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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY: 

DEPUTY

No. 39415-4-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

PEDRO F. GARCIA MORALES,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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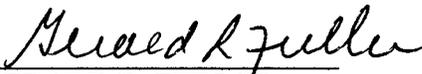
THE HONORABLE DAVID L. EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTERSTATEMENT OF THE CASE**

### **Procedural History.**

The defendant was charged by Information on January 2, 2009, with Assault in the First Degree, RCW 9A.36.011(1)(a). The Information contained an allegation that the defendant was armed with a deadly weapon at the time of the commission of the offense. RCW 9.94A.602. (CP 1-2). The matter was tried to a jury commencing on April 21, 2009. The jury returned a verdict of guilty as charged. The jury returned a special finding that the defendant was armed with a deadly weapon at the time of the commission of the offense. (CP 25, 26).

At the sentencing hearing the State proved that the defendant had prior convictions for Assault in the Second Degree, Grays Harbor County Cause 01-1-575-1 and Assault With a Deadly Weapon, San Diego County, California, Cause 97124857. The court found that the California conviction was comparable to Assault in the Second Degree under Washington law. (RP 156-157). The defendant was sentenced as a persistent offender. (CP 90-95).

### **Factual Background.**

The proof at trial was that the defendant stabbed Luis Guevara-Villanueva with a knife. As a consequence of the assault the victim had large gaping hole in his abdomen, exposing his intestines. (RP 47). The defendant has raised no issue concerning matters at trial.

### **RESPONSE TO ASSIGNMENTS OF ERROR**

- 1. Due process not require a jury determination beyond a reasonable doubt regarding the existence of the prior convictions.**

The defendant alleges that Persistent Offender Accountability Act (POAA) is unconstitutional because it allows the trial court to make factual findings about the prior convictions. See Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The Washington courts have uniformly rejected this argument. See State v. Rudolph, 141 Wn.App. 59, 168 P.3d 430 (2007). As pointed out by the court in Rudolph, 141 Wn.App. at 65:

The United States Supreme Court 's subsequent decision in Blakely excludes the fact of prior convictions from its constitutionally-based jury trial requirement in Apprendi for facts that increase the penalty beyond what the court could impose without additional factual findings.

The POAA does not create a separate offense. It does not define or specify the elements of a crime. Accordingly, the Constitution does not require that the prior convictions be pleaded or proved or, for that matter,

submitted to the trier of fact and proven beyond a reasonable doubt. State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001).

The life sentence imposed under the Persistent Offender Accountability Act depends only on the fact of the prior conviction. The trial court is allowed to determine the existence of prior convictions based upon appropriate documentation presented at sentencing. Almendarez-Torres v. U. S., 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

**2. The classification of the persistent offender finding as an “aggravator” does not violate due process.**

The Persistent Offender Accountability Act does not create a separate offense. State v. Thorne, 129 Wn.2d 736, 779, 921 P.2d 514 (1996). Following the decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), courts once again held that the Persistent Offender Accountability Act did not create a separate offense because it did not define or specify the elements of a crime. State v. Wheeler, supra, 145 Wn.2d at 116-121.

The holding in State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008) does not change this result. In Roswell the defendant was charged with Communication With a Minor for Immoral Purposes. The statute specifically provided that proof of a prior conviction was necessary to convict the defendant of the felony crime of Communication With a Minor for Immoral Purposes. Roswell, 165 Wn.2d at 192. In other words, the

fact of the prior conviction was an element of the offense. Interestingly enough, the defendant in Roswell wanted the trial court to find the fact of his prior conviction to be an aggravator so that he could bifurcate the jury trial and keep the jury from hearing about his prior conviction.

The court in Roswell pointed out that the Legislature may define the elements of the crime, which it had done in the case of the crime of Communicating with a Minor for Immoral Purposes. The defendant's prior convictions herein, while they must be treated as an element for the purposes of the Sixth Amendment at sentencing are clearly not elements needed to convict the defendant herein of the crime of Assault in the First Degree. Roswell, 165 Wn.2d at 194.

The same reasoning was applied in State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002). The court found that an "essential element" of the crime of Felony No Contact Order Violation was proof of two prior felony convictions. The Legislature, as noted by the court in Oster, had expressly included the existence of the prior convictions as an element of the offense. Once again, this is totally unlike the case at hand. The defendant's prior convictions are not, in any way, elements of the charged offense.

This assignment of error must be denied.

**3. The California assault statute is legally comparable.**

The defendant pled guilty to a violation of California Penal Code, § 245(a)(1) - Assault With a Deadly Weapon. The pertinent portion of the charging language from the Information alleges as follows:

On or about April 13, 1997, Pedro Garcia did willfully and unlawfully commit an assault upon Javier Gonzales with a deadly weapon and by means of force likely to produce great bodily injury.

An assault under California law is an “unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” California Penal Code, § 240. See State v. Rocha, 3 Cal.3d 893, 899, 479 P.2d 372 (1971):

An assault is an unlawful attempt, coupled with the present ability to commit a violent injury on the person of another, or in other words, is an attempt to commit a battery....

Accordingly, the intent for assault with a deadly weapon is the intent to attempt to commit a battery, a battery being any “willful and unlawful use of force or violence upon the person of another.

While the courts in California have specified Assault With a Deadly Weapon as a “general” intent crime, the use of that phrase only confuses the issue. The act must be willful. Rocha, supra, at 899.

Willfully is defined under California law. California Penal Code § 7 (1):

The word “willfully” when applied to the intent with which an act is done or admitted, implies simply a purpose or willingness to commit the act, or make the emission referred to. It does not require an intent to violate the law, or to injure another, to require any advantage.

Accordingly, an assault in California, as in Washington, is an intentional act done with intent to commit a battery. Under California law this is not a specific intent crime because the defendant only has to intend the act and not the consequences.

In People v. Colantuono, 26 Cal. Rptr. 2d 908, 911-912, 865 P.2d 704 (1994) the California Supreme Court addressed what they referred to as the “recurring” question of the intent necessary to prove an assault. The court explained that “a conventional specific intent - general intent inquiry” is not adequate to resolve the question directly. The California courts have always recognized that “specific” and “general” intent have been notoriously difficult terms to define. People v. Hood, 1 Cal.3d 444, 462 P.3d 370 (1969). The court in Colantuono concluded that the necessary mental state for an assault under California law is “an intent to do a violent act.” Colantuono, at 26 Cal. Rptr. at 916. The State need not prove “a specific intent to inflict a particular harm.” Colantuono, 26 Cal. Rptr. at 913.

In Washington, the State is required to prove an intent to cause bodily harm or an intent to put another in apprehension of harm. In California, the State is required to prove an intent to do a violent act. As defined by statute in Washington “bodily injury” and “bodily harm” mean “physical pain or injury, illness or impairment of physical condition.” Accordingly, an intent to cause bodily harm encompasses any intent to cause pain or injury. The California definition of the assault is not more

broadly defined than the Washington definition. There is no appreciable difference between an intent to cause bodily harm or to put another in apprehension of harm and an intent to do a violent act against another person.

The State acknowledges that this issue has recently been addressed by this court. In re Personal Restraint Petition of Carter, Court of Appeals No. 37048-4-II decided March 9, 2010. With all due respect to the court, Carter was wrongly decided. The State acknowledges that the intent to cause injury is an element of Second Degree Assault in Washington. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). The same requirement is required by California law, regardless of whether it is called specific intent or general intent. An assault under California law is an attempted battery. It is an unlawful attempt, coupled with present ability to commit the violent injury. The intent element under California law is inherent in the attempt to commit a battery. State v. Rocha, supra.

The State is unaware of any case holding that out-of-state conviction cannot be comparable to a conviction under Washington State law simply because the law in the foreign jurisdiction does not provide a particular defense to the crime. Finally, under California law a deadly weapon is defined as “any object, instrument, or weapon which is used in a manner as to be capable of producing and likely to produce death or great bodily harm.” Clearly this is comparable to Washington law. See RCW 9A.04.110(6).

In short, the California statute defines an assault that is comparable to Assault in the Second Degree in the state of Washington: It defines assault as an attempt, with unlawful force, to inflict bodily injury upon another which, under Washington law is the exact definition of an assault. State v. Stevens, 158 Wn.2d 304, 310-311, 143 P.3d 817 (2006).

The information charging the California offense does list an alternative means. It is alleged that the defendant both committed an assault with a deadly weapon and committed an assault by means of force likely to produce great bodily injury. This second portion, while part of the statute defining the offense, is an alternative means which, apparently, is not comparable to an assault under Washington law.

The State believes, however, that the trial court could properly look to the record to determine factual comparability. State v. Larkens, 147 Wn.App. 858, 873, 199 P.3d 441 (2008). This should include the presentence report which contains the admissions of the defendant. (State's Memorandum of Authorities, RP 51-56). The records from the California proceedings, without any fact finding or inference drawing by the sentencing court in the case at hand, set forth the factual basis underlying the defendant's California conviction.

The facts concerning his offense were submitted to the sentencing court in California in the form of the presentence investigation report which outlined the events underlying the defendant's conviction. The defendant, as part of the sentencing proceeding, admitted that he stabbed

the victim with a knife. (Memorandum of Authorities Re: Sentencing, RP 53.) The sentencing court herein did not engage in judicial fact finding. The sentencing court could properly consider all the records from California including the presentence report that was submitted to the sentencing judge. State v. Larkens, 147 Wn.App. at 866 (2008). The trial court was entitled to consider the statement of the defendant in the pre-sentence report because those facts were admitted by the defendant in the California proceedings. In re Lavery, 153 Wn.2d 249, 257-58, 111 P.3d 837 (2005). See also, State v. Ball, 127 Wn.App. 956, 957, 113 P.3d 520 (2005).

#### CONCLUSION

For the reasons set forth, the sentence imposed must be affirmed.

Respectfully Submitted,

By: Gerald R Fuller  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

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STATE OF WASHINGTON,

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v.

**DECLARATION OF MAILING**

PEDRO F. GARCIA MORALES,

Appellant.

**DECLARATION**

I, Wendy Sivonen hereby declare as follows:

On the 26<sup>th</sup> day of March, 2010, I mailed a copy of the Brief of Respondent to David L. Donnan and Gregory C. Link; Washington Appellate project; 1511 - 3rd Avenue, Suite 701; Seattle, WA 98101-3635, and Pedro F. Garcia Morales 835192; Clallam Bay Corrections Center; 1830 Eagles Crest Way; Clallam Bay, WA 98326, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 26<sup>th</sup> day of March, 2010, at Montesano, Washington.

