31699-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON M. GILES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. INTRODUCTION

Jason Matthew Giles only qualified for the sentence of life without possibility of parole ("LWOP") because his prior criminal acts coupled with those herein qualified him for classification as a Persistent Offender. Mr. Giles' first strike was his conviction of First Degree Robbery in 1999.[1] Shortly after being released from his sentence on the 1999 Robbery conviction, defendant feloniously assaulted a person who responded to defendant's assault of a female outside of a bar.[2] Mr. Giles' second strike occurred in 2009 when defendant was charged with three counts of First Degree Assault with firearm enhancements and agreed to plead guilty to one count of Second Degree Assault.[3]

Herein, Mr. Giles' supporters at sentencing proffered Mr. Giles as a 34-year-old man who is caring, sensitive, hardworking, and a gifted artist. 5/18/13-RP 642-643. Defendant's criminal history contravenes that characterization with his first conviction for a most serious offense occurring in 1999 when he was 19. Mr. Giles' conviction for an assault that could have

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[1] In Spokane County Superior Court # 98-1-01554-4: defendant facilitated his theft of beer by striking the victim twice in the head with a beer bottle which caused two lacerations that required nine sutures. Defendant was sentenced to 31 months.

[2] In Spokane County Superior Court #03-1-00609-3: defendant sucker-punched the victim in the back of the head and rendered him unconscious. The victim was hospitalized with a skull fracture. In 2007, defendant agreed to plead guilty to the amended charge of Third Degree Assault from Second Degree Assault.

[3] In Spokane County Superior Court #09-1-03086-4: defendant and co-defendant tried to enter a vehicle sitting in a McDonald's parking lot. Gunshots were fired as the victim tried to drive away. Investigation discovered a bullet hole in the front passenger-side of the vehicle. Witnesses identified defendant and estimated that two to three gunshots had been fired during the incident.

qualified as his second strike was committed when he was 22 was reduced when he agreed to plead guilty to a non-strike offense in 2007. Then Mr. Giles actually plead guilty to his second strike in 2009 to avoid being convicted of three counts of First Degree Assault with three firearm enhancements. Herein, Mr. Giles qualified for his third strike because he decided to arm himself with a deadly weapon to facilitate his lawless acts.

II. ASSIGNMENTS OF ERROR

1. Defendant's constitutional right to a public trial was violated when for-cause challenges of jurors were made at a sidebar and peremptory challenges by "secret ballot."
2. The Public's right to open proceedings was violated when for-cause challenges were made at a sidebar and peremptory challenges by "secret ballot."
3. Insufficient evidence supported the First Degree Assault conviction.
4. Insufficient evidence supported the First Degree Robbery conviction.
5. Insufficient evidence supported the Second Degree Robbery conviction.
6. The Trial Court misstated the definition of "beyond a reasonable doubt" and thereby diluted the State's burden of proof.

7. A LWOP sentence violates Washington Constitution, Art. I, § 14.

8. A LWOP sentence violates U.S. Constitution, Eighth Amendment.

9. A LWOP sentence based upon the Trial Court's determination, by a preponderance of the evidence, that defendant had two prior "strike" convictions violated defendant's due process right to have a jury determine every element of the crime beyond a reasonable doubt.

10. A LWOP sentence based upon the Trial Court's determination, by a preponderance of the evidence, that defendant had two prior "strike" convictions violated defendant's equal protection rights.

11. The Trial Court erred by imposing discretionary court costs with a payment plan without finding the defendant had or likely would have the ability to pay.

III. ISSUES

1. Do written peremptory challenges and for-cause challenges as exercised at sidebar of prospective jurors violate the defendant's public trial right and the Public's right to open proceedings?

2. Did sufficient evidence support defendant's First Degree Assault conviction?

3. Did sufficient evidence support defendant's conviction for Robbery of the Champs store?

4. Did sufficient evidence support defendant's conviction for the Robbery of the Costco store?

5. Did the Trial Court wrongly define the State's burden of proof by instructing the jury that it could find defendant guilty if it had an "abiding belief in the truth if the charge?"

6. Does a life without possibility of parole sentence violate the U.S. Eighth Amendment and the Washington Constitution, Art. I, § 14 provisions against cruel punishments when the crimes caused no serious injury or endangered the Public?

7. Did the Trial Court violate defendant's constitutional rights by imposing a life without possibility of parole sentence based upon the Trial Court's finding by a preponderance that defendant had twice before been convicted of most serious violent offenses?

8. Did the Trial Court violate defendant's procedural due process rights when it found defendant's two "strikes" by a preponderance of the evidence?

9. Does the Persistent Offender Accountability Act ("POAA") violate the equal protection clause by providing less procedural protections than other statutes with the same purpose?

10. Did the Trial Court err by ordering defendant to pay discretionary fees and court costs?

IV. STATEMENT THE CASE

The Respondent accepts the Appellant's statement of the case with the following additions.

Champs Robbery. The victim, Mr. Redding, with another store employee placed themselves at the store entrance before defendant tried to exit. RP 122- Jury Trial – Count I. When defendant approached the counter, he turned around and headed to the exit. RP 122. Mr. Redding asked the defendant if he intended to pay for the merchandise. RP 122. At that point the defendant "brushed by us and pushed the…lease line…out of the way…then ran into the mall." RP 122. Mr. Redding pursued defendant through the mall to the exit doors between the JC Penny and Kohl stores. RP 126. Defendant then turned around, pulled a knife and said, "I will gut you." RP 126. Mr. Redding described the knife as being "black in color…probably 4-5 inches…length with the blade out…was…a switchblade." RP 127-128. At that point of the trial Mr. Redding examined a knife that was identified as Exhibit P-5. RP 128. Upon examination of the knife, Mr. Redding identified the exhibit as being similar if not identical to the knife that defendant had threatened him with the night of the robbery. RP 129. At that point, Mr. Redding believed that if he continued the pursuit that he would have been stabbed by the defendant. RP 141. Thereafter, Mr. Redding identified the defendant to law enforcement by means of a photomontage. RP 132; Exhibit P-7.

Costco Assault and Robbery. Appellant points out that the bite injury he inflicted on Mr. Wolfe had healed by the trial; however, the trial occurred over a year later.

Procedural Background. The procedural history of this case is interesting since it resulted in the trial court and counsel picking and seating three separate juries to try Count I separately from Counts II, III, and IV. On December 11, 2012, the jury returned its verdict on the trial of Count I and a sentencing was scheduled. CP 157- 159. On December 12, 2012, a jury for the trial of Counts II-IV was seated prior to the lunch recess. CP 269-271. After the recess, the parties advised the trial court that the defendant had accepted the offer by the State to plead guilty to an Amended Information. CP 269-271; 46-47.

The Trial Court proceeded through the process of confirming and accepting the entry of defendant's guilty plea to the Amended Information. CP 46-47. The sentencing date on the guilty plea was scheduled for the same date as that for the conviction on Count I. However, on January 31, 2013, the parties advised the Trial Court that defendant wished to withdraw his guilty plea without objection. CP 272. The Trial Court granted the motion and set the trial date for April 15, 2013. CP 272. On February 5, 2013, the Trial Court executed the Order granting defendant's motion to withdraw his guilty plea to the Amended Information. CP 64-65.

On April 15, 2013, a jury was seated that returned verdicts regarding Counts II-IV of the original Information and the sentencing enhancements. CP 260-268.

The entire jury selection process of each trial was completed in open court without objection by defendant or any member of the Public.

The court and counsel examined the jurors in open court. Jury Trial–Count I–RP 28-90 ("JT-I"); Jury Trial Counts II-IV-RP 375-434 ("JT-II-IV"). Prior to exercising for-cause challenges, the trial court asked counsel to approach the bench. JT-I-RP 86; JT-II-IV-RP 429.

The State and Defense Counsel identified prospective jurors that were being challenged for cause. JT-I-RP 87; JT-II-IV-RP 429-431. The Trial Court granted the challenges for cause of prospective jurors and identified those for the Clerk. Thereafter the record notes:

> (Bench conference concluded.)
> (Peremptory challenge process being conducted.)
> (Bench conference resumed outside hearing of the jury.)
> (Bench conference concluded.)
> (Peremptory challenge process continuing.)
> …
> Trial Court: ...Looks like we do have our jury selected…

JT-I-RP 89-90; JT-II-IV-RP 433-434. There was no objection to the procedure of exercising for-cause challenges at the sidebar and no objection to the procedure of exercising peremptory challenges in writing in open court in either trial.

V. ARGUMENT

A. THE MEANS USED TO EXERCISE CAUSE AND PEREMPTORY CHALLENGES OF JURORS DID NOT VIOLATE EITHER THE DEFENDANT'S PUBLIC TRIAL RIGHT NOR THE PUBLIC'S RIGHT TO THE OPEN ADMINISTRATION OF JUSTICE.

Appellant contends that the exercise of the cause and peremptory challenges was required to be held before the jury in the public courtroom. The record reflects there was no objection made to the manner in which either the cause or peremptory challenges were exercised. Additionally, the public had the ability to be present throughout the entirety of both trials and the announcements of the respective juries. There was neither a violation of the Public's right to the open administration of justice or the Defendant's right to a public trial.

A criminal defendant has the right to a "speedy and public trial." Article I, § 22. The constitution also requires that justice be administered openly. Article I, § 10.

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are violated. In *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705 (1923), an adult was tried as if he were a juvenile, closing the entire proceeding and failing to provide counsel. In *State v. Bone-Club*, 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995), the court summarily granted the State's request to clear the courtroom for the pretrial

testimony of an undercover detective. In *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the court ordered, *sua sponte*, that the courtroom be closed for the entire 2-½ days of *voir dire*, excluding the defendant's family and friends. In *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), the court summarily ordered the defendant's family and friends excluded from *all voir dire* proceedings. And, in *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant. In *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), the court held private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the *Bone-Club* factors before holding *voir dire* in chambers. In *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), the court held that, even if there was error, defendant had invited the error by his conduct and thus was not entitled to a new trial.

In each of the cases above, however, a courtroom closure was either directly ordered or indirectly effectuated by the trial court's action. Here, the courtroom was never closed at all, nor was anyone excluded and all substantive matters were discussed in open court.

Appellant argues that the Supreme Court's decision in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 7159 (2012) and hence, this Court's decision in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), do not apply to this case

because the U.S. Supreme Court has already held that the right to a public trial includes the right of public access to jury selection. However, the Washington Supreme Court has thus far not adopted such a bright-line perspective of the requirements of Washington Constitution, Article I §§ 10 and 22, despite numerous invitations. The Supreme Court has provided guidance regarding how to best protect these rights when resolving the innumerable issues that its "open courts" decisions have promulgated. Finally, in *State v. Sublett, supra*, the Supreme Court provided a tool to determine whether a particular court procedure actually "closed" the courtroom to trigger the requirement of an analysis pursuant to *State v. Bone-Club, supra*. The Supreme Court would not have proffered such a tool if it concurred that the issue of "open courts" had been resolved with respect to jury selection.

In *Sublett,* the Supreme Court proffered the Experience and Logic test. The experience prong, asks "whether the place and process have historically been open to the press and general public." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*. If the answer to both prongs is yes, the public trial right attaches and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

1. The Exercise Of Cause Challenges At A Sidebar Conference And Peremptory Challenges By Writing In Open Court With The Defendant Present Does Not Violate The Defendant's Right To A Public Trial Or The Public's Right To Open Proceedings.

The appellant argues that conducting side-bars and written peremptory challenges are the equivalent of closing the courtroom in violation of his right to a public trial and the public's right to open proceedings. However, the Court in *Sublett, supra,* cited to "*People v. Virgil*, 51 Cal.4th 1210, 1237-38, 253 P.3d 553 (2011) (not every sidebar conference rises to the level of a constitutional violation; brief bench conferences during jury selection about sensitive subjects when the courtroom itself was open to the public and the defendant was present did not deprive the defendant of his right to a public trial), *cert. denied,* ___ U.S. ___, 132 S. Ct. 1636, 182 L.Ed.2d 237 (2012)." *Sublett, supra* at 97. Such is the situation here. Appellant does not claim that the courtroom was closed in the "usual" sense of the word. Applying the test from *Sublett,* Appellant's arguments are unpersuasive. The "experience prong" asks whether the process in question has historically been open to the press and general public. Here, the answer is a resounding "no." Sidebars only exist for the purpose of providing privacy to inter-party communications.

The second part of the test or the "logic prong" asks whether "public access plays a significant positive role in the functioning of the process in

question." *Sublett, supra* at 73. Here, Appellant would have to argue that the public should hear the side-bars and all the items the parties might want to keep private, yet side-bars have traditionally been used to communicate between the parties without the public overhearing. Again, the answer to the question is "no" because the contrary would contravene a fair and impartial trial in many circumstances.

Under the test as outlined in *Sublett,* sidebars during juror selection pass neither of the prongs of the test. Under *Sublett,* sidebars would not be expanded to the point that courts that employ sidebars are considered closed and subject to *Bone-Club* requirements.

Moreover, the sidebar conference and written exercise of peremptory challenges at issue here are not "proceedings" that implicate the public trial right or the public right to open proceedings. In the cases cited above, all or part of an important substantive proceeding was shielded from public view.[4] Here, the exercise of cause and peremptory challenges were completed in the open courtroom between counsel and the trial court. There was no challenge to any of the exercises of cause or peremptory challenges and thus no need to make a further record.

[4] *Bone-Club* (pretrial testimony); *Orange*, (voir dire); *Brightman* (voir dire); *Easterling* (pretrial hearing); *Strode* (voir dire of selected jurors); *Momah* (voir dire of selected jurors).

The clerk's minutes show which jurors were excused by which means, so there is a record of the challenges. CP 154-156; 257-259. Which party excused each juror did not need to be made part of the public proceedings because the exercise of peremptory challenges is not controlled by the court unless there is a claim such as discriminatory exercise of peremptory challenges. Since there were no objections during the process, there were no contested issues.

Having the public and the jury available to see which party exercises the peremptory challenge against each juror defeats the purpose of the peremptory challenge which is to keep the jurors from drawing inferences from the exercises of such challenges. *Georgia v. McCollum*, 505 U.S. 42, 53, 112 S. Ct. 2348, 2356, 120 L. Ed. 2d 33 (1992) (footnote 8), *People v. Willis*, 27 Cal. 4th 811, 822, 43 P.3d 130 (2002). The logic of this perspective equally applies to the exercise of cause challenges. There was no violation of Mr. Giles' right to public trial by the exercise of cause challenges at a sidebar or peremptory challenges in writing in open court.

2. Applying The Experience And Logic Test To The Manner In Which The Cause And Peremptory Challenges Were Exercised In This Case, There Was No Closure Of The Courtroom.

As previously noted, Appellant contends that this Court's holding in *Love,* does not apply here because the U.S. Supreme Court has held that all aspects of the jury selection process must be open. Here, as in *Love,* the for-cause

challenges of prospective jurors was conducted at a sidebar with the defendant present in open court. JT-I-RP 86-90; JT-II-IV-RP 429-434. The only difference between the circumstances present here and those in the *Love* case is that the peremptory challenges were exercised at sidebar therein and in writing at counsel table herein. Nevertheless, the analysis this Court applied in resolving the issues in *Love, supra,* resolve this issue in appellant's case.

> The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.
>
> Similarly, the logic prong does not indicate that the challenges need to be conducted in public. The purposes of the public trial right are to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Brightman*, 155 Wash.2d 506, 514,
>
> …
>
> Those purposes … are not furthered by a party's actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law for the judge to decide. The written record of these actions—the clerk's written juror record and the court reporter's transcription of the cause challenges at sidebar—satisfies the public's interest…and assures that all activities were conducted aboveboard, even if not within public earshot. The alternative is to excuse all jurors from the courtroom while legal arguments take place in public concerning a juror's perceived bias. We do not believe the public trial right requires the use of two rooms…to facilitate the defendant's challenge to some jurors for cause.
>
> …
>
> Neither prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public. Mr. Love needed to establish that both aspects of that test

> required that the courtroom be open. The written record protected the public's interest in Mr. Love's cause challenges and the prosecutor's peremptory challenge. *Sublett*, 176 Wash.2d at 77…
> …
> The experience and logic test confirms that the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar, nor would it have been error to consider the peremptory challenge in that manner if the court had done so. The sidebar conference did not close the courtroom.

State v. Love, supra. The Appellant was in the courtroom and had the ability to consult with his lawyer prior to and during the exercise of both cause and peremptory challenges. JT-I-RP 86-90; JT-II-IV-RP 429-434. Here, as in *Love,* the clerk's written record of the peremptory challenges combined with the court reporter's record of the of the cause challenges establishes that the juror selection process employed herein satisfied the public's interest in the case and assured that all activities were conducted with the earnest goal of seating a fair and impartial jury for each of appellant's trials.

The purpose of *voir dire* is to gain information, which enables parties to challenge jurors for cause or to use peremptory challenges. *State v. Frederiksen,* 40 Wn. App. 749, 752, 700 P.2d 369, *rev. denied,* 104 Wn.2d 1013 (1985). Applying the experience and logic test to the circumstances here confirms that the courtroom was not closed by either the exercise of cause challenges at a sidebar or peremptory challenges in writing in open court, yet still served the core purpose of *voir dire.*

B. SUFFICIENT EVIDENCE SUPPORTED THE FIRST DEGREE ASSAULT CONVICTION.

Defendant was charged with First Degree Assault as follows:

> FIRST DEGREE ASSAULT…That the defendant, JASON MATTHEW GILES, in the State of Washington, on or about December 07, 2011, did, with intent to inflict great bodily harm, intentionally assault VIRGIL L. WEAR, with a firearm or deadly weapon, and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4),

CP 7-8. Appellant contends that insufficient evidence at trial supported the findings that he: (1) acted with the intent to inflict great bodily harm, (2) with a deadly weapon.

Though acknowledging the standard of review, appellant reiterates the defendant's testimony and perspective of the evidence before the jury. The determination of the weight and credibility of the defendant's perspective of the assault was the responsibility of the jury.

The test for adjudging the sufficiency of the evidence to support a verdict is well-established. Whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). Here, appellant has made no claim that there was juror misconduct during the taking of evidence or deliberations, so the presumption is that this charge was tried by a rational trier of fact. Nevertheless,

in reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Hagler,* 74 Wn. App. 232, 872 P.2d 85 (1994).

Appellant is asking this Court to accept the credibility of the defendant's perspective of the incident despite the fact that the jury did not find it credible. As this Court has held, "we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton,* 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992). Hence, the only inquiry before this Court is whether the jury could find the defendant guilty of first degree assault as charged. The jury was satisfied that sufficient evidence was presented beyond a reasonable doubt since it returned a verdict of guilty.

Appellant summarizes the evidence before the jury for this Court, yet left out some key aspects. Mr. Humphrey testified that while they were struggling to control Mr. Giles on the ground that, "as I pulled his right hand out from underneath him, he actually produced a lock-blade knife…a folding blade knife that…locks open…I saw no knife on him at the time of contact nor during the struggle…don't think he had it open." JT-II-IV-RP 472-473. The reasonable inference being that Mr. Giles retrieved the knife from his pocket and opened it while he was on the ground resisting the detention efforts of the Costco employees. The fact that Mr. Giles' use of the deadly weapon was immediately

limited by his intended victims does not minimize that he armed himself with a deadly weapon to resist his detention after his theft of property. Mr. Giles resorted to the use of the deadly weapon after his assault on Mr. Humphrey was unsuccessful in enabling him to escape. Defendant intentionally armed himself with the locked-open bladed knife that he tried to use to escape. JT-II-IV-RP 472-473. Defendant then swung his arm with sufficient force to cause injury to Mr. Wear with that knife. It was merely fortuitous that Mr. Wear was struck with the blunt end of the weapon. The fact of no great bodily harm being inflicted is not the measure of whether such was defendant's intent sufficient to support a conviction for first degree assault. Rather, it is how his actions manifested his intent that is important when no significant injury is inflicted. "Intent is to be gathered from all the circumstances of the case." *State v. Shelton,* 71 Wn.2d 838, 839, 431 P.2d 201 (1967).

Defendant readily admitted to intending to steal the property form Costco which meshed with the other evidence before the jury and his argument that this was merely an incident of shoplifting. Accordingly, defendant testified that he did not pull a knife out; did not swing a knife at anyone, and did not believe that he punched anyone. JT-II-IV-RP 566-567. That testimony is directly contradicted by the testimony of the other witnesses at the scene. Accordingly, the jury was free to credit defendant's version of the incident as it saw fit, either partially or wholly. The jury apparently chose to give more weight and

consideration to the testimony of the other witnesses who testified that defendant was armed with a knife that had its blade locked open. The evidence supported the verdict.

C. SUFFICIENT EVIDENCE SUPPORTED THE FIRST DEGREE ROBBERY CONVICTION.

Defendant was charged with First Degree Robbery by Information as follows:

> That the defendant…in the State of Washington, on … December 06, 2011, with the intent to commit theft, did unlawfully take and retain personal property, that the defendant did not own, from the person and in the presence of CHRISTIAN RIDING, against such person's will, by use or threatened use of immediate force, violence or fear of injury to said person or the property of said person or the person or property of another, and in the commission of and immediate flight therefrom, the defendant was armed with a deadly weapon, a knife, and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4),

CP 7-8. Appellant contends that insufficient evidence supported the guilty verdict rendered by the jury with respect to this charge because it did not prove that the "taking" was against Mr. Riding's will, by use or threatened use of immediate force, violence or fear of injury to his person.

As noted, the test for adjudging the sufficiency of the evidence is: whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proven beyond a reasonable doubt. *State v. Green,* 94 Wn.2d at 221-222. In reviewing

the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Hagler, supra*.

Again, appellant asks this Court to accept the credibility of his version of the incident contrary to the perspective taken by the jury in returning a guilty verdict. Again, as noted, this Court has ruled that it will defer to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Walton,* 64 Wn. App. at 415-416. Here, the jury was satisfied that sufficient evidence was presented beyond a reasonable doubt since it returned a verdict of guilty.

Appellant claims the evidence is insufficient because defendant was handed the shoes that he stole, so he cannot be convicted of having "taken" the shoes. Appellant's Brief at page 39. Appellant argues that there is no evidence that he used force or the fear of force or any other charged means to "take" the stolen property or to facilitate his escape from the Champs store with same. Finally, appellant contends there is no evidence that he displayed a knife or threatened its use against Mr. Riding. Again, appellant asks this Court to accept his version of the offense as opposed to the testimony of all the other witnesses. Mr. Riding testified that the defendant stopped running away, pulled out a switchblade knife with the blade out, and threatened to "gut" Mr. Riding. JT-I-RP 125-130 and 141-142. As noted, this Court is required to defer to the resolution

of the disputed evidence that is reflected by the verdict of the jury. Again, the jury apparently chose to give more weight and consideration to the testimony of Mr. Riding and the other witnesses who testified that defendant stole the shoes, fled the store, and armed himself with the open-bladed knife to commit the first degree robbery. The evidence supported the verdict.

D. SUFFICIENT EVIDENCE SUPPORTED THE SECOND DEGREE ROBBERY CONVICTION.

Appellant contends that insufficient evidence supported the jury verdict finding him guilty of Second Degree Robbery from the events at the Costco store. Appellant admitted that he stole the items that were found in his clothing from the Costco store but that he did not use force or the threat thereof to "take" the items because the "taking" was complete before he crossed the point-of-sale without paying. Brief of Appellant at page 44. The evidence was that Mr. Giles was still inside the store when Mr. Wolfe initially confronted him regarding the stolen items at Mr. Humphrey's request. JT-II-IV-RP 463-465. Mr. Humphrey testified that Costco's policy is to provide the customer every opportunity to pay for merchandise prior to leaving the store, so that if someone passes the pay-point Costco will not confront them until they try to exit the building without paying. JT-II-IV- RP 463-465. The evidence before the jury was that Costco did not consider it a "taking" until the individual left the building, so defendant could not manifest his intent to use force or threatened force to complete the "taking" until

he exited the building. Here, the jury had evidence that defendant admitted to stealing the property from Costco. In addition, there was evidence that defendant used force by punching Mr. Humphrey in the face and biting Mr. Wolfe on the arm to complete the "taking" and thereby retain that stolen property. JT-II-IV-RP 464-470, 471, 489, 492, 500-506, 515-516. The defendant denied punching Mr. Humphrey or biting Mr. Wolfe despite the evidence to the contrary. Reviewing the body of evidence before the jury with respect to the Second Degree Robbery charge per the standard of review noted above, there was sufficient evidence to support the guilty verdict by the jury.

E. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF THE STATE'S BURDEN OF PROOF.

Appellant claims that the trial court misstated the definition of beyond a reasonable doubt in its instructions to the jury. Appellant argues that the trial court's instruction diluted the State's burden of proof because of the inclusion of the "abiding belief" bracketed material. Appellant contends that the Supreme Court's comments in its *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012), decision that a prosecutor's argument that it is the jury's duty to determine the truth constituted misconduct supports his argument herein. Specifically, that the use of the "abiding belief in the truth" constitutes a misstatement of the law because "the jury's job is not to determine the truth of what happened. *Id.*, 174 Wn.2d at 760.

Appellant's argument is a little strained in light of the Supreme Court's holding in *State v. Bennett,* 161 Wn.2d 303, 278 P.3d 653 (2012). The definition of beyond a reasonable doubt that the Supreme Court ruled should not be used is that:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Id., 161 Wn.2d at 313.

The trial court did not use this cited version of the definition of the State's burden of proof in this case. The Supreme Court's Washington Pattern Jury Instructions Committee's ("WPIC") comments regarding WPIC 4.01 discuss the two approved versions of "beyond a reasonable doubt." The WPIC comments regarding the "abiding belief" note that this definition of reasonable doubt has been approved by the Supreme Court and this Court.

Appellant relies on the Supreme Court's dicta in *State v. Emery, supra,* to hereby have this Court overrule the Supreme Court's approval of the use of the "abiding belief" definition of beyond a reasonable doubt. The Supreme Court's focus in *State v. Emery* was on the prosecutor's arguments and does not provide a

valid basis to conclude that the trial court's definition of beyond a reasonable doubt was erroneous or diluted the State's burden of proof in this case.

F. THE PROVISIONS OF THE PERSISTENT OFFENDER ACCOUNTABILITY ACT DO NOT VIOLATE THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION OR THE WASHINGTON CONSTITUTION ARTICLE I, § 14.

Appellant contends that the sentence imposed by the trial court pursuant to the POAA violates the U.S. Constitution, Eighth Amendment and Washington Constitution Article I, §14 when it is examined under the factors set out in *State v. Fain,* 94 Wn.2d 387, 617 P.2d 720 (1980). In determining whether a life sentence was grossly disproportionate to the fraud offenses for which it was imposed and thus violated the prohibition against cruel punishment, the *Fain* court considered (1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment imposed for other offenses in the same jurisdiction. *Id.,* 94 Wn.2d at 397. Appellant characterizes his crimes herein as "shoplifting" attempts not worthy of such a severe result under *Fain.*

Division I of this Court applied the *Fain* factors when it resolved the issue of whether a POAA sentence for a second degree assault constituted cruel and unusual punishment. In *State v. Ames,* 89 Wn. App. 702, 950 P.2d 514 (1998), the Court noted that: second degree assault is a most serious offense; the purposes of the POAA include deterring those who would otherwise commit three most

serious offenses and segregating those who do so from the rest of society; Washington's POAA is similar to state and federal legislation throughout most of the U.S. such that defendant would likely have received a similarly harsh sentence in most jurisdictions; and all defendants who have been convicted of a third strike receive a sentence of LWOP. *Id.*, 89 Wn. App. at 709-710 (*citing State v. Thorne,* 129 Wn.2d 736, 921 P.2d 514 (1996); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996)). Finally, the Court observed that the defendant's three strikes (second degree assault and first and second degree robbery) were serious violent offenses directly comparable to the "strikes" that were the basis for the POAA sentences upheld in *Thorne, supra* (second degree robbery and first degree kidnapping) and *Rivers, supra* (attempted second degree robbery, second degree robbery and second degree assault).

Here, defendant's strikes were the most serious violent offenses of first degree robbery, second degree assault, first degree robbery, first degree assault, and second degree robbery. The trial court's conclusion that defendant's prior convictions plus current offenses were sufficient to trigger the POAA was appropriate. Accordingly, the imposition of the LWOP sentence does not constitute cruel and unusual punishment in violation of either U.S. Constitution, Eighth Amendment or Washington Constitution Article I § 14.

G. THE TRIAL COURT'S IMPOSITION OF A POAA SENTENCE DID NOT VIOLATE DEFENDANT'S DUE PROCESS RIGHTS.

Appellant contends that his constitutional rights under the U.S. Constitition Sixth Amendment and the Due Process Clause of the U.S. Constitution Fourteenth Amendment were violated when the trial court, not the jury, found the existence of his prior two strikes for sentencing pursuant to the POAA. Appellant attacks the POAA on grounds that have long been rejected by the appellate courts of Washington.

Appellant cites to the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that a jury must determine every element of the crime with which the defendant is charged. However, the protections of the Sixth and Fourteenth Amendments of the U.S. Constitution do not apply to the determination of the existence of a defendant's prior convictions. *See Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *Apprendi*, 530 U.S. 490 ("*[o]ther than the fact of a prior conviction*, proved beyond a reasoanble doubt"(emphasis added)).

In *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007), the Supreme Court rejected appellant's argument that a jury must determine the existence of prior convictions.

> This court has repeatedly rejected similar arguments and 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. See, e.g., *State v. Lavery*, 154 Wash.2d at 256–57, 111 P.3d 837; *State v. Smith*, 150 Wash.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004); *State v. Wheeler*, 145 Wash.2d 116, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996, 122 S.Ct. 1559, 152 L.Ed.2d 482 (2002); see also *State v.* Ortega, 120 Wash.App. 165, 84 P.3d 935; accord *Almendarez–Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (holding that the State need not prove the fact of a prior conviction to a jury).

Id., 160 Wn.2d at 418. Here, the trial court determined the existence of defendant's prior strikes, so the imposition of a POAA sentence did not violate defendant's Sixth Amendment or due process rights. Of note is that appellant acknowledges that the Supreme Court has rejected his arguments on these very issues. Brief of Appellant 62, n. 14.

Alternatively, appellant claims that under the procedural-due process analysis of *Matthews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), that proof of his prior "strike" convictions must be to a jury beyond a reasonable doubt. This argument has also been rejected. In *State v. Heddrick,* 166 Wn.2d 898, 904, n.3, 215 P.3d 201 (2009), the Supreme Court observed that the balancing test of *Matthews v. Eldridge* was held inappropriate to assess the validity of state procedural rules in criminal cases. *Medina v. California,* 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Finally, appellant's citation to Judge Quinn-Brintnall's opinions in *State v. Witherspoon,* 171 Wn. App. 271, 286 P.3d 996 (2012) and *State v. McKague,* 159 Wn. App. 489, 246 P.3d 558 (2011) (concurring/dissenting opnion), that the State must

prove prior "strikes" to a jury does not carry the day because it simply is not the perspective of the Supreme Court.

H. THE TRIAL COURT IMPOSITION OF A SENTENCE PURSUANT TO THE POAA DID NOT VIOLATE DEFENDANT'S EQUAL PROTECTION RIGHT.

Appellant contends that his equal protection rights under the constitution were violated because his classification as a "persistent offender" under the POAA must be proved to a jury beyond a reasonable doubt and not found by a court. This argument has also been rejected by the appellate courts of Washington.

The equal protection clauses of the U.S. and Washington constitutions guarantees that persons similarly situated under the law receive equal treatment. *State v. Thorne,* 129 Wn.2d at 770-771; *State v. Manussier,* 129 Wn.2d 652, 672, 921 P.2d 473 (1996). As appellant notes, equal protection claims are reviewed under three standards depending upon the level of scrutiny required for the statutory classification: (1) strict scrutiny when a fundamental right is threatened; (2) heightened scrutiny when important rights or semi suspect classifications are concerned; and (3) rational basis scrutiny when none of the above rights or classes is threatened. *Manussier,* 129 Wn.2d at 672-673.

Appellant argues that the standard of proof for prior crimes that classify persistent offenders should be the same as that for prior crimes that elevate the

level of a crime. Appellant cites to *State v. Roswell,* 165 Wn.2d 186, 192, 196 P.3d 705 (2008), to support his contention that when a prior conviction alters the crime that may be charged, the prior conviction becomes an essential element that must be proved beyond a reasonable doubt. Appellant contends that there is no rational basis for classifying a prior crime as an "element" to be proved beyond a reasonable doubt in some circumstances and as an "aggravator" to be proved by a preponderance of the evidence in other circumstances.

Appellant's basic equal protection argument was rejected in *State v. Williams,* 156 Wn. App. 482, 234 P.2d 1174 (2010). In *Williams,* the court noted that a defendant challenging the Legislature's differing treatment of two classes of defendants must show that such differing treatment rests on "grounds wholly irrelevant to the achievement of legitimate state objectives." *Id.*, 156 Wn. App. at 497 (*quoting State v. Thorne,* 129 Wn.2d at 771). This court held that the purpose of the POAA is to protect public safety by placing the most dangerous offenders in prison to reduce the number of serious repeat offenders, that the Legislature's differing treatment of recidivists vis-à-vis other offenders was not irrelevant to the purpose of the POAA such that there was no equal protection violation. *Id.,* 156 Wn. App. at 498.

Notably, Division One of this Court had rejected equal protection challenges to the POAA because "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from

persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense." *State v. Langstead*, 155 Wn. App. 448, 456-457, 228 P.3d 799 (2010). This precedent dictates that appellant's equal protection challenge must fail.

I. THE TRIAL COURT PROPERLY IMPOSED DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Appellant claims that the trial court's imposition of $200 in court costs should be stricken because there was no evidence that defendant has or likely will have the ability to pay and the trial court did not enter such a finding. The lack of a specific finding regarding the ability to pay coupled with the fact that there is nothing in the record that the State has sought to enforce the payment of any discretionary fees imposed against Mr. Giles means that this issue is not ripe for review. The existence of the order in the judgment and sentence that his payments are to be $5 a month beginning in January, 2014, does not establish that the State has sought to collect from Mr. Giles. Accordingly, the challenge to the order requiring payment of discretionary legal financial obligations on hardship grounds is not ripe for review.

Appellant relies upon the holding in *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), that a trial court can only impose discretionary costs and fees if there is evidence that clearly supports a finding that defendant has or likely will have the future ability to pay. Citing to *State v. Curry*, Division II of this

Court noted that "neither RCW 10.01.160 nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay [discretionary] court costs." *State v. Lundy,* 176 Wn. App. 96, 105, 308 P.3d 755 (2013) (*citing State v. Curry,* 118 Wn.2d at 916).

Here, there was evidence before the trial court regarding defendant's ability to pay legal financial obligations. Defendant was described to the trial court as having held a number of hard labor, low-paying jobs, including a union job with Rob's Concrete Company for years. Defendant was characterized as having an amazing work ethic that makes him happy to be able to work and provide for his family. 5/8/13-RP 642. It was proffered to the trial court that if the economy had "not gone South" resulting in his being "laid off from work" that he and his girlfriend "would still be living in Seattle in their condo, gainfully employed, living an amazing life." 5/18/13-RP 642. The trial court was advised that if Mr. Giles "were given another chance, he would be a productive member of society." 5/18/13-RP 643. The reasonable inference from this evidence before the trial court is that Mr. Giles has been and always will be an individual who is driven to be a productive member of whatever society of which he is a member. Mr. Giles will have the opportunity to obtain and hold employment within the Department of Corrections, so his work ethic and character will most likely result in his earning money while in the Department of Corrections. Nevertheless, the trial court entered no formal finding that Mr. Giles had or would have the ability

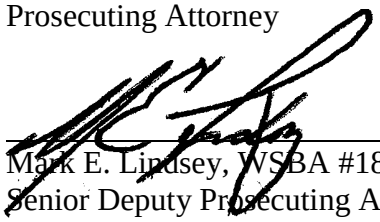
to pay his legal financial obligations. Though there was no factual finding of the past, present, or future ability to pay made by the trial court, there was evidence before the trial court by the defendant regarding his past and future ability to pay sufficient that it was justified in ordering the discretionary costs. Accordingly, the trial court's order was properly imposed and should be affirmed.

VI. CONCLUSION

The State respectfully requests that the convictions and sentences imposed herein be affirmed.

Dated this 10th day of March, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey, WSBA #18272
Senior Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 31699-8-III
v.	)	
	)	CERTIFICATE OF MAILING
JASON M. GILES,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on March 10, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Marla L. Zink
wapofficemail@washapp.org

and mailed a copy to:

Jason M. Giles
DOC #793670
1830 Eagle Crest Way
Clallam Bay WA 98326

3/10/2014 **(Date)** Spokane, WA **(Place)** Kathleen K. Owens **(Signature)**