No. 30732-8-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

ROBERT MARTINEZ Jr., Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

For the most part, the "Facts" of the case as recited by the Appellant in his brief are accurate but there are a few significant omissions. Notable among these is the fact that in addition to telling Amber Grimm, when she arrived at the victim's home, on the evening of May 14, 2010 that he had "fucked up" (*See*: Brief of Appellant, page 4, and RP page 260), the Appellant specifically told Amber Grimm: "He told me that he didn't want me to be at, or him to be at the barbecue because he had raped my friend." RP page 323. Another notable absence from the Appellant's recitation is any reference to the My Space messages that he sent to the victim while he was a fugitive. In these he stated:

> Are you going to write me, I [*sic.*] really sorry, tell me if I'm better off in jail or dead, what would you prefer, I am so very sorry for what I have done. I was, I will always love you and miss you and the kids tremendously. Please find it in your heart to forgive me for what I have done. I love you so much and can't express how sorry I am for what I have done, or what I did.

RP pages 267 - 268. And:

> I would like to say I'm sorry to my boys and to Patty. It was wrong. But what you did to me was not right. You fucked with my head and played with my heart. I hope you are happy now. I will never forget my boys and the ones I love again. My God forgive me for what I have done.

RP page 268. These admissions by the Appellant were admitted into evidence at trial, in addition to his other statements made to Ms

Grimm, Mr. Ryan, Mr. Wassmuth, and Mr. Canas wherein he acknowledged his guilt, as described in the Appellant's Brief.

Also missing from the Appellant's recitation of the facts is that the Defense at the trial level never was able, neither in pre-trial motion hearings, nor at trial, to produce any good argument for the relevance of the fact that the victim in the case had sex with anyone other than the Appellant at any time prior to the rape. The Appellant now tries to argue that exclusion of evidence of prior sexual intercourse with someone other than himself deprived him of the opportunity to argue that the victim had a motive to falsely accuse him. Brief of Appellant, page 17. A review of the record demonstrates that in fact Defense Counsel was able to make this very argument without being allowed to drag the victim's sexual history in front of the jury:

> Defense: But actually I guess from our interview I had with you in the prosecutor's office you kind of had emotionally had moved, moved on in your life, had you not?
>
> Victim: Yes I had.
>
> Defense: And you were seeing other people.
>
> Victim: I, yes I was.

RP pages 274 - 275. A concise statement of the Prosecution's position on this issue - allowing evidence of "moving on" or "seeing other people" was appropriate to support the Defense version, BUT evidence of prior sexual acts with another person was highly

prejudicial and probative of no relevant fact - appears in the record as well. With the jury out of the room during an interlude the Prosecutor stated:

> But what he cannot do is, is ask this witness if she has had consensual sex with anyone any time because that's not, that doesn't go to her consent on this occasion. So if he wants to ask her, did you tell him you'd moved on, did you tell him you were seeing other people, that's fine. But he cannot ask her are you, were you having consensual sex with somebody else when this happened because that's inappropriate.

RP page 285.

With these notable exceptions the "facts" of the case as well as the procedural history contained in the Appellant's Brief are not challenged herein.

II. ISSUES

A. DID THE TRIAL COURT ERR BY CONSIDERING THE APPELLANT'S PRIOR ROBBERY CONVICTION FROM THE STATE OF CALIFORNIA "COMPARABLE" TO A WASHINGTON CONVICTION FOR THE PURPOSES OF SENTENCING UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT?

B. IS THE PERSISTENT OFFENDER ACCOUNTABILITY ACT UNCONSTITUTIONAL AS APPLIED TO THE APPELLANT HEREIN AS VIOLATIVE OF THE *EX POST FACTO* CLAUSE?

C. DID THE TRIAL COURT ERR BY EXCLUDING EVIDENCE OF PRIOR CONSENSUAL SEX BETWEEN THE VICTIM AND ANOTHER INDIVIDUAL?

D. DID THE TRIAL COURT ABUSE ITS DISCRETION BY ALLOWING THE ADMISSION OF OUT-OF-COURT STATEMENTS MADE BY THE VICTIM AS "EXCITED UTTERANCES?"

III. ARGUMENT

A. THE APPELLANT'S PRIOR CALIFORNIA SECOND DEGREE ROBBERY CONVICTION IS "COMPARABLE" TO A WASHINGTON CONVICTION AS A MATTER OF LAW.

B. THE PERSISTENT OFFENDER ACCOUNTABILITY ACT IS CONSTITUTIONALLY SOUND BOTH FACIALLY AND AS APPLIED TO THE APPELLANT HEREIN.

C. THE TRIAL COURT DID NOT ERR BY EXCLUDING EVIDENCE OF PRIOR CONSENSUAL SEX BETWEEN THE VICTIM AND ANOTHER INDIVIDUAL.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE ADMISSION OF OUT-OF-COURT STATEMENTS MADE BY THE VICTIM AS "EXCITED UTTERANCES."

DISCUSSION

A. THE APPELLANT'S PRIOR CALIFORNIA SECOND DEGREE ROBBERY CONVICTION IS "COMPARABLE" TO A WASHINGTON CONVICTION AS A MATTER OF LAW.

Addressing the weakest of the Appellant's arguments first, Counsel for the Appellant has conceded that the "comparability" of the California Second Degree Robbery (Appellant's Fourth Assignment of Error) is without merit in the face of State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). As such, the Respondent would accept the concession and ask that the Court conclude that the California conviction is comparable to a Washington conviction for the purposes of sentencing under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, as a matter of law.

B. THE PERSISTENT OFFENDER ACCOUNTABILITY ACT IS CONSTITUTIONALLY SOUND BOTH FACIALLY AND AS APPLIED TO THE APPELLANT HEREIN.

Having dispensed with the "comparability" challenge, the only remaining issue regarding sentencing in this case, is the Appellant's Third Assignment of Error, an invitation for this Court to void Persistent Offender Accountability Act (POAA), RCW 9.94A.570, on the basis of the *ex post facto* clause. While the Appellant may be technically correct in his assertion that Division Three has not yet published an opinion upholding the POAA in the face of such a direct

challenge (Brief of Appellant, page 21), the Appellant certainly cannot demonstrate any contrary or even equivocal holding by Division Three in any published or unpublished opinion.[1] Rather, the Appellant acknowledges that every single Court that has addressed a challenge to the POAA as violative of *ex post facto* prohibitions has found no constitutional infirmity.[2] In fact, all such challenges to similar sentencing provisions in the State of Washington have been denied. More than one hundred years ago, in State v. Le Pitre, 54 Wash. 166, 103 P. 27 (1909), the Supreme Court concluded that a persistent offender sentencing provision merely provides an increased punishment for the last offense and so does not violate the *ex post facto* prohibitions. In 1940 our Supreme Court denied *a similar ex post facto* attack on a habitual offender sentencing provision:

> Rem.Rev.Stat. § 2286 ("Habitual Offender" sentencing provision) sets forth what will constitute being an habitual criminal. The severer penalty provided by statute for one who is an habitual criminal is not imposed for an offense, except the last one (in this case, burglary in the second degree), upon which the defendant has been convicted and not yet sentenced.

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[1] It cannot go unnoticed that Division Three has upheld the POAA on *ex post facto* grounds in at least one unpublished opinion interestingly enough, authored by Judge Kato. Mindful of RCW 2.06.040 and GR 14.1, this unpublished opinion is not cited herein as a legal precedent.

[2] *See*: State v. Angehrn, 90 Wn.App. 339, 952 P.2d 195 (Div. I, 1998) *review denied* 136 Wn.2d 1017, 966 P.2d 1277, *certiorari denied* 120 S.Ct. 92, 528 U.S. 833, 145 L.Ed.2d 78; State v. Nordlund, 113 Wn.App. 171, 53 P.3d 520 (Div. II, 2002) *review denied* 149 Wn.2d 1005, 70 P.3d 964; Brown v. Mayle, 283 F.3d 1019, 1040 (9th Cir. 2002).

State v. Domanski, 5 Wn.2d 686, 687, 106 P.2d 591, 592 (1940). The Appellant offers absolutely no legal or logical basis for this Court to reverse prior precedent and go against the established authority, because none exists. There is no reason to believe that Division Three would reject the long established precedent, the well supported and soundly reasoned analysis, and clear holdings of the Courts on this issue. As such, the issue is without merit.

C. THE TRIAL COURT DID NOT ERR BY EXCLUDING EVIDENCE OF PRIOR CONSENSUAL SEX BETWEEN THE VICTIM AND ANOTHER INDIVIDUAL.

The Appellant's Second Assignment of Error, the issue of the Trial Court's exclusion of evidence of consensual sex between the victim and someone other than Mr. Martinez, as with his other arguments, fails on factual and legal bases. First and foremost the Appellant cannot be allowed to argue that the Trial Court's recognition of RCW 9.44.020[3] (the "Rape Shield Statute") in any way hindered his legitimate efforts to advance his defense. Despite the Trial Court's ruling that ANY references to prior consensual sex acts would not be permitted (RP at pages 114, 122, 283, and 307), the Defense did present this type of evidence to the jury (RP at pages 277 and 293).

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[3] The Appellant throughout his brief cites to RCW "9.94A.020." (Brief of Appellant, pages i, ii, iii, iv, 2, 14, 16, and 17). At one point he cites to RCW "9.94.020." (*Id.* at page 1). It appears that all of these are intended to be citations to RCW 9.44.020, commonly referred to as the "Rape Shield Statute."

The Defense was even able to argue this to the jury during his closing (RP at pages 529 - 530). As the Appellant notes, this evidence was "highly prejudicial to the alleged victim and barred by [9.44.020] and ER 404(b)" and had been barred by the Trial Court. Brief of Appellant, page 16. If, as the Appellant asserts herein, evidence of the victim's sexual activities was offered solely "on the limited issue of her motive to falsely accuse" the Appellant (Brief of Appellant, page 17), then his argument is without merit in the facts of the case or in the law.

The rule set forth in RCW 9.44.020 predates the statute and has been the law in this state for many years:

> Whatever the rule in this state may formerly have been in regard to the right of a defendant in forcible rape cases to show specific acts of misconduct on the part of the complaining witness, it is now firmly established that such acts are not admissible.

State v. Severns, 13 Wn.2d 542, 554, 125 P.2d 659, 664 - 665 (1942). The express language of the statute provides that evidence of past sexual evidence is inadmissible to prove either credibility or consent:

> Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual

> intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

RCW 9A.44.020(2). In the present case the Appellant's defense throughout the proceedings below was that the victim consented to sex with him during the charged incident. He asserted "consent" at the Suppression hearing (RP pages 98, 99, 100, 110, 111, 113), at trial (RP pages 223, 277, 284, 308, 409, 414, 432, and 456), and during closing argument (RP pages 526, 529, and 532). This point was succinctly and unequivocally captured in the following exchange:

> Judge: I understand, or, or perceive that it is the defendant's case in chief that the allegations of which the alleged victim and the State complain was, that it was consensual.
>
> Defense: Right.

RP page 285. In fact, at one point the Defense went so far as to plainly state that evidence of prior consensual sex with the Appellant would "allow him to show to a jury that she probably consented the second time by the fact that she consented the first time." RP page 113. This is unquestionably contrary to the express language of the statute and all relevant case law precedence.

Having concluded that the evidence of past consensual sex would be completely irrelevant and inappropriate to the issue of

"consent" the next clearly stated bar in the statute is the use of such evidence to impugn the "credibility" of the victim. As has been noted:

> The rape shield law was enacted to remedy the practice of producing evidence of a victim's past sexual conduct and attempting to show that there was a logical nexus between chastity and veracity. Thus, the statute guards against prejudice resulting from promiscuity.

State v. Peterson, 35 Wn.App. 481, 485-486, 667 P.2d 645, 648 (Div. I, 1983). In the present case the Defense attempted to do just this under the guise of "motive." The Appellant asserts that the Trial Court's exclusion of evidence of prior sex acts with another man (not the Appellant) prevented him from presenting evidence that the victim had a reason to "fabricate" the rape allegations. Brief of Appellant, page 17. What is this tact, if not an attack on the credibility of the victim? Evidence of the "relationship" between the victim and this other man - minus specific instances of sexual intercourse - was presented and Defense was able to accuse the victim of "fabrication" without the lurid details or prejudicial smear of her character. RP pages 274 - 275.

As further indication of the utter lack of support for his position, the Appellant can only muster citation to one case in support of this particular aspect of this appeal: State v. Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997). Brief of Appellant, page 17. Hamlet has nothing to do with a rape prosecution, application of the Rape Shield, issues

of motive, credibility, or any other factual similarity to the case here at bar. The holding in Hamlet is also adverse to the very position espoused by the Appellant herein. In Hamlet the Supreme Court held that although the Trial Court abused its discretion by allowing the State to introduce evidence that their expert had been first retained by the Defense, this would not require reversal in the face of all of the admissible evidence presented at trial. *Id.* at 327 - 328.

In the present case the Appellant has failed to demonstrate that the Trial Court erred, and even if he could make such a showing, following the Hamlet Court's reasoning, this Court would have to agree that reversal is not required in the face of all of the "untainted" evidence presented at trial.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE ADMISSION OF OUT-OF-COURT STATEMENTS MADE BY THE VICTIM AS "EXCITED UTTERANCES."

The final area of complaint advanced by the Appellant is the Trial Court's decision to allow the admission of the victim's statement to her friend immediately after the rape and her statement to the police officer at the hospital shortly after the rape. In his First Assignment of Error the Appellant asserts that the Trial Court erred when it allowed the introduction of these statements as "excited utterances." Brief of Appellant, page 10.

Moving first to the statement the victim made to her friend, the Appellant miscasts this as not a "spontaneous response, she had time to reflect and protect her self-interest in having [the Appellant] out of her life." *Id.* at page 12. It should be recalled that the actual evidence presented at trial was that the rape was ongoing when the friend arrived at the residence. RP page 258. In fact, it was a phone call and her arrival that caused the Appellant to stop sexually assaulting the victim. *Id.* The uncontested testimony presented at trial was that the victim walked out of the bedroom, wrapped only in a blanket, to let her friend in. *Id.* The victim testified that because her friend was pregnant and so she feared for her safety, she considered closing the door in her friend's face to protect her from the Appellant's violence. RP page 259. When her friend entered the residence the Appellant was in a very emotionally disturbed state and that as soon as he left their immediate company (he went into the kitchen and retrieved a large knife) the victim whispered to her friend that the Appellant had raped her. RP pages 260 - 261. This is hardly the situation where a victim has "time to reflect" and to create a statement in their "self-interest." Moreover, the "hearsay" statement made to the friend was allowed into evidence AFTER the victim herself had described making the statement during her direct testimony. (RP pages 258 - 261: victim's testimony regarding the "whispered" statement, RP pages 318

- 319: the friend's confirmation that the victim "whispered" to her that she had been raped.)

There is absolutely no indication that this statement was anything but an excited utterance made immediately after the rape and while the Unlawful Imprisonment was still ongoing. The Court did not err in permitting this testimony.

As for the statement the victim made to the police officer at the hospital, the record is clear that sufficient foundation for an "excited utterance" was laid prior to its admission. The officer testified that when he first saw the victim at the hospital she was in a very stressed condition:

> When I walked into the room she was sitting in a chair close to one of the side walls inside the door and was rocking back and forth. She was, you could definitely tell that she was excited or upset about something that had, that had previously happened.

PR page 220. Contrary to the Appellant's assertion in his brief, the Trial Court Judge did not ask questions of the officer because of foundational issues (Brief of Appellant, at page 13). Rather the Judge's questions were solely directed to the **length** of the conversation between the officer and victim. RP page 226. Having been satisfied by the foundation laid by the State the Judge ruled:

> I find that certainly the first few minutes of the officer's colloquy with the, Ms. Harris, clearly her comments clearly fall under the excited utterance exception to the hearsay rule.

RP page 226. As the Judge explained in detail:

> The first few minutes of the colloquy I will allow as exited utterance, again basing the decision on the fact that she is still crying, she's visibly upset, she is excited, she's rocking back and forth, she is not well composed, she's got her head down, she's slumped over, she's looking at the ground, all of these things combine to me to show that she definitely is still under an excited utterance type state or a state such as would authorize an excited utterance. So for the first few minutes of that conversation, I will allow her responses in under the excited utterance.

RP pages 228 - 229. However, erring on the side of caution, the Judge ruled that as the officer continued to question the victim about the Rape the situation changed to a more investigatory stance and so would not be allowed. RP page 228. This limitation clearly was sufficient protection under the rule.

Interestingly it must be noted that the victim told both the nurse and the doctor at the hospital that she was raped by the Appellant. (Nurse: RP page 336; Doctor: RP page 460). These statements were contemporaneous with her statements to the officer and were allowed into evidence without objection, under the "medical diagnosis or treatment" exception to the hearsay rule in ER 803(a)(4). The admission of these statements was never challenged at trial and is not challenged on appeal. It seems incongruous that the admission of part of one statement deprived the Appellant a fair trial, but the admission of two statements made to medical providers, at the same

time, and the same setting, are unquestioned. If there is any error, it must surely be harmless.

The Appellant's citation to State v. Brown, (127 Wn.2d 749, 758, 903 P.2d 459 (1995)) for the proposition that a Trial Court should not be afforded any deference on the issue of an excited utterance (Brief of Appellant, page 12) is not an accurate statement of the law. The law is well-settled that a Trial Court's decisions to "admit or exclude evidence are entitled to great deference and will be overturned only for manifest abuse of discretion." State v. Pavlik 165 Wn.App. 645, 650-651, 268 P.3d 986, 989 (Div. III, 2011). This deference includes decisions to admit statements under the "excited utterance" exception to the hearsay rule. May v. Wright, 62 Wn.2d 69, 73, 381 P.2d 601, 604 (1963). Although Brown was cited by this Court in a decision which cast some doubt on this rule (State v. Sharp, 80 Wn.App. 457, 460, 909 P.2d 1333 (Div. III, 1996)), this interpretation has been fairly consistently distinguished, questioned, or disagreed with by other Courts. Just four years after the decision in State v. Sharpe, Division Three recognized the criticism of its holding therein and in its interpretation of Brown for a legal basis for the decision. State v. Williamson, 100 Wn.App. 248, 996 P.2d 1097 (Div. III, 2000). The Williamson Court went on to overrule Shape and hold that in deciding to admit a statement as an excited utterance the

Trial Court is in a far better position than is the Appellate Court to assess "all the other intangibles that go into the evaluation which cannot be reflected on a written record, the trial judge is entitled to absolute deference." Williamson at 257.

One final point on this particular issue, this case cannot be "boiled down to a he said-she said" as the Appellant concludes. Brief of Appellant, page 14. The State's case was supported by physical evidence, the victim's testimony, admissions made by the Appellant himself to several witnesses and even posted on the internet, medical evidence, circumstantial evidence including evidence of flight, and the Appellant's blatantly contradictory trial testimony in the light of his prior statements. If the State's case boils down to anything, it must be seen as a case supported by each and every piece of evidence presented. The Appellant's version of events, on the other hand, was utterly unsupported by any other witnesses, pieces of physical evidence, logic, reason, or anything. The Appellant was justly tried and rightfully convicted.

IV. CONCLUSION

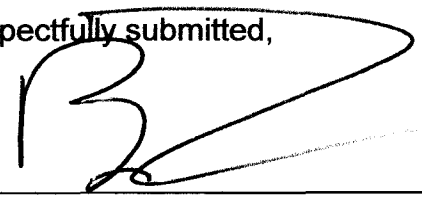
In summary, the Trial Court did not abuse its discretion by allowing the victim's statements to her friend and to the police office to be introduced into evidence at trial as excited utterances. The Trial

Court did not err in excluding evidence of prior sex acts under the aegis of the Rape Shield Statute (RCW 9A.44.020) and ER 404(b). The Persistent Offender Accountability Act is neither constitutionally invalid on its face nor as applied to the Appellant as contrary to the *ex post facto* clause and was appropriately applied to the Appellant at sentencing. And finally, it cannot be disputed that the Sentencing Court did not err in considering the California Second Degree Robbery comparable to Washington's Robbery in the Second Degree for the purposes of the POAA.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 10 day of April, 2013.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. ROBERT MARTINEZ Jr., Appellant.	Court of Appeals No: 30732-8-III **DECLARATION OF MAILING**

DECLARATION

On April 10, 2013 I deposited in the mail of the United States a properly stamped, and addressed envelope directed to all counsel and parties as listed below a copy of the BRIEF OF RESPONDENT in this matter to:

ROBERT MARTINEZ Jr. #792711
191 Constantine Way
Aberdeen, WA 98520

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on April 10, 2013.

Lisa M. Webber

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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. ROBERT MARTINEZ Jr., Appellant.	Court of Appeals No: 30732-8-III **DECLARATION OF SERVICE**

DECLARATION

On April 10, 2013 I electronically mailed, with prior approval from Mr. Kato, a copy of the BRIEF OF RESPONDENT in this matter to:

KENNETH H. KATO
khkato@comcast.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on April 10, 2013.

Lisa M Webber

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