NO. 28932-0-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELODIO RIZO,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES (continued)

PAGE

Rules and Statutes

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

Assignments of Error

1. There was insufficient evidence to prove beyond a reasonable doubt that appellant was guilty of robbery and assault.
2. Double jeopardy was violated.
3. The unanimity jury instruction was flawed.
4. The court abused its discretion when it relied on fingerprint comparisons.
5. Appellants equal protection rights were violated because persistent offender is not classified as an element.
6. Appellants right to a jury trial was violated when the court found by a preponderance of the evidence he had qualifying strike convictions.

Response to Assignment of Errors.

1. There was sufficient evidence to support the convictions on both counts; robber and assault.
2. Double jeopardy was not violated.
3. The unanimity instruction was not flawed.
4. The court did not abuse its discretion regarding fingerprint evidence.
5. Appellants equal protection rights were not violated by the persistent offender finding.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State

shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

1. SUFFICIENCY OF THE EVIDENCE.

Appellant was charged with first degree robbery and first degree assault. He now claims the evidence presented does not support these convictions because the evidence was "inconsistent and conflicting" with regard to whether appellant's use of the firearm was in support of the other actors criminal conduct. The jury was given instructions one of which was the accomplice liability instruction. (CP 32) The very definition of Robbery and the elements of Robbery in the First degree were clearly established by the conduct of appellant. (CP 35, 44, 52) (See Appendix A)

Appellant alleges the testimony regarding the gun was conflicting and there was dispute as to whether there was one shot or two, this does not matter. The fact is the one witness, Mr. Englund, testified he saw and heard a gun; he is an expert with weapons and was an Iraqi war veteran. The claim that a person who is in the military and has done two tours of duty in Iraq was unable to determine that there was a weapon and that it was discharged is absurd. (RP 152-54) There is no doubt even after just the testimony of this one witness;

Q Okay. And what happened after Ms. Pina said no, no, no?
A At this time when I was talking to Ms. Pina, also kept eyes on the Defendant, watching what he was doing. At that time Rigo was yelling that he had something, possibly a knife. And so at that time the Defendant pulled his hand out of his right side, it was either his pocket or his right coat pocket or waistband, it was one of that area. Since I was on his left side I couldn't tell you exactly the position of where his hand was. **He pulled out a silver revolver and started shooting in the direction of Rigo. I was --**
Q Okay. Let me --
A -- in the -- Let me -- let me stop you right there, we kind of go step-by-step. How could you tell it was a silver revolver?
A **Military training. I grew up with weapons and I know how -- I can identify any kind of -- whether it's a revolver or a semiautomatic pistol or a rifle or shotgun.**
Q And how much of the gun could you see?
A **I could see it fully in his hand enough to know that it was a revolver, silver, and probably around three to four inches long.**
Q Okay. When he pulled out the gun -- I guess can you stand up and demonstrate where -- how he pulled it out and where it was?
A **When he was pointing it towards Rigo, I was off to about his – nine o'clock, and he was in the hunched-down mode with his hand almost to -- just past his waist, in this position. That's why I could see from that angle what it was.**
Q *Thank you. And did he shoot the weapon?*
A **Correct. He shot the weapon**.
Q How many times did he shoot the weapon?
A **At the time I believe it was one or two shots**.
Q And did you see which direction he shot?
A **Direction of Rigo. The way his body was faced, the weapon was parallel to the ground, it was in his direction.**
Q *And did you actually see when he pulled the trigger on the weapon?*

A **Correct. I did hear as I'm in the midst of walking with the group, as I would say, 'cause they all were moving towards the parking lot, I heard the shot, also saw the shot and the muzzle flash as well.**
Q And what do you -- what was going through your mind at that point?
A Get out of there. **As soon as I heard the first shot, I immediately turned the other way, simultaneously, and went the other way.**
Q After you turned, do you know if there were any shots fired?
A At the time I don't. I know I was yelling at the time, yelling gun, shots fired, anything I could yell. We had people in the background that were going in our direction. There were only -- they were parked a few cars down from where they were parked. They were actually getting into their car as a family, as well as families coming out.
(RP 164-67) (Emphasis mine.)
...
Q When the Defendant pulled out the gun, were you afraid for your safety?
A Absolutely.
Q What were you afraid of?
A Being shot, especially coming back from a deployment. What went through my mind is if someone shoots me or shoots at me I'm going to defend myself, but I had nothing. Sears policy is we don't carry any kind of weapons, handcuffs, mace, I mean, nothing, it's just you and your words. And since I had no right to -- or had nothing to defend myself, I had to move out the other way.
(RP 168)
...
Q Did Ms. Pina ever give you the cologne back during that -- on that day?
A No, she didn't.
Q Okay. And you said you did go back in the store to check the shelves and the cologne wasn't there?
A Correct. The -- I went to the shopping cart, the shopping car still had the shirt in it, there was nothing else was in the area. (RP 169-70)

This is a witness knows guns and months after the crime identified Rizo in court even though Rizo had changed his facial hair. This is bolstered by the testimony of all other witnesses who said they heard the shot(s) and the observation by the officer on the video of smoke from a weapon. (RP 337)

This section of the transcript also refutes the claim by appellant that he had reached "a place of temporary safety" This was a continuous action where the security officers immediately confronted Rizo and his companion. There was not a single second of time which would or could be said to be "temporary place of safety." The theory is dependant on the abandonment of the stolen item and the change in the intent of the party from the theft and robbery to purely flight, escape. That is not the case here.

State v. Johnson, 155 Wn. 2d 609, 121 P.3d 91 (2005) cited by Rizo is distinguishable. Johnson dropped the stolen property and was attempting to affect a get away at the time he assaulted the other person. This case is factually very distinguishable in that the property was retained, the process of the theft and the apprehension were still ongoing, there was not "place of temporary safety" reached here in that the officers were in pursuit the entire time, until they saw the weapon and fled. The testimony was there were mere seconds from the time Rizo and Pina left

the building and the initial confrontation occurred. There is absolutely nothing in the record, nor does Rizo argue such in his brief, which would indicate that Rizo or Pina abandon the property and were merely trying to escape at the time Rizo pulled the gun and fired. Cases which cite Johnson make it clear that abandonment of the property is essential, not just an escape.

First degree robbery occurs when a person inflicts bodily injury in the commission of a robbery or in immediate flight therefrom. RCW 9A.56.200(1)(iii). It requires a connection between the use of force and taking of the property. State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. RCW 9A.56.190. To convict Rizo the jury had to find, beyond a reasonable doubt, that he or his accomplice, unlawfully took personal property and was armed with a deadly weapon; or displays what appears to be a firearm or other deadly weapon. The jury had to find that Rizo used force or fear to retain possession of the property or to overcome the victim's resistance, but the degree of force was unimportant. Id.; State v. Johnson, 155 Wn.2d 609, 610, 121 P.3d 91 (2005). The jury also had to find that Rizo and/or his companion intended to steal the perfume. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

Johnson held that robbery occurs when a defendant either (1) uses force or threat of force to obtain property, (2) uses force or threat of force to retain property, or (3) uses force to overcome resistance to the taking of the property. Johnson, 155 Wash.2d at 611, 121 P.3d 91. Johnson is based on an earlier opinion State v. Handburgh, 119 Wash.2d 284, 830 P.2d 641 (1992). Handburgh articulated the legal principle that robbery occurs when a defendant uses force to retain possession of property, even if the defendant initially took the property peaceably or took it in the owner's absence. Handburgh, 119 Wash.2d at 293, 830 P.2d 641 Washington law has established that robbery requires a defendant's use or threat of force to relate to taking or to retaining another's property. Under this construction, Rizo is guilty of robbery if he confronted Englund or Cardenas and used force in an attempt to flee the area. This court should affirm this conviction because the evidence sufficiently supports this verdict.

The jury could readily have found the elements were satisfied. Timothy Englund testified that Rizo and Pina took the perfume from the store without paying and left the store, when confronted in the parking lot, Rizo used force, in this instance he initially displayed then discharged a revolver, to overcome the victim's attempt to stop him. Video surveillance supported Englund's account of the incident. The claim by Rizo that the

evidence was insufficient without merit. Rizo does not dispute he and Pina took the property from the store without paying for it or that he used force against the victims.

State v. Johnson, supra, (citing RCW 9A.56.190). Any force or threatened force, however slight, is sufficient to sustain a robbery conviction. State v. O'Connell, 137 Wn. App. 81, 95, 152 P.3d 349 (2007). Moreover, a perpetrator who peacefully obtains the stolen property but uses violence during flight commits robbery. See State v. Manchester, 57 Wn.App. 765, 770, 790 P.2d 217 (1990).

Evidence is sufficient if, when viewed 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." State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. *Id*. A reviewing court gives deference to the trier of fact on the issues of conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). State v. Schapiro, 28 Wn. App. 860, 868, 626 P.2d 546 (1981) “The

conflict in testimony was a matter for the trial court to resolve. This court will not substitute its judgment for that of the trier of fact upon a disputed issue of fact. Udhus v. Peglow, 55 Wn.2d 846, 350 P.2d 640 (1960); Keogan v. Holy Family Hosp., 22 Wn. App. 366, 589 P.2d 310 (1979)." State v. Johnston, 100 Wn. App. 126, 137, 996 P.2d 629 (2000) "The trier of fact is in a better position to resolve conflicts, weigh evidence, and draw reasonable inferences from the evidence. State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888, review denied, 95 Wn.2d 1021 (1981)."

Even in his "hysterical" state after the shots were fired the transcript of the 911 phone call proves Mr. Englund was able to clearly and concisely tell the 911 operator there had been shots fired that the came from a silver revolver this was after loss prevention confronted the thieves for stealing perfume. He was able to give the operator a description of the perpetrators, the make and model of the car and the license plate number and the direction of flight; all the while apparently checking on the others in the parking lot. (RP 170-74) Rizo alleges there was confusion and gaps in testimony such as why the officer observing the scene on the video saw only one puff of smoke. The fact is the State did not have to prove a shot or shots were fired; there was proof of a gun. Englund stated in the 911 call "one shot, possibly two" in the heat of the moment, while reacting to a threat to his life, whether the witness states one shot or two is

immaterial. The only person who stated they did not see a gun was Rizo's accomplice Pina and she heard two big booms. (RP 171, 337, 414) Even during the extensive testimony there was nothing elicited from Englund other than minor discrepancies between the different reports or interviews that he gave. The bottom line was that there was a gun, it was silver, in the hands of Rizo and it was discharged.

To sum up Mr. Englund's testimony;

Q. And what percentage are you sure that this was in fact a firearm?
A. A hundred percent sure I know it was a firearm. (RP 214)

The following in just a small section of the testimony of Rigoberto Cardenas' testimony;

....And they proceed and then when we get to the parking lot, it's probably 20 to 18 feet away from where I had first confronted them and that's when the male turns around and he -- at waist level, he holds the weapon and he fire -- and as soon as I seen the weapon, I just turned and ran, and that's when I heard the gunshot.
Q Can you stand up and demonstrate how he was holding the weapon or?
A He had the weapon like this at waist, in a hand. Yeah.
Q Could you see what type of weapon it was?
A I don't know. I just -- all I saw was a weapon and I just ran. I mean,
I didn't have time to see what kind of weapon it was.
Q Okay. Could you tell whether it was a knife or a gun or?
A It was definitely a gun.
Q Could you tell what type of gun, whether it was a semi automatic, a revolver?
A I could not tell what kind of gun. As soon as I saw the gun, I just

turned and ran. I just --
Q And how far were you away from him when you saw the gun?
A When I saw the gun, I was probably about somewhere around eight feet away, when he pulled the gun out.
Q And what direction was it pointed?
A The weapon was pointed at me.
Q Okay. Directly at you?
A Yes, it was directly at me.
Q Okay. Were you afraid of anything at that point?
A I was just trying to get out of safety, you know, and this -- I heard
this -- I just heard the shot, and I was like, I hope I don't get hit.
Q Okay. Were you concerned about getting hit?
A Yeah, I was.
Q Okay. And did you hear a gunshot?
A Yes, I did hear a gunshot. Possibly two, but I'm not sure, 'cause As soon as I saw the weapon, I just got like an adrenaline rush and just
wanted to get out of there soon as I could.
Q Okay. At what point did you hear the gunshot?
A As soon as I turned around.
Q Have you heard a gunshot before?
A Yes, I have.
Q And when had you heard a gunshot before?
A In the military.
Q Okay. Are you sure it was a gunshot that you heard?
A Yes, it was a gunshot.
Q Okay. Could it have been anything else besides a gunshot?
A No, it was a gunshot.
(RP 228-29)

Two witnesses confronted the Rizo and Pina, their testimony may vary in the exact detail but does not waiver in the core facts, there was a gun, it was discharged and the discharge was at or in the direction of both.

There was additional evidence and testimony that the robbery was committed by Rizo using a gun. Mr. Cardenas on cross at RP 243-48; the

testimony of Officer Rivera who identified an impact location which corresponded to the general direction from which a shot would have come RP 258-60, 69,72; Officer James who identified the impact location and stated in his experience it appeared to be the impact location from a small caliber hand gun and that location was consistent with a handgun having been fired in the direction Cardenas indicated from the location Cardenas was at, at the time the shot was fired RP 277-81; loss prevention supervisor Fred Haas who heard the shots and met Englund as he fled yelling shot fired RP 287-88 (It should be noted that Haas did not describe Englund as "hysterical" as indicated in appellant's brief at pg. 12 what he did state was "He was on the verge of hysterics...He was keeping within a hair's width of losing control. He is a combat veteran. He is usually quite well, he was just fired on, point-blank" RP 287, 292.) He then states Englund was yelling shots fired, shots fired everyone take cover" (RP 287). Mr. Haas was an ex-Marine who stated when asked if there was any doubt as to what the sound he heard was "No ma'am. It was gunfire" RP 289; Ms Fernandez who was watching the monitors stated that she heard "two gunshots – I – one or two gunshots at the time." RP 303, I just saw him reached (sic) his pocket and pull something out. I didn't really directly see, (the gun)... and I heard gunshots." RP 304, I did see a gun when he pulled the -- something out of his pocket... It --- he pulled a gun.

I know it was a gun because I heard gunshots." RP 307; Det. Levesque observed the video and identified where Rizo pulled out a gun fired at Cardenas then turned and fired at Englund RP 326-7, she also identified what smoke that would be consistent with a revolver having been fired. RP 333-34, she also indicates that Mr. Haas state to her that he heard what he thought was a second shot. RP 343; codefendant Pina stated she heard "some big booms, two times and that's it." RP 388.

The evidence presented from all of the witnesses proved beyond a reasonable doubt that the crimes charge were committed by Rizo. Rizo did not move the trial court for a directed verdict nor move to dismiss at the end of the trial for sufficiency of the evidence.

2. DOUBLE JEOPARDY WAS NOT VIOLATED.

Rizo was not punished twice for the same criminal act. The jury instruction cited above makes it clear that the theory throughout this case was that Pina and Rizo were working as accomplices. Therefore the State's theory is a logical conclusion. The act of shoving Mr. Cardenas was all the force needed to insure the conviction for the robbery, the display of the gun was the aggravator.

The two loss prevention officers believed that Rizo had something on his person but at the time Pina was shoving Mr. Cardenas there was no weapon which had been displayed. They were worried about the fact that

he had been messing with his waist band in the store and outside when the confrontation occurred. The crime was completed when they saw the gun and both the victims turned and fled. It was after that even if just seconds later that the assault occurred as stated by the Deputy Prosecutor. The fact that Rizo took the gun out then he actually fired it turned this Robbery in to a Robbery and an Assault. Timothy Englund;

> A. ...So, in this case, because Rigo was pushed by Ms. Pina, I knew -- I wasn't there at the time, I knew something was wrong -- when he was off into where he is now when I come up that something went wrong. And I could see that he was in between Rigo and Ms. Pina.
> Q At this point had you been -- had Rigo notified you that there was something in his pocket he was concerned about?
> A At this time he's yelling at me as I'm running up.
> Q Okay. And what was he yelling at you?
> A That he -- his hand's in his pocket or something -- he has something, but he didn't know exactly what it was, to watch him. (RP 188-89)

Rigoberto Cardenas;

> Q Okay. And what did she and the male do?
> A Well, they -- she proceeded -- and she kinda tried to push me off, but I kinda moved back and then they started passing my right side because our store policy is no-hands contact and no -- we don't have no -- we don't want no confrontation with the customers.
> Q You aren't going to try to --
> A Yeah, I'm not --
> Q -- (inaudible)?
> A -- gonna try to take her down because she tried to put her hands on me. (RP 226)

The actual robbery was complete once Pina pushed and resisted Cardenas. The fact that the crime could be elevated in degree, based on

the possession of the weapon, does not make the crimes the same for double jeopardy, further assault does not require the taking of personal property from another. It is correct that each requires, in this factual situation, the use of a weapon, however they are distinctive crimes and therefore do not merge.

In re Fletcher, 113 Wn.2d 42, 47, 776 P.2d 114 (1989):

> The double jeopardy clause does not prohibit the imposition of separate punishments for *different* offenses. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) held that:
> In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.
>
> > The test set forth in Vladovic involves two components. First, the offenses must be factually the same. If "proof of one offense would not necessarily also prove the other", double jeopardy would not protect against multiple punishments. Vladovic, at 423.

The actions of Pina and Rizo with regard to the actual robbery were directed towards Mr. Cardenas. The testimony was, the act of firing the gun at Cardenas was separate from the act of turning and firing on Englund therefore even if this court were to find that the robbery and the assault on Cardenas were double jeopardy and merged this court should determine that the second act by Rizo to turn and fire the weapon in the direction of Englund constituted a separate assault. The mere display of

the weapon or the actions of Rizo which lead the victims to believe he had a weapon were sufficient to elevate this crime to Robbery in the first degree. At the moment Rizo took the gun from where he had it hidden and aimed it at Cardenas and when he took the separate action of turning to aim and fire at Englund were separate acts which were necessary to prove the robbery. The testimony regarding these acts was chronologically from inside the store continuing outside when Cardenas indicated to Englund that he, Rizo, had something at his waist. The actions of Rizo in this matter did not need to amount to "assault" in order for the jury to find him guilty of the Robbery. As was recently stated by this court in State v. Gatlin, 241 P.3d 443, 447 (2010):

> At issue in any double jeopardy analysis is whether the legislature intended to impose multiple punishments for the same event. In the Pers. Restraint of Orange, 152 Wash.2d 795, 815, 100 P.3d 291 (2004). Courts may discern the legislature's purpose by applying the tests set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) ("same elements test"). Under Blockburger, " [t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304, 52 S.Ct. 180. Under the Washington rule, double jeopardy attaches only if the offenses are identical in both law and fact, which is demonstrated when "'the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.' "State v. Reiff, 14 Wash. 664, 667, 45

> P. 318 (1896) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)). The "same elements" test and the " same evidence" test are largely indistinguishable. Orange, 152 Wash.2d at 816, 100 P.3d 291.

There was no necessity to prove the assault in order to obtain a conviction for the robbery first degree based on the facts before this court, especially with regard to the Assault first degree which was charged with Mr. Englund as the victim. The robbery was "elevated" in degree not by the assault but by the use of the weapon. It was also not necessary to prove the Robbery in order to prove that the actions of Rizo in discharging the firearm was an assault in the first degree. This can be seen from the elements instructions that were given and which are contained in the appendix. (CP 10, 18, 52)

It is essential that at the time of the actual discharge of the firearm both of the victims appeared to be fleeing the scene. Rizo did not "need" to fire the gun to complete his crime. This was a secondary action which was an attempt to injury both of the victims.

> .... And they proceed and then when we get to the parking lot, it's probably 20 to 18 feet away from where I had first confronted them and that's when the male turns around and he -- at waist level, he holds the weapon and he fire -- and as soon as I seen the weapon, I just turned and ran, and that's when I heard the gunshot.
> ...
> A I could not tell what kind of gun. As soon as I saw the gun, I just turned and ran. I just --
> Q And how far were you away from him when you saw the gun?

A When I saw the gun, I was probably about somewhere around eight feet away, when he pulled the gun out.
Q And what direction was it pointed?
A The weapon was pointed at me.
Q Okay. Directly at you?
A Yes, it was directly at me.
Q Okay. Were you afraid of anything at that point?
A I was just trying to get out of safety, you know, and this -- I heard this -- I just heard the shot, and I was like, I hope I don't get hit.
Q Okay. Were you concerned about getting hit?
A Yeah, I was.
Q Okay. And did you hear a gunshot?
A Yes, I did hear a gunshot. Possibly two, but I'm not sure, 'cause as soon as I saw the weapon, I just got like an adrenaline rush and just wanted to get out of there soon as I could.
Q Okay. At what point did you hear the gunshot?
A As soon as I turned around.
Q Have you heard a gunshot before?
A Yes, I have.
Q And when had you heard a gunshot before?
A In the military.
Q Okay. Are you sure it was a gunshot that you heard?
A Yes, it was a gunshot.
Q Okay. Could it have been anything else besides a gunshot?
A No, it was a gunshot.
(RP 228-29)

...

Q Did you see what Tim Englund was doing at this point, while you were running back?
A Well, as I turned and ran, I kinda saw Englund out of the corner of my eye, duck behind a car and then he took off running too, so.
(RP 230)

...

A Yeah. As soon as I saw the weapon, I just took off. And that's when I ran back into the store.
(RP 233)

3. ASSAULT INSTRUCTION WAS PROPER.

In this amended brief Rizo challenges jury instruction 19. The instruction given, states;

> An assault is an act, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted. An assault is also an act done with the intent to create in another apprehension and fear *of* bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. (CP 45)

Rizo did not object to this instruction the claimed error is not of constitutional magnitude, he has waived this issue on appeal; THE COURT: 35.50...MR. BANDA: No objection. (RP 429); THE COURT: I'll ask again whether there's any exceptions to the giving of or the failure to give instructions...MR. BANDA: No objections. (RP 439)

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Rizo must make a plausible

showing that the asserted error had practical and identifiable consequences in the trial of the case. Id. This instruction is "WPIC", 35.50, which was proposed by the State's and adopted by the court. This instruction and the supporting case law is contained in its entirety in Appendix A.

An erroneous instruction is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. State v. Brown, 147 Wash.2d 330, 332, 58 P.3d 889 (2002). State v. Lundy, 162 Wn.App. 865, 871-2, 256 P.3d 466 (2011);

> An erroneous jury instruction, however, is generally subject to a constitutional harmless error analysis. State v. Brown, 147 Wash.2d 330, 332, 58 P.3d 889 (2002). We may hold the error harmless if we are satisfied " 'beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " State v. Bashaw, 169 Wash.2d 133, 147, 234 P.3d 195 (2010) (quoting Brown, 147 Wash.2d at 341, 58 P.3d 889). Even misleading instructions do not require reversal unless the complaining party can show prejudice. State v. Aguirre, 168 Wash.2d 350, 364, 229 P.3d 669 (2010).
> **...**
> Because Lundy cannot show that he was prejudiced by the instruction or that it relieved the State of its burden of proof, we decline to treat this error as a structural error and instead follow the general rule that erroneous jury instructions are subject to a constitutional harmless error analysis. See Bashaw, 169 Wash.2d at 147, 234 P.3d 195; Brown, 147 Wash.2d at 332, 58 P.3d 889.

A challenged jury instruction will be reviewed de novo, evaluating it in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). It is reversible error to instruct the jury

in a manner that would relieve the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt. Pirtle, 127 Wn.2d at 656. RAP 2.5(a)(3) requires that a defendant raising a constitutional error for the first time on appeal show how the alleged error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). This court will employ a two-part analysis to determine whether an asserted error is a manifest error affecting a constitutional right. See State v. Holzknecht, 157 Wn.App. 754, 760, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011). First, this court will determine whether the error is truly constitutional, as opposed to another form of trial error. Holzknecht, 157 Wn.App. at 759-60.

Second, this court will decide whether the error is manifest. Holzknecht, 157 Wn.App. at 760 "Manifest" error requires a defendant to demonstrate actual prejudice. Holzknecht, 157 Wn.App. at 760. Actual prejudice arises if the asserted error had practical and identifiable consequences at trial. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting Kirkman, 159 Wn.2d at 935). To decide the actual prejudice prong, this court will examine the record to determine if it is sufficiently developed to decide the merits of the claim. Manifest errors affecting constitutional rights are subject to harmless error analysis." A

constitutional error is harmless if this court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Holzknecht, 157 Wn.App. at 760.

State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) discussed this very question, Smith challenged whether the actions of the trial court in giving an identical instruction resulted in a lack of unanimity. Smith was also charged with First Degree Assault by the State:

> It alleged, pursuant to RCW 9A.36.011(1)(a), that each assault was intentionally committed "with a firearm or deadly weapon." CP at 1, 2. At the close of evidence, the jury was instructed that "[a] person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with a firearm." *Id.* at 141. In addition, the jury was instructed regarding the lesser-degree offense of second degree assault, the instruction reading, "A person commits the crime of Assault in the Second Degree when under circumstances not amounting to Assault in the First Degree he or she assaults another with a deadly weapon." *Id.* at 151. The jury was also given a separate instruction that set forth the common law definitions of assault. It read:
>
> An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon

> another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> **An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.**
>
> *Id.* at 142.
>
> (Smith at 782-3, emphasis mine)

Smith determined that this exact wording given as an instruction did not set forth a separate means of committing the crime of assault but;

> the common law definitions of assault, when submitted in a jury instruction as they were in this case, do not constitute alternative means of committing assault is that, properly understood, these definitions merely define an element of the crime charged and, thereby, give rise to a "means within a means" scenario. As stated above, a "means within a means" scenario does not trigger jury unanimity protections. Here, we conclude that the common law assault definitions represent such a "means within a means" because those definitions merely define the element of assault.
>
> (Smith at 787)

This analysis is applicable to herein. As was the case in Smith the fact that the court in Rizo's case gave, un-objected to, WPIC 35.50 did not confuse the requirements that that State was required to prove beyond a reasonable doubt. This definitional instruction did not contradict the statutory requirements for proof of an assault in the first degree. These common law definitions have been used in innumerable cases because the

statute does not give a definition of what the term "assault" is. Therefore it is the duty of the court to inform the jury what that term in fact means.

4. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT RELIED ON FINGERPRINT COMPARISONS.

Rizo has not and can not cite a single case in this State which would support his position. While he has "cited" law review articles, and studies he does not cite case law from this State or any other State or Federal jurisdiction which would support his theory.

This has been an accepted form of identification since State v. Clark, 156 Wash. 543, 549-51, 287 P. 18 (Wash. 1930):

> Courts are no longer skeptical that by the aid of scientific appliances the identity of a person may be established by finger prints.
> ...
> This is a progressive age. The scientific means afforded should be used to apprehend the criminal.
> 'Progressive and scientific processes and appliances which belong to the various human endeavors belong equally to the machinery of the law.' State v. Kuhl, 42 Nev. 185, 175 P. 190, 195, 3 A. L. R. 1694.
> An apt authority is People v. Jennings, 252 Ill. 534, 96 N.E. 1077, 1082, 43 L. R. A. (N. S.) 1206, wherein the court said, referring to the admissibility of finger print evidence:
> 'We are disposed to hold from the evidence of the four witnesses who testified, and from the writings we have referred to on this subject, that there is a scientific basis for the system of finger print identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it.

See also State v. Hayden, 90 Wn. App. 100, 950 P.2d 1024 (1998) where the court even accepted the use of digitally enhanced finger print evidence. State v. Johnson, 194 Wash. 438, 442, 78 P.2d 561 (Wash. 1938) "Identification of individuals by means of comparison of fingerprints is generally accepted in this and other states. State v. Bolen, 142 Wash. 653, 254 P. 445, 449; State v. Witzell, 175 Wash. 146, 26 P.2d 1049; People v. Sallow, 100 Misc. 447, 165 N.Y.S. 915; Stacy v. State, 49 Okl.Cr. 154, 292 P. 885; People v. Les, 267 Mich. 648, 255 N.W. 407; Piquett v. United States, *7 Cir.,* 81 F.2d 75; Id., 298 U.S. 664, 56 S.Ct. 749, 80 L.Ed. 1388."

State v. Enlow, 143 Wn.App. 463, 178 P.3d 366 (2008) "Fingerprint evidence alone is sufficient to support a conviction if the trier of fact could reasonably infer that fingerprints could have been made only at the time when the crime was committed. State v. Lucca, 56 Wash.App. 597, 599, 784 P.2d 572 (1990).

5-6 THE METHODOLOGY USED TO DETERMINE RIZO WAS A PERSISTENT OFFENDER IS CONSTITUTIONALLY SOUND.

This issue has been raised in numerous cases and the courts have consistently decided as was set forth in State v. Rivers, 130 Wn.App. 689, 128 P.3d 608 (2005) review denied 158 Wn.2d 1008, 143 P.3d 829 (2006),

Rivers argues that in Apprendi v. New Jersey, the United States Supreme Court retreated from its earlier decision in Almendarez-Torres, the precedent for our supreme court's holding that the federal constitution does not require the fact of a prior conviction to be proved to a jury beyond a reasonable doubt. Almendarez-Torres, he contends, does not answer the question before the court because Blakely v. Washington, and Ring v. Arizona expanded Apprendi to require any fact that increases punishment to be decided by a jury. However, this same argument relying on *Ring* was explicitly rejected by our supreme court in State v. Smith. There, the court noted "the Ring Court did not specifically overrule Almendarez-Torres or address the issue of prior convictions." The court reaffirmed its holding in State v. Wheeler stating that "... [in] Almendarez-Torres ... the United States Supreme Court expressly held that prior convictions need not be proved to a jury. Because the Court has not specifically held otherwise since then, we hold that the federal constitution does not require that prior convictions be proved to a jury beyond a reasonable doubt."

Moreover, Blakely did not overrule Almendarez-Torres. Rather, in reiterating the Apprendi rule, Blakely specifically excluded its application to prior convictions, noting that the juries must determine any fact, "***other than the fact of a prior conviction,***" that increases a sentence over the statutory maximum.

Because prior convictions are not elements of a crime that must be found by a jury beyond a reasonable doubt, Rivers' argument that he was denied due process under the Fourteenth Amendment also fails.

Smith also held that under the state constitution, "there is no constitutional requirement that defendants be given a jury trial on the fact of their prior convictions, "rejecting Rivers' argument on state law grounds.

...

We adhere to the rationale more fully outlined in *Smith.* None of the case law since that case was decided requires that we retreat from the federal and state

> authority holding that a right to trial by jury does not exist for the fact of prior convictions.

See also State v. Rudolph, 141 Wn. App. 59, 64-66,168 P.3d 430 (2007):

> Citing Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Rudolph argues that Washington's POAA sentencing procedures are unconstitutional because they allow the trial court to make factual findings about prior convictions, which increase punishment, rather than requiring a jury to make these findings. The State responds that we have already resolved this issue contrary to Rudolph's position in State v. Ball, 127 Wash. App. 956, 113 P.3d 520 (2005), *review denied,* 156 Wash.2d 1018, 132 P.3d 734 (2006), in which we held that the POAA is a recidivism statute not subject to Blakely analysis. We decline to reverse Ball and, instead, adhere to our previous holding that POAA sentencing procedures are not subject to Blakely.
> ...
> Accordingly, we decline to depart from our holding in Ball that the POAA is a recidivism statute: A life sentence under the POAA depends only on the fact of prior convictions; therefore, Blakely does not apply. The Almendarez-Torres exception to the jury trial requirement remains for facts of a prior conviction that can be proved by trustworthy documentation. Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed. 2d 350 (1998).(Footnotes omitted, some citations omitted.)

In a recently decided case State v. McKague, 39087-6-II (WACA);

> Taken together, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution "entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 477, 120

S.Ct. 2348, 147 L.Ed.2d 435 (2000) (internal citation and quotation omitted). Although the right to a jury trial and the prosecution's burden of proof beyond a reasonable doubt are "constitutional protections of surpassing importance, "Apprendi, 530 U.S. at 476, the Supreme Court has decided that these protections do not apply to determining the existence of prior convictions. *See* Almendarez-Torres v. United States, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *see also* Apprendi, 530 U.S. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added); U.S. v. O'Brien, __ U.S. __, 130 S.Ct. 2169, 2174, L.Ed.2d. (2010) (recognizing exception carved out by Almendarez-Torres).

Our Supreme Court continues to follow this federal constitutional rule:

This court has repeatedly . . . held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.

...

In essence, McKague and Quinn-Brintnall's oncurrence/dissent urge us to disregard the United States Supreme Court's interpretation of the Sixth Amendment right to a jury trial in Almendarez-Torres, Apprendi, and their progeny and its refusal to date to extend the right to a jury trial to proof of prior convictions in sentencing hearings conducted under recidivist statutes like the "Persistent Offender Accountability Act" (POAA), chapter 9.94A RCW. This we cannot and will not do.

...

Our Supreme Court already has held that the State has a rational basis for distinguishing between "persistent offenders" and "non-persistent offenders" under the POAA. *See* Manussier, 129 Wn.2d at 674; *see also* Thorne, 129 Wn.2d at 771-72. It is also well-established that the weaker procedural safeguards given to "persistent offenders" during the fact-finding process of determining prior convictions do not violate any constitutional rights

> under Almendarez-Torres, Apprendi, or their progeny. *See* Part IV (A.) of this Analysis, *supra*. Although McKague may disagree with our state legislature's distinction between two classes of defendants and its decision to afford weaker procedural safeguards to one class, there is nothing unconstitutional about this practice under the current law. Thus, McKague's equal protection challenge fails.
>
> Both the United States Supreme Court and our Washington Supreme Court have expressly held that recidivist statutes such as the POAA are not constitutionally infirm, on due process, equal protection, or other grounds. Accordingly, McKague's argument that the POAA violates the Equal Protection Clause of the Fourteenth Amendment or article I, section 12 of the Washington Constitution fails.

The standard of proof was addressed in State v. O'Connell, 137 Wn.App. 81, 152 P.3d 349 (2007):

> Second, at a hearing to impose a POAA sentence, the trial court employs a preponderance of the evidence standard to the offender's prior offenses and convictions. *Id.* at 957, 113 P.3d 520; *see also* In re Pers. Restraint of Cadwallader, 155 Wash.2d 867, 876, 123 P.3d 456 (2005) (the State bears the burden of proving with a preponderance of the evidence the existence of prior convictions). As with any determination of an offender's criminal history, the sentencing court is entitled to rely on a stipulation or acknowledgment of facts and information related to prior convictions. Cadwallader, 155 Wash.2d at 873-74, 877, 123 P.3d 456; former RCW 9.94A.370(2) (1999). "Acknowledgement includes not objecting to information included in presentence reports." Cadwallader, 155 Wash.2d at 874, 123 P.3d 456; *see also* former RCW 9.94A.370(2).

This issue is clearly settled by existing case law was factual in nature and the court did not abuse its discretion. The court held a

separate sentencing hearing which covers pages 490-527 of the verbatim report of proceedings. The State had a fingerprint expert who testified to the fact that Rizo was the same person on each and every judgment and sentence entered into the record. The State supplied the court with certified copies of all of the judgment and sentences used to support the POAA sentence. Defense counsel strongly challenged each and every aspect of this hearing. In the end the court stated: "The Court will accept the State's evidence that the offenses do not wash, and will accept the State's argument that Mr. Rizo is the same person all the way through here." (RP 527) There is no abuse of discretion on the part of the court. The court listened to lengthy testimony from the expert, considered all of the certified documents and found that the Rizo was in fact the same person in all of the documents as well as the person who had been convicted in this most recent strike felony.

Therefore, based on the law the court was required to follow, Rizo was sentenced under the POAA to life without possibility of parole.

IV. CONCLUSION

The actions of the trial court should be upheld this appeal should be dismissed.

Respectfully submitted this 6th day of December 2012,

s/David B. Trefry
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APPENDIX

RCW 9A.56.190. Robbery - Definition
A person commits robbery when he unlawfully takes 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.

RCW 9A.56.200. Robbery in the first degree
(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

INSTRUCTION NO. 10

To convict the defendant of the crime of First Degree Robbery in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 25, 2007, the defendant or an accomplice unlawfully took personal property from the person or in the presence of another;

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant or an accomplice 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 prevent 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; and

(6) That the acts occurred in the State of Washington.

INSTRUCTION NO. 18

To convict the defendant of the crime of First Degree Assault as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 25, 2007, the defendant assaulted Timothy Englund;

(2) That the assault was committed with a firearm;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not
guilty.

INSTRUCTION NO. 26

To convict the defendant of the crime of First Degree Assault as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 25, 2007, the defendant assaulted Rigoberto Cardenas;

(2) That the assault was committed with a deadly weapon;

(3) That the defendant acted with intent to inflict great bodily ham; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

11 WAPRAC WPIC 35.50
WPIC 35.50 Assault—Definition

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed)

Washington Practice Series TM
Database Updated November 2011

Washington Pattern Jury Instructions--Criminal
2008 Edition Prepared by the Washington Supreme Court Committee On Jury Instructions, Hon. Sharon S. Armstrong, Co-Chair, Hon. William L. Downing, Co-Chair

Part VI. Crimes Against Personal Security
WPIC CHAPTER 35. Assault and Reckless Endangerment

WPIC 35.50 Assault—Definition

[An assault is an intentional *[touching] [or] [striking] [or] [cutting] [or] [shooting]* of another person*[, with unlawful force,]* that is harmful or offensive *[regardless of whether any physical injury is done to the person]*. [A *[touching] [or] [striking] [or] [cutting] [or] [shooting]* is offensive if the *[touching] [or] [striking] [or]* cutting] *[or] [shooting]* would offend an ordinary person who is not unduly sensitive.]]

[An assault is *[also]* an act*[, with unlawful force,]* done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. *[It is not necessary that bodily injury be inflicted.]*]

[An assault is *[also]* an act*[, with unlawful force,]* done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]

[An act is not an assault, if it is done with the consent of the person alleged to be assaulted.]

Note on Use

Use this general definition with any instruction that refers to assault.

Use the first bracketed definition in cases involving a battery whether accompanied or unaccompanied by an apprehension or fear of bodily injury on the part of the victim. Use the bracketed sentence of this paragraph, if it is necessary to define "offensive" for the jury. See Comment.

Use the second bracketed definition in cases involving an attempt to inflict bodily injury but not resulting in a battery. The inner bracketed sentence should be used if there is a factual issue as to the extent of the act committed, i.e., whether it constituted mere preparation or had progressed

far enough to constitute an attempt, or if there is a factual issue as to the existence of an apparent present ability to inflict bodily injury.

Use the third bracketed definition in cases in which there is evidence that the actor's intent was not to inflict bodily injury but only to create the apprehension or fear of bodily injury in the victim. Use WPIC 5.01, Direct and Circumstantial Evidence, with this instruction if this paragraph is given. See the Comment below.

Use the fourth bracketed paragraph relating to consent if there is an issue whether the victim consented to the defendant's act and the act is not otherwise a breach of the peace.

If the charge necessitates use of more than one paragraph of this instruction, the bracketed word "also" should be used as applicable. For directions on using bracketed phrases, see the Introduction to WPIC 4.20.

Along with this instruction, use WPIC 10.01 (Intent—Intentionally—Definition) and WPIC 2.03 (Bodily Injury—Physical Injury—Definition).

Include the phrase "with unlawful force" if there is a claim of self defense or other lawful use of force.

Comment

Approval of instruction. A former version of WPIC 35.50 was approved in *State v. Krup*, 36 Wn.App. 454, 676 P.2d 507 (1984).

Common law definition of assault. The opinion in *State v. Hupe*, 50 Wn.App. 277, 748 P.2d 263 (1988), disapproved of on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007), contains an extended review of cases defining the term "assault":

The term "assault" is not defined in the criminal code; therefore courts use common law to define the crime. *State v. Krup*, 36 Wn.App. 454, 457, 676 P.2d 507 (1984); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942). Three definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.

State v. Hupe, 50 Wn.App. at 282, 748 P.2d 263.

Definition of assault—Battery. The first paragraph of the instruction defines assault by battery. See *State v. Madarash*, 116 Wn.App. 500, 513, 66 P.3d 682 (2003). The definition of "offensive" in the first paragraph is adapted from § 19 of the Restatement (Second) of Torts. Section 19 states that "a bodily contact is offensive if it offends a reasonable sense of personal dignity." Comment (a) to § 19 states:

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

Definition of assault—Attempted battery. The second paragraph is based on the common law definition of an assault as an attempted battery. The common law definition is an attempt to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. *State v. Rush*, 14 Wn.2d 138, 139, 127 P.2d 411 (1942); *State v. Stewart*, 73 Wn.2d 701, 703, 440 P.2d 815 (1968). The actual existence of a state of apprehension or fear in the person assaulted is not an element of the crime of second degree assault. *State v. Stewart*, supra; *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972).

Definition of assault—Common law assault. The third paragraph defines the crime of "common law assault," which consists of an act undertaken with the intent to cause fear and apprehension of injury. *State v. Rivas*, 97 Wn.App. 349, 984 P.2d 432 (1999), disapproved of on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Bland*, 71 Wn.App. 345, 860 P.2d 1046 (1993), disapproved of on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). This alternative requires that the actor had the specific intent to create reasonable fear and apprehension of bodily injury. Failure to so instruct the jury is a constitutional error. *State v. Eastmond*, 129 Wn.2d 497, 919 P.2d 577 (1996) (noting that WPIC 35.50 "reflects the necessity of a specific intent instruction"). See also *State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995).

In *Bland*, there was insufficient evidence of actual reasonable apprehension and fear by the victim to support the third alternative means, intentional creation of apprehension and fear, when the victim was sleeping in his living room until the defendant's shot from the street went over his head, covering him with broken glass. According to the court, there was no evidence that the victim had a "fear about the future; a presentiment of danger." *State v. Bland*, 71 Wn.App. at 356, 860 P.2d 1046. This does not mean that the victim's fear of future harm must occur before the act which constitutes the assault, however. *State v. Ratliff*, 77 Wn.App. 522, 892 P.2d 118 (1995) (sufficient evidence of victim's reasonable fear of future harm when defendant threw urine which entered his eyes, ears, and mouth). Under this alternative, it must be established that the defendant committed "an intentional act, directed at another person." *State v. Karp*, 69 Wn.App. 369, 848 P.2d 1304 (1993) (distinguishing the general menacing behavior sufficient for violation of the unlawful display of a weapon statute).

Jury unanimity not needed. Jury unanimity is not necessary as to individual means when the crime charged can be committed by alternative means. However, the jury may not be instructed as to alternative means unless there is constitutionally sufficient evidence to support each means. *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987). If the appellate court finds that there is a lack of substantial evidence to support one of the means on which the jury was instructed and there has only been a general verdict, the verdict will not stand unless the appellate court can determine that the verdict was based upon another means. *State v. Rivas*, supra; *State v. Bland*, supra.

Unlawful use of force. The phrase "with unlawful force" has been bracketed in all three paragraphs. The definition of "assault" includes the requirement that it be committed with unlawful force. See, e.g., *State v. Hupe*, 50 Wn.App. 277, 748 P.2d 263 (1988), disapproved of on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Krup*, 36 Wn.App. 454, 676 P.2d 507 (1984). In another context, however, the court has criticized jury instructions that used the term "unlawful" without defining it. See *State v. Hardy*, 44 Wn.App. 477, 722 P.2d 872 (1986) (aggressor instruction for second degree murder); *State v. Arthur*, 42 Wn.App. 120, 708 P.2d 1230 (1985) (aggressor instruction for second degree assault). If there is a claim of self defense or other lawful use of force, the instruction on that defense will define the term "lawful." If there is no such evidence, the jury should not be left to speculate on what might constitute "lawful" conduct.

Consent. In *State v. Garcia*, 20 Wn.App. 401, 579 P.2d 1034 (1978), the court defined an assault as "an attempt to commit a battery, which is an unlawful touching; a touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive." 20 Wn.App. at 403, 579 P.2d 1034; also see *State v. Humphries*, 21 Wn.App. 405, 408, 586 P.2d 130 (1978). However, an individual cannot consent to an assault if the activity consented to is against public policy or is a breach of the peace. *State v. Hiott*, 97 Wn.App. 825, 828, 987 P.2d 135 (1999) (a juvenile could not consent to a game in which the victim and defendant were shooting each other with BB's). Thus, the circumstances in which the jury is properly instructed regarding the defense of consent are rather limited, outside the context of a sexual assault.

The court in *State v. Shelley*, 85 Wn.App. 24, 929 P.2d 489 (1997), held that consent is a defense to an assault occurring during an athletic contest when the conduct was reasonably foreseeable to the participants, regardless of whether the conduct was permitted by the rules of the athletic event. However, in *Shelley*, the defendant was not entitled to argue consent when he broke the victim's jaw throwing a punch over a disagreement that occurred in the course of a basketball game.
[Current as of 2005 Update.]

11 WAPRAC WPIC 35.50

END OF DOCUMENT

DECLARATION OF SERVICE

I, David B. Trefry state that on December 6, 2012, I emailed, by agreement of the parties a copy of the Respondent's Brief to: Mr. David Donnan, WAP, at wapofficemail@washapp.org and to Elodio Rizo DOC # 262034, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

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

DATED this 6th day of December, 2012 at Spokane, Washington.

s/David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on December 7, 2012, I emailed, by agreement of the parties a copy of the Corrected Pages and Corrected Appendix to: Mr. David Donnan, WAP, at wapofficemail@washapp.org

Service on Elodio Rizo DOC # 262034, Washington State Penitentiary I313 N. 13th Ave. Walla Walla, WA 99362, shall be made upon return and correction of previously served Brief of Appellant. Notice of such service shall be supplied to Court and counsel at the time of service.

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

DATED this 7th day of December, 2012 at Spokane, Washington.

s/David B. Trefry
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