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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEREMIAH SMITH, a/k/a GLENN A. AKERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether substantial evidence supports those findings of fact now assigned as error on appeal?
2. Did the State present sufficient evidence that the defendant or an accomplice caused the death of the victim?
3. Whether the defendant's constitutional challenge to his sentence was waived by his failure to raise the issue below, or whether the error is manifest or obvious?
4. Does the defendant's persistent offender sentence violate either the Eighth Amendment or article I, section 14, where the court was not asked to consider whether the defendant's youthfulness merited an exceptional sentence downward from the mandatory sentence of life in prison without the possibility of parole?

II. STATEMENT OF THE CASE

The defendant, Jeremiah Smith, also known as Glenn Akers, was charged by second amended information on November 10, 2015, with one count of first degree felony murder predicated on a first degree burglary, first degree burglary, first degree assault, first degree unlawful possession of a firearm, and tampering with a witness. CP 104-05. The first degree felony murder, first degree burglary and first degree assault were all charged with a special allegation that the defendant committed the offenses with a firearm. *Id.* The matter proceeded to a bench trial before the Honorable John O. Cooney on May 21, 2018. The court found the defendant guilty of all charges except for the charges of conspiracy to commit first degree robbery and tampering with a witness. CP 411-17.

Substantive facts – background.

Jeremiah Smith, also known as Glenn Akers and “King,” met Vatsana Muongkoth, also known as “Linnie,” in approximately 2008. CP 400 (FF 1).¹ They dated until approximately 2013, although they did not see each other after 2009. CP 400 (FF 2). In 2013, Muongkoth met Ruben Marmalejo, and the pair began dating, although Marmalejo was married to a woman living in Moses Lake. CP 401 (FF 6-8). Marmalejo was an uncle to Ceasar Medina, the victim in this case, who, at the time of his death was 17-years-old. CP 401 (FF 10-11). Medina lived with Marmalejo and Muongkoth in Spokane. CP 401 (FF 11).

Ruben Flores founded a business called Northwest Accessories (“NWA”), which, in May 2015, was located at 3400 North Monroe Street in Spokane. CP 401 (FF 16). NWA sold pipes, glassware, apparel and, probably, synthetic marijuana. CP 401 (FF 17). NWA was poorly managed, and multiple people congregated at the shop, including Muongkoth, who assisted with running the business. CP 402 (FF 19-20). Within NWA, Anthony Baumgarden operated a tattoo business. CP 402 (FF 21).

¹ As explained below, unchallenged findings of fact are verities on appeal. Challenged findings of fact are further discussed below with additional citations to the record.

In the weeks preceding May 26, 2015, Muongkoth and Smith began seeing each other again, and on May 24, 2015, spent the night in a hotel room. CP 402 (FF 24-25). The following morning, Mr. Smith found a duffle bag containing numerous firearms and two kilograms of cocaine in Muongkoth's Chevy Suburban; the contraband ostensibly belonged to Marmelejo. CP 402 (FF 25). Muongkoth took Smith home before noon on May 25, 2015, and, although Smith claimed that he did not see Muongkoth again until 10:00 p.m. that night, a photograph of the two was taken at 7:47 p.m. CP 402 (FF 26-28).

During the evening of May 25, 2015, multiple individuals congregated at NWA – Medina, Flores, Marmelejo and Baumgarden were there, as were Shane Zornes and Juan Cervantes; all were drinking beer or smoking marijuana, or both. CP 402 (FF 29). Muongkoth and Marmelejo argued by text message about Marmelejo's failure to leave his wife or Muongkoth's relationship with Smith; Marmelejo and Muongkoth threatened each other with violence. CP 402-03 (FF 30).

At approximately 9:30 p.m., a neighbor to NWA heard what he thought to be gunshots; however, what he heard and observed was Muongkoth striking Marmelejo's BMW with an aluminum bat. CP 403 (FF 32-33). Later, Muongkoth and Smith decided to go to NWA; Smith claimed that they intended to return Marmelejo's contraband. CP 403

(FF 36). At 11:22 p.m. Muongkoth told Smith by text message, “delete these text messages.” Smith replied at 11:23 p.m., “lets go to the shop then.” CP 406 (FF 65). Smith and Muongkoth did not use Muongkoth’s Suburban, but rather drove her roommate’s vehicle to NWA. CP 403 (FF 36).

During this time, Zornes and Flores were returning to the shop in Marmalejo’s BMW after running an errand; immediately preceding their return, Smith and Muongkoth drove past NWA from west to east on Cora Avenue. RP 403 (FF 37). After passing the shop, Muongkoth and Smith noticed Marmalejo’s BMW (occupied by Zornes and Flores) turn from northbound Monroe Street onto west Cora Avenue and park in the NWA parking lot. CP 403 (FF 37). Muongkoth circled the block to the west and returned to NWA heading east on Cora; she parked hidden from view from those at the shop. CP 403 (FF 38).

Events occurring when Smith and Muongkoth entered NWA.

Muongkoth and Smith immediately exited the vehicle, leaving Marmalejo’s contraband inside. CP 403 (FF 39). Both were armed with a firearm when they ran to the west entrance of NWA. CP 403 (FF 39). Video surveillance showed Smith and Muongkoth enter NWA through the west door. CP 404 (FF 41). Just prior to their entry, Flores exited his office and went to the TV/lounge room. CP 404 (FF 41). Suddenly, he and another

individual darted out of the TV/lounge room into the sales area, rushed north to the long hallway before turning east down the long hallway. CP 404 (FF 41).

Smith and Muongkoth emerged from the TV/lounge room into the sales area. CP 404 (FF 45). Interior surveillance video showed that as they appeared from the TV/lounge room into the sales area, Smith grabbed Muongkoth and pulled her back into the TV/lounge room. CP 404 (FF 45).

Flores and Medina then entered the sales area through the small hallway near the main sales entrance to investigate; while Medina remained in the sales area, Flores peeked into the TV/lounge room before suddenly turning and running into his office. CP 404 (FF 43). Twenty-four seconds after pulling Muongkoth back into the TV/lounge, Smith emerged with his gun drawn, and entered the sales area; at approximately the same time, Muongkoth emerged from where the bathroom door connected to the long hallway. CP 404 (FF 44-45). Medina, still in the sales area, was unable to hide or retreat from Smith; Smith approached Medina with his gun drawn and Medina slowly backed toward the small hallway while raising his hands over his head. CP 404 (FF 45-46). As Medina laid on the floor, Smith approached him, and placed his gun to Medina's head. CP 404 (FF 46).

Concurrently, Baumgarden, who had been in the tattoo room, heard someone yell, "get down"; in response, Baumgarden looked into the sales

area from the small hallway and observed Smith holding someone at gunpoint. CP 404 (FF 47). Baumgarden threw a metal propane bottle at Smith with the intent of defending the person held at gunpoint on the floor (Medina). CP 404 (FF 47). In response, Smith aimed the gun down the small hallway to the east and fired a single shot.² CP 404 (FF 46, 48). Baumgarden, knowing the shot had been fired at him, went through the small room on the east side of the building into the long hallway and into the basement.³ CP 404 (FF 48). This shot fired by Smith travelled down the small hallway, struck the south wall of the hallway and exited the building through the wall, shattering an exterior light fixture. CP 405 (FF 50). Smith left Medina, jumped over a display case and fled into the bathroom, following Muongkoth. CP 405 (FF 51). Medina rose from the floor and walked east down the small hallway. CP 405 (FF 51).

Thirty-two seconds after Medina was first placed into a prone position on the floor, Smith reentered the sales area through the TV/lounge room door. CP 405 (FF 53). Smith walked through the sales area and into the small hallway with his gun raised, temporarily leaving the view of the

² The defendant challenges this finding of fact.

³ While in the basement, Baumgarden heard another gunshot; in total, he heard two to three shots, with a break in between. CP 405 (FF 49).

surveillance cameras. CP 405 (FF 53). Smith then “sprung back” and left the sales room in the direction he had entered.⁴ CP 405 (FF 53).

A short time later, after Smith and Muongkoth left the building, Baumgarden emerged from the basement, and found Medina on the floor of the long hallway near the tattoo room; a trail of blood led from the southeast hallway doorjamb, into the long hallway, through the tattoo room and back into the long hallway where Medina was located. CP 405 (FF 54-55).

Marmolejo called 911 at approximately the same time Smith and Muongkoth fled NWA. CP 405 (FF 57). Others within NWA appeared “preoccupied with something other than Medina,” and Zornes left the store before police arrived, carrying unidentified items. CP 405 (FF 57). The remaining individuals dragged Medina from the building through the bathroom exit taken by Smith; they placed him in Marmolejo’s car and attempted to transport him to a hospital. CP 405 (FF 58). They were pulled over by Lieutenant Sprague less than one block away from NWA. CP 405 (FF 58).

Medina’s injury and ballistics.

Medina died – a bullet had entered the lower left side of his neck and passed through his body, exiting the upper left area of his back, striking

⁴ The defendant challenges this finding of fact.

veins, an artery, a lung, his collarbone and three ribs. CP 407 (FF 71). The only bullet fragment that was removed from Medina's body was a copper jacket to a bullet located near the exit wound.⁵ CP 407 (FF 71). Dr. Howard, the medical examiner, opined that the injuries would have led to significant blood loss, causing Medina to collapse within seconds of being shot. CP 407 (FF 73). Howard testified that the bullet entry wound was higher than the exit wound – which meant that either Medina was in an upright position when a gun was fired at him in a downward direction or was bent forward toward the direction of the bullet. CP 407 (FF 73). It was likely that Medina was leaning forward to lay on the floor at the time he was shot; this explains the trajectory of the bullet, and was consistent with his initial reaction to Smith when Smith aimed the gun at him during the initial encounter on the sales floor.⁶ CP 408 (FF 86).

Investigators searched NWA, and found no spent shell casings. CP 407 (FF 74). Other than the bullet defect found in the small hallway (which occurred when Smith fired his gun in response to Baumgarden throwing the propane bottle), investigators found only one other bullet defect; it was located on the east wall in the small room that separated the

⁵ Other bullet fragments were detected by x-ray within Medina's body but were not removed. CP 407 (FF 72).

⁶ The defendant challenges this finding of fact.

small hallway from the long hallway, and was south of the window and approximately four feet above the floor. CP 407 (FF 75). In the defect, investigators found the lead portion of a bullet; a firearms examiner testified that it was possible the lead core found in the wall was inside the copper jacket found near Medina's exit wound. CP 407-08 (FF 76-79). Video surveillance did not show anyone retrieving shell casings from the floor, making it likely that Smith was armed with a revolver – either a .357 magnum or .38 special, neither of which eject shell casings when fired. CP 407-08 (FF 78-82). At trial, Smith stipulated to knowingly possessing a firearm. CP 408 (FF 87).

Smith and Muongkoth's actions after leaving NWA.

After leaving NWA, Smith and Muongkoth returned Muongkoth's roommate's car and travelled in Muongkoth's Suburban to Brittany Verzal's house; Verzal was a close friend to Muongkoth. CP 401, 406 (FF 12, 60). While at Verzal's house they learned of the shooting at NWA; Muongkoth became upset and Smith became very quiet. CP 406 (FF 61). Bobbie Stuhlmiller, Smith's girlfriend, came to pick Smith up at Verzal's house at his request. CP 406 (FF 62). Verzal and Muongkoth decided to go back to NWA and then to visit local hospitals in search of the victim of the shooting. CP 406 (FF 63). Verzal thought it odd

that Muongkoth demanded that Verzal drive Muongkoth's vehicle. CP 406 (FF 63).

At 12:22 a.m. on May 26, 2015, after Muongkoth and Smith had exchanged no other text messages since 11:23 p.m. the preceding night, Smith texted Muongkoth, "turn on the news." CP 406 (FF 66). Muongkoth also began texting Marmelejo, making it known she was aware of the shooting. CP 406 (FF 67). Muongkoth texted Smith, telling him to get rid of his sweater. CP 406 (FF 68). In reply, Smith instructed Muongkoth to calm down and to "not say nothing to no one." CP 406 (FF 68). Later, Smith told Stuhlmiller that he "tried to hit a lick that night but it went ba[d]." ⁷ CP 407 (FF 69).

In addition to challenging the noted findings of fact above, defendant also challenges the trial court's rejection of portions of his testimony. As discussed below, however, it was within the province of the fact finder to believe or disbelieve any of the witnesses.

From the above facts, the trial court found the defendant guilty of first degree felony murder as charged, as well as several other offenses which are not contested by the defendant on appeal.

⁷ The term "hit a lick" is slang for robbery. CP 407 (FF 69).

Procedural history.

The matter proceeded to sentencing on July 12, 2018. CP 512. The defendant's prior criminal history consisted of second degree assault (2008 offense sentenced in 2010),⁸ first degree burglary (2009 offense sentenced in 2010),⁹ conspiracy to commit first degree robbery (2009 offense sentenced in 2010), and first degree robbery (2007 offense sentenced in 2008).¹⁰ CP 506. The court sentenced the defendant to life in prison without the possibility of early release as a persistent offender on counts 1, 2, and 3. CP 507.

⁸ The defendant was born on December 22, 1989. CP 360. The second degree assault occurred on December 17, 2008, when the defendant was 18 years, 11 months and 360 days old. CP 360. For that offense, he was sentenced to 44 months in prison to run concurrently with the 2009 offenses. CP 364.

⁹ The 2009 first degree burglary and conspiracy to commit first degree robbery occurred on November 16, 2009, when the defendant was 19 years, 10 months and 340 days old. CP 373. For those offenses, the defendant was sentenced to 44 months and 80 months (including a 36-month firearm enhancement), respectively, to run concurrently to each other. CP 377.

¹⁰ This first degree robbery occurred on July 26, 2007, and the defendant was sentenced on July 26, 2008. CP 386. At the time of this offense, the defendant was approximately 17 and one-half years old. CP 386. The defendant was sentenced in adult court, CP 386, was granted an exceptional sentence downward from the standard range of 31 to 41 months, CP 388, and was ordered to serve 12 months confinement with 36 months of community custody, CP 392-93.

III. ARGUMENT

A. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND ITS CONCLUSIONS OF LAW WERE PROPER; THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR FIRST DEGREE FELONY MURDER.

1. Standard of review for challenged factual findings.

Following a bench trial, appellate review is limited to determining whether substantial evidence supports the challenged findings of fact and, if so, whether the findings of fact support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Unchallenged findings of fact are verities on appeal. *Id.* at 106. A defendant challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence exists when it is enough “to persuade a fair-minded person of the truth of the stated premise.” *State v. Russell*, 180 Wn.2d 860, 866-67, 330 P.3d 151 (2014). Stated differently, substantial evidence is “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Deference is given to the trier of fact who resolves conflicting testimony, evaluates witness

credibility and decides the persuasiveness of material evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989), *amended*, 113 Wn.2d 591 (1990), *opinion amended on reconsideration* (Apr. 13, 1990).

As this Court stated in *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010): “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” Moreover, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

2. Discussion of challenged findings of fact.

a. *The floorplan of NWA is crucial to an understanding of the trial court’s findings.*

In its oral findings of fact, incorporated by reference into its written findings of fact, the trial court set forth its understanding of the floor plan of NWA. RP 1003-05; CP 402. A diagram of NWA was identified and marked as Ex. P2, but was not admitted into evidence; therefore, the court’s full description of the floor plan of NWA is reproduced below.

The structure locate[d] at 3400 North Monroe Street was laid out as follows. Mr. Baumgarden’s tattoo area was located along the north side of the building, primarily to the east. To the south of the tattoo

area was the hallway that ran east and west. It paralleled Mr. Baumgarden's tattoo area. The Court will refer to this hallway as the long hallway.

There were two doors connecting Mr. Baumgarden's tattoo area to the long hallway; one on the east side and the other near the center of the building. On the south side of the long hallway near the second doorway to Mr. Baumgarden's tattoo area was a door that lead into a basement.

To the west, the long hallway ended at a bathroom. The west side of the bathroom connected into a vestibule. The vestibule was accessible through the west entrance to the building.

If entering through the west entrance, a person could go north through the vestibule and then east into the bathroom and then into the long hallway. Where the long hallway and bathroom met, the sales area could be accessed.

When entering through the west entrance, a person could turn south to what was commonly referred to as the TV/lounge room. Through the TV/lounge room, one could then access the sales area through a door.

The southeast corner of the building was an area generally open to the public. The public entrance was located near the middle of the building on the east side.

The east entrance led into the southeast room, which contained the merchandise. The Court will refer to this room as the sales area.

The sales area had a glass display case that ran along the south, west, and north walls. There was a walkway between the walls and the display cases allowing sales personnel to access the displays.

There [were] a total of five points of entry into the sales area. One could enter from the east entrance; from Mr. Flores' office in the southwest corner; from the TV/lounge room on the west side, which was next to Mr. Flores' office; or from the long hallway on the north side where the long hallway met the bathroom.

Lastly, just north of the east entrance was a small hallway that led to the sales area to the east. The Court will refer to this hallway as the small hallway. The small hallway connected the sales area to a small room that set to the south of the long hallway. From the small room, one could see across the long hallway into Mr. Baumgarden's tattoo area through the east door to his work area.

RP 1003-05.

b. Finding 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."

The defendant faults the trial court for characterizing his movement after briefly walking into the small hallway, gun raised, as "springing back." Br. at 25. Defendant argues that the video surveillance does not show him "spring back," consistent with the kick-back of a gun but rather, that he "backed out of the hallway, quickly turning and facing forward and exiting the sales area." Br. at 25. However, the trial court never found that the defendant's action of "springing back" was indicative of the kick-back one might experience upon shooting a gun. CP at *passim*; RP at *passim*. And, contrary to the defendant's claim on appeal, the video clearly demonstrates more than him simply "back[ing] out of the hallway." Ex. P1. The video reflects that after the defendant briefly walked into the short hallway, gun raised, he then hopped, skipped, or popped backward, giving the appearance of "springing" backward. Ex. P1. The court's characterization of the defendant's movements is supported by substantial evidence, the

surveillance video, and is not subject to further review. The defendant simply does agree with the manner in which the court characterized the evidence, despite the fact that the characterization is fully supported by the surveillance video.

c. 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.”¹¹

The defendant claims that Finding of Fact 86 is speculation, arguing the medical examiner’s testimony does not support it. He also asserts that

¹¹ The defendant also assigns as error Conclusion of Law 18 and Conclusion of Law 21, which state:

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.

CP 413-14.

These “conclusions of law” appears to be “findings of fact.” A finding of fact is a determination of “whether...evidence shows that something occurred or existed.” *Casterline v. Roberts*, 168 Wn. App. 376, 382, 284 P.3d 743 (2012) (alteration omitted). A conclusion of law is a “determination...made by a process of legal reasoning from facts in evidence.” *Id.* at 382-83 (alteration omitted). Where a finding of fact is mislabeled as a conclusion of law, it is reviewed by the appellate

Smith's "quick response" after briefly entering the small hallway does not support the finding that Medina raised his hands and slowly laid on the floor before being shot. Br. at 26.

In crafting Finding of Fact 86, the court attempted to explain three pieces of evidence – the bullet trajectory through Medina's body, the location of the bullet fragment in the east wall of the small room, and Smith's movement after entering the small hallway with his gun raised, all of which are inextricably related.

The trajectory of the bullet was significant because it would either have required (1) Medina to be shot at a downward angle from above or (2) Medina to be shot while bending forward. RP 328-30; CP 407; Ex. P39. There was no evidence that Medina was shot from above. Except for perhaps a crawl space or rafters, NWA was a single-story building with a subterranean basement and there was no evidence that any person, let alone someone with a gun, shot him from the rafters, crawl space, roof or ceiling. In this context, there were no bullet defects noted anywhere other than those

court as a finding of fact (and vice versa – a conclusion of law mislabeled as a finding of fact is reviewed as a conclusion of law). *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Because these "conclusions of law" do not involve any legal reasoning, but rather, factual reasoning or rejection of certain testimony, they should be reviewed as findings of fact. Because these "conclusions" are similar in many respects to the other contested findings of fact, the analysis of whether substantial evidence exists in support of those findings would be the same.

found on the external wall of the small hallway and the small room connecting the small hallway and long hallway. Ex. P15-P18, P28-P31. From this circumstantial evidence, which is no less compelling than direct evidence, it was reasonable for the trial court to conclude that Medina was leaning forward when he was shot. It was also compelling circumstantial evidence that, when previously confronted by Smith and his gun in the sales area, Medina leaned forward in order to lay on the floor in a submissive, prone position. Ex. P1. Based upon this evidence, the court could reasonably conclude that Medina was in the process of prostrating himself when he was shot. That Medina was leaning forward at the time he was shot is the *only* reasonable explanation for Medina's injuries which is consistent with this evidence.

Further, the finding of fact that Medina was leaning forward when shot is supported by the location of the bullet defect and fragment in the east wall of the small room. Given the location of the defect and the trail of blood, Medina had to have been shot in the small room connecting the small and long hallways. The bullet defect found within the small room connecting the small and long hallways was approximately four feet off the floor. CP 407 (FF 75); RP 362. Medina's wound track had to be aligned with the defect in the wall. RP 328-29. The blood trail found in NWA led from the small room, through the long hallway, into the tattoo room, and

back into the long hallway where Medina was ultimately found. CP 405 (FF 54-55); Ex. P68-P70, P72-P83; RP 381. The absence of any other ballistic evidence – other bullet defects, spent shell casings, shattered glass, etc., and the presence of an obvious bullet wound, leads to only one conclusion – that Medina was fatally shot while leaning forward in the small room connecting the small and long hallways.

Lastly, the court stated that Medina was likely in the process of laying down when he was shot which explains Smith’s quick response after briefly entering the hallway before quickly retreating; defendant assigns error to this statement. But it was logical for the court to find that Smith, who entered the west entrance of the small hallway, observed and quickly shot Medina, who was located within the small room at the east end of the small hallway. This explanation was a reasonable factual determination after a thorough review of the video surveillance, Ex. P1, photographs, other forensic evidence and testimony. The court, as the trier of fact, was free to reject the defendant’s testimony to the contrary.

d. Finding of Fact 89: “[Mr. Smith’s] testimony is inconsistent with most of the facts in this case...,” and Finding of Fact 93: “The surveillance videos defeat Mr. [Smith’s] testimony....”

The defendant claims that the trial court erred in finding that his testimony was inconsistent with most of the other facts presented and that

his testimony was defeated by the surveillance videos. Regarding Finding of Fact 89, the court stated, “*This* testimony is inconsistent with most of the facts in this case.” CP 409 (emphasis added). The use of the word “this” refers to the preceding finding of fact, in which the court found that:

[Smith] claimed at trial he was attempting to return Mr. Marmelejo’s guns and cocaine. During this attempt Mr. Marmelejo was leading he and Ms. Muongkoth from location to location. Eventually he and Ms. Muongkoth got fed up with Mr. Marmelejo’s games and returned to her residence. They then thought it was best to return the contraband to Marmelejo at Northwest Accessories.

CP 408 (FF 88).

Thus, the court’s Finding of Fact 89, refers to the preceding finding of fact pertaining to the defendant’s explanation of why he and Muongkoth went to NWA. The Court further explained in Finding of Fact 89 that “it defies prudence to believe Mr. [Smith] and Ms. Muongkoth would travel to Northwest Accessories to drop off Mr. Marmelejo’s drugs and guns” after Muongkoth had earlier vandalized Marmelejo’s car, and believing the individuals who were within NWA were “heavily armed” and “laying in wait” and ready to ambush. The trial court’s credibility determination pertaining to Mr. Smith’s proffered reason for going to NWA is not subject to review by this Court. The trial court did not err in making this credibility determination or entering it as Finding of Fact 89.

Defendant also challenges Finding of Fact 93's assertion that "the surveillance videos defeat Mr. Smith's testimony." Br. at 26. This finding does not pertain, as Smith now asserts, solely to his testimony that when walking down the small hallway, he raised his gun, and, seeing no one was there, he brought his gun back down," Br. at 26, and is, therefore, a mischaracterization of the court's finding. Finding of Fact 93 pertains to the trial court's rejection of other testimony offered by Mr. Smith, namely that (1) Mr. Smith's only choice upon arriving at NWA was to follow Ms. Muongkhoth into the store after arming himself with a gun; (2) an unknown individual within NWA fired a gun at him, (3) after being fired upon he fled, but got lost within the shop, and (4) that, in total, Smith and Muongkhoth were shot at on four occasions – when entering NWA, when he held Medina on the floor, when Smith entered the small hallway near the east entrance, and as they fled the store. The trial court further explained its interpretation of the evidence and its rejection of Mr. Smith's testimony in Findings of Fact 93 through 102. The court found, based in part on the surveillance video, Ex. P1, that (1) the individuals in NWA were not laying in wait for Smith and Muongkhoth, CP 409 (FF 95), (2) they were not armed with firearms, CP 409 (FF 96), (3) no other bullet strikes were recorded by surveillance, CP 410 (FF 96), (4) the individuals in NWA were armed only with a wine bottle, a propane tank, and a large piece of plywood, CP 410

(FF 98), and (5) that had multiple shots been fired at Smith and Muongkoth, there would have been some minimal physical evidence in support, but no such evidence, including the surveillance video, was found by law enforcement, CP 410 (FF 99). The trial court was free, as with its other findings above, to evaluate the evidence, or lack thereof, and make credibility determinations of the witnesses, including the defendant. The court did not err in entering this finding.

e. 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.”

Briefly, and as above, the trial court was entitled, as the trier of fact, to consider and weigh the evidence and make any rational, logical inferences from that evidence. The trial court was therefore entitled to find that, considering the nature of the incident, and the uncontested substance use by the occupants of NWA, it would have been unlikely that the numerous cameras in NWA would not have recorded *someone* other than the defendant carrying a firearm during or immediately following the incident. While, admittedly, the NWA cameras did not record activity in all areas of the shop, it would have been highly unlikely that, had any of the other individuals been armed with a firearm, they would have managed to

avoid detection by the cameras that were present. After all, the cameras did record individuals possessing other implements – such as a wine bottle and a piece of plywood – immediately following the shooting of Medina and Smith’s exit from NWA. This finding is further supported by the court’s *unchallenged* finding that, when police arrived at NWA, mere minutes after the shooting, they found no shell casings, firearms, or ammunition supporting the defendant’s contention that multiple shots were fired at him. CP 410 (FF 99). Indeed, Smith was the only individual clearly captured on video, who was armed with a firearm. The trial court did not err in entering this finding.

g. Finding of Fact 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.”

“An essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Here, the trial court properly exercised its right to believe (or disbelieve) Marmelejo’s assertion that, if he had been armed with a firearm during the altercation he would have “killed the motherfucker.” CP 410 (FF 101). This determination is not subject to

review by the appellate court. Further, this finding is supported by the record to the extent that the video surveillance demonstrated that immediately following the incident, none of the occupants, including Marmelejo, appeared to be armed with a firearm. Ex. P1.

Additionally, the defendant's claim that Marmelejo had to be armed with a firearm during the altercation is mere speculation, as found by the trial court in its Finding of Fact 102. He asserts, based upon: (1) a video (but not audio) recorded interaction between Marmelejo and Zornes, (2) Zornes' later action of leaving NWA with an unidentified item, and (3) the presence of a Royal Crown bag outside NWA where there was testimony that Marmelejo kept a .357 Magnum in such a bag, that there was evidence that Marmelejo was armed with a firearm on the night of the shooting. Br. at 28-29, Contrary to his assertion, however, this evidence does not demonstrate that Marmelejo was armed. At best, it demonstrates that Marmelejo and Zornes spoke with each other after the murder and that Zornes removed something from NWA.¹² The presence of a Crown Royal bag outside the shop demonstrates nothing – the interior of the shop was also strewn with garbage, food and alcohol containers. Ex. P67, P69, P75, P76, P78-P83.

¹² More probable than the defendant's theory, Zornes removed "spice" or some other illegal substance, as NWA was known to sell synthetic marijuana; although, this is also speculation. RP 160-61.

There was no evidence that the bag belonged to Marmelejo, was discarded after the altercation, or contained (at any time) a firearm. The trial court did not err in entering this finding of fact, or determining the defendant's theory to be speculative or not credible.

3. The evidence was sufficient to support the court's conclusion that the defendant or his accomplice caused the victim's death.

The defendant claims that the evidence was insufficient to prove beyond a reasonable doubt that he or an accomplice caused Mr. Medina's death. He claims that the evidence was insufficient to convict him because the videographic evidence and testimony did not show who shot Mr. Medina, and no murder weapon or bullet was ever conclusively linked to him. As explained above, the contested findings of fact are supported by substantial evidence. Those findings of fact, as well as the unchallenged findings, when viewed in the light most favorable to the State, lead to the conclusion that the defendant caused the victim's death, satisfying the causation requirement of first degree felony murder.

To determine whether sufficient evidence supports a conviction, an appellate court views the evidence in the light most favorable to the State and determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*,

443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). “Specifically, following a bench trial, [an appellate court’s] review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *Homan*, 181 Wn.2d at 105-06.

In claiming insufficient evidence, a defendant admits the truth of the State’s evidence and all inferences that reasonably can be drawn from it. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014). These inferences are “drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). As above, this Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). A trier of fact may rely upon circumstantial evidence alone, even if that evidence is also consistent with the hypothesis of innocence. *State v. Kovac*, 50 Wn. App. 117, 119, 747 P.2d 484 (1987).

In order to convict the defendant of first degree felony murder as charged, the State was required to prove beyond a reasonable doubt that on or about May 26, 2015, Smith committed or attempted to commit first degree burglary; that Smith or an accomplice caused the death of Medina in the course of or in furtherance of such crime or in immediate flight therefrom; that Medina was not a participant in the burglary or attempt to commit first degree burglary; and that any of these acts occurred in the State of Washington. CP 411 (CL 1); RCW 9A.32.030(1)(c). On appeal, the defendant only challenges the sufficiency of the evidence pertaining to the court's conclusion that Smith or an accomplice caused Medina's death. Br. at 21-30.

The flaw in the defendant's argument is that his claim requires this court to reevaluate the credibility of the witnesses – namely himself – and the persuasiveness of the evidence presented to the trial court. Here, although there were no eyewitnesses to the shooting, there was sufficient evidence that Smith shot and killed Medina.

Contrary to the defendant's speculation that Marmelejo was armed with a firearm during the shooting (notwithstanding Marmelejo's adamant denial of that fact which was believed by the trial court, and the absence of any other evidence supporting that contention), Smith was the only occupant of NWA who is on the surveillance footage during the time of the

shooting brandishing a firearm.¹³ Ex. P1. Mere seconds before Medina was shot, Smith held Medina on the ground, with his gun aimed at Medina's head. *Id.* After Smith fired an errant shot toward Baumgarden (who had thrown a propane canister at him in defense of Medina), Smith left the sales room, and Medina retreated into the small room separating the small and long hallways (from which Baumgarden had thrown the canister). *Id.* Smith intentionally returned seconds later, with the gun in his hand and his arm extended outward. *Id.* Smith then walked into the small hallway, with his arm and firearm still extended, and suddenly "sprung back," turned around and left the store. *Id.* A trail of blood led from that small room, into the long hallway, through the tattoo room to where Medina was found on the floor bleeding. CP 405 (FF 54-55).

After Smith and Muongkoth fled the scene, Muongkoth texted Smith, instructing him to get rid of his sweater, which linked¹⁴ Smith to the video surveillance. CP 406 (FF 68). In reply, Smith instructed Muongkoth to calm down and to "not say nothing to no one." CP 406 (FF 68). Smith told Stuhlmiller that he "tried to hit a lick that night but it went ba[d]." CP 407 (FF 69).

¹³ His accomplice, Muongkoth, also was armed with a firearm. CP 404 (FF 40).

¹⁴ *See* Ex. P1 and Ex. P7 (defendant wearing the same "Air Jordan" sweatshirt).

Contrary to the defendant's assertions that other individuals shot firearms within NWA, no ballistic or other forensic evidence demonstrated that any more than two shots were fired. There were only two bullet defects in the walls of the building. No spent bullet casings were located and the video did not show any of the individuals in NWA attempting to find or retrieve any spent casings. The video only demonstrated that, after Medina was shot, the individuals within NWA emerged into view wielding a wine bottle and a piece of plywood.

Taking all evidence and inferences from that evidence in the light most favorable to the State, the court did not err in concluding that Smith, as the only individual who was clearly armed with a firearm, and the only individual who was within direct proximity to the victim where he was shot, caused the death of the victim. This claim fails.

B. SMITH WAS SENTENCED AS A PERSISTENT OFFENDER AT AGE 25. ANY ERROR IN THE TRIAL COURT'S FAILURE TO CONSIDER THE DEFENDANT'S YOUTHFULNESS AT THE TIME OF THE CURRENT STRIKE OFFENSE IS NOT MANIFEST; THE FAILURE TO CONSIDER THE DEFENDANT'S YOUTHFULNESS AT THE TIME OF THE CURRENT STRIKE DID NOT RUN AFOUL OF THE EIGHTH AMENDMENT OR ARTICLE I, SECTION 14.

In his supplemental brief discussing the applicability of *State v. Moretti*, 193 Wn.2d 809, 446 P.3d 609 (2019), the defendant "acknowledges that *Moretti* forecloses his argument that his mandatory

sentence of life without the possibility of parole, with no consideration of his youthfulness at the time he committed the predicate offenses, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under article I, section 14.” Supp. Br. at 5. However, the defendant asserts that *Moretti* does not foreclose his argument that “his mandatory sentence of life without the possibility of parole, with no consideration of his youthfulness *at the time* he committed the current offenses,” amounts to cruel and unusual punishment under the Eighth Amendment or cruel punishment under article I, section 14. Supp. Br. at 5-6.

The defendant’s claim fails. The claim is not preserved as the defendant did not specifically object to the imposition of a POAA sentence on Eighth Amendment or article I, section 14, grounds, the record is insufficiently developed to merit review, and, based upon the facts that are reflected in the record, the defendant’s punishment is not constitutionally prohibited.

1. Overview of POAA sentencing

Under RCW 9.94A.570, a persistent offender *shall* be sentenced to life in prison without the possibility of release. A persistent offender is one who has been convicted of a most serious offense and has two prior felony convictions on separate occasions that are also most serious offenses, and

at least one of those previous convictions occurred before the commission of any of the other previous convictions for a most serious offense. RCW 9.94A.030(38)(a).

Here, the defendant's current convictions for first degree murder, first degree burglary and first degree assault are most serious offenses, both because those crimes are defined as most serious offenses as Class A offenses, and because any felony with a deadly weapon verdict is a most serious offense. RCW 9.94A.030(33)(a),(t); RCW 9A.20.021(1)(a), RCW 9A.32.030(2), RCW 9A.52.020(2), RCW 9A.36.011(2). The defendant does not dispute that his prior convictions provide the predicate strikes necessary for POAA sentencing to life without the possibility of parole for the current offenses.

The Washington Supreme Court has repeatedly upheld Washington's persistent offender statute against both federal and state constitutional challenges under the Eighth Amendment and article I, section 14. *See Moretti*, 193 Wn.2d 809; *Witherspoon*, 180 Wn.2d 875; *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996); *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996).

2. Any claimed error in the POAA sentence imposed for the defendant's third strike was not preserved and is not manifest.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5 which “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Id.* at 749, (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

Id. at 749-50.¹⁵

¹⁵ Citing BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, defendant alleges that the trial court’s failure to consider his “youthfulness” at the time of his third and final strike offense violates the Eighth Amendment and article I, section 14. However, the trial court was never asked to analyze or consider this issue. The failure to assert this issue in the trial court is not reviewable on appeal because there is not a showing that the alleged error is manifest.

During sentencing, defense counsel stated:

I have had an opportunity to thoroughly investigate, read the files, and I did quite a bit of legal research on most serious offenses. And I would represent to the Court that this is Mr. Smith’s criminal history. *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 -- 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. Akers 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.

I hope that his prison classification is not excessive. And I hope as time goes on that they -- I mean, I've had a great experience with -- with Mr. Smith. He's -- he's been polite to me. He's been cooperative with me. He's been helpful in his defense. I rarely, rarely get that in these types of serious -- serious cases. I mean, it -- but he was, you know, somebody that I would -- I would have no problem representing if I was appointed for in the future on an indigent case.

He's somebody that I think got caught up that night between what was going on between Vatsana Muongkoth and Ruben Marmolejo. The statue 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. And, you know, I don't think he used the best judgment necessarily that night, but I know that he was in fear of his life, and I know that he was in fear of Vatsana's Muongkoth's life, and for good reason. And I think that can be genuinely said.

And we respect Your Honor's decision. And we intend to appeal your verdict, but it was very confusing for him that evening. Was it the best judgment? Probably not. It's a tragic situation. I know that he is remorseful. He's not going to say a lot here today in court, and that's because of my instruction to him. He's going to -- I know that he is going to make an apology for how things turned out that night because he is sorry how that happened.

But, again, we'd ask Your Honor to take into consideration any mitigating circumstances, run any time concurrent that is imposed

on separate counts that would not be a life sentence. He's going to have a long, long time to think about this. And it is too bad, because I find him to be quite an articulate individual. And he -- he's fairly well-read and he communicates well. And he's pretty athletic build on a guy, and I think about some of people that I had, you know, participated my life with that had some of the attributes that he has. And it just didn't turn out real good for him.

RP 1055-57 (emphasis added).

Thus, the defendant did not request the court analyze whether a life sentence imposed upon a 29-year-old who was 25-years-old at the time he committed first degree murder violated the Eighth Amendment or article I, section 14. The defendant's request to "reserve any constitutional issues that could be brought for purposes of challenging sentencing in the appeal process" is simply too vague to preserve this claim. Additionally, the defendant did not ask the court to consider imposing anything less than a life sentence on those offenses subject to the POAA. The defendant conceded that the appropriate sentence under the circumstances was life in prison without the possibility of parole, but requested, as a mitigated sentence, for the court to "*run any time concurrent that is imposed on separate counts that would not be a life sentence.*" Inexplicably, the defendant now complains that the trial court did not exercise discretion to consider imposing a sentence less than life without the possibility of parole on the POAA sentences, when it was never requested to do so.

Because there was no objection below, the claim must be a manifest constitutional error in order to merit review for the first time on appeal.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review... It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote and internal citation omitted) (emphasis added).

There is nothing in defendant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the sentencing judge should have clearly noted a violation of the Eighth Amendment or of article I, section 14, by the failure to consider, during a third-strike POAA sentencing hearing, whether to impose anything less than life in prison without the possibility of parole, as mandated by the legislature, upon a defendant who was 29-years-old at the time of sentencing and 25-years and five-months old at the time he committed first degree murder. Because the defendant did not object to the imposition of a POAA sentence on specific constitutional grounds or otherwise ask the

court to exercise discretion in considering his “youthfulness” at the time of the current offense, and because the claimed error is not manifest, this Court may properly decline to consider the argument.

3. The defendant’s sweeping statements that, at the time of the murder, he was not a “fully developed adult offender” is without support in the record and is unsupported by social science.

Assuming, arguendo, that a sentencing court possesses discretion to decline to impose a life sentence without the possibility of parole for an adult convicted of three separate most serious offenses, the record in this case is insufficient for this court to determine that the defendant’s “youthfulness” was a “substantial and compelling factor” diminishing his culpability and justifying a mitigated sentence. *See State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). Other than asserting at sentencing that the defendant was 29-years-old at the time of sentencing, lost his father at a young age, had few opportunities in life and did not exercise good judgment on the night of the murder, the defendant made no attempt to establish at sentencing by lay or expert testimony that his “youthfulness” at age 25 (when he committed the first degree murder, first degree burglary and first degree assault) actually diminished his culpability. *See id.* at 697 (“In this case, the defense offered...lay testimony that a trial court should consider in evaluating whether youth diminished a defendant’s culpability,” citing testimony by defendant’s mother, friends, and pastor, all indicating

the defendant was very young, did not mentally act his age, and was “still just a kid”).

If anything, the record establishes that the defendant did not act impulsively (or consistently with any other “hallmark feature” of youth¹⁶) but rather, took deliberate action to kill Medina, despite his ample opportunity to flee when it appeared that the burglary had gone awry. The record also establishes that since Smith was 18-years-old, he had associated, not with other youth, but had been incarcerated with adult offenders (for 80 months on his 2010 conspiracy to commit robbery and first degree burglary committed while armed with a firearm). The lack of any specific testimony pertaining to how the defendant’s age impacted his culpability precludes this Court from finding any prejudice, as required under RAP 2.5 for unpreserved alleged errors.

Furthermore, the defendant’s claim that he was not a fully developed adult is belied by social science. To the extent Smith relies on *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (mandatory life sentences for juveniles); *Graham v. Florida*, 560 U.S. 48,

¹⁶ *Miller*, 132 S.Ct. at 2468, holds that in exercising full discretion in *juvenile* sentencing, the court must consider mitigating circumstances related to the defendant’s youth—including age and its “hallmark features,” such as the juvenile’s “immaturity, impetuosity, and failure to appreciate risks and consequences.”

130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (sentencing juveniles to life without parole in non-homicide cases); *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct 1183, 161 L.Ed.2d 1 (2005) (sentencing juveniles to death), such reliance is misplaced. *Miller*, *Graham*, and *Roper* protect *juvenile offenders* from actual or de facto life sentences and capital punishment. The Supreme Court’s cases were grounded in the Court’s concern, based on scientific research about *adolescent* brain development, that juveniles lack maturity, are more vulnerable to bad influences, and are more amenable to rehabilitation. *Roper*, 543 U.S. at 569-70. However, the Court drew a line between juveniles and adults at the age of 18 years; while it acknowledged that the line was arbitrary, it “must be drawn.” *Id.* at 574; *see also Miller*, 567 U.S. at 465; *Graham*, 560 U.S. at 74-75. Smith falls on the adult side of that line.

The science undergirding *Miller*, *Houston-Sconiers*,¹⁷ and *O’Dell*,¹⁸ as applicable to juvenile or youthful offenders, is unavailing to Smith, who was over the age of 25 when he committed first degree murder. The science

¹⁷ *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), involving juvenile defendants tried as adults for a robbery committed when they were 16 and 17 years old, during which they robbed other children of candy.

¹⁸ *O’Dell* is the only case cited by the defendant and involved the consideration of the mitigating qualities of youthfulness for a legally adult offender who was 18 years and 10 days old when he committed second degree rape of a child, a 12-year-old with whom he had consensual sex. 183 Wn.2d at 683-84.

in this area has been synthesized by law professor Elizabeth S. Scott and psychologist Laurence Steinberg, whose work was cited extensively by the Supreme Court in *Roper*. Per Scott and Steinberg, social scientists recognize that *juveniles* achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control. Elizabeth S. Scott & Laurence Steinberg, *RETHINKING JUVENILE JUSTICE* 34 (2008); Elizabeth S. Scott & Laurence Steinberg, *BLAMING YOUTH*, 81 *Tex. L. Rev.* 799, 812-13 (2003). Research also suggests that *teens* are more responsive to peer pressure between childhood and early adolescence. “This susceptibility peaks around age 14 and declines slowly during the high school years.” *BLAMING YOUTH* at 813-14. Furthermore, studies show, in general, there are “gradual but steady increases in individuals’ capacity for self-direction throughout the *adolescent* years, with gains continuing through the final years in high school.” *Id.* at 815 (emphasis added). “Impulsivity, as a general trait, increases between middle adolescence and early adulthood and declines soon thereafter.” *Id.* at 815.

In that regard, adolescents and adults differ in their ability to regulate their own behavior and control their impulses. Risk-taking and sensation-seeking peak around 16 or 17 and then decline in adulthood. Barry C. Feld, *ADOLESCENT CRIMINAL RESPONSIBILITY, PROPORTIONALITY, AND SENTENCING POLICY: ROPER, GRAHAM, MILLER/JACKSON, AND THE YOUTH*

DISCOUNT, 31 Law & Ineq. 263, 286 (2013). “Youths’ ability to resist peer influences approaches that of adults in their late teens and early twenties.”

Id. at 291. Importantly, one commentator has suggested:

Just as risk taking peaks during adolescence, studies that have been conducted in different historical epochs and in countries around the world have found that crime engagement peaks at about age seventeen (slightly younger for nonviolent crimes and slightly older for violent ones), and declines significantly thereafter. Longitudinal studies have shown that the majority of adolescents who commit crime desist as they mature into adulthood. Only a small percentage --generally between five and ten percent--become chronic offenders or continue offending during adulthood.

Elizabeth Cauffman, et. al., HOW DEVELOPMENTAL SCIENCE INFLUENCES JUVENILE JUSTICE REFORM, 8 UC Irvine L. Rev. 21, 26 (2018) (footnotes omitted).

Brain structure and function (brain mapping) studies assert that there is still growth in parts of the brain associated with decision-making and judgment *up to 25 years old*. See Jay Giedd, BRAIN DEVELOPMENT, IX: HUMAN BRAIN GROWTH, 156 Am. J. Psychiatry 4 (1999). However, this theory has limitations. In 2009, one commentator noted:

The most significant current limitation of developmental neuroscience is its inability to inform individual assessment. Imaging studies that show group trends in structural maturity--such as relative levels of myelination in prefrontal cortex--do not show that all individuals in the group perfectly reflect the trend. Normal brains follow a unique developmental path bounded roughly by the general trajectory; that is, while all humans will pass through the same basic stages of structural maturation at more or less the same stages of life, the precise timing and manner in which they do so will vary. Moreover, such variation cannot be detected or interpreted in any legally meaningful way. Neither structural nor functional

imaging can determine whether any given individual has a “mature brain” in any respect, though imaging might reveal gross pathology. Researchers therefore consistently agree that developmental neuroscience cannot at present generate reliable predictions or findings about an individual’s behavioral maturity.

Terry A. Maroney, *THE FALSE PROMISE OF ADOLESCENT BRAIN SCIENCE IN JUVENILE JUSTICE*, 85 *Notre Dame L. Rev.* 89, 146 (2009) (footnote citations omitted).

In a 2016 article, summarizing some recent behavioral and neural findings on cognitive capacity in “young adults,” members of the MacArthur Research Network on Law and Neuroscience conducted a study showing that, relative to control groups comprised of adolescents aged thirteen to seventeen and adults aged 22 to 25, young adults aged 18 to 21 showed diminished cognitive capacities similar to the adolescent group when they are in emotionally charged situations.¹⁹ Alexandra O. Cohen, et al., *WHEN DOES A JUVENILE BECOME AN ADULT? IMPLICATIONS FOR LAW AND POLICY*, 88 *Temple L. Rev.* 769, 786 (2016). The publishers of the study remarked that:

[F]ew studies have focused specifically on behavioral and brain changes in eighteen – to twenty-year-olds relative to older adults and teens. The few studies that have examined motivational and social influences on cognitive capacity in

¹⁹ Treating 21- to 25-year-olds as the control group, the study did not undertake any further comparison between the group of adults aged 22 to 25 and other adults aged over 25.

young adults have used varying age ranges and produced mixed results.

Id. at 785.

Importantly, the study also found that “the mere presence of a peer can lead to increased risk-taking in teens that is not typically observed in individuals over eighteen.” *Id.* at 781.

Defendant claims that at 25-years-old, his “mental and emotional development was far from complete.” Supp. Br. at 8. This contention is unsupported by the record or by science, and amounts to nothing more than conjecture. Nothing in the juvenile brain science literature compels the conclusion that Smith’s commission of first degree murder, first degree burglary or first degree assault is an artifact of or mitigated by his age and brain development. During sentencing, Smith did not attempt to supply any professional or expert evaluation and/or an assessment regarding his personal history and his adult age, nor did he supply any scientific literature on the evolving science on “juvenile” maturity and brain development as applied those adults at or over the age of 25 in mitigation of his criminal acts. The record does not contain any evidence about how the evolving science on juvenile maturity and brain development, that helped form the basis for the *Miller*, *Houston-Sconiers*, and *O’Dell* opinions, applies to Smith’s specific age, facts and circumstances, if any. Therefore, the record

is not sufficiently developed for this Court to determine, under RAP 2.5, whether the defendant was prejudiced by the trial court's failure to *sua sponte* consider exercising its theoretical discretion to impose a sentence less than life without the possibility of parole.

4. The defendant's persistent offender sentence is not cruel and unusual under the Eighth Amendment.

As above, the Supreme Court recognized in *Roper*, 543 U.S. at 574, that a line had to be drawn between childhood and adulthood under the Eighth Amendment, and chose to draw the line at age 18. Neither *Graham* nor *Miller* changed that dynamic. For adult offenders, the United States Supreme Court has found that a mandatory life sentence based upon a state recidivist statute is not cruel and unusual punishment under the Eighth Amendment. *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). Our State Supreme Court has also held that the mandatory life sentence under the Persistent Offender Accountability Act (POAA) does not violate the Eighth Amendment when imposed on a defendant who committed all three strike offenses as an adult. *Witherspoon*, 180 Wn.2d at 890.

Referring to *Roper*, *Graham*, *Miller*, and *Houston-Sconiers*, the defendant attempts to extend juvenile brain science jurisprudence to adult offenders. However, these cases apply explicitly only to juveniles.

Mr. Smith, as a 25-year-old adult, falls on the adult side of the line under the Eighth Amendment. Two²⁰ of his prior strike offenses also fell on the adult side of that line. As he was over the age of majority when convicted of each strike offense, his Eighth Amendment claim fails.

5. The defendant's sentence was proportionate to his crimes and was not cruel under article I, section 14, of the State Constitution.

The defendant also argues that his persistent offender sentence violates article I, section 14, under the rubric set forth in *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980). The defendant does not analyze the *Fain* factors directly, but instead asks this Court to hold, “that punishment must be proportionate both to the offense and to the offender in order to comport with article I, section 14,” Br. at 38; Supp. Br. at 7-8, arguing that *O’Dell* and the *Roper*, *Graham* and *Miller* cases support this contention. This claim also fails.

The defendant’s life without the possibility of parole sentence is not “grossly disproportionate” to the offenses under the *Fain* factors: “(1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other

²⁰ Excluding the 2007 robbery committed when Smith was a juvenile, but sentenced in adult court.

jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction.” 94 Wn.2d at 397.

First Fain Factor: Nature of the Offense:

Smith was convicted of first degree murder, first degree burglary, first degree assault (of a different victim than the murder victim); each offense was alleged and proven to have been committed with a firearm. These offenses were all class A offenses, and were, in and of themselves punishable by confinement of up to a term of life imprisonment. RCW 9A.20.021(1)(a), RCW 9A.32.030(2), RCW 9A.52.020 (2), RCW 9A.36.011(2).

As noted in *Moretti*, the first *Fain* factor “demands consideration of not only the nature of the crime but also the culpability of the offender who committed it.” 193 Wn.2d at 832. Here, as in *Moretti*, the defendant has failed to demonstrate “that [his] culpability was reduced when [he] committed the instant offenses. Far from showing that as the years go by...[his] deficiencies will be reformed, the defendant has continued to recidivate after [his] brain [was] fully developed and [has] shown entrenched patterns of problem behavior.” *Id.* (internal quotation marks omitted). Furthermore, Smith has not only continued to recidivate, but has also demonstrated escalating violent behavior, ultimately culminating in the death of a 17-year-old boy. The defendant’s prior periods of incarceration

and community custody²¹ afforded him the opportunity to reform – an opportunity he failed to seize. This factor, even considering the defendant’s own qualities and culpability, indicates that the sentence is not grossly disproportionate.

Second Fain Factor: Legislative Purpose of the Statute:

In *Rivers*, our Supreme Court recognized that “the purposes of the persistent offender law include deterrence of criminals who commit three ‘most serious offenses’ and the segregation of those criminals from the rest of society.” 129 Wn.2d at 713.

Third Fain Factor: Punishment in other Jurisdictions:

The third *Fain* factor is the punishment that the defendant would have received in other jurisdictions. *Rivers*, 129 Wn.2d at 714. The defendant has made no attempt to provide other jurisdictions’ treatment of 25-year-olds who commit first degree murder, first degree burglary and first degree assault with a firearm, after having twice been convicted, as an adult of similar offenses.

Fourth Fain Factor: Punishment in this Jurisdiction:

The fourth *Fain* factor is the punishment meted out for other offenses in the same jurisdiction. *Rivers*, 129 Wn.2d at 714. In Washington,

²¹ The defendant was being supervised on community custody at the time he committed the current offenses. CP 517.

all adult offenders convicted of three “most serious offenses” are sentenced to life in prison without the possibility of release under the POAA. Even if Smith had not been sentenced as a persistent offender, his sentencing would have resulted in a significant sentencing range (assuming the court did not grant an exceptional sentence downward):

Standard Range for First Degree Murder (of Medina) with an Offender Score of “9+” ²²	RCW 9.94A.510; 9.94A.530,	411 - 458 months (34.25 months to 45.66 months)
Standard Range for First Degree Assault (on Baumgarden) with an Offender Score of “0”	RCW 9.94A.589(1)(b); RCW 9.94A.510; RCW 9.94A.515	93 - 123 months (7.75 to 10.25 years)
Firearm Enhancement(s) for Subsequent Firearm Offense ²³	RCW 9.94A.530(1); RCW 9.94A.533(3)(a), (d), (e).	30 years (Three consecutive 10-year enhancements for Counts 1, 2, 3.)
Total Incarceration (exclusive of other current offenses that need not be sentenced consecutively)		864 - 941 months (72 to 78.4 years)

Therefore, even assuming the defendant were not subject to the POAA as a persistent offender, he would face a de facto life sentence of

²² For purposes of this argument, the State assumes that the defendant was sentenced, not as a persistent offender, but rather, with an offender score of “9+.”

²³ The defendant’s 2009 offenses included a deadly weapon enhancement. CP 377.

over 70 years for these offenses. Thus, his sentence of life without the possibility of parole is not “grossly disproportionate” so as to violate article I, section 14, of the Washington Constitution. This claim fails.

IV. CONCLUSION

The defendant’s challenge to the trial court’s findings of fact and conclusions of law fails as it does not give the trial court proper deference, nor does it view the facts in the light most favorable to the State. Sufficient evidence exists supporting the defendant’s conviction for first degree murder.

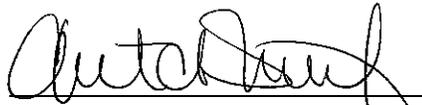
The defendant’s belated claim that his persistent offender sentencing violates the Eighth Amendment and article I, section 14, was not preserved. He does not claim ineffective assistance of counsel for counsel’s failure to request the court consider anything other than a life sentence for his third strike sentencing. The defendant is also unable to establish the requisite prejudice to merit review for the first time on appeal, and the claimed error is not otherwise manifest. Further, the defendant has not, and cannot demonstrate that, at 25 years and 5 months old, any of the “juvenile brain science” even applies to him, or that he was not fully developed both emotionally and mentally. Eighth Amendment jurisprudence holds that a life sentence under these circumstances, for a third-time offender who is over the age of 18 is not cruel and unusual; under a State analysis, even

considering the defendant's own "attributes," the sentence is not "grossly disproportionate." This claim fails.

The State respectfully requests this Court affirm the trial court's judgment and sentence.

Dated this 6 day of January, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef, WSBA #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH SMITH, a/k/a JEREMIAH
AKERS,

Appellant.

NO. 36213-2-III

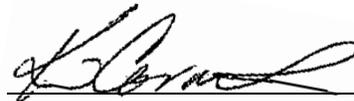
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 6, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jill S. Reuter
admin@ewalaw.com

1/6/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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