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67572-9

NO. 67572-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GUY ADAM ROOK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly exercised its discretion in granting the King County Jail's motion for Rook to wear a security device that was invisible to the jury, given the trial court's concerns about the layout of the courtroom, the fact that Rook was facing a life sentence, and Rook's agreement that he would wear it.

2. Whether Rook's life sentence under the Persistent Offender Accountability Act for a third "strike" offends the Washington Constitution's prohibition against cruel punishment.

3. Whether Rook's life sentence offends the Eighth Amendment's prohibition against cruel and unusual punishment.

4. Whether Rook's claim that he was entitled to a jury trial on his prior convictions for purposes of the POAA should be rejected based on controlling authority.

5. Whether Rook's claim that the POAA violates equal protection should be rejected based on controlling authority.

6. Whether a scrivener's error in Rook's judgment and sentence should be corrected.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Guy Rook, with vehicular assault (under the DUI and "reckless manner" alternative means) and felony hit and run based on a collision that occurred on August 25, 2009 and resulted in serious injuries to another driver, Chris Kalaluhi. CP 1-7, 52-53.

During the protracted pretrial proceedings, after Rook unsuccessfully moved to discharge his fourth court-appointed attorney, Rook decided to proceed *pro se* and waived his right to counsel,[1] despite the fact that he was facing a life sentence under the Persistent Offender Accountability Act. CP 505-06; RP (10/14/10) 8-12; RP (11/22/10) 15-24. After concluding that Rook had knowingly and voluntarily waived his right to counsel, the court was not prepared to address Rook's motions regarding discovery at that time. In response, Rook exclaimed, "Thanks for fucking me again! Piece of – ". RP (11/22/10) 26.

Rook's discovery demands were discussed at the next hearing, during which Rook constantly interrupted both counsel and

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[1] Rook's fourth defense attorney was then appointed as standby counsel. RP (11/22/10) 24.

the court. *See, e.g.,* RP (1/7/11) 43-48. The next hearing was difficult as well; Rook accused the prosecutor of "malicious prosecution and abuse of process," and asserted that "[t]he prosecutor looked at my past history, said this guy is a dumb ass, let's roll the dice." RP (1/14/11) 53, 60. These issues reoccurred at the next hearing, where Rook continued to accuse the prosecutor of misconduct and pounded on the table. RP (2/4/11) 65-67, 79, 81. Eventually, the court asked Rook to keep his voice down. RP (2/4/11) 84. Rook became agitated and pounded the table again. RP (2/4/11) 96-97. At the next hearing, Rook continued to insist that the prosecution was relying on "perjured" documents and had committed a crime by charging Rook with a crime. RP (2/18/11) 106, 122-23.

At the next hearing, the pre-assigned trial judge addressed the King County Jail's motion for Rook to wear a "Band-it," a fabric band that delivers an electric shock when activated by a hand-held control by a corrections officer. Counsel for the jail made the motion based on Rook's volatile behavior, his jail infractions, and the fact that he was facing a life sentence. CP 507-33. During his testimony regarding the jail's motion, Rook denied the infractions, argued that he had not engaged in "displays of rage and lack of

control," denied all but one alleged confrontation with corrections officers, and claimed that he would not "act a fool" in the courtroom. RP (4/6/11) 29-31, 34.

When the trial court asked Rook if he had any alternative suggestions other than wearing the Band-it, Rook noted there were "armed guards here that are told to kill you if you try to do anything stupid." RP (4/6/11) 34. When the trial court asked for suggestions "other than having a guard kill you," Rook said, "I guess the best thing, if you decide that I'm going to be a fool, would be that leg band thing that the jury can't see[.]" RP (4/6/11) 34.

The trial court confirmed with the jail's counsel and a jail captain that the Band-it would be placed on Rook's calf under his clothing and would not be visible to the jury, that the officer with the control device could be seated unobtrusively in another part of the courtroom, and that it would not be activated unless there was an attempted escape or an attempted assault. RP (4/6/11) 39-44. The trial court repeatedly expressed serious concerns about the ability to maintain security without the Band-it in light of the physical layout of the courtroom. RP (4/6/11) 40, 44-46. Eventually, the following exchange occurred:

> THE COURT: Okay. So I guess my initial point is, I haven't made any ruling as to whether I will require it or not, but I do know that the security – the way it looks is going to be much different if you choose to have [the Band-it] or if I order it, even over your objection.
>
> MR. ROOK: Go ahead and order it, I've got no problem.
>
> THE COURT: Okay. All right.
>
> MS. BALIN [counsel for the jail]: Very well, your Honor.
>
> THE COURT: So we'll do that.

RP (4/6/11) 44-45. The court granted the jail's motion for Rook to wear the Band-it based on security concerns regarding the physical configuration of the courtroom, the fact that Rook was facing a life sentence, and Rook's express agreement that he would wear it. RP (4/6/11) 45-47, 52; CP 534-35. The court declined to enter findings of fact and conclusions of law regarding Rook's behavior and infractions in the jail because Rook had agreed to wear the device and because the court's other stated reasons for ordering it (which were uncontested by Rook) were sufficient. RP (4/6/11) 45.

Less than two weeks later, Rook informed the trial court that he no longer wanted to represent himself because he was "in over [his] head." RP (4/19/11) 2-3. The trial court re-appointed Rook's

standby counsel to represent Rook at trial, and granted a recess so that counsel could finish preparing for trial. RP (4/19/11) 3-4; CP 536.

The jury trial took place in June 2011. Rook had various outbursts at different points in the trial, including at the conclusion of his trial testimony, when he blurted gratuitous remarks at the jurors as they were being excused.[2] RP (6/29/11) 50-51. At the conclusion of the trial, the jury found Rook guilty of vehicular assault and acquitted Rook of felony hit and run. CP 191, 193. The jury also answered an interrogatory that they had found Rook guilty of vehicular assault under the "reckless manner" alternative means, but did not find him guilty under the DUI alternative means. CP 192.

At sentencing, the trial court found that Rook's criminal history included a conviction for robbery in the first degree and a conviction for rape of a child in the first degree. Accordingly, the trial court sentenced Rook to life in prison without the possibility of parole as required under the POAA. CP 486-95; RP (8/19/11)

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[2] This outburst was serious enough that the trial court admonished Rook, outside the presence of the jury, that he was "one comment [away] from me asking the officer to activate" the Band-it. RP (6/29/11) 51.

35-36, 53. Rook's parting words regarding the court and both counsel included:

> You see what I've been dealing with? These fuckers, they are so corrupt. Over there grinning, laughing. It's real funny. They know the cops lie, they know they lie, you know this whole thing is built on lies.

RP (8/19/11) 58.

Rook now appeals. CP 474-85.

2. SUBSTANTIVE FACTS

On August 25, 2009 at approximately 11:40 p.m., Sergeant Dan Flynn of the Port of Seattle Police Department was driving his patrol car on S. 154th St. at the north end of Sea-Tac Airport . RP (6/27/11 – Townsend) 28-32.[3] As Flynn was driving around a blind corner near the third runway, he saw a car approaching from the opposite direction at very high speed that was partially over the center line. RP (6/27/11 – Townsend) 35-36. Flynn visually estimated the oncoming car's speed at 70 mph; the posted speed limit was 35. Flynn fully expected that a collision was imminent, so

[3] The verbatim report of proceedings on June 27, 2011 comprises two volumes prepared by two different court reporters. This brief references these volumes by both the date and the court reporter's last name (*i.e.*, "Townsend" or "Runnels") for clarity's sake.

he pulled off the road to the right and braced for impact. RP (6/27/11 – Townsend) 36. Fortunately, the speeding car "blows right by" Flynn at that point and continued around the corner at a high rate of speed. RP (6/27/11 – Townsend) 36-37. Flynn activated his emergency lights, turned around, and began a pursuit. RP (6/27/11 – Townsend) 37-38. The last time Flynn saw the car in motion, it was "[a]ccelerating eastbound, very fast" toward the traffic light at S. 154th St. and 24th Ave. S. RP (6/27/11) 39.

Chris Kalaluhi works in customer service for Horizon Air at Sea-Tac Airport. RP (6/27/11 – Runnels) 2. On August 25, 2009, Kalaluhi clocked out at approximately 11:30 p.m., took the employee bus to the employee parking lot on the north side of the airport, got into his 1997 Geo Metro, and began to drive home. RP (6/27/11 – Runnels) 3-4. Kalaluhi headed south on 24th Ave. S., where he stopped at a red light at the intersection of S. 154th St. RP (6/27/11) 5.

Kalaluhi's coworker, Lori Patridge, was in her car directly behind Kalaluhi's car. RP (6/16/11) 54-55. After the light turned green and Kalaluhi was driving through the intersection, Patridge saw "a flash of red" coming from the right. RP (6/16/11) 55. Patridge looked to the left and verified that traffic coming from that

direction had a red light. Patridge then looked forward and saw a red Pontiac Grand Am crash into Kalaluhi's car "directly in the middle" on the passenger's side. RP (6/16/11) 55. Kalaluhi was about halfway through the intersection when the collision occurred. RP (6/27/11 – Runnels) 6. The momentum of the red Pontiac pushed Kalaluhi's car through the intersection and into "a big spin." RP (6/16/11) 57. Kalaluhi's car stopped moving only after crashing into a power pole. RP (6/16/11) 17.

Patridge parked her car near Kalaluhi's car in order to render assistance. As she was doing so, she saw Rook getting out of the driver's side of the red Pontiac. RP (6/16/11) 59-62. Patridge thought Rook was going to fall over; instead, he "kind of stumbled across the street" and "went into the bushes." RP (6/16/11) 65.

Patridge started to call 911, but Sergeant Flynn arrived just then, so she walked over to Kalaluhi's car. RP (6/16/11) 66-67. The Geo Metro was "flat as a pancake," and Kalaluhi was bleeding and frightened. RP (6/16/11) 70-71. Patridge spoke to Kalaluhi and tried to comfort him. RP (6/16/11) 71.

Sergeant Flynn had also seen Rook walk away from the scene of the crash. RP (6/27/11 – Townsend) 43. Flynn walked over to the Metro and saw that Kalaluhi "was basically wrapped in

metal" and "bleeding severely from his face[.]" RP (6/27/11 – Townsend) 44. Flynn called for aid, asked Patridge to stay with Kalaluhi, and went to check on Rook's passenger, Tracy Rechtenwald. RP (6/27/11 – Townsend) 44-46. Rechtenwald had a mark on the skin of her chest from her seatbelt, but she said that she was okay. RP (6/27/11 – Townsend) 47. At that moment, Sergeant Flynn heard someone say, "He is coming back." RP (6/27/11 – Townsend) 48. Flynn stood up and saw Rook returning to the scene. Flynn immediately ran up to Rook, placed him in handcuffs, and handed him off to another officer to be placed in a patrol car. RP (6/27/11 – Townsend) 48-49.

King County Sheriff's Deputy Andy Connor arrived shortly thereafter and made contact with Rook. Connor noted that Rook had bloodshot eyes, slurred speech, and an odor of alcoholic beverages on his breath. RP (6/27/11 – Runnels) 29. Connor advised Rook of his rights and asked him how much he had had to drink; Rook replied, "Too much; I'm drunk." RP (6/27/11 – Runnels) 31. Rook also indicated that his arm was injured, so Connor accompanied him to Valley Medical Center. RP (6/27/11 – Runnels) 32, 38.

Rook was examined at the hospital by physician's assistant Jefferey Goon. RP (6/16/11) 93-96. Goon noted that Rook smelled of alcoholic beverages and appeared intoxicated. RP (6/16/11) 105. Deputy Connor read Rook the implied consent warnings for a blood test and asked Rook if he would provide a blood sample. RP (6/27/11 – Runnels) 38. Rook responded, "Fuck that, I'm going to prison anyway so I'm not going to help you[.]" RP (6/27/11) 82. Rook was belligerent and verbally abusive to Deputy Connor and the hospital staff. RP (6/27/11 – Townsend) 82. Eventually, Rook insisted upon leaving the hospital against medical advice. RP (6/16/11) 108-09.

Chris Kalaluhi had to be cut out of his car before he could be transported to the hospital. RP (6/27/11 – Townsend) 49. He was initially transported to Highline Medical Center, but was then transferred to Harborview Medical Center due to the nature and severity of his injuries. RP (6/27/11 – Runnels) 7; RP (6/28/11) 18-19. Kalaluhi had suffered a lacerated spleen, a fractured vertebra, a hematoma in his buttocks, and extensive cuts on his face and head. RP (6/28/11) 21-22. He was also in excruciating pain. RP (6/28/11) 25. Dr. David Baker, who treated Kalaluhi at Harborview, determined that Kalaluhi's splenic laceration was a

life-threatening injury due to the danger that it could break open and cause acute internal bleeding. RP (6/28/11) 36-37. After Dr. Baker confirmed with a CT scan that Kalaluhi did not need emergency surgery, he transferred him to the intensive care unit for close observation. RP (6/28/11) 42. Ultimately, Kalaluhi's spleen healed without surgical intervention; however, as Dr. Baker explained, this does not diminish the fact that this injury was initially life-threatening. RP (6/28/11) 47.

In addition to the splenic laceration and fractured vertebra, Kalaluhi also had approximately 30 staples in his head and face. RP (6/27/11 – Runnels) 7. Kalaluhi spent multiple days in the hospital and missed approximately two months of work, the first month of which he was almost completely bedridden. RP (6/27/11 – Runnels) 7-8. Kalaluhi also suffered nerve damage that continues to affect the functioning of his right arm. He is also still in pain on a daily basis. RP (6/27/11 – Runnels) 8-10.

Rook testified in his own defense at trial. Rook claimed that he had not been drinking on the night of the accident, but that Rechtenwald was drinking heavily. He said that he and Rechtenwald were arguing in the car as he was driving. RP (6/28/11) 15-17. Rook claimed he almost crashed into

Sergeant Flynn's car because Rechtenwald had dumped her alcoholic drink in his lap as they were rounding the corner, so Rook swerved into the oncoming lane. RP (6/28/11) 17-19. Rook said he crashed into Kalaluhi because Rechtenwald hit him in the head and knocked his glasses off. RP (6/29/11) 23. Rook said he left the scene because he was going for help.[4] He denied that anyone asked him to take a blood test at the hospital, and he claimed that he told Deputy Connor "I think this is too much" rather than "I had too much to drink[.]" RP (6/28/11) 24-25, 27-28, 41-43.

Additional relevant facts will be discussed below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING ROOK TO WEAR A SECURITY DEVICE THAT WAS INVISIBLE TO THE JURY AND HAD NO EFFECT ON ROOK'S RIGHT TO A FAIR TRIAL.

Rook first argues that the trial court abused its discretion and violated his right to a fair trial by ordering him to wear an electrified

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[4] On the other hand, Rook admitted that he knew he had almost crashed into a police car moments before the collision, and that the officer was likely to follow him. Specifically, Rook stated that he "wasn't so drunk that [he] couldn't see it was an unmarked police car" that he had almost collided with. RP (6/28/11) 33.

band (a "Band-it") under his clothing for security purposes at the request of the King County Jail. Appellant's Opening Brief, at 9-26. This claim should be rejected. The trial court exercised its discretion properly based on security concerns regarding the layout of the courtroom, the fact that Rook was facing a life sentence, and Rook's express agreement to wear the device. In addition, Rook's disruptive courtroom behavior provides another tenable basis for the court's decision. Moreover, Rook was not prejudiced because the device was invisible to the jury and it did not impact Rook's ability to assist in his defense. This Court should reject Rook's arguments, and affirm.

As a preliminary matter, Rook frames this claim in terms of a criminal defendant's right to appear in court free from shackles and other physical restraints that may undermine the presumption of innocence and prejudice the jury. Appellant's Opening Brief, at 9-10. This framing seems inapt, as the Band-it does not constitute "restraints" in the traditional sense as the term is used in the relevant case law. *See, e.g.,* Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (shackles and gags should be used as a last resort); Holbrook v. Flynn, 475 U.S. 560, 567-68, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (shackles and prison garb

are inherently prejudicial); State v. Finch, 137 Wn.2d 792, 844-45, 975 P.2d 967 (1999) (shackles, handcuffs and gags may prejudice the jury, unduly restrict the defendant's movements, and offend the dignity of the proceedings); State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999) (shackles and other physical restraints may undermine the right to a fair trial).

Unlike shackles, gags, and other traditional physical restraints, the Band-it does not restrict a defendant's body movements and is not visible to the jury because it is worn on an arm or leg under clothing. CP 99; RP (4/6/11) 43-44. Indeed, given that the Band-it is not visible and does not restrict movement, it is difficult to envision how it could prejudice a jury or undermine the presumption of innocence, which are the primary concerns appellate courts have with shackles, handcuffs, and the like. Accordingly, analyzing this claim in the same way as if the Band-it were a form of shackling seems to miss the mark.

Nonetheless, Division Two of this Court has applied the traditional analysis in a case involving a stun belt such as the Band-it. *See* State v. Monschke, 133 Wn. App. 313, 336-37, 135 P.3d 566 (2006), rev. denied, 159 Wn.2d 1010 (2007). But

even under the analysis that applies to shackling, Rook still has not shown an abuse of discretion in this case.

The decision to employ security measures in the courtroom, including shackling, is "within the inherent power and discretion of the trial judge," and should be "made on a case-by-case basis after a hearing with a record evidencing the reasons for the action taken." State v. Hartzog, 96 Wn.2d 383, 401, 635 P.2d 694 (1981) (quoting State v. Hartzog, 26 Wn. App. 576, 588-89, 615 P.2d 480 (1980)). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). An appellate court will find an abuse of discretion only if no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 631 (2001).

The Washington Supreme Court has identified twelve factors for courts to consider before shackling a criminal defendant: 1) the seriousness of the charge; 2) the defendant's "temperament and character"; 3) the defendant's "age and physical attributes"; 4) the defendant's prior record; 5) any past escapes, attempted escapes, or evidence of a present plan to escape; 6) any "threats to harm others or cause a disturbance"; 7) any "self-destructive tendencies";

8) any risk of "mob violence" or revenge by others; 9) any "possibility of rescue by other offenders still at large"; 10) the number and "mood" of courtroom spectators; 11) "the nature and physical security of the courtroom"; and 12) "the adequacy and availability of alternative remedies." Hartzog, 96 Wn.2d at 400 (quoting Hartzog, 26 Wn. App. at 588-89). In addition, a defendant's agreement or failure to object to shackling is also relevant to a court's analysis. Elmore, 139 Wn.2d at 472-73.

In this case, the trial court stated on the record that its primary concerns were that Rook was facing a life sentence, that there were serious security issues related to the physical layout of the courtroom, and that other more intrusive security measures would be necessary if Rook were not ordered to wear the Band-it. RP (4/6/11) 40, 44-45, 47, 52. These findings satisfy factors 1, 11, and 12 of the Hartzog test, and provide tenable bases for the trial court's ruling. In addition, Rook admitted that he had no reasonable alternatives to suggest, conceded that the "leg band thing" was the best choice, and ultimately affirmed that he had "no problem" with wearing the Band-it. RP (4/6/11) 34, 45. In light of Rook's agreement, his claim of abuse of discretion rings hollow. *See* Elmore, 139 Wn.2d at 472-73.

Furthermore, although the trial court did not state on the record that Rook's disruptive courtroom behavior was also a reason to order him to wear the Band-it, this behavior is apparent from the record and provides another tenable basis for the trial court's ruling.[5] Rook was verbally abusive to the prosecutor, defense counsel, and the court throughout the proceedings. *See, e.g.,* RP (11/22/10) 26; RP (1/14/11) 53; RP (2/4/11) 81, 84, 96-97; RP (7/8/11) 4-5; RP (6/30/11) 53-58. At one point during the trial, Rook was so disruptive that the court admonished him that he was "one comment" away from the court asking the corrections officer to activate the Band-it. RP (6/29/11) 51. The fact that a defendant "cannot behave in an orderly manner while in the courtroom" is a reasonable basis upon which a trial court may exercise its discretion in determining whether the defendant should be restrained. Finch, 137 Wn.2d at 850. Such is the case here, where the record amply demonstrates that Rook would not behave in an orderly manner.

In sum, Rook has not shown that no reasonable person would have granted the jail's motion to order him to wear the

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[5] The trial court may be affirmed on any basis supported by the record and the law. State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992).

Band-it. The trial court considered the alternatives, expressed great concern about courtroom security, cited the fact that Rook was facing a life sentence, and relied upon Rook's express agreement in ordering him to wear the Band-it. Rook's continuing outbursts in court were a legitimate cause for concern as well. The trial court's ruling rests on tenable grounds, and thus, it should be affirmed.

Nonetheless, Rook argues that he did not waive his right to be free from restraint, that the trial court abused its discretion because it did not specify what its concerns were regarding the layout of the courtroom, and that the trial court did not consider less restrictive alternatives. Appellant's Opening Brief, at 14-19. These arguments should be rejected. First, although Rook's agreement to wear the Band-it was not the result of a colloquy and formal waiver of constitutional rights, Rook's agreement is still a relevant consideration in determining whether any error occurred. *See* Elmore, 139 Wn.2d at 472-73. Second, a trial court should *not* be required to explain on the record exactly what security concerns it has regarding the layout of a courtroom. Put another way, the trial court should not have to provide the defendant with a blueprint for an escape attempt or an assault in order for its ruling to be upheld.

And third, no less-restrictive alternative security measures were suggested in this case. Indeed, Rook's only alternative suggestion was that the corrections officers could shoot him if he tried "anything stupid." RP (4/6/11) 34. Rook's arguments are without merit, and the trial court's ruling should be affirmed.

But even if this Court were to conclude that the trial court erred in ordering Rook to wear the Band-it during trial, there is still no basis to reverse because any possible error is harmless.

"A claim of unconstitutional shackling is subject to a harmless error analysis." Elmore, 139 Wn.2d at 274. In order to reverse a defendant's conviction on the basis of shackling, the reviewing court must find that the shackling resulted in prejudice, *i.e.*, "'a substantial or injurious effect or influence on the jury's verdict.'" Id. (quoting State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)). Put another way, a showing of prejudice "requires evidence that the jury saw the restraints or that the restraints substantially impaired the defendant's ability to assist in his trial defense." Monschke, 133 Wn. App. at 336.

Division Two of this Court has previously held that no prejudice resulted from ordering a defendant to wear a stun belt "because the stun belt was not visible to the jury." State v.

Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), rev. denied, 148 Wn.2d 1001 (2003); *see also* Monschke, 133 Wn. App. at 336-37 (also holding that there was no prejudice resulting from the use of the stun belt because there was no evidence that it was visible to the jury). Similarly, in this case, the Band-it was not visible to the jury, and the record is devoid of any evidence that it affected Rook's ability to assist in his defense at trial. Accordingly, any possible error is harmless because there is no prejudice.

Nonetheless, Rook argues that he was prejudiced because the Band-it "interfere[ed] with his mental faculties and his constitutional right to defend himself and work with counsel." Appellant's Opening Brief, at 22. Rook cites no evidence in the record to support this assertion. Rather, he cites authorities from other jurisdictions and a law review article to support his argument that stun belts cause anxiety and negatively affect a defendant's demeanor in court. Appellant's Opening Brief, at 22-25. But the record shows no such effects in this case. To the contrary, Rook's demeanor and behavior remained the same (*i.e.*, disruptive and obstreperous) after he was ordered to wear the Band-it.

Moreover, as the jail explained to the trial court, inmates are provided with specific instructions as to precisely which behaviors

will cause an officer to activate the Band-it. These behaviors are limited to attempted assault, attempted escape, and tampering with the device itself. CP 107; RP (4/6/11) 41. Inmates are also specifically informed that the device "will NOT be activated for simply consulting with counsel." CP 107 (emphasis in original). These specific instructions regarding the jail's Band-it protocol should alleviate a defendant's alleged anxiety.

In sum, the trial court exercised sound discretion in granting the jail's motion to order Rook to wear a security device that was not visible to the jury and did not restrain Rook's movements, and Rook suffered no prejudice as a result of wearing the device. Rook's arguments to the contrary are without merit, and his conviction should be affirmed.

2. ROOK'S LIFE SENTENCE DOES NOT CONSTITUTE CRUEL PUNISHMENT UNDER THE WASHINGTON CONSTITUTION.

Rook next argues that his sentence of life without the possibility of parole under the Persistent Offender Accountability Act violates the Cruel Punishment Clause of the Washington Constitution. Appellant's Opening Brief, at 26-42. This claim should be rejected. Although the Washington Constitution is more

protective in this context than the Eighth Amendment to the United States Constitution, Rook has not demonstrated that his sentence under the POAA is so grossly disproportionate to his crime and his criminal history that it constitutes cruel punishment. Accordingly, Rook's sentence should be affirmed.

Article I, section 14 of the Washington Constitution protects against "cruel punishment." The Washington Supreme Court has previously determined that this provision provides more protection than its federal counterpart, the Eighth Amendment, against punishments that are "grossly disproportionate" to the crimes committed. State v. Fain, 94 Wn.2d 387, 392, 617 P.2d 720 (1980). Nonetheless, "[a] punishment is grossly disproportionate only if . . . the punishment is clearly arbitrary and shocking to the sense of justice." State v. Smith, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980).

To determine whether a sentence is grossly disproportionate, and hence unconstitutional, Washington courts consider four factors identified in Fain: 1) the nature of the crime; 2) the legislative purpose behind the sentence, 3) the sentence the defendant would receive in other jurisdictions; and 4) the sentence the defendant would receive for other crimes in

Washington. Fain, 94 Wn.2d at 397. None of these factors is dispositive; they merely guide the court's analysis. State v. Gimarelli, 105 Wn. App. 370, 381-82, 20 P.3d 430, rev. denied, 144 Wn.2d 1014 (2001). Moreover, in POAA and habitual offender cases, reviewing courts consider the defendant's prior offenses together with the current offense in applying the Fain factors and determining whether a life sentence is grossly disproportionate; the current offense is not considered in a vacuum. *See, e.g.,* Fain, 94 Wn.2d at 397-403; State v. Morin, 100 Wn. App. 25, 29-34, 995 P.2d 113, rev. denied, 142 Wn.2d 1010 (2000).

For example, in Morin, this Court analyzed the Fain factors in a case involving a "two strikes" sex offender. Morin, 100 Wn. App. at 28. In analyzing the first factor, this Court noted:

> As to the nature of the offenses, rape in the first degree (Morin's "first strike") is considered a "serious violent offense," and indecent liberties by forcible compulsion (his "second strike") is a "violent offense." Both are also categorized as "most serious offenses." Both crimes were committed against persons as opposed to property, a factor given considerable weight by our Supreme Court in upholding the three strikes law.

Morin, 100 Wn. App. at 30 (footnotes omitted). By contrast, in Fain, the court emphasized that none of the defendant's crimes, whether past or present, involved physical injury, violence, threats of

violence, or weapons. Rather, the defendant's crimes collectively involved the theft of "a total of less than $470." Fain, 94 Wn.2d at 397-98.

As to the first Fain factor, this case is far more similar to Morin than Fain. Rook's first "strike" offense was robbery in the first degree, and his second "strike" offense was rape of a child in the first degree. CP 349-56, 393-98. Both crimes are class A felonies and are categorized as "violent offenses" in the Sentencing Reform Act. RCW 9A.56.200; RCW 9A.44.073; RCW 9.94A.030(50)(a)(i). Vehicular assault, Rook's current offense, is a class B felony and is also categorized as a violent offense. RCW 46.61.522(1)(a) and (2); RCW 9.94A.030(50)(a)(xiii). All three[6] of these convictions are "most serious offenses" for purposes of the POAA. RCW 9.94A.030(29)(a) and (q). As in Morin, Rook's crimes are crimes against persons rather than property, all are categorized as violent, and all have been designated as "strike" offenses by the legislature. Two of them are class A felonies with a statutory maximum of life in prison. Accordingly, the first Fain factor weighs against Rook's

[6] Although this analysis focuses on Rook's "strike" offenses, it bears mentioning that Rook has additional felony criminal history, including convictions for taking a motor vehicle without permission, possessing stolen property in the first degree, burglary in the second degree (twice), and extortion in the second degree. CP 491.

claim that his sentence is so grossly disproportionate that it constitutes cruel punishment.

As to the second Fain factor, the legislative purpose of a life sentence under the POAA is well-established:

> Here, the purpose of the law is to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

State v. Thorne, 129 Wn.2d 736, 771-72, 921 P.2d 514 (1996), *abrogation on other grounds recognized by* In re Personal Restraint of Eastmond, 173 Wn.2d 632, 635-36, 272 P.3d 188 (2002). As the Thorne court further stated, the purpose of recidivist statutes like the POAA is "to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." Thorne, 129 Wn.2d at 774-75 (quoting Rummel v. Estelle, 445 U.S. 263, 284-85, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). Rook has eight adult felony convictions, including three "strikes" under the POAA. CP 491.

Accordingly, this factor also weighs against Rook's claim that his sentence is grossly disproportionate.

The third Fain factor involves consideration of the punishment the offender would receive in other jurisdictions. Rook argues that Washington is the only state in the country in which he would receive a sentence of life without parole for vehicular assault. Appellant's Opening Brief, at 35-38. However, Rook's argument is valid only if this Court considers crimes with exactly the same elements as vehicular assault. But if Rook's *conduct*[7] is considered, rather than strictly the elements of vehicular assault, there are at least two other states in which Rook could have received a life sentence as a result of his current offense. Moreover, there are still other states with recidivist statutes that are broader than Washington's, which punish conduct less serious than

[7] Rook's driving would have met any definition of "recklessness." Sergeant Flynn visually estimated Rook's speed at 75 mph as he came around a blind curve and forced Flynn off the road to avoid a collision. RP (6/27/11 – Townsend) 35-36. Rook then sped away, ran through a red light, and smashed into the passenger's side of Chris Kalaluhi's car. RP (6/27/11 – Runnels) 6. And despite Rook's attempts to minimize the seriousness of Kalaluhi's injuries, the undisputed evidence established that Kalaluhi's lacerated spleen was initially a life-threatening injury, and that Kalaluhi suffered permanent nerve damage that has resulted in ongoing pain and loss of normal function in his shoulder and right arm. RP (6/27/11 – Runnels) 8-10; RP (6/28/11) 34-36, 47. Accordingly, these injuries would have met the definition of "serious bodily injury" under the former vehicular assault statute. *See* Former RCW 46.61.522(2) (defining "serious bodily injury" as involving "a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body").

Rook's with a life sentence or its functional equivalent, at least two of which could have given Rook a life sentence based on his prior criminal history. Accordingly, Rook's sentence is not grossly disproportionate under this factor, either.

For example, Rook asserts that North Carolina has no statute that would punish him similarly to Washington, and cites the statute for felony serious injury by vehicle, which requires proof of intoxication. Appellant's Opening Brief (Appendix), No. 27 (citing N.C. Gen. Stat. § 20-141.4). However, Rook's *conduct* meets the requirements for assault with a deadly weapon under N.C. Gen. Stat. § 14-32, which is a "strike" offense under that state's violent habitual offender law. *See* N.C. Gen. Stat. § 14-7.12. Under North Carolina's case law, a driver who operates a motor vehicle in criminally negligent manner and who causes serious injury is guilty of this crime. State v. Jones, 252 N.C. 159, 164-65, 538 S.E.2d 917 (2000). Criminal negligence in this context means a thoughtless disregard of consequences or a heedless indifference to the safety of others, which is very similar to the mental element of vehicular assault. Id. Accordingly, Rook's conduct would constitute a "strike" offense in North Carolina, which could subject

him to a sentence of life without the possibility of parole. N.C. Gen. Stat. § 14-7.12.

In addition, Rook cites California's reckless driving statute, Ca. Veh. Code § 23104(b), which is punishable by only 30 to 180 days in jail. Appellant's Opening Brief (Appendix), No. 4. However, Rook's conduct in this case meets the elements of assault with a deadly weapon under Cal. Penal Code § 245. California case law holds that "any operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon." People v. Wright, 100 Cal. App. 4th 703, 706, 123 Cal. Rptr. 2d 494, 497 (2002). In this case, any reasonable person would have realized that the kind of driving Rook engaged in would probably and directly result in a battery. Accordingly, Rook would have been eligible for an indeterminate life sentence under California's "three strikes" statute. Cal. Penal Code § 667(e)(2)(A).

Furthermore, although Rook is correct that his conduct would not constitute a "strike" offense in many jurisdictions, there are jurisdictions that subject offenders to potential life sentences under their recidivist sentencing statutes for conduct that is less serious than Rook's. For example, in Indiana, the prosecution may

seek a sentence of life without parole for a wide range of "third strike" offenses, including selling drugs to minors or a third conviction for DUI. Ind. Code §§ 35-50-2-8.5 and 35-50-2-2(b)(4). In Montana, an offender may be sentenced to between 5 and 100 years in prison for a second felony conviction within 5 years, and between 10 and 100 years for a third felony conviction within 5 years of the most recent prior offense. Mont. Code §§ 46-18-501 and 502. Montana's statutes do not limit the felonies that trigger these enhanced penalties of up to a century in prison. Similarly, in Nevada, an offender is subject to a sentence between 5 and 20 years after a third conviction for any felony, and may receive a sentence of life without parole after a fourth conviction for any felony. Nev. Rev. Stat. § 207.010. Vermont also authorizes a life sentence upon conviction of a fourth felony. 13 Vt. Stat. § 11. Accordingly, Rook potentially could have received a life sentence in at least Nevada and Vermont based on the seven felony convictions he had amassed before he committed a vehicular assault.

In addition to at least four other states where Rook would be subject to a potential life sentence as a result of his conduct in this case or his convictions prior to this case, there are many other

states where he would be subject to a substantial prison term for a serious felony offense. For example, Rook correctly cites Alaska's second-degree assault statute, Alaska St. § 11.41.210(a)(3), which is committed when a person recklessly causes serious physical injury to another person. "Serious physical injury" means a substantial risk of death, serous disfigurement, or protracted loss or impairment of the function of a body member or organ. Alaska St. § 11.81.900(56). Given the facts of this case, Rook could have been charged with this class B felony in Alaska. Rook's conduct could also constitute second-degree assault with a deadly weapon in Oregon – also a class B felony. *See* State v. Lopez, 56 Or. App. 179, 641 P.2d 596 (1982).

As another example, Rook contrasts Kansas's aggravated battery statute, which is a violent felony, with vehicular homicide, which is a "class A person misdemeanor." Appellant's Opening Brief (Appendix), No. 13 (citing Kan. Stat. § 21-5413(b)(2)(A) and Former Kan. Stat. § 21-3414(a)(2)(B)[8], respectively). However, these statutes reveal that vehicular homicide requires only criminal negligence, whereas the *reckless* infliction of great bodily harm

[8] This statute was repealed in 2010 and replaced by Kan. Stat. § 21-5406. The elements and classification are the same.

constitutes the far more serious offense of aggravated battery. Moreover, Kansas has no statutory definition of "great bodily harm"; rather, it is a question for the factfinder and must be more than bruising. State v. Delacruz, 43 Kan. App. 2d 173, 179-80, 223 P.3d 810 (2010). Aggravated battery also includes an alternative means for recklessly causing bodily harm (rather than "great bodily harm") by the use of a deadly weapon. Kan. Stat. § 21-5413(b)(2)(b). A vehicle can be a deadly weapon for purposes of aggravated battery. State v. Lafoe, 24 Kan. App. 2d 662, 664-65, 953 P.2d 681 (1997). Therefore, Rook's conduct meets the requirements for aggravated battery in Kansas under two alternative means. Moreover, under the law in effect when Rook committed his crime, Rook could have received a significantly enhanced sentence (three times greater than the presumptive sentence) as a habitual offender. Former Kan. Stat. § 21-6706.

Although the multi-state survey set forth above is by no means fully comprehensive, it plainly demonstrates that Rook is incorrect in arguing that Washington is the only state in which he could have received a life sentence, or that there are no other states where Rook would have been convicted of a serious felony for his conduct. As such, Rook has not shown that his sentence is

grossly disproportionate, meaning it is "clearly arbitrary and shocking to the sense of justice." Smith, 93 Wn.2d at 344-45. Indeed, there are other states where Rook could have "struck out" before he had the opportunity to commit vehicular assault.

Furthermore, this Court has previously recognized that even if an offender is unlikely to receive a life sentence for a similar crime in *any* other jurisdiction, this does not mean that the offender's life sentence is grossly disproportionate under the Cruel Punishment Clause. Morin, 100 Wn. App. at 33-34. Rather, if the first two Fain factors weigh in favor of the sentence, the sentence should be affirmed. Id. Such is the case here.

The fourth Fain factor concerns the punishment an offender would receive for other Washington crimes. However, the Washington Supreme Court has previously held that this factor has little utility for analyzing life sentences under the POAA:

> There is no logical or practical basis for comparison of punishment appellant might receive for other crimes committed in Washington. Sentences under the Sentencing Reform Act vary with each defendant's criminal history and the presence or absence of aggravating or mitigating factors. In appellant's case, however, even without reference to Initiative 593, two of his three "most serious offenses" fall into a *class of crimes with a maximum allowable sentence of life imprisonment.*

State v. Manussier, 129 Wn.2d 652, 678, 921 P.2d 473 (1996) (emphasis in original) (footnote omitted). The same is true in Rook's case, as he received a life sentence for having three "strikes" under the POAA, two of which are class A felonies with a statutory maximum of life in prison. As in Manussier, the fourth Fain factor has little bearing on this Court's analysis. Moreover, as the court further noted in Thorne, "all defendants who are convicted of a third 'most serious offense' receive sentences of life imprisonment without possibility of parole," and thus, the fourth Fain factor also weighs against a finding of gross disproportionality. Thorne, 129 Wn.2d at 775.

Nonetheless, Rook focuses on the crimes of assault by watercraft and assault in the second degree as "comparable" offenses to vehicular assault, and he argues that a life sentence for vehicular assault is grossly disproportionate because assault by watercraft is not a "strike," and because second-degree assault requires an intentional act. Appellant's Opening Brief, at 38-41. But as discussed above, the current offense is not to be considered in a vacuum; rather, a defendant's current offense must be considered together with his or her criminal history when applying the Fain factors to a life sentence under the POAA. *See*

Manussier, 129 Wn.2d at 678; Thorne, 129 Wn.2d at 775. Rook's current offense, which resulted in serious, life-threatening, and permanent injuries to the victim and posed a serious threat to the safety of the motoring public, coupled with his two prior convictions for violent class A felonies, did not result in a sentence that is "clearly arbitrary and shocking to the sense of justice." Smith, 93 Wn.2d at 344-45.

In sum, Rook has failed to show that his life sentence is so grossly disproportionate to his crime and his criminal history that it constitutes cruel punishment under Article I, section 14. Accordingly, Rook's state constitutional claim should be rejected and his sentence should be affirmed.

3. ROOK'S LIFE SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL CONSTITUTION.

Rook also argues that his sentence of life without parole runs afoul of the Eighth Amendment to the United States Constitution because it constitutes cruel and unusual punishment. Appellant's Opening Brief, at 42-49. This claim should be rejected in accordance with controlling state and federal authorities.

The Washington Supreme Court has already held that the POAA does not violate the Eighth Amendment. Thorne, 129 Wn.2d at 772-76; Manussier, 129 Wn.2d at 674-76. In addition, the United States Supreme Court has held that mandatory life sentences for *nonviolent* felonies do not violate the Eighth Amendment. *See* Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (holding that a mandatory life sentence for possessing cocaine did not constitute cruel and unusual punishment, even in light of the defendant's lack of felony criminal history); Rummel v. Estelle, 445 U.S. 263 (holding that a mandatory life sentence for theft of $120.75, where defendant's two prior felony convictions involved the theft of a total of $108.36, did not violate the Eighth Amendment); *see also* Fain, 94 Wn.2d at 391-92 (holding that the defendant's Eighth Amendment claim was barred by Rummel v. Estelle). Rook's claim should be rejected based on these controlling authorities.

Despite these controlling authorities contrary to his position, Rook relies upon Graham v. Florida, ___ U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 637 (1983), for the proposition that his life sentence is unconstitutional under the Eighth Amendment. Appellant's Opening Brief, at 42-45. But Graham does not concern recidivist

sentencing for adult felons under statutes like the POAA. Rather, Graham addresses the issue of whether it is unconstitutional to impose a mandatory sentence of life without parole on a *juvenile* offender for a non-homicide crime. Rook is not a juvenile; he is a recidivist adult felon. Thus, Graham is simply inapplicable.

4. ROOK'S ARGUMENTS REGARDING THE RIGHT TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT HAVE BEEN REPEATEDLY REJECTED BY THE WASHINGTON SUPREME COURT.

Rook next argues that his right to a jury trial was violated because the trial court found the existence of Rook's two prior "strike" offenses by a preponderance of the evidence. Rook contends that under Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and its progeny, his prior convictions must be found by a jury beyond a reasonable doubt. Appellant's Opening Brief, at 49-55.

This argument has been expressly rejected by the Washington Supreme Court on more than one occasion. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003); State v. Thiefault, 160

Wn.2d 409, 418-20, 158 P.3d 580 (2007).[9] In accordance with these authorities, this Court has previously rejected this argument as well. State v. Langstead, 155 Wn. App. 448, 453-57, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010). Rook's claim is contrary to controlling authority, and it should be rejected.

5. ROOK'S EQUAL PROTECTION ARGUMENT HAS BEEN REPEATEDLY REJECTED BY THIS COURT.

Rook also argues that the Persistent Offender Accountability Act violates the Equal Protection Clause of the United States Constitution because similarly situated offenders are treated differently with respect to whether they receive a jury trial. More specifically, Rook argues that although offenders like himself who have three "strikes" do not receive a jury trial regarding their prior convictions, offenders whose current substantive offense requires proof of a prior offense as an essential element of the crime (*e.g.,* unlawful possession of a firearm) do receive a jury determination on the existence of the prior conviction. Appellant's Opening Brief, at 55-62.

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[9] Although both cases are controlling, Rook cites neither Smith nor Thiefault in the relevant section of his brief. Appellant's Opening Brief, at 49-55. However, Rook cites Smith in the section of his brief regarding equal protection. Appellant's Opening Brief, at 58-59.

This Court has expressly rejected this argument on more than one occasion. Langstead, 155 Wn. App. at 453-57; State v. Salinas, ___ Wn. App. ___, 279 P.3d 917, 925-26 (2012).[10] Accordingly, this Court should reject it in this case as well.

6. THE SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Lastly, Rook argues that his judgment and sentence should be corrected to reflect that the jury found him guilty of vehicular assault under the "reckless manner" alternative means, but not the DUI alternative means. Appellant's Opening Brief, at 62. Rook is correct that the first page of the judgment and sentence cites "RCW 46.61.522(1)(A),(B)" rather than only RCW 46.61.522(1)(a). CP 486. This Court should direct the trial court to correct this scrivener's error.

[10] Salinas was decided after Rook filed his brief. However, Rook's brief does not cite Langstead, which was decided by this Court in 2010. Appellant's Opening Brief, at 55-62.

D. CONCLUSION

The scrivener's error in the judgment and sentence should be corrected. In all other respects, Rook's conviction and sentence should be affirmed.

DATED this 20th day of August, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GUY ROOK, Cause No. 67572-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

C Brame
Name

8/20/12
Date

Done in Seattle, Washington