

NO. 40293-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,  
Respondent,  
v.  
GEORGE WOODARD,  
Appellant.

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. Woodard's multiple convictions and sentences for kidnapping in the first degree predicated on facilitating rape or child molestation, as well as both underlying offenses, violate the state and federal constitutional prohibitions against double jeopardy.

2. Woodard's conviction for child molestation in the second degree violates double jeopardy and the right to a unanimous jury verdict under the Fifth Amendment and Article I, sections 9 and 22 of the Washington Constitution.

3. The court impermissibly demanded that the jury rest its special verdict finding of sexual motivation on unanimous agreement when unanimity is only required if the jury finds the State has proven this aggravating factor.

4. The introduction of prior bad acts that were explicitly barred by the court's pretrial rulings denied Woodard a fair trial.

5. The trial court's communication with the deliberating jury without consulting counsel or Woodard denied Woodard his rights to counsel and to be present under the Sixth Amendment and due process clause of the Fourteenth Amendment, as well as the Washington Constitution, article I, sections 3 and 22.

6. The trial court deprived Woodard the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, when the court, and not a jury, found the facts necessary to sentence him as a persistent offender.

7. The failure to file findings of fact following a contested CrR 3.5 hearing denies Woodard his right to meaningfully appeal from the court's order.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense. Woodard's conviction for first degree kidnapping was elevated to a higher degree by his convictions for the underlying offenses of second degree rape of a child and second degree child molestation. Where the offenses occurred in a single, short time frame, without any separate injury, do his convictions for the multiple crimes violate the Double Jeopardy Clause of the Fifth Amendment and the Washington Constitution, article I, section 9?

2. A jury's verdict for one crime must rest on the unanimous determination that the State has proven a single act and that act

must be separate and distinct from the act used to punish the same behavior in another conviction. Where the jury was never instructed that its verdict for second degree child molestation must rest on unanimous agreement as to a single act separate from an act used to convict Woodard of a different crime, does the verdict violate double jeopardy and the requirement of juror unanimity?

3. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. The trial court instructed the jury that it could not find the State had failed to meet its burden of proof unless it reached this decision unanimously. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect instruction undermine the jury's special verdict finding?

4. A court properly excludes allegations of highly prejudicial and unrelated prior acts by ordering that witnesses must be instructed not to offer such unduly prejudicial, irrelevant, accusations against a person charged with a crime. The prosecution's witnesses ignored the court's plain directive and testified about prohibited allegations against Woodard. Where the prejudicial nature of other conduct cannot be erased once placed before the jury, was Woodard denied a fair trial by the State's

witnesses testimony about uncharged, prejudicial, and irrelevant conduct?

5. The court may not communicate with a deliberating jury, particularly in the absence of counsel and when the content of the communication pertains to substantive legal and factual issues. When the court answered the jury's question about the facts underlying one of the charges without consulting with counsel or Woodard, did the court's communication affect jury deliberations, deny Woodard his right to the assistance of counsel, and constitute a stage of the proceedings at which Woodard was denied the right to be present?

6. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or

'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

7. Under CrR 3.5, a court must enter written findings of fact and conclusions of law following a hearing on the admissibility of statements of the accused. The court never issued a final oral ruling in the case at bar and never filed written findings. Does the court's failure to file written findings, combined with the absence of a complete oral ruling, deny Woodard his right to appeal from the court's CrR 3.5 ruling?

C. STATEMENT OF THE CASE.

On December 24, 2008, Dallas Hazelrigg had just been released from jail and arranged to spend a few days at the home of George Woodard, so he and his family could be together. 2ARP 81; 3RP 24. Hazelrigg's wife Wendy Galloway was staying at the local women's mission with her 12-year-old daughter M.P. and her son Jordan. 2ARP 89; 3RP 14-15. During the day, Hazelrigg, his

brother Wayne, Galloway, and Woodard drove around in an effort to post bail for a friend Hazelrigg met in jail, in order to help Hazelrigg earn some money. 2ARP 108; 3RP 25.

M.P. spent the day with her friend Kirsten Pendergast and Pendergast's young child. 3RP 30. Once Hazelrigg earned several hundred dollars as a payment for posting his jail acquaintance's bail, Galloway told M.P. she needed to visit with her family and brought M.P. to Woodard's home. 2ARP 108; 3RP 30. At about 7:30 p.m., M.P. wanted to buy a snack from the grocery store, which would close at eight o'clock. 2ARP 125; 3RP 16. Either Hazelrigg or M.P. asked Woodard to take M.P. to the store. 2ARP 36-38; 5RP 33. Hazelrigg himself could not take M.P. to the store because he was taking his brother Wayne to buy drugs and he understood it was inappropriate to bring M.P. on such a journey. 2ARP 81, 83.

Woodard drove M.P. to the grocery store and waited in the car while she bought her snack. 2BRP 15. Woodard agreed he was testing his car's ability to turn in the parking lot, doing "brodies," or "donuts"<sup>1</sup> but denied that any inappropriate action

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<sup>1</sup> Meaning to create a circular pattern by rotating tires. See [http://en.wikipedia.org/wiki/Donut\\_\(driving\)](http://en.wikipedia.org/wiki/Donut_(driving)).

followed and told the police and the jurors at trial that he drove M.P. home from the store without further incident. 5RP 34, 41.

According to M.P., Woodard drove a different route home because he wanted to show M.P. that his recently purchased car could do “donuts” in the snow. 2BRP 20. After doing a “donut,” Woodard stopped the car and ordered M.P. into the back seat. 2BRP 22. He put his mouth on the outside of her sweatshirt near her breast and on the outside of her vagina, and also penetrated her vagina with his finger and penis. 2BRP 22-29. Then he drove M.P. back to his home, where both her parents were. 2BRP 29; 3RP 18. M.P. did not tell anyone that anything had happened when she returned to her parents. 2ARP 85, 88. She said the store had a long line to explain why she was gone for about 30 minutes. 3RP 19. She laughed at Woodard when he fought with someone else in an unrelated argument. 2BRP 44. Then M.P. asked to spend the night at her friend Kirsten’s house, where she had spent the day. 2BRP 43.

The next day, M.P. told Kirsten Pendergast and her parents that Woodard had sexually assaulted her. 2BRP 48; 3RP 22, 34. Lewis County police officer Susan Shannon took M.P. to the hospital for a “rape kit.” 3RP 55. DNA analysis of samples taken

from M.P. and her clothing did not contain evidence connected to Woodard, other than a small amount of saliva on the sweatshirt M.P. wore. 4RP 127, 143-45. Woodard explained that the sweatshirt belonged to his son and he had lent it to M.P. because she had no coat. 4RP 134; 5RP 35-36.

The prosecution charged Woodard with one count of first degree kidnapping with sexual motivation, rape of a child in the second degree, and child molestation in the second degree. CP 13-14. He was convicted of the charged offenses. CP 53-57. The court found he had one qualifying prior conviction under the “two strikes” life sentence law and imposed a sentence of life without the possibility of parole. 5RP 172-73. Pertinent facts are addressed in further detail in the relevant argument section below.

D. ARGUMENT.

1. BY ELEVATING KIDNAPPING TO A HIGHER DEGREE BASED ON THE COMMISSION OF OTHER OFFENSES, IMPOSING MULTIPLE PUNISHMENTS FOR THE INTERRELATED OFFENSES IN ADDITION TO FIRST DEGREE KIDNAPPING VIOLATES DOUBLE JEOPARDY

Woodard was charged with and convicted of kidnapping in the first degree. The sole element increasing the level of kidnapping to a first degree offense was that the kidnapping

occurred for the purpose of facilitating the underlying offenses of rape of a child in the second degree and child molestation in the second degree during the same, single, half-hour period. Woodard was also separately punished for those two underlying offenses regarding the same, singular incident. This pyramiding of charges based on the same conduct violates the constitutional prohibition against double jeopardy.

a. Double jeopardy is violated when separate punishments are imposed for the same offense. The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9. “Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

A conviction and sentence violate double jeopardy if, under the “same evidence” test, the two crimes are the same in law and fact. Orange, 152 Wn.2d at 816; State v. Adel, 136 Wn.2d 629,

632, 965 P.2d 1072 (1998). A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 816. The test is not simply whether two offenses have different statutory elements. United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (conviction for criminal contempt barred prosecution for drug offense); Brown v. Ohio, 432 U.S. 161, 164, 100 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (“separate statutory crimes need not be identical either in constituent elements or actual proof in order to be the same within the meaning of the constitutional prohibition”).

As explained in Orange, proper application of the Blockberger same elements test is focused specifically on “the facts used to prove the statutory elements” rather than comparing generic statutory language. 152 Wn.2d at 818-19. For example, convictions for rape and rape of a child based on the same act violate double jeopardy even though “the elements of the crimes facially differ.” State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

When discerning legislative intent, the United States Supreme Court requires an express statement of the legislature's purpose to permit separate punishments. Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). For example, an express statement of legislative intent exists where a statute authorizes courts to punish a burglary separately from another crime committed incidentally to the burglary. RCW 9A.52.050. If there is doubt about the legislature's intent, principles of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

b. First degree kidnapping merges with the underlying predicate offenses. Under the merger doctrine, when a particular degree of crime requires proof of another crime, the court presumes the legislature intended to punish both offenses singly. See State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005); State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. Johnson, 92 Wn.2d at 680.

In Johnson, the defendant was charged with kidnapping, assault, and rape. The offenses occurred during a single,

prolonged incident, where the defendant bound his victim and threatened her before and during the rape. “[T]he restraints [underlying the kidnapping] and use of force [underlying the assault] were elements which elevated the acts of sexual intercourse to rape in the first degree.” Id. at 681. The offenses were also essentially contemporaneous and “the sole purpose of the kidnaping and assault was to compel the victims’ submission to acts of sexual intercourse.” Id.

The Johnson Court concluded that imposing convictions and sentences for all three offenses unjustly multiplied the punishments for a single offense. Id. at 680. When conduct that is involved in a rape has no independent purpose or effect other than enabling the sexual assault, “the legislature intended” that it should not be punished as a separate crime. Id. at 676.

Like Johnson, the State pyramided charges by prosecuting Woodard for first degree kidnapping, which its defined as the intent to facilitate rape of a child in the second degree and/or child molestation in the second degree, in addition to the underlying offenses of rape and child molestation, without an independent purpose and effect. The court must presume the legislature intended to punish these offenses singly when there was no

separate and distinct injury inflicted. This imposition of multiple punishments for the same acts violates double jeopardy.

c. The “kidnapping” was elevated by the underlying offenses and yet caused no separate harm meriting multiple punishments. The elements of first degree kidnapping as charged and set forth in the “to convict” instruction provided that the State must prove Woodard abducted the complainant, “with the intent to facilitate the commission of rape of a child in the second degree and/or child molestation in the second degree, or flight thereafter.” CP 36 (Instruction 6); RCW 9A.40.020(1)(b). The intent to facilitate these specific offenses aggravated the seriousness of the kidnapping charge to a higher degree.<sup>2</sup>

As charged and proven in the case at bar, the facts underlying the kidnapping constituted the minimum restraint necessary for the sexual assaults. Woodard took the complainant on a detour as they headed home after going to the grocery store. Woodard drove one or two minutes<sup>3</sup> in a different direction to show the complainant how his car could do a “donut” in the snow. 2BRP

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<sup>2</sup> The lesser degree of second degree kidnapping requires an intentional abduction “under circumstances not amounting to kidnapping in the first degree.” RCW 9A.40.030(1).

20. He stopped the car at a cul de sac and began the sexual assault. The cul de sac was not in a remote area. 2BRP 19-20. People lived in nearby homes, the complainant was familiar with the area, and many other cars had gone to the same place to do “donuts” in the snow, as shown by a number of tire tracks found by police. 3RP 126; 5RP 60.

Illustrating the incidental nature of the restraint, the prosecutor argued to the jury, “Let’s face it, if somebody is going to have sex with a 12 year-old, are they going to do it in the middle of North Pearl Street and Market? You are going to go to a place where nobody is going to see you.” 5RP 88. Taking the complainant to a location off the main street was what was expected of a sexual assault and part of the nature of the offense; it should not constitute a separate crime.

When the sexual assault ended, the complainant sat in the front passenger seat, buckled her seat belt, and Woodard drove her back to the trailer where he lived and where she was staying with her parents. 2BRP 29. The manner of the restraint was not separately severe or injurious. Its purpose was to commit the

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<sup>3</sup> Police detective Shannon timed the route the day after the incident, driving in the same manner as the complainant reported Woodard drove, and it took her one to two minutes each way. 3RP 103

sexual assaults. Consequently, the kidnapping, rape, and child molestation punishments violate double jeopardy, because they are based on the same factual occurrence and legal elements.

d. The double jeopardy violation requires the court to strike the multiple punishments. The proper remedy for a double jeopardy violation is to vacate the lesser conviction. State v. League, 167 Wn.2d 671, 223 P.3d 493 (2009). The lesser conviction is the offense that forms part of the proof of the other. Id.; Freeman, 153 Wn.2d at 777. The elevation of the kidnapping based on the intent to commit rape of a child and child molestation elevates the seriousness of kidnapping and requires vacation of the lesser offenses that form the basis for the greater. Johnson, 92 Wn.2d at 682.

2. THE MULTIPLE ACTS UNDERLYING THE ALLEGATION OF CHILD MOLESTATION DENIED WOODARD HIS RIGHTS TO BE FREE FROM DOUBLE JEOPARDY AND TO HAVE A UNANIMOUS JURY VERDICT

a. The jury must unanimously find the State proved separate acts when the State seeks multiple convictions for the same conduct. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 5, 14; Wash. Const. art. I, §§ 3, 21, 22. The right to a unanimous jury verdict demands the jury verdict reflects a unanimous finding of the act or acts underlying the charged offense. See Apprendi v. New Jersey, 530 U.S. 466, 498, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Scalia, J. concurring) (charges must be proved “beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens”); Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (“longstanding tenet” of criminal law jurisprudence is “the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’” (quoting 4 W. Blackstone, Commentaries on the Laws of England, 343 (1769))).

In Washington, the state constitutional right to a trial by jury “provides greater protection for jury trials than the federal constitution.” State v. Williams-Walker, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22. The jury’s verdict must explicitly authorize the punishment imposed. 167 Wn.2d at 900. Punishment sought by the State “must not only be alleged, it also must be authorized by the jury” in its verdict. Id.

b. The jury was not instructed that it must rest its verdict for count 3 on unanimous agreement of a specific act, separate from that underlying count 2. A violation of the right to jury unanimity occurs when the defendant is accused of several counts of the same offense but the jurors were not expressly instructed that each conviction must rest on a “separate and distinct act or event.” State v. Carter, \_\_ Wn.App. \_\_, 2010 WL 2590552 (June 25, 2010); State v. Berg, 147 Wn.App. 923, 935, 198 P.3d 529 (2008); State v. Borsheim, 140 Wn.App. 357, 368, 165 P.3d 417 (2007).

Jury instructions must make the unanimity requirement manifestly apparent to the average juror. Carter, 2010 WL 2590552 at \*3. Unless the instructions unambiguously direct the jury that its verdict must rest on separate acts, the accused person has been exposed to the possibility of multiple punishments for the same criminal conduct, contrary to the bar against double jeopardy. Id.

In Berg, the defendant was charged with two counts of third degree child molestation occurring during the same period of time, and the court instructed the jury that its verdict must be unanimous

as “to one particular act.” 147 Wn.App. at 934. But the Court of Appeals held,

as in Borsheim, the trial court here did not give a “separate and distinct act” instruction or otherwise require that the jury base each charged count on a “separate and distinct” underlying event. And as in Borsheim the missing language potentially exposed Berg to multiple punishments for a single offense. Accordingly, we reverse and order the trial court to vacate one of the third degree molestation convictions.

Id. at 935.

In Carter, the complainant testified she was raped 40 to 50 times over a certain time period and Carter was charged with four counts of rape of a child. 2010 WL 2590552 at \*1. The court gave a unanimity instruction but no instruction on the requirement of separate and distinct acts. Following Berg, this Court held that the instructions “exposed Carter to the possibility of multiple convictions for the same criminal act. Thus, we remand with instructions to dismiss three of the four child rape counts.” Id. at \*3.

Here, the court gave a unanimity instruction that applied only to the rape in the second degree charge in count 2. The court gave no instructions to the jury that they must rest a conviction for child molestation based upon unanimous agreement of the same act, and that the act must be separate and distinct from the act of

sexual contact used in a conviction for count 2, rape in the second degree. Instruction 14 told the jury that there were allegations of separate acts that could constitute second degree rape of a child, and “you must unanimously agree as to which act has been proved.” CP 44. No instruction explained the “separate and distinct” finding required by the constitutional prohibition against double jeopardy, and the unanimity instruction explicitly applied only to the charge of second degree rape of a child. The lack of a unanimity instruction regarding the child molestation charge violated double jeopardy as explained by this Court.

c. The allegations at trial included various acts that a juror could use to convict Woodard. Second degree child molestation requires an act of “sexual contact,” defined in the jury instructions as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” CP 43 (Instruction 13); RCW 9A.44.010(2). Several alleged acts could have potentially constituted sexual contact, including touching the complainant’s sweatshirt in the area of her breast, touching the outside of her vagina, using a finger to touch the inside of her vagina, and penetrating the complainant in sexual intercourse. See e.g., State v. Adams, 24 Wn.App. 517, 519, 601

P.2d 995 (1979) (contact with breast through clothing could be “sexual contact” under certain circumstances).

Whether Woodard touched the complainant’s breast was plainly considered by the jury as a possible basis for conviction. The sole question the deliberating jury asked the court was whether sexual contact as defined in Instruction 13 included the “bare and/or covered breast?” CP 52. The court responded by telling the jury to reread its instructions. Id.

The prosecution did not unambiguously elect the touching of the complainant’s breast as the factual predicate for this charge and mentioned the various alleged acts in its closing argument. 5RP 91-93, 118. The prosecution emphasized that the complainant accused Woodard of putting his mouth on the outside of her vagina, as well as the forensic evidence showing Woodard’s saliva was on the sweatshirt the complainant wore, potentially corroborating the claim that his mouth touched the area of her breast.<sup>4</sup> 5RP 91-93. Even if the prosecution’s closing argument had focused on a single act as the basis of its child molestation prosecution, the jury was instructed not to rely on the arguments of

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<sup>4</sup> The sweatshirt belonged to Woodard, not the complainant, and thus the presence of his saliva on the sweatshirt was not clearly inculpatory. 5RP 35-36.

counsel and argument alone would not prove the basis of the jury's general verdict. State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008).

The latter two accusations involving penetration were also the basis of the rape charge. While rape requires some penetration, child molestation is more broadly defined to include "any touching" in a sexual manner. 5RP 91 (prosecutor's closing argument explaining child molestation is "very similar" to rape but only requires "sexual contact"). Child molestation includes the same acts as could constitute rape, although the two offenses have different mental elements. See State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006). The jurors had numerous acts before it that could constitute the factual predicate for child molestation, and yet they were never instructed that they must unanimously agree upon the proof of a certain act, distinct from an act used as the basis of a verdict in count 2.

d. The failure to ensure the verdict in count 3 rests on unanimous agreement as to an act separate from the basis for count 2 requires reversal. The remedy for submitting various allegations to the jury that could constitute the basis for a charge of child molestation and failing to insist that the jury unanimously

agree to an act separate and distinct from the act underlying another count requires reversal with an order to vacate one of the convictions. Berg, 147 Wn.App. at 935; Borsheim, 140 Wn.App. at 371. The child molestation conviction must be reversed and vacated due to the double jeopardy violation. See Womac, 160 Wn.2d at 657.

3. THE COURT GAVE A FATALLY FLAWED UNANIMITY INSTRUCTION FOR THE AGGRAVATING FACTOR USED IN THE SPECIAL VERDICT FORM

a. The court must properly instruct the jury on the unanimity required for an aggravating circumstance. When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to vote “no,” and find the State has not sufficiently proven the aggravating factor. State v. Bashaw, \_ Wn.2d \_\_, 2010 WL 2615794 (July 1, 2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form, addressing an additional aggravating factor, must be unanimous for either a “yes” or “no” answer. Bashaw, 2010 WL 2615794 at \*2; Goldberg, 149 Wn.2d at 894. The Supreme Court

held that such an instruction is incorrect, and unanimity is required only when the jury answers “yes.”

The rule from Goldberg<sup>5</sup> then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence.

Bashaw, at \*6.

The jury instruction given in Bashaw for the special verdict form told the jurors, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at \*2. The Bashaw Court held that jurors need not be unanimous in a special finding. Rather, any jury's less than unanimous verdict “is a final determination that the State has not proved that finding beyond a reasonable doubt.” Id. at \*5.

Similarly to Bashaw, the trial court told Woodard's jury that their special finding must be unanimous to decide the sexual motivation aggravating factor either “yes” or “no.” The court's instruction stated in pertinent part,

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<sup>5</sup> In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either “yes” or “no.” 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

Because this is a criminal case, all twelve of you must agree to return a verdict. When you all have so agreed, fill in the verdict form to express your decision.

CP 50-51 (Instruction 20).

The jury instruction in the case at bar presents the identical error identified in Bashaw. The court erroneously told the jury that they could not vote “no” unless they were unanimous in finding the State had not proven this special verdict.

b. The clearly incorrect jury instruction requires reversal of the special verdict. The court in Bashaw characterized the problem as an error in “the procedure by which unanimity would be inappropriately achieved.” 2010 WL 2615794, \*7. This instructional error creates a “flawed deliberative process” and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id. The Court in Bashaw looked to the example of the deliberative process in Goldberg, where several jurors had initially answered “no” to the special verdict, but after the trial judge told them they must be

unanimous, they returned with a “yes” finding on the aggravating factor. Id.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id. As in Bashaw, the jury was incorrectly informed that their special verdict finding of sexual motivation must be unanimous. CP 20. This Court cannot guess as to the outcome of the case had the jury been correctly instructed and the special finding of sexual motivation must be vacated.

Bashaw, 2010 WL 2615794 at \*7.

4. TESTIMONY ABOUT WRONGFUL ACTS  
THAT WERE CLEARLY BARRED BY THE  
COURT’S PRE-TRIAL RULINGS DENIED  
WOODARD A FAIR TRIAL

a. The court properly barred irrelevant and highly prejudicial testimony about uncharged bad acts in its pretrial ruling.  
Uncharged wrongful acts are presumed to be too prejudicial to be admissible. ER 404(b)<sup>6</sup>; see State v. Rupe, 101 Wn.2d 664, 707-

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<sup>6</sup> Under ER 404(b):  
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

08, 683 P.2d 571 (1984) (allegations defendant possessed uncharged firearms may be perceived with such disdain by jurors that it requires reversal).

Uncharged criminal conduct may be admitted into evidence only when it is materially relevant to an essential ingredient of the charged crime and its probative value outweighs its prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1145 (2002); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 404(b). Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

There are some types of information that a jury cannot be expected to disregard, such as a witness's claim that the accused person participated in a crime. Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). As the Bruton Court recognized, a limiting instruction to disregard inculpatory evidence is the equivalent of asking a jury to perform, "a mental gymnastic which is beyond, not only their powers, but anybody's

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opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

else.” Id. at 132 n.8 (citing Nash v. United States, 54 F.2d 1006, 1007 (2<sup>nd</sup> Cir. 1932)); see also Dunn v. United States, 307 F.2d 883, 887 (5<sup>th</sup> Cir. 1962) (“If you throw a skunk in the jury box, you cannot instruct the jury not to smell it.”).

Woodard moved to exclude the uncharged acts. First, Woodard explained that the prosecution should be bound by its failure to identify any ER 404(b) evidence it intended to introduce. 1RP 131; Supp. CP \_\_, sub. no. 27 (Omnibus Order). Then Woodard voiced fears about several specific instances where the States’s witnesses might inject improper allegations against Woodard. Two of the prosecution’s witnesses, James Barnes and Jonathan Neff, were in jail with Woodard and they claimed Woodard told them he had sex with the complainant on six occasions in the past, unrelated to the charged offense. 1RP 131. The complainant denied these allegations and the prosecution agreed that it did not intend to introduce these claims of uncharged sexual acts. 1RP 131-32.

Not only did the prosecution agree that it did not plan on introducing allegations of other sexual activity involving the complainant, the prosecution specifically requested Woodard not mention any “sexual activity” involving M.P., either before or after

the charged incident. CP 25. The prosecution also requested that Woodard refrain from eliciting any testimony about any instances of drug or alcohol use by any witnesses, and Woodard agreed. CP 24; 1RP 120.

In addition to the prosecution's agreement that it would not purposefully introduce these uncharged and unproven allegations, defense counsel urged the court to order the prosecution to explicitly instruct its witnesses not to mention these claims. 1RP 132. The court also emphasized the importance of instructing the witnesses that they must abide by the court's evidentiary restrictions. 1RP 122. The prosecutor responded, "I can tell them. What they say is up to them, but I can at least inform them." 1RP 133.

In response to these arguments, the trial court issued several uncontested pretrial rulings. The court ruled that all of the State's witnesses should be instructed not to volunteer other accusations against Woodard that were not charged. 1RP 133-35. Woodard clarified that all witnesses should be instructed not to blurt out negative opinions or uncharged claims about Woodard. 1RP 136. The prosecution agreed provided it would be permitted to question witnesses if the defense opened the door. 1RP 137.

The court instructed the prosecution to tell all witnesses to exclude personal opinions of Woodard. 1RP 137. Additionally, the court expressly and repeatedly ordered the prosecution to convey its evidentiary rulings to its witnesses. 1RP 122, 133, 136.

b. The State's witnesses violated the court's unambiguous rulings barring unduly prejudicial evidence. As Woodard feared, when Barnes testified, he violated the court's order and told the jury that Woodard "bragged" that he had sex with the complainant six times before the charged incident on Christmas Eve. 4RP 68. The court ordered the jury to leave the courtroom and expressed frustration with this violation of the motion in limine. 4RP 68. The parties debated the effectiveness of an instruction to the jury and the court agreed that the "bell has been rung." 4RP 72-75. Woodard also moved for a mistrial due to the impossibility of instructing the jury to disregard this type of information, noting that jurors were paying attention and writing in their notes when the witness claimed Woodard had sexually assaulted the complainant on six other occasions. 4RP 72. Woodard noted that the witness was snickering when testifying about this claim. 4RP 72.

The court denied the mistrial and instructed the jury to disregard "the previous question and answer" without referencing

the information specifically and even though some time had passed since the jury heard the “previous” question and answer. 4RP 76.

After Barnes testified, the prosecution called a second witness from the jail, who was also in prison now for other offenses. In direct examination, Jonathan Neff claimed that Woodard said he was “smoking crack,” right before the incident. 4RP 78. The defense moved for a mistrial after this comment, explaining that he did not object during the witness’s testimony so he would not call undue attention to this prejudicial allegation. 4RP 86.

The court agreed that these two prosecution witnesses had violated its pretrial rulings, and it had reviewed the record to be certain of the scope of its rulings. 4RP 85. The court denied the mistrial motion. The court offered to tell the jury to disregard the evidence about drug use but Woodard decided that any further instructions from the court on the matter would only repeat the witness’s testimony and would not cure the error. 4RP 85-86.

c. The witnesses’ injection of highly prejudicial allegations regarding uncharged bad acts denied Woodard a fair trial. The prosecution called several witnesses even though it knew they would be reluctant to abide by the court’s rulings barring certain allegations from being placed before the jury. 1RP 133. As

Woodard feared, these witnesses violated the court's pretrial rulings. Even the court agreed the bell had been rung and further instruction might not unring that bell.

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002). This Court must assess whether the error was harmless by looking at the weight reasonably accorded this evidence, thus measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. Id.

Before trial, the court cautioned the prosecution against using highly inflammatory allegations without probative value against Woodard and told the State to make clear to its witnesses that no such information should be volunteered. 1RP 133-37. The State's witnesses disregarded this court order, and the trial judge agreed with Woodard that the witnesses had violated the terms of the court's pretrial rulings. 4RP 85.

Woodard saw the jurors taking notes and paying close attention when Barnes testified that Woodard bragged about having sex with the complainant on numerous occasions. 4RP 72. Immediately after Barnes inserted the highly inflammatory

claim about uncharged sexual assaults, Neff claimed Woodard had been smoking crack right before the incident as a further effort to paint Woodard as a dangerous person with criminal propensity. 4RP 68, 78. No instruction could erase these allegations from the forefront of the jury's thoughts.

The evidence against Woodard was not overwhelming. Although the complainant testified about a sexual assault, Woodard denied her claims consistently to police and at trial. Despite extensive forensic tests, the State only found Woodard's DNA on a sweatshirt that belonged to him. Furthermore, the complainant came from a troubled background, with her *de facto* father in jail or prison on several occasions and her mother living in a shelter. 2ARP 76-77; 2BRP 49-50; 3RP 24-26. She clearly preferred to spend her time with a girlfriend and the girlfriend's child than with her own family. 2BRP 43, 47; 3RP 29. She could have been motivated to concoct or exaggerate the allegations against Woodard based on her own desire to escape from an apparently difficult homelife. In light of the highly prejudicial nature of the uncharged allegations against Woodard, the witnesses' blatant and intentional violation of the court's pretrial orders denied Woodard a fair trial by jury.

5. THE COURT IMPERMISSIBLY  
COMMUNICATED WITH THE  
DELIBERATING JURY WITHOUT  
CONSULTING WOODARD OR COUNSEL

a. The trial court may not confer information to the deliberating jury and must consult with counsel when the jury has a substantive question. The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); U.S. Const. amends. 5, 6, 14<sup>7</sup>; Wash. Const. Art. I, § 22<sup>8</sup>; CrR 3.4 (a). A trial court commits error when it communicates with the jury without notice to the defendant or counsel. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). CrR 6.15(f)(1) provides:

After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

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<sup>7</sup> The Fifth and Fourteenth Amendments protect the right to “due process of law,” while the Sixth Amendment protects the right to “a speedy and public trial” with the assistance of counsel and right to confront witnesses.

<sup>8</sup> “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .”

There are some simple scheduling matters or pure legal discussions to which a defendant cannot meaningfully contribute and for which his presence is not constitutionally required. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (conference on pretrial legal matter need not include defendant if no disputed facts involved). But aside from basic housekeeping details or technical legal questions, the defendant has the right to be present when a legal matter raises issues for which there are disputed facts or the defendant could potentially play a role in shaping the outcome. For example, the court in Lord agreed that a defendant has a right to be present during a hearing on the admissibility of a prior conviction. Id. (citing People v. Dokes, 595 N.E.2d 836, 839 (N.Y. 1992)). In Dokes, the court found that one key factor in assessing the right to be present is whether the proceedings involve factual matters “about which defendant might have peculiar knowledge that would be useful in advancing the defendant’s or countering the [prosecution’s] position.” Id.

b. The trial court answered the jury’s question without obtaining counsel’s input and in Woodard’s absence. The deliberating jury asked the court about the meaning of sexual

contact in Instruction 13. CP 52. The jury asked “Does this [definition of sexual contact] include bare and/or covered breast?” CP 52.

The jury submitted its question to the court at 4:10 p.m., and the court responded three minutes later. CP 52. The court told the jury “reread all your instructions.” CP 52.

The court supplied this response to the jury’s question without consulting with Woodard himself, his attorney, or the prosecution. There is no mention in the otherwise-detailed clerk’s minutes of the presence of counsel or Woodard during this exchange. Supp. CP \_\_, sub. no. 67.

c. The court was required to protect Woodard’s right to counsel and to personally participate in the case. The record does not demonstrate the court protected or respected Woodard’s right to be present and consult with counsel regarding the jury inquiry.

On occasion, courts have found a defendant need not be present during technical legal discussions or simply procedural matters such as scheduling. Lord, 123 Wn.2d at 306. But this jury inquiry was not administrative or purely legal because it related to

the facts of the case and the acts underlying the charge of child molestation.

As discussed above, the jury was not instructed that its verdict for second degree child molestation must be based on unanimous agreement as to a single or separate act from that underlying count two. The prosecution presented several acts that could constitute sexual contact. Had the attorneys and Woodard been consulted on this note from the jury, they would have seen that the jury was examining whether the touching of the breast should be considered as a predicate act for child molestation and could have given appropriate unanimity and separate and distinct instructions to the jury. Having failed to inform anyone of the inquiry, the court permitted the jury's verdict to violate double jeopardy.

d. The trial court's failure to include Woodard in its response to the jury inquiries requires reversal under the State and Federal Constitutions. The federal constitutional right to be present is culled from the rights to due process of law and to confront one's accusers, and if there is a violation of the right to be present, "the burden is on the prosecution to prove that the error was harmless beyond a reasonable doubt." United States v. Marks, 530 F.3d

759, 812 (9<sup>th</sup> Cir. 2008); State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). But the Washington Constitution expressly declares a right to be present and thus more strictly requires the State to enforce this fundamental right. State v. Ahren, 64 Wn.App. 731, 735 n.4, 826 P.2d 1086 (1992).

The court's improper communication with the deliberating jury exacerbated the jury's failure to properly reach unanimous verdicts resting on separate and distinct acts, and therefore, cannot be harmless.

6. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATED WOODARD'S RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE ONE, SECTION TWELVE OF THE WASHINGTON CONSTITUTION.

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. State v. Smith, 150 Wn.2d 135, 143,

75 P.3d 934 (2003), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, 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 a prior-conviction-as-aggravator and a 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.

First, in addressing arguments that one act is an element and another merely a sentencing fact the 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 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006) (Recuenco II). Beyond its failure to abide the logic of Apprendi, the distinction Roswell draws does not accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

In Roswell the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,<sup>9</sup> proof of a prior conviction functions as an “elevating element,” i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum

possible penalty from one year to five. See RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to Blakely, the “maximum punishment” is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. In all other circumstance “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3<sup>10</sup> would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See Washington Sentencing Guidelines Comm’n, Adult Sentencing Manual 2008, III-76. The “elevation” in punishment on which Roswell pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the “elements” of the substantive crime remain the

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<sup>9</sup> 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 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

<sup>10</sup> Because the offense is elevated to a felony based upon a conviction of prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have score lower than 3.

same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 10 years to life without the possibility of parole.

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”). But there is no rational basis for classifying the punishment for recidivist criminals as an ‘element’ in certain circumstances and an ‘aggravator’ in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Division One concluded that there is no equal protection violation where the Legislature elects to classify the fact of a prior conviction as an element of certain offenses but as merely a sentencing factor for purposes of the POAA. State v. Langstead, 155 Wn.App. 448, 228 P.3d 799 (2010) (petition for review filed June 28, 2010). The decision distinguished Roswell, on the grounds that the substantive crime in that case was a

misdemeanor which was elevated to a felony by the fact of the prior conviction whereas Mr. Langstead's substantive crime was a felony in and of itself. Id. at 456.

This distinction is inapt. There is no constitutionally meaningful distinction that flows from labeling a person a felon as opposed to a misdemeanant. Rather, the equal protection analysis is properly focused on the difference in punishment. There is no rational basis to afford offenders such as Woodard less due process than offenders such as Roswell.

In Langstead, the court distinguished persons convicted of unlawful possession of a firearm in the first degree from persons sentenced as a persistent offender, on the grounds that possession of a firearm is unlawful only where there is a prior conviction. Id. However, this distinction is inconsistent with to the ultimate conclusion that "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or similar offense." Id. at 456-57. A person convicted of unlawful possession of a firearm in the first degree must necessarily have a prior felony conviction. See RCW 9.41.040(1). Therefore, an offender convicted for

unlawful possession of a firearm in the first degree necessarily engaged in prior conduct that was “inherently culpable enough to incur a felony sanction.” Yet that offender is entitled to have the prior conviction proven to a jury beyond a reasonable doubt.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); 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 affects 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 where an equal protection challenge is raised, the court will apply a “rational basis” test. 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 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the POAA 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 772.

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 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 circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person's only felony and thus results in a "maximum sentence of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. Roswell concluded the recidivist fact in that case 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." (Italics in original.) 165 Wn.2d at 192. 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 prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject. Id. So

too, first degree rape is a crime whether one has prior convictions for most serious sex offenses or not.

The recidivist fact here operates in the precise 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 Woodard’s persistent offender sentence and remand for entry of a standard range sentence.

7. THE COURT’S FAILURE TO ENTER  
MANDATORY FINDINGS OF FACT  
FOLLOWING THE SUPPRESSION  
HEARINGS PRECLUDES MEANINGFUL  
APPELLATE REVIEW

a. Written findings are a mandatory and essential part of appellate review. When the court conducts a hearing on the admissibility of pretrial statements, it is required to file written findings explaining the factual findings and legal conclusions that form the basis for its decision. CrR 3.5.<sup>11</sup> The rule is mandatory. See e.g., State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) (the

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<sup>11</sup> CrR 3.5(b) provides:  
Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

word “shall” in a statute is presumptively imperative and creates a duty); RAP 1.2(b) (when a word indicating “must” rather than “should” is used, the rule emphasizes that failure to perform act in timely way involves severe sanctions).

The purpose of written findings is not merely to assist, but to enable an appellate court’s review of questions presented on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). A court’s oral ruling is “no more than [an] oral expression[ ] of the court’s informal opinion at the time rendered.” Head, 136 Wn.2d at 622. The oral opinion has no binding effect unless expressly incorporated into a final written judgment. Id. at 622.

When facts are not included in the written findings, the reviewing court presumes the omission means missing facts were not adequately proven. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The “lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof.” In re Welfare of A.B., \_ Wn.2d \_, 232 P.3d 1104, 1114 (2010).

Here, the court issued only a preliminary oral ruling following the CrR 3.5 hearing, and promised to conduct additional research

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to determine whether Woodard had invoked his right to counsel before the police detective resumed questioning him. 1RP 195-99. The court noted that its oral ruling was “conditional” on further research. 1RP 198. The court never again mentioned the result of its research and made no further oral findings.

Additionally, the court re-opened the CrR 3.5 hearing in regards to another statement by Woodard in the middle of the trial. 3RP 82. This “re-opening” occurred over Woodard’s objection. 3RP 72. Woodard argued that no additional information could be allowed because the State was required to identify the statements it wished to introduce before trial under CrR 3.5. Following this additional, mid-trial, CrR 3.5 hearing, the court ruled that Woodard’s statement was voluntary and admissible without making specific or detailed findings. 3RP 88.

b. The failure to file findings of fact requires reversal.

When the lack of written findings prejudices the defendant’s right to appeal, reversal is the proper remedy. Head, 136 Wn.2d at 624; see State v. Dahl, 139 Wn.2d 678, 692-93, 990 P.2d 396 (1999) (Alexander J., dissenting) (grounds for finding prejudice include reliance on inadmissible evidence and lengthy delay in proceedings); State v. Witherspoon, 60 Wn.App. 569, 572, 805

P.2d 248 (1991) (late findings violate appearance of fairness and require reversal where remand is inadequate remedy based on lengthy delay and defendant's continued custody).

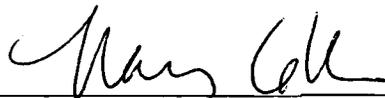
The court never issued full, complete, or formal findings orally or in writing, despite the mandatory nature of such findings under CrR 3.5. Woodard filed his notice of appeal months ago, but the court has not entered written findings of fact and conclusions of law. The court's failure to enter these mandatory findings impairs his ability to appeal his convictions and impedes his exercise of his constitutional right to appeal in all cases. Wash. Const. art. I, section 22.

E. CONCLUSION.

For the reasons stated above, Mr. Woodard respectfully asks this Court to reverse his convictions due to double jeopardy violations, flawed unanimity instructions, and taint from unduly prejudicial accusations about uncharged acts. Additionally, his sentence must be reversed based on the denial of equal protection of the laws and fundamental fairness.

DATED this <sup>29<sup>th</sup></sup> day of July 2010.

Respectfully submitted,



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Washington Appellate Project (91052)  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 40293-9-II
v.	)	
	)	
GEORGE WOODARD,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> LIAM GOLDEN, DPA	<input checked="" type="checkbox"/>	U.S. MAIL
LORI SMITH, DPA	<input type="checkbox"/>	HAND DELIVERY
LEWIS COUNTY PROSECUTING ATTORNEY	<input type="checkbox"/>	_____
345 W MAIN ST FL 2		
CHEHALIS, WA 98532		

<input checked="" type="checkbox"/> GEORGE WOODARD	<input checked="" type="checkbox"/>	U.S. MAIL
C/O SARAH WOODARD	<input type="checkbox"/>	HAND DELIVERY
15 MURRAY PL RD #13	<input type="checkbox"/>	_____
ELMA, WA 98541		

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF JULY, 2010.

X \_\_\_\_\_ 

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COURT OF APPEALS  
DIVISION ONE  
JUL 29 2010 4:11:54  
BY \_\_\_\_\_

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