

66867-6

66867-6

NO. 66867-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERRY PERKINS,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove each element of assault in the second degree beyond a reasonable doubt, depriving Mr. Perkins of his Fourteenth Amendment right to due process.

2. Mr. Perkins was denied his right to a unanimous jury verdict.

3. Instruction 15 relieved the State of its burden to prove every element of the offense of second degree assault beyond a reasonable doubt and violated Jerry Perkins's right to due process under the Fourteenth Amendment.

4. The trial court violated Mr. Perkins's Sixth and Fourteenth Amendment right to a jury trial.

5. The trial court denied Mr. Perkins the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington constitution, by finding the facts necessary to sentence him as a persistent offender, rather than allowing a jury to do so.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The United States and Washington Constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. To convict Mr. Perkins of second degree assault, the State had to prove he inflicted substantial bodily injury on Mr. Hedgcoth. Must Mr. Perkins's conviction for assault in the second degree be reversed and dismissed where the evidence did not establish that Mr. Hedgcoth suffered any impairment or loss of any bodily function, or that his injuries were even caused by the incident on the night in question?

2. A criminal defendant has a right guaranteed by the Washington Constitution to a verdict by a unanimous jury. Where the prosecution charges multiple acts which could constitute the single charged crime, the trial court is required to instruct the jury on the requirement of unanimity. Where the evidence showed two distinct acts of taking from the victim, did the court err in failing to give a unanimity instruction?

3. Where a jury is instructed that proof of one element conclusively establishes another, the State is relieved of its burden of proof and the defendant is denied the process due under the Fourteenth Amendment. In a prosecution for second degree

assault, where the State alleged Mr. Perkins intentionally assaulted another and thereby recklessly caused injury, was the State relieved of its burden of proof when the jury was instructed that the proof of intent necessarily proves recklessness?

4. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Perkins's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

5. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In

certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate Equal Protection?

C. STATEMENT OF THE CASE

Jerry Perkins and John Hedgcoth had known each other since childhood. 2/23/11 RP 39-42.<sup>1</sup> Mr. Hedgcoth was a known crack-user from the neighborhood, and he had purchased drugs from Mr. Perkins's friend, Alexander "Primo" Hinojosa. Id. at 43. Mr. Hedgcoth also owed money to Mr. Perkins. Id. at 42.

On November 6, 2011, Mr. Hedgcoth stopped to pick up food at McDonald's, when Primo invited him to come by his house to have a beer. 2/23/11 RP 45-47. When he arrived, Mr. Hedgcoth

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<sup>1</sup> The verbatim report of proceedings consists of two volumes of consecutively paginated proceedings, with separate report for the date of sentencing. The proceedings will be referred to herein by date.

was hit on the back of the head by Shawn Godwin – an individual he also knew since childhood – and was then jumped from behind by Primo. Id at 48-50. Mr. Hedgcoth lost consciousness for a minute, but awoke to see Mr. Perkins already in the room, asking for the money owed him. Id. at 50. According to Mr. Hedgcoth, Mr. Perkins hit him once in the nose, but any kicking and additional injuries were inflicted by Mr. Godwin and Primo. Id. at 53-54.

Mr. Hedgcoth drove himself to the hospital and was treated for a broken nose, a non-concussive head-wound, an abrasion, and a puncture wound to the arm. 2/23/11 RP 5. Mr. Hedgcoth noted that any trouble with his nose is due to his early years as an amateur boxer, not by this incident. Id. at 60. He also left the hospital against medical advice, shortly after his arrival, and refused to give a urine specimen. Id. at 7-9.

Mr. Perkins was charged with Robbery in the First Degree and Assault in the Second Degree. CP 34-35. Although he was alleged to have committed these crimes with a deadly weapon, specifically a knife, Mr. Hedgcoth had no clear recollection at trial of Mr. Perkins possessing a knife. 2/23/11 RP 51-52, 58-59. The

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State subsequently agreed to remove the “deadly weapon” language from the jury instructions. Id. at 75-77.

A jury acquitted Mr. Perkins of Robbery in the First Degree but convicted him of Assault in the Second Degree. CP 23, 24.

Over defense objection, he was sentenced as a persistent offender to life without the possibility of parole. CP 4-14.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT JERRY PERKINS OF ASSAULT IN THE SECOND DEGREE.

a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt. A criminal defendant has the right to a jury trial and may only be convicted if the State proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi, 530 U.S. at 476-77.

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State failed to prove Mr. Perkins inflicted substantial bodily harm. Although the State initially attempted to prove that Mr. Perkins's actions were responsible for a stab wound, the State's later withdrawal of all "deadly weapon" language from jury instructions indicates an intention to rely on the injury to Mr. Hedcoth's nose instead. 2/23/11 RP 75-77.<sup>2</sup>

In Jury Instruction 17, substantial bodily harm was defined as follows:

"Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

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<sup>2</sup> See Section 2 for the Petrich issue raised by this decision.

Supp. CP\_\_\_\_, sub. no. 35 (Instruction 17).

Even in the light most favorable to the State, the evidence fails to establish that Mr. Hedgcoth suffered substantial bodily harm caused by this incident. "'Substantial' as used in RCW 9A.36.021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." State v. McKague, \_\_Wn.2d \_\_ (Slip Op. 85657-5, October 6, 2011).

Mr. Hedgcoth testified that he was hit on the back of the head by Shawn Godwin and was then jumped from behind by Primo. 2/23/11 RP 48-50. Although Mr. Hedgcoth says he momentarily lost consciousness, he suffered no substantial pain or lasting impact from this event. Id. at 60. Mr. Hedgcoth testified that he had been a boxer for many years, and he told police detectives the same. 2/22/11 RP 63-65; 2/23/11 RP 60. It is impossible to determine whether the proximate cause of the fracture suffered by Mr. Hedgcoth was the incident on November 6<sup>th</sup> or the years as an amateur boxer.

Mr. Hedgcoth, an admitted crack cocaine user, remained at the hospital just long enough to partake in some IV-narcotics,

misinforming the hospital staff that he did not know the identities of those with whom he had fought. 2/23/11 RP 5, 7-8. He fled the hospital against medical advice when he realized that he would need to give a urine specimen or be catheterized. Id. 7-9.<sup>3</sup>

In sum, according to the emergency room doctor who treated the complainant, the non-displaced fracture in Mr. Hedgcoth's nose required no follow-up treatment. 2/23/11 RP 5-6, 60. According to the same ER doctor, the head injury did not result in a concussion. Id. at 5. And according, once again, to this ER doctor, there was inconclusive evidence of a stab wound. Id. at 5.

In its best light, the State's evidence proved that Mr. Perkins participated in an assault on Mr. Hedgcoth. The State did not establish, however, that Mr. Hedgcoth suffered substantial bodily harm. By entering a conviction in the absence of proof beyond a reasonable doubt of each element, the trial court violated Mr. Perkins's Fourteenth Amendment right to due process.

c. The prosecution's failure to prove all essential elements requires reversal. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221.

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<sup>3</sup> Mr. Hedgcoth told a nurse's aide that the police had best find his

The Fifth Amendment's Double Jeopardy Clause bars retrial of a case such as this, where the State fails to prove an essential element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Because the State failed to prove the element that Mr. Perkins inflicted substantial bodily harm, the Court must reverse the conviction. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. MR. PERKINS WAS DENIED HIS CONSTITUTIONALLY PROTECTED RIGHT TO A UNANIMOUS JURY WHEN THE COURT FAILED TO INSTRUCT THE JURY IT HAD TO BE UNANIMOUS AS TO THE ACT CONSTITUTING THE ASSAULT

- a. A defendant may only be convicted by a unanimous jury. A criminal defendant has a constitutional right to a jury trial and a corresponding constitutional right that the jury be unanimous as to their verdict. Const. art. I, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Thus, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State

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assailants before he did, as he had a .9 mm handgun. 2/22/11 RP 75.

v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Where the State charges one count of criminal conduct and presents evidence of more than one criminal act, to ensure jury unanimity, the State must elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 569, 683 P.3d 173 (1984).

Lack of assurance that a verdict was unanimous is a manifest error that can be raised for the first time on appeal. State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993). Thus, the fact there was no objection or challenge by Mr. Perkins at trial does not preclude this challenge.

b. The State neither elected the act upon which it relied, nor did the trial court instruct the jury on unanimity. The State was never entirely clear on its theory, but seemed to argue that Mr. Perkins was either the principal or an accomplice in both the taking of Mr. Hedgcoth's money and in the assault. Since the jury acquitted Mr. Perkins of the robbery, the focus here must remain on the assault.

The State produced evidence of two specific and separate assaultive acts allegedly constituting assault in the second degree:

the conduct resulting in a fractured nose and the conduct resulting in a puncture wound to the arm. Indeed, the State initially presented its case as a stabbing – the amended information informed the jury that, as to both counts, Mr. Perkins had been armed with a deadly weapon, specifically, a knife. CP 34-35. Photographs of two knives seized from the location of the incident were introduced as exhibits during the trial, without objection. 2/23/11 RP 17-19. At trial, however, Mr. Hedgcoth seemed unable to clearly recall whether Mr. Perkins had a knife, recanting this part of the accusation. Id. at 51-52, 58-59.

Once the State had rested, the deputy prosecutor acknowledged, “Clearly, I was not expecting that testimony,” but proposed eliminating the “deadly weapon” language from the jury instructions, suggesting otherwise it would be unclear how the jury had rendered its verdict. 2/23/11 RP 75. This was done. This proposal, however, was inadequate to cure the Petrich problem.

In closing argument, the prosecutor argued only the fractured nose as evidence of the assault. 2/23/11 RP 82-87.

Given the State’s proof and discussion of the two acts at trial and the resulting closing argument by the State which failed to elect the act which constituted the assault, a Petrich instruction

requiring jury unanimity was required. The failure to so instruct was error.

c. The two acts of assault presented by the State were not a continuous course of conduct. The Petrich rule applies only when the State presents evidence of “several distinct acts”. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989), quoting Petrich, 101 Wn.2d at 571. It does not apply when the evidence indicates a “continuous course of conduct”. Id. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Handran, 113 Wn.2d at 17; State v. Doogan, 82 Wn. App. 185, 191, 917 P.2d 155 (1996). When the evidence involves conduct at different times and places, it tends to show several distinct acts. Handran, 113 Wn.2d at 17, citing Petrich, 101 Wn.2d at 571; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). However, when the evidence shows that a defendant engaged in a series of actions intended to achieve the same objective, the inference is those actions constituted a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

Here there were allegedly two distinct acts, separate from one another. The first was an assault resulting in Mr. Perkins punching Mr. Hedgcoth in the nose. 2/23/11 RP 51-54. The second assault, initially alleged by Mr. Hedgcoth and then partially recanted, involved a puncture wound to his right arm. Id. at 5. This was a separate attack, and it was unclear who wielded the weapon. Id. at 51, 58-59.

This was not a continuous course of conduct but two distinct acts, and simply eliminating the “deadly weapon” language of the instruction, without providing the jury with additional directive, was inadequate.

d. The error in failing to instruct the jury on unanimity was not harmless. When a trial court abridges a right guaranteed by the United States Constitution, the jury’s verdict will be affirmed only if the error was “harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

When the State fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error. The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.

Kitchen, 110 Wn.2d at 411.

Petrich error is presumed to be prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411, quoting State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985), review denied, 105 Wn.2d 1011 (1986).

Here, the jury had no guidance as to which act constituted the assault, particularly given the posture of the case following the reading of the amended information and opening statements. CP 34-35; 2/22/11 RP 17. Given this, the error in failing to give a Petrich instruction was not harmless, as the verdict failed to guarantee that all of the jurors were unanimous on which act by Mr. Perkins constituted the assault in the second degree. This Court must reverse Mr. Perkins's conviction and remand for a new trial.

3. INSTRUCTION 15 CREATED A MANDATORY PRESUMPTION ON THE ISSUE OF RECKLESSNESS, RELIEVING THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF SECOND DEGREE ASSAULT AND DEPRIVING MR. PERKINS OF DUE PROCESS.

a. A jury instruction which creates a mandatory presumption violates the Due Process Clause of the Fourteenth Amendment. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely, 542 U.S. at 300-01; Apprendi, 530 U.S. at 476-77; Green, 94 Wn.2d at 220-21. The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77; U.S. Const. amends. 6 & 14.

To convict Mr. Perkins of second degree assault, the State was required to prove he intentionally assaulted Mr. Hedgcoth and “thereby recklessly inflict[ed] substantial bodily harm.” RCW 9A.36.021 (1)(a). Supp. CP\_\_\_\_, sub. no. 35 (Jury Instruction 13).

Jury Instruction 15 created a mandatory presumption, providing that if the jury found Mr. Perkins intentionally or knowingly assaulted Mr. Hedgcoth, he necessarily “recklessly inflict[ed]

substantial bodily harm” upon Hedgcoth. That presumption improperly relieved the State of its obligation to prove the second element of this crime in violation of Mr. Perkins’s right to due process.

A mandatory presumption is a presumption, created by jury instructions, that requires the jury “to find a presumed fact from a proven fact.” State v. Hayward, 152 Wn. App. 632, 642, 126 P.3d 354 (2009) (citing State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 966 (1996)). A mandatory presumption exists if a reasonable juror would interpret the presumption to be mandatory. Sandstrom v. Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Hayward, 152 Wn. App. at 642.

Such presumptions violate a defendant’s right to due process because they relieve the State’s of its obligation to prove every element of a charged crime. Sandstrom, 442 U.S. at 522 (citing Morissette v. United States, 342 U.S. 246, 274-75, 72 S.Ct. 240, 96 L.Ed. 288 (1952)) (impermissible presumption in jury instructions conflicts with presumption of innocence for each element of charged crime)); Hayward, 152 Wn. App. at 642 (citing State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)); Deal, 128 Wn.2d at 699. A reviewing court must examine the jury instructions as a whole to

determine if the mandatory presumption unconstitutionally relieves the State's obligation. Deal, 128 Wn.2d at 701; State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

b. Instruction 15 created an improper mandatory presumption. The court's "to convict" instruction accurately defined the elements of assault in the second degree as:

(1) That on or about the 7<sup>th</sup> day of November, 2010, the defendant, or an accomplice, intentionally assaulted John Hedgecoth;<sup>4</sup>

(2) That the defendant, or an accomplice, thereby recklessly inflicted substantial bodily harm on John Hedgecoth; and

(3) That this act occurred in the State of Washington.

Supp. CP \_\_\_\_, sub. no. 35 (Jury Instruction 13), compare RCW 9A.36.021. The jury was further instructed: "When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result." Supp. CP \_\_\_\_, sub. no. 35 (emphasis added) (Jury Instruction 15).

A reasonable juror who found that Mr. Perkins intentionally assaulted Mr. Hedgcoth (element one) would understand Instruction 15 to mean that the 'recklessness element' (element two) was also

automatically established, because Mr. Perkins had “act[ed] intentionally or knowingly.” See Supp. CP\_\_\_\_, sub. no. 35 (Jury Instruction 15). This confusion would naturally arise because Jury Instruction 15 does not inform the jury that the ‘intentional act’ must be specifically related to the second element of recklessness.

Moreover, Jury Instruction 13, the “to-convict,” treated the intentional assault and the reckless causing of injury as a single element, thereby collapsing the distinction between these two aspects of second degree assault. Supp. CP\_\_\_\_, sub. no. 35. Jury Instruction 15 thus created a mandatory presumption. Sandstrom, 442 U.S. at 514; Hayward, 152 Wn. App. at 642, citing Deal, 128 Wn.2d at 701.

This conclusion is precisely the result this Court recently reached in Hayward, 152 Wn. App. at 640. Just as in the present case, the first two elements in the “To Convict” in Hayward’s provided:

- (1) That on or about the 25<sup>th</sup> day of March, 2007, the Defendant intentionally assaulted [the victim];
- (2) That the Defendant thereby recklessly inflicted substantial bodily harm on [the victim].

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<sup>4</sup> Mr. Hedgcoth’s name is spelled with no “e” in the Verbatim Report of Proceedings.

152 Wn. App. at 640. The instructions stated further: “Recklessness also is established if a person acts intentionally.” Id. This Court found the instructions created a mandatory presumption which:

conflated the intent the jury had to find regarding Hayward’s assault against [the victim] with a [sic] intent to cause substantial bodily harm required by the recklessness mental state into a single element and relieved the State of its burden of proving [the defendant] recklessly inflicted substantial bodily harm.

Id., at 645 (internal citations omitted). The Court concluded:

Without language limiting the substituted mental states (here, intentionally) to the specific element at issue (here, infliction of substantial bodily harm), as required by RCW 9A.08.010(2) and revised WPIC 10.03 (2008), [the jury instructions] violated [the defendant’s] constitutional right to due process by creating a mandatory presumption and relieved the State of its burden to prove [the defendant] recklessly (or intentionally) inflicted substantial bodily harm.”

Id. at 646.<sup>5</sup>

The instructions in Hayward are similar to those in the present case. Both instructions state that ‘recklessness’—or the ‘recklessness element’—is “established if a person acts intentionally”. Furthermore, neither instruction specifies that

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<sup>5</sup> The language of RCW 9A.08.010 (2) does not limit the substituted mental states (‘intent’ or ‘knowledge’) to a specific element of a crime. However, RCW 9A.08.010(2) does not exist within the confines of a specific crime and could not, therefore, specify which element ‘intent’ must relate to. More importantly, this Court recognized in Hayward that RCW 9A.08.010(2) clearly

“intention” must be related to the element at issue. Just as in Hayward, Instruction 15 violated Mr. Perkins’s right to due process.

This Court reached a contrary result in State v. Holzkecht, 157 Wn. App. 754, 765, 238 P.3d 1233 (2010) “respectfully disagree[ing]” with Hayward. The Holzkecht Court relied in part on a plurality decision in State v. Sibert, 168 Wn.2d 306, 316, 230 P.3d 142 (2010), a drug possession case, which found that defining knowledge to include acting intentionally did not create an improper presumption. Sibert is inapposite to the issue in the case at bar, since the only mens rea required for drug possession is knowledge of the possession of the drug and the Court found no possibility that the jury misunderstood the mens rea element when the to-convict instructions did not mention any other mens rea. 168 Wn.2d at 316.

On the other hand, assault in the second degree contains and requires the mens rea of intent and recklessness. Supp. CP \_\_\_, sub. no. 35. The Hayward Court correctly analyzed the confusion resulting from the jury being told that proof of intent necessarily proves recklessness.

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intends to “limit[] the substituted mental states...to the specific element at issue.” Hayward 152 Wn. App at 646.

Because the conclusive presumption required the jury to find the second element was established whenever the first was, the State was relieved of its obligation to prove all elements of assault in the second degree. This violated Mr. Perkins's right to due process. U.S. Const. amend 14; Sandstrom, 442 U.S. at 520 (citing In re Winship, 397 U.S. at 364; Hayward, 152 Wn. App. at 642; Deal, 128 Wn.2d at 699. This Court should thus hold that Jury Instruction 15 violated Mr. Perkins's right to due process.

c. This Court must reverse Mr. Perkins's sentence. A constitutional error is presumed prejudicial unless the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24; Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Applied to instructions which create a mandatory presumption, this standard requires reversal unless the error was "unimportant in relation to everything else the jury considered on the issue in question..." Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), overruled in part on other grounds, Estelle v. McGuire, 502 U.S. 62, 73 n.4, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). To make this determination, a court must engage in two-step analysis.

First, it must ask what evidence the jury actually considered in reaching its verdict. . . [I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy Chapman's reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under Chapman is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in Chapman's words, that the presumption did not contribute to the verdict rendered

Yates, 500 U.S. at 404-05. Thus, a reviewing court evaluating prejudice cannot rely on evidence drawn from the entire record "because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." Id., at 405-06.

Here, the effect of the presumption was not "comparatively minimal." The presumption narrowed the jury's focus so as to leave it questionable that a reasonable juror would look to anything

but the evidence establishing the predicate fact in order to infer the fact presumed. Id., at 405-06. Instruction 15 told the jury that if they found Mr. Perkins had a mens rea of intent he also necessarily had acted recklessly. Supp. CP\_\_\_\_, sub. no. 35. The instruction did this without limitation of which acts those mens rea were to apply to; i.e., jurors could presume guilty knowledge from proof of *any* intentional act. Id. A straightforward application of the instruction would require jurors to conclude that if it concluded Mr. Perkins had intentionally assaulted Mr. Hedgcoth, and Hedgcoth was injured, Mr. Perkins necessarily did so recklessly.

The absence of a limitation on which intentional act the jury could rely upon to find recklessness makes it impossible to know what act the jury relied upon, much less whether that act was independent of the predicate for presumption. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence on the question. Under Yates and Chapman, the State cannot show the presumption was harmless beyond a reasonable doubt; i.e., that it did not contribute to the verdict obtained in this case.

4. MR. PERKINS WAS DENIED HIS RIGHT TO DUE PROCESS WHEN THE TRIAL COURT IMPOSED A SENTENCE OVER THE MAXIMUM TERM BASED UPON PRIOR CONVICTIONS THAT WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT

The trial court denied Mr. Perkins the right to have a jury determine beyond a reasonable doubt that he had two prior convictions for most serious offenses, and instead made that determination on its own and only by a preponderance of the evidence. Mr. Perkins's sentence as a persistent offender therefore deprived him of his Sixth and Fourteenth Amendment rights to due process and to a jury trial on this issue, and must be vacated.

a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence. The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. It is axiomatic a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely, 542 US. at 300-01; Apprendi, 530 U.S. at 476-77;

Winship, 397 U.S. at 364; Green, 94 Wn.2d at 220-21. The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.’”

Apprendi, 530 U.S. at 476-77, quoting Gaudin, 515 U.S. at 510.

In recent cases, the Supreme Court has recognized this principle applies not just to the essential elements of the charged offense, but also extends to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant. In Blakely, the Court held that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, 542 U.S. at 304-05. Likewise, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey’s “hate crime” legislation unconstitutional because it permitted a court to give a sentence above the statutory maximum after making a

factual finding by a preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. Ring pointed out the dispositive question is one of substance, not form. "If a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

b. This issue is not controlled by prior federal decisions. Almendarez-Torres v. United States held recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Almendarez-Torres pleaded guilty and admitted his prior convictions, but argued that his

prior convictions should have been included in the indictment. 523 U.S. at 227-28. The Court concluded the prior conviction need not be included in the indictment because (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range and judges have typically exercised their discretion within a permissive range, and (4) the statute did not change a pre-existing definition of the crime; thus Congress did not try to "evade" the Constitution. Id. at 244-45.

Almendarez-Torres, however, expressed no opinion as to the constitutionally-required burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. Id. at 246.

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Apprendi distinguished Almendarez-Torres because that case only addressed the indictment issue. 530 U.S. at 488, 495-

96. Apprendi noted “it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. Id.

In Blakely, Apprendi, and Jones, the Court stated that, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the Apprendi rule. Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. 530 U.S. at 499.

Rather than focusing on whether something is a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. Id. at 499-519; accord, Ring v. Arizona, 536 U.S. 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute call them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing Ring), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). The Washington Supreme Court, however, has felt obligated to “follow” Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds.

Moreover, the Blakely decision makes clear that the Supreme Court's protection of due process rights extends to sentencing factors that increase a sentence, not over the statutory maximum provided at RCW 9A.20.021, but over the statutory standard sentence range, a decision not anticipated by the Washington courts. Blakely, 542 U.S. at 305.

Further, the reasons given by Almendarez-Torres to support its conclusion that due process does not require prior convictions used to enhance a sentence to be pled in the information do not apply to the Persistent Offender Accountability Act (POAA). First, Almendarez-Torres looked to the legislative intent and found that Congress did not intend to define a separate crime. But Congressional intent does not set the parameters of due process.

Here, the initiative places the persistent offender definition within the sentencing provisions of the SRA, thus evincing a legislative intent to create a sentencing factor. This is in stark contrast to the prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940).

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Mr. Perkins's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. This Court should revisit Washington's blind adherence to that now-disfavored decision and remand for a jury determination of the prior convictions.

c. The trial court denied Mr. Perkins his right to have a jury determine by a reasonable doubt the facts establishing his maximum punishment. Almendarez-Torres held prior convictions need not be pled in the information for several reasons. First, the court held that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 118 S.Ct. at 1230. Historically, however, Washington required jury determination of prior convictions prior to sentencing as a habitual offender. State v. Manussier, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement): Furth, 5 Wn.2d at 18. Likewise, many other states' recidivist statutes provide for proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass.

Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

For several reasons, Almendarez-Torres does not answer the question whether Mr. Perkins was entitled to have a jury decide beyond a reasonable doubt whether he had two prior convictions for most serious offenses before he could be sentenced as a persistent offender. The cases cited by Almendarez-Torres support not pleading the prior convictions until after conviction on the underlying offense; they do not address the burden of proof or jury trial right. 523 U.S. at 243-45.

Second, Almendarez-Torres noted the fact of prior convictions triggered an increase in the maximum permissive sentence. “[T]he statute’s broad permissive sentencing range does not itself create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 118 S.Ct. at 1231-32. Here, in contrast, Mr. Perkins’s prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Life without the possibility of parole in Washington is reserved for aggravated murder and persistent offenders. This fact is important in the constitutional analysis.

The SRA eliminated a sentencing court's discretion in imposing the mandatory sentence under the POAA, requiring the life sentence be based on a judge's finding regarding sentencing factors. Mr. Perkins was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase his sentence.

5. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS A "SENTENCING FACTOR," OR "AGGRAVATOR" RATHER THAN AN "ELEMENT" VIOLATED MR. PERKINS'S RIGHT TO EQUAL PROTECTION.

As noted, even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24.

However, the Washington Supreme Court has held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-

conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony, it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.* While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed “sentencing factors,” is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact, the United States Supreme Court has said, “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S. at 476.

More recently the Court noted:

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

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II). Beyond its failure to abide by

the logic of Apprendi, the distinction Roswell draws does not accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

In Roswell the Court considered the crime of communication with a minor for immoral purposes (CMIP). Id. at 191. The Court found that in the context of this and related offenses,<sup>6</sup> proof of a prior conviction functions as an “elevating element,” i.e.: elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum possible penalty from one year to five. See RCW 9.68.090 (providing CMIP is a gross misdemeanor unless the person has a prior conviction, in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to Blakely, the “maximum punishment” is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. In all other circumstance the “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender

score of 3<sup>7</sup> would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See Washington Sentencing Guidelines Comm'n, Adult Sentencing Manual 2008, III-76. The "elevation" in punishment on which Roswell pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the "elements" of the substantive crime remain the same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 10 years to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" at issue in Roswell is to elevate the penalty for the substantive crime: see RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an

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<sup>6</sup> Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

<sup>7</sup> Because the offense is elevated to a felony based upon a prior sex offense conviction, and because prior sex offenses score as 3 points, a person convicted of felony CMIP could not have an offender score lower than 3.

'aggravator' in others. The difference in classification, therefore, violates the Equal Protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. Id.

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

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

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

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

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a Class B felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism,

the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person's only felony and thus results in a maximum sentence of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, a second "strike", both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. Roswell concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, "if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes." 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction or not; the prior offense merely alters the maximum punishment to which the person is subject. Id. So too, second degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Finally, as the dissent in State v. McKague recently recognized, "under Blakely, a trial court sitting without a jury may not

constitutionally sentence a defendant to life without the possibility of parole on a class B felony.” 159 Wn. App. 489, 527, 246 P.3d 558 (2011) (Quinn-Brintnall, J., dissenting). As this analysis indicates, the lead opinion of McKague “fails to comply with the constitutional principles elucidated in Apprendi and Blakely.” 159 Wn. App. at 527 (Quinn-Brintnall, J., dissenting).

The evolution of Washington jurisprudence on this issue indicates, however, that the State, as well as the Washington courts, mistakenly continue to rely upon pre-Apprendi case law, such as Thorne, 129 Wn.2d at 770-71, Wheeler, 145 Wn.2d at 117, Smith, 150 Wn.2d at 148, and Almendarez-Torres, 523 U.S. at 246-47. For this reason, the McKague decision was inconsistent with Blakely, 542 U.S. at 303-04, and Apprendi, 530 U.S. at 490; moreover, it was in violation of the equal protection rights guaranteed by the Fourteenth Amendment and article I, section 12 of the Washington Constitution. McKague, 159 Wn. App. at 530 (Quinn-Brintnall, J., dissenting).

The trial court’s treatment of prior convictions as “elements” in one instance – with the attendant due process safeguards afforded “elements” of a crime – and as aggravators in another, has no rational basis. An accused’s right to a trial by jury is the heart and

soul of our criminal justice system. As Justice Scalia wrote in

Blakely:

The Framers would not have thought it too much to demand that, before depriving a man of ... his liberty, the State should suffer the modest inconvenience of submitting its accusation to “the unanimous suffrage of twelve of his equals and neighbours,” [citation omitted] rather than [the judge], a lone employee of the State.

542 U.S. at 313-14.

Here, the trial court refused to honor the jury’s verdict – a verdict in which the jury rejected the only class-A felony charge before it, Robbery in the First Degree – the only count with a possible life sentence. RCW 9A.20.021(1)(a). By sentencing Mr. Perkins to life without the possibility of parole, even where the jury had rejected the State’s only class-A count, the trial court imposed a sentence in excess of that supported by the jury verdict and therefore, beyond its constitutional authority. See McKague, 159 Wn. App. at 535 (Quinn-Brintnall, J., dissenting)

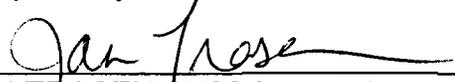
This Court should strike Mr. Perkins’s persistent offender sentence and remand for entry of a standard range sentence.

E. CONCLUSION

For the foregoing reasons, Jerry Perkins respectfully requests this Court reverse his conviction and remand the case for further proceedings. In the alternative, Mr. Perkins requests this Court reverse his sentence and remand for imposition of a standard range sentence.

DATED this 14<sup>th</sup> day of October, 2011.

Respectfully submitted,



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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66867-6-I
	)	
JERRY PERKINS,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |   |                   |                                     |
|-----|---|-------------------|-------------------------------------|
| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | JERRY PERKINS<br>968515<br>WSP<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362          | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 14<sup>TH</sup> DAY OF OCTOBER, 2011.

X \_\_\_\_\_ *grs*

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 OCT 14 PM 6:08