

NO. 33649-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

RONALD MCCOMB,

Appellant.

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

The Honorable James Warme

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Mr. McComb appeals his conviction for second degree assault, contending the trial court failed to instruct the jury on the lesser included offense of third degree assault, also failed to give a Petrich instruction despite the fact there were two distinct assaults described at trial, and erroneously admitted transcripts of telephone calls between the defendant and complaining witness in violation of Washington's Privacy Act.

The trial court also made several errors in sentencing Mr. McComb. First, it erred in finding a 1988 conviction for second degree assault was comparable to the current crime of second degree assault, despite the fact the two crimes have different mental elements. Second, the trial court erred by finding two prior most serious offenses where the State had not presented sufficient evidence. Third, the trial court erroneously found Mr. McComb was armed with a deadly weapon when he committed an assault in 1988, making that crime a most serious offense.

Mr. McComb also challenges his persistent offender sentence based on violations of the federal constitution where it resulted in a maximum term based on prior offenses not found by a jury beyond a reasonable doubt. Finally, the Persistent Offender

Accountability Act (POAA) violates the single subject requirement of the Washington Constitution.

B. ASSIGNMENTS OF ERROR.

1. The trial court failed to instruct the jury on the lesser included offense of third degree assault, despite a defense request.

2. The trial court erred in not giving a Petrich instruction.

3. The trial court erred in admitting telephone calls recorded in violation of Washington's Privacy Act.

4. The trial court erred in failing to find the defendant's 1988 conviction for second degree assault was not comparable to second degree assault as listed in the POAA.

5. The trial court violated Mr. McComb's federal constitutional rights when it imposed a sentence over the maximum term based on prior convictions that were not found by a jury beyond a reasonable doubt.

6. The trial court erred in finding Mr. McComb was armed with a deadly weapon during his 1988 second degree assault.

7. The trial court erred in imposing a sentence under the POAA even though it violates the single subject rule of the Washington Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A trial court must give a lesser included offense instruction if each element of the lesser offense is an element of the charged offense and the facts in the case support the inference that the lesser crime was committed. Here, both the legal and factual prongs of the test are met, and third degree assault is a lesser included degree of second degree assault. Did the trial court err in failing to instruct the jury on third degree assault despite a defense request? (Assignment of Error 1)

2. When the State presents evidence of two or more distinct acts that each meet the elements of the crime charged, the trial court must give a Petrich instruction in order to ensure a unanimous jury. Here the State presented evidence of two distinct acts, each of which could have constituted second degree assault. Did the trial court err in failing to give a Petrich instruction? (Assignment of Error 2)

3. Washington's Privacy Act requires consent from both parties to record telephone calls before those calls may be admitted at trial. Here the State failed to prove the defendant agreed to the recording of telephone calls he made from jail. Did the court err in admitting the telephone calls at trial? (Assignment of Error 3).

4. A prior conviction may not be counted as a most serious offense unless it is comparable to a current most serious offense. Here the court failed to recognize that a 1988 second degree assault conviction required a lesser mental state than a current second degree assault conviction. Did the trial court err in counting the 1988 conviction as a prior most serious offense? (Assignment of Error 4)

5. The Sixth and Fourteenth Amendment rights to a jury trial and to due process prohibit the imposition of a sentence other than that permitted by the jury verdict. The sentencing court imposed a sentence over the statutory maximum term for the defendant's crimes based upon the court's conclusion by a preponderance of the evidence that he had two prior convictions for "most serious" offenses. Was the defendant denied his

constitutional right to a jury finding of every element of the crime beyond a reasonable doubt? (Assignment of Error 5)

6. In order for a prior conviction that is not otherwise comparable to a most serious offense to count as a strike, the State must show the defendant was armed with a deadly weapon at the time of the offense. The State here cannot make that showing. Did the trial court err in sentencing Mr. McComb as a persistent offender? (Assignment of Error 6)

7. Washington Constitution, article II, § 19, prohibits a voter initiative from containing more than one subject and requires the subject be expressed in the ballot title. The POAA's ballot title was restrictive, but the initiative contained more than one subject. The practice of "logrolling," or attaching a less popular provision to a more popular one, cannot be eliminated unless the entire initiative is stricken for violating the single subject provision. Should the POAA be stricken in its entirety because it violated art. II, section 19 of the Washington Constitution? (Assignment of Error 7).

D. STATEMENT OF THE CASE.

Ronald McComb and his wife, Amy McComb, argued on February 6, 2005 after consuming methamphetamine. 4/15/06RP

439-41.¹ After arguing the two threw a pair of scissors back and forth at each other. 4/15/05RP 445-46. Shortly thereafter the fight continued when the defendant kicked Ms. McComb and she kicked him back. 4/15/06RP 448. Ms. McComb then told Mr. McComb she was leaving him and taking their daughter. 4/15/06RP 449.

Eventually Ms. McComb went to the couple's bedroom. 4/15/06RP 453. Ms. McComb testified that later Mr. McComb also went to the bedroom, where he put a kitchen knife to Ms. McComb's neck and threatened to hurt her if she took the couple's daughter. 4/15/05RP 454-56. Mr. McComb did not intentionally move the knife or use it to cut Ms. McComb. 4/15/05RP 458-59. Ms. McComb experienced what she described as an adrenaline rush and pushed her neck into the knife. 4/15/05RP 459, 487. Eventually Mr. McComb released Ms. McComb and she crawled under a vanity. 4/15/05RP 459.

Police arrived within hours of the extended fight and arrested Mr. McComb. 4/14/05RP 232; 4/15/05RP 463, 468. While held in the Cowlitz County Jail, the defendant made several calls to Ms.

¹ The Verbatim Report of Proceedings will be referred to by their date, followed by "RP" and the page number.

McComb, which the trial court admitted over defense objections.

4/13/05RP 38-54. This appeal timely follows.

E. ARGUMENT.

1. THE COURT FAILED TO INSTRUCT THE JURY ON THIRD DEGREE ASSAULT DESPITE A DEFENSE REQUEST.

a. Mr. McComb requested a third degree assault instruction.

The defense requested an instruction on third degree assault and took exception to the court's failure to give the instruction.

4/14/05RP 330; 4/15/05RP 559. See CP 22 (Attached as Appendix). The defense noted on the record that the court refused a request for a third degree assault instruction.

b. Jury instructions are sufficient when they allow the parties to argue their theory of the case. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The failure to give a lesser included offense instruction violated the defendant's right to due process because defense counsel was not able to argue Mr. McComb's theory of the case. U.S. Const. amend. 14; Conde v. Henry, 198 F.3d 734 (9th Cir. 1999). Mr. McComb was not able to argue his theory of the case—that he negligently injured Ms. McComb when she lunged into the knife he held at her neck—without an instruction as to the

elements of third degree assault. Finally, a defendant has a due process right to a lesser included offense instruction. U.S. Const Amend. 14; Beck v. Alabama, 447 U.S. 625, 627, 100 S.Ct. 3382, 65 L.Ed. 392 (1980) (death penalty may not be imposed when jury not permitted to consider lesser included non-capital offense).

c. Workman requires a trial court to give a lesser included jury instruction if the factual and legal requirements are met. First, each element of the lesser offense must be a necessary element of the charged offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Second, the facts in the case must “support the inference that the lesser crime was committed.” Id. at 448.

Here, both the law and the facts supported the giving of a third degree assault instruction. Mr. McComb was charged with assaulting the complaining witness with a deadly weapon. Legally, a person is guilty of second degree assault if he “assaults another with a deadly weapon.” RCW 9A.36.021 (1) (c). A person is guilty of third degree assault if “under circumstances not amounting to assault in the first or second degree” he

with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

RCW 9A.36.031 (d).

Third degree assault is legally included in second degree assault. State v. Jackson, 70 Wn.2d 498, 503, 424 P.2d 313 (1967). If a defendant is charged with second degree assault, it is appropriate to submit the a third degree assault instruction to the jury if

the facts of the particular case are such that they will sustain a conviction for assault in the third degree.

Id. at 503.

The facts in the case at bar support the inference that Mr. McComb committed third degree assault. The complaining witness testified that she lunged forward toward a knife the defendant held to her neck. 4/15/05 RP 459, 487. The defendant did not push the knife into the complaining witness' neck. 4/15/05 RP 458. The jury could have found that Mr. McComb negligently harmed the complaining witness with a weapon, as third degree assault requires.

d. Reversal is required. The trial court refused to give an instruction that allowed the defendant to argue his theory of the case. Additionally, both the factual and legal prongs of Workman were met. Reversal is required.

2. THE TRIAL COURT ERRED IN FAILING TO GIVE A
PETRICH INSTRUCTION.

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. Wash. Const. art. I, § 22; U.S. Const. amend. 6; 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 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.2d 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). Here the State presented evidence of two assaults on Amy McComb, yet the court

did not give a Petrich instruction. Ms. McComb testified that the defendant kicked her in the side of the face in addition to holding a knife to her throat. 4/15/05RP 448.

b. 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. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); 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 was evidence of two distinct acts. The first was the defendant's kicking Amy McComb. The second was his threatening her with a knife. This was not a continuous course of conduct but two distinct acts. See State v. Stockmyer, 83 Wn.App. 77, 87, 920 P.2d 1201 (1996) (Petrich rule applies to assault cases where there are two distinct acts, each of which could constitute assault).

c. The error in failing to instruct the jury on unanimity was prejudicial. 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 Sect. 824 (1967); Kitchen, 110 Wn.2d at 409.

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 fact 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).

This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.

Kitchen, 110 Wn.2d at 411. See also People v. Wolfe, 114 Cal.App.4th 177, 186-89, 7 Cal.Rptr.3d 483 (2003) (harmless error standard for court's failure to instruct on unanimity where distinct acts proved analyzed under the Chapman reasonable doubt harmless error standard).

Here, some jurors could have found that Mr. McComb committed second degree assault by holding a knife to Ms. McComb's throat while others could have found the defendant committed second degree assault if he kicked Ms. McComb in the head. 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 about which act constituted the second degree

assault. This Court must reverse Mr. McComb's conviction and remand for a new trial because the failure to give a Petrich instruction violated his right to a unanimous jury. U.S. Const. amend. 6; Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979).

3. STATE DID NOT PROVE CONSENT FROM BOTH PARTIES, THEREFORE THE TELEPHONE CONVERSATIONS THE COURT ADMITTED VIOLATED THE PRIVACY ACT.

a. RCW § 9.73.030 requires the consent of all parties to a phone call before that call can be recorded.

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication

Conversations recorded in violation of the privacy act are not admissible in a criminal or civil trial. State v. Williams, 94 Wn.2d 531, 541, 617 P.2d 1012 (1980) (recordings of phone conversations made without consent of both parties to the calls

were inadmissible in criminal trial); State v. Faford, 128 Wn.2d 476, 488, 910 P.2d 447 (1996) (evidence obtained in violation of the privacy act inadmissible at criminal trial for any purpose, including impeachment); RCW 9.73.050.²

b. Defense counsel argued the court should not admit tape recordings of calls the defendant made to the complaining witness from the jail. During motions in limine the defense argued that the phone calls Mr. McComb made to his wife, the complaining witness, from the jail should not be admitted at trial. The defense reasoned the recording of the calls violated Washington's Privacy Act. 4/13/05RP 48-50. The Court nonetheless allowed transcripts of some of the recorded phone calls to be read at trial. 4/13/05RP 52-55.

c. The State did not show Mr. McComb knew his calls were being recorded. The State failed to prove Mr. McComb consented to the recording of his calls to Amy McComb. The State argued that the defendant received notice when he made calls from the jail

² Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the

that those calls would be recorded. 4/13/05RP 51. However, the State offered no proof to that effect, merely the prosecutor's argument. The court accepted the State's description of jail phone calls without question and admitted the phone calls. 4/13/05 RP 53.

State v. Faford is instructional. 128 Wn.2d 476. In that case, a neighbor used a police scanner to listen to the defendant's calls, which included discussion of a marijuana grow operation, on their cordless phones. Id. at 479.

The Washington Supreme Court found the calls in Faford were private³ because the defendants

clearly intended the information related in their telephone conversations to remain confidential between the parties to the call, regardless of their use of a cordless telephone instead of a conventional telephone.

Id. at 485. Similarly, Mr. McComb clearly intended his calls to Ms. McComb remain confidential, regardless of his use of

commission of which would jeopardize national security.
RCW 9.73.050.

³The Washington Supreme Court has adopted the following definition of private:
belonging to one's self. . . secret. . . intended only for the persons involved (a conversation). . . holding a confidential relationship to something. . . a secret message: a private communication. . . secretly:
not open or in public

State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996).

a phone at the Cowlitz County Jail. The nature of the calls is such that it is obvious their content was not meant for outside parties to hear.

The State in Faford argued the fact that the defendants were using cordless phones, which were easily intercepted, showed those calls were not private. The Washington Supreme Court rejected that argument. In much the same way, the State in the case at bar argued the fact that the defendant made calls from a jail phone showed his calls were not private.

The Washington Supreme Court in Faford refused to permit the use of recordings of private phone calls despite the State's attempt to show the defendants should have been aware their calls were susceptible to being recorded. The trial court in Faford refused to admit testimony regarding a local retail store that sold cordless phones with warnings that cordless phone calls could be intercepted. Id. at 487. The Washington Supreme Court implicitly required some foundation the defendants knew or should have known their

calls were being monitored. Similarly, this court should reject the admission of the phone calls between Mr. and Ms. McComb because the State laid no substantial foundation Mr. McComb knew his calls were being recorded. As in Faford, the State's offer of proof is inadequate.

d. Mr. McComb did not make his phone calls from a State correctional facility. RCW 9.73.095 allows department of corrections employees to record calls from residents at State correctional facilities.

"state correctional facility" means a facility that is under the control and authority of the department of corrections, and used for the incarceration, treatment, or rehabilitation of convicted felons.

RCW 9.73.095 (1).

Mr. McComb made the recorded calls to Ms. McComb from the Cowlitz County Jail, which is a county run facility used to hold people convicted of misdemeanors or awaiting trial on, but not convicted of, felonies.

The trial court erroneously ruled that although the Cowlitz County Jail was not a state facility "the public policy to me seems to be the same." 4/13/05RP 54. However, the privacy act must be strictly construed. State v. Williams, 94

Wn.2d 531, 548, 617 P.2d 1012 (1980). RCW 9.73.095 spells out the strict definition of a state facility and does not make an exception for county facilities. The trial court erroneously ruled the phone calls were admissible because they were made from a county correctional facility.

e. Mr. McComb's phone calls were not admissible because they did not convey threats. RCW 9.73.030 (2)

reads in part

wire communications or conversations . . . (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands . . . may be recorded with the consent of one party to the conversation.

RCW 9.73.030(2) (b).

The trial court in Mr. McComb's case did not find that his calls to Ms. McComb fell under RCW 9.73.030(2) (b), but instead admitted them as admissions.

[T]he relevancy of those conversations, in this case, is that they must involve some unlawful request or demand or they're not relevant. The discussion we've had earlier is the relevancy is they are admissions. They're admissions essentially because he's seeking to suborn perjury or tamper with a witness, that's the whole idea. That's a second exception to the rule of the statute.

4/13/05RP 53-54. However, no case law or section of the statute contains exceptions for admissions made during phone calls recorded without the consent of both parties.

Mr. McComb's statements to Ms. McComb during their conversations do not fall under the exception to the privacy act in 9.73.030(2) (b). While Mr. McComb did encourage Ms. McComb to tell the prosecutor no knife was involved in the incident, he did not threaten or demand anything from Ms. McComb. State v. Williams, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980) makes clear that the types of statements Mr. McComb made to Ms. McComb on the phone are not covered by RCW 9.73.030(2)(b).

The legislature intended to establish protections for individuals' privacy and to require suppression of recordings of conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements. The exception contained in RCW 9.73.030(2) (b) must be strictly construed to give effect to the legislative intention underlying the general statute. Thus RCW 9.73.030(2) (b) must be interpreted as exempting from the act only communications or conversations "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests *of a similar nature*."

Id. at 548 (citations omitted).

Mr. McComb's recorded statements to Ms. McComb did not include threats of any nature. To the contrary, they were pleas to

help him with his case. See, e.g., 4/15/04 RP 529 (asking Ms. McComb to tell the prosecutor a favorable version of events); 4/15/04RP 530 (asking, Ms. McComb why she told prosecutor a knife was involved).

f. Reversal is required because the trial court abused its discretion in admitting calls recorded in violation of the Privacy Act.

The erroneous admission of evidence is harmless only if the significance of the wrongly admitted evidence is minor compared to the evidence as a whole. State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002). Here, the transcripts of phone calls the court admitted were extremely prejudicial, especially when compared to the evidence as a whole, which consisted largely of the testimony of Ms. McComb, who was angry at Mr. McComb and who admitted her memory was hazy based on the use of drugs. Reversal is required.

4. THE TRIAL COURT ERRED WHEN IT REFUSED TO FIND MR.MCCOMBS 1988 SECOND DEGREE ASSAULT WAS NOT COMPRABLE TO CURRENT SECOND DEGREE ASSAULT AND THEREFORE NOT A STRIKE OFFENSE.

a. Defense counsel argued Mr. McComb's 1988 offense was not comparable to the current charge of second

degree assault. At sentencing Mr. McComb argued his 1988 Washington conviction for second degree assault should not count as a strike because the elements of that charge at the time of the 1988 conviction were different than they are currently. The elements in 1988 were that the defendant “knowingly assaults with a weapon or thing likely to cause harm.” 8/2/05RP 615-18; CP 57 (Defendant’s Supplement [sic] Sentencing Brief). The trial court did not decide the issue but ruled the defendant was a persistent offender on other grounds. 8/2/05RP 631.

b. To be a “most serious offense,” a crime must be comparable to a current “most serious offense,” and the 1988 second degree assault is not. RCW 9.94A.030 (28) (u) refers to

[a]ny felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection[.]

(emphasis added). Just as an out of state conviction must be comparable to a current most serious offense to count as a strike offense, so must “any felony offense in effect at any time prior to December 2, 1993.” Mr. McComb’s 1988 second degree assault charge is such a felony offense.

In conducting comparability analyses, Washington courts have primarily compared out of state offenses with in state offenses, but the analysis is the same for two in-state offenses. To determine whether two offenses are legally comparable, a court must first look to the elements of the crime. State v. Morely, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). To be legally comparable to a strike offense, the elements of an out-of-state crime must be comparable to the elements of the Washington Strike offense on its face. Id. at 606.

An out-of-state conviction must be comparable to a Washington crime to be counted as a conviction.

Where a defendant's criminal history includes out-of-state convictions, the SRA requires these convictions be classified "according to the comparable offense definitions and sentences provided by Washington law."

State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (citations omitted). See also State v. Lopez, 147 Wn.2d 515, 521-22, 55 P.3d 609 (2002) (prosecution bears the burden of proving the existence and comparability of out-of-state prior convictions).

The same is true of out-of-state convictions the State wishes to count as strikes. State v. Bunting, 115 Wn.App. 135, 61 P.3d 375 (2003). Following established case law, the Bunting Court set

out a blueprint for sentencing where a defendant's criminal history includes an out-of-state prior conviction:

the sentencing court first compares the elements of the crime [of which the defendant was convicted] in the out-of-state statute to those of comparable Washington statutes in effect when the crime was committed.

Id. at 140 (quoting State v. Mutch, 87 Wn.App. 433, 436-37, 942 P.2d 1018 (1997), rev. denied, 134 Wn.2d 1016 (1998)). Where an out-of-state statute does not include an essential element included in the Washington statute, "it means that the out-of-state court or jury did not have to find each fact that must be found to convict the defendant of the essential elements of liability under the Washington counterpart crime." Id. (quoting Mutch, 87 Wn.App. at 441-42). Where the out-of-state statute is broader than the Washington statute, "the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute." Id. at 140-41 (quoting State v. Morley, 134 Wn.2d at 606).

In Bunting, the defendant was sentenced to life in prison as a persistent offender based in part on 1972 Illinois conviction for armed robbery that the trial court counted as a strike. The Court of

Appeals remanded for re-sentencing because the Illinois conviction was not comparable to the same crime in Washington. The Illinois statute did not “require proof of specific intent to steal or deprive,” while in 1972 the crime of armed robbery did require specific intent. Id. at 141. Therefore, the 1972 Illinois armed robbery could not count as a strike against the defendant. Id. at 143.

Here the 1988 Washington offense is not comparable to the current Washington offense or to the Washington offense at the time the legislature passed Persistent Offender Accountability Act. The court should apply the same analysis as if the 1988 conviction were an out of state conviction the state were proposing as a strike.

c. Second degree assault in 1988 required a mental state of knowledge, not intent. In early 1988, when Mr. McComb was convicted of second degree assault, RCW 9A.36.020, which codified the crime read in part

[e]very person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he. . . [s]hall **knowingly** assault another with a weapon or other thing likely to produce bodily harm. . . .

Former RCW 9A.36.020 (1) (c), as quoted in State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979) (emphasis added). The

legislature amended the statute effective July 1, 1988. State v. Ashcraft, 71 Wn.App. 444, 451, 859 P.2d 60 (1993).

The current second degree statute reads in relevant part

[a] person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . [a]ssaults another with a deadly weapon.

RCW 9A.36.021 (1) (c).

Intent is an element of the current statute. See State v. Chaten, 84 Wn.App. 85, 925 P.2d 631 (1996) (second degree assault includes the element of intent); Washington Pattern Jury Instructions Criminal, Vol. 11, 453 (2nd ed. 1994) (WPIC 35.50, Definition of Assault). As counsel noted in his sentencing brief, the jury in the case at bar was instructed that assault is an intentional act and

[a] person commits the crime of Assault in the Second Degree when he intentionally assaults another with a deadly weapon.

CP 40 (Instruction 9). Such an instruction is in keeping with current case law.

d. Knowledge is a lesser mental state than intent. RCW 9A.08.010 defines both knowledge and intent.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010 (1).

State v. Allen interprets RCW 9A.08.010 (1) and makes clear it sets out a hierarchy of mental states.

[RCW 9A.08.010] defines four levels of culpability applicable to the Washington Criminal Code: intent, knowledge, recklessness, and criminal negligence. The statutory scheme creates a hierarchy of mental states for increasing culpability.

State v. Allen, 101 Wn.2d 355, 359, 678 P.2d 798 (1984).

Knowledge is included in intent because intent creates a higher level of mental culpability than knowledge. State v. Shipp, 93 Wn.2d 510, 518, 610 P.2d 1322 (1980). However, the reverse is untrue. Knowledge is a lesser mental state than intent, and

therefore one who acts with knowledge does not necessarily act with intent. Allen, 101 Wn.2d at 359.

Knowledge requires that a juror

must find that the defendant had actual knowledge, and that he is permitted, but not required, to find such knowledge if he finds that the defendant had "information which would lead a reasonable man in the same situation to believe that [the relevant] facts exist."

Shipp, 93 Wn.2d at 514.

Intent, however, requires

the objective or purpose to accomplish a result which constitutes a crime.

RCW 9A.08.010 (1) (a).

e. Different mens rea requirements make two crimes non-comparable for purposes of determining a most serious offense. An out-of-state conviction is not comparable to a similar Washington crime with a greater mens rea requirement. See State v. Freeburg, 120 Wn.App. 192, 198-99, 84 P.23d 292 (2004) (federal robbery conviction under statute that did not require specific intent to steal was not comparable to Washington's second degree robbery statute which required specific intent to steal); State v. Lavery, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005) (federal

bank robbery is a general intent crime while second degree robbery in Washington requires specific intent to steal, therefore, the two crimes are not legally comparable). Similarly, two in-state convictions with different mental states are not legally comparable.

f. The rule of lenity requires ambiguity in RCW 9.94A.030 (28) (u) be interpreted in favor of the defendant. To the extent RCW 9.94A.030 (28) (u) is ambiguous, this court must interpret it as requiring comparability of in-state as well as out-of-state convictions.

The rule of lenity requires ambiguity in a statute be interpreted in favor of the defendant.

Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused.

State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984).

The language of RCW 9.94A.030 (u) requiring that only “[a]ny felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection” be counted as a most serious offense makes clear that felonies in effect prior to December 2, 1993, must be comparable to those current offenses listed in RCW 9.94A.030 to be a most serious offense. However, to the extent the court finds this

language ambiguous, it must interpret the language in favor of Mr. McComb.

g. Remand for re-sentencing is required. The trial court sentenced Mr. McComb as a persistent offender when he had only one offense that qualified as a most serious offense. Mr. McComb's 1988 second degree assault conviction is not a most serious offense because it is not comparable to the current crime of second degree assault listed in RCW 9.94A.030. Therefore, this court must remand Mr. McComb's case for a sentence within the standard range.

5. MR. MCCOMB'S FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WERE VIOLATED WHEN THE COURT IMPOSED A SENTENCE OVER THE MAXIMUM TERM BASED UPON PRIOR CONVICTIONS THAT WERE NOT FOUND BY A JURY BEYOND A REASONABLE DOUBT.

a. Because a prior most serious offense increases the statutory maximum, it must be treated as an element of the crime charged. To sentence Mr. McComb as most serious offender, the State must show two prior most serious offenses. RCW 9.94A.030 (32). Under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531,

159 L.Ed. 403 (2004), any factor that increases a defendant's sentence must be proved beyond a reasonable doubt to a jury. While Blakely states that a prior conviction is not a fact that must be proved to a jury, that statement is dicta only and inconsistent with the evolving state of the law.

At trial counsel challenged the trial court's ability to sentence Mr. McComb a sentence above the standard range based on Blakely v. Washington, 542 U.S. 296. 4/15/05 RP 16; 8/2/05TP 619-20; CP 51 (Sentencing Brief). The sentencing court nonetheless determined by a preponderance of the evidence that Mr. McComb had two prior convictions for "most serious offenses," and sentenced him to life without the possibility of parole under the Persistent Offender Accountability Act. 8/4/05RP 640. Had Mr. McComb not been a persistent offender, his offender score would have been 12, and his standard ranges would have been 75 to 96 months for second degree assault with a deadly weapon. CP 59 (Judgment and Sentence). Mr. McComb's sentence of life without the possibility of parole exceeded the maximum term permitted by the jury verdict and violates Mr. McComb's federal constitutional right to due process and to a jury trial.

b. The constitutional rights to due process and a jury trial require that any fact that increases a defendant's maximum sentence must be found by a jury beyond a reasonable doubt. 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. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. 6, 14. Thus, it is axiomatic that 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 v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536-37, 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). 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.

The United States Supreme Court applied this principle to facts the legislature had labeled "sentencing factors" but that

effectively increased the maximum penalty faced by the defendant. In Blakely, the Court found 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, 124 S.Ct. at 2537. Likewise, the Court held Arizona's death penalty scheme was unconstitutional where a defendant received the death penalty based upon aggravating factors found by a judge by a preponderance of the evidence. 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 the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. Apprendi, 530 U.S. at 491-92, 497.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The Ring Court pointed out the dispositive question is one of substance, not form. "If a State makes an increase in a 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.” Ring, 536 U.S. at 602, citing Apprendi, 530 U.S. at 482-83. Thus, a judge may only impose punishment within the maximum term justified by the jury verdict or guilty plea. Blakely, 124 S.Ct. at 2537.

c. No controlling Supreme Court precedent mandates a determination that the POAA is valid and constitutional. The Washington Supreme Court has previously held that the POAA does not violate an offender’s federal constitutional right to due process even though it increases the mandatory sentence based upon the court’s determination of prior convictions by only a preponderance of the evidence. State v. Rivers, ___ Wn.App. ___, 123 P.3d 500 (2005); State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002); State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1996); State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). In each of these cases, the court believed it was following federal precedent. Yet, as will be shown below, that precedent is either no

longer viable or it never supported the Washington court's conclusion.

i. Almendarez-Torres does not control this issue.

Both Smith and Wheeler rely upon the United States Supreme Court opinion in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The Wheeler Court recognized, however, that the continuing validity of Almendarez-Torres is questionable in light of Apprendi, but refused to reconsider the issue unless Almendarez-Torres was overruled. Wheeler, 145 Wn.2d at 123-24. In Smith, the court stated it was obligated to "follow" Almendarez-Torres. Smith, 150 Wn.2d at 143.

But the Washington Court misreads the Almendarez-Torres ruling. Almendarez-Torres does not address whether prior convictions must be proved to a jury beyond a reasonable doubt. Instead, the Court ruled only that recidivism was not an element of the substantive crime that needed to be pled in the information. 523 U.S. at 246. See Apprendi, at 530 U.S. at 488; Jones, 526 U.S. at 248.

Almendarez-Torres was charged with being found in the United States after being deported, and his maximum term was 20 years because he was deported for an aggravated felony.

Almendarez-Torres had pled guilty and admitted three prior aggravated felony convictions, but argued he faced only a two-year maximum because the aggravated felonies were not included in his indictment. 523 U.S. at 227. The Court determined that Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id. at 235. The Court reasoned that creating a separate crime with the prior conviction as an element would be unfair to defendants because juries would learn of their prior convictions. Id. at 234-35.

The Court had previously held that Pennsylvania's Mandatory Minimum Sentencing Act did not violate due process in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Almendarez-Torres attempted to distinguish McMillan because in that case visible possession of a firearm triggered a mandatory minimum term, whereas Almendarez-Torres received a higher maximum term. The Court found McMillan nonetheless controlled 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; Congress did not try to “evade” the Constitution. *Id.* at 1231-32. The Almendarez-Torres Court, however, expressed no opinion as to 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 1233.

ii. The reasoning of *Almendarez-Torres* is not persuasive. As mentioned above, Almendarez-Torres holds only that due process does not require notice in the indictment of prior convictions used to enhance a sentence; it does not address the burden of proof required by due process or the right to a jury trial. Moreover, the Court’s reasoning does not support the conclusion the POAA does not violate due process by failing to provide a jury trial or proof beyond a reasonable doubt.

First, the Almendarez-Torres Court looked to legislative intent and found that Congress did not intend to define a separate crime. But later Supreme Court cases make it clear that legislative intent does not establish the parameters of due process. Blakely, 124 S.Ct. at 2539; Ring, 536 U.S. at 602; Apprendi, 530 U.S. at 476. See, State v. Sawatzky, 196 Or.App. 159, 96 P.3d 1288,

2004 WL 1987638 at 7 (2004) (Blakely makes it clear Sixth Amendment analysis not dependent on legislative intent). Nor does the placement of an enhancement in the sentencing provisions of the criminal code mean that the enhancement is not really an element of a higher offense. Ring, 536 U.S. at 605; Apprendi, at 501 (Thomas, J., concurring). Thus, the fact the voters may have intended the POAA as a sentencing provision is not determinative of whether the act violates due process.

The Almendarez-Torres Court noted that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 118 S.Ct. at 1230. Both the Almendarez-Torres dissent and Justice Thomas's concurring opinion in Apprendi, however, cast doubt on the court's assumption that recidivism has historically been treated differently than other elements of a crime. Apprendi, 530 U.S. at 506-19 (Thomas, J., concurring; Almendarez-Torres, 523 U.S. at 259-60 (Scalia, J., dissenting). Two of the cases relied upon in Almendarez-Torres to support the proposition that the prior conviction need not be pled in the indictment involve the West Virginia recidivist statute, where the prior conviction must be found by the jury. Oyler v. Boles, 368 U.S. 448, 449-51, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) (prosecutor filed

separate information charging defendant as recidivist after conviction for crimes; defendant admitted prior convictions); Graham v. West Virginia, 224 U.S. 616, 624, 32 S.Ct. 583, 56 L.Ed. 917 (1912) (jury found identity in separate proceeding after separate information). Although not mentioned in those cases, West Virginia also requires prior convictions be proven beyond a reasonable doubt. W.Va. Code § 61-11-19; Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E. 2d 205, 208 (1981).

The fact that recidivism is a “traditional” sentencing factor does not mean that it need not be proven beyond a reasonable doubt or found by a jury. The Apprendi Court rejected the government’s argument that motive need not be found by a jury beyond a reasonable doubt because it was a traditional sentencing factor. Apprendi, 530 U.S. at 492-95. Many states’ recidivist statutes provide for proof beyond a reasonable doubt of prior convictions. 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 Ann. § 61-11-19. This was historically true in Washington. State v. Manussier, 129 Wn.2d at 690-91

The Almendarez-Torres Court also noted the fact of prior convictions in that case only 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. McComb’s prior convictions lead to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. Mr. McComb’s sentence – life without the possibility of parole – is far higher than the statutory standard sentence range.

The Almendarez-Torres Court also held that the federal statute did not “create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. The opinion then notes new sentencing guidelines channel that discretion with sentencing factors the defendant did not claim were elements of the a crime. 523 U.S. at 245-46. This argument has now been completely undermined by Blakely, where the Court found that Washington’s aggravating factors act as elements of the crime because they permit the judge to sentence the defendant over the statutory standard sentence range. Blakely, 124 S.Ct. at 2537-38. Here, Mr. McComb’s convictions mandate a sentence that exceeds both the SRA

standard range and the statutory maximum found at RCW 9A.20.021 (1).

The Almedarez-Torres Court further noted Congress had not changed the traditional elements of a crime and was not trying to “evade” the Constitution by treating an element as a sentencing factor. 523 U.S. at 246. Washington had a well-established crime -- being an habitual offender -- and a long history of treating this status as a separate offense. The POAA radically changed that crime by eliminating its elements and reducing them to sentencing factors. Thus, the voters may well have been attempting to avoid traditional constitutional requirements by placing the POAA within the SRA.

Finally, the Court noted there was no reason to require the government to plead any fact that increases the statutory maximum term when the judge may determine aggravating factors warranting the death penalty. 523 U.S. at 247, citing inter alia Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). This argument is not longer valid as the Court overruled Walton because it was “irreconcilable” with Apprendi, further demonstrating the weakness of the Almendarez-Torres reasoning. Ring, 536 U.S.

at 588-89. There is no reason for this Court to feel “bound” by Almendarez-Torres.

iii. Apprendi did not create an “exception” for prior convictions. 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, 124 S.Ct. at 2536; Apprendi, 530 U.S. at 476; Jones, 526 U.S. at 243 n.6. The Apprendi Court distinguished Almendarez-Torres because it involved recidivism and because the defendant only raised the indictment issue. 530 U.S. at 488, 495-96. The Apprendi Court went so far as to state “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.

The State will no doubt rely on the often-cited statement from Blakely and Apprendi: “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; Apprendi, 530 U.S. at 490. This statement is not a holding that prior convictions are excluded from the Apprendi rule. Rather, it demonstrates that the Court has not yet addressed the issue of prior convictions. 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 signed the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that Almendarez-Torres was 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.”)

d. There is insufficient proof to find Mr. McComb has three most serious offenses. The evidence in Mr. McComb's case was insufficient to prove two prior most serious offenses, as required by due process. A conviction violates a defendant's constitutional right to due process unless each element is supported by sufficient evidence. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); U.S. Const Amend. 14; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Green, 94 Wn.2d at 220-22. A claim of insufficiency requires we presume the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Inferences drawn from the evidence must still be **reasonable** inferences. Id. To be reasonable, an inference must be rationally related to the proven facts. State v. Johnson, 100 Wn.2d 607, 616, 674 P.2d 145 (1983), overruled on other grounds, State v. Bergeron, 105 Wn.2d 1, 711 P.2d 2000 (1985);

As argued above, an offense is a “most serious offense” only if equivalent to a current strike offense. Section 4, supra. Mr. McComb’s 1988 offense is not equivalent to the current offense of second degree assault. See section 4, supra.

The United States Supreme Court has held that a defendant has a right to notice and an opportunity to be heard on whether he has prior convictions that change his maximum possible punishment. Oyler v. Boles, 368 U.S. 448, 452, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) (habitual criminal statute); Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (sex offender statute). More recent cases such as Blakely, Ring, and Apprendi make it clear that facts that increase a defendant’s maximum sentence are elements of a greater crime and must be found by the jury beyond a reasonable doubt. This constitutional principle logically applies to prior convictions, and this Court should hold that the Sixth Amendment requires jury findings beyond a reasonable doubt of prior convictions used to impose a sentence of life without the possibility of parole under the POAA.

6. THE STATE CANNOT SHOW MR. MCCOMB WAS ARMED WITH A DEADLY WEAPON IN ORDER TO TREAT HIS 1988 SECOND DEGREE ASSAULT A

STRIKE UNDER RCW 9.94A.030 (28) (t).

The State may argue even though the 1988 second degree assault is not comparable to a current strike offense, it was a “felony with a deadly weapon verdict under RCW 9.94A.602.” RCW 9.94A.030 (28) (t). However, the judgment and sentence for the 1988 offense does not show a deadly weapon verdict as described by RCW 9.94A.602.

a. Mr. McComb’s 1988 conviction did not count as a most serious offense. Mr. McComb argued RCW 9.94A.030 (28) (t) refers to RCW 9.94A.602. That statute requires the defendant was “armed” with a deadly weapon. Nothing in the judgment and sentence for the 1988 second degree assault indicated Mr. McComb was “armed” with a deadly weapon at the time of the crime, even though he may have **possessed** a firearm.

[T]he statute requires there be a specific finding that he’s armed with a deadly weapon. But in the J and S it simply says possession of a gun and it doesn’t say armed. And so that . . . calls into question whether it can serve as a predicate . . . offense for the Persistent Offender Act. So, therefore, there wouldn’t be a felony with a deadly weapon enhancement attached to it because it would just be possession of a deadly weapon, not being armed with a deadly weapon.

8/2/05RP 619. See also CP 51 (Judgment and Sentence for 1988 second degree assault, attached as Appendix A).

Although receptive to defense counsel's argument, the trial court nonetheless found that Mr. McComb's 1988 conviction for second degree assault was a "most serious offense" because he was armed with a deadly weapon. 8/2/05RP 626. The court added. "I'm sure the Court of Appeals is going to straighten this out." 8/2/05RP 627.

b. The judgment and sentence does not show the defendant was "armed" with a deadly weapon. RCW 9.94A.602 requires a finding of fact

whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

The Judgment and Sentence for Mr. McComb's 1988 crime merely indicates

possession by the defendant or an accomplice of a deadly weapon as defined in RCW 9.94A.125 at the time of the commission of the crimes. . . .

CP 51, (page 1 of Appendix C to Defendant's Sentencing Brief).

Nowhere does the judgment indicate the defendant was "armed" with a deadly weapon at the time of the commission of the crime.

A person may possess a deadly weapon but still not be armed with it. If a weapon is not readily available, a defendant is not armed with it for purposes of RCW 9.94A.602. State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005). The State must show a nexus between the crime, the defendant and the weapon. Id. at 138. A person is armed with a deadly weapon only

If a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.

Id. at 137.

In Gurske the defendant possessed methamphetamine. He also possessed a gun in a backpack behind the driver's seat of the car he was driving. Id. at 136. The Washington Supreme Court found mere constructive possession of the gun insufficient to show he was armed with a deadly weapon. Even though the backpack was within the defendant's reach, the gun in the backpack was not. Id. at 143. The defendant was not "armed" with the gun. Id. at 144. See also State v. Mills, 80 Wn.App. 231, 907 P.2d 316 (1995) (constructive possession of a gun insufficient to prove defendant was "armed" with a gun at time of crime, even though gun was next to drugs defendant was charged with possessing. "Armed" means "readily available and easily accessible.").

c. Remand for re-sentencing is required. A defendant may possess a gun but not be armed with it. The judgment and sentence indicating Mr. McComb “possessed” a deadly weapon does not indicate a finding he was “armed with a deadly weapon. Therefore, it is not clear from the 1988 judgment and sentence that Mr. McComb “received a deadly weapon verdict under RCW 9.94A.602.” The State cannot meet the requirements of RCW 9.94A.030 (28) (t) to show Mr. McComb’s 1988 conviction is a strike offense. Additionally, the foregoing violated Mr. McComb’s right to due process because the State cannot show Mr. McComb was sentenced to life without parole on a sufficient factual basis. U.S. Const. Amend. 14; In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Apprendi, 530 U.S. 466.

8. THE PERSISTENT OFFENDER ACCOUNTABILITY ACT VIOLATES THE SINGLE SUBJECT REQUIREMENT OF THE WASHINGTON CONSTITUTION.

Mr. McComb was sentenced under the POAA to a term of life without the possibility of parole. The statute, however, violated the single subject requirement of the Washington Constitution. The constitutional provision cannot prevent improper legislative

practices unless the remedy for violation for violation is vacating the entire piece of legislation. Mr. McComb's sentence must therefore be vacated.

a. A voter initiative may not contain more than one subject.

The Framers of the Washington Constitution were distrustful of corporations and their ability to corrupt legislatures. Utter & Spitzer, The Washington State Constitution at 11-12. They therefore placed restrictions upon designed to prevent such abuse legislation. Article II, section 19 of the Washington Constitution placed two restrictions upon legislation, providing that bills may only cover one subject and that the subject be clearly stated in the title. Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 207, 11 P.3d 762, 27 P.3d 608 (2000). Specifically, the provision states: "No bill shall embrace more than one subject, and that shall be express in the title." Wash. Const. art. II, § 19.

The purposes of the first section of article II, section 19 is to prevent "logrolling," the practice of passing unpopular legislation by attaching it to a more popular bill on an unrelated subject. Burien v. Kiga, 144 Wn.2d 891, 824-25, 31 P.3d 659 (2001); Amalgamated Transit, 142 Wn.2d at 207. The second section is

designed to ensure that voters understand a measure's purpose.

Id.

Article II, section 19 is liberally construed in favor of upholding the legislation. Amalgamated Transit, 142 Wn.2d at 206. It applies to both enactments of the Legislature and initiatives to the people like the POAA. Kiga, 144 Wn.2d at 824; Amalgamated Transit, 142 Wn.2d at 204-05; Thorne, 129 Wn.2d at 757. Here, article II, section 19 applies to the ballot title voted on by the people. Amalgamated Transit, 142 Wn.2d at 207; Thorne, 129 Wn.2d at 757.

In interpreting article II, section 19, Washington courts have first looked at the ballot title to determine if it is broadly worded, giving liberally construction to a title that is broad and general. Amalgamated Transit, 142 Wn.2d at 207-09. In that case, "all that is required is rational unity between the general subject and the incidental subjects." Id. at 209. In contrast, a restrictive or narrow ballot title deals with "a particular part of branch of a subject." Id. at 210, quoting State v. Broadaway, 133 Wn.2d 118, 127, 942 P.2d 363 (1997). Because a restrictive ballot title "expressly limits the scope of the act to that expressed in the title," it is narrowly

construed and provisions not within the title are void. Id.; Kiga, 144 Wn.2d at 825.

b. The POAA's ballot title was restrictive, but it contained more than one subject. The POAA began as an initiative to the people in 1993. Initiative 593. The ballot title read, "Shall criminals who are convicted of 'most serious offenses' on three occasions be sentenced to life in prison without parole?" State of Washington Voters Pamphlet at 6 (Edition 8, 1993); Thorne, 129 Wn.2d at 746. However, the initiative covered not only life terms for persistent offenders, it also limited earned early release for other offenders. State v. Cloud, 95 Wn.App. 606, 615, 976 P.2d 649 (1999).

The Thorne Court found the ballot title to be restrictive because it refers only to criminals who have been convicted of "most serious offenses" on three occasions. Thorne, 129 Wn.2d at 758. The court therefore did not invalidate the persistent offender sections of the initiative, holding they fell within the ballot title. Id. This Court later struck the earned early release portions of the initiative because they fell beyond the scope of the ballot title and violated the single subject requirement of article II, section 19. Cloud, 95 Wn.App. at 617-18.

c. Because the POAA violated the single subject requirement of the Washington Constitution, all its provisions are unconstitutional. Subsequent to both Thorne and Cloud, the Washington Supreme Court reviewed two separate tax initiatives and found each violated the logrolling section of article II, section 19. Kiga, supra (Initiative 722); Amalgamated Transit, supra (Initiation 695). In both cases, the court held that the entire initiative was void as a result of the violation of the single subject requirement. Kiga, 144 Wn.2d at 828; Amalgamated Transit, 142 Wn.2d at 256-57 (initiative violated several constitutional provisions, including art. II, § 19).

When an initiative embodies more than one subject, the entire initiative must be stricken because it is impossible for the court to know whether either subject would have passed if voted on separately. Kiga, 144 Wn.2d at 825.

The purpose of the single subject clause is to prohibit the enactment of an unpopular provision pertaining to one subject by attaching it to a more popular provision whose subject is unrelated. When an initiative embodies two unrelated subjects, it is impossible for the court to assess whether either subject would have received majority support if voted on separately. Consequently, the entire initiative must be voided.

(Citations omitted). Id. Moreover, the temptation for logrolling cannot be eliminated unless the entire statute is not voided. Pierce

County v. State, 150 Wn.2d 422, 445, 78 P.3d 640 (2003)

(Chambers, J., dissenting) (“The evils of logrolling are not eliminated [though they may be diminished] merely because some text is inoperative.”)

This is also the rule in Illinois. The Illinois Constitution also has a single subject requirement provision.⁴ Ill. Const. 1970, art. IV, § 8(d). Like Washington’s, Illinois’ constitutional provision has two purposes: to (1) prevent the enactment of legislation that, standing on its own, could not garner the votes necessary for passage, and (2) facilitate the enactment of bills in a legislative process that is orderly and well-informed. People v. Reedy, 186 Ill.2d 1, 708 N.E.2d 1114, 1119-20 (Ill. 1999). There, any enactment that violates the single subject requirement of the state constitution is unconstitutional in its entirety. People v. Burndice, 339 Ill.App.3d 986, 990, 791 N.E.2d 1148, 1152 (2003), aff’d, 211 Ill.2d 264, 811 N., E.2d 678 (2004). Any other rule “would unjustifiably emasculate” the constitutional requirement. Reedy, 708 N.E.2d at 1120.

⁴ Article IV, section 8(d) of the Illinois Constitution reads: “Bills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject.”

Severing the offending part of legislation that violates the constitutional single subject requirement is also not permitted in California where the legislation at issue is an initiative. California Trial Lawyers Assn. v. Eu, 200 Cal.App.3d 351, 245 Cal.Rptr. 916 (1988). In that case, the appellate court upheld a writ of mandamus to prevent an initiative from being placed on the ballot because it violated article II, section 8(d) of the California Constitution.⁵ The court rejected the insurance association's assertion that the initiative could be rescued by severing the offending provision because the remedy was not permitted by the constitutional provision in question. Id. at 361-62. The court pointed out that severance was available for legislative enactments only because it was mentioned in the constitution.⁶ Id. at 362, citing Cal. Const. art. IV, § 9. This is also the rule in Arizona and Florida. Taxpayer Protection Alliance v. Arizonans Against Unfair Tax Schemes, 199 Ariz. 180, 16 P.3d 207 (Ariz. 2001) (removing from ballot entire citizen initiative amending three sections of

⁵ Cal. Const. art. II, § 8(d) reads, "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

⁶ Cal. Const. art. IV, § states: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. . ."

constitution because it violated single subject requirement of state constitution; constitution provided no authority to sever sections)⁷; Fine v. Firestone, 448 So.2d 984, 992 (Fla. 1984) (severability language on petition did not cure violation of single subject requirement of Florida Constitution, art. XI, § 3)⁸.

Washington's constitution makes no provision for severance of portions of an initiative or bill, and unambiguously states that "no bill shall" embrace more than one subject. Wash. Const. art. II, § 19. Here, Initiative 593 clearly contained more than one subject, including both mandatory sentences for persistent offenders and limiting earned early release for other offenders. Cloud, 95 Wn.App. at 617-18. This Court cannot determine whether either subject would have received majority support if voted on separately. In light of Kiga and Amalgamated Transit, this Court should find Initiative 593 void in its entirety.

F. CONCLUSION.

⁷ Ariz. Const. art. XXI, § 1 provides, "If more than one proposed amendment shall be submitted an any election, such proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately."

The trial court erred in failing to instruct the jury on the lesser included offense of third degree assault, failing to give a Petrich instruction and admitting telephone calls recorded in violation of Washington's Privacy Act. For the foregoing reasons, Mr. McComb asks that this court remand his case for a new trial.

The trial court also wrongly sentenced Mr. McComb as a persistent offender. The court erred in failing to find the defendant's 1988 conviction for second degree assault was not comparable to that charge as listed in the POAA. The trial court erred in finding Mr. McComb was armed with a deadly weapon during a 1988 assault. The trial court violated Mr. McComb's federal constitutional rights when it imposed a sentence over the maximum term based on convictions not found by a jury beyond a reasonable doubt. Finally, the trial court erred in imposing a sentence under the POAA even though it violates the single subject rule of the Washington Constitution. For the foregoing reasons, Mr. McComb asks that this court remand his case for re-sentencing.

⁸ Fla. Const. art. XI, § 3 provides, "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith."

DATED this 13^m day of February, 2006.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Magda R. Baker". The signature is written in black ink and is positioned above the printed name.

MAGDA R. BAKER (WSBA 30655)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

1 Service accepted this 8th day of April, 2005

2 SUSAN BAUR - By: _____

3 Attorney for Plaintiff

Susan J. Baur

FILED
SUPERIOR COURT

2005 APR -8 P 3: 56

COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY *[Signature]*

6 SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

7 STATE OF WASHINGTON,

8 Plaintiff,

9 v.

10 RONALD GALE McCOMB, JR.,

11 Defendant.

No. 05 1 00159 1

DEFENDANT'S MOTIONS
FOR LESSER INCLUDED
OFFENSE INSTRUCTIONS

12
13
14 COMES NOW the Defendant, by and through his attorney, MICHAEL H.
15 EVANS of CRANDALL, O'NEILL & McREARY, P.S., and moves for lesser included
16 offense(s) jury instructions for the lesser included offenses of Assault in the Third
17 Degree and Assault in the Fourth Degree.

18 I. Facts

19 On February 8, 2005, the State charged Mr. McComb with one count of Assault
20 in the Second Degree with a Deadly Weapon, to-wit: a knife against Amy McComb.
21 Based on Kelso Police Officer Tim Gower's report, Amy stated that "she pushed
22 against the knife because "if he was going to do it to just do it."

23 II. Analysis

24
25 A lesser included offense instruction may be given if the offense satisfies the
26 two-part test set forth in *State v. Workman*.¹ To satisfy the legal prong of the test, each

27 _____
28 ¹ 90 Wn.2d 443, 584 P.2d 382 (1978)

(77)

1 of the elements of the lesser offense must be a necessary element of the offense
2 charged.² To satisfy the 'factual prong,' the evidence must support an inference that
3 the lesser offense was committed.³

4 A lesser included offense exists when all of the elements of the lesser offense are
5 necessary elements of the greater offense. Put another way, if it is *possible* to commit
6 the greater offense without having committed the lesser offense, the later is not an
7 included crime.⁴ Put another way, under "the statutory approach," the elements of the
8 lesser offense must be "necessarily" and "invariably" included among the elements of
9 the greater charged offense.⁵

10 Here, assault in the third degree is a lesser included offense of assault in the
11 second degree. The State has charged Mr. McComb with assault in the second degree.
12 The elements of the charged count are an assault and a deadly weapon was used to
13 commit that assault. The elements for assault in the third degree are a criminally
14 negligent infliction of bodily harm caused by a weapon or thing likely to produce bodily
15 harm.

16 Under the *Workman* test, the evidence clearly supports the giving of the lesser
17 included instruction of Assault in the Third Degree. Mr. McComb grabbed Amy by
18 the hair and held a knife on or near to the front/side portion of her neck. In
19 desperation, Amy lunged forward toward the knife to end it all. It is clear from these
20 facts that the elements of the assault in the third degree are necessarily included among
21 the elements of the assault in the second degree. Therefore, having shown that both
22 prongs of the *Workman* test have been met, the Defendant requests the giving of the
23 lesser included instructions.

24
25
26 ² *Workman*, 90 Wn.2d at 447-48

27 ³ *Workman*, 90 Wn.2d at 448

28 ⁴ *State v. Frazier*, 99 Wn.2d 180, 191, 661 P.2d 126, (1983)

⁵ *State v. Harris*, 121 Wn.2d 317, 321-23, 849 P.2d 1216 (1993).

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III. Conclusion

Because the two prongs of the Workman test are satisfied, the lesser included jury instructions of Assault in the Third Degree and Assault in the Fourth Degree should be provided to the fact finder.

RESPECTFULLY submitted this 8th day of April, 2005.


MICHAEL H. EVANS, WSB #31556
Attorney for Defendant

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,)

Plaintiff,)

vs.)

Ronald Gale McComb)

Address: _____)

Date of Birth: 12-26-64,)

Defendant.)

No. 88-1-00118-9

88 9 00700 3

FINDINGS OF FACT,
 CONCLUSIONS OF LAW AND
 JUDGMENT AND SENTENCE

(PRISON)

ENT'D

Judgment &

Execution

Docket

THIS MATTER having come on regularly for sentencing on the 15 day of March, 1988, the defendant being present and represented by his undersigned attorney, with the State being represented by the undersigned deputy prosecuting attorney, and the defendant having previously (entered valid pleas of guilty to) (~~been convicted at~~ ~~jury~~ bench trial) of:

Count I, charging Assault II with Deadly Weapon

Count II, charging FILLED

Count III, charging MAR 15 1988

Count VI, charging _____

Count V, charging JoAnne McBride, Clerk, Clark Co.

and the court having afforded each counsel the right to speak, having asked the defendant if he wished to make a statement in mitigation of punishment, and having heard and considered the arguments presented, now, therefore, the Court makes the following:

I. FINDINGS OF FACT

1. The defendant is guilty of the above-listed crimes;

2. The maximum terms for the above crimes are:

Count I: 10 years, \$20,000.00 Count II: _____

Count III: _____ Count IV: _____

Count V: _____

3. The following crimes encompass the same criminal conduct and count as one crime in determining criminal history: Counts: N/A

4. Possession by the defendant or an accomplice of a deadly weapon as defined by RCW 9.94A.125 at the time of the commission of the crimes charged in Count(s) I

(was) (~~was not~~) specially alleged and proven, and 12 months are to be added to the presumptive sentencing range.

FINDINGS, CONCLUSIONS AND JUDGMENT AND SENTENCE - 1
 (PRISON)

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 367

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Robert D. Kern
 Deputy

I saw the same defendant who appeared in this document affix his thumbprints thereto.
 SUPERIOR COURT OF CLARK COUNTY

Left Thumb

Right Thumb

5. The Court finds that the defendant has a criminal history as set forth in the Declaration of Criminal History previously filed.

6. The defendant has served 38 days of confinement prior to sentencing, said confinement being solely related to the crimes for which the defendant is being sentenced.

7. The presumptive sentencing range for this defendant based upon the criminal history related above is as follows:

Count I: 3-9 + 12 months; Count II: _____;
total: 15 - 21 months
Count III: _____; Count IV: _____;
Count V: _____.

8. The following facts are found to exist and justify an exceptional sentence outside the presumptive sentencing range:

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the defendant and the subject matter.
2. The defendant is guilty of the crime(s) set forth above.
3. There ~~(exist)~~ (do not exist) substantial and compelling reasons justifying an exceptional sentence outside the presumptive sentencing range.

III. JUDGMENT AND SENTENCE

The court having determined that no legal cause exists to show why judgment should not be pronounced, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant is sentenced to a term of confinement as follows:

Count I: 21 months
Count II: _____
Count III: _____
Count IV: _____
Count V: _____

said terms to run as follows: _____

Further, defendant shall make the following monetary

payments:

- 1. To be set restitution
- 2. 70.00 at 8450.00 fine victims assessment
- 3. 70.00 court costs and reimbursement of Attorney Fees

Defendant is hereby remanded to the custody of the Clark County Sheriff for detention until delivered into the custody of Officers of the State of Washington Department of Corrections for transportation to a correctional facility designated by the Department.

DONE in Open Court and in the presence of the defendant this 15 day of March, 1988.

Barbara D. Johnson
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

[Signature]
Deputy Prosecuting Attorney

[Signature]
Attorney for Defendant

STATE OF WASHINGTON)
 : ss
COUNTY OF CLARK)

I, JOANNE MCBRIDE, County Clerk and Clerk of the Superior Court of the State of Washington, for the County of Clark, holding terms at Vancouver, in said County, do hereby certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this _____ day of _____, 198_____.

JOANNE MCBRIDE
Clerk of said County and State

By: _____
Deputy

FINDINGS, CONCLUSIONS AND JUDGMENT AND SENTENCE - 3
(PRISON)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,

No. 88-1-00118-9

vs.
Ronald Gale McComb
Defendant.

WARRANT OF COMMITMENT
TO STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

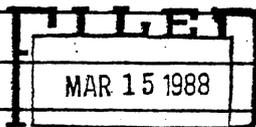
STATE OF WASHINGTON)
 :SS
COUNTY OF CLARK)

THE STATE OF WASHINGTON, to the Sheriff of Clark County,
Washington, and the State of Washington, Department of Corrections,
Officers in charge of correctional facilities of the State of
Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted
in the Superior Court of the State of Washington of the County of
Clark of the crime(s) of:

- Count I: Assault II with Deadly Weapon
- Count II: _____
- Count III: _____
- Count IV: _____
- Count V: _____



JoAnne McBride, Clerk, Clark Co.

and judgment has been pronounced and the defendant has been sentenced
to a term of imprisonment in such correctional institution under the
supervision of the State of Washington, Department of Corrections,
as shall be designated by the State of Washington, Department of
Corrections pursuant to RCW 72.13, all of which appears of record;
a certified copy of said judgment being endorsed hereon and made a
part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the
defendant until called for by the transportation officers of the
State of Washington, Department of Corrections, authorized to con-
duct defendant to the appropriate facility, and this is to command
you, said Superintendent of the appropriate facility to receive
defendent from said officers for confinement, classification and
placement in such correctional facilities under the supervision of
the State of Washington, Department of Corrections, for a term of
confinement of:

- Count I: 21 months
- Count II: _____
- Count III: _____
- Count IV: _____
- Count V: _____

And these presents shall be authority for the same.
HEREIN FAIL NOT.

Honorable Barbara Dale
JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS 15 day of
March



JOANNE McBRIDE, Clerk of the
Clark County Superior Court
Robert D. Ken
Deputy

