

No. 34729-0-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

FREDERICK DEL ORR,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence presented at trial was insufficient to support a conviction for first-degree burglary.
2. The trial court abused its discretion in denying Mr. Orr's motion to instruct the jury on the defense of others.
3. The sentence of life without the possibility of parole constitutes cruel and unusual punishment under both the federal and state constitutions.
4. The sentence of life without the possibility of parole violates the Equal Protection Clause.

Issues Pertaining to Assignments of Error

1. To qualify as a deadly weapon and elevate burglary to first degree, a metal pipe must be readily capable of causing death or substantial bodily harm "under the circumstances in which it is used, attempted to be used, or threatened to be used." Where there was no evidence of such circumstances, did the State fail to prove beyond a reasonable doubt that petitioner used, attempted to use, or threatened to use the pipe?
2. A defendant is entitled to have the court instruct the jury on his theory of the case if any evidence supporting it is presented. In this

burglary case, there was testimony that if the harm Mr. Orr feared was true some witnesses would act as he did. Did the trial court abuse its discretion in denying Mr. Orr's request to instruct the jury on defense of others?

3. The Eighth Amendment prohibits cruel and unusual punishment and Article I, section 14 prohibits cruel punishment. Where Mr. Orr was only 19 and 21 years old when he committed the two predicate offenses, did imposition of a mandatory sentence of life without the possibility of parole constitute cruel punishment?

4. For some crimes in Washington, the fact of a prior conviction that elevates the punishment is classified as an "element" that must be proved to a jury beyond a reasonable doubt. For other crimes, such as those subject to sentencing pursuant to the POAA, the fact of a prior conviction that elevates the punishment is classified as a "sentencing factor" that need be proved to the court by only a preponderance of the evidence. Does the POAA violate the Equal Protection Clause by arbitrarily providing lesser procedural protections for prior convictions classified as "sentencing factors" than those classified as "elements," even though the same government interest is served in both instances?

B. STATEMENT OF THE CASE

On a late afternoon in April, Spokane police responded to a report of person with a weapon. They arrived to find Frederick Del Orr in a church parking lot waiting to be taken into custody. RP 160–61, 170, 187, 215, 300.

Earlier that day, a fellow homeless street friend named Sean told Mr. Orr that Sean’s girlfriend was being extorted by a guy named “Sasquatch” to perform sexual favors in return for drugs. RP 282–83, 285, 304. Mr. Orr was upset at the notion and agreed to help Sean find her. RP 283–84. They walked from Monroe Street to an apartment complex on West Boone Avenue, but Sean’s friend said the girlfriend was not there. RP 284. When he heard they were looking for the girlfriend, an unidentified man said he might know where she’s at. RP 284–85. The man agreed to show Mr. Orr where he thought Sasquatch was. They walked and turned onto Gardner Street. RP 285–86. While walking, the man told Mr. Orr more about Sasquatch and how he extorts girls, holds kids against their will, and does other foul things. RP 285. Mr. Orr got increasingly upset because as a kid he’d experienced some of these things like being abused and beat on, and he’d spent eighteen years in prison with

sex offenders where these kinds of things happen all the time. RP 285–86, 289–90, 318.

The man pointed out Sasquatch’s alleged house to Mr. Orr, but didn’t accompany him. RP 286. A neighbor across the street, Jake Ford, saw Mr. Orr knocking on the door at 2620 West Gardner and peering into the windows. RP 223–25, 242, 287. Having seen nothing, Mr. Orr went over and asked the neighbor whether he knew the people in the house and explained some kids were being held there against their will. RP 288–89. The neighbor, describing Mr. Orr as rather ticked off and not very happy, declined to give him any information and suggested he wait until the people came home or call police and let them handle it. RP 226–29. Mr. Orr, who was upset, enraged and worried for the kids, responded, “sometimes, man, the police don’t get there fast enough.” RP 229–30, 289–90. The neighbor noted Mr. Orr had a pipe approximately three feet long in his hand as he came over and when he returned across the street. RP 227, 231, 238. It appeared to the neighbor that whatever Mr. Orr was worried about seemed urgent to him. RP 236.

Mr. Orr looked in two or three windows on the east side of the house and, seeing nothing, went to the alley in back of the house. He got up on an overturned refrigerator and peered over the fence into the

backyard looking for anything out of the ordinary or signs of foul play, but saw just a yard. RP 239–40, 290–92. When the son of the owner of the house across the alley asked, “Hey, what are you doing,” Mr. Orr responded he was looking for the guy holding children against their will. RP 145–46, 292. The son, Nicholas Largent, noted Mr. Orr looked crazed and was holding a black metal pole. RP 145–46. The son was not particularly concerned that Mr. Orr was asking about the neighbor. RP 146.

When Mr. Orr heard a rustling noise in the back yard, he jumped over the fence and went to the back door. RP 293. Mr. Orr did not see or hear anything coming from inside, but when he saw strange handprint-type things on the back door “like they’re clawing” he reacted by kicking in the door. RP 294, 305–06. Once inside he was confused because it was not what he had expected – nobody came when he yelled hello, nothing looked out of the ordinary and it looked like a nice home. RP 295, 301. He was inside less than five minutes. RP 312.

Liv Nelson was a resident at the house at 2620 West Gardner. RP 241–42. While outside with her two-year-old daughter, Ms. Nelson heard a loud banging noise on the other side of the back yard. RP 243. She saw

Mr. Orr just inside the main¹ house door; he turned around and came out holding a large metal pipe² in his hand. RP 243–44. She described his face as looking “intent and intimidating” but “he was searching clearly,” like he had a purpose. RP 244, 250. When he saw Ms. Nelson and her daughter standing there, Mr. Orr sat down on the stairs. RP 245. His demeanor became “relaxed, yeah, and he seemed down almost” and kind of deflated, and he apologized to her daughter for frightening her. RP 245, 251–52, 254–55, 295.

The son had alerted his father, Dale Wills, when Mr. Orr jumped over the neighbor’s fence. RP 146–47, 167. The father opened his fence and crossed the alley when he heard a loud boom. He apparently saw Mr. Orr enter the neighbor’s back door but did not see anything in Mr. Orr’s hand. RP 167. The father ran back to get his gun and a soft pellet gun, and returned to the neighbor’s fence. Breaking a board which popped the gate open, the father stepped inside and saw Mr. Orr come out the back door. Mr. Orr was holding a pipe and the father described him as looking confused. RP 168. Mr. Orr sat down. RP 176.

¹ Ms. Nelson was having difficulties with her husband and staying in a separate apartment that was attached to the main house. RP 22. To make sense of her testimony at RP 242–44, it appears Ms. Nelson was in her apartment prior to entering the backyard and hearing the loud noise.

When the father approached with guns, Mr. Orr said he was there because somebody had told him there were kids being held and the person inside the house was drilling holes in their heads. RP 145–46, 169, 176, 296. The father told Mr. Orr he didn't know what he was talking about and that Mr. Orr had the wrong house. RP 169. They argued and exchanged words loudly. RP 148, 156, 169. Both sides felt threatened by the weapons. RP 169, 170, 173, 177–78, 252. Mr. Orr left the porch to keep Ms. Nelson and her child out of harm's way during an expected altercation. RP 295–96.

At least five people ended up in the alley: the father with his guns out, his son holding a hatchet while yelling, a friend of the father's trying to calm things down, the father's wife, and Mr. Orr pointing his pipe at them. RP 148–49, 158, 171, 176–78, 181, 296, 298. For all Mr. Orr knew, the six-foot tall father may have been Sasquatch. RP 296. Eventually Mr. Orr swung the pipe at the father, but did not hit him. RP 149, 174, 178–79, 182, 208, 214. The father stated he feared for his life. RP 170, 182. At some point, Mr. Orr put the pipe down by throwing it away, behind him. RP 159–60, 181, 209, 215–16, 299.

² On cross-examination, Mr. Orr admitted he had the pipe with him and "yes," he would have used it to scare or hit someone inside the house if they were doing as he feared. RP 306.

Several people called police, who arrived fairly quickly to the nearby church parking lot to which Mr. Orr and some of the people had retreated. RP 162, 170–71, 208, 215, 300–01. By then, things had de-escalated, and Mr. Orr continued saying that he “had the wrong house.” RP 170, 172, 181–82, 215. Witnesses agreed Mr. Orr had not been hiding his actions or trying to be sneaky. RP 154, 210, 212, 233. The son didn’t blame Mr. Orr for doing what he was doing because if what he thought was actually true, the son would have done the same thing. RP 157, 162–62. “In all honesty,” the father said, “I don’t want to see anything happen to him other than get him counselling or something. He’s probably a nice guy.” RP 180.

By amended information, Mr. Orr was charged with second degree assault (regarding the father) and first degree burglary committed while armed with a deadly weapon. CP 38. The court granted Mr. Orr’s motions to instruct the jury on fourth degree assault as a lesser included of second degree assault (RP 369–70), and self-defense on the second degree assault (RP 335), and first degree criminal trespass as a lesser included of first degree burglary (RP 380). The court denied his motion to instruct the jury on the lawful use of force in the defense of others regarding the burglary. RP 381–82.

The jury found Mr. Orr guilty as charged, and returned special verdicts that Mr. Orr was armed with a deadly weapon other than firearm during commission of the crimes. CP 180, 181, 183, 184.

At sentencing, the State asserted Mr. Orr must receive a sentence of life without the possibility of parole under the POAA. RP 455. The State presented certified copies of judgments and sentences for two prior convictions for “strike” offenses. RP 457–58. One was a 1994 conviction for second degree robbery from Spokane County Superior Court. CP 222. That crime was committed on December 7, 1993, when Mr. Orr was 19 years old. CP 222; RP 8³. The other prior conviction was for first degree robbery from King County Superior Court. CP 222. That crime was committed on May 3, 1995, when Mr. Orr was 21 years old. CP 222; RP 8.

The court imposed a sentence of life without the possibility of parole for both counts. CP 224; RP 464–65. The court imposed mandatory costs of \$800, payable at \$5.00 per month. CP 227. Mr. Orr appeals. CP 234–35.

³ Mr. Orr’s date of birth is April 8, 1974.

C. ARGUMENT

1. The evidence was insufficient to support the first degree burglary conviction because Mr. Orr's pipe was not used as a deadly weapon.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution and inquires whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) overruled on other grounds by *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980), overruled on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Mr. Orr's burglary conviction should be reversed because the State failed to prove the pipe was a deadly weapon.

a. The definition of "deadly weapon" depends on the circumstances of its use, attempted use, or threatened use, and mere possession is not enough.

The State charged Mr. Orr with first-degree burglary under the deadly weapon prong of that offense. RCW 9A.52.020(1)(a); CP 38. The evidence was insufficient because the State failed to prove he was armed with a deadly weapon as that term is defined for burglary. The burglary statute provides:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon.

RCW 9A.52.020(1). For purposes of this statute, the term “deadly weapon” is defined as:

any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a vehicle as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6) (emphasis added).

Under the plain language of this statute, any item other than an explosive or firearm is not a deadly weapon per se.⁴ *State v. Winings*, 126 Wn. App. 75, 87-88, 107 P.3d 141 (2005); *State v. Gotcher*, 52 Wn. App.

⁴ RCW 9A.04.110(6) should not be confused with RCW 9.94A.825, which defines “deadly weapon” for purposes of sentencing enhancement following conviction. The latter statute has a far broader list of per se dangerous weapons.

350, 353-54, 759 P.2d 1216 (1988). Instead, the jury must determine whether the instrument was a deadly weapon from the circumstances of its use, attempted use, or threatened use. *Gotcher*, 52 Wn. App. at 354; *In re Martinez*, 171 Wn.2d 354, 366, 256 P.3d 277, 283 (2011). The “circumstances” include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995).

Thus, in *Gotcher*, the court held mere possession of a knife was insufficient to render it a deadly weapon, “because it makes a nullity of the ‘used, attempted to be used, or threatened to be used’ language of RCW 9A.04.110(6).” 52 Wn. App. at 354. The court explained, “[I]t must be shown that under the circumstances in which it is *used*, or *attempted* or *threatened* to be used, the weapon is readily capable of causing death or serious bodily injury. *Id.* (emphasis in original). This requires “some manifestation of a willingness to use the knife before it can be found to be a deadly weapon under RCW 9A.04.110(6).” *Id.*; *Winings*, 126 Wn. App. at 87–88 n.6 (“The plain language of this statute . . . refutes the State’s argument that a sword is a deadly weapon per se based on its use throughout history.”).

Similarly, in *Martinez*, the court disapproved of *State v. Gamboa*, 137 Wn. App. 650, 154 P.3d 312 (2007), where the court of appeals held that “a machete used to forcibly enter a home was a deadly weapon, despite the lack of evidence that it was used or intended to be used as a weapon.” *Martinez*, 171 Wn.2d at 368 n .6. The *Gamboa* court reasoned that a machete’s nature and size and thus its potential use as a weapon made it a deadly weapon. *Gamboa*, 137 Wn. App. at 653. The *Martinez* court explained, “By characterizing a machete as a deadly weapon on the sole basis of its dangerousness and without regard to its actual, attempted, or threatened use, the *Gamboa* court essentially read the circumstances provision out of the statute and treated the machete as if it were a deadly weapon per se.” *Martinez*, 171 Wn.2d at 368 n. 6.

The *Martinez* reasoning would likewise eliminate a claim of circumstantial evidence sufficient to support a deadly weapon finding based on Mr. Orr not knowing if anyone was in the house and perhaps having no reason to carry the pipe other than to have the pipe available to use against a person who may be therein. An apparatus does not become a deadly weapon simply because it could have harmed someone had they been present. See *Martinez*, 171 Wn.2d at 368 n. 6.

State v. Skenadore, 99 Wn. App. 494, 496, 994 P.2d 291 (2000), illustrates this point. There, Division Two reversed a deadly weapon finding where Skenadore attacked a corrections officer with a homemade spear. *Id.* The spear was “two-and-one-half feet to three feet long, fashioned from writing paper rolled into a rigid shaft bound with dental floss, affixed to a golf pencil.” *Id.* The court noted that, under some circumstances, the pencil spear might be shown to be a deadly weapon. *Id.* at 500. For example, the spear could have inflicted serious bodily harm had it pierced the officer's eyes. *Id.* But, from where Skenadore was standing, he was unable to reach the officer's head with the spear. *Id.* Thus, “the surrounding circumstances inhibited the spear's otherwise potential, but unproven, ready capability to inflict substantial bodily harm.” *Id.*

Here, the surrounding circumstances likewise inhibited the potential to inflict harm. No one else was present when Mr. Orr possessed the pipe. It was therefore capable of causing substantial bodily harm or death only by virtue of its nature and size. *Martinez* makes clear that this is not enough. *See* 171 Wn.2d at 368 n. 6. The evidence is insufficient to lead a rational trier of fact to find the deadly weapon element beyond a

reasonable doubt. The conviction for first degree burglary and the deadly weapon sentencing enhancement must be vacated⁵.

b. The State failed to present evidence Mr. Orr used or attempted to use or threatened to use the pipe.

There was no evidence Mr. Orr actually used the pipe or attempted to use the pipe during the burglary. Thus, the State's case rests entirely on the prong of threatened use. But the record is devoid of evidence Mr. Orr made a threat to use or handle the pipe in any way during the course of the burglary.

“Threat” is defined as the expression of an intention to inflict injury. *Webster's Third New International Dictionary* (1976). RCW 9A.04.110(28) defines “threat” in terms of “to communicate, directly or indirectly.” The legislature has not defined the word “communicate.” Where the legislature does not specifically define a statutory term, the court will read the word according to its plain and ordinary meaning. *First Covenant Church v. City of Seattle*, 120 Wn.2d 203, 220, 840 P.2d 174 (1992). Communication has been defined as “a process by which

⁵ Remand for resentencing on a lesser included offense is appropriate only if the jury was explicitly instructed on the lesser offense. *State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980); *In re the Pers. Restraint of Heidari*, 174 Wn.2d 288, 292–93, 274 P.3d 366 (2012). Here, the jury was not instructed on the lesser included offense of second degree burglary.

information is exchanged between individuals through a common system of symbols, signs, or behavior.” *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 2 June 2017. Thus, making a threat requires there be at least a second person present to “receive” the threat. Here, there was no evidence anyone was in the house at the time of the burglary. Without a “victim” or someone to receive the communication contemporaneously, there is insufficient evidence to find Mr. Orr made a threat to use or handle the pipe to inflict injury.

Case law supports this conclusion. For example, in *State v. Bright* the court concluded that the act of wearing a holstered weapon while committing a rape constituted a “threat” under RCW 9A.04.110. 129 Wn.2d 257, 270, 916 P.2d 922 (1996). In *State v. Lubers*, the nonverbal act of setting a gun down next to a rape victim was sufficiently threatening to constitute “threatened ... use of a deadly weapon” for first degree rape. 81 Wn. App. 614, 620–21, 915 P.2d 1157 (1996). In *State v. Eker*, victim’s knowledge that weapon is available because it is in possession of an accomplice standing guard outside was sufficient to constitute “threatened ... use of a deadly weapon” for first degree rape. 40 Wn. App. 134, 136–39, 697 P.2d 273, *review denied*, 104 Wn.2d 1002 (1985). In *State v. Collinsworth*, the unequivocal yet calm demand for immediate

surrender of the bank's money and the teller's subsequent fear were sufficient to constitute threatened use of force for robbery, even in the absence of a weapon. 90 Wn. App. 546, 553–54, 966 P.2d 905 (1997).

Where there was no evidence Mr. Orr used, attempted to use, or threatened to use the pipe, the pipe could not have caused death or substantial bodily harm under the circumstances, and thus it could not be considered a deadly weapon. No reasonable trier of fact could find the all the elements of first degree burglary beyond a reasonable doubt.

2. The trial court abused its discretion in denying Mr. Orr's motion to instruct the jury on the defense of others.

a. A defendant is entitled to have the jury instructed on his theory of the case if any evidence supports the theory.

“A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction.” *State v. Werner*, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). The quantum of evidence necessary is simply any evidence. *State v. Hendrickson*, 81 Wn. App. 397, 401, 914 P.2d 1194 (1996). The defendant need not show sufficient evidence was presented to create a reasonable doubt regarding the defense. *State v. Adams*, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982). Once any evidence supporting the defense is produced, “the

defendant has a due process right to have his theory of the case presented under proper instructions even if the judge might deem the evidence inadequate to support such a view of the case were he [or she] the trier of fact” *Id.* (internal quotation omitted).

A claim of defense of another is treated the same as a self-defense claim. A defendant is entitled to a defense of another jury instruction whenever there is some evidence, viewed in the light most favorable to the defendant, that the defendant reasonably believed an innocent party was in danger. The trial court must apply a subjective standard and view the evidence from the defendant’s point of view as the event appeared to him at the time. *State v. Bernardy*, 25 Wn. App. 146, 148, 605 P.2d 791 (1980); *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977); *State v. McCullum*, 998 Wn.2d 484, 488–89, 656 P.2d 1064 (1983).

b. Mr. Orr was entitled to have the jury instructed on the defense of others.

Mr. Orr requested jury instructions on defense of others in relation to the intent to commit a crime (assault) element of the burglary charge. The trial court denied the request. This was error.

The use of force toward another is lawful when used “by a party about to be injured, or by another lawfully aiding him or her, in preventing

or attempting to prevent an offense against his or her person, ... [and] the force is not more than is necessary.” RCW 9A.16.020(3). “A person is entitled to act on appearances in defending another, if he or she believes in good faith and on reasonable grounds that another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.” WPIC 17.04 Lawful Force—Actual Danger Not Necessary, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04 (4th Ed); *see Penn*, 89 Wn.2d 63 (a person may defend another when the defender reasonably believes that the other person is in danger even though such belief may be later shown to have been erroneous). Reasonableness of the force used is a question of fact for the jury. *State v. Kirvin*, 37 Wn. App. 452, 458, 682 P.2d 919 (1984).

In determining the sufficiency of evidence to support a proposed instruction, the trial court must consider the evidence and inferences therefrom in the light most favorable to the party requesting the instruction. *State v. Hanson*, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990). Mr. Orr contends that on the record before this Court, a jury could find that there was no intent to commit a crime in the house because any

assault would have been done in defense of others. Evidence was presented to support this theory.

The unrefuted evidence establishes that a friend told Mr. Orr a woman was being held against her will, and two other people confirmed this with one man telling Mr. Orr the person was named "Sasquatch" and that the woman together with some children were presently being held at 2620 West Gardner and that terrible things were being done to them including drilling into their heads. Evidence was presented that Mr. Orr was upset and worried about the kids in part based on events from his childhood and having been around sex offenders while incarcerated. Evidence was presented that Mr. Orr went to the house and nobody answered his knocking and he couldn't see activity in the windows. He asked a neighbor, who hadn't observed anything wrong and seemed unconcerned. Still worried, Mr. Orr returned to the house and, hearing rustling in the back yard, hopped over the fence. Seeing weird handprints on the door, he kicked in the back door. But he found no one inside and no indication people were in trouble. Realizing he'd made a mistake, he went back outside where he encountered Liv Nelson and her young child coming up the porch steps. He apologized. Mr. Orr presented his case, anticipating that the court would instruct the jury on defense of another.

He requested the trial court to give the Washington Pattern Jury Instructions (WPIC) on his theory of the case: Lawful Force, WPIC 17.02; defense of self or another, WPIC 17.04; and no duty to retreat, WPIC 17.05. CP 101–03.

The trial court denied Mr. Orr’s requested defense of another instructions based on a narrow view of the facts. The trial court explained its refusal to instruct on self-defense as follows:

In order for self-defense to be appropriate, there has to be some evidence showing some aggressive threatening behavior or communication by the victim causing the defendant to act, and there has to be reasonable grounds to believe there was imminent danger. And, once again, here you have the subjective belief of the defendant and all the other evidence that has been presented doesn't match the subjective belief, that being what he witnessed when he arrived at the house, the statements of the neighbors. And the only information he did receive was from two unidentified people and one person named Sean. And, again, those -- that evidence was just used for his subjective belief rather than the truth of the matter asserted.

So the Court doesn't find that there is sufficient evidence that has been presented other than his subjective belief that there was an imminent threat to others. If there was this subjective belief and perhaps some additional evidence that may be sufficient but it doesn't appear there's any additional evidence other than this subjective belief. And that goes back to what the neighbors testified to, what the defendant indicated he saw as he went around the house, and even what he saw when he went inside the house. So the Court's going to maintain its earlier ruling.

RP 389–90. In essence, the trial court did not believe that Mr. Orr could reasonably have believed that Sean’s girlfriend and/or children were in imminent danger of harm.

The trial court erroneously invaded the jury’s fact-finding function. It also erroneously characterized the evidence in a light most unfavorable to Mr. Orr. It discounted the uncontroverted testimony as set forth above, including what Mr. Orr was told and by whom, why he believed it, and contributing factors culminating in kicking in the door. See, e.g., *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) (‘the reasonableness of the defendant’s perception of immediacy {of harm} should be evaluated in light of the defendant’s experience of abuse. This is a question of fact, which generally should be resolved by a jury.’) (citation omitted) (emphasis added)).

c. Mr. Orr was prejudiced by the failure to give the instruction, and the remedy is reversal of the conviction and remand for a new trial.

Without the requested instructions, Mr. Orr could argue only that the State had not proved that he intended to harm whoever might be present in the house. The trial court’s instruction precluded him from arguing defense of another. At least one witness stated he may have reacted in the same manner as Mr. Orr. RP 157, 162–62. In the absence

of self-defense instructions, the State was able to argue that Mr. Orr feloniously burglarized Ms. Nelson's house with no counter-balancing defense of another for the jury to consider.

Failure to instruct the jury on self-defense, defense of others, and the lawful use of force, when warranted by the facts and requested by the defense, constitutes reversible error. *Williams*, 132 Wn.2d at 259; *Werner*, 170 Wn.2d at 337. In *Werner*, the Supreme Court held that the trial court abused its discretion in denying a request to instruct the jury on self-defense, because some evidence was presented to support that theory. *Id.* at 337–38. The Court further held that the error required reversal: “Since the outcome turns on which version of events the jury believed, the failure to give a self-defense instruction prejudiced Werner.” *Id.* at 338. The same is true here. As in *Werner*, the jury heard two versions of events and the outcome of the case depended on which version of events the jury believed. Mr. Orr should have a new trial with proper jury instructions that enable the jury to consider his defense. Mr. Orr accordingly asks this Court to reverse his conviction and remand for a new trial. See *Werner*, 170 Wn.2d at 338.

3. A mandatory sentence of life without the possibility of parole, with no consideration of Mr. Orr’s youthfulness at the time he committed the predicate offenses, amounts to cruel and unusual punishment in violation of the Eighth Amendment and Article I, section 14.

a. Article I, section 14 is more protective than the Eighth Amendment and established factors require the punishment be proportionate to the crime.

It is well-established that article I, section 14 of the Washington Constitution is more protective than the Eighth Amendment. See *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000).

The seminal case is *State v. Fain*, 94 Wn.2d 387, 402, 617 P.2d 720 (1980). There, our supreme court reversed a life sentence imposed under the former habitual offender statute because the three predicate crimes were all relatively minor. *Id.* The court recognized that the United States Supreme Court had upheld a life sentence under similar circumstances, but ruled that article I, section 14 should be construed as more protective than the Eighth Amendment. *Id.* at 391–92. Among other reasons, our state constitution explicitly prohibits “cruel punishment,” while the Eighth Amendment protects only against punishments that are both “cruel and unusual.” See *Fain*, 94 Wn.2d at 392–93; Const. art. I, § 14; U.S. Const. amend. VIII.

While holding that article I, section 14 is more protective than the Eighth Amendment, the *Fain* court looked to federal constitutional jurisprudence as a starting point. The court held our cruel punishment clause, like its federal counterpart, must be interpreted consistent with “evolving standards of decency that mark the progress of a maturing society.” *Fain*, 94 Wn.2d at 396–97 (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)). The court also followed Eighth Amendment case law in concluding that article I, section 14 mandates proportionate punishment – meaning the punishment must be “commensurate with the crimes for which [the] sentences are imposed.” *Fain*, 94 Wn.2d at 396 (citing, inter alia, *Coker v. Georgia*, 433 U.S. 584, 591-92, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (prohibiting death penalty for crime of rape)).

Fain set forth four factors to guide judges in determining whether a particular sentence is proportionate to the crime: (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment the defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. *Fain*, 94 Wn.2d at 397. Although similar considerations are taken into account under the Eighth Amendment, they

are viewed more strictly under article I, section 14. Thus, even though Fain’s sentence would pass Eighth Amendment muster, it was “entirely disproportionate to the seriousness of his crimes” for purposes of article I, section 14. *Id.* at 402.

b. Recent United States Supreme Court cases emphasize that under the Eighth Amendment, punishment must be proportionate not just to the crime but also the defendant, and that youth is a particularly relevant characteristic.

Fain and federal constitutional cases predating *Fain* focused on the requirement that punishment be proportionate to the offense. But later Eighth Amendment cases emphasized that punishment must also be proportionate to the defendant. See *Thompson v. Oklahoma*, 487 U.S. 815, 834, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (invalidating death penalty for children under 16 and stating “punishment should be directly related to the personal culpability of the criminal defendant”); *Atkins v. Virginia*, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (invalidating death penalty for intellectually disabled defendants); *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (invalidating death penalty for defendants under age 18).

In *Roper*, the Court explained that because juvenile brains are not fully developed, young people who commit crimes are both less culpable

and more amenable to rehabilitation than older defendants, and sentences must reflect this difference. *Roper*, 543 U.S. at 570.

This proportionality principle extends to cases outside the capital punishment context. In *Graham*, the Court held that juveniles who commit non-homicide crimes may not be sentenced to life in prison without the possibility of parole. *Graham v. Florida*, 560 U.S. 48, 74-75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Court explained there are “two subsets” of cases holding certain types of punishments categorically violate the Eighth Amendment: “one considering the nature of the offense, the other considering the characteristics of the offender.” *Graham*, 560 U.S. at 60. The characteristics of a youthful offender preclude mandatory lifetime imprisonment. *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012) (extending *Graham* to homicide cases). Only in the rarest circumstances, after a sentencing hearing at which the impact of youth on the particular individual is addressed, may a juvenile be sentenced to life in prison. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 733-34, 193 L.Ed.2d 599 (2016) (holding *Miller* applies retroactively and emphasizing that life sentences should almost never be imposed on juvenile defendants—even for the most egregious homicides).

c. Youth is also an important characteristic to consider when sentencing adults under the Sentencing Reform Act.

The Washington Supreme Court has also acknowledged the importance of considering a defendant's age as a potential mitigating circumstance in sentencing adults under the Sentencing Reform Act. *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015). *O'Dell* reversed a young adult's sentence and remanded for consideration of whether his youth justified a sentence below the standard range. *O'Dell*, 183 Wn.2d at 698-99.

O'Dell found studies of brain development “establish a clear connection between youth and decreased moral culpability for criminal conduct.” *Id.* at 695. The court endorsed the data referenced in *Roper*, *Graham*, and *Miller* as well as other studies showing that “the parts of the brain involved in behavior control continue to develop well into a person's 20s.” *O'Dell*, 183 Wn.2d at 691-92. “The brain isn't fully mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.” *Id.* at 692 n.5 (quoting *MIT Young Adult Development Project: Brain Changes*, Mass. Inst. of Tech., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Dec. 13, 2016)).

Thus, age is highly relevant to sentencing not just for juveniles, but also for young adults. *Id.* (quoting *Roper*, 543 U.S. at 574) (“[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”)).

d. In light of recent developments, this Court should hold that a defendant’s personal characteristics, including his age, must be considered in deciding whether a sentence violates article I, section 14.

The confluence of the Washington Supreme Court’s decision in *O’Dell* and the United States Supreme Court’s decisions in *Roper* and its progeny suggest that a defendant’s young age must be considered in evaluating whether his sentence violates article I, section 14. Although it is well-established that article I, section 14 is more protective than the Eighth Amendment, Washington courts have not yet had occasion to update the state constitutional standard in light of these significant developments. The *Fain* factors include consideration of the nature of the offense but do not explicitly include consideration of the defendant’s characteristics. This Court should hold that punishment must be proportionate both to the offense and to the offender in order to comport with article I, section 14.

e. Mr. Orr's sentence of life without the possibility of parole violates article I, section 14.

“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, mandatory life without parole poses too great a risk of disproportionate punishment.” *Montgomery*, 136 S. Ct. at 726 (internal citation omitted). An evaluation of all relevant factors demonstrates that Mr. Orr’s life sentence violates article I, section 14. Mr. Orr was just 19 and 21 years old when he committed the two predicate crimes. At that age, his mental and emotional development was far from complete. *O’Dell*, 183 Wn.2d at 691–92. Other considerations also dictate reversal of this sentence. His presumptive base sentence for the current offenses in the absence of the POAA is 87-116⁶ months. Yet he is serving the same sentence as defendants convicted of multiple counts of aggravated murder. See RCW 10.95.030(1).

Mr. Orr’s sentence of life without the possibility of parole is disproportionate in light of all relevant circumstances. The sentence should be reversed and remanded for resentencing within the standard range.

⁶ 2016 Washington State Adult Sentencing Guidelines Manual, pp. 216, 232.

4. The arbitrary labeling of a persistent offender finding as a “sentencing factor” that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); U.S. Const. amend. XIV. When analyzing an equal protection claim, the Court applies strict scrutiny to laws implicating fundamental liberty interests. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. *Plyler*, 457 U.S. at 217. The liberty interest at issue here—physical liberty—is the prototypical fundamental right. “[T]he most elemental of liberty interests [is] in being free from physical detention by one’s own government.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. *Skinner*, 316 U.S. at 541.

b. Under either strict scrutiny or rational basis review, the classification here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens applied. Under either strict scrutiny or rational basis review, the classification here is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The Legislature determined that the State has an interest in punishing repeat criminal offenders more severely than first-time offenders. For example, defendants who twice previously violated no-contact orders are subject to a significant increase in punishment for a third violation. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). And defendants who have twice previously been convicted of “most serious” (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW

9.94A.030(33); RCW 9.94A.570. But the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels “elements” of a crime or “sentencing factors” which have been attached to them. Where prior convictions that increase the maximum sentence available are termed “elements,” they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. *Oster*, 147 Wn.2d at 146. In neither example did the Legislature label the facts “elements.” Courts simply treat them as such.

But where, as here, prior convictions that increase the maximum sentence available are termed “sentencing factors,” they need only be proved to the jury by a preponderance of the evidence. See *Witherspoon*, 180 Wn.2d at 892–93. Just as the Legislature never labeled the facts in *Oster* or *Roswell* “elements,” the Legislature never labeled the fact at issue here a “sentencing factor.” Instead it is an arbitrary judicial construct.

This classification violates the Equal Protection Clause because the government interest in either case is exactly the same: to punish repeat offenders more severely.

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the “three strikes” context but not in other contexts because the punishment in the “three strikes” context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. But it makes no sense to say greater procedural protections apply where the necessary facts only marginally increase punishment but need not apply where the necessary facts result in the most extreme increase possible.

As the United States Supreme Court explained, “merely using the label ‘sentencing enhancement’ to describe [one fact] surely does not provide a principled basis for treating [two facts] differently.” *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See *Roswell*, 165 Wn.2d at 192. “The equal protection clause would indeed be a formula of empty words if

such conspicuously artificial lines could be drawn.” *Skinner*, 316 U.S. at 542.

The imposition of a sentence of life without the possibility of parole in this case violated the Equal Protection Clause. Mr. Orr should be resentenced within the standard range.

5. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors

such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. Orr was forty-one years old and homeless at the time of this incident. RP 8, 304. Mr. Orr owns no real or personal property, and has no income. CP 252–53. He has been sentenced to life in prison with no possibility of parole. The trial court found Mr. Orr remained indigent for purposes of this appeal. CP 252, 255–57.

In light of Mr. Orr’s indigent status, and the presumption under RAP 15.2(f), that he remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent

[he] is no longer indigent,”⁷ this court should exercise its discretion to waive appellate costs.⁸ RCW 10.73.160(1).

D. CONCLUSION

For the reasons stated, this court should reverse and dismiss Mr. Orr’s first-degree burglary conviction and the deadly weapon sentencing enhancement, or remand for a new trial with proper jury instructions. For various reasons, Mr. Orr’s sentence of life with the possibility of parole is unconstitutional, and the sentence must be reversed and remanded for resentencing within the standard range. Alternatively, should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on June 3, 2017.

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⁷ *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

⁸ Appellate counsel anticipates filing a report as to Mr. Orr’s’ continued indigency no later than 60 days following the filing of this brief.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 3, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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