NO. 28932-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ELDIO RIZO,

Appellant.

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

APPELLANT'S AMENDED OPENING BRIEF

DAVID L. DONNAN
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Treatises and Other Authorities

A. SUMMARY OF APPEAL.

Mr. Rizo was convicted of robbery and assault and sentenced to life in prison without the possibility of parole. On appeal he contends the evidence was inadequate to support his conviction, that the multiple convictions for the same conduct violate the constitutional protections from double jeopardy and that the jury was improperly instructed regarding the elements of assault. Mr. Rizo further contends that his life sentence must be stricken because the evidence establishing his criminal history was improperly admitted and the procedures employed by the sentencing court violated his rights to equal protection under the law and the constitutional right to trial by jury.

B. ASSIGNMENTS OF ERROR.

1. The evidence was insufficient to prove Mr. Rizo's conviction for robbery in the first degree and assault in the first degree beyond a reasonable doubt.

2. Mr. Rizo's convictions and sentences for robbery in the first degree and two counts of assault in the first degree violate the state and federal constitutional prohibitions against double jeopardy.

3. The jury instructions regarding first degree assault relieved the prosecution of the burden of proving an essential element of the crime in

violation of the defendant's state and federal constitutional rights to due process of law and a jury finding on all the elements.

4. Where defense counsel failed to timely challenge the erroneous instruction, Mr. Rizo has received constitutional deficient representation which has prejudiced him, and he is entitled to relief.

5. The trial court erred in finding Mr. Rizo committed certain prior offenses based on evidence of fingerprint comparisons in the absence of scientifically establish and uniformly accepted standards. CP 14 (Findings of Fact III (A), (B), (C), and IV (A), (B)).

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

7. The trial court deprived Mr. Rizo of his constitutional right to a jury determination of all facts necessary to aggravate a crime beyond that otherwise provided the jury's determination of the underlying offense requiring reversal of the persistent offender finding and life in prison sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The constitutional right to due process of law includes the right to proof beyond any reasonable doubt in order to sustain a conviction. Where the evidence that Mr. Rizo used a firearm was inconsistent and incomplete, did the State fail to meet its burden of proof requiring reversal of convictions for first degree robbery and assault in the first degree?

2. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense. Mr. Rizo's conviction for first degree robbery was elevated to a higher degree by the same criminal conduct upon which his convictions for assault in the first degree were based. Where the offenses occurred in a single incident, in a short time frame, without any separate injury, and the assaults constituted the force necessary to establish the robbery, do his convictions for the multiple crimes violate the Double Jeopardy Clause of the Fifth Amendment and the Washington Constitution, article I, § 9?

3. First degree assault requires proof that the accused acted "with intent to inflict great bodily harm." RCW 9A.36.011(1)(a). In defining the common law forms of assault for the jury, however, the jury was instructed that an assault occurs "even though the actor did not actually intend to inflict bodily injury." CP 45 (attached hereto as Appendix A). It

is the trial court's obligation to ensure that the jury is properly, and clearly, instructed on the law in such a manner as to guarantee the verdict which touches on all the elements of the offense. Where the instructions to they jury give conflicting direction with regard to the essential elements which must be establish, is the verdict which results, flawed requiring reversal.

4. Mr. Rizo is guaranteed the right to the effective assistance of counsel by the 14th Amendment due process clause and Art 1, sec 22 of the Washington Constitution. Where there was no conceivable tactical or strategic reason to relieve the prosecution of its burden of proof with regard to the specific intent to inflict great bodily injury by giving conflicting instructions to the jury, did Mr. Rizo receive constitutionally deficient representation?

5. In order to sentence Mr. Rizo as a persistent offender it was necessary for the State to prove he had two prior most serious offenses which had not "washed out" of his criminal history. Mr. Rizo denied having committed such offenses and the State sought to prove he did using testimony regarding fingerprint comparisons from a variety of court documents, but the State's witness acknowledged there were no uniform or accepted professional standards for making such comparisons. Was the evidence sufficient to establish identity and support imposing a sentence of life in prison in the absence of such standards?

6. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 12 of the Washington Constitution require similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature, and the courts, have labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances have termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

7. The Sixth Amendment right to jury trial, and the Fourteenth Amendment right to due process of law, encompasses the right to a jury determination, beyond a reasonable doubt, of all facts which permit the imposition of a greater sentence than otherwise allowed by a verdict. Does the so-called "prior conviction" exception described in recent United

States Supreme Court caselaw violate these fundamental constitutional standards.

D. STATEMENT OF THE CASE.

On November 25, 2007, Timothy Englund was working as a loss prevention officer at the Sears store in Union Gap with Rigoberto Cardenas and Kristina Fernandez. RP 151-56, 221-22. Mr. Englund was monitoring the multitude of surveillance cameras when he observed Julia Pina and Elodio Rizo in the cologne department of the store. RP 157-58. Mr. Englund concluded Ms. Pina was acting suspiciously because she seemed to be looking up at the various surveillance cameras. RP 157.

After selecting several colognes, Ms. Pina placed them in her shopping cart under her purse and then went to the men's department where she selected a shirt, took off the price tag and put it on top of her purse. RP 159-61. Ms. Pina, with Mr. Rizo following, then continued around the store, passing through several other departments before stopping in a back corner of the store. RP 161-62. Ms. Pina was eventually observed moving the shirt out of the way, lifted her purse and put the cologne inside. RP 163-64. She then pushed the cart away and headed out the doors of the store with Mr. Rizo approximately 8 to 10 feet behind. RP 165.

Mr. Cardenas had been directed to wait outside the exit while Mr. Englund observed the events unfold on the surveillance cameras. RP 163. When Mr. Englund saw Ms. Pina and Mr. Rizo leaving the store, he left his location and ran outside to assist Mr. Cardenas. RP 165, 187.

Outside the store, Mr. Cardenas ran toward Ms. Pina and Mr. Rizo, identified himself and said "I need all my unpaid merchandise." RP 225-26. Mr. Englund also reportedly contacted Ms. Pina, identified himself as a loss prevention officer, and asked for the cologne, to which she responded, "no, no, no." RP 165, 188.

Both Mr. Cardenas and Mr. Englund testified that Mr. Rizo kept walking and then pulled his hand out of his pocket or waistband holding what appeared to be a silver revolver and discharged one or two shots. RP 166-67, 227-29. Ms. Pina and Mr. Rizo then proceeded to their car which was parked nearby and drove away. RP 169-71.

Mr. Englund testified that the shots were directed at Mr. Cardenas. RP 166 189, 203, 207. Mr. Cardenas testified the events happened so quickly, he did not have an opportunity to see what type of gun it was and instead immediately turned and ran. RP 243-47. Because he had turned, Mr. Cardenas did not know where the gun was pointed when the shots were allegedly fired. RP 247, 254.

Investigating officers were unable to find any shell casings at the scene. RP 257. Officers speculated a wall of the Sears building a few inches from the ground might have been a possible impact sights. RP 258, 278-80, 327. The officers were unable to confirm this was in fact an impact sight, however, and no tests were conducted, nor was there any evidence of paint or chipping below the spot that would have been indicative of impact. RP 269, 272, 284, 339-41.

E. ARGUMENT.

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE, BEYOND A REASONABLE DOUBT, THAT MR. RIZO WAS GUILTY OF ROBBERY AND ASSAULT AS CHARGED.

a. The evidence must establish all the elements of the alleged offense beyond a reasonable doubt. The constitutional guarantee of due process of law requires the State to prove each element of the crime that is charged. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).[1]

Robbery is defined by RCW 9A.56.190 which provides:

A person commits robbery when he unlawfully takes

[1] The appellate court must determine "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 422 U.S. 307, 319, 99 S.Ct. 2781, L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); State v. Johnson, 100 Wn.2d 607, 614, 674 P.2d 145 (1983) overruled in part on other grounds by, State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Robbery in the first degree is defined by RCW 9A.56.200 and provides in pertinent part:

(1) A person is guilty of robbery in the first degree if:
(a) In the commission of a robbery or of immediate flight therefrom, he or she:
(i) Is armed with a deadly weapon; or
(ii) Displays what appears to be a firearm or other deadly weapon; or
(iii) Inflicts bodily injury;...

Assault in the first degree is defined by RCW 9A.36.011 and provides in pertinent part:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death;....

The amended information alleged in Count 1, the robbery, that:

On or about November 25, 2007, in the State of Washington, with intent to steal, you unlawfully took, from the person or in the presence of Rigoberto Cardenas and/or Timothy Englund working as employees of Sears, the property of another, perfume, against that person's will, by use or threatened use of immediate force, violence, or fear

> of injury to that person or his/her property or the person or property of anyone in order to obtain or retain the property taken, and in the commission of or immediate flight therefrom, you were armed with a deadly weapon, a firearm; or displayed what appeared to be a firearm or other deadly weapon.

CP 62. As to the assault, the amended information alleged in Count 2:

> On or about November 25, 2007, in the State of Washington, with intent to inflict great bodily harm upon the person of Timothy Englund, you assaulted that person with a firearm.

CP 62. Count 3 then alleged:

> On or about November 25, 2007, in the State of Washington, with intent to inflict great bodily harm upon the person of Rigoberto Cardenas, you assaulted that person with a firearm.

CP 62.

b. The evidence presented at trial failed to establish all the essential elements beyond a reasonable doubt. In a challenge to the sufficiency of the evidence of a robbery, the prosecutor's burden is clear.

> To successfully resist the challenge to the sufficiency of the evidence, the state must make out a prima facie case consisting of two elements: first, that the victim was put in fear of violence to his person or property; and second, that something of value was taken from his person or in his presence.

State v. McDonald, 74 Wn.2d 141, 143, 443 P.2d 651 (1968). Mr. Rizo contends the State has failed here on both points.

Mr. Rizo defended against the allegations at trial by acknowledging that he was present when Ms. Pina stole items from Sears, but denied having, displaying or firing a gun in support of her unlawful efforts.[2] RP 148-50, 462-74. Because the evidence in support of this allegation was inconsistent and conflicting, it was insufficient to establish proof beyond a reasonable doubt of the elements of either first degree robbery or assault. Furthermore, where the theft occurred peaceably, any force was used at a later time after they had left the store and were passing through the parking lot to their car, the facts do not establish robbery.

i. Evidence Mr. Rizo used, displayed or discharged a firearm was insufficient to establish proof beyond a reasonable doubt. Although the loss prevention officers testified they believed they saw a weapon and heard shots fired, there was an overwhelming amount of contradictory evidence in the form of surveillance video and other witnesses which effectively precluded a finding of proof beyond reasonable doubt.

Mr. Englund testified he began to get excited as soon as he saw signs of potential theft and felt an adrenaline rush. RP 175, 195, 212-13. It took Mr. Englund 15 to 20 seconds to run from his location monitoring

[2] Although he did not testify at trial, Mr. Rizo explained at the time of sentencing that, "I have never in my life used a firearm, otherwise the video shows that I've never had a weapon." RP 528.

the surveillance cameras to the parking lot where he supposedly saw a gun and heard shots. RP 197. Fredrick Haas, another security guard who came upon the scene after the shooting described Mr. Englund as hysterical. RP 292.

Mr. Englund was certainly not a state of mind conducive to either taking or relating particularly accurate observations. As a result significant differences were identified in his description of the gun he thought he saw. RP 200-08, 214-17. Furthermore, although Mr. Englund thought he heard two shots, other witnesses such as Mr. Haas described hearing only one elongated reverberation which he did not immediately recognize as a gunshot. RP 293, 339.

Mr. Cardenas noted that the incident took only a split second. RP 240. He reported he saw Mr. Rizo fumbling or playing with something in his waistband, but never saw him reach into his pocket. RP 241-42. As their brief encounter continued into the parking lot, the lighting becomes poorer. RP 242. Mr. Cardenas acknowledged that as he saw Mr. Rizo fumbling with his pants, he thought Rizo might have a knife or want to fight. RP 242-43. He described Mr. Rizo as being approximately 8 feet away when he allegedly pulled the gun and fired from a position where the limited lighting cast a shadow in front of Mr. Rizo. RP 245. Mr. Cardenas quickly turned and ran when he saw what he thought was a gun.

He had his back to Mr. Rizo, therefore, when he heard what he thought was a gunshot. RP 247-48.

From her position monitoring the surveillance cameras, Kristina Fernandez acknowledged that she "didn't really directly see [a gun]...." RP 306. In reviewing the video again during trial Ms. Fernandez admitted, "No, I didn't – I – I didn't see the gun there. I mean, I didn't – if from looking at that video, I – I can't see the gun,...." RP 308.

The investigating detective, Alba Levesque, also agreed that the video surveillance failed to show what if anything Mr. Rizo might have taken from his waistband after he left the Sears store. RP 336. Furthermore, while the detective identified what he believed to be smoke on the video, he was unable to explain why there would not have been two such puffs of smoke if two shots had been fired as alleged. RP 337.

Finally, Ms. Pina, who was closer to Mr. Rizo than anyone and testified on behalf of the State, indicated she never saw a gun or knife. RP 414.

In light of the significant gaps in the evidence, it should not have been possible for a reasonable jury to find, beyond a reasonable doubt, that the State had proven Mr. Rizo had a gun or that he fired it at the loss prevention officers. His convictions for first degree robbery and first degree assault based upon that supposition should be reversed.

ii. Where the property was peacefully taken and use of force occurred only after leaving the store, robbery is not established. Washington has utilizes a "transactional view" of robbery. State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). Under this view, a robbery can be an ongoing offense so that force used to retain the stolen property will satisfy the force element of robbery. Force that is used merely to affect an escape after property is peaceably taken, however, does not satisfy the force element of robbery under Washington's transactional view.[3] State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005). This analysis is based on the logical concept that the commission of a crime is over when all acts constituting the offense have ceased. People v. Cooper, 53 Cal.3d 1158, 1161, 282 Cal.Rptr. 450, 811 P.2d 742 (1991).

In the present case, Mr. Rizo and Ms. Pina affected their escape upon exiting the Sears store. RP 164, 223. Under our transactional approach, the crime of theft was complete when Ms. Pina reached this place of temporary safety in the parking lot outside the store. It was only in an effort to avoid a subsequent detention, after he had already successfully reached a place of temporary safety, that Mr. Rizo allegedly used a firearm. RP 228 (they proceeded 18-20 feet into the parking lot,

---

[3] The majority of jurisdictions favor this transactional view that considers the robbery complete once the assailant has affected his escape. People v. Anderson, 64 Cal.2d 633, 638, 414 P.2d 366, 51 Cal.Rptr. 238 (1966); People v.

past Cardenas, when Mr. Rizo allegedly turned and fired).[4]

Although the transactional approach does broaden the scope of common law robbery by allowing force occurring after the unlawful taking to satisfy the force element of the crime, it must occur prior the perpetrators arrival at a place of temporary safety. This is clearly illustrated in State v. Johnson, where the defendant, after unlawfully taking a television set out of a store and into the parking lot, dropped the television set when he became aware that security guards were attempting to apprehend him. The defendant then punched a security guard in the face. 155 Wn.2d 610. The Supreme Court found that because the force was not used to retain the property, it could not satisfy the force element of robbery. Id. at 611. Similarly, because the theft was completed when Ms. Pina exited the Sears and walked on past Mr. Cardenas into the parking lot, are insufficient to support a conviction for robbery.

Sanders, 28 Mich.App. 274, 276, 184 N.W.2d 269 (1970).

[4] Federal case law illustrates this break between the theft and the use of force. In U.S. v. Vowiell, 869 F.2d 1264, 1268 (9th Cir.1989), applying the rule regarding escape to temporary safety to the federal crime of escape, held that the crime of aiding an escape terminates once the escapee has reached temporary safety. the Court went on to say,"[w]hen the physical control has ended by flight beyond immediate active pursuit, the escape is complete. After that, aid to the fugitive is no longer aiding his escape." Id. at 1268, quoting Orth v. United States, 252 F. 566, 568 (4th Cir. 1918),

c. The appropriate remedy for a conviction based on insufficient evidence is reversal. The evidence the State presented at trial was insufficient to prove beyond a reasonable doubt that Mr. Rizo used a firearm and thereby either committed either robbery or assault in the first degree. Furthermore, in the absence of sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Rizo used force to effectuate the theft, rather than to avoid detention after the unlawful taking was completed, the robbery conviction cannot stand. "The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence." State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) citing North Carolina v. Pearce, 395 US 711, 717, 89 S. Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Because the State failed to prove the essential elements of robbery and assault in the first, this Court should reverse Mr. Rizo's conviction.

2. ELEVATING ROBBERY TO A HIGHER DEGREE BASED ON THE COMMISSION OF THE ASSAULT OFFENSES AND IMPOSING MULTIPLE PUNISHMENTS FOR THE INTERRELATED OFFENSES VIOLATES DOUBLE JEOPARDY PROHIBITIONS

Mr. Rizo was convicted of robbery in the first degree. CP 21. The offense was aggravated to first degree by Mr. Rizo's alleged use of a gun

to accomplish the robbery. CP 34-35. This was the same conduct which established assault in the first degree. CP 43-44. These multiple convictions serve to separately punish him for the same, singular incident. Mr. Rizo contends the pyramiding of charges in this manner based on the same conduct violates the constitutional prohibition against double jeopardy.

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

A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one

---

[5] The Fifth Amendment provides in pertinent part that "No person shall...be twice put in jeopardy of life or limb...." and applies to the states through the Fourteenth Amendment due process clause. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Washington Constitution provides that "no person shall ...be twice put in jeopardy for the same offense." Art I, § 9. The state double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 816; State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). However, the test is not simply whether two offenses have different statutory elements. United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (conviction for criminal contempt barred prosecution for drug offense); Brown v. Ohio, 432 U.S. 161, 164, 100 S.Ct. 2221, 53 L.Ed.2d 187 (1977) ("separate statutory crimes need not be identical either in constituent elements or actual proof in order to be the same within the meaning of the constitutional prohibition").

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

When discerning legislative intent, the United States Supreme Court requires an express statement of the legislature's purpose to permit separate punishments. Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). For example, an express statement of legislative intent exists where a statute authorizes courts to

punish a burglary separately from another crime committed incidentally to the burglary. RCW 9A.52.050. If there is doubt about the legislature's intent, principles of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

The merger doctrine avoids multiple punishment in violation of the double jeopardy bar by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992). "The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." State v. Parmelee, 108 Wn.App. 702, 710, 32 P.3d 1029 (2001). When two crimes merge, the trial court convicts the defendant only of the one offense into which the other offenses merge. Id. at 711.

The clearest example of the doctrine's application here is State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). The Freeman Court held that a second degree assault committed in the course of a robbery can merge into the greater offense when it is a single act. 153 Wn.2d at 774.

b. The robbery and assault convictions were based on the same conduct in violation of the double jeopardy bar. The proof of two assault offenses here was an necessary integral part of the proof which aggravated the robbery offense to robbery in the first degree in this case.

The jury was instructed,

> A person commits the crime of First Degree Robbery when in the commission of a robbery or in immediate flight therefrom he is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

CP 34.[6] As to assault, the jury was instructed that "A person commits the crime of First Degree Assault when, with intent to inflict great bodily harm, he assaults another with a firearm." CP 43. In her closing argument, the prosecutor explained the State's theory regarding the robbery as follows,

> Element Number 3. Element Number 3 is that there was forced [sic] used to help with this taking of property. The taking was against the will of a – Sears loss prevent officers and it was completed by the accomplice, Ms. Pina, pushing it – pushing officer Cardenas, so she used force there, and the Defendant used force when he displayed and shot that weapon. And this use of force was towards the Sears loss prevention officers.
>
> So their ability to take the cologne was accomplished with force used by both Ms. Pina and the

---

[6] The "to convict" instruction as to the robbery provided in part:

> (3) That the taking was against the person's will by the defendant or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;
>
> (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to present knowledge of the taking;
>
> (5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice
>
> (a) was armed with a deadly weapon; or
>
> (b) displayed what appeared to be a firearm or other deadly weapon;...

CP 35.

> Defendant. Ladies and gentlemen, this element has been proven beyond a reasonable doubt.
> ....
> Second to last element is Element Number 5. And I've highlighted Number B because I think it's significant. Element 5, that in the commission of these acts the Defendant was armed with a deadly weapon or displayed what appeared to be a firearm o other deadly weapon. That's all we have to prove, ladies and gentlemen. We don't have to prove, for Robbery, that he even shot the weapon, just that he displayed what appeared to be a firearm or a deadly weapon.

RP 455-56 (emphasis added). As to the assault, the prosecutor argued:

> Count II are Element I [sic], Assault I. He shot a weapon. When you shoot a weapon, something that has the ability to cause great bodily injury, that's an assault....
> ....
> Element II, the assault was committed with a firearm.

RP 457. Clearly the conduct alleged to constitute the first degree assault was the force, utilizing the same firearm, which elevated the robbery to first degree.

The court must presume the legislature intended to punish these offenses singly when there was no separate and distinct injury inflicted. See State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005); State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). This imposition of multiple punishments for the same acts violates double jeopardy.

c. The robbery was elevated by the underlying assault offenses and yet caused no separate harm meriting multiple punishments. Under the merger doctrine, when a particular degree of crime requires proof of another crime, the court presumes the legislature intended to punish both offenses singly. A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. Johnson, 92 Wn.2d at 680.[7]

The Johnson Court concluded that imposing convictions and sentences for kidnapping, assault and rape unjustly multiplied the punishments for a single offense. Id. at 680. Because conduct surrounding the rape had no independent purpose or effect other than enabling the sexual assault, "the legislature intended" that it should not be punished as a separate crime. Id. at 676. Like Johnson, the State pyramided charges here by prosecuting Mr. Rizo for first degree robbery, which is taking property from the presence of another by force or fear while "armed with a deadly weapon" or "display[ing] what appears to be a firearm..." in addition to the assaults with that same firearm.

---

[7] In Johnson, the defendant was charged with kidnapping, assault, and rape. The offenses occurred during a single, prolonged incident, where the defendant bound his victim and threatened her before and during the rape. "[T]he restraints [underlying the kidnapping] and use of force [underlying the assault] were elements which elevated the acts of sexual intercourse to rape in the first degree." Id. at 681. The offenses were also essentially contemporaneous and "the sole purpose of the kidnapping and assault was to compel the victims' submission to acts of sexual intercourse." Id.

d. The double jeopardy violation requires the appellate court to strike the multiple punishments. The proper remedy for a double jeopardy violation is to vacate the lesser conviction. State v. League, 167 Wn.2d 671, 223 P.3d 493 (2009). The lesser conviction is the offense that forms part of the proof of the other. Id.; Freeman, 153 Wn.2d at 777. The elevation of the robbery based on the assault of the same two individuals requires vacation of these lesser offenses that form the basis for the greater. Johnson, 92 Wn.2d at 682.

Even where the sentences are not separately imposed, Mr. Rizo is entitled to relief because the term "punishment" for double jeopardy purposes encompasses more than just the sentence. See e.g State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007). In fact, even a conviction along without an accompanying sentence can constitute "punishment" sufficient to trigger double jeopardy protections. Id. at 657.[8]

---

[8] The Supreme Court explained in Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985):

> The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.

(Emphasis omitted.)

3. MR. RIZO'S RIGHT TO DUE PROCESS OF LAW AND A JURY VERDICT ON ALL THE ELEMENTS OF THE OFFENSE HAS NOT BEEN VIOLATED WHEN THE TRIAL COURT GAVE CONFLICTING INSTRUCTIONS REGARDING THE MENTAL STATE REQUIRED FOR FIRST DEGREE ASSAULT.

a. Mr. Rizo was constitutionally entitled to have the jury instructed to ensure their verdict touched on every element of the crime. Jury instructions are sufficient only when read as a whole they properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999). The adequacy of jury instructions is review de novo as a question of law. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

The failure to properly instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal.[9] See State v. Roberts, 142 Wn.2d 471, 500-01, 14 P.3d 713 (2000); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). These constitutional errors are "manifest" for purposes of

---

[9] The protections of due process of law are found in U.S. Const. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."); Wash. Const. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

The right to a jury trial is found in U.S. Const. art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury.") and amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); as well as Wash. Const. art. I, § 21 ("The right of a trial by jury shall remain inviolate.") and art. I, § 22 ("In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury.").

RAP 2.5(a)(3) where, as here, they have "'practical and identifiable consequences in the trial of the case.'" Roberts, 142 Wn.2d at 500 (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

b. First degree assault required a finding of intent to inflict great bodily injury. First degree assault requires proof that the accused acted "with intent to inflict great bodily harm." RCW 9A.36.011(1)(a).[10] The mens rea of first-degree assault is the intent to inflict great bodily harm. State v. Rivera, 85 Wn.App. 296, 932 P.2d 701, rev den, 133 Wn.2d 1002 (1997); State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994). Intent requires one act "with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

It is for this reason that in a prosecution for assault, an instruction which stated: "The court instructs the jury that the law presumes that every

---

[10] The statute, RCW 9A.36.011, defines assault in the first degree as follows:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
>
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
>
> (c) Assaults another and inflicts great bodily harm.
>
> (2) Assault in the first degree is a class A felony.

man intends the natural and probable consequences of his own acts," unconstitutionally relieved state of burden of proving intent as element of offense of first-degree assault. State v. Caldwell, 94 Wn.2d 614, 617-18, 618 P.2d 508 (1980). What the instruction in Cladwell did by implication, Instruction 19 did expressly. CP 45. It told the jury it did not matter that "the actor did not actually intend to inflict bodily injury." Id.

c. The assault instructions gave the jury conflicting directions with regard to the proof of intent. In defining the common law forms of assault for the jury, the jury was instructed that an assault occurs "even though the actor did not actually intend to inflict bodily injury." CP 45. This served to contradict directly the requirements of the statute and place in constitutional doubt the verdict which resulted.

The jury instructions, read as a whole, must make the relevant legal standard manifestly apparent to the average juror. State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). Instructions which misstate the prosecutor's burden of proof with regard to an essential and disputed element of the crime charged fail to satisfy this legal standard. State v. Rodriquez, 121 Wn.App. 180, 184-85, 87 P.3d 1201 (2004). By telling the jury at one point that the specific intent to inflict great bodily injury was required, and then telling the jury in the following instruction that it was irrelevant if the defendant intended to inflict any bodily injury at all,

the verdict fails to ensure the jury has concluded, beyond a reasonable doubt, that all the elements of first degree assault were established.

d. The instructional error was prejudicial. Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. Clausing, 147 Wn.2d at 628; State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Mr. Rizo challenged each and every aspect of the State's case with regard to the assault allegation and that includes the absence of any intent on his part to inflict great bodily injury. By instructing the jury separately that no such intent was required to commit an assault, Mr. Rizo's right to due process of law and a jury verdict on all the elements of the offense has not been violated.

e. Counsel's performance was constitutionally deficient in failing to identify and correct the error. Neither principles of waiver or invited error preclude relief from this constitutional defective conviction. Defense counsel did not object to the court's proposed instructions to the jury, nor does the record indicate he proposed the erroneous instruction at issue here. RP 425-39. There was, however, no reasonable tactical or strategic reason for defense counsel to acquiesce jury instructions which misstated the prosecutor's burden of proof on an essential and disputed element. See e.g. Rodriquez, 121 Wn.App. at 187; see also State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). To relieve the prosecution of

its burden to prove the specific intent required to establish first degree assault where the evidence with regard to the assault was vigorously contested, was also inevitably prejudicial and requires relief. Id.

4. THE COURT ABUSED ITS DISCRETION IN RELYING UPON FINGERPRINT COMPARISONS IN THE ABSENCE OF PROFESSIONAL STANDARDS.

a. Mr. Rizo properly challenged the reliance on fingerprint comparisons to establish identity for purposes of criminal history. Mr. Rizo specifically asked the court to reject the State's fingerprint identification evidence based on the lack of evidence to support the scientific validity of the comparisons. RP 490, 506.

The State's witness, Robin Karp, a law enforcement specialist with the Yakima County Sheriff's Office, explained that there were no definitive regulations regarding the number of similarities needed to make an affirmative conclusion in a fingerprint comparison. RP 491, 495. Ms. Karp acknowledged that there is no standard for the number of points of likeness set either by the State of Washington or the FBI. RP 501. Furthermore, Ms. Karp explained that when looking for basic patterns she does not measure for relative position and that a bifurcation in the fingerprint could appear larger or smaller depending on the amount of pressure applied when the print was taken. RP 503-04. Even the presence of dirt on the finger could create the impression of a bifurcation that was

not there. RP 504

In light of the absence of standards, defense counsel argued:

> I guess they call it a science. From what I understand, Your Honor, science is something they – that you can replicate or get a prediction based on experiments, and we get the same predictions. There are no standards here. No standard within the countries, no standard within the states, no standard within the world, in fact, not even standards between individual examiners. That is an absurdity.

RP 506. Counsel went on to note that:

> As far as relative position, well, it could – it looks about the same position, so it's got to be that. That's not – that's not correct, Your Honor. That's not right. That's not science. That's voodoo science. I would call it, Your Honor. No standards whatsoever.
>
> And the State's asking you to say – accept the testimony as being accurate, as being based on science, as being based on training, when there are no standards for training. How can you have training and qualifications without standards? That's an absurdity, You Honor.
>
> . . . .
>
> I'm going to ask You Honor to not accept the testimony. I don't think the State's met its burden, Your Honor.

RP 506-07.

Notwithstanding the lack of standards for making fingerprint comparisons which were acknowledged by the State's witness, the sentencing judge concluded:

> As far as the testimony of Ms. Karp, the Court does accept her testimony, finds that she's qualified as a fingerprint analysis expert, and will accept her testimony and will make findings that the exhibits that were introduced and admitted as Exhibits 1, 2, 3, and 4, although

> the aliases are different, nevertheless they all refer to the same individual.

RP 508.

At a separate hearing regarding the offenses the State alleged precluded "wash out" of Mr. Rizo's prior most serious offenses, Ms. Karp presented similar testimony and defense counsel interposed the same objections. RP 513-20. Although Mr. Rizo denied committing the prior offenses, the sentencing judge again chose to accept the State's evidence and found that he had committed the prior offenses alleged. RP 527.

b. Admission of expert fingerprint evidence for purposes of identification requires reliable authentication. It is fundamental that evidence must be authenticated before it is admitted. See e.g. ER 901(a). Authentication requires that the proponent produce proof "sufficient to support a finding that the matter in question is what its proponent claims." Id. The party offering the evidence must make a prima facie showing consisting of proof that is sufficient "to permit a reasonable juror to find in favor of authenticity or identification." State v. Payne, 117 Wn.App. 99, 106, 69 P.3d 889 (2003).[11]

[11] See also Judicial Council Cmt. 901, cited in 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 901.1, at 283 n. 3 (5th ed.2007); ROBERT H. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON § 901.05(1), at 901-12 (4th ed. 2008) ("Unless evidence is in fact what it purports to be, it is not relevant").

In Mr. Rizo's case, if the evidence of prior offenses were not determined to have been committed by him, the evidence was not relevant and improperly admitted. That relationship was established by the fingerprint comparisons which must, therefore, have a demonstrable reliability. Given the absence of standards by which to reliably judge the comparability of fingerprints, and the substantial debate regarding reliability which is outlined below, the sentencing judge abused his discretion by admitting the exhibits and concluding Mr. Rizo completed the prior offenses. CP 13-15.

c. Substantial debate continues regarding the validity of these identification practices. Contrary to the sentencing judge's conclusion "the accuracy of latent print identification has been subject to intense debate." Simon Cole, Criminology: More than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 986 (Spring 2005). For example, the editor of the Journal of Forensic Identification published an article discussing the lack of standards measuring an examiner's ability to compare fingerprints and the likelihood of error. David L. Grieve, Possession of Truth, 46 J. Forensic Ident. 521 (1996). The first proficiency test produced by the principal organization of fingerprint examiners found only 44 percent of the participants correctly completed the test. J. Forensic Ident. at 524.

The results were "alarming" according to the author, and the "forensic science community" was shocked and deemed the poor performance "unacceptable." Id. at 524-25. The test indicated that one in five latent print examiners do not have adequate knowledge, skill, or ability. Id. at 526.

Other scholars have also criticized the science underlying fingerprint identifications. One wrote, "The field of forensic fingerprint identification suffers from an appalling lack of basic foundational research." Tara M. LaMorte, Comment: Sleeping Gatekeepers, United States v. Llera Plaza and the Unreliability of Forensic Fingerprint Evidence Under Daubert, 14 Alb. L.J. Sci. & Tech. 171, 179, 183 (2003) (calling for courts to thoroughly reexamine field of fingerprint analysis based on widely known lack of scientific reliability and standards). Another noted,

> The reliability of fingerprint identification has never been comprehensively tested. The foundational premise on which fingerprint identification rests - that no two individuals have the same fingerprint - has never been proven. Nor has the fingerprint-identification process's error rate been established or even estimated.

Katherine Schwinghammer, Note: Fingerprint Identification: How the "Gold Standard of Evidence Could be Worth Its Weight, 32 Am. Crim. L.Rev. 265, 266 (2005).

Furthermore, substantial research demonstrates that despite the long-standing practice of admitting fingerprint testimony in court, very little research demonstrates the relative frequency with which the defining ridge characteristics or other identifying marks in a fingerprint occur within any given population, or the adequacy of the standards underlying fingerprint identification. See e.g., David Stoney, The Scientific Basis of Expert Testimony of Fingerprint Identification, 27-2.3.1, in Modern Scientific Evidence: The Law and Science of Expert Testimony (David L. Faigman, et al. eds. 2002) (finding fingerprint analysis is based on subjective criteria, not "conventional scientific experimentation and statistical evaluation"); Michael J. Saks, Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Science Identification, 49 Hastings L. J., 1105-06 (1998) (finding basic premises of fingerprint science untested by conventional means); Margaret A. Berger, Procedural Paradigms for Applying the Daubert Test, 78 Minn. L. Rev. 1345, 1353 (1994) ("Considerable forensic evidence [including fingerprints] made its way into the courtroom without empirical validation of the underlying theory and/or its particular application."). James W. Osterburg, An Inquiry into the Nature of Proof, 9 J. Forensic Sci. 413, 425 (1964).[12]

[12] In a highly publicized case, a federal district court judge barred

d. The erroneous admission of this unreliable evidence of identification requires reversal and remand for resentencing. In light of the substantial ongoing debate in the professional community and the acknowledged lack of standards by the State's witness, the sentencing court abused its discretion in accepting the fingerprint testimony to find Mr. Rizo had the criminal history necessary to sentence him to life in prison.

5. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATED MR. RIZO'S RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE 1, § 12 OF THE WASHINGTON CONSTITUTION.

a. Equal protection under the law is constitutionally guaranteed. Under the Fourteenth Amendment to the United States Constitution and article I, § 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must

---

fingerprint analysis testimony from a trial, but later changed his mind and admitted the testimony. See Simon Cole, Grandfathering Evidence: Jennings to Llera Plaza and Back Again, 41 Am. Crim. L. Rev. 1189, 1195 n.13 (Summer 2004) (discussing United States v. Llera Plaza, Nos. CR. 98-362-10, CR. 98-362-11, CR. 98-362-12, 2002 WL 27305, at * 19 (E.D. Pa. Jan. 7, 2002) (Llera Plaza I), vacated and withdrawn by 188 F. Supp. 549 (E.D. Pa 2002) (Llera Plaza II). However, the judge adhered to many of his factual findings, including the finding that fingerprint examiners do not represent a scientific community so that even if they agree among themselves that fingerprint analysis is a valid science, this agreement does not demonstrate the scientific community agrees with the science underlying fingerprint identification. 41 Am. Crim. L. Rev. at 1244, 1250.

receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. Id.

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991). Upon careful examination, it is clear there is no rational basis upon which to treat recidivist offenses differently by providing fewer procedural protections to those individuals with the most at stake.

b. Washington courts are treating the same recidivist facts in different ways. Although under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to

a jury beyond a reasonable doubt, Washington courts have failed to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001). The Washington Supreme Court has, however, recently held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

While conceding the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of "much confusion," the Roswell Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it "actually alters the crime that may be charged...." Id. The prior conviction was, therefore, an element that must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed "sentencing factors," is neither persuasive nor correct. The disparate treatment which results violates the constitutional right to equal protection under the law.

c. The label of element versus sentencing factor is illusory.

In addressing arguments that one act is an element and another merely a sentencing fact, the United States Supreme Court has noted "merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. More recently the Court explained:

> Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006) (Recuenco II). The distinction Roswell seeks to draw does not, therefore, accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

In Roswell the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,[13] proof of a prior conviction functions as an "elevating element," i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a

[13] Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum possible penalty from one year to five. See RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Pursuant to Blakely, however, the "maximum punishment" is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. In all other circumstance "maximum penalty" is the top of the standard range.

The "elevation" in punishment on which Roswell pins its analysis is not in all circumstances real because the "elements" of the substantive crime remain the same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 10 years to life without the possibility of parole.

d. The legislative purpose of recidivist factors is the same, so there is no rational basis for treating them differently. The Legislature has expressly provided that the purpose of the additional conviction "element" at issue in Roswell is to elevate the penalty for the substantive

crime: see RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others.[14] The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

The Washington Supreme Court has described the purpose of the POAA as follows:

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

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a

---

[14] Division One concluded that there is no equal protection violation where the Legislature elects to classify the fact of a prior conviction as an element of certain offenses but as merely a sentencing factor for purposes of the POAA. State v. Langstead, 155 Wn.App. 448, 228 P.3d 799 (2010) (petition for review filed June 28, 2010). The decision distinguished Roswell, on the grounds that the substantive crime in that case was a misdemeanor which was elevated to a felony by the fact of the prior conviction whereas Mr. Langstead's substantive crime was a felony in and of itself. Id. at 456. This distinction is inapt since there is no constitutionally meaningful distinction that flows from labeling a person a felon as opposed to a misdemeanant. Rather, the equal protection analysis is properly focused on the difference in punishment. There is no rational basis to afford offenders such as Mr. Rizo less due process than offenders such as Roswell.

felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an "element" and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an "aggravator" and need only be found by a judge by a preponderance of the evidence.

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

The legislative classification that permits this result is wholly arbitrary. Roswell concluded the recidivist fact in that case was an element because it defined the very illegality reasoning "if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of felony communication with a minor for immoral purposes." (Italics in original.) 165 Wn.2d at 192. But as the Court

recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject. Id. So too, first degree rape is a crime whether one has prior convictions for most serious sex offenses or not.

The recidivist fact here operates in the precise fashion as in Roswell. This Court should hold there is no basis for treating the prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another. The Court should strike Mr. Rizo's persistent offender sentence and remand for entry of a standard range sentence.

6. MR RIZO'S CONSTITUTIONAL RIGHT TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WERE VIOLATED WHEN THE COURT IMPOSED A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE BASED ON PRIOR CONVICTIONS FOUND BY THE COURT BY A PREPONDERANCE OF THE EVIDENCE.

The POAA mandates a sentence of life in prison for a person convicted of certain specified offenses notwithstanding the otherwise applicable maximum sentence and impose a determinate sentence. RCW 9.94A.030(37)(b). The underlying factual determinations with regard to the POAA sentencing were made by the trial judge by a preponderance of

the evidence. CP 13-16. This procedure violated Mr. Rizo's right to due process of law and a jury determination of all the elements of the crime.

a. The life sentence exceeds the statutory maximum for robbery and assault. The Sentencing Reform Act (SRA) generally requires a sentencing court to determine an offender's standard sentencing range based on the seriousness of the current offense and the offender's criminal history. RCW 9.94A.510, 515, 525. Depending on the nature of the current and prior offenses an individual's offender score is calculated in accordance with the provisions of RCW 9.94A.525. RCW 9.94A.599 in turn provides that a standard range sentence cannot exceed the statutory maximum penalty for the crime. The statutory maximum penalty for the robbery was a determinate sentence with the possibility of parole.

Pursuant to the POAA, however, where a person is convicted of a third "most serious" offense, i.e. the sentencing judge determines the offender has on two prior occasions been convicted of most serious offenses, the judge must impose a sentence of life imprisonment without the possibility of parole. RCW 9.94A.570; RCW 9.94A.030(32), (37). A life term is required regardless of the otherwise applicable standard range or statutory maximum. Id.

In Mr. Rizo's case, the sentencing judge, not the jury, determined he had prior qualifying assault convictions and sentenced him to life

without the possibility of parole. RP 490-530; CP 13-16. Mr. Rizo's sentence exceeds the maximum term permitted by the convictions for robbery and assault based upon the facts found by the jury in its verdict and therefore violates his federal constitutional right to due process of law and to a jury trial.

b. The constitutional rights of due process and a jury trial requires that any fact that increases a defendant's maximum sentence must be found by a jury beyond a reasonable doubt. The Due Process Clause that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides defendants with the right to trial jury. U.S. Const. amend VI. It is axiomatic then that a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 O.Ed.2d 368 (1970). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to a 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77, quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

The Supreme Court applies this principle to facts that increase the maximum penalty faced by the defendant even if the fact is labeled a "sentencing factor" by the legislature. Therefore an exceptional sentence imposed under the SRA was unconstitutional because the court imposed a sentence over the standard range based on facts that were not admitted in plea or found by a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

> Our precedents make clear...that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

Id. at 303 (original emphasis); Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Therefore, a judge may only impose punishment within the maximum term justified by the jury verdict. Blakely, 542 U.S. at 303-04.

c. The prior conviction "exception" described in Apprendi is unconstitutional. The Supreme Court has not recently addressed recidivist statutes and instead has distinguished prior convictions from

other facts used to enhance a defendant's sentence.[15] The Court has not, however, directly addressed the continuing validity of its 1998 opinion upholding a recidivist sentence under the federal illegal re-entry statute, Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Additionally, Almendarez-Torres itself never addressed the requirements of the Due Process Clause of the Fourteenth Amendment that any fact that increases a sentence to a term beyond the statutory maximum be submitted to a jury and proven beyond a reasonable doubt. See Specht v. Patterson, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

In Almendarez-Torres the Court held that the nature of prior convictions was not an element of a federal offense making it illegal for a deported alien to return to the United States and thus did not need to be included in the charging document, even though it increased the defendant's possible punishment. 523 U.S. at 246. Apprendi distinguished this holding because (1) the issue in Apprendi was racial motivation, not recidivism and (2) the defendant there had admitted the prior convictions in his guilty plea, only raising the indictment issue,

---

[15] The rule is often stated as, "[o]ther than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury an proved beyond a reasonable doubt." Blakely, 542 U.S. at 301; Apprendi, 530 U.S. at 476.

whereas Apprendi argued he had the right to have a jury find the facts at issue beyond a reasonable doubt. 530 U.S. at 488, 495-96.

The Apprendi Court went beyond distinguishing Almendarez-Torres to cast doubt on its continuing validity stating "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489. The wording of the Court's holding regarding the prior conviction "exception" demonstrates that the Court has not yet addressed the issue of prior convictions. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-990 (2004).[16]

Unfortunately, the Washington Supreme Court relied upon Almendarez-Torres for the proposition that prior convictions do not need to be pled or proven to a jury. See e.g. State v. Thiefault, 160 Wn.2d 409, 418-19, 158 P.3d 580 (2007); State v. Smith, 150 Wn.2d 135, 142-43, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). Only in Wheeler did the Court recognize that the continuing

---

[16] Justice Thomas, who signed the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J., concurring).

validity of Almendarez-Torres was questionable in light of Apprendi. Wheeler, 145 Wn.2d at 123-24.

d. The logical underpinning of Almendarez-Torres have been completely eroded by subsequent cases. The defendant in Almendarez-Torres was charged with reentering the United States after being deported and his maximum term was 20 years because he was deported for an aggravated felony. He pled guilty and admitted three prior aggravated felony convictions, but argued he was subject to only a two-year maximum because the aggravated felonies were not included in the indictment. 523 U.S. at 227. The Court decided the nature of the prior convictions need not be included in the indictment because Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id. at 235. Although Almandarez-Torres looked to legislative intent and found Congress did not intend to define a separate crime when it provided for a higher maximum term based upon the nature of the defendant's prior convictions, more recent cases make it clear that legislative intent does not establish the parameters of due process. Blakely, 542 U.S. at 306; Ring, 536 U.S. at 602; Apprendi, 530 U.S. at 476.

Both the Almendarez-Torres dissent and Justice Thomas's concurring opinion in Apprendi also cast considerable doubt on the

assumption that recidivism has historically been treated differently than other elements of a crime. Apprendi, 530 U.S. at 506-19 (Thomas, J., concurring); Almendarez-Torres, 523 U.S. at 259-60 (Scalia, J., dissenting).[17]

Almendarez-Torres also noted the fact of prior conviction under that statute only triggered an increase in the maximum permissive sentence. 523 U.S. at 244-45. Here, however, Mr. Rizo's prior convictions lead to a mandatory sentence much more severe than the maximum sentence under the guidelines.

Finally, Almendarez-Torres held that the federal statute did not "create significantly greater unfairness" because judges traditionally exercised discretion within broad statutory ranges and noted new sentencing guidelines channel that discretion. 523 U.S. at 245-46. This distinction has subsequently been rejected by Blakely, however, when the Court found that Washington's aggravating factors act as elements of the

---

[17] Two of the cases relied upon in Almendarez-Torres to support the proposition that the prior conviction need not be pled involved the West Virginia recidivist statute where the prior conviction must be found by the jury. Oyler v. Boles, 368 U.S. 448, 449-51, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) (prosecutor filed separate information charging defendant as recidivist after conviction for crimes; defendant admitted prior convictions); Graham v. West Virginia, 224 U.S. 616, 624, 32 S.Ct. 583, 56 L.Ed. 917 (1912) (jury found identity in separate proceeding after a separate information). Although not mentioned in those cases West Virginia also requires proof of prior convictions beyond a reasonable doubt. W.Va. Code § 61-11-19; Wanstreet v. Bordenkircher, 276 S.E.2d 205, 208 (W.Va 1981).

aggravated crime because they allowed the judge to sentence the defendant over the maximum sentence permitted by the jury's verdict. Blakely, 542 U.S. at 303-05. Here the use of Mr. Rizo's prior convictions would mandate a sentence that exceeds the range established by the jury's verdict under the SRA.

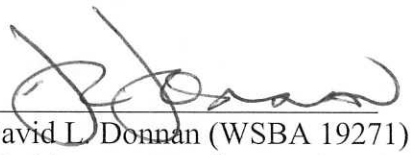
e. The constitutional violations require the sentence be reversed. Facts that increase a defendant's maximum sentence, including prior convictions, are elements of a greater crime and must be pled and found by the jury beyond a reasonable doubt. Blakely, supra; Apprendi, supra. Mr. Rizo disputed identity with regard to the prior offenses and was entitled to determination by jury, upon proof beyond a reasonable doubt, before his sentence was increased to life without parole. RP 527. That sentence must be reversed.

F. CONCLUSION.

Mr. Rizo requests this Court order his sentence of life in prison be stricken and the case remanded for resentencing on the lesser offenses supported by the evidence.

DATED this 24th day of September 2012.

Respectfully submitted,



David L. Donnan (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 28932-0-III
	)	
ELODIO RIZZO,	)	
	)	
APPELLANT.	)	

AMENDED DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JAMES HAGARTY, DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	DAVID BRIAN TREFRY ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X]	ELODIO RIZZO 262034 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF SEPTEMBER, 2012.

X_____