

NO. 34014-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT EDWARD LEWIS, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Fredrick W. Fleming

No. 03-1-05918-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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8. In determining that the defendant was a persistent offender, did the trial court properly consider the defendant's two prior facially valid conviction? (Appellant's Assignment of Error No. 7).

B. STATEMENT OF THE CASE.

1. Procedure

On December 18, 2003, Robert Edward Lewis, hereinafter "defendant" was charged with murder in the first degree. CP 1-4. The defendant was sent to Western State Hospital for a 15 day competency evaluation pursuant to an order filed on January 21, 2004. CP 10-13. A report was later filed after the evaluation. CP 192-199. The court then ordered a 90 day commitment for competency restoration. CP 19-20.

Two reports were filed by Western State Hospital staff after the 90 day period. CP 200-212.

On December 1, 2004, both parties appeared for pretrial motions¹. RP (12/1/04)² 1. The court ultimately found that the defendant was competent to proceed. CP 58-62; RP (12/9/04) 36. On September 26, 2005, both parties appeared for trial. RP (9/26/05) 1. There were multiple motions for a mistrial made during the trial, the details of which are discussed below.

On October 5, 2005, the defendant was found guilty of murder in the second degree. CP 170. The defendant was also found to have been armed with a firearm during the commission of the crime. CP 171.³

On October 28, 2005, the court sentenced the defendant to life imprisonment without the possibility of parole. CP 172-181. On October 28, 2005, the defendant filed a timely notice of appeal. CP 184.

¹ A more detailed statement of the facts adducted from the competency hearing is contained below.

² A review of the verbatim report of proceedings that have been submitted indicate that there are multiple volumes identified as "volume I," and that the numbering is not sequential. Therefore, for convenience of reference, the State will be referring to the verbatim report of proceedings by the date of each volume, and the page numbers as they appear in each volume.

³ The verbatim report of proceedings from October 5, 2005, were not provided.

2. Facts

a. Competency Hearing

On December 1, 2004, both parties appeared before the Honorable Judge Frederick Fleming for a competency hearing. RP (12/1/04) 1. Dr. Ronald Murray Hart, a psychologist at Western State Hospital, testified at the competency hearing. RP (12/6/04) 20. He conducted an evaluation of the defendant and authored two reports to the court. CP 192-199, 200-212; RP (12/6/04) 23. Dr. Hart stated that Washington has the “capacity standard.” RP 12/6/04) 24. The test for an individual’s capacity to proceed, or his ability to proceed, is based on capacity. RP (12/6/04) 25. Evaluators are not required to assess a person’s actual knowledge, but to advise the court on their abilities. Id. In terms of competency, Dr. Hart assessed the defendant to determine if he was unable to understand the nature of the proceedings against him and an inability to participate in his own defense as the result of a mental disease or defect. RP (12/6/04) 27.

i. 15 Day Commitment Period

Dr. Hart stated that he first conducted a 15 day competency evaluation on the defendant. RP (12/6/04) 23. The defendant was not motivated to demonstrate his capacity to Dr. Hart. RP (12/6/04) 37. There was no direct support that the defendant was delusional. RP (12/6/04) 39.

The defendant self-reported to Dr. Hart that he had used drugs such as marijuana and LSD. RP (12/6/04) 44. The defendant also self-reported that he abused organic solvents such as gasoline and toluene. RP (12/6/04) 45. During the defendant's initial 15 day commitment, Dr. Hart determined that the defendant was an "impaired individual," but that he was embellishing or exaggerating his symptoms. RP (12/6/04) 46. He acknowledged that the defendant had functioned fairly well in the ward. RP (12/6/04) 46-47.

Dr. Hart defined a mental disease or defect as "a condition of mind, either transitory or permanent, which grossly and demonstrably impairs an individual's perception of or understanding of reality, grossly or demonstrably." RP (12/6/04) 49-50. He stated the defendant has the capacity to understand the nature of the charges against him and that he had the rational capacity to participate in his own defense. RP (12/6/04) 51. The defendant was able to articulate the charges against him, stating that the charges were "Killing that guy, I guess. Murder one." Id.

Dr. Hart indicated that the defendant's prior guilty pleas were significant to him because it demonstrated that the defendant understood what he was pleading guilty to. RP (12/6/04) 55. The defendant was able to identify guilt, innocence, and pleas of guilt and innocence. RP (12/6/04) 53. When asked if he understood what would happen if he was convicted, the defendant stated, "Shit, I could get life." Id. During the March evaluation, Dr. Hart found that the defendant possessed the basic

fundamental capacity to understand the nature of the proceedings against him and the basic and fundamental capacity to assist in his own defense. CP 192-199.

ii. 90 Day Commitment Period

During the defendant's second commitment at Western State Hospital, Dr. Hart had the opportunity to observe the defendant on the ward. RP (12/6/04) 61. The defendant would frequently approach Dr. Hart with a request or a complaint. Id.

Dr. Hart believed that the defendant was embellishing his symptoms. RP (12/6/04) 62. On the ward with his peers, the defendant appeared relaxed and jovial. Id. He played cards with his friends. Id. When he was approached by staff, the defendant began to blink and stutter, and appeared quite impaired. Id.

The defendant was aware of who he was and where he was. RP (12/6/04) 64. While with Dr. Hart, the defendant demonstrated a lack of motivation or lack of cooperation. Id. He failed to provide basic information that even grossly impaired people can provide. RP (12/6/04) 64-65. Dr. Hart believed that the defendant's failure to provide such information was based on the defendant's lack of motivation to participate. Id. The defendant asked Dr. Hart about an "NGRI," or not guilty by reason of insanity defense. RP (12/6/04) 125. Dr. Hart did not explain to the defendant what an "NGRI" meant. RP (12/6/04) 125-126.

Dr. Hart noted some isolated symptoms, such as the defendant stating that there was a chip in his head. RP (12/6/04) 65. The defendant also demonstrated possible paranoia regarding what Dr. Hart was writing down in his notes. Id. The defendant commented that his wife and Bill Gates were reading his mind, but Dr. Hart believed that it was not a true delusion. RP (12/6/04) 66.

The defendant appeared to function in a below average intelligence range, low average to the upper extent of the borderline range. Id. During an interview, the defendant was asked to do basic mathematics, such as subtracting by twos and threes. RP (12/6/04) 70. The defendant was unable to do it. Id. When the defendant was in the ward, however, he was observed making a telephone call and being able to recall the telephone number from memory. RP (12/6/04) 70-71. The defendant also was able to keep score of a game of dominos he was playing with a friend. Id. The defendant was able to play a card game correctly. RP (12/6/04) 72.

When the defendant was interviewed, however, he would stutter, squint, complain of hallucinations, and appear very impaired. Id. An occupational therapist at the hospital noted possible malingering because the defendant had attended group sessions and was able to recall in detail events from a prior incarceration. RP (12/6/04) 73. The occupational therapist reported that he was able to describe his prior incarceration but was unable to recall his mother's name. Id.

Dr. Hart used two tests, the TOMM and the SIRS, to determine if the defendant was malingering. RP (12/6/04) 77-78. Both tests are generally accepted in the scientific community. RP (12/6/04) 78. On the first test the results supported the contention that the defendant's proffered memory was probably greatly embellished. RP (12/6/04) 82-83. On the second test, the defendant fell into the "probably malingering" ranged when asked to describe blatant symptoms, or symptoms that are overly endorsed. RP (12/6/04) 87. Dr. Hart stated that the defendant did not suffer from a mental disease or defect, and he was of the opinion at a "far greater level" than reasonable psychological certainty. RP (12/6/04) 90. Dr. Hart believed that the defendant had the capacity to understand the charges against him and the capacity to assist counsel in his defense. Id. Dr. Hart indicated that he was "clearly convinced" that the defendant was not developmentally disabled, and that his IQ was above 70. RP (12/6/04) 104.

Dr. Hart testified that he believed, to a reasonable degree of psychological certainty, that the defendant did not meet the definition of developmentally disabled under RCW 71A.10.020. RP (12/8/04) 78-79. Dr. Hart indicated that, based on the defendant's history, the fact that he attended high school, his observations on the ward, his ability to socialize with his peers, all indicated that the defendant's IQ was in the low average to the upper extent of the borderline range. RP (12/8/04) 93. Based on the defendant's IQ, Dr. Hart concluded that he was not suffering from a

developmental disability. RP (12/8/04) 92-93. He stated in both of his reports, that he saw no reason why the defendant would not meet the statutory test of legal competency. CP 192-199, 200-212.

Dr. Waiblinger, a forensic psychiatrist from Western State Hospital, contacted the defendant during the 90 day competency restoration period. RP (12/7/04) 185, 187. Dr. Waiblinger also contacted the defendant several weeks before the competency hearing, while the defendant was in the Pierce County Jail. RP (12/7/04) 187. Dr. Waiblinger indicated that there was a lack of consistency in the defendant's behavior at Western State Hospital—that the defendant would be reasonably jovial with others, and when he contacted Dr. Waiblinger, the defendant would squint, blink his eyes, and stutter. RP (12/7/04) 194. Dr. Waiblinger expressed his opinion that, to a reasonable degree of medical certainty, the defendant has the capacity for competency to go to trial. RP (12/7/04) 198. The defendant was capable of understanding the proceedings. Id. The defendant had the capacity to assist his attorney. RP (12/7/04) 200. He did not believe that the defendant suffered from a mental disease or defect that would interfere with competency. Id. Dr. Waiblinger stated that he believed the defendant's I.Q. to be in the high 70s to mid 80s. RP (12/7/04) 221.

Dr. Gollogly, the defense expert, testified that the defendant was not competent. RP (12/8/04) 18. Dr. Gollogly was previously the clinical director at the Special Commitment Center. RP (12/8/04) 20. In his

capacity as the director for the Special Commitment Center, Dr. Gollogly stated that a developmental disability professional would conduct an evaluation when an individual is ready to leave, and he believed that the individual would benefit from certain programs. Id. He stated that he did not have a developmental disability professional evaluate individuals merely because they met the statutory or administrative code definition of developmentally disabled, but that such evaluation occurred when the individual was ready to be released. Id.

Dr. Gollogly had concerns that the defendant was malingering, lying, or exaggerating his symptoms. RP (12/8/04) 24. He testified that he believed the defendant's I.Q. to be in the 70 to 75 range. RP (12/8/04) 27. He stated that the defendant was able to control and function well under the medication he was taking. RP (12/8/04) 49.

At the close of testimony from the competency hearing, the court made the following ruling with respect to a developmental disability evaluation:

The Court: I think there is a threshold issue, if you will, Mr. Thoenig.

And as you probably realized from the question that I asked the doctor, you know, "What did you use to determine whether there was an issue or there is an issue of developmentally disabled person, namely Mr. Lewis," and he used—his opinion is based upon reasonable psychological probability and certainty, and he didn't see any factors based on the criteria, as he

understands them, based on that science that there is an issue here. I am going to accept that as being sufficient at this stage to resolve the issue of testing or further examination for developmental disabilities disorder with reference—

Mr. Thoenig: A point of clarification, Your Honor, for the record.

The Court: —with reference to Mr. Lewis.

Mr. Thoenig: Point of clarification for the record if I might ask a couple of questions to the Court.

It is the Court's position that the statute requires—which requires an evaluation does not have to be complied with? Is that the court's ruling?

The Court: You don't think I'm going to say that, do you? If you get to the level where the experts tell you that it's necessary, sure you are going to have to comply with it, once you get to a level where there is an issue of developmentally disabled.

RP (12/8/04) 97-98.

The court then concluded that, by a preponderance of the evidence, the defendant was competent to go to trial and to assist his attorney. RP (12/9/04) 33-36.

b. Trial

On July 23, 2002, Ruby Weishaar overheard a telephone call between the victim, Brett Holdorph, and someone else. RP (9/28/05) 288.

Weishaar stated that there appeared to be a problem with some drugs that the victim had sold and someone was not happy with the deal. RP (9/28/05) 288. The victim was trying to tell the caller that he would take care of it. Id. Near the end of the conversation the victim stated, “Well, he better not come over here and start any trouble.” RP (9/28/05) 289.

Frank Hieber stated that the defendant was like a brother to him. RP (9/29/05) 342. On July 23, 2002, he was staying at his girlfriend’s home when she engaged in a telephone call with the victim. RP 342, 346-347. Hieber gathered from the conversation that his girlfriend had purchased some drugs from the victim and the quantity was not correct. RP (9/29/05) 348. The defendant indicated that the victim owed him money, too, and that he would not have a problem going and getting the money or drugs that was owed to Heiber’s girlfriend and himself. RP (9/29/05) 349. They drove to the victim’s residence in the defendant’s purple Mustang convertible. RP (9/29/05) 355.

The defendant got out of the car and told Heiber that he would be right back. RP (9/29/05) 373. The defendant returned and said “let’s go.” RP (9/29/05) 376. When they were a few hundred yards away, the defendant looked at Hieber and said, “Fuck, Frank, Fuck.” RP (9/29/05) 375-376. Heiber knew that “something obviously bad happened.” RP (9/29/05) 377. The defendant told Heiber that “he fucked up, something

went wrong.” RP (9/29/05) 379. The defendant and Heiber drove to the defendant’s brother’s residence, where the defendant changed clothing. RP (9/29/05) 376, 380. Heiber believed that the defendant changed clothing because he had been wearing a distinct red sweater. RP (9/29/05) 380. The defendant trimmed his hair. RP (9/29/05) 409.

A police scanner was brought into the residence. RP (9/29/05) 381, 410. Heiber and the defendant removed the spoiler from the Mustang and it was covered with a tarp. RP (9/29/05) 382-383. The defendant left the Mustang at his brother’s home for approximately two months. RP (9/29/05) 413.

A couple of weeks after the shooting the defendant told his brother that the incident was a “drug deal gone bad.” RP (9/29/05) 428. He told his brother that he had gone to the victim’s house because the victim had “ripped him off a lot of money” and he wanted to get some of the money or drugs back. Id. He said he pushed his way into the victim’s house and before he could say anything the victim was right on him, and the gun went off. Id.

Deputy Brian Witt responded to the shooting at the Holdorph residence on July 23, 2002. RP (9/27/05) 62. He entered the residence and observed the victim lying in a pool of blood. RP (9/27/05) 63. The victim’s mother, Francis Holdorph, told Deputy Witt that there was a

knock on the front door and when she answered the door it was forced in and she was grabbed by the hair. RP (9/27/05) 67-68. The suspect told Mrs. Holdorph that he wanted her to get her son, the victim. RP (9/27/05) 68. She told Deputy Witt that as soon as the victim appeared, he was shot. Id.

Mrs. Holdorph testified the victim was living with her at the time of the murder. RP (9/27/05) 141-142. On July 23, 2005, Mrs. Holdorph returned from home from work at approximately 7:30 a.m. RP (9/28/05) 161. When she arrived home the victim was in her yard picking raspberries with a female, Ruby Weisharr. RP (9/28/05) 162, 286. Mrs. Holdorph went to sleep and awoke at approximately 3:00 p.m. RP (9/28/05) 162-163. Soon after 3:00 p.m., there was a knock on the door of the residence. RP (9/28/05) 167. When Mrs. Holdorph looked out of the peep hole, all she was able to see was black hair. RP (9/28/05) 167. The portion she observed was the top of a head. RP (9/28/05) 167, 178.

Mrs. Holdorph answered the door, and it was pushed open by an individual whom she identified as the defendant. RP (9/28/05) 170, 175. She stated that she was positive that the defendant killed her son, and that she would never forget his face. RP (9/28/05) 175.

The defendant grabbed Mrs. Holdorph by the hair. RP (9/28/05) 170. He asked her if Brett, the victim, was there. RP (9/28/05) 170. Mrs.

Holdorph indicated to the defendant that Brett was sleeping. Id. She then began to call for the victim, who came out of his bedroom. RP (9/28/05) 170-171. Mrs. Holdorph tried to get loose from the defendant. RP (9/28/05) 172. As Mrs. Holdorph called for the victim, her dog went after the defendant. Id. The defendant kicked the dog over a table in the room. Id.

The victim came out of the bedroom and stepped in to the living room with a look of horror on his face. RP (9/28/05) 173. The gun was pointed at the victim. Id. The time between when the victim emerged from the bedroom to the time of the shooting was almost immediate. RP (9/28/05) 174. There was no struggle between the defendant and the victim. RP (9/28/05) 175. The victim never got close enough to the defendant to have physical contact with him. RP (9/28/05) 173. At the time the victim was shot, he was unarmed. RP (9/28/05) 173. He was wearing nothing but a towel around his waist. RP (9/28/05) 173. After the victim was shot, he told his mother to call 911. RP (9/28/05) 181.

The defendant stated that as he and Heiber pulled up to the victim's home, Heiber handed him a gun. RP (10/3/05) 472. The defendant asserted that inside the home the victim grabbed him, wrestled for the gun, and the gun went off. RP (10/3/05) 473. The defendant admitted to kicking Mrs. Holdorph's dog across the room. RP (10/3/05) 481. The

defendant was asked why he did not call the police after the shooting, and the defendant stated that he was scared. RP (10/3/05) 494. When asked what he was scared of, the defendant stated that he had been in trouble before. Id. He also stated that he had been in trouble with the law. RP (10/3/05) 495.

Dr. Ramoso, an associate medical examiner for Pierce County, performed an autopsy on the victim. RP (9/28/05) 228, 234. He stated that the victim had a gunshot wound to the upper portion of the chest on the left side. RP (9/28/05) 234. He stated that the victim was shot from a distance of six inches to two feet away. RP (9/28/05) 240. Blood analysis indicated that there was methamphetamine, amphetamine, nicotine, caffeine, and marijuana in the victim's system. Id. The manner of death was classified as a homicide, which was caused by a gunshot wound to the chest. RP (9/28/05) 252.

C. ARGUMENT.

1. THE COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THE DEFENDANT COMPETENT TO PROCEED TO TRIAL, THE DEFENDANT IS NOT CONTESTING THE FINDING OF COMPETENCY, AND THE REQUIREMENTS OF RCW 10.77.090 WERE SATISFIED WHEN DR. HART MADE A FINDING THAT THE DEFENDANT WAS NOT DEVELOPMENTALLY DISABLED.
 - a. This court should treat the findings of fact regarding competency as verities on appeal as the defendant has failed to present specific argument as to why they are erroneous.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Further, an erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal. State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal before the court, the court should treat the findings of fact as verities. Defendant has assigned error to only one finding of fact, number 19, which states:

Defendant's I.Q. is reasonably estimated by doctors Hart, Waiblinger, and Gollogly to be in the high 70's or low 80's. Defendant has below average intelligence. Defendant is not mentally retarded.

CP 58-62; Br. of Appellant at 1.

There is no argument in the brief, however, as to how finding of fact 19 is factually unsupported by the evidence. In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue that the findings are not supported by substantial evidence, made no cites to the record to support its assignments and cited no authority. Id. at 244. The court held that under these circumstances, the assignments of error to the findings are without legal consequence and the findings must be taken as verities:

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Id.; see also State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998). Because the defendant has failed to support his assignment of error to the court's findings of fact with argument, citations to the record, and citations to authority, the court should treat the assignment as being

without legal consequence. All of the findings should be considered as verities upon appeal.

- b. The requirements of RCW 10.77 were satisfied.

RCW 10.77.060(a)(1) states, in part:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional person, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. At least one of the experts or professional persons appointed shall be a developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled.

(emphasis added).

The order for a 15 day evaluation, signed on January 21, 2004, has a section which states:

DEVELOPMENTAL DISABILITIES
PROFESSIONAL: The court has been advised by a party that the defendant may be developmentally disabled and hereby orders that one of the experts qualify as a developmental disabilities professional.

CP 10-13.

The check box available for the section is not checked on the order. Id. Therefore, at the time of the 15 day evaluation, neither party had raised concerns that the defendant may be developmentally disabled.

On June 2, 2004, the court signed an agreed order sending the defendant back to Western State Hospital for a 90 day competency restoration. CP 19-20. The court found that there was, “. . . reason to doubt the defendant’s competency to understand the proceedings against the defendant and assist in defendant’s own defense. . .” Id. There is no indication in the 90 day order that either party expressed a concern that the defendant may be developmentally disabled.

RCW 10.77.090(1)(c) states, in part:

A defendant found incompetent shall be evaluated at the direction of the secretary and a determination made whether the defendant is developmentally disabled.

In the case at bar, the statute was complied with. Dr. Hart testified that he considered (1) his evaluation of the defendant on two different visits to Western State Hospital, (2) his review of the documents and consultation with others, (3) his personal interviews with the defendant, (4) and all of the other materials in the case, and determined that the defendant was not developmentally disabled. RP (12/8/06) 79. Dr. Hart stated that he never suspected that the defendant met the criteria for being developmentally disabled. RP (12/8/04) 79-80. Dr. Hart indicated that his conclusion that the defendant did not have a developmental disability was based upon a reasonable psychological certainty. RP (12/8/04) 79, 92-93. He also stated that the criteria upon which he relied were generally accepted in his field. RP (12/8/04) 93.

There is nothing in the record to support a claim that the defendant is developmentally disabled. Dr. Hart indicated that the defendant's I.Q. was in the upper 70's to low 80's. RP (12/6/04) 66, 103. Dr. Hart stated that the defendant was not "close at all" to being developmentally disabled. RP (12/6/004) 104. Dr. Hart stated that he was "clearly convinced" that the defendant was not developmentally disabled. RP (12/6/04) 104. The defendant did not appear to be functioning in a mentally retarded range. RP (12/6/04) 153.

Dr. Waiblinger stated that the defendant's I.Q. was in the high 70's to mid 80's. RP (12/7/04) 221. When asked to elaborate, Dr. Waiblinger stated:

They don't tend to use very complicated sentences or words, their sentences tend to be a little bit more simple. But an I.Q. of 85, 80, 85 I don't see that as impairing anyone. It's not certainly in the mildly mentally retarded range, which would be lower and I don't see him as being mildly mentally retarded, no.

RP (12/7/04) 221.

Even the defense expert, Dr. Gollogly, could not state that the defendant was developmentally disabled. Dr. Gollogly only stated that the defendant is "handicapped." RP (12/8/04) 22. Dr. Gollogly agreed with Dr. Hart and Dr. Waiblinger that the defendant was in a borderline range, but estimated the defendant's I.Q. at 70 to 75. RP (12/8/04) 26-27. Dr. Gollogly stated that an I.Q. of below 70, unless other deficits are present,

qualifies as being developmentally disabled, but did not indicate what he was basing such assertion upon. RP (12/8/04) 27.

RCW 10.77.090 requires that a determination be made as to whether the defendant is developmentally disabled. Such a determination was made by Dr. Hart, and he found that the defendant was not developmentally disabled. There is no requirement in RCW 10.77.090 that the initial determination be conducted by a developmental disability specialist.

The defendant relies on RCW 10.77.120 for the proposition that a developmental disability specialist must make the initial determination as to whether an individual who has been found to be incompetent is developmentally disabled. Br. of Appellant at 23. RCW 10.77.120, however, is inapplicable to the present case. RCW 10.77.120 states in part:

The secretary shall forthwith provide adequate care and individualized treatment at one or several of the state institutions or facilities under his or her direction and control wherein persons committed as criminally insane may be confined. Such persons shall be under the custody and control of the secretary to the same extent as are other persons who are committed to the secretary's custody, but such provision shall be made for their control, care, and treatment as is proper in view of their condition. In order that the secretary may adequately determine the nature of the mental illness of developmental disability of the person committed to him or her as criminally insane, and in order for the secretary to place such individuals in the proper facility, *all persons who are committed to the secretary as criminally insane* shall be promptly examined by qualified

personnel in such a manner as to provide a proper evaluation and diagnosis of such individual. The examinations of *all developmentally disabled persons* committed under this chapter shall be performed by developmental disabilities professionals. Any person so committed shall not be released from the control of the secretary save upon the order of a court of competent jurisdiction made after a hearing and judgment of release.

(Emphasis added).

By its language, RCW 10.77.120 applies to persons who (1) have been found to be criminally insane and (2) are developmentally disabled. In the case at bar, the defendant meets neither criteria. There was no evidence presented that the defendant was developmentally disabled, and he was never committed as criminally insane. Therefore, RCW 10.77.120 does not apply to the defendant.

The defendant asserts that RCW 10.77.120 mandates that all commitments require examinations to be done by a developmental disability professional. Br. of Appellant at 23. Such claim is without merit. RCW 10.77.120 requires examinations of all *developmentally disabled* persons be done by a developmental disabilities professional. Such requirement is only applicable after a threshold determination has been made that an individual is developmentally disabled.

Moreover, RCW 10.77.120 specifies that the examinations of persons who are developmentally disabled be done by a developmental

disabilities specialist. The legislature clearly elected to specify who is to perform such evaluations. Such specificity, however, is absent from RCW 10.77.090(1)(c). The legislature could have specified in 10.77.090(1)(c) who is to make the threshold determination, and elected not to do so. There no requirement in Chapter 10.77 which requires that the initial determination as to whether an individual is developmentally disabled be done by a developmental disabilities professional. There were never any concerns raised by either party that the defendant may be developmentally disabled, and the doctors who examined the defendant did not find that he was developmentally disabled. RCW 10.77.090(1)(c) requires that an initial determination be done, and in this case it was. The defendant was not developmentally disabled.

- c. A determination as to whether the defendant was developmentally disabled is irrelevant as the defendant was competent.

A reviewing court will grant a trial court's determination of competency great deference and will not reverse unless it finds that the trial court abused its discretion. State v. Lawrence, 108 Wn. App. 226, 232, 31 P.3d 1198 (2001), review denied, 145 Wn.2d 1037, 43 P.3d 21 (2002). In the case at bar, the defendant is not disputing the trial court's finding that he was competent to proceed to trial. The defendant only asserts that the determination that the defendant was not developmentally

disabled was deficient. As argued above, the finding that the defendant was not developmentally disabled complies with the statutes.

If, however, this court finds that the determination that the defendant was not developmentally disabled was improper or lacking, such deficiency has no bearing on the court's finding of competency. It is undisputed on appeal that the court properly found the defendant competent to stand trial. The issue of whether the defendant was properly evaluated for a developmental disability has no bearing on the competency determination. Therefore, the defendant's request that this court reverse the trial court's finding of competency is without merit. The defendant has not articulated any basis for reversal, even if the statutes were not complied with in terms of a developmental disability evaluation. He has not specified how a developmental disability examination by a developmental disabilities specialist would have yielded a different result. An individual can be developmentally disabled and still be found competent. Likewise, an individual can have no developmental disability and be found to be incompetent. The defendant, with or without a developmental disability, was found competent to stand trial, and his competency is not in dispute on appeal. The defendant's claim is without merit.

2. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION IN EXCLUDING
INADMISSIBLE EVIDENCE AND THEREFORE
THE DEFENDANT WAS NOT PREVENTED
FROM PRESENTING HIS DEFENSE.

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), Washington v. Texas, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996).

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the accused does not have an

unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the

evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

Moreover, “for evidence of drug use to be admissible to impeach, there must be a reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial. State v. Tigano, 63 Wn. App. 336, 344, 818 P.3d 1369 (1991), review denied, 118 Wn.2d 1021, 827 P.3d 1392 (1992).

During Dr. Ramoso’s cross-examination at trial, he testified that the victim had a fairly high level of methamphetamine in his system. RP (9/28/05) 255. Defendant asked Dr. Ramoso if such a level of methamphetamine would cause violent behavior. Id. Outside the presence of the jury Dr. Ramoso indicated that methamphetamine can cause increased heart rate, increased blood pressure, increased temperature, paranoia, hallucinations, and is known to cause irrational or violent behavior at times. RP (9/28/05) 259. Dr. Ramoso stated that he did not know if methamphetamine would cause the victim to behave violently. RP (9/28/05) 257. The court made the following ruling:

Well, as I started to say about, I think, if I understand the evidence the defendant intends to put on, that the defense will still be able to put forward its theory of the case

without Dr. Ramoso speculating with respect to the effects of methamphetamine. I assume that he was testifying that basically, although I didn't hear him be asked this question, that he didn't die as a result of the toxins that were in his body. He died from a gunshot wound, and that's as far as I'm going to allow it to go.

RP (9/28/05) 265-266.

The court allowed the defendant to question Dr. Ramoso regarding how much methamphetamine the victim had consumed. RP (9/28/05) 272.

The trial court properly excluded testimony regarding a potential effect of methamphetamine. There was no evidence as to the effects of methamphetamine on the particular victim in this case. Dr. Ramoso indicated that he had no idea how methamphetamine effected the victim. In this case, the court ruled, the testimony the defendant sought to introduce would require Dr. Ramoso to speculate about the effects methamphetamine had on the victim. Dr. Ramoso did not know the victim and never examined any medical records of the victim when he was alive. RP (9/28/05) 257. Dr. Ramoso could not state whether methamphetamine caused the victim to act violently. Id.

The defendant's theory at trial was that the victim charged at him, there was a struggle, and the gun went off accidentally. RP (10/3/05) 473. The defendant was still able to argue that theory, regardless of whether or not methamphetamine caused the victim to act violently. The mere fact that the victim had methamphetamine in his system does not establish that

he would have behaved in a certain way. The victim's behavior must be linked to the consumption of methamphetamine at the time of the incident, and the defendant cannot so establish. The defendant's theory as to why the victim "came at him," is too speculative. The defendant never stated that the victim looked like he was high or that he appeared to be under the influence of a drug. While it is not disputed that the victim had methamphetamine in his system, there is no evidence that he was affected by the methamphetamine. The victim's methamphetamine use was not a fact at issue in the case. To introduce testimony that as to a *possible* explanation justifying the defendant's version of events would be merely speculative.

The two cases relied on by the defendant are inapplicable to the case at bar. Both are nonbinding authority and, as discussed below, are distinguishable. In State v. Hopkins, 113 Wn. App. 954, 55 P.3d 691 (2002), Hopkins and Smith appealed their convictions for manufacturing and possessing methamphetamine. Id. at 956. Hopkins and Smith asserted on appeal that the search of the outbuildings on the property exceeded the scope of a lawful protective sweep. Id. In addressing possible explanations for the officers conducting a protective sweep, the court addressed the security purposes for conducting the sweep. Id. at 959. The court discussed one possible explanation—that there were other dangerous persons on the property besides the defendant, and that the officers were concerned because methamphetamine users can be

aggressive. Id. at 960. The court rejected such proposition because there was no evidence that the officers (1) knew there were other persons on the property and (2) that those persons were methamphetamine users. Id. The court found the search unreasonable. Id. at 961.

The facts of Hopkins do not apply to the facts of the present case. The court in Hopkins addressed a protective sweep. The court did not reach the issue of whether generalized testimony that methamphetamine can cause violent behavior would be admissible in a trial where there was no evidence presented as to how methamphetamine effected the particular victim. Moreover, the court in Hopkins addressed the general belief that methamphetamine can cause violent behavior in the context of analyzing a police officer's reasonable belief that there were dangerous persons at a scene. Such analysis is wholly different than the facts of the present case.

The defendant's reliance on Williams v. Herbert, 435 F. Supp. 2d 199 (W.D. N.Y. 2006), is also misplaced. The defendant cites to Williams insofar as he asserts that Williams "notes a case establishing that evidence of drug use was relevant to a defense claim that the victim was acting 'crazy' at the time of the incident." Br. of Appellant at 36. In Williams, the court addressed whether it was a reasonable defense strategy for defense counsel to not call an expert witness to present testimony concerning the effects of cocaine on the victim's behavior. Id. at 206. The court concluded that it was a reasonable defense strategy. Id.

People v. Chevalier, 220 A.D.2d 114, 117, 644 N.Y.S.2d 508

(App. Div. 1st Dept. 1996), the case cited by Williams and vaguely referenced by the defendant, is also inapplicable. In Chevalier, the trial court excluded evidence of the victim's drug *use*. Id. at 116-117. The court stated:

Since Davis's recent drug use was potentially a powerful objective causal factor of his purportedly "crazy" conduct, and since a person under the influence of both alcohol and drugs might well be perceived—even by an observer unaware of the cause of the conduct—as acting more dangerously than one who had merely been drinking, the evidence of Davis's *drug use* was admissible and relevant to the justification defense.

...

Although the toxicological report also described evidence of contemporaneous cannabis and cocaine use by Davis, arguably a potent factor in the victim's "crazy" behavior, the defense was permitted neither to introduce such evidence nor to discuss its implications for the victim's actions.

...

Finally, we see no legal barrier to the introduction of the evidence of contemporaneous *drug usage* to support a justification defense where a defendant, though ignorant of *drug use*, reports crazed behavior consistent with such evidence.

...

Most significantly, the purpose of the introduction of the toxicological report in this case—to enhance the objective description of the victim's behavior so as to better judge the reasonableness of the defendant's conduct—was highly

relevant to the justification defense, particularly in light of the prosecution's misleading use of the report.

Id. at 116-118 (emphasis added).

In the present case, evidence of the victim's drug use was admitted by the State. RP (9/28/05) 240. The defendant was permitted to question Dr. Ramoso about the quantity of methamphetamine in the defendant's system. RP (9/28/05) 255. Dr. Ramoso could not speculate as to whether the victim was violent as a result of drug use. RP (9/28/05) 260. Unlike Chevalier, however, the jury was presented with testimony regarding the victim's drug use and that it was a "fairly high" amount of methamphetamine. RP (9/28/05) 255.

In Chevalier, there was testimony that the victim threatened to return and "get" the defendant. Chevalier, 220 A.D.2d at 115. The defendant remained at the scene, despite learning that the victim was dangerous and believing that the victim was "feeling good" after drinking alcohol in the defendant's presence. Id. The defendant wrestled a gun away from another individual, and the victim began running toward the defendant when the defendant fired. Id. In the case at bar, there was no testimony from the defendant that the victim was acting "crazy" or "feeling good" before the shooting. Rather, the defendant stated that the victim charged him as he stood in the residence with the victim's mother. RP (10/3/05) 482. Mrs. Holdorph testified that the victim never got close

to the defendant. RP (9/28/05) 175. There is absolutely no evidence that drug use caused the victim to behave violently.

The defendant asserts that drug use would explain why the victim, who was unarmed, would charge at the defendant. Br. of Appellant at 36. Defendant ignores, however, another possibility—that the victim was trying to protect his mother, whom the defendant had by the hair while holding a gun. RP (9/28/05) 170. There is no evidence that the victim was acting violently due to drugs.

Finally, the defendant was not precluded from arguing its theory of the case. The defendant argued that there was a struggle over the gun at the time of the shooting. RP (10/3/05) 567. In closing, the defendant argued the following:

Mr. Holdorph, what do we know about him on the night in question, in terms of putting the pieces together as to what has been proved beyond a reasonable doubt? We know that he had a very high level of methamphetamine and amphetamine in his system. We know what his blood tested positive for marijuana. He had been doing drugs, a lot of drugs. We know he was expecting trouble from Frank. We knew—we know that he thought Frank was a bully or a strong arm. He told Ruby that. “He had better not be coming out here and start something” or he would take care of it. That was Ruby’s testimony, and that’s the frame of mind that Mr. Holdorph was in when there was a knock at the door, and when he came out he charged out. Did he mistake who he was charging to? Did he think it was Frank Heiber? He wasn’t expecting Mr. Lewis.

RP (10/3/05) 570.

In the State's closing, the State argued that it was impossible to know what effects drugs may have had on the victim. RP (10/3/05) 576. Such argument is proper, given Dr. Ramoso's testimony. Dr. Ramoso stated that he would be unable to determine if drugs effected the victim. RP (9/28/05) 257.

The court properly exercised its discretion in precluding the defendant eliciting testimony from Dr. Ramoso which would require him to speculate about how the victim was effected by drug use. The jury heard about the victim's drug use and about the quantity of drugs in the victim's system. The court properly exercised its discretion in not requiring Dr. Ramoso to speculate further, and the court's ruling did not prevent the defendant from presenting a defense. Dr. Ramoso could not state that the victim in this case was gripped violently by methamphetamine use, and therefore such testimony was properly excluded. The defendant was still free to argue that drugs caused the victim's behavior, and that the victim had drugs in his system.

Finally, assuming arguendo, that any error was committed, any error was harmless. The test to determine whether an error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Stated another way, "[a]n error is not

harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred A reasonable probability exists when confidence in the outcome of the trial is undermined.” State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). In the present case, it is irrelevant whether the victim was made violent by methamphetamine or not—the defendant’s story was essentially that of accident. The defense was that there was a struggle for the gun and it just went off. RP (10/3/05) 473. Because the defendant’s theory was that of accident, it does not matter what the victim’s behavior was prior to the shooting. The jury did not accept the defendant’s version of events. It is clear that the any potential error committed by excluding Dr. Ramoso’s speculative testimony regarding possible effects of methamphetamine on the victim did not create a reasonable probability that the outcome of the trial would have been different.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT’S MOTIONS FOR A MISTRIAL WHERE THERE WAS NOT A SUBSTANTIAL LIKELIHOOD THAT THE STATEMENTS AFFECTED THE JURY’S VERDICT, THE STATEMENTS WERE NOT SERIOUS AND THE COURT GAVE A CAUTIONARY INSTRUCTION.

The trial court’s denial of a motion for a mistrial is reviewed for an abuse of discretion. See State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d

541 (2002). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court’s denial of a motion for mistrial will be overturned only when there is a “substantial likelihood” the error prompting the motion affected the jury’s verdict. Rodriguez, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless “the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” Id. at 270 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. See State v. Crane, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

During Frank Heiber’s testimony, the State asked him if the defendant had a weapon with him when they went to the victim’s

residence. RP (9/29/05) 358-359. In response, Heiber stated: “Well, not that I know of. I mean, it was my understanding that he had just been released from the penitentiary.” RP (9/29/05) 359. The defendant immediately moved for a mistrial based on Heiber’s statement. RP (9/29/05) 360. The court found that the State’s questioning was not fashioned to elicit such information from Heiber. RP (9/29/05) 362.

The court indicated that the jury may not have heard the word “penitentiary” because the State interrupted Heiber’s statement. RP (9/29/05) 364. The court ruled that the statement was not highly prejudicial and did not prejudice the defendant’s ability to put on evidence or argue to the jury that the victim was the aggressor. RP (9/29/05) 368. The court also stated that it was his perception that members of the public did not know of a difference between jail and prison. RP (9/29/05) 366-367. At the defendant’s request, the court read the question and answer back to the jury and instructed them to disregard it entirely. RP (9/29/05) 366, 369, 372.

During Detective Larson’s testimony, the State was questioning him regarding the police investigation. RP (9/29/05) 446. Detective Larson was asked about a break in the police investigation. RP (9/29/05) 445. Detective Larson stated that he received a telephone call from LESA communications. RP (9/29/05) 446. He then stated:

They gave me a name. They also gave me a description of a vehicle. What I did at that point I ran in our global system, which is a computer system which lists people that have had prior contact with law enforcement, the name that I was given.

Id.

The court immediately struck the statement. Id. Defendant moved for a mistrial. RP (9/29/05) 447. The State asserted that the jury had already heard testimony from Mr. Ostrander, a former Fircrest Police Officer, who indicated that he had prior contacts with the defendant. Id. The court denied the motion for a mistrial, and made the following ruling:

Right. Well, I had sustained the objection and granted the motion to strike because I felt it was inconsistent with the motion in limine with respect to the particular—well, I don't know who to say it, but we've been real careful in the motions in limine as to prior law enforcement and although I think that even some of our jurors indicated in voir dire that they had prior contact with law enforcement and they could certainly reach that conclusion, given that they were pulled over for speeding or whatever, I still think that it's a dangerous area to go to with this defendant. I'm going to deny the motion for a mistrial, but I'm going to ask Mr. Costello to kind of skip this and get to the point.

RP (9/29/05) 449.

The statement made by Heiber did not create a substantial likelihood that the jury's verdict was affected. The statement made by Heiber was merely that the defendant had just been released from the penitentiary. RP (9/29/05) 359. The statement did not specify why the defendant was in the penitentiary. The defendant asserts that no one could

be in a penitentiary without having been convicted of a “serious crime,” but provides no authority to support such an argument. Br. of Appellant at 41. The record is devoid of any mention as to why the defendant was in a penitentiary. There is no basis for the jury to speculate that the defendant had been convicted of a “serious crime.” Additionally, the defendant himself admitted that he had “been in trouble before” and that he had, “been in trouble with the law.” RP (10/3/05) 494-495.

Moreover, the cases relied on by the defendant are distinguishable from the case at bar. In State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997), the court made a pretrial ruling that the defendant’s prior “unarmed felony” conviction was admissible if the defendant testified at trial. Id. at 706. The defendant had been convicted of a prior drug offense. Id. at 705-706. The defendant then testified and evidence of a prior unarmed felony was introduced. Id. The court held that “evidence of prior felony convictions is generally inadmissible” and that the trial court erred in admitting evidence of a prior felony conviction. Id. at 706, 715. In the case at bar, there was no testimony about any of the defendant’s prior convictions. The jury was not told that the defendant was convicted of a felony. Most jurors would not even understand that an offender must have been convicted of a felony in order to be in a

penitentiary. The statement made by Heiber was not similar to the evidence that was erroneously allowed by the court in Hardy.

The defendant also relies on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), in support of his argument. Br. of Appellant at 40. Escalona, however, is distinguishable from the case at bar. In Escalona, the court made a pretrial ruling that there was to be no reference to Escalona's prior conviction for stabbing someone. Id. at 252. During trial, a witness stated ". . . Alberto already has a record and had stabbed someone." Id. at 253. Clearly, such testimony was in direct contradiction to the court's pretrial ruling. That testimony was specific in that it referenced not only that the defendant had a prior record, but that he had stabbed someone. Id.

In the present case, however, the statement was not specific. The statement by Heiber was vague and ambiguous as to what the defendant did or did not do to have served time in a penitentiary. The statement made in Escalona is clearly of a more serious nature than the statement made here. Heiber did not specify what crime the defendant committed to be in a penitentiary. Mere reference that the defendant had been in a penitentiary does not rise to the same level as the statements that were made in Escalona. Finally, the statement was immediately cured by an instruction to disregard the comment, and the jury is presumed to follow

such instruction. State v. Swan, 114 Wn.2d 613, 661-662, 790 P.2d 610 (1990).

The statement made by Detective Larson also did not create a substantial likelihood that the jury's verdict was affected. Detective Larson's statement, which referenced that the defendant had prior contacts with law enforcement, did not specify any prior convictions or arrests of the defendant. As the State argued below, Mr. Ostrander, a former Fircrest police officer, testified at trial that he had stopped and contacted the defendant. RP (9/28/05) 296-297. The statement by Detective Larson was ambiguous and vague as to what kind of contact the defendant had with law enforcement. It is likely that the jury thought the statement was referencing the prior contact the defendant had with Mr. Ostrander. It is also possible, as the court indicated, that the jury could have believed that a prior contact with law enforcement referenced a traffic stop.

The statement made by Detective Larson did not reference any prior arrests or convictions of the defendant. Applying the factors discussed in Crane and Escalona to Detective Larson's comment, it was not a serious irregularity, it was cumulative of Officer Ostrander's testimony that he contacted the defendant, and the jury was immediately instructed to disregard the comment.

In State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993), there were two statements made at trial that the defendant was in jail. Id. at 647. The court, in applying the factors discussed in Crane and Escalona, found that the statements referencing the defendant being in jail was ambiguous, not so serious as to warrant a mistrial, and the court's instruction to disregard the comments were sufficient. Id. at 649-650. The defendant attempts to distinguish Condon on the basis that the witness in Condon stated that the defendant had been in jail, and in the present case the statement was that the defendant had been in prison. Br. of Appellant at 41. The defendant's attempt to distinguish Condon fails.

The court in Condon held that the fact that someone has been in jail does not indicate a propensity to commit murder. Condon, 72 Wn. App. 638 at 649. Similarly, there is no evidence to indicate that if someone has been in a penitentiary they have a propensity to commit murder. Second, the statements made in Condon are much more serious than the statements made in the present case. In Condon, there were *two* separate statements referencing the defendant having been in jail. Id. at 647. In the present case, there was one statement that the defendant had been in the penitentiary, which was immediately stricken. Finally, the court reasoned that that an individual could be in jail having not been convicted of a crime. Id. at 649. As the trial court noted, most members of the general

public do not know the difference between jail, a penitentiary, and prison. RP (9/29/05) 366-367. It is likely that the jury did not know the difference between jail and a penitentiary, and, as the court in Condon held, an individual can be in jail without having been convicted of a crime. The court in Condon stated, “. . . although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court’s instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted.” Id. at 649-650.

The trial court is in the best position to determine the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). In Weber, the court held that the trial court did not abuse its discretion in denying a motion for a mistrial. Weber, 99 Wn.2d 158 at 166. In Weber, an officer testified regarding an incriminating statement made by the defendant which had not been previously disclosed. Id. at 160-161. In this case, the court clearly found that no prejudice existed that would warrant a mistrial. The statements were not serious errors, the statement of Detective Larson was cumulative, the court gave cautionary instructions after each statement, and the defendant himself admitted that he had been in trouble before. The denial of the motions for a mistrial were a proper exercise of the court’s discretion. The statements were not so unfairly prejudicial as to warrant a mistrial.

Finally, any error caused by Heiber's or Detective Larson's comments was harmless. As argued above, harmless error occurs when the error complained of did not contribute to the verdict obtained. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). In the present case, the jury was presented with testimony that the defendant forced his way into the victim's home to settle a drug dispute. RP (9/28/05) 170, 175, (9/29/05) 349, 428. The defendant was armed with a firearm. RP (9/28/05) 173. He grabbed the victim's mother by the hair, and as the victim came out of his bedroom the defendant shot him. RP (9/28/05) 380, 409. The defendant then fled the scene and attempted to modify his very conspicuous purple Mustang convertible. The defendant changed his clothing and cut his hair. The defendant even admitted that he had been in trouble with the law. RP 495. There was clear and overwhelming evidence for the jury to have found the defendant guilty of murder, and therefore, any potential error committed by the statements was harmless.

4. THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT IN CLOSING ARGUMENT WHEN HE DID NOT TELL THE JURY THAT ANY WITNESS WAS LYING AND DEFENSE COUNSEL NEVER OBJECTED.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407,

cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 570 (1995). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10

(1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In closing argument, a prosecutor is permitted reasonable latitude in arguing inferences drawn from the evidence admitted during testimony. State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983).

During closing argument by the State, the State argued that the victim was trying to help his mother. RP (10/3/05) 548. The State argued, in part:

A trial is a search for the truth. Part of the jury's role is, of course, to decide what happened, what are the true facts, what occurred. When you study the evidence and decide what happened, you then, of course, decide whether the State has proven its case beyond a reasonable doubt under the law given to you by the Court, but the first step is figuring out what happened, and that's not hard to do in this instance. It is, as I say, a simple case.

The truth of what happened in the Holdorph home comes to you mainly through Francis Holdorph. She was there. She saw it happen. She lived through it. She experienced it. The other evidence in this case essentially supports and corroborates what Mrs. Holdorph told you occurred. When you look at the evidence as a whole, it allows you to very reasonably conclude that Mrs. Holdorph's memory is solid and, very importantly, she has no motive to lie to you about what occurred. The State submits to you that the murder happened just like she told you it did. Ladies and gentlemen, as long as she lives, she will not forget. I

submit to you that she cannot forget what happened in the living room of her home.

RP (10/3/05) 548-549.

The State then went on to argue the following:

Now, the defendant offers, as I said, a dramatically different version. I ask you to consider, when you look at the testimony of each, whether Mrs. Holdorph had any motive to lie to you. I ask you to see if you can come up with a motive why Mrs. Holdorph would lie to you about what happened in her home. If there had literally been a struggle over the handgun, a scenario as the defendant tried to tell you, that he came into the home peacefully—peacefully. There was no forced entry into the home, he didn't grab Mrs. Holdorph by the hair, he didn't drag her across the room, that the victim came out of his bedroom and first laid hands on the defendant and only then did the defendant grab Mrs. Holdorph and try to pull her in between the two of them, assaulting her in the process, and only then did the defendant produce a gun—if that had occurred in that kind of a fashion, the struggle over the gun with Brett Holdorph slapping at the gun as the defendant tried to describe for you, don't you suppose that Mrs. Holdorph might have noticed that, had it occurred that way?

Her testimony was completely different than the defendant's testimony, and I urge you to ask yourselves, to deliberate on this question to you: Is the defendant's desire for self protection for self preservation, is that motive for him to mislead you? Of course, it is, to try to protect himself. I'm stating the obvious here, would he tailor his testimony to try to fit the evidence, but he can't make it fit. It's trying to stuff a square peg into a round hole. It doesn't work when you look at all the evidence as a whole.

RP (10/3/05) 553-554.

No objections were made during either portion of the State's closing. Therefore, the comments would have to be so flagrant and ill intentioned that they leave an enduring prejudice that could not have been cured by an admonition. The comments made by the State were neither flagrant and ill intentioned nor did they leave an enduring prejudice.

The defendant cites to State v. Castaneda-Perez, 61 Wn. App. 354, 810 P.2d 74 (1990), as authority for the proposition that it is "misleading and unfair to make it appear that an acquittal requires the conclusion' that the prosecution's witnesses are lying." Br. of Appellant at 29-30. In Castaneda-Perez, however, the defendants were challenging questions asked by the prosecutor of the defendants on cross-examination. Id. at 357-364. The prosecutor asked the defendants if the officers involved in the case were lying. Id. In the present case, the State did not ask the defendant if Mrs. Holdorph was lying. The State also did not ask Mrs. Holdorph if the defendant was lying. Essentially, the State's argument to the jury was that they had to either believe the defendant or Mrs. Holdorph, since their respective testimony was markedly different.

The State's argument falls squarely into the type of permissible argument. Unlike Castaneda-Perez, the State in the present case never called anyone a "liar," never asked a witness to call another witness a "liar," and never told the jury that in order to convict the defendant the jury had to find that Mrs. Holdorph was a "liar." Rather, the State merely presented argument that Mrs. Holdorph's version of events made more

sense than the defendant's version. The State is certainly permitted in closing argument to argue that the defendant had the opportunity to listen to all of the testimony and tailor his own testimony. State v. Miller, 110 Wn. App. 283, 284, 40 P.3d 692, review denied, 147 Wn.2d 1011, 56 P.3d 565 (2002). Therefore, the State's comments that the defendant had tailored his testimony was entirely proper.

In State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995), the court held:

Where, as here, the parties present the jury with conflicting versions of the facts and credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.

Id. at 825 (internal footnotes omitted).

The court stated that it was prosecutorial misconduct for the State to argue that in order to believe the defendant, a jury must find that the State's witnesses are lying. Id. at 826. In the present case, the State did not argue to the jury that in order to believe the defendant, they must find that Mrs. Holdorph is a liar. The State did not tell the jury that in order to believe Mrs. Holdorph, they must find that the defendant is a liar. The State merely presented argument to the jury as to why Mrs. Holdorph's testimony was credible and logical. The State did not tell the jury that in order to accept one version of events—the defendant's or Mrs. Holdorph's—that they must also necessarily reject the other, although

such argument would have been permissible under Wright. Such dilemma is obvious when there is testimony in direct contradiction to another. Mrs. Holdorph testified that there was no struggle over the gun, the defendant testified about a struggle. Such testimony is in direct contradiction to each other.

It is not misconduct for a prosecutor to make arguments regarding a witnesses' veracity that are based on inferences from the evidence. See State v. Rivers, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999). The State merely presented argument as to why Mrs. Holdorph's testimony made sense. Such argument was argument regarding Ms. Holdorph's veracity. The State even told the jury that they could accept the defendant's testimony or reject it. RP (10/3/05) 577. The defendant mischaracterizes the State's argument by asserting that it gave the jury a "false choice" of either believing the Mrs. Holdorph or the defendant. Br. of Appellant at 30. The State never proffered to the jury that they must reject the defendant's testimony if they believed Mrs. Holdorph. While it would have been permissible, the State did not argue to the jury that the defendant was lying. See State v. Luoma, 88 Wn.2d 28, 49, 558 P.2d 756 (1977). The State was well within the wide latitude afforded to prosecutors in closing argument. See State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991). The defendant cannot establish that the

comments were flagrant and ill-intentioned, or that they resulted in an enduring prejudice that could not have been cured by an admonition.⁴

Finally, there was no ineffective assistance of counsel in failing to object the State's comments. As argued above, the State's comments were entirely proper, and any objection would have been properly overruled.

5. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL UNDER THE CUMULATIVE ERROR DOCTRINE.

Under the cumulative error doctrine, the court may grant a new trial based on accumulated errors, even though some of the errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial. State v. Badda, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984). The cumulative error doctrine permits the appellate court to weigh the effect of the claimed errors that alone do not rise to the level of reversible error. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal...”); Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) (“Finally, Lord contends that, even if none of the claimed errors set forth in his 387-page personal restraint petition by themselves require

⁴ The defendant asserts that the prosecutor in the present case, Gerald Costello, is the elected prosecutor for Pierce County, and that it is regrettable because the “citizens of the county had clearly placed their faith and confidence and faith [in him] by electing him.” Br. of Appellant at 32. While there is nothing in the record to support the defendant's claim, it appears that he is mistaking Gerald Costello for the elected prosecutor, Gerald Horne.

reversal, the cumulative error was so prejudicial as to require a new trial.”).

The cumulative error argument does not provide relief to defendant in this case because, as discussed above, the defendant either has failed to show error or has failed to show any prejudice resulting from the error.

6. THE COURT DID NOT VIOLATE THE DEFENDANT’S CONSTITUTIONAL RIGHTS BY FINDING THAT HE HAD PRIOR CONVICTIONS; THE “FACT OF A PRIOR CONVICTION” EXCEPTION IN APPRENDI INCLUDES THE DETERMINATION OF THE IDENTITY OF THE PERSON CONVICTED.

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court expressed the rule that: “*other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (Emphasis added). Apprendi did not overrule the Court’s earlier decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), which held that a defendant did not have a right to a jury trial on facts of recidivism, specifically, prior convictions. The Court further clarified in Jones v. United States, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), that facts of prior conviction were distinguishable from other factors increasing a sentence, which would have to be found by a jury because a “prior conviction must itself have

been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” The Supreme Court specifically applied the rule of Apprendi to the SRA in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Both Apprendi and Blakely exclude “the fact of a prior conviction” from the proscription against using judicially determined facts to impose sentences beyond the statutory maximum. See, Blakely, 124 S. Ct. at 2536 (quoting Apprendi, 530 U.S. at 490).

In a post-Apprendi/pre-Blakely case, the Washington Supreme Court held that neither the federal nor state constitution requires prior convictions to be proved to a jury beyond a reasonable doubt. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004). The court noted that the “United States Supreme Court has never held that recidivism must be pleaded and proved to a jury beyond a reasonable doubt.” Id. at 141. Post-Blakely, Washington courts have determined that a persistent offender sentence is constitutional even though the relevant statutes permit a sentencing court to determine prior convictions by a preponderance standard, without submitting the matter to a jury. State v. Rivers, 130 Wn. App. 689, 694-697, 128 P.3d 608 (2005); State v. Ball, 127 Wn. App. 956, 960-61, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018, 132 P.3d 734 (2006).

In Rivers, a defendant contended that after Blakely, “a jury must find beyond a reasonable doubt that *he was convicted of two prior most serious offenses.*” Rivers, 130 Wn. App. at 694 (emphasis added). The Court of Appeals, Division I, rejected this argument finding that the issue was controlled by the Washington Supreme court decisions in State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1559, 152 L. Ed. 2d 482 (2002) and State v. Smith, 150 Wn.2d 135, 75 P.3d 934, cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004). The court did not find that the decision in Blakely undermined the rationale of Wheeler or Smith as Blakely specifically excluded its application to prior convictions. Rivers, 130 Wn. App. at 695. This court should follow Rivers and find that this issue is controlled by Smith. Defendant is not entitled to a jury determination regarding his criminal history.

Defendant seeks to avoid the application of Almendarez-Torres, Wheeler, and Smith as well as ignore the express exclusions made for prior convictions in Apprendi and Blakely, by arguing that the “fact of a prior conviction” is somehow distinct from the fact of “to whom” that conviction belongs. Defendant asserts that the issue of identity of a convicted person must be submitted to a jury even though the existence of prior conviction does not. The State submits that the “fact of a prior conviction” includes within it the determination of the identity of the person convicted.

The analysis of the Supreme Court in Almendarez-Torres depended greatly on the fact that the subject matter of the statute at issue was recidivism. Almendarez-Torres, 523 U.S. at 230. At issue was a federal statute authorizing increased punishment for a deported alien's illegal return if the alien's initial deportation had been subsequent to a conviction for an aggravated felony. Almendarez-Torres argued that the constitution required that *his* recidivism be treated as an element of his offense. The court rejected his claim, commenting that recidivism –that is consideration of an offender's prior record - was typically a sentencing factor rather than an element of a crime. Id. at 243-247. The court noted that while some states afforded a jury determination on the issue of prior convictions, the practice was not uniform and that “nowhere” to the court's knowledge, did the practice rest “upon a federal constitutional guarantee.” Id. at 246-247. The court's focus on “recidivism” is important because the very term presupposes that the court is considering whether a particular person has offended again before imposing sentence. Thus, the decision in Almendarez-Torres addressed whether the constitution required that a *particular* offender's criminal history had to be pleaded and proved to a jury before the court could use it to increase punishment; the court concluded it did not.

Another obvious indication that the “fact of a prior conviction” includes the identity of the person convicted is the number of times that criminal defendants have raised this issue in the courts, hoping to succeed

on a claim that the Sixth Amendment (or a state constitutional provision) requires a jury determination on this fact. The Washington Supreme Court rejected the claim pre-Apprendi in State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997) (The SRA does not provide for a jury trial when prior convictions are used to increase the penalty faced by a defendant.) The court again rejected it, post-Apprendi, in State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1559, 152 L. Ed. 2d 482 (2002). The court rejected it once again, post Ring v. Arizona,⁵ in State v. Smith, 150 Wn.2d 135, 75 P.3d 934, cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004). The Court of Appeals has now rejected the argument post-Blakely. See State v. Rivers, supra. When Mr. Manussier, Mr. Wheeler, Mr. Smith, or Mr. Rivers were standing before the court for sentencing, only their respective prior convictions had any relevance to the sentencing court. The State has no interest in proving - and the trial court has no interest in considering - the existence of prior convictions unless they belong to the person standing before the court for sentencing. If the State tried to admit evidence that some other person had been previously convicted of a crime, any of these defendants could have challenged the evidence on relevance grounds and had it excluded. The defendants would not need to assert a constitutional

⁵ 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

basis to support their argument; the rules of evidence would suffice. It is only because the “fact of a prior conviction” includes within it the determination that it is a “prior conviction” of the recidivist offender standing before the court that a constitutional analysis is warranted. Various criminal defendants have kept reasserting a Sixth Amendment claim every time the United States Supreme Court issues a new case applying Apprendi. However, as long as Almendarez-Torres remains as good authority, the answer remains the same - prior convictions, including the identity of the person convicted - need not be proved to a jury beyond a reasonable doubt.

As argued below, there was sufficient evidence to establish by a preponderance of the evidence that the prior convictions belonged to the defendant. The court below properly determined that the alleged prior criminal history belonged to defendant.

7. THERE WAS SUFFICIENT EVIDENCE
PRESENTED FOR THE COURT TO
DETERMINE BY A PREPONDERANCE OF THE
EVIDENCE THAT THE PRIOR CONVICTIONS
BELONGED TO THE DEFENDANT.

The unchallenged certified copies were sufficient to establish the existence and nature of the prior convictions. See State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). In the present case, the only challenge to the certified copies was that they were not the original fingerprints examined by Steven Wilkins. RP (10/28/05) 605. Moreover,

because defendant failed to allege, under oath, that he was not the person named in the documents, this evidence was also sufficient to establish identity. See State v. Ammons, 105 Wn.2d 175, 189-90, 713 P.2d 719 (1986); State v. Cabrera, 73 Wn. App. 165, 169 n.3, 868 P.2d 179 (1994). Based on the evidence presented the court sentenced the defendant as a persistent offender. RP (10/28/05) 611. Under RCW 9.94A.500(1), the State must prove the defendant's criminal history by a preponderance of the evidence.

Steven Wilkins, a forensic specialist, testified that he had compared over 4,000 fingerprints. RP (10/28/05) 601. He examined the defendant's original fingerprint card that was obtained in the current case. Id. He examined the file under Superior Court Cause Number 94-1-0034309, a felony assault conviction. RP (10/28/05) 602. Wilkins examined the original judgment and sentence containing the fingerprints of an individual named "Robert Edward Lewis." RP (10/28/05) 602-603. Wilkins also examined the file under Superior Court Cause Number 95-1-01917-1, a kidnapping in the first degree conviction. RP (10/28/05) 603. He examined the original judgment and sentence, which contained fingerprints. Id. The document had the name "Robert Lewis" on it. Id. Wilkins compared the original fingerprints to the two judgment and sentences, and concluded that they were all from the same individual. Id. Wilkins testified that it was his opinion that the fingerprints in the present case were the same fingerprints in the two prior cases. RP (10/28/05) 604-

605. To make his comparison, Wilkins examined all four fingers that were on the judgment and sentences. RP (10/28/05) 607.

As the court also noted, all of the dates of birth on all three matters are the same. RP (10/28/05) 611. The defendant's name appears the same on all of the documents, as do the social security numbers. *Id.* The documents, combined with Wilkins's testimony, clearly established, by a preponderance of the evidence, that the prior convictions belonged to the defendant. As argued above, the court acted properly in making the determination that the prior convictions belonged the defendant, and the defendant did not allege that any of the convictions were not his. The defendant's claim that there was insufficient evidence to establish that the prior convictions belonged to him is without merit.

8. IN DETERMINING THAT THE DEFENDANT WAS A PERSISTENT OFFENDER, THE TRIAL COURT PROPERLY CONSIDERED THE DEFENDANT'S TWO PRIOR CONVICTIONS AS THEY WERE FACIALLY VALID CONVICTIONS.

In order to use a prior conviction for criminal history purposes, the State need only establish its existence by a preponderance of the evidence. State v. Ammons, 105 Wn.2d 175, 185, 713 P.2d 719 (1986). The courts have considered a certified copy of the judgment to be the best evidence of a prior conviction. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The State is not required to prove that the prior conviction is a

constitutionally valid conviction. Ammons, 105 Wn.2d at 187. However, a “prior conviction which *has been previously determined* to have been unconstitutionally obtained or which is *constitutionally invalid on its face*” may not be used. Id., at 187-188.

The court in Ammons reasoned that a defendant has no right to contest a prior conviction at a subsequent sentencing; moreover, to require the State to prove the constitutional validity of prior convictions would turn each “sentencing proceeding into an appellate review of all prior convictions.” Id. at 188. The court held that a defendant seeking to invalidate a prior conviction must use established avenues of challenge provided for post-conviction relief in the state or federal court where the judgment was entered and, if he is successful, he can then be resentenced without the unconstitutional conviction being considered. Id.

Increased punishment under the Persistent Offender Accountability Act (POAA) is triggered *only* upon the third conviction of a most serious offense. State v. Angehrn, 90 Wn. App. 339, 344, 952 P.2d 195 (1998), review denied, 136 Wn.2d 1017, 966 P.2d 1277 (1998), see also RCW 9.94A.030(23), (27) (emphasis added). The State does not have an affirmative burden to prove the constitutional validity of a prior conviction before it can be used in a sentencing proceeding. State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986). A facially invalid conviction is one

that, without further elaboration, affirmatively shows that the defendant's constitutional rights were violated. Id., State v. Gimarelli, 105 Wn. App. 370, 20 P.3d 430, 433 (2001), review denied, 144 Wn.2d 1014, 31 P.3d 1185 (2001). Not only must the plea forms themselves be deficient, but the defendant must also show that the constitutional safeguards were not provided. Id. at 189, State v. Burton, 92 Wn. App. 114, 117, 960 P.2d 480 (1998).

The conviction need not show that a defendant's rights were not violated; rather, *for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant's rights were violated.* Ammons, 105 Wn.2d at 189, 713 P.2d 719. Likewise, the defendant may not impeach the conviction by offering testimony that his or her rights were violated. State v. Bemby, 46 Wn. App. 288, 291-92, 730 P.2d 115 (1986).

Gimarelli, 20 P.3d at 433 (emphasis added).

In Ammons, the court stated:

To require the State to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing. To allow an attack at that point would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, 105 Wn.2d at 188.

In the present case, the defendant seeks to raise the very type of claim which Ammons held was precluded and to shift the burden to the State to prove the constitutionality of the conviction. Defendant has not met his burden of showing a facially invalid plea. The defendant has available to him more appropriate avenues for challenging the constitutional validity of his plea, specifically under RAP 16.3. See Ammons, 105 Wn.2d at 189.

Finally, the defendant asserts that he should have been advised on the his two prior convictions that he was pleading guilty to strike offenses, but the fact that the crimes were strike offenses did not increase the penalties on those convictions. Increased punishment is only triggered under the third offense. See State v. Angehrn, supra. The defendant in this case was given notice that the current offense was his third strike. The defendant cannot establish that the two prior convictions are facially invalid, and the trial court properly considered the defendant's two prior convictions as facially valid under the POAA.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that this court affirm the defendant's conviction.

DATED: DECEMBER 8, 2006

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail for ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/10/06
Date Signature