

NO. 35862-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DONALD LESLIE HADLEY,

Appellant.

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STAFF
07/20/07
COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it admitted evidence of similar convictions and similar uncharged offenses against the same complaining witness.

2. The trial court violated Washington Constitution, Article 4, § 16, when it instructed the jury that the complaining witness was victim of the defendant's assaults.

3. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction for first degree assault because substantial evidence does not support this charge.

4. Trial counsel's failure to object when the state introduced irrelevant, unfairly prejudicial evidence denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

5. The cumulative errors in this case violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

6. The trial court's imposition of an exceptional sentence based upon aggravating factors not alleged in the information violated the defendant's right to notice under Washington Constitution, Article 1, § 22 and under United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it admits evidence of similar convictions and similar uncharged offenses the defendant committed against the same complaining witness?

2. In a case in which a defendant is charged with assault, does a trial court violate Washington Constitution, Article 4, § 16, when it instructs the jury that the complaining witness was victim of the defendant's assaults?

3. Does a trial court violate due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction on a charge unsupported by substantial evidence?

4. Does a trial counsel's failure to object when the state introduces irrelevant, unfairly prejudicial evidence deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when it is more likely than not that the

verdict would have been an acquittal but for trial counsel's errors?

5. Do the cumulative errors in a case violate the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when the verdict would have been for acquittal without the cumulative errors?

6. Does a trial court's imposition of an exceptional sentence based upon aggravating factors not alleged in the information violate a defendant's right to notice under Washington Constitution, Article 1, § 22 and under United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

For two years prior to August of 2006, forty-five year Brenda Frisk was living in a small house at 321 24th Avenue in Longview with Defendant Donald Hadley, her long-term boyfriend. RP 125-128. By August of that year they were having severe financial difficulties, the electricity had been turned off at their house, and they were about to be evicted. RP 143-144. In fact Brenda had decided to move alone to Portland to work as an in-home care provider, even though the defendant did not want her to do this. RP 129-130. On the evening of August 20th, Brenda and the defendant decided to go drinking at a local bar called the Cross Keys, as Brenda had just cashed her paycheck from her employment with a “temp” agency in Longview. RP 139-140. Once they arrived at the Cross-Keys, Brenda began drinking rum and cokes, while the defendant drank whiskey and coke. RP 140-141. Brenda had not had anything to eat that day. *Id.* In the space of two or three hours Brenda drank at least five rum and cokes, if not more. RP 140-141, 194. After two or three hours, Brenda and the defendant got into an argument, and they both decided to leave. RP 142-143. According to Brenda, that evening the defendant had a “cut down bat” up his coat sleeve for self-protection. RP 140-141.

Brenda’s memory of what ensued after leaving the bar was very

sketchy because of her high degree of intoxication. RP 194. She did remember that the defendant walked across Oregon Way to go home, and that she walked down Oregon Way to go to her ex-boyfriends house to see if she could sleep on his couch. RP 143-144, 194. She did have some memory of making it to that house. *Id.* In fact, Art Anderson, her ex-boyfriend was able to verify that she did appear at his home, that she was highly intoxicated to the point that she was stumbling around and had mistakenly entered the neighbor's house thinking it was his. RP 270. Once inside his house she began arguing with him and he had to eventually call the police to get her to leave. RP 270-271. Brenda did not remember anything that happened at his house and did not remember any contact with the police. RP 143-144; 197-198. Brenda then made her way back to her own house, although she had little or no memory of what happened along the way. RP 143-144.

About the last thing Brenda remembered was entering the house, which was dark (because the electricity had been disconnected), and hearing the defendant inside the house say something in which she thought was an angry voice. RP 143-144. In fact, a neighbor was in the yard next door letting her dog out, and she heard Brenda say "I've had enough" and heard the defendant say "I'll tell you when you've had enough," although he was not yelling or speaking in a loud voice. RP 323-329. At about this time she heard what she thought was a thud and a moan, as if someone was hitting a

wall. *Id.* This happened about 2:30 in the morning. RP 329. The neighbor did not report having heard anything else. RP 318-241.

Early the next afternoon Brenda woke up in bed feeling sick, disoriented, and dizzy. RP 148-151. Her head and eye hurt, and her hair was matted with blood. *Id.* She tried to get up to go to the bathroom a number of times and fell to the floor. *Id.* At this point the defendant came in and told her to stay in bed. *Id.* The defendant then went and got her a pan so she could urinate while laying down in bed. *Id.* At this point Brenda fell back asleep for a while. RP 152-153. After waking again, she was able to stumble out into the living room and try to call her friend Marleen Hadley. RP 153-156. Although Marleen was not home, her boyfriend agreed to come and take her to the hospital. *Id.* When Brenda asked what had happened to her, the defendant told her that she had been very intoxicated and had fallen and hit her head against the refrigerator. RP 157. Within a few minutes, Marleen's boyfriend arrived and took Brenda and the defendant to St. John's Hospital in Longview. RP 158-159. At this time the defendant and Brenda's car was not working. RP 204-205.

Once at the hospital, the emergency room (ER) doctor examined Brenda and noted that she had multiple facial and head injuries, including significant swelling to her left eye, and a three and one-half centimeter laceration to the back of her head, which the doctor closed with staples. RP

242-245, 248. She also had some bruising on her arms and her neck showed some tenderness. RP 246-247. She was "slightly confused" and stated that she'd had a lot to drink and thought she had fallen a number of times. RP 243, 263-264. A CAT scan revealed a subdural hematoma. RP 249-250. Since St. John's hospital did not have a neurosurgeon, the ER doctor decided to transfer Brenda to the Oregon Health Sciences University (OHSU) in Portland to make sure the subdural hematoma did not increase in size. RP 247-248. According to the ER doctor, a fall against a refrigerator or a number of falls could have caused her injuries. RP 259. Although the ER doctor later explained that scalp lacerations such as Brenda's have a tendency to bleed a lot, Brenda had not suffered blood loss sufficient to cause much concern. RP 266-267.

At OHSU a second CAT scan revealed a fracture to the delicate bone structure behind her left eye. RP 223-225. According to the maxiofacial surgeon who examined Brenda, these types of injuries occur when some type of object pushes the eye back into the socket, as in sporting injuries when a racquetball, tennis ball, or softball hit an eye. RP 228-229. Some of these types of injuries require surgery, but the majority heal naturally and do not. RP 235-236. Brenda's facial injury did not require surgery. *Id.* According to the maxiofacial surgeon, these types of injuries usually do not occur from a fall onto a flat surface, but could well result from a fall against an object

with rounded corners. RP 235-236.

At OHSU Brenda was also examined by an ER surgeon. RP 288-291. According to this doctor, Brenda was oriented as to time, place and person, could move all of her extremities, and could see and talk, although her speech was a little slurred. RP 295. In addition, she did not appear confused in her thinking. *Id.* Although the second CAT scan revealed a “fair sized subdural hematoma,” it had not increased in size from the first CAT scan, and the neurosurgeon determined that it did not require surgery. RP 291-292. As a result, she was admitted to the hospital for observation. RP 296. Although the ER surgeon at OHSU did not find any life-threatening injuries, he did discover a potentially life threatening medical condition unrelated to any physical injury: Brenda was hypertensive. RP 296-304. After observing Brenda for three days the doctors discharged her from OHSU with prescriptions for lisinopril to treat her high blood pressure and for pain medication. RP 296. According to the ER surgeon, a fall or falls could have caused Brenda’s injuries, and he did not anticipate that she would suffer any long-term or permanent problems as a result of her injuries. RP 300-305.

While Brenda was at OHSU, her mother, brother, and sister-in-law went to her house to pack up her belongings before the landlord took the property back on the pending unlawful detainer. RP 345. Inside the house, Brenda’s mother noted that the living room was not in any particular type of

disarray. *Id.* However, she did see blood on the floor in the kitchen, blood on the refrigerator, a bloody hand print on the refrigerator, and a significant amount of blood on Brenda's sheets, pillow, mattress, and some clothing, along with blood on a washcloth in the sink of the bathroom. RP 345-350. A police officer later took pictures of these rooms and items, and took a number of these items into evidence. RP 376-401. One of these items was a wooden back scratcher that had previously had three wooden wheels on the end of it and was missing one wheel when the officer took it. RP 387-390.

Procedural History

By information filed June 29, 2006, the Cowlitz County Prosecutor charged Defendant Donald Leslie Hadley with one count of first degree assault - domestic violence against Brenda Frisk. CP 1. The state also charged second degree assault in the alternative. CP 2. Almost six months later, on December 18, 2006, the state filed a "Notice of Intent to Seek Exceptional Sentence," which alleged the following:

(1) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, as provided by RCW 9.94A.535(3)(a);

(2) The current offense involved domestic violence, as defined in RCW 10.99.020, and 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 and/or the defendant's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim, as provided by RCW 9.94A.535(3)(h).

CP 11.

The state did not seek to amend the information to include these allegations. *Id.*

Prior to trial, the court held a hearing upon the state's request to admit into evidence a number of the defendant's prior convictions and other alleged prior bad acts against Brenda Frisk. RP 1-103. At this hearing the state called four witnesses, including Brenda Frisk. *Id.* Mr. Frisk testified to a number of prior instances of abuse, some of which resulted in the defendant's conviction for assault. RP 36-64. The court ruled that the majority of these allegations could be presented to the jury to show motive or lack of accident but not common scheme or plan or identity. RP 30-32. The court also ruled that the evidence was more probative than unfairly prejudicial. *Id.* Upon the defendant's motion the court did grant the defense a continuing objection to the admission of all evidence of prior bad acts. RP 123-124.

Prior to the admission of this evidence, the court read the following instruction to the jury without objection from the defense. RP 124-125.

THE COURT: Prior to calling the first witness, I have an instruction for you.

If you determine, based on the evidence, that prior assaults occurred, that evidence of prior assaults by the Defendant on the victim may only be considered by you to understand the victim's state of mind at the time of any statements she made before testifying or while testifying and during the assault, if you determine an assault occurred. It might also be considered as proof of motive by the

Defendant. The evidence of prior assaults by Ms. Brenda Frisk on the Defendant may only be considered by you as to bias on behalf of Ms. Frisk against the Defendant.

RP 124-125.

Following this instruction, the state called Brenda Frisk as its first witness. RP 125. Ms Frisk testified to a number of facts contained in the preceding *Factual History*. See Factual History. In addition, she testified to the following five instances of physical and verbal abuse by the defendant:

(1) Incident in 2002 in which she was in the bathroom when he kicked the door in, punched her repeatedly in the face and nose, and caused bruising and swelling, RP 131-132;

(2) Incident in 2003 in which they got into an argument and he shoved her down stairs and she cut her arm on a broken plate, RP 132-133;

(3) Another Incident in 2003 in which she was in the bathroom when he kicked the door in, hit her until she fell to the floor, and then kicked her in the fact with his cowboy boots, breaking her dental plate and causing "at least 68 bruises" to her body to the point that she was bedridden for five days, RP 132-133;

(4) An incident in 2004 in which he continually punched her in the mouth until her dental plate again broke and she was forced to jump out of a window to get away from him, RP 134-135;

(5) Another incident in 2004 in which the defendant got mad and threw a full can of beer and hit her in the forehead, causing a cut and a small scar, RP 135-136; and

(6) A number of unspecified times when he had threatened to kill her. RP 136-137.

Consistent with its prior ruling, the court allowed the state to

introduce the following exhibits into evidence.

(1) Exhibit 1: A Cowlitz County District Court Citation in cause no. 03-12335 showing that the defendant had been convicted of assaulting Brenda Frisk on 9-13-03;

(2) Exhibits 2 & 4: A Cowlitz County District Court Citation in cause no. 02-8530 showing that the defendant was convicted of assaulting Brenda Frisk on 7-15-02 and malicious mischief on 7-15-02;

(3) Exhibit 6: The Cowlitz County District Court judgment and sentence relating to Exhibit 1;

(4) Exhibit 7: The Cowlitz County District Court judgement and sentence relating to Exhibit 2;

(5) Exhibit 8: The Cowlitz County District Court judgement and sentence relating to Exhibit 4.

During the trial, the state also elicited evidence from Brenda Frisk and her mother that after being discharged from OHSU, Brenda Frisk moved into and spent four months at the local women's shelter because that was the "safest place for her." RP 168, 192, 352-353. The defense did not object to this evidence and the state did not offer any argument as to why this evidence was relevant to any issues before the jury. *Id.*

Following the admission of evidence the court instructed the jury without objection on the charged offenses but not on the alleged aggravating factors. RP 442-458. Following deliberation the jury returned a verdict of "guilty" to the charge of first degree assault along with a special verdict finding that the defendant and Brenda Frisk were "family or house

member[s]” at the time of the commission of the offense. CP 68-69.

After reception of the verdict, the court instructed the jury to consider the state’s alleged aggravating factors, and counsel presented closing argument on this issue.. RP 514-515. Following deliberation, the jury returned special verdicts finding that the state had proved each of the alleged aggravating factors beyond a reasonable doubt. RP 70. Based upon these aggravating factors, the court sentenced the defendant to 192 months in prison on a standard range of 111 to 147 months in spite of the defendant’s argument that the state’s failure to allege the aggravating factors in the information precluded the court from going outside the standard range. CP 86-98; RP 526-545. The defendant thereafter filed timely notice of appeal. CP 103.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ADMITTED EVIDENCE OF SIMILAR CONVICTIONS AND SIMILAR UNCHARGED OFFENSES AGAINST THE SAME COMPLAINING WITNESS.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

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.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). As the court stated in *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), "[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest."

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the

right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." See *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." See *State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, review denied, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. See *Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v. Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the

statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed the same time of crime with which he is now charged. The case at bar presents another example of this unfair prejudice. In fact the evidence presented in this case exceeded that in the three cases cited, particularly when considering that (1) in the case at bar the trial court allowed the state to elicit multiple convictions and prior bad acts of a similar nature, and (2) the complaining witness in the case before the jury was the same complaining witness in the prior convictions and bad acts. Under these circumstances there was no way for the jury to overcome the overwhelming inclination to do just what they were not supposed to do: assume that the defendant had committed a crime in the case before it because the defendant had committed the same crime against the same complaining witness on prior occasions.

In this case there was little or no evidence that a crime had even occurred. Each of the doctors testified that the complaining witness could have received her injuries as the result of a fall or multiple falls. In addition,

by her own admission and by the evidence of at least one of the state's witnesses, the complaining witness was so intoxicated at the time of her injuries that she could barely walk. Under these circumstances, there is a high likelihood that but for the improper admission of the defendant's prior convictions and bad acts, he would have been acquitted. As a result, the court's error in admitting this highly prejudicial evidence entitles the defendant to a new trial.

II. THE TRIAL COURT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 16, WHEN IT INSTRUCTED THE JURY THAT THE COMPLAINING WITNESS WAS VICTIM OF THE DEFENDANT'S ASSAULTS.

Under Washington Constitution, Article 4, § 16, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement made by the court in front of the jury constitutes an impermissible "comment on the evidence" if a reasonable juror hearing the statement in the context of the case would infer the court's attitude toward the merits of the case, or would infer the court's evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well

and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. at 250-51.

The courts of this state “rigorously” apply the prohibition found in Article 4, § 16, and presume prejudice from any violation of this provision.

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge’s conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, “[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment”. *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff’d in part, rev’d in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

State v. Lane, at 838-839.

In the case at bar the trial court violated this constitutional provision when it gave the jury the following instruction at the beginning of the trial.

THE COURT: Prior to calling the first witness, I have an instruction for you.

If you determine, based on the evidence, that prior assaults occurred, that evidence of prior assaults by the Defendant on the **victim** may only be considered by you to understand the **victim’s**

state of mind at the time of any statements she made before testifying or while testifying and during the assault, if you determine an assault occurred. It might also be considered as proof of motive by the Defendant. The evidence of prior assaults by Ms. Brenda Frisk on the Defendant may only be considered by you as to bias on behalf of Ms. Frisk against the Defendant.

RP 124-125 (emphasis added).

In the first sentence of this instruction the trial court tells the jury that it will hear evidence of alleged “prior assaults” by the defendant against the “victim” in this case. The common meaning for the term “victim” found in the dictionary is one who has been “injured” or “subjected to mistreatment.” Webster’s New Collegiate Dictionary, p. 1304 (1977). By using this term, the court informed the jury that in the case before it Ms Brenda Frisk was the “victim” of the defendant’s acts, and might well have been the “victim” of the defendant’s prior acts. While this admonition by the court was ostensibly an instruction on how to use certain evidence, its effect was to convey the court’s opinion to the jury that the defendant was guilty of assaulting Brenda Frisk since the court had already determined that she was the “victim” in this case.

In so instructing the jury in this case the court violated Washington Constitution, Article 4, § 16 by commenting on the evidence and conveying its opinion to the jury that the defendant was guilty. This violation of Article 4, § 16 creates a presumption of prejudice which the state cannot overcome,

particularly given the lack of evidence that a crime had even occurred in this case. Thus, the defendant is entitled to a new trial based upon the trial court's comments on the evidence.

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION FOR FIRST DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the state charged the defendant with first degree assault under RCW 9A.36.011(1)(a). This statute states:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death;

RCW 9A.36.011(1)(a).

In the case at bar there was no question that Ms Frisk had suffered a significant injury. However, as a review of the decision in *State v. Aten*, *supra*, in the case at bar there was a paucity of evidence that a crime had even occurred.

In *State v. Aten*, the court addressed the issue whether or not evidence that is consistent with both criminal and non-criminal means is sufficient to support a corpus delicti. In this case, the defendant was convicted of the second degree manslaughter of a four-month-old child who had died while in her care. Although the original medical examination indicated that the child died of SIDS, the defendant later confessed on a number of occasions that she had placed her hands on the mouth and nose of the child to keep her from crying, thereby causing the child's death.

At trial, the state offered the testimony of the medical examiner, who opined that the child's death could have been caused SIDS, and could have been caused by manual suffocation as described by the mother. Either was equally as likely. The trial court then admitted the defendant's confession, holding that the state had adduced the "some evidence" necessary to prove a corpus and allow the admission of the defendant's statements. The jury convicted.

Defendant appealed her conviction, arguing that the court had erred in admitting her confessions, because the state failed to prove the corpus

delicti of the crime. After a careful and detailed review of the corpus delicti rule and the evidence presented in the case, the Court of Appeals agreed and reversed, finding that the confession was improperly admitted, and that absent the confession, substantial evidence did not support the conviction.

The court stated the following on this latter issue.

Evidence may lead to a reasonable inference of criminality, or it may lead to a reasonable inference of innocence. But evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either. It would be speculative to conclude from the autopsy report that Aten was criminally negligent.

State v. Aten, 79 Wn.App. 79, 91, 900 P.2d 585 (1995) .

Following this decision, the state sought and obtained further review. However, the Washington Supreme Court agreed with the Court of Appeals, and affirmed the Court of Appeals decision to vacate the conviction and dismiss the charges. The Supreme Court stated the following concerning the absence of substantial evidence.

Respondent argues the State did not present sufficient evidence at trial to sustain a conviction or to be presented to a trier of fact. In reviewing the sufficiency of evidence in a criminal case, the question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”

Admitted at trial were Respondent’s statements that she suffocated the infant. She had also indicated she was only trying to calm Sandra, but did not intend to kill her. Dr. Schiefelbein testified the autopsy revealed the infant died of SIDS. But he also hesitatingly

stated he might possibly make a reasonable and logical inference the infant died from suffocation when considering the infant's history. Viewing that evidence in the light most favorable to the State, it still can not be concluded there was sufficient evidence at trial for a rational trier of fact to find beyond a reasonable doubt that Respondent caused the child's death through criminal negligence. The corpus delicti issue permeates any conclusion on sufficiency of the evidence. That is the critical issue in this case.

State v. Aten, 130 Wn.2d at 666-67 (footnotes omitted).

As both the Court of Appeals and the Supreme Court explain in *Aten*, evidence that is equally consistent with innocence as it is with guilty is not sufficient to support a conviction; it is not substantial evidence. The same situation exists in the case at bar. In this case the only evidence of causality came from two of the three doctors the state called as witnesses. Both of these doctors testified that the Ms Frisk's injuries could well have been caused by a fall, particularly against the edge of a rounded instrument such as a refrigerator. In fact, even apart from the defendant's statements to Ms Frisk about Ms Frisk falling against the refrigerator, there was blood on the refrigerator and the stove, indicating that she had fallen. Might the defendant have intentionally pushed her? Certainly the evidence does not exclude this possibility. Might Ms Frisk have fallen accidentally and repeatedly because of her high level of intoxication? Certainly the evidence does not exclude this possibility. However, the evidence is just as consistent with either method of causality. This evidence is, in the words from *Aten*, as equally consistent

with innocence or guilt. As such, it no more raises to the level of substantial evidence than did the facts in *Aten*. As a result, the defendant is entitled to a vacation of the conviction and dismissal of the charges.

IV. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE INTRODUCED IRRELEVANT, UNFAIRLY PREJUDICIAL EVIDENCE DENIED THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a

reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object to irrelevant, prejudicial evidence. This evidence came in the form of testimony from Brenda Frisk and her mother that after being discharged from OHSU, Brenda Frisk moved into and spent four months at the local women's shelter because that was the "safest place for her." RP 168, 192, 352-353. The following addresses this argument.

Under ER 401, "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." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony can be received

into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the “existence of any fact” as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant’s arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness' opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it excluded the defendant’s proposed witness because she did not meet these criteria as she had never observed the defendant when he was abusing drugs.

In the case at bar, the state charged the defendant with first degree

assault, claiming that the defendant had physically assaulted Brenda Frisk. Ms Frisk had no memory of receiving her injuries, as she was in a state of extreme intoxication at the time. She was also being evicted from her rented house, and was in such dire financial straits that the electricity had been turned off. Given this charge and these facts, one is left to question what the relevance of her subsequent actions in staying at the women's support shelter were. In fact, they were not relevant at all in determining whether or not the defendant had committed the crime charged. Rather, what this evidence did was express the opinions of Ms Frisk, her mother, and the staff at the support shelter that she was the victim of the defendant's assaults and in need of protection. This opinion evidence of guilt was prejudicial to the defendant.

In this case there was no tactical reason for the defendant's attorney to fail to object to the admission of this evidence since it was both inadmissible and prejudicial. Thus, counsel's failure to object fell below the standards of a reasonably prudent attorney. In addition, given the lack of evidence that a crime had even occurred in this case, there is a substantial likelihood that but for the admission of this evidence the jury would have returned a verdict of acquittal. Thus, trial counsel's failure to object denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, and the defendant is entitled to a new trial.

V. THE CUMULATIVE ERRORS IN THIS CASE VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

Under the doctrine of harmless error, a trial court's error of a non-constitutional magnitude does not warrant reversal of a conviction unless the defendant can show a reasonable probability that but for the errors, the jury would have returned a verdict of acquittal. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Absent such a showing, the error is deemed harmless. *Id.* Under the same rule, error of constitutional magnitude does not warrant reversal of a conviction if the state proves beyond a reasonable doubt that without the error, the jury would still have convicted. *State v. Hopson*, 113 Wn.2d 273, 778 P.2d 1014 (1989). If the state meets its burden in this instance, the error is again deemed harmless. *Id.*

However, when the court makes multiple errors, each of which alone is deemed harmless, the defendant is yet entitled to a new trial if it appears reasonably probable that the cumulative effect of those errors materially affected the outcome of the trial. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1981) (citing *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994)); see also *State v. Coe*, 101 Wn.2d 772, 789, 694 P.2d 668 (1984). In such a case, the cumulative effect of the otherwise harmless errors has denied the defendant the right to a fair trial under Washington Constitution,

Article 1, § 3. *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996).

For example, in *State v. Johnson, supra*, the defendant was convicted of First Degree Illegal Possession of a Firearm and First Degree Assault out of a single incident in which he allegedly intentionally shot a person in the leg. Following conviction, the defendant appealed, arguing that the trial court erred in that (1) it admitted evidence of his prior rape conviction, in spite of his willingness to stipulate that he had a conviction for a prior serious offense, (2) it allowed the state to elicit the fact that he had stated a self-defense claim at omnibus (although he did not pursue it at trial), (3) the court did not allow the defense to cross-examine a state's witness on prior inconsistent statements as well as on the issue of bias, and (4) the court allowed the state to impeach a defense witness with the fact of a probation violation.

On appeal, the state argued that even if the defendant was correct, the argued errors were harmless. The Court of Appeals did find error, and it agreed that each of the errors standing alone was harmless. However, the court went on to find that the cumulative effect of the errors was not harmless. As a result, the court reversed, stating as follows:

Although none of the errors discussed above alone mandate reversal, it appears reasonably probable that the cumulative effect of those errors materially affected the outcome. *See State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994). First, the admission of Johnson's rape conviction and Johnson's prior claim of self-defense

were prejudicial because they improperly allowed the jury to infer that Johnson was a bad character and that his defense was not credible. The refusal to allow the impeachment of Purcell with his prior inconsistent statement implicated Johnson's constitutional rights to confront adverse witnesses and reasonably could have influenced the jury's evaluation of Purcell's credibility. *Russell*, 125 Wash.2d at 93, 882 [950 P.2d 992] P.2d 747. Although the admission of Martin's probation violation appears harmless, it added to the cumulative effect of a fundamentally unfair trial.

The jury reasonably could have reached a different outcome absent these errors. Consequently, we must reverse the conviction.

State v. Johnson, 90 Wn.App. at 74.

Here, as in *Johnson*, the trial court erred when (1) it improperly admitted evidence of similar prior convictions and bad acts, and (2) it commented on the evidence by referring to Ms Frisk as the "victim" in this case. In addition, trial counsel's failure to object when the state elicited irrelevant, prejudicial evidence concerning Ms Frisk living at the women's shelter. In this case, as in *Johnson*, even were each of these errors by themselves, their cumulative effect denied the defendant a fair trial. Thus, the defendant is entitled to a new trial.

VI. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED UPON AGGRAVATING FACTORS NOT ALLEGED IN THE INFORMATION VIOLATED THE DEFENDANT'S RIGHT TO NOTICE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, a charging document must contain "[a]ll

essential elements of a crime” so as to give the defendant notice of the charges and allow the defendant to prepare a defense. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This right to adequate notice is also part and parcel of the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. *State v. Sullivan*, 143 Wn.2d 162, 19 P.3d 1012 (2001). Thus, a defendant may only be convicted of the crime charged, or a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987); *State v. Taylor*, 90 WnApp. 312, 950 P.2d 526 (1998). As this Division of the Court of Appeals has previously stated:

Generally, the State must give the accused notice of the charge he will face at trial. An accused cannot be convicted of an uncharged or inadequately charged offense. A jury may, however, find an accused guilty of a lesser degree offense when the State charges the accused with a higher degree of a multiple degree offense. In such instances, the State does not have to notify the defendant that he may be convicted of the lesser included offense.

State v. Taylor, 90 Wn.App. at 322 (citations omitted).

This constitutional principle is also adopted in by statute in RCW 10.61.010, which states as follows:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010.

These principles also apply to the imposition of sentencing enhancements based upon the existence of specific facts such as the commission of a crime within a particular protected area (school zone enhancement under RCW 69.50.435), the use of a firearm in the commission of a crime (firearm enhancement under RCW 9.94A.533(3)), the use of a deadly weapon during the commission of an offense (deadly weapon enhancement under RCW 9.94A.533(4)), and the existence of prior convictions for the same offense (elevating harassment to a felony under RCW 26.50.110).

For example in *State v. Theroff*, 95 Wn.2d. 385, 622 P.2d 1240 (1980), the prosecutor filed an information charging the defendant with two counts of first degree murder. At the same time, the state filed a "notice" informing the defendant that it would seek to enhance his sentence under RCW 9.41.025 (firearm enhancement) and RCW 9.95.040 (deadly weapon enhancement). The state later filed an amended information adding a third count of felony murder. The jury eventually returned a verdict that the defendant was guilty to Second Degree Murder. The jury also returned a special verdict that the defendant was armed with a firearm during the commission of the offenses. The court later sentenced the defendant and included a firearms enhancement.

On appeal, the defendant argued in part that the inclusion of the firearms enhancement in his sentence violated his constitutional right to notice and due process because the enhancement was not alleged in either the original or amended informations. The state responded that the separate filing was sufficient to put the defendant on notice that the state would be seeking the sentence enhancement. The Washington Supreme Court rejected the state's argument. Initially, the court stated:

A separate notice of intention to seek an enhanced penalty under RCW 9.41.025 and 9.95.040 was served and filed with the first information. This was not done with the amended information. In *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972), we determined that intention to charge under RCW 9.41.025 should be set forth in the information. In *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975), Justice Hamilton writing for the court, said:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040, or both, due process of law requires that the information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. Failure of the State to so allege precludes reliance upon the statutes by the trial court or the Board of Prison Terms and Paroles.

We do not propose to recede from these holdings. Rather, we again emphasize the necessity of prosecuting attorneys uniformly adhering to the announced rule. Preferably, compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding, i. e., firearms and/or deadly weapons.

(Citations omitted.)

State v. Theroff, 95 Wn.2d at 392.

The court then went on to note that it was specifically adopting the quoted language from *State v. Frazier*. The court held:

We adopt the above language in this case. It is the rule in this state clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information. Our concern is more than infatuation with mere technical requirements. As we said in *Frazier, supra* 81 Wn. at 634, 503 P.2d 1073:

The inclusion of this separate issue in the information and verdict will give the appellant notice prior to trial that, if convicted, and if the jury finds the facts causing the aggravation are correct, she will have no possibility of probation. Her decision to enter a plea of guilty to a lesser charge if the prosecutor and court in their discretion would so accept it, is only one of the practical consequences that follow from receipt of notice at a time while alternative courses of action on her part are still available to her.

Because the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant. The conviction is otherwise affirmed and the case remanded to the trial court for resentencing consistent with this opinion.

State v. Theroff, 95 Wn.2d at 392-393. See also¹, *In re Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981) (the enhanced penalty “allegation must be included in the information”); *State v. Cosner*, 85 Wn.2d 45, 50, 530 P.2d 317 (1975) (“due process of law requires that the information contain specific allegations ... putting the accused person upon notice that enhanced consequences will

¹This list is taken from footnote 10 in *State v. Crawford*, 128 Wn.App. 376, 115 P.3d 187 (2005).

flow with a conviction”); *State v. Frazier*, 81 Wn.2d 628, 635, 503 P.2d 1073 (1972) (“where a greater punishment will be imposed ... notice of this must be set forth in the information”); *State v. Porter*, 81 Wn.2d 663, 663-64, 504 P.2d 301 (1972) (where “[t]here was no indication of [mandatory minimum sentence] in the information” the matter had to be “remanded for resentencing”); *In re Bush*, 26 Wn.App. 486, 490, 616 P.2d 666 (1980), *aff’d*, 95 Wn.2d 551, 627 P.2d 953 (1981) (“due process of law requires that the information contain specific allegations ... putting the accused person upon notice that enhanced consequences will flow with a conviction”) (quoting *Cosner*, 85 Wn.2d at 50, 530 P.2d 317); *State v. Shaffer*, 18 Wn.App. 652, 655, 571 P.2d 220 (1977), *review denied*, 90 Wn.2d 1014, *cert. denied*, 439 U.S. 1050, 99 S.Ct. 729, 58 L.Ed.2d 710 (1978) (“due process of law requires that the information contain specific allegations ... putting the accused person upon notice that enhanced consequences will flow with a conviction”) (quoting *Cosner*, 85 Wn.2d at 50, 530 P.2d 317); *State v. Stamm*, 16 Wn.App. 603, 616, 618, 559 P.2d 1 (1976), *review denied*, 91 Wn.2d 1013 (1977) (due process violated absent “a specific allegation in the information of the particular enhanced penalty statute to be relied upon at sentencing”); *State v. Smith*, 11 Wn.App. 216, 225, 521 P.2d 1197 (1974) (“it is required that the prosecution allege ... the ‘factor [which] aggravates [the] offense and causes [a] defendant to be subject to a greater punishment’”); *State v. Mims*,

9 Wn.App. 213, 219, 511 P.2d 1383 (1973) (“due process of law requires notice in the information of a potentially greater penalty”).

In *Theroff*, the defendant did not allege that he did not have actual notice of the state’s claim that the enhancement applied. Similarly, in the case at bar, the defendant does not claim that he did not have notice of the state’s claim that it was seeking an exceptional sentence by the time the court finally allowed the defendant to plea guilty. However, in *Theroff* the information and amended information both failed to allege the firearm enhancement. Absent such an allegation in the information, the court could not impose the enhancement without violating the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Sixth Amendment. Similarly, in the case at bar, the information failed to allege that the existence of aggravating factors sufficient to put the defendant on legal notice that he would be subject to anything other than the applicable range were he to plead guilty. Thus, in this case, as in *Theroff* this court would be violating the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment were it to grant the state’s request to now empanel a jury.

In this case the defense is not claiming that RCW 9.94A.537, commonly referred to as Washington’s “Blakely Fix,” is unconstitutional

except in so far as the state suggests that this court interpret it to grant the state a jury trial on aggravating factors without first alleging the aggravating factors in the information. In fact, a statutory comparison between RCW 9.94A.537 and other enhancement statutes supports the defendant's argument that RCW 9.94A.537 should be interpreted to require the state to allege aggravating factors in the information and that failure to do so precludes the state from seeking an enhanced sentence.

Under RCW 9.94A.533(3)-(5) the legislature has authorized the court to enhance a defendant's sentence beyond that allowed under the standard range if the defendant was armed with a firearm at the time of the offense, if the defendant was armed with a deadly weapon at the time of the offense, or if the defendant committed the charged crime in a jail. This statute states in part:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. . . .

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. . . .

RCW 9.94A.533(3)-(5).

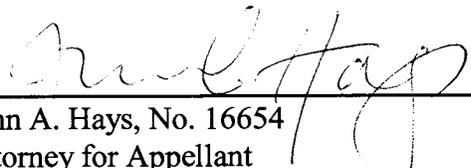
As a careful review of this language reveals the statute does not even require notice that the state will seek to enhance the sentence given the listed aggravating factors. However, as the court clarified in *Theroff*, Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment not only require notice, but they require that such notice be placed within the information. If an information fails to allege the facts that enhance the possible sentence in the information, then the constitution precludes using those facts to enhance the sentence.

CONCLUSION

This court should dismiss the charges against the defendant because the state failed to present substantial evidence that a crime occurred. In the alternative, this court should grant the defendant a new trial based upon the trial court's improper admission of prejudicial evidence that denied the defendant a fair trial, and based upon ineffective assistance of counsel. At a minimum, this court should vacate the defendant's exceptional sentence and remand for sentencing within the standard range.

DATED this 21st day of September, 2007.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

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 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 of 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.

**WASHINGTON CONSTITUTION
ARTICLE 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

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 defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.36.011

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

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

STATE OF WASHINGTON,)
Respondent)
vs.)
DONALD LESLIE HADLEY)
Appellant)

CLARK CO. NO. 06-1-00768-6
APPEAL NO: 35862-0-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF COWLITZ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the **21st day of SEPTEMBER, 2007**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

DONALD LESLIE HADLEY
DOC #810267
Stafford Creek Corrections Center
191 Constatine Way
Aberdeen, WA. 98529

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 21st day of SEPTEMBER, 2007.

[Signature]
DONNA BAKER

SUBSCRIBED AND SWORN to before me this 21st day of SEPTEMBER, 2007.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009

John A. Hays
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1402 Broadway
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