

64100-0

64100-0

NO. 64100-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD APPELATE,

Appellant.

MAR 17 11 44 AM
CLERK OF COURT
COURT OF APPEALS
STATE OF WASHINGTON

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE.....4

D. ARGUMENT 9

1. THE TRIAL COURT VIOLATED MR. APPLGATE’S
CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL..... 9

 a. A trial court may not conduct any portion of
 proceedings outside the public courtroom unless it
 satisfies the *Bone-Club* procedures, including
 identifying a compelling interest in closure, showing a
 serious and imminent threat to that interest, and
 entering formal findings..... 9

 b. The closure in this case was unconstitutional because
 no compelling interest was identified, only one of the
 five Bone-Club factors was satisfied, and no formal
 findings were entered..... 11

 c. The remedy is reversal and remand for a new trial..... 13

2. THE CONVICTIONS ON TWO AGGRAVATING
FACTORS WHICH ARE THE SAME IN FACT AND LAW
VIOLATE DOUBLE JEOPARDY, REQUIRING
VACATION OF THE “ONGOING PATTERN”
CONVICTION..... 13

 a. A defendant’s right to be free from double jeopardy is
 violated if he is convicted of two offenses that are
 identical in fact and law. 14

 b. The “domestic violence” aggravator and “ongoing
 pattern” aggravator charged in this case are identical
 in fact and law. 16

3. THE TRIAL COURT VIOLATED MR. APPLGATE’S
RIGHT TO DUE PROCESS BY OMITTING THE TO-

CONVICT INSTRUCTION FOR THE “ONGOING PATTERN” AGGRAVATOR	20
a. The failure to provide a “to-convict” instruction with every element of the crime charged violates due process	20
b. The trial court violated Mr. Applegate’s right to due process by omitting the to-convict instruction for the “ongoing pattern” aggravator.....	22
c. Reversal is required.....	23
4. THE APPLICATION OF THE DOMESTIC VIOLENCE ENHANCEMENT TO MR. APPLGATE VIOLATED THE EX POST FACTO CLAUSE	23
a. The ex post facto clause prohibits retrospective application of an amendment that aggravates a crime or increases the punishment for a criminal act.....	23
b. The application of the domestic violence enhancement to Mr. Applegate violated the ex post facto clause because it retroactively aggravated his crimes and increased his punishment.....	24
5. THE APPLICATION OF THE DOMESTIC VIOLENCE ENHANCEMENT TO MR. APPLGATE VIOLATED THE PRESUMPTION AGAINST RETROACTIVE APPLICATION OF A STATUTORY AMENDMENT	26
E. CONCLUSION.....	29

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Detention of Elmore</u> , 162 Wn.2d 27, 168 P.3d 1285 (2007) ..	27
<u>In re the Personal Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2005)	10, 11, 13, 19
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	21
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995)	10
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005)	10
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002)	23
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995)	14, 16
<u>State v. Cruz</u> , 139 Wn.2d 186, 985 P.2d 384 (1999)	26, 27, 28
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003)	21
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006)	13
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005)	15, 16
<u>State v. Jackman</u> , 156 Wn.2d 736, 132 P.3d 136 (2007)	15, 16
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005)	21
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009)	21
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007)	4
<u>State v. Reiff</u> , 14 Wash. 664, 45 P. 318 (1896)	15
<u>State v. Sibert</u> , ___ Wn.2d ___, ___ P.3d ___, 2010 WL 653868 (filed February 25, 2010)	23
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997)	20, 21
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245 (2002)	26, 27, 28

<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	passim
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	15
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007)	14, 15, 20

United States Supreme Court Decisions

<u>Blockburger v. United States</u> , 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932)	14
<u>Calder v. Bull</u> , 3 Dall. 386, 1 L.Ed. 648 (1798)	24, 26
<u>Carmell v. Texas</u> , 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000)	23
<u>Collins v. Youngblood</u> , 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)	24, 26
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	21
<u>Presley v. Georgia</u> , ___ S.Ct. ___, 2010 WL 154813 (filed 1/19/2010)	10
<u>Rutledge v. United States</u> , 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996).....	15, 16
<u>Sattazahn v. Pennsylvania</u> , 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).....	16
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	13

Constitutional Provisions

Const. art I, § 23.....	23
Const. art. I, § 10.....	1, 9
Const. art. I, § 22.....	1, 9

Const. art. I, § 9.....	14
U.S. Const. amend. V	14
U.S. Const. amend. VI	1, 9
U.S. Const. art. I, § 10.....	23

Statutes

Laws of 1996 Ch. 248, § 2	24
RCW 10.99.010 (1989)	26
RCW 9.94A.390 (1989).....	24
RCW 9.94A.390 (1996).....	24
RCW 9.94A.535	16, 17
RCW 9A.44.076	19

Other Authorities

5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, <u>Criminal Procedure</u> (2d ed. 1999).....	14
---	----

A. ASSIGNMENTS OF ERROR

1. The trial court violated the Sixth Amendment to the United States Constitution, and article I, sections 10 and 22 of the Washington Constitution, when it questioned a juror in chambers.

2. The convictions for both “domestic violence” and “ongoing pattern of sexual abuse” violate the double jeopardy clauses of the state and federal constitutions.

3. The trial court violated Mr. Applegate’s right to due process by omitting the to-convict instruction for the “ongoing pattern” aggravating factor.

4. The application of the domestic violence aggravator to Mr. Applegate violated the ex post facto clauses of the federal and state constitutions.

5. The application of the domestic violence aggravator to Mr. Applegate violated the presumption against retroactive application of a statutory amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court violates a defendant’s constitutional right to a public trial if it holds a portion of voir dire in chambers without satisfying the factors set forth in State v. Bone-Club, including identifying a compelling interest in closure, balancing that interest

against the public trial right, and entering formal findings and conclusions in a closure order. Where the trial court conducted a portion of voir dire in chambers without identifying a compelling interest in closure, without balancing that unnamed interest against the public trial right, and without entering any findings and conclusions, did the trial court violate Mr. Applegate's right to a public trial?

2. A defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. Here, Mr. Applegate was convicted of six counts of second-degree rape of a child, aggravated by both "domestic violence" and "an ongoing pattern of sexual abuse." Where one of the elements of the "domestic violence" aggravator is "an ongoing pattern of physical, psychological or sexual abuse," and the State's theory for both aggravators was that Mr. Applegate repeatedly raped his stepdaughter and niece, do the convictions for both aggravating factors violate double jeopardy, requiring vacation of the lesser-included "ongoing pattern of sexual abuse" aggravator?

3. The failure to provide a "to-convict" instruction with every element of the crime charged violates due process. Here, the trial court provided the jury with a to-convict instruction for the domestic

violence aggravator, but not for the “ongoing pattern of sexual abuse” aggravator. Did the trial court violate Mr. Applegate’s right to due process?

4. The ex post facto clause prohibits retrospective application of an amendment that aggravates a crime or increases the punishment for a criminal act. In 1988-89, when Mr. Applegate committed his crimes, the domestic violence aggravating factor did not exist. The legislature added it to the SRA in 1996. Do Mr. Applegate’s six convictions for rape of a child aggravated by domestic violence – and the enhanced sentence based thereon – violate the constitutional prohibition on ex post facto laws?

5. A legislative amendment should not be applied retroactively unless (a) the legislature clearly intended retroactive application, (b) the amendment is curative, or (c) the amendment is remedial. Did the trial court improperly apply the domestic violence aggravator to Mr. Applegate where the statute contains no statement of intent for retroactive application, and the amendment adding the aggravator is substantive, rather than curative or remedial?

C. STATEMENT OF THE CASE

In 2005, Ronald Applegate was convicted of six counts of rape of a child in the second degree. CP 63. Three counts involved his stepdaughter, A.F., and three involved his niece, D.B. The court imposed an exceptional sentence of 120 months on each count, all to run concurrently. CP 75-77. The exceptional sentence was based on facts found by the jury, including “domestic violence” aggravators for each count, “ongoing pattern of sexual abuse” aggravators for each count, and a pregnancy aggravator for D.B. CP 75-76.

In 2008, this Court vacated the sentence and remanded for resentencing because at the time of Mr. Applegate’s trial, the court lacked statutory authority to submit aggravating factors to the jury. CP 56 (citing State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007)). On remand, the State did not argue that the pregnancy aggravator applied, but did argue that both the “domestic violence” and “ongoing pattern” aggravators applied to each count. 2 RP 66.¹

¹ There are three volumes of reports of proceedings in this case: 1 RP (8/10/09 – the version filed 3/8/10 has the full voir dire), 2 RP (8/11/09 and 8/12/09), and 3 RP (8/27/09).

Prior to jury selection, the defense attorney asked how the court was going to explain the unique nature of the case. 1 RP 25.

The Court responded:

That would be by way of the advance oral instruction that has been proposed. I do have the proposed advanced oral instruction. It does seem appropriate. Any jurors who wish to speak privately, we can address that. I still don't know if we have a verdict on the Momah and Frawley cases from the Supreme Court. I don't think we do. I would expect to follow the Momah line of cases.

Is there any objection, Mr. Nelson or Mr. Setter or any member of the public present in the courtroom, if an individual juror wishes to speak about some of the issues perhaps raised in the questionnaire or in voir dire that we take the public session into a less open setting? That is a lot easier than shuffling all of the jurors out.

1 RP 25-26. The defense attorney stated, "I leave it entirely to the Court's discretion." 1 RP 26. The prosecutor responded, "Well, this is not a matter that's addressed entirely to the Court's discretion. ... The public would be excluded under the circumstances." 1 RP 26. The prosecutor noted that at that time there was a member of the public in the courtroom. 1 RP 27. He suggested that the issue be tabled until the point at which it became necessary to address it. 1 RP 27.

The Court agreed that the matter could be addressed later. The judge further stated, “Under Momah, as I recall, it didn’t even state that the factors need to be specifically addressed....” 1 RP 27.

Toward the end of voir dire, the Court noted that several jurors expressed a desire to answer some questions privately. 1 RP 62-63. The Court noted it was unlikely that most of them would make it onto the jury anyway, due to their high juror numbers. 1 RP 63. However, one person with a low number – Number 2 – had indicated she wished to answer questions 10A and 11 in private.

The Court said, “Counsel, if you do wish to inquire along those lines I would suggest we meet in chambers.” 1 RP 64. The Court then stated:

Is there any member of the jury panel or any member of the public who is present who has an objection to our speaking with juror No. 2 I guess in my office? It would be a public proceeding. Any member of the public that is available to come in I will have the outer door open for that purpose. Is there any objection from anyone in the courtroom? Counsel, I evaluated the factors set forth by case law and I think all those factors have been met.

1 RP 64-65. The defense indicated it did not object to the in-chambers questioning. 1 RP 65-66. The Court stated, “It must remain a public proceeding. So I will open the doors to my office.”

1 RP 66. The judge explained, “it’s easier to do that than to have the bailiff take out all the other jurors.” 1 RP 66.

Juror 2 was then questioned in chambers, and she ultimately served on the jury. 1 RP 66-68, 73.

To prove its case, the State called as witnesses A.F. and D.B., who each testified that Mr. Applegate had had sex with them two to three times per week for a period of years during their youth. 2 RP 38, 65, 76.

At the end of the trial, the Court instructed the jury that Mr. Applegate had already been convicted of the underlying crimes, but that this jury was to determine whether the State proved the two aggravating factors for each count. CP 38-40. As to the first aggravator, Instruction 5 provided:

An “ongoing pattern of sexual abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

CP 43. As to the second aggravator, Instruction 7 provided:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt as to each count:

(1) That the victim and the defendant were family or household members; and

(2) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

If you find from the evidence that element (1) and element (2) have been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer “no” on the special verdict form.

CP 45.

The jury returned a special verdict form finding each aggravating factor existed for each count. CP 32-34. Mr. Applegate appeals. CP 18-31.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. APPLGATE'S
CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

a. A trial court may not conduct any portion of proceedings outside the public courtroom unless it satisfies the *Bone-Club* procedures, including identifying a compelling interest in closure, showing a serious and imminent threat to that interest, and entering formal findings. The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The Washington Constitution similarly states, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial." Const. art. I, § 22. Our constitution further mandates, "Justice in all cases shall be administered openly." Const. art. I, § 10.

Proceedings may occur outside the public courtroom "in only the most unusual circumstances." State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). Before holding proceedings outside the public courtroom, the trial court must:

1. identify a compelling interest that the closure is essential to protect and show a "serious and imminent threat" to that compelling interest;

2. provide anyone present with the opportunity to object;
3. ensure that the method for curtailing open access is the least restrictive means available for protecting the threatened interests;
4. weigh the competing interests of the proponent of the closure and the public; and
5. ensure that the closure is no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); see also In re the Personal Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2005). The trial court must enter formal findings of fact and conclusions of law on these factors, which “should be as specific as possible rather than conclusory.” Orange, 152 Wn.2d at 807; accord Strode, 167 Wn.2d at 228.

The right to a public trial extends to jury selection. Strode, 167 Wn.2d at 226; Presley v. Georgia, ___ S.Ct. ___, 2010 WL 154813 at 3 (filed 1/19/2010). The violation of the right to a public trial is an issue that may be raised for the first time on appeal. Strode, 167 Wn.2d at 229. This Court reviews de novo the question of whether the trial court violated the constitutional right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

b. The closure in this case was unconstitutional because no compelling interest was identified, only one of the five Bone-Club factors was satisfied, and no formal findings were entered. In this case, as in Orange, the only Bone-Club factor that was satisfied was the second – the opportunity to object. 1 RP 25-26, 65-66; see Orange, 152 Wn.2d at 811. Accordingly, as in Orange and Strode, the closure was improper and a new trial on the aggravating factors should be granted.

The trial court in this case never identified a compelling interest in holding a portion of the proceedings outside the courtroom. A fortiori, it did not identify a serious and imminent threat to that interest. But “determination of a compelling interest is the affirmative duty of the trial court.” Orange, 152 Wn.2d at 810.

In Strode, which was also a child sex abuse case, the conviction was reversed where jurors were questioned in chambers even though the trial court alluded to the fact that the interest in private questioning was to ensure confidentiality and to prevent the inquiry from being “broadcast” in front of the whole jury panel. Strode, 167 Wn.2d at 224. This was not good enough because the record was “devoid of any showing that the trial court engaged in

the detailed review that is required in order to protect the public trial right.” Id. at 228.

Here, the trial court did not even do as much as the trial court in Strode had done to identify the interest at stake – there is no mention of a compelling interest justifying closure at all. Indeed, the only reasons for closure mentioned were interests of preference and convenience: jurors who “wished” to be questioned privately would be questioned in chambers because it would be “a lot easier than shuffling all of the jurors out.” 1 RP 25-26. Accordingly, if the trial court’s analysis in Strode was insufficient, it was certainly insufficient here.

As in Strode, the trial court’s failure to identify the interest at stake prevented it from satisfying the other Bone-Club factors. The court did not weigh the competing interests and did not employ the least-restrictive means of addressing the unnamed interest. Finally, the court simply made a conclusory statement that it had “evaluated the factors set forth in case law,” but did not even list the factors, let alone enter the “required formal findings of fact and conclusions of law relevant to the Bone-Club criteria.” Strode, 167 Wn. 2d at 228.

But these steps are not optional. “[T]he party seeking to close the hearing must advance an overriding interest that is likely

to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.” Orange, 152 Wn.2d at 806 (emphasis in original) (citing Waller v. Georgia, 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). In failing to satisfy these requirements, the trial court violated Mr. Applegate’s right to a public trial.

c. The remedy is reversal and remand for a new trial. The violation of the right to a public trial is not subject to harmless error analysis. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006). The exceptional sentence must be vacated, and the case remanded for a new trial. Strode, 167 Wn.2d at 231; Orange, 152 Wn.2d at 814.

2. THE CONVICTIONS ON TWO AGGRAVATING FACTORS WHICH ARE THE SAME IN FACT AND LAW VIOLATE DOUBLE JEOPARDY, REQUIRING VACATION OF THE “ONGOING PATTERN” CONVICTION.

Mr. Applegate was convicted of six counts each of two different aggravated felonies: second-degree rape of a child aggravated by an ongoing pattern of sexual abuse, and second-degree rape of a child aggravated by domestic violence. CP 4, 16-

17, 32-34. But the “ongoing pattern” aggravating factor is a subset, or lesser-included offense, of the “domestic violence” aggravating factor. Accordingly, entering convictions for both aggravators violates the prohibition on double jeopardy. The “ongoing pattern” conviction should be vacated for each count.

a. A defendant’s right to be free from double jeopardy is violated if he is convicted of two offenses that are identical in fact and law. The Fifth Amendment to the United States Constitution provides, “No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....” U.S. Const. amend. V. Similarly, article I, section 9 of our state constitution provides, “No person shall be ... twice put in jeopardy for the same offense.” Const. art. I, § 9. These clauses protect defendants against “prosecution oppression.” State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007) (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1(b), at 630 (2d ed. 1999)).

To determine whether multiple convictions violate double jeopardy, Washington courts apply the “same evidence” test. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to

the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law.

Id.; State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other.

Freeman, 153 Wn.2d at 772 (citing State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). If one statute constitutes a lesser-included offense of another, convictions for both offenses violate double jeopardy. State v. Jackman, 156 Wn.2d 736, 749, 132 P.3d 136 (2007); accord Rutledge v. United States, 517 U.S. 292, 297, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). Courts evaluate the elements "as charged and proved, not merely as the level of an abstract articulation of the elements." Freeman, 153 Wn.2d at 777.

Although the State may bring, and the jury may consider, multiple charges arising from the same conduct, courts may not enter multiple convictions for the same offense without violating double jeopardy. Id. at 770. Where two convictions violate double jeopardy, the court must vacate the conviction on the offense that constitutes a subset of the other, i.e., the "lesser" offense. Womac,

160 Wn.2d at 656; State v. Weber, 159 Wn.2d 252, 266, 149 P.3d 646 (2006).

Double jeopardy protections apply to exceptional sentences. Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (3-justice plurality) & 118 (4-justice dissent), 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Furthermore, the double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. Rutledge, 517 U.S. at 302; Calle, 125 Wn.2d at 775.

This Court reviews de novo the question of whether multiple convictions violate double jeopardy. Freeman, 153 Wn.2d at 770. A double jeopardy claim may be raised for the first time on appeal. Jackman, 156 Wn.2d at 746; RAP 2.5(a).

b. The “domestic violence” aggravator and “ongoing pattern” aggravator charged in this case are identical in fact and law. For each of the six counts of second-degree rape in this case, the State charged Mr. Applegate with two aggravating factors. CP 78-80.

The first was:

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

RCW 9.94A.535(2)(g); CP 79. The second was:

The current offense involved domestic violence, as defined in RCW 10.99.020, and ... [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(2)(h)(i); CP 80.²

As charged and proved in this case, the first (“ongoing pattern”) aggravating factor is merely a subset, or lesser offense, of the second (“domestic violence”) aggravating factor. The domestic violence aggravating factor can be alternatively charged as occurring within sight or sound of the defendant’s or victim’s minor children, or as manifesting deliberate cruelty (see subsections (ii) and (iii) of RCW 9.94A.535(2)(h)), but those bases were not charged or found in this case.

To prove the “ongoing pattern” aggravator, the State presented testimony by the complainants indicating that Mr. Applegate had sex with them two to three times per week over a period of years when they were minors. 2 RP 38, 65, 76. To prove the “domestic violence” aggravator, the State presented the same evidence, plus evidence of the familial relationships. 2 RP 23, 38, 56, 65, 70, 76.

² Although a pregnancy aggravator was originally charged in 2005, the State dropped that factor for this proceeding. See CP 32-50.

The jury instructions similarly show that the two aggravating factors are the same in law and fact. As to the first aggravator,

Instruction 5 provided:

An “ongoing pattern of sexual abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

CP 43. As to the second aggravator, Instruction 7 provided:

To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt as to each count:

- (3) That the victim and the defendant were family or household members; and
- (4) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. An “ongoing pattern of abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

If you find from the evidence that element (1) and element (2) have been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer “no” on the special verdict form.

CP 45.

The only difference between the two is that the “domestic violence” aggravator includes an “ongoing pattern of psychological, physical, or sexual abuse,” whereas the “ongoing pattern” aggravator mentions only an “ongoing pattern of sexual abuse.” But in this case there was no evidence of any psychological or physical abuse that was separate from the sexual abuse, and the jury did not find that there was. CP 32-34; 2 RP 18-102.

Furthermore, the fact that the “ongoing pattern” statute includes an age element is of no moment. The underlying crime (second-degree rape of a child) includes an even stricter age element, which necessarily applies both to the crime of second-degree rape of a child aggravated by an ongoing pattern of sexual abuse, and second-degree rape of a child aggravated by domestic violence. CP 38-40; RCW 9A.44.076. Thus, the former offense did not require proof of a fact which the latter did not. See Orange, 152 Wn.2d at 817 (“The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”).

The State's theory was that the "domestic violence" aggravator applied because Mr. Applegate engaged in an ongoing pattern of sexual abuse against his stepdaughter and niece, and that the "ongoing pattern" aggravator applied because Mr. Applegate engaged in an ongoing pattern of sexual abuse against his stepdaughter and niece. The two convictions are the same in law and fact, and violate the prohibition on double jeopardy. The "ongoing pattern" aggravator must be vacated for all six counts. Womac, 160 Wn.2d at 656.

3. THE TRIAL COURT VIOLATED MR. APPLGATE'S RIGHT TO DUE PROCESS BY OMITTING THE TO-CONVICT INSTRUCTION FOR THE "ONGOING PATTERN" AGGRAVATOR.

a. The failure to provide a "to-convict" instruction with every element of the crime charged violates due process. In criminal cases, trial courts must provide juries with "to-convict" instructions containing all of the elements of the crime, because the to-convict instruction serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process

clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. “It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved.” Smith, 131 Wn.2d at 263.

The failure to provide the jury with a to-convict instruction listing every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of the to-convict instruction or an element therefrom “obviously affect[s] a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

b. The trial court violated Mr. Applegate's right to due process by omitting the to-convict instruction for the "ongoing pattern" aggravator. In this case, the trial court provided a to-convict instruction for the "domestic violence" aggravator, but not for the "ongoing pattern" aggravator. CP 35-50. For the "ongoing pattern" aggravator, only a definitional instruction was given. CP 43. This made it seem as if the State only had to prove domestic violence in order for the jury to find Mr. Applegate guilty of both aggravators. Indeed, the "ongoing pattern" definitional instruction appears to be describing an element of the domestic violence aggravator. Compare CP 43, CP 45. This omission was exacerbated by the fact that the "beyond a reasonable doubt" standard of proof was emphasized in the to-convict instruction for the domestic violence aggravator, but was not mentioned in the definitional instruction for the "ongoing pattern" aggravator. In essence, the jury was instructed that all it had to do "to convict" was find Mr. Applegate committed domestic violence. This was an incorrect statement of the law. Accordingly, Mr. Applegate's six convictions for an ongoing pattern of sexual abuse violate due process.

c. Reversal is required. “An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The total omission of essential elements from the “to convict” instruction relieves the State of its burden of proof, requiring reversal. State v. Sibert, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 653868 at *2 (filed February 25, 2010). Here, not only were all of the essential elements of the ongoing pattern aggravator omitted from the to-convict instruction, the to-convict instruction itself was omitted. Accordingly, the “ongoing pattern” aggravator must be reversed for all six counts.

4. THE APPLICATION OF THE DOMESTIC VIOLENCE ENHANCEMENT TO MR. APPLGATE VIOLATED THE EX POST FACTO CLAUSE.

a. The ex post facto clause prohibits retrospective application of an amendment that aggravates a crime or increases the punishment for a criminal act. The federal and state constitutions prohibit ex post facto laws. U.S. Const. art. I, § 10; Const. art I, § 23. The framers considered these provisions to be “perhaps greater securities to liberty and republicanism than any the Constitution contains.” Carmell v. Texas, 529 U.S. 513, 521, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) (quoting *The Federalist*

No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison)). The ex post facto clause “was designed as an additional bulwark in favour of the personal security of the subject, to protect against the favorite and most formidable instruments of tyranny, that were often used to effect the most detestable purposes.” Carmell, 529 U.S. at 532 (internal citations omitted).

“Every law that aggravates a crime, or makes it greater than it was, when committed” violates the ex post facto clause. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (quoting Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)) (emphasis in original). In other words, the Constitution prohibits legislatures from retroactively altering the definition of crimes or increasing the punishment for criminal acts. Collins, 497 U.S. at 43.

b. The application of the domestic violence enhancement to Mr. Applegate violated the ex post facto clause because it retroactively aggravated his crimes and increased his punishment.

In 1988-89, when Mr. Applegate committed his crimes, the domestic violence aggravating factor did not exist. RCW 9.94A.390 (1989). The Legislature added this aggravating factor in 1996. Laws of 1996 Ch. 248, § 2; RCW 9.94A.390 (1996). The

retrospective application of this factor to increase Mr. Applegate's punishment violated the ex post facto clauses of the state and federal constitutions.

Mr. Applegate had no notice that committing crimes against family members constituted aggravated offenses subject to enhanced penalties. Indeed, not only was the domestic violence aggravator absent from the 1989 code, but the legislature explicitly stated that crimes against family or household members should be treated the same as other crimes, not as either greater or lesser crimes:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or

tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

RCW 10.99.010 (1989) (emphasis added).

In sum, the enhancement of Mr. Applegate's sentence based on the domestic violence aggravator violated the ex post facto clause because the new law "aggravate[d] a crime, or [made] it greater than it was, when committed." Collins, 497 U.S. at 42; Calder, 3 Dall. at 390. The domestic violence aggravator should be vacated on all six counts.

5. THE APPLICATION OF THE DOMESTIC VIOLENCE ENHANCEMENT TO MR. APPLGATE VIOLATED THE PRESUMPTION AGAINST RETROACTIVE APPLICATION OF A STATUTORY AMENDMENT.

Largely because of constitutional ex post facto concerns, statutes are presumed to apply prospectively only. State v. Smith, 144 Wn.2d 665, 673, 30 P.3d 1245 (2002). This presumption "is an essential thread in the mantle of protection that the law affords the individual citizen." State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 384 (1999). It "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Id.

A statutory amendment should not be applied retroactively unless (1) the Legislature evinces a clear intent for retrospective

application, (2) the amendment in question is curative, or (3) the amendment is remedial. In re Detention of Elmore, 162 Wn.2d 27, 35-36, 168 P.3d 1285 (2007).

The Legislature did not evince any intent – let alone a clear intent – for retrospective application of the domestic violence amendment to former RCW 9.94A.390. Laws of 1996 Ch. 248, § 2. In Smith, the Supreme Court ruled there was no clear legislative intent for retroactive application of RCW 9.94A.345 even though the “intent” section of the new statute stated, “RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court’s decision in State v. Cruz.” Smith, 144 Wn.2d at 672. The Court acknowledged that the Legislature expressed “discontent” with Cruz, which held the same statute did not apply retroactively. But it noted, “RCW 9.94A.345 does not contain an explicit legislative command that the 1997 amendment applies retroactively.” Id (emphasis added). Here, there is neither an explicit nor an implicit legislative command that the 1996 amendment to former RCW 9.94A.390 applies retroactively.

Nor was this amendment curative. A curative amendment is one that clarifies or technically corrects an ambiguous statute. Cruz, 139 Wn.2d at 192. A “substantive change is not curative.”

Smith, 144 Wn.2d at 674. The 1996 change to RCW 9.94A.390, like the amendments in Cruz and Smith, did not clarify an existing law, but effected a substantive change. It created a new aggravated crime and increased the punishment for those committing crimes against family or household members. Laws of 1996 Ch. 248, § 2.

Finally, the amendment to former RCW 9.94A.390 was not remedial. “A remedial change is one that relates to practice, procedures, or remedies, and does not affect a substantive or vested right.” Cruz, 139 Wn.2d at 192. The amendment at issue here was substantive, not procedural, and therefore it was not remedial. Accordingly, the application of the domestic violence aggravator to Mr. Applegate was improper, and the convictions on this aggravator should be vacated for all six counts.

E. CONCLUSION

For the reasons set forth above, Mr. Applegate respectfully requests that this Court vacate his exceptional sentence and remand for a new trial for violation of the right to a public trial. In the alternative, Mr. Applegate asks this Court to vacate the convictions on the “ongoing pattern” aggravator for a violation of the double jeopardy clause and the omission of the to-convict instruction. In the alternative, Mr. Applegate asks this Court to vacate the convictions on the “domestic violence” aggravator for violations of the ex post facto clause and the presumption against retroactive application of a statutory amendment.

DATED this 17th day of March, 2010.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 64100-0-I
)	
RONALD APPELATE,)	
)	
APPELLANT.)	

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAR 17 PM 4:13

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|------------------------------------|-----|---------------|
| [X] DAVID MCEACHRAN, DPA | (X) | U.S. MAIL |
| WHATCOM COUNTY PROSECUTOR'S OFFICE | () | HAND DELIVERY |
| 311 GRAND AVENUE | () | _____ |
| BELLINGHAM, WA 98225 | | |
|
 | | |
| [X] RONALD APPELATE | (X) | U.S. MAIL |
| 881203 | () | HAND DELIVERY |
| COYOTE RIDGE CORRECTIONS CENTER | () | _____ |
| PO BOX 769 | | |
| CONNELL, WA 99326-0769 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF MARCH, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711