96775-0

Supreme Court No. ____
(COA No. 76802-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NAZIYR YISHMAEL,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Naziyr Yishmael, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Yishmael seeks review of the Court of Appeals decision dated November 26, 2018, a copy of which is attached as Appendix A. An order for reconsideration was denied on this matter on December 19, 2018, a copy of which is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Did the court err in holding that unlawful practice of law is a strict liability crime?

2. Was the court's use of GR 24 to define unlawful practice of law to the jury a violation of the separation of power doctrine?

3. Is unlawful practice of law unconstitutionally vague because it fails to define the term "practice of law"?

4. Did the trial court improperly comment on the law when it endorsed "practice of law" as defined by the prosecutor's expert witness?

D. STATEMENT OF THE CASE

When the recession of 2009 hit, many of the people who Mr. Yishmael helped find homes when he was a realtor found themselves unable to stay in their homes. RP 822. Mr. Yishmael created an organization to help these people keep their homes. RP 822.

Mr. Yishmael saw that there was an increasing number of abandoned homes. RP 823. He began to use his organization to help people who could not afford to stay in their homes take adverse possession of these abandoned homes. RP 823. Mr. Yishmael gave lectures on adverse possession. RP 826, 833, 836. At no time did he represent that he practiced law or could represent the people he worked with. RP 324, 395, 597, 618. Even the government's expert found no evidence Mr. Yishmael ever held himself out to be a lawyer. RP 488.

Mr. Yishmael worked with a number of people, including Carrie Bouwkamp, Angela Simmons, and Crystopher Smith. RP 321, 512, 608. They paid Mr. Yishmael for his information, which included lists of homes that he believed were abandoned. RP 326, 514, 614. Each of these people used this list to occupy abandoned homes, which they then filed notice with King County record keeper of their intent to occupy. RP 334, 528, 672. They entered the homes, changed the locks, and

began to reside in them. RP 338, 353, 539-40, 570. They cared for the home and invested in its upkeep. RP 356, 574, 685. They placed notices on the homes, including no-trespass signs. RP 541, 628.

Ms. Bouwkamp met Mr. Yishmael in 2011. RP 511. She knew Mr. Yishmael was not a lawyer. RP 597. Ms. Bouwkamp tried to move into three homes, ultimately taking possession of 4404 S. 176th Street in SeaTac. CP 6. A Des Moines police officer contacted Ms. Bouwkamp on January 1, 2014. CP 6, RP 574. She informed the officer she was adversely possessing claimed the property and filed a notice with the county record's office. RP 575-76 (Ex. 1-4). On August 14, 2014, Sergeant Cathy Savage, confronted Ms. Bouwkamp, to whom she also explained how she had taken possession of the home. CP 6, RP 430. That officer arrested Ms. Bouwkamp when she did not move out of the home. RP 443. Her charges were later dismissed. RP 578.

Mr. Smith had been living with his girlfriend, Helen Gaines, who had moved into a home in an attempt to gain adverse possession, with Mr. Yishmael's assistance. RP 601. When Mr. Smith's relationship with Ms. Gaines ended, he tried to adversely possess two properties, ultimately moving into a property located at 1458 S.W. Dash Point Road. CP 19, RP 611. Mr. Smith used Mr. Yishmael's

property list to find an abandoned property. CP 19, RP 611. He posted notice of his intent with the records office on July 16, 2014, maintained the home, and placed notices on the property of his intent to take possession. RP 676. Sergeant Savage also arrested him.. RP 439. Charges were later dismissed. RP 680.

Ms. Simmons met Mr. Yishmael in 2013. RP 321. She attempted to adversely possess two homes, ultimately moving into 24017 113th Pl. S.E. in Kent. RP 22. Mr. Yishmael provided Ms. Simmons with a list of homes he believed had been abandoned. RP 328. Like the others, Ms. Simmons filed a notice of her intention, took possession of the home, paid the liens, and attempted to maintain the home. RP 331. Ms. Simmons moved out of the home after about three weeks, believing that she would not be able to maintain possession of the property. 359.

Mr. Yishmael never represented that he was an attorney to anyone. RP 324, 597, 618. He told the people he worked with in the program he could not represent them in court. RP 326. He stated he did not like the ethics of legal practice, after having taken some law school courses. RP 325. Each of the people paid Mr. Yishmael some money, up to $7,000. RP 326, 514, 849.

The government charged Mr. Yishmael with unlawful practice of law and several counts of felony theft. CP 1-27.

At trial, the prosecutor called former Seattle University School of Law Professor David Boerner to explain to the jury what "practice of law" meant. RP 99. The professor also testified about what specific actions of Mr. Yishmael constituted unlawful practice of law. RP 99-100. Because RCW 2.48.180 does not define the term "practice of law," the professor's testimony focused on GR 24. Professor Boerner read the rule to the jury, which was then submitted to them as evidence. RP 481-83.

In the court's closing instructions, the court read the definition of practice of law endorsed by Professor Boerner to the jury. RP 894, CP 552 (Jury Instruction 20). Mr. Yishmael objected to this as an improper comment on the evidence by the court. RP 886.

After the trial, Mr. Yishmael was convicted of unlawful practice of law, but was acquitted of the other charges. RP 1012.

E. ARGUMENT

1. Unlawful practice of law is not a strict liability offense.

The Court of Appeals held that unlawful practice of law is a strict liability offense. APP 15. The Court of Appeals published decision is the first time a Washington appellate court has examined this issue. This Court should grant review because the Court of Appeals decision is in conflict with this Court's general rule that strict liability offenses are not favored and because the Court of Appeals decision could affect many people who innocently impart their knowledge of the law to others. This is an issue of substantial public interest this Court should resolve. RAP 13.4.

Criminal offenses without mens rea are disfavored. *State v. Bash*, 130 Wn.2d 594, 606, 925 P.2d 978 (1996). This Court set forth eight factors to consider when determining whether an offense without a specified mens rea was intended by the legislature to be a strict liability crime. *Id*. at 605-06. Other than the first factor, the Court of Appeals found that all of the other factors weighed in favor of holding unlawful practice of law to be a strict liability offense. APP 15.

However, this is in error. First, neither the statutory language nor the legislative history demonstrate an intent to create a strict

liability offense, nor does any holding from the common law. *See* RCW 2.48.180; Washington Senate Bill Report, 2001 Reg. Sess. H.B. 1579.

By creating a strict liability offense here , a broad range of behavior could be criminalized, including basic teaching of constitutional rights in school classrooms.[1] Sharing legal forms or computer programs could create criminal liability.[2] The Court of Appeals points to affirmative defenses for some of this conduct like the actions of a realtor, but these defenses do not cover much of what most would consider innocent conduct. APP 12. This factor does not support the Court of Appeals decision.

The Court of Appeals held that the consequences for a conviction are not serious, but this is simply not the case. APP 13. The first conviction is a gross misdemeanor, but subsequent convictions are class C felonies, which carry serious and lifelong consequences. Sara Berson, *Beyond the Sentence – Understanding Collateral Consequences*, National Institute of Justice, NIJ Journal No. 272 (originally posted May 2013);[3] *see also National Inventory of*

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[1] American Constitution Society, *The Constitution in the Classroom*, https://www.acslaw.org/conclass; KCTS9, *Teaching the Constitution*, https://kcts9.pbslearningmedia.org/collection/teaching-the-constitution.

[2] *Contracts, forms and documents*, Thomson Reuters, *Protect the people you love*, Willing.com.

[3] https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx.

Collateral Consequences of Conviction, Justice Center, The Council of State Governments.[4] A person can serve up to five years for a conviction for unlawful practice of law. RCW 2.48.180. This factor weighs in favor of holding that this is not a strict liability crime. *Anderson*, 141 Wn.2d at 364-65 (citing RCW 9A.20.021).

While the Court of Appeals held that the seriousness of the harm also weighs in favor of requiring knowledge, many civil remedies exist to ameliorate this potential. APP 13, *see also State v. Anderson*, 141 Wn.2d 357, 365, 5 P.3d 1247 (2000). Because a court can enjoin persons from practicing law without a license and impose civil penalties for such conduct, this Court should presume that more is required to make the unauthorized practice of law unlawful. GR 24. Requiring knowledge distinguishes this offense from the penalties prohibited under GR 24. This factor does not weigh in favor of making this crime a strict liability offense.

The other factors that the Court of Appeals examined also do not suggest that unlawful practice of law should be a strict liability offense. While the Court of Appeals held otherwise, the fewer expected prosecutions, the more likely intent is required. APP 15, *compare to*

[4] https://niccc.csgjusticecenter.org/

Anderson, 141 Wn.2d at 365. Given that this is the first published opinion on this issue, it is safe to assume the government prosecutes very few people for this offense. Likewise, proving that a person knew they were engaged in the unlawful practice of law does not create a heavy burden on the government, even though the Court of Appeals held otherwise. APP 15, *see Anderson*, 141 Wn.2d at 366.

This Court should accept review. Intent is an essential element of unlawful practice of law. The legislature never intended for unlawful practice of law to be a strict liability offense. The failure of the Court of Appeals to make this finding warrants review. RAP 13.4.

2. The trial court's use of GR 24 to define unlawful practice of law violates the separation of powers doctrine.

The Court of Appeals declined to address whether the trial court's use of GR 24 to define to the jury unlawful practice of law violates the separation of powers doctrine and denied Mr. Yishmael's motion for reconsideration on this issue. APP 9, 18. But this Court has consistently recognized that RAP 1.2(a) is liberally interpreted to promote justice and facilitate decisions of cases on their merits. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709, 592 P.2d 631 (1979) (serving justice is of greater importance than a strict technical interpretation of the rules).

At Mr. Yishmael's trial, the court used GR 24 to define practice of law in its instructions to the jury. And while RCW 2.24.180 makes the unlawful practice of law a crime, this term is not defined in the statute. Instead, the legislature delegated its authority to the judiciary to define this term, through its rule making authority. *See* GR 24; *State v. Janda*, 174 Wn. App. 229, 234, 298 P.3d 751 (2012). The procedure is an unconstitutional delegation of legislative power to the judiciary and violates the separation of powers doctrine.

Separation of power is "one of the cardinal and fundamental principles of the American constitutional system" and a cornerstone of Washington's governmental form. *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988). The doctrine is implicit in our state constitution and arises from "the very division of our government into different branches." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

The authority to define crimes and set punishment rests firmly with the legislature. *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). The legislature cannot constitutionally delegate its legislative authority to the other branches of government. *Amalgamated*

Transit Union Local 587 v. State, 142 Wn.2d 183, 234, 11 P.3d 762 (2001) (citing *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998)).

When the trial court relied on GR 24 to define practice of law to the jurors, it violated the separation of powers doctrine. This constitutes an improper delegation of legislative authority to the judiciary. *State v. Ramos*, 149 Wn. App. 266, 276, 202 P.3d 383 (2009). The question of whether the use of GR 24 violates the separation of powers doctrine satisfies many of the factors this Court considers when determining whether to accept review. RAP 13.4(b). It is a significant question of law under the state and federal constitutions and involves an issue of substantial public interest this Court should address. *Id*. Review should be granted on this issue.

3. Unlawful practice of law is unconstitutionally vague.

At trial, Mr. Yishmael challenged RCW 2.48.180 as unconstitutionally vague. The Court of Appeals held that while the statute fails to define "unlawful practice of law," the court could rely on other doctrines and ordinary usage to hold that the phrase was not vague. APP 6. But this Court has previously held that "practice of law" does not lend itself to an easy definition. *Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 54, 586 P.2d

870 (1978) (hereinafter *Great Western*). This recognition is in conflict with the Court of Appeals holding and warrants review, as do other factors, including that this issue is a significant question of law under the state and federal constitutions and involves an issue of substantial public interest this Court should address. RAP 13.4(b).

The void for vagueness doctrine is rooted in the Fourteenth Amendments guarantee of due process. U.S. Const. amend.XIV; *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972); *State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). The Washington Constitution also grants an accused, in a criminal prosecution, the right "to demand the nature and cause of the accusation against him." Const. art. I, § 22. These constitutional provisions demand that a crime be defined in specific language, so that a citizen may know what conduct the legislature intends to "proscribe, prevent, and punish." *State v. Harrington*, 181 Wn. App. 805, 822, 333 P.3d 410 (2014) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

This Court has long recognized that "practice of law" is a difficult term to define. *State v. Chamberlain*, 132 Wash. 520, 524, 232 P. 337 (1925); *see also Great Western*, 91 Wn.2d at 54 ("practice of

law" does not lend itself easily to a precise definition). This Court adopted GR 24 because the term was so difficult to define. Teglund, 2 Wash. Prac., Rules Practice GR 24. And while the Court of Appeals holds otherwise, GR 24 defines practice of law for purposes of enjoinder and for civil remedies and not for when a person may be prosecuted under RCW 2.48.180.

Even relying on GR 24, it was necessary to have a law professor testify about what this term means. The professor relied on GR 24 to define the term, which the prosecutor then introduced into evidence. RP 480. The prosecution's need for Professor Boerner's testimony demonstrated that "practice of law" is a term of art that is beyond the understanding of the average citizen. *See Watson*, 160 Wn.2d at 6. Without a legislative definition, this term is unconstitutionally vague.

This Court has never examined whether "practice of law" is vague. The Court of Appeals last examined it in *State v. Hunt*, where it held the definition was not vague. 75 Wn. App. 795, 805, 880 P.2d 96 (1994). But *Hunt* relies on disciplinary proceedings and civil matters to make this determination. *Id*. at 802 (citing I*n re Droker and Mulholland*, 59 Wn.2d 707, 719, 370 P.2d 242 (1962); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 586, 675 P.2d 193 (1983);

Hagan & Van Camp, P.S. v. Kassler Escrow, Inc., 96 Wn.2d 443, 446–47, 635 P.2d 730 (1981); *Great Western*, 91 Wn.2d at 54; *Hecomovich v. Nielsen*, 10 Wn. App. 563, 571, 518 P.2d 1081, *review denied*, 83 Wn.2d 1012 (1974). Criminal liability must be distinguished from civil liability, which cannot form the basis for a criminal conviction and no court, before this matter, had ever examined it in that context.

Mr. Yishmael does not argue that GR 24 fails to provide a sufficient definition of what the practice of law constitutes for purposes of civil liability. Instead, Mr. Yishmael asks this Court to accept review of whether the failure to define this vague term in RCW 2.48.180 makes the statute constitutionally defective. This Court should accept review of this significant constitutional question. RAP 13.4(b).

4. The prosecution presented insufficient evidence of unlawful practice of law.

The Court of Appeals held that there was sufficient evidence of unlawful practice of law. APP 15. This Court should accept review of whether this holding is consistent with the requirement that the government must establish all elements of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), RAP 13.4(b). Because although Mr. Yishmael agreed to help people find abandoned homes and attempt to adversely

possess them for a fee, this is not practicing law. It is insufficient to establish guilt under RCW 2.48.180. This Court should grant review to correct this error, which involves a significant question of constitutional law. RAP 13.4(b).

Like Mr. Yishmael, there are many entities that explain legal principles. These include Washington Law Help, which describes itself as a source for "Legal help for Washingtonians who cannot afford a lawyer."[5] Cornell Law School created the Legal Information Institute to provide legal information, including the definition of adverse possession to non-lawyers.[6] Describing legal terms is not the same as practicing law and does not violate RCW 2.48.180. If it were, any person describing a legal principle to another would be guilty of this offense unless they were entitled to practice law or were otherwise exempted from prosecution.

Just as the information Mr. Yishmael provided is not sufficient to establish that he was unlawfully practicing law, neither are the forms he provided. Legal forms are largely available for purchase, online and

[5] Washington Law Help, *Legal help for Washingtonians who cannot afford a lawyer*, https://www.washingtonlawhelp.org/.

[6] Legal Information Institute, *Adverse Possession*, https://www.law.cornell.edu/wex/adverse_possession.

locally. Like Mr. Yishmael, some of these firms provide templates that allow people to generate legal forms with personalized information.[7] And while Professor Boerner described legal practice as providing forms for a fee, this is contrary to the business model of these firms, including institutions like Thomson Reuters, all of whom charge fees for this very service.[8] Such forms can be created easily on the computer for a fee or for free.[9] Providing forms that can be filled out is not practicing law and is an insufficient basis to convict Mr. Yishmael.

Additionally, providing information on houses that might be abandoned is not practicing law. What Mr. Yishmael did was no different from a realtor, except that the listing he provided was not homes for purchase. And like Mr. Yishmael, many established companies provide information on abandoned homes in Washington, including Zillow[10] and Realtor.com.[11]

There are many cases that interpret GR 24, but few that interpret RCW 2.48.180. The only published case interpreting the statute appears

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[7] Legaltemplate, *Legal Documents, Forms, and Templates – Full List*, https://legaltemplates.net/legal-documents-forms/

[8] Thomson Reuter, *Contracts, forms and documents*, http://legalsolutions.thomsonreuters.com/law-products/solutions/legal-forms

[9] Willing.com, *Protect the people you love*, https://willing.com/Washington.

[10] Zillow, *Washington Foreclosures*, https://www.zillow.com/wa/foreclosures/

[11] Realtor.com, *Seattle, WA Real Estate & Homes for Sale*, https://www.realtor.com/realestateandhomes-search/Seattle_WA

to be *State v. Janda*, where the Court of Appeals upheld Mr. Janda's conviction. 174 Wn. App. at 238. Mr. Janda had spent years providing estate planning services, representing himself to be an attorney. *Id*. at 231. Even when he agreed to cease and desist his practice, he did not. *Id*. Mr. Janda created legally binding documents including health care directives, wills, living trusts, and documents necessary to settle estates. *Id*. The victims of his unlawful practice did not learn that he was not an attorney until after he had provided these services. *Id*. Unlike here, Mr. Janda challenged the sufficiency of the evidence charged against him under the theory that RCW 2.48.180 only applied to persons who had once been licensed to practice law. *Id*. at 233-34. This Court denied Mr. Janda relief under this provision. *Id*. at 234-35.

Mr. Yishmael did not engage in the same practices. He did not hold himself out to be an attorney or practice law. He provided forms but did not fill them out. RP 434. Mr. Yishmael was always clear he would not be able to represent any of the people he helped in court because he was not a lawyer. RP 324, 395, 597, 618.

Mr. Yishmael was not practicing law as defined by RCW 2.48.180(2)(a). Unlawful practice, as charged, required the government to prove Mr. Yishmael was a non-lawyer practicing law, or that he held

himself out as entitled to practice law. *Id*. The government failed to prove this essential element. Mr. Yishmael asks this Court to grant review of whether the government presented sufficient evidence of unlawful practice of law.

5. The trial court improperly commented on the evidence when it read GR 24 to the jury in its closing instructions.

The Court of Appeals held that Instruction No. 20, which defined "practice of law" as set forth in GR 24, which is a court-promulgated rule, was not a comment on this evidence. APP 8. But this instruction, which mirrored the testimony of the government's expert witness violated the constitutional prohibition against judges commenting on the evidence. Const. art. IV, § 16.

By adopting the expert witness's definition of unlawful practice of law in the jury instructions, the court essentially resolved a contested factual issue. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

At trial, the prosecution called Professor Boerner to offer his opinion on what constituted unlawful practice of law. RP 99-100. During the course of the professor's testimony, the government introduced GR 24 into evidence. RP 473.

At the conclusion of the evidence, the prosecution proposed a jury instruction that defined practice of law as it is defined in GR 24.

RP 890. Over defense objections, the court determined it would instruct the jury on the definition of law contained in GR 24, determining it was not a comment on evidence. RP 887, 894, CP 552 (Instruction 20).

This definition is not contained in RCW 2.48.180(2)(a). Instead, it was the definition provided by Professor Boerner. RP 99-100. In endorsing the same language the professor used to explain his opinion on the definition of the practice of law, the court improperly commented on a disputed or unsettled question of fact, essentially resolving a factual issue. *Brush*, 183 Wn.2d at 557. At the very least, the court implied that this element of the offense had been met and threw its weight behind the opinions offered by the prosecution's witness. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

The instruction here conflicts with this Court's warning that jury instructions should not be based on case law analyzing whether specific evidence in a particular case was sufficient to satisfy the government's burden of proof. *Brush*, 183 Wn.2d at 558; *see also State v. Sinrud*, 200 Wn. App. 643, 652, 403 P.3d 96 (2017). The language at issue does exactly that. This Court should accept review of whether the trial court's instruction was an unconstitutional comment on the evidence.

F. CONCLUSION

Based on the foregoing, Mr. Yishmael respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 15th day of December 2018.

Respectfully submitted,

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APPENDIX A-B

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NAZIYR YISHMAEL, Appellant.	No. 76802-6-I DIVISION ONE PUBLISHED OPINION FILED: November 26, 2018

BECKER, J. — Appellant Naziyr Yishmael, a nonlawyer, offered a program promoting the use of adverse possession to obtain ownership of houses. In exchange for a fee, Yishmael provided members with advice on adverse possession law, lists of houses in foreclosure, forms to use to make claims of abandonment by the owners, and other services. A jury convicted him of the unlawful practice of law. Affirming the conviction, we conclude the statute defining the crime is not void for vagueness, the instruction defining the practice of law was appropriately taken from a court rule, the practice of law by a nonlawyer is a strict liability offense, and the evidence was sufficient.

FACTS

Before the real estate crash of the late 2000s, Yishmael worked as a realtor. After the downturn, he founded an association and recruited members by offering free seminars with PowerPoint presentations focusing on the legal doctrine of adverse possession. He encouraged members to believe that they

could legally enter vacant homes, claim them as their own, and secure legal title after 7 to 10 years of occupation.

Yishmael charged $7,000 to $8,000 for membership in his association. Members were entitled to receive his advice on adverse possession, including statutes and case law; listings of homes that were apparently abandoned or that had "foreclosure" issues; and legal forms to aid them in making claims of adverse possession. Yishmael promised to stand by and offer guidance if any legal difficulties should arise.

Yishmael was not a lawyer. The advice he provided to association members was largely erroneous, and the legal documents were effectively meaningless.

Yishmael was arrested in April 2016. The State charged him with one count of unlawful practice of law and several counts of theft, attempted theft, conspiracy to commit theft, and offering false instruments for filing or record.

During the course of Yishmael's five-day trial, the State presented the testimony of three former members of his association. When these individuals met Yishmael, they were struggling to pay their monthly rent. Swayed by Yishmael's explanation of adverse possession, they agreed to join his association. They worked out installment plans with Yishmael and began paying membership dues.

The three testified similarly about using a list provided by Yishmael to identify vacant homes they were interested in owning. Yishmael in some cases arranged to have a locksmith change the locks on the selected homes. The

members moved into the homes they had decided to possess. On Yishmael's advice, they posted "no trespassing" signs, filed documents with the recorder's office, and paid for landscaping, repairs, and new appliances. All three testified that they were visited by police officers. Two were arrested. One of them had been offered $1,000 to move out; Yishmael offered to draft a counter-offer for $3,000. Yishmael also advised him on how to deal with the criminal proceedings.

Yishmael's defense focused on challenging the theft charges. The facts supporting the charge of unlawful practice went largely uncontested. The jury convicted Yishmael of the unlawful practice of law and acquitted him on the other charges. He was given a sentence of 364 days in jail, suspended on condition that he spend five days in jail and report for 30 days of a community work program.

ANALYSIS

Vagueness

After the defense rested, Yishmael moved to dismiss the charge of unlawful practice of law on the grounds that the statute defining the crime is void for vagueness. Yishmael contends the trial court erred by denying this motion.

Whether a former, shorter version of RCW 2.48.180 was void for vagueness was considered in State v. Hunt, 75 Wn. App. 795, 801, 880 P.2d 96, review denied, 125 Wn.2d 1009, 889 P.2d 498 (1994). A statute violates Fourteenth Amendment due process protections if it fails to provide a fair warning of proscribed conduct. Hunt, 75 Wn. App. at 801. In analyzing whether a statute is unconstitutionally vague, courts presume that a statute is constitutional; the

burden is on the challenger to prove otherwise beyond a reasonable doubt. Hunt, 75 Wn. App. at 801. Whether a statute is constitutional is reviewed de novo. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

Although some uncertainty is constitutionally permissible, a statute is unconstitutionally vague if (1) it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Hunt, 75 Wn. App. at 801; Spokane v. Douglass, 115 Wn.2d 171, 178-79, 795 P.2d 693 (1990).

The unlawful practice of law is a crime. A single violation is a gross misdemeanor. RCW 2.48.180(3)(a). RCW 2.48.180(2) has five subsections defining various ways in which the crime may be committed. The State charged Yishmael under the first subsection, which states that the unlawful practice of law occurs when a "nonlawyer practices law, or holds himself or herself out as entitled to practice law." RCW 2.48.180(2)(a).

The statute does not define the "practice of law." Yishmael argues that without a statutory definition of what it means to practice law, an average person cannot understand what conduct the statute proscribes and penalizes. But statutes are not read in a vacuum, nor is a statute void for vagueness "merely because some terms are not defined." State v. Harrington, 181 Wn. App. 805, 824, 333 P.3d 410, review denied, 181 Wn.2d 1016, 337 P.3d 326 (2014). When a criminal statute does not define words alleged to be unconstitutionally vague, "the reviewing court may 'look to existing law, ordinary usage, and the general

purpose of the statute' to determine whether 'the statute meets constitutional requirements of clarity.'" Hunt, 75 Wn. App. at 801, quoting State v. Russell, 69 Wn. App. 237, 245, 848 P.2d 743, review denied, 122 Wn.2d 1003, 859 P.2d 603 (1993).

Although it may be difficult to define the "practice of law" precisely, the term is not unconstitutionally vague when existing law and ordinary usage allow an ordinary person to know that RCW 2.48.180 proscribes a defendant's conduct. Hunt, 75 Wn. App. at 803. In Hunt, a man with no formal training referred to himself as a paralegal and provided legal services such as representing clients in negligence actions, conducting settlement negotiations, preparing legal documents and liens, and dispensing legal advice. Hunt, 75 Wn. App. at 797-98. Convicted of unlawful practice, he argued that the statutory phrase "practice law" was unconstitutionally vague. Hunt, 75 Wn. App. at 800. This court rejected his arguments, relying on a number of Washington cases defining the practice of law. Hunt, 75 Wn. App. at 802, citing In re Droker and Mulholland, 59 Wn.2d 707, 719, 370 P.2d 242 (1962); Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wn.2d 48, 54, 586 P.2d 870 (1978); Hecomovich v. Nielsen, 10 Wn. App. 563, 571, 518 P.2d 1081, review denied, 83 Wn.2d 1012 (1974); Hagan & Van Camp, P.S. v. Kassler Escrow, Inc., 96 Wn.2d 443, 446-47, 635 P.2d 730 (1981). The cited cases hold that preparing legal documents and providing legal advice constitute the practice of law. Hunt, 75 Wn. App. at 802. We concluded that the defendant's conduct was clearly proscribed by the definitions in these cases and he could not have

reasonably been surprised by the application of the statute to his activities. Hunt, 75 Wn. App. at 803-04.

In this case Yishmael provided legal advice, distributed purportedly necessary legal documents, gave instructions on how to record the legal documents, and sought to counsel the members of his association through any resulting legal troubles. Although Yishmael compares his behavior to that of teachers and newspaper reporters, his actions went beyond what ordinarily occurs when those professionals talk about law. Ordinary usage, court rules, and case law, including Hunt, were sufficient to warn Yishmael that his conduct constituted the practice of law.

Yishmael attempts to distinguish this case from Hunt by claiming that RCW 2.48.180 infringes upon his First Amendment rights. Because Yishmael's briefing on this point is inadequate to permit meaningful review, we do not consider it. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011). We conclude that as applied to Yishmael's actions, RCW 2.48.180 was not impermissibly vague.

Use of GR 24 to Define the Practice of Law

At trial, the State called David Boerner to testify on the definition of "practicing law." Boerner is a professor emeritus at Seattle University. He contributed to the drafting of GR 24, the general rule defining the practice of law, as set forth by the Washington Supreme Court. The rule was adopted in 2001 and amended in 2002. Boerner testified that the practice of law is defined by GR 24. GR 24 was admitted as evidence. The relevant portion states the following:

> The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:
>
> (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
>
> (2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
>
> (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
>
> (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

GR 24(a).

The State proposed that GR 24 be used to define the practice of law in a jury instruction. At the State's suggestion, and over Yishmael's objection, the trial court used GR 24 to formulate jury instruction 20:

> The "practice of law" means the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which requires the knowledge and skill of a person trained in law. This includes giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration. It also includes the selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).

Yishmael argues that by including language from GR 24 in the jury instruction, the trial court effectively endorsed Boerner's testimony and thereby improperly commented on the evidence.

This court reviews jury instructions de novo, within the context of jury instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A judge may not instruct a jury that matters of fact have been

established as a matter of law. Levy, 156 Wn.2d at 721. But a jury instruction that does no more than accurately state the law pertaining to an issue is not an impermissible comment on the evidence. State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). Here, the disputed instruction provided an accurate definition of practicing law, as set forth by the Washington Supreme Court in GR 24. The fact that Boerner testified about GR 24 did not transform the instruction into a comment on the evidence.

Separation of Powers

For the first time on appeal, Yishmael argues that RCW 2.48.180 is unconstitutional under the separation of powers doctrine. His assignment of error reads as follows:

> The use of GR 24 to define an element of the crime of unlawful practice of law is an improper delegation of legislative authority to the judiciary and violates the separation of power doctrine.

This is an issue statement, not an assignment of error.

A party's assignments of error should include a "separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). Assignments of error enable the reviewing court to pinpoint the time and place in the record at which the trial court allegedly committed error. "Mistakes were made" is not a satisfactory assignment of error.

Yishmael's assignment of error raises the separation of powers doctrine as an abstract issue without specifying an error committed by the trial court. He might be challenging jury instruction 20, or he might be challenging the statute.

He alleges an improper delegation of legislative authority, but does not say who did the delegating. By not assigning error to a specific decision made by the trial court, Yishmael avoids acknowledging that he did not present the issue of separation of powers to the trial court for a decision. He also avoids the responsibility of explaining why he is entitled to raise the issue for the first time on appeal.

As a general rule, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a). There is an exception for manifest error affecting a constitutional right. RAP 2.5(a). "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "'manifest,'" allowing appellate review." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995). Yishmael does not attempt to make this showing.

As a result of Yishmael's failure to make a proper assignment of error, his discussion of separation of powers is not susceptible to appellate review. The separation of powers issue is not properly before this court and we decline to address it.

Absence of Mens Rea Element

Of the five subsections defining the various ways the crime may be committed, three contain a knowledge element:

> (2) The following constitutes unlawful practice of law:
> (a) A nonlawyer practices law, or holds himself or herself out as entitled to practice law;

> (b) A legal provider holds an investment or ownership interest in a business primarily engaged in the practice of law, *knowing* that a nonlawyer holds an investment or ownership interest in the business;
> (c) A nonlawyer *knowingly* holds an investment or ownership interest in a business primarily engaged in the practice of law;
> (d) A legal provider works for a business that is primarily engaged in the practice of law, *knowing* that a nonlawyer holds an investment or ownership interest in the business; or
> (e) A nonlawyer shares legal fees with a legal provider.

RCW 2.48.180(2) (emphasis added). The first subsection, under which Yishmael was charged, does not specify a required mens rea. RCW 2.48.180(2)(a).

Yishmael proposed a jury instruction requiring the State to prove that he "knowingly" practiced law. The trial court ruled that the word "knowingly" would not be used in the instruction because it was not used in RCW 2.48.180(2)(a). Yishmael contends the trial court erred by rejecting his proposed instruction.

Whether a mental element is an essential element of a crime is a matter to be determined by the legislature. Criminal offenses with no mens rea are generally disfavored. State v. Bash, 130 Wn.2d 594, 606, 925 P.2d 978 (1996). Bash sets forth eight factors for consideration by a court when determining whether an offense without a specified mens rea was intended by the legislature as a strict liability crime:

> (1) a statute's silence on a mental element is not dispositive of legislative intent; the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) and the harshness of the penalty. Other considerations include: (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it

> important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected.

Bash, 130 Wn.2d at 605-06, quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.8, at 341-44 (1986).

To find legislative intent to impose strict liability, it is not necessary that all Bash factors are aligned. See State v. Burch, 197 Wn. App. 382, 399, 389 P.3d 685 (2016), review denied, 188 Wn.2d 1006, 393 P.3d 356 (2017) (concluding that vehicular homicide under the influence of alcohol or drugs is a strict liability offense even though the Bash factors do not all point in that direction).

With respect to the unlawful practice of law as charged against Yishmael, neither party identifies guidance found in the common law. This first Bash factor does not favor or disfavor strict liability.

The second Bash factor looks at whether the crime is a public welfare offense. Public welfare offenses, regulatory in nature, are often upheld as strict liability crimes. Bash, 130 Wn.2d at 607. They typically share certain characteristics:

> (1) they regulate "dangerous or deleterious devices or products or obnoxious waste materials;" (2) they "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare;" and (3) they depend on no mental element but consist only of forbidden acts or omissions.". . .
>
> Public welfare statutes render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." Thus, under such statutes, "a defendant can be convicted even though he was unaware of the circumstances of his conduct that made it illegal."

Staples v. United States, 511 U.S. 600, 628-29, 114 S. Ct. 1793, 1809, 128 L. Ed. 2d 608 (1994) (citations omitted). "Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." Morissette v. United States, 342 U.S. 246, 255-56, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

Case law and commentary indicate that RCW 2.48.180(2)(a) is a public welfare offense. "The unauthorized practice of law is prohibited to protect the public." Hunt, 75 Wn. App. at 803. "Defining 'the practice of law' lies at the heart of any effort to protect the public from untrained and unregulated persons who hold themselves out as able to offer advice and counsel in matters customarily performed by lawyers." 2 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE GR 24 drafters' cmt. at 105 (8th ed. 2014). We conclude RCW 2.48.180(2)(a) is a public welfare offense. This factor weighs in favor of strict liability.

The third factor considers whether strict liability would encompass seemingly innocent conduct. Yishmael argues that the lack of a mens rea element exposes professionals such as teachers and realtors to liability, but he does not explain how their normal professional conduct would come within the definition of practicing law. In addition, RCW 2.48.180(7) provides an affirmative defense for conduct authorized by a professional license:

> In a proceeding under this section it is a defense if proven by the defendant by a preponderance of the evidence that, at the time of the offense, the conduct alleged was authorized by the rules of professional conduct or the admission to practice rules, or Washington business and professions licensing statutes or rules.

Providing an affirmative defense ameliorates the harshness of a strict liability crime. State v. Deer, 175 Wn.2d 725, 735, 287 P.3d 539 (2012), cert. denied, 568 U.S. 1148, 133 S. Ct. 991, 184 L. Ed. 2d 770 (2013). The third factor weighs in favor of strict liability.

The harshness of the penalty is the fourth factor. "'Other things being equal, the greater the possible punishment, the more likely some fault is required; and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault.'" Bash, 130 Wn.2d at 608-09, quoting 1 LAFAVE & SCOTT § 3.8, at 343. There is no bright line rule for when a punishment is severe enough to weigh against strict liability, but courts have hinted that punishing an offense as a felony is incompatible with strict liability. Bash, 130 Wn.2d at 609. In this case, a single violation is a gross misdemeanor. It is true that subsequent violations are punishable as Class C felonies under RCW 2.48.180(3)(b), but if there are subsequent violations, the offender has already learned from the first prosecution that the unauthorized practice of law is a criminal offense. This fourth factor weighs in favor of strict liability.

The fifth factor looks at the seriousness of harm to the public. The potential harm of the unlawful practice of law is significant. The drafters' comments to GR 24 state that the "public has no recourse for poor, illegal, or negligent performance" of legal services by a nonlawyer. 2 TEGLAND, supra, at 105. Yishmael's "clients" were in some cases arrested, all were exposed to potential felony charges as a result of following his advice, and the rightful

owners of properties selected for the scheme experienced property losses and criminal trespass. This factor weighs in favor of strict liability.

The sixth factor is the ease or difficulty of the defendant ascertaining the true facts. GR 24 is a publicly available court rule defining the practice of law. It would not have been difficult for Yishmael to read it and learn that the services he was offering constituted the practice of law. This factor weighs in favor of strict liability.

Yishmael testified that he did read RCW 2.48.180 before beginning his adverse possession program and concluded that what he planned to do would not violate the statute. He said he understood that practicing law was "assisting someone with court documents and representing them in court." He now argues that the State should be required to prove he knew his services constituted the practice of law. This argument illustrates the significance of the seventh factor, which considers the difficulty of proving intent. In the face of Yishmael's testimony that he subjectively interpreted the statute as not being a bar to his conduct, it would have been difficult for the State to prove that he practiced law knowingly. See State v. Mertens, 148 Wn.2d 820, 830, 64 P.3d 633 (2003) (commercial fishing without a license is a strict liability crime; if proof of intent were required, a defendant could easily evade conviction by claiming noncommercial intent, thereby circumventing personal daily limits and potentially placing undue pressure on natural resources). The seventh factor weighs in favor of strict liability.

The final factor looks at the number of prosecutions. There are few appellate opinions on the criminal prosecution of unlawful practice of law. It is reasonable to infer that criminal prosecutions for this offense are rare. This factor weighs in favor of strict liability.

Taken together, the Bash factors support the conclusion that the legislature intended a nonlawyer's practice of law to be a strict liability crime. The legislature's decision to use the words "knowing" and "knowingly" in subsections (b), (c), and (d) of RCW 2.48.180(2), but not in subsection (a), is further evidence of that intent. See Mertens, 148 Wn.2d at 826 (statute listed five alternative means, only one of which contained a mens rea element, the other four were strict liability crimes). "When drafting a statute, if the Legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred." Matter of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994). Had the legislature intended to limit punishment to nonlawyers who *knowingly* practice law, the legislature clearly would have done so.

We conclude that the practice of law by a nonlawyer is a strict liability offense. The trial court properly refused Yishmael's request to require the State to prove that he "knowingly" practiced law.

Sufficiency of the Evidence

Yishmael challenges the sufficiency of the evidence underlying his conviction. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, a rational trier

of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Yishmael was charged under the first subsection of the relevant statute, which states that the unlawful practice of law occurs in two circumstances: when a nonlawyer practices law, or when a nonlawyer holds himself or herself out as entitled to practice law. RCW 2.48.180(2)(a). Yishmael emphasizes that he did not hold himself out to be an attorney.

Although the information originally charged Yishmael both with practicing law and with holding himself out as a lawyer, the trial court granted Yishmael's motion to dismiss the holding out charge. The court did not include it in the jury instructions and ordered the parties not to argue about whether Yishmael held himself out as a lawyer. Thus, Yishmael was convicted only for practicing law as a nonlawyer. The evidence was sufficient to support that conviction.

STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds, Yishmael argues that RCW 2.48.180(1)'s definition of nonlawyer is confusing. The statute defines nonlawyer as:

> "Nonlawyer" means a person to whom the Washington supreme court has granted a limited authorization to practice law but who practices law outside that authorization, *and* a person who is not an active member in good standing of the state bar, including persons who are disbarred or suspended from membership.

RCW 2.48.180(1)(b) (emphasis added). Yishmael claims the emphasized "and" is a qualifier to the overall definition, not a separate definition. This argument is inconsistent with this court's previous holding that the definition specifies two

categories of nonlawyers, not one. State v. Janda, 174 Wn. App. 229, 234, 298 P.3d 751 (2012), cert. denied, 571 U.S. 881, 134 S. Ct. 221, 187 L. Ed. 2d 144 (2013). Yishmael was convicted as a nonlawyer under a definition that a nonlawyer "means a person who is not an active member in good standing of the state bar." RCW 2.48.180(1)(b).

The conviction is affirmed.

Becker, J.

WE CONCUR:

Andrus, J.

Mann, ACJ.

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

STATE OF WASHINGTON, Respondent, v. NAZIYR YISHMAEL, Appellant.	No. 76802-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Naziyr Yishmael has filed a motion for reconsideration of the opinion filed on November 26, 2018. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Becker, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76802-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: January 15, 2019
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

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