

NO. 39358-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JACK DANIEL VESS,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
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BY [Signature]

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

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Introduction of inherently prejudicial evidence deprived appellant of a fair trial, and the court erred in refusing to grant a mistrial.

2. Prosecutorial misconduct in closing argument denied appellant a fair trial.

3. Imposition of a persistent offender sentence deprived appellant of his Sixth and Fourteenth Amendment rights to a jury trial and due process.

4. Classification of appellant's prior conviction as a sentencing factor rather than an element deprived him of equal protection guaranteed by the state and federal constitutions.

Issues pertaining to assignments of error

1. Appellant was charged with second degree rape and incest involving his daughter. Prior to trial the parties agreed that his prior conviction for sex abuse involving the same daughter would be excluded from evidence. Nonetheless, despite explicit instruction from the court, a witness testified that appellant had previously raped his daughter. Where this serious trial irregularity deprived appellant of his constitutional right to a fair trial, did the trial court abuse its discretion in refusing to grant appellant's motion for a mistrial?

2. During closing argument the prosecutor shifted the burden of proof to appellant, arguing the jury should find appellant guilty because no evidence had been presented to provide an innocent explanation for the State's evidence. Where the State's case was not overwhelming and appellant refuted the accusations, is there a substantial likelihood the prosecutor's flagrant misconduct affected the jury's verdict?

3. Were appellant's Sixth and Fourteenth Amendment rights to a jury trial and due process violated when a judge, not a jury, found by a preponderance of the evidence that he had a prior most serious offense, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

4. The Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances the prior convictions are labeled "elements," requiring they be proven to a jury beyond a reasonable doubt, and in other instances they are termed "aggravators" or "sentencing factors," permitting the judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly situated recidivist criminals differently, does the arbitrary classification deny appellant equal protection?

B. STATEMENT OF THE CASE

1. Procedural History

On July 21, 2008, the Clark County Prosecuting Attorney charged appellant Jack Daniel Vess with second degree rape and first degree incest. CP 7-8; RCW 9A.44.050(1); RCW 9A.64.020(1). The case proceeded to jury trial before the Honorable Robert A. Lewis, and the jury returned guilty verdicts. CP 60-61. The court concluded Vess was a persistent offender and sentenced him to life without the possibility of early release on the rape charge and 75 months to life on the incest charge. CP 64, 68. Vess filed this timely appeal. CP 77.

2. Substantive Facts

On July 12, 2008, D.D.V. visited the home of her father, Jack Vess, in Yacolt, Washington. 2RP¹ 171, 173. When she arrived, Vess was sitting outside with his friends drinking. 2RP 174. Vess was already intoxicated at that point, and he continued drinking throughout the evening. 2RP 187. During the evening, the group rode all-terrain vehicles and sat around talking, and Vess, who gets silly when he is intoxicated, kept dropping his pants and suggested streaking and skinny dipping. 2RP 175-77. D.D.V. drank the bottle and a half of wine she brought with her,

¹ The Verbatim Report of Proceedings is contained in seven volumes, designated as follows: 1RP—1/12/09; 2RP—1/13/09 (a.m.); 3RP—1/13/09 (p.m.); 4RP—1/14/09 (a.m.); 5RP—1/14/09 (p.m.); 6RP—1/15/09; 7RP—6/22/09.

as well as a couple of beers, and with Vess's permission she mixed drinks of alcohol and Kool-Aid for her 17-year-old step brother. 2RP 175, 185-86.

Later in the evening, the group moved inside so that D.D.V. could sing karaoke. 2RP 184. Vess started falling asleep while she was singing, and D.D.V. helped him up the stairs to his bedroom. 2RP 188. D.D.V. went back downstairs to answer her phone and sing a couple more songs, then she returned to Vess's room. 2RP 191; 4RP 434. Sometime after midnight D.D.V. screamed at Vess and left the house. 2RP 203; 4RP 437; 5RP 571; 6RP 655.

D.D.V. was still intoxicated when she left, and she was driving very poorly, speeding and weaving through traffic. 1RP 67, 88. She was stopped for speeding, and when the officer approached her car, D.D.V. claimed she had just been raped by her father. 1RP 65-66, 85. She was upset and crying, and she smelled of alcohol. 1RP 72, 76. The officer arranged to transport D.D.V. to the hospital. 1RP 77. In light of the rape allegations, the officer decided not to pursue drunk driving charges. 1RP 77.

D.D.V. received several phone calls after leaving Vess's house. She ignored some from Vess, who called to ask why she had left suddenly. 3RP 233; 5RP 507; 6RP 621-22. She also ignored calls from her

boyfriend, with whom she was fighting. 1RP 56-57, 59. D.D.V. had a long conversation with her ex-boyfriend, Michael Raymond, to whom she told the same story she told the officer. 1RP 96.

Later that afternoon, several officers arrived at Vess's house to serve a search warrant. 6RP 629-30. When a detective asked Vess what had happened the day before, Vess said he and his friends had been sitting around drinking when D.D.V. showed up. 5RP 572-73. D.D.V. drank the wine she had brought with her, and they were all intoxicated. 5RP 577, 579. At some point, they went inside where D.D.V. sang karaoke. 5RP 579. Vess was tired, so he went upstairs to bed. 5RP 580. He did not remember D.D.V. helping him up the stairs. 6RP 596. Vess was not aware that D.D.V. was in his room until she started screaming. 6RP 596. He heard her leave in her car, with gravel flying and the wheels spinning. 6RP 598.

At trial D.D.V. testified that when she went back upstairs to Vess's room, he was already in bed. He told her to lie down next to him so they could talk, and he started playing with her hair like he did when she was a child. 2RP 191-92. D.D.V. said she passed out or fell asleep, and when she woke up, she was naked and Vess was having intercourse with her. 2RP 195-96; 3RP 296. D.D.V. pretended she was still sleeping, and Vess turned her over and penetrated her anally. 2RP 198-99. At that point she

jumped up and started yelling at Vess. 2RP 200. A sexual assault exam conducted the next morning revealed no evidence of bodily fluids or lubricant and no indication of tearing, bruising, or other injury. 2RP 143, 146, 153-54. No sperm was found on the oral, vaginal, or rectal swabs collected from D.D.V. 5RP 474. A mixed DNA profile was found on a swab from Vess's penis collected after his arrest. 4RP 353; 5RP 477. Neither Vess nor D.D.V. could be ruled out as possible contributors, although the expert could not testify either was a match. 5RP 477, 484.

Vess testified that several people were visiting on July 12, 2008, including his daughter D.D.V. 6RP 654. During the course of the visit, he went upstairs to bed, and he remembered D.D.V. walking up the stairs with him. 6RP 654. Once upstairs he got into bed and went to sleep. He was awakened in the middle of the night by D.D.V. yelling, "I've got to go, I've got to go." 6RP 655. Vess testified that he did not have intercourse with D.D.V. 6RP 656.

a. Defense Motion for Mistrial

Prior to trial, the parties agree to exclude reference to Vess's prior Oregon conviction for sex abuse involving D.D.V. 1RP 32-34. At trial, during direct examination of Michael Raymond, the prosecutor asked if he knew why D.D.V. had called him that night. Raymond responded that D.D.V. called him because he knew about her past. The court sustained

defense counsel's objection and instructed the jury to disregard Raymond's answer. 1RP 97. Outside the jury's presence, defense counsel explained that he had the impression Raymond was referring to the prior rape, which the parties had agreed to exclude. He asked the court to caution Raymond not to mention the prior conviction, to avoid the need for a mistrial. 1RP 98. The court directed Raymond only to answer the questions asked of him and not volunteer information. 1RP 98.

When direct examination resumed, the prosecutor asked Raymond if D.D.V. told him what had happened. He responded, "She told said [sic] that my father raped me again." 1RP 102. Defense counsel immediately objected and moved for a mistrial, arguing that Raymond had deliberately disregarded the court's instruction and the prejudice from his testimony could not be corrected. 1RP 103. The court denied the motion for mistrial, stating that the reference to Vess's prior rape of D.D.V. was brief. 1RP 104. The court also stated it did not recommend a cautionary instruction, which would only serve to highlight the problem. 1RP 104.

b. Prosecutor's Improper Closing Argument

During closing argument the prosecutor discussed the mixed DNA sample found on Vess's penis, arguing that since only one in 2700 people could be a contributor, and since there were only six people in the house that night, Vess must be guilty. 6RP 697. She argued that just because the

evidence did not show D.D.V. was a match for the DNA profile did not mean there was reasonable doubt. 6RP 698. She took the argument further, pointing out that no evidence had been presented as to who else could have been a contributor to the DNA profile:

So just because you can say well, maybe – well, maybe there’s another person out there that can match these contributors. Well, maybe. Well, there’s been no evidence presented to show that there was someone out there. There’s been no other person claiming – that falls into that category that has been raped by Jack Vess. There’s been no other person in that house or anywhere near there who’s claiming on that’s [sic] night to have had sexual intercourse with Jack Vess.

6RP 697. Defense counsel did not object to this argument.

c. Sentencing Facts

The jury returned guilty verdicts on both counts, and the State argued that Vess should be sentenced as a persistent offender, based on a 1992 conviction from Oregon for first degree sex abuse. 7RP 6. The State presented evidence from a custody officer who compared Vess’s booking fingerprints from July 13, 2008, with fingerprints from the Portland Police taken in 1992. 7RP 17-19. In addition, a Clark County Sheriff’s detective testified that he recognized Vess as a registered sex offender who had been checking in every 90 days and who had signed a document stating he was convicted of first degree sex abuse. 7RP 26-29. Vess’s ex-wife and daughter also testified Vess had been convicted of first degree sex abuse.

7RP 38, 40. Based on this evidence, the court found that Vess was the person convicted of sex abuse in Oregon in 1992. 7RP 49.

The State next argued that the Oregon offense was comparable to first degree child molestation in Washington, a two strikes offense. 7RP 46. Defense counsel argued that the offenses were not comparable. While Washington defines sexual contact as a touching of intimate parts for the purpose of sexual gratification, there was no reference to sexual gratification in the Oregon charging documents or guilty plea. 7RP 47-48. The Court ruled that the offenses were comparable, finding no reason to believe that sexual contact as used in the Oregon statute did not require sexual gratification. 7RP 50. The court concluded Vess was a persistent offender and sentenced him to life without the possibility of parole. 7RP 57.

C. ARGUMENT

1. THE COURT'S REFUSAL TO DECLARE A MISTRIAL DEPRIVED VESS OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. The erroneous denial of a motion for mistrial violates that right. See State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as

an improper remark requires mistrial is whether the irregularity “prejudiced the jury, thereby denying the defendant his right to a fair trial.”).

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). In determining whether a trial irregularity deprived the defendant of a fair trial, the appellate court considers (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other properly admitted evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. Babcock, 145 Wn. App. at 163; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). An appellate court reviews a decision on a motion for mistrial for an abuse of discretion. Babcock, 145 Wn. App. at 163.

In this case, despite a clear prohibition from the court, Michael Raymond informed the jury that Vess had previously raped D.D.V., the crime he was accused of in this case. 1RP 102. This was a serious irregularity, not involving cumulative evidence, which could not have been cured by instruction. The court abused its discretion in denying Vess’s motion for a mistrial, and remand for a new, fair trial is required. See Escalona, 49 Wn. App. at 256.

In Escalona, the defendant was charged with second degree assault with a deadly weapon after he pointed a knife at the victim and threatened to kill him. Escalona, 49 Wn. App. at 252. Prior to trial, the court granted the defendant's motion to exclude reference to the defendant's prior conviction for precisely the same offense. Id. Nonetheless, the victim testified at trial that the defendant "already has a record and had stabbed someone." Escalona, 49 Wn. App. at 253. Defense counsel immediately moved for a mistrial, which the court denied. The court then instructed the jury to disregard the answer. Id.

On appeal, the Court characterized the witness' unsolicited remark as "extremely serious" in light of the policy against admission of prior crimes evidence and the lack of credible evidence against the defendant. Escalona, 49 Wn. App. at 255. Moreover, the statement was not cumulative to other evidence. And in fact, the trial court had ruled that the prior conviction was inadmissible. Escalona, 49 Wn. App. at 255.

Finally, while recognizing that jurors are generally presumed to follow the court's instructions to disregard, the Court observed that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). The

Court concluded that it would have been extremely difficult, if not impossible, for the jury to ignore the prior conviction. Undoubtedly the jury had used that information for the most improper purpose, that is, to conclude that the defendant had acted in conformity with his prior conduct in the present case. Escalona, 49 Wn. App. at 256. The trial court therefore abused its discretion in denying the defendant's motion for a mistrial. Id.

Here, as in Escalona, the reference to Vess's prior commission of a similar offense, in violation of the court's explicit instruction, was a serious trial irregularity. Admission of other bad acts evidence is "extremely serious." Babcock, 145 Wn. App. at 164 (quoting Escalona, 49 Wn. App. at 255). Improper references to a defendant's prior criminal conduct tend to "shif[t] the jury's attention to the defendant's propensity for criminality, the forbidden inference. . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P. 2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997). And Washington courts have long recognized that the danger of prejudice from prior bad acts evidence is at its highest in sex cases. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must

be guilty, he could not help but be otherwise.” Salterelli, 98 Wn.2d at 363 (quoting Slough and Knightly, *Other Vices, Other Crimes*, 41 Iowa L.Rev. 325, 333-34 (1956)).

Given the problems with the State’s case, it is likely the jury was swayed by testimony that Vess had raped D.D.V. in the past. Although there were several other people in the house that night, none of them corroborated D.D.V.’s allegations. No evidence of injury, lubricants, or bodily fluids was found during the sexual assault exam. 2RP 143, 146, 153-54. Testing revealed a mixed DNA profile on a swab collected from Vess, and, while D.D.V. could not be ruled out as a possible contributor, she could not be classified as a match. 5RP 477, 484. Moreover, even if D.D.V. was the source of the DNA, there was evidence that its presence could have resulted from secondary transfer. 5RP 482-83. In addition, D.D.V.’s various statements about the incident were inconsistent. She initially said she had slept through most of the intercourse but then later claimed she was awake but pretending to be asleep. 3RP 278-80. As was the case in Escalona, the similarity between the charged offenses and the prior conduct increased the likelihood the jury convicted Vess based on his criminal propensity. See Escalona, 49 Wn. App. at 255-56. Consequently, testimony that Vess had raped D.D.V. in the past had a high potential for prejudice and represents a serious irregularity.

The trial irregularity was also serious because Raymond was well aware that evidence of Vess's prior conviction was excluded. Raymond had just been reminded not to volunteer information about the prior conviction, making his unsolicited response a particularly egregious violation of the court's order. 1RP 98; see State v. Hager, 152 Wn. App. 134, 141, 216 P.3d 438 (2009) (detective's testimony that defendant was evasive, after extensive discussion and trial court ruling that such characterization was inadmissible, was serious trial irregularity).

Next, Raymond's testimony that Vess had previously raped D.D.V. was not cumulative of other evidence. The prior offense involved an entirely separate incident, which the parties agreed would not be admitted in evidence. 1RP 32-34. This factor also weighs in favor of mistrial. See Babcock, 145 Wn. App. at 164; Escalona, 49 Wn. App. at 255.

Finally, a curative instruction would have been ineffective to remedy the prejudice caused by the improper testimony. In fact, the trial court advised against an instruction, convinced it would only highlight the problem. 1RP 104. It is well recognized that admission of evidence concerning a crime similar to the charged offense is inherently difficult to disregard, and no instruction can remedy the effects of such inherently prejudicial testimony. Babcock, 145 Wn. App. at 164-65; Escalona, 49 Wn. App. at 255-56.

Raymond's testimony that Vess had previously raped D.D.V. undoubtedly implanted in the jurors' minds the idea that because Vess had committed this type of act before, he most likely committed the charged offenses. See Miles, 73 Wn.2d at 70 (prejudice from witness's reference to police report predicting defendant would commit crime could not be cured by instruction); see also Escalona, 49 Wn. App. at 256. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." Miles, 73 Wn.2d at 70. The introduction of inherently prejudicial evidence deprived Vess of a fair trial, and the trial court abused its discretion by refusing to grant a mistrial. This Court should reverse Vess's convictions and remand for a new trial.

2. THE PROSECUTOR'S CLOSING ARGUMENT IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO VESS, DENYING HIM A FAIR TRIAL.

In closing argument, the prosecutor told the jury that it could not have a reasonable doubt that Vess had raped D.D.V. because there was no evidence presented to provide an alternate explanation for the State's DNA evidence. 6RP 697. This argument was improper. A defendant has no duty to present evidence; the State bears the entire burden of proving each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Fleming,

83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). It is error for a prosecutor to suggest in closing argument that a defendant bears the burden to produce evidence in his defense. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); Fleming, 83 Wn. App. at 215.

When a defendant chooses to testify, the prosecutor may in certain circumstances comment on the defendant's failure to call a witness or produce evidence supportive of his testimony. For example, where the defendant testifies regarding an alibi witness, the prosecutor may comment on the defendant's failure to produce that witness if the witness is especially available to the defendant and "the defendant's testimony unequivocally implied that the absent witness could corroborate his theory of the case." State v. Blair, 117 Wn.2d 479, 487, 816 P.2d 718 (1991); see also Cheatam, 150 Wn.2d at 652-53.

But Vess did not testify that he had sex with someone other than D.D.V. who would be a match for the DNA evidence. He simply denied D.D.V.'s accusations. 6RP 654-56. The prosecutor's improper comments were not directed at Vess's testimony and cannot be characterized as a legitimate response to Vess's defense.

Nor was the prosecutor merely commenting on her own evidence. A prosecutor is permitted to point out that the State's evidence is

unrefuted. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d at 491. That was not the case here. Vess did refute the State's evidence, testifying he did not have intercourse with D.D.V. 6RP 656. Instead, by arguing that there was no evidence as to who else could have contributed to the mixed DNA profile, the prosecutor shifted the burden to Vess to disprove the State's case.

It is misconduct for a prosecutor to question the defendant's failure to provide an innocent explanation for the State's evidence. Fleming, 83 Wn. App. at 215; see also, Traweek, 43 Wn. App. at 107. The State must seek a conviction on the merits of its case. "Although prosecutors have 'wide latitude' to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant." State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007); Fleming, 83 Wn. App. at 216.

The prosecutor's misconduct requires reversal despite defense counsel's failure to object. Reversal is required if the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

In Fleming, the prosecutor's improper arguments had the effect of shifting the burden to the defense to disprove the state's evidence. First, the prosecutor argued that the jury could not acquit unless it found that the State's witnesses were mistaken or lying. Next, the prosecutor argued that the defendants had not explained the State's evidence, implying they had a duty to provide an explanation, and because they did not, they were guilty. Fleming, 83 Wn. App. at 214-15. The Court of Appeals held that the prejudicial effects of such flagrant and ill-intentioned prosecutorial misconduct required reversal, despite defense counsel's failure to object. Fleming, 83 Wn. App. at 216.

Here, as in Fleming, the prosecutor focused on Vess's failure to explain the State's evidence and argued that the jury must therefore find him guilty. No curative instruction could have removed the prejudicial effects of this burden-shifting argument.

When no objection is raised to the prosecutor's misconduct, the issue is whether there was a substantial likelihood the prosecutor's improper comments affected the verdict. Belgarde, 110 Wn.2d at 508; State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). The prosecutor's misconduct cannot be deemed harmless unless the record shows there would have been a conviction regardless of the misconduct. Charlton, 90 Wn.2d at 664.

The State's case here was not overwhelming. As discussed above, none of the several people in the house corroborated D.D.V.'s accusations, nor did the sexual assault exam. D.D.V. made inconsistent statements, and Vess consistently denied having intercourse with D.D.V. In response, the State unfairly bolstered its case by shifting the burden of proof to the defense. "[P]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215. Under the circumstances, there is a substantial likelihood the prosecutor's improper argument affected the outcome of the case, and reversal is required.

3. IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED VESS OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.

a. **Due process requires that a jury find beyond a reasonable doubt any fact that increases the defendant's maximum possible sentence.**

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of liberty without due process of law. U.S. Const., amend XIV. The Sixth Amendment also guarantees a criminal defendant the right to a jury trial. U.S. Const., amend. VI. The constitutional rights to due process and a jury trial "indisputably entitle a

criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

In recent cases, the Supreme Court has recognized that this principle applies not just to the essential elements of the charged offense, but also to the facts labeled “sentencing factors,” if the facts increase the maximum penalty faced by the defendant. For example, in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Court held that an exceptional sentence imposed under Washington’s Sentencing Reform Act was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based on facts that were not found by a jury beyond a reasonable doubt. Blakely, 542 U.S. at 304-05. Likewise, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive the death penalty based on aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey’s “hate crime” legislation unconstitutional because it permitted the court to impose a

sentence above the statutory maximum after making a factual finding by a preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Supreme Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The Ring Court pointed out that the dispositive question is one of substance, not form. “If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.” Ring, 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based on the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

b. This issue is not controlled by prior federal decisions.

In Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Court held that recidivism was not an element of the substantive crime that needed to be pleaded in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. Almendarez-Torres, 523 U.S. at 246. Almendarez-Torres had pleaded guilty and admitted his prior convictions, but he argued that his prior convictions should have been included in the indictment. Id. at 227-28. The Court

determined that Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id.

The Almendarez-Torres Court expressed no opinion, however, as to the constitutionally-required burden of proof of sentencing factors used to increase the severity of punishment or as to whether a defendant has the right to a jury determination of such factors. Id. at 246.

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance possible penalty. See e.g. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311(1999). Moreover, Apprendi noted “it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” Apprendi, 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find beyond a reasonable doubt any fact that increases the statutory maximum sentence for a crime. Id.

In Blakely, Apprendi, and Jones, the Court stated that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. This statement cannot be

read as holding that prior convictions are necessarily excluded from the Apprendi rule, however. Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of the five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that Almendarez-Torres was wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J., concurring). Justice Thomas suggested that, rather than focusing on whether something is a sentencing factor or an element of the crime, the Court should determine if the fact, including a prior conviction, is used as a basis for imposing or increasing punishment. Id. at 499-519; accord Ring, 536 U.S. at 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing Ring), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v.

Wheeler, 145 Wn.2d 116, 121-24, 34 P.3d 799 (2001) (addressing Apprendi). Nonetheless, the Washington Supreme Court has felt obligated to “follow” Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d at 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds. Moreover, Blakely makes clear that due process protections extend to sentencing factors that increase a sentence above the statutory standard sentence range, a decision not anticipated by the Washington courts. Blakely, 542 U.S. at 305.

The judicial finding by a preponderance of the evidence of the sentencing factor used to elevate Vess’s punishment to life without the possibility of parole violates due process and Vess’s right to a jury trial. Vess’s sentence must therefore be vacated.

4. CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN “AGGRAVATOR” OR “SENTENCING FACTOR,” RATHER THAN AN “ELEMENT,” VIOLATES VESS’S RIGHT TO EQUAL PROTECTION.

The Washington Supreme Court has recently held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705

(2008). While conceding that the distinction between prior-conviction-as-aggravator and prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony “it actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed “sentencing factors,” is neither persuasive nor correct.

In addressing arguments that one act is an element and another merely a sentencing fact, the United States Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S. at 476. More recently the Court noted:

Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.” 530 U.S., at 478, 120 S.Ct. 2348 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

In Roswell, the Court considered the crime of communication with a minor for immoral purposes. Roswell, 165 Wn.2d at 191. The Court found that in the context of this and related offenses², proof of a prior conviction functions as an “elevating element,” in that it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime. Id. at 191-92. But the elements of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment by classifying the crime as a class C felony rather than a gross misdemeanor, as in the case of CWMIP³, is not fundamentally different from a recidivist fact which actually alters the maximum punishment from 211 months to life without the possibility of parole, as in Vess’s case. CP 65.

In fact, the Legislature has expressly provided that the purpose of the additional conviction “element” is to elevate the penalty for the substantive crime. See RCW 9.68.090 (“Communication with a minor for immoral purposes – Penalties”). There is no rational basis for classifying the punishment for recidivist criminals as an “element” in certain

² Another example of this type of offense is violation of a no contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196.

³ RCW 9.68.090 (communication with minor for immoral purposes is gross misdemeanor unless accused has prior conviction, in which case it is class C felony)

circumstances and an “aggravator” in others. The difference in classifications, therefore, violates equal protection.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const., amend. XIV; Wash. Const., art. I, § 12; Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also involves a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore the rational basis test applies. Id.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act as follows:

to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices

that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 771-72.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a Class A felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter instance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

The legislative classification which permits this result is wholly arbitrary. The Roswell Court concluded that the recidivist fact was an element because it defined the very illegality, reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” Roswell, 165 Wn.2d at 192 (emphasis in original). But, as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction or not; the prior offense merely alters the maximum punishment to which the offender is subject. Id. (“If all other elements

had been proved he could have been convicted of only a misdemeanor.”). So, too, second degree rape is a crime whether one has a prior conviction for a most serious offense or not.

Because the recidivist fact here operates in the same fashion as in Roswell, this Court should hold there is no basis for treating the prior conviction as an “element” in one instance—with the attendant due process safeguards afforded “elements” of a crime—and as an aggravator in another. The Court should strike Vess’s persistent offender sentence and remand for entry of a standard range sentence.

D. CONCLUSION

The improper introduction of testimony about Vess's prior offense denied him a fair trial, and the court abused its discretion in refusing to declare a mistrial. The prosecutor's burden-shifting argument also denied Vess a fair trial. His convictions should therefore be reversed and the case remanded for a new trial. Further, imposition of the persistent offender sentence violated Vess's rights to due process, a jury trial, and equal protection, and the sentence must be vacated.

DATED this 5th day of January, 2010.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Jack Vess*, Cause No. 39538-0-II directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 6, 2010

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