

NO. 35786-1

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY KELLY, APPELLANT

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**CORRECTED BRIEF OF APPELLANT**

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Appeal from the Superior Court of Pierce County  
The Honorable Ronald E. Culpepper  
Superior Court Cause No. 05-1-01173-6'

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*accepted*  
*Jan 11, 2008*  
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A. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO:

1. Was trial counsel's representation constitutionally deficient where:

(a) Trial counsel failed to object to testimony regarding the defendant's alleged use of methamphetamine.

(b) Trial counsel failed to object to testimony regarding the defendant's purchases of methamphetamine.

(c) Trial counsel failed to object to inadmissible hearsay statements that the witness Misty Saldana-Williams was afraid to talk to police at one point because she would be six feet under if she talked to police.

(d) Trial counsel failed to object to inadmissible hearsay statements made by Saldana-Williams to police typically get the property from theft.

(e) Trial counsel failed to object to testimony that people exchange property for drugs

(f) Trial counsel failed to object to testimony that the defendant had an "appointed" attorney.

(g) Trial counsel failed to object to repeated questioning from the prosecutor that was structured to suggest that a defense witness had an improper relationship with the defendant and another young man.

2. Did the deputy prosecutor commit misconduct when:

(a) He asked a witness if she was afraid that the defendant would use a weapon on her.

(b) He asked the defendant's witness whether the witness thought that the defendant's prior incarceration in the Pierce County Jail "give . . . any idea that he may be involved in criminal activity"? RP 586.

(c) He argued that the defendant must have driven the Lykken's Saturn vehicle because there was blood in it and the defendant had left blood in the Lykken's residence despite knowing that the apparent blood in the Saturn had never been tested

(d) His closing argument was intended to inflame the passion and prejudice of the jury by suggesting that the defendant would have shot anyone who entered the residences he allegedly burglarized.

3. Did the trial court abuse its discretion when it admitted ER 404(b) evidence of an unrelated incident that occurred after one of the burglaries?

4. Did the trial court err when it failed to give the defendant's proposed "missing witness" instruction?

5. Did the trial court err when it imposed an unlawful sentence where it relied upon an inapplicable statute and entered conclusion of law no. 1?

6. Is the defendant entitled to relief under the cumulative error doctrine?

B. STATEMENT OF THE CASE.

1. Procedure.

The State of Washington charged TIMOTHY MICHAEL KELLY, hereinafter defendant, with the crimes of Burglary in the First Degree, Theft of a Firearm, Trafficking in Stolen Property in the First Degree, Theft in the First Degree, Burglary in the First Degree, Trafficking in Stolen Property in the First Degree, Theft in the First Degree, Theft in the First Degree, Unlawful Possession of a Firearm in the First Degree, Theft of a Firearm, Theft of a Firearm, Unlawful Possession of a Firearm in the First Degree. The State alleged that the crimes occurred on September 3 or 5, 2006. RP 43-44. The Lykken burglary was alleged to have occurred on August 28, 2003. CP 1-7. The state later amended the charging dates on the Lyhikken charged crimes to August 28, September 3, 2003. CP 26-34.

On October 24, 2006, trial commenced before the Honorable Ronald Culpepper:

a. CrR 3.5 Hearing:

On October 25, 2006, the trial court conducted a CrR 3.5 hearing. The State called Gig Harbor Police Department Officer Kelly, who contacted the defendant on September 23, 2003, at the Pierce County Jail. RP 43. At that time, the defendant was incarcerated on a related crime. RP 43. The detectives from

several related cases met and decided to “collectively interview” the defendant regarding “his knowledge of the burglary that occurred in Gig Harbor and the related crimes that had occurred after that.” RP 43. The defendant was not in custody on the instant case at the time of the interview. RP 43. However, he was nevertheless in custody. RP 47.

The police officers checked the defendant out of the jail and took him to an interview room. RP 44. Officer Kelly read the Miranda rights. RP 44. The defendant stated that he understood his rights and agreed to “tell you whatever you want to know.” RP 44. The interview then was conducted and later stopped when the defendant informed police that he wanted to discontinue the interview. RP 46.

Prior to the conclusion of the interview, Detectives Centoni and Westby as well as Officer Kelly interrogated the defendant. RP 48. During his interview, Officer Westby asked the defendant about an individual named Eric Milton. RP 48. The defendant stated that he had not seen much of Milton since they were released from custody previously. RP 49. Officer Westby asked the defendant if he knew Misty Ann Saldana-Williams. RP 49-50. The defendant stated that he knew her through a mutual friend, that they had both stayed at his aunt’s house, and that they first met at a drug court hearing. RP 50. The defendant also acknowledged knowing Niccolocci Andretti, Jennifer Forsch, Curtis Edmon and

Mark Niese. RP 51-52. The defendant denied knowing David Mulholland and Tiffany Milhans. RP 52-53.

Officer Kelly showed the defendant some photographs from a store surveillance that purportedly depicted him using a stolen credit card from the burglary. RP 54. The defendant denied using any stolen credit card. RP 54. He stated that a woman he knew had given him the credit card. RP 54. The defendant stated that he had purchased a prepaid cell phone card and two accessories. RP 55. The defendant stated: "I guess she got the card and I kept the cell phone stuff." RP 55.

Officer Kelly knew that Misty Saldana-Williams had worked at Thousand Trials and that she handled customer reservations. RP 56. A list of reservations was left behind at the Gig Harbor burglary. RP 56. Officer Kelly showed the list to the defendant, who asked, "Where did you get that?" RP 57. The defendant denied knowing anything about the list. RP 57.

The defendant told Officer Kelly that Mr. Niccolocci had loaned his blue 1987 Honda Prelude to him when Niccolocci was in custody. RP 58.

Pierce County Sheriff's Department Detective Westby also interviewed the defendant that day regarding a Lakewood burglary, which he thought was related to another burglary in unincorporated Pierce County. RP 73. Westby had identified the defendant as a "person of interest". RP 73. Westby believed that the defendant acknowledged knowing Catherine Milton. RP 79.

After argument by counsel, the court ruled that the defendant's statements were admissible pursuant to CrR 3.5<sup>1</sup>. RP 88-89. The trial court entered findings of fact and conclusions of law as required by the rule. CP 180-187.

b. Other Pretrial Matters.

The State had charged the defendant with a count of unlawful possession of a firearm and thus had to prove a prior conviction, in this case, a 2003 residential burglary. RP 95. The defendant agreed to stipulate to that the defendant had been previously convicted of a serious offense. RP 95.

The defendant moved to sever the Lykken burglary charge from the Eva burglary charge because the defendant was in the Pierce County Jail at the time the Lykken burglary went off at 2:30 a.m. on August 28, 2003. RP 105.

The defendant argued that severance was warranted under CrR 4.4(b)<sup>2</sup>. RP 106. The defendant noted that there was a substantial difference in the strength of the State's evidence on these counts. RP 107. Regarding the Lykken burglary, the State had evidence that the defendant's DNA was found on a pair of scissors inside the house. RP 109. However, the State could not "age" the blood or otherwise determine if the scissors would have been left at the scene by another individual who had taken the scissors after the defendant's blood was deposited on them. The State had no eyewitnesses or other physical evidence to link the defendant with being inside the Eva residence. RP 110.

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<sup>1</sup> See Appendix N

<sup>2</sup> See Appendix O

The prosecutor argued that joinder was warranted where there were factual similarities between the two charged crimes. RP 115. The prosecutor argued:

“They’re very similar in nature. Both burglaries occur when outdoor lights are unscrewed, meter bases are removed from the meters on each house, thereby killing power to both houses and presumably an alarm, although it would appear that the Lykken alarm may have had an independent source of power since it may have gone off. But it’s unclear if that was even related to this case. I don’t know. It probably was. In both cases, the houses are ransacked...It’s not often that in two burglaries the meter bases are taken off in that matter or that exterior lights are unscrewed in the same manner...” RP 115-16.

The trial court questioned the prosecutor’s recitation of similarities between the charged crimes, noting that the type of items taken was typical and usual for burglaries. RP 116.

Nevertheless, the prosecutor argued, “Mr. Kelly admits what he typically steals.” RP 116. The prosecutor had no statements at any time during the trial to support this statement. Passim.

The court denied the defendant’s motion to sever, holding that the evidentiary similarities as well as judicial economy warranted joinder. RP 119.

The defense moved to exclude evidence regarding other uncharged burglaries as well as references to other individuals who were not necessarily involved in the charged crimes. RP 134-35. Some of the individuals may have been involved in other aspects of criminal activity that the prosecutor attributed to the defendant. RP 135.

In response, the prosecutor announced, “404(b) applies to the defendant, not other people.” RP 135.

The defendant moved to dismiss pursuant to CrR 8.3(b)<sup>3</sup> because the state had failed to investigate the report that the Lykken burglary occurred at a time when the defendant was in custody. At that time, the burglar alarm at the residence went off early in the morning. That evidence suggested that the burglary likely occurred then. Because the state failed to investigate that information and to document which individual heard the burglar alarm go off, the defendant could not access this potentially exculpatory evidence. RP 155-56. That evidence would have been relevant because it tended to prove that the Lykken burglary occurred when the defendant was in custody. RP 156.

Because the police failed to take a statement from the individual, the individual could no longer know when the burglar alarm went off, except that it was early in the morning. RP 159.

The court denied the defendant’s motion, although the court agreed with the defendant that this information would be relevant if it would confirm that the burglary occurred at a time when the defendant was locked up. RP 161.

The parties agreed to stipulate that the defendant was “in physical custody of the Pierce County Jail until 6 a.m. on August 28 of 2003.” RP 163.

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<sup>3</sup> See Appendix A

During the defendant's opening statement, the prosecutor objected to the defendant's statements that the Lykken burglary likely occurred on August 27, 2003. RP 168. The defendant noted that August 27, 2003, was the date used in the police reports and the emails written by police. RP 168-69. The defendant noted that the police used the date of August 27, 2003 in the time line they created regarding the burglaries. RP 169.

c. Trial.

At trial, the prosecutor asked Gig Harbor Police Department Officer Welch questions about the sophistication of burglars. RP 193. For example, he asked whether "the skill or experience of the burglar might influence what protection or precautions they take." RP 193. The police officer agreed with the prosecutor and then expounded that burglars who planned their crimes commonly wore gloves. RP 194.

At trial, defense counsel elicited testimony from Misty Saldana-Williams about buying methamphetamine with the defendant. RP 306.

At trial, defense counsel asked Saldana-Williams about using methamphetamine with the defendant. RP 306.

At trial, defense counsel elicited testimony from Saldana-Williams that she and the defendant purchased needles, rented a motel room and then used methamphetamine. RP 307-08.

At trial, defense counsel elicited testimony from Saldana-Williams that the defendant possessed the methamphetamine and was her source at that time. RP 309.

At trial, defense counsel elicited testimony from Saldana-Williams that she and the defendant continued to ingest drugs when they stayed at his aunt's house. RP 311, 314, 315. Saldana-Williams stayed at the aunt's house for six to eight days. RP 331.

At trial, defense counsel elicited testimony from Saldana-Williams that the defendant was in and out of his aunt's house but that he would return sporadically to inject her with methamphetamine. RP 316.

At trial, defense counsel elicited testimony from Saldana-Williams that she gave the list of Thousand Trail customer reservations to the defendant "because I didn't want him going into houses with guns when people were home, and he had said that he had did that." RP 333.

At trial, the prosecutor asked Ms. Saldana-Williams why she was afraid of the defendant. RP 342. She replied that she was afraid because "I knew that he liked weapons." RP 342. The prosecutor then asked Ms. Saldana-Williams if she was afraid that he would use a weapon on her. RP 342.

During the testimony of Detective Busey, he stated that during the execution of the search warrant, he asked Misty Saldana-Williams if she wanted to help. He further testified that Saldana-Williams said, "She would be six feet

under if she told me anything.” RP 410. Defense counsel failed to object to this inadmissible hearsay. Id.

Busey also was allowed to testify regarding the substance of Saldana-Williams’ statements to him regarding her involvement with the defendant. RP 413-416. Defense counsel failed to object to this inadmissible hearsay. Id.

The prosecutor attempted to qualify Busey as an expert on drug recognition evidence (DRE). RP 471-72. Although the police officer acknowledged that he was not a DRE expert, he testified without objection that he had no evidence that Saldana-Williams had been using meth. RP 473-74.

Busey also testified that in “the drug culture” people trade vehicles and property for drugs and that the vehicles and property are typically obtained by theft. RP 475. Busey also testified moments later that the defendant had an appointed attorney. RP 476. Defense counsel did not object to this testimony. Id.

Before the State rested, the trial court read two stipulations into the record:

There is no dispute about the information contained herein. The parties agree that the defendant was in physical custody at the Pierce County Jail on August 27, 2003, and that he was released from the jail at or around 6 a.m. on the morning of August 28, 2003.

The defendant Timothy Kelly has previously been convicted of a serious offense as defined under the law of the State of Washington as it relates to the crimes of unlawful possession of a firearm in the first degree. The conviction was entered prior to all relevant dates in this case.

RP 530-31, 534-35.

The defendant repeatedly renewed his severance motion throughout the trial. RP 542.

The defendant called retired U.S. Army Major Gerry King to testify. RP 550. Retired U.S. Army Major Gerry King testified that the defendant, his adopted son, returned home on August 29, 2003 (the day after the defendant's release from the Pierce County Jail). RP 554-557. Major King testified that the defendant was home every night thereafter. RP 558, 561. Because the defendant had been seriously injured in 2002, Major Kelly, a retired nurse, continued to check on him every night while the defendant slept. RP 563-65.

Major Kelly testified that he had never seen the defendant with a firearm. RP 560. Defense counsel asked Major King whether during the period in late August and early September 2003, he observed anything that he thought indicated criminal behavior. RP 566. During cross-examination, the prosecutor asked, "Did the fact that he was staying at the jail give you any idea that he might be involved in criminal behavior?" RP 585.

During Major King's testimony, the prosecutor repeatedly asked him about his financial relationship with the defendant and another young man who resided with him as well as his living arrangement. RP 587-589. Defense counsel

failed to object to this irrelevant, misleading, and potentially prejudicial examination. Id.

The prosecutor also asked Major King whether he met the other young man with whom he resided in a bar. RP 590. Defense counsel failed to object to this irrelevant, misleading, and potentially prejudicial examination. Id.

The trial court declined to give defendant's proposed instruction, "A", the missing witness instruction. CP 95-97.

During closing argument, the prosecutor argued that the defendant must have driven the Lykken's Saturn after the burglary because police and a witness who purchased the vehicle a year or so after the burglary noticed blood in the car. RP 641. The prosecutor attempted to mislead the jury when he argued that it must be the defendant's blood because the suspected blood in the car had never been tested. Id.

The deputy prosecutor also urged the jury to consider what might have happened to Mr. Eva if he had come home during the burglary. The prosecutor argued:

And, then finally, the instruction says, and this is for the special verdict only: A person is armed with a firearm if at the time of the commission of the crime the firearm is easily accessible and readily available for offensive or defensive purposes. Again, if Mr. Eva came home at one in the morning and caught Mr. Kelly in the process of burglarizing his house and Mr. Kelly had that gun in his hand. If Mr. Eva would have walked in on this burglary Mr. Kelly would have had the firearm in his hand, and we can all imagine what could have happened in that context. RP 654-55.

Defense counsel objected to this argument because it was “incredibly prejudicial” and inflammatory. RP 655, 657-58. Defense counsel elaborated regarding what would be in the jury’s mind “Oh my God, it’s a guy with a gun robbing the house. The prosecutor is right. All kinds of things could have happened. Boy, we’re really got to teach this guy a lesson.” RP 659. Defense counsel also argued that the prosecutor had issued an invitation to the jury to speculate about some sort of violent act occurring.” RP 640. Defense counsel moved for a mistrial. RP 659. The court denied the mistrial motion. RP 670.

The court agreed that the deputy prosecutor’s comments to the jury, I think did invite speculation a bit and probably should not have been made.” RP 670-71.

d. Sentencing.

The jury convicted the defendant as charged. CP 151-162. At sentencing and over the defendant’s objection, the trial court allowed the prosecutor to discuss “facts” from a previous robbery conviction, where the Richards’ residence was burglarized and the defendant was apprehended at the scene. The prosecutor informed the court: “That was a burglary where he went into the Richard’s residence. They came home during the burglary and interrupted it. The defendant attacked them, both Mr. Richard and his wife.” RP 12/14/06, 8. The

prosecutor continued, “Mr. Kelly bit, beat, spat on, and kicked Mr. and Mrs. Richard as they struggled with the defendant in the garage . . .” RP 12/14/06, 9.

Defense counsel objected to the prosecutor providing irrelevant information from a prior conviction. RP 12.14 06 8. The court overruled the objection and observed, “Some of the details aren’t in the document (judgment and sentence). A little background is useful, so go ahead.” RP 12/14/06, 8.

The prosecutor asked for an exceptional sentence based RCW 9.94A.535(2)(c)<sup>4</sup>, an aggravator which did not exist at the time of the crimes in 2003. RP 12/14/06, 6. He noted that the defendant had a prior burglary in the first degree when he went into a residence and attacked the couple who lived there when they arrived home during the burglary. RP 12/14/06, 8. Defense counsel objected to the prosecutor’s account of the prior burglary and the court overruled the objection. *Id.* The prosecutor urged the court to consider “facts” from a previous conviction, telling the court that the defendant had burglarized the Richard’s residence. “They came home during the burglary and interrupted it. The defendant attacked them, both Mr. Richard and his wife.” RP 12/14/06, 8. The prosecutor argued regarding the prior conviction: “Mr. Kelly bit, beat, spat on, and kicked Mr. and Mrs. Richard as they struggled with the defendant in the garage, and accordingly the jury found him guilty of the two counts of assault two

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<sup>4</sup> See Appendix B

and burglary in the first degree. He received a standard range sentence even though his offender score at that time was around 15.” RP 9.

The prosecutor urged the court to impose an exceptional sentence pursuant to RCW 9.94A.535(2)(c) (Appendix “B”), a sentencing provision that is not applicable to crimes committed in 2003. RP 12/14/06, 6. The court adopted the prosecutor’s recommendation. RP 12/14/06 22-23. CP 180-182.

The defendant thereafter timely filed this appeal. CP 191.

2. Facts.

a. Eva Burglary.

At approximately midnight on September 4, 2003, Jack Merritt was awakened at his Gig Harbor residence by a knock on the door. RP 264. Merritt answered the door and spoke to a young man who had a bald head and was shorter and stockier than Merritt. RP 266. The individual asked for directions to the 7855 Grayhawk, the Eva residence. RP 267. Although there appeared to be another person standing out in the road at that time, Merritt did not get a good look at that person and was unable to provide any description to police. RP 441-42.

On September 5, 2003, Gig Harbor Police Department Officer Welch was dispatched to 7755 Greyhawk Place regarding a suspicious person report. RP 174. When he arrived, he spoke to Jack Merritt, who informed him that two individuals had come to his door and asked for directions to a nearby residence.

RP 175. The individuals were looking for a residence that was four doors down from the Merritt residence. RP 175. Welch went to that residence at 7855 Grayhawk Place.

When Welch arrived at the residence, he noted that a window screen had been pried off and the interior of the house appeared to have been ransacked. RP 176. Welch believed that there either had been or there was an on-going burglary. RP 176. Welch also observed that the motion-activated lights have been unscrewed. RP 177. Welch walked through the residence and did not find anyone inside. RP 178.

Welch learned that the residents at 7855 Grayhawk Place were out of town. The residents were Jim and Carol Eva. RP 177.

After the Evas returned, Welch went through the residence with them. They pointed out that a vehicle had been stolen. RP 178. They later also provided an itemized list of missing property. RP 179. That list included firearms. RP 179. The list also included personal checks, credit cards, computer monitors, cell phones, laptops, printers, camcorders, and jewelry. RP 183.

Shortly after the burglary, someone went to a check cashing business and tried to pass a check on the Evas' account. RP 185. The credit card also was used that evening or the following day. RP 185.

Welch wrote a police report to document what had occurred. RP 185-86. In that report, Welch noted that Merritt initially told him that the two individuals

who had been looking for the Eva residence had appeared on his doorstep either the night before or a couple of nights before that. RP 187. Welch did not document Merritt's physical description of the two individuals. RP 187. Welch dusted for fingerprints at the point of entry and did not recover any. RP 188.

Police later showed a photomontage to Merritt and he selected one of the photographs as the individual with whom he had spoken on September 3, 2003. RP 269-72. That individual was not the defendant, but rather was Kevin Spaulding. RP 426. Police did not show Merritt a photo of the defendant. RP 428.

Jim and Carol Eva had been on vacation from September 4 -6, 2003. RP 198. They were at a Thousand Trails RV park. RP 199. When they received word that their residence had been burglarized, they returned home early. RP 199. When they arrived home, they noted that the residence had been ransacked and that many items had been removed. RP 201-02. The missing vehicle was a 2000 Ford Windstar minivan. RP 209. The Evas also reported that a firearm, a Gold Cup mach .45 caliber automatic pistol, had been taken. RP 10/30/06, 6. The firearm had been fully loaded with seven or eight rounds. Id.

The Evas also found a list on the floor of their bedroom. RP 10/30/06, 14. The list contained names and dates, including the Evas' name and the dates of their interrupted vacation. RP 10/30/06, 14, 15-16. The Evas gave this list to the police. RP 10/30/06, 16.

On September 6, 2003, Jim Eva contacted police to report the use of his credit card in Tacoma. RP 396. Detective Busey went to a 7-11 in Tacoma where one of the cards had been used to obtain store records and videotape regarding the transaction. RP 396-97. Busey later printed still photos from the video. RP 397. The video showed that the photos were taken on September 5, 2003, from 9:39 to 9:46 a.m. RP 399. No witness ever identified the defendant as being in the photos or established that any crime was committed during the transaction. Passim; RP 626.

b. Lykken Burglary:

On September 3, 2003, Pierce County Sheriff's Department Deputy Myron responded to a security check at the Lykken residence at 7314 – 86<sup>th</sup> Street Court in unincorporated Pierce County. RP 10/30/06, 36-38. An employee of the power company who had gone to that residence to check on a meter had called in the report. RP 10/31/06, 38. Myron observed that a back door had been smashed and that the residence was in disarray. RP 10/30/06, 38. He also noted that a blue Honda was in the back of the house. RP 10/30/06, 39. The back hatch was open on the car and a flashing light was going very slowly, as if the battery was run down. RP 10/30/06, 39. Myron checked with the Department of Licensing and could not determine the registered owner of the car because the previous owner had sold it to another individual who had not yet registered the sale. RP 10/30/06, 51.

Myron located a pair of scissors that “had a piece broken into the wall board right where the alarm panel had been in the kitchen area.” RP 10/30/06, 43. Myron concluded that the scissors had been used to disarm the alarm panel. Id. Myron did not observe any blood in the residence. RP 10/30/06, 48. However, Myron later recalled that he saw blood somewhere on the scissors. RP 10/30/06, 68. Police did not dust for fingerprints. RP 10/30/06, 48.

Myron contacted Mr. Lykken a few weeks later when police recovered a Saturn that had been stole from his residence. RP 10/30/06, 44. Myron observed that there was some blood on the sun visor of the vehicle on the driver’s side as well as on the steering column. RP 10/30/06, 45, 66-67. Lykken also found a Tobisha computer and leather jacket in the trunk. He did not own these items. RP 10/30/06, 96.

Myron also observed blood on the light switch plate in the Lykken garage. RP 10/30/06, 65. Police did not collect the light switch plate. RP 252. Police did not collect any evidence from the apparent blood in the car. RP 252-53. Police also noticed apparent blood on a bus pass but they did not test that blood. RP 253.

Myron was not able to determine when the burglary occurred. RP 10/30/06, 46. He did not contact any of the neighbors to determine whether they might have information about the burglary. RP 10/30/06, 46.

In an email to another police officer, Myron noted that there had been a report of an alarm ringing at the Lykken home at 2:30 a.m. on August 28, 2003. RP 10/30/06, 58. The burglary could have been committed at that time and date. RP 10/30/06, 60. Myron did nothing to investigate this trip and did not even document the name of the party who reported the alarm. RP 121. The police officer thus failed to preserve exculpatory evidence. Passim.

Based on information from other police officers, Busey believed that the Lykken burglary occurred on August 27, 2003. RP 483. He knew that the Lykken burglar alarm had sounded at 2:30 a.m. on August 28, 2003. RP 484.

Norm and Kathy Lykken, the owners of the burglarized residence, had been on vacation in late August and early September. RP 10/30/06, 81. They had made reservations with Thousand Trails to camp at Crescent Bar. RP 10/30/06, 81. They returned to their residence on September 4, 2003, after learning of the burglary from a neighbor. RP 10/30/06, 82.

As they inventoried their residence, the Lykkens noted that many items had been taken, including a lot of jewelry, two rifles, a Saturn car, and a GMC truck. RP 10/30/06, 87-90. Mr. Lykken also found a pair of broken scissors with apparent blood on them. RP 10/30/06, 99. They gave the scissors to police. Id. Mr. Lykken never saw any portion of a broken scissor blade in the wall. RP 10/30/06, 106.

c. The Investigation.

On September 6, 2007, Andretti Niccolocci had been arrested in Ruston in the Lykken vehicle. RP10/30/06 53. A license plate registered to Niccolocci had been found at the Lykken residence. RP 10/30/06, 53-54.

Busey recovered the car that had been taken from the Lykken residence. RP 402, 403.

On September 8, 2003, Busey arrested Andretti Niccolicco and Jennifer Forsch, the two individuals who had been in that vehicle. RP 402. He did so after he found some property in the vehicle that had been taken from the Gig Harbor burglary. RP 403.

Busey also contacted Daymond Mulholland, an individual who had cashed a check taken from the Eva burglary on September 7, 2003. RP 404.1

On September 10, 2003, police informed Lykken that they would check DNA on the blood evidence. RP 231. Lykken believed that the police would conduct DNA analysis on the blood on the items found inside his residence. RP 239.

The Eva van was recovered in Tacoma on September 11, 2003. RP 404. Catherine Milton had possession of the van when it was recovered. RP 405. She is married to Eric Milton. RP 405.

After speaking to these individuals, police obtained a search warrant for 5302 North 47<sup>th</sup> Street, the reported residence of the individuals having knowledge of the Eva burglary. RP 405-07. When the search warrant was executed, Busey found a piece of paper in the defendant's possessions that bore handwriting with the words "Leisure Time" and "Misty at work." RP 409. Police did not recover any other items associated with the Eva burglary at that residence. RP 409. Police specifically searched the defendant's bedroom for such items but found nothing. RP 446.

Misty Saldana-Williams worked at Leisure Time/Thousand Trails in the summer of 2003. RP 279-80. She worked as a park ranger and also took reservations for customers. RP 281. The reservations were recorded in a computer. RP 281.

Ms. Saldana-Williams knew an individual named Kevin Spaulding. RP 282. She met the defendant on August 28, 2003, when she picked him up from jail. RP 283, 335-36. She discussed with the defendant where she worked and how the reservation process operated. RP 284. At the time, Saldana-Williams used methamphetamine. RP 285.

Saldana-Williams compiled a list of reservations for Gig Harbor residents and gave it to the defendant. RP 289. The list included names, addresses, and the dates for the reservations and contained four or five names. RP 289. She gave him the list sometime between September 3 and September 5, 2003. RP 289.

On September 18, 2003, police interviewed the defendant. RP 430. The defendant was advised of his Miranda rights, which he acknowledged and waived. RP 431. During the interview, the defendant acknowledged that he knew Eric Milton, Misty Saldana-Williams, Kevin Spaulding, Andretti Niccolocci. RP 431-434.

During the interview, police showed the defendant photos supposedly depicting him using a stolen credit card at the 7-11 shortly after the Eva burglary. RP 435. The defendant denied using a stolen credit card. RP 435.

When the police showed the defendant the Thousand Trails list recovered at the Lykken residence, the defendant's demeanor changed and he stated, "Where did you get that?" RP 438. The defendant also said that he did not know what the list was, had never seen it, and did not know what the detective was talking about. RP 438.

The Washington State Patrol Crime Lab conducted DNA analysis on the blood from the scissors and determined that the estimated probability of selecting an individual at random from the U.S. population with a matching profile is 1 in 2.5 quadrillion. RP 527. Forensic science is not able to determine when evidence, such as blood evidence, is deposited on an item. RP 528.

C. LAW AND ARGUMENT:

1. WAS TRIAL COUNSEL’S REPRESENTATION CONSTITUTIONALLY DEFICIENT WHERE:

The federal and state constitutions guarantee a criminal defendant effective assistance of counsel. The United States Constitution provides: “In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.” U.S. Const. Amend. VI<sup>5</sup>. The Washington State Constitution provides: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.” Wash. Const., art. 1. sec. 22<sup>6</sup>.

In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Brockob, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

To show deficient representation, the defendant must show that it fell below an objective standard of reasonableness based on all the circumstances. McFarland, 127 Wn.2d at 334-35. The defendant must overcome a strong

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<sup>5</sup> See Appendix C

<sup>6</sup> See Appendix D

presumption that counsel's performance was not deficient. Reichenbach, 153 Wn.2d at 130. Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. Id.

In the instant case, trial counsel failed to object to the prosecutor's continuing and repeated efforts to characterize the defendant as a member of a burglary ring. RP 8. Trial counsel permitted the prosecutor to expound upon his knowledge of the defendant, informing the court on the first day of trial that the defendant's modus operandi is to steal cars at burglary sites, abandon the cars, steal others, load up the car, etc." RP 9. Trial counsel failed to object to the prosecutor's reference to "my extensive knowledge of Mr. Kelly's criminal background, and there's a lot of it." RP 94. When responding to the defendant's severance motion, the prosecutor enumerated the types of property that were taken in the burglaries as a factor justifying joinder. RP 116. The prosecutor argued, with no good faith basis since the defendant had made no such statements, "Mr. Kelly admits that that's what he typically steals." RP 116. The prosecutor's only purpose in making these repeated comments was to taint the trial court's opinion against the defendant in the hopes of affecting the trial court rulings. A review of the record confirms that the prosecution succeeded on this endeavor.

In this case, trial counsel allowed the prosecutor to admit unfairly prejudicial evidence regarding the defendant without making any objection. The quantity of such evidence deprived the defendant of a fair trial.

- a. Trial counsel failed to object to testimony regarding the defendant's alleged use of methamphetamine where that evidence was inadmissible as ER 404(b) evidence.

ER 404(b)<sup>7</sup> permits the admission of evidence of other crimes, wrongs, or acts if offered for such purposes as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Prior to the admission of such evidence, the trial court must articulate a balancing of probative value against prejudicial effect on the record. State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984). The analysis and determination should be made on the basis of an offer of proof and in the absence of the jury. State v. Ecklund, 30 Wn. App. 313, 633 P.2d 933 (1981). In a criminal case in which the evidence is offered against the defendant, any doubt should be resolved in favor of excluding the evidence. State v. Myers, 49 Wn. App. 243, 742 P.2d 180 (1987).

Evidence of drug use is generally inadmissible unless it is offered for impeachment purposes. State v. Tigano, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991), rev. denied 118 Wn.2d 1021 (1992).

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<sup>7</sup> See Appendix E

In the instant case, trial counsel failed to object to the introduction of evidence regarding the defendant's alleged use of methamphetamine. The state did not contend that the defendant was under the influence of methamphetamine when he committed the crimes or that he committed the crimes to obtain resources to obtain methamphetamine. Thus, the evidence was inadmissible even under the definition of "relevant evidence" in ER 401<sup>8</sup>. That rule provides: "Relevant evidence" means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

Nothing about the defendant's alleged use of methamphetamine made it more probable that he committed the charged crimes. Nothing about the defendant's alleged methamphetamine was admissible to impeach his memory because he did not testify. The evidence by its very nature was unfairly prejudicial and should have been excluded.

b. Trial counsel failed to object to testimony regarding the defendant's purchases of methamphetamine.

For the reasons set forth in the preceding section, trial counsel should have moved to exclude this ER 404(b) evidence (Appendix E). Evidence regarding the manner in which the defendant acquired methamphetamine was not relevant. Apparently the State injected the methamphetamine into the record at trial in

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<sup>8</sup> See Appendix F

order to suggest that the defendant somehow took advantage of Misty Saldana-Williams by plying her with drugs so that she would provide information regarding the Thousand Trails campers. Assuming arguendo that the State was entitled to prove this theory, the State could have done so without eliciting testimony regarding the defendant's particular purchases of methamphetamine and his use thereof. Certainly trial counsel should have requested a limiting instruction as permitted by WPIC 5.30<sup>9</sup>.

c. Trial counsel failed to object to the police officer's testimony about "the drug culture."

The prosecutor elicited testimony from a police officer that "in the drug culture" people trade vehicles and property for drugs and that the vehicles and property are typically obtained by theft. RP 475. Trial counsel failed to object to this evidence, which was not admissible under any authority. Trial counsel could have objected to this evidence as improper expert testimony from a witness who lacked any expertise sufficient to qualify him as an expert. In addition, the testimony was "profiling" evidence to which counsel had an obligation to object so that the trial court could limit the objection "profile" aspect. State v. Avendano-Lopez, 79 Wn. App. 706, 711, 904 P.2d 324 (1995), *rev. denied*, 129 Wn.2d 1007, 917 P.2d 129 (1996). Further, such evidence is not habit evidence

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<sup>9</sup> See Appendix G

pursuant to ER 406<sup>10</sup>. Because trial counsel failed to object, the prosecutor did not have to justify its admission.

- d. Trial counsel failed to object to evidence regarding the type of precautions that skilled or experienced burglars used.

Trial counsel repeatedly failed to object to the prosecutor's efforts to characterize him as a skilled and accomplished burglar. For example, the prosecutor asked a police witness whether "the skill or experience of the burglar might influence what protective or precautions they take." RP 193. The police officer agreed with the prosecutor and then expounded that burglars who planned their crimes commonly wore gloves. RP 194. Trial counsel had an obligation to object to such patently inadmissible evidence for the reasons and legal authority cited in the previous section.. Had trial counsel objected, the prosecutor would not have been able to offer any legal theory warranting the admission of the evidence. By remaining silent, trial counsel permitted the prosecutor to portray the defendant as an habitual burglar whose skills were shared by other habitual burglars. There is no authority for the admission of such prejudicial evidence as it does not fall within the ER 406 rule permitting the admission of habit evidence.

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<sup>10</sup> See Appendix H

- e. Trial counsel failed to object to repeated questioning from the prosecutor that was structured to suggest that the defense witness had an improper relationship with the defendant and another young man.

Evidence that is irrelevant is inadmissible. ER 402<sup>11</sup>. Similarly, there is no authority for impeachment by innuendo or casting aspersions upon a witness's lifestyle.

In the instant case, the prosecutor asked the defendant's alibi witness, Major Gerry King (ret.) how he met the defendant, whether he financially supported the defendant and the other alibi witness, Gregory Capelli. RP 587-89, 590. The prosecutor's obvious intention was to portray Major King as a man who picked up younger men in bars and then took them home where he supported them and cared for them. The prosecutor apparently thought that this was a proper form of impeachment. However, the prosecutor's transparent motive to probe the relationship between Major King, the defendant, and the other alibi witness was to suggest that in the eyes of the prosecutor, they may have had an aberrant lifestyle. Certainly the prosecutor never used this evidence to argue that these witnesses were not credible. The prosecutor could not have done so because such evidence is not probative of veracity.

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<sup>11</sup> See Appendix I

Trial counsel failed to grasp the import of this evidence and did not object to its admission.

2. THE PROSECUTOR COMMITTED MISCONDUCT BY REPEATEDLY ASKING IMPROPER QUESTIONS DESIGNED TO ELICIT INADMISSIBLE EVIDENCE AND ALSO BY COMMITTING MISCONDUCT IN CLOSING ARGUMENT.

The appellate court will not reverse a conviction for prosecutorial misconduct unless there is a substantial likelihood that the prosecutorial misconduct affected the jury. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). When defense counsel fails to object at trial, the prosecutor's misconduct cannot constitute reversible error unless it is so flagrant that no instruction could have cured it. State v. Peyton, 29 Wn. App. 701, 712, 650 P.2d 1362, *rev. denied*, 96 Wn.2d 1024 (1981). The defendant has the burden of proving such prejudice. State v. Hughes, 106 Wn.2d 176m 195, 721 P.2d 902 (1986). If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.*

In the instant case, the prosecutor committed misconduct by repeatedly asking improper questions that were designed to elicit inadmissible evidence and also by making improper and unfairly prejudicial comments in closing argument.

- a. The prosecutor asked the defendant's witness whether the witness thought that the defendant's prior incarceration in the Pierce County Jail "give . . . any idea that he may be involved in criminal activity."

ER 609<sup>12</sup> limits evidence of prior convictions to impeachment purposes. Evidence of a prior incarceration for any other purpose highlights a defendant's prior conviction in an impermissible way. In this case, the prosecutor apparently wanted to force the defendant's witness Major King to testify that he knew the defendant was engaged in some unspecified criminal activity. The prosecutor asked Major King: "Did the fact that he [defendant] was staying at the jail give you any idea he might be involved in criminal activity?" RP 585.

This line of inquiry was improper because the prosecutor obviously wanted to use the fact of the prior incarceration as propensity evidence, which is prohibited. ER 404(b) (Appendix E); State v. Saunders, 91 Wn. App. 575, 580, 958 P.2d 364 (1998), citing State v. Hardy, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997).

- b. The prosecutor committed reversible error in closing argument.

A defendant who claims that prosecutorial misconduct in closing argument bears the burden of establishing the impropriety of the prosecutor's

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<sup>12</sup> See Appendix J

comments as well as the prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Absent a proper objection and a request for a curative instruction, the defendant waives any issue of misconduct unless the comment was so flagrant or ill intentioned that an instruction would not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). The appellate court reviews the prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-88, 882P.2d 747 (1994). Prejudice is established only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the jury verdict. Russell, supra, 125 Wn.2d at 86.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Brown, 132 Wn.2d at 566. However, a prosecutor may not misstate the evidence or attempt to mislead the jury by misrepresenting the evidence.

In this case, the prosecutor made ill-intentioned and patently false comments about the blood evidence in the Lykken car. He did so in an attempt to buttress the State's proof of the Lykken burglary by arguing that the defendant must have driven the Lykken vehicle because there was blood in it and the defendant had left blood in the Lykken's residence. The prosecutor had to have known that there was no evidence whatsoever that the substance inside the

Lykken vehicle in fact was blood. Rather, the police officer thought he observed blood on the sun visor of the Lykken car, but he did not test it in any way. RP 10/30/06 45, 66-67. The prosecutor's misstatement of the evidence was both significant and prejudicial because the prosecutor had no evidence that the defendant was ever in the Lykken car, which was the apparent repository for some of the items taken from the Eva burglary. RP 10/30/06 96. The prosecutor could not connect the defendant to the car without misstating the "blood" evidence. The prosecutor purposefully misrepresented the evidence to persuade the jury that there was a forensic connection that had never been made.

Further, the prosecutor commits misconduct when he urges the jury to convict for an improper reason through appeals to emotion or passion. See, State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994); State v. Belgarde, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988).

In this case, the prosecutor committed such prejudicial misconduct when he made improper argument that encouraged the jury to speculate about how dangerous the defendant was. The prosecutor urged the jury to consider what would have happened to Mr. Eva had he walked in on the burglary when the defendant was armed. RP 654-55. The court agreed that the argument "probably should not have been made." RP 670-71.

Trial counsel objected to the second argument on the grounds that it was "incredibly prejudicial" and inflammatory. RP 655, 657-58. The prosecutor

argued lamely that his comments were appropriate because he had to persuade the jury that the defendant possessed a firearm that was readily accessible and available for use for either offensive or defensive purposes.

However, as he had done throughout the trial, the prosecutor's motive was to persuade the jury that the defendant was a dangerous habitual criminal. When the prosecutor's improper arguments are placed in the context of the prosecutor's numerous other improprieties in this case, the prosecutor's comments unfairly prejudiced the defendant and doubtless affected the verdict.

- c. The prosecutor committed misconduct at sentencing when he argued facts from prior convictions in a transparent attempt to influence the court to impose an exceptional sentence on improper grounds.

The Sentencing Reform Act of 1981 (SRA) limits the use of an offender's prior convictions. The law permits prior convictions to be used to calculate the offender score – nothing more.

In this case, over the objection of trial counsel, the prosecutor related to the court its version of assaults by the defendant upon prior crime victims. These details were not relevant to any determination required from the sentencing court.

3. THE TRIAL COURT ERRED WHEN IT PERMITTED THE STATE TO AMEND THE CHARGING DATES DURING TRIAL WHERE THE DEFENDANT CLAIMED AN ALIBI DEFENSE FOR COUNT I.

The Washington courts have held that the trial court does not abuse its discretion when it permits the state to amend the information where only the date

has charged, no alibi has been claimed, and the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated. State v. Allyn, 40 Wn. App. 27, 35, 696 P.2d 45 (1985). When the defendant asserts an alibi defense, he is prejudiced from the amendment of a charging date. Amendment of a charging date in an alibi case differs from amendment of the date of an offense in a non-alibi case. This is so because the date of an offense is normally a matter of form, not substance, and is usually not a material element. Accordingly, amendment of the information as to the offense date is generally permitted absent an alibi defense or a showing of other substantial prejudice to the defendant. State v. Fischer, 40 Wn. App. 506, 510-11, 699 P.2d 249 (1985).

The State charged the defendant with the commission of the Eva burglary, alleged to have been committed on August 27, 2005. CP 86-92.

The defendant had a solid alibi for that date, having been released from the Pierce County Jail at 6 a.m. on August 28, 2005. RP 160.

However, after defense counsel informed the prosecutor of the defendant's alibi, the prosecutor during trial moved to amend the information to change the charging dates. CP 86-92. Defense counsel noted, "The reason we're here at trial is because these materials (police reports) say it happened on August 27 at a time when my client was in jail." RP 171.

Because the untimely amendment of the date of the alleged crime undermined the defendant's alibi defense, the trial court should not have

permitted the amendment on the day of trial. By doing so, the trial court substantially prejudiced the defendant's ability to defend against the charge.

4. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE PURSUANT TO ER 404(B) REGARDING AN UNCHARGED CRIMINAL ACT COMMITTED AFTER ONE OF THE BURGLARIES.

The prosecutor asked the court to admit photographic evidence purporting to show the defendant using a credit card stolen from one of the burglaries. The prosecutor alleged that evidence established that the defendant used the card from a burglary that had occurred hours earlier. RP 94. The prosecutor wanted to use this evidence to establish nunc pro tunc the defendant's opportunity and motive to commit the burglary. The prosecutor also argued that the evidence was relevant to show a close connection to time and place of the burglary. RP 94.

However, even assuming that the defendant used a credit card that a friend gave him, the trial court should not have admitted the photographic evidence. This is so because the State failed to establish whether, in the photos shown, the defendant in fact used or attempted to use a credit card that related to the charged crimes. In the absence of that vital connection, the trial court admitted evidence that was inadmissible under ER 403<sup>13</sup> because it tended to mislead the jury. By allowing the jury to see photos of the defendant making a purchase at a store without connecting that purchase to the proceeds of any charged crime, the trial

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<sup>13</sup> See Appendix K

court permitted the prosecutor to admit highly prejudicial evidence for which there was no nexus to the instant charges.

The trial court ultimately realized that the admission of this evidence had been error. RP 627. However, by that time, the damage was done and the State had been permitted to put into evidence photographs that purported to show the defendant committing the crime shortly after the Eva burglary.

5. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE DEFENDANT'S PROPOSED MISSING WITNESS INSTRUCTION.

In Washington, a party is entitled to a missing witness instruction when (1) the witness is peculiarly available to the State; (2) the testimony relates to an issue of fundamental importance as contrasted to a trivial or unimportant issue; and (3) the circumstances establish, as a matter of reasonable probability that the State would not knowingly fail to call the witness in question unless the witness testimony would be damaging. State v. Davis, 73 Wn.2d 271,438 P.2d 185 (1968).

WPIC 5.20 applies when the State has failed to call such a witness:

If a party does not produce the testimony of a witness who is [within the control of] [or] [peculiarly available to] the party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

In the instant case, the State charged the defendant with committing the Lykken robbery during the time period from August 28 – September 3, 2003. CP 86-92, 105-160. The missing witness had contacted the authorities to report that the Lykken burglar alarm had gone off during the early morning hours of August 28, 2003. RP 612-616. Authorities apparently chose not to take a taped statement from this witness or otherwise preserve contact information. Thus the witness was peculiarly available to the State. Further, because the witness’s testimony would have assisted the State in proving the time and date of the burglary, the State had an interest in putting on this evidence. Thus the witness’ testimony was not trivial or inconsequential. The State’s failure to put on this witness who would have testified to the sounding of the burglar alarm, certainly compelled the inference that the witness’s testimony would not have been favorable to the State.

6. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE BASED ON THE MULTIPLE OFFENSE AGGRAVATOR OF RCW 9.941 IN VIOLATION OF BLAKELY V. WASHINGTON AND CONSIDERED “FACTS” FROM A PREVIOUS CONVICTION.

The Sentencing Reform Act of 1981, RCW 9.94A (SRA), governs the imposition of sentences in felony cases. The SRA contains a “timing” provision, which expressly and unambiguously states:

Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the *current offense was committed*. (emphasis added).

RCW 9.94A.345<sup>14</sup>.

Under the SRA, defendants are sentenced based on offender score and seriousness of the crime. These two factors are placed on a sentencing grid to determine the applicable standard ranges. RCW 9.94A.525<sup>15</sup>, .530<sup>16</sup>. Under these sentencing models, the facts of prior convictions are simply irrelevant. However, in this case, the prosecutor recited facts from a prior conviction. RP 12/14/06, 8-9. The trial court wanted to know such facts. RP 12/14/06, 8. Where a trial court receives inadmissible evidence at sentencing, the defendant is entitled to a new sentencing before another judge. E.g., State v. Hanson, 148 Wn.2d 550, 558, 61 P.3d 1104 (2003).

In the instant case, where the offenses for which the defendant was convicted occurred in 2003, the defendant was required to be sentenced under the 2003 Sentencing Guidelines. Nevertheless, the deputy prosecutor urged the court to impose an exceptional sentence under the 2006 Sentencing Guidelines.

Between 2003 and 2006, the Legislature amended the SRA and added several new provisions to the law. In the 2003 law which governs this case, RCW 9.94A.535(2)(i) (Appendix B) provided, “The operation of the multiple offense

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<sup>14</sup> See Appendix L

<sup>15</sup> See Appendix P

<sup>16</sup> See Appendix Q

policy of RCW 9.94A.589<sup>17</sup> results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter . . .”. In 2006, the exceptional sentences provision had been revised and the relevant language had been changed to provide: “The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c) (Appendix B).

In the instant case, the deputy prosecutor and the court failed to apply the appropriate aggravator. Further, they used the 2006 aggravator and then they relied on the “free crimes” analysis of cases construing the inapposite provision. RP 12/14/06, 22. Those cases, State v. Solomon, 158 Wn.2d 280, \_\_\_ P.3d \_\_\_ (20\_\_) and State v. Hughes construe the 9.94A.535(2)(c) (Appendix B), which does not apply to this case. Relying upon the deputy prosecutor’s argument and the inapplicable case law, the court reasoned: “. . . I do have discretion under what’s called the ‘free crimes analysis’, RCW 9.94A.535(2)(c) because I think this is a case where Mr. Kelly would go unpunished if we simply follow the standard range. He started the trial on both of these cases with an offender score above nine already, and Mr. Richard’s. He’s been punished for that Mr. Leech says free. Well, somebody would be free, Richard’s Eva or Lykken, at least two of them, so I think this is a probably a good case where an exceptional sentence is

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<sup>17</sup> See Appendix M

warranted, and I do find compelling reason to go beyond the standard range in this case.” RP 12/14/06, 22-23.

7. THE DEFENDANT’S CONVICTIONS MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO PROVE GUILT BEYOND A REASONABLE DOUBT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567, P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff’d, 95 Wn.2d 385, 622 P.2d 1240 (1980).

In this case, the State lacked any evidence to put the defendant at the scene of either burglary. Regarding the Eva burglary, the State proved that someone other than the defendant contacted neighbor Merritt and asked directions to the Eva residence. The Eva residence was burglarized. Later on the police found some of the evidence from the Eva burglary in the Lykken car when it was

recovered a few weeks later. However, the defendant was not driving the vehicle when it was recovered.

Although police officer Myron observed a substance he believed to be blood on the visor of the Lykken vehicle, he made no effort to preserve a sample of the blood so that future tests could determine what the substance was. Instead, he assumed that because there had been blood found on some scissors in the wall at the Lykken burglary the substance in the car must be more blood from the person whose blood was on the scissors.

Although the blood on the scissors at the Lykken burglary was determined to be from the defendant, the State's expert could not determine *when* the defendant bled on the scissors. Thus the scissor-blood evidence was not proof beyond a reasonable doubt that the defendant had been in the Lykken residence. To the contrary, the defendant had been in the Pierce County Jail when the Lykken burglary alarm went off during the early morning hours of August 28, 2003.

The defendant was never seen with any of the proceeds from the burglaries. Instead, individuals with whom the defendant was acquainted were seen some of the items.

The prosecutor's theory was that because the defendant acknowledged that he knew some of the individuals who later were determined to possess some of

the proceeds, the defendant must have provided those items to them. The prosecutor's theory was nothing more than the "guilt by association" argument.

Because all of the charges stemmed from the burglaries and the State could not prove the burglaries, then all of the charges must be reversed for insufficiency of the evidence.

Even assuming for the sake of the sufficiency argument that the State proved that Misty Saldana-Williams provided to the defendant names and addresses of Thousand Trails members who were away from their residences, the State's evidence supports nothing more than a conspiracy charge.

8. THE DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Id.

As discussed above, the defendant's case was flawed by numerous errors. His trial counsel failed to ensure that his trial was fair. Trial counsel failed to interpose objections to inadmissible evidence and to improper arguments by the prosecutor. The prosecutor shamelessly exploited trial court's lackadaisical approach to this case by repeatedly eliciting inadmissible evidence, attacking witnesses by means of impermissible impeachment, making ill-intentioned and

misleading representations about the evidence, and by appealing to passions and prejudices in closing argument. As a result of these numerous errors, and the other errors attributed to the trial court, the defendant did not a fair trial. The trial produced a result that is inconsistent with the constitutional principles and evidentiary rules governing the conduct of criminal trials. The defendant therefore is entitled to a new trial.

D. CONCLUSION:

For the foregoing reasons, the defendant respectfully asks this court to reverse his convictions and remand the case for a new trial. Alternatively, the defendant is entitled to re-sentencing before a different judge.

Respectfully submitted this 10th day of December, 2007.

  
\_\_\_\_\_  
Barbara Corey, WSB #11778  
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State Of Washington that the following is true and correct: That on this date, I delivered via ABC-LMI a copy of Brief of Appellant, Pierce County Prosecutor's Office Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Room 946, Tacoma, WA 98402-2171

12-10-07        
Date                      Signature

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APPENDIX "A"



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RULE 8.3  
DISMISSAL

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Comment

Supersedes RCW 10.46.090.

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## **RCW 9.94A.535**

### **Departures from the guidelines.**

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

#### (1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

#### (2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW

9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

- (i) The offense resulted in the pregnancy of a child victim of rape.
- (j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.
- (k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.
- (l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.
- (m) The offense involved a high degree of sophistication or planning.
- (n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
- (o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.
- (p) The offense involved an invasion of the victim's privacy.
- (q) The defendant demonstrated or displayed an egregious lack of remorse.
- (r) The offense involved a destructive and foreseeable impact on persons other than the victim.
- (s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.
- (t) The defendant committed the current offense shortly after being released from incarceration.
- (u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.
- (v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.
- (w) The defendant committed the offense against a victim who was acting as a good samaritan.
- (x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.
- (y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).
- (z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.
- (ii) For purposes of this subsection, "metal property" means commercial metal property or nonferrous metal property, as defined in RCW 19.290.010.

[2007 c 377 § 10; 2005 c 68 § 3; 2003 c 267 § 4; 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4. Prior: 1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.]

#### Notes:

**Captions not law -- Severability -- 2007 c 377:** See RCW 19.290.900 and 19.290.901.

**Intent -- Severability -- Effective date -- 2005 c 68:** See notes following RCW 9.94A.537.

**Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12:** See notes following RCW 71.09.250.

**Application -- 2001 2nd sp.s. c 12 §§ 301-363:** See note following RCW 9.94A.030.

**Technical correction bill -- 2000 c 28:** See note following RCW 9.94A.015.

**Effective date -- 1996 c 121:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall

take effect immediately [March 21, 1996]." [1996 c 121 § 2.]

**Effective date -- Application -- 1990 c 3 §§ 601 through 605:** See note following RCW [9.94A.835](#).

**Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3:** See RCW [18.155.900](#) through [18.155.902](#).

**Severability -- 1986 c 257:** See note following RCW [9A.56.010](#).

**Effective date -- 1986 c 257 §§ 17 through 35:** See note following RCW [9.94A.030](#).

**Effective dates -- 1984 c 209:** See note following RCW [9.94A.030](#).

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## APPENDIX "C"

## **SECTION 22 RIGHTS OF THE ACCUSED.**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]

Original text - Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS - In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

## APPENDIX "D"

**Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses. Ratified  
12/15/1791.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**APPENDIX "E"**



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RULE ER 404  
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT;  
EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[Amended effective September 1, 1992.]

Comment 404

[Deleted effective September 1, 2006.]

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RULE ER 401  
DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[Adopted effective April 2, 1979.]

Comment 401

[Deleted effective September 1, 2006.]

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## APPENDIX "G"

**WPIC 5.30** GUIDES FOR EVIDENCE CONSIDERATION

**WPIC 5.30**  
**EVIDENCE LIMITED AS TO PURPOSE**

Evidence has been introduced in this case on the subject of \_\_\_\_\_ for the limited purpose of \_\_\_\_\_. You must not consider this evidence [for any other purpose] [for the purpose of \_\_\_\_\_].

**NOTE ON USE**

For a special instruction limiting evidence of criminal conviction of a witness to impeachment, see WPIC 5.06, Prior Conviction—Impeachment—Witness, and as to a defendant, WPIC 5.05, Prior Conviction—Impeachment—Defendant. Use bracketed material as applicable.

**COMMENT**

ER 105.

When evidence of the defendant's prior misconduct is admissible under ER 404(b) for a limited purpose, such as showing motive or intent, the court must, on request, instruct the jury on the limited purpose for which the evidence is admissible. *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985).

However, the party seeking a limiting instruction has the burden of requesting it and, in the absence of such a request, any objection to the lack of instruction is waived. *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985) and authorities therein.

Special limiting instructions are appropriate when a criminal conviction is admitted to impeach a witness. See WPIC 4.64, WPIC 5.05, and WPIC 5.06.

An instruction limiting the use of prior consistent statements of the prosecuting witnesses introduced to rehabilitate the witness was held proper and necessary in *State v. Pitts*, 62 Wn.2d 294, 382 P.2d 508 (1963). Similarly, an instruction that limits the jury's use of a prior inconsistent statement admitted for impeachment purposes to a determination of the credibility of a witness is proper. Impeaching and contradictory statements are "admitted only to destroy the credit of the witnesses, to annul and not to substitute their testimony." *State v. Johnson*, 40 Wn.App. 371, 699 P.2d 221 (1985).

GENERAL PRINCIPLES OF EVIDENCE **WPIC 5.30**

WPIC 5.30 is cited with approval in *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *rehearing* 113 Wn.2d 520, 782 P.2d 1013 (1989), 787 P.2d 906 (1990) and *State v. Anderson*, 31 Wn.App. 352, 641 P.2d 728 (1982).

ER 105 is covered in detail in *K. Tegland*, 5 Washington Practice: Evidence §§ 23 and 24 (3rd Ed.1989).

**Library References:**

West's Key No. Digests, Criminal Law §-783.

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RULE ER 406  
HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

[Adopted effective April 2, 1979.]

Comment 406

[Deleted effective September 1, 2006.]

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RULE ER 402  
RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT  
EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

[Adopted effective April 2, 1979.]

Comment 402

[Deleted effective September 1, 2006.]

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## APPENDIX “J”



RULE ER 609  
IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

[Amended effective September 1, 1988

Comment 609

[Deleted effective September 1, 2006.]

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RULE ER 403  
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE,  
CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[Adopted effective April 2, 1979.]

Comment 403

[Deleted effective September 1, 2006.]

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### **RCW 9.94A.345 Timing.**

Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

[2000 c 26 § 2.]

#### **Notes:**

**Intent -- 2000 c 26:** "RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court's decision in *State v. Cruz*, Cause No. 67147-8 (October 7, 1999). A decision as to whether a prior conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives." [2000 c 26 § 1.]




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RCWs > Title 9 > Chapter 9.94A > Section 9.94A.589

9.94A.585 << 9.94A.589 >> 9.94A.595

### RCW 9.94A.589

## Consecutive or concurrent sentences.

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

[2002 c 175 § 7; 2000 c 28 § 14; 1999 c 352 § 11; 1998 c 235 § 2; 1996 c 199 § 3; 1995 c 167 § 2; 1990 c 3 § 704. Prior: 1988 c 157 § 5; 1988 c 143 § 24; 1987 c 456 § 5; 1986 c 257 § 28; 1984 c 209 § 25; 1983 c 115 § 11. Formerly RCW 9.94A.400.]

#### Notes:

**Effective date -- 2002 c 175:** See note following RCW 7.80.130.

**Technical correction bill -- 2000 c 28:** See note following RCW 9.94A.015.

**Severability -- 1996 c 199:** See note following RCW 9.94A.505.

**Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3:** See RCW 18.155.900 through 18.155.902.

**Application -- 1988 c 157:** See note following RCW 9.94A.030.

**Applicability -- 1988 c 143 §§ 21-24:** See note following RCW 9.94A.505.

**Severability -- 1986 c 257:** See note following RCW 9A.56.010.

**Effective date -- 1986 c 257 §§ 17-35:** See note following RCW 9.94A.030.

**Effective dates -- 1984 c 209:** See note following RCW 9.94A.030.

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RULE 3.5  
CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court To Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

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RULE 4.4

SEVERANCE OF OFFENSES AND DEFENDANTS

(a) Timeliness of Motion--Waiver.

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(b) Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

(c) Severance of Defendants.

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

(i) the prosecuting attorney elects not to offer the statement in the case in chief; or

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

(3) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

(4) The assignment of a separate cause number to each defendant of those named on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for

severance.

(d) Failure To Prove Grounds for Joinder of Defendants. If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

(e) Authority of Court To Act on Own Motion. The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

[Amended effective December 28, 1990; September 1, 2007.] Comment  
Supersedes RCW 10.46.100.

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## RCW 9.94A.525 Offender score.

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis

found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under \*RCW 9A.44.130(10), count

priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under \*RCW 9A.44.130(10), which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was under community placement, add one point.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

(21) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Accordingly, prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions.

[2007 c 199 § 8; 2007 c 116 § 1. Prior: 2006 c 128 § 6; 2006 c 73 § 7; prior: 2002 c 290 § 3; 2002 c 107 § 3; 2001 c 264 § 5; 2000 c 28 § 15; prior: 1999 c 352 § 10; 1999 c 331 § 1; 1998 c 211 § 4; 1997 c 338 § 5; prior: 1995 c 316 § 1; 1995 c 101 § 1; prior: 1992 c 145 § 10; 1992 c 75 § 4; 1990 c 3 § 706; 1989 c 271 § 103; prior: 1988 c 157 § 3; 1988 c 153 § 12; 1987 c 456 § 4; 1986 c 257 § 25; 1984 c 209 § 19; 1983 c 115 § 7. Formerly RCW 9.94A.360.]

#### Notes:

**Reviser's note:** \*(1) RCW 9A.44.130 was amended by 2006 c 129 § 2, changing subsection (10) to subsection (11).

(2) This section was amended by 2007 c 116 § 1 and by 2007 c 199 § 8, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Findings – Intent – Short title – 2007 c 199:** See notes following RCW 9A.56.065.

**Effective date – 2007 c 116:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2007." [2007 c 116 § 2.]

**Effective date – 2006 c 73:** See note following RCW 46.61.502.

**Effective date – 2002 c 290 §§ 2 and 3:** See note following RCW 9.94A.515.

**Intent – 2002 c 290:** See note following RCW 9.94A.517.

**Finding – Application – 2002 c 107:** See notes following RCW 9.94A.030.

**Effective date – 2001 c 264:** See note following RCW 9A.76.110.

**Technical correction bill – 2000 c 28:** See note following RCW 9.94A.015.

**Effective date – 1999 c 331:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 14, 1999]." [1999 c 331 § 5.]

**Effective date – 1998 c 211:** See note following RCW 46.61.5055.

**Finding – Evaluation – Report – 1997 c 338:** See note following RCW 13.40.0357.

**Severability – Effective dates – 1997 c 338:** See notes following RCW 5.60.060.

**Index, part headings not law – Severability – Effective dates – Application – 1990 c 3:** See RCW 18.155.900 through 18.155.902.

**Application – 1989 c 271 §§ 101-111:** See note following RCW 9.94A.510.

**Severability – 1989 c 271:** See note following RCW 9.94A.510.

**Application -- 1988 c 157:** See note following RCW 9.94A.030.

**Effective date -- Application of increased sanctions -- 1988 c 153:** See notes following RCW 9.94A.030.

**Severability -- 1986 c 257:** See note following RCW 9A.56.010.

**Effective date -- 1986 c 257 §§ 17-35:** See note following RCW 9.94A.030.

**Effective dates -- 1984 c 209:** See note following RCW 9.94A.030.

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### **RCW 9.94A.530** **Standard sentence range.**

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in \*RCW 9.94A.535(2) (d), (e), (g), and (h).

[2005 c 68 § 2; 2002 c 290 § 18; 2000 c 28 § 12; 1999 c 143 § 16; 1996 c 248 § 1; 1989 c 124 § 2; 1987 c 131 § 1; 1986 c 257 § 26; 1984 c 209 § 20; 1983 c 115 § 8. Formerly RCW 9.94A.370.]

#### **Notes:**

**\*Reviser's note:** RCW 9.94A.535 was amended by 2005 c 68 § 3, changing subsection (2) to subsection (3).

**Intent – Severability – Effective date – 2005 c 68:** See notes following RCW 9.94A.537.

**Effective date – 2002 c 290 §§ 7-11 and 14-23:** See note following RCW 9.94A.515.

**Intent – 2002 c 290:** See note following RCW [9.94A.517](#).

**Technical correction bill – 2000 c 28:** See note following RCW 9.94A.015.

**Severability – 1986 c 257:** See note following RCW [9A.56.010](#).

**Effective date – 1986 c 257 §§ 17-35:** See note following RCW 9.94A.030.

**Effective dates – 1984 c 209:** See note following RCW 9.94A.030.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY

STATE OF WASHINGTON,

Respondent,

and

TIMOTHY MICHAEL KELLEY,

Appellant.

CAUSE NO. 35786-1

STATEMENT OF ADDITIONAL  
AUTHORITY

Summarized below is the additional grounds for review that have not been addressed in my opening brief. Appellant would like considered for additional review, State v. Ra, Case No. 35019-0, filed on January 29, 2008. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Respectfully submitted this 1<sup>st</sup> day of February, 2008.

  
BARBARA COREY

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC-LMI a copy of the Statement of Additional Authority to Kathleen Proctor, Sr. Appellate Deputy, Room 946 County-City Building, Tacoma, WA 98402.

1-4-08  
Date

  
Signature