

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

STATE OF WASHINGTON,

Respondent,

v.

JAY McKAGUE,

Appellant.

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

The Honorable Anne Hirsch, Judge
Cause No. 08-1-01905-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence was sufficient, beyond a reasonable doubt, to sustain McKague's conviction of assault in the second degree.

2. Whether the trial court abused its discretion when it refused McKague's request to waive his Sixth Amendment right to a jury trial.

3. Whether the trial court deprived McKague of either his right to a jury trial or his due process rights when it imposed a sentence in accordance with RCW 9.94A.570 based on a preponderance of the evidence of his two prior convictions.

4. Whether the trial court's classification of McKague as a persistent offender under RCW 9.94A.570 violated his right to equal protection under either the Fourteenth Amendment or Article One, Section 12 of the Washington Constitution.

B. STATEMENT OF THE CASE.

1. The State accepts the appellant's statement of the case, while noting the following clarifications, corrections, and additions:

The open can of oysters was still in McKague's hand when the shopkeeper, Mr. Chang, approached him in the parking lot. [3-30-09 RP 59]. When Chang approached McKague, the shopkeeper asked him twice, "Why did you steal my item?," to which McKague said, "What? What?," twice and made a "scary" facial expression. [3-30-09 RP 59]. Thirty-seven-year old McKague is a much larger and younger man at approximately six feet and 230 pounds, [CP 4-5], than 54-year old Chang. [3-30-09 RP 62, Ex. 34 at 1]. When McKague attempted to leave the scene, both Chang and a witness,

Wolf, testified that Chang then grabbed McKague's sweatshirt to prevent his departure. [3-30-09 RP 63, 105]. McKague then began punching Chang in the face, pushing him to the ground with his body, causing him to strike the back of his head on the pavement, and then continuing to punch him as Chang was on the ground. [3-30-09 RP 63, 105, 122, 146].

As a result of striking his head and being punched, Change testified he became very dizzy and was unable to immediately rise from the ground. He then testified that he attempted to stand once, but had to sit back down until he was able to stand without becoming disoriented. [3-30-09 RP 64, 66]. Upon arriving at the scene, Officer Samuelson described Chang as "flustered, distracted, stunned," "looked like he was affected, affected by [the] blows," "a little bit off," "obviously . . . had some injuries to the left side of his face where his face was extremely puffy," and he was "bruised." [3-30-09 RP 36-37]. Additionally, Chang reported a headache following the assault, described severe neck and shoulder pain lasting for more than a week after, and then further neck and shoulder pain lasting for two to three months after that. [3-30-09 RP 66 – 67, Ex. 34 at 9]. Chang's physician prescribed him the narcotic, Vicodin, to address the on-going pain. [3-30-09 RP 66 – 67, Ex. 34].

Prior to this incident, McKague had previous felony convictions for assault in the second degree (May 16, 1990), kidnapping in the first degree (December 20, 1995) and robbery in the first degree (December 20, 1995). [4-2-09 RP 305; CP 68, 71].

C. ARGUMENT

1. The evidence is sufficient, beyond a reasonable doubt, to sustain McKague's conviction of assault in the second degree.

Although not expressly stated as such, after reviewing McKague's first assignment of error, the State believes it is his intent to argue insufficient evidence existed to support his second degree assault conviction based on a lack of substantial bodily harm, as required by the Revised Code of Washington (RCW) 9A.36.021. The State disagrees. The State presented the jury with a litany of evidence and reasonable inferences from which it could rationally determine the State satisfied each element of assault in the second degree. The State agrees with McKague that the statute and both the state and federal constitutions require the State to prove each element of the crime beyond a reasonable doubt and maintains that it did so in this case.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

McKague argues that Chang's injuries do not meet the definition of substantial bodily harm and based on the evidence at

trial, it is impossible that any reasonable trier of fact could have determined otherwise. The State takes issue with his argument for several reasons.

In addition to not viewing the facts in the light most favorable to the State and ignoring the testimony regarding the obvious and significant facial bruising and swelling of Chang, McKague provides no authority to support either his argument or his analysis of Chang's injuries. In contrast, clear authority shows that not only does at least one (if not several) of Chang's injuries constitute substantial bodily harm, but the evidence presented at trial was also sufficient to support the jury in making such a finding.

a. Chang's injuries constitute substantial bodily harm.

RCW 9A.36.021(1)(a) provides that "a person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree intentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). RCW 9A.04.110(1)(b) defines "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(1)(b). Chang's injuries fall squarely within this definition.

First, in State v. Hovig, this court held that “bruising can rise to the level of ‘substantial bodily injury’ if the State produces sufficient evidence of temporary or substantial disfigurement.” State v. Hovig, 149 Wn. App. 1, 202 P.3d 318 (2009) (because the injury was specific to disfigurement, the court did not address the substantial loss or impairment of the function of any bodily part or organ). While playing with his infant child, Hovig intentionally bit his child’s cheek, leaving a “mouth-shaped bruise covering” the cheek. Hovig, 149 Wn. App. at 5. The State presented testimony including the mother and aunt’s observations of the child’s bruising, as well as the treating physician’s testimony describing the injury as “a teeth-mark bruise from an adult bite” which “had not broken the skin” and “likely caused the infant pain and discomfort.” Id. at 6. He further observed “that the bruising would persist for 7 to 14 days.” Id.

In addition to testimony of various family members and the doctor, the investigating officer also gave his verbal description of the “nature and extent” of the injury as well as providing “photographs of the injury that [he] had taken.” Id. at 7. The pictures were consistent with the descriptions of the injury given by the other witnesses and the described causal events. Id.

Like McKague, the defendant in Hovig contended the child’s injuries, specifically the bruise, did not rise to the level of

“substantial disfigurement,” but this court unambiguously disagreed. This court cited to Division One’s holding in State v. Ashcraft, where the Ashcraft Court stated, “[T]he presence of bruise marks indicates temporary but substantial disfigurement.” Id. at 12 (citing to State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993)). In Ashcraft, the court held substantial bodily harm occurred where bruise marks were apparent on a child whose mother had hit her with a shoe. Ashcraft, 71 Wn. App. at 455. See generally State v. Miles, 77 Wn.2d 593, 600-01, 464 P.2d 723 (1970) (holding that the State failed to produce sufficient evidence of the injury through witness testimony, but not that the injury itself did not qualify).

As in Hovig and Ashcraft, the jury in McKague’s case heard from a variety of witnesses for the State who each described first-hand impressions as to the extent and nature of Mr. Chang’s injuries. For example, Officer Samuelson, who testified to having met Chang on “numerous occasions” prior, noted that Chang had “a bump to the back of the head,” “obviously . . . had some injuries to the left side of his face where his face was extremely puffy,” and was “bruised.” [3-30-09 RP 36-37]. Detective Costello also testified to Chang being “disheveled,” “injured on the left side of his face and on the back of his head,” and having abrasions on an elbow. [3-30-09 RP 49]. The jury was also provided with pictures of the facial

injuries, which included the bruising, and which were consistent with the witness descriptions. [Ex. 23-30].

In sum, testimony of all of the witnesses regarding the nature and extent of Chang's injuries, particularly the bruising, was consistent not only with each other, but also the nature and extent of the assault. The testimony of Chang's facial bruising and swelling is at least as severe, if not more so, than the bruise marks of the children in Hovig and Ashcraft. Further, where the injuries in Hovig did not break the skin and there was no report of swollen flesh or possible head injury, Chang's scalp contusion clearly broke the skin and resulted in a protrusion obvious to the naked eye.

For whatever reason, McKague ignores these injuries in his analysis, never addressing any facial bruising or abnormal bumps jutting from the victim's head—disfiguring by definition. Because McKague makes no argument as to the existence or extent of the bruising or swelling, the State can only assume he finds them to be irrelevant. Case law, however, clearly establishes that the bruising alone satisfies the statutory element of substantial bodily harm due to its nature of being temporary, but substantially disfiguring.

Second, while McKague consistently describes Chang as simply bumping his head on the ground, a rational juror could view the same injury quite differently. The undisputed evidence at trial and as presented to the jury was that 37-year old, 6'2", 245-pound

McKague repeatedly punched 53-year old, 5'3" Mr. Chang in the face, knocked him to the ground and caused him to strike his head. Then, while on the ground, McKague continued to punch the victim in the face until the defendant could escape in his friend's car.

McKague focuses on the fact that Chang did not lose consciousness from the blow to the head and not only glosses over the resulting symptoms, but in fact misstates the evidence. Testimony showed that Chang became dizzy and disoriented and was unable to stand immediately following the assault. Officer Samuleson who, again, knew Chang prior to the injury described him as being "flustered, distracted, stunned," "look[ing] like he was affected . . . by [the] blows," and "a little bit off." [3-30-09 RP 36-37]. Chang, himself, additionally described having a headache and severe neck pain, the latter of which lasted for several months following the attack and required a prescription of Vicodin to manage. [3-30-09 RP 66-67, Ex. 34 at 5, 9].

The medical reports noted that Chang suffered a concussion, the symptoms of which are described in the medical report—severe headache, dizziness, confusion, change in behavior, increasing scalp or face swelling, or stiff neck—and are consistent with the description of Chang following the assault. [Ex. 34 at 6-7]. In short, the lack of any loss of consciousness is irrelevant; it is simply not the threshold for the existence of

temporary but substantial impairment as McKague appears to argue.

Instead, a jury could reasonably interpret a person's inability to stand and immediate lack of mental acuity and balance, dizziness, slight personality change, severe neck pain, and headaches as symptoms meeting the definition of a temporary but "substantial loss or impairment of the function of a body part" (i.e. the brain). RCW 9A.04.110(1)(b). The fact that Chang was fortunate enough that many of those symptoms ebbed over the course of the nearly five hours from the time of the assault to being examined by hospital staff does not diminish their severity or existence (as testified to by multiple witnesses). [Ex. 34 at 9]. Rather, the State maintains this is persuasive evidence which a jury could reasonably determine falls squarely within the RCW definition of "temporary but substantial," just as the bruising and contusion did.

Third, the medical report noted opacification of the ethmoid sinuses and the air-fluid levels of the maxillary sinuses indicating a potential occult fracture. [Ex. 34 at 2]. While McKague argues these injuries do not rise to the level of substantial bodily harm, the State, again, disagrees and maintains that a jury could reasonably interpret the report to the contrary.

When reviewing the totality of the evidence, a jury could rationally determine that the indication of a possible facial fracture, when combined with the nature of the attack, significant facial bruising and swelling, concussion, and severe pain is more indicative of a fracture than not. McKague claims that because the medical reports do not indicate a definitive fracture, then clearly none occurred, but that is a logical fallacy. The inability to conclusively confirm the existence of a medical event does not inherently, or by default, result in the nonexistence of that event. Because the medical reports noted that the scans revealed a possible fracture may exist, the issue then became one of fact for the jury to determine based on the persuasiveness of the evidence. [3-30-09 RP 237-38].

In this case, and as defense counsel acknowledged in his closing, the medical reports could be interpreted in more than one manner. [3-30-09 RP 270-71]. Whether the damages “better fit” second or third degree assault was entirely up to the jury to resolve. Id. If the jury found, based on all of the other evidence and testimony presented, that a facial fracture did occur—a reasonable conclusion—then this injury, too, would meet the statutory definition of substantial bodily harm because it is “a fracture.” RCW 9A.04.110(1)(b). Thus, at a minimum, the bruising Chang suffered constitutes substantial bodily harm, and, at the maximum, the

disfiguring scalp contusion, impairing head injury, and facial fracture (all of which one might likely consider worse than the bruising) would further satisfy the injury element of second degree assault.

b. The evidence introduced by the State regarding Chang's injuries was sufficient to prove the existence, extent, and nature of Chang's injuries.

In addition to the injuries described by the witnesses and Chang, which were consistent with the assault, the State introduced photographs of Chang's injuries taken the morning of the assault. The pictures showed the swelling and bruising of the victim's face and head, [3-30-09 RP 37, Ex. 23, 24], and abrasions to Chang's elbow, [3-30-09 RP 176, Ex. 27]. The State also introduced pictures taken of Chang's injuries three days later which showed additional bruising around the victim's eye [3-30-09 RP 176, Ex. 29], as well as another picture showing some of the facial bruising which was turning yellow. [3-30-09 RP 176].

Further, the State introduced medical records via Exhibit 34, which were also consistent with the type of attack and injuries described by the witnesses and seen in photographs of the injuries. The medical records noted the shoulder injury, headaches, possible facial fracture, scalp contusion, and concussion.

In both Hovig and Ashcraft, the courts focused on the degree of injury and determined that sufficient evidence of the bruising

satisfied the statutory requirement. The Hovig Court expressly stated that the “persuasive photographic evidence and medical testimony . . . fit squarely within the statutory definition of ‘substantial bodily harm.’” Hovig, 149 Wn. App. at 13. As in Hovig, the combination of witness testimony as to the nature and extent of Chang’s injuries, multi-day photographs, and medical reports constituted sufficient evidence of substantial bodily harm. See generally State v. Miles, 77 Wn.2d 593, 600-01, 464 P.2d 723 (1970) (where, unlike here, the State failed to produce sufficient evidence because there was no testimony as to “the nature, size, extent, or degree of the [injury]” and “[t]here was no testimony whatsoever as to any other bruises or contusions.”).

In sum, not only did the injuries meet the statutory definition of substantial bodily harm, but the evidence presented by the State of those same injuries was also sufficient for a reasonable trier of fact to determine the State met its burden. Therefore, McKague’s argument on this issue fails.

2. The trial court did not abuse its discretion when it refused McKague’s request to waive his Sixth Amendment right to a jury trial.

As McKague states in his brief, “a defendant may waive his right to a jury trial as long as the waiver is voluntary, knowing, and intelligent.” [Appellant brief at 11]; Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984); State v. Stegall, 124 Wn.2d 719,

725, 881 P.2d 979 (1994). McKague also correctly states the Supreme Court's holding in Singer v. United States that no constitutional right to a nonjury trial exists. 380 U.S. 24, 13 L. Ed. 2d 630, 85 S. Ct. 783 (1965); State v. Rupe, 108 Wn.2d 734, 753, 743 P.2d 210 (1987) ("There is no constitutional right to a nonjury trial."). "In Washington, there is no historical evidence that the right to trial by jury has ever included the right to demand a bench trial. In fact, . . . the evidence is to the contrary." State v. Oakley, 117 Wn. App. 730, 743, 72 P.3d 1114 (2003), *review denied*.

The current rule in Washington is stated in RCW 10.01.060:

No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.

RCW 10.01.060 (emphasis in original). CrR 6.1(a) further states: "Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court." Reversible error exists where a court abuses its discretion in denying a defendant's request to waive the jury trial right when the denial is "clearly untenable or manifestly unreasonable," State v. Thompson, 88 Wn.2d 13, 15, 558 P.2d 202 (1977) citing to State v. Jones, 70 Wn.2d 591, 424 P.2d 665 (1967),

or where there is a showing of prejudice due to having a forced jury trial. State v. Maloney, 78 Wn.2d 922, 928, 481 P.2d 1 (1971).

Because McKague does not argue he suffered any prejudice (and thus waives the argument now), the State responds only to McKague's claim that the trial court abused its discretion by basing its denial on untenable grounds, and thus was manifestly unreasonable.

The Supreme Court of Washington expressly stated in Maloney that "an appellate court will not disturb a trial court's refusal of such a request absent a showing that the trial court *manifestly abused its discretion*." Maloney, 78 Wn.2d at 927 (emphasis added). See also Thompson, 88 Wn.2d at; Rupe, 108 Wn.2d at 753. McKague argues that the trial court denied his request for a bench trial because the court "was not comfortable with the responsibility of determining his guilt where it would lead to a sentence as a persistent offender." [Appellant brief at 12]. In support of his argument, McKague cites to State v. Williamson noting that, "The range of . . . acceptable discretionary choices is . . . a question of law. For example, . . . the judge abuses his or her discretion if the discretionary decision is contrary to law." 100 Wn. App 248, 257, 996 P.2d 1097 (2000).

McKague's follow-on analysis, however, is lacking in a couple of ways. He first argues that the trial court improperly denied

his request solely because of his persistent offender status which is an abuse of discretion because it is untenable. He next argues that since courts often allow defendants to waive their constitutional rights in any number of situations which might result in potential life sentences, the trial court here erred by not doing so. Presumably, his argument as to the last point is that the trial court's decision was an abuse of discretion because it was contrary to the law. What is missing in his analysis, however, is: 1) an accurate statement of the trial court's reasoning for denying McKague's request and any controlling or supporting authority for his argument, and 2) the lack of any manifest unreasonableness in the trial court's decision or any actual conflict between it and the law (and, again, any authority to support his argument).

First, McKague misstates the court's reasons for denying his request to waive and fails to analyze the court's actual reasons using the proper standard. While there was some discussion in the record of McKague's persistent offender status as it related to his desire for requesting a bench trial, it was one among a number of issues the trial court waded through with both McKague and the attorneys (relating to the waiver) before deciding to deny the request. The record contains at least five pages of dialogue which investigated numerous potential issues. [3-30-09 RP 7-12]. This discussion included factors such as McKague's previous criminal

history; the rights of the defendant, the court, and the State; the requirement for a written waiver request (which did not exist); the skill and experience of McKague's trial attorney in felony criminal matters and jury trials as a whole, as well as third-strike cases; the opportunity for McKague to fully confer on the topic with his attorney; and trial strategy. Id.

In the end, while McKague stated he thought a bench trial would be "more fair" than a jury trial due to his previous criminal history, the trial court inferably disagreed. [3-30-09 RP 10]. The court stated it primarily denied the request in order to protect "the fairness of the trial" and the "appearance of any fairness" due to the "seriousness of the charge," meaning the combination of the robbery and assault charges, not the third-strike penalty. [3-30-09 RP 11-12]. The trial court expressly noted these two reasons were the "most important" among the circumstances which it considered. [3-30-09 RP 11-12]. This action, then, would appear to be more protective of McKague's fair trial rights rather than less so as he seems to claim, and would not constitute any abuse of discretion, let alone a manifest abuse.

In Thompson, the Supreme Court of Washington held that no abuse of discretion occurred where the trial judge refused to allow the defendant to waive his jury trial right because of the "seriousness of the crime charged; because a jury would prevent

the appearance of impropriety, lack of fairness, or injustice; because the verdict [w]ould represent the thinking of the community as represented by 12 jurors; and because a jury would free the court from having to weigh the evidence.” Thompson, 88 Wn.2d 13, 15, 558 P.2d 202 (1977) (); See also Rupe, 108 Wn.2d at 754 (denial of waiver was appropriate where “the court doubted [the] case was an appropriate one in which to permit waiver of the jury,” among other issues); State v. Newsome, 10 Wn. App. 505, 508, 518 P.2d 741 (1974) (denial of waiver was appropriate where court noted as a factor, the likelihood the court would be less open to criticism if a jury trial occurred); and Jones, 70 Wn.2d at 593 (denial of waiver was appropriate where the court cited the timing of the request—the morning of the trial prior to the jury being empanelled, the same as in the instant case—as well as legal maneuvering as the reasons for denial).

The reasoning of the trial court in the instant case is directly in line with Thompson. Denial based on seriousness of the crime charged, as well as fairness and appearance of fairness are proper grounds for refusal of a waiver request, even when the waiver is given voluntarily, intelligently, and knowingly.

To be fair, McKague fully explains why he disagrees with the court’s decision. Unfortunately, however, his explanation is based on a false premise and even then fails to provide any express legal

authority for why his premise is specifically untenable, manifestly unreasonable, or contrary to any existing case law or statute. Rather, he simply makes the bold and inaccurate statement that “[b]y the court’s logic a defendant cannot waive jury, nor plead guilty to a Class A or B felony” in contrast to “the standard [] practice in Washington courts.” [Appellant brief at 13]. This argument is not supported by the record or the law, however. McKague’s only reference to any analytical authority is a cite to Williamson, a Division Three case, which is not instructive in evaluating the facts at issue here. Williamson, 100 Wn. App. at 257-58 (applying the “abuse of discretion” standard to the fact-specific evaluation of the admissibility of a hearsay statement). McKague’s argument seems to be that because other defendants are allowed to plead guilty in other Class A or B offenses and thereby waive several constitutional rights, he should be as well. By this logic, though, trial court discretion in approving waivers would be nonexistent, which is contrary to CrR 6.1(a) and RCW 10.01.060.

Judicial discretion to consent to waiver is a fact-based decision that a court evaluates on a case-by-case basis. In this case, the trial court determined and clearly expressed that its denial was first and foremost based on the fairness and the appearance of fairness of the trial. McKague does not give any explanation as to

why either of these reasons constitute an abuse of the court's proper use of discretion. In short, he does not because he cannot.

Additionally, the trial court expressly noted that unless McKague testified, the jury would not hear his criminal history, which appears to be his primary concern for requesting the waiver. [3-30-09 RP 10]. Thus, contrary to McKague's brief, [Appellant's brief at 12], it appears the trial court believed his concern was potentially misplaced and he was less likely to take issue with any decisions made by a 12-person panel that was unaware of his previous history than with a single decision-maker who was. [3-30-09 RP 11]. Although the trial court once, and then only briefly, referenced the "stakes" of his trial as being "too high" for a bench trial, [3-30-09 RP 12], the reference was not inherently related to his persistent offender status. To be interpreted as such, the comments would have to be read in a vacuum and without taking the preceding five pages of the record into account. Instead, the trial court looked at the totality of the circumstances and determined that a trial by 12 of his peers on the serious charges of first degree robbery and second degree assault would both likely appear and actually be more fair than a bench trial—two reasons that are far from manifestly unreasonable and squarely within the court's appropriate use of discretion, and could best address his trial concern. [Appellant brief at 11-12].

Second, and somewhat redundantly, even if McKague's proposed reason for denial were correct, he still fails to provide any authority to support his argument that it was *manifestly* unreasonable or untenable. While McKague consistently describes the trial court's actions as an abuse of discretion, he does not cite to any case law supporting his premise that it was *manifestly* unreasonable. Even if the State were to concede (which it adamantly does not), that the trial court abused its discretion, there is no evidence or argument of manifest abuse which would rise to the level of a Constitutional violation.

In fact, the State was unable to find a single case in Washington where a higher court determined a trial court abused its discretion in denying a request for a nonjury trial in a criminal case (or otherwise for that matter). See Singer, 380 U.S. 24, 13 L. Ed. 2d 630, 85 S. Ct. 783 (1965); Jones, 70 Wn.2d 591, 424 P.2d 665 (1967); Maloney, 78 Wn.2d 922, 481 P.2d 1 (1971); Newsome, 10 Wn. App. 505, 518 P.2d 741 (1974) (no abuse of discretion occurred in denial of defendant's jury trial waiver request, even where both the defense and State counsels agreed to it); Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977); Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987); see generally Wilson v. Horsley, 137 Wn.2d 500, 974 P.2d 316 (1999) (the right to request a jury trial automatically renews following a mistrial); Oakley, 117 Wn. App.

730, 72 P.3d 1114 (2003), *review denied*. As a result, McKague's claim of any abuse of discretion, let alone manifest abuse falls vastly short of the standard and is in direct contradiction to the entirety of existing case law.

In sum, the United States Supreme Court's reasoning in Singer, which Washington adheres to, is much clearer than any paraphrasing by the State:

In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him.

Singer, 380 U.S. at 36. The only way McKague can claim reversible error on this issue is if the trial court's use of discretion was so unreasonable as to violate the constitution. As the court stated in Singer above, the State finds it "difficult to understand" McKague's "bald proposition" that having a jury trial was somehow contrary to his constitutional rights, especially when the denial was based expressly and primarily on the court's intent to protect those rights. Thus, McKague's argument that the court's denial was manifestly unreasonable or untenable and an abuse of its discretion fails.

3. The trial court deprived McKague of neither his right to a jury trial nor his due process rights when it imposed a sentence in accordance with RCW 9.94A.570 based on a preponderance of the evidence of his two prior convictions.

The Supreme Court of Washington “has consistently held that fixing penalties for criminal offenses is a legislative, and not a judicial, function.” State v. Manussier, 129 Wn.2d 652, 667, 921 P.2d 473 (1996). “The trial court’s discretion in sentencing is that . . . given by the Legislature.” Id. at 668. Where persistent offenders are concerned, RCW 9.94A clearly defines who qualifies for such sentences, clearly defines the sentencing guidelines courts must follow, the express legislative intent, and the standards of proof required prior to imposition of an exceptional sentence.

RCW 9.94A.570 states: “Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release[.]” RCW 9.94A.555(2)(a-d) codifies the legislature’s intent noting that

by sentencing three-time, most serious offenders to prison for life without the possibility of parole, the people intend to: (a) [i]mprove public safety by placing the most dangerous criminals in prison[;] (b) [r]educer the number of serious, repeat offenders by tougher sentencing[;] (c) [s]et proper and simplified sentencing practices that both the victims and persistent offenders can understand[; and] (d) [r]estore public trust in our criminal justice system by directly involving the people in the process.¹

¹ This act is known as the Persistent Offender Accountability Act (POAA) and was previously titled Initiative Measure No. 593, approved November 2, 1993. 1994 c 1 § 7.

The legislature further clarified its intent in passing the POAA in RCW 9.94A.537 saying,

The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in Blakely v. Washington, 542 U.S. [296, 124 S. Ct. 2531] (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, *other than the fact of a prior conviction*, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury.

LAWS OF 2005, ch. 68, § 1 (emphasis added). RCW 9.94A.530(2)

then goes on to establish:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. . . . The facts shall be deemed proved at the hearing by a preponderance of the evidence.

In imposing a sentence above the standard range, “facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.” RCW 9.94A.535. “Most serious offense” includes “[a]ny felony defined under any law as a class A felony or criminal solicitation of

or criminal conspiracy to commit a class A felony” or “[a]ssault in the second degree[.]” RCW 9.94A.030 (29)(a-b).

McKague argues that Blakely and Apprendi should apply and then goes on to essentially echo Justice Thomas’s concurrence in Apprendi (which the majority declined to adopt as the rule). He appears to argue that all “facts” are equal, all facts should be construed to constitute elements of the crime and thus proved to a jury beyond a reasonable doubt, and lastly, that the existing case law cannot be read as holding that “prior convictions are . . . excluded from the . . . rule.” [Appellant’s brief at 15-19].

Unless the State has completely misread and misunderstood the volumes of relatively straightforward case law on this issue, it does not understand McKague’s denial of the unambiguous exception stated in Apprendi and Blakely, nor his in-depth discussion of the Almendarez-Torres case which is distinguishable from the facts of this case.²

“Blakely does not apply to sentencing under the POAA.” State v. Ball, 127 Wn. App. 965, 959, 113 P.3d 520 (2005). As Ball very succinctly noted,

Blakely [was] specifically directed at exceptional sentences under RCW 9.94A.535, “Departures from the guidelines.”. . . Ours is not an exceptional sentence situation. The ‘persistent offender’ is not

² In Almendarez-Torres, the defendant objected to his aggravated felony conviction because his indictment did not plead the issue. Thus, the specific question decided was as to the sufficiency of the indictment, itself, which is not the case here.

listed in RCW 9.94A.535, but in RCW 9.94A.030(2) and is found in RCW 9.94A.570.

Id. at 959-60. In Ball, the defendant argued “that under Blakely, the trial court had to submit the question of whether he was a persistent offender to the jury to be found beyond a reasonable doubt.” Id. at 959. This court disagreed, though. It recognized that the sentence enhancement statute, RCW 9.94A.533, is entitled “Adjustment to standard sentences,” and persistent offenders with “most serious offenses” are nowhere on that list. Id. at 960 (“The POAA is not listed or referred to anywhere in RCW 9.94A.533.”). The Ball court then noted that Apprendi does not extend to recidivism statutes, as the language “other than the fact of a prior conviction” indicates. Id.; State v. Wheeler, 145 Wn.2d 116, 124, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996 *cert. denied sub nom.*; Sanford v. Washington, 535 U.S. 1037, 152 L. Ed. 2d 654, 122 S. Ct. 1796 (2002).

The court summed up the entirety of holdings on this topic by restating and reaffirming Wheeler. Wheeler held that “(1) the POAA statute was constitutional, (2) the [prior] convictions need not be charged in the information [(the rule resulting from Almendarez-Torres)], (3) the sentence need not be submitted to a jury, and (4) it need not be proved beyond a reasonable doubt.” Wheeler, 145 Wn.2d at 120. As a follow-up, Ball reiterated that, “all that is required by the constitution and the statute is a sentencing hearing

where the trial judge decides by a preponderance of the evidence whether the prior convictions exist.” Ball, 127 Wn. App. at 960 (citing Wheeler, 145 Wn.2d at 121); State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004).

In sum, any aggravating factor required to support the imposition of an exceptional sentence, other than the fact of a prior conviction, shall be determined by a jury and beyond a reasonable doubt. For the purpose of sentencing a persistent offender in light of his third strike “most serious offense,” however, the existence of the felon’s prior convictions must only be determined by a preponderance of the evidence. RCW 9.94A.030. The reasoning for this is the idea that the “determination [of] whether [the defendant] committed a third ‘most serious offense’ . . . was made under the procedural safeguards of a judicial proceeding,” as were the prior two offenses. Manussier, 129 Wn.2d at 667. The determination of an aggravating factor requires a finding of the defendant’s guilt or innocence on the existence of a set of circumstances not previously evaluated by a jury beyond a reasonable doubt. That is not the case for prior convictions, though; such a culpability determination has already occurred and need not be repeated by another jury and to the same standard of proof.³

³ In fact, one can construe the existing system to equate to the suggested bifurcation system briefly mentioned in Justice Thomas’s concurrence in Apprendi. Apprendi, 530 U.S. at 521 n.10 (Thomas, J., concurring).

In other words, the determination of the persistent offender's guilt or innocence as to either the current or past offenses occurred beyond a reasonable doubt. The sentencing court then, lacking any objection from the defendant, is respecting the previously made findings of proof beyond a reasonable doubt, and must only do so upon a preponderance showing. See Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S. Ct. 2348 (2000) ("Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres [v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998)] did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range."). Controlling and overwhelming case law requires nothing more.

First, while the State appreciates McKague's support of Justice Thomas's concurrence in Apprendi, it neither agrees with it, nor accepts it as the rule for precisely the reasons stated by the majority in Apprendi and Blakely. As Blakely notes, the "rule reflects . . . longstanding tenets of common-law criminal jurisprudence," Blakely, 542 U.S. at 301, which "courts and treatises [have acknowledged] since the earliest days of graduated sentencing" and which the Court overwhelmingly "compiled" in Apprendi. Id. at

302; see *also* Apprendi, 530 U.S. at 476-483, 489-490, n.15, 147 L. Ed. 2d 435, 120 S. Ct. 2348.

Second, the language the court uses is unambiguous in delineating a difference between those facts relevant to the determination of a person's guilt in the current offense versus the recognition of the "fact" of a prior conviction where a jury has already determined the offender's guilt. To interpret the Court's holding otherwise is to blatantly ignore the express and plain language used. McKague argues that, in Apprendi, the Court did not consider (and must not mean) "prior convictions" in the sense that one commonly understands it, therefore the issue is still open for interpretation.

To make this argument, however, means one must accept that somehow the Court did not mean what it plainly said, it did not understand what it meant in using the phrase "prior convictions" or by creating a clear and single exception to the rule, or that it was being pointedly cagey in its use of the term in Apprendi in 2000 and then again four years later in Blakely. Each of these seems extraordinarily unlikely to the State. As a result, is not prepared to assign such an error to the Supreme Court of this country, nor to the multitude of lower courts, to include those of this state, that have interpreted and applied both the rule and the exception since Blakely. Instead, the State sees no ambiguity in the terminology

used and accepts the majority's holding as repeatedly stated.

Third, case law decided since both Apprendi and Blakely demonstrate that the courts of this state, to include this court, have consistently interpreted and applied the rule exactly as the trial court did in McKague's case. Over and over again, the courts of this state have determined the use of a preponderance of the evidence standard for prior convictions results in no constitutional violation of either due process or the Sixth Amendment under Apprendi or Blakely. See State v. Lewis, 141 Wn. App. 367, 166 P.3d 786 (2007) (holding that the trial court, not the jury, is responsible for determining whether a defendant has two prior qualifying offenses under the POAA, RCW 9.94A.570); State v. Hunt, 128 Wn. App. 535, 116 P.3d 450 (2005) (holding that because the increase in the defendant's offender score arose out of the fact of a prior conviction, the increase in score determination did not violate Blakely and did not implicate constitutional considerations requiring the determination be made by a jury beyond a reasonable doubt); City of Yakima v. Skov, 129 Wn. App. 535, 116 P.3d 450 (2005) (holding that where a trial judge used the fact of a defendant's prior deferred prosecution to enhance his sentence, Blakely was not violated because the rule expressly excludes prior convictions from the determination of facts otherwise required to be made by a jury and beyond a reasonable doubt);

State v. Alkire, 124 Wn. App. 169, 100 P.3d 837 (2004) (holding that, under Apprendi, an increased penalty based on the facts determined by a jury as well as on the fact of the defendant's prior convictions, in accordance with RCW 9.94A.535, did not violate either the defendant's due process or Sixth Amendment rights); Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004) (finding that 9.94A.570 does not violate either the Sixth Amendment of the U.S. Constitution, nor Article I, Section 21 of the Washington State Constitution, because neither the state or federal constitutions require a jury to determine the existence of a defendant's prior convictions); State v. Ben, 114 Wn. App. 148, 149, 55 P.3d 1169 (2002); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001); see *generally* State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) (holding the exceptional sentencing provisions of RCW 9.94A.535 are facially constitutional following Blakely); State v. Rudolph, 141 Wn. App. 59, 1678 P.3d 430 (2007); State v. Jennings, 111 Wn. App. 54, 44 P.3d 1 (2002), review denied, 148 Wn.2d 1001, 60 P.3d 1212 (2003); State v. Burton, 92 Wn. App. 114, 960 P.2d 480 (1998), review denied, 137 Wn.2d 1017, 978 P.2d 1100 (1999); State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996) (“[W]e conclude the preponderance standard is also sufficient to determine the existence of prior offenses for purposes of the

Persistent Offender Accountability Act.”); Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997). State v. Ammons, 105 Wn. 2d 175, 185-86; 713 P.2d 719 (1986) (“[I]t is constitutional to use a preponderance standard to determine the existence of prior crimes in order to determine the length of a sentence under the SRA.”), *superseded by statute on other grounds*, RCW 10.73.090.

Assuming McKague is arguing that somehow the current system is either not effective or the defendant’s rights are not protected, the State again disagrees. Once again, the State points to decisions of the Supreme Courts of this country and state that the existence of a prior conviction is not of the category of “fact” which either Constitution is concerned with having a jury determine, despite McKague’s argument to the contrary. See Thorne, 129 Wn.2d at 783 (“[W]e fail to see how the presence of a jury would be necessary. . . . While technically questions of fact, they are not the kind of facts for which a jury trial would add to the safeguards available to the defendant.”). It may simply be an issue of semantics in use of the term “fact,” but as previously noted, there is a clear difference in the two—one is wholly within the jury’s purview, while the other has already been decided by a jury and, in the context of sentencing, is simply being confirmed by the sentencing court upon a preponderance of proof by the State.

Nothing in the rule relieves the State of this burden. The constitutional concern is that 1) the defendant has a timely and appropriate opportunity to defend himself and 2) the State meets required burden of proof.

It is unclear to the State how the argument can be made that any defendant, and in this case McKague, is denied due process or Sixth Amendment protection by the exception in Blakely. McKague had the opportunity to defend himself against the charges in the prior cases to a jury, the opportunity to defend himself to a jury against the current charges, and the opportunity to challenge the existence of the prior convictions in the current case to the court. In each instance, the State met the required burdens of proof. McKague was aware of his prior convictions at the time of both the commission of the currently charged crime, as well as Washington's well-established persistent offender law. The current rule not only does nothing to compromise McKague's constitutional rights, but it most effectively strikes the balance between protection of those rights and preservation of judicial efficiency and the already strained resources of the court system. In fact, the State regards the current system as a win-win for all involved.

In light of the above, the State maintains that there is no gap on this issue—the authority is straightforward and controlling. Case law establishes that RCW 9.94A.570 satisfies the constitutional

concerns of both Apprendi and Blakely and the facts of this case fit squarely within that exception. Finally, the trial court applied the exception appropriately and there was no violation of McKague's due process or Sixth Amendment rights.

4. The classification McKague as a persistent offender did not violate his right to equal protection under either the Fourteenth Amendment or Article One, Section 12 of the Washington Constitution.

McKague argues that because prior convictions may be statutorily deemed "elements" in one crime, but only "aggravating factors" in another, the application of the POAA violates the equal protection guarantees of both the state and federal constitutions. The State maintains, however, that the use of a defendant's prior two "most serious offense" convictions under RCW 9.94A.570 does not violate the equal protection clause of either the federal or state constitutions for several reasons. First, the lifetime sentencing of persistent felons based on their prior convictions is neither the result of an aggravating factor nor a sentencing enhancement. It is a separate sentencing guideline specifically created for persistent felon recidivists. Second, the legislature has plenary power to establish both the elements of crimes and the punishments for crimes. Third, recidivist criminals (e.g. "persistent offenders") are neither a suspect nor quasi-suspect class, thus the rational basis test applies which the statute satisfies.

As previously noted, this court found in Ball that RCW 9.94A.570, the statute addressing persistent offenders, deals with neither sentencing enhancements nor aggravating factors. Ball, 127 Wn. App. 956, 959-60; 113 P.3d 520 (2005). Rather, it is a wholly separate sentencing guideline which determines the mandatory sentence for someone convicted of a third “most serious offense.” Ball, 127 Wn. App. at 960. “It does not increase the penalty for the current offense,” but rather determines the penalty for a specific group of recidivist offenders. Id. Moreover, this court has consistently held that the POAA is constitutional. Ball, 127 Wn. App. at 961 (citing State v. Wheeler, 145 Wn.2d 116, 120, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996, *cert. denied sub nom.*, (citing to former RCW 9.94A.110 (2000) (originally titled Initiative 593, but now recodified as RCW 9.94A.500)); Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004).

McKague’s attempt to apply a Blakely/Apprendi analysis to the issue is misplaced. Prior convictions are expressly excepted from that rule and the application of it is inappropriate here. Ball, 127 Wn. App. at 959. Likewise, McKague’s reliance on the logic of State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008), to support his argument is also faulty. In that case, the prior convictions were an element of the crime which raised it from a misdemeanor to a felony. Because the statutory inclusion of the prior convictions

an element of the crime which raised it from a misdemeanor to a felony. Because the statutory inclusion of the prior convictions altered the crime Roswell was charged with, they had to be proved beyond a reasonable doubt. Roswell, 165 Wn. at 192. In the instant case, however, the prior convictions did not alter or increase the crime charged—McKague was charged with and convicted of the same felony crime as he would have been had he had no prior convictions. The simple fact that both Roswell and McKague had prior convictions (and differing prior convictions at that) does not inherently reclassify them into the same population which must have the fact of their prior convictions used in the same manner. Roswell and McKague were not similarly situated because they were charged with different crimes, with different elements, different fact patterns, and were separate and distinct classes of recidivist criminals which the legislature can choose to treat differently based on the crime and criminal history. To analogize, McKague is attempting to compare apples and oranges. The fact that they are both “fruits” does not mean they are similarly situated.

The “legislature has substantial discretion in defining whether a fact constitutes an element of a crime” or otherwise. State v. Thorne, *supra*; see McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986). Likewise, the setting of the penalty or punishment for a criminal offense is a legislative function,

granted by statute, “and the power of the legislature in that respect is plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment.” State v. Ritchie, 126 Wn.2d 388, 394, 894 P.2d 1308 (1995); State v. Manussier, 129 Wn.2d at 667. The POAA is a valid grant of sentencing authority to the trial courts. Thorne, 129 Wn.2d at 761.

Moreover, “[a] statute is presumed to be constitutional, and a party challenging its constitutionality bears the heavy burden of proving that it is unconstitutional beyond a reasonable doubt.” Id. at 769-70; State v. Myles, 127 Wn.2d 807, 812, 903 P.2d 979 (1995); State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). The equal protection clause of the Washington State Constitution, article I, section 12, and the Fourteenth Amendment to the United States Constitution, establish that persons similarly situated must receive like treatment. Id. at 770-71.

In evaluating whether this clause has been violated, a court must apply one of three tests: strict scrutiny review where either a suspect class exists or a fundamental right is at issue, intermediate scrutiny review where both a liberty interest and a quasi-suspect class exist, or rational basis review where only a liberty interest exists. Id. at 771; Westerman v. Cary, 125 Wn.2d 277, 294-95, 885 P.2d 827, 892 P.2d 1067 (1994); State v. Coria, 120 Wn.2d 156, 171, 839 P.2d 890 (1992). Physical liberty is a liberty interest, and

recidivist criminals constitute neither a suspect, nor a quasi-suspect class, thus the rational basis test applies. Thorne, 129 Wn.2d at 771; Coria, 120 Wn.2d at 171, 172 n.4; State v. Ward, 123 Wn.2d at 516.

“Under this test, a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” Thorne, 129 Wn.2d at 771; Coria, 120 Wn.2d at 171, 172 n.4; State v. Shawn P., 122 Wn.2d 553, 561 n.28, 859 P.2d 1220 (1993). In other words, the party challenging the statute must demonstrate that the statute’s means are not rationally related to a legitimate government objective, i.e. that it is wholly arbitrary. McKague recognizes the appropriate test, but then fails to accurately apply it.

He essentially argues that all recidivist criminals are created equal and thus, the fact of their prior convictions must be used and evaluated equally as well—either considered as elements of a crime or aggravating factors. However, “[t]he legislating body has broad discretion to determine what the public interest demands and what measures are necessary to protect that interest.” Thorne, 129 Wn.2d at 772; Ward, 123 Wn.2d at 516; CONST. art. II, § 1. “The POAA is a [recidivist] sentencing statute . . . and one with a rationale entirely different from that of either exceptional sentences or sentence enhancements.” Ball, 127 Wn. App. at 960. McKague

conviction element in RCW 9.68A.090 was to “elevate the penalty for the substantive crime,” [Appellant brief at 28]; however, this purpose is not stated anywhere in that chapter, nor in any of the notes indicating the legislature’s intent following RCW 2.48.180, as directed by RCW 9.68A.090. See RCW 9.68A.090; RCW 2.48.180; LAWS OF 2003, ch. 53. Rather, the legislative findings and intent of RCW 9.68A indicates that the purpose of the chapter is “to encourage . . . children to engage in prevention and intervention services and to hold those who pay to engage in the sexual abuse of children accountable for the trauma they inflict on children.” RCW 9.68A.001. It says nothing about the purpose being to elevate the penalty. Moreover, this purpose is wholly different from those of RCW 9.94A.⁴ Additionally, even if McKague is correct in his stated purpose of RCW 9.68A.090, but incorrect in citation (explaining why the State could not find it), the legislative purposes of the two crimes would still be wholly different, as the cases of Thorne, Ward, and Ball, indicate. The purpose of adding an element to a crime in order to elevate a penalty is wholly different from the stated purpose of “improving public safety,” “reducing the number of serious, repeat offenders by tougher sentencing,” and “simplif[ying]

⁴ The legislature’s intent is codified in RCW 9.94A.555(2)(a-d): “By sentencing three-time, most serious offenders to prison for life without the possibility of parole, the people intend to: (a) [i]mprove public safety by placing the most dangerous criminals in prison[;] (b) [r]educe the number of serious, repeat offenders by tougher sentencing[;] (c) [s]et proper and simplified sentencing practices that both the victims and persistent offenders can understand[;] and] (d) [r]estore public trust in our criminal justice system by directly involving the people in the process.”

sentencing practices that both the victims and persistent offenders can understand.” RCW 9.94A.555 (a)-(c).

Further, this Court has unequivocally recognized that the legislature can determine the elements of a crime, to include recidivism, and choose to punish recidivists in a different and more severe manner than other criminals. Thorne, 129 Wn.2d at 772 (the recidivist’s classification as a “persistent offender’ is rationally related to the goals enunciated in the Act”); In re Grisby, 121 Wn.2d 419, 429, 853 P.2d 901 (1993) (citing Solem v. Helm, 463 U.S. 277, 296, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)). The Manussier Court noted, “The initiative’s goal . . . is a legitimate state objective. . . [and is] an arguably rational, and not arbitrary, attempt to define *a particular group of recidivists* who pose a significant threat to the legitimate state goal of public safety.” Manussier, 129 Wn.2d at 674 (emphasis added). Thus, the Supreme Court of Washington recognizes even among persistent offenders, all offenses and offenders are not created equal. The third strike law, RCW 9.94A.570, is specific to persistent offenders of the “most serious offenses,” not persistent offenders of all criminal offenses and the legislative objective of using this category of defendants’ prior convictions is rationally related to a legitimate government goal. The case law further expands on this notion.

In Manussier, the defendant claimed that Initiative 593, as the POAA was labeled then, violated both state and federal equal protection clauses because a defendant's "classification [was] based solely on recidivism," which was not closely related to the stated legislative purpose. Manussier, 129 Wn.2d at 672. The Supreme Court of Washington there said, "[The POAA] easily passes rational basis scrutiny and does not, therefore, violate either the federal or state equal protection clauses." Id. at 674. The Manussier Court went on to observe, "There is no logical or practical basis for comparison of punishment appellant might receive for other crimes committed in Washington. Sentences under the Sentencing Reform Act vary with each defendant's criminal history and the presence or absence of aggravating or mitigating factors." Id. By definition, this would include a variance due to the absence of an aggravating factor under RCW 9.94A.535 but the presence of prior convictions for "most serious offenses" under RCW 9.94.570. The simple occurrence of the same or similar fact having differing effects on defendants' punishment for different crimes does not create a classification of people or constitute a violation of the equal protection clauses.

Likewise, in Thorne, the defendant claimed the POAA violated his state and federal equal protection rights as well, but again, the Supreme Court of this state disagreed, finding that

Initiative 593, did not violate the equal protection guaranty of either the state or federal constitutions. Thorne, 129 Wn.2d at 772. The Thorne Court noted that “the purpose of the Persistent Offender Accountability Act includes deterrence of criminals who commit three “most serious offenses” and the segregation of those criminals from the rest of society.” Id. at 775. Thus, the rationale of treating persistent offenders of the “most serious offenses” different from the rest of the recidivist population was rationally related to a legitimate government purpose.

Similarly, in Harner, a drug court case, the defendants claimed the statute, “as applied” violated their equal protection rights because drug courts did not exist in the counties where they were charged and they had the “right” to have their cases “adjudged the same in the county where they were charged as in any other county in Washington.” State v. Harner, 153 Wn. 2d 228, 235, 103 P.3d 738 (2004). Although the facts of this case are different from the instant case, the argument is analogous. Like McKague, the defendants in Harner argued that the statute created a classification by application. Id. The Harner Court rejected this argument, though, noting both the legislative purpose as it related to the distinct nature of recidivism, as well as the legislative power in establishing the drug court system in the manner it and the counties deem reasonable. Id. at 235-36. Simply because a

defendant's recidivist actions might qualify him for drug court in one county, but not in another—a result that arguably increase the level of punishment for the same crime, similar to the argument McKague makes—did not equate to a violation of his equal protection rights.

In fact, one could argue the defendants in Harner had a stronger case for a violation of equal protection than McKague, because at least there the argument made was that people convicted of the same or similar crime were being subject to different punishments based purely on their locale. Even then, the Court held that because the power rested with the legislature and the legislature declined to “mandate a uniform [drug court] requirement,” but rather combined permissive statutory language with a consistent legislative purpose, there was no equal protection violation. Id. at 236. In short, as long as the government means are rationally related to a legitimate government purpose, the statute survives a rational basis review.

In sum, there is a distinct difference between proving a defendant's prior convictions as an element in order to convict him of a current crime, versus using the fact of his prior convictions for “most serious offenses” to classify him as a persistent offender subject to the punishment of RCW 9.94A.570. The differing burdens of proof are consistent with each situation and wholly

within the legislature's pejorative to determine based on the type of crime, offender, and level of recidivism. As the Court determined in Manussier and Thorne, the statute is not purely arbitrary, as McKague claims and Roswell is inapplicable. There was no violation of McKague's equal protection rights.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 14th of December, 2009.

for Carol LaVerne 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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BY Chong McAfee
DEPUTY

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

Dated this 14th day of December, 2009, at Olympia, Washington.


Chong McAfee