to a 12-person jury. Slip Op. at 10-11 & n.31. In State v. Stegall, this Court held that “waiver of the right to a 12-person jury may be shown by a personal statement from the defendant expressly agreeing to waiver or an indication that the judge or defense counsel discussed the issue with the defendant prior to the attorney’s waiving the right.” State v. Stegall, 124 Wn.2d 719, 729, 881 P.2d 979 (1994). The concurring opinion in Strode cited Stegall along with several other cases to show that not all rights require a colloquy on the record in order for a waiver to be valid. State v. Strode, 167 Wn.2d 222, 235, 217 P.3d 310 (2009) (Fairhurst, J. concurring). But the Strode concurrence implied that at a minimum the court must consider the public trial right in light of competing interests on the record in order for a waiver of that right to be knowing, intelligent and voluntary. Id.

The Court of Appeals compared this case to Momah, where “our Supreme Court affirmed a courtroom closure, based in part upon Momah’s

affirmative conduct....” Slip Op. at 12 (citing State v. Momah, 167 Wn.2d 140, 154-55, 217 P.3d 321 (2009)). But Momah could not be more different from this case. In Momah, defense counsel “affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this.” Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) (discussing Momah, 167 Wn.2d 140). Indeed, in Momah, the defense attorney is the one who requested in-chambers voir dire in order to safeguard the defendant’s right to a fair trial. Momah, 167 Wn.2d at 151-52. Mr. Applegate, however, did not affirmatively seek private questioning of jurors, did not seek to expand the number of jurors subject to such questioning, and did not actively engage in discussions about how to accomplish private voir dire. He merely acquiesced to the court’s decision to engage in private juror questioning – a decision apparently based on mere preference and convenience. 1 RP 25-26 (jurors who “wished” to be questioned privately would be questioned in chambers because it would be “a lot easier than shuffling all of the jurors out.”).

This Court has not yet specified the requirements for a valid waiver of the right to a public trial. It is clear that for any constitutional right, a waiver is not valid unless knowing, intelligent and voluntary. In re James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). Furthermore, courts must

“indulge every reasonable presumption against waiver.” Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Beyond these basic rules, waiver requirements vary depending on the constitutional right at issue. Stegall, 124 Wn.2d at 725.

A waiver of the right to counsel is valid only if the record shows the defendant is aware of the risks of self-representation, the seriousness of the charges, the maximum penalty, and the existence of technical rules. Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). This will “rarely” occur absent a colloquy on the record. Id. Furthermore, the defendant himself must unequivocally state his desire to proceed pro se in order to forego an attorney. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

A guilty plea, pursuant to which a defendant waives multiple constitutional rights, requires a showing that the defendant understood the nature of the offense charged, the consequences of the plea, and the rights he is giving up. State v. Chervenell, 99 Wn.2d 309, 312-14, 662 P.2d 836 (1983). As with a waiver of counsel, this will rarely occur absent a colloquy between the court and the defendant. Id. at 313.

As to the constitutional right to be tried by a jury rather than a judge, this Court has held that “a waiver of jury must be expressly made, by the defendant, on the record.” Acrey, 103 Wn.2d at 207-08 (citing

State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979)) (emphasis added). In contrast, as the Court of Appeals noted, the right to a 12-person jury may be waived in favor of a smaller jury if there is “an indication that the judge or defense counsel discussed the issue with the defendant prior to the attorney’s waiving the right.” Stegall, 124 Wn.2d 719 at 729.

The Court of Appeals did not explain why it imported the low waiver standard from the 12-person jury context to the public-trial context, instead of requiring an express waiver by the defendant himself as is necessary to waive the right to a jury in favor of a bench trial. Nor did it explain why it is unnecessary to ensure on the record that the defendant is aware of the importance of the public trial right or the dangers of waiving it. Just as a colloquy is preferable in the context of waiver of counsel or a guilty plea, it would arguably be preferable for trial courts to conduct a Bone-Club analysis on the record prior to any courtroom closure. That way, any subsequent waiver would necessarily be knowing, intelligent and voluntary. A Bone-Club analysis on the record may not be necessary in the unusual case like Momah, in which the defense requests a closed courtroom in order to safeguard other important rights. But it is necessary in the run-of-the-mill case like this one, where the court sua sponte holds proceedings outside the public courtroom without explaining why.

In sum, this Court should grant review to address the open question of the requirements for a valid waiver of the constitutional right to a public trial. The issue is a significant question of constitutional law and a matter of substantial public interest. RAP 13.4(b)(3), (4).

2. This Court should also grant review of the double jeopardy, ex post facto, and statutory retroactivity issues.

a. The convictions on two aggravating factors which are the same in fact and law violate double jeopardy, requiring vacation of the “ongoing pattern” conviction. Mr. Applegate was convicted of six counts each of two different aggravated felonies: second-degree rape of a child aggravated by an ongoing pattern of sexual abuse, and second-degree rape of a child aggravated by domestic violence. CP 4, 16-17, 32-34. But the “ongoing pattern” aggravating factor is a subset, or lesser-included offense, of the “domestic violence” aggravating factor. Accordingly, entering convictions for both aggravators violates the prohibition on double jeopardy. The “ongoing pattern” conviction should be vacated for each count.

The state and federal constitutions protect defendants from double jeopardy. U.S. Const. amend. V; Const. art. I, § 9. To determine whether multiple convictions violate double jeopardy, Washington courts apply the “same evidence” test. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155

(1995) (citing Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. Id.; State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. Freeman, 153 Wn.2d at 772 (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). If one statute constitutes a lesser-included offense of another, convictions for both offenses violate double jeopardy. State v. Jackman, 156 Wn.2d 736, 749, 132 P.3d 136 (2007); accord Rutledge v. United States, 517 U.S. 292, 297, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). Courts evaluate the elements "as charged and proved, not merely as the level of an abstract articulation of the elements." Freeman, 153 Wn.2d at 777.

Double jeopardy protections apply to exceptional sentences. Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (3-justice plurality) & 118 (4-justice dissent), 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Furthermore, the double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. Rutledge, 517 U.S. at 302; Calle, 125 Wn.2d at 775. For this reason, the Court of

Appeals is wrong in stating “the imposition of one exceptional sentence based on two aggravating factors does not raise double jeopardy concerns.” Slip Op. at 14. The conviction itself, apart from the sentence, has potential adverse collateral consequences. State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007). “To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction.” State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010).

For each of the six counts of second-degree rape in this case, the State charged Mr. Applegate with two aggravating factors. CP 78-80. The first was:

The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(2)(g); CP 79. The second was:

The current offense involved domestic violence, as defined in RCW 10.99.020, and ... [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(2)(h)(i); CP 80.

As charged and proved in this case, the first (“ongoing pattern”) aggravating factor is merely a subset, or lesser offense, of the second (“domestic violence”) aggravating factor. The domestic violence

aggravating factor can be alternatively charged as occurring within sight or sound of the defendant's or victim's minor children, or as manifesting deliberate cruelty (see subsections (ii) and (iii) of RCW 9.94A.535(2)(h)), but those bases were not charged or found in this case.

To prove the "ongoing pattern" aggravator, the State presented testimony by the victims indicating that Mr. Applegate had sex with them two to three times per week over a period of years when they were minors. 2 RP 38, 65, 76. To prove the "domestic violence" aggravator, the State presented the same evidence, plus evidence of the familial relationships. 2 RP 23, 38, 56, 65, 70, 76.

The jury instructions similarly show that the two aggravating factors are the same in law and fact. As to the first aggravator, Instruction 5 provided:

An "ongoing pattern of sexual abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

CP 43. As to the second aggravator, Instruction 7 provided:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt as to each count:

- (1) That the victim and the defendant were family or household members; and
- (2) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim

manifested by multiple incidents over a prolonged period of time. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

CP 45.

The only difference between the two is that the “domestic violence” aggravator includes an “ongoing pattern of psychological, physical, or sexual abuse,” whereas the “ongoing pattern” aggravator mentions only an “ongoing pattern of sexual abuse.” But in this case there was no evidence of any psychological or physical abuse that was separate from the sexual abuse, and the jury did not find that there was. CP 32-34; 2 RP 18-102.

Furthermore, the fact that the “ongoing pattern” statute includes an age element is of no moment. The underlying crime (second-degree rape of a child) includes an even stricter age element, which necessarily applies both to the crime of second-degree rape of a child aggravated by an ongoing pattern of sexual abuse, and second-degree rape of a child aggravated by domestic violence. CP 38-40; RCW 9A.44.076. Thus, the former offense did not require proof of a fact which the latter did not. See In re the Personal Restraint of Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2005) (“The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be

applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”).

The State’s theory was that the “domestic violence” aggravator applied because Mr. Applegate engaged in an ongoing pattern of sexual abuse against his stepdaughter and niece, and that the “ongoing pattern” aggravator applied because Mr. Applegate engaged in an ongoing pattern of sexual abuse against his stepdaughter and niece. The two convictions are the same in law and fact, and violate the prohibition on double jeopardy. The “ongoing pattern” aggravator should be vacated for all six counts. Womac, 160 Wn.2d at 656.

b. The application of the domestic violence enhancement to Mr. Applegate violated the ex post facto clause. The federal and state constitutions prohibit ex post facto laws. U.S. Const. art. I, § 10; Const. art I, § 23. “Every law that aggravates a crime, or makes it greater than it was, when committed” violates the ex post facto clause. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (quoting Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)).

In 1988-89, when Mr. Applegate committed his crimes, the domestic violence aggravating factor did not exist. RCW 9.94A.390 (1989). The Legislature added this aggravating factor in 1996. Laws of

1996 Ch. 248, § 2; RCW 9.94A.390 (1996). The retrospective application of this factor to Mr. Applegate violates the ex post facto clause.

Mr. Applegate had no notice that committing crimes against family members constituted aggravated offenses subject to enhanced penalties. Indeed, not only was the domestic violence aggravator absent from the 1989 code, but the legislature explicitly stated that crimes against family or household members should be treated the same as other crimes, not as either greater or lesser crimes:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

RCW 10.99.010 (1989) (emphasis added).

The Court of Appeals held this was not “manifest” constitutional error for the same reason it refused to find a double jeopardy violation – “the trial court’s conclusion that either of the aggravators would justify the exceptional sentence.” Slip Op. at 18. But again, the fact of conviction is a violation on its own, regardless of sentence. Womac, 160 Wn.2d at 657. The conviction for domestic violence violates the ex post facto clause.

c. The application of the domestic violence enhancement to Mr. Applegate violated the presumption against retroactive application of a statutory amendment. Largely because of constitutional ex post facto concerns, statutes are presumed to apply prospectively only. State v. Smith, 144 Wn.2d 665, 673, 30 P.3d 1245 (2002). A statutory amendment should not be applied retroactively unless (1) the Legislature evinces a clear intent for retrospective application, (2) the amendment in question is curative, or (3) the amendment is remedial. In re Detention of Elmore, 162 Wn.2d 27, 35-36, 168 P.3d 1285 (2007).

The Legislature did not evince any intent – let alone a clear intent – for retrospective application of the domestic violence amendment to former RCW 9.94A.390. Laws of 1996 Ch. 248, § 2. Nor was this amendment curative. A curative amendment is one that clarifies or technically corrects an ambiguous statute. State v. Cruz, 139 Wn.2d 186, 192, 985 P.2d 384 (1999). A “substantive change is not curative.” Smith, 144 Wn.2d at 674. The 1996 change to RCW 9.94A.390 did not clarify an existing law, but effected a substantive change. It created a new aggravated crime and increased the punishment for those committing crimes against family or household members. Laws of 1996 Ch. 248, § 2. Finally, the amendment to former RCW 9.94A.390 was not remedial. “A remedial change is one that relates to practice, procedures, or remedies,

and does not affect a substantive or vested right.” Cruz, 139 Wn.2d at 192.

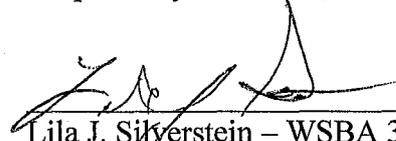
The Court of Appeals wrongly held Mr. Applegate “waived his ability to pursue these claims on appeal by failing to object at trial.” Slip Op. at 17. Even a defendant who pleads guilty “cannot ... agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence.” In re the Personal Restraint of Goodwin, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). “In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). This Court should grant review.

F. CONCLUSION

Mr. Applegate respectfully requests that this Court grant review.

DATED this ____ day of _____, 2011.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 64100-0-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	AMENDED OPINION
RONALD EUGENE APPLGATE,)	PUBLISHED IN PART
)	
Appellant.)	FILED: August 8, 2011

LEACH, A.C.J. — A criminal defendant can waive his constitutional right to a public trial if that waiver is knowing, voluntary, and intelligent. Here, after a discussion with his attorney, Ronald Eugene Applegate consented to the in-chambers questioning of a single juror during jury selection. We hold that Applegate waived his public trial right.

Applegate also challenges his exceptional sentence on the basis that the aggravating factors found by the jury violated double jeopardy and due process provisions and constituted an improper retroactive application of a statutory amendment. Finally, Applegate raises several arguments in a statement of additional grounds. Because none of Applegate's arguments, whether raised through counsel or pro se, have merit, we affirm.

FACTS

In 1996, the State charged Applegate with six counts of second degree rape of a child for incidents in 1988 and 1989 involving his wife's daughter, A.F., and niece, D.R. Applegate fled to Oregon, where he lived under an alias.¹ He was arrested in 2004.²

Applegate's first trial occurred in the interim between the United States Supreme Court's decision in Blakely v. Washington³ and our legislature's enactment of statutory procedures for submitting evidence of aggravating factors for sentencing to a jury.⁴ Before that trial, the prosecutor filed a notice alleging three aggravating factors: "that the offenses were part of an ongoing pattern of domestic violence, were part of an ongoing pattern of sexual abuse, and resulted in the pregnancy of one of the child victims."⁵ The trial court submitted the aggravating factors to the jury, which returned a guilty verdict on all six counts and "found each of the aggravating factors proved beyond a reasonable doubt."⁶

Applegate appealed to this court, arguing that at the time of his trial, the Sentencing Reform Act of 1981 (SRA)⁷ did not yet authorize the trial court to submit the aggravating factors for jury determination.⁸ The State conceded error,

¹ State v. Applegate, 147 Wn. App. 166, 170, 194 P.3d 1000 (2008).

² Applegate, 147 Wn. App. at 170.

³ 542 U.S. 296, 303-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (holding that aggravating factors must be submitted to the trier of fact).

⁴ Former RCW 9.94A.537(2) (2005).

⁵ Applegate, 147 Wn. App. at 171.

⁶ Applegate, 147 Wn. App. at 171.

⁷ Ch. 9.94A RCW.

⁸ Applegate, 147 Wn. App. at 172.

and this court vacated Applegate's sentence and remanded for further proceedings.⁹ We held that the then current version of RCW 9.94A.537(2)¹⁰ authorized the trial court to impanel a jury on remand to consider the alleged aggravating circumstances.¹¹

On remand, the State presented to a jury evidence of two aggravating factors: ongoing pattern of domestic violence and ongoing pattern of sexual abuse. A.F. and D.R. testified for the State. A.F. told the jury that Applegate sexually abused her two to three times per week between the ages of 9 and 14, when she left home. On cross-examination, A.F. admitted that she initially denied the abuse to her mother.

D.R. testified that she began living with her aunt and Applegate when she was 6 years old. D.R. said that Applegate sexually abused her two to three times per week between the ages of 10 and 19. D.R. and A.F. further testified that Applegate's abuse resulted in D.R.'s pregnancy when she was 15 years old. D.R. admitted that she initially denied the abuse when questioned by family members and school counselors but said she did so because she was scared.

Applegate's wife and stepson testified in his defense. Both stated that they were unaware that any abuse had occurred.

The jury found each aggravating factor proved beyond a reasonable doubt. The trial court entered findings of fact and concluded that either one of

⁹ Applegate, 147 Wn. App. at 172, 177.

¹⁰ LAWS OF 2007, ch. 205, § 1.

¹¹ Applegate, 147 Wn. App. at 172.

the aggravating factors was a substantial and compelling reason justifying an exceptional sentence and imposed the 10-year statutory maximum.

ANALYSIS

Applegate contends that by conducting a portion of jury selection in chambers, the trial court violated his right to a public trial under the Sixth Amendment to the United States Constitution and article I, sections 10 and 22 of the Washington State Constitution. Because Applegate affirmatively waived his public trial rights for the purposes of privately questioning juror 2, we disagree.

During pretrial motions, the trial court announced, "Any jurors who wish to speak privately, we can address that. I still don't know if we have a verdict on the Momah and the Frawley cases from the Supreme Court. I don't think we do. I would expect to follow the Momah line of cases." The court asked if anyone would object "if an individual juror wishes to speak about some of the issues perhaps raised in the questionnaire or in voir dire that we take the public session into a less open setting." No one objected. Defense counsel stated, "I leave it entirely to the Court's discretion. This is not an issue for me." The prosecutor noted, however, that the determination was not entirely within the court's discretion: "So the defense counsel needs to address whether he objects or his client." The trial court responded,

Under Momah, as I recall, it didn't even state that the factors need to be specifically addressed, because it still is a trial of record. We can still address those factors at another time. And I will direct Mr. Nelson to discuss that with his client and then to let us know what his client's wishes are in that regard.

During this discussion, the prosecutor observed that one member of the public was present in the courtroom. That person made no objection to the trial court's proposal.

Once voir dire had begun, the trial court indicated that juror 2 wished to speak in chambers. The following exchange occurred,

THE COURT: Is there any member of the jury panel or any member of the public who is present who has an objection to our speaking with juror No. 2 I guess in my office? It would be a public proceeding. Any member of the public that is available to come in I will have the outer door open for that purpose.

Is there any objection from anyone in the courtroom? Counsel, I evaluated the factors set forth by case law and I think all those factors have been met.

MR. SETTER: Except the record doesn't reflect that the defendant has no objection to that process or defense counsel.

THE COURT: That's the next question I'm going to ask, that in terms of I believe the five factors set forth referred to as the [Bone-Club] factors. I believe those have been met.

Mr. Nelson, do you or your client have any objection to—

MR. NELSON: No.

THE COURT: Are you speaking for yourself and for your client?

MR. NELSON: I'm not speaking for my client. I'm speaking for myself as his counsel. I don't know if he heard.

THE COURT: All right. Well, we have addressed it previously. I'll let you step into my [o]ffice to discuss it with him.

MR. NELSON: For the record, I have talked it over with Mr. Applegate. He has no objection and I have no objection to going back into chambers and asking these questions without the public hearing.

THE COURT: It must remain a public proceeding. So I will open the doors to my office.

The individual voir dire of juror 2 then commenced, with the judge, Applegate, counsel, the clerk, and court reporter present in chambers. The judge stated, "Okay. We are in my chambers. Juror No. 2 is present. The inner and

outer door to my chambers are open. The courtroom door is closed, but this must remain a public proceeding.”

We review de novo as a question of law whether this procedure violated Applegate’s right to a public trial.¹² The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” Similarly, article I, section 22 of the Washington Constitution guarantees, “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.” And article I, section 10 secures the public’s right to open and accessible proceedings, mandating that “[j]ustice in all cases shall be administered openly.” These provisions assure a fair trial, foster public understanding and trust in the judicial system, and provide judges with the check of public scrutiny.¹³ While the public trial right is not absolute, Washington courts strictly guard it to ensure that proceedings occur outside the public courtroom in only the most unusual circumstances.¹⁴

To protect a defendant’s right to a public trial, our Supreme Court held in State v. Bone-Club¹⁵ that a trial court must apply and weigh five factors before closing a portion of a criminal trial. Under Bone-Club,

¹² State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006).

¹³ State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)); Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

¹⁴ Easterling, 157 Wn.2d at 174-75 (quoting State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995)).

¹⁵ 128 Wn.2d 254, 906 P.2d 325 (1995).

"1. The proponent of the closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.

"2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

"3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

"4. The court must weigh the competing interests of the proponent of closure and the public.

"5. The order must be no broader in its application or duration than necessary to serve its purpose."^[16]

In addition to applying and weighing the Bone-Club factors on the record, the trial court must enter specific findings justifying its closure order.¹⁷ Generally, if a trial court fails to follow these procedures, this court presumes prejudice,¹⁸ reverses the conviction, and remands for a new trial.¹⁹

As a threshold matter, we consider the State's argument that questioning juror 2 in chambers was not a courtroom closure within the public trial rights context. When determining whether a courtroom closure occurred, we look to

¹⁶ Bone-Club, 128 Wn.2d at 258-59 (second alteration in original) (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

¹⁷ Easterling, 157 Wn.2d at 175; Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 725, 175 L. Ed. 2d 675 (2010) (a court must consider reasonable alternatives and articulate findings specific enough to permit review before closing jury selection proceedings (quoting Press-Enter. Co. v. Superior Court of Cal., Riverside County, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984))).

¹⁸ Easterling, 157 Wn.2d at 181.

¹⁹ Easterling, 157 Wn.2d at 174.

the plain language of the trial court's ruling.²⁰ "[O]nce the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed."²¹

The State contends that Applegate must show that the judge expressly excluded the public by affirmatively ordering a closure. Relying on our decision in State v. Momah,²² as the trial court did, the State argues that Applegate cannot do so because the judge "intended to and did keep the proceeding open to the public" by calling the in-chambers proceeding "public" and leaving open the doors to chambers. We disagree.

In Momah, the record did not show either an express closure order or the actual exclusion of any member of the public. As a result, this court reasoned that Momah failed to demonstrate that a closure occurred when a portion of jury selection was held in chambers.²³ On review, the Supreme Court appears to have rejected that rationale without a discussion because its decision assumes a closure occurred.²⁴ Therefore, while the trial court here did not expressly exclude the public from the individual questioning, the law does not require an express exclusion for Applegate to meet his burden.²⁵

²⁰ Brightman, 155 Wn.2d at 516.

²¹ Brightman, 155 Wn.2d at 516.

²² 141 Wn. App. 705, 171 P.3d 1064 (2007).

²³ Momah, 141 Wn. App. at 706, 712.

²⁴ State v. Momah, 167 Wn.2d 140, 156, 217 P.3d 321 (2009) ("We hold the closure in this case was not structural error.").

²⁵ State v. Sadler, 147 Wn. App. 97, 113, 193 P.3d 1108 (2008) (citing State v. Erickson, 146 Wn. App. 200, 207-08, 189 P.3d 245 (2008)).

Generally, the decision to move individual questioning of prospective jurors from the courtroom into chambers acts as a closure and requires prior compliance with Bone-Club's requirements.²⁶ Here, the trial court affirmatively moved voir dire from a public courtroom into chambers, making it private. The trial court recognized this when it called chambers a "less open setting." We find no principled basis to distinguish this case from others simply because the door between the courtroom and chambers was open and the judge called the proceeding public. A member of the public would not have recognized chambers as a public space just because the trial court said it was.²⁷ And had a member of the public attempted to observe the proceedings—something on which the record is silent—that person likely would not have understood that he could enter.

A trial court cannot have it both ways. Moving voir dire from a public courtroom to chambers due to privacy concerns but then calling the ensuing proceeding public does not make it so. Under Bone Club, as we have stated, the court's constitutional obligation to balance a defendant's right to a public trial and

²⁶ Momah, 167 Wn.2d at 146-47, 151-52 (noting that a portion of voir dire occurred in chambers and discussing that procedure as a closure); State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) ("Here, . . . the questioning of at least 11 prospective jurors took place in the judge's chambers, and 6 of them were challenged for cause. This process was closed to the general public. The trial judge's decision to allow this questioning of prospective jurors in chambers was a courtroom closure and a denial of the right to a public trial."); Duckett, 141 Wn. App. at 800-01; State v. Frawley, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007); Erickson, 146 Wn. App. at 211; State v. Heath, 150 Wn. App. 121, 127-28, 206 P.3d 712 (2009).

²⁷ We note that our Supreme Court has recently described a judge's chambers as "an inaccessible location." State v. Lormor, No. 84319-8, 2011 WL 2899578, at *4 (Wash. July 21, 2011).

a juror's privacy interest requires more. We reject the State's contention that no closure occurred.

The State next argues that Applegate explicitly waived his public trial right. We agree. A defendant's right to a public trial is one of a limited class of rights subject to structural error analysis on appeal.²⁸ Membership in this limited class, however, does not affect our analysis of whether a defendant may waive his right at trial.²⁹ An individual may waive a constitutional right, as long that decision is knowing, voluntary, and intelligent.³⁰ To establish waiver in the public trial context, the record must show either that the defendant gave a personal statement expressly agreeing to the waiver or that the trial judge or defense counsel discussed the issue with the defendant prior to defense counsel's waiver.³¹

²⁸ Johnson v. United States, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (listing as structural errors: a total deprivation of the right to counsel, lack of an impartial trial judge, unlawful exclusion of grand jurors of defendant's race, the right to self-representation at trial, the right to a public trial, and erroneous reasonable doubt instruction to jury (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))); State v. Grenning, 169 Wn.2d 47, 60 n.11, 234 P.3d 169 (2010) ("Structural errors include things like relieving the State of its burden of proof, denying a public trial, and denying counsel.").

²⁹ See, e.g., State v. Woods, 143 Wn.2d 561, 585, 23 P.3d 1046 (2001) (noting that a defendant may waive right to counsel).

³⁰ Strode, 167 Wn.2d at 229 n.3 ("The right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.").

³¹ Strode, 167 Wn.2d at 235 (Fairhurst, J., concurring) ("[W]aiver of the right to a 12-person jury may be shown by a personal statement from the defendant expressly agreeing to waiver or an indication that the judge or defense counsel discussed the issue with the defendant prior to the attorney's waiving the right." (citing State v. Stegall, 124 Wn.2d 719, 729, 881 P.2d 979 (1994))).

Applegate characterizes his statement of no objection as a “failure to object.” Applegate relies on the following statement from Bone-Club to argue that his lack of an objection was not a waiver:

We also dismiss the State’s argument that Defendant’s failure to object freed the trial court from the strictures of the closure requirements. To the contrary, this court has held an opportunity to object hold no “practical meaning” unless the court informs potential objectors of the nature of the asserted interests.^[32]

Applegate did not simply fail to object. Nor did he merely acquiesce to the court’s procedure. He stated through defense counsel on the record that he personally had no objection to the closure after he discussed the issue with counsel. Washington law requires no more. We hold that Applegate’s statement constituted a knowing, voluntary, and intelligent waiver. Because Applegate waived his right to a public trial, he cannot now complain that the court interviewed juror 2 in chambers without first applying and weighing the Bone-Club factors on the record.

Applegate, however, asserts, “It is true that the trial court satisfied the second Bone-Club factor here by giving those present an opportunity to object, but the court’s failure to address the other [Bone-Club] factors requires reversal.” Applegate essentially argues that a defendant’s waiver of the public trial right can never be effective unless the trial court first analyzes and weighs the Bone-Club factors on the record. We agree that Bone-Club requires more than an opportunity for a defendant to object to closure. But Applegate conflates

³² Bone-Club, 128 Wn.2d at 261.

Bone-Club's requirements with his own ability to assert a right that he expressly waived. In Momah, for example, our Supreme Court affirmed a courtroom closure, based in part upon Momah's affirmative conduct, even though the trial court failed to analyze the Bone-Club factors.³³ Here, the State established a valid waiver. Whether the trial court properly analyzed and weighed the Bone-Club factors is a separate issue that we need not decide, because Applegate's waiver of his public trial right precludes him from raising it.

Applegate's assignments of error also assert a violation of the public's right to open proceedings under article I, section 10. We do not consider this claim for two reasons. First, "A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under Bone-Club, or has been waived."³⁴ Here, because Applegate waived his right to a public trial, he cannot obtain a new trial by asserting the public's right. Second, Applegate provides no discrete argument relating to section 10. In his brief, he argues only a violation of his own right to a public trial. An appellant waives an assignment of error if he fails to support it with argument or citation to authority.³⁵

³³ Momah, 167 Wn.2d at 154-55; Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) ("[T]he court could properly conclude that [Momah] waived his public trial right. . . . While it is true the failure to object, alone, does not constitute waiver of the right to a public trial, the record in Momah shows more than a failure to object.").

³⁴ Strode, 167 Wn.2d at 236 (Fairhurst, J., concurring).

³⁵ RAP 10.3(a)(6); Am. Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

We affirm.

The remainder of this opinion has no precedential value. It will be filed for public record in accordance with the rules governing unpublished opinions.³⁶

Applegate claims that the domestic violence and ongoing pattern aggravating factors were the same in law as in fact, violating double jeopardy principles. At trial, Applegate did not object to the aggravating factors on this basis. A defendant, however, may raise a double jeopardy claim for the first time on appeal.³⁷ Our review is de novo.³⁸

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution bar multiple punishments for the same offense and protect against a subsequent prosecution for the same offense after acquittal or conviction.³⁹ A trial court's consideration of two aggravating factors, however, does not implicate the double jeopardy protections guaranteed by the federal and state constitutions. Multiple punishments do not arise from consideration of multiple aggravating factors. The SRA expressly allows a trial court to consider "one or more" aggravating factors when deciding whether to impose an exceptional sentence.⁴⁰ And after a consideration of the facts as

³⁶ RCW 2.06.040.

³⁷ State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

³⁸ In re Pers. Restraint of Francis, 170 Wn.2d 517, 523, 242 P.3d 866 (2010).

³⁹ In re Pers. Restraint of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007); State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).

⁴⁰ RCW 9.94A.537(6).

found by the jury, the court imposes one sentence. The imposition of one exceptional sentence based on two aggravating factors does not raise double jeopardy concerns, especially here, where the court found that either factor would support Applegate's exceptional sentence.

Next, Applegate claims that the trial court violated his due process rights by failing to provide the jury with a "to convict" instruction for the "ongoing pattern" aggravator. We disagree.

Before deliberations, the jury received the following instructions based on the Washington Pattern Jury Instructions.⁴¹ The court instructed the jury to determine

[w]hether any of the following aggravating circumstances exist:

1. Whether the crime was part of an ongoing pattern of sexual abuse of the same victims under the age of 18 years manifested by multiple incidents over a prolonged period of time and/or
2. Whether the crime is an aggravated domestic violence offense.

The instruction regarding the ongoing pattern aggravator read, "An 'ongoing pattern of sexual abuse' means multiple incidents of abuse over a prolonged period of time. The term 'prolonged period of time' means more than a few weeks."

And as to domestic violence, the trial court instructed the jury:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt as to each count:

⁴¹ 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (3d ed. 2008).

(1) That the victim and the defendant were family or household members; and

(2) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

If you find from the evidence that element (1) and element (2) have been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer “no” on the special verdict form.

The court also provided a general reasonable doubt instruction, which instructed the jury that “[t]he State has the burden of proving the existence of each aggravating circumstance beyond a reasonable doubt.”

At trial, Applegate objected to the ongoing pattern instruction as unconstitutionally vague and without “an objective framework to work from that lays out what an ongoing pattern of abuse is.”

This court reviews a challenged jury instruction de novo and in the context of the instructions as a whole.⁴² Due process requires a criminal defendant be convicted only when every element of the crime charged is proved beyond a reasonable doubt.⁴³ To satisfy the constitutional requirement of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law and permit the defendant to argue his theory of the case.⁴⁴ When instructing on the charged crime, the trial court must provide a to-convict

⁴² State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

⁴³ Jackson v. Virginia, 443 U.S. 307, 315-16, 99 S. Ct 2781, 61 L. Ed. 2d 560 (1979).

⁴⁴ State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

instruction setting forth all the elements of a crime, so that the jury has a yardstick by which to measure the evidence.⁴⁵ The “constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.”⁴⁶ An aggravating factor is the functional equivalent of an element for the purpose of instructing the jury on exceptional sentencing.⁴⁷

Applegate claims that due process required the trial court to provide the jury with a “to-convict” instruction for the ongoing pattern aggravator. Applegate does not elaborate on what was missing from the instruction given, except to say that the instruction was definitional whereas the domestic violence instruction was not. But Applegate fails to cite any case that requires a trial court to provide a separate to-convict instruction for every aggravating factor alleged. He simply conflates the requirements for an instruction on an underlying offense with the requirements for an aggravator instruction.

Washington law does not require a specific format to conclude the existence of facts raising a punishment beyond the statutory maximum.⁴⁸

⁴⁵ State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

⁴⁶ State v. Fowler, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990) (citing State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988)), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991).

⁴⁷ State v. Gordon, 153 Wn. App. 516, 534, 223 P.3d 519 (2009), review granted, 169 Wn.2d 1011, 236 P.3d 896 (2010).

⁴⁸ Also, aggravating factors do not have to be provided in the “to convict” instructions for the underlying offense, provided the jury is otherwise properly instructed as to how the existence of the aggravating circumstances is to be determined. Gordon, 153 Wn. App. at 534 n.9 (quoting State v. Kincaid, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)).

Because the instructions as a whole instructed the jury that it had to find the existence of the aggravating circumstances beyond a reasonable doubt and properly stated the legal standard for those factors, we find that the instructions were constitutionally sufficient.

Finally, Applegate argues that the domestic violence aggravator, enacted in 1996,⁴⁹ cannot be retroactively applied to his crime. He advances two related arguments: (1) retroactive application violates the constitutional prohibition against ex post facto laws; and (2) retroactive application violates the presumption under RCW 10.01.040 that crimes be prosecuted under the laws in effect at the time they were committed.⁵⁰ Applegate, however, waived his ability to pursue these claims on appeal by failing to object at trial. He cannot raise them now because he does not argue the error is a manifest error of constitutional magnitude⁵¹ and cannot show actual prejudice in light of the trial court's conclusion that either of the aggravators would justify the exceptional sentence. We therefore reject Applegate's claim that the retroactive application of the domestic violence aggravator was in error.

⁴⁹ RCW 9.94A.535(3)(h).

⁵⁰ Applegate does not cite the applicable statute, but the cases he relies upon do.

⁵¹ With regards to the ex post facto argument, Applegate asserts for the first time in reply that a manifest error of constitutional magnitude occurred, citing RAP 2.5(a) without further elaboration. This late, unsupported assertion does not merit our consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Applegate also claims several additional grounds for review. He bases the bulk of these claims on the belief that A.F. and D.R. lied during their testimony, raising the issue of witness credibility. Because it is the jury's exclusive province to decide credibility issues and the weight to be given to the evidence, we will not disturb the jury's determination that A.F. and D.R. were credible.⁵²

Applegate contends that evidence of D.R.'s pregnancy should not have been introduced at trial because his parentage was never proved, the child was born outside of the charged crime's dates, and mention of the pregnancy prejudiced Applegate. At trial, defense counsel objected to the pregnancy testimony on the grounds that it was irrelevant, prejudicial, and not supported by scientific evidence. The court overruled Applegate's objection because the evidence was necessary to allow the State to argue its case, given that the only way the State could establish that D.R. was a family member was if she and Applegate had a child together. Because the evidence of D.R.'s pregnancy was indisputably relevant, the trial court's decision was not an abuse of discretion, i.e., was not based on untenable grounds or reasons such that no reasonable trial judge would have reached the same conclusion.⁵³

Applegate claims that the prosecutor engaged in misconduct when he allowed D.R. to provide incorrect information as to which Washington city they

⁵² See State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

⁵³ See State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

lived in when the earliest of Applegate's sexual offenses occurred. Applegate, however, cannot demonstrate how this information, even if inaccurate, prejudiced him.

CONCLUSION

We affirm.

Leach, A.C.J.

WE CONCUR:

Appelwick, J.

Everton, J.

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

STATE OF WASHINGTON,)	
)	NO. 64100-0
Respondent,)	
)	
v.)	
)	
RONALD APPELATE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 6TH DAY OF SEPTEMBER, 2011, A COPY OF **APPELLANT'S PETITION FOR REVIEW** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

- Hilary A. Thomas
Whatcom County Prosecutors Office
311 Grand Ave Ste 201
Bellingham WA 98225-4038

- Ronald Applegate
6473 Lawrence Road
Everson, WA 98247

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP -6 PM 4:07

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF SEPTEMBER, 2011

x Ann Joyce