

FILED
Court of Appeals
Division III
State of Washington
2/27/2019 10:46 AM

No. 36213-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH A. SMITH also know as GLENN A. AKERS,

Appellant.

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

The Honorable Judge John O. Cooney

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jeremiah A. Smith, also known as Glenn A. Akers, went into a business in Spokane late one night, armed with a gun. He fired one shot, after a metal propane bottle was thrown at him. Mr. Smith denies firing any additional shots that night. Cesar Medina, who was present at the time Mr. Smith was in the business, died that night from a gunshot wound. Although surveillance video captured some of the scene that night, the video does not depict the shooting of Mr. Medina.

The State charged Mr. Smith with first degree felony murder of Mr. Medina; first degree burglary; first degree assault; and first degree unlawful possession of a firearm. The case proceeded to a bench trial, and Mr. Smith was found guilty of these counts. Following trial, Mr. Smith was sentenced as a persistent offender to life in prison without the possibility of parole. Mr. Smith was 25 years old at the time of the current offenses, and he was 18 years old and 19 years old, respectively, at the time of each of his prior strike offenses.

Mr. Smith now appeals, challenging the sufficiency of the evidence to support his conviction for first degree felony murder. He also challenges his sentence of life without the possibility of parole, as cruel and unusual punishment in violation of the Eighth Amendment and Article I, section 14, where the sentence was imposed without consideration of Mr. Smith's youthfulness at the time he committed the current offenses or the predicate offenses.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Smith guilty of first degree felony murder, where the evidence was insufficient that Mr. Smith or Ms. Muongkoth caused the death of Mr. Medina.
2. The trial court erred in entering the following findings of fact:

53. . . .After briefly walking into the small hallway with his gun momentarily raised and out of view of the surveillance cameras, Mr. [Smith] sprung back, then walked directly back the way he entered.

86. Given Mr. Medina's immediate response of raising his hands over his head and slowly laying on the floor the first time he was approached by Mr. [Smith], the Court finds that likely this was his response as Mr. [Smith] entered the small hallway. This would explain the direction the bullet traveled through Mr. Medina's body, the location the bullet was found in the wall, and Mr. [Smith's] quick response after briefly entering the hallway before quickly retreating.

89. [Mr. Smith's] testimony is inconsistent with most of the facts in this case. . . .

93. The surveillance videos defeat Mr. [Smith's] testimony. . . .

97. Under such an adrenaline-producing event, as well as after drinking alcohol and smoking marijuana, it seems unlikely that those inside Northwest Accessories on May 26, 2015, if armed with firearms, would have the wherewith all to avoid being detected by any of those numerous cameras. This supports the conclusion that no one else within Northwest Accessories was involved in the shooting death of Mr. Medina.

102. Given Mr. Marmelejo's demeanor and statements, it seems reasonable to believe that if he was armed with a firearm on May 26, 2015, there would have been some evidence, rather than just speculation, to support it.

(CP 405, 408-410).

3. The trial court erred in entering the following conclusions of law:

18. Mr. [Smith] insists that he did not shoot Mr. Medina. The evidence shows otherwise. Other than Ms. Muongkoth, who was not in the immediate area, Mr. [Smith] was the only person armed with a firearm. . . .

21. The direction of the bullet wound to Mr. Medina is consistent with how he reacted the first time he was approached by Mr. [Smith]. The first time Mr. Medina was contacted by Mr. [Smith], he gradually leaned forward with his hands in the air. Had Mr. Medina responded in the same manner when Mr. [Smith] entered the small hallway, it would explain Mr. Medina's gunshot wound entry being higher on his body than the exit wound.

24. The State has proven beyond a reasonable doubt that, on or about May 26, 2015 . . . that Mr. [Smith] caused the death of Cesar Medina in the course of or in furtherance of such crime or in immediate flight from such crime; therefore, the Court finds Mr. [Smith] guilty of the crime of murder in the first degree, as charged in Count I.

25. The State has proven beyond a reasonable doubt that while committing the crime of murder in the first degree, Mr. [Smith] was armed with a firearm, the firearm was used in an offensive manner, and the Mr. [Smith's] use of the firearm was the means of Mr. Medina's death; therefore, the Court find Mr. [Smith] was armed with a firearm during the commission of the crime of murder in the first degree, as charged in Count I.

(CP 413-414).

4. A mandatory sentence of life without the possibility of parole, with no consideration of Mr. Smith's youthfulness at the time he committed the current offenses or the predicate offenses, amounts to cruel and unusual

punishment in violation of the Eighth Amendment and Article I, section 14.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in finding Mr. Smith guilty of first degree felony murder, where the evidence was insufficient that Mr. Smith or Ms. Muongkoth caused the death of Mr. Medina.

Issue 2: Whether a mandatory sentence of life without the possibility of parole, with no consideration of Mr. Smith's youthfulness at the time he committed the current offenses or the predicate offenses, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under Article I, section 14.

D. STATEMENT OF THE CASE

Jeremiah A. Smith, also known as Glenn A. Akers, met Vatsana Muongkoth in approximately 2008. (CP 400; RP 787).¹ Mr. Smith and Ms. Muongkoth began dating, and continued dating until approximately 2013, but they did not physically see each other after 2009. (CP 400; RP 787, 822).

In 2013, Ms. Muongkoth met an individual named Ruben Marmalejo. (CP 401; RP 114). Mr. Marmalejo has a prior conviction for hindering prosecution. (CP 401; RP 158). Ms. Muongkoth and Mr. Marmalejo, who was married, began dating shortly after they met. (CP 401; RP 114, 141, 250, 792).

¹ The Report of Proceedings consists of eleven volumes: three volumes, reported by Allison Stovall, containing pretrial proceedings; one volume, reported by Crystal Hicks, containing a pretrial proceeding; one volume, reported by Tammey McMaster, containing pretrial proceedings heard on May 11, 2018; and six volumes, reported by Korina Kerbs, containing a pretrial hearing, the bench trial, the trial court's oral decision, and sentencing. References to "RP" herein are to the six volumes reported by Ms. Kerbs. References to "2 RP" herein is to the single volume reported by Tammey McMaster. The other volumes are not referenced herein.

Mr. Marmalejo's nephew, Cesar Medina, resided with Mr. Marmalejo and Ms. Muongkoth in Spokane. (CP 401; RP 36, 113).

In May 2015, Mr. Smith and Ms. Muongkoth started seeing each other again, and frequently communicated by text message. (CP 402, 517-518, 521, 791, 823; Def.'s Exs. 209, 210).

Ruben Flores owned a business called Northwest Accessories (referred to herein as "the shop"), located on North Monroe Street in Spokane. (CP 401-402; RP 182-184, 211). The shop was not well managed. (CP 402; RP 207). There were no formal employees. (CP 402; RP 184-185). Instead, Mr. Flores allowed several individuals, including Ms. Muongkoth, to congregate at the shop and assist him with running the store. (CP 402; RP 185). Anthony Baumgarden conducted a tattoo business from the shop. (CP 402; RP 186, 276-277).

On the evening of May 25, 2015, several individuals were present at the shop, including Mr. Medina, Mr. Flores, Mr. Marmolejo, Mr. Baumgarden, Shane Zornes, and Juan Cervantes, drinking beer and/or smoking marijuana. (CP 402; RP 87-91, 106-107, 116-117, 127, 148). Mr. Marmolejo and Ms. Muongkoth were arguing over text message regarding their relationship. (CP 402; RP 115-116, 517-518, 521; Def.'s Ex. 210). Both of them sent each other threatening text messages. (CP 402-403; RP 517-518, 521; Def's Ex. 210). That night, Ms. Muongkoth struck Mr. Marmolejo's car with a baseball bat, while it was parked at the shop. (CP 403; RP 118-120, 251, 651-652, 739-740). Ms. Muongkoth

took this action alone; Mr. Smith was not with her at the time. (RP 120, 143, 227, 740).

Around 11:00 p.m., Mr. Smith and Ms. Muongkoth decided to go to the shop. (CP 403; RP 809-811; Def.'s Exs. 209, 210). According to Mr. Smith, their purpose for going there was to return a bag of contraband (firearms and cocaine) to Mr. Marmolejo that belonged to him, that Mr. Smith found earlier that day in Ms. Muongkoth's vehicle. (CP 402-403; RP 799-800, 825-826, 843, 846).

Mr. Smith and Ms. Muongkoth parked outside the shop, then entered the shop through the west door. (CP 403; RP 257-258, 486, 504-505, 806, 812, 874-875). Both individuals were armed. (CP 403-404; RP 123, 806, 812, 874-875). They left Mr. Marmolejo's bag of contraband in the car. (CP 403; RP 875).

Surveillance cameras recorded Mr. Smith and Ms. Muongkoth's movements inside certain areas of the shop. (CP 404; RP 95-96, 108-112, 565-587; Pl.'s Ex. 1; Def.'s Ex. 206). At one point, Mr. Smith walked into the sales area of the shop with his gun drawn. (CP 404; Pl.'s Ex. 1). Mr. Smith approached Mr. Medina, and Mr. Medina raised his hands and laid on the ground. (CP 404; RP 815, 882-883; Pl.'s Ex. 1). Mr. Smith then approached Mr. Medina's left side with his gun drawn on Mr. Medina's head. (CP 404; Pl.'s Ex. 1).

Mr. Baumgarden looked out into the sales area from a small hallway and saw Mr. Smith holding someone at gunpoint. (CP 404; RP 283). Mr. Baumgarden threw a metal propane bottle at Mr. Smith. (CP 404; RP 123, 151-152, 283, 306-307; Pl.'s Ex. 66). In response to this item being thrown at him, Mr. Smith aimed the gun down the small hallway to the east and fired one shot. (CP 404; RP 123-124, 153, 284, 815-816, 886-887; Pl.'s Ex. 1). This shot traveled down the small hallway before striking the south wall of the hallway. (CP 405; RP 284). The bullet exited the building through the wall and struck the exterior light, causing it to shatter. (CP 405; Pl.'s Ex. 1).

After this shot, Mr. Smith left the sales area. (CP 405; Pl.'s Ex. 1). Mr. Medina got up off of the floor and walked east down the small hallway. (CP 405; Pl.'s Ex. 1).

Mr. Smith subsequently returned to the sales area, and walked through the sales area and into the small hallway near the east entrance to the store. (CP 405; Pl.'s Ex. 1). As he walked into the small hallway, he raised his right arm, and brought it back down again. (Pl.'s Ex. 1). Mr. Smith then backed out of the hallway; turned around and faced forward; and walked through the sales area. (Pl.'s Ex. 1). As he walked through the sales area, he had a gun in his right hand. (Pl.'s Ex. 1). Mr. Smith then exited the building. (CP 405).

Mr. Baumgarden found Mr. Medina on the floor in the long hallway near the tattoo room. (CP 405; RP 285). A trail of blood was found that began on the

southeast hallway doorjamb to the long hallway. (CP 405; CP 375, 381). The blood trail passed across the long hallway into the tattoo room, and through the tattoo room and back into the long hallway through the west door that connected the long hallway with the tattoo room. (CP 405; RP 381).

According to Mr. Baumgarden, after Mr. Smith shot towards him, Mr. Baumgarden went into the basement of the building. (CP 404; RP 284). While in the basement, he heard another gunshot. (CP 405; RP 284). In total, Mr. Baumgarden heard two to three gunshots with a break between them. (CP 405; RP 284, 312-313).

Mr. Marmolejo called 911. (CP 405; RP 125, 145-146; Def.'s Ex. 208). Meanwhile, those individuals within the store appeared to be preoccupied with something other than Mr. Medina. (CP 405). After a brief period, Mr. Zornes fled the shop with unidentified items. (CP 405; RP 147, 224-225, 579-580, 582-584, 613).

After racing around the store in an apparent panic, the individuals eventually dragged Mr. Medina from the shop and put him in Mr. Marmolejo's car, in an attempt to transport Mr. Medina to the hospital. (CP 405; RP 126-127, 195, 285). They made it less than one block before being pulled over by a police officer. (CP 405; RP 46-57). At some point that night, Mr. Medina died. (RP 65, 319).

After they left the shop, Mr. Smith and Ms. Muongkoth went to the home of a friend of Ms. Muongkoth's, Brittany Verzal. (CP 401, 406; RP 243-247, 894). According to Ms. Verzal, Mr. Smith was quiet and would not really acknowledge her. (CP 406). Upon receiving notice of the shooting at the shop, Mr. Smith became very quiet and shut off. (CP 406; RP 248-249). Ms. Muongkoth became upset upon hearing the news. (CP 406; RP 248).

At some point, Mr. Smith left Ms. Verzal's house. (CP 406). Ms. Verzal and Ms. Muongkoth decided to visit local hospitals in search of Mr. Medina. (CP 406; RP 251-252).

Ms. Muongkoth sent Mr. Smith a text message telling him to get rid of his sweater. (CP 406, 521, 550, 896; Def.'s Exs. 209, 210). Mr. Smith instructed Ms. Muongkoth to please calm down and to not say nothing to no one. (CP 406; Def.'s Ex. 209).

An autopsy was conducted of Mr. Medina by Dr. John Howard. (CP 407; RP 319). The cause of death was "[d]eath caused by a gunshot wound of the neck and chest." (RP 329). Mr. Medina had a bullet wound entry point on the lower left side of his neck. (CP 407; RP 322). The bullet passed through Mr. Medina and exited the upper left area of his back. (CP 407; RP 323). The only bullet fragment removed from Mr. Medina's body was a copper jacket to a bullet, which was located and recovered from near the exit wound in his back. (CP 407; RP 324).

Dr. Howard testified the bullet entry wound to Mr. Medina's body was higher than the exit wound. (CP 407; RP 325). According to Dr. Howard, this means that potentially Mr. Medina was in an upright position when a gun was fired at him in a downward direction, or Mr. Medina may have been bent forward toward the direction of fire. (CP 407; RP 328-330).

Law enforcement officers searched the interior of the shop following the incident. (CP 407; RP 347-348). They did not find any shell casings, firearms, or ammunition. (CP 407, 410; RP 384-386, 388). Evidence was presented that Mr. Marmolejo owned a .357 magnum that he kept in a Crown Royal bag. (CP 410; RP 153-154, 584, 613). Following the shooting, the Crown Royal bag was found, but not the firearm. (CP 410; RP 390-391; Def.'s Ex. 249).

Law enforcement officers located two bullet defects in the building. (CP 407; RP 351-352, 362-363, 365-367). One bullet defect came from the direction of the sales area into the small hallway, exited the building, and potentially shattered the exterior light. (CP 407; RP 351-352). The second bullet defect was found on the east wall of the building in the small room that separated the small hallway from the long hallway. (CP 407; RP 362-363, 365-367). In this defect, law enforcement officers located the lead portion of a bullet. (CP 407; RP 367).

Glenn Davis, a forensic firearms expert, examined the lead portion of the bullet found in the second defect, and the copper jacket of the bullet taken from Mr. Medina's body. (CP 407; RP 467-469). Mr. Davis concluded the lead bullet

was from a .38 special, a .357 magnum, or a .9 millimeter. (CP 407; RP 471). He concluded that it was possible that at some point the lead core was inside the copper jacket. (CP 408; RP 473).

Given the number of firearms with similar rifling characteristics as those found on the lead bullet and the copper jacket, it could have been any number of millions of firearms that fired the bullet found at the shop. (CP 407-408; RP 476).

Based on these events, the State charged Mr. Smith with the following counts, as an actor or an accomplice: (1) first degree felony murder of Mr. Medina, based on the predicate felony of first degree burglary; (2) first degree burglary of the shop; (3) first degree assault of Mr. Baumgarden; and (4) first degree unlawful possession of a firearm.² (CP 104-105). Mr. Smith was 25 years old on the date of the charged offenses. (CP 104-105).

Prior to trial, in his motions in limine, Mr. Smith moved the trial court “[t]o allow evidence of relevant third party perpetrators who may be culpable for the death of [Mr.] Medina.” (CP 172-184, 208-216; 2 RP 9-19). The trial court granted the motion. (CP 422; 2 RP 18-19).

Mr. Smith waived his right to a jury trial. (CP 248-249; 2 RP 4-7).

The case proceeded to a bench trial. (RP 20-991). Witnesses testified consistent with the facts stated above. (RP 35-906).

² The State also charged Mr. Smith with conspiracy to commit first degree robbery and tampering with a witness, but he was acquitted of these charges. (CP 105, 415-416, 417-418, 507). Therefore, they are not on appeal here.

In addition, Spokane Police Department Detective Paul Lebsock acknowledged surveillance cameras do not record every room in the shop. (RP 95). He testified there is no surveillance cameras in the following areas: the office; the lounge/TV room; the bathroom/toilet area; the hallway next to the tattoo room; the tattoo room; a second hallway; and a room to the right of the second hallway. (RP 95-96).

Detective Lebsock testified regarding the content of extended clips from the surveillance cameras offered into evidence by the defense. (RP 565-570, 576-587, 608-613; Def.'s Ex. 206). The extended clips show approximately ten minutes of footage both before and after the shooting. (RP 566; Def.'s Ex. 206).

Detective Lebsock testified that in an extended video clip, there appeared to be a person on a bicycle outside the shop, crossing the street, approximately four minutes before law enforcement arrived. (RP 579-580, 582). He testified he could "most logically conclude that it would have been [Mr.] Zornes." (RP 580).

On cross-examination, Detective Lebsock testified:

[Defense counsel:] All right. And did -- was that suspicious to you that Mr. Zornes had left?

[Detective Lebsock:] It's certainly not normal. Yeah, I would say it's suspicious. Any time you have a shooting and somebody leaves, of course that's suspicious.

[Defense counsel:] Did you observe the video surveillance and see that Mr. Zornes was carrying something around?

[Detective Lebsock:] Yes.

[Defense counsel:] And did that raise your level of suspicion?

[Detective Lebsock:] Yes.

[Defense counsel:] And I'm guess you're wondering is it possible did he remove evidence from the scene of a crime.

....

[Detective Lebsock:] It raised suspicion that he would have removed an object from the scene. Could it have been evidence, yes.

[Defense counsel:] And --

[Detective Lebsock:] Could it have been something else, yes. Could have been something that was illegal but not necessarily directly related to the death of [Mr.] Medina, yes.

[Defense counsel:] But it could have been a firearm that was used in the shooting of Ceasar Medina?

....

[Detective Lebsock:] With regards to could-have-beens, we could argue that till forever. In my opinion, for sake of argument, it could have been; for the sake of argument.

(RP 583-584).

Also on cross-examination, Detective Lebsock testified:

[Defense counsel:] And do you recall -- there's a video clip there of Mr. Marmolejo on a phone?

[Detective Lebsock:] Yes.

[Defense counsel:] And is that your understanding of where he was making the 9-1-1 phone call?

[Detective Lebsock:] It -- it matches up based on the timing, the time stamp on the video as well as the 9-1-1 call received.

[Defense counsel:] And you can identify Mr. Zornes in that lobby?

[Detective Lebsock:] Yes.

[Defense counsel:] And there is -- during that video clip there's quite an extensive conversation between Mr. Marmolejo and Mr. Zornes prior to Mr. Zornes leaving.

[Detective Lebsock:] Based on my recollection, it appears that there's some kind of conversation. To what extent, I don't -- I didn't time it, but there's apparent clear communication going on between those individuals, absolutely.

[Defense counsel:] And then slightly before and after that conversation between Mr. Marmolejo and Mr. Zornes, Mr. Zornes is, for lack of a better term, bouncing around the building?

[Detective Lebsock:] As were all of them.

[Defense counsel:] And -- yeah. And Mr. Zornes was going in the -- I'm laying a bit of a record here. He's going in the back off

surveillance camera, he's coming back onto the lobby area, which is under surveillance, correct?

[Detective Lebsock:] Yes, as were the other fellows as well.

. . . .

[Defense counsel:] Mr. Zornes also goes into the lounge room, as identified on the State's Exhibit 2, does he not?

[Detective Lebsock:] Yes. I recall that.

[Defense counsel:] And then it's -- it's from there that Mr. Zornes grabs items and then within a relatively short period of time he leaves Northwest Accessories, correct?

[Detective Lebsock:] I don't argue with that. I'd say that's reasonable.

(RP 585-587).

Detective Lebsock acknowledged a firearm was not recovered from Mr. Smith. (RP 588).

Mr. Marmolejo testified he heard “[t]hree, maybe four” gunshots on the night in question. (RP 125, 129). He denied having any weapons on him. (RP 127). Mr. Marmolejo acknowledged he never saw Mr. Smith fire a gun, and he did not see Mr. Medina get shot. (RP 144-145). He testified that when Mr. Medina was shot, he was back in the tattoo room area. (RP 124, 144-145).

Mr. Flores testified neither he nor any of the others present at the shop that night had any firearms. (RP 194-196, 215, 222). He acknowledged he never saw Mr. Smith fire a gun, and he did not see Mr. Medina get shot. (RP 215-216). Mr. Flores acknowledged there is not surveillance footage of Mr. Medina getting shot. (RP 223).

Mr. Baumgarden testified he was not armed with any firearms that night, nor was he aware that anyone else present at the shop had one. (RP 285-286). He acknowledged he did not see Mr. Medina get shot. (RP 315-316).

Mr. Smith testified in his own defense. (CP 408-409; RP 786-906). He testified he was aware there were threats made by Mr. Marmolejo to Ms. Muongkoth. (RP 793, 804-805). Mr. Smith testified he considered Mr. Marmolejo a violent individual. (RP 794-798). He testified Ms. Muongkoth had told him Mr. Marmolejo and anyone associated with the shop was violent and would retaliate. (RP 847).

Mr. Smith testified that on the night in question, he and Ms. Muongkoth were trying to return the contraband to Mr. Marmolejo, so he would not come after them. (RP 806-809, 843, 846-848, 868, 905). He testified the reason he was helping Ms. Muongkoth was as follows: "I'm going out my way to show my -- because she's in fear for her life . . . he made additional threats outside of threaten [sic] me and her." (RP 862).

Mr. Smith does not deny that he entered the shop on the night in question, with a gun. (RP 806, 812, 874-875, 878). He testified that as he was running to the shop, he heard a gunshot. (RP 813, 877). He continued on, trying to grab Ms. Muongkoth and get her out of the way. (RP 814, 877-878).

Mr. Smith testified the following occurred when he stepped back into the sales area for the second time:

[Mr. Smith:] . . . So I come in the room a second time.
[Defense counsel:] All right. When do you leave next?
[Mr. Smith:] Okay. So I'm looking for [Ms. Muongkoth]. So I goes down this hallway, this hallway that I got shot at. I'm coming down this hallway, but I'm -- I got my gun drawn. So I'm coming down. I'm easing down here. I don't see nobody or nothing so I put my gun back down. When I made one more step I heard the shot bang. I jump like, oh. Get up. Man, I -- I turned away to leave. At this time I left. This time I -- you know what I'm saying, I was able to -- I ran into her. That's what happened. I ran into her. I was running. I'm like, oh, there she go. Let's go.
[Defense counsel:] So you ran -- when you left --
[Mr. Smith:] Yeah.
[Defense counsel:] -- the lobby a second time, you were able to find Ms. Muongkoth outside?
[Mr. Smith:] Yeah.
[Defense counsel:] And then you left from there?
[Mr. Smith:] Yeah.

(RP 818-819).

Mr. Smith testified he did not shoot Mr. Medina:

[Defense counsel:] When you were in the lobby the second time -- or I'm sorry, when you're in the hallway the second time, did you shoot Ceasar Medina?
[Mr. Smith:] No, I didn't.

(RP 819).

On cross-examination, Mr. Smith again testified to what occurred when he went down the hallway:

[The State:] So when you went down that hallway did you see [Mr. Medina]?
[Mr. Smith:] No, I didn't. I didn't see nobody.
[The State:] There was nobody there?
[Mr. Smith:] Nah.
[The State:] Okay. And did you say when you went down that hallway there were more shots being fired?

[Mr. Smith:] Yeah. What -- in the midsts -- all right. So on the video it shows you that I approached the hallway with, you know, extreme caution. So I'm saying I raised the gun but there was nobody there. So I went on in the midsts of, you know what I'm saying, going through the hallway, you know I -- I put the gun down. So right when I'm getting -- I take another step, I'm saying going down the hallway, I heard shots, I jump, I'm like, oh, snap. So.

[The State:] Did you shoot in response to hearing that shot?

[Mr. Smith:] Nah, I didn't.

[The State:] Okay.

[Mr. Smith:] I ran.

[The State:] You didn't shoot the gun a second time?

[Mr. Smith:] No, I didn't shoot -- I didn't shoot my gun. I didn't even know I shot my gun the first time.

(RP 893).

Mr. Smith testified gun shots continued to ring out, even as he and Ms.

Muongkhoth went to the car to leave the shop. (RP 819, 900).

Ms. Muongkhoth testified for the defense. (RP 708-786). She denied being present at the shop during the night in question. (RP 746). She testified she does not know what Mr. Smith did at the shop. (RP 775).

Spokane Police Officer Christopher Benesch also testified for the defense. (RP 697-707). Officer Benesch testified he responded to the shop following the incident in question, and spoke with Mr. Baumgarden. (RP 698-699). He acknowledged Mr. Baumgarden told him that when he came back upstairs from the basement, he saw Mr. Medina in the same location he saw him before he went downstairs, only this time he had been shot. (RP 701-702).

Mr. Benesch testified that when he asked Mr. Baumgarden about the cameras inside the shop, there was “definitely a change in his demeanor.” (RP 703, 705-706). He testified:

He just seemed -- as soon as I brought up the video camera, that he -- almost like he was kind of worried about us seeing that video and what might be on that video. He asked multiple times, if I remember, if he could go back inside and get water. And I had to tell him that because it was an active crime scene, he wouldn't be allowed to go back in there.

....

But I just noted that his demeanor definitely changed when I brought up about accessing video footage and if there was video footage inside.

....

[W]hen I said -- when I brought up whether there was video footage or not, I could tell the change in his demeanor. And like I said, based on the way that he was acting, it lead me to believe that he did not want us to see whatever was on the . . . video footage.

(RP 706-707).

The trial court found Mr. Smith guilty of first degree felony murder, first degree burglary, first degree assault, and first degree unlawful possession of a firearm. (CP 411-418).

The trial court entered written findings of fact and conclusions of law. (CP 400-473). A transcript of the trial court's ruling was attached to the written findings of fact and conclusions of law, “as additional facts.” (CP 411, 419-473).

Mr. Smith had four prior convictions for most serious offenses. (CP 516-517, 360-399; RP 822-823, 1052, 1055). He was 17 years old when he committed the first most serious offense (first degree robbery); 18 years old when he

committed the second (second degree assault); and 19 years old when he committed the third (first degree burglary) and fourth (conspiracy to commit first degree robbery). (CP 516-517, 360-399, 1055).

Prior to sentencing, the State filed a sentencing memorandum. (CP 347-399). In this memorandum, the State argued the imposition of a life sentence without the possibility of parole does not constitute cruel and unusual punishment in violation of the Eighth Amendment, or cruel punishment under Article I, section 14. (CP 354-356). The State also attached certified copies of Mr. Smith's previous Judgment and Sentences for his four convictions for most serious offenses. (CP 360-399; RP 1052).

At sentencing, the State argued "the only possible sentence that the Court is authorized to give is life in prison without the possibility of parole." (RP 1053). Defense counsel stated the following in terms of a sentencing recommendation:

At this point it is our intention to reserve any constitutional issues that could be brought for purposes of challenging sentencing in the appeal process. I've looked at that. I think that that's probably more efficient use of the Court's time rather than myself briefing out matters which, for my analysis, have largely been addressed from the issues that I saw that could be present here in this case. The . . . trial was bench trial. The statute would appear to require that he be sentenced to life. I couldn't find any exceptions to that. I spent a lot of time looking. If Your Honor is -- however, there are mitigating factors in there -- in this case. This is something that was an incident that got out of control. I think it can be genuinely said that Mr. [Smith] was not really the main catalyst of what happened there on that unfortunate night. He is remorseful

about this. He has been very good to deal with through the process of this case.

....

He's somebody that I think got caught up that night between what was going on between [Ms.] Muongkoth and [Mr.] Marmolejo. The statute [sic] is pretty clear with regard to what Your Honor has to do, but, again, there are mitigating factors here. He's 29 years old. He lost his father, my understanding is at a very young age. And I know that he hasn't had a lot of opportunities in life that many people have. I think he was brought up on the streets in Detroit. He got into a life of crime, and it followed him.

(RP 1055-1057).

The trial court stated “there's only one thing the Court can do at sentencing.” (RP 1060). The trial court then sentenced Mr. Smith to life in prison without the possibility of parole for the first degree murder, first degree burglary, and first degree assault counts, stating as follows:

Sir, the Court does find that you have at least two most serious convictions, those being the assault second degree with a sentencing date of August 17 of 2010, burglary in the first degree from August 13 of 2010. There's also a conspiracy to commit first-degree robbery from August 13th of 2010, and a first-degree robbery from April 18 of 2008. So you do have sufficient convictions in your history to make you a persistent offender. That means based upon these convictions, under Counts I, II, and III, the Court is required to impose a sentence of life imprisonment without the possibility of any type of parole. So that will be the sentence on Counts I, II, and III.

(CP 507; RP 1060-1061).

Mr. Smith appealed. (CP 484-485).

E. ARGUMENT

Issue 1: Whether the trial court erred in finding Mr. Smith guilty of first degree felony murder, where the evidence was insufficient that Mr. Smith or Ms. Muongkoth caused the death of Mr. Medina.

The trial court erred in finding Mr. Smith guilty of first degree felony murder, because there was insufficient evidence that Mr. Smith, or Ms. Muongkoth, caused the death of Mr. Medina. No witnesses saw Mr. Medina get shot. The only potential evidence showing Mr. Smith caused Mr. Medina's death is a surveillance video, which does not depict the actual shooting. Other individuals were present at the time of the shooting, and one individual fled the scene after the shooting, carrying unidentified items. No gun or bullet linked Mr. Smith to the shooting of Mr. Medina. Mr. Smith's conviction for first degree felony murder should be reversed and the charge dismissed with prejudice.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against

the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

Sufficiency of evidence in a bench trial is reviewed for “whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court’s conclusions of law.” *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citing *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001)). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding’s truth.” *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). The defendant challenging a finding of fact bears the burden of showing the finding was not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Unchallenged findings of fact are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

“In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *see also State v. Thomas*, 150 Wn. 2d 821, 874, 83 P.3d 970 (2004). “In rendering a guilty verdict, a trier of fact properly may rely on circumstantial evidence alone, even if it is also consistent with the hypothesis of innocence, so long as the evidence meets the *Green*

standard.” *State v. Kovac*, 50 Wn. App. 117, 119, 747 P.2d 484, 485 (1987); *see also Green*, 94 Wn.2d at 220-22 (setting forth the standard for reviewing sufficiency of the evidence: “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.”).

Circumstantial evidence “is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt.” *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224, 1228 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

In order to find Mr. Smith guilty of first degree felony murder, the trial court had to find the following elements, beyond a reasonable doubt:

[T]hat, on or about May 26, 2015, Mr. [Smith] committed or attempted to commit first-degree burglary; that Mr. [Smith], or an accomplice, caused the death of [Mr.] Medina in the course of or in furtherance of such crime or in immediate flight from such crime;

that [Mr.] Medina was not a participant in the crime of first-degree burglary or attempt to commit first-degree burglary; and that any of these acts occurred in the state of Washington.

(CP 411, 413); *see also* RCW 9A.32.030(1)(c) (first degree felony murder).

Under the evidence presented at the bench trial, a rational trier of fact could not have found Mr. Smith guilty, beyond a reasonable doubt, of first degree felony murder. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). There was insufficient evidence that Mr. Smith, or Ms. Muongkoth, caused the death of Mr. Medina.

None of the witnesses present at the time of the shooting (Mr. Marmolejo, Mr. Flores, and Mr. Baumgarden), who testified at trial, testified to seeing the shooting of Mr. Medina, or that Mr. Smith was the shooter. (RP 144-145, 215-216, 315-316). The only evidence presented by the State at trial to prove that it was Mr. Smith who caused the death of Mr. Medina was the surveillance video of Mr. Smith walking through the sales area of the shop a second time, into the small hallway near the east entrance to the store. (Pl.'s Ex. 1). However, the surveillance video does not show who shot Mr. Medina. (Pl.'s Ex. 1).

The nine-second portion of surveillance video shows the following: Mr. Smith walks into the small hallway; momentarily raises the gun in his right hand; lowers the gun back down; backs out of the hallway; turns around and faces forward; and walks through the sales area, to exit the building. (Pl.'s Ex. 1, at 3 minutes, 25 seconds to 3 minutes, 34 seconds).

Substantial evidence does not support the trial court's finding of fact 53, that "[a]fter briefly walking into the small hallway with his gun momentarily raised and out of view of the surveillance cameras, Mr. [Smith] sprung back, then walked directly back the way he entered." (CP 417); *see also Stevenson*, 128 Wn. App. at 193 (defining substantial evidence). The surveillance video does not depict that Mr. Smith "sprung back," which could connote he experienced kick-back from shooting his gun. (Pl.'s Ex. 1). Instead, the surveillance video depicts Mr. Smith backing out of the hallway, quickly turning around and facing forward, and exiting the sales area. (Pl.'s Ex. 1).

Further, substantial evidence does not support the trial court's finding of fact 86:

Given Mr. Medina's immediate response of raising his hands over his head and slowly laying on the floor the first time he was approached by Mr. [Smith], the Court finds that likely this was his response as Mr. [Smith] entered the small hallway. This would explain the direction the bullet traveled through Mr. Medina's body, the location the bullet was found in the wall, and Mr. [Smith's] quick response after briefly entering the hallway before quickly retreating.

(CP 408).

Without evidence of Mr. Medina's response when Mr. Smith entered the small hallway, either by testimony or by surveillance video, it is speculation to assume Mr. Medina had the same response as when Mr. Smith first approached him.

Dr. Howard's testimony does not support finding of fact 86; he did not testify that the bullet path through Mr. Medina's body was the result of Mr. Medina raising his hands over his head and slowly laying on the floor. (RP 318-335). To the contrary, Dr. Howard testified the bullet path through Mr. Medina's body means that potentially Mr. Medina was in an upright position when a gun was fired at him in a downward direction, or Mr. Medina may have been bent forward toward the direction of fire. (CP 407; RP 328-330). In addition, Mr. Smith's "quick response" does not support the finding that Mr. Medina raised his hands over his head and slowly laid on the floor. (CP 408). Finding of fact 86 was speculation, and not supported by substantial evidence. *See Stevenson*, 128 Wn. App. at 193.

Further, Mr. Smith's testimony regarding what occurred when he walked into the small hallway aligns with what the surveillance video shows. (RP 818-819, 893; Pl.'s Ex. 1). Mr. Smith testified he raised his gun, and after seeing nobody was there, he brought his gun back down. (RP 818-819, 893). Therefore, substantial evidence does not support the portion of the trial court's finding of fact 93, that "[t]he surveillance videos defeat Mr. [Smith's] testimony." (CP 409); *see also Stevenson*, 128 Wn. App. at 193. Likewise, substantial evidence also does not support the portion of the trial court's finding of fact 89, that "[Mr. Smith's] testimony is inconsistent with most of the facts in this case." (CP 409).

Further, substantial evidence does not support the trial court's finding of fact 97:

Under such an adrenaline-producing event, as well as after drinking alcohol and smoking marijuana, it seems unlikely that those inside Northwest Accessories on May 26, 2015, if armed with firearms, would have the wherewith all to avoid being detected by any of those numerous cameras. This supports the conclusion that no one else within Northwest Accessories was involved in the shooting death of Mr. Medina.

(CP 410).

Surveillance cameras do not record every room in the shop. (RP 95-96). Seven areas of the shop lacked surveillance cameras, including the small hallway Mr. Smith walked down. (RP 95-96). Given this fact, substantial evidence does not support the finding of fact that "it seems unlikely that those inside [the shop] . . . if armed with firearms, would have the wherewith all to avoid being detected by any of those numerous cameras." (CP 410). There were many areas those present that night could have gone, while armed, and not be captured by surveillance video. (RP 95-96).

In addition, Officer Benesch testified Mr. Baumgarden's demeanor changed when he asked him about the cameras inside the shop. (RP 703, 705-706). Officer Benesch testified "based on the way he was acting, it lead me to believe that he did not want us to see whatever was on the . . . video footage." (RP 707). This fear of being detected on video also shows that substantial evidence does not support the finding of fact that "it seems unlikely that those

inside [the shop] . . . if armed with firearms, would have the wherewith all to avoid being detected by any of those numerous cameras.” (CP 410).

The facts presented at trial do not support a finding, by substantial evidence, that no one else within the shop was involved in the death of Mr. Medina. (CP 410). In addition to the limited surveillance cameras, Mr. Zornes fled the shop after the shooting with unidentified items. (CP 405; RP 147, 224-225, 579-580, 582-584, 613). The extended video clips from the surveillance cameras, showing footage after the shooting, show Mr. Zornes carrying something around. (RP 583-584; Def.’s Ex. 206). Detective Lebsock testifies it could have been the firearm used to shoot Mr. Medina. (RP 584). The extended video clips also show a conversation between Mr. Marmolejo and Mr. Zornes prior to Mr. Zornes leaving. (RP 586; Def.’s Ex. 206).

Finally, substantial evidence does not support the trial court’s finding of fact 102:

Given Mr. Marmolejo’s demeanor and statements, it seems reasonable to believe that if he was armed with a firearm on May 26, 2015, there would have been some evidence, rather than just speculation, to support it.

(CP 410).

Evidence was presented that Mr. Marmolejo owned a .357 magnum that he kept in a Crown Royal bag. (CP 410; RP 153-154, 584, 613). Following the shooting, the Crown Royal bag was found, but not the firearm. (CP 410; RP 390-391; Def.’s Ex. 249). In addition, the extended video clips show a conversation

between Mr. Marmolejo and Mr. Zornes. (RP 586; Def.'s Ex. 206). Mr. Zornes then fled the shop after the shooting with unidentified items. (CP 405; RP 147, 224-225, 579-580, 582-584, 613). This is evidence that Mr. Marmolejo was armed with a firearm on the night in question, not merely speculation.

In addition, Mr. Marmolejo testified that when Mr. Medina was shot, he was back in the tattoo room area. (RP 124, 144-145). There was evidence presented at trial that shows both that Mr. Marmolejo was armed with a firearm that was later removed from the scene by Mr. Zornes, and also that he was in a position, in the tattoo room area, to have fired the shot at Mr. Medina. (CP 405, 410; RP 147, 224-225, 390-391, 579-580, 582-584, 586, 613; Def.'s Ex. 249).

In addition to the lack of video surveillance or testimony to show who shot Mr. Medina, there was no gun or bullet linked to Mr. Smith to establish him as the shooter of Mr. Medina. Millions of guns could have fired the bullet found at the shop. (CP 407-408; RP 476). No firearms were recovered in this case. (CP 407, 410; RP 384-386, 388, 588). There was no forensic evidence connecting Mr. Smith to the bullet that killed Mr. Medina.

A rational trier of fact could not have found Mr. Smith guilty, beyond a reasonable doubt, of first degree felony murder, where no witnesses saw Mr. Medina get shot; the only potential evidence showing Mr. Smith caused Mr. Medina's death is a surveillance video which does not depict the actual shooting; and no gun or bullet linked Mr. Smith to the shooting of Mr. Medina. *See*

Salinas, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). This evidence is not more than a mere scintilla. See *Fateley*, 18 Wn. App. at 102. And, the circumstantial evidence does not meet the *Green* standard. See *Kovac*, 50 Wn. App. at 119; see also *Green*, 94 Wn.2d at 220-22. Any rational trier of fact could not have found, beyond a reasonable doubt, that Mr. Smith caused the death of Mr. Medina. See *Green*, 94 Wn.2d at 220-22.

Based on the evidence presented at the bench trial, a rational trier of fact could not have found Mr. Smith guilty, beyond a reasonable doubt, of first degree felony murder. See *Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). The trial court's findings of fact do not support its conclusion of law that there is sufficient evidence to find Mr. Smith guilty of first degree felony murder. See CP 400-411, 413-414; see also *Smith*, 185 Wn. App. at 956 (citing *Alvarez*, 105 Wn. App. at 220). There was insufficient evidence that Mr. Smith, or Ms. Muongkoth, caused the death of Mr. Medina. Mr. Smith's conviction for first degree felony murder should be reversed and the charge dismissed with prejudice. See *Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: Whether a mandatory sentence of life without the possibility of parole, with no consideration of Mr. Smith’s youthfulness at the time he committed the current offenses or the predicate offenses, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under Article I, section 14.

The trial court violated Mr. Smith’s rights under the Eighth Amendment of the United States Constitution and article I, section 14 of the Washington Constitution, by imposing a sentence of life without the possibility of parole with no consideration of Mr. Smith’s youthfulness at the time he committed both the current offenses or the predicate offenses. The case should be reversed and remanded for resentencing for the trial court to exercise its discretion on whether to impose a life sentence.

All three divisions of the Court of Appeals have rejected the argument that sentencing an adult offender to life in prison without the possibility of parole, pursuant to the Persistent Offender Accountability Act (POAA), based on prior strike offenses the defendant committed when he was a youthful adult (i.e., ages 19, 20, and 21), constitutes cruel and unusual punishment under the United States Constitution or cruel punishment under the Washington Constitution. *See State v. Moretti*, No. 47868-4-II, 2017 WL 4899567, at *9-10 (Wash. Ct. App. Oct. 31, 2017), *review granted in part*, 433 P.3d 805 (Wash. 2019); *State v. Nguyen*, No. 74962-5-I, 2018 WL 417969, at *3-4 (Wash. Ct. App. Jan. 16, 2018), *review granted in part*, 433 P.3d 820 (Wash. 2019); *State v. Orr*, 34729-0-III, 2018 WL 1960197, *4 (Wash. Ct. App. Apr. 26, 2018), *review granted in part*, 433 P.3d

815 (Wash. 2019); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). Nonetheless, on February 6, 2019, our Supreme Court granted review of this sentencing issue in these three cases. *Id.* Therefore, Mr. Smith raises this sentencing challenge herein, to preserve the issue, should our Supreme Court reverse the Court of Appeals and find such a sentence under the POAA unconstitutional.

Mr. Smith also raises the additional issue that sentencing an adult offender to life in prison without the possibility of parole, pursuant to the POAA, based on current offenses the defendant committed when he was a youthful adult (here, at age 25), constitutes cruel and unusual punishment under the United States Constitution or cruel punishment under the Washington Constitution.

Although defense counsel argued there are mitigating factors in Mr. Smith's case, he did not object to the POAA sentence at Mr. Smith's sentencing hearing. *See* RP 1055-1057. Nonetheless, the issue is properly raised here, because illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Rivers*, 130 Wn. App. 689, 697, 128 P.3d 605 (2015); *see also* RAP 2.5(a)(3) (a party may raise a manifest error affecting a constitutional right for the first time on appeal). Alleged constitutional violations are subject to *de novo* review. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

Under the POAA, “a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release. . . .” RCW 9.94A.570.

A persistent offender is defined as follows, in relevant part:

“Persistent offender” is an offender who:

- (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
- (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted[.]

RCW 9.94A.030(38)(a).

“Most serious offense” includes, among other enumerated offenses, any class A felony, or conspiracy to commit a class A felony, and second degree assault.

RCW 9.94A.030(33).

Mr. Smith was sentenced to life imprisonment without the possibility of parole under the POAA. (CP 507; RP 1060-1061). He was 25 years old when he committed the current offenses. (CP 104-105; 503-514). He committed the two prior strike offenses (most serious offenses) relied upon by the trial court when imposing his POAA sentence, at age 18 (second degree assault) and age 19 (first degree burglary). (CP 360-385, 516-517; RP 1060-1061). Both Mr. Smith’s current offenses and the predicate strike offenses were committed within the age at which our Supreme Court has recognized the characteristics of youth persist.

See State v. O'Dell, 183 Wn.2d 680, 695, 358 P.3d 359 (2015) (acknowledging that “age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.”).

Mr. Smith’s POAA sentence amount to both cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and cruel punishment in violation of article I, section 14 of the Washington Constitution.

The Eighth Amendment extends special protection to juveniles. For example, the death penalty for juveniles is unconstitutional. *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In so holding, the Supreme Court recognized “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Id.* In addition, life-without-parole sentences for juveniles convicted of nonhomicide offenses are unconstitutional. *Graham v. Florida*, 560 U.S. 48, 68-70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). “[C]riminal proceedings that fail to take defendants’ youthfulness into account at all would be [constitutionally] flawed.” *Id.* at 76. The Supreme Court also held “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). “By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison

sentence, such a scheme poses too great a risk of disproportionate punishment.” *Id.*

In *State v. Houston-Sconiers*, our Supreme Court held “[t]rial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA [Sentencing Reform Act] range and/or sentence enhancements.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 34, 391 P.3d 409 (2017).

In *O’Dell*, our Supreme Court held “a defendant’s youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise discretion to decide when that is.” *O’Dell*, 183 Wn.2d at 699. The *O’Dell* Court reasoned that the same characteristics of youth, based on the same scientific findings relied on by *Miller*, *Roper*, and *Graham*, require a sentencing court to consider whether a youthful defendant should receive an exceptional sentence below the standard range under the SRA, even if the defendant was over the age of 18 at the time of offense. *Id.* at 689, 691-92, 695. In reaching this holding, *O’Dell* quoted from one study that “[t]he 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 A. Rae Simpson, *MIT Young Adult Development Project: Brain Changes*, Mass. Inst. of Tech. (2008)), available at <http://hr.mit.edu/static/worklife/youngadult/brain.html> (last visited Feb. 27,

2019)). “The law acknowledges that one’s 18th birthday does not mark some abrupt and mystic translation into the mind of an adult.” *Moretti*, 2017 WL 4899567, at *18 (J. Bjorgen, dissenting); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

The same characteristics that led to the Eighth Amendment analyses and holdings of *Roper*, *Graham*, and *Miller*, and to the constitutional and statutory analyses of *Houston-Sconiers* and *O’Dell*, also apply to crimes committed at age 18, 19, and 25, when Mr. Smith committed the current offenses and predicate strike offenses. Mr. Smith was not sentenced to life without the possibility of parole only for the current offenses, or for any single strike conviction. Rather, his sentence rested equally on the current offenses and predicate strike offenses. Because he could not have been sentenced under the POAA without his predicate strike offenses, his life sentence was as much a punishment for his first and second strike offenses as it was for the current offenses.

Mr. Smith’s POAA sentence also amounts to cruel punishment in violation of article I, section 14 of the Washington Constitution. It is well established that this provision 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); *State v. Fain*, 94 Wn.2d 387, 391-92, 617 P.2d 720 (1980).

While holding that article 1, 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 640 (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.” *Id.* at 396.

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. *Id.* 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. *Fain*, 94 Wn.2d at 402.

Our 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. *See Roper*, 543 U.S. at 574; *Graham*, 560 U.S. at 68-70; *Miller*, 567 U.S. at 479; *O'Dell*, 183 Wn.2d at 699. 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. As the dissent in *Moretti* stated:

In *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996), *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996), and *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014), our Supreme Court upheld the POAA against various challenges, including those based on the Eighth Amendment to the United States Constitution and article I, section 14 of our state constitution. None of these decisions, though, involved issues relating to the characteristics of youth, and each of them were decided before the court's ground-breaking opinions in *O'Dell* and *Houston–Sconiers*, which touch directly on the present issues. Thus, these prior POAA cases do not speak to this case.

Moretti, 2017 WL 4899567, at *19 n.12 (J. Bjorgen, dissenting); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

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.

“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 v. Louisiana*, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016) (citation omitted). An evaluation of all the relevant factors demonstrates that Mr. Smith’s life sentence violates article I, section 14. Mr. Smith was just 18 and 19 years old when he committed the two predicate offenses, and 25 years old when he committed the current offenses. At these ages, his mental and emotional development was far from complete. *See O’Dell*, 183 Wn.2d at 691-92. Mr. Smith’s sentence of life without the possibility of parole is disproportionate in light of all relevant circumstances.

“[W]hile no defendant is entitled to an exceptional sentence . . . , every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (quoting *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). The case must be remanded for resentencing to enable the trial court to exercise its discretion on whether to impose a life sentence.

F. CONCLUSION

The evidence presented at trial was insufficient to find Mr. Smith guilty of first degree felony murder. There was insufficient evidence that Mr. Smith, or Ms. Muongkoth, caused the death of Mr. Medina. This conviction should be reversed and the charge dismissed with prejudice.

This case should also be reversed and remanded for resentencing for the trial court to exercise its discretion on whether to impose a life sentence.

Respectfully submitted this 27th day of February, 2019.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

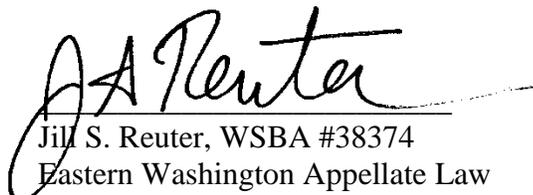
STATE OF WASHINGTON)	
Plaintiff/Respondent)	COA No. 36213-2-III
vs.)	Spokane Co. No. 15-1-02459-1
)	
JEREMIAH A. SMITH)	PROOF OF SERVICE
also known as GLENN A. AKERS)	
Defendant/Appellant)	
_____)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 27, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served a copy on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 27th day of February, 2019.


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February 27, 2019 - 10:46 AM

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Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: State of Washington v. Jeremiah Smith, aka Glenn A. Akers
Superior Court Case Number: 15-1-02459-1

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