

COA No. 75079-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RAETHKE,

Appellant.

FILED

Nov 09, 2016

Court of Appeals

Division I

State of Washington

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George F. Appel

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in violation of Due Process under the Fourteenth Amendment to the U.S. Constitution, and Article 1, § 3 of the Washington Constitution, by instructing Robert Raethke's jury with the "truth" definition of proof beyond a reasonable doubt, and in denying the proposed defense instruction defining reasonable doubt without the "truth" language.

2. The trial court exceeded its statutory authority by imposing a "two strikes" sentence, where the defendant's second degree assault with intent to commit indecent liberties with sexual motivation convictions violated Mr. Raethke's Double Jeopardy protections under the Fifth Amendment to the U.S. Constitution, requiring reversal of Mr. Raethke's two strikes sentence.

3. The trial court violated Mr. Raethke's Due Process right under the Fourteenth Amendment and his Sixth Amendment right to a jury trial when it imposed the sentence of Life Without Possibility of Parole.

4. This Court should exercise its discretion under State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016), if Mr.

Raethke does not substantially prevail in the present appeal, to deny any award of appellate costs under RCW 10.73.160(1).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in instructing the jury with the “truth” definition of proof beyond a reasonable doubt, and in denying the defense request to instruct the jury without such language.

2. Did the trial court exceed its statutory authority in imposing the “two strikes” sentence, where second degree assault is only a “two strikes” offense under the Sentencing Reform Act if accompanied by a sexual motivation finding, but where that finding must be vacated because it violates Double Jeopardy in this case because it was imposed on a conviction for assault with intent to commit indecent liberties?

3. Did the trial court violate Mr. Raethke’s Due Process and Sixth Amendment rights when it imposed the sentence of Life Without Possibility of Parole without a jury finding that Mr. Raethke was a Persistent Offender?

4. Should this Court exercise its discretion under State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016), if Mr. Raethke does not substantially prevail in the present appeal, to

deny any award of appellate costs under RCW 10.73.160(1)?

C. STATEMENT OF THE CASE

1. Charge and conviction. Robert Raethke was convicted of second degree assault, by commission of simple assault but with intent to commit the felony of indecent liberties by forcible compulsion. CP 330-31 (information); see RCW 9A.36.021(1)(e); CP 71 (verdict form). The crime was also alleged to have been committed with sexual motivation. CP 330-31 (citing RCW 9.94A.030(47), RCW 9.94A.535(3)(f), RCW 9.94A.835.); CP 72 (special verdict form).

According to the affidavit of probable cause, A.C., a 19 year old woman, was walking her dog on a wooded trail near the Arlington Airport. CP 332. She encountered Mr. Raethke, a silver-haired man in his 60's, who asked to hug her. His appearance reminded A.C. of elderly persons she had recently worked with at a retirement home. A.C. subsequently called 911 from her cell phone, and made criminal allegations. CP 332-33; 2/24/16RP at 680-91.

2. Facts. A.C. claimed at trial that after Mr. Raethke approached her, he told her repeatedly that she was beautiful, and asked her for a hug. When A.C. responded by touching

Mr. Raethke on his shoulder, she stated, he grabbed her around her waist, pulled her toward him and held her, and then kissed A.C. on her neck. 2/24/16RP at 681-82.

A.C. testified that she started shoving Mr. Raethke away as hard as she could, and she was telling him to let go of her, but the hug lasted for seven to ten seconds. 2/24/16RP at 683-84. After another shove, Mr. Raethke let go of her, and he then ran off when A.C. pulled her cell phone out and said she was going to call the police. 2/24/16RP at 684.¹

A.C. admitted that Mr. Raethke had no weapons, no rope or bag, nor any other items with him, and he did not attempt to take her off the trail. She also agreed that Mr. Raethke had stopped hugging her when she told him to, but she said that this was “[a]fter a struggle”. 2/24/16RP at 711-12. However A.C. conceded that she never said in her 911 call, or in her police statement given to responding officer Peter Barrett, that there was a struggle, or that she had to push Mr. Raethke off of her. 2/24/16RP at 712-14; State’s exhibits 45, 49.

¹ Mr. Raethke dyed his gray hair to a darker color soon after this time; this was at the insistence of his friend Cindy Posey, who also testified that she had dyed his hair several times in the past, because “it made him look old.” 2/26/16RP at 1001-02.

It was only after A.C. went home, later, when she discovered at her mother's urging that Mr. Raethke was pictured on a local sex offender internet website, that she contacted the police again. It was then that she said she had thought she was going to be raped. 2/24/16RP at 715-17; see also 2/24/16RP at 731-33 (testimony of complainant's mother); 2/24/16RP at 759-60 (testimony of Officer Barrett).

In order to prove the allegation that Mr. Raethke committed the misdemeanor assault with intent to commit the felony of indecent liberties, and to show sexual motivation, the State brought forth three witnesses from the past. These were S.C., K.D., and M.H., who had made accusations of rape committed by Mr. Raethke in wooded trail areas in 1982 and 1983, when the defendant was in his 20's. These allegations had resulted in Mr. Raethke pleading guilty and being imprisoned until 2012. See RCW 9A.36.021(1)(e); CP 180-325 (State's ER 404(b) motion).

S.C. testified that when she was 14 years old, Mr. Raethke grabbed her off of a forest trail in the Mountlake Terrace area, tied her hands with a rope, and forced her to engage in oral intercourse. 2/25/16RP at 929-39. M.H. testified

that when she was 14 years old Mr. Raethke grabbed her arm on a trail area also in Mountlake Terrace, and led her into the woods, where he forced her to engage in oral intercourse. 2/25/16RP at 944-52. K.D. testified that when she was 14 years old she was walking through the woods to go to the Alderwood Mall, when Mr. Raethke pulled her off the trail to a clearing, blindfolded her with something, and made her engage in oral intercourse. 2/25/16RP at 956-64.²

Mr. Raethke, when arrested and interrogated following Miranda, told police officers that he might be “falling back” into “old ways.” 2/24/16RP at 767-68. He was convicted as charged. CP 71, 72.

3. Sentencing. In the charging documents stating that the present offense was a second strike that would render Mr. Raethke a persistent offender subject to a mandatory LWOP sentence, the State alleged the crime was committed with sexual motivation. CP 330-36; see also RCW 9.94A.030(47), RCW 9.94A.535(3)(f), and RCW 9.94A.835.. At sentencing, the

² The trial court ruled that these prior bad acts were admissible under ER 404(b) to show Mr. Raethke’s intent to commit indecent liberties, for motive, and for consideration of the jury for evaluating proof of the allegation that the crime was sexually motivated. 7/29/15RP at 205-16; CP 134-48 (404(b) Findings of Fact); 2/24/16RP at 768; 2/26/16RP at 978; CP 82 (Instruction 7).

deputy prosecutor made no mention of an exceptional sentence, arguing instead that the two strikes law left the court with “no discretion” except to impose the mandatory LWOP sentence as a Persistent Offender. CP 52-53; 4/13/16RP at 1077. Mr. Raethke timely appeals. CP 2-13.

D. ARGUMENT

(1). **MR. RAETHKE’S JURY WAS GIVEN AN ERRONEOUS, DISAPPROVED DEFINITION OF PROOF BEYOND A REASONABLE DOUBT OVER HIS LAWYER’S OBJECTION AND PROPOSAL OF THE PROPER DEFINITION.**

a. **Mr. Raethke may appeal.** Over objection, the trial court gave the jury Instruction 3, defining reasonable doubt under the abiding belief in the “truth” language, and denied the proposed defense jury instruction that instead defined reasonable doubt without the “truth” language. 2/26/16RP at 1004; CP 78 (Instruction 3); CP 112 (Defense proposed instruction). Mr. Raethke may appeal. RAP 2.5.

b. **The Washington Courts have held the jury’s job is not to find the truth but to determine whether the State proved its case beyond a reasonable doubt.** Thus, the jury’s role is not to determine if it has a belief in the truth of the criminal charge. State v. Lindsay, 180 Wn. 2d 423, 437, 326 P.3d 125

(2014); State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn. App. 103, 286 P.3d 402, 411 (2012) (“truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden”).

Instead, the job of the jury “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” Emery, 174 Wn.2d at 760. “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice.” Id. at 757 (quoting Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Over Mr. Raethke's objection, the trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had “an abiding belief in the truth of the charge.” CP 78 (Instruction 3); CP 112 (defense proposed instruction without this language). By equating proof beyond a reasonable doubt with a “belief in the truth” of the charge, the court confused the critical role of the jury. The “belief in the truth” language encourages the jury to undertake

an impermissible search for the truth and invites the error identified in Lindsay and Emery.

The presumption of innocence may be diluted or even “washed away” by confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court’s obligation to vigilantly protect the presumption of innocence. Id. In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), was “problematic” as it was inaccurate and misleading. Bennett, 161 Wn.2d at 317-18. Exercising its “inherent supervisory powers,” the Supreme Court therefore directed trial courts to use WPIC 4.01 in all future cases. Id. at 318. That pattern instruction reads:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and

carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3rd ed. 2008) (“WPIC”). The Court of Appeals has relied in part on Bennett to uphold the instruction given here. See State v. Fedorov, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014).

However, the Bennett Court did not comment at all on the bracketed “belief in the truth” language. More recent cases show the problematic nature of such language. In Emery, the prosecution told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges, are that” the defendants are guilty. Emery, 174 Wn.2d at 751. The Court held that these remarks misstated the jury’s role, but because they were not part of the court’s instructions, and the evidence was overwhelming, the error was harmless. Emery, at 764 n.14.

The other case this court relied on in Fedorov was State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995). See Fedorov, 181 Wn. App. at 200. But in Pirtle, the language at issue was not “the truth.” Instead, the defendant challenged the phrase

“abiding belief” as inconsistent with proof beyond a reasonable doubt. Pirtle, 127 Wn.2d at 658. The court rejected the argument because the U.S. Supreme Court had held “[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof.” Pirtle, at 658 (citing Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)).

Regardless of whether the phrase “abiding belief” is proper, the point is that the jury’s role is not to determine “the truth.” Lindsay, 180 Wn. 2d at 437; Emery, 174 Wn.2d at 760. Thus, the trial court erred in overruling Mr. Raethke’s objection to the inclusion of this language.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan, 508 U.S. at 281-82.

This Court has a supervisory role in ensuring the jury’s instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should hold that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an “abiding belief in the truth of the charge” misstates the

prosecution's burden of proof, confuses the jury's role, and denied Mr. Raethke his right to a fair trial by jury as protected by the state and federal constitutions.

(2). THE TWO-STRIKES SENTENCE WAS IMPOSED IN THE ABSENCE OF STATUTORY AUTHORITY BECAUSE THE CURRENT OFFENSE CAN ONLY BE A STRIKE CRIME IN VIOLATION OF DOUBLE JEOPARDY.

a. Procedural Facts; appealability. Following trial, the sentencing court found that Mr. Raethke was a Persistent Offender, having been convicted of a second enumerated “two strikes” sex offense, namely, second degree assault with sexual motivation. CP 14-24 (Judgment); 4/13/16RP at 1083.

Mr. Raethke challenges this sentence as having been imposed contrary to the SRA, which is an argument he can raise for the first time on appeal. State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). This is because a defendant can never waive his right to be free from punishment “in excess of that which the Legislature has established.” In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002).

In this case, Mr. Raethke's POAA sentence was imposed without statutory authority because a sexual motivation finding

cannot be applied, without violating Double Jeopardy, to a second degree assault conviction where the conviction is obtained under RCW 9A.36.021(1)(e), and where the underlying crime of intent is indecent liberties. Double Jeopardy challenges to verdicts and judgments argued to be duplicative in violation of this right may also be raised for the first time on appeal. RAP 2.5(a)(3); see, e.g., State v. Tanberg, 121 Wn. App. 134, 137, 87 P.3d 788 (2004); cf. State v. Lazcano, 188 Wn. App. 338, 354 P.3d 233 (2015) (Double Jeopardy challenge to subsequent prosecution may not be appealable as manifest constitutional error in the absence of adequate factual development in trial court), review denied, 185 Wn.2d 1008 (2016).

b. The POAA required that Mr. Raethke’s current crime be a second “strike” offense. The State of Washington adopted the Persistent Offender Accountability Act (POAA) by initiative in 1993. See State v. Thorne, 129 Wn.2d 736, 746, 921 P.2d 514 (1996). The POAA imposes a mandatory term of life imprisonment without the possibility of release for defendants who qualify as persistent offenders. RCW 9.94A.570.

In 1996, the legislature expanded the POAA, which originally required three “strike” crimes, by adding a “two strikes”

provision relating to certain enumerated sex offenses. Laws of 1996, ch. 289, § 1. Under this provision, a defendant such as Mr. Raethke, if shown to have a prior strike (see Part D.3, infra), would qualify as a persistent offender if his current, 2014 offense is a qualifying two strike offense. Former RCW 9.94A.030 at former (37)(b)(i) - (ii).

The enumerated offenses for “two strikes” purposes include, inter alia, certain felonies, including second degree assault if accompanied by a sexual motivation finding. RCW 9.94A.030(37)(b)(i) - (ii). Second degree assault is defined at RCW 9A.36.021 (as effective July 22, 2011), which provides that the crime can be committed as follows:

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . .
 - (e) With intent to commit a felony, assaults another[.]

RCW 9A.36.021(1)(e). Mr. Raethke was convicted of second degree assault under (1)(e) with the underlying crime of intent charged as “indecent liberties.” CP 330-31 (information); CP 332-37 (affidavit of probable cause); CP 84 (Instruction 9).

The definitions of these offenses and special allegations implicate Double Jeopardy concerns. Under RCW

9A.44.100(1)(a), a person is guilty of indecent liberties when he knowingly causes another person to have sexual contact with him or another by forcible compulsion. For purposes of indecent liberties, sexual contact means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” RCW 9A.44.010(2) (as effective April 10, 2007). And, under RCW 9.94A.030(48), sexual motivation means “that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.”

Mr. Raethke argues that this pairing of two functional elements, that were identical as charged and proved, violated Double Jeopardy.

c. As charged and proved in this case, the sexual motivation finding violates Double Jeopardy. The Double Jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5.³ This guarantee protects

³ Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. 1, § 9. The Washington courts give Article I, section 9 the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

against, among other things, multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

To determine if multiple convictions under different statutory provisions violate Double Jeopardy, the courts utilize the Blockburger, or “same elements” test. United States v. Dixon, 509 U.S. 688, 697, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Dixon, 509 U.S. at 696. Two offenses are the “same offense” for purposes of Double Jeopardy analysis when one is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. See State v. Roybal, 82 Wn.2d 577, 579, 512 P.2d 718 (1973). The court may not enter

multiple convictions for the “same offense.” State v. Freeman, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

d. As charged and proved in Mr. Raethke’s case, the sentence-enhancing finding of “sexual motivation” is the functional equivalent of the same element of second degree assault as intent to commit indecent liberties. For the purposes of the jury trial right, in Apprendi and Blakely, the Supreme Court clarified the long-standing requirement that any fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This is true because such facts are elements, even when the fact is labeled a “sentencing factor,” or as here with sexual motivation, a “sentence enhancement,” by the Legislature. Blakely, 542 U.S. at 306-07; Apprendi, 530 U.S. at 482-83; Ring v Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In turn, enhancing facts also operate as elements for purposes of the protection against Double Jeopardy. Sattazahn

v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In this, his concurring opinion in Sattazahn, Justice Scalia emphasized that there is “no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment’s Double Jeopardy Clause. 537 U.S. at 111.

It is true that the Washington Supreme Court has previously rejected Double Jeopardy challenges to firearm and deadly weapon enhancements where the use of a firearm or deadly weapon is an element of the underlying offense. State v. Kelley, 168 Wn.2d 722, 26 P.3d 773 (2010); State v. Husted, 118 Wn. App. 92, 95-96, 74 P.3d 672 (2003), rev. denied, 151 Wn.2d 1014 (2004).

However, the reasoning of these opinions is no longer persuasive and should not be applied to the sexual motivation finding in this case where the underlying crime is second degree assault with intent to commit indecent liberties. Under Blockburger, when each provision at issue requires proof of an additional fact which the other does not, Double Jeopardy has

not been offended by duplicative punishment. Blockburger, 284 U.S. at 304.

That cannot be said here. In applying the test, the courts inquire whether the evidence proving one crime also proved the second crime. In re Pers. Restraint of Orange, 152 Wn.2d 795, 820-21, 100 P.3d 291 (2004). This is examined by looking to the charging theories and proof of the case rather than merely examining the statutory elements. Orange, at 819-820; State v. Freeman, 153 Wn.2d at 779.

Thus the Supreme Court in Orange cited with approval State v. Potter, 31 Wn. App. 883, 645 P.2d 60 (1982), and In re Personal Restraint of Burchfield, 111 Wn. App. 892, 46 P.3d 840 (2002). Orange, at 820. In Potter, the Court of Appeals held that convictions for reckless driving and reckless endangerment based on the defendant's excessive speed violated Double Jeopardy because “proof of reckless endangerment through use of an automobile will always establish reckless driving.” Potter, 31 Wn. App. at 888. In Burchfield, the Court held that convictions for manslaughter and assault arising out of the same gunshot violated Double Jeopardy even though the crimes contained slightly different statutory elements. Burchfield, 111

Wn. App. at 845. See State v. Fuentes, 150 Wn. App. 444, 451 n. 20, 208 P.3d 1196 (2009) (citing Orange, Potter, and Burchfield). See also Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (consecutive sentences for felony murder predicated on rape, and a separate rape conviction, violated Double Jeopardy because the defendant was punished twice for rape).

For further example, in United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), double jeopardy was violated where the defendant was convicted of contempt, for violating conditions of release by possessing drugs, and also of the substantive offense of drug possession. Dixon, 509 U.S. at 698. The importance of Dixon lies in its instruction on the application of Blockburger. While there were a myriad of ways of violating the contempt provision of the defendant's release, in Dixon, proving contempt by showing the defendant's arrest for possession of narcotics also necessarily proved the crime of drug possession. Double Jeopardy was therefore violated.

As in these cases, including Whalen and Dixon, the finding of a purpose of sexual motivation and the element of intent to commit indecent liberties both involve the purpose of

sexual contact. Put another way, proof of the assault required proof of an intent to commit indecent liberties – and the sentencing enhancement, required proof of a purpose of sexual gratification. The additional finding of sexual motivation violates Double Jeopardy.

e. Remedy. The multiple punishments for an underlying crime and an enhancement that were functionally the “same offense” violated Double Jeopardy. This Court should reverse and remand with directions that the sexual motivation enhancement on the assault conviction be stricken. Whalen, 445 U.S. at 693–94. Further, because without the sexual motivation finding, the trial court did not have authority to enter judgment for a second “strike” offense, Mr. Raethke must be re-sentenced within the standard range for the crime of second degree assault. RCW 9.94A.030(37)(b)(i) - (ii).

(3). THE BENCH FINDINGS THAT MR. RAETHKE HAD PRIOR CONVICTIONS THAT MADE HIM A PERSISTENT OFFENDER VIOLATED HIS RIGHTS TO A JURY TRIAL AND TO DUE PROCESS.

The trial court violated Mr. Raethke’s Due Process and Sixth Amendment rights when it imposed the sentence of Life Without Possibility of Parole absent a jury finding that Mr.

Raethke was a Persistent Offender with a prior strike. CP 14-24 (Judgment and Sentence); CP 25-51 (Certified documents).

a. Sentencing; bench finding only. As noted, the sentencing court found from the bench that Mr. Raethke was a Persistent Offender, based on its finding that he had committed a prior enumerated “two-strikes” sex offense. CP 14-24 (Judgment); 4/13/16RP at 1083. Neither the State’s sentencing memorandum, the State’s argument at sentencing, the court’s oral sentencing ruling, nor the judgment and sentence state the specific prior offense that was deemed to be the defendant’s first strike crime. See CP 52-58; 4/13/16RP at 1077, 1083; CP 15, 25-51.

b. The sentence violated Mr. Raethke’s Due Process and jury trial rights. The Due Process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. 6. A criminal defendant has the right to a jury trial and may only be convicted and punished if the government proves every element or fact necessary to that sanction beyond a reasonable doubt. Alleyne v. United States,

570 U.S. ____, 133 S.Ct. 2151, 2160-62, 186 L.Ed.2d 314 (2013); Blakely v. Washington, *supra*, 542 U.S. at 300-01.

The Supreme Court has recognized that this principle applies to facts that are labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant, or the mandatory minimum. Alleyne, 133 S.Ct. 2161-62; Blakely, 542 U.S. at 304. The Blakely decision held that an exceptional sentence imposed under Washington’s 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. Blakely, at 304-05; *see* Ring v. Arizona, *supra*, 536 U.S. at 609 (invalidating death penalty scheme where jury had not found the aggravating factors).

In Alleyne, the Supreme Court ruled that the facts underlying the imposition of a mandatory minimum sentence must be found beyond a reasonable doubt by a jury, ruling that “the principle applied in Apprendi applies with equal force to facts increasing the mandatory minimum.” 133 S.Ct. 2160.

In the foregoing cases, the Court rejected the notion that arbitrarily labeling 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. A judge may not impose punishment based on judicial findings. Alleyne, 133 S.Ct. at 2162-63; Blakely, 542 U.S. at 304-05. Under Alleyne, Blakely, and Apprendi, the judicial finding of Mr. Raethke’s prior strike conviction and the finding that he qualified as a persistent offender violated his right to Due Process and his right to a jury trial. His sentence under the POAA must be reversed.

E. CONCLUSION AND PRAYER FOR RELIEF AS TO APPELLATE COSTS

1. Conclusion - reversal of conviction and sentence.

For the reasons argued herein, Mr. Robert Raethke respectfully requests that this Court reverse the judgment of the trial court and reverse his LWOP sentence.

2. Appellate Costs. Mr. Raethke, if he does not substantially prevail in the present appeal, respectfully asks this Court to exercise its discretion under State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016), and considering the broad policy imperatives regarding costs generally expressed in State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015), to

deny any award of appellate costs under RCW 10.73.160(1).

Recognizing that Mr. Raethke would have limited if any ability to pay costs generally, the trial court imposed only Legal Financial Obligations in the form of the \$500 victim compensation fee and the \$100 DNA testing fee. The court had learned from counsel that both the defendant and jail personnel had indicated that Mr. Raethke had medical issues restricting his ability to work. 4/13/16RP at 1079-83 (also setting payments at 5 dollars per month with a lifetime time limit); CP 14-24 (judgment, ¶ 4.1); see also ¶ 2.5 (unchecked finding regarding “ability or likely future ability to pay legal financial obligations”). While Mr. Raethke is in Department of Corrections custody, DOC is entitled to deduct 20 percent of his wages, income, and trust account funds if any, and send the money to the Superior court for payment of the aforementioned (LFOs). RCW 72.11.010; RCW 72.11.020; RCW 72.09.111; RCW 72.09.480; RCW 72.65.050. And the Court of Appeals has held that this is not a collection action triggering an inquiry into ability to pay. State v. Crook, 146 Wn. App. 24, 27-28, 189 P.3d 811 (2008).

Should Mr. Raethke fail to prevail in the present appeal, future further costs in the form of appellate costs under RCW 10.73.160(1) are even more likely than in the typical case to greatly preclude the availability of any already minimal funds he might have to purchase daily luxuries such as hygiene or personal care items. Mr. Raethke asks that this Court exercise its discretion to deny any award of appellate costs.

DATED this 9TH day of November, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75079-8-I
)	
ROBERT RAETHKE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF NOVEMBER, 2016, 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:

- | | | |
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SIGNED IN SEATTLE, WASHINGTON, THIS 9TH DAY OF NOVEMBER, 2016.



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