

68241-5

68241-5

NO. 68241-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRYAN DORSEY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LAURA GENE MIDDAUGH

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Did the prosecutor commit misconduct in closing argument and, if so, was the misconduct so egregious that the defendant's complete failure to object should be excused and his conviction reversed?

2. Zaria Thomas, who was one of the participants in the charged robbery and was a State's witness, initially testified the defendant was not involved in the robbery and she provided a description of the robber that was very different than the defendant. The trial court then allowed her to be impeached with a prior statement in which she described the robber very differently than her testimony. Did the trial court properly allow Zaria to be impeached with her prior inconsistent statement?

3. The defendant challenges the admission of recorded jail phone calls under article I, section 7 of the Washington Constitution. Should this Court reject the defendant's argument, the same argument that was raised and rejected by this Court in State v. Archie<sup>1</sup> and State v. Haq?<sup>2</sup>

4. Should this Court agree that the defendant's failure to prove multiple trial court errors and substantial prejudice bars him from prevailing under the cumulative error doctrine?

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<sup>1</sup> 148 Wn. App. 198, 199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009).

<sup>2</sup> 166 Wn. App. 221, 268 P.3d 997, rev. denied, 174 Wn.2d 1004 (2012).

5. The defendant pled guilty to two counts of aggravated robbery in Arkansas. Are the Arkansas convictions comparable to a “most serious offense” in Washington?

6. After the defendant was convicted of a first-degree robbery, his fingerprints were taken and used at his sentencing hearing. Has the defendant shown that there is any authority supporting his proposition that a search warrant is required to take a convicted felon's fingerprints when the Supreme Court has held that a search warrant is not even required to take a convicted felon's DNA?

7. Is the defendant's claim that fingerprint evidence is not reliable an issue that is properly before the court, and if so, does his claim have any validity in the face of substantial contrary authority?

8. The defendant asserts that in sentencing a defendant as a persistent offender, prior convictions must be found by a jury beyond a reasonable doubt. Should this Court reject the defendant's argument, the same argument that was raised and rejected by the Supreme Court in State v. Thiefaul?<sup>3</sup>

9. The defendant asserts that the persistent offender accountability act is unconstitutional under the equal protection clause. Should this

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<sup>3</sup> 160 Wn.2d 409, 158 P.3d 580 (2007).

Court reject the defendant's argument, the same argument that was raised and rejected by this Court in State v. Langstead?<sup>4</sup>

10. Did the sentencing court properly find that the defendant was on community custody when he committed the current offense?

11. Is the issue of whether the sentencing court properly imposed a term of community custody moot?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged with first-degree robbery with a firearm sentencing enhancement. CP 115. A jury found the defendant guilty as charged. CP 116-17. As a persistent offender, the defendant received a mandatory life sentence. CP 205-15.

**2. SUBSTANTIVE FACTS**

Fifty-one-year-old, Victor Curtis, and his mother, 76-year-old Deloris Major, live at 619 20<sup>th</sup> Avenue in Seattle. 3RP<sup>5</sup> 336, 437. Marcus Wilson, Deloris' grandson, sometimes stays at the house. 3RP 336-37.

The two were home together on the evening of February 28, 2009, with Victor downstairs watching TV, and his mother upstairs taking a

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<sup>4</sup> 155 Wn. App. 448, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010).

<sup>5</sup> The verbatim report of proceedings is cited as follows: 1RP—9/21/11 & 9/22/11; 2RP—10/6/11 & 10/10/11; 3RP—10/11/11; 4RP—10/12/11; 5RP—10/13/11; 6RP—10/17, 10/18 & 10/19/11; 7RP—10/18/11 & 1/13/12.

bath. 3RP 337. Earlier, a woman had called Deloris and claimed that Marcus had stolen her flat screen TV and that she wanted Deloris to pay for it. 3RP 438. Marcus had had some prior troubles with the law. 4RP 470. Deloris told the woman that she did not have any money. 3RP 438. Still, a short time later, two females and a male showed up at Deloris' front door saying that Marcus had stolen their TV and wanting money for it. 3RP 341. The male was described as being in his mid-20's, black, short and slender—this matched the defendant's physical appearance. 3RP 342, 440; 4RP 481.

When one of the females said that she wanted money for the TV, Deloris told her to call the police because she did not have any money and there was nothing she could do about it. 3RP 343. The male then proclaimed that this was his girlfriend and somebody is going to have to “pay for this motherfucking TV.” 3RP 344. The male then pulled out a gun and pointed it at Victor, demanding money. 3RP 345. When Victor said he did not have any, Deloris said that she could see what she had upstairs. 3RP 345. The male then grabbed Deloris by the collar and took her upstairs to her bedroom. 3RP 345-46. One of the females stayed downstairs while the other one followed Deloris and the male upstairs. 3RP 351.

Deloris kept her late husband's wallet under her pillow.

3RP 445-46. Inside was \$2000. 3RP 445. The male took all the money from the wallet, tossed the wallet back on the bed, and then handed the money to the female. 4RP 464. After the three of them went back downstairs, the male told the two females to go get the car and bring it up front. 4RP 465. The male then told Deloris that he wasn't going to shoot her but that he had to "get mines." 3RP 354; 4RP 465. He then apologized and left the house. Id.

Three days later, the same vehicle involved in the robbery was stopped in California for reckless driving. 4RP 494-95, 559. Inside the vehicle were the defendant, Javonna Williams—one of the co-perpetrators in the robbery, and Ronterrious "Ron" Watkins, who was in the vehicle at the time of the robbery but he did not go inside the house. 4RP 497. One hundred dollars was found on the defendant's person, along with a .38 caliber revolver tucked into his waist band. 4RP 498-99, 514, 530.

In a statement he gave to the California police officers, the defendant told the officers that Javonna was his girlfriend and that they had left Washington a day or two prior to being stopped. Trial exhibit 15 at 4;<sup>6</sup> 4RP 515. The defendant admitted that the gun belonged to him, but

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<sup>6</sup> Trial exhibit 14 is the recorded interview. Trial exhibit 15 is a transcript of that interview. 4RP 502-03.

he claimed he did not know where he got it from even though he said he had only had the gun for a week or so. Trial exhibit 15 at 8. Later, when Seattle police discovered that the defendant was implicated in the robbery, the gun was shown to both Victor and Deloris. Both identified the gun as the gun used in the robbery. 3RP 350, 428, 443; 4RP 479-80, 483, 489.

Victor and Deloris were shown montages that included photos of Javonna Williams and Zaria Thomas—the two females involved in the robbery. Victor made positive identifications of both. 3RP 356-57, 409-11. Deloris was able to identify Zaria, but not Javonna. 5RP 766. The police did not become aware that the male involved in the robbery was the defendant until December 1, 2010, when this information was provided to authorities by Javonna. 5RP 766. Thus, it was not until almost two years after the robbery that Victor and Deloris were shown montages containing a photograph of the defendant and neither could make a positive identification. 5RP 776-77, 806.

The identification of the defendant came about in 2010 after both Javonna and Zaria had been charged in the robbery. 4RP 541-42. In December of 2010, Javonna identified the defendant as the male involved in the robbery. 4RP 541-42. In February of 2011, Javonna pled guilty in a plea deal that required her to testify at the defendant's trial. 4RP 547, 549, 554.

Javonna Williams testified that she is friends with Zaria Thomas, Ron Watkins, and the defendant, who goes by the name of Gemini. 4RP 539-41, 559. Javonna said the incident began earlier in the day when she was out with the defendant and Ron. 4RP 555. She received a call from her daughter, Jakia, that Zaria was at their house, passed out, and that she had been raped. 4RP 555. When Javonna, Ron and the defendant got home, they found that the TV had been stolen and that the police had not been called about the alleged rape. 4RP 557. Javonna was told that Marcus Wilson had stolen the TV. 4RP 557. Javonna testified that Zaria lied about having been raped. 4RP 561, 611.

According to Javonna, Jakia then called Deloris. 4RP 558. Javonna testified that Jakia told her that Deloris said to come over and she would give them \$500 for the TV. 4RP 558. Javonna, Ron, Zaria and the defendant then drove over to Deloris' house. 4RP 559. When they got to the house, Javonna, Zaria and the defendant went to the door. 4RP 566. When Javonna told Deloris why they were there, Javonna testified that Deloris got angry, did not give them any money, and told them that they should call the police about Marcus. 4RP 569, 583. Javonna said that the defendant then got mad and proclaimed that he wasn't leaving without any money. 4RP 571.

The defendant, Zaria and Deloris then went upstairs while Javonna stayed downstairs with Victor. 4RP 572. Javonna admitted seeing the defendant pull out what she said “looked like” a gun, and she admitted she knew it was a robbery, although she claimed to know this only after the fact. 4RP 573-75, 577-78. When the three got back into the car, the defendant had a bunch of money and he gave some of it to Zaria. 4RP 578-79. Javonna confirmed that within two days, they were in California when they got pulled over and the police found the gun on the defendant. 4RP 589-90.

Ron Watkins testified that he was with the defendant, Javonna, and Zaria when they drove over to Deloris’ house to confront someone about a stolen TV. 3RP 369-72, 386-87. However, he claimed that he was drunk and did not remember much about the incident. 3RP 371-72. He did admit that after Javonna, Zaria and the defendant left Deloris’ house, he saw the defendant with the money and that the defendant gave him \$50. 3RP 385. He also admitted that he had previously said that when the defendant got back into the car at Deloris’ house, he heard him say, “fuck them, we got the money.” 3RP 379.

Zaria Thomas also testified and confirmed her role in the robbery. 5RP 696. She positively identified the defendant as the male involved in

the robbery. 5RP 750.<sup>7</sup> Jail phone calls were introduced into evidence showing the defendant and Zaria discussing the robbery and the fact that Javonna had turned State's witnesses. See section C 3 below.

The defendant did not testify. Additional facts are included in the argument sections they pertain.

**C. ARGUMENT**

**1. THE DEFENDANT HAS FAILED TO SHOW THAT ANY MISCONDUCT OCCURRED IN HIS TRIAL OR THAT HIS CONVICTION SHOULD BE REVERSED.**

The defendant contends that the prosecutor committed such flagrant and egregious misconduct in closing argument that his own complete failure to object should be excused and his conviction reversed. This claim is without merit.

The defendant claims that the prosecutor committed egregious misconduct when he told the jury that the trial was about seeking the truth. However, in this case, that is exactly what the defense made the trial about. The defendant agreed that an armed robbery had indeed occurred, however, his theory was that the State's witnesses were a "pack of liars" when it came to identifying him as the perpetrator of the crime. 6RP 976. In short, this was not a case of mistaken identity, a mental defense, a question as to intent, etc., if the jurors determined that the witnesses were

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<sup>7</sup> For more about Zaria's testimony, see section C 2 a.

telling the truth as to the defendant's identity, then the defendant was guilty of first-degree robbery. Thus, the State's argument that the case was about determining whether the witnesses were telling the truth was not misconduct and was directly in line with the defense theory of the case.

In any event, if defense counsel felt the prosecutor's comments were improper, a simple objection and request for a curative instruction would have remedied any potential prejudice. Thus, his complete failure to object constitutes waiver.

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing both (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). The first step, however, is for the defendant to show the issue is properly before the court. Absent a proper objection and a request for a curative instruction before the trial court, the defense waives the issue of misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273

(2009), rev. denied, 170 Wn.2d 1002 (2010). No objection or request for a curative instruction was made here.

**a. The Facts.**

In this case, defense counsel admitted that Victor Curtis and Deloris Major were robbed at gunpoint, and that Zaria Thomas and Javonna Williams were two of the three perpetrators of the crime. However, when it came to identifying the third perpetrator, the male who actually brandished the gun, the defendant asserted that the State's witnesses were a "pack of liars."

Specifically, defense counsel told the jury in closing argument that the robbery did in fact occur: "what makes part of your case so easy is that we know that Victor and Deloris – Ms. Major, Mr. Curtis are victims. We know that a robbery happened." 6RP 979. However, he then told the jury that the defendant was the "convenient set-up," that "[t]he facts of this case reveal that this pack of liars has set Mr. Dorsey up." 6RP 976, 979. Counsel added that "[t]here's a way of evaluating testimony," and that "if you believe that somebody has said something under oath falsely once, you can disregard that testimony. They're unreliable. They're liars. How do you know what is the truth if you know they've lied once." 6RP 983. Counsel then directly argued that Javonna Williams was a liar

who would “say anything in any circumstance to benefit her.” 6RP 983.

He then repeated this allegation in regards to Zaria Thomas. 6RP 984.

The prosecutor was in agreement with the defense premise, “[t]hat’s what this whole thing is about, what’s the truth? Was he there?” 6RP 987. “What is the truth?” the prosecutor questioned and then answered, “[t]he truth is what the State can prove.” 6RP 988.

What is the truth? How do we find the truth? Like anything, we gather the people that were together at the time and we find out what the truth is. And the truth of the matter, ladies and gentlemen, is that on February 28<sup>th</sup>, 2009, the defendant was over at that house, and if you find that he’s at the house, then he’s guilty of robbery in the first degree.

6RP 991. The prosecutor prefaced his comments with a more generic statement:

Now, we’ve got a cast of characters and we’re going to spend some time talking about that. And they’re not perfect, not by a long shot. But what is this process about? What are we here to achieve? What is the search that occurs in this courtroom, and every courtroom in this building? And it’s a search for the truth. What happened that day and who was involved.

6RP 962.

**b. The Defendant’s Burden.**

It is the defendant who bears the heavy burden of establishing the impropriety of any challenged comment. Reed, 102 Wn.2d at 145. Prejudicial error does not occur until such time as it is clear and

unmistakable from the record that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Greater latitude is given in closing argument than elsewhere during trial. State v. Stover, 67 Wn. App. 228, 232-33, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). In addition, remarks that may otherwise be improper are not grounds for reversal if they are provoked by defense counsel or are in reply to defense arguments, unless the remarks are so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

The defendant relies on State v. Anderson, supra, and State v. Emery,<sup>8</sup> to support his argument that misconduct occurred here.

In Anderson, the prosecutor made repeated requests for the jury to "declare the truth," and to return "not just a verdict, but a just verdict." Anderson, 153 Wn. App. at 423-24. Division Two found these comments amounted to misconduct because the comments mischaracterized the role of the jury. Id. at 431-32. Still, the court found the comments harmless.<sup>9</sup>

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<sup>8</sup> State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012).

<sup>9</sup> The prosecutor also told the jurors that the beyond a reasonable doubt standard is a minimal standard we use every day when making very simple decisions like whether to change lanes on the freeway or whether to leave a child with a babysitter. Id. at 425. The court found this too was improper—although again the court found it harmless. Id.

In contrast, in State v. Curtiss,<sup>10</sup> a different panel of the same court rejected the idea that telling the jury that their job was to "search for and speak the truth" was misconduct. As the court noted, "trial judges frequently state that a criminal trial's purpose is to search for truth and justice." Curtiss, 161 Wn. App. at 701-02. Recently (and subsequent to this trial), the Supreme Court brought at least a bit of clarity to this issue, stating that "truth" statements are improper if "they mischaracterize the role of the jury." State v. Emery, 174 Wn.2d at 760-61. The jury's job, the Court noted, is to determine whether the State has proved the charged offense beyond a reasonable doubt. Id. Just as the court did in Anderson, the Court in Emery found the comments harmless. Id.

Here, the theme of both the State and the defense was that the jury needed to determine whether or not the witnesses were telling the truth or lying about whether the defendant was the third perpetrator in the robbery. Under the facts of this case, the defendant cannot show that the comments by the prosecutor were misconduct. After all, like the word "liar," use of the word "truth" is not taboo. See State v. McKenzie, 157 Wn.2d 44, 59-60, 134 P.3d 221 (2006) (prosecutor's use of the word "liar" not improper). The harm comes if the prosecutor mischaracterizes the jury's role and that did not occur here. Rather, the prosecutor merely stated the

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<sup>10</sup> 161 Wn. App. 673, 250 P.3d 496, rev. denied, 172 Wn.2d 1012 (2011).

obvious, the case depended on the jurors finding that the witnesses were telling the truth.

In any event, the issue of misconduct has been waived. The defendant did not object or ask for a curative instruction below. "Where the defense fails to object to an improper comment, the error is considered waived unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." McKenzie, 157 Wn.2d at 52. In regards to the first aspect of the waiver argument, the defendant asserts that not only was the State's argument flagrant and ill-intentioned, but that it was made in "bad faith," because it was made in contravention of published decisions. Def. br. at 16. The problem with this argument is twofold. First, the defendant fails to cite to this tribunal Curtiss, supra, then existing contrary authority to Anderson, supra, one of the cases he relies. Second, the defendant fails to note that the only Supreme Court decision to weigh in on the issue, Emery, supra, was decided *after* this case was tried.

The defendant also asserts that the alleged misconduct was flagrant and ill-intentioned because the prosecutor repeatedly used the word "truth." This argument fails just as the same argument failed in McKenzie.

The dissent opens with its own tabulation of the prosecutor's allegedly improper remarks, but what the dissent neglects to acknowledge is that, assuming these remarks were improper, an objection from defense counsel would have prevented *any* repetition of the five remarks that McKenzie has challenged on appeal.

McKenzie, 157 Wn.2d at 53 (emphasis in original).

The defendant also cannot show that a curative instruction would not have cured any potential prejudice. For example, in State v. Warren,<sup>11</sup> the Supreme Court found that an objection and curative instruction obviated any potential prejudice emanating from the prosecutor's very inaccurate statement of the law. Specifically, in a clear misstatement of the law, the prosecutor in Warren, repeatedly told jurors that the defendant was not entitled to "the benefit of the doubt." Warren, 165 Wn.2d at 24. Warren objected and the trial court gave a simple curative instruction restating the law, an instruction that the Court held obviated any potential prejudice. Id. at 28. If the prosecutor here was indeed misstating the law, in a far less egregious manner than in Warren, the defendant cannot show how a proper objection and curative instruction would not have been sufficient to cure any potential prejudice. Thus, the failure to object and request such an instruction constitutes waiver of the misconduct claim.

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<sup>11</sup> 165 Wn.2d 17, 195 P.3d 940 (2008).

Finally, the defendant can prove no prejudice. Prejudice is established only where the defendant proves that "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). But jurors are presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). And here, the court instructed the jury that:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions...[t]he lawyers' remarks, statements, and argument are intended to help you understand the evidence and apply the law... however...the lawyers' statements are not evidence...The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 119, 121. Further, in no uncertain terms, the jury was instructed on the burden of proof.

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person

after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 125.

The defendant fails to demonstrate that the comments he contends constitute misconduct could have had such a dramatic impact that the jurors ignored the instructions of the court. Even if misconduct, the comments would have been of little moment. Like the situations in Anderson and Emery, the defendant cannot show that there is a substantial likelihood the jury's verdict would have been different but for the alleged misconduct.

**2. THE TRIAL COURT PROPERLY ADMITTED CERTAIN TESTIMONY OF ZARIA THOMAS.**

The defendant contends that a single statement that was admitted at trial was inadmissible hearsay and so incredibly prejudicial that based on the admission of this single statement, his conviction must be reversed. The defendant is mistaken as to the facts. In addition, the single statement, even if inadmissible, was not of such magnitude that the defendant can show that but for its admission, the outcome of trial probably would have been different.

**a. Zaria Thomas' Testimony.**

Zaria Thomas was 19 years old at the time of trial. 5RP 690. She testified that she had been friends with Javonna Williams for a number of years. 5RP 690. She admitted to being involved in the robbery with Javonna and a man she knew as "Gemini." 5RP 696, 699. She testified that the man she knew as Gemini, who was involved in the robbery, was Javonna's boyfriend. 5RP 694.

After pleading guilty herself, Zaria was called by the State as a witness with the expectation that she would identify the defendant as Gemini, the man involved in the robbery. However, when asked if the person she knew as Gemini was in the courtroom, she said no, "not the one that did the crime with us." 5RP 691. Asked then to describe the person who committed the robbery with her, Zaria stated that he was a tall black man who dated Javonna. 5RP 692. Asked to provide further descriptive details of the robber, Zaria testified that the Gemini who committed the robbery was 6-foot-2 to 6-foot-3, big, buff and with a fade haircut.<sup>12</sup> 5RP 709.

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<sup>12</sup> While this Court cannot view the defendant as the jurors could, the sentencing documents include photographs of the defendant and a physical description. See sentencing exhibit 4. At 5-7 and 132 pounds, the defendant is rather diminutive, and photos do not show him with a fade haircut. Id.

Perplexed by this turn of events, the prosecutor asked Zaria what was going on. Zaria asserted that there were in fact two persons she knew as “Gemini”—both of whom were Javonna’s boyfriends. 5RP 692, 700. One “Gemini,” she claimed, who committed the robbery with her and Javonna—and who they dropped off after the robbery was complete, and the second “Gemini,” the defendant, who they picked up after dropping off the other Gemini, and who then drove to California with Javonna and Ron Watkins. 5RP 698-99. Upon questioning, Zaria admitted that she had never before claimed that there were two persons she knew as Gemini. 5RP 723.

The prosecutor then began to ask Zaria about prior statements she had made about the robbery. Zaria admitted that she had earlier told a detective that the first name of the person she knew as Gemini, and who had committed the robbery, was Bryan. 5RP 711. She also admitted that the person she spoke to on the recorded phone calls (the jail phone calls—trial exhibits 23, 29 and 30) was the person who committed the robbery. 5RP 713.

Zaria was then asked about a recorded statement she had given to a detective two years prior, on June 2, 2009. 5RP 715-16. She admitted in that statement that the person she said had committed the robbery was a person she knew as “Gemini.” 5RP 717-18. Asked to read how she

described him back then, she stated, “He – I would say he’s about five-seven; he’s dark-skinned; he has waves; he has a thing for snakes; he does voodoo.”<sup>13</sup> 5RP 717-18.

Defense counsel objected. His objection, counsel stated, was based on the fact that “I just don’t know how you’ve established that she knows this particular person.” 5RP 718. He later explained that he believed Zaria’s knowledge came from being told this by Javonna, not from any personal knowledge she might have. 6RP 853. The court specifically rejected this argument and noted that defense counsel never asked Zaria where her information came from, nor did he present any evidence in support of his argument that Zaria did not have firsthand knowledge of the defendant. 6RP 854. The court ruled that use of the statement was appropriate. 5RP 719. Defense counsel then stated, “[c]an we keep the voodoo crap out?” 5RP 719. The court responded that, well, she had already said it in front of the jury. 5RP 719. The defense did not make a motion to strike the comment about voodoo even when asked by the court if there was anything else to address. 5RP 720. Back in front of the jury, Zaria added that she had described the robber as being about 32 and that he was thin. 5RP 721.

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<sup>13</sup> This is the single statement that the defendant claims should not have been admitted into evidence and that should result in his conviction being reversed.

After the lunch break recess, Zaria was asked to again identify the person who committed the robbery with her. 5RP 750. This time she identified the defendant. Id. Asked why she had not said this earlier, she responded, “[b]ecause I was nervous and scared.” 5RP 750.

**b. The Statement Was Admissible.**

The admission of evidence lies within the sound discretion of the trial court. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). A decision to admit evidence will not be reversed absent a showing of abuse of discretion, a standard met only when a reviewing court concludes that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1992). The defendant bears the burden of proving that the trial court abused its discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538 (1983).

Hearsay is an out-of-court statement that is offered at trial to prove the truth of the statement. ER 801(c). Hearsay statements are generally inadmissible under ER 802. However, an out-of-court statement that is offered for a purpose other than to prove the truth of the statement is not hearsay. State v. Parris, 98 Wn.2d 140, 145, 654 P.2d 77 (1982).

The credibility of a witness may be attacked by any party, including the party calling the witness, if the credibility of the witness is a

fact of consequence to the action. ER 607; State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999), rev. denied, 140 Wn.2d 1022 (2000). Here, Zaria Thomas was a participant in, and an eyewitness to the crime. By her initial testimony, Zaria was exculpating the defendant by claiming that there were two persons she knew as Gemini and describing the person who committed the robbery in terms very different than the defendant. Thus, her credibility was a relevant issue in the case.

As pertinent here, a prior out-of-court statement is “not hearsay” and may be used to impeach a witness if the statement casts doubt on the witness’ credibility without regard to the truth of the matter asserted. Allen S., 98 Wn. App. at 467; State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995). If a witness testifies at trial to a particular statement, the jury’s need to know that the fact that the statement is inconsistent with a prior statement made by the witness can be “compelling.” Allen S., at 464. “To say that a witness’ prior statement is ‘inconsistent’ is to say it has been compared with, and found different from, the witness’ trial testimony.” Williams, 79 Wn. App. at 26.

Here, after Zaria testified as to the robbery suspect’s description, she was impeached with her prior inconsistent statement that consisted of a completely different description of the suspect. This is entirely proper under the rules of evidence. While reasonable minds might disagree with

the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, the defendant would have to prove that no reasonable person would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42. That, the defendant cannot do here.

Further, any argument beyond the scope of the defendant's objection below has been waived. A party may only assign error in the appellate court on the specific ground of the evidence objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985), cert. denied, 475 U.S. 1020 (1986); State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). Here, the basis for the defendant's objection below was that he claimed Zaria did not have personal knowledge about the defendant, that her description was based on what she was told by Javonna. 5RP 718. In other words, there was double hearsay. However, the trial court specifically rejected this argument because there was no evidence supporting the defendant's assertion that Zaria did not have firsthand knowledge of the defendant. 6RP 854. On appeal, the defendant cites to no facts to the contrary. Any argument beyond the scope of this objection has been waived.

In the defendant's argument on appeal, he complains mainly about the reference to snakes and voodoo. However, if the defendant felt that

this part of Zaria's statement was either not relevant or was overly prejudicial—an analysis that involves ER 401, 402 and 403, he had a duty to provide a specific objection. However, the only reference coming even close to an objection was counsel's comment that "[c]an we keep the voodoo crap out?" 5RP 719. This is hardly a specific objection. Further, as the evidence had already been admitted, it was incumbent upon the defendant to ask that the testimony be struck—something he did not do.

Finally, an erroneous evidentiary ruling is harmless unless, within reasonable probabilities, it affected the outcome of the trial. State v. Thomas, 150 Wn.2d 821, 870, 83 P.3d 970 (2004). Here, even if the trial court's ruling was in error, the error was harmless. The defendant did not testify and thus his credibility was not at issue. The defendant cannot show that the fact the jury may have believed he liked snakes or believed in a more unusual African and Haitian based Christian influenced religion<sup>14</sup> meant he was guilty of a robbery. Under the facts of this case, any error was harmless.

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<sup>14</sup> See [http://en.wikipedia.org/wiki/Louisiana\\_Voodoo](http://en.wikipedia.org/wiki/Louisiana_Voodoo).

**3. THIS COURT HAS REPEATEDLY REJECTED THE ARGUMENT THAT THE RECORDING OF A JAIL PHONE VIOLATES ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.**

The defendant contends that jail phone calls are private affairs that, if recorded without a warrant, the recording violates article I, section 7 of the Washington State Constitution. This Court has repeatedly rejected this very argument. See State v. Haq, 166 Wn. App. 221, 268 P.3d 997, rev. denied, 174 Wn.2d 1004 (2012); State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, rev. denied, 166 Wn.2d 1016 (2009). Further, this issue was never raised below and has been waived.

The State played a redacted version of three phone calls made by the defendant from the King County Jail to Zaria Thomas—one of the State’s witnesses, and her boyfriend, Lamont (last name unknown). In these calls, the defendant identified himself as Gemini, discussed how witnesses/co-conspirators Ron Watkins and Javonna Williams had turned against him, and discussed how he was satisfied with how Zaria was dealing with the situation. See trial exhibit 23 (exhibit 26 is a transcript of call number one); trial exhibit 29 (exhibit 31 is a transcript of call number two); trial exhibit 30 (exhibit 32 is a transcript of call number three).

The defendant submitted briefing and argued to the court that the calls should be suppressed. In doing so, he raised three very specific

objections—none of which relates to the arguments the defendant raises on appeal.

In his brief to the trial court, the defendant defined his objections as follows:

1. Whether the court should exclude jail call recordings because there is not a witness with personal knowledge of the conversations that can authenticate the recordings?
2. Whether the court should exclude the jail call recordings because there is not sufficient independent proof to prima facie establish the corpus delicti of the charged crime?
3. Whether the court should exclude the jail call recordings because the overwhelming prejudicial value of the content substantially outweighs the probative value of the recordings?

CP 105. This was the basis of the defendant’s argument before the trial court. See 2RP 186-87.

A reviewing court will not consider an issue raised for the first time on appeal unless the issue constitutes a “manifest” error affecting a constitutional right. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Even if the claimed error is constitutional in nature, this Court will not review it unless it is also manifest. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). An error is manifest when the defendant shows “the asserted error had practical and identifiable consequences in the trial of the case.” Id. “‘Manifest’ means

unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. ‘Affecting’ means having an impact or impinging on, in short, to make a difference.” Id.

Absent proof by the defendant that the issue truly constitutes a manifest constitutional error, a party may only assign evidentiary error on the specific ground made at trial. Kirkman, 159 Wn.2d at 926. The purpose of this rule is to allow the trial court an opportunity to consider the issue and prevent or cure any error. Kirkman, 159 Wn.2d at 926. If the facts necessary to adjudicate a particular claimed error are not in the record on appeal, no actual prejudice can be shown and the error cannot be shown to be manifest. State v. McNeal, 98 Wn. App. 585, 595, 991 P.2d 649 (1999) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), aff’d, 145 Wn.2d 352 (2002).

The defendant makes no attempt to explain why it is that he believes he can raise this issue for the first time on appeal. In fact, the defendant’s own words highlight why he cannot raise this issue. In his brief to this Court, the defendant states, “[t]he jail provided copies of Mr. Dorsey’s telephone calls to the King County Prosecutor, *apparently* without a warrant or other court order.” Def. br. at 23 (emphasis added). He also states that “[t]he recording was not based upon any individualized and particularized suspicion, and they were not used to monitor jail

security.” Def. br. at 26. The defendant can point to nothing in the record supporting these conclusory statements. The reason he cannot point to anything in the record is because he never raised this issue below so there is no factual basis in the record to support his claims. Thus, the defendant cannot make a showing to this Court that his claim of error is manifest, and therefore, the issue has been waived.<sup>15</sup>

In any event, the defendant’s legal claim is without merit. In State v. Modica,<sup>16</sup> the Supreme Court held that jail phone calls are not private and that any expectation of privacy in the recorded calls is not reasonable.<sup>17</sup> In State v. Archie, supra, this Court held that the recording of jail phone calls does not violate article I, section 7 of the Washington Constitution. Accord State v. Haq, supra.

The defendant fails to distinguish these cases. Instead, the defendant cites to a number of other dissimilar situations wherein courts

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<sup>15</sup> It should also be noted that the failure to bring a motion to suppress in the trial court is not necessarily deficient performance under a claim of ineffective assistance of counsel—if an ineffective assistance of counsel claim were raised. See McFarland, 127 Wn.2d at 336. Counsel can legitimately decline to seek suppression of evidence if there appears to be no viable ground for such a motion. State v. Nichols, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). Considering there are two published cases in direct conflict with the position the defendant now argues on appeal, it would not have been ineffective assistance to not raise the issue in the trial court.

<sup>16</sup> 164 Wn.2d 83, 186 P.3d 1062 (2008).

<sup>17</sup> See also State v. Hall, 168 Wn.2d 726, 729 n.1, 230 P.3d 1048 (2010) (“Phone calls made from the King County jail are automatically recorded. Given that all parties are very clearly informed of this, we held this practice does not violate a prisoner’s statutory right to privacy”).

have found a private affair—within the meaning of article I, section 7, has been violated. Specifically, he argues that since banking records,<sup>18</sup> telephone call records<sup>19</sup> and garbage<sup>20</sup> are private affairs within the meaning of article I, section 7, then a jail phone conversation must also be a private affair. But in none of the cases cited was the person alleging an article I, section 7 violation a jail inmate with a reduced expectation of privacy. See Modica, 164 Wn.2d at 88 (citing State v. Campbell, 103 Wn.2d 1, 23, 691 P.2d 929 (1984)). Further, in none of these cases cited was the aggrieved party *fully aware* that the item they considered private was in fact going to be searched—as is the case with jail phone calls.

In determining whether a privacy interest merits article I, section 7 protection, the court asks several questions: whether the information obtained reveals intimate or discrete details of a person's life, what expectation of privacy a person has in the information sought, and whether there are historical protections afforded to the perceived interest. Archie, 148 Wn. App. at 202 (citing State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007)). The person alleging a violation of article I, section 7 must prove that their expectation of privacy is "reasonable." State v.

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<sup>18</sup> State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007).

<sup>19</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

<sup>20</sup> State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990).

Berber, 48 Wn. App. 583, 587, 740 P.2d 863, rev. denied, 109 Wn.2d 1014 (1987); State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). The individual must first, by their conduct, exhibit a subjective expectation of privacy, and second, this subjective expectation of privacy must be objectively reasonable. State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004). As this Court held in Archie, jail phone calls do not meet this test, they are "not private affairs deserving of article I, section 7 protection." Archie, at 204.

Finally, even if the recordings were inadmissible, any error in the admission of the calls was harmless. Admission of evidence seized in violation of article I, section 7 is harmless error if the reviewing court is convinced beyond a reasonable doubt that any rational finder of fact would have reached the same result absent the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Here, absent the allegedly improperly admitted evidence, the result of the trial would have been the same. The jail recordings were very limited. There was no "confession" on tape. Considering the extensive eyewitness testimony and circumstantial evidence of the defendant's identification as the third perpetrator, any error was harmless.

**4. THE DEFENDANT'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.**

The defendant contends that the cumulative effect of the trial errors alleged requires reversal, even if the errors do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the “accumulated error” doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Reversals due to cumulative error are justified only in rather extraordinary circumstances.<sup>21</sup> Here, as explained in the sections above, no error occurred that warrants a new trial, either individually or cumulatively.

**5. THE DEFENDANT'S ARKANSAS AGGRAVATED ROBBERY CONVICTIONS ARE COMPARABLE TO A WASHINGTON STRIKE OFFENSE.**

The trial court found the defendant's two aggravated robbery with a firearm convictions out of Arkansas were comparable to Washington

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<sup>21</sup> See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial), rev. denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

strike offenses and sentenced the defendant as a persistent offender. The defendant claims that because the Arkansas robbery statute does not require the actual taking of property from the victim, as does Washington's robbery statute, that his Arkansas robbery convictions are not comparable to Washington robbery convictions. However, what the defendant overlooks is that "a felony attempt to commit" first-degree or second-degree robbery is also a strike offense in the State of Washington.

Persistent Offender proceedings are governed by the Sentencing Reform Act. State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996). When a defendant's criminal history includes an out-of-state conviction, the SRA requires that the conviction be classified according to the comparable Washington offense. State v. Ford, 137 Wn.2d 472, 483, 973 P.2d 452 (1999); RCW 9.94A.525(3). The State is required to prove the existence and classification of any out-of-state conviction by a preponderance of the evidence. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

In determining whether a foreign conviction is comparable to a Washington felony, the court has devised a two-part test for comparability. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the sentencing court compares the elements of the out-of-state offense with the elements of the apparently comparable Washington crime; the comparison must be made against the Washington criminal statute in

effect when the foreign crime was committed. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are comparable as a matter of law, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts towards the defendant's offender score for the present crime. Ford, 137 Wn.2d at 479-80.

If the elements are not identical or the Washington statute defines the offense more narrowly than does the foreign statute, the court may proceed to conduct a factual comparability analysis. State v. Farnsworth, 133 Wn. App. 1, 17-18, 130 P.3d 389 (2006), remanded on other grounds, 159 Wn.2d 1004 (2007); Morley, 134 Wn.2d at 606. The analysis has been summarized as follows:

Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment or information, Morley, 134 Wash.2d at 606, 952 P.2d 167, or the records of the foreign conviction, Lavery, 154 Wash.2d at 255, 111 P.3d 837, would have violated the comparable Washington statute. The underlying facts in the foreign record must be admitted, stipulated to, or proven beyond a reasonable doubt.

Farnsworth, 133 Wn. App. at 18; State v. Ortega, 120 Wn. App. 165, 173, 84 P.3d 935 (2004) (“[w]hen a foreign criminal statute is broader than Washington's, the court may look at the defendant's conduct—evidenced by the indictment or information—to determine the comparable

Washington statute”), rev. granted and remanded on other grounds, 154 Wn.2d 1031 (2005).

Here, the State provided the court with numerous documents, including but not limited to, the charging document, the plea of guilty, and the judgment and sentence. See sentencing exhibits 3 and 4. The documents prove that the defendant was charged with two counts of “Aggravated Robbery with a Firearm,” with each count bearing the same charging language:

I Brent Davis, Prosecuting Attorney within and for the second judicial circuit of the State of Arkansas, of which Crittenden County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse: Bryan Dorsey of the crime of Aggravated Robbery with a Firearm, committed as follows, to wit: The said defendant on the 11 day of Aug. 1997, in Crittenden County, Arkansas, did unlawfully and feloniously and with a firearm rob Patricia Shelton dba Subway Sandwich Shop, West Memphis, Ark. of money/property against the peace and dignity of the State of Arkansas.

Sentencing exhibit 3 (titled “Information,” under cause number CR 97-948).<sup>22</sup> On December 3, 1997, the defendant pled guilty to two counts of aggravated robbery. Sentencing exhibit 3 (Guilty Plea Statement, and Plea and Sentence Recommendation).

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<sup>22</sup> The second count is identical to the first count in all pertinent respects with the only apparent differences being the date of the offense and the named victim. See sentencing exhibit 3 (title “Information” under cause number CR 97-949).

A “persistent offender” is an offender who has been convicted in this state of a “most serious offense” and has on at least two other prior occasions been convicted of a “most serious offense” in this or any other state. RCW 9.94A.030(37).<sup>23</sup> A “most serious offense” “means any of the following felonies *or a felony attempt to commit* any of the following felonies: (a) any felony defined under any law as a class A felony... [and] (o) robbery in the second degree.” RCW 9.94A.030(32). Thus, under the statute, the defendant’s Arkansas aggravated robbery convictions count as a strike offense if they are comparable to any one of the four following crimes: first-degree robbery, attempted first-degree robbery, second-degree robbery, and attempted second-degree robbery.

As pertinent here, in Washington, a person commits first-degree robbery, if, “[i]n the commission of a robbery or of immediate flight therefrom, he or she: is armed with a deadly weapon; or displays what appears to be a firearm or other deadly weapon, or inflicts bodily injury.” RCW 9A.56.200(a).

A person commits robbery in the second degree “if he or she commits robbery.” RCW 9A.56.210. Robbery itself is defined as follows:

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<sup>23</sup> The defendant’s two aggravated robbery convictions constitute a single “most serious offense” because the counts were charged and prosecuted together. His other prior “most serious offense” was a King County case involving convictions for first-degree burglary and second-degree assault. See sentencing exhibit 8. That conviction has not been challenged.

A person commits robbery when he or she ***unlawfully takes personal property*** from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added).

A person is guilty of an attempt to commit a felony offense “if, with intent to commit a specific crime, he or she does an act which is a substantial step toward the commission of that crime.” RCW

9A.28.020(1).

The Arkansas aggravated robbery statute provides as follows:

A person commits aggravated robbery if he or she commits robbery as defined in § 5-12-102, and the person:

- (1) Is armed with a deadly weapon;
- (2) Represents by word or conduct that he or she is armed with a deadly weapon; or
- (3) Inflicts or attempts to inflict death or serious physical injury upon another person.

A.C.A. § 5-12-103.

Robbery is defined as follows:

A person commits robbery if, *with the purpose of committing* a felony or misdemeanor *theft* or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person.

A.C.A. § 5-12-102 (emphasis added).

The defendant is correct, under the Arkansas robbery statute, a robbery is complete when physical force is threatened, no actual transfer of property need take place. Robinson v. State, 317 Ark. 17, 24, 875 S.W.2d 837 (1994). In Washington, a robbery requires the actual taking of property. But contrary to the defendant's assertion, the fact that the Arkansas robbery statute is broader than Washington's robbery statute does not mean he prevails. The employment or threat to employ physical force with the purpose of committing theft is attempted robbery in Washington, a strike offense as stated above. Thus, while his convictions may not be directly comparable to robbery convictions in Washington, they are comparable to attempted robbery convictions in Washington. Whether comparable to first-degree attempted robbery or second-degree attempted robbery is of no moment—both constitute “most serious offenses.”

**6. THERE IS NO LEGAL SUPPORT FOR THE CLAIM THAT A SEARCH WARRANT NEEDS TO BE OBTAINED IN ORDER TO TAKE THE FINGERPRINTS OF A CONVICTED FELON.**

The defendant was convicted of first-degree robbery on October 19, 2011. CP 116-17. On October 28, 2011, the parties appeared in court for the defendant to provide his fingerprints. 7RP 1009-10. Defense counsel made a perfunctory objection, whereupon the court signed an order directing the taking of the defendant's fingerprints pursuant to CrR 4.7. *Id.*; CP 223-24. Subsequently, in sentencing the defendant as a persistent offender, the State used the prints taken on October 28 as *part* of the evidence<sup>24</sup> used to prove the defendant had two prior "most serious offense" convictions. 7RP 1021-49; *see* sentencing exhibits 1-8. The defendant contends a search warrant was required to obtain the prints taken on October 28, and because a warrant was not obtained, his sentence must be reversed. The defendant's argument is unavailing.

Literally, in a few conclusory statements, the defendant makes his case. Def. br. at 33. First, he cites to State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010), for the proposition that the taking of a

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<sup>24</sup> Along with the multitude of court documents that contained identifying information used to prove the defendant had two prior most serious offenses, the State also used the defendant's fingerprints obtained when he was booked on the current offense. Sentencing exhibit 1. In fact, the print examiner compared and found matches using a total of seven sets of prints. *See* sentencing exhibit 7; 7RP 1031-33. None of the other evidence, or the other six sets of prints used to prove that the defendant had two prior most serious offenses has been challenged on appeal.

biological sample for DNA testing invades a person's private affairs under article I, section 7, and therefore a search warrant is required to obtain a biological sample. Second, he cites to State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007), and claims that the taking of fingerprints is equivalent to the taking of a biological sample, ergo, he asserts, the only way to obtain fingerprints is by way of a search warrant. This "logical connection" has no basis in law.

The defendant does begin with a correct premise, generally a warrant or equivalent court order is needed to obtain a biological sample from a person for DNA testing. This is the holding of Garcia-Salgado, a case where the State obtained a biological sample from a pretrial detainee for use at his subsequent rape trial. 170 Wn.2d at 184-85. Such an "intrusion into the body," the Court held, is protected by the constitution. Id. However, no case has ever extended this rationale to fingerprints.

The statement in Surge, that fingerprints and DNA are similar, was made in regards to the fact that both are used as a means of identification. Surge, 160 Wn.2d at 74-75. The Court did not hold that fingerprints are a privacy interest protected under article I, section 7. In fact, the State has found no case—and the defendant has cited none—that has held that fingerprints are protected under any state constitution or the United States Constitution. Where no authority is cited in support of a proposition, the

court is not required to search out authority, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (citing DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Additionally, in Surge, the Court discusses the analysis that must be done to determine if there is a "private affair" protected under article I, section 7. Surge, 160 Wn.2d at 71-72. This analysis focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Id. at 71 (citing State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994)). This includes examining the historical treatment of the interest asserted. Id. at 72. The defendant conducts no such analysis here. "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

In this regard, the defendant's argument is similar to the argument rejected by this Court in State v. Collins, 152 Wn. App. 429, 438-42, 216 P.3d 463 (2009), rev. denied, 168 Wn.2d 1020 (2010). Collins argued that the obtaining of a voice exemplar required a warrant or equivalent court

order because it was a private affair protected by article I, section 7. In declining to even consider the claim, this Court stated:

Collins' argument on this issue is limited to citing several cases holding that the nonconsensual collection and analysis of blood or urine invokes privacy concerns. He otherwise fails to address any of the relevant inquiries in a private affairs determination. He has thus provided us no basis for consideration of his argument.

Collins, at 400 (citing Palmer v. Jensen, 81 Wn. App. 148, 913 P.2d 413 (1996)) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration").<sup>25</sup>

Finally, the defendant completely ignores this statement from Surge: "[t]he constitutionality of fingerprinting convicted persons is unquestioned." Surge, at 78 (citing State v. Olivas, 122 Wn.2d 73, 106, 856 P.2d 1076 (1993)).

Even if the taking of fingerprints is considered a search of a private affair, the "search" here was lawful. In Surge, multiple convicted felons challenged the taking of biological samples for DNA testing. While the

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<sup>25</sup> This Court also rejected the defendant's Fourth Amendment argument noting that in United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973), the Supreme Court held that a directive to provide a voice exemplar does not infringe upon any interest protected by the Fourth Amendment because no person can have a reasonable expectation of privacy in his voice:

Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

Id. at 14.

taking of a biological sample is an actual intrusion of the body and therefore a protected private affair, which would thus generally require a search warrant to obtain, the Supreme Court held that due to the lessened expectation of privacy of a convicted felon, the taking of a biological sample of a convicted felon does not require a search warrant. Surge, at 80-82. Thus, if a search warrant is not needed for an actual intrusion into a person's body—if that person is a convicted felon—to obtain a biological sample for DNA testing, then it cannot be argued that obtaining the fingerprints of a convicted felon—an act that does not intrude into the person's body, cannot possibly require a warrant.

And finally, even if the defendant's argument had merit, his remedy is not available to him. Proof of his prior "most serious offenses" was shown with full documentation supporting the existence of the prior convictions and that the defendant committed the prior offenses. See sentencing exhibits 1-8. This included the use of the defendant's fingerprints—his booking prints—that were not challenged below or on appeal. See sentencing exhibit 1. The challenged fingerprints were just one piece of that evidence—a non-critical piece of evidence, used to prove the defendant was a persistent offender. Any error in admitting the challenged print evidence was harmless.

**7. THE DEFENDANT'S CLAIM THAT FINGERPRINT EVIDENCE IS NOT ADMISSIBLE EVIDENCE IS NOT AN ISSUE THAT IS PROPERLY BEFORE THIS COURT.**

The defendant contends that the fingerprint evidence admitted at his sentencing hearing should not have been admitted because fingerprint evidence is not reliable, essentially, that fingerprint evidence does not meet the Frye standard.<sup>26</sup> The method of fingerprint comparison and analysis used in this case is referred to as the ACT-V method. 7RP 1029. The defendant's argument was not raised below and is not properly before this Court.

In Washington, the Frye test is used to determine admissibility of novel scientific evidence. State v. Copeland, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996). Under this test, scientific evidence is admissible if it is generally accepted in the relevant scientific community. State v. Hayden, 90 Wn. App. 100, 103-04, 950 P.2d 1024 (1998) (citing Copeland, 130 Wn.2d at 255). However, if the evidence does not involve new methods of proof or new scientific principles, then a Frye inquiry is not necessary. State v. Ortiz, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992). However, before a reviewing court gets to these questions, the questions must have

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<sup>26</sup> Referring to Frye v. United States, 293 F. 1013 (D.C.Cir. 1923).

been raised by the party opposing the admission of the evidence at the trial court—it was not here.<sup>27</sup>

“When a party fails to raise a Frye argument below, a reviewing court need not consider it on appeal.” In re Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006), rev. denied, 159 Wn.2d 1006 (2007). “Error may not be predicated upon a ruling which admits ... evidence unless ... a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.” ER 103(a)(1). Further, a defendant may not couch the failure to raise an evidentiary challenge to scientific evidence as a question of constitutional significance on appeal. In re Post, 145 Wn. App. 728, 755-56, 187 P.3d 803 (2008) (rejecting attempts to sidestep the fact that the defendant did not seek a Frye hearing in the trial court), aff’d, 170 Wn.2d 302 (2010). Moreover, particularly where evidence is based upon a routinely used and “familiar forensic

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<sup>27</sup> The defendant does not actually cite to Frye. Rather, he appears to couch his argument in terms of the reliability of the evidence. This gets him nowhere. First, reliability is simply a factor in the Frye test. Second, if he is trying to distance himself from a Frye claim because he did not raise it below, then there is even more reason why this issue is not properly before this Court—the issue would be nothing more than an evidentiary issue under ER 401 and ER 403—and evidentiary issues cannot be raised for the first time on appeal. See State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

technique,”<sup>28</sup> an objection to that evidence must be sufficiently specific to inform the trial court that a Frye challenge is intended. State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006); see also State v. Newbern, 95 Wn. App. 277, 288–89, 975 P.2d 1041 (1999) (declining to review Frye issue on appeal where the defendant did not invoke Frye or otherwise argue that the methodology employed was not accepted within the relevant scientific community), rev. denied, 138 Wn.2d 1018 (1999).

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<sup>28</sup> The defendant does not cite to a single case wherein the ACE-V methodology employed here has been found inadmissible. In fact, his argument is contrary to existing authority. It is undisputed that “ACE-V is the standard methodology used throughout the United States and other parts of the world for fingerprint analysis.” Com. v. Patterson 445 Mass. 626, 642, 840 N.E.2d 12 (2005). “ACE-V methodology easily satisfies the general acceptance factor of Daubert. United States v. Sullivan, 246 F.Supp.2d 700, 702-03 (E.D.Ky.2003) (referring to Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the standard for admissibility of scientific evidence in federal court).

Fingerprint identification has been admissible as reliable evidence in criminal trials in this country since at least 1911. While we have not definitively assessed the admissibility of expert fingerprint identifications in the post-Daubert era, every Circuit that has done so has found such evidence admissible. See United States v. Hernandez, 299 F.3d 984 (8th Cir. 2002) (concluding that fingerprint identification satisfies Daubert); United States v. Havvard, 260 F.3d 597, 601 (7th Cir. 2001) (same); United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996) (noting defendant’s acknowledgment that “fingerprint comparison has been subjected to peer review and publication,” and holding that trial court did not commit clear error where it admitted fingerprint evidence without performing Daubert analysis); see also United States v. Llera Plaza, 188 F.Supp.2d 549, 572–73 (E.D.Pa. 2002) (discussing long history of latent fingerprint evidence in criminal proceedings, and citing lack of proof of its unreliability, to hold such evidence admissible); United States v. Joseph, 2001 WL 515213, 1 (E.D.La. 2001) (observing that “fingerprint analysis has been tested and proven to be a reliable science over decades of use for judicial purposes”)[unpublished]; United States v. Martinez-Cintrón, 136 F.Supp.2d 17, 20 (D.P.R. 2001) (noting that questions of reliability of fingerprint identifications can be addressed through vigorous cross-examination of expert witness).

United States v. Crisp, 324 F.3d 261, 266 (4<sup>th</sup> cir. 2003) (some citations and footnotes omitted), cert. denied, 540 U.S. 888 (2003).

In short, the defendant does not even attempt to argue how this issue can be raised for the first time on appeal, and as the case law shows, it cannot.

**8. THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL IN DETERMINING WHETHER A DEFENDANT IS A PERSISTENT OFFENDER.**

The defendant claims that he has a constitutional right to have a jury determine whether he is a persistent offender. This argument has been rejected by both the United States Supreme Court and the Washington Supreme Court. As this Court just recently stated “Our Supreme Court has ‘repeatedly rejected’ the argument that a jury must determine the existence of prior convictions.” State v. Salinas, 169 Wn. App. 210, 279 P.3d 917, 925 (2012) (quoting State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007)).

In Almendarez-Torres v. United States, the United States Supreme Court rejected the argument that recidivist factors need to be charged in an indictment, proven to a jury, or proven beyond a reasonable doubt. Almendarez-Torres v. United States, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). On at least four separate occasions, the Washington State Supreme Court has agreed; specifically finding that prior convictions used to prove that a defendant is a persistent offender need not be submitted to a jury and proved beyond a reasonable doubt.

State v. Thieffault, 160 Wn.2d 409, 158 P.3d 580 (2007); State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 124 S. Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799, cert. denied, 535 U.S. 996 (2001); State v. Manussier, 129 Wn.2d 652, 921 P.2d 743 (1996), cert. denied, 520 U.S. 1201 (1997).

Subsequent to Almendarez-Torres, the United States Supreme Court concluded that factual matters relating to the charged crime that enhance a sentence must be proved to a jury. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Court held that the finding that Apprendi committed the crime charged because of racial bias, a factor used to enhance his sentence, should have been determined by the jury, not the sentencing court. In so holding, the Court refused to overturn Almendarez-Torres, specifically stating that their decision did not apply to the question of whether a defendant has a prior conviction. Apprendi, 530 U.S. at 489-90. "Other than the fact of a prior conviction," the Court said, "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." Apprendi, at 489-90.

Two years later, in Ring v. Arizona, the Supreme Court held that in a capital case a jury, rather than a judge, must determine whether aggravating circumstances exist allowing for imposition of a death

sentence. Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Again, the Court had the opportunity to overrule Almendarez-Torres, but again the Court neither specifically overruled Almendarez-Torres nor held that prior convictions needed to be determined by a jury.

In State v. Smith, the Washington Supreme Court reviewed its prior decisions regarding recidivism factors in light of defense arguments that somehow Apprendi and Ring required that a jury determine whether a defendant has prior convictions. Again, the Supreme Court reaffirmed that prior convictions need not be proved to a jury in order to establish that a defendant is a persistent offender. Smith, 150 Wn.2d at 141-43. The Court fully analyzed Almendarez-Torres, Apprendi, and Ring, and concluded that the holding of Almendarez-Torres was still valid.

The United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2351, 159 L. Ed. 2d 403 (2004), did not change this fact. All the Court in Blakely did was reaffirm the holding of Apprendi and expand its application to sentences below the statutory maximum but beyond the statutory sentence range.

This case requires us to apply the rule we expressed in Apprendi v. New Jersey. "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."

Blakely, 124 S. Ct. at 2536.

Nothing in Blakely purports to modify the "prior conviction" exception of Almendarez-Torrez and Apprendi. See State v. Rivers, 130 Wn. App. 689, 692-93 n.3, 695-96, 128 P.3d 608 (2005), rev. denied, 158 Wn.2d 1008 (2006); State v. Jackson, 129 Wn. App. 95, 105 n.10, 117 P.3d 1182 (2005), rev. denied, 156 Wn.2d 1029 (2006); State v. Hunt, 128 Wn. App. 535, 542, 116 P.3d 450 (2005), rev. denied, 160 Wn.2d 1001 (2007); State v. Alkire, 124 Wn. App. 169, 176-77, 100 P.3d 837 (2004), review granted in part, remanded, 154 Wn.2d 1032 (2005).

The United States Supreme Court has ruled that there is no Federal Constitutional right to have a jury determine recidivist factors. The Washington State Supreme Court has agreed. The United States Supreme Court is the final arbiter of controversies arising under the Federal Constitution and their decision is binding on this Court. State v. Chrisman, 100 Wn.2d 814, 816, 676 P.2d 419 (1984); State v. Laviollette, 118 Wn.2d 670, 826 P.2d 684 (1992). Thus, this Court must reject the defendant's claim that he is entitled to have a jury determine whether he is a persistent offender.

**9. THE PERSISTENT OFFENDER STATUTE DOES NOT VIOLATE PRINCIPLES OF EQUAL PROTECTION.**

The defendant contends that the Persistent Offender Accountability Act (POAA), chapter 9.94A.570 RCW, is unconstitutional. He bases his claim on the fact that when proof of a prior conviction is an element of a crime, the State must prove its existence to a jury beyond a reasonable doubt, but when the same conviction is a prior persistent offender offense (a "most serious offence") requiring a life sentence, a judge may determine the existence of the prior conviction by a preponderance of the evidence. This, the defendant contends, violates the equal protection clause of the Fourteenth Amendment and article I, section 12 of the Washington Constitution. This issue has been repeatedly rejected by cases the defendant neither addresses, nor cites. See Salinas, 169 Wn. App. 210 (rejecting again this same argument); State v. Langstead, 155 Wn. App. 448, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010); State v. Williams, 156 Wn. App. 482, 234 P.3d 1174, rev. denied, 170 Wn.2d 1011 (2010); State v. Reyes-Brooks, 165 Wn. App. 193, 267 P.3d 465 (2011).

Under the POAA, trial courts are required to sentence "persistent offenders" to life imprisonment without the possibility of parole. RCW 9.94A.570. A "persistent offender" is a person who had been convicted of

a "most serious offense" and, before the commission of the offense, has been convicted as an offender on two separate occasions of most serious offenses. RCW 9.94A.030. A "most serious offense" includes second-degree assault, first-degree robbery, attempted first-degree robbery and second-degree robbery or comparable out-of-state offenses. RCW 9.94A.030. Thus, the defendant's current felony conviction, and his prior second-degree assault conviction and his aggravated robbery convictions all qualify as most serious offenses. Thus, the court found the defendant is a persistent offender.

**a. The Equal Protection Clause.**

The equal protection clause<sup>29</sup> is not intended to ensure complete equality among individuals or classes. Rather, the equal protection clause prohibits governmental classifications that impermissibly discriminate among similarly situated groups. In re Silas, 135 Wn. App. 564, 145 P.3d 1219 (2006); State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992). Under the equal protection clause, persons similarly situated with respect to the legislative purpose of the law must receive like treatment. State v. Shawn P., 122 Wn.2d 553, 561, 859 P.2d 1220 (1993).

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<sup>29</sup> U.S. Const. amend. XIV; Wash. Const. art. I, § 12.

**b. The Standard Of Review.**

Equal protection challenges are analyzed under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis. Manussier, 129 Wn.2d at 672-73. Recidivist criminals are not a semi-suspect class; thus, the proper test to apply where only a liberty interest is asserted is the rational basis test. Id.

The rational basis test "is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause." Shawn P., 122 Wn.2d at 561. In fact, "[o]nly in the rarest of cases will a statute fail to survive rational basis review." More v. Washington State Dept. of Retirement Systems, 133 Wn. App. 581, 585-86, 137 P.3d 73 (2006) (citing DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998)).

Under a rational basis test, the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives. Shawn P., at 561. A "presumption of constitutionality exists for the statute in question." Arnold v. Dept. of Retirement Sys., 74 Wn. App. 654, 665, 875 P.2d 665 (1994), rev. on other grounds, 128 Wn.2d 765 (1996). The burden is on the party challenging the classification to show that it is "purely arbitrary." Coria, 120 Wn.2d at 172. The challenging party must prove that the statute is

unconstitutional beyond a reasonable doubt. Forbes v. Seattle, 113 Wn.2d 929, 941, 785 P.2d 431 (1990).

Two other caveats are important to any equal protection argument. First, if there is a legitimate objective for the classification, then there need not be a perfect fit between the objective and the means employed; all that is required is a rational relationship. DeYoung, 136 Wn.2d at 144. In other words, a statute survives rational basis review even if it is to some extent both under-inclusive and over-inclusive. Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 901, 83 P.3d 999 (2004).

Second, "[o]ne who challenges a statute under the rational basis test must do more than merely question the wisdom and expediency of the statute." Coria, at 174. "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." Id. "[S]tatutes do not offend [the federal or state constitutions] unless they are invidiously discriminatory." Northshore Sch. Dist. No. 417 v. Kinnear, 84 Wn.2d 685, 722, 530 P.2d 178 (1974), overruled on other grounds by Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978).

**c. Not Similarly Situated.**

The defendant contends that persons charged with certain felony offenses where a prior conviction is an element of the crime, for example,

unlawful possession of a firearm (see RCW 9.41.040, hereinafter UPFA) or felony violation of a no-contact order (see RCW 26.50.110, hereinafter FVNCO) and persons who are persistent offenders are similarly situated with respect to the legislative purpose of the law. The defendant is incorrect.

For example, the UPFA statute serves two purposes. First, the statute defines certain classes of persons that the legislature has determined should not be allowed to possess a firearm. This includes persons found guilty, or not guilty by reason of insanity, of any felony offense, persons who have been involuntarily committed for mental health treatment, persons found guilty of certain domestic violence misdemeanor offenses, persons under a certain age, and persons pending trial for serious offenses. Second, the statute provides that it is a criminal offense for persons in these classifications to possess a firearm.

On the other hand, the purpose of the POAA is to improve public safety by imprisoning the most serious recidivist offenders—a purpose that the Supreme Court has held is a legitimate state objective. Manussier, at 674. The POAA is the legislature's appropriate "attempt to define a particular group of recidivists who pose a significant threat to the legitimate state goal of public safety. Id.

In sum, statutes like the UPFA statute deal with deterring certain behavior, for example, prohibiting certain persons from possessing or owning a firearm. The POAA deals solely with the amount of punishment the most serious recidivist criminals should receive based on the class of the current crime committed, and the class and number of the prior crimes committed. There is a purpose for treating prior convictions differently under different statutes, and thus, a person subject to one statute is not similarly situated in regards to the legislative purpose of the other statute.

**d. A Rational Basis.**

The defendant's argument that there is no rational basis for the legislature's differing treatment of persons charged with UPFA or FVNCO and persons being sentenced as a persistent offender ignores the distinction between a prior conviction that actually alters or defines the crime charged, and a prior conviction that is used solely to establish recidivism.

Under the POAA, the recidivist fact of a prior conviction is used like all recidivist facts of prior convictions throughout the Sentencing Reform Act; the prior conviction dictates the amount of punishment to be imposed upon a jury's finding that the underlying offense has been committed. Here, the defendant would still be guilty of first-degree

robbery with a firearm enhancement whether or not the State proved that he had been convicted of multiple most serious offenses in the past.

On the other hand, the legislature chose to prohibit convicted felons from possessing a firearm, thus making the prior conviction an element of the crime. The fact that persons with a prior conviction of a certain type can be charged with a higher degree of crime (for example, the charging of UPFA in the first or second degree depends on the nature of the prior offense), does not change the fact that the conviction for the current crime is based on proof of the prior conviction. It is certainly rational for the legislature to elevate the crime of unlawful possession of a firearm for those felons who have committed more serious prior offenses.

The fact that the legislature has chosen to handle these situations differently is not wholly irrational. Making certain actions a crime based on prior convictions or making the crime more serious based on specific recidivist facts evinces a legislative intent to deter specific conduct. Increasing punishment for felonies by taking recidivism into account reflects a generalized legislative choice to protect the public. The defendant can point to no invidious discrimination, nor can he support his claim that the different treatment of the fact is wholly irrelevant to the legislative purposes of each statute.

Further, the defendant's equal protection argument, taken to its logical conclusion, would invalidate not only the POAA, but the entire sentencing scheme of the SRA in general—all prior convictions would have to be treated as "elements" of the current crime, charged in the Information and proven to a jury beyond a reasonable doubt. But Washington courts have repeatedly rejected such claims. See In re Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998) (no equal protection violation when legislature changed its view of criminal punishment, resulting in offenders being subject to different punishment schemes); State v. Ross, 152 Wn.2d 220, 240-41, 95 P.3d 1225 (2004) (same); Manussier, *supra* (POAA passes rational basis test and thus does not violate equal protection clause in regards to offenses that count as a most serious offense); Langstead, *supra* (POAA does not violate equal protection where other crimes treat prior conviction as an element); Williams, *supra*; Reyes-Brooks, *supra*; Salinas, *supra*.

**10. EVIDENCE SHOWED THE DEFENDANT WAS ON COMMUNITY CUSTODY AT THE TIME HE COMMITTED THE CURRENT OFFENSE.**

If a present conviction is for an offense committed while the offender was under community custody, one point is added to the offender score. RCW 9.94A.525(19). In calculating the defendant's offender score, a point was added based on the fact that he was on community

custody at the time of his current conviction. CP 206; CP \_\_\_\_, sub # 110. The defendant claims he did not agree to his offender score and therefore can raise this issue for the first time on appeal. Additionally, he claims that there was no evidence presented that showed that he was on community custody at the time he committed his current offense. The defendant is incorrect on both points.

The Supreme Court has stated "that waiver can be found where the alleged [sentencing] error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Shale, 160 Wn.2d 489, 495, 158 P.3d 588 (2007) (citing In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)). In claiming that he did not agree that he was on community custody when he committed the current offense, the defendant ignores his own sentencing brief submitted to the trial court. CP 199-204.

The defendant's criminal history consists of two counts of aggravated robbery out of Arkansas, one count of second-degree assault and one count of first-degree burglary out of Washington, and one count of unlawful possession of a firearm out of California. CP 211. The State and the Court both determined that the defendant's offender score was an eight, with one point being added because the defendant committed the

current offense while he was on community custody. CP 206; CP \_\_\_\_, sub # 110. The defendant disagreed.

Instead of an eight, the defendant claimed his offender score was three points less because, he claimed, the two Arkansas robbery convictions and California unlawful possession of a firearm conviction did not count in his offender score. CP 199. Thus, the defendant stated, he had “an offender score of five.” CP 199. With this concession and agreement, the defendant is barred from raising this factual claim for the first time on appeal.

Additionally, the defendant’s claim that no evidence was presented that showed that he committed the current crime while he was on community custody is not accurate.

On October 18, 2007, under cause number 05-C-09880-1, the defendant was sentenced to a term of confinement of 36 months for a first-degree burglary conviction and second-degree assault conviction. Sentencing exhibit 8, pps 1-5. The defendant was also ordered to serve a 24 to 48 month term of community custody. Sentencing exhibit 8, p 5. The defendant was released from custody on March 3, 2008. Sentencing exhibit 5, p 4. The defendant committed his current crime on February 28, 2009. CP 115. Even if the defendant served the shortest possible term of community custody (24 months), he would have been on community

custody until March 3, 2010. Thus, his claim that no evidence was admitted showing he was on community custody at the time he committed his current offense is without merit.

**11. THE FACT THAT THE COURT IMPOSED A TERM OF COMMUNITY CUSTODY IS MOOT.**

As part of the defendant's sentence, the court imposed an 18 month term of community custody, "if [the defendant is] ever released on this cause." CP 209. The defendant asserts that the imposition of a term of community custody was error. This issue is moot. An issue is moot if the matter is "purely academic." State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

Robbery in the first degree is a violent offense. See RCW 9.94A.030. As a violent offense, the sentencing court is normally required to impose a term of community custody. See RCW 9.94A.702. However, when it comes to persistent offenders, RCW 9.94A.570 provides in pertinent part that:

Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death. In addition, **no offender**

**subject to this section may be eligible for community custody**, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of release...

RCW 9.94A.570 (emphasis added).

It is likely that the sentencing court ordered a term of community custody in the unlikely event that the defendant's persistent offender sentence is ever overturned. However, in the event this were to happen, the defendant would need to be resentenced. Upon resentencing, if the subsequent court were to sentence the defendant to a non-persistent offender sentence, the sentencing court would be required to impose a term of community custody per RCW 9.94A.030 and RCW 9.94A.702. At the same time, as this case currently stands, the defendant will not serve a term of community custody. Thus, this issue is moot. The defendant will either never serve a term of community custody—if his sentence is upheld, or if his sentence is not upheld, he will be resentenced and if resentenced to a non-persistent offender sentence, community custody will be imposed.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 25 day of October, 2012.

Respectfully submitted,

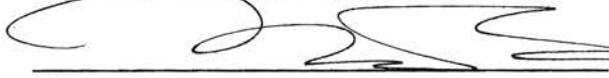
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DORSEY, Cause No. 68241-5-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

10-26-12  
Date