Supreme Court No. 96061-5
Court of Appeals No. 34729-0-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

FREDERICK DEL ORR,
Defendant/Appellant/Petitioner.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable John O. Cooney, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER/DECISION BELOW

Frederick Del Orr requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in *State v. Orr*, No. 36068-7-III, filed April 26, 2018.[1] Reconsideration was denied on May 31, 2018. Copies of the opinion and order denying motion for reconsideration are attached as Appendices A and B respectively.

II. ISSUES PRESENTED FOR REVIEW

1. Under the Persistent Offender Accountability Act ("POAA"), a sentencing judge is required to impose a sentence of life without the possibility of parole when the offender has committed three qualifying crimes. The judge has no discretion to consider any mitigating factors.

> (a) Does the POAA violate Article 1, § 14, and the less-protective Eighth Amendment because it does not allow the sentencing court to consider the characteristics of the offender and his relative youth and culpability at the time of the commission of a predicate crime?
>
> (b) 37 years ago this Court set forth in *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), the factors for determining when a sentence violates Article 1, § 14, as "cruel" punishment. Should this Court grant review to revise the *Fain* factors because those factors are limited to examining whether a sentence is proportional in light of the crime but do not include any consideration of proportionality in light of the characteristics of the offender, a now-essential, separate part of the constitutional analysis?
>
> (c) In *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed. 407 (2012), the Court recognized that youthful offenders are less culpable because of the "transient vulnerabilities" when

[1] The current online version is found at *State v. Orr*, No. 34729-0-III, 2018 WL 1960197 (Wash. Ct. App. April 26, 2018).

can lead to criminal behavior but which all but a few "incorrigibles" will outgrow.

In *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2012), this Court recognized that those vulnerabilities can mitigate culpability even into an offender's mid-20s.

Should this Court grant review to address whether automatic imposition of life without the possibility of parole based on a predicate "strike" crime committed as a youthful offender violates the state and federal prohibitions against cruel and cruel and unusual punishment? [2]

2. To qualify as a deadly weapon and elevate burglary to first degree, a metal pipe must be readily capable of causing death or substantial bodily harm "under the circumstances in which it is used, attempted to be used, or threatened to be used." Where there was no evidence of such circumstances in the course of the burglary, does the Court of Appeals' reliance on mere intent to harm violate established law and warrant review by this Court?

III. STATEMENT OF THE CASE

a. Procedural posture. Petitioner was charged with and convicted of first degree burglary and second degree assault after a jury trial in Spokane County. CP 38, 180, 181, 183, 184. The Honorable John O. Cooney imposed a mandatory sentence of life without the possibility of parole under the POAA. CP 224; RP 464–65. Petitioner appealed and on September 1, 2016, Division Three of the court of appeals affirmed in an unpublished opinion. *See* App. A. The opinion was unanimous for its

[2] Lower appellate courts' cases with the same issues pending are *State v. Anthony Moretti*, No. 95263-9 (defendant in his 30s who was 20 and 26 at ages of first and second strike

bulk on the merits but only a two-judge majority found the conviction for first degree burglary was supported by the evidence while a dissenting judge would have reversed. *Id.* A motion for reconsideration was denied, and this Petition timely follows.

b. Overview of facts regarding incident.[3] Orr was living on the streets of Spokane when a fellow homeless friend named Sean told him that a man known as "Sasquatch" was extorting sexual favors from Sean's girlfriend in exchange for drugs. RP 282–83, 285, 304. Orr agreed to help find her. RP 283–84. They were unable to locate her at an apartment complex, but an unidentified man thought Sasquatch lived nearby and offered to show them. RP 284–85. While walking, the man told Orr more about Sasquatch and how he extorts girls, holds kids against their will, and does other foul things. RP 285.

Deeply upset because of abuse he himself had suffered while a child, and having heard in prison sex offenders discuss their treatment of children, Orr approached Sasquatch's alleged house at 2620 West Gardner Avenue and began knocking on doors and windows. RP 223–25, 242, 286–87. Seeing nothing, he walked over and asked the neighbor across

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crimes) and *State v. Hung Van Nguyen*, No. 95510-7 (defendant in his 40s who was 20 at age of first strike crime).

[3] More detailed discussion of facts regarding the incident is contained in Petitioner's Brief of Appellant in the court of appeals ("AOB") at 3–9.

the street whether he knew the people in the house and explained some kids were being held there against their will. RP 288–89. The neighbor declined to give him any information. RP 226–29. Orr looked in several more windows and from the back alley peered over the fence. RP 239–40, 290–92. He told an inquiring neighbor across the alley he was looking for the guy holding children against their will. RP 145–46, 292.

When Orr heard a rustling noise in the back yard, he jumped over the fence and went to the back door. RP 293. Orr did not see or hear anything coming from inside, but when he saw strange handprint-type markings on the back door "like they're clawing" he reacted by kicking in the door. RP 294, 305–06. Once inside he was confused because it was not what he had expected – nobody came when he yelled hello, nothing looked out of the ordinary and it looked like a nice home. RP 295, 301. He was inside less than five minutes. RP 312.

Liv Nelson was a resident at the house at 2620 West Gardner. RP 241–42. While outside with her two-year-old daughter, Ms. Nelson heard a loud banging noise on the other side of the back yard. RP 243. She saw Orr just inside the main[4] house door; he turned around and came out

[4] Ms. Nelson was having difficulties with her husband and staying in a separate apartment that was attached to the main house. RP 22. To make sense of her testimony at RP 242–44, it appears Ms. Nelson was in her apartment prior to entering the backyard and hearing the loud noise.

holding a large metal pipe[5] in his hand. RP 243–44. She described his face as looking "intent and intimidating" but "he was searching clearly," like he had a purpose. RP 244, 250. When he saw Ms. Nelson and her daughter standing there, Orr sat down on the stairs. RP 245. His demeanor became "relaxed, yeah, and he seemed down almost" and kind of deflated, and he apologized to her daughter for frightening her. RP 245, 251–52, 254–55, 295.

A neighbor across the alley, Dale Wills, had armed himself with a gun and from the fence saw Orr come out the back door and sit down. RP 168, 176. Wills approached with guns and an argument ensued. RP 145–46, 148, 156, 169, 176, 296. Mr. Orr left the porch to keep Ms. Nelson and her child out of harm's way during an expected altercation. RP 295–96.

At least five people ended up in the alley: Wills with his guns out, his son holding a hatchet while yelling, a friend of Wills trying to calm things down, Wills' wife, and Orr pointing his pipe at them. RP 148–49, 158, 171, 176–78, 181, 296, 298. Eventually Orr swung the pipe at Wills, but did not hit him. RP 149, 174, 178–79, 182, 208, 214. Wills stated he

[5] On cross-examination, Mr. Orr admitted he had the pipe with him and "yes," he would have used it to scare or hit someone inside the house if they were doing as he feared. RP 306.

feared for his life. RP 170, 182. At some point, Orr put the pipe down by throwing it away, behind him. RP 159–60, 181, 209, 215–16, 299.

Several people called police, who arrived fairly quickly to the nearby church parking lot to which Orr and some of the people had retreated. RP 162, 170–71, 208, 215, 300–01. By then, things had de-escalated, and Orr continued saying that he "had the wrong house." RP 170, 172, 181–82, 215. Witnesses agreed Orr had not been hiding his actions or trying to be sneaky. RP 154, 210, 212, 233. Wills' son didn't blame Orr for doing what he was doing because if what he thought was actually true, the son would have done the same thing. RP 157, 162–62. "In all honesty," his father said, "I don't want to see anything happen to him other than get him counselling or something. He's probably a nice guy." RP 180.

Additional facts relevant to the issues presented are contained in the argument section below.

IV. ARGUMENT IN SUPPORT OF REVIEW

1. This Court should grant review because the POAA mandate of life without the possibility parole based on predicate "strike" crimes committed as a young adult without allowing discretion to consider the mitigating factors of youth at the time of those crimes is both cruel and cruel and unusual punishment and *Fain* is no longer adequate.

Under RAP 13.4(b)(3), this Court will consider granting review when there is a significant issue of constitutional law under either the state or federal constitution. That standard is met in this case. Both the state prohibition against cruel punishment in Article 1, § 14, and the federal Eighth Amendment prohibition against cruel and unusual punishment are involved. Further, the questions presented are significant, because they involve the authority of the state to take away freedom and liberty for the remainder of someone's life with the extreme sentence of life without the possibility of parole. Such a sentence, second only to capital punishment, should be based upon the soundest of constitutional grounds. This case presents a serious, significant issue of both state and federal constitutional law upon which this Court should rule.

Washington's "Persistent Offender Accountability Act" or "three-strikes" law is codified in several sections of the Sentencing Reform Act, Title 9 RCW. RCW 9.94A.570 provides that a person identified as a "Persistent Offender" must be sentenced "to a term of total confinement for life without the possibility of release." The relevant RCW defines a "Persistent Offender" as an "offender" who has been convicted of a current felony "considered a most serious offense" and, before the commission of the current offense,

> [h]as . . . been convicted as an offender on at least two separate occasions . . .of felonies that under the laws of this state would be considered most serious offenses. . . provided that of the two or more previous convictions, at least on conviction must have occurred before the commission of any other of the most serious offenses for which the offender was previously convicted.

Former RCW 9.94A.030(38)(2016).[6] An offense is a "most serious offense" if it is, *inter alia*, a class A felony or second degree robbery. Former RCW 9.94A.030(33)(a), (o) (2016).

Petitioner was born in April of 1974. The first crime counted as a "strike" was a second degree robbery committed in December of 1993, when the defendant was 19 years old. For that crime, a plea was entered and a sentence of six months imposed. CP 195, 197–207, 222; RP 8. The second crime counted as a "strike" was also resolved by plea, this time when the defendant was 21 years old. That crime was a first degree robbery committed in May 1995 and 50 months were imposed. CP 195, 208–14, 222; RP 8.

Under the POAA, the sentencing judge was required to impose a sentence of life in prison without the possibility of parole. The court did so, recognizing it as the "only option" available. RP 463–65. This Court

[6] RCW 9.94A.030 is amended very frequently and the specific subsection numbers reordered as a result. *See, e.g.*, Laws of 2015, ch. 287, § 1. The version/numbering at the time of Orr's September 1, 2016, sentencing is 2016 as noted herein.

should grant review of the opinion affirming imposition of that sentence, under RAP 13.4(b)(3).

The Eighth Amendment prohibits punishment which is "cruel and unusual," but our state's constitution does more. *See State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000). Article 1, § 14, prohibits punishment which is "cruel" even if it that cruelty is not "unusual" at all. *See Fain*, 94 Wn.2d at 387. This Court has thus held that our provision provides greater protection and must be interpreted as such. *Fain*, 94 Wn.2d at 396.

In *Fain*, this Court applied this provision and struck down as cruel punishment a sentence of life in prison without the possibility of parole as a "habitual offender" where the crimes supporting that sentence were relatively minor. *Fain*, 94 Wn.2d at 402. The court cited the "evolving standards of decency" of our "maturing society" and stated its concern for proportional punishment as part of our state's constitutional guarantees. *Id*. The court held that punishment must be "commensurate with the crimes" for which it is imposed. *Fain*, 94 Wn.2d at 396.

This principle of proportional punishment is deeply rooted in our criminal law. *See Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910); *see Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77

L. Ed. 2d 637 (1983). In *Solem*, the federal Supreme Court set forth three "objective" factors to use in determining "proportionality," all of them in relation to the crime - 1) the gravity of the offense/harshness of the penalty, 2) the sentences imposed for other crimes in this jurisdiction, and 3) the sentences imposed for the same crimes in other jurisdictions. 463 U.S. at 280. For the state constitution, this Court adopted four factors, also focused on the crime, rather than the offender. *Fain*, 94 Wn.2d at 397. Those factors are (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment the defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. *Fain*, 94 Wn.2d at 397.

But *Fain* is no longer good law. *Fain* and federal constitutional cases predating *Fain* focused on the requirement that punishment be proportionate to the offense. Later Eighth Amendment cases emphasized that punishment must also be proportionate to the defendant. *See Thompson v. Oklahoma*, 487 U.S. 815, 834, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (invalidating death penalty for children under 16 and stating "punishment should be directly related to the personal culpability of the criminal defendant"); *Atkins v. Virginia*, 536 U.S. 304, 314, 122 S. Ct.

2242, 153 L. Ed. 2d 335 (2002) (invalidating death penalty for intellectually disabled defendants); *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating death penalty for defendants under age 18).

In *Roper*, the Court explained that because juvenile brains are not fully developed, young people who commit crimes are both less culpable and more amenable to rehabilitation than older defendants, and sentences must reflect this difference. *Roper*, 543 U.S. at 570.

This proportionality principle extends to cases outside the capital punishment context. In *Graham*, the Court held that juveniles who commit non-homicide crimes may not be sentenced to life in prison without the possibility of parole. *Graham v. Florida*, 560 U.S. 48, 74-75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Court explained there are "two subsets" of cases holding certain types of punishments categorically violate the Eighth Amendment: "one considering the nature of the offense, the other considering the characteristics of the offender." *Graham*, 560 U.S. at 60. The characteristics of a youthful offender preclude mandatory lifetime imprisonment. *Miller v. Alabama*, 132 S. Ct. at 2469 (extending *Graham* to homicide cases). Only in the rarest circumstances, after a sentencing hearing at which the impact of youth on the particular

individual is addressed, may a juvenile be sentenced to life in prison. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 733-34, 193 L.Ed.2d 599 (2016) (holding *Miller* applies retroactively and emphasizing that life sentences should almost never be imposed on juvenile defendants—even for the most egregious homicides).

In affirming below, the Court of Appeals summarily rejected Petitioner's arguments that, with these significant developments in Eighth Amendment law, *Fain* is no longer sufficient to ensure constitutionality under our more protective state constitution. *Slip Opinion* at 9–10. By definition, if our state provides greater protection but applies a standard giving *less* protection, then our standard is unconstitutional. This Court should grant review to address that issue, in order to ensure that the fundamental rights guaranteed under both the Eighth Amendment and our state constitution are ensured.

This Court has already begun following the U.S. Supreme Court and its recognition that the defendant's age at the time of the crime is relevant to his culpability—and to the sentence which may properly be imposed. This Court has acknowledged the importance of considering a defendant's age as a potential mitigating circumstance in sentencing adults under the Sentencing Reform Act. *See O'Dell*, 183 Wn.2d at 689. And in

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), this Court recently struck down sentences of 26 and 31 years on Eighth Amendment grounds, based on the characteristics of the *offenders*, not the offense. Both defendants in that case were youth and both of them were sentenced as adults, based on mandatory "flat-time" sentencing enhancements. *Id*. In reversing the resulting sentences, this Court found an "Eighth Amendment requirement to treat children differently, with discretion." 188 Wn.2d at 20–21. Because youth are "generally less culpable at the time of their crimes and culpability is of primary relevance in sentencing," the Court found that a sentencing court must have the "necessary discretion to comply with constitutional requirements in the first instance." 188 Wn.2d at 23.

In *O'Dell*, this Court reversed a young adult's sentence and remanded for consideration of whether his youth justified a sentence below the standard range. *O'Dell*, 183 Wn.2d at 698-99. *O'Dell* found studies of brain development "establish a clear connection between youth and decreased moral culpability for criminal conduct." *Id*. at 695. This Court endorsed the data referenced in *Roper*, *Graham*, and *Miller* as well as other studies showing that "the parts of the brain involved in behavior control continue to develop well into a person's 20s." *O'Dell*, 183 Wn.2d

at 691–92. "The brain isn't fully mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car." *Id*. at 692 n.5 (quoting *MIT Young Adult Development Project: Brain Changes*, Mass. Inst. of Tech., http://hrweb.mit.edu/worklife/youngadult/brain.html (last visited Dec. 13, 2016)).

Thus, this Court has recognized age is highly relevant to sentencing not just for juveniles, but also for young adults. *Id*. (quoting *Roper*, 543 U.S. at 574) ("[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.")).

Further, in *O'Dell*, this Court clarified a holding it had issued in 1997 in *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997), that it was "absurd" to believe that youth could mitigate culpability. This Court noted all the changes in science and law and reiterated that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," while acknowledging some people younger than 18 are more mature than some adults. *O'Dell*, 183 Wn.2d at 695, quoting *Roper*, 543 U.S. at 574.

The Court of Appeals simply dismissed the idea that any of these cases were relevant to this three-strike case. *Slip Opinion* at 9–10. But

two of those strike offenses were committed when Orr was just 19 and 21 years old, "well within the age" at which this Court held, in *O'Dell*, that the mitigating qualities of youth may reduce culpability and justify an exceptional sentence as a result. The POAA has condemned him to imprisonment without hope of release and with no consideration of the characteristics of youth, based in part on crimes committed when our law recognizes those characteristics exist.

The convergence of this Court's decision in *O'Dell* and the United States Supreme Court's decisions in *Roper* and its progeny suggest that a defendant's young age must be considered in evaluating whether his sentence violates article I, section 14. Although it is well-established that article I, section 14 is more protective than the Eighth Amendment, Washington courts have not yet had occasion to update the state constitutional standard in light of these significant developments.

This Court should grant review. *Fain* is no longer sufficient to ensure that sentences are truly proportional because it fails to allow consideration of proportionality in light of the characteristics of the offender, not just the crime. Further, this court should grant review under RAP 13.4(b)(3) to address the very significant question of whether the

POAA is unconstitutional as allowing cruel and cruel and unusual punishment, in violation of article I, § 14 and the Eighth Amendment.

2. Review should also be granted because there was no evidence of use or attempt to use or threat to use the metal pipe to harm someone during the course of the burglary, and the Court of Appeals' reliance on mere intent to harm to elevate the metal pipe to a deadly weapon status violates established law.

This Court should accept review under RAP 13.4(b)(1) and (2) because the issue highlights a conflict with decisions of this Court and the Court of Appeals.

RCW 9A.52.020(1) provides:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon.

WPIC[7] 60.02 provides that in order to convict the defendant of first degree burglary, the State must prove each of the following elements:

> (1) That on or about(date)the defendant entered or remained unlawfully in a building;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
>
> (3) That in so entering or while in the building or in immediate flight from the building the defendant was armed with a deadly weapon; and

[7] Washington Pattern Jury Instructions – Criminal.

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

The State satisfied the second element. The Court of Appeals does not dispute Orr entered the house with the intent to assault a man named Sasquatch. *Slip Opinion* at 6, Fearing, J. (dissenting in part, concurring in part) at 2.

The two-judge majority incorrectly held that the third element was satisfied, reasoning that because Orr held a metal pipe while entering the house with the intent to assault Sasquatch, he therefore attempted to use a deadly weapon. *Slip Opinion* at 4, 7. The majority misapprehends the facts and the applicable law.

The majority concedes there was no threatened use of the pipe and that the record lacks any evidence Orr actually used the pipe in obtaining entry into the house or in the course of the burglary. *Slip Opinion* at 6. Instead, the majority states that the "totality of the circumstances" demonstrated Orr's intent to use the weapon as a deadly weapon. *Slip Opinion* at 6. According to the majority, the "totality of the circumstances" consists of Orr articulating his intent to use the weapon both to the police and the jury, holding the pipe prior to entering into the house, carrying the pipe out of the house, and subsequently using it against the neighbor, Mr. Wills. *Slip Opinion* at 6.

No Washington decision adjudges a weapon as deadly simply by intent to use the weapon. If that premise were true, the court would need to deem all weapons deadly weapons no matter how used by the accused, if the accused hopes to inflict substantial bodily injury. *Slip Opinion*, Fearing, J. (dissenting in part, concurring in part) at 6. It is also unclear whether the majority bases its decision on an attempt to wield a deadly weapon against Sasquatch or against Dale Wills. If it is the latter basis, the State never made this argument, Orr had no opportunity to address such a theory of criminal liability, the appellate court cites no supporting authority, and the courts do not decide appeals based on theories not raised by the parties. *Id.* at 14–15; *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn. App. 666, 679, 360 P.3d 934 (2015).

RCW 9A.52.020 allows a conviction for first degree burglary only if the use of the deadly weapon accompanies the entering of the dwelling, presence inside the dwelling, or immediate flight from the residence. It is undisputed Dale Wills was not in the house when Orr entered it. The evidence does not support a finding that the assault on Dale Wills occurred during an immediate flight from the dwelling. Nor is there any evidence Orr fled from the house. RP 145–46, 148, 156, 169, 170, 173, 176, 177–78, 243–45, 250, 251–52, 254–55, 295–296.

Further, Orr never claimed he was not "armed." The question on appeal is whether Orr used a "deadly weapon" in the course of the burglary within the meaning of the term's definition found in RCW 9A.04.110(6).

> Deadly weapon means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, *under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm*.

RCW 9A.110(6) (emphasis added).

A weapon included in the second category as a circumstantial deadly weapon does not qualify as a per se deadly weapon, but the State must show that, under the circumstances the accused used, attempted to use or threatened to use the weapon in a manner readily capable of causing death or serious bodily injury. *State v. Gotcher*, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988). Within this second category, the inherent capability of the weapon and the circumstances in which the accused actually used the weapon control the deadly nature of the weapon. *State v. Skenandore*, 99 Wn. App. 494, 499, 994 P.2d 291 (2000); *In re Personal Restraint of Martinez*, 171 Wn.2d 354, 366 (2011). The "circumstances" include "the intent and present ability of the user, the degree of force exerted, the part of the body to which it was applied and the physical

injuries inflicted." *Skenandore*, 99 Wn. App. at 499; *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995).

Here, Orr possessed an intent to assault Sasquatch. But the record discloses he had no ability to harm Sasquatch. He expended no force against Sasquatch. The metal pipe struck no bodily part of Sasquatch. Orr inflicted no injury on the unseen person. Under these circumstances, the evidence failed to establish that the pipe held by Orr qualified as a deadly weapon for purposes of elevating the offense to first degree burglary.

Orr's mere possession of a metal pipe does not qualify for first degree burglary. *Martinez*, 171 Wn.2d at 366. There was insufficient evidence of use or attempted use or threatened use of the pipe as a deadly weapon during the course of the burglary in order to convict Orr of the crime of first degree burglary. The majority's conclusion that mere intent to harm establishes an "attempted use" sufficient to elevate the pipe to a deadly weapon under the burglary statute is in error. Review is warranted.

V. CONCLUSION

For the reasons stated, this Court should grant review.

Respectfully submitted on June25 , 2018.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 25, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendices A and B:

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CASE # 347290
State of Washington v. Frederick Del Orr
SPOKANE COUNTY SUPERIOR COURT No. 161013661

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
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FILED
APRIL 26, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. FREDERICK DEL ORR, Appellant.	)))))))))	No. 34729-0-III UNPUBLISHED OPINION

KORSMO, J. — Frederick Orr appeals from his convictions for second degree assault and first degree burglary, both of which were committed with a deadly weapon, and his ensuing persistent offender sentence. Concluding that the evidence supported the first degree burglary conviction, there was no basis for instructing the jury on defense of others, and that Mr. Orr's constitutional challenges are without merit, we affirm.

FACTS

Mr. Orr was charged with the two noted offenses after breaking into an occupied house in northwest Spokane while armed with a metal pipe and then attempting to fight his way off the property. According to Mr. Orr, 41 at the time of these charges, he was living on the streets of Spokane when an acquaintance named Sean told him that a man known as "Sasquatch" was obtaining sexual favors from Sean's girlfriend in exchange for

drugs. Sasquatch also was alleged to be holding children against their will. These events were allegedly happening at a house on West Gardner Avenue.

Deeply upset because of abuse he himself had suffered while a child, and having heard in prison sex offenders discuss their treatment of children, Mr. Orr approached a house at 2620 West Gardner Avenue and began knocking on doors and windows. Frightened when her back door was broken down, Liv Nelson grabbed her child and fled out the front door. She observed Mr. Orr just inside the door, holding a metal pipe.[1]

Mr. Orr, now aware that he had not found Sasquatch's lair, left the house and went into the backyard. Neighbors had observed his actions and several had gathered to assist Ms. Nelson. One of them, Dale Wills, had armed himself with a gun. An argument ensued between Wills and Orr, with Orr several times swinging his metal pipe at Wills' head while challenging Wills to shoot him. Eventually acknowledging that he had the wrong house, Orr dropped his pipe. The police soon arrived and arrested Orr. He told them that if he found children in peril, "all I know is I'm going to kick somebody's ass. I won't kill them, but they deserve an ass whopping." Report of Proceedings (RP) at 313-314.

Mr. Orr testified at the ensuing jury trial that he never swung the pipe at Wills, but did gesture with it while speaking. He further testified that he carried the pipe throughout the entire incident with the intent of scaring or hitting someone if necessary.

[1] The pipe was later identified as the leg of a camp stove.

The defense sought a defense of others self-defense instruction on the burglary count, but the court rejected the request because there was no objective evidence to support the instruction. The court did permit a self-defense instruction as to the assault against Mr. Wills and also gave an instruction on the inferior degree offense of fourth degree assault. The jury convicted Mr. Orr of first degree burglary of the Nelson house while armed with a deadly weapon and second degree assault against Mr. Wills while armed with a deadly weapon.

The court sentenced Mr. Orr to life in prison as a persistent offender. He previously had been convicted in 1993, at age 19, of second degree robbery. In 1995, while age 21, he pleaded guilty to a crime of first degree robbery. Four years later, he was sentenced to 20 years in prison for five felony offenses. He was released from custody in January 2014, little over a year before the current incident.

Mr. Orr timely appealed to this court. A panel heard oral argument on the matter.

ANALYSIS

This appeal challenges the sufficiency of the evidence to support the first degree burglary conviction, the failure to grant a self-defense instruction on that charge, and the constitutionality of the persistent offender sentencing statute. We will address the arguments in the order listed.

Sufficiency of the Evidence

The initial challenge is to the sufficiency of the evidence to support the element of first degree burglary that Mr. Orr was armed with a deadly weapon. He contends that because no one was present against whom he could threaten to use the pipe, he was not "armed" at the time of the crime.

As charged here, to convict of first degree burglary, the State had to establish, among other elements, that Mr. Orr unlawfully entered the Nelson house with the intent to commit a crime against a person or property therein and, while in the building and in immediate flight therefrom, he was armed with a deadly weapon. RCW 9A.52.020(1)(a); Clerk's Papers (CP) at 38, 170. The jury was instructed that a deadly weapon:

> means any weapon, device, instrument, substance, or article which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantial bodily harm.

CP at 160. This instruction reflects a portion of the language of RCW 9A.04.110(6), defining the term "deadly weapon" when the weapon in question is not a firearm or explosive device.

Sufficiency of the evidence challenges are reviewed under very well settled standards. Appellate courts assess such challenges to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing

court will consider the evidence in a light most favorable to the prosecution. *Id.* This court also must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Relying on the definition of "deadly weapon" contained in instruction 13 (above), Mr. Orr argues there was no evidence that the pipe was "used, attempted to be used, or threatened to be used" because he encountered no one in the building once he broke in. His focus is too narrow.

The meaning of RCW 9A.04.110(6) in the "attempted use" context was at issue in *In re Personal Restraint of Martinez*, 171 Wn.2d 354, 256 P.3d 277 (2011). There the petitioner had been interrupted in the course of burglarizing a rural building and fled upon the arrival of a deputy sheriff. *Id*. at 357-358. The deputy eventually caught the burglar and tackled him. *Id.* at 358. At that point the officer noted that the burglar was wearing a knife sheath, but had no knife; the knife was later located on the ground about 15 feet from the building. *Id*. Mr. Martinez was convicted of first degree burglary based on his possession of the deadly weapon during the crime and flight therefrom.

The Washington Supreme Court noted that Mr. Martinez had neither used nor threatened to use the knife, so treated the case as a matter of attempted use. *Id*. at 368. In cases of a deadly weapon "in fact," courts must look to the totality of the circumstances to determine whether the defendant was armed with a deadly weapon. *Id*. at 368 n.6. The court concluded that no one saw Mr. Martinez with the knife or even attempt to

reach the knife, and he "manifested no intent to use it." *Id*. at 368. The most that could be said was that the knife's sheath had been unfastened. *Id*. at 369. In those circumstances, the evidence was insufficient to find that the defendant was armed with a deadly weapon. *Id*. at 368-369. The court expressly distinguished *State v. Gotcher*, 52 Wn. App. 350, 759 P.2d 1216 (1988). *Id*. at 368. There, during a struggle, the defendant had reached for the pocket in which he kept his knife, thus evidencing his intent to use the weapon. *Id*.

Mr. Orr relies heavily on *Martinez*, arguing there was no evidence that he attempted to use the pipe as a club, largely because there was no one to use the club against. Although we agree there was no threatened use of the pipe, we question whether or not Mr. Orr actually used the pipe in the course of the burglary. Nonetheless, even if we analyze this solely as an attempted use case a la *Martinez*, we conclude that it is closer to the *Gotcher* example of attempted use than it is to the *Martinez* nonuse situation.

As noted, in *Gotcher* the act of reaching for a pocket where the defendant had a knife was sufficient to demonstrate attempted use of the deadly weapon. The facts of this case demonstrate even more attempted use of the club as a deadly weapon. Mr. Orr articulated his intent to use the weapon both to the police who arrested him and to the jury. He was armed with the club prior to breaking into the house, although our record does not demonstrate whether he used the club when forcing his entry into the building. He carried the club out of the house and then used it against Mr. Wills. Unlike *Martinez*,

here the totality of the circumstances evinced Mr. Orr's intent to use the weapon but for the absence of the man he sought.[2] By arming himself prior to the entry, and breaking into the home with the expressed intent to use the weapon against Sasquatch, Mr. Orr attempted to use a deadly weapon.

Accordingly, the evidence allowed the jury to conclude that Mr. Orr was armed with a deadly weapon when he entered the Nelson home. The evidence was sufficient to support the jury's verdict.

Defense of Others Instruction

Mr. Orr also argues that the trial court erred by failing to give a defense of others instruction concerning the burglary charge. However, Mr. Orr's subjective belief that others needed rescuing was not a sufficient basis for giving such an instruction.

Once again, well settled standards govern review of this claim. RCW 9A.16.020(3) permits the use of force against another person in certain circumstances, including when lawfully aiding in preventing or attempting to prevent an offense against a party about to be injured. A criminal defendant is entitled to an instruction on his theory of the case if the evidence supports the instruction. *State v. Werner*, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). More specifically, a defendant is entitled to a defense of

[2] The unarticulated premise of Mr. Orr's argument is that there can never be a first degree burglary of an unoccupied building unless the defendant is armed with a firearm or an explosive device. This runs counter to the legislative determination that neither factual nor legal impossibility is a defense to an attempted crime. RCW 9A.28.020(2).

another instruction if there is "some evidence" demonstrating defense of another. *State v. Marquez*, 131 Wn. App. 566, 578, 127 P.3d 786 (2006). When a trial court refuses to give a self-defense instruction because it finds no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, the standard of review on appeal is abuse of discretion. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

The trial court must evaluate evidence of self-defense "from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees." *Id*. at 242. This analysis involves both subjective and objective components. *Id*. at 242-243. For the subjective component, the court must "place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred." *Id*. at 243. For the objective component, the court must "determine what a reasonable person would have done if placed in the defendant's situation." *Id*. The same approach applies to the defense of another. *Marquez*, 131 Wn. App. at 575.

Defense of another is permitted when: (a) the defendant would be justified in using force to defend himself against the same injury being threatened against the third party, (b) under the circumstances as understood by the defendant, the third party would be justified in using force to protect himself or herself, and (c) the defendant believes that the intervention is necessary to protect the third party. *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977). Critically, the person the defendant seeks to protect must be

present at the time. If there is no evidence that any "victims" were present, the defendant has no right to defend them. *State v. Trevino*, 10 Wn. App. 89, 99, 516 P.2d 779 (1973) (discussing previous justifiable homicide statute, former RCW 9.48.170 (1973)) ("The statute has no application to a situation involving the defense of an absent person.").

The proposed instruction certainly foundered on the last requirement. There was no one inside the Nelson home who needed protecting. For that reason, among others,[3] the trial court did not abuse its discretion. There was no basis for instructing on defense of others.

Sentencing Challenges

Mr. Orr also raises two challenges to the persistent offender sentencing scheme. This court has previously rejected both challenges, so we need not discuss them at any length.

First, Mr. Orr contends that the persistent offender statute does not account for his youth at the time he committed the first two "strike" offenses. He was 19 and 21, respectively, when he committed the earlier "most serious offenses." This argument fundamentally fails because Mr. Orr was not a youthful offender at age 41 and he is not now being punished once again for those earlier offenses. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 363, 759 P.2d 436 (1988). To the extent that youthful

[3] It also was not reasonable for Mr. Orr to believe his intervention was necessary. A call to law enforcement would have sufficed.

immaturity is considered when sentencing youthful offenders and those just out of their minority, it is factored into the *sentence* they receive rather than into the determination of guilt or innocence. It is only the fact of guilt that has consequence today, not any mitigated punishment imposed two decades earlier. Simply put, the age at which Mr. Orr committed his earlier offenses is of no concern in this case.

This court previously rejected this argument in *State v. Hart*, 188 Wn. App. 453, 462-465, 353 P.3d 253 (2015). Similarly, the Washington Supreme Court has consistently rejected a somewhat similar challenge to the persistent offender statute. *State v. Witherspoon*, 180 Wn.2d 875, 887-891, 329 P.3d 888 (2014). That court also has previously rejected a variety of constitutional challenges to the persistent offender statute. *E.g.*, *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996).

Mr. Orr also contends that the prior convictions should have been submitted to a jury rather than have been found by a trial judge. However, the United States Supreme Court has expressly exempted prior convictions from the scope of the Sixth Amendment right to a jury trial. *Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Washington courts are in accord. *Witherspoon*, 180 Wn.2d at 891-894; *State v. Williams*, 156 Wn. App. 482, 498, 234 P.3d 1174 (2010).

There is no right to require proof of a prior conviction to a jury in a persistent offender sentencing case. Mr. Orr's argument is without merit.

The convictions and sentence are affirmed. In light of the determination that Mr. Orr is a persistent offender and will likely be unable to repay appellate costs, we grant his motion to deny costs.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

I CONCUR:

Lawrence-Berrey, C.J.

No. 34729-0-III

FEARING, J. — (dissenting in part, concurring in part) I disagree with the majority that sufficient evidence sustains Frederick Orr's guilty verdict for first degree burglary. I concur in the remainder of the majority's rulings, including the ruling that upholds the sentence of life in prison. The conviction for second degree assault of Dale Wills alone qualifies Frederick Orr for the life sentence. I disagree with some of the reasoning employed by the majority in upholding the sentence and thus concur in the result only as to the sentence.

As to the charge of first degree burglary, this appeal asks if Frederick Orr used a "deadly weapon" in the course of the burglary within the meaning of the term's definition found in RCW 9A.04.110(6). The State presented evidence that Orr, a homeless transient, entered the Nelson abode without permission and with a two-foot metal pipe in hand. Traci Pronto, an investigating officer, described the pipe as one of four metal legs from a camp stove.

Officer Traci Pronto testified to the injuries that could result from the use of the pipe:

> Q And based on your experience and what you've personally observed, what kind of injuries can be inflicted with a weapon such as this?
> A Well, really depending on—on who's swinging it and how hard it is and where they connect at. I mean, that can do pretty good damage. If someone were to get hit in the head with that, I would suspect it would cause a skull fracture or something; some pretty good damage.

Report of Proceedings (RP) at 193.

Frederick Orr testified to his behavior on the day of the entry into the Nelson home. He entered the home because he believed, from a conversation with Sean, that a big dude, nicknamed Sasquatch, abused people, including children, inside the home. Orr did not request law enforcement assistance to apprehend Sasquatch, because he inhabits a world where denizens do not call the police. Orr intended to use the pipe to scare and strike Sasquatch. He characterized his prospective swinging of the pipe as an "ass whooping." RP at 313-14. Nonetheless, the State presented no evidence of Orr using the pipe when entering, while inside, or when leaving the Nelson dwelling. Orr planned to swing the pipe if he encountered Sasquatch, but he never encountered the big, malevolent dude so he never attempted to employ the pipe inside the home.

The statute defining first degree burglary, RCW 9A.52.020(1), provides:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

The evidence showed that Frederick Orr entered the Nelson residence with the intent to assault Sasquatch such that he intended to commit a crime against a person inside the dwelling. Thus, the State satisfied this first element of the crime.

First degree burglary under RCW 9A.52.020 requires the State to prove, among other elements, that the defendant armed himself with a deadly weapon or assaulted another person. *In re Personal Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). Although the State convicted Frederick Orr of assaulting Dale Wills, the State does not rely on this assault to convict on first degree burglary perhaps because Wills never inhabited the burglarized Nelson home. Instead, the State relies on the deadly weapon alternative to prove first degree burglary and contends that the two-foot pipe held by Orr, when entering the Nelson home, constituted a deadly weapon because Orr intended to pummel Sasquatch inside the home with the pipe. The State identifies the ogre Sasquatch, not Liv Nelson or Nelson's daughter, as a subject of the assault. In turn, Orr argues that mere possession of a deadly weapon does not qualify for first degree burglary. He further contends that the State presented insufficient evidence of use or attempted use of the pipe in order to convict him of the crime. I agree with Orr.

The term "armed" as used in RCW 9A.52.020(1)(a) means a weapon readily accessible and available for use. *State v. Gotcher*, 52 Wn. App. 350, 353, 759 P.2d 1216 (1988); *State v. Randle*, 47 Wn. App. 232, 235, 734 P.2d 51 (1987). I assume that Frederick Orr "armed himself" with the metal pipe, since he does not argue to the contrary. I move to the next element of the crime, the accused being armed with a

"deadly weapon."

RCW 9A.04.110(6) defines "deadly weapon" for purposes of first degree burglary as:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, *under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm*.

(Emphasis added.) This definition also applies to the crime of second degree assault when the State charges the crime based on use of a deadly weapon. RCW 9A.36.021(1)(c). A distinct definition applies to a mandatory minimum sentence based on the use of a deadly weapon. RCW 9.95.040. Note that, under RCW 9A.04.110(6), the deadly weapon need not be capable of inflicting death, only substantial bodily harm.

RCW 9A.04.110(6) creates two classes of deadly weapons: (1) any explosive or loaded or unloaded firearm, and (2) any other weapon or instrument which, under the circumstances in which the accused uses it, attempts to use it, or threatens to use it, is readily capable of causing death or serious bodily injury. *In re Personal Restraint of Martinez*, 171 Wn.2d at 365 (2011). Under Washington law, the first category of per se deadly weapons reviews the nature of the weapon and the second category of circumstantial deadly weapons addresses the method of use of the weapon. The trier of fact need not determine any willingness or present ability to use the firearm or explosive as a deadly weapon. *State v. Gotcher*, 52 Wn. App. at 354.

A weapon included in the second category as a circumstantial deadly weapon does

not qualify as a per se deadly weapon, but the State must show that, under the circumstances the accused used, attempted to use, or threatened to use the weapon in a manner readily capable of causing death or serious bodily injury. *State v. Gotcher*, 52 Wn. App. at 354. Within the second category, the inherent capacity and the circumstances in which the accused used the weapon control the deadly nature of the weapon. *State v. Skenandore*, 99 Wn. App. 494, 499, 994 P.2d 291 (2000). Circumstances include the intent and present ability of the user, the degree of force, the part of the body to which the accused applied the weapon, and the physical injuries inflicted. *State v. Skenandore*, 99 Wn. App. at 499. The trier of fact ascertains ready capability in relation to surrounding circumstances with reference to potential substantial bodily harm. *State v. Skenandore*, 99 Wn. App. at 499. The accused must manifest a willingness to use the weapon before the trier of fact may categorize the weapon as deadly. *State v. Gotcher*, 52 Wn. App. at 354.

The principles of law listed in deadly weapon decisions and recited above fall short in aiding a reviewing court. Those principles alternate between the potentiality of the harm controlling and the actual harm imposed dominating the outcome. The principles oscillate also between the accused's intent and the accused's actions as significant to the result. Thus, I review the facts of individual decisions to discern whether to concentrate on the accused's intent and the weapon's potential for harm, on the one hand, or the accused's actions and the actual harm suffered by a victim, on the other hand. I include in the discussion decisions involving prosecutions for second

degree assault, since no decision construes the definition found in RCW 9A.04.110(6) differently depending on whether the State charges the accused with second degree assault or first degree burglary.

I initially note that if the court examined only the potentiality of harm, the court would need to consider a paper clip a deadly weapon, since the clip could pierce the victim's eyeball and render the victim sightless. If the court assessed only the intent of the accused, the court would need to deem all weapons deadly weapons, no matter how used by the accused, if the accused hope to inflict substantial bodily injury.

I survey deadly weapon decisions in chronological order. In *State v. Gotcher*, 52 Wn. App. 350 (1988), Norman Gotcher and a companion broke into a residence. Law enforcement later apprehended the intruding duo inside the residence. Police found valuables from the residence in Gotcher's possession. Gotcher also held in a coat pocket a partially opened switchblade knife with a blade four-and-one-half inches long. During closing argument, the State argued that the knife qualified as a deadly weapon. According to the State, possession of the knife was sufficient to convict regardless of whether Gotcher intended to use the weapon to further the burglary. This court reversed the conviction because of the misstatement of the law by the State.

The *Gotcher* court refused, however, to dismiss the charge of first degree burglary but remanded for a new trial. The court held that, viewing the evidence in the light most favorable to the State, evidence sufficed from which the jury could find all the essential elements of the crime beyond a reasonable doubt. This court decided *State v. Gotcher*

before the Washington Supreme Court's decision in *In re Personal Restraint of Martinez*, 171 Wn.2d 354 (2011), discussed below.

In *State v. Carlson*, 65 Wn. App. 153, 828 P.2d 30 (1992), this court ruled that a BB gun, under the circumstances of its use, did not constitute a deadly weapon. Todd Carlson approached Cliff Ewell with what appeared to be a rifle. Carlson pointed the gun at Ewell, and held the barrel inches from his face. Ewell grabbed the barrel of the gun and pushed it away. Ewell testified that Carlson stepped back and held the gun as if preparing to strike him with it. Carlson, however, did not strike Ewell, but turned and walked away. Carlson testified that the gun was an inoperative, unloaded, sawed off BB gun. Carlson also testified that the safety switch was on and that the gun was incapable of firing in any event. Carlson did not tell Ewell that it was a BB gun nor did he tell Ewell that the gun was inoperative. Carlson testified that he pointed the BB gun at Ewell to intimidate and frighten him. Based on Carlson's testimony that the gun was inoperable, we held that the State submitted insufficient evidence to show the gun was readily capable of causing substantial bodily harm and constituted a deadly weapon.

In *State v. Shilling*, 77 Wn. App. 166, 889 P.2d 948 (1995), we affirmed James Shilling's conviction for assault with a deadly weapon. Shilling threw a drinking glass at the head of a bar bouncer after the bouncer grabbed the overserved Shilling's alcohol glass. The blow from the glass knocked off the bouncer's eyeglasses. The drinking glass broke on impact and glass shards flew fifteen feet. The bouncer's face suffered lacerations and demanded five stitches. One glass shard fell from the bouncer's head one

month later. Expert testimony showed that the glass could have fractured the bouncer's nose and caused permanent scarring. Since the glass did not qualify as a deadly weapon per se, this court analyzed the circumstances under which Shilling utilized the glass. Shilling admitted that the glass carried the inherent capability of causing substantial bodily harm.

State v. Taylor, 97 Wn. App. 123, 982 P.2d 687 (1999) contrasts with *State v. Carlson*, 65 Wn. App. 153 (1992), previously discussed. Charles Taylor held a BB gun to the head of three trespassing teenagers and threatened to blow the youths' respective "'fucking brains out.'" *State v. Taylor*, 97 Wn. App. at 125. Taylor appealed his conviction for second degree assault and argued that the State did not prove the BB gun to be a deadly weapon. We disagreed. The evidence showed that Taylor threatened to use the gun to shoot the boys in a way that would have caused substantial bodily harm.

In *State v. Skenandore*, 99 Wn. App. 494 (2000), the State charged Neil Skenandore, an inmate at the Clallam Bay Corrections Center, with second degree assault. Skenandore assaulted Corrections Officer Jason Jones with a homemade spear two-and-one-half feet to three feet long, fashioned from writing paper rolled into a rigid shaft bound with dental floss, affixed to a golf pencil. As Jones peered through the viewing window on the left side of Skenandore's cell door, he bent over to pass breakfast through a locked portal in the door. The spear struck Jones twice on the chest and once on the arm. The spear did not tear the shirt, but left pencil marks on Jones' left shirt pocket, near the center of the chest, and on the left sleeve. The makeshift spear also left

indented red marks but did not break Jones' skin. A physician assistant examined Jones, but prescribed no treatment. The marks on Jones' chest evaporated within two hours. The State argued to the jury that a sharpened pencil in the eye could cause substantial bodily injury and thus the spear qualified as a deadly weapon.

This court, in *State v. Skenandore*, reversed Neil Skenandore's conviction for second degree assault and dismissed the charges based on insufficiency of evidence. We reasoned that the State failed to present evidence that the homemade spear functioned as a deadly weapon. Although under some circumstances the spear used by Skenandore might be shown to be a deadly weapon, the record did not demonstrate that the instrument served as a per se deadly weapon. The State presented no testimony regarding the spear's potential for substantial bodily harm had Skenandore struck Jones on the face or in the eye. The record did not reflect that Jones placed his face near the cuff port such that the spear could have struck his eye. The three blows all landed on Jones' upper torso, well below his head. The cell door that separated Jones and Skenandore restricted the spear's movement. Thus, the surrounding circumstances inhibited the spear's otherwise potential, but unproven, ready capability to inflict substantial bodily harm. The red indentations on Jones' chest faded within hours of the assault. Thus, no rational trier of fact could have found that Skenandore's spear was readily capable of causing death or substantial bodily harm under the circumstances in which Skenandore used it.

In *State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000), we affirmed the conviction of Miguel Barragan for first degree assault by reason of using a pencil as a

deadly weapon. Barragan resided in jail with Steven Garcia. The two physically fought. Barragan swung first and told Garcia, "'You're gonna die.'" *State v. Barragan*, 102 Wn. App. at 759. As Garcia pushed an intercom alarm button, Barragan picked up a pencil from the floor and swung it toward Garcia's left eye. Garcia blocked the first swing, but only partially blocked a second blow, which struck him in the left temple. The pencil shattered as it hit Garcia's head, and over one-half inch of it embedded into his temple. An officer who used forceps to remove the pencil from Garcia's temple later testified that it was as difficult to remove as a nail. The actual wound, however, was not serious. We noted that a pencil poke could blind the victim.

In *State v. Winings*, 126 Wn. App. 75, 107 P.3d 141 (2005), Ryan Winings appealed his conviction of second degree assault while armed with a deadly weapon. Daniel Warner visited Tracy Neitzel's residence to show him a sword he recently acquired. Warner joined other guests at the home, including Winings, who imbibed alcohol. Warner displayed the sword to his friends, when Winings grabbed the sword and pulled it from its sheath. Winings swung the sword in the air and then poked Warner in the chest with the sword. Warner exclaimed: "'ow that hurts,'" after which Winings stabbed Warner in the foot with the sword. *State v. Winings*, 126 Wn. App. at 81. The sword cut a hole in Warner's leather shoe. Warner received a small cut on his toe. Warner did not seek medical attention for his foot.

On appeal, Ryan Winings assigned error to the trial court's refusal to deliver a jury instruction for an inferior degree of assault. He argued that the evidence could also

support a finding that he employed a nondeadly weapon and emphasized that Warner did not suffer serious injury. We observed that, if Winings had landed the sword in a slightly different manner, the sword could have severed the toe. We ruled that the trial court committed no error.

In *State v. Baker*, 136 Wn. App. 878, 151 P.3d 237 (2007), Shappa Baker deliberately drove his car into a police car and a police motorcycle. We held the evidence sufficient to convict Baker of first and second degree assault with a deadly weapon, his vehicle.

In *State v. Gamboa*, 137 Wn. App. 650, 154 P.3d 312 (2007), this court held that Joaquin Gamboa's possession of a machete as he burglarized a home constituted the use, attempted use, or threatening of use of a deadly weapon for purposes of first degree burglary. We agreed with the State's contention that Gamboa armed himself with a deadly weapon merely because Gamboa held the weapon and the machete was readily capable of causing death. We reasoned:

> It is the potential as a weapon and not how the machete was actually used [was] important. . . . It is rather the potential for inflicting bodily injury or death that counts. . . . It was not necessary for the homeowners to appear and for Mr. Gamboa to brandish the machete for it to qualify as a deadly weapon. A machete is readily capable of causing great harm by its very nature and size.
>
> . . . .
>
> The question is whether the machete was "'easily accessible and readily available for use by the defendant for either offensive or defensive purposes.'"

State v. Gamboa, 137 Wn. App. at 653 (internal citations omitted). If *State v. Gamboa*

remained good law, I would affirm Frederick Orr's conviction for first degree burglary.

In *State v. Hoeldt*, 139 Wn. App. 225, 160 P.3d 55 (2007), this court held a pit bull dog constituted a deadly weapon under the circumstances in which the accused employed the dog. Robbie Hoeldt held, by the collar, his powerful, barking, and growling pit bull. Hoeldt released the dog, who then charged a law enforcement officer and lunged at the officer's throat and chest.

In *In re Personal Restraint of Martinez*, 171 Wn.2d 354 (2011), Washington's leading decision on the subject of a deadly weapon, Raymond Martinez challenged his conviction for first degree burglary, by contending that the State failed to prove beyond a reasonable doubt that he armed himself with a deadly weapon within the meaning of RCW 9A.04.110(6). The state high court agreed and vacated the conviction. Grant County Sheriff Deputy Joseph Wester spied Raymond Martinez rummaging in a rural farm shop. Deputy Wester shined his flashlight on Martinez, drew his gun, and commanded Martinez to stop. Martinez fled, but Wester chased and eventually tackled him. Deputy Wester then noticed an empty knife sheath on Martinez's belt. Later, law enforcement officers retraced the path on which the chase had occurred and located a knife with a fixed blade in the mud, about fifteen feet from the farm shop. The State argued that the knife constituted a deadly weapon for purposes of first degree burglary. Martinez contended he had neither used nor threatened to use his knife during the alleged burglary.

The *Martinez* court rejected the State's contention that mere possession of the

knife by Raymond Martinez when he entered the farm shop constituted being armed with a deadly weapon. The court reasoned:

> Under the plain meaning of this statute, mere possession is insufficient to render "deadly" a dangerous weapon other than a firearm or explosive. To interpret the statute otherwise would eliminate the distinction between deadly weapons per se (firearms and explosives) and deadly weapons in fact (other weapons). Likewise, it would render meaningless the provision as to the circumstances of use, attempted use, or threatened use.
>
> Thus, we hold that RCW 9A.04.110(6) requires more than mere possession where the weapon in question is neither a firearm nor an explosive. In accordance with the plain meaning of this statute, unless a dangerous weapon falls within the narrow category for deadly weapons per se, its status rests on the manner in which it is used, attempted to be used, or threatened to be used.

In re Personal Restraint of Martinez, 171 Wn.2d at 366.

The *Martinez* court concluded that, even when viewed in the light most favorable to the State, the evidence did not support a finding of Raymond Martinez arming himself with a deadly weapon. No one saw Martinez with the knife, and he manifested no intent to use it. No one saw Martinez reach for the knife at any time after his apprehension. Martinez did not have access to the knife during the scuffle with Deputy Wester. Viewed in the light most favorable to the State, the only evidence that Martinez attempted to use the knife was the unfastened sheath. In so ruling, the *Martinez* court disapproved of our decision in *State v. Gamboa*, because *Gamboa* characterized the machete as a deadly weapon on the sole basis of its inherent dangerousness rather than its actual, attempted or threatened use.

None of the Washington decisions analyze whether the accused "attempted" to

assault a victim with a deadly weapon for purposes of RCW 9A.04.110(6) by employing the "substantial step" test applied under the attempted crime statute, RCW 9A.28.020(1). The State may ask that we apply RCW 9A.28.020 for the purposes of assessing whether Frederick Orr attempted to use a deadly weapon. The State writes that "Orr manifested a clear intent to use the metal pipe on the inhabitants of the Nelson home and he took a substantial step toward that end." Br. of Resp't at 11. Nevertheless, the evidence only supports Orr possessing an intent to hurt Sasquatch, not the "inhabitants" of the residence. One might guess that entering the home could constitute a step toward attacking Sasquatch, but the State does not identify the substantial steps purportedly taken by Orr that it claims entailed substantial steps. More importantly, the State presents no case wherein a Washington court analyzes an attempt to arm oneself with a deadly weapon as eliciting the same test required for an attempt under RCW 9A.28.020.

In holding that the State presented sufficient evidence of attempted use of a deadly weapon, the majority writes: "[b]y arming himself prior to entry, and breaking into the home with the expressed intent to use the weapon against Sasquatch, Mr. Orr attempted to use the deadly weapon." Majority at 7. Yet, no Washington decision adjudges a weapon as deadly simply by intent. Two sentences earlier, the majority declares: "He [Frederick Orr] carried the club out of the house and then used it against Mr. Wills." Majority at 6. When juxtaposing the two sentences, the reader wonders if the majority bases its holding on an attempt to use a deadly weapon against Dale Wills, against Sasquatch, or both.

If the majority relies on the use of the deadly weapon toward Dale Wills, the majority does not need to even concern itself with Frederick Orr arming himself with a deadly weapon, since Orr actually assaulted Wills. One commits the crime of first degree burglary when one assaults another in the immediate flight from the burglary regardless of whether one arms himself with a weapon, let alone a deadly weapon. RCW 9A.52.020(1). Nevertheless, the majority makes sure to hold that Orr armed himself with a deadly weapon.

If the majority bases its decision on an attempt to wield a deadly weapon against Dale Wills, the majority also grounds its ruling in an argument never made by the State. We do not decide appeals based on theories not raised by the parties. *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn. App. 666, 679, 360 P.3d 934 (2015). This court has bestowed no opportunity on Frederick Orr to address such a theory of criminal liability.

RCW 9A.52.020 allows a conviction for first degree burglary only if the use of the deadly weapon accompanies the entering of the dwelling, presence inside the dwelling, or immediate flight from the residence. The evidence does not support a finding that the assault on Dale Wills occurred during an immediate flight from the dwelling. Frederick Orr did not even flee the Nelson dwelling.

Frederick Orr possessed an intent to assault Sasquatch. Nevertheless, although Washington courts deem intent a factor for consideration, Washington courts rely on how the accused actually employed the weapon, not how he hoped to use the weapon

regardless of a real or illusory victim. Washington decisions further rule that the accused must manifest the intent by some actions involving use of the weapon. In each decision, the Washington court only held the defendant to be armed with a deadly weapon if the defendant actually wielded and used the weapon against a victim in the present, real world.

In re Personal Restraint of Martinez, 171 Wn.2d 354 (2011) and *State v. Skenandore*, 99 Wn. App. 494 (2000) suggest we consider the capability of the weapon under the circumstances of what actually transpired, not what might have happened. Those circumstances include the intent and present ability of the user, the degree of force exerted, the part of the body to which the accused applied the weapon, and the physical injuries inflicted. *State v. Skenandore*, 99 Wn. App. at 499. Frederick Orr had no ability to harm Sasquatch. Orr expended no force against the Bigfoot. The metal pipe struck no muscle of the mean monster. Orr inflicted no injury on the phantom menace.

The State relies on *State v. Kilponen*, 47 Wn. App. 912, 737 P.2d 1024 (1987) for the proposition that the burglary statute, RCW 9A.52.020(1), does not demand that the person, against whom the burglar intends to commit a crime, be present in the home at the time of the burglary. The State accurately cites the decision for this rule. Nevertheless, the *Kilponen* court applied the rule to the element of the crime of first degree burglary that requires proof of the intent to commit a crime against a person therein. The court did not apply the rule to the element at issue in this appeal, that being whether the trespasser armed himself with a deadly weapon. Gerald Kilponen entered his

estranged wife's home with a rifle, so he bore a per se deadly weapon.

Insufficient evidence wrongly convicted Frederick Orr of first degree burglary.

Fearing, J.

Renee S. Townsley
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CASE # 347290
State of Washington v. Frederick Del Orr
SPOKANE COUNTY SUPERIOR COURT No. 161013661

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy (unless filed electronically) of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attachment

FILED
MAY 31, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FREDERICK DEL ORR, Appellant.	)	No. 34729-0-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of April 26, 2018 is hereby denied.

PANEL: Korsmo, Fearing, Lawrence-Berrey

BY A MAJORITY:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

GASCH LAW OFFICE

June 25, 2018 - 10:05 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
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