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67868-0

NO. 67868-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MARCEL SAMPSON,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
KING COUNTY

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A. SUMMARY OF ARGUMENT.

At Marcel Sampson's trial, the prosecution relied on a then-recently enacted statute, RCW 10.58.090, to introduce evidence indicating Sampson had a propensity and "appetite" for committing crimes involving sexual assaults on children. The Supreme Court subsequently declared this statute unconstitutional because it permitted the jury to consider uncharged conduct for purposes such as the accused's propensity to commit offenses like the one charged. Sampson's trial was irreparably affected by the introduction and improper use of evidence accusing Sampson of committing acts for which he was not charged.

Additionally, the prosecution relied on the child hearsay statute to elicit evidence that the statute did not authorize. It also elicited evidence from numerous adult witnesses explaining how the child witnesses were guaranteed to tell the truth. It neglected to ask the jury to decide whether Sampson had the necessary prior convictions to receive a sentence of life without the possibility of parole. Finally, the court permitted 13 jurors to deliberate in the case even though the alternates had been directed to leave before deliberations. These errors, taken together and viewed in isolation, denied Sampson a fair trial by jury.

B. ASSIGNMENTS OF ERROR.

1. The erroneous admission of evidence of uncharged misconduct without limitations on its use denied Sampson a fair trial.

2. The improper admission of evidence under the guise of the child hearsay statute, RCW 9A.44.120, denied Sampson a fair trial.

3. The prosecution impermissibly elicited testimony vouching for the truthfulness of the witnesses, which intruded on the province of the jury and affected Sampson's right to a fair trial.

4. The cumulative evidentiary errors and misconduct impacted the jury and denied Sampson a fair trial.

5. The court permitted 13 jurors to deliberate in the case, thereby allowing an unauthorized person to participate in the case.

6. Sampson was denied his Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof of each element beyond a reasonable doubt.

7. Sampson was denied the equal protection of the law in violation of the Fourteenth Amendment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The Supreme Court ruled that RCW 10.58.090 was unconstitutional because it permitted the jury to consider evidence that an accused person had committed other acts of misconduct for the purpose of concluding that he had the propensity for committing such acts. The trial court admitted evidence under RCW 10.58.090 showing Sampson's propensity for committing acts of sexual misconduct and did not limit the jury's use of this evidence. Did the erroneously admitted evidence impact the jury's deliberations?

2. RCW 9A.44.120 permits the court to admit otherwise inadmissible hearsay statements by a child, but it only applies to statements by the child about sexual contact that was performed on that child, not what a child saw happen to someone else. The prosecution elicited hearsay statements repeating what a child claimed happened to another child as well as statements about conduct that did not involve sexual contact. Did the inadmissible child hearsay statements impact the jury's deliberations?

3. The prosecution may not elicit a person's propensity for truth-telling to bolster that person's veracity. Several adult witnesses testified that the child complainants were telling the truth.

Did the prosecution impermissibly vouch for the testimony of the complaining witnesses?

4. When the jury is deliberating, only people who are authorized to be present may participate in deliberations. When the jury announced its verdict, 13 jurors told the court that each deliberated in the case. Was there an unauthorized person who participated in jury deliberations?

5. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Sampson's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

6. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of

the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. However, in some instances the prior convictions are treated as 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances they are treated as 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for this arbitrary distinction and the effect of the classification is to deny some persons the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

D. STATEMENT OF THE CASE.

A teenager named P.R. accused Marcel Sampson of sexually assaulting her. 7/27/11RP 70. Her story unraveled as the detective assigned to the case investigated, and Sampson was not charged with any crime committed against her. 7/27/11RP 81; 7/28/11RP 77-78. However, in the course of the investigation,

P.R.'s cousin, L.R.<sup>1</sup> said that Sampson had touched her "privacy" over her clothes. 7/20/11RP 119, 137; 7/27/09RP 83-84. L.R. also said that Sampson tried to "put his thing" into L.R.'s younger brother L.H. 7/20/11RP 120.

A third child, N.P., later said that Sampson was "digging in his butt" while giving him a bath. 7/25/11RP 75. At trial, N.P. did not repeat this claim but said Sampson "would make stuff hurt" in the bath but he did not know how. 7/25/11RP 95, 98. Sampson was not convicted of the charged crimes involving N.P. CP 159-60,170.

Sampson was also charged with two counts of rape of a child in the first degree against L.H., but the jury convicted him of a single count. CP 136, 157-58, 170. He was convicted of first degree child molestation for touching L.R. CP 138, 161. He was also convicted of two counts of the misdemeanor offense communicating with a minor for immoral purposes. CP 140-41. These two charges were based on a "nasty" video Sampson showed to L.R. (d.o.b. 5/2/2001) and her cousin L.R. (d.o.b. 9/3/1998). 7/20/11RP 125, 130; 8/1/11RP 47.

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<sup>1</sup> The child complainants are referred to herein by their initials for in the interest to preserving their privacy. Two child complainants had the initials L.R. This L.R. refers to the child complainant in counts 5 and 7, date of birth May 5, 2001.

At Sampson's trial on these various allegations of sexual abuse, the prosecution offered extensive testimony under RCW 10.58.090 relating to a prior conviction and other uncharged incidents. Briann Porter, her aunt, and her mother testified about an incident that occurred in 2005, when Porter was 14 years old. 7/19/11RP 88-127, 159-215; 7/20/11RP 76-103. Porter said that Sampson raped her one night while she was sleeping at her aunt's house. 7/19/11RP 181-82. In that case, Sampson ultimately pled guilty to second degree assault and communicating with a minor for immoral purposes. 7/27/11RP 78; 7/28/11RP 88.

The State also introduced evidence, over Sampson's objection, accusing him of other sexual misconduct toward minors. Sampson's former girlfriend Christina Rock testified that one time, Sampson asked her if she wanted to have a sexual three-some with Rock's younger sister M.R., who was approximately 15 years old. 7/25/11RP 34; 7/28/11RP 48. Rock claimed Sampson was intoxicated at the time and he did not remember making that comment. 7/25/11RP 34.

Another former girlfriend of Sampson's, Fuhyda Rogers, mother of N.P. and P.W., said that she saw a video on Sampson's cell phone of P.W. taking a shower. 7/20/11RP 198. No one else

saw that video and the police investigator could not locate it on Sampson's phone. 7/28/11RP 32, 34. P.W. testified that when using Sampson's computer, she went to a tab labeled gymnastics, and saw a cartoon figure of a person with her legs open and it was "gross." 7/21/11RP 68. Sampson never said anything to P.W. about the cartoon. 7/21/11PR 69. Porter also testified that in 2005, Sampson told her he had sex with Porter's cousin, I[.],<sup>2</sup> who was also a teenager. 7/19/11RP 167, 175. Porter did not believe this statement. 7/19/11RP 175.

After Sampson's arrest, he made numerous telephone calls from jail to Rogers, Rock, and others. 7/7/11RP 51-52. These calls were recorded. Because Sampson was prohibited from calling Rogers due to a no contact order, and he had prior unrelated convictions for violating no contact orders, he was convicted of felony violation of a no contact order. 7/21/11RP 33, 40; CP 143. He was also convicted of tampering with a witness, based on remarks he made to Rogers or Thornton encouraging them not to testify against him. 8/1/11RP 47; CP 142.

Although Sampson was convicted of only two of the five charged felony sex offenses, the prosecution alleged that he had

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<sup>2</sup> The cousin's last name or initial were not mentioned at trial.

two prior convictions for “most serious offenses” under the Persistent Offender Accountability Act. After the court found Sampson had these prior convictions, it imposed a sentence of life without the possibility of parole. CP 175.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **The prosecution relied on RCW 10.58.090, an unconstitutional statute, to offer inadmissible allegations and argue Sampson should be found guilty based on his propensity for committing crimes**

a. The court admitted an allegation of prior misconduct pursuant to an unconstitutional statute.

RCW 10.58.090 permitted the court to admit “evidence of the defendant’s commission of another sex offense or sex offenses . . . notwithstanding Evidence Rule 404(b).” RCW 10.58.090(1). After Sampson’s trial, the Supreme Court ruled that RCW 10.58.090 is unconstitutional because it lets the jury use uncharged acts for any purpose, including the accused’s propensity to commit the charged offense. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). The statute impermissibly allows the jury to use evidence of other wrongdoing “for the purpose of proving the

defendant's character," and lets the prosecution argue that the defendant was the "type" to commit such crimes, "in spite of ER 404(b)'s prohibition of admission for that purpose." Id.

As the Gresham Court explained, ER 404(b) is "a categorical bar" to evidence introduced to show the defendant acted in conformity with his character traits. Id. at 429. "There are no exceptions to this rule." Id. RCW 10.58.090 irreconcilably conflicts with ER 404(b) because it "makes evidence of prior sex offenses admissible for the purpose of showing the defendant's character and action in conformity with that character." Id.

At Sampson's trial, and over his objection, the prosecution relied on the unconstitutional criteria of RCW 10.58.090 as the basis for admitting allegations of uncharged sexual misconduct and the court admitted the proffered evidence under this statute. 7/6/11RP 68-69, 74; 7/7/11RP 12-19. The court instructed the jury to consider this evidence for an improper purpose and did not limit its use as would be required if admitted under ER 404(b). CP 156 (Instructions 7 and 8).

2. The jury used the evidence for an improper purpose because the court instructed it to do so.

Uncharged sexual misconduct, admitted under RCW 10.58.090 and without any limitations on their use by the jury, were a central focus of the prosecution's case.

The first prosecution witness called at the outset of the trial was Briann Porter's aunt, Celeste Taylor, who introduced an incident that occurred in 2005, when Sampson sexually assaulted Porter. 7/19/11RP 91, 95-111, 145-55. The incident occurred at Taylor's home; Taylor had been dating Sampson. 7/19/11RP 91. The next witness was Porter, who explained in detail how Sampson vaginally raped her as she was sleeping at her aunt's home in 2005, when Porter was 14 years old. 7/19/11RP 162, 181-86, 194, 213-15. It was a "horrible experience." 7/19/11RP 194. The prosecution also called Porter's mother to testify about that 2005 incident. 7/20/11RP 76-103. The prosecution used for purposes of identification copies of the court documents showing Sampson's conviction and sentence. Exs. 45 and 46. The State further offered Sampson's admissions of responsibility to Detective Donna Stangeland regarding Porter under RCW 10.58.090. 7/27/11RP 78.

The prosecution may respond that although this evidence was erroneously admitted under RCW 10.58.090, the same evidence was admitted under ER 404(b). This argument fails for two primary reasons. First, the court instructed the jury to consider the information for improper purposes, unconstrained by the limitations of ER 404(b), and second, the court ruled the Porter incident did not satisfy the “common scheme or plan” exception to ER 404(b) but the prosecution urged the jury to consider Porter’s testimony as evidence of Sampson’s “pattern” of sexual misconduct. 7/7/11RP 19-20, 8/1/11RP 47, 50, 52, 55, 99.

A jury is presumed to follow the court’s instructions. State v. Perez-Valdez, 172 Wn.2d 808, 858, 265 P.3d 853 (2011). Accurate limiting instructions are critical, the Gresham Court explained, because they inform the jury how evidence may be used. Gresham, 173 Wn.2d at 423-24.

An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Id. When admitting evidence under ER 404(b), it is “the court’s duty to give the cautionary instruction that such evidence is to be

considered for no other purpose or purposes.” Gresham, 173 Wn.2d at 423-24 (citing State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)).

Here, the court’s Instruction 7 merely indicated that the bad acts the jury heard about Sampson could not be the only basis for convicting him. CP 156. No instruction told the jurors not to make the forbidden inference that testimony indicating Sampson committed other sexual misconduct may not be used to conclude he is a bad person, a dangerous guy, or a sex offender by nature.

The court gave a second instruction intended as an ER 404(b) limiting instruction. CP 156 (Instruction 8). This instruction applied only to four specific pieces of evidence. The court directed the jury this particular evidence was admitted for a “limited purpose.” Id. As to those four items, the jury was directed to consider them “only for the purpose of evaluating the defendant’s motive, intent, preparation, or plan in committing the crimes charged by the State in this case.” Id.<sup>3</sup> As to all other allegations of

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<sup>3</sup> The court limited the jury’s use of the following evidence: statements the defendant made to Briann Porter regarding sexual encounters with Briann’s cousin I[.], a cell phone containing a video of P[.]W[.], a cartoon of a teenaged gymnast a computer purported to belong to the defendant, and the defendant’s request for sex with the sister of Christina Rock. CP 156 (Instruction 8).

uncharged misconduct, the court gave no limiting instruction. It did not require or even suggest that the evidence may not be used for impermissible purposes such as Sampson's propensity to commit acts like those charged.

Acting under the misconception that RCW 10.58.090 permitted propensity arguments, the prosecution did not limit its discussion of the Porter evidence to the permissible purposes of ER 404(b). Indeed, it opposed the court's instruction restricting the jury's use of uncharged allegations against Sampson because RCW 10.58.090 allowed "a broader brush" than ER 404(b). 7/28/11RP 112. It argued that under RCW 10.58.090, the jury was free to consider any allegations of sexual misconduct by Sampson "for the purposes it sees fit." 7/28/11RP 113.

In his opening statement, the prosecutor explained the charged crimes and then said "normally" I would sit down after describing the complainants involved in this case and I would say "this is all the evidence I'm going to present." 7/19/11RP 79. But in this case, that would not be "the full picture" and "whole story of the defendant's conduct." *Id.* at 80. Thus, the prosecutor explained he would also present "details of [Sampson's] pattern of preying on kids through older relations." *Id.*

In his closing argument, the prosecutor told the jury Sampson was engaging in a “pattern” of behavior exemplified by his sexual assault against Porter. 8/1/11RP 44. He repeated the details of Porter’s allegations against Sampson. Id. at 45, 50-52. He emphasized that Sampson’s “pattern of conduct” must be the central focus in its deliberations. Id. at 44-45, 52 (Sampson’s “pattern of conduct” proved by acts toward Porter).

The prosecutor claimed that Sampson had committed other uncharged acts of sexual misconduct, including having sex with Christina Rock’s teenage sister. 8/1/11RP 56. This assertion had not been admitted into evidence – the court had admitted only the testimony that Sampson asked Rock about the possibility of having sex Rock’s younger sister, and that testimony was not admitted for its truth, but for the limited purpose of showing Sampson’s motive, intent, or common scheme. CP 156; 7/25/11RP 36. Yet during closing argument, the prosecutor contended that Sampson actually had sex with Rock’s young sister. 8/1/11RP 56, 99. The claim that Sampson had raped Rock’s 15-year old younger sister was not limited by the court’s ER 404(b) instruction and shows the prosecutor using evidence for the broader purpose of Sampson’s propensity for sexual misconduct. CP 156.

Even defense counsel noticed that the prosecution was unusually and unnecessarily focused on Porter. He questioned why the prosecution “spent an awful lot of time talking to you about the Briann Porter incident” and an “awful lot of time” talking about Rock’s sister and things “other than these [charged] incidents.” 8/1/11RP 93.

But in its rebuttal argument, the prosecution continued its theme of condemning Sampson based on uncharged conduct. He argued that Sampson had committed more acts against other children, including Porter’s cousin Ivy and Rock’s sister M., which proved that he “didn’t have control over his appetite for kids.” 8/1/11RP 99. The prosecution expanded its victim list yet again in closing argument to include P.R. P.R. had made allegations against Sampson that were not prosecuted due to inconsistencies and credibility problems. 7/28/11RP 77-78. Yet the prosecution pronounced P.R. to be “yet another victim of the defendant,” in closing argument. 8/1/11RP 101.

In sum, the focal point of the State’s effort to convict Sampson was on the so-called “pattern” of misconduct reflected in allegations about other uncharged acts. This focus is not surprising given the complainants’ inability to clearly articulate the sexual

offenses charged. See 7/20/11RP 118-19, 145-58, 151-52.

However, as the Court explained in Gresham, RCW 10.58.090 made admissible evidence that was prohibited under ER 404(b). 173 Wn.2d at 427. This prohibited evidence was evidence admitted “for the purpose of demonstrating the criminal defendant’s character in order to show activity in conformity with that character.” Id. The State used otherwise inadmissible evidence to obtain convictions against Sampson.

c. The improperly admitted evidence affected the jury’s deliberations.

Improperly admitted evidence requires reversal where it may have impacted the jury’s deliberations. Gresham, 173 Wn.2d at 433. This harmless error test does not view the evidence in the light most favorable to the prosecution akin to a sufficiency of the evidence review. Id. Evidentiary errors require reversal when it is reasonably likely that “had the error not occurred, the outcome of the trial would have been materially affected.” State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

Here, the impermissible evidence and arguments based on that evidence were exacerbated by inadequate instructions to the jury that not only allowed but encouraged the jury to use other

claims of sexual offenses for any purpose. State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (reversing due to evidentiary error where State asked jury to make inferences affected by improperly admitted evidence).

The State's case rested largely on the fact that many people were making accusations against Sampson, and given the volume of accusations, they must be believed. Yet the jury was unconvinced as to all of the claims and did not convict Sampson of three of the charged counts of rape of a child in the first degree. CP 170. The likely reason for the jury's inability to reach a unanimous verdict on three charged counts was because the child complainants in counts one through five, each of the felony sex offenses charged, gave vague and somewhat unbelievable testimony.

When L.H. testified, the prosecutor not only used entirely leading questions, many of which were met with no response, he was reduced to asking questions and then, getting no clear response, he would ask L.H., "can you say yes?" 7/20/11RP 148, 151-53. L.R. said Sampson tried to touch the outside of her clothes without saying anything. 7/20/11RP 120, 137. N.P., whose testimony was too vague for the prosecution to convince the jurors

to convict Sampson, said “bad stuff” happened, and after numerous leading questions prodding him, N.P. said Sampson used “his teeth” to hurt him, which is not the conduct the prosecution alleged. 7/21/11RP 95-96; CP 170. Although the State’s impermissible claims of preying on children did not suffice for a conviction based on N.P.’s ambiguous allegations, it certainly impacted the jury’s evaluation of the limited testimony of L.H. and L.R.

Having heard detailed testimony of Porter, Porter’s relatives, and Rock, accusing Sampson of a litany of uncharged acts, and the prosecution’s explanation that these other allegations proved Sampson’s uncontrolled “appetite” to commit such crimes, the jury convicted Sampson despite the vague claims by L.R. and L.H. as to what happened to them. This testimony, used to show Sampson’s propensity, undeniably impacted the jury’s deliberations. Because it impacted the jury’s deliberations, it taints the trial and requires a new trial to be ordered. Gresham, 173 Wn.2d at 433.

**2. The court admitted “child hearsay” that far exceeded its authority under the child hearsay statute**

- a. The child hearsay statute strictly limits the type of out-of-court allegations that may be admitted at trial.

The court let several witnesses repeat claims of misconduct that the child complainants made out-of-court about Sampson. The court admitted what would otherwise be inadmissible hearsay under the authority of RCW 9A.44.120, which allows limited types of child hearsay.

RCW 9A.44.120 has procedural and substantive limitations on the admissibility of a child’s out-of-court statements at a criminal trial. Substantively, this hearsay exception applies only to a child’s statements “describing any act of sexual contact performed with or on the child by another, [or] describing any attempted act of sexual contact with or on the child by another . . . .” (emphasis added).<sup>4</sup>

Thus, the child’s out-of-court statement must relate to (1) sexual contact, and (2) it must be a statement about an act performed on that child, not another child. RCW 9A.44.120 “does not apply by its terms to a statement by a child describing an act of sexual contact performed on a different child.” State v. Harris, 48

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<sup>4</sup> A third type of statement relating to allegations of physical abuse does not pertain to the case at bar. RCW 9A.44.120.

Wn.App. 279, 284, 738 P.2d 1059 (1987). In Harris, a detective repeated what one child said happened to another child. The Harris Court ruled that this statement was “not within the scope of the child hearsay statute because it does not describe sexual contact performed on [the declarant].” Id.

A similar error occurred in State v. Hancock, 46 Wn.App. 672, 731 P.2d 1133 (1987), where one child testified about what the accused did to another child. The Hancock Court ruled the hearsay statement “does not fall within the purview of RCW 9A.44.120 and its admission was error.” Id. at 678.

Procedurally, a child hearsay statement is inadmissible unless the prosecution “makes known” its “intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.” RCW 9A.44.120. The court must find the statement reliable even when the child testifies at trial. Id.; see State v. C.J., 148 Wn.2d 672, 63 P.3d 76 (2003) (detailing procedures for finding child hearsay reliable).

b. The prosecution misused the child hearsay statute.

Rather than limiting its use of child hearsay to one child’s claim of “sexual contact” performed on or with that same child, the

prosecution used RCW 9A.44.120 as a springboard for admitting evidence about other children and involving wrongful acts that did not happen to that same child.

Janine Thornton repeated what L.R. told her about sexual contact Sampson had with her brother, L.H. 7/20/11RP 34. Because this is hearsay testimony about an act committed against a different child, Thornton's testimony relaying what L.R. said Sampson did to L.H. is inadmissible under RCW 9A.44.120. Harris, 48 Wn.App. at 284.

Thornton also repeated what L.R. said regarding conduct that did not involve "an act of sexual contact" as required by RCW 9A.44.120. Thornton testified that L.R. said she saw Sampson "playing with himself" and saw "white stuff" come out. 7/20/11RP 34. L.R. did not offer this same testimony – she did not remember Sampson doing anything to himself. 7/20/11RP 123. L.R. did not put this claim in the context of anything that was happening to her. The hearsay statement that L.R. saw Sampson masturbating does not establish sexual contact with L.R. as required by the statute.

Caroline Webster, a child interview specialist, offered extensive child hearsay by videotaping her interviews with the child witnesses that the prosecution admitted as evidence. The jury

watched each videotape during trial and requested to see each a second time during its deliberations. 8/3/11RP 2; 8/4/11RP 2-3; 8/8/11RP 2-3. Webster's interview with L.R. showed L.R. repeatedly answering questions about things she saw happen to L.H., not to herself. Ex. 19, at 9-14 (transcript); Ex. 21 (DVD). Like Thornton's testimony about what L.R. said happened to L.H., this testimony is inadmissible under RCW 9A.44.120. Harris, 48 Wn.App. at 284.

Webster also asked L.H. to explain "what L.R. told your mom." Ex. 29, at 16. Although Webster may have been trying to encourage L.H. to talk about things that happened to him, she asked L.H. to repeat what L.R. said, which is not admissible hearsay under RCW 9A.44.120. L.H.'s hearsay should have been limited to what happened to him, not what another person said about it.

- c. The inadmissible child hearsay improperly emphasized the complainant's stories, which they could not articulate at trial, and rendered the proceedings unfair.

Sampson objected to the State's improper use of child hearsay testimony. 7/12/11RP 90, 93. He argued in his brief and to the court that the children's inability to articulate the charged acts of

sexual contact could render such hearsay testimony unduly prejudicial. The court admitted the child hearsay without limitation after a hearing on the reliability and competency of the witnesses. See 7/7/11RP 30, 33; 7/12/11RP 93-95.

Improperly admitted evidence that impacts the jury's deliberations causes reversible error. See Gresham, 173 Wn.2d at 433. The child hearsay testimony bolstered the testimony of both L.H. and L.R. and was decidedly prejudicial because neither child witness articulated the same allegations as they had out-of-court. The prosecutor had to ask leading questions of L.H. and tell him the answers or simply move forward without any answer. See 7/20/11RP 151-53. L.R. could not remember what happened and said vaguely that Sampson tried to touch her down there but never on her skin. 7/20/11RP 118,137. The jury deliberated for six days and in that time asked to listen to Webster's interviews of the children in deliberations, in which L.R. told Webster what she thought happened to L.H. 8/9/11RP 2-3. Repeating the child hearsay in a manner unauthorized by the child hearsay statute impermissibly bolstered the State's tenuous case and impacted the jury's deliberations.

**3. The prosecution improperly elicited testimony vouching for the credibility of the complainants**

- a. The prosecution's repeated injection of the witness's ability to tell the truth amounted to impermissible vouching.

Evidence that a witness has agreed to testify truthfully is “generally self-serving, irrelevant, and may amount to vouching, particularly if admitted during the State’s case-in-chief.” State v. Ish, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). A witness’s promise to give truthful testimony has “little probative value” and should not be admitted in the State’s case. Id. In addition to its lack of probative value, such testimony may prejudice the accused by placing the prestige of the State behind the witness’s testimony when it is “entirely for the jury to determine” whether a witness has testified truthfully. Id. at 198-99.

It is impermissible for one witness to comment on the veracity of another witness. State v. Suarez-Bravo, 72 Wn.App. 359, 367, 864 P.2d 426 (1994); RP 157. It is likewise improper to insinuate that the accused must supply a reason why the State’s witness would fabricate his testimony. State v. Traweek, 43 Wn.App. 99, 106, 715 P.2d 1148 (1986), disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991); see

State v. Boehning, 127 Wn.App. 511, 524-25, 111 P.3d 899 (2005).

A prosecutor may not “seize[ ] the opportunity to admit otherwise clearly inadmissible and inflammatory” evidence by virtue of a question to a witness. State v. Jones, 144 Wn.App. 284, 295, 183 P.3d 307 (2008). “A defendant has no power to ‘open the door’ to prosecutorial misconduct.” The State deliberately elicited testimony about the children’s truthfulness and repercussions of not testifying truthfully from the mothers of the children, knowing that the mothers would defend their children’s honesty.

Trial proceedings must not only be fair, they must “appear fair to all who observe them.” Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Misconduct by a prosecutor violates the “fundamental fairness essential to the very concept of justice.” Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (quoting Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941)); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

b. The prosecution elicited opinions on the child complainants’ propensity for telling the truth.

The prosecutor asked Janine Thornton, mother of L.R. and L.H., about the consequences they suffer if they do not tell the

truth. 7/20/11RP 11. They get “in big trouble” if they do not tell the truth and they understand “[t]o always tell the truth,” Thornton explained. Id. When L.R. was going to speak with the detective in this case, Thornton said she told L.R. and L.H. to “tell the truth.” Id. at 38. The detective had told Thornton she would “be okay” if she would “tell the truth.” Id.

The prosecutor asked Fuhya Rogers, mother of N.P. and P.W., whether she expected her children to tell the truth. Rogers replied of N.P., “He knows the importance of telling the truth.” 7/20/11RP 173. Because they live “very spiritual lives . . . he knows that you lie, it’s a sin, you know and that it’s not pleasing to God.” Id. It was “not acceptable in our house” to not tell the truth. Id. The same was true for P.W. Id. Although Sampson was not convicted of the charged crimes against N.P., P.W.’s testimony was presented as part of the State’s ER 404(b) claims and the assurances of their truth-telling were part of the case against Sampson. See CP 156; 7/21/11RP 65-68, 75-76.

Detective Stangeland also testified about her efforts to extract the truth from those she interviewed. 7/27/11RP 57. She had been trained in an interview technique she used “to elicit

people to be honest.” Id. The purpose of her interviews is “to get people to tell the truth about what happened.” Id. at 58.

In his closing argument, the prosecutor emphasized that child interview specialist Webster had both L.H. and N.P. take a “truth/lie test” and a morality test, and “both passed” these tests, showing their ability to tell the truth. 8/1/11RP 64.

c. The vouching, along with the numerous evidentiary errors, denied Sampson a fair trial.

The “cumulative effect of repetitive prejudicial error” may deprive a person of a fair trial. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. United States v. Frederick, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Here, the prosecution used the child complainants’ mothers, interview specialist, and detective to assure the jury that the children were testifying truthfully. This issue was entirely for the jury to determine without the opinions of other adults. See Ish, 170 Wn.2d at 198. The prosecution left the impression that these adults

had the ability to monitor the children's accusations, ferret out what was true, and guarantee they would not say something untruthful.

Whether L.R. and L.H. were accurate and truthful was the central issue in the case, as there was no adult corroboration or physical evidence. The prosecution used patently improper means to convince the jury that these witnesses knew how to tell the truth and would suffer consequences if they did not. In addition, these errors were not isolated but must be viewed in context of the impermissibly admitted claims of Sampson's propensity and appetite for sexual misconduct as well as the improper hearsay that bolstered the child witnesses' allegations. Taken together, these errors denied Sampson a fair trial.

**4. The presence of an unauthorized person in jury deliberations denied Sampson fair trial.**

- a. Jury deliberations are private and may not be conducted in the presence of unauthorized persons

The right to be tried by an impartial jury is fundamental to the fairness of the trial and explicitly protected by the Sixth Amendment and Washington Constitution. U.S. Const. amend. 6; Const. art. I, §§ 21, 22. To protect the right to an impartial jury, “[p]rivate communications, possibly prejudicial, between jurors and

third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.” Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892). Any “contact,” direct or indirect, “with a juror about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.” Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

Conducting jury deliberations in the presence of someone who is not a juror, “even by one sworn to secrecy and silence, violates the cardinal requirement that juries must deliberate in private.” State v. Cuziak, 85 Wn.2d 146, 148-49, 530 P.2d 288 (1975); see also State v. Aker, 54 Wash. 342, 347, 103 P. 420 (1909) (“We are not inclined to sanction any practice which permits the invasion of the privacy of the jury room during deliberation.”).

b. The jury deliberated in the presence of and with the assistance of an excused alternate.

Twelve jurors are required in a criminal case. Art. I, § 21. Alternate jurors may be empaneled, but may not deliberate with the 12 selected jurors. CrR 6.5.

When the court polled the jury at the close of the case, 13 jurors responded that they had participated in deliberations and agreed with the verdict rendered. 8/9/11RP 14-17. The court had previously instructed the alternate jurors to leave the courtroom and not discuss the case with anyone. 8/1/11RP 105. Yet the polling of the jury demonstrates that there was an unauthorized person who participated in jury deliberation. 8/9/11RP 14-17.

The sanctity of jury deliberations is a structural requirement of a fair trial. Cuziak, 85 Wn.2d at 148-49. “[P]rejudice will be presumed to flow from a substantial intrusion of an unauthorized person into the jury room unless it affirmatively appears that there was not and could not have been any prejudice.” Id. Because jurors may not be asked to explain how they reached their verdict, the procedure by which the jury deliberates must ensure that they are deliberating without the potential for improper influence. See State v. Hoff, 31 Wn.App. 809, 813, 644 P.2d 763, rev. denied, 97 Wn.2d 1031 (1982).

Subtle influences affect the jury and threaten “the integrity of the jury process itself.” See Jones v. Sisters of Providence Hospital, 140 Wn.2d 112, 120, 994 P.2d 838 (2000). The impossibility of knowing how the presence of the 13<sup>th</sup> juror affected

Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Id. at 304-05. Likewise, the Court found Arizona's death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey's "hate crime" legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. 530 U.S. at 492-93.

In these cases, the Court rejected the notion that arbitrary labeling of facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476; see also, Ring, 536 U.S. at 602 (pointing out the dispositive question is one of substance, not form). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

b. The rights to a jury trial and proof beyond a reasonable doubt apply in this case.

The Supreme Court has never conclusively held the Sixth Amendment does not apply to proof of prior convictions which elevate the maximum punishment. Almendarez-Torres v. United States, 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), held recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. Almendarez-Torres, however, expressed no opinion as to the constitutionally-required burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. Id. at 246.

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Apprendi distinguished Almendarez-Torres because that case only addressed the indictment issue. 530 U.S. at 488, 495-96. Apprendi

noted “it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find any fact increasing the statutory maximum sentence beyond a reasonable doubt. Id.

This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the Apprendi rule. Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J. concurring). Rather than focusing on whether something is a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for

imposing or increasing punishment. Id. at 499-519; accord, Ring v. Arizona, 536 U.S. 610 (Scalia, J. , concurring).

The Washington Supreme Court has noted the United States Supreme Court's failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing Ring) cert. denied, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). The Washington Supreme Court, however, has felt obligated to "follow" Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds.

Indeed, the Washington Court's "following" of these case has been sharply criticized. State v. McKague, 159 Wn.App. 489, 529-34, 246 P.3d 558 (Quinn-Brintnall, J, dissenting in part), affirmed on other grounds, 172 Wn.2d 802, 262 P.3d 1225 (2011). The Washington Supreme Court's original decisions addressing the Sixth Amendment's application to the Persistent Offender Accountability Act (POAA) were premised upon the conclusion that the legislative characterizations of a fact as either an "element" or

“sentencing fact” was determinative of the constitutional protections to be afforded. Moreover, the court found it significant whether the Legislature codified the applicable fact to be proved in a sentencing as opposed to substantive statute. State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1994). The distinctions upon which Thorne rested ceased to be constitutionally relevant following Apprendi and Blakely. Apprendi, 530 U.S., at 476. Blakely, 542 U.S. at 304-05. The Washington Supreme Court has not addressed this question following the decisions in Blakely and Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) which plainly rejected the artificial distinction upon which the Washington Court has based its decision. And with those decisions Thorne and its progeny are no longer analytically sound.

Even if constitutionally significant, the treatment of a persistent offender finding as a mere sentencing factor is in stark contrast to this State’s prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). And historically, Washington cases required a jury

determination of prior convictions prior to sentencing as a habitual offender. State v. Manussier, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement); Furth, 5 Wn.2d at 18. Likewise, many other states' recidivist statutes provide for proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Sampson's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. Sampson was entitled to a jury finding beyond a reasonable doubt that he is a persistent offender.

**7. The arbitrary labeling of a persistent offender finding as a “sentencing factor” that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment**

- a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); U.S. Const. amend. 14. When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. “[T]he most elemental of liberty interests [is] in being free from physical detention by one’s own government.” Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541; Cf. In re the

Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict scrutiny to civil-commitment statute in face of due process challenge, because civil commitment constitutes “a massive curtailment of liberty”).

b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. Manussier, 129 Wn.2d at 672-73. Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens through which the Court evaluates the issue. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first-time offenders. For example, defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). And defendants who have twice previously been convicted of “most serious” (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels “elements” of a crime or “sentencing factors” which have been attached to them.

Where prior convictions which increase the maximum sentence available are termed “elements” of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order

must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn.App. 456, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements. Instead, courts have simply treated them as such.

But where, as here, prior convictions which increase the maximum sentence available are termed as “sentencing factors,” they need only be proved to the judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143 (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike). Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers as “elements,” the legislature has never labeled the fact at issue here as a “sentencing factor.” Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW

9.68.090 (elevating “penalty” for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years “shall be punished under RCW ch. 9.94A”); Thorne, 129 Wn.2d at 772 (purpose of POAA is to “reduce the number of serious, repeat offenders by tougher sentencing”).

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the “three strikes” context but not in other contexts, because the punishment in the “three strikes” context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes – even if the

prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37)(b) (two strikes for sex offenses); RCW 9.94A.570; Smith, 150 Wn.2d at 143. This is so despite the fact that the defendant is the same person, the alleged prior conviction is the same, and the alleged prior conviction is being used for the same purpose in either instance: to punish the person more harshly based on his recidivism.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in Skinner, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in Skinner mandated extreme punishment upon a third conviction for an offense of a particular type. Id. at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under Oklahoma's act the extreme punishment was sterilization. Id. The Court applied strict scrutiny to

the law, finding that sterilization implicates a “liberty” interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. Id. at 541-42. Acknowledging that a legislature’s classification of crimes is normally due a certain level of deference, the Court declined to defer in this case because:

We are dealing here with legislation which involves one of the basic civil rights of man. ... There is no redemption for the individual whom the law touches. ... He is forever deprived of a basic liberty.

Id. at 540-41. The same is true here. Being free from physical detention by one’s own government is one of the basic civil rights of man. Hamdi, 542 U.S. at 529. The legislation at issue here forever deprived Sampson of this basic liberty; it subjected him to life in prison without the possibility of parole. It did so based on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

As the Supreme Court explained in Apprendi, “merely using the label ‘sentence enhancement’ to describe [one fact] surely does not provide a principled basis for treating [two facts] differently.”

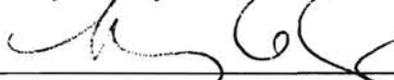
Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." Skinner, 316 U.S. at 542. This Court should hold that the trial judge's imposition of a sentence of life without the possibility of parole, based on the court's finding the necessary facts by a preponderance of the evidence, violated the equal protection clause. The case should be remanded for resentencing within the standard range.

F. CONCLUSION.

Marcel Sampson respectfully asks this Court to reverse his convictions due to the impermissible use of prejudicial evidence and fundamentally flawed jury deliberations. Alternatively, he asks this Court to remand this case for a new sentencing hearing.

DATED this 31<sup>st</sup> day of August 2012.

Respectfully submitted,



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NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67868-0-I
v.	)	
	)	
MARCEL SAMPSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF AUGUST, 2012.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710