NO. 44061-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEE RICHARD McCLURE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 11-1-01384-9

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On April 1, 2011, the Pierce County Prosecuting Attorney (State) charged Lee McClure, the defendant, with one count of rape of a child in the second degree, one count of rape of a child in the third degree, and one count of sexual exploitation of a minor. CP 1-2. Because the defendant had a prior conviction for rape of a child in the first degree[1], the State notified the defendant of a possible sentence of life without parole under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570. CP 133. The State later amended the Information to add a count of possession

[1] Pierce County cause #93-1-00235-3.

of depictions of a minor engaged in sexually explicit conduct in the second degree. CP 7.

The case was assigned to Hon. Linda Lee for trial. 1 RP 2. Trial began on August 1, 2012. *Id.* After hearing all the evidence, the jury found the defendant guilty of all four counts. CP 82-85, 10 RP 1050.

On October 9, 2012, the court sentenced the defendant to life without early release on Count I; and the statutory maximums for Counts II-IV. CP 94. The defendant filed a timely notice of appeal on October 12, 2012. CP 108.

2. Facts

Norma Jean McClure was divorced from Bill H, with whom she had four children: Elizabeth, Joseph, R.H., and Adam. 3 RP 252. In 2006, Ms. McClure married Lee McClure, the defendant. As step-father, the defendant soon assumed the role of head of household, laying down the rules, and meting out discipline. 4 RP 324,325, 331. Soon after the marriage, Joseph and Elizabeth moved out of their mother's house. 4 RP 320, 322.

Soon after R.H. turned 12, the defendant began to have sexual intercourse with her. 4 RP 376, 389. The defendant would have sex with R.H., the victim, after her mother, Ms. McClure, had left for work in the

morning or before her mother got home in the evening. 4 RP 386. The defendant had sex with victim on days when there was no school and on days when school had a late start. 4 RP 387, 373. The defendant regularly had sex with the victim until shortly before her 16th birthday.

The defendant had sexual intercourse with the victim on many occasions. He penetrated her vagina with his penis (4 RP 384-386, 418, 419), digitally (4 RP 380, 383-384, 418), and with two different "sex toys" (4 RP 384-385, 418). He penetrated her anus with his penis and digitally. (4 RP 383, 420). He had her perform oral sex on him (4 RP 392-393), and performed oral sex on her (4 RP 423). The defendant usually used a condom, but not when the victim was menstruating, explaining to her that she could not get pregnant then. 4 RP 385-386.

The defendant usually had sexual intercourse with the victim in her bedroom or his. 4 RP 377. However, he also had sexual intercourse with the victim in the playroom (4 RP 421), the family room (4 RP 423), the car (4 RP 336), and a 5th wheel trailer (4 RP 437).

On her 16th birthday, the victim went to her father for visitation. 4 RP 375, 6 RP 615. That night she disclosed the sexual abuse to him. 4 RP 6 RP 617. She never returned to her mother's home. 4 RP253, 6 RP 620.

The Sunday following the victim's 16th birthday, she was supposed to return to her mother's custody. 3 RP 255. When the father and

children failed to appear, the father called the mother. 6 RP 620. Confused and worried, the victim's mother spoke to the defendant. 3 RP 257. The defendant told her that he knew why the kids were not coming back. 3 RP 256. He cryptically said that it was about the victim. 3 RP 257.

As the victim's mother drove home, the defendant called her on her cell phone. 3 RP 258. He told her to meet him in a nearby drugstore parking lot. 3 RP 259. He said that he was bringing their young mutual son to hand over and was leaving her. 3 RP 259. The defendant admitted that he "knew it was about [victim]" and that he was "out of there." 3 RP 259.

The defendant fled to his son's home in Texas. 3 RP 241. He told his son that he had fled because he was accused of molesting the victim. 3 RP 243. The defendant said he wanted to leave the country. *Id.* The defendant sold his belongings and asked his son's help to obtain a passport and false identification. *Id.* The defendant's son called the police. 3 RP 245.

The police tracked the defendant to Kansas City, Missouri, where he was arrested. 6 RP 648. Two Pierce County Sheriff Deputies were dispatched to transport him back to Washington. *Id.* During a lay-over in the Minneapolis airport, the defendant tried to escape from the deputies. 6 RP 653. As the deputies tackled him, the defendant shouted: "I don't want to go back! Take me out. Just take me out!" 6 RP 653, 666.

While in Missouri, the defendant had called his father to have him come retrieve the defendant's belongings, including a minivan. 6 RP 711. His father did so. 6 RP 712. The defendant was later returned to Washington. While awaiting trial, he called his father from jail. 6 RP 713. This time, the defendant requested that his father obtain the defendant's computers. 6 RP 713. The defendant instructed his father to delete files from the computer. 6 RP 714.

Police had seized the computers under authority of search warrant. 6 RP 692. On the defendant's computer, police found photographs of the victim. 3 RP 190. Some of the photographs depicted the victim exposing her breasts and genitals. 4 RP 432, 433. The defendant took these photographs of the victim. 4 RP 313, 428. He directed her to pose for the photographs. 4 RP 433.

C. ARGUMENT.

1. DR. DURALDE'S TESTIMONY DID NOT VIOLATE THE DEFENDANT'S RIGHT TO JURY DETERMINATION; NOR DID THE DEFENDANT PRESERVE ANY ERROR REGARDING IT.

a. Dr. Duralde did not opine regarding the defendant's guilt.

An expert witness may not offer testimony in the form of an

opinion regarding an ultimate fact to be determined by the jury; including the guilt or innocence of the defendant, or the veracity of the defendant or another witness. *See* ***State v. Black***, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); ***State v. Kirkman***, 159 Wn.2d 918, 155 P.3d 125 (2007). Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. *See* ***State v. Embry***, 171 Wn. App. 714, 287 P.3d 648 (2012).

Here, Dr. Yolanda Duralde, the medical director of the Child Abuse Intervention Dept. of Mary Bridge Children's Hospital testified as an expert witness. 8 RP 778 ff. Dr. Durlade testified, without objection, about sexual abuse of children in general. 8 RP 781-783. She also testified regarding her examination of the victim. 8 RP 796-801.

Dr. Duralde testified that pediatric sexual abuse generally occurs within families or with people known or close to the victim. 8 RP 781. Neither attorney asked, nor did Dr. Duralde testify or opine, whether the defendant was guilty. Likewise, neither attorney asked, nor did Dr. Duralde testify or opine, regarding any witness' credibility.

b. <u>The defendant fails to demonstrate that this issue may be raised for the first time on appeal</u>.

Defendants fail to preserve an issue for appeal when they do not

object to impermissible opinion testimony at trial. ***Kirkman***, 159 Wn.2d 918, 926–927. To raise an error for the first time on appeal, a defendant must demonstrate that the error was "manifest" and truly of constitutional dimension by identifying the constitutional error and showing how the alleged error actually affected his rights at trial. RAP 2.5(a)(3); ***Kirkman***, 159 Wn.2d at 926–927.

In ***State v. Embry***, 171 Wn. App.714, three co-defendants were charged with several crimes arising from a violent confrontation between members of different gangs at a Tacoma nightclub. A police detective who was a gang expert testified about the behavior and interactions of members of different gangs. *Id.*, at 739. The defendants failed to properly object. This Court held that the defendants failed to preserve the issue for appeal. *Id.*, at 741. The Court also pointed out that the jury was properly instructed, and a timely and specific objection could have cured any potential error. *Id.* The same is true in the present case.

The defendant had no objections to Dr. Duralde's testimony. To the contrary: the defense asked additional questions regarding the reasons for delayed reporting by sexual abuse victims. 8 RP 809-810. Defense counsel elicited the information that "the closer the family member [perpetrator] is, the harder it is to disclose." 8 RP 810. When the prosecutor asked if it was common for teenagers to present with false allegations of sexual abuse,

Dr. Duralde replied that she had not seen this in her experience. 8 RP 814. Defense counsel did not object; and discussed the topic further on re-cross-examination. 8 RP 815. The defendant sought to use Dr. Duralde's testimony for his own purpose.

Dr. Duralde's testimony was not improper, but even if it had been, the appropriate remedy was: an objection, motion to strike, and instruction for the jury to disregard it. If necessary, the defendant could have requested a more pointed or specific jury admonishment or curative instruction. Jurors are presumed to follow the court's instructions. *See e.g.*, ***State v. Warren***, 165 Wn.2d 17, 195 P. 3d 940 (2008); ***Embry***, 171 Wn. App. at 741.

For this Court to review unpreserved constitutional error, the defendant must not only show that there was manifest error, but that he was actually prejudiced by it; i.e., that but for the error, the result would have been different. Here, the defendant has to show that Dr. Duralde's testimony was manifest constitutional error, and that this testimony, rather than that of the victim and other witnesses, the photographs on the defendant's computer, and the defendant's own statements and actions, resulted in the convictions.

As argued above, the testimony was not improper. That is why defense counsel did not object to it. The defense did not preserve the

"error" and cannot show manifest constitutional error resulting in actual prejudice. The Court should not review the issue.

2. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN CLOSING; NOR DID DEFENDANT OBJECT TO THE SECTIONS OF THE CLOSING TO WHICH HE NOW ASSIGNS ERROR.

a. Prosecutorial misconduct in general.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. ***State v. Monday***, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The appellant bears the burden of establishing the impropriety of the statements and their prejudicial effect. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The prosecutor's improper statements are prejudicial only where there is a substantial likelihood that the misconduct affected the jury's verdict. ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, citing ***State v. Gentry***, 125 Wn.2d 570, 593-594, 888 P. 2d 570 (1995); *see also* ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The defendant has a duty to object to a prosecutor's allegedly improper argument. ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). "If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." *Id.*, at 761-762, quoting 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice And Procedure § 4505, at 295 (3d ed. 2004). Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. ***Emery***, at 761-762.

The absence of a motion for mistrial at the time of the argument strongly suggests that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Id.*, quoting ***Jones v. Hogan***, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

Reviewing courts focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the

resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" ***Emery***, 174 Wn. 2d at 762.

b. The prosecutor did not comment on the defendant's right to confront his accuser.

Here, the prosecutor stated in closing:

> Recall again Dr. Duralde's testimony that this kind of delayed disclosure by children of sexual abuse is common, that they wait until they feel safe, and again, look at what she's being asked to talk about. It's very hard for her to verbalize, for her to describe to you, for her to find the words. She didn't have the words to explain it, what he did to her. So when you're thinking about her testimony specifically, remember these things. She's being asked to talk about something that her stepfather did to her, sexually, in a strange and intimidating environment, from that stand, in front of all of you, other strangers who are present here in the courtroom, but also in front of the person who abused her.

9 RP 980-981.

It is not improper for a prosecutor to discuss the obvious difficulties that a witness faces when testifying in court. *See*, ***State v. Gregory***, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). In ***Gregory***, the court rejected a similar argument that such argument chilled the defendant's constitutional right to confrontation. *Id.*, at 806-808. The court noted that a general discussion of the emotional cost of a victim's

testimony offered to support the victim's credibility has never been held to amount to an improper comment on the defendant's right to confrontation. ***Gregory***, 158 Wn.2d at 808. The relevant issue is "whether the prosecutor manifestly intended the remarks to be a comment on that right." ***State v. Crane***, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

In ***Gregory***, as in the present case, the argument was not improper because it focused on the credibility of the victim, not on the defendant's exercise of his constitutional right to confrontation. The prosecutor pointed out that the victim had testified in public, before the jury and every other person who sat in the courtroom, including "other strangers." The prosecutor did not argue or imply that there was anything unjust or "wrong" with this process. The defendant was not singled out, he was mentioned as one of those in the courtroom. The defendant does not demonstrate that "the prosecutor manifestly intended the remarks to be a comment on that right".

State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993) is distinguishable. In ***Jones***, the prosecutor expressly criticized the defendant's exercise of his right to confrontation, asking the defendant on cross-examination whether he was frustrated because his view of the victim was blocked during her testimony and commenting that the

defendant's direct eye contact with the victim resulted in the victim breaking down and crying.

c. The prosecutor did not argue facts not in evidence.

A prosecutor may not argue facts not in evidence. *See* ***State v. Pierce***, 169 Wn. App. 533, 555, 280 P.3d 1158 (2012). However, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. ***State v. Hoffman***, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991).

Here, the prosecutor argued that:

> And, again, remember Dr. Duralde explaining that this is typical of kids, to not be able to give specific dates, specific instances, particularly when they occurred over an extended period of time. They're bound to blend together, as they did for her. Instances that stood out did so because they were slightly different, like in the car, or the one time they did it in Aaron Michael's room. They were different. Even then she couldn't say exactly when it happened because it was in the context of this same thing happening over and over again.

9 RP 982.

The prosecutor was arguing a conclusion or an inference from Dr. Duralde's testimony:

> [Prosecutor] Q. Okay. Thank you. In your experience, when you're in contact with children who are presenting with allegations of child sexual abuse, are they able to tell

> you like specific dates and times, when abuse may have occurred?
> [Dr. Duralde] A. Well, again, I'm not usually doing a forensic interview, so I'm not really asking those specific type of questions. But most kids can't. Most kids, you know, it's difficult, but I think that's true for most adults too, I don't know that that's that different, you know, and particularly, if something has occurred over a period of time, it certainly is harder to say, "Oh, it was this day" or "It was that day," and to sort of pinpoint it because sometimes it sort of blends together.

8 RP 794.

The prosecutor's argument was proper. In addition, the jury was properly instructed that:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

Instruction 1, CP 137. So, even if one counsel or the other misstates the evidence, the jury disregards it as the ultimate finder of facts. In closing argument, both sides normally argue what the evidence means and how it supports their theory of the case or fails to support the other's. There was no misconduct or error here.

d. The defendant waived the issues regarding closing argument where he failed to object to them.

As argued above, in order to preserve the issue of prosecutorial misconduct in closing, the defendant is required to object and seek remedy in the trial court. *See* ***Emery***, 174 Wn.2d 761. The defendant in the present case did not. Therefore, it is presumed that he saw nothing wrong with the argument, and has waived the issue on appeal. *See, e.g.*, ***Dhaliwal***, 150 Wn.2d at 578.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMEMNTS OF COUNT IV BEYOND A REASONABLE DOUBT, INCLUDING KNOWLEDGE.

In determining whether sufficient evidence supports a conviction, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." ***State v. Rempel***, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court need not be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. ***State v. Fiser***, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). The reviewing court defers to the jury's decisions resolving conflicting testimony, evaluating witness credibility, and determining the persuasiveness of the evidence. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Where a person is charged with possession of depictions of a minor under RCW 9.68A.070, among other elements, the State must prove that the defendant "knowingly" possessed the image(s). RCW 9.68A.070(1)(a); *see also* ***State v. Grenning***, 142 Wn. App. 518, 174 P.3d 706 (2008).

Here, as in ***Grenning***, there is no dispute that the images were found on the defendant's computer. 3 RP 166, 190, 202. The defendant had an unusual computer user name of "squide." 3 RP 217, 276, 8 RP 897. That user name was linked to the images depicting the victim. 3 RP 217. The defendant exercised control over the computer and the digital camera. 3 RP 283. The defendant controlled the passwords to the computer. 4 RP 327. Others had to ask permission to use the computer (4 RP 327) and the camera (4 RP 328, 8 RP 875).

Most significantly, the defendant was the one had the victim pose nude. 4 RP 433. The defendant took the nude photos of the victim's breasts and genitals. 4 RP 428, 433, 5 RP 520. He used the same digital camera found by police. 4 RP 405.

Also, flight is circumstantial evidence of guilty knowledge. *See*, ***State v. McDaniel***, 155 Wn. App. 829, 853-854, 230 P.3d 245 (2010). For the same reasons, so is the destruction of evidence.

Here, the defendant fled immediately after he found out the victim refused to return to her mother's home. He told his wife he was running because of the potential allegations. He fled to Texas, then to Missouri. He told his son that he was running to escape the allegations. He tried to escape from the deputies escorting him back.

The defendant requested that his father "clean" the defendant's computer, deleting files and folders. 6 RP 714, 9 RP 926-927. Significantly, the defendant requested that the photos be deleted. 9 RP 927.

By challenging the sufficiency of the evidence, the defendant admits all this evidence is true. *See* ***Salinas***, *supra*. He likewise agrees to all reasonable inferences from this evidence. *Id.*

The jury could reasonably conclude that the defendant the defendant fled because he knew that the evidence of his actions, including

the photographs, would be discovered. Any doubt of his knowledge of the photographs evaporated when he directed his father to destroy the evidence. The evidence of the defendant's guilt of Count IV is truly overwhelming.

4. THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT TO LIFE IN PRISON AS A PERSISTENT OFFENDER.

a. The sentence did not violate ***Apprendi*** where it did not exceed the statutory maximum; life in prison.

The Legislature's power to establish what qualifies as crime and to fix the penalties and punishments for crime is "plenary and subject only to constitutional provisions." ***State v. Thorne***, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). The Legislature may abolish probation and parole. *See* ***State v. Ammons***, 105 Wn.2d 175, 713 P.2d 719 (1986). The Legislature may elevate the crime of rape of a child in the second degree from a Class B to a Class A felony. *See* Laws of 1990, Chapter 3, Part IX, §903.

The defendant was convicted of rape of a child in the second degree under RCW 9A.44.076(1). This is a class A felony. RCW 9A.44.076(2). The maximum penalty is life in prison. RCW 9A.20.021(1)(a).

A person sentenced for rape of a child in the second degree as a non-persistent offender is sentenced under RCW 9.94A.507. It is an indeterminate sentence. The court sets the minimum and the maximum sentence. RCW 9.94A.507(3)(a). The court must set the maximum term as the statutory maximum. RCW 9.94A.507(3)(b). In this case, life in prison.

Release of a sex offender from incarceration is subject to RCW 9.95.420. If an offender is released from the incarceration segment under RCW 9.95.420, and the offender violates terms of his lifelong community custody, he can be returned to prison to serve additional periods of incarceration, including the "remainder" of his sentence. *See* RCW 9.95.435(1), (2). In this case, the rest of the defendant's life.

In ***In re Personal Restraint of Grisby***, 121 Wn.2d 419, 427–428, 853 P.2d 901 (1993), the defendant had been convicted in 1978 of several counts of murder and sentenced under former RCW 9A.32.040 to life without parole on three counts, and life with parole on two counts, all consecutive. He challenged the constitutionality of his sentences of life without parole. The Supreme Court held the sentences constitutional, re-affirming its holding in ***State v. Frampton***, 95 Wn.2d 469, 627 P.2d 922 (1981). ***Grisby***, at 427. The Court held that while there is obviously a difference between a life sentence and life without the possibility of

parole, it is not constitutionally significant[2]. *Id.*, quoting ***Frampton***, 95 Wn.2d at 528-530 (Dimmick, J, concurring). The Court stated this again in ***State v. Rivers***, 129 Wn.2d 697, 714, 921 P.2d 495 (1996), in the context of the POAA. *See also* ***State v. Thomas***, 150 Wn.2d 821, 848, 83 P.3d 970 (2004) (discussing the issue in the context of a capital case).

Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) held that "Other than the fact of a prior conviction, any fact that *increases* the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt" (emphasis added). Here, the sentencing range and the statutory maximum sentence were life in prison. The defendant's sentence was not increased beyond the maximum sentence. Therefore, the defendant's sentence does not violate ***Apprendi***.

b. The Persistent Offender Accountability Act (POAA) is constitutionally valid.

In 1993, the people of the state of Washington passed Initiative 593, commonly known as the "Three Strikes, You're Out" Initiative. As a result, the Legislature codified the terms "most serious offense" and

[2] The POAA, RCW 9.94A.570, more accurately uses the word, and gives examples of, "release," as "parole" was eliminated by the SRA.

"persistent offender," defined "offender," and amended RCW 9.94A, the Sentencing Reform Act (SRA), to include a provision that mandated a sentence of life in prison without the possibility of release or parole for any person classified as a persistent offender. That classification and sentence has been found constitutionally valid by the Supreme Court. *See* ***State v. Thorne***, 129 Wn.2d 736, 921 P.2d 514 (1996); ***State v. Rivers***, 129 Wn.2d 697, 921 P.2d 495 (1996); ***State v. Manussier***, 129 Wn.2d 652, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997). In 1996, the POAA was amended to classify certain sex offenders as persistent offenders after two convictions. *See* former RCW 9.94A.030(27)(b)(i) and (ii); Laws of 1996, c 289. A sex offender "persistent offender" is currently defined in RCW 9.94A.030(37) (b)(i) and (ii).

c. <u>The Sixth Amendment and the due process clause of the Fourteenth Amendment do not require jury determination of a prior conviction</u>.

The Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged. But these protections do not apply to determining the existence of prior convictions. "*Other than the fact of a prior conviction,*

any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added) ***Apprendi***, 530 U.S. at 490; *See* ***Almendarez–Torres v. United States***, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). The Washington Supreme Court has rejected the argument that a jury must determine the existence of prior convictions. ***State v. Thiefault***, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).

When the POAA was first challenged, the Washington Supreme Court upheld it as constitutional. ***Manussier***, 129 Wn.2d at 684-685. The Supreme Court also recognized that the POAA did not provide for jury determination of criminal history. *Id.*, at 682. The Court considered the defendant's argument in comparison to the old habitual criminal statute, RCW 9.92.090. The Court held that the new POAA procedures were "constitutional even though they are less protective than those developed by the court under the former habitual criminal statute". *Id.*, at 682.

Subsequent cases and statutes have rejected jury determination of sentencing factors which were based solely on criminal history. In ***State v. Jones***, 159 Wn.2d 231, 248, 149 P.3d 636 (2006), the Supreme Court held that the defendant had no constitutional right to have the jury determine whether he had been on community placement at the time of the offense. In ***State v. McGrew***, 156 Wn. App. 546, 234 P.3d 268 (2010), the Court of

Appeals held that the trial court, not the jury, had the authority to find that the defendant had a prior "drug conviction" necessary to trigger the sentence doubling provision of RCW 69.50.408. *Id.*, at 558.

RCW 9.94A.535(2)(c) was enacted in response to ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and its requirement of jury determination of exceptional sentences.[3] The statute permits the court to impose a sentence above the standard range because it is based upon criminal history alone. No jury determination is required. Recently, in ***State v. Mutch***, 171 Wn.2d 646, 659, 254 P.3d 803 (2011), the Supreme Court held again that the defendant had no constitutional right to jury determination of his prior convictions, specifically under RCW 9.94A.535(2)(c).

In every felony case in general, the court, not a jury, determines criminal history. RCW 9.94A.500(1). It does so by reviewing the evidence of prior convictions and determining, by a preponderance, that the prior conviction has been proven. *Id.*

As the Appellant's Brief points out, ***Almendarez–Torres v. United States*** has been criticized and questioned. App. Br. at 35. However, it has

[3] ***Blakley*** does not apply to POAA sentences. ***State v. Magers***, 164 Wn.2d 174, 193, 189 P.3d 126 (2008).

never been overruled. As recently as 2010, the United States Supreme Court cited ***Almendarez–Torres*** and had the opportunity to overrule it or remark on its continued authority. The Court did neither. *See* ***U.S. v. O'Brien***, 560 U.S. 218, 130 S. Ct. 2169, 2174-2175, 176 L. Ed. 2d 979 (2010).

The Washington Supreme Court specifically discussed this issue in ***Jones***. There, the Court extensively discussed the continued validity of ***Almendarez–Torres.*** It held that the principle and the case were still valid. 159 Wn.2d at 239-241.

Recently, this Court has taken the opportunity to discuss the jury determination of criminal history in POAA cases issue through two published cases: ***State v. Witherspoon***, 171 Wn. App. 271, 286 P.3d 996 (2012) and ***State v. McKague***, 159 Wn. App. 489, 246 P.3d 558 (2011). It rejected the same argument in ***McKague***, at 513. Judge Hunt wrote for the majority. Judge Quinn-Brintnall dissented.

In ***Witherspoon***, the same panel of judges that decided ***McKague*** considered the issue again. Judge Quinn-Brintnall wrote the lead opinion. ***Witherspoon***, 171 Wn. App. at 281. Judge Hunt concurred in the result, but dissented from the parts holding that the State must prove the defendant's prior convictions to a jury, beyond a reasonable doubt. *Id.*, at 316-317. She pointed out that the former habitual criminal statute is no

longer applicable; and that a large body of caselaw rejected the jury function of determining prior criminal history. *Id.* As in ***McKague***, Judge Armstrong concurred in Judge Hunt's analysis of the POAA. 171 Wn. App., at 319. Therefore, as to the POAA jury -determination issue, ***Witherspoon*** follows ***McKague***. Judge Quinn-Brintnall acknowledged this in her lead opinion. 171 Wn. App. at 281-282 n. 1.

It is worth noting that McKague and Witherspoon were both sentenced under the POAA for committing Class B felonies: assault in the second degree for McKague, and robbery in the second degree for Witherspoon. The ordinary statutory maximum for each was 10 years. In contrast, in the present case the defendant was sentenced to life in prison for a Class A felony, whose maximum sentence is life in prison.

d. The Washington Constitution does not require a jury determination of the defendant's prior convictions.

In ***Almendarez–Torres v. United States***, the United States Supreme Court rejected the argument that recidivist factors need to be charged in an indictment, proven to a jury, or proven beyond a reasonable doubt. 523 U.S. 224, 239. Subsequent to ***Almendarez–Torres***, the Court held that factual matters relating to the charged crime that enhance a sentence must be proved to a jury, but reaffirmed that a jury need not

otherwise determine the fact of a defendant's prior conviction. ***Apprendi v. New Jersey***, 530 U.S. 466, 489–490. Consistent with the United States Supreme Court, our Supreme Court has repeatedly rejected the argument that a jury must determine the existence of prior convictions. *See* ***State v. Salinas***, 169 Wn. App. 210, 225–26, 279 P.3d 917 (2012) (citing ***Thiefault***, 160 Wn.2d at 418).

In ***State v. Smith***, 150 Wn.2d 135, 144–156, 75 P.3d 934 (2003), the Washington Supreme Court rejected the argument that, under the Washington Constitution, prior convictions need to be proved to a jury in order to establish that a defendant is a persistent offender. The Court conducted an extensive analysis of state constitutional law, including a ***Gunwall***[4] analysis. ***Smith***, 150 Wn.2d at 149-154. The Supreme Court distinguished ***State v. Furth***, 5 Wn.2d 1, 104 P.2d 925 (1940), which applied the previous habitual criminal statute. The Court noted, as Judge Hunt pointed out in her concurring opinion in ***Witherspoon***, RCW 9.92.090 is no longer the law in Washington. ***Smith***, 150 Wn.2d at 147; ***Witherspoon***, 171 Wn. App. at 316. In ***Smith***, the Supreme Court also rejected the ***Furth*** court's comments regarding a constitutional right to jury trial as flawed and dicta. ***Smith***, at 146.

[4] ***State v. Gunwall***, 106 Wn.2d 54, 720 P. 2d 808 (1986).

Under current, binding caselaw, there is no independent right to jury determination of criminal history under the State Constitution.

e. There is no violation of the Equal Protection clause of the 14th Amendment to the United States Constitution.

In ***Witherspoon***, the Court of Appeals again rejected this argument. 171 Wn. App. at 303-304. The defendant also contends that the POAA violates the equal protection clause of the Fourteenth Amendment and article I, section 12 of the Washington Constitution. This argument has been repeatedly rejected, recently in ***Witherspoon***, at 305, (citing ***State v. Langstead***, 155 Wn. App. 448, 453–58, 228 P.3d 799 (2010) and ***State v. Williams***, 156 Wn. App. 482, 496–98, 234 P.3d 1174 (2010)); *see also* ***Salinas***, 169 Wn. App. at 225–26; ***State v. Reyes–Brooks***, 165 Wn. App. 193, 206–207, 267 P.3d 465 (2011).

Recidivist criminals are not a semi-suspect class and the proper test to apply is the rational basis test, "the most relaxed and tolerant form of judicial scrutiny under the equal protection clause." ***State v. Shawn P.***, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993). Under the rational basis test, the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives. ***Williams***, 156 Wn. App. at 496–98.

The purpose of the POAA is to improve public safety by imprisoning the most serious recidivist offenders, a purpose that our Supreme Court has held is a legitimate state objective. ***Manussier***, 129 Wn.2d at 674. The POAA is the legislature's appropriate "attempt to define a particular group of recidivists who pose a significant threat to the legitimate state goal of public safety." *Id.* This legislative objective is a sufficient basis for upholding the POAA's classification and treatment of persistent criminals.

A life sentence under the POAA does not violate the Eighth Amendment to the United States Constitution, nor Washington Constitution Article I, Section 14, which proscribes infliction of "cruel punishment." ***Manussier***, 129 Wn.2d at 674, 677. The defendant in the present case was sentenced to life in prison after conviction of a crime whose maximum sentence is life in prison. His sentence was mandated by the Legislature as a consequence of the seriousness of his acts and his criminal history. The Legislature has the power to determine that this is the appropriate punishment for this offender and the risk he poses to public safety. The defendant is not a member of a suspect class. The Supreme Court rejected this equal protection argument in ***Manussier***, at 674.

5. THE SENTENCE CONDITION OF NO CONTACT WITH JUVENILES WAS WITHIN THE COURT'S DISCRETION.

An appellate court reviews sentencing conditions, including crime-related prohibitions for abuse of discretion. ***State v. Riley***, 121 Wn. 2d 22, 37, 846 P.2d 1365 (1993). There are a number of cases with facts similar to the present case; a stepfather sexually abusing his step-daughter. In each case, the trial court prohibited contact with a family member that the defendant had a fundamental right to have a relationship with. Each prohibition was affirmed by the appellate court as within the trial court's discretion.

In ***State v. Warren,*** 134 Wn. App. 44, 70, 138 P.3d 1081 (2006), the defendant molested and raped his two young step-daughters. As a condition of sentence, the trial court prohibited defendant contact with his wife, the mother of the victims. *Id.*, at 52. Ms. Warren was a witness in the trial. Although his wife had not been a victim or actual witness to the crimes, the Court noted that no causal link need be established between the crime and the prohibition, so long as the condition relates to the circumstances of the crime. *Id.*, at 70.

Sentencing courts can restrict even the fundamental right to parent by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and

protecting children. ***State v. Berg***, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). The decision in ***Berg*** is similar to the facts here. A jury convicted Berg of third degree child rape and two counts of third degree child molestation after he sexually molested a 14-year-old girl (A.A.) who lived with him. Berg parented A.A. but she was not his biological child. *Id.* at 927-931. Berg challenged the reasonableness of a no-contact order covering all minor females, including his two-year-old biological daughter (A.B.). *Id*, at 941. The Court upheld the no-contact order as a reasonable crime-related prohibition. *Id.*, at 942.

In ***State v. Corbett***, 158 Wn. App. 576, 242 P.3d 52 (2010), this Court considered a case strikingly similar to ***Berg*** and the present case. Corbett sexually abused his step-daughter, sometimes while her younger brother was in the house. ***Corbett***, at 600. "Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children." ***Corbett***, at 598, citing ***Berg***. This Court held that the trial court did not abuse its discretion in prohibiting the defendant's contact with his biological minor son. *Id.*, at 601.

In the present case, the defendant sexually abused his step-daughter. He was in a parenting position and was also the care-giver while

the victim's mother was at work. The court had the discretion to decide that violation of this type of relationship between the defendant and the victim was grounds to prohibit contact with all children. The sentencing condition is directly related to his criminal behavior, his criminal history, and the danger that he poses to all children.

State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000), cited by the defendant, is distinguishable. She did not have sex with a family member or with a child living in her home. Letourneau had been in a sexual deviancy treatment program. At sentencing, there was an extensive psychosexual evaluation that failed to conclude that she was a pedophile or a danger to her own children. *Id.*, at 440.

In the present case, there was even more information considered by the trial court than in ***Berg*** and ***Corbett***. The information was different, and more damning, than in ***Letourneau.*** Here, the defendant had a similar prior sex conviction: for rape of a child in the first degree. CP 279, 283.

The Presentence Investigation (PSI) in the present case noted that the defendant had refused to participate in sex offender treatment while in prison, and failed to successfully complete such a program when he was released to community supervision. CP 171, 177. During a polygraph in 1993, the defendant admitted molesting other children before the incident which resulted in criminal charges. CP 176. During supervision for the

rape of a child conviction, the defendant admitted viewing child pornography of male children. CP 183. A DOC report to the court, dated October 14, 2002, detailed numerous violations, including contact with children, possessing pornography, and improper use of a computer. CP 183-185, 188-194.

These reports and information show the defendant as a sex offender with extreme risk to re-offend. His previous crime was similar. He had been offered treatment, which he rejected or failed. The court had imposed conditions in a prior sentence to protect the community, which the defendant had disobeyed. After he was free of the conditions of his previous sentence which prohibited contact with children, the defendant married a woman with young children. The trial court did not abuse its discretion in prohibiting contact with all children, including his own.

D. CONCLUSION.

The defendant was convicted after a fair trial where the State proved all elements of the crimes charged beyond a reasonable doubt. The defendant failed to object to expert testimony and the prosecutor's closing argument because there was nothing improper in either. The defendant was lawfully sentenced as a persistent sex offender.

For all the reasons argued in this brief, the State respectfully requests that the conviction and sentence be affirmed.

DATED: August 30, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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WSB # 17442

Certificate of Service.
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/30/13
Date Signature

PIERCE COUNTY PROSECUTOR

August 30, 2013 - 11:48 AM

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