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NO. 57941-8+

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent/Cross-Appellant

v.

TERRANCE J. IRBY,
Appellant/Cross-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

**RESPONDENT'S BRIEF AND
OPENING BRIEF ON CROSS-APPEAL**

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I. SUMMARY OF ARGUMENT

The defendant, Terrance Irby, was convicted by a jury of Aggravated First Degree Murder and Burglary in the First Degree for the bludgeoning death of James Rock.

Prior to jury selection, the trial court sent an e-mail to both counsel regarding excusing some of the jurors. The defense did not oppose excusing the jurors. Irby claims the e-mail exchange violated his right to public trial and to be present at all stages of the proceedings. Because there was no courtroom closure and these were legal matters for which the defendant was not required to be present, Irby's right to a public trial and be present were not violated.

Irby also claims that some of his prior history should not have been included as most serious offenses due to lack of comparability and a claim that a prior misdemeanor was not sufficiently proven to prevent wash-out. Because Irby's prior conviction for Statutory Rape in the Second Degree is comparable to Rape of a Child in the Second Degree and because there was sufficient evidence of the prior conviction, the trial court properly determined criminal history.

On cross-appeal, the State contends that the trial court erred in choosing not to impose a sentence of life imprisonment on the

Aggravated Murder in the First Degree charge. The trial court chose not to impose a life sentence due to already imposing a life sentence as a persistent offender. RCW 10.95.030 requires the life sentence.

Thus, the conviction should be affirmed and the case should be remanded for the trial court to additionally impose a sentence of life imprisonment as required by RCW 10.95.030.

II. ISSUES PERTAINING TO APPELLANT'S CLAIMS

1. Where there was no courtroom closure and the trial court sent an e-mail to both counsel about excusing some jurors, was the defendant's right to a public trial violated?
2. If the defendant's right to a public trial was violated by the e-mail exchange, is the remedy reversal of the conviction?
3. Where the trial court was addressing a legal issue regarding excusing some of the jurors, was the defendant's right to be present at trial violated by an e-mail exchange with counsel?
4. Is the defendant's prior conviction for Statutory Rape in the Second Degree comparable to the present offense of Rape of Child in the Second Degree?

5. Where there was testimony from a court clerk about the existence of prior convictions based upon computer records, was the defendant's prior misdemeanor conviction sufficiently established?

III. CROSS-APPELLANT'S ASSIGNMENT OF ERROR

Because the trial court chose to impose a persistent offender sentence, the trial court erred in failing to additionally impose a life sentence based upon conviction for Aggravated Murder in the First Degree as required by RCW 10.95.030.

IV. ISSUE PERTAINING TO CROSS-APPEAL

Did the trial court improperly fail to impose a life sentence as required by RCW 10.95.030, based upon the conviction of Aggravated Murder in the First Degree?

Should the case be remanded for imposition of the life sentence as required by RCW 10.95.030?

V. STATEMENT OF THE CASE

1. Statement of Procedural History

On April 15, 2005, Terrance Irby was charged with Aggravated Murder and in the alternative, Felony Murder in the First Degree and

seven other crimes alleged to have occurred between March 6, 2005, and March 8, 2005.¹ CP 1-4. Irby was tried on the charges of Aggravated Murder, the alternative Felony Murder in the First Degree and Burglary in the First Degree.²

On January 2, 2007, the case proceeded to jury trial.³ The jury found Irby guilty of the Murder in the First Degree, Felony Murder in the First Degree, and Burglary in the First Degree. CP 1181, 1185, 1188. The jury also found the aggravating circumstances that supported the charge of Aggravated Murder in the First Degree. CP 1182-3. Irby was also found to have been armed with a deadly weapon at the time of the commission of the murder. CP 1187.

¹ The charges initially filed were:

Count 1	Burglary in the Second Degree
Count 2	Aggravated Murder or alternative of Felony Murder in the First Degree
Count 3	Burglary in the First Degree
Count 4	Robbery in the First Degree
Count 5	Unlawful Possession of Firearm in the First Degree
Count 6	Unlawful Possession of Firearm in the First Degree
Count 7	Unlawful Possession of Firearm in the First Degree
Count 8	Attempting to Elude

CP 1-4.

² The other charges were disposed of by various means. The trial court ordered that venue be transferred as to Counts 1 (Burglary in the Second Degree), 6 (Unlawful Possession of a Firearm in the First Degree), and 8 (Attempting to Elude) since those were alleged to have occurred in other counties. CP 1233, 5/5/06 RP 10. The Robbery in the First Degree charge from Count 4 was dismissed on a Knapstad motion. CP 1092. The Unlawful Possession of a Firearm in the First Degree charges in Counts 5 and 7 were severed for trial. CP 1119.

On March 6, 2007, Irby was sentenced. 3/6/07 RP 2-53. The trial court found that Irby had prior convictions which included a Statutory Rape in the Second Degree conviction from 1976 and an Assault in the Second Degree from 1984 as well as misdemeanor convictions that prevented the felonies from washing out. 3/6/07 RP CP 1205-6 (see Appendix B for Findings of Fact and Conclusions of Law and Order on Persistent Offender Sentencing). The trial court found that the prior conviction for Statutory Rape in the Second Degree was comparable to the present offense of Rape of a Child in the Second Degree which is a most serious offense. CP 1207.

Thus, the trial court found that Irby was a persistent offender and sentenced him to life imprisonment upon that basis. CP 1208, 1193, 3/6/07 RP 46-7. The trial court was made aware of the requirement of imposing a life sentence on the first degree murder charge given that the jury had found the aggravating factors of concealing the commission of a crime, concealing the identity of the person committing a crime and in furtherance or flight from Burglary in the First Degree. 3/6/07 RP 44-6, 3/8/07 RP 3-8, CP 1182. The

³ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings are listed in Appendix A attached hereto.

trial court chose not to order a sentence based upon the Aggravated Murder in First Degree because a life sentence without the possibility of parole was being imposed as a persistent offender. 3/6/07 RP 46-7, 3/8/07 RP 8; CP 1207.

On March 8, 2007, Irby timely filed a notice of appeal. CP 1209-17. On March 13, 2007, the State filed a notice of cross appeal of the trial court's decision not to impose a life sentence under RCW 10.95.030. CP ___, (Supplemental Designation of Clerk's Paper's Pending, State's Notice of Cross Appeal, Sub. No. 231, filed March 13, 2007).

2. Summary of Case⁴

James Rock lived on Shangri-La drive in Skagit County. 1/12/07 RP 925. Rock lived in a house in a wooded area along the Skagit River. 1/12/07 RP 925-6.

Rock used a transport service to take him places. 1/22/07 RP 1767. A volunteer transport person called police because they could not contact him and deputies did a welfare check. 1/4/07 RP 17, 1/22/07 RP 1767.

⁴ The State will provide a summary of pertinent facts with appropriate references to the record in each of the argument sections provided below.

On March 11, 2005, in the morning, a deputy from the Skagit County Sheriff's Office arrived at the residence and discovered Mr. Rock's body in the garage. 1/4/07 RP 16, 19, 24. His body was covered with a waterbed mattress. 1/4/07 RP 27. Rock had been beaten in the head with some type of instrument and had his neck cut and stabbed. 1/8/07 RP 182, 1/11/08 RP 585. Blood stains consistent with cast off from an instrument were located around the room including on the walls and concrete floor. 1/5/7 RP 128, 1/8/07 RP 182, 300. Rock had died about a half day to two days before the pathologist observed his body on the day he was discovered. 1/11/07 RP 638.

Rock had a number of guns in his residence. 1/12/07 RP 834, 1/17/07 RP 1157-9. Rock showed the guns and jewelry that he kept at the residence to his neighbors. 1/12/07 RP 834-5.

On March 8, 2005, Terrance Irby stopped by the residence of a friend of Rock. 1/18/07 RP 1422-7. Irby was driving his truck. 1/18/07 RP 1424. Irby's coloring was very red, purple and blue and he was incoherent. 1/18/07 1424-6. Irby arrived around 4:00 p.m. and left about 9:25 in the evening. 1/18/07 RP 1423, 1440.

On March 8, 2005, about 11:00 p.m., Irby was stopped by a Marysville Police officer for traffic infractions. 1/11/07 RP 695-697,

699-700, 707. Irby was acting suspicious and then drove away from the officer and a pursuit began. 1/11/07 RP 707-8.

Irby attempted to get away by driving on the railroad tracks, but ended up abandoning his truck and fleeing on foot. 1/11/07 RP 710-12. Irby was caught a short distance away. 1/11/07 RP 718.

In the truck Irby was driving, officers located guns that had belonged to Mr. Rock. 1/8/07 RP 206-7, 1/11/07 RP 721-23, 1/16/07 RP 1102, 1/17/07 RP 1150-1, 1157-9.

Boots located in the back of Irby's truck had blood stains. 1/12/07 RP 776, 785, 1/16/07 RP 952-3, 981, 986-7. The DNA from those stains also matched Rock's. 1/16/07 RP 992.

VI. ARGUMENT

1. An e-mail exchange between court and counsel regarding dismissing jurors for conflicts did not violate of the right to public trial and the defendant cannot raise that right at this time to obtain reversal of his conviction.

i. Facts pertaining to e-mail exchange

Irby alleges that there was a violation of his right to public trial where there was an e-mail exchange between the trial court and both counsel regarding conflicts of seven jurors. This was not a closure of denying the right to an open trial.

On January 2, 2007, the jury selection began with the jurors completing a questionnaire. 12/27/06 RP 16, 30, CP 1234-6. See Appendix C. That questionnaire included questions about whether the jurors or family had been victims of crime, whether they had feelings regarding murder that would prevent them from being fair and impartial and whether they had any knowledge of the case. CP 1234-6.

After the responses were completed, the judge inquired by e-mail of defense counsel and the prosecutor about whether the parties would agree to excuse ten of the jurors. CP 1279-80. Four jurors had already been approved by the court administrator to limit the period of service to one week, one juror home schooled and another juror had a business hardship. CP 1279-80. The other four jurors had a parent who had been murdered. CP 1280. Defense counsel for Mr. Irby agreed to excuse all of the ten jurors. CP 1279. The State agreed to excuse all of the jurors except three of those who had a parent murdered. CP 1279.

There is no indication in the record below that Irby or his counsel raised an issue as to this procedure of excusing the jurors.

Irby does not cite to any portion of the record for support of this claim.⁵

ii. Law regarding right to public trial⁶

Article I, Section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. W.A. Const. art I, §22. Similarly, Article I, Section 10 provides that “[j]ustice in all cases shall be administered openly....” W.A. Const. art 1 §10. These rights include jury selection, an important part of the criminal trial process. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

A courtroom closure occurs when any member of the public is excluded from the courtroom. See State v. Russell, 141 Wn. App. 733, 172 P.2d 361 (2007) (analyzing case law regarding complete closure, partial closure by exclusion of particular persons and finding a trial court’s order that press not photograph juvenile witnesses

⁵ The transcripts of the jury selection process do not show that there was any motion made by the defense at the time of jury selection or at any point in the trial. 1/3/07 RP 2-190, 1/4/07 RP 193-232. The record also shows that Irby and his counsel were made aware that the questionnaire would be filled out and that his counsel would have a chance to review the responses before jury selection with the entire panel assembled. 12/27/06 RP 16.

⁶ Although the Supreme Court has accepted review of two cases involving the right to a public trial and set oral argument for June 10, 2008, those cases are not factually comparable to the present case. State v. Momah, 141 Wn. App. 705, 171 P.3d 1064, rev. granted ___ Wn.2d ___, 180 P.3d 1291 (2008), State v. Strode, 80849-0 (Ferry County case #05-1-00030-9).

without consent not even akin to a partial closure), see *also* State v. Gregory, 158 Wn.2d 759, 815-6, 147 P.3d 1201 (2006)(courtroom closure excluding one family member during the testimony of defendant's grandmother was a permissible partial closure).

When a party requests closure of the courtroom, the trial court must weigh five factors to balance the competing constitutional interests. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006). To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. Orange, at 806 (*citing* Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The trial court must consider alternatives and balance the competing interests on the record. Orange, at 809-11.

iii. Irby should not be able to raise a claim of closure for the first time on appeal.

RAP 2.5 (a) expresses the "nearly universal rule that an appellate court may refuse to review a claim of error that was not

raised in the trial court.” 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5(a) author’s cmts. at 192 (6th ed. 2004). In part, the rule “arose out of solicitude for the sensibilities of the trial court – that the trial court should be given an opportunity to correct errors and omissions” as they occur. Id. The more substantive rationale, however, recognizes that “the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.” Id. In essence, RAP 2.5(a) is “designed to eliminate the time and expense of unnecessary appeals by encouraging the resolution of issues at the trial court level—a policy that benefits the parties and the appellate courts alike.” Id.

RAP 2.5 (a)(3) creates an exception to the rule that a party must object to error in the trial court, but review is appropriate only as to “manifest error affecting a constitutional right.” State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on “knowledge” was not manifest error); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992) (failure to establish unavailability of witness was not manifest error). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can

identify a constitutional issue not raised before the trial court. Scott, 110 Wn.2d at 688.

Issues raised for the first time on appeal are frequently more difficult to analyze because the facts were never developed below. In State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007), for example, this Court refused to consider the constitutionality of a search where the claim was not raised in the trial court. The Court explained that it was impossible to assess the record when no factual record was developed. Kirkpatrick, 160 Wn.2d at 879-81. Likewise, in State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), this Court held that to fall within the RAP 2.5 (a)(3) exception, “[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” Kirkman, 159 Wn.2d at 926-27 (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Although this Court has permitted public trial claims to be raised for the first time on appeal, in each case the error was clearly “manifest.” In State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), the trial court summarily granted the State's request to clear the courtroom for pretrial testimony of an undercover detective.

Bone-Club, at 256-57. In State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), the trial court sua sponte ordered that the courtroom be closed for the entire 2½ days of voir dire, excluding the defendant's family and friends. Brightman, 155 Wn.2d at 511. Likewise, in In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from all voir dire proceedings. And, in State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions. Easterling, 157 Wn.2d at 172-73.

In each of these cases, the constitutional violation was clear; it was "manifest." Thus, none of these cases precludes application of RAP 2.5 (a) to this case, where Irby never objected and where the alleged error is not manifest because it is unclear whether a right to public trial was violated and Irby was not prejudiced.

Nor do this Court's decisions establish that *all* violations of the right to public trial are "manifest" error. In Bone-Club, this Court cited State v. Marsh, 126 Wash. 142, 217 P. 705 (1923), for the proposition that Bone-Club's failure to object did not waive his public trial claim. Marsh does not, however, always preclude waiver of the public trial issue; Marsh should be limited to its facts, which involved the total

deprivation of public trial rights, not a partial closure of some aspect of the case.

In Marsh, an adult was illegally tried in juvenile court and private juvenile proceedings were expressly permitted by statute. Marsh, at 144. Although Marsh was an adult, not a juvenile, the trial court withheld a jury and a lawyer, and the entire trial was held in the judge's chambers without a court reporter. Marsh in no way benefited from this trial devoid of constitutional protections. This Court reversed Marsh's conviction, holding that "there is not, nor can there be, any custom of the court for the trial of criminal cases in private." Marsh, at 145. The Court expressly distinguished, however, cases involving more limited closures:

...[A]nd in our opinion this is not a case calling for a decision upon the important question of whether or not under our Constitution there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion of it during the trial of a criminal case, and, if so, to what extent and under what circumstances it may be done.

Id. at 145. The Court noted that a constitutional violation "**may** be reviewed on appeal, although no exception or objection was interposed at the time." Id. at 146 (citing State v. Crotts, 22 Wash. 245, 60 P. 403 (1900)) (emphasis added). The complete deprivation of Marsh's rights to trial, including the right to a public trial, certainly

constituted manifest constitutional error, and could be reviewed absent objection below. Thus, Marsh simply applies the long-standing rule that an appellate court may exercise its discretion to review *manifest* constitutional errors for the first time on appeal. RAP 2.5 (a).⁷

Moreover, Marsh was distinguished four years after it was decided, in a true public trial case. State v. Gaines, 144 Wash. 446, 258 P. 508 (1927). The court in Gaines distinguished Marsh as follows:

The case of State v. Marsh, bears no relation to this case upon the facts. There the defendant was charged with contributing to the delinquency of a minor and was tried without a jury in private as are juvenile delinquents. *The question as to whether there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion of it during the trial of a criminal case, and if so to what extent and under what circumstances it may be done, was not there involved.*

⁷ State v. Crotts, 22 Wash. 245, 60 P. 403 (1900), does not compel a different conclusion. In Crotts, this Court entertained for the first time on appeal an argument that the trial court had commented on the evidence. Review was proper because requiring an objection "would destroy the very object for which the objection is ordinarily made." In other words, it would be unfair to require trial counsel to object when the trial judge is commenting on the evidence because the objection would simply highlight the court's inappropriate comments and bring the lawyer into conflict with the judge in front of the jury concerning a factual matter. Such concerns are not present with regard to the right to a public trial.

Gaines, at 463-64 (italics added). The holding in Gaines suggests that Marsh simply states the usual rule -- that manifest error may be raised for the first time on appeal -- rather than the broader rule that any public trial claim may be raised for the first time on appeal.

Additionally, this Court has held that a defendant who fails to object to partial closure of the courtroom waives any claim that the trial court violated the state constitution. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door due to overcrowding. The defendant did not object, but raised the issue on appeal. This Court held:

Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)

Collins, at 748. In-chambers questioning of jurors is more like the highly discretionary decision in Collins, where failure to object was a bar to consideration of the issue on appeal. Thus, Marsh and Bone-Club simply illustrate that a violation of the right to public trial *can* be manifest error, not that any such violation *is always* manifest error.

The United States Supreme Court and a majority of jurisdictions prohibit defendants from raising the public trial claim for the first time on appeal. See Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) (citing Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960)). See also, e.g., Wright v. State, 340 So.2d 74, 79-80 (Ala.1976); People v. Bradford, 14 Cal.4th 1005, 60 Cal.Rptr.2d 225, 929 P.2d 544, 570 (1997); Commonwealth v. Wells, 360 Mass. 846, 274 N.E.2d 452, 453 (1971); People v. Marathon, 97 A.D.2d 650, 469 N.Y.S.2d 178, 179 (N.Y.App.Div.1983); Dixon v. State, 191 So.2d 94, 96 (Fla. 2d DCA 1966); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989).

Finally, it should be noted that at trial Irby was represented by both Mr. Jon Ostlund, the former head of the Whatcom County Public Defender's Office, and Mr. Keith Tyne, the present head of Skagit County Public Defender's office who are both experienced, respected criminal law practitioners. Counsel vigorously defended Irby and challenged many rulings, evidence, and conduct by the trial court or prosecutor that might have affected their client's right to a fair trial. Yet, no objection was made at all to the trial court's proposal by e-mail of excusal of a few jurors.

- iv. **The e-mail exchange between the trial court and counsel was equivalent to a side-bar conference and not a violation of the public's right to a public trial.**

The e-mail exchange between the trial court and both counsel regarding excusing potential jurors was akin to a sidebar conference. Such a sidebar conference does not result in a violation of the right to a public trial.

In every courtroom closure case decided in Washington, the appellate court has reversed only upon a showing that the trial court actually issued an order closing the courtroom, or where it was clear that people were in fact excluded from the proceedings. Marsh, 126 Wash. at 142-43; Collins, 50 Wn.2d at 745-46; Bone-Club, 128 Wn.2d at 256-57; Orange, 152 Wn.2d at 801-03; Brightman, 155 Wn.2d at 511; Easterling, 157 Wn.2d at 171-73.

The record here shows that the trial court did not enter any order closing the proceedings and that neither Irby's counsel nor the State objected suggesting that the manner of excusing the jurors was not an issue regarding the right to public trial.

In State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), the trial court had barred the public from the courtroom to deal confidentially with one juror's complaint regarding the lack of personal

hygiene of another juror. The defendant did not object to the closed hearing and the trial court did not balance interests before conducting the closed hearing. The Court of Appeals cited to Waller v. Georgia, and Ayala v. Speckard, 131 F.3d 62, 69 (2nd Cir. 1997) for the proposition that the public's right to an open court applied to "adversary proceedings." The Court in Rivera went on to analyze that the issue of juror hygiene was a ministerial matter and did not implicate the right to trial.

This was a ministerial matter, not an adversarial proceeding. It did not involve any consideration of evidence, or any issue related to the trial. The hearing was akin to a chambers hearing or bench conference, and not part of a trial. Opening such conferences to the public would not further the aims of the public trial guarantee.

State v. Rivera, 108 Wn. App. at 653. The Court went on to cite to State v. Bremer, 98 Wn. App. 832, 991 P.2d 118 (2000) for the proposition that the defendant does not have the right to be present during a chamber hearing or bench conference. Thus, since the defendant does not have the right to be present there can be no violation of the constitutional right to have the public present. State v. Rivera, 108 Wn. App. at 653.

Similarly here, the issue of excusing some of the jurors by agreement, for cause or due to pre-arrangement regarding length of

service as a juror is a ministerial matter and the defendant has no right to be present as indicated in State v. Rivera and explained further below. Thus, even if this Court permits Irby to raise the issue at this point, Irby's right to a public trial was not violated by the question submitted to counsel for both parties by the e-mail sent by the judge.

2. The e-mail by the trial court to both counsel was a permissible disposition of ministerial tasks regarding jury selection and the defendant's presence was not required.

i. Facts pertaining to e-mail exchange

The facts in the preceding section regarding the right to public trial contain the pertinent facts regarding the e-mail sent by the trial court to both counsel. It should be noted additionally, that the first e-mail sent by the trial court occurred at 1:02 p.m. on January 2, 2007. CP 1280 (see Appendix D). Counsel for Mr. Irby responded by agreeing to the release of the certain jurors at 1:53 p.m. that same day. The prosecutor responded at 1:59 p.m.. And the judge sent the final e-mail at 2:01 p.m.. CP 1280. There is no indication that the defendant was not available to be consulted by his counsel prior to the decision by the defense.

ii. **Law regarding defendant's right to be present**

Washington court rules provide some assistance about when a defendant's presence is required.

CrR 3.4. Presence of the Defendant

(a) When Necessary.

The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

A defendant's right to be present does not necessarily extend to all proceedings in a particular case.

The core of the constitutional right to be present is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). **Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....'"** Gagnon, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), *cert. denied*, 409 U.S. 857, 93 S.Ct. 140, 34 L.Ed.2d 102 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

In Re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (emphasis added), see also, State v. White, 74 Wn.2d 386, 444 P.2d 661 (1968) (passing out of jury orientation handbook did not amount a stage in the proceedings at which the defendant's presence is required). In Lord, the defendant was not present during numerous sidebar conferences and in-chambers hearings. The court found that Lord's presence at those proceedings was not required. In Re Personal Restraint of Lord, 123 Wn.2d at 306.

In In Re Personal Restraint of Pirtle, the Supreme Court characterized the issue of the defendant's right to be present at in chambers conferences to be "controlled by well settled law." In Re Personal Restraint of Pirtle, 136 Wn.2d 467, 483, 965 P.2d 593 (1998). The Supreme Court went on to explain that all the hearings save one did not require Pirtle's presence. The one hearing at which Pirtle's presence was required was at a hearing regarding juror misconduct. Pirtle was present at conference where the issue was subsequently addressed on the record and thus, his constitutional right to be present was not violated. Id.

In State v. Bremer, the defendant raised a claim of violation of his right to be present when proposed jury instructions were being

discussed. The court held that the defendant had no right to be present.

Mr. Bremer contends that he was not allowed to be present when the court, the State and his attorney discussed proposed jury instructions. This was not a hearing at which evidence was being presented. Jury instructions involve resolution of legal issues, not factual issues. State v. Edwards, 92 Wn. App. 156, 164, 961 P.2d 969 (1998) (citing State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981)). In the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings. Because Mr. Bremer was fully represented by counsel at the hearing, he would not have had an opportunity to speak. As such, Mr. Bremer's presence had no relation to the opportunity to defend against the charge of attempted residential burglary. Pursuant to the holding in Lord, Mr. Bremer's absence from the jury instruction hearing was not a violation of his constitutional rights.

State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000). Thus, a defendant does not have a constitutional right to be present at every action taken by the trial court on a case

iii. The e-mail exchange between the trial court and counsel was not a hearing at which the defendant had a right to be present.

The e-mail exchange between the trial court and counsel was not a hearing at which Irby's presence was required. It was not a hearing on the record. It was akin to a sidebar, bench or in-chambers conference at which a judge would discuss excusing some of the

jurors with both counsel. In fact, in the present case there is more documentation about what happened than would normally occur at the sidebar conference. Additionally, the time frame indicated on the e-mail exchange shows that there was a period of fifty minutes between the time that the trial court posed the question to both counsel and the time that the defense counsel indicated that they would agree to excuse the jurors. This was plenty of time for defense counsel to contact Irby to consult him regarding excusing some of the jurors if they chose to do so.⁸

As case law above shows, a defendant is not entitled to be present at every stage of the proceedings. Although the jury selection process was occurring, there was not a courtroom proceeding occurring at the point where the trial court sent the e-mail. The e-mail was about a legal matter and not a factual matter where Irby's presence would have no relation to his opportunity to defend against the charge.

Irby was not required to be present when the issue of excusing some of the jurors was addressed with counsel by e-mail.

⁸ Since the issue was not raised in the trial court, there is no record about whether Irby was consulted or the extent to which Irby was involved in the jury selection process. Irby's claims in this regard are unsupported by the record.

3. Irby's prior conviction for Statutory Rape in the First Degree is sufficiently legally and factually comparable to the present strike offense of Rape of a Child in the Second Degree.

i. Facts pertaining to prior conviction

The trial court held that Irby was subject to persistent offender sentencing in the present case based upon the present conviction for Felony Murder in the First Degree and prior convictions for Assault in the Second Degree from 1984 and Statutory Rape in the Second Degree in Washington from 1976. CP 1207.

On appeal, Irby claims that his prior conviction for Statutory Rape in the Second Degree is not comparable to a present most serious offense of Rape of a Child in the Second Degree.

On October 15, 1976, Irby was found guilty by a jury in Chelan County case number 5029 to the charge of Statutory Rape in the Second Degree. Sentencing Exhibit 8, attached here to as Appendix

E. The information charged Irby as follows:

That the said defendant in the County of Chelan, State of Washington, on or about the 31st day of May, 1976, did then and there willfully, unlawful and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Keri Fogelstrom who was thirteen years of age, contrary to the form of the Statute RCW 9.79.210 in

such cases made and provided, and against the peace and dignity of the State of Washington.

The Information was filed on July 8, 1976, in Chelan County Superior Court. Irby's date of birth is June 10, 1958. CP 1204. Since the case was filed in Superior Court on July 8, 1976, Irby was over age eighteen at the time of filing. At the time, had Irby's case been handled under "Juvenile Court Law," he would have been subject to being found delinquent and made a ward of the State. Former RCW 13.04.010 (1961).

At the time of Irby's offense, Statutory Rape in the Second Degree, was defined as follows:

A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

Former RCW 9.79.210.

The present offense of Rape of a Child in the Second Degree is defined as follows:

A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.076(1). See Appendix F for graphical explanation of age ranges of statutes.

ii. **Law regarding comparability of prior convictions.**

A defendant is subject to a persistent offender sentencing upon either two or three qualifying offenses. RCW 9.94A.030(33) provides:

(33) **"Persistent offender" is an offender who:**
(a)(i) **Has been convicted in this state of any felony considered a most serious offense; and**
(ii) **Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or**

RCW 9.94A.030(33).

In determining whether foreign convictions are comparable to Washington strike offenses, we have devised a two part test for comparability. State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998). In Morley, we determined that for the purposes of determining the comparability of crimes, **the court must first compare the elements of the crimes.** Morley, 134 Wn.2d at 605-06, 952 P.2d 167. In cases in which the elements of the Washington crime and the foreign crime are not substantially similar, we have held that the sentencing court may look at the defendant's conduct, as evidenced by the

indictment or information, to determine if the conduct itself would have violated a comparable Washington statute. Morley, 134 Wn.2d at 606, 952 P.2d 167. However, "[w]hile it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. **Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.**" Id.

In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (emphasis added). Although the Court in Lavery was comparing a foreign conviction, the same comparability analysis would apply to a conviction under a prior Washington statute. RCW 9.94A.030(33)(b)(ii), see State v. Stockwell, 159 Wn.2d 394, 150 P.2d 82 (2007) (applying comparability analysis of prior first degree statutory rape conviction to rape of a child statute), *but see* State v. Ball, 127 Wn. App. 956, 957 n. 1, 113 P.3d 520 (2005) *rev. denied*, 156 Wn.2d 1018, 132 P.3d 734 (2006) (holding that Lavery is inapplicable to defendant's prior convictions because they were Washington State, not foreign, convictions). In determining whether a foreign conviction is comparable to a Washington felony, the court has devised a two-part test for comparability. Lavery, 154 Wn.2d at 255.

First, the sentencing court compares the elements of the out-of-state offense with the elements of the apparently comparable Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are comparable as a matter of law, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score for the present crime. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). If the legal comparability does not resolve the issue, the ability to do factual comparability still remains.

I. Legal Comparability.

To determine if a foreign crime is comparable to a Washington offense, the sentencing court must first look to the elements of the crime. Morley, 134 Wn.2d at 605-06, 952 P.2d 167. More specifically, the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. Id. at 606, 952 P.2d 167. **If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense. Id.**

In re Personal Restraint of Lavery, 154 Wn.2d at 255 (emphasis added).⁹

II. Factual Comparability.

In In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005), the court limited but did not eliminate the factual comparability test.

Any attempt to examine the underlying facts of a foreign conviction, **facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.** Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable

In re Personal Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005) (emphasis added). It specifically limited the analysis to facts that were either admitted or stipulated as part of the prior conviction. The Court goes on to state:

Furthermore, Lavery neither admitted nor stipulated to facts which established specific intent in the federal prosecution, and specific intent was not proved beyond a reasonable doubt in the 1991 federal robbery conviction. We conclude

⁹ The Court in State v. Stockwell, 159 Wn.2d 394, 150 P.2d 82 (2007) applied legal comparability to find that the offense of the non-marriage element of a prior offense of first degree statutory rape was an implied element of statutory element making it legally comparable to first degree rape of a child. State v. Stockwell, 159 Wn.2d at 399-400. The court also noted that the legislature had added a comparability clause after the courts had declined to infer one and thus determined that the legislature intended the comparability to apply in that case. Id.

that Lavery's 1991 foreign robbery conviction is neither factually nor legally comparable to Washington's second degree robbery and therefore not a strike under the POAA.

In re Personal Restraint of Lavery, 154 Wn.2d at 258. Division II summarized this analysis following Lavery.

Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment or information, Morley, 134 Wn.2d at 606, 952 P.2d 167, or the records of the foreign conviction, Lavery, 154 Wn.2d at 255, 111 P.3d 837, would have violated the comparable Washington statute. The underlying facts in the foreign record must be admitted, stipulated to, or proven beyond a reasonable doubt.

State v. Farnsworth, 133 Wn. App. 1, 18, 130 P.2d 389 (2006).

iii. Irby's 1976 conviction for Statutory Rape in the Second Degree is comparable to Rape of a Child in the Second Degree.

Comparing the former Statutory Rape in the Second Degree statute, RCW 9.76.201, to the present Rape of a Child in the Second Degree statute, RCW 9A.44.076, reveals that they are very similar. The only differences are that under Statutory Rape in the Second Degree the victim had to be under the age of fourteen and over age eleven, while under Rape of a Child in the Second Degree the victim had to be under age 14 but over age twelve. Additionally, the Statutory Rape in the Second Degree required the defendant to be at least sixteen whereas the present Rape of a Child in the Second

Degree requires the perpetrator to be more than thirty-six months older than the victim.

These are statutory differences. However, the differences are not the only issue. If those differences mean that the prior conviction is a subset of the present statutory definition, then a defendant's prior history counts. The present charge of Rape of a Child in the Second Degree has a more restrictive age range for the age of the victim. Rape of a Child in the Second Degree has an age range of twelve to fourteen years of age. Statutory Rape in the Second Degree required the age range of the victim to be eleven to fourteen. Thus even though the range is less, the present Rape of a Child in the Second Degree addresses less egregious conduct because the age range at the lower end is higher than for Statutory Rape in the Second Degree.

The other difference is that the Rape of a Child in the Second Degree carries an age range of the perpetrator based upon the age of the victim of thirty-six months older than the victim. The Statutory Rape in the Second Degree statute address this issue by addressing the age of the suspect to be a flat sixteen years of age, which can result in range of ages where the victim is perpetrator is twenty-four months older than the victim.

Although there are these statutory differences in elements on their face, that is not the end of the inquiry. Factual comparability analysis is still available and in this case shows that Irby's prior conviction was comparable.

In the present case, there was no guilty plea in Irby's prior conviction for Statutory Rape in the Second Degree. Thus, the only documents pertinent to addressing the claim are the information and the jury verdict. The information alleges that the victim was age thirteen and thus, this was a fact that was charged and proven to the jury.

This establishes that the victim's age in the Statutory Rape in the Second Degree conviction was within the range of the present offense of Rape of a Child in the Second Degree.

Thus, the only issue remaining is the age of Irby relative to the age of the victim at the time of the offense. The information charged Irby with committing the prior offense on May 31, 1976. Irby was charged in Superior Court on July 8, 1976. Irby would not have been able to be charged in Superior Court had he not been over age

eighteen at the time.¹⁰ Had he been under age eighteen, his case would have been handled under "Juvenile Court Law." Former RCW 13.04.010 (1961). Instead, Irby was charged, tried and convicted in Superior Court and sentenced as an adult.

Since he was at least age eighteen when the case was filed, he was also at least age seventeen when the offense occurred just under a month and a half before it was filed. Thus, this Court can be certain that Irby was over age seventeen when the offense occurred. Thus, factually Irby's conviction for the Statutory Rape in the Second Degree was conduct that falls squarely within the present charge of Rape of a Child in the Second Degree. See Appendix F.

4. The State sufficiently proved Irby's misdemeanor convictions thus preventing wash-out of Irby's prior most serious offense.

Irby claims that his prior conviction for Assault in the Second Degree should be considered to be washed out. Prior convictions, including most serious offenses, may wash out. RCW 9.94A.525, RCW 9.94A.030(33)(a)(ii). Assault in the Second Degree is a class B felony. RCW 9A.36.021 (former RCW 9A.36.020). The offense free

¹⁰ Irby's date of birth is June 10, 1958. CP 1204. He turned eighteen on June 10, 1976.

period that permits wash out of a class B felony is ten years. RCW 9.94A.525(2)(b).

Since Irby was sentenced on the Assault in the Second Degree charge on November 13, 1984, the potential wash out period begins on that date. The State did present evidence of subsequent misdemeanor convictions that prevents the prior conviction from washing out.

i. Facts pertaining to misdemeanor convictions

The defendant had six prior misdemeanor convictions from Skagit County District Court under the name Terrance John Irby with a date of birth of June 10, 1958. 3/6/07 RP 7, 11.

The State called Deannie Nelson, a record custodian at the Skagit County District Court to testify as to the records maintained there. 3/6/07 RP 5. Nelson testified that some records from the Skagit County District Court pertaining to Irby were destroyed after a period of five years based upon a policy established by the administrator of the courts. 3/6/07 RP 6. Thereafter, the court docket is the record that is retained evidencing the existence of the conviction. 3/6/07 RP 6.

The records established that Irby had a conviction for Driving While License Suspended in the Third Degree with a date of violation

of May 26, 1994. Sentencing Exhibit 1. Irby had a conviction for Driving While License Suspended in the Third Degree with a date of violation of August 24, 1994. Sentencing Exhibit 2. Irby had a conviction for Driving While License Suspended in the Third Degree with a date of violation of April 8, 1996. Sentencing Exhibit 3. For these three exhibits the State admitted court certified copies of the docket from Skagit County District Court.

Guilty plea forms, judgment and sentence forms, and citations were available for Irby's other more recent convictions. Irby had a conviction for DUI and Reckless Driving from December 18, 2003. Sentencing Exhibits 4 and 7. Irby also had a conviction for violation of a protection order from December 26, 2003. Sentencing Exhibits 5 and 6.

Irby did not contest the accuracy of the testimony of the court clerk regarding the prior convictions. 3/6/07 RP 16.

Irby did not present any testimony or evidence that contradicted the records indicating the existence of the misdemeanor criminal history.

ii. Law regarding proving criminal history

The State must prove the existence of prior convictions by a preponderance of the evidence. RCW 9.94A.500(1). Although a

court certified copy of a judgment and sentence is the best evidence of proof of a prior conviction, it is not the only means of proof.

The best evidence of a prior conviction is a certified copy of the judgment. Cabrera, 73 Wn. App. at 168, 868 P.2d 179. However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history. Cabrera, 73 Wn. App. at 168, 868 P.2d 179; see also Morley, 134 Wn.2d at 606, 952 P.2d 167 (court may look at foreign indictment and information to determine whether underlying conduct satisfies elements of Washington offense). *But see* Morley, 134 Wn.2d at 606, 952 P.2d 167 (facts and allegations contained in record of prior proceedings, if not directly related to the elements of the charged offense, may be insufficiently proved and unreliable).

The above underscores the nature of the State's burden under the SRA. It is not overly difficult to meet. The State must introduce evidence of some kind to support the alleged criminal history, including the classification of out-of-state convictions.

State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

The state may introduce other comparable evidence only if it is shown that the writing is unavailable for some reason other than the serious fault of the proponent. State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979).

State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

- iii. **Where the State established that the records of the defendant's prior convictions had not been destroyed in bad faith, the trial court properly admitted and considered the testimony and certified copies of the court docket establishing the defendant's prior convictions.**

Ford and Lopez provide the general rule of application of the best evidence for proof of prior convictions. The best evidence rule is defined in the State of Washington by Article 10 of the rules of evidence. ER 1001-1008. Although these rules provide that the best evidence is preferred, they do provide guidance as to when other types of evidence are admissible.

ER 1002 provides the general rule that in the proof of the content of a writing, recording or photograph the original is required, subject to the remainder of the rules. ER 1003 provides that duplicates are admissible unless there is a genuine issue as to the authenticity of the original or it would be unfair to admit a duplicate. ER 1004 provides that in certain circumstances the proof by other means than the original is permissible.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(a) Original Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or ...

ER 1004 (relevant excerpt). In the context of ER 1004, the term bad faith is taken to mean destruction with fraudulent intent. 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice ER 1004

(§1004.3 pg 289) (5th ed. 2007). ER 1004 is substantially the same as the corresponding federal rule. In applying the federal evidence rule federal courts have ruled that bad faith does not exist where a transcript of a recording was made but the tapes of the recording were reused or discarded. Wright v. Farmers Co-Op of Arkansas and Oklahoma, 681 F.2d 549, 553 (1982). Thus, the admission of the transcript was within the discretion of the court. The State believes that the bad faith analysis for destruction of potentially exculpatory evidence would be analogous.

The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed.

Arizona v. Youngblood, 488 U.S. 51, 56-7 n.*, 109 S.Ct. 333, 336-7 n.*, 102 L.Ed.2d 281 (1988). In addition, compliance with established retention policy regarding evidence at issue is determinative of good faith. State v. Wittenbarger, 124 Wn.2d 467, 477-8, 980 P.2d 517 (1994), *citing* State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992).

ER 1005 provides the means by which a certified copy may be used.

RULE 1005. PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. **If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.**

ER 1005 (emphasis added).

The records and testimony presented at Irby's sentencing hearing establish that the records from the Skagit County District Court were destroyed after a period of five years based upon a policy established by the administrator of the courts. 3/6/07 RP 6. Thus, there is no indication of bad faith in the failure to retain the court records. Thereafter the court docket is the record that is retained evidencing the prior conviction. 3/6/07 RP 6. Thus, sufficient uncontroverted evidence was presented before the trial court that Irby had the prior misdemeanor convictions preventing washout of his prior most serious offenses.

Case law supports the fact that records other than a certified copy of a judgment and sentence may be used to establish the prior criminal history. State v. Vickers, 148 Wn.2d 91, 119–21, 59 P.3d 58, 72–73 (2002) (certified copy of docket sheet showing guilty plea was

sufficient to prove existence of prior conviction), State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005) (certified copy of minute order and information showing prior convictions), State v. Aronhalt, 99 Wn. App. 302, 306-09, 994 P.2d 248 (2000) (certified verdict forms, judgments, clerk minute entries, and court orders support existence of prior convictions). State v. Reinhart, 77 Wn. App. 454, 456, 891 P.2d 735, 736 (1995) (where certified copies of judgments and sentences were not signed by court, state established history by submitting copies of connected presentence report, state penitentiary sentence data record showing sentences and terms of parole, and copy of defendant's FBI rap sheet which noted prior convictions and resulting prison sentences).

The case law cited by Irby does not require a contrary result. Irby cites to the case of State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) for the proposition that the "state may introduce other comparable evidence for some reason other than the serious fault of the proponent." State v. Lopez, 147 Wn.2d at 519, *citing*, State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). However in Lopez, the Supreme Court did not address the sufficiency of the evidence of criminal history presented since the State had not presented any at the trial court and only offered to provide that to the

court. Thus in citing to Fricks, the Supreme Court was citing to that case a standard that it did not rely upon. In Fricks, the issue before the appellate court was not an issue of proof of a prior conviction. In Fricks, the State had sought to prove the amount of money stolen from a gas station by the use of a tally sheet kept by station employees. The tally sheet itself was not produced and no foundation was laid to establish that the contents of the tally sheet were admissible. State v. Fricks, 91 Wn.2d at 397. The court went on to cite to the best evidence rule, but then went on to evaluate that the contents of the tally sheet itself was hearsay and the admissibility as a business record had not been established. Thus, the admission of the testimony from the manager was found to be prejudicial error. State v. Fricks, 91 Wn.2d at 398.

The standard presented in Lopez as drawn from Fricks is not particularly applicable to the present situation where there was actual testimony as to the records presented before the trial court.

Irby also cites to State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005), *rev denied* 158 Wn.2d 1008 (2006). In Rivers, the State at sentencing sought to prove the fact of the defendant's prior convictions by providing an uncertified copy of a prior conviction without explanation for why that occurred. State v. Rivers, 130 Wn.

App. at 702, 705.¹¹ The court in Rivers stated the application of the best evidence rules.

The State must prove the existence of a prior conviction by a preponderance of the evidence. To establish the existence of a conviction, a certified copy of the judgment and sentence is the best evidence. The State may introduce other comparable evidence only if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. In that case, comparable documents of record or trial transcripts may suffice.

State v. Rivers, 130 Wn. App. at 698-9 (footnote citations omitted).

In the present case, the State provided evidence why the judgment and sentence was no longer available. The reason that the records were no longer available was not by operation of bad faith. And the State presented certified court documents in addition to the testimony of a court clerk establishing the existence of the prior convictions.

Our Supreme Court has stated that the submission of uncertified copies of court records is a "loose practice" that it does not condone. In re Pers. Restraint of Connick, 144 Wn.2d 442, 455, 28 P.3d 729 (2001). But in Ford, the court held that, while the best evidence of a prior conviction is a certified copy of the judgment, the State "may introduce *other*

¹¹ It should also be noted that the Court of Appeals in Rivers remanded the case to the trial court for another evidentiary hearing since the court decided the case on a basis neither party raised at the trial court level. State v. Rivers, 128 Wn. App. at 707.

comparable documents of record or transcripts of prior proceedings to establish criminal history.” Ford, 137 Wn.2d at 480, 973 P.2d 452 (emphasis added). The court further held that “the nature of the State’s burden under the SRA ... is not overly difficult to meet. The State must introduce *evidence of some kind* to support the alleged criminal history.” Ford, 137 Wn.2d at 480, 973 P.2d 452 (emphasis added).

State v. Winings, 126 Wn. App. at 92-3.

In the absence of any contrary evidence presented by the defense, the State met the burden of proof of Irby’s prior convictions that prevented Irby’s prior most serious conviction from washing by a preponderance of the evidence.

VII. ARGUMENT REGARDING CROSS-APPEAL

1. Trial court erred in failing to also order that Irby be sentenced to imprisonment for life pursuant to RCW 10.95.030.

The trial court did find that Irby was convicted of aggravated first degree murder. 3/6/07 RP 37-8, CP 1206. The trial court was made aware of the requirement that Irby be sentenced to imprisonment for life pursuant to RCW 10.95.030. 3/6/07 RP 44-5. The trial court indicated that since a sentence was being imposed on Irby as a persistent offender, that a life sentence based upon a finding of aggravated first degree murder was unnecessary and could be imposed upon remand if an appellate court overturned the

persistent offender sentencing. 3/6/07 RP 45-6, CP 1207. Although the State believes that the trial court was correct, that if remanded for resentencing a life sentence could be imposed based upon the aggravated first degree murder conviction, the State appealed the trial court's failure to impose the sentence to preserve the issue so that it would not be in some way foreclosed by the failure to challenge the sentence.

The statute makes a life sentence mandatory for conviction of aggravated first degree murder.

RCW 10.95.030. Sentences for aggravated first degree murder

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

...

"So long as the Legislature does not violate the state and federal constitutional directives against cruel and unusual punishment

or excessive fines, it may restrict judicial discretion in imposing criminal sentences.” State v. Hughes, 106 Wn.2d 176, 203, 721 P.2d 902 (1986) (upholding constitutionality of life imprisonment under RCW 10.95.030(1)), see also State v. Kincaid, 103 Wn.2d 304, 310, 692 P.2d 823 (1985).

There is no judicial discretion not to impose life imprisonment when a defendant is found guilty of aggravated first degree murder, even if there is also a life sentence imposed on a different basis.

Thus, this Court should direct the trial court to amend the judgment and sentence to indicate that life imprisonment on the additional basis of the defendant's conviction of the crime of aggravated first degree murder.

VIII. CONCLUSION

For the foregoing reasons, this Court should affirm Irby's conviction for Aggravated Murder in the First Degree, affirm the trial court's determination that Irby is a persistent offender and should remand the case to the trial court to also require that life imprisonment be ordered as a result of the conviction for Aggravated Murder in the First Degree.

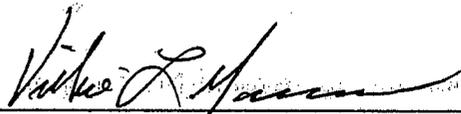
DATED this 30th day of May, 2008.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, VICKIE MACURER, declare as follows:
I sent for delivery by; United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Neilsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 30th day of May, 2008.


DECLARANT

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 JUN -2 AM 11:22

APPENDIX A

TABLE OF REPORT OF PROCEEDINGS

DATE	VRP REFERENCE	HEARING
April 21, 2005	4/21/05 RP	Arraignment - Continued
April 28, 2005	4/28/05 RP	Arraignment - Continued
July 21, 2005	7/21/05 RP	Arraignment – Conducted – Dates set
August 19, 2005	8/19/05 RP	Status of case – Recall that day
August 19, 2005	8/19/05 (2) RP	Representation / Pro Se Issue
August 22, 2005	8/22/05 RP	Hearing – Request for New Counsel
September 1, 2005	9/1/05 RP	Omnibus Continued – Counsel Issue
September 8, 2005	9/8/05 RP	Hearing – Counsel Issue - New Counsel
September 16, 2005	9/16/05 RP	Hearing – Counsel Issue
September 22, 2005	9/22/05 RP	Waiver of Right to Counsel
September 30, 2005	9/30/05 RP	Pro Se / Standby Counsel Motion
October 7, 2005	10/7/05 RP	Pro Se Motions
October 14, 2005	10/14/05 RP	Pro Se Motions
October 21, 2005	10/21/05 RP	Appearance of Jon Ostlund for Motion
October 31, 2005	10/31/05 RP	Pro Se Motions
November 10, 2005	10/10/06 RP	Motion to Continue Trial - Granted
January 10, 2006	1/10/06 RP	Motion re Discovery
January 26, 2006	1/26/06 RP	Withdrawal of Pro Se Status
March 29, 2006	3/29/06 RP	Continuance Motion - Granted
May 5, 2006	5/5/06 RP	Venue Hearing regarding some counts
August 2, 2006	8/2/06 RP	Motion to Dismiss Robbery count
August 9, 2006	8/9/06 RP	Motion to Dismiss Robbery count
September 20, 2006	9/20/06 RP	Motion to Dismiss Burglary count
September 21, 2006	9/21/06 RP	Omnibus Hearing
October 4, 2006	10/4/06 RP	Motion to Sever Counts
October 18, 2006	10/18/06 RP	Continuance of Motion to Dismiss
October 25, 2006	10/25/06 RP	CrR 8.3/Brady Motion to Dismiss
October 26, 2006	10/26/06 RP	Status Hearing / Motion to Continue Trial
October 27, 2006	10/27/06 RP	Status Hearing / Motion to Continue Trial
October 30, 2006	10/30/06 RP	Jail Clothing / Continue for COA action
October 31, 2006	10/31/05 RP	Motion to Continue Trial - Granted
November 14, 2006	11/14/06 RP	Status Hearing
December 27, 2006	12/27/06 RP	Trial Confirmation
January 3, 2007	1/3/07 RP	Hearing Regarding Clothing
January 3, 2007	1/3/07 (2) RP	Second Hearing Regarding Clothing
January 4, 2007	1/4/07 RP	Trial Testimony Day 1
January 5, 2007	1/5/07 RP	Trial Testimony Day 2
January 8, 2007	1/8/07 RP	Trial Testimony Day 3
January 9, 2007	1/9/07 RP	Trial Testimony Day 4
January 10, 2007	1/10/07 RP	Trial Testimony Day 5
January 11, 2007	1/11/07 RP	Trial Testimony Day 6

January 12, 2007	1/12/07 RP	Trial Testimony Day 7
January 16, 2007	1/16/07 RP	Trial Testimony Day 8
January 17, 2007	1/17/07 RP	Trial Testimony Day 9
January 18, 2007	1/18/07 RP	Trial Testimony Day 10
January 19, 2007	1/19/07 RP	Trial Testimony Day 11
January 22, 2007	1/22/07 RP	Trial Testimony Day 12
January 23, 2007	1/23/07 RP	Jury Instructions & Closing Arguments
February 23, 2007	2/23/07 RP	Sentencing Hearing – Continued
March 6, 2007	3/6/07 RP	Sentencing Hearing - Completed
March 8, 2007	3/8/07 RP	Entry of Findings Regarding Sentence
March 12, 2007	3/12/07 RP	Pro Se Motion for Deposition - Denied

APPENDIX B

2007 MAR -8 AM 10:01

1
2
3
4
5 SUPERIOR COURT OF WASHINGTON

6 COUNTY OF SKAGIT

7 STATE OF WASHINGTON,

8 Plaintiff,

NO. 05-1-00276-9

9 v.

10 TERRANCE IRBY,

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON PERSISTENT
OFFENDER SENTENCING

11 Defendant.

12 Comes now the Honorable John M. Meyer and having heard
13 arguments of counsel and examined the exhibits and records and
14 files herein makes and enters the following findings, conclusions
15 and order:

16 **I. FINDINGS OF FACT**

- 17 1. The defendant in this case is Terrance J. Irby. His date
18 of birth is June 10, 1958.
- 19 2. On January 25, 2007, a jury found the defendant guilty of
20 Burglary in the First Degree occurring on or about March 8,
21 2005. The jury returned a special verdict finding that the
22 defendant was armed with a deadly weapon: to wit a knife.
- 23 3. On January 25, 2007, a jury found the defendant guilty of
24 Felony Murder in the First Degree occurring on or about March 8,
25 2005. The jury returned a special verdict finding that the
26 defendant was armed with a deadly weapon: to wit a knife.
- 27 4. The jury made the following findings of aggravating
28 circumstances that existed at the time of the crime.
(a) While committing Murder in the First Degree the
defendant did intend to conceal the commission of the
crime;

ORIGINAL

1 (b) While committing the crime of Murder in the First
2 Degree the defendant intended to protect or conceal the
identity of any person committing the crime, and;

3 (c) That the murder was committed in the course of, or in
4 the furtherance of, or in immediate flight from Burglary in
the First Degree.

5 5. On October 15, 1976, the defendant, Terrance Irby, was
6 convicted of the crime of Statutory Rape in Second Degree under
7 Chelan county cause # 5029. On December 22, 1976, the defendant
was sentenced on that case.

8 6. On October 17, 1984, the defendant, Terrance Irby, pled
9 guilty to Assault in the Second Degree in King County cause #
10 84-1-2641-0. On November 13, 1984, was sentenced on that case
11 to a term of 24 months of confinement. There was also a special
12 finding entered that the defendant was armed with a deadly
weapon to wit: a handgun. The judgment and sentence from this
King County case specifically lists the defendant's prior Chelan
County conviction among the criminal history.

13 8. By a strong preponderance of evidence based upon the
14 records from the two (2) convictions, Statutory Rape in the
15 Second Degree from Chelan County cause #5029 and Assault in the
16 Second Degree from King County cause #84-1-2641-0, that the
defendant in those two (2) cases is the same Terrance Irby who
committed the present crimes in the present case wherein James
Rock was murdered.

17 9. On August 2, 1994, the defendant, Terrance Irby, was
18 sentenced in Skagit County District Court on the crime of
19 Driving While License Suspended in the Third Degree in case
#7729630 occurring on May 26, 1994.

20 10. On April 11, 1995, the defendant, Terrance Irby, was
21 sentenced in Skagit County District Court of the crime of
22 Driving While License Suspended in the Third Degree in case
#24666 occurring on August 28, 1994.

23 11. On July 17, 1996, the defendant, Terrance Irby, was
24 sentenced in Skagit County District Court of the crime of
25 Driving While License Suspended in the Third Degree in case
#C31767 occurring on April 8, 1996.

26 12. On February 4, 2004, the defendant, Terrance Irby, was
27 sentenced in Skagit County District Court of the crimes of
28 Driving While Under the Influence of Intoxicants and Reckless
Driving in case #C43861, occurring on December 18, 2003.

1
2 13. On February 9, 2004, the defendant, Terrance Irby, was
3 sentenced in Skagit County District Court of the crime of
4 Violation of a Protection Order in case #C44068, occurring on
5 January 12, 2004.

6 14. On March 5, 2004, the defendant, Terrance Irby, pled guilty
7 and was sentenced in Skagit County Superior Court to the felony
8 crime of Malicious Mischief in the Second Degree occurring on
9 January 12, 2004.

10 II. CONCLUSIONS OF LAW

11 NOW, THEREFORE, the Court finds that.

12 1. The Court finds that the defendant's prior conviction for
13 Statutory Rape in the Second Degree is comparable to the crime
14 of Rape of a Child in the Second Degree. According to certified
15 court records the defendant was about one (1) week short of his
16 18th birthday at the time of the commission of the offense. The
17 victim at the time of the offense was 13 years of age.

18 2. Rape of a Child in the Second Degree is a Class A felony
19 and codified under RCW 9A.44.076. Before being changed the
20 crime of Statutory Rape in the Second Degree was codified under
21 RCW 9.79.210.

22 3. The State has adequately proven that the defendant has
23 prior misdemeanor convictions, which prevent the defendant's
24 prior conviction(s) from washing out under RCW 9.94A.525(2).

25 4. The Court finds that the two (2) prior convictions
26 (Statutory Rape in the Second Degree and Assault in the Second
27 Degree) are "most serious offenses" pursuant to RCW
28 9.94.030(28)¹.

29 5. Prior to the commission of the two (2) current convictions
30 in the present case of Burglary in the First Degree and Murder
31 in the First Degree (by Felony Murder), the defendant had
32 previously been convicted of two (2) predicate three (3) strike
33 offenses (most serious offenses as defined by RCW
34 9.94A.030(28)).

35
36
37
38 ¹ The numbering of RCW 9.94.030 is based upon the numbers at the time of the
commission of the offense by the defendant herein.

110

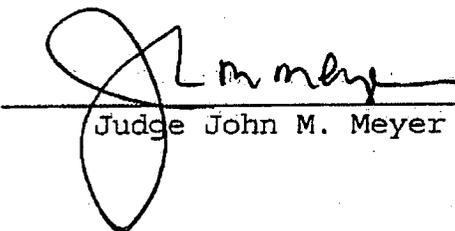
1 6. That the defendant, Terrance Irby, is a Persistent Offender
2 pursuant to RCW 9.94A.030(32) under the statutory laws of the
3 State of Washington.

4 7. Because the Court has ^{finds it unnecessary to Jmm.} sentenced the defendant as a
5 persistent offender, the Court ~~is not entering~~ a sentence at
6 this time based upon the aggravating factors found by the jury
7 pursuant which could result in a sentence pursuant to RCW
8 10.95.030. ~~Should the conviction and/or persistent offender
9 sentencing herein not be upheld upon appellate review, the trial
10 court would enter a finding that the defendant is subject to a
11 sentence of life imprisonment without the possibility of parole
12 based upon the aggravating factors found by the jury and RCW
13 10.95.030(1).~~ Jmm.

14 III. ORDER

15 NOW, THEREFORE, it is hereby ordered that the defendant be
16 sentenced to life imprisonment without the possibility of release
17 pursuant to RCW 9.94A.570.

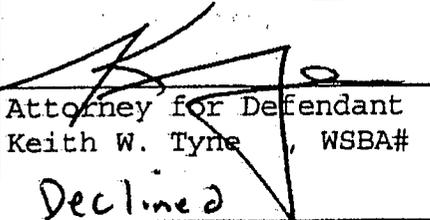
18 Dated this 8 day of March, 2007.

19 
20 Judge John M. Meyer

21 Presented by:

22 
23 Richard A. Weyrich, WSBA# 799
24 Prosecuting Attorney

25 Approved as to Form only (KT)

26 
27 Attorney for Defendant
28 Keith W. Tyne, WSBA#

Declined
Terrance Irby
Defendant

H.D.

APPENDIX C

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2007 JAN -2 AM 10:29

Juror Number _____

05-1-2769

To Prospective Jurors:

This questionnaire is designed to elicit information with respect to your qualifications to sit as a juror in this case. Using this questionnaire will shorten the jury selection process and will allow you to answer questions privately that would otherwise be asked in open court.

Because this questionnaire is part of the jury selection process, the questions should be answered by you under penalty of perjury; you should fill out the questionnaire without help from others. If you need more room to complete your answers, please use the back of this page.

After you have completed the questionnaire, please give it to the bailiff.

- 3
1. Have you, any member of your family, any relative, or anyone else close to you been the victim of crime? If so please explain.
 2. Have you, any member of your family, any relative, or anyone close to you, ever been accused of a crime? If so please explain.
 3. In your job, education, or training, have you ever had any experience or preparation for dealing with the victims of crime? If so please explain.

10

JUROR NUMBER _____

4. Does any member of your family or anyone close to you have any such experience? If so please explain.

5. Do you have any feelings regarding the subject of an allegation of murder that would prevent you from being a fair and impartial juror?

6. Please list the number of times during the past week that you:
 - A. Watch the news on TV. _____
 - B. Read the newspaper. _____
 - C. Listen to the news on radio. _____

7. Please list your other sources for news.

8. Please list the magazines that your subscribe to.

9. How would you describe your level of awareness concerning current events? (Please check one)
 - A. Very Aware _____
 - B. Moderately Aware _____
 - C. Not Very Aware _____

10. What organizations, clubs, social or charitable groups do you belong to? (Please list)

100

JUROR NUMBER _____

11. Have you, any member of your family or close friends ever worked in law enforcement or belonged to any organization associated with law enforcement? If so please explain.

12. Do you regularly watch any TV shows involving crime or law or any talk shows involving crime? i.e. Cops, Law and Order, CSI, Nancy Grace. Please list all.

13. This case involves the death of James Rock a resident of Hamilton which occurred in march 2005. Do you have any knowledge or this case? If so please explain.

14. Do you have any strong beliefs that you believe would prevent you from being a fair and impartial juror, if you were chosen to hear this case? If the answer to this question is yes, please describe your reasons.

15. Would you prefer to discuss the answer to any of these questions privately, in the judge's chambers?

APPENDIX D

JohnMMeyer

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 2:01 PM
To: JohnMMeyer; KeithTyne; Tom Seguine
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

05-1-276-9

Oops. 7 goes, not 3. OK?

John M. Meyer, Judge
Skagit County Superior Court

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 1:59 PM
To: JohnMMeyer; KeithTyne; Tom Seguine
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

The State objects to letting 36, 48, and 49 go. I will have the others notified this afternoon so that they need not appear tomorrow. Thank you. JMM

John M. Meyer, Judge
Skagit County Superior Court

2

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 1:55 PM
To: KeithTyne; Tom Seguine
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

If I let all 10 go, we still have 82. That should be plenty. Tom, O.K with you?

John M. Meyer, Judge
Skagit County Superior Court

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA
2007 JAN -4 PM 12:01

From: KeithTyne
Sent: Tuesday, January 02, 2007 1:53 PM
To: JohnMMeyer; Tom Seguine
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

No objection from the defense to letting some or all go.

Keith

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 1:02 PM
To: KeithTyne; Tom Seguine
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: Irby

I note that 3,23,42 and 59 were excused after one week by the Court Administrator.

1/2/2007

17 home schools, and 3 weeks is a long time.
77 has a business hardship.
36, 48, 49 and 53 had a parent murdered.

Any thoughts? If we're going to let any go, I'd like to do it today.

John M. Meyer, Judge
Skagit County Superior Court

JSM055 DISPLAY CHARGE SKAGIT SUPERIOR 05-07-08 13:27 1 OF 1
CASE#: 05-1-00276-9 DEF01 IRBY, TERRANCE JON
NOTE1: SCSO 05-03552 *CRT/APPL #597418
NOTE2: **PREASSIGNED TO JUDGE MEYER**
DEF.RESOLUTION CODE: CVJV DATE: 01 25 2007 CONVICTED BY JURY
JUDGE: MEYER

RS	CNT	RCW/CODE	CHARGE DESCRIPTION	DV	INFO/VIO	VIOL	RESULT
				---	DATE---	---	DATE---
		-----	INFORMATION SCSO05-03552		04	15	2005
D	1	9A.52.030	BURGLARY 2ND DEGREE	N	03	06	2005 03 13 07
G	2	10.95.020	AGGRAVATED MURDER-1	N	03	08	2005 01 25 07
		9.94A.602	DEADLY WEAPON SPECIAL VERDICT				
		9A.32.030	MURDER 1ST DEGREE				
		9.94A.602	DEADLY WEAPON SPECIAL VERDICT				
G	3	9A.52.020	BURGLARY 1ST DEGREE	N	03	08	2005 01 25 07
D	4	9A.56.200	ROBBERY 1ST DEGREE	N	03	08	2005 08 14 06
D	5	9.41.040(1)	FIREARM POSSESSION UNL-1	N	03	08	2005 03 13 07
CV	6	9.41.040(1)	FIREARM POSSESSION UNL-1	N	03	08	2005 06 22 06
D	7	9.41.040(1)	FIREARM POSSESSION UNL-1	N	03	08	2005 03 13 07
D	8	46.61.024	ELUDING A POLICE VEHICLE	N	03	08	2005 03 13 07
	901	NOTEPCN	862507312				

? F1=Help ENTER=Process F7=Bwd F8=Fwd PA1=Cancel

APPENDIX E

In the Superior Court of the State of Washington

FOR CHELAN COUNTY

FILED AND RECORDED ON
OCT 15 1976

THE STATE OF WASHINGTON
Plaintiff,

vs.
TERRANCE LEBY

Defendant.

No. 54129

MURIEL E. ROATH, Co. Clerk
By: [Signature] Deputy

VERDICT
Criminal

We, the Jury in the case of the State of Washington, Plaintiff, against

Terrance Leby Defendant and
the Defendant Terrance Leby

Guilty as charged in the information.

Dated at Wenatchee Washington, this _____ day of
October 19 76

[Signature]
Foreman.

In the Superior Court of the State of Washington
FOR CHELAN COUNTY

THE STATE OF WASHINGTON

Plaintiff,

vs.

TERRANCE IRBY

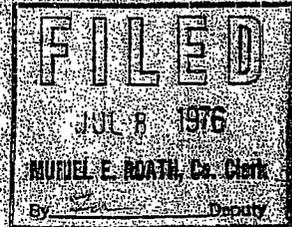
Defendant.

No. 5029

INFORMATION

Comes now E. R. Whitmore, Jr., Prosecuting Attorney for Chelan County, State of Washington, and by this his information accuses TERRANCE IRBY of the crime of STATUTORY RAPE, SECOND DEGREE committed as follows, to-wit:

That the said defendant in the County of Chelan, State of Washington, on or about the 31st day of May, 1976, did then and there willfully, unlawfully, and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Kori Fogelstrom, not being married to the said Kori Fogelstrom, who was thirteen years of age.



contrary to the form of the Statute RCW 9A.79.210 in such cases made and provided, and against the peace and dignity of the State of Washington.

Dated at Wandawee, Washington this 8th day of July, 1976.

E. R. WHITMORE JR.

Prosecuting Attorney in and for said County.

[Signature]
Deputy

STATE OF WASHINGTON

County of Chelan

ss.

The undersigned, being first duly sworn on oath, says: He is the duly elected (or appointed) Deputy Prosecuting Attorney in and for said County, that he has read the foregoing information, knows the contents thereof and believes the same to be true.

Subscribed and Sworn To before me this 8th day of July, 1976.

MURIEL E. ROATH
County Clerk and Clerk of the Superior Court

By *[Signature]*

CHELAN COUNTY DISTRICT COURT

CHELAN COUNTY, STATE OF WASHINGTON
COMMITTING MAGISTRATE

THE STATE OF WASHINGTON

Plaintiff,

vs

TERRANCE IRBY

Defendant.

No. R 261-708
COMMITTING MAGISTRATE'S
Criminal Complaint
For RAPE, SECOND DEGREE

STATE OF WASHINGTON

County of Chelan

Comes now E. R. WHITMORE, JR. who, being first
fully sworn, by this complaint accuses TERRANCE IRBY
in the crime of RAPE, SECOND DEGREE committed as follows:
to-wit:

That the said defendant, in the County of Chelan, State of Washington, on or about the
5th day of May, 1976, did then and there wilfully and
unlawfully and feloniously by forcible compulsion perpetrate an act
of sexual intercourse with one Keri Remelstrom, then and there a
female person not the wife of said Terrance Irby;

contrary to the form of the Statute in such cases made and provided, and against the peace
and dignity of the State of Washington.

Wherefore, said complainant prays that the said defendant may be arrested and dealt
with according to law.

Subscribed and Sworn to before me this 7th day of June, 1976

CCSO

E. R. Whitmore, Jr.
Judge, No. 11 Public
COMMITTING MAGISTRATE
STATE OF WASHINGTON
County of Chelan
I, CAROLYN G. ALLEN, Judge, No. 11 Public, Chelan County District
Court, do hereby certify that the foregoing is a true and
correct copy of the original as the same now appears on the land of
record in the office of the
COMMITTING MAGISTRATE, Chelan County, Washington, by my hand
this 7th day of June, 1976.
CAROLYN G. ALLEN
By [Signature]
Clerk

1
2 CHELAN COUNTY DISTRICT JUSTICE COURT
3 CHELAN COUNTY, STATE OF WASHINGTON

4 STATE OF WASHINGTON,

5 Plaintiff,

NO. *X-76/208*

6 vs.

7 TERRANCE IRBY,

8 Defendant.

AFFIDAVIT OF
PROBABLE CAUSE

9
10 STATE OF WASHINGTON)
11) ss.
12 County of Chelan)

13 E. R. WHITMORE, JR., being first duly sworn on oath,
14 deposes and says: That he is the duly elected Prosecuting Attorney
15 for Chelan County and is authorized to make this affidavit on behalf
16 of the Plaintiff, that the affiant has been provided with the report
17 of Detective Don Danner of the Chelan County Sheriff's Department,
18 including the signed statement taken from Kori Fogelstrom, wherein
19 said Kori Fogelstrom states that on the 31st day of May, 1976,
20 Terrance Irby did force himself upon her and have sexual intercourse
21 with her; that Dr. Ronald Wick will testify that an examination
22 he made of slides prepared from a Tamox he removed from said
23 Kori Fogelstrom's vagina shortly after the alleged sexual intercourse
24 was found to contain male sperm and semen; all incidents occurring
25 in Chelan County, Washington.

26
27 *E. R. Whitmore, Jr.*
28 E. R. WHITMORE, JR.
Prosecuting Attorney

29 SUBSCRIBED AND SWORN to before me this 7th day of June
30 1976.

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32 AFFIDAVIT OF
33 PROBABLE CAUSE

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CHELAN COUNTY DISTRICT JUSTICE COURT
CHELAN COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

TERRANCE IRBY,

Defendant.

NO. *K 76/208*

ORDER FOR WARRANT
ON PROBABLE CAUSE

Based upon the complaint and supporting affidavit of
W. R. WHITMORE JR. the court finds probable cause
for the issuance of a warrant for the arrest of the above
defendant.

IT IS HEREBY ORDERED that a warrant be issued for the
arrest of TERRANCE IRBY upon the
charge of RACE, SECOND DEGREE.

and bail is fixed in the amount of \$2500 pending the
defendant's first appearance in court. Transmission by telephone
is hereby authorized.

DATED this 7th day of June, 1976.



JUDGE-COURT COMMISSIONER

ORDER FOR WARRANT
ON PROBABLE CAUSE

W. R. WHITMORE JR.
CHELAN COUNTY
PROSECUTING ATTORNEY
1000 1/2 3RD ST. S.E.
WENATCHEE, WASHINGTON 98801
(509) 642-1177

STATE OF WASHINGTON
County of Chelan
I, CAROLYN HAMLEN, duly appointed clerk of the County District
Justice Court, do hereby certify that this document is a true and
correct copy of the original as the same now appears on file and of
record in my office.
IN TESTIMONY WHEREOF I have hereunto set my hand
this 7th day of June, 1976
CAROLYN G. ALLEN, Clerk
By: [Signature]
Clerk

CHELAN COUNTY DISTRICT COURT

CHELAN COUNTY, STATE OF WASHINGTON

FILED
JUL 3 1976
MURIEL E. ROATH, Co. Clerk
By *[Signature]* Deputy

STATE OF WASHINGTON,
Plaintiff,

vs.
TERRANCE JREBY

No. K76-708 #5029

ORDER OF TRANSFER
TO SUPERIOR COURT

THIS MATTER having come on regularly for Preliminary Hearing on the 17th day of June, 1976, the State of Washington being represented by Grant Mueller, Deputy Prosecuting Attorney and the Defendant being represented by James Flynn, an attorney at law, and the court having heard the testimony and considered the evidence presented and it appearing to the court that there is probable cause to believe that the offense as charged in the complaint was committed and that the same was committed by the Defendant; and it further appearing that said offense is within the exclusive jurisdiction of Superior Court, NOW THEREFORE;

IT IS ORDERED that all proceedings herein be bound over to the Superior Court of the State of Washington for Chelan County;

IT IS FURTHER ORDERED that all papers in the above proceedings, including an abstract of costs, and any bail taken by this court shall forthwith be transferred to the Chelan County Clerk.

DONE IN OPEN this 18th day of June, 1976

cc: Def. Atty.
Prob. Atty.
Bondsman
Chelan County Sheriffs Office
District Court File

[Signature]
JUDGE

CHELAN COUNTY DISTRICT JUSTICE COURT

CHELAN COUNTY, STATE OF WASHINGTON
COMMITTING MAGISTRATE

THE STATE OF WASHINGTON

Plaintiff

vs.

TERRANCE TRBY

Defendant

No. _____

COMMITTING MAGISTRATE'S
Warrant

CHELAN COUNTY
DISTRICT JUSTICE COURT

JUN 24 1976

ROSEANNE SHAW
DISTRICT COURT JUDGE

STATE OF WASHINGTON }
COUNTY OF CHELAN } ss.

To the Sheriff or any Peace Officer of said County or any County in the State of Washington:

E. R. WHITMOPE, JR. has this day complained in writing under oath to the undersigned Judge of the Chelan County District Justice Court, that on or about the 21st day of MAY, 1976, in said County and State, TERRANCE TRBY

then and there being, did then and there unlawfully and willfully and feloniously commit the crime of RAPE, SECOND DEGREE and the court finding probable cause for the issuance of a warrant herein.

THEREFORE in the name of the State of Washington, you are commanded forthwith to apprehend the said TERRANCE TRBY

and bring him before me to be dealt with according to law. Endorsed for transmission by teletype.

Given under my hand this 7th day of June, 1976

Judge, Court Commissioner
COMMITTING MAGISTRATE

Bail \$ 2500

CCSO

PRINTED BY THE STATE OF WASHINGTON

STATE OF WASHINGTON

County of Chelan

I, CAROLYN G. ALLEN, County Clerk of Chelan County District Justice Court, do hereby certify that this instrument is a true and correct copy of the original as the same now appears on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand this 18th day of June, 1976

CAROLYN G. ALLEN, CLERK

By [Signature]

Clerk

In the Superior Court of the State of Washington
FOR CHELAN COUNTY

THE STATE OF WASHINGTON
Platiff,

TERRANCE TRBY

Defendant.

No. 5029

WARRANT OF ARREST
ON INFORMATION

State of Washington

TO THE SHERIFF OF SAID CHELAN COUNTY, GREETING.

WHEREAS, In the Superior Court for said County, held at Wenatchee, the Prosecuting Attorney for said Chelan County, did present and file an information on the part of the State of Washington, charging the above named TERRANCE TRBY

with the crime of STATUTORY RAPE, SECOND DEGREE

FILED
JUL 15 1976
MURIEL E. ROATH, C. L. J.
By *[Signature]* Clerk

NOW, THEREFORE, IN THE NAME OF THE STATE OF WASHINGTON, You are commanded forthwith to apprehend and arrest the said TERRANCE TRBY

and bring him before this Court to answer said charge, and abide such further order as the Court may make in the premises.

WITNESS the Hon. Lawrence Leahy, Judge of the said Superior Court, and the seal of said Court hereto affixed, this 8th day of July, 1976.

MURIEL E. ROATH,
Clerk of said Superior Court.

By *[Signature]* Deputy.

Bail fixed at \$ _____

DEC 22 1976

MURIEL E. ROATH, Co. Clerk

By _____ Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,)

Plaintiff,)

NO. 5029

vs.)

JUDGMENT AND SENTENCE

TERRANCE IRBY,)

Defendant.)

On the 21st day of July, 1976 this cause came on regularly for arraignment and hearing, plaintiff, State of Washington, appearing by J. Kirk Bromley, Deputy Prosecuting Attorney for Chelan County and the defendant appearing in person and by counsel James R. Elinn, Jr. Defendant waived reading of the information charging him with the crime of Statutory Rape, Second Degree. Defendant was advised that in the event he did not have funds of his own with which to employ legal counsel that the Court would appoint counsel for him and that said counsel would be compensated for his services from county funds. Asked if he desired the aid of counsel, defendant stated he had counsel and was advised of his rights by his said counsel to his satisfaction. Asked if he was ready to be arraigned and answer to the information, the defendant stated that he was and entered a plea of not guilty to the information charging him with Statutory Rape, Second Degree.

On the 14th day of October, 1976 this matter was brought on for a jury trial, plaintiff appearing by E. R. Whitmore, Jr., Prosecuting Attorney, and the defendant appearing in person and by counsel, James R. Elinn, Jr. On the 15th day of October, 1976, the jury returned a verdict of guilty.

On the 22nd day of December, 1976 the defendant was brought before the Court for sentencing, the defendant appearing in person and by counsel, James R. Elinn, Jr. The defendant was asked if he had any legal cause to show why judgment and sentence should not be pronounced against him and the defendant stated he had none. Now, therefore, the Court being fully advised,

IT IS ORDERED AND ADJUDGED by the Court that the defendant TERRANCE IRBY is guilty of the crime of Statutory Rape, Second Degree, committed as follows, to-wit:

That the said defendant in the County of Chelan, State of Washington, on or about the 31st day of May, 1976, did then and there wilfully, unlawfully and feloniously then and there being over sixteen years of age, did then and there engage in sexual intercourse with Kori Fogelstrom, not being married to the said Kori Fogelstrom, who was thirteen years of age; contrary to the form of the Statute R.C.W. 9.79.210 in such cases made and provided, and

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against the peace and dignity of the State of Washington.

And that he be punished, therefore, by imprisonment in a Washington State penal institution and be committed to the Washington Corrections Center for classification, confinement and placement in such correctional facility under the supervision of the Department of Social and Health Services, as said department shall deem appropriate for a period of not more than ten (10) years and the defendant is hereby remanded to the custody of the Sheriff of Chelan County, to be by him detained and delivered into the custody of the proper officers for transportation to the proper institution.

IT IS FURTHER ORDERED that the bond filed herein is hereby exonerated.

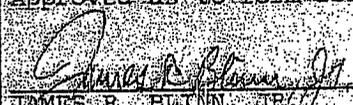
22 DONE IN OPEN COURT in the presence of the defendant this 22 day of December, 1976.



JUDGE OF THE SUPERIOR COURT
FOR CHELAN COUNTY

Presented by:


R. R. WHITMORE, JR.
Chelan County Prosecuting Attorney

Approved as to form for entry:


JAMES R. BLINN, JR.
Attorney for Defendant



STATE OF WASHINGTON
BOARD OF PRISON TERMS AND PAROLES

SENTENCE FIXED BY BOARD

FILED
MAY 19 1937
MUREL E. ROATH, Sec. Clerk
By J.B. Deputy

No. 111718

P 5079

THOMAS IRBY having been by the Superior Court
of Chelan County, Washington, in case No 5079 convicted of the crime
of KNIFE WOUND, FELONY
and sentenced for a minimum term of TEN (10)
years of confinement in a Washington Correctional Facility, and

The Board of Prison Terms and Paroles, having fully considered the Prosecuting Attorney's
and Judge's statements of the facts surrounding said convicted person's crime and other information
relative to such convicted person, and having interviewed said convicted person, NOW THEREFORE,
By virtue of the authority in it vested by the laws of the State of Washington, and within six months
after the admission of such convicted person to a Washington Correctional Facility, the Board of
Prison Terms and Paroles fixes the duration of his confinement as follows, to wit:

That said THOMAS IRBY he and his is hereby ordered to be confined
in a Washington Correctional Facility, for a period of TEN (10) years,

and he is hereby required to perform as many hours of faithful labor in each and every day during
said term of imprisonment as shall be prescribed by the rules and regulations of said institution

Done at Olympia, Washington, this 10th day of February, 1937

BOARD OF PRISON TERMS AND PAROLES

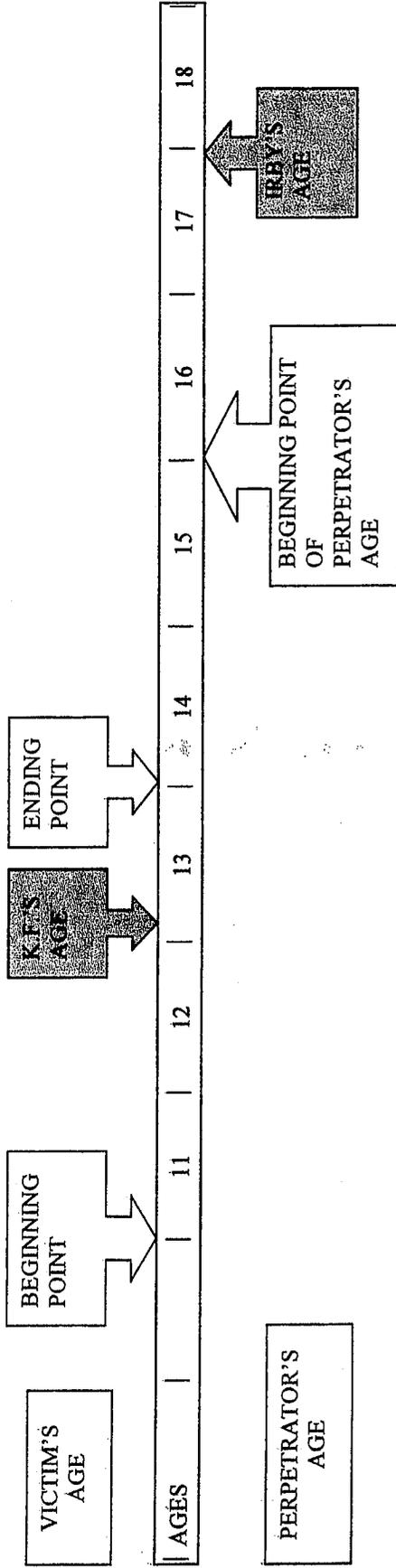
By _____

THOMAS IRBY
THOMAS IRBY

APPENDIX F

COMPARISON OF FORMER STATUTORY RAPE IN THE SECOND DEGREE WITH RAPE OF A CHILD IN THE SECOND DEGREE

RCW 9.76.210: STATUTORY RAPE IN THE SECOND DEGREE



RCW 9A.44.076: RAPE OF A CHILD IN THE SECOND DEGREE

