

64404-1

64404-1

No. 64404-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH RUPE,

Appellant.

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

The Honorable Cheryl Carey

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to bifurcate the defendant's trial on the underlying charges from a separate proceeding on the aggravating factors.

2. The exceptional sentence that was imposed based on a special verdict must be reversed because the jury was erroneously informed that it had to be unanimous as to a "no" answer on the form.

3. The trial court erred in imposing the exceptional sentence where the aggravating factor of a pattern of "abuse" of multiple "incidents" over a "prolonged period" of time is unconstitutionally vague as applied.

4. There was insufficient evidence of unlawful imprisonment.

5. The trial court erred in denying the defendant's motion for a mistrial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, in the defendant Jeremiah Rupe's trial on charges of second degree assault, fourth degree assault, felony harassment, and unlawful imprisonment, the trial court erred in failing to bifurcate the defendant's trial on the underlying charges

from a separate proceeding on the aggravating factors, requiring reversal of the convictions and sentences imposed, including the exceptional sentence on the second degree assault conviction.

2. Whether the exceptional sentence that was imposed based on a special verdict, in which the jury found that the crime of second degree assault was domestic violence that was part of a pattern of multiple incidents over a prolonged period of time, must be reversed because the jury was erroneously informed that it had to be unanimous as to a “no” answer on the form.

3. Whether the trial court erred in imposing the exceptional sentence where the aggravating factor of a pattern of “abuse” of multiple “incidents” over a “prolonged period” of time is unconstitutionally vague as applied, where this period of time was defined as more than a few weeks simply on the basis of a case holding that two weeks is not a prolonged period of time, and where no standard was provided defining what prior conduct is considered abuse or constitutive of a pattern of incidents.

4. Whether there was insufficient evidence of unlawful imprisonment where there was no “restraint” of the complainant, the defendant and complainant both having been passengers in a

car driven by another.

5. Whether the trial court erred in denying the defendant's motion for a mistrial where the prosecutor elicited from a witness that the defendant was in jail custody.

C. STATEMENT OF THE CASE

Jeremiah Rupe was given a 63 month exceptional sentence on a conviction for second degree assault. CP 93-101. He appeals all of his convictions and the sentences imposed. CP 105.

Mr. Rupe had been charged initially with second degree assault by strangulation, and unlawful imprisonment. CP 1-6. Later the information was amended to add a charge of fourth degree assault, and the aggravating factor that his conduct was domestic violence and 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. CP 1-6 (Information); CP 7-9 (First Amended Information); see RCW 9.94A.535(3)(h)(i).

According to the affidavit of probable cause, the defendant, on February 9, 2009, struck the victim Bailey Giard, his girlfriend, while they were walking on SE 240th St., and then attempted to

strangle Giard from behind as he rode in the rear passenger seat of a car in which she was the front seat passenger. Later he tried to physically force Giard to get back into the car after they had both exited. CP 3-4.

Subsequently, in response to the defense motion to bifurcate the trial of the underlying crimes and the aggravating factor under RCW 9.94A.537(4), on ground that the State's proffered prior bad act evidence (claimed to support the "multiple incidents" aggravating factor) was not relevant to the underlying substantive offenses and would not be admissible at a trial on those crimes, the State added a charge of felony harassment. 9/29/09RP at 30; Supp. CP ____, Sub # 43 (Second Amended Information).

The trial court allowed the amendment, denied the motion to bifurcate, and Mr. Rupe was convicted as charged on the crimes and aggravating factor, except that the jury found no evidence whatsoever on the charge of felony harassment - threat to kill. CP 82. As noted Mr. Rupe was given a 63 month exceptional sentence on the second degree assault, based on the aggravating factor. CP 93-101.

The jury instructions also erroneously told the jury it had to be unanimous on the non-existence of the aggravating factor, and the aggravating factor is also unconstitutionally vague as applied. See infra. Mr. Rupe appeals. CP 105.

D. ARGUMENT

1. MR. RUPE'S CONVICTIONS AND SENTENCE MUST BE REVERSED FOR FAILURE OF THE TRIAL COURT TO BIFURCATE TRIAL ON THE AGGRAVATING FACTOR.

a. RCW 9.94A.537(4) presumes bifurcation will be ordered unless all three circumstances required under the statute for a unified proceeding are met. In addition to the underlying charges of second degree assault and unlawful imprisonment charged against Mr. Rupe in the original information, the defendant was also charged in a subsequent first amended information with the aggravating factor of RCW 9.94A.535(3)(h)(i) that the crime of second degree assault by strangulation was one of domestic violence as defined by RCW 10.99.020 and that there was an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. CP 1-6 (Information); CP 7-9 (First Amended

Information) (also adding a charge of fourth degree assault).

Prior to trial the prosecutor proffered evidentiary claims of prior acts of violence by the defendant against Bailey Giard occurring in the previous several years stretching back to June of 2005, and sought to have this evidence presented to a jury in a single proceeding (along with trial on the substantive counts) in order to prove the aggravating factor and support an exceptional sentence. Supp. CP ____, Sub # 41 (State's Trial Memorandum); see also 10/1/09RP at 81-85. The State specifically contended that the prior acts were being proffered on this issue alone and not as ER 404(b) evidence relevant to any of the underlying counts:

The State intends to offer evidence of the defendant's prior bad acts in order to prove an element of the crimes he is presently charged with, specifically the aggravating factor of a history of domestic violence. Under RCW 9.94A.535(3)(h)(i), the State is required to prove an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.

Supp. CP ____, Sub # 41 (State's Trial Memorandum, at pp. 12-13).

The State twice asserted in its briefing and to the trial court that the evidence of Mr. Rupe's alleged prior acts was therefore simply "not subject to the restrictions of ER 404(b)." (Emphasis added.) Supp.

CP ____, Sub # 41 (State's Trial Memorandum, at p. 13); 9/24/09RP at 16-17.

When the State filed its first amended information adding a charge of fourth degree assault and the aggravating factor, and sought to introduce evidence of prior bad acts as pertinent to the latter, the defense objected on ER 404(b) grounds, argued that the evidence would be irrelevant at a trial of the underlying substantive counts, and noted its request, upon which it had also provided written briefing, that the trial on the aggravating factor be separate. 9/24/09RP at 17-18; CP 10-15 (Defendant's Trial Brief). The State contended simply that a unified proceeding would serve "judicial efficiency." 9/24/09RP at 18. The trial court reserved decision on the bifurcated trial request. 9/24/09RP at 19.

However, as the defendant argued, a specific statute addresses the question of whether evidence supporting alleged aggravating factors should be "presented to the jury during the trial of the alleged crime" or should, in fairness to the accused, be presented to a jury in a "separate proceeding." The statute, RCW 9.94A.537(4), provides as follows:

Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in **RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t)**. If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the *res geste* [sic] of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(Emphasis added.) RCW 9.94A.537(4). And indeed, the aggravating factor of domestic violence – multiple incidents over a prolonged period of time, appears in RCW 9.94A.535(3)(h)(i), one of the listed exceptions to .537(4)'s language that the evidence on a factor “shall be presented to the jury” in a unified trial. RCW 9.94A.537(4).

Accordingly, Mr. Rupe moved again for a bifurcated trial, by further written briefing filed September 29, 2009. CP 16-18.

In the brief, Mr. Rupe quite correctly noted that the case before the court satisfied the three (3) requirements (including inadmissibility of the evidence at a substantive trial) for the trial

court to hold a separate proceeding. CP 18 (citing RCW 9.94A.537(4)).

In response, at a hearing held the next day, on September 30, 2009, the State indicated it would be soon filing a Second Amended Information, to add a charge of “felony harassment” pursuant to RCW 9A.46.020, now further alleging that Mr. Rupe threatened to “kill Bailey Giard” and placed her “in reasonable fear that the threat would be carried out.” 9/29/09RP at 30; Supp. CP ____, Sub # 43 (Second Amended Information).¹

Mr. Rupe objected to the second amendment of the information, because the State was plainly adding the felony harassment charge in response to the previous week’s discussion of the issue of bifurcation. 9/29/09RP at 33. As counsel argued in his briefing and to the court, under RCW 9.94A.535 and .537(4), a separate trial should be held if the aggravating factor is multiple incidents, and if the evidence is irrelevant to the underlying charges – thus not “otherwise admissible” to those charges -- under .537(4).

¹The reference at page 9 of the transcript of the prior proceeding of 9/24/09 is to the first amended information (adding a charge of assault in the fourth degree and adding the aggravating factor), to which Mr. Rupe waived reading and entered a plea of not guilty.

9/29/09RP at 33-34; see CP 16-18.

The trial court, however, stated: “There’s a case that allows the State to [INAUDIBLE].” 9/29/09RP at 33. The court therefore rejected the defense objection and allowed the amendment.

9/29/09RP at 33.

b. The information was improperly amended to add felony harassment and the prior bad acts were not relevant to any of the remaining charges. The State contended that the prior bad acts were now relevant (as ER 404(b) evidence) to the new (soon to be added) underlying charge of felony harassment, but also to the originally charged crime of unlawful imprisonment, despite having twice previously asserted that the evidence of prior acts was relevant only to the aggravating factor and that ER 404(b) was not implicated in the case. 9/29/09RP at 32; see Supp. CP ____, Sub # 41 (State’s Trial Memorandum, at p. 13); 9/24/09RP at 16-17.

The prosecutor correctly noted that there is general case law allowing prior bad act evidence in felony harassment cases as relevant to the element of whether the victim reasonably feared that the threat would be carried out. 9/29/09RP at 35. See. e.g., State

v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000). The trial court ruled that the prior bad act evidence was relevant to Ms. Giard's fear on the charge of felony harassment, [and] also as to her intent, why she [INAUDIBLE]." 9/29/09RP at 39.

However, the State's theory of Felony Harassment was that the act of strangling Ms. Giard (which was the second degree assault charged) was also an implicit threat to kill because the defendant had threatened to do so in the past. 9/29/09RP at 37. But there must be a threat to kill the victim, communicated to that person. See RCW 9A.46.020. And the act of restraining a person that is merely "incidental" to another offense does not establish an independent crime of unlawful imprisonment. See State v. Green, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980) (analyzing aggravated murder statute's requirement of killing in the course of kidnap).

The State's application for yet another amendment of the information to add felony harassment was putatively premised on the deputy prosecuting attorney's checking of the box on the application asserting that "[t]he Amended Information more accurately represents the Defendant's Conduct." Supp. CP ____, Sub # 43 ([Second] Amended Information, and Motion and Order

Permitting Filing of [a Second] Amended Information, dated September 29, 2009).

However, in fact, there was no further evidence presented to the trial court to support the further amendment of the information, beyond the implicit reliance on the original affidavit of probable cause, to support a felony harassment charge. See CP 3-5 (Certification of Probable Cause prepared by Auburn Police Department Detective Randey Clark).

In that Certification, Detective Clark notes that when a concerned friend of Ms. Giard called the police on her behalf to report the incident of assault, Ms. Giard apparently told the 911 operator that Mr. Rupe was "going to be so mad," and stated, "He's going to kill me." CP 4 (Paragraph 3).

But it is beyond any cavil whatsoever that this statement fails to provide a basis for a charge of Felony Harassment. Pursuant to RCW 9A.46.020, a person is guilty of Felony Harassment -- threat to kill, when:

[w]ithout lawful authority, the person knowingly threatens: to cause bodily injury immediately or in the future to the person threatened or to any other person [and] the person by words or conduct places the person threatened in reasonable fear that the threat

will be carried out [and] the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened[.]

See RCW 9A.46.020. There must be an actual, knowing threat to kill, and it must be communicated to the victim. See, e.g., State v. Mills, 154 Wn.2d 1, 12, 109 P.3d 415 (2005); State v. Kilburn, 151 Wn.2d 36, 48-49, 84 P.3d 1215 (2004).

Furthermore, as noted, there was no new evidence or alleged facts added to the September 24, 2009 State's Trial Memorandum to support a charge of Felony Harassment. The State added new facts regarding the prior conduct of the defendant, but there were no new facts regarding the February 9, 2009 incident (upon which the underlying substantive crimes were based) that would support Felony Harassment.

There was no basis for a charge of felony harassment and the information should not have been amended a second time. CrR 2.1(a)(1) provides that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Here, the amended information was improperly allowed per State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). In Knapstad, the Supreme Court

affirmed that a trial court must dismiss criminal charges before trial if the State's pleadings are insufficient to establish a prima facie case with regard to all the elements of the charges. Knapstad, 107 Wn.2d at 351-53. In addition, former RCW 9.94A.411(2)(a) states that “[c]rimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.”

Thus, at that juncture, under the language of the above statute, the significant issue arose of whether the prior bad acts would be “otherwise admissible in trial of the charged crime,” this being one of the three (3) requirements for the trial court to require the evidence of the prior acts to be presented to the jury in a separate proceeding. RCW 9.94A.537(4).

Because there was no basis for a charge of Felony Harassment, and the information should not have been amended, when this Court analyzes the question of whether the prior bad act evidence was “otherwise admissible,” it must do so without consideration of that wrongly instituted charge.

Absent that charge, only the State's unlawful imprisonment theory remains. The State argued that the prior act evidence was also relevant under ER 404 to the issue of whether Bailey Giard was restrained by the defendant allegedly keeping her in two cars by intimidation, for purposes of this element of unlawful imprisonment, because the jury would wonder why she did not "picked up a cell phone and called 911 or at a stoplight gotten out of the car and walked away." 9/29/09RP at 35; CP 21 (State's Supplemental Brief, citing State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (prior acts are admissible to explain recanting victim's credibility)).

But the State's Trial Brief – effectively its offer of proof – does not support the State's theory of Unlawful Imprisonment, and the corresponding belated theory of relevance of prior bad acts, asserted by the prosecutor in order to avoid bifurcation. There was no admissibility of the prior bad acts under a Magers theory that the prior bad acts explained some recantation or reluctance to report by Ms. Giard. Magers, 164 Wn.2d at 186; see also State v. Fisher, 1654 Wn.2d 727, 746, 202 P.3d 937 (2009) (prior acts may be admissible to show delayed reporting of a crime if the delay

becomes an issue at trial). The State's Trial Brief states that Mr. Rupe jumped into a car (as a passenger) owned by Ms. Giard's friend Gina, and then followed her into a car owned by her friend Brandon. Among the many things the defendant did and said were that he refused to get out of Brandon's car, and said he would be "going with Bailey wherever she went." Supp. CP ____, Sub # 41 (State's Trial Memorandum, at p. 5).

During this time in Brandon's car, Bailey sat in the front seat and the defendant sat in the back. The cell phone was in constant use, by Brandon, the driver; and Bailey, the victim; and the defendant at one point tried to knock the phone out of Bailey's hand. Supp. CP ____, Sub # 41 (State's Trial Memorandum, at pp. 5-6). Later the defendant tried to strangle Ms. Giard from behind, and later again he tried –unsuccessfully – to force her back into Brandon's car after she got out. Supp. CP ____, Sub # 41 (State's Trial Memorandum, at pp. 6-7).

The State's pre-trial proffer of its theory of the crime and belated theory of prior act relevance was unsupportable. The crime of unlawful imprisonment was charged in the information simply under its element of restraint. CP 1-6; CP 7-9. That

restraint may occur by physical force, intimidation or deception. RCW 9A.40.040. The proffer of claimed facts did not make out unlawful imprisonment by the State's theory of intimidation, if any theory at all, and thus the prosecutor's theory of the relevance of prior bad acts was wholly untenable. The belated theory was introduced merely to defeat the defense request for a trial that would not be prejudiced by extensive inadmissible propensity evidence. ER 404(b). Bifurcation should have been granted under RCW 9.94A.537(4) and reversal is required.

c. Even if the prior acts were minimally relevant to unlawful imprisonment, the prejudice of the prior bad acts required bifurcation. Finally, arguendo, even if the prior bad acts had some de minimis relevance to the unlawful imprisonment charge, a matter Mr. Rupe in no way concedes, the court reversibly erred in its analysis that under .537(4), the probative value of the prior act evidence was not outweighed by its prejudicial effect "on the jury's ability to determine guilt or innocence for the underlying crime." See 9/29/09RP at 39 (court's ruling); RCW 9.94A.537(4).

The court's analysis was considered while including the improperly added felony harassment crime, which should not have

been allowed by any measure. This left only one minor crime of all three remaining viable counts as to which the evidence was (claimedly) properly introduced, and resulted in a trial in which the prior bad acts seriously prejudiced the defendant's right to a fair trial on the charge of second degree assault by strangulation, on which he was given his 63-month exceptional term. This Court need not be presented with an extended recitation of the case law attesting to the serious prejudice of prior bad acts in similar conduct prosecutions. See, e.g., State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). In doubtful cases of ER 404(b) admissibility, prior bad act evidence should be excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Here, that analysis must consider all of the charges at trial, as to the majority of which – assuming, as Mr. Rupe does not concede, that the prior acts were even relevant to the one charge of unlawful imprisonment – the prior bad act evidence was manifestly not relevant.

Thus in fact, the probative value of the prior bad act evidence was substantially outweighed by the danger of prejudice to the defendant's right to fair jury consideration of all of the

RCW 9.94A.537(4). See also ER 403.

The trial court erred in not granting the defendant's motion to bifurcate and his convictions and sentence must be reversed.

2. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE.

a. The special verdict form was faulty and requires reversal of the exceptional sentence. The special verdict form was faulty under State v. Bashaw, Supreme Court No. 81633-6, decided July 1, 2010, and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

The exceptional sentence of 63 months that was imposed on Mr. Rupe based on a special verdict, in which the jury found that the crime of second degree assault was domestic violence that was part of a pattern of multiple incidents over a prolonged period of time, must be reversed because the jury was erroneously informed that it had to be unanimous as to a "no" answer on the special verdict form. CP 72, CP 79.

In Bashaw and Goldberg the Supreme Court makes clear that a non-unanimous negative jury decision on a special finding is a final determination that the State has not proved that finding

beyond a reasonable doubt. In Goldberg, it was held that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's sentence. Goldberg, 149 Wn.2d at 891.

Here, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instructions here stated that unanimity was required for either determination. CP 72, CP 79. That was error, and cannot be concluded to be harmless beyond a reasonable doubt under State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), and Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), because it is deemed impossible to speculate what a jury in an aggravating factor case did, or might have done or not done in terms of unanimity or mere disagreement among jurors caused by a sole juror (either of which circumstance would equally defeat the finding) if the jury had been properly instructed. State v. Bashaw, at pp. 15-17. Reversal is

mandated.

b. The aggravating factor is unconstitutionally vague.

The trial court further erred in imposing the exceptional sentence because the aggravating factor of multiple incidents over a “prolonged period” of time is unconstitutionally vague as applied, where this period of time was defined as more than a few weeks simply on the basis of a case holding that two weeks is not a prolonged period of time.

RCW 9.94A.535, entitled "Departures from the guidelines," provides in pertinent initial part as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

RCW 9.94A.535. Mr. Rupe received an exceptional sentence as a result of a jury finding based on vague criteria that the second degree assault involved domestic violence and was "part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time."

CP 72, CP 79. The trial court then found that "substantial and compelling reasons justify an upward departure from the standard range." Supp. CP ____, Sub # 71 (Findings on Exceptional Sentence).

RCW 9.94A.535 explains what aggravating factors a jury may consider. They include the aggravating factor imposed here under RCW 9.94A.535(3)(h)(i). However, RCW 9.94A.535(3)(h)(i) does not offer an objective framework to determine when an ongoing pattern of abuse has occurred or whether there were "multiple incidents over a prolonged period of time." The statute is vague as applied to Mr. Rupe and violates his right to due process because it does not provide explicit standards to protect against arbitrary application and was in fact applied arbitrarily in this case, notwithstanding the trial court's "more than a few weeks" definition of the temporal aspect of the factor, which derives from a case stating only that two weeks is not a prolonged period.

First, Mr. Rupe's claim of statutory vagueness is properly before this Court. This claim is properly raised because the asserted error is "a manifest error affecting a constitutional right." RAP 2.5; State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

The vagueness of these statutes presents a due process of law claim rooted in the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. 14.

In any vagueness challenge, the first step is to determine if the statute in question is to be examined as applied to the particular case or on its face. Spokane v. Douglass, 115 Wn.2d 171, 181-82, 795 P.2d 693 (1990) (citing Schwartzmiller v. Gardner, 752 F.2d 1341, 1346 (9th Cir. 1984)). The rule regarding vagueness challenges is well settled: vagueness challenges to enactments which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case. Douglass, 115 Wn.2d at 182 (citing Maynard v. Cartwright, 486 U.S. 356, 361, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988)). Consequently, the statute in question in Mr. Rupe's case must be judged as applied to him.

The rule is that a penal statute is void for vagueness if there are no minimal guidelines provided by the legislature to prevent arbitrary and discriminatory application. A penal statute is void for vagueness under the Fourteenth Amendment if persons of common intelligence must necessarily guess at the statute's

meaning and differ as to its application. State v. O'Day, 109 Wn.2d 796, 810, 749 P.2d 142 (1988). "Notice, however, is not the most important aspect. Rather, the vagueness doctrine is most concerned with whether a legislature established minimal guidelines to govern enforcement." O'Day, 109 Wn.2d at 811-12 (quoting Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983)); see also State v. Hunt, 75 Wn. App. 795, 880 P.2d 96, review denied, 125 Wn.2d 1009 (1994).

Thus for example in State v. Carter, the Washington Supreme Court succinctly stated that a statute must contain ascertainable standards for adjudication so that police, judges, and juries are not free to decide what is prohibited and what is not, depending on the facts of each particular case. State v. Carter, 89 Wn.2d 236, 239-40, 570 P.2d 1218 (1977). Importantly, a statute fails to offer sufficient guidelines where it relies on inherently subjective terms, or invites an inordinate amount of discretion in its application. State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992).

RCW 9.94A.535(3)(h)(i), as applied in Mr. Rupe's case fails both prongs of the Coria standard. There are no guidelines in case law or RCW 9.94A.535(3)(h)(i) creating an objective framework for

deciding what constitutes an ongoing pattern of abuse or multiple incidents over a prolonged period of time. The jury here was left to determine the meaning of those ambiguous phrases on their own.

Notably, the jury instructions' definition of prolonged period as "more than a few weeks" fails to incorporate any case law standard that is helpful to determining the meaning of the statute. CP 74. One decision states that two weeks is not a prolonged period of time. State v. Barnett, 104 Wn. App. 191, 203, 16 P.3d 74 (2001). The Washington cases suggest that the period required is one of years. State v. Schmeck, 98 Wn. App. 647, 651, 990 P.2d 472 (1999); State v. Duvall, 86 Wn. App. 871, 877, 940 P.2d 671 (1997) (two-year period of abuse occurring in Oregon and Washington sufficient to demonstrate pattern of abuse). There is no reason why a period of time that is a scintilla greater than a period of time that a Washington court has stated was not enough, might be enough to establish a "prolonged period." This reasoning from the obverse solves nothing in terms of the indecipherability of the aggravating factor's temporal meaning.

For further example, it is not clear whether the jury considered past incidents that were similar to the crime as to which

the exceptional sentence was imposed, or incidents similar to the fourth degree simple assault, as to which the defendant was also charged with the aggravating factor. The imposition of the exceptional sentence depended solely on the jury's subjective view of the factor the court gave them to consider. RCW 9.94A.935(3)(h)(i) is therefore applied inconsistently and arbitrarily in this case. The exceptional sentence must be reversed.

c. The evidence was insufficient. The State must prove aggravating factors beyond a reasonable doubt. State v. Mills, 154 Wn.2d at 7-8; U.S. Const. amend. 14. The aggravating factor statute was designed to codify existing common law, Laws of 2005, Ch. 68 §§ 1,3, and that requires that all aggravating factors relate to the offense(s), not other matters. See, e.g., State v. Barnes, 117 Wn.2d 701, 711-14, 818 P.2d 1088 (1991). The SRA's explicit command is that sentences be imposed “without discrimination as to any element that does not relate to the crime or the previous record of the defendant.” RCW 9.94A.340. Here, prior uncharged wrongful conduct over years manifestly does not satisfy the requirement that the crimes charged were a pattern of abuse over a prolonged period of time. The sentence must be reversed.

3. MR. RUPE'S CONVICTION FOR UNLAWFUL IMPRISONMENT UNDER RCW 9A.40.040(1) MUST BE REVERSED FOR INSUFFICIENCY OF THE EVIDENCE.

Sufficient evidence must support a criminal conviction. U.S. Const. amend. 14; Wash. Const. Art. 1, § 3; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Valencia, 148 Wn. App. 302, 313, 198 P.3d 1065 (2009). To determine whether sufficient evidence exists to affirm a jury verdict of guilty, the reviewing court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the essential elements of the charged crime were proved by the prosecution beyond a reasonable doubt. State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

When a defendant challenges the sufficiency of evidence in a criminal case, all reasonable inferences from the evidence are drawn in favor of the State. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Even under that liberal standard, the evidence in the present case was constitutionally inadequate.

Here, Mr. Rupe was charged with and convicted of unlawful

imprisonment. A person commits unlawful imprisonment if “he knowingly restrains another person.” RCW 9A.40.040(1). To restrain someone is to restrict their movements without consent and without legal authority in a manner which “interferes substantially” with the person’s liberty. RCW 9A.40.010(1).

A substantial interference is a real or material interference with the liberty of another, and mere petty annoyance, a slight inconvenience, or an imaginary conflict is inadequate to establish guilt. State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), affirmed, 92 Wn.2d 357 (1979).

By placing the word “substantial” in the statutory definition of “restraint,” the Legislature demonstrated its intent that the law reach only significant conduct restricting a person’s freedom of movement in “important” and “essential” ways. Robinson, 20 Wn. App. at 885; see also State v. Washington, 135 Wn. App. 42, 50, 143 P.3d 606 (2006), review denied, 160 Wn.2d 1017, 161 P.3d 1028 (2007) (real or material interference with liberty is required).

For example, sufficient evidence of restraint existed where a defendant threatened a victim with death if the victim tried to escape his custody. State v. Lansdowne, 111 Wn. App. 882, 889,

46 P.3d 836 (2002). In comparison, here, the actual facts of Ms. Giard's presence in a car with the defendant demonstrate that Ms. Giard and the defendant were both passengers. 10/12/09RP at 152. Mr. Rupe's claim that he would be following Ms. Giard wherever she went may be stalking, but it is not "restraint." 10/12/09RP at 153. The fact that the defendant refused to get out of the car when Ms. Giard asked him to, manifestly does not establish that Mr. Rupe restrained the victim in the automobile. 10/12/09RP at 153-54.

There was also no "substantial interference" with Ms. Giard's freedom of movement. The Court of Appeals has held that obstruction of a solitary doorway exit is sufficient evidence to support an unlawful imprisonment conviction. State v. Allen, 116 Wn. App. 454, 466, 66 P.3d 653 (2003). In that case, the victim was at an apartment with the defendant, and screamed repeatedly as she tried to exit the apartment, but Allen prohibited her from leaving by standing in the only doorway. Allen, at 458. Here, the defendant did nothing to prohibit the victim, who was in the front passenger seat next to the driver (who was not Mr. Rupe) from leaving the vehicle. Indeed, Ms. Giard wanted to stay in the car, to

be near her friend Thomas. 10/13/09RP at 14. She later did exit, and the defendant at most then tried to push her back into the vehicle. 10/13/09RP at 26-28.

There was insufficient evidence of “restraint,” and therefore Mr. Rupe’s conviction for unlawful imprisonment must be reversed as the entry of judgment violated due process. U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

4. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A MISTRIAL WHERE THE STATE ELICITED THAT THE DEFENDANT WAS IN JAIL, VIOLATING HIS PRESUMPTION OF INNOCENCE.

The trial court must grant a mistrial where an irregularity occurs and as a result the defendant’s right to a fair trial is “so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Thus, where a mistrial motion is made for an irregularity, the court must determine whether the irregularity prejudiced the defendant’s right to a fair trial. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). Here, the defense moved for a mistrial,

when the prosecutor elicited repeatedly that the defendant had called the witness from Jail. 10/14/09RP at 15-17. The defense objected. The State argued that it was known that the prosecutor would be asking about telephone calls, but there was absolutely no agreement that the fact of Jail custody could be elicited.

10/14/09RP at 55. The defense declined a limiting instruction, because doing so would only remind the jury of the prejudicial testimony. 10/14/09RP at 62.

In assessing the degree of prejudice, a court should examine (1) the seriousness of the irregularity; (2) whether it was cumulative of properly admitted evidence; and (3) whether it could have been cured by an instruction. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987) (new trial warranted where assault complainant testified that the defendant "already has a record and had stabbed someone"); State v. Weber, 99 Wn.2d at 165-66.

In addition, the inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. State v. Weber, 99 Wn.2d at 164.

Here, the principle at work is that every criminal defendant is entitled to a fair trial by an impartial jury. U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22. The right to a fair trial includes the right to the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. Morissette v. United States, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." State v. Gonzalez, 129 Wn. App. 895, 901, 120 P.3d 645 (2005) (quoting State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)). Courts must be alert to any factor that may "undermine the fairness of the fact-finding process." Williams, 425 U.S. at 503. Due process requires the trial judge to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78

(1982).

Here, in light of the trial court's duty to safeguard the presumption of innocence, the denial of the motion for a mistrial following the revelation that Mr. Rupe had been in Jail was an abuse of discretion. Where evidence is admitted that is inherently prejudicial and likely to permanently impress itself upon the minds of the jurors, even withdrawal of that evidence accompanied by an instruction to disregard may not remove the prejudicial impression created. State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

Applying the three-part Escalona test discussed above, the trial court should have granted the defense mistrial motion. First, the violation was serious, as discussed above. See Gonzalez, 129 Wn. App. at 900-01, 905 (court's announcement to the jury that Gonzalez was in jail because he could not post bail, was being transported in restraints, and was under guard in the courtroom violated Gonzalez's rights to the presumption of innocence and to an impartial jury and reversal was required). Moreover, had Mr. Rupe's presumption of innocence not been undermined, the jury would have been less likely to believe the claims of his wrongful conduct against the victim, or the claims of his prior conduct for

purposes of the exceptional sentence aggravating factor.

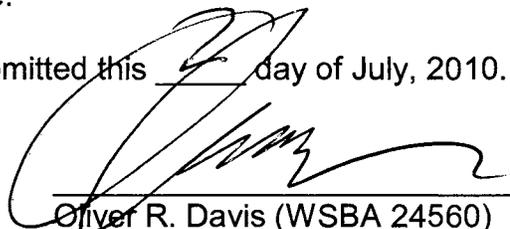
Further, the improper revelation of Mr. Rupe's incarceration was not cumulative or repetitive of any evidence properly admitted at trial. The presumption of innocence requires defendants sit before the court during trial while assumed to be innocent.

Gonzalez, 129 Wn. App. at 901; Finch, 137 Wn.2d at 844. And as for the third factor, a curative instruction was smartly denied by defense counsel, because it would have reminded the jury of the prejudicial evidence, and in any event, no curative instruction could have cured the resulting prejudice. The witness statements informing the jury that Mr. Rupe had been incarcerated were "irretrievably" prejudicial and required the trial court in this case to grant a new trial. Suleski, 67 Wn.2d at 51.

E. CONCLUSION

Mr. Rupe respectfully requests this Court reverse his judgment and sentence.

Respectfully submitted this 4 day of July, 2010.



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Washington Appellate Project - 91052
Attorneys for Appellant.

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

STATE OF WASHINGTON,)	
)	
Respondent)	NO. 64404-1
)	
v.)	
)	
JEREMIAH RUPE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 2ND DAY OF JULY, 2010, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Ave Ste W554
Seattle WA 98104-2362

Jeremiah Rupe
785171
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

SIGNED IN SEATTLE, WASHINGTON THIS 2nd DAY OF JULY, 2010

x 