

64100-0

64100-0

No. 64100-0-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

**STATE OF WASHINGTON, Respondent,**

**v.**

**RONALD APPLGATE, Appellant.**

---

**BRIEF OF RESPONDENT**

---

**DAVID S. McEACHRAN,  
Whatcom County Prosecuting Attorney  
By HILARY A. THOMAS  
Appellate Deputy Prosecutor  
Attorney for Respondent  
WSBA #22007**

**Whatcom County Prosecutor's Office  
311 Grand Avenue, Second Floor  
Bellingham, WA 98225  
(360) 676-6784**

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 JUL -6 AM 10:16

**TABLE OF CONTENTS**

**A. ASSIGNMENT OF ERRIR ..... 1**

**B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1**

**C. STATEMENT OF FACTS ..... 2**

**D. ARGUMENT ..... 5**

**1. Applegate explicitly waived his ability to assert any violation of his right to public trial and the court’s questioning of the juror in chambers while leaving the door to chambers open and inviting the public to attend did not constitute a closure of the courtroom. .... 7**

*a. Applegate waived his right to public trial explicitly regarding questioning the one juror in chambers.... 8*

*b. The judge did not order a closure of the courtroom. .... 12*

**2. Double jeopardy principles do not apply to the statutory aggravating factors under RCW 9.94A.535..... 14**

**3. The trial court was not required to submit a “to-convict” instruction to the jury on the statutory aggravating factor of ongoing pattern of sexual abuse where the instructions required that the jury find the aggravating factor beyond a reasonable doubt and properly defined the factor..... 18**

*a. Applegate may not raise this issue for the first time on appeal. .... 19*

*b. No “to-convict” instruction was constitutionally required. .... 20*

4. **The trial court’s reliance on the domestic violence aggravating circumstance that rendered Applegate’s conduct more egregious than others did not violate ex post facto, even though the specific circumstance was not formally listed in the statute until after Applegate’s crimes because the list of circumstances in the statute was not exclusive..... 24**

5. **The amendment to the statute adding the aggravating circumstance of domestic violence was not an impermissible retroactive application of the amendment.31**

E. **CONCLUSION ..... 35**

**TABLE OF AUTHORITIES**

**Washington State Court of Appeals**

State v. Elmore, 154 Wn. App. 885, 228 P.3d 760, 766 (2010) ..... 15

State v. Garnica, 105 Wn. App. 762, 20 P.3d 1069 (2001) ..... 17

State v. Goodman, 108 Wn. App. 355, 30 P.3d 516 (2001), *rev. den.*, 145  
Wn.2d 1036 (2002) ..... 29

State v. Gordon, 153 Wn. App. 516, 223 P.3d 519 (2009)..... 20, 21

State v. Hooper, 100 Wn. App. 179, 997 P.2d 936 (2000)..... 27

State v. Hylton, 154 Wn. App. 945, 226 P.3d 246 (2010) ..... 33

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992)..... 19

State v. McNeal, 142 Wn. App. 777, 175 P.3d 1139 (2008) ..... 33

State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007)..... 12

State v. Overvold, 64 Wn. App. 440, 825 P.2d 729 (1992)..... 24, 27

State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009)..... 16

**Washington State Supreme Court**

State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007)..... 32, 33

State v. Eggleston, 164 Wn.2d 61, 187 P.3d 233, *cert. den.*, 1295 S.Ct. 735  
(2008)..... 16

State v. Armstrong, 106 Wn.2d 547, 723 P.2d 1111 (1989)..... 26, 29

State v. Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007), *cert. den.*, 128 S.Ct.  
2871 (2008)..... 16

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) ..... 10, 13

|  |        |
|--|--------|
| <u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....  | 12     |
| <u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995) .....   | 17     |
| <u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237 (1987).....   | 27     |
| <u>State v. Fisher</u> , 108 Wn.2d 419, 739 P.2d 683 (1987).....   | 30     |
| <u>State v. Jackson</u> , 150 Wn.2d 251, 76 P.3d 217 (2003) .....  | 31     |
| <u>State v. Kelley</u> , 168 Wn.2d 72, 226 P.3d 773 (2010) .....   | 15, 16 |
| <u>State v. Kincaid</u> , 103 Wn.2d 304, 692 P.2d 823 (1985) .....   | 21, 22 |
| <u>State v. Mason</u> , 160 Wn.2d 910, 162 P.3d 396 (2007), <i>cert. den.</i> , 553 U.S.<br>1035 (2008)..... | 22     |
| <u>State v. McDonald</u> , 138 Wn.2d 680, 981 P.2d 443 (1999).....   | 20     |
| <u>State v. Schmidt</u> 143 Wn.2d 658, 23 P.3d 462 (2001) .....  | 25     |
| <u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997) .....   | 20, 34 |
| <u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994).....  | 8, 11  |
| <u>State v. Strobe</u> , 167 Wn. 2d. 222, 217 P.3d 310 (2009) .....  | 8      |
| <u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....   | 19     |
| <u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....  | 26     |

**Federal Authorities**

|  |            |
|--|------------|
| <u>Apprendi v. New Jersey</u> , 530 U.S. 501, 120 S.Ct. 2348, 147 L.Ed.2d 435<br>(2000)..... | 16, 22, 33 |
| <u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403<br>(2004).....  | 16, 22     |

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306  
(1932)..... 15

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) 16

**Other Authorities**

1996 Laws of Washington Chapter 248 Section 2..... 28

Berkuta v. State, 788 So.2d 1081 (Fla. 2001), *rev. den.*, 816 So.2d 125  
(2002)..... 8

People v. Webb, 642 N.E.2d 871 (1994), *rev. den.* 647 N.E. 2d 1016  
(1995)..... 9

**Rules and Statutes**

RAP 2.5..... 14, 19, 25

RCW 9.9A.535 ..... 18

RCW 9.94A.390 ..... 26, 27, 33

RCW 9.94A.390 (1989)..... 26

RCW 9.94A.390(2)..... 27

RCW 9.94A.535 ..... 14, 17, 27

RCW 10.01.040 ..... 33

RCW 10.99.020 ..... 17, 18

**Constitutional Provisions**

Art. I §10 and 22 ..... 5

Sixth Amendment ..... 5

**A. ASSIGNMENT OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the defendant waived his ability to raise a violation of his constitutional right to public trial when he affirmatively informed the court, through his defense attorney, he had no objection to the court questioning the one juror in chambers, after the court had discussed the open courtroom issue on the record and after the defendant had an opportunity to consult with his attorney.
2. Whether the trial judge ordered a closure of the courtroom when it questioned one juror in chambers with the door open and invited the public in the courtroom to attend the in chambers questioning.
3. Whether the trial court committed an error in not using a "to-convict" instruction for the ongoing pattern of sexual abuse aggravating factor where the trial court used the WPIC instructions for aggravating factor instructions at the special sentencing trial and provided an accurate definition for that aggravating factor in accord with the WPICs and whether the defendant may raise that issue for the first time on appeal.
4. Whether the trial court's reliance on the domestic violence aggravating circumstance violated *ex post facto* provisions where the circumstance wasn't specified as a statutory aggravating circumstance at the time of the crimes but the aggravating circumstances listed in the statute were not exclusive and merely illustrative.
5. Whether the trial court's reliance on the domestic violence aggravating factor to impose an exceptional sentence was an impermissible retroactive application of a statutory

amendment where the law provided for an exceptional sentence both before and after the amendment.

**C. STATEMENT OF FACTS**

Applegate was charged with six counts of Rape of a Child in the Second Degree in February 1996 for offenses committed against two victims, A.F. and D.B., in 1988 and 1989. CP 78-86.<sup>1</sup> Prior to trial, the State filed a Notice of Intent to Seek Exceptional Sentence and a Third Amended Information, alleging the following aggravating circumstances: that the offenses were part of an ongoing pattern of sexual abuse with respect to both victims; that the offenses involved domestic violence and an ongoing pattern of psychological, physical or sexual abuse with respect to both victims; and that the offense resulted in the pregnancy of a child victim of rape. CP 78-80, Supp. CP \_\_\_\_, Sub Nom 46. Defense did not object to the amended information or to the filing of the notice of intent to seek aggravating factors. Court of Appeals No. 56085-9-I; RP 35-37.<sup>2</sup>

After Applegate was found guilty of all counts, the court instructed the jury on the aggravating factors and sent the jury out for further deliberations. CP 20-21, 42-47; Supp. CP \_\_\_\_, Sub Nom. 64, 71. The

---

<sup>1</sup> Applegate was in warrant status on this case until he was arrested in May of 2004. Supp. CP \_\_\_\_, Sub Nom 7A.

<sup>2</sup> This is a reference to the verbatim report of proceedings in the previous appeal of this case. See Appendix A.

jury found all aggravating circumstances beyond a reasonable doubt. Supp. CP \_\_\_, Sub Nom. 72. Finding that each of the aggravating factors found by the jury was a substantial and compelling reason justifying imposition of an exceptional sentence, the court imposed the statutory maximum of 10 years. CP 75-77. Applegate appealed his convictions and the court's imposition of an exceptional sentence. Court of Appeals No. 56085-9-I. The Court of Appeals reversed the exceptional sentence, but otherwise upheld his convictions.

On remand at a special trial regarding only the aggravating factors, the State pursued only two of the three aggravating factors it originally alleged, the ongoing pattern of sexual abuse and the domestic violence factor. Supp. CP \_\_\_, Sub Nom. 114, 115; RP 84-85. At the sentencing hearing A.F. testified that she was born on September 28, 1975, that Applegate, her stepfather, started sexually abusing her when she was nine years old and the abuse ended when she was fourteen. RP<sup>3</sup> 38-39. It happened two to three times a week from the age of nine until she turned thirteen, and then it happened more frequently, three to four times per week. RP 38-39. Applegate, whom she viewed as her father, sexually

---

<sup>3</sup> RP refers to the verbatim report of proceedings for Aug. 11 and Aug. 12, 2009. VDRP refers to the Second Amended report of proceeding for the voir dire on Aug. 10, 2009, and SRP for the sentencing hearing on Aug. 27, 2009.

molested her and raped her at the same time that he molested and raped her cousin D.B. RP 23, 27, 73, 75. He abused A.F. by touching her vagina and mouth with his penis, hands and mouth. RP 36-37. He put his penis and hand inside her vagina and had her touch his penis with her hands and mouth. RP 37-38. He had D.B. and A.F. strip dance in front of him and touch themselves while dancing and put them in certain sexual positions. RP 37-38.

D.B. was born on March 15, 1975, was a cousin of A.F.'s, but not related to Applegate by blood. RP 55-57. When she was six years old, she went to live with Applegate and A.F.'s family. RP 57. Applegate started sexually abusing her when she was 10 years old. RP 58. Initially he just abused her alone and then later together with A.F. RP 62. As she got older it would happen two to three times per week. RP 65. When she was 15 she got pregnant with Applegate's baby. RP 40, 66, 69-70.

Applegate continued to have sexual intercourse with her after the baby was born until she was 19 years old. RP 71-72. Applegate had her strip for him, touched her with his hands and mouth and penetrated her every time. RP 73-74. He would have her suck his penis sometimes. RP 74. When A.F. and she were together, Applegate always raped the one while the

other watched. RP 75. He took Polaroid pictures but tore them up after each time. RP 76.

The jury found each aggravating factor as to each of the six child rape counts. CP 32-34. At sentencing, based on the jury's findings of those two aggravating factors with respect to both victims, the court again imposed an exceptional sentence of the statutory maximum of 120 months on each count to run concurrently. CP 16-17. The court indicated that any one of the aggravating factor findings provided a substantial and compelling reason for an exceptional sentence. CP 16.

#### **D. ARGUMENT**

Applegate first asserts that the sentencing judge violated his Sixth Amendment and Art. I §10 and 22 constitutional rights when it heard one juror's concerns about her ability to be fair and impartial given her past sexual abuse in chambers. Applegate explicitly waived his ability to assert this issue on appeal, and even if not waived, the court did not order a closure of the courtroom in this case, but instead expressly maintained an open courtroom by leaving the doors to his chambers open and inviting the public to attend if they so chose.

Second, Applegate asserts a number of bases for vacating the aggravating circumstances found by the jury. In addition to asserting that

the “convictions” for the “ongoing pattern of sex abuse” aggravator and the “domestic violence” aggravator are the same for purposes of double jeopardy, thus requiring vacation of the “ongoing pattern of sex abuse,” Applegate alleges that the jury instructions omitted the “to-convict” instruction for the “ongoing pattern of sex abuse” aggravator and that the application of the domestic violence aggravator to his case violated *ex post facto* and retroactivity principles. None of these contentions has merit. Double jeopardy principles do not apply to aggravating factors because factors are not “convictions.” The jury instructions mirrored what was required by the WPICs, both aggravators were adequately defined by the instructions and the jury was instructed that they had to be unanimous and had to find the aggravators beyond a reasonable doubt. Nothing more was required. Applegate has failed to demonstrate that his allegation that the domestic violence aggravator as applied to his crimes violated *ex post facto* principles is a manifest error of constitutional magnitude. Therefore the Court should decline to review this issue. As the possibility of an exceptional sentence up to the statutory maximum existed at the time Applegate committed his offenses and the aggravating circumstances listed in the statute at the time were merely illustrative, the subsequent addition of the domestic violence aggravating factor does not violate *ex*

*post facto* provisions. The application of the domestic violence aggravator to his crimes does not violate retroactivity principles because the amendment did not affect Applegate's substantive rights. Moreover, any error would be harmless regarding this issue because the judge found that the ongoing pattern of sexual abuse was a basis in and of itself to impose an exceptional sentence.

- 1. Applegate explicitly waived his ability to assert any violation of his right to public trial and the court's questioning of the juror in chambers while leaving the door to chambers open and inviting the public to attend did not constitute a closure of the courtroom.**

Applegate contends that the questioning of one juror in chambers regarding her prior sex abuse constituted a closure in violation of his right to a public trial under both the federal and state constitutions. Applegate waived this issue by explicitly stating, through his attorney, that he had no objection to hearing this juror's concerns in chambers. Furthermore, the court did not actually order a closure because although he ordered the questioning to occur in chambers, he explicitly ordered that the door to chambers remain open and invited the public to attend.

a. *Applegate waived his right to public trial explicitly regarding questioning the one juror in chambers.*

Applegate waived the objection he now asserts. In general in order to show a valid waiver of a constitutional right, the record must demonstrate that the waiver was knowing, intelligent and voluntary. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). The validity of the waiver, as well as the inquiry required by the court to establish the waiver, depends on the nature of the right being waived, the circumstances of each case and the experience and capabilities of the defendant. *Id.* at 725.

While the failure to object, in and of itself, does not effect a waiver of the right to public trial, the intentional relinquishment of that right will effect a waiver. State v. Strode, 167 Wn. 2d. 222, 234, 217 P.3d 310 (2009) (J. Fairhurst concurring). Other jurisdictions have held that defense counsel can waive the right to public trial for the defendant. *See, e.g., Berkuta v. State*, 788 So.2d 1081, 1082-83 (Fla. 2001), *rev. den.*, 816 So.2d 125 (2002) (“A defense counsel’s affirmative representation to the court that the defendant consents to excluding persons otherwise entitled to be present in the courtroom is sufficient to effectively waive the defendant’s right to a public trial”); People v. Webb, 642 N.E.2d 871, 958-59 (1994),

*rev. den.* 647 N.E. 2d 1016 (1995) (defense counsel can waive defendant's right to public trial).

In this case, the judge and counsel specifically addressed the issue of in chambers questioning of members of the venire panel both before and during voir dire. Noting that there had not been a Washington Supreme Court decision on the right to public trial issue, prior to voir dire the judge inquired of defense counsel, as well as the courtroom, whether there was any objection to taking the voir dire into his chambers if a juror wanted to discuss a questionnaire issue in a less public setting, but still permitting the public to attend. VDRP 26. Defense counsel responded: "I leave it entirely up to the Court's discretion. This is not an issue for me." *Id.* The prosecutor then noted that it was not entirely a matter for the court's discretion and defense counsel and the defendant needed to indicate if they were objecting or not. VDRP 26-27. The judge indicated it would address the factors at another time, but directed that defense counsel discuss the issue with Applegate and inform the court as to his wishes. VDRP 27. Defense counsel stated that approach was fine and requested the judge to inquire again if there was any objection from the public

regarding going into chambers to discuss sexual abuse issues. VDRP 27-28.<sup>4</sup>

During general voir dire, defense counsel invited the venire to request in chambers questioning if it would make any of them more comfortable in answering. VDRP 76-77, 85. At the end of the general voir dire, the judge stated that juror no. 2 had requested to speak in private about question 10A,<sup>5</sup> to which the juror responded that she only wanted to speak privately if questions were going to be asked about that particular question. VDRP 116-17. Defense counsel then informed the judge that he had not questioned her because she had asked to speak in private. VDRP 118. At that point the judge again inquired whether there was any member of the public who would object to the juror being questioned in chambers. VDRP 118. After indicating it had evaluated the five Bone-Club<sup>6</sup> factors, the court inquired of defense counsel if he or Applegate had any objection. VDRP 119. Defense counsel stated “no.” When pressed whether he was speaking for Applegate, counsel stated he wasn’t. Id. After being given an opportunity to go into the judge’s chambers to discuss the issue with

---

<sup>4</sup> There was no objection from the public. VDRP 28.

<sup>5</sup> The juror apparently had also asked to speak in private about question 11, but by the end of voir dire, that no longer appeared to be an issue. VDRP 116-17, 120. Question 10A was a question about the juror’s experience with sexual abuse. Supp CP \_\_, Sub Nom. 113.

<sup>6</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Applegate<sup>7</sup>, defense counsel stated that he had discussed the issue with Applegate and he did not object to going into chambers and asking questions without the public being able to hear. VDRP 119. The court, Applegate and counsel, then went into chambers and asked juror no. 2 a couple questions about her ability to be fair. VDRP 120-22. Defense counsel indicated that he had not asked about her ability to be fair in the courtroom because she had requested to speak in private. VDRP 122.

Applegate was explicitly given an opportunity to object to the court going into chambers to question individual jurors and after having discussed the issue with defense counsel, he explicitly indicated that he did not object to that procedure. Applegate effectively and validly waived his right to public trial regarding that procedure. *Cf.*, Stegall, 124 Wn.2d at 729 (waiver of state constitutional right to a 12 person jury valid upon showing that defense counsel discussed the issue with the defendant prior to defense counsel waiving that right on behalf of the defendant). This is not the case where the defendant failed to object, but a case in which there was an explicit discussion of the issue and an explicit waiver of the right.

---

<sup>7</sup> Applegate was hard of hearing.

*b. The judge did not order a closure of the courtroom.*

Even if Applegate did not waive this issue, Applegate must show that the judge affirmatively ordered a closure of the courtroom. In determining whether there was a closure of the courtroom, the court looks at the plain language of the trial court's ruling. *Id.* at 516. State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005). A trial court's decision to close courtroom proceedings is subject to de novo review. Brightman, 155 Wn.2d at 514.

Here, the judge was very cognizant of the Court of Appeals decision in Momah<sup>8</sup> and tried to duplicate the conditions it appeared were imposed and upheld in that case. While the judge desired to give jurors who wished to speak in private an opportunity to speak in a "less open setting," the judge stated a number of times that the questioning would not be closed to the public and that persons in the courtroom could attend if they wanted to. VDRP 26, 118. Prior to general voir dire, the judge proposed going into chambers if jurors wished to discuss their questionnaire answers in private: "I would propose that we do that in my chambers or in the jury room for that matter – it makes no difference to me

---

<sup>8</sup> State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007).

– with a court reporter and all parties present, and it *would be a public party proceeding and the public could attend.*” VDRP 26 (emphasis added). At the end of general voir dire when the issue arose regarding questioning juror number 2 in chambers, the judge inquired:

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 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?”

VDRP 118. The judge then indicated that he had evaluated the factors required by caselaw and found that they had been met. VDRP 118-19.

When defense counsel informed the court that Applegate had no objection to going into chambers to ask questions “without the public hearing,” the judge corrected him: “It must remain a public hearing. So I will open the doors to my office.” VDRP 120. Once in chambers, the judge noted for the record that the inner and outer doors to his chambers were open, although the courtroom door was closed, and reiterated that the questioning had to remain a public proceeding. VDRP 120.

While the judge addressed the Bone-Club factors, albeit in a conclusory fashion, it’s clear that he intended to and did keep the proceeding open to the public, just out of the view and hearing of the rest of the venire panel. He did not order that the public be excluded from his

chambers where the questioning was to occur. Applegate has failed to demonstrate that the judge ordered a closure of the courtroom.

**2. Double jeopardy principles do not apply to the statutory aggravating factors under RCW 9.94A.535.**

Applegate next asserts that the jury's finding that Applegate's crimes were part of an ongoing pattern of sexual abuse and an ongoing pattern of domestic violence abuse violated double jeopardy. Specifically he asserts that the jury's findings regarding those factors were "convictions" and that those "convictions" were identical in law and in fact. Findings regarding statutory aggravating circumstances are not convictions and therefore do not implicate double jeopardy. Moreover, the domestic violence and ongoing sexual abuse factors are not the same in fact and law; the domestic violence factor requires a finding that the defendant and victim were household members and the sexual abuse factor requires a finding that the victim was under the age of 18 at the time. Each requires a factual finding the other does not. The jury's findings regarding these aggravating circumstances did not violate double jeopardy.

Applegate never asserted that the imposition of an exceptional sentence based on these two aggravating factors violated double jeopardy. Therefore, he is obligated under RAP 2.5(a) to demonstrate a manifest

error of constitutional magnitude in order to raise this issue on appeal.

State v. Elmore, 154 Wn. App. 885, 899, 228 P.3d 760, 766 (2010). He must specifically show identifiable prejudice from the alleged violation.

Id. He has asserted none and therefore should not be able to raise this issue for the first time on appeal.

The federal and state provisions regarding double jeopardy provide the same protections. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Double jeopardy prohibits, among other things, multiple punishments for the same *offense*. Id. (emphasis added). On the other hand, the legislature has the authority to impose cumulative punishment for the same conduct. Id at 77. “If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause.” Id. In absence of clear legislative intent as to whether the legislature intended to impose multiple punishments, the court applies the Blockburger<sup>9</sup> test to determine whether each of the charged statutory provisions requires proof of a fact the other does not. Id. If the two statutes require proof of the same facts such that only one offense has been committed, then double jeopardy is violated if multiple punishments are

---

<sup>9</sup> Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

imposed. *Id.* Allegations regarding violations of double jeopardy provisions are reviewed de novo. *Id.* at 76.

The opinions in Blakely<sup>10</sup> and Ring<sup>11</sup> do not change this analysis for *Fifth Amendment* double jeopardy principles. Sentencing factors are not treated like elements in this context. *See, Kelley*, 168 Wn.2d at 80-81 (imposition of firearm enhancement on second degree assault conviction did not violate double jeopardy post Apprendi, Blakely, and Ring where legislature intended to impose cumulative punishments). “[H]istorically, double jeopardy protections are inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an “offense.” State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233, *cert. den.*, 1295 S.Ct. 735 (2008). In State v. Benn, the court held that double jeopardy principles do not apply to individual death penalty aggravating factors. State v. Benn, 161 Wn.2d 256, 264, 165 P.3d 1232 (2007), *cert. den.*, 128 S.Ct. 2871 (2008). “... [S]entencing enhancements do not violate the double jeopardy clause even when the enhancement constitutes an element of the underlying offense.” State v. Yarbrough, 151 Wn. App. 66, 95-96, 210 P.3d 1029 (2009).

---

<sup>10</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

<sup>11</sup> Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Here, the imposition of one exceptional sentence based on two different statutory aggravating factors does not implicate the double jeopardy clause. Aggravating factor findings are not “offenses” or “convictions.” While the Washington Supreme Court in State v. Calle, 125 Wn.2d 769, 772-75, 888 P.2d 155 (1995), held that multiple convictions for the same offense can violate double jeopardy even where the sentences run concurrently, its reasoning was premised on the adverse consequences that can arise from separate *convictions*, e.g., impeachment and stigma. *Id.* at 773-75. No such adverse consequences arise from the imposition of one exceptional sentence based on aggravating factors arising out of similar conduct. Multiple punishments do not arise from multiple aggravating findings.

Moreover, each of the statutory aggravating factors requires proof of a fact the other does not. As instructed here, in addition to proof of an ongoing pattern of sexual (or psychological or physical abuse), the domestic violence aggravating factor required proof that the current offense involved “domestic violence.” RCW 9.94A.535(2)(h)(i); CP 45. “Domestic violence” requires proof that the victim and the defendant were “family or household members.” RCW 10.99.020(5); State v. Garnica, 105 Wn. App. 762, 772-73, 20 P.3d 1069 (2001). As D.B. and Applegate did

not have a biological or legal parent-child relationship, the State was required to prove that Applegate and D.B. had a child in common in order to prove that D.B. was a household or family member. RCW 10.99.020(3); CP 43; RP 140-41. In order to prove the ongoing pattern of sexual abuse aggravator, the State has to prove that the victim was under the age of 18 years at the time of the offense, in addition to proving a pattern of sexual abuse. RCW 9.9A.535(3)(g). Thus, each aggravating factor requires proof of a fact that the other does not. Double jeopardy is not violated by the jury's finding that Applegate committed his offenses with the aggravating circumstances of domestic violence and an ongoing pattern of sexual abuse with a victim under the age of 18.

3. **The trial court was not required to submit a “to-convict” instruction to the jury on the statutory aggravating factor of ongoing pattern of sexual abuse where the instructions required that the jury find the aggravating factor beyond a reasonable doubt and properly defined the factor.**

Applegate asserts that the trial court was required to submit a to-convict instruction “containing all the elements of the crime” on the aggravating factor of ongoing pattern of sexual abuse. Failure to do so violated due process. Applegate never raised this issue below and did not object to the instructions regarding ongoing pattern of sexual abuse on this

basis. While the failure to provide a “to-convict” instruction for a crime may be raised for the first time on appeal, Applegate has failed to show manifest error of constitutional magnitude for failure to provide a “to-convict” instruction regarding a *sentencing aggravating factor*. Applegate asserts that the court was required to provide a “to-convict” instruction for the ongoing pattern of sexual abuse because it provided one for the domestic violence factor. The instructions here either mirrored or were derived from the WPICs and contained all that was constitutionally required. No specific “to-convict” instruction was required for the jury to find the ongoing pattern of sexual abuse aggravating factor.

a. *Applegate may not raise this issue for the first time on appeal.*

Applegate bears the burden of showing that the failure to set forth the ongoing pattern of sexual abuse aggravator in a separate “to-convict” instruction was a manifest error of constitutional magnitude because he did not raise this issue below. RAP 2.5. “Manifest” means that a showing of actual prejudice is made. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *see also*, State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (error is manifest if it had “practical and identifiable consequences” in the case). If the error was manifest, the court must also determine if the error was harmless. Lynn, 67 Wn. App. at 345. The burden is on the

defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

While defense counsel objected to the aggravator of ongoing pattern of sexual abuse as being unconstitutionally vague, he never objected to the instructions based on the failure to set forth the definition in a “to-convict” instruction. RP 5-6, 79, 121-28. He specifically requested and was given an instruction on the definition of sexual abuse. This court should decline to review this issue because he failed to object below on this basis and has failed to demonstrate on appeal that any error in not providing a “to-convict” instruction for the aggravator was a manifest error of constitutional magnitude.

*b. No “to-convict” instruction was constitutionally required.*

Jury instructions must, when read as a whole, inform the jury of the applicable law, including all the elements of the offense, and permit the defendant to present his theory of the case. State v. Gordon, 153 Wn. App. 516, 531, 223 P.3d 519 (2009). To-convict instructions are required in order to set forth all the elements of the *crime*, so that the jury has a yardstick by which to measure the evidence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (emphasis added). Aggravating factors,

however, are not elements of the underlying crime and do not need to be included in the to-convict instruction for the crime. State v. Kincaid, 103 Wn.2d 304, 692 P.2d 823 (1985).

In Kincaid the court addressed whether the aggravating circumstances to impose the enhanced penalty (mandatory life imprisonment or death) on a premeditated first degree murder conviction were required to be set forth in the to-convict instruction for first degree murder. *Id.* at 307. It found they did not because the aggravating circumstances are “aggravation of penalty” provisions and not elements of the crime itself. *Id.* at 312. Ultimately the court concluded that all that was necessary for instructions regarding an aggravating circumstance was that the jury be properly instructed “as to how the existence of any such aggravating circumstance is to be determined,” *i.e.*, that the State had to prove the circumstance beyond a reasonable doubt and that the jury needed to be unanimous in its decision. *Id.* at 307, 311.

In Gordon, the court addressed the adequacy of the instructions regarding aggravating factors in defining the factors. It held that where an appellate court has further defined the legal standard of a statutory aggravating factor, the jury instruction must include that legal standard. Gordon, 153 Wn. App. at 533-34. In holding that aggravating

circumstances are elements of the crime for purposes of instructing the jury regarding exceptional sentencing, the court specifically stated it was not finding that the aggravating factors are elements of the substantive crime, and agreed with the holding in Kincaid that the aggravating circumstances did not need to be in the to-convict instruction, but emphasized that the jury must be properly instructed as to how it is to determine the existence of the aggravating circumstances. *Id.* at 534 n.9, 10.

From those two cases it can be gleaned that instructions regarding aggravating circumstances are constitutionally sufficient if they inform the jury that they must find the aggravating circumstance beyond a reasonable doubt and must be unanimous in their verdict, and inform the jury of any specific, technical legal standard for the factor if one has been set forth in case law. Nothing further is required post- Apprendi<sup>12</sup> and Blakely: “As we explained in *Mills*, *Apprendi* and its progeny do not require a specific format for the jury to conclude the existence of facts raising a punishment beyond its statutory maximum; it requires a jury make the decision based on the reasonable doubt standard.” State v. Mason, 160 Wn.2d 910, 936-937, 162 P.3d 396 (2007), *cert. den.*, 553 U.S. 1035 (2008).

---

<sup>12</sup> Apprendi v. New Jersey, 530 U.S. 501, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The instructions met these standards and followed the WPICS. The preliminary aggravating factor instruction mirrored WPIC 300.07, and informed the jury that they had to find the factor beyond a reasonable doubt and that they had to be unanimous in their decision. CP 42. The definition for “ongoing pattern of sexual abuse” mirrored WPIC 300.16, including a definition for a “prolonged period of time.” CP 43. An instruction was also included, per defense request, for the definition of “sexual abuse.” CP 44. The instruction for the domestic violence aggravator followed WPIC 300.17, and included only those provisions from that WPIC that were applicable to the case. CP 45. The instructions also included a definition of the statutory term for “family or household members.” CP 46. The only reason the domestic violence aggravator appeared similar to a “to-convict” instruction was because under the statute and WPICs there are alternative means of satisfying this aggravator and depending on the facts of the case one or more of those “elements” would have to be found by the jury. There is no requirement that the “elements” of aggravating factors appear in a “to-convict” instruction. The instructions, taken as a whole, set forth all that was constitutionally required for the jury’s verdict.

4. **The trial court's reliance on the domestic violence aggravating circumstance that rendered Applegate's conduct more egregious than others did not violate *ex post facto*, even though the specific circumstance was not formally listed in the statute until after Applegate's crimes because the list of circumstances in the statute was not exclusive.**

Applegate again raises an *ex post facto* allegation that he raised in his previous appeal, although this Court declined to address it in the prior appeal. However, as before, he failed to raise this challenge below at the sentencing hearing. He cannot raise the issue on appeal unless he demonstrates it is a manifest error of constitutional magnitude. He has failed to brief this, so this Court should decline to reach this issue. Moreover, under this Court's precedence in Overvold,<sup>13</sup> reliance on aggravating circumstances not cited in the exceptional sentence statute at the time of the crime, but listed later, does not violate *ex post facto*. Finally, any error would be harmless as the trial court stated that any of the aggravating circumstances, including ongoing pattern of sexual abuse which was listed in the statute at the time Applegate committed his crimes, would support imposition of an exceptional sentence.

---

<sup>13</sup> State v. Overvold, 64 Wn. App. 440, 825 P.2d 729 (1992).

While an *ex post facto* allegation implicates constitutional concerns, Applegate must also show that the alleged error is manifest. If a defendant failed to raise a claim below, the appellate court may refuse to review the claim unless the defendant can demonstrate that it is a manifest error of constitutional magnitude. RAP 2.5(a). See argument *infra* at p. 19-20. Applegate did not object to the jury instructions regarding the domestic violence aggravating circumstance. The only objection he raised to any of the instructions focused on the alleged vagueness of the ongoing pattern of sexual abuse aggravating factor. During his last appeal, Applegate raised this very issue, although the Court declined to address it at that time. See Court of Appeals No. 56085-9-I. Despite this he decided not to raise this *ex post facto* issue initially, as he should have, in the trial court. The Court should decline to review this issue.

Applegate asserts that reliance on the domestic violence aggravating circumstance violates the *ex post facto* provision regarding an increase in punishment. The *ex post facto* clauses of the United States Constitution and the Washington Constitution prohibit enactment of any law that increases the quantum of punishment after the offense was committed. State v. Schmidt 143 Wn.2d 658, 672-73, 23 P.3d 462 (2001). The purpose of this prohibition against *ex post facto* laws is to ensure that

persons have fair warning of the punishment the State may impose for violations of the law. *Id.* The test to determine whether a law violates the *ex post facto* clause is whether the law “(1) is substantive, [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.” State v. Ward, 123 Wn.2d 488, 498, 869 P.2d 1062 (1994) (quoting In re Personal Restraint of Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991)). “In the context of an act already criminally punished or punishable, “disadvantage” means the statute alters the standard of punishment which existed under the prior law.” Schmidt, 143 Wn.2d at 673.

In 1988 and 1989, a sentencing judge could impose an exceptional sentence as long as he found substantial and compelling reasons to do so. State v. Armstrong, 106 Wn.2d 547, 549, 723 P.2d 1111 (1989). The list of aggravating circumstances set forth in the statute was illustrative rather than exclusive. *Id.* at 550; RCW 9.94A.390 (1989) (“the following are illustrative only and are not intended to be exclusive reasons for exceptional sentences”). At the time an aggravating circumstance found by the judge was sufficient to support an exceptional sentence if it took “into account factors other than those which [were] necessarily considered in computing the presumptive range for the offense.” State v. Dunaway,

109 Wn.2d 207, 218, 743 P.2d 1237 (1987); *see also*, State v. Hooper, 100 Wn. App. 179, 185, 997 P.2d 936 (2000) (“What is important is whether the conduct was proportionately more culpable than that inherent in the crime.”).

In a similar challenge to the retroactive application of the aggravating circumstance of multiple incidents of sexual abuse, the court in State v. Overvold, 64 Wn. App. 440, 825 P.2d 729 (1992) rejected such an *ex post facto* argument. In that case the defendant pled guilty to two counts of indecent liberties for sexually molesting his daughter. *Id.* at 442-43. The defendant argued on appeal that the trial court had erred in relying upon a pattern of sexual abuse as a basis for the exceptional sentence the court imposed because that reason had not been listed as an aggravating circumstance under the exceptional sentence statute<sup>14</sup> for the entire charging period. *Id.* at 444-45. The court disagreed that there was an *ex post facto* violation because the aggravating factors listed in the statute at the time were illustrative and not exclusive. *Id.* at 445.

Applegate makes the same argument. The aggravating circumstances that the offense was a domestic violence offense involving an ongoing pattern of psychological, physical or sexual abuse of the

---

<sup>14</sup> RCW 9.94A.390(2), now codified as RCW 9.94A.535.

victim manifested by multiple incidents over a prolonged period of time was formally codified as a statutory aggravating circumstance in 1996. 1996 Laws of Washington Chapter 248 Section 2. The fact that the domestic violence basis for Applegate's exceptional sentence was not formally listed as an "aggravating circumstance" under the statute in effect at the time he committed his crime does not mean that he couldn't have received an exceptional sentence based on that reason at the time of his crimes. As long as the reason for the exceptional sentence was one based on factors other than those that are necessarily considered in computing the standard range, it would have been, and was, a legitimate basis for an exceptional sentence. Since the list of aggravating circumstances was not an exclusive list, and merely illustrative, reliance on reasons which were codified later is not barred by *ex post facto* doctrine.

Applegate asserts that he would not have been on notice of a possible increase in punishment because of legislative language in the Domestic Violence Act. That Act, passed in 1979, was aimed at ensuring that crimes involving domestic partners received the same serious consideration as non domestic crimes.

But the legislature specifically stated that the purpose of the Domestic Violence Act, Chapter 10.99 RCW, was not to

establish new crimes, finding that “the existing criminal statutes are adequate to provide protection for victims of domestic violence.” RCW 10.99.010. Thus, *the Act* “created no new crimes but rather *emphasized the need to enforce existing criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor.*

State v. Goodman, 108 Wn. App. 355, 359, 30 P.3d 516 (2001), *rev. den.*, 145 Wn.2d 1036 (2002) (emphasis added). While the legislature considered the criminal statutes sufficient in 1979 to address crimes committed against domestic partners, the Act said nothing about sentencing. Even if the legislature’s statement can be taken to mean that the criminal statutes were generally sufficient to protect victims of domestic violence, its statement most certainly cannot be taken as addressing those domestic crimes involving an ongoing pattern of psychological, physical or sexual abuse.

Applegate was certainly on notice that the offenses he committed were ripe for an exceptional sentence where the comparable aggravating circumstance of ongoing pattern of sexual abuse was specifically listed in the statute at the time. *See, Armstrong*, 106 Wn.2d at 550 (infliction of multiple injuries, although not a statutory “aggravating circumstance,” was sufficient to support exceptional sentence, noting that it was similar to multiple incidents per victim which was a statutory aggravating

circumstance in the context of economic offenses). He also was on notice that his criminal conduct was amenable to an exceptional sentence under the then existing abuse of trust aggravating factor. *See, State v. Fisher*, 108 Wn.2d 419, 427, 739 P.2d 683 (1987) (statutory rape involving “a relationship over a period of time, or within the same household, would indicate a more significant trust relationship, such that the offender’s abuse of that relationship would be a more substantial reason for imposing an exceptional sentence”). The maximum sentence that Applegate faced before and after the statutory amendment adding domestic violence as a formal aggravating circumstance did not change - he still faced up to the statutory maximum of 10 years. In 1988 through 1989 when he committed his offenses, he could have received the very same sentence he did receive for the very reasons the trial court relied upon.

Moreover, any error in considering the domestic violence aggravating circumstance in support of an exceptional sentence was harmless because the judge specifically indicated that he would have imposed the same exceptional sentence on the basis of any of the other aggravating factors. A court need not remand for sentencing when it invalidates one or more of the reasons supporting an exceptional sentence as long as it is clear from the record that the court would have imposed the

same sentence on the basis of the remaining valid reasons. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

The sentencing judge specifically found that any one of the aggravating factors found by the jury, standing alone, supported imposition of an exceptional sentence. CP 16, SRP 5-6. In fact at the prior sentencing, the judge stated that he was “constrained” by the 10 year maximum and that he certainly believed that an exceptional sentence was called for. Court of Appeals, No. 56085-9-I RP 532, see Appendix A. Even if this Court were to invalidate the domestic violence basis for the exceptional sentence due to *ex post facto* concerns, the record clearly shows the judge would have imposed the same sentence solely on the basis of the other aggravating circumstance of ongoing pattern of sexual abuse.<sup>15</sup>

**5. The amendment to the statute adding the aggravating circumstance of domestic violence was not an impermissible retroactive application of the amendment.**

Applegate also asserts that application of the domestic violence aggravating circumstance to his sentence is an improper retroactive application of a statutory amendment. The addition of domestic violence

---

<sup>15</sup> If the Court were to invalidate the domestic violence aggravating circumstance basis for the exceptional sentence, that would, however, impact the relief Applegate has requested in his double jeopardy argument.

as a statutory aggravating circumstance did not affect Applegate's substantive rights: both before and after he committed his crimes the possibility of an exceptional sentence existed. Therefore it was not an improper retroactive application of the statutory amendment.

Generally criminal statutes apply prospectively in order to give fair notice of the statutory provisions. State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). Lack of notice is not an issue regarding statutory amendments if those amendments do not change the substantive consequences of the crime. *Id.* "A statute is not retroactive merely because it applies to conduct that predated its effective date." *Id.* at 471.

"A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired in the existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." ... As Justice Stevens noted:

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

*Id.* (internal citations omitted).

•  
•

In State v. Hylton, 154 Wn. App. 945, 952-56, 226 P.3d 246 (2010) the court addressed whether the addition of the abuse of trust aggravating circumstance in 2005 was a substantive change to the Sentencing Reform Act of 1981 (“SRA”) and therefore could not be retroactively applied under RCW 10.01.040 to an offense committed before 2005. Noting that RCW 10.01.040, the savings clause, applied only to substantive changes in the law and not procedural ones, the court found that the addition of the abuse of trust aggravating factor to those listed in former RCW 9.94A.390 did not constitute a substantive change despite aggravating factors now operating as functional equivalents of elements for sentencing purposes post-Apprendi. *Id.* Relying on Pillatos, the court found that since the law provided for an exceptional sentence both pre and post the 2005 procedural changes to the SRA, adding the abuse of trust aggravator did not affect the defendant’s substantive rights. *Id.* at 955-56. *See also*, State v. McNeal, 142 Wn. App. 777, 793-94, 175 P.3d 1139 (2008) (as defendant did not have any vested right to a standard range sentence, without consideration of an exceptional sentence, and the amendment did not create any new legal consequences, the 2007 amendment to the exceptional sentence provisions of the SRA was not an impermissible retroactive amendment).

Similarly, here the addition of the domestic violence aggravating circumstance as a specified statutory basis for an exceptional sentence did not increase the punishment Applegate was facing and did not affect his substantive rights. The cases cited by Applegate, Smith and Cruz, are distinguishable because they both were determined to involve substantive changes in the law.

Further, the 1997 amendment is not remedial. A remedial change is one that relates to practice, procedures, or remedies and does not affect a substantial or vested right. ... In *Cruz*, we explained the 1990 amendments *were substantive changes* because they imposed an affirmative disability, they promoted a retributive aim of punishment, and there was no nonrational basis or nonpunitive purpose for the changes. ... Similarly, the 1997 amendment at issue here imposes an affirmative disability and promotes a retributive aim of punishment by removing the juvenile wash-out provisions from the SRA.

State v. Smith, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001) (internal citations omitted) (emphasis added). Both cases involved changes to the criminal history SRA provisions which resulted in higher offender scores, and thus an increase in punishment.

The statute does not permit greater punishment than Applegate faced when he committed the crimes; it permits the same punishment. The imposition of an exceptional sentence based on the domestic violence

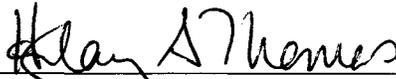
aggravating circumstance was not an impermissible retroactive application of a statutory amendment.

**E. CONCLUSION**

For the foregoing reasons, the State requests that the Court affirm Applegate's exceptional sentence.

DATED this 2nd day of July, 2010.

Respectfully submitted,



HILARY A. THOMAS

WSBA No. 22007

Appellate Deputy Prosecutor

Attorney for Respondent

**CERTIFICATE**

I certify that on this date I placed a copy of the attached document in the in the United State's mail with proper postage thereon, or otherwise caused to be delivered, to this Court and Appellant's attorney, Lila J. Silverstein, addressed as follows:

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

\_\_\_\_\_  
Legal Assistant

\_\_\_\_\_  
Date

# APPENDIX A

1 THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 COUNTY OF WHATCOM

3

4 STATE OF WASHINGTON,

5 Plaintiff,

6 vs.

No. 96-1-00099-2  
COA No. 56085-9-I

7 RONALD APPEGATE,

8 Defendant,

9

---

10 VERBATIM REPORT OF PROCEEDINGS

11 MARCH 21, 2005 and MARCH 22, 2005

---

12

13 VOLUME I OF III

14 PAGES 1 THROUGH

15

16

17

18

19

20

21

22 LAURA PORTER, CCR

23 OFFICIAL COURT REPORTER

24 WHATCOM COUNTY SUPERIOR COURT

25 BELLINGHAM, WASHINGTON

1                   MR. NELSON: My only comment on No. 4 is I'm  
2 asking for the same as No. 3. I would -- my intent  
3 was that I was not going to ask for any opinion  
4 evidence. I was going to ask them directly, but I'm  
5 happy to do that outside of the presence of the jury.

6                   THE COURT: Okay. Mr. Setter, is that  
7 acceptable?

8                   MR. SETTER: That's fine.

9                   THE COURT: Okay.

10                  MR. SETTER: We have to rearraign the  
11 defendant at some point at the Court's pleasure on, I  
12 think, a Third Amended Information.

13                  THE COURT: Okay.

14                  MR. SETTER: The defendant is charged with  
15 six counts of child rape in the 2nd degree and they  
16 provide for specific dates which is actually the  
17 starting date is the date the child rape in the 2nd  
18 degree became a law. Prior to that, although it's  
19 the same time period, we are talking about statutory  
20 rape in the 2nd degree.

21                  Secondly, it addresses locations where acts  
22 occurred under, to satisfy the requirements of  
23 Heathridge, and the Second Amended Information or the  
24 First Amended Information wasn't intended to change  
25 the Information except to add exceptional sanctions.

1 Except I think we made some mistakes in terms of the  
2 date. Each charge was copied as if it was the same.  
3 The time periods for Counts I through III are  
4 different than Counts IV through VI. So that gave  
5 raise to a Second Amended Information. And in the  
6 Second Amended Information, it didn't track the  
7 locations properly so that would be --

8 THE DEFENDANT: I have read all of this.

9 MR. SETTER: So that gave rise to the Third  
10 Amended Information. I don't think counsel has an  
11 objection.

12 MR. NELSON: I have no objection. I  
13 understand the need for the Third Amended  
14 Information. It was explained to me. I have given a  
15 copy of this Information to Mr. Applegate. He has  
16 reviewed it with me and we are prepared to be  
17 arraigned on this at this time.

18 THE COURT: Do you wish to be formally  
19 arraigned or waive a formal reading of the  
20 Information at this time?

21 MR. NELSON: We would waive formal reading  
22 and enter pleas of not guilty.

23 THE COURT: Okay. And there are six counts  
24 then still?

25 MR. SETTER: Yes, Your Honor.

1 THE COURT: Okay. Mr. Applegate, you  
2 understand this is some amended paperwork still  
3 alleging six counts.

4 THE DEFENDANT: Yes.

5 THE COURT: And to those six counts your  
6 attorney entered a plea of not guilty on your behalf.

7 Is that your understanding and that is your  
8 wish?

9 That's what you want?

10 MR. NELSON: He is asking you do you plead  
11 not guilty to the Third Amended Information?

12 THE DEFENDANT: Well, I don't understand  
13 what --

14 MR. NELSON: I have gone over this with you.

15 THE DEFENDANT: It's what?

16 MR. NELSON: I have gone over this with you.

17 THE DEFENDANT: Yes.

18 MR. NELSON: And you wish to have a trial on  
19 these charges?

20 THE DEFENDANT: Yes.

21 MR. NELSON: So your plea is not guilty?

22 THE DEFENDANT: Yes.

23 THE COURT: Okay. Very good. I think that  
24 is sufficient.

25 MR. SETTER: Your Honor, next we have a

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF WHATCOM

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
RONALD APPLGATE,  
Defendant,

No. 96-1-00099-2  
COA No. 56085-9-I

---

VERBATIM REPORT OF PROCEEDINGS  
MARCH 24, 2005; MARCH 25, 2005  
AND MARCH 28, 2005

---

VOLUME III OF III  
PAGES 419 THROUGH 537

LAURA PORTER, CCR  
OFFICIAL COURT REPORTER  
WHATCOM COUNTY SUPERIOR COURT  
BELLINGHAM, WASHINGTON

1 here who have been victimized by Mr. Applegate can  
2 take what they have learned from their healing  
3 process and they can help others, they can help  
4 others heal, just the way they will heal and they  
5 will be better persons for it.

6 The Court is constrained with the State's  
7 recommendation of a maximum of 10 years and 10 years  
8 it will be. I believe certainly an exceptional  
9 sentence is called for. So the 10 year sentence  
10 sought by the State will be imposed.

11 Let me advise Mr. Applegate of his rights  
12 under 7.2. Do you have a form there for that as  
13 well? Let me advise him of those on the record. I  
14 have a copy here.

15 MR. SETTER: That's fine.

16 THE COURT: Mr. Applegate, you have the  
17 right to appeal this conviction. You have the right  
18 to appeal a sentence outside the standard range;  
19 unless a Notice of Appeal is filed within 30 days  
20 after the entry of judgment or order appealed from,  
21 the right to appeal is irrevocably waived. The  
22 Superior Court Clerk will, if requested by the  
23 defendant appearing without counsel, supply of a  
24 Notice of Appeal form and file it upon completion by  
25 your attorney, if you have one. You have the right,