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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH HARPER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. During closing argument, was the deputy prosecutor's unobjected-to statement to the jury that the defendant did not have to form the intent to cause great bodily injury to commit first-degree assault so flagrant and ill-intentioned that it could have not been neutralized by an instruction from the court and does the statement require reversal?

2. Was the deputy prosecutor's unobjected-to remark during closing argument that the defendant was "a difficult person, difficult to deal with," a rational inference from the evidence; even if it was not, was it so flagrant and ill-intentioned that it could not have been cured by an instruction from the court and has the defendant established the remark impacted the verdict?

3. Can the defendant raise an ER 404(b) issue for the first time on appeal regarding introduction of the defendant's uncharged conduct which occurred out of the same incident? Even if the defendant can raise the issue for the first time on appeal, was evidence of the defendant's uncharged conduct properly introduced under the res gestae exception to ER 404(b), and to establish the defendant's intent and motive to commit the charged offenses?

4. Does the change in the law removing second-degree robbery as a strike offense apply prospectively to the defendant's case, which is

pending direct review, if a sentencing court must apply the law in effect at the time the defendant committed his third strike offense?

5. Has the defendant met his burden to establish the amendment to RCW 9.94A.030(33)(o), repealing second-degree robbery as a “most serious offense,” applies retroactively to his crime committed in 2017, before the effective date of the July 28, 2019 repeal, if the long standing rule in this State is that RCW 10.01.040 (savings clause) and RCW 9.94A.345 (law in effect at the time a crime was committed governs sentencing) require that the repeal of a statute does not apply to crimes committed before its effective date?

II. STATEMENT OF THE CASE

Joseph Harper was charged by information with first-degree assault, theft of a motor vehicle, attempt to elude a police vehicle, and third-degree assault; all offenses involved a different victim. CP 1-2. A jury subsequently convicted Harper as charged. CP 160-63.

Substantive facts.

Chelsea Harper was married to the defendant. RP 450. Ms. Harper purchased a 1993 Chevrolet Camaro, with a bank loan, approximately three to four months after her employment began at a Dairy Queen restaurant in Spokane – during the summer of 2017. RP 453-54. The Camaro was in disrepair; it could be started without a key and the key to lock the car doors

was lost. RP 454. During that period, Ms. Harper and the defendant became estranged and each lived at separate residences. RP 452-53. The defendant disliked Ms. Harper working at the Dairy Queen and preferred that she work with him to allow her to make more money.¹ RP 455-46. Based upon the defendant's occasional disruptive behavior inside the Dairy Queen prior to the current episode, Ms. Harper believed the defendant was attempting to get her fired. RP 457-58.

On November 8, 2017, before Ms. Harper started work, she observed the defendant driving erratically and screaming in a parking lot outside the apartment complex where she resided. RP 459-60. Ms. Harper told the defendant to leave and he apparently complied. RP 460. Approximately four to five hours passed, and Ms. Harper drove herself to work at the Dairy Queen and parked nearby. RP 460-61.

Around 10:00 p.m., Spokane Police Officers Jeremy McVay and David Betts were on patrol and had contact with the defendant. RP 387-88, 406. The defendant, in the median of the roadway near Wellesley Avenue and Nevada Street, waived his arms, and indicated the need for assistance.

¹ During August 2017, the defendant spoke by telephone with Glick, and told her that Ms. Harper needed to be fired because she was using methamphetamine. RP 496. During that same month, the defendant filed a complaint with Dairy Queen and claimed Glick was selling methamphetamine to Ms. Harper. RP 497.

RP 388-89. Upon contact with the officers, the defendant was sweating profusely and speaking very quickly. RP 390. Based upon Officer McVay's training, he believed Harper was under the influence of some form of stimulant.² RP 392. During the conversation, the defendant expressed concern for his wife's safety and told officers she could be located at the Dairy Queen restaurant across the street.³ RP 393. The Dairy Queen was located at 900 East Wellesley. RP 623. Officer McVay complied with Harper's request, contacted Ms. Harper, who was working at the Dairy Queen, and determined she was okay. RP 393-94, 399. Thereafter, the officers ended their contact with Harper, who then ran on foot away from the area. RP 396.

Approximately 30 minutes later, while Ms. Harper was washing dishes and cleaning the grill inside the restaurant, she saw her car doing "donuts"⁴ in the parking lot and peeling around very quickly. RP 462-63. Tiffany Glick, the manager, also witnessed the same behavior. RP 500, 506. Soon thereafter, the defendant exited Ms. Harper's car, walked to the

² Harper remarked that he had ingested methamphetamine. RP 411.

³ A CrR 3.5 hearing was conducted before trial. RP 33-102, 102-08 (ruling). The court allowed several voluntary statements made by the defendant and suppressed several others. No error is assigned to that ruling.

⁴ To make a car "spin in tight circles." <https://www.macmillandictionary.com/us/dictionary/american/do-doughnuts> (last reviewed August 18, 2020).

restaurant's window, and began pounding on it and screaming for Ms. Harper to speak with him outside. RP 463-64. Ms. Harper did not comply. RP 464. The defendant then left the Dairy Queen parking lot in Ms. Harper's Camaro, drove Ms. Harper's car into a gas station parking lot across the street; there he drove at a high rate of speed around the building and gas pumps and struck a car in the parking lot. RP 465-66, 509-10, 533. Subsequently, the defendant drove back to and parked Ms. Harper's car in the Dairy Queen parking lot; he again aggressively pounded on the window and screamed at Ms. Harper to speak with him outside;⁵ Ms. Harper again refused to do so. RP 467, 510, 539, 547. Employees called 911 during the incident. RP 515, 518.

Kelly Krebs was a driver for both Uber and Lyft and was driving his 2005 Chevrolet Cobalt. RP 551-552. He drove toward the JK gas station to fuel up. RP 552. As Mr. Krebs turned from Nevada Street onto Wellesley Avenue, he observed the Camaro back out of the Dairy Queen parking lot, with no headlights or taillights turned on. RP 553. Mr. Krebs had to brake hard to avoid a collision with the Camaro. RP 553. Mr. Krebs then drove around the Camaro and raised his arms signaling confusion over the defendant's driving. RP 554. Mr. Krebs then drove into the JK gas station,

⁵ Harper appeared as if in a rage or very angry; Ms. Harper was scared for herself and her coworkers. RP 490, 533.

and stopped next to a gas pump. RP 554. Contemporaneously, the defendant drove into the gas station parking lot, stopped near a bicyclist, and yelled at the bicyclist. RP 555. The defendant then turned his attention toward Mr. Krebs. As described by Mr. Krebs:

And as I looked over, the driver turned his head, looked back at me, put his car in reverse and kept, like, inching back, revving the engine, hitting the brakes, backing up towards my car. And I'm -- I kept asking him what are you doing, what are you doing, don't hit my car, why are you trying to hit my car. And then about maybe one, two feet from the front left tire of my car he just backed into my car.

RP 555-56.

Mr. Krebs continued to ask the defendant why he struck his car; Mr. Krebs also grabbed his stun gun from inside his car and activated it to scare away the defendant. RP 556-57. The defendant then drove back into the Dairy Queen parking lot, revved his engine, and independently struck two different vehicles with the Camaro. RP 467, 476-77, 506-08, 557, 578; Ex. P17. Thereafter, Mr. Krebs crossed the street, on foot, toward the Dairy Queen parking lot and video recorded the defendant with his cell phone. RP 558. In response, the defendant maneuvered the Camaro and accelerated toward Mr. Krebs, attempting to hit him. RP 558-59. Mr. Krebs jumped out of the way of the Camaro to avoid being struck. RP 560. Mr. Krebs continued to film the defendant and asked the defendant "what [is] going on?" RP 561. Again, the defendant accelerated the Camaro toward

Mr. Krebs, who again jumped from danger. RP 561. The defendant then drove his vehicle at Mr. Krebs for a third time; Mr. Krebs contemporaneously hid behind one of the vehicles in the parking lot, which had previously been struck by the defendant. RP 562; Ex. P2 (RP 566).⁶ During that part of the altercation, the defendant remarked he wanted to “smash ... out” Mr. Krebs. RP 567. The defendant would have struck Mr. Krebs with the Camaro, during the three separate incidents, but for Mr. Krebs taking evasive action. RP 574.

Soon thereafter, the defendant returned to the JK gas station and sideswiped Mr. Krebs’ car with the Camaro. RP 568. As Mr. Krebs, who had crossed the street back to the gas station, stood toward the rear of his vehicle, as the defendant accelerated backward into Mr. Krebs’ car; it appeared he attempted to push Mr. Krebs’ car into a gas pump. RP 568. The defendant subsequently accelerated out of the gas station parking lot, over the median in the roadway, and back into the Dairy Queen parking lot. RP 568. The defendant aimed the Camaro toward the entrance of the Dairy Queen, drove toward the entrance, and struck a trash can at the entrance. RP 569. The defendant then drove back onto Wellesley and faced the wrong direction. RP 569.

⁶ Ex. P2 was the video footage captured by Mr. Krebs; it was incomplete in terms of what he observed at the time of the incident. RP 566-67.

Around 10:44 p.m., Sergeant Kevin Vaughn and Officer Jerry Anderson, driving a fully marked Spokane Police vehicle and in police uniform, responded to the incident at the Dairy Queen. RP 608, 611-12, 614, 639-40. Upon arrival, Sergeant Vaughn observed the Camaro stopped, facing in an eastward direction in the westbound lanes of Wellesley; the defendant had both hands visible and extended outside of the car window. RP 614. As Sergeant Vaughn approached the defendant, he appeared compliant. RP 617. As Sergeant Vaughn grabbed the defendant's hand however, the defendant quickly accelerated the Camaro away from the officers, crossed the median, and traveled eastbound on Wellesley. RP 618, 648; Ex. P6 (RP 649). When asked on cross-examination, Sergeant Vaughn stated he believed the defendant was under the influence of a narcotic. RP 633.

Several police vehicles, including the vehicle driven by Sergeant Vaughn and a separate vehicle driven by Officer Betts, began pursuit of the defendant with emergency lights and sirens activated.⁷

⁷ The defendant travelled on Wellesley, south on Nevada Street, east on Heroy Avenue, north on Perry Street, across Wellesley, to Broad Avenue, northbound on Magnolia Street, to Queen Avenue, then west on Rowan Avenue to 803 East Rowan where the vehicle was located. RP 652-55. During the chase, the defendant travelled between 40 m.p.h. and 76 m.p.h. RP 653-54, 669-71. The areas travelled by the defendant were mainly residential areas and posted at either 25 m.p.h. or 35 m.p.h. RP 653-54; 669-71. The defendant proceeded through several stop signs

RP 619, 630, 650-51, 667. The defendant drove the vehicle without any headlights or taillights. RP 669, 679, 686. Eventually, police officers located the Camaro at 800 East Rowan, where the vehicle had crashed;⁸ the defendant had fled the scene. RP 624. Ultimately, after a short foot pursuit, the defendant was taken into custody. RP 625, 708, 721-26, 732-36. The defendant had lacerations on his head, was bloody and his shirt was ripped. RP 725, 795. Ms. Harper's vehicle was totaled as result of the defendant's actions during the evening. RP 478. The defendant did not have permission to drive Ms. Harper's car, nor did he contribute any money toward the purchase of it. RP 464-65, 487.

The defendant was taken to the hospital. RP 709. Officer Brent Armstrong observed the defendant, once inside the hospital, become increasingly aggressive. RP 710. James Pluid worked as an emergency room technician at Deaconess Hospital on November 8, 2017. RP 602-03. He generally transported patients to different locations within the hospital. RP 603. Mr. Pluid assisted a nurse attempting to take a CT scan of the defendant. RP 604. As the nurse and Mr. Pluid positioned the defendant for

without stopping. RP 669-70. The distance of the chase was approximately 1.9 miles. RP 685.

⁸ The Camaro appeared to have slid from 803 East Rowan, traveled through a fence, into a resident's yard. RP 657-58, 700. Tire tracks were observed from the roadway into the yard. RP 658, 687.

the CT scan, he attempted to grab the nurse; Mr. Pluid then held the defendant's hand down, looked away, and the defendant then grabbed Mr. Pluid's throat. RP 604, 710. The defendant remarked that, "he'd f--k [Mr. Pluid] up if he wasn't tied down." RP 604. The defendant later stated that he "choked" Mr. Pluid. RP 711. The defendant appeared angry and aggressive, in addition to being under the influence of a drug. RP 606-07. The defendant directed sexually suggestive comments toward the nursing staff and doctors and made a homophobic slur toward several officers. RP 785-87. The defendant also remarked that he did not believe the medical staff were real and that they were trying to hurt him. RP 787.

At the hospital, the defendant told Officer McVay that he went to the Dairy Queen to get Ms. Harper's attention and have her walk outside. RP 745-46. The defendant admitted he entered Ms. Harper's vehicle and started it; he knew the vehicle could be started without a key. RP 746. The defendant acknowledged he did not have permission to drive Ms. Harper's vehicle and that Ms. Harper owned the Camaro. RP 747. The defendant further said that he intentionally began striking other cars and then the Dairy Queen building with the vehicle. RP 746, 760-61. The defendant did so to get Ms. Harper's attention. RP 747. Unsuccessful in his attempt to get Ms. Harper's attention, the defendant admitted he drove across the street to

the JK gas station and struck another car, again seeking his wife's attention. RP 747.

The defendant testified at trial. He self-identified as a pastor and testified that on the day of the incident, he was instructed by God to save his wife. RP 812. On foot, he ran from the NorthTown Mall to the Dairy Queen located on Wellesley. RP 812. The defendant banged on the Dairy Queen's windows because he believed that Ms. Harper was going to be hurt. RP 813-14. The defendant contacted an officer driving on Wellesley to get help for Ms. Harper. RP 815. The defendant claimed that God yelled at him in a "firm voice" and told him "exactly what to do." RP 818. The defendant admitted to driving Ms. Harper's Camaro and striking a white van with the car in the Dairy Queen parking lot so that whomever was driving it would not abduct Ms. Harper and take her to Idaho. RP 818-19. As stated by the defendant, "I felt that -- that I did a good enough damage to the van they wouldn't be able to drive that car away so I'm doing brodie's in the parking lot[,]'" apparently to get the attention of the officers. RP 819.

The defendant further asserted that Mr. Krebs tried to block his exit from the Dairy Queen parking lot, and that the defendant tried to maneuver the Camaro around Mr. Krebs' vehicle. RP 820-21. The defendant acknowledged, at that point during the string of crimes, that Mr. Krebs began video recording the defendant. RP 821. The defendant denied

attempting to strike Mr. Krebs with the Camaro. RP 821. The defendant maintained that he did “a bunch more brodies” in the roadway so that other drivers would call 911; as drivers exited their vehicles, the defendant alleged he directed them to the Dairy Queen. RP 821-22.

After law enforcement arrived, he claimed that one of the officers turned into the devil, which scared him and caused him to accelerate away from the officers. RP 823. The defendant then asserted that he believed that it was the end of the world so he tried to kill himself. RP 824. He informed the jury that he reached a speed of 100 m.p.h., which lifted the Camaro above the ground and he was floating. RP 824. The defendant maintained two angels settled him on the ground, and that he ran from the Camaro because “the evil ones are coming.” RP 825. The defendant then ran into an alley, tripped over himself and ended up in a ditch. RP 826.

Once at the hospital, the defendant alleged that he asked the medical staff if they had Jesus in their heart, and the staff laughed and hissed at him. RP 829-30. The defendant asserted that he did not want any medical attention. RP 830.

On cross-examination, the defendant admitted to ingesting methamphetamine with his girlfriend (not Ms. Harper) before the incident. RP 839. The defendant denied being angry with or threatening Mr. Krebs during the incident. RP 842. The defendant claimed that he collided with

Mr. Krebs' vehicle so that Mr. Krebs would leave him alone. RP 842-43. The defendant also denied telling the officer that he took Ms. Harper's car and did not have permission to take it, but did admit he drove the Camaro out of the parking lot. RP 843. The defendant further denied telling the officer that he had knowledge the Camaro belonged to Ms. Harper. RP 845. The defendant also denied taking the Camaro to get Ms. Harper's attention. RP 843. The defendant further denied that he attempted to elude the police. RP 846. He admitted that he drove the Camaro at a high rate of speed through narrow residential streets, until he crashed through a residential yard. RP 850. The defendant further denied threatening Mr. Pluid at the hospital. RP 853.

Dr. Michael Stanfill, a licensed clinical psychologist, testified for the defense that the defendant had a "delusion of grandeur" during the events surrounding the Dairy Queen and afterward. RP 865-867, 869. Dr. Stanfill opined that the defendant's beliefs were genuine, but,

"[w]ith the caveat that there is now substantial testing across multiple prior evaluations, including mine, that he has a tendency to overexaggerate and over-report that. So they can still be there. They can still be present. He will -- he has a tendency to say that they are worse than what they -- that what they actually are at the time.

RP 869-70.

Consequently, in addition to speaking with the defendant and administering several psychological tests, Dr. Stanfill relied on third-hand

accounts, such as officers and medical staff, to make his assessment. RP 870-71, 882, 884-85, 889. He stated that the defendant had a history of abusing drugs such as methamphetamine and cannabis. RP 871. Dr. Stanfill believed that the defendant was highly intoxicated at the time of the incident⁹ and that persistent drug use caused the defendant's persistent delusional beliefs. RP 872. Ultimately, Dr. Stanfill diagnosed the defendant with "substance-induced psychotic disorder," which had been resolved at the time of trial. RP 877-78. He also diagnosed the defendant with "unspecified schizophrenia, which is the ongoing delusional beliefs that are well beyond the period of intoxication or withdrawal, antisocial personality disorder, [and] several substance use disorders related to stimulants, inhalants, and cannabis." RP 878.

Dr. Stanfill admitted during cross-examination that he did not consult with the defendant's family, friends, Ms. Harper, Mr. Krebs, Mr. Pluid, and did not conduct an independent investigation. RP 881. He further acknowledged that he only met with the defendant once, and that was approximately one-year after the event. RP 881-82. He also acknowledged that it is possible for an individual to falsely claim a mental

⁹ The psychologist admitted on cross-examination that his only knowledge of how much methamphetamine the defendant ingested was based on the self-reporting by the defendant. RP 896-97.

illness. RP 886. Dr. Stanfill also admitted there was a potential for the defendant to exaggerate symptoms of abnormality when Dr. Stanfill evaluated the defendant and that the defendant was exaggerating his symptoms at the time of psychologist's assessment. RP 888. Dr. Stanfill acknowledged that drug use contributed to the defendant's behavioral issues. RP 878. Dr. Stanfill did not find the defendant had a mental disorder amounting to insanity, nor did he find the defendant had diminished capacity at the time of the event, and found the defendant competent to stand trial. RP 890. Dr. Stanfill stated the defendant had the capacity to form intent during the incident. RP 894, 897.

In rebuttal, the State called Dr. Cedar O'Donnell, a forensic, licensed psychologist employed by Eastern State Hospital. RP 926-27. Dr. O'Donnell conducted a forensic examination on the defendant on September 17, 2018, and then a second forensic examination on April 8, 2019. RP 930. Dr. O'Donnell diagnosed the defendant with "substance use disorder, primarily methamphetamine, and a history of substance-induced psychosis and that he had antisocial traits." RP 932-33. Dr. O'Donnell opined that, as relayed to mental health professionals, the defendant exaggerated both the amount of methamphetamine he ingested prior to the November 8, 2017, incident and his reporting of auditory or visual hallucinations at the time of the incident. RP 933, 935. This conclusion was

supported by prior mental health evaluations of the defendant. RP 939. Dr. O'Donnell agreed with Dr. Stanfill that the defendant was highly intoxicated and was "suffering from some substance-induced psychosis" at the time of the incident. RP 934.

Dr. O'Donnell disagreed with Dr. Stanfill's diagnosis that the defendant had an unspecified schizophrenia spectrum disorder, but rather the defendant's behavior was "explained by a prolonged substance-induced psychosis and antisocial traits." RP 940. Dr. O'Donnell found that the defendant's antisocial behavior was consistent throughout his mental health testing and evaluations. RP 947. After review of the defendant's mental health records, Dr. O'Donnell could not find that the defendant had previously been diagnosed with unspecified schizophrenia disorder. RP 949. Dr. O'Donnell also found that the defendant did not have a mental illness, and explained:

There's no indication in his history records or other evaluations that he has mental illness. There's no indication that he suffered from any mental illness symptoms outside of his drug use. And also there's no indication that his mental health symptoms preceded his drug use.

RP 943, 949.

III. ARGUMENT

A. *THE DEPUTY PROSECUTOR'S UNOBJECTED-TO, SHORT-LIVED REMARK REGARDING THE INTENT NECESSARY TO COMMIT FIRST-DEGREE ASSAULT DOES NOT REQUIRE REVERSAL.*

For the first time on appeal, the defendant contends the deputy prosecutor committed misconduct by misstating the intent necessary to commit first-degree assault.

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). To prevail on a claim of prosecutorial misconduct, the defendant must establish “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *see also State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (an appellate court reviews a prosecutor’s statements during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the closing argument, and the jury instructions).

If a defendant does not object, any error is waived “unless the prosecutor’s misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Our high court noted in *Matter of Phelps*, that it has found prosecutorial misconduct to be flagrant

and ill-intentioned in only a narrow set of cases where the court was “concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant’s membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner.” 190 Wn.2d 155, 170, 410 P.3d 1142 (2018).

“Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *Emery*, 174 Wn.2d at 761 (quotations omitted); *see also State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). When evaluating whether misconduct is flagrant and ill-intentioned, an appellate court “focus[es] less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Emery*. 174 Wn.2d at 762.

In the present case, the trial court instructed the jury as to the elements of first-degree assault:

To convict the defendant of the crime of assault in the first-degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 8th day of November 2017, the defendant assaulted KELLY LEE KREBS.

- (2) That the assault was committed with by a force or means likely to produce great bodily harm or death;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That this act occurred in the State of Washington.

CP 141.

The court also defined assault under instruction number 13:

An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 145.

During rebuttal argument, the deputy prosecutor stated:

Instruction No. 8 defines what assault in the first-degree is. Instruction No. 9 tells you the elements that the State has to prove. Instruction No. 10 defines "intent." There is the voluntary intoxication instruction. There is the definition of "great bodily harm." And then, finally, there is the definition of what an assault is. And you have two different definitions to look at and to determine. I won't read them again.

But keep in mind it is not necessarily -- it is not necessary to inflict bodily harm and the actor, meaning Mr. Harper, doesn't need to actually intend to inflict bodily injury. What he intends to do is to create in another apprehension and imminent fear of bodily injury, which is what you witnessed there. And so based upon their interaction, ladies and gentlemen, Mr. Harper did intend to assault Mr. Harper -- or I'm sorry, Mr. Harper did intend to assault

Mr. Krebs that night, and the State has proven that beyond a reasonable doubt.

CP 1052.

The deputy prosecutor¹⁰ arguably misstated an element of the crime of first-degree assault when she momentarily stated that the defendant did not have form the intent to inflict great bodily injury. In context, it appears the deputy prosecutor misspoke. Had defense counsel timely objected and requested a curative instruction, the trial judge would have only needed to remind the jury to follow the elements instruction for the first-degree assault or instructed the jury that it needed to find the defendant acted with intent to cause great bodily harm. Such a curative instruction would have neutralized and obviated any possible prejudice from the deputy prosecutor's ill-phrased remark. Importantly, this statement was not repeated by the deputy prosecutor. *See In re Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (“[t]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of

¹⁰ Deputy Prosecutor Gayle Ervin has since retired from the prosecutor's office. *See* https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=000000019483

instructions can erase their combined prejudicial effect.” (internal quotation marks omitted).¹¹

Accordingly, the defendant has not established this stand-alone remark was flagrant and ill-intentioned *and* that it impacted the verdict. In that regard, the trial court instructed the jury that it was the jurors duty to “accept the law from [the court’s instructions] ... [y]ou must apply the law from [the court’s instructions] to the facts that you decide have been proved and in this way decide the case.”¹² CP 101 ¶2. Additionally, the jury was instructed that the lawyer’s remarks were not evidence, the law was contained in the court’s instructions, that it should disregard any argument by the lawyers not supported by the law in the court’s instructions, and “[t]he law is contained in [the court’s] instructions.” CP 102 ¶2. The record contains no evidence the jury was confused or relied the deputy prosecutor’s transient remark. Additionally, the jury is presumed to follow the court’s instructions. *Matter of Phelps*, 190 Wn.2d at 172. All things considered, there is little likelihood, if any, that the deputy prosecutor’s passing statement concerning the intent necessary to commit first-degree assault

¹¹ This Court’s opinion in *State v. Jones*, 13 Wn. App. 2d 386, 407, 463 P.3d 738 (2020) is easily distinguished. In that case and during closing argument, the deputy prosecutor repeatedly misstated the State’s burden to establish actual knowledge for the crime of possession of a stolen vehicle. *Id.*

¹² Trial court instruction number 1.

impacted the jury's verdict. There were many witnesses called to testify, and Mr. Krebs testified that the defendant tried to run him over, during three separate instances, with the Camaro, part of which was captured on video. Either the jury believed the defendant had the intent to cause great bodily harm by attempting to run over Mr. Krebs with the Camaro on three different occasions or they did not. Our Supreme Court has noted that "[a] defendant is entitled to a fair trial but not a perfect one." *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012) (internal quotation marks omitted), *abrogated on other grounds*, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). The deputy prosecutor's once off remark does not warrant reversal as any conceivable prejudice could have been cured by an instruction and there is no evidence it impacted the verdict.

B. THE DEPUTY PROSECUTOR'S UNOBJECTED-TO REMARK DURING CLOSING ARGUMENT THAT THE DEFENDANT WAS "A DIFFICULT PERSON, DIFFICULT TO DEAL WITH" WAS A REASONABLE INFERENCE FROM THE EVIDENCE, WAS NOT FLAGRANT AND ILL-INTENTIONED, AND DID NOT IMPACT THE VERDICT.

During closing argument, the deputy prosecutor made the following argument:

Now, we've talked about the agreement of the doctors in terms of the drug-induced psychoses and the exaggeration of symptoms. But what you also have to understand is that across five separate evaluations, the other consistent has been the antisocial personality diagnosis.

[DEFENSE ATTORNEY]: Objection, Your Honor. That fact wasn't permitted into evidence.

THE COURT: Overruled. The diagnosis was permitted but not what factors are taken into consideration in making that diagnosis. So you're welcome to comment on the diagnosis but not beyond that.

[DEPUTY PROSECUTOR]: Thank you.

Antisocial personality, a difficult person, difficult to deal with. And that's what we've got here, a difficult person who didn't want to have to deal with the break-up of his marriage that he caused and, over the course of time, progressively escalated his attempts to get Chelsea Harper fired. I mean, think about it, ladies and gentlemen, why else on that night, 30 minutes before he flags down the officers, says she's going to be -- she is being raped, she's been kidnapped, but yet he calls 9-1-1 that night and he tells them that she's suicidal; two conflicting stories. It's going to be whatever story is going to get him to achieve his goal.

RP 1054-55.

A prosecutor has wide latitude to argue reasonable inferences from the evidence. *In re Glasmann*, 175 Wn.2d at 704. A prosecutor may not express a personal opinion; however, there is no misconduct unless the record unmistakably demonstrates a personal opinion which is independent of the evidence presented at trial. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006). To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence produced at trial, an appellate court reviews the challenged comments in context:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

Id. at 53-54.

In that regard, the defendant bears the burden to establish the prosecutor's conduct was improper and prejudicial; he or she must first show the deputy prosecutor's conduct was improper. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). An appellate court will not reverse when an instruction, had the defendant requested it, would have cured any prejudice. *Russell*, 125 Wn.2d at 85.

Here, the defendant fails to establish the deputy prosecutor's remark was both improper *and* prejudicial. It is obvious the deputy prosecutor offered an unobjected-to alternative explanation for the defendant's conduct and the reason he acted out during his commission of the crimes. The defendant and Ms. Harper were estranged and living separately. Ms. Harper wanted a dissolution and the defendant did not. RP 451. The defendant attempted to get Ms. Harper fired several times before the day of the incident, had previously accused her of ingesting methamphetamine on the job, and even accused Ms. Harper's supervisor of selling methamphetamine

to Ms. Harper. Shortly before the incident, the defendant called 911 falsely claiming Ms. Harper was suicidal. RP 483. At the inception of the defendant's criminal conduct at the Dairy Queen, Ms. Harper did not give way to the defendant's several demands that she speak with him outside the establishment. By the defendant's own admission, he violently escalated his actions and behavior in response to Ms. Harper's inaction. The deputy prosecutor's statement that the defendant was "a difficult person, difficult to deal with" was a euphemistic expression reasonably drawn from the evidence and provided an explanation for the defendant's vitriolic behavior and decision-making leading up to and during his commission of the charged crimes, due to his resistance to a divorce and his activity to prevent it.

Even if the defendant could establish the deputy prosecutor's remark was improper, he fails to establish it was prejudicial. The defendant attempts to cast this remark as propensity evidence in that "[the defendant] had a psychological predilection for criminal behavior and was, accordingly more likely guilty of the charges against him." *See* Appellant's Br. at 14. This assertion is unsupported by the record and the deputy prosecutor's statement taken in context.

The defendant relies *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009) to support his argument. But that case is distinguishable. There,

Fisher was charged with four counts of child molestation of the same victim. *Id.* at 733. During trial, there was testimony regarding Fisher’s physical abuse of the victim. *Id.* at 735-38. The trial court “expressly conditioned the admission of evidence of physical abuse on defense counsel’s making an issue of [the victim’s] delayed reporting.” *Id.* at 747. The prosecutor mentioned the physical abuse during opening argument, which continued throughout trial. *Id.* at 748. Our high court found that the prosecutor impermissibly used the evidence in violation of a pretrial ruling. *Id.* The Supreme Court also held that there was a substantial likelihood that the prosecuting attorney’s misconduct affected the jury’s verdict. *Id.* at 749. The prosecutor’s emphasis on the physical abuse left the jury “with the wrong impression that it must convict Fisher to obtain justice for the harm caused” to Fisher’s other children. *Id.*

Here, unlike *Fisher*, the defense psychologist, during cross-examination identified the defendant with antisocial personality disorder, in context with other diagnosed disorders. Indeed, it was defense counsel who first placed the psychologist on the stand with the objective of explaining and downplaying the defendant’s ability to form the requisite mental states during the commission of the charged crimes and to explain his conduct. *See* RP 836, 863. The State was certainly allowed to comment on the defendant’s conduct describing him as difficult and a difficult person to deal

with regarding his treatment and actions toward Ms. Harper. The defendant has not established the prosecutor's argument was improper and that it impacted the verdict.

C. FOR THE FIRST TIME ON APPEAL, THE DEFENDANT CLAIMS, YET FAILS TO ESTABLISH, IT WAS IMPROPER FOR THE STATE TO INTRODUCE EVIDENCE OF HIS COLLATERAL, UNCHARGED CONDUCT WHICH OCCURRED DURING THE SAME INCIDENT.

For the first time on appeal, the defendant challenges the admissibility the defendant's uncharged conduct during the same criminal episode under ER 404(b). Defense counsel never lodged an objection under ER 404(b) at trial and this Court should not consider it for the first time on appeal. If this Court does consider this argument, the trial court properly allowed the evidence, under other defense evidentiary objections, to establish the defendant's various mental states (intent and knowledge) during commission of the alleged offenses and to rebut the defendant's claim that he could not form the requisite mental states during commission of the crimes.

1. Any challenge under ER 404(b) is waived.

The defendant did not preserve any objection below under ER 404(b), so he cannot assert it now for the first time on appeal. "A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). On appeal, a party may not raise an objection not

properly preserved at trial absent manifest constitutional error. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (plurality opinion); RAP 2.5(a)(3). Specifically regarding RAP 2.5(a)(3), our high court has 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) (internal quotation marks omitted).

An error is considered manifest when there is actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). The focus of this analysis is on whether the error is so obvious on the record as to warrant appellate review. *Id.* An appellant can demonstrate actual prejudice by making a plausible showing that the asserted error had practical and identifiable consequences in the trial. *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). If error, it “requires reversal only if the error, within reasonable probability, materially affected the outcome.” *Id.* Moreover, any such error is harmless “if the evidence is of minor significance compared to the overall evidence as a whole.” *Id.* In that regard, “[a]n objection to the

admission or exclusion of evidence based on relevance is insufficient to preserve appellate review based on ER 404(b).” *State v. Jordan*, 39 Wn. App. 530, 539, 694 P.2d 47 (1985), *review denied*, 106 Wn.2d 1011 (1986), *cert. denied*, 479 U.S. 1039 (1987).

In the present case, the State did not seek to elicit ER 404(b) evidence, defense counsel did not object under ER 404(b), and the court was never asked to analyze any evidence under ER 404(b). Defense counsel asserted several other objections to the now complained of admitted evidence, but not under ER 404(b). *See e.g.*, RP 500 (hearsay objection); RP 506-07 (relevancy objection to admitted photographs); 518-19 (relevancy objection to a video); 521-22 (relevancy objection to uncharged conduct). Thus, an evidentiary error claim, such as this, is not reviewable under RAP 2.5 where the objection was not preserved at trial. *See Powell*, 166 Wn.2d at 84. This Court should decline review of this asserted error.

2. *If this Court considers the claim, there was no error.*

If this Court reaches the merits, evidence of the defendant’s collateral, uncharged conduct during the same, continuing criminal incident did not constitute propensity evidence and it was properly introduced at trial.

Evidence of a defendant’s “other crimes, wrongs, or acts” is generally inadmissible to demonstrate the defendant’s propensity to commit

the charged crime. ER 404(b); *Powell*, 166 Wn.2d at 81. If the State offers evidence of a defendant's "other crimes, wrongs, or acts" for a legitimate purpose, the evidence is admissible under ER 404(b). *See Fisher*, 165 Wn.2d at 744.

Under the res gestae exception to ER 404(b),¹³ evidence of other crimes or misconduct is admissible to complete the crime story by establishing the immediate time and place of its occurrence. *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, (1998); *see also State v. Grier*, 168 Wn. App. 635, 647, 278 P.3d 225 (2012), *cert. denied*, 574 U.S. 860 (2014) (res gestae evidence is evidence that completes the story of a crime by proving the context of events near in time and place to the commission of the crime and for a complete description for the jury). Res gestae evidence "constitutes a link in the chain of an unbroken sequence of events surrounding the charged offense." *Brown*, 132 Wn.2d at 571.

Collateral crimes are admissible as res gestae evidence when they complete the story of a crime "by proving its immediate context of happenings near in time and place" *State v. Tharp*, 27 Wn. App. 198, 204,

¹³ An appellate court reviews res gestae evidence in conjunction with ER 401, 402, and 403. *Fisher*, 165 Wn.2d at 745. If the res gestae evidence is relevant under ER 401, then it is generally admissible under ER 402, unless the prejudicial effect outweighs its probative value under ER 403. *Grier*, 168 Wn. App. at 646, 649.

616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591 (1981) (internal quotations omitted). In *Tharp*, the defendant, charged with murder, challenged the admission of three collateral crimes committed on the same day as the murder. In the first, he broke into a car and took various items. *Id.* at 200. He then broke into a residence and took several items, including a gun. *Id.* at 200-01. In the third collateral crime, the defendant stole a truck. *Id.* at 201.

The gun and the truck were used in the commission of the murder, and some of the other stolen items were found at the scene of the crime and on the defendant's person at the time of his arrest. *Id.* at 201, 203-04. Under these facts, Division One of this Court concluded that the three collateral crimes were connected to the murder and upheld their admission as part of the whole story. *Id.* at 205. The court of appeals explained:

The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "[A] party cannot, by multiplying his crimes, diminish the volume of competent testimony against him."

Id. at 205 (alteration in the original) (internal citation omitted); *see also State v. Bockman*, 37 Wn. App. 474, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984) (a burglary and assault occurring before a murder were admissible because evidence of the crimes substantially connected the

defendants to the murder); *State v. Thompson*, 47 Wn. App. 1, 12, 733 P.2d 584 (1987) (evidence of other collateral crimes was admissible under res gestae as that evidence filled in the gap between the time the defendant first encountered his murder victim and the time of the shooting); *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004) (evidence of an uncharged burglary and weapons allegations out of the same event were admissible in a murder prosecution under res gestae exception). In all four opinions discussed above, the collateral acts admitted as res gestae explained parts of the whole story which otherwise would have remained unexplained.¹⁴

The facts in this case are closely analogous to *Tharpe*, *Bockman*, *Thompson*, and *Hughes*. The defendant does not discuss or attempt to distinguish the holdings in those cases. Rather, the defendant complains that the State did not charge him with any related property offenses such as

¹⁴ *But see State v. Mutchler*, 53 Wn. App. 898, 771 P.2d 1168, *review denied*, 113 Wn.2d 1002 (1989). There, the defendant was charged with assault in the first-degree with intent to commit rape or indecent liberties, for attacking a woman who was walking in a park. The State introduced evidence that another woman had encountered Mutchler a few days earlier, that she had felt uncomfortable and nervous as Mutchler passed her. The court held that although the second woman's testimony was admissible on the issue of intent, it was not admissible on the basis of res gestae. The story of the attack on the first woman was complete without the testimony of the second woman. Therefore, despite the close timing of the events, res gestae did not apply. *Id.* at 902. That case is distinguished from the facts as presented here.

malicious mischief which occurred during the unbroken, turbulent chain of events. The facts relating to the defendant's collateral crimes were necessary to show the whole picture to the jury and not a sanitized version as now advocated by the defendant on appeal.

Moreover, evidence may be also admitted under ER 404(b)¹⁵ to prove an essential element of the charged crime; here, intent to cause great bodily harm. *See State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 404(b) was not designed "to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *Id.* at 175. Accordingly, evidence may be admitted under ER 404(b) to establish intent, *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995), ER 404(b); and motive, *State v. Baker*, 162 Wn. App. 468, 473-74, 259 P.3d 270 (2011).

¹⁵ ER 404(a) and (b) state, in pertinent part:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In the present case, the collateral crimes evidence that the defendant slammed into several different cars during the incident was necessary to establish that he intended to inflict great bodily injury against Mr. Krebs. It is obvious that the defendant was building up a full head of steam and became increasingly barbarous from the time he initially banged on the Dairy Queen windows, until he tried to intentionally run over Mr. Krebs during his three successive attempts, and that his charged and uncharged conduct also provided a motive for the defendant to attempt to elude the police officers. The defendant's collateral behavior also negated the defendant's claim that that he was not able to form the requisite mental states for the charged crimes. This claim has no merit.

D. CUMULATIVE ERROR DOES NOT APPLY.

The defendant asks this Court to apply the cumulative error doctrine to his case, if no individual error results in reversal. Where there are no errors or the errors have little to no effect on the trial's outcome, the cumulative error doctrine does not apply. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant has not demonstrated any error that could have affected his trial, so the doctrine does not apply.

E. THE 2019 LEGISLATION REMOVING SECOND-DEGREE ROBBERY AS A STRIKE OFFENSE DOES NOT APPLY TO STRIKE OFFENSES COMMITTED IN 2017.

As established during trial, the defendant committed his most current offenses on November 8, 2017. At sentencing on October 1, 2019, the trial court determined that the defendant was a persistent offender based upon his current conviction for first-degree assault and his predicate offenses, which consisted of a 2009 first-degree manslaughter and a 2005 second-degree robbery. CP 293.

The defendant asserts that because he is on direct review, he is entitled to the benefit of the July 28, 2019, legislative amendment repealing second-degree robbery as a “most serious offense,” under former RCW 9.94A.030(33)(o). He asks this Court to remand for resentencing without consideration of his second-degree robbery conviction as a strike offense. His argument is of no avail because Washington law is clear that the law in effect when the crime is committed must be applied to the imposition of the sentence for that crime. RCW 9.94A.345 and RCW 10.01.040 expressly state that rule, and courts have consistently applied it.

Standard of review.

An appellate court reviews questions of statutory interpretation de novo. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

Whenever a sentencing court concludes an offender is a “persistent offender,” the court must impose a life sentence, and the offender is not eligible for early release. RCW 9.94A.570. A “persistent offender” is someone who has been convicted in this state of a “most serious offense” and has, before the commission of the most recent “most serious offense,” been convicted on at least two separate occasions of felonies that would be considered “most serious offenses.” *See* RCW 9.94A.030(38)(a)(i) and (ii) (persistent offender definition). At the time the defendant committed the first-degree assault, a third strike, on November 8, 2017, former RCW 9.94A.030(33) listed Washington’s “most serious offenses,” which included first-degree manslaughter¹⁶ and second-degree robbery,¹⁷ among others. Thereafter, the classification of second-degree robbery as a “most serious offense,” under former RCW 9.94A.030(33)(o), was repealed by the Legislature, which took effect on July 28, 2019. Laws of 2019, ch. 187 (ESSB 5288¹⁸).

The defendant relies primarily on the holdings in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) (plurality opinion), which dealt with the imposition of certain legal financial obligations on defendants pending

¹⁶ RCW 9.94A.030(33)(k).

¹⁷ Former RCW 9.94A.030(33)(o).

¹⁸ Engrossed Substitute Senate Bill (ESSB) 5288, attached hereto as “Attach. A.”

direct review, and *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), regarding the application of General Rule 38 to jury selection.

In *Ramirez*, the Court had to determine whether the 2018 legislative amendments to various legal financial obligations imposed upon convicted defendants, which required trial courts not impose discretionary costs on indigent defendants, applied prospectively to defendants currently on direct appeal. 191 Wn.2d at 723. Ultimately, the court held that the LFO amendments under RCW 10.01.160(3), applied prospectively to cases pending on direct review because the imposition of those costs are governed by the statute in effect at the *termination* of a defendant's particular case, and Ramirez' case was not yet final at the time the statute was enacted. *Id.* at 749. The *Ramirez* court expressly limited its analysis to the imposition of legal financial obligations. *Id.* at 747-50.

Jefferson involved the application of a new court rule, GR 37, which refined the *Batson*¹⁹ framework for jury selection and whether it applied to Jefferson on direct appeal. 192 Wn.2d at 243. The rule did not become effective until after Jefferson's trial. *Id.* The Court determined the precipitating event for application of GR 37 is voir dire, which occurred in

¹⁹ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Jefferson’s case before the enactment date of GR 37. *Id.* at 248. In dicta, the

Court stated:

[W]e generally hold that when the new statute concerns a postjudgment matter like the sentence or revocation of release, or a prejudgment matter that has not yet occurred because of the interlocutory nature of the appeal, then the triggering event is not a “past event” but a future event. In such a case, the new statute or court rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred. In contrast, where the new statute concerns a problem with the charging document but the trial and conviction are over, then the triggering event is over—so the new statute does not apply on appeal to that past event.

Id. at 225 (internal footnote and citation omitted).

Both *Jefferson* and *Ramirez* resolved an issue involving criminal procedure (when fees and costs could be collected from a defendant and jury selection), not a statutory, substantive change in the law. Only new rules of criminal procedure or rules regarding the conduct of criminal prosecutions apply retroactively to all cases pending on direct review or which are not yet final. *See e.g. State v. Wences*, 189 Wn.2d 675, 681, 406 P.3d 267 (2017); *In re Haghghi*, 178 Wn.2d 435, 443, 309 P.3d 459 (2013); *State v. Kilgore*, 167 Wn.2d 28, 35, 216 P.3d 393 (2009); *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005); *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

The repeal of second-degree robbery under ESSB 5288 is a substantive change in the law altering punishment for a given offense.

Consequently, a comparison of the Court’s holdings in *Jefferson* and *Ramirez* have no bearing on whether the repeal of second-degree robbery as a “most serious offense” applies to the defendant on direct review. The defendant’s analysis equating the “triggering event” in *Ramirez* to the “triggering event” under ESSB 5288 is the same as comparing apples to oranges. As discussed below, based upon the plain language of ESSB 5288, the repeal of second-degree robbery as a “most serious offense” applies only to crimes committed after the July 28, 2019, the effective date of the legislation. Hence, *Ramirez* and *Jefferson* are inapplicable to the present case.

Generally, statutory amendments are presumed to operate prospectively, not retroactively. *In re Flint*, 174 Wn.2d 539, 546, 277 P.3d 657 (2012); *In re Hegney*, 138 Wn. App. 511, 542, 158 P.3d 1193 (2007). Courts disfavor retroactivity. *State v. T.K.*, 139 Wn.2d 320, 329, 987 P.2d 63 (1999), *as amended* (Oct. 28, 1999), *overturned due to legislative action on other grounds* (July 22, 2001). The presumption is overcome only when the legislature explicitly provides for retroactive application or an amendment is curative or remedial.²⁰ *In re Hegney*,

²⁰ Exceptions are made where retroactivity is expressed or implied in the legislation or where the statute is remedial or curative. *See Jefferson*, 192 Wn.2d at 248. “A remedial statute is one which relates to practice, procedures, and

138 Wn. App. at 546. The United States Supreme Court has recognized the same. In *United States v. Sec. Indus. Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982), a bankruptcy case, the Court summarized the well-established legal principles governing the interpretation of a statute to determine whether it applies retroactively or prospectively, explaining:

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. This court has often pointed out:

the first rule of construction is that legislation must be considered as addressed to the future, not to the past.... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be “the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.”

Id. at 79-80 (alterations in original).

In that regard, Washington’s savings statute, RCW 10.01.040, presumptively “saves” offenses already committed and penalties or forfeitures already incurred from being affected by a substantive amendment or repeal of a criminal statute. *State v. Rose*, 191 Wn. App. 858,

remedies.” *T.K.*, 139 Wn.2d at 332-33. A legislative amendment is “curative only if it clarifies or technically corrects an ambiguous statute.” *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006), *as corrected* (Nov. 15, 2006). The defendant makes no plausible claim that ESSB 5288 is remedial or curative.

860, 365 P.3d 756 (2015), *review denied*, 185 Wn.2d 1030 (2016). That

statute states:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

The savings clause “is deemed a part of every repealing statute as if expressly inserted therein, and hence renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute.” *State v. Gradt*, 192 Wn. App. 230, 233-34, 366 P.3d 462 (2016), *as amended* (Feb. 11, 2016) (quoting *State v. Ross*, 152 Wn.2d 220, 237, 95 P.3d 1225 (2004)). RCW 10.01.040 applies to both repeals and amendments of criminal statutes. *Rivard v. State*, 168 Wn.2d 775, 781, 231 P.3d 186 (2010). In *State v. Kane*,

101 Wn. App. 607, 617-18, 5 P.3d 741 (2000), *as amended* (Aug. 4, 2000),

Division One of this Court recognized:

The fixing of legal punishments for criminal offenses is a legislative function. *State v. Ammons*, 105 Wn.2d 175, 180, 718 P.2d 796 (1986). The saving statute is a basic principle of construction the Legislature is entitled to rely on when it makes changes to criminal and penal statutes. To ignore the presumption established by the saving statute is to introduce uncertainty into legislation and intrude into legislative prerogatives. For example, an amendatory statute that substitutes treatment for time spent in prison may well require fiscal or administrative adjustments. The Legislature may have decided that such changes should be phased in gradually as new cases arise. Or it may not have thought about timing at all. The Legislature is not obliged to express its thinking on such matters in its criminal and penal statutes. It is entitled to assume that the courts will enforce the saving statute and give prospective application to criminal and penal statutes that do not express a contrary intent.

However, since the savings statute is strictly construed,²¹ the legislature need not expressly state its intention for the statute to apply retroactively to *pending* prosecutions for crimes committed before the effective date of the amendment. *Ross*, 152 Wn.2d at 238. “Instead, such intent need only be expressed in words that fairly convey that intention.” *Id.*

In determining whether a statute applies retroactively, an appellate court may examine its “purpose and language, legislative history, and legislative bill reports.” *State v. Ramirez*, 140 Wn. App. 278, 289 n.7,

²¹ Under the common law, all pending cases must be decided according to the current law “at the time of the decision.” *State v. Brewster*, 152 Wn. App. 856, 859, 218 P.3d 249 (2009).

165 P.3d 61 (2007), *review denied*, 163 Wn.2d 1036 (2008). In the present case, the legislature did not express any intent that the repeal of RCW 9.94A.030(33)(o), was to apply retroactively. In fact, the legislative history imparts the opposite intent. The Senate first substitute bill would have allowed offenders the opportunity to be resentenced if second-degree robbery had been used as a predicate offense for sentencing those defendants as persistent offenders. Senate Bill Report, SB 5288, at 2 (Attach. B). However, the Senate subsequently removed that provision from the amendment. SSB 5288 AMD 161, at 1 (Attach. C); Senate Engrossed First Substitute Bill 5288, as passed by the Senate on March 13, 2019; Senate Bill Report, ESSB 5288, at 1-4 (Attach. D). As enacted, ESSB 5288 removed second-degree robbery from the list of offenses that qualify as a “most serious offense” when sentencing persistent offenders, which became effective date of July 28, 2019.

Accordingly, RCW 9.94A.570 (Persistent Offender Accountability Act), RCW 9.94A.030(33) (“most serious offense” defined), RCW 9.94A.030(38)(a)(i) and (ii) (defining “persistent offender”), and ESSB 5288 are unambiguous and contain a clear legislative indication that the statutes’ terms are to be applied to crimes committed after the effective date of July 28, 2019.

The defendant's reliance on *State v. Heath*, 85 Wn.2d 196, 197, 532 P.2d 621 (1975), is misplaced. In that case, Heath had his driver's license revoked in a 1972 civil proceeding under the Washington Habitual Traffic Offenders Act. That statute was amended and became effective in July 1973. The amendment allowed a trial court to stay a driver's license revocation if the offense involved alcohol and the offender was in treatment. *Id.* at 196. The superior court stayed Heath's revocation order because Heath was in treatment. The State argued on appeal that the new statute should be given only prospective application, but the Supreme Court held that the superior court did not err giving the statute retroactive application under general rules of statutory construction because it was "patently remedial." *Id.* at 198.

Thereafter, Division Two of this Court distinguished *Heath* in *State v. Toney*, 103 Wn. App. 862, 862-63, 14 P.3d 826 (2000). In that case, the State appealed a trial court use of a new Drug Offender Sentencing Alternative (DOSA) for sentencing Toney for a crime committed before the effective date of the new sentencing alternative. In 1995, the legislature created DOSA as a sentencing alternative. In 1999, the legislature amended the statute to include those offenders who had a prior felony conviction, which took effect July 25, 1999. *Id.* at 862-63. Toney was charged with an offense which took place on June 22, 1999. *Id.* The superior court sentenced

Toney under the 1999 amendment even though the State argued he was ineligible because the amendment to the DOSA statute was not in effect when Toney committed the crime. *Id.* at 864.

On appeal, *Toney* relied, in part, on *Heath*. *Id.* at 865. Judge J. Dean Morgan, writing for the court, rejected Toney’s argument and differentiated *Heath*, stating:

By its plain terms, this statute [RCW 10.01.040] says that when a criminal or penal statute is amended, its preamendment version applies to offenses before the amendment’s effective date, “unless a contrary intention is expressly declared in the amendatory ... act[.]” DOSA is criminal and penal, and the 1999 amendments to it do not contain an express declaration on retroactivity. Accordingly, we are constrained to hold that the 1999 amendment does not apply to crimes committed before its effective date.

...

Toney relies on *State v. Grant*²² and *State v. Heath*, but neither of those cases governs this one. In *Heath*, RCW 10.01.040 seems to have been overlooked. In *Grant*, according to the Supreme Court, the statute in issue contained an express declaration on retroactivity.

103 Wn. App. at 864-65 (internal footnote citations omitted).

Judge Morgan, writing for the court, further observed:

It seems obvious that RCW 10.01.040 should have been noted, and either followed or distinguished, in the fifth paragraph of the *Heath* opinion. In that paragraph, however, the court cites only a California case and a New York case. *Heath*, 85 Wn.2d at 198, 532 P.2d 621. It appears, then, that the parties and the court overlooked RCW 10.01.040.

²² *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978).

Id. at 865 n.12; *See also Ross*, 152 Wn.2d at 239 (“*Heath* did not directly implicate the savings clause since it pertained to amendments governing civil driver license revocations under the Washington Habitual Traffic Offenders Act); *Kane*, 101 Wn. App. at 615-16 (distinguishing *Heath* stating: “The court’s suggestion that an ameliorative sentencing statute should be applied retroactively in the face of a saving statute was dicta because the presumption against retroactivity established by RCW 10.01.040 was not at issue in *Heath*”).

The defendant further relies on *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994), for the proposition that an amendment to a statute which reduces punishment requires retroactive application. That case is easily distinguished. The defendant arguably focuses on the Supreme Court’s statement in *Wiley* that a legislative downgrading of a crime based upon a determination that the conduct is less culpable will ordinarily be given retroactive effect. *See Wiley*, 124 Wn.2d at 688. However, as recognized later and distinguished by our high court in *Ross*, the *Wiley* court did not consider the impact of RCW 10.01.040 on its decision. *See Ross*, 152 Wn.2d at 240.

Moreover, *Wiley’s* comments about retroactivity were based upon pre-2000 versions of the Sentencing Reform Act of 1981 (SRA). In 2000, the legislature clarified its intent regarding retroactivity by enacting

RCW 9.94A.345: “Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” The law was designed to cure any ambiguity as to what law to use when calculating a defendant’s offender score for sentencing and “to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives.” Laws of 2000, ch. 26, § 1.

Accordingly, under the SRA, a defendant must be sentenced in accordance with the law in effect at the time of his or her offense. *State v. Medina*, 180 Wn.2d 282, 287, 324 P.3d 682, 685 (2014) (the terms of a defendant’s sentence are governed by the version of the SRA in effect when the crime was committed); *In re Carrier*, 173 Wn.2d 791, 808, 272 P.3d 209 (2012) (same); *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (same); *State v. Delgado*, 148 Wn.2d 723, 726, 63 P.3d 792 (2003) (same).

By its plain terms, RCW 9.94A.345 does not limit its application to an offender score calculation. In this context, courts have applied RCW 9.94A.345 outside the setting of offender score calculations. For example, in *State v. Jenks*, 12 Wn. App. 2d 588, 459 P.3d 389 (2020),²³ Division Two of this Court addressed whether the statutory amendment

²³ The Supreme Court granted review as to the persistent offender sentencing issue on September 9, 2020. Attach. E.

omitting second-degree robbery as a strike offense, which became effective while Jenks' case was pending on direct appeal, applied to defendant's persistent offender sentence. Ultimately, the court concluded that RCW 9.94A.345 and RCW 10.01.040 both required Jenks to be sentenced under the law in effect when he committed his third strike. *Id.* at 592. As explained by the court:

Here, it is undisputed that former RCW 9.94A.030(32)(o) – listing second-degree robbery as a most serious offense – was in effect at the time Jenks committed his current offense. And the 2019 amendment did not express an intent that it would apply to pending prosecutions for offenses committed before its effective date. Therefore, both RCW 9.94A.345 and RCW 10.01.040 require that Jenks be sentenced based on the former version of RCW 9.94A.030(33) rather than based on the 2019 amendment to RCW 9.94A.030(33) unless those statutes are inapplicable or some exception applies under the facts of this case.

Id. at 593.

Later, in *State v. Molia*, 12 Wn. App. 2d 895, 897, 460 P.3d 1086 (2020),²⁴ Molia argued that the removal of second-degree robbery as a most serious offense applied prospectively to his case because he was pending direct review at the time of the legislative change, and, in the alternative, that the statutory change applied retroactively to his sentencing.

²⁴ The Supreme Court stayed its decision on whether to accept review pending the outcome of *Jenks*, 12 Wn. App. 2d 588.

In rejecting Molia’s claim, Division One of this Court concluded that the holdings in *Jefferson* and *Ramirez* had no bearing on whether the removal of second-degree robbery as a strike offense applied to Molia’s case on direct review. *Id.* at 902. Specifically, the *Molia* court found that *Jefferson* did not involve an amendment to a statute affecting sentencing, and *Ramirez* involved the imposition of legal financial obligations accompanying a sentence rather than the sentencing itself. *Id.* at 902-03. Applying RCW 10.01.040, Division One ultimately concluded that the legislature gave no indication that the removal of second-degree robbery as a most serious offense applied retroactively to Molia’s sentencing. *Id.* at 904; *see also State v. Coombes*, 191 Wn. App. 241, 250, 361 P.3d 270 (2015) (this Court held that a trial court’s authority to impose community custody conditions “must be in accordance with the law in effect when the offense was committed,” citing RCW 9.94A.345); *State v. Small*, 1 Wn. App. 2d 254, 404 P.3d 543 (2017), *review denied*, 190 Wn.2d 1014 (2018) (in an ex post facto context, it was error to enhance the defendant’s sentencing range since the enhancement provision was not in existence at the time of the commission of crime based upon RCW 9.94A.345).

Applying RCW 10.01.040 in conjunction with RCW 9.94A.345, a court is required to sentence a defendant under the law in effect at the time the offense was committed, absent legislative intent to the contrary. These

statutes, which were not addressed in *Wiley* or *Heath*, establish there is no retroactivity when the punishment for a crime is later reduced or repealed by the legislature for an offender already sentenced under a prior version of the law. *Heath* and *Wiley* do not apply to this case. Likewise, *Jefferson* and *Ramirez* addressed procedural rules, not substantive changes in the law, which presumptively have a retroactive application. Additionally, the legislation removing second-degree robbery as a strike offense lacks express legislative intent regarding retroactive application. To the contrary, the legislature removed a provision in the bill which would have allowed those sentenced as a persistent offender, with second-degree robbery as a predicate offense, to be resentenced.

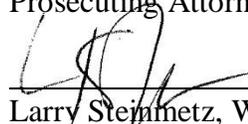
This Court should stay this matter pending the Supreme Court's decision in *Jenks*.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this this 15 day of September, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz, WSBA #20635
Deputy Prosecuting Attorney
Attorney for Respondent

ATTACHMENT A

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 5288

Chapter 187, Laws of 2019

66th Legislature
2019 Regular Session

PERSISTENT OFFENDERS--REMOVING ROBBERY IN THE SECOND DEGREE

EFFECTIVE DATE: July 28, 2019

Passed by the Senate March 13, 2019
Yeas 29 Nays 20

KAREN KEISER
President of the Senate

Passed by the House April 16, 2019
Yeas 53 Nays 45

FRANK CHOPP
Speaker of the House of Representatives
Approved April 29, 2019 3:06 PM

JAY INSLEE
Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE SENATE BILL 5288 as passed by Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON
Secretary

FILED

April 30, 2019

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE SENATE BILL 5288

Passed Legislature - 2019 Regular Session

State of Washington

66th Legislature

2019 Regular Session

By Senate Law & Justice (originally sponsored by Senator Darneille)

READ FIRST TIME 02/22/19.

1 AN ACT Relating to removing robbery in the second degree from the
2 list of offenses that qualify an individual as a persistent offender;
3 and amending RCW 9.94A.030.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 9.94A.030 and 2018 c 166 s 3 are each amended to
6 read as follows:

7 Unless the context clearly requires otherwise, the definitions in
8 this section apply throughout this chapter.

9 (1) "Board" means the indeterminate sentence review board created
10 under chapter 9.95 RCW.

11 (2) "Collect," or any derivative thereof, "collect and remit," or
12 "collect and deliver," when used with reference to the department,
13 means that the department, either directly or through a collection
14 agreement authorized by RCW 9.94A.760, is responsible for monitoring
15 and enforcing the offender's sentence with regard to the legal
16 financial obligation, receiving payment thereof from the offender,
17 and, consistent with current law, delivering daily the entire payment
18 to the superior court clerk without depositing it in a departmental
19 account.

20 (3) "Commission" means the sentencing guidelines commission.

1 (4) "Community corrections officer" means an employee of the
2 department who is responsible for carrying out specific duties in
3 supervision of sentenced offenders and monitoring of sentence
4 conditions.

5 (5) "Community custody" means that portion of an offender's
6 sentence of confinement in lieu of earned release time or imposed as
7 part of a sentence under this chapter and served in the community
8 subject to controls placed on the offender's movement and activities
9 by the department.

10 (6) "Community protection zone" means the area within eight
11 hundred eighty feet of the facilities and grounds of a public or
12 private school.

13 (7) "Community restitution" means compulsory service, without
14 compensation, performed for the benefit of the community by the
15 offender.

16 (8) "Confinement" means total or partial confinement.

17 (9) "Conviction" means an adjudication of guilt pursuant to Title
18 10 or 13 RCW and includes a verdict of guilty, a finding of guilty,
19 and acceptance of a plea of guilty.

20 (10) "Crime-related prohibition" means an order of a court
21 prohibiting conduct that directly relates to the circumstances of the
22 crime for which the offender has been convicted, and shall not be
23 construed to mean orders directing an offender affirmatively to
24 participate in rehabilitative programs or to otherwise perform
25 affirmative conduct. However, affirmative acts necessary to monitor
26 compliance with the order of a court may be required by the
27 department.

28 (11) "Criminal history" means the list of a defendant's prior
29 convictions and juvenile adjudications, whether in this state, in
30 federal court, or elsewhere, and any issued certificates of
31 restoration of opportunity pursuant to RCW 9.97.020.

32 (a) The history shall include, where known, for each conviction
33 (i) whether the defendant has been placed on probation and the length
34 and terms thereof; and (ii) whether the defendant has been
35 incarcerated and the length of incarceration.

36 (b) A conviction may be removed from a defendant's criminal
37 history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640,
38 9.95.240, or a similar out-of-state statute, or if the conviction has
39 been vacated pursuant to a governor's pardon.

1 (c) The determination of a defendant's criminal history is
2 distinct from the determination of an offender score. A prior
3 conviction that was not included in an offender score calculated
4 pursuant to a former version of the sentencing reform act remains
5 part of the defendant's criminal history.

6 (12) "Criminal street gang" means any ongoing organization,
7 association, or group of three or more persons, whether formal or
8 informal, having a common name or common identifying sign or symbol,
9 having as one of its primary activities the commission of criminal
10 acts, and whose members or associates individually or collectively
11 engage in or have engaged in a pattern of criminal street gang
12 activity. This definition does not apply to employees engaged in
13 concerted activities for their mutual aid and protection, or to the
14 activities of labor and bona fide nonprofit organizations or their
15 members or agents.

16 (13) "Criminal street gang associate or member" means any person
17 who actively participates in any criminal street gang and who
18 intentionally promotes, furthers, or assists in any criminal act by
19 the criminal street gang.

20 (14) "Criminal street gang-related offense" means any felony or
21 misdemeanor offense, whether in this state or elsewhere, that is
22 committed for the benefit of, at the direction of, or in association
23 with any criminal street gang, or is committed with the intent to
24 promote, further, or assist in any criminal conduct by the gang, or
25 is committed for one or more of the following reasons:

26 (a) To gain admission, prestige, or promotion within the gang;

27 (b) To increase or maintain the gang's size, membership,
28 prestige, dominance, or control in any geographical area;

29 (c) To exact revenge or retribution for the gang or any member of
30 the gang;

31 (d) To obstruct justice, or intimidate or eliminate any witness
32 against the gang or any member of the gang;

33 (e) To directly or indirectly cause any benefit, aggrandizement,
34 gain, profit, or other advantage for the gang, its reputation,
35 influence, or membership; or

36 (f) To provide the gang with any advantage in, or any control or
37 dominance over any criminal market sector, including, but not limited
38 to, manufacturing, delivering, or selling any controlled substance
39 (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen
40 property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88

1 RCW); human trafficking (RCW 9A.40.100); promoting commercial sexual
2 abuse of a minor (RCW 9.68A.101); or promoting pornography (chapter
3 9.68 RCW).

4 (15) "Day fine" means a fine imposed by the sentencing court that
5 equals the difference between the offender's net daily income and the
6 reasonable obligations that the offender has for the support of the
7 offender and any dependents.

8 (16) "Day reporting" means a program of enhanced supervision
9 designed to monitor the offender's daily activities and compliance
10 with sentence conditions, and in which the offender is required to
11 report daily to a specific location designated by the department or
12 the sentencing court.

13 (17) "Department" means the department of corrections.

14 (18) "Determinate sentence" means a sentence that states with
15 exactitude the number of actual years, months, or days of total
16 confinement, of partial confinement, of community custody, the number
17 of actual hours or days of community restitution work, or dollars or
18 terms of a legal financial obligation. The fact that an offender
19 through earned release can reduce the actual period of confinement
20 shall not affect the classification of the sentence as a determinate
21 sentence.

22 (19) "Disposable earnings" means that part of the earnings of an
23 offender remaining after the deduction from those earnings of any
24 amount required by law to be withheld. For the purposes of this
25 definition, "earnings" means compensation paid or payable for
26 personal services, whether denominated as wages, salary, commission,
27 bonuses, or otherwise, and, notwithstanding any other provision of
28 law making the payments exempt from garnishment, attachment, or other
29 process to satisfy a court-ordered legal financial obligation,
30 specifically includes periodic payments pursuant to pension or
31 retirement programs, or insurance policies of any type, but does not
32 include payments made under Title 50 RCW, except as provided in RCW
33 50.40.020 and 50.40.050, or Title 74 RCW.

34 (20) "Domestic violence" has the same meaning as defined in RCW
35 10.99.020 and 26.50.010.

36 (21) "Drug offender sentencing alternative" is a sentencing
37 option available to persons convicted of a felony offense other than
38 a violent offense or a sex offense and who are eligible for the
39 option under RCW 9.94A.660.

40 (22) "Drug offense" means:

1 (a) Any felony violation of chapter 69.50 RCW except possession
2 of a controlled substance (RCW 69.50.4013) or forged prescription for
3 a controlled substance (RCW 69.50.403);

4 (b) Any offense defined as a felony under federal law that
5 relates to the possession, manufacture, distribution, or
6 transportation of a controlled substance; or

7 (c) Any out-of-state conviction for an offense that under the
8 laws of this state would be a felony classified as a drug offense
9 under (a) of this subsection.

10 (23) "Earned release" means earned release from confinement as
11 provided in RCW 9.94A.728.

12 (24) "Electronic monitoring" means tracking the location of an
13 individual, whether pretrial or posttrial, through the use of
14 technology that is capable of determining or identifying the
15 monitored individual's presence or absence at a particular location
16 including, but not limited to:

17 (a) Radio frequency signaling technology, which detects if the
18 monitored individual is or is not at an approved location and
19 notifies the monitoring agency of the time that the monitored
20 individual either leaves the approved location or tampers with or
21 removes the monitoring device; or

22 (b) Active or passive global positioning system technology, which
23 detects the location of the monitored individual and notifies the
24 monitoring agency of the monitored individual's location.

25 (25) "Escape" means:

26 (a) Sexually violent predator escape (RCW 9A.76.115), escape in
27 the first degree (RCW 9A.76.110), escape in the second degree (RCW
28 9A.76.120), willful failure to return from furlough (RCW 72.66.060),
29 willful failure to return from work release (RCW 72.65.070), or
30 willful failure to be available for supervision by the department
31 while in community custody (RCW 72.09.310); or

32 (b) Any federal or out-of-state conviction for an offense that
33 under the laws of this state would be a felony classified as an
34 escape under (a) of this subsection.

35 (26) "Felony traffic offense" means:

36 (a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW
37 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-
38 run injury-accident (RCW 46.52.020(4)), felony driving while under
39 the influence of intoxicating liquor or any drug (RCW 46.61.502(6)),

1 or felony physical control of a vehicle while under the influence of
2 intoxicating liquor or any drug (RCW 46.61.504(6)); or

3 (b) Any federal or out-of-state conviction for an offense that
4 under the laws of this state would be a felony classified as a felony
5 traffic offense under (a) of this subsection.

6 (27) "Fine" means a specific sum of money ordered by the
7 sentencing court to be paid by the offender to the court over a
8 specific period of time.

9 (28) "First-time offender" means any person who has no prior
10 convictions for a felony and is eligible for the first-time offender
11 waiver under RCW 9.94A.650.

12 (29) "Home detention" is a subset of electronic monitoring and
13 means a program of partial confinement available to offenders wherein
14 the offender is confined in a private residence twenty-four hours a
15 day, unless an absence from the residence is approved, authorized, or
16 otherwise permitted in the order by the court or other supervising
17 agency that ordered home detention, and the offender is subject to
18 electronic monitoring.

19 (30) "Homelessness" or "homeless" means a condition where an
20 individual lacks a fixed, regular, and adequate nighttime residence
21 and who has a primary nighttime residence that is:

22 (a) A supervised, publicly or privately operated shelter designed
23 to provide temporary living accommodations;

24 (b) A public or private place not designed for, or ordinarily
25 used as, a regular sleeping accommodation for human beings; or

26 (c) A private residence where the individual stays as a transient
27 invitee.

28 (31) "Legal financial obligation" means a sum of money that is
29 ordered by a superior court of the state of Washington for legal
30 financial obligations which may include restitution to the victim,
31 statutorily imposed crime victims' compensation fees as assessed
32 pursuant to RCW 7.68.035, court costs, county or interlocal drug
33 funds, court-appointed attorneys' fees, and costs of defense, fines,
34 and any other financial obligation that is assessed to the offender
35 as a result of a felony conviction. Upon conviction for vehicular
36 assault while under the influence of intoxicating liquor or any drug,
37 RCW 46.61.522(1)(b), or vehicular homicide while under the influence
38 of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal
39 financial obligations may also include payment to a public agency of

1 the expense of an emergency response to the incident resulting in the
2 conviction, subject to RCW 38.52.430.

3 (32) "Minor child" means a biological or adopted child of the
4 offender who is under age eighteen at the time of the offender's
5 current offense.

6 (33) "Most serious offense" means any of the following felonies
7 or a felony attempt to commit any of the following felonies:

8 (a) Any felony defined under any law as a class A felony or
9 criminal solicitation of or criminal conspiracy to commit a class A
10 felony;

11 (b) Assault in the second degree;

12 (c) Assault of a child in the second degree;

13 (d) Child molestation in the second degree;

14 (e) Controlled substance homicide;

15 (f) Extortion in the first degree;

16 (g) Incest when committed against a child under age fourteen;

17 (h) Indecent liberties;

18 (i) Kidnapping in the second degree;

19 (j) Leading organized crime;

20 (k) Manslaughter in the first degree;

21 (l) Manslaughter in the second degree;

22 (m) Promoting prostitution in the first degree;

23 (n) Rape in the third degree;

24 (o) ~~((Robbery in the second degree;~~

25 ~~(p))~~ Sexual exploitation;

26 ~~((q))~~ (p) Vehicular assault, when caused by the operation or
27 driving of a vehicle by a person while under the influence of
28 intoxicating liquor or any drug or by the operation or driving of a
29 vehicle in a reckless manner;

30 ~~((r))~~ (q) Vehicular homicide, when proximately caused by the
31 driving of any vehicle by any person while under the influence of
32 intoxicating liquor or any drug as defined by RCW 46.61.502, or by
33 the operation of any vehicle in a reckless manner;

34 ~~((s))~~ (r) Any other class B felony offense with a finding of
35 sexual motivation;

36 ~~((t))~~ (s) Any other felony with a deadly weapon verdict under
37 RCW 9.94A.825;

38 ~~((u))~~ (t) Any felony offense in effect at any time prior to
39 December 2, 1993, that is comparable to a most serious offense under
40 this subsection, or any federal or out-of-state conviction for an

1 offense that under the laws of this state would be a felony
2 classified as a most serious offense under this subsection;

3 ~~((v))~~ (u)(i) A prior conviction for indecent liberties under
4 RCW 9A.44.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex.
5 sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b),
6 and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW
7 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986,
8 until July 1, 1988;

9 (ii) A prior conviction for indecent liberties under RCW
10 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988,
11 if: (A) The crime was committed against a child under the age of
12 fourteen; or (B) the relationship between the victim and perpetrator
13 is included in the definition of indecent liberties under RCW
14 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27,
15 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25,
16 1993, through July 27, 1997;

17 ~~((w))~~ (v) Any out-of-state conviction for a felony offense with
18 a finding of sexual motivation if the minimum sentence imposed was
19 ten years or more; provided that the out-of-state felony offense must
20 be comparable to a felony offense under this title and Title 9A RCW
21 and the out-of-state definition of sexual motivation must be
22 comparable to the definition of sexual motivation contained in this
23 section.

24 (34) "Nonviolent offense" means an offense which is not a violent
25 offense.

26 (35) "Offender" means a person who has committed a felony
27 established by state law and is eighteen years of age or older or is
28 less than eighteen years of age but whose case is under superior
29 court jurisdiction under RCW 13.04.030 or has been transferred by the
30 appropriate juvenile court to a criminal court pursuant to RCW
31 13.40.110. In addition, for the purpose of community custody
32 requirements under this chapter, "offender" also means a misdemeanor
33 or gross misdemeanor probationer ordered by a superior court to
34 probation pursuant to RCW 9.92.060, 9.95.204, or 9.95.210 and
35 supervised by the department pursuant to RCW 9.94A.501 and
36 9.94A.5011. Throughout this chapter, the terms "offender" and
37 "defendant" are used interchangeably.

38 (36) "Partial confinement" means confinement for no more than one
39 year in a facility or institution operated or utilized under contract
40 by the state or any other unit of government, or, if home detention,

1 electronic monitoring, or work crew has been ordered by the court or
2 home detention has been ordered by the department as part of the
3 parenting program or the graduated reentry program, in an approved
4 residence, for a substantial portion of each day with the balance of
5 the day spent in the community. Partial confinement includes work
6 release, home detention, work crew, electronic monitoring, and a
7 combination of work crew, electronic monitoring, and home detention.

8 (37) "Pattern of criminal street gang activity" means:

9 (a) The commission, attempt, conspiracy, or solicitation of, or
10 any prior juvenile adjudication of or adult conviction of, two or
11 more of the following criminal street gang-related offenses:

12 (i) Any "serious violent" felony offense as defined in this
13 section, excluding Homicide by Abuse (RCW 9A.32.055) and Assault of a
14 Child 1 (RCW 9A.36.120);

15 (ii) Any "violent" offense as defined by this section, excluding
16 Assault of a Child 2 (RCW 9A.36.130);

17 (iii) Deliver or Possession with Intent to Deliver a Controlled
18 Substance (chapter 69.50 RCW);

19 (iv) Any violation of the firearms and dangerous weapon act
20 (chapter 9.41 RCW);

21 (v) Theft of a Firearm (RCW 9A.56.300);

22 (vi) Possession of a Stolen Firearm (RCW 9A.56.310);

23 (vii) Malicious Harassment (RCW 9A.36.080);

24 (viii) Harassment where a subsequent violation or deadly threat
25 is made (RCW 9A.46.020(2)(b));

26 (ix) Criminal Gang Intimidation (RCW 9A.46.120);

27 (x) Any felony conviction by a person eighteen years of age or
28 older with a special finding of involving a juvenile in a felony
29 offense under RCW 9.94A.833;

30 (xi) Residential Burglary (RCW 9A.52.025);

31 (xii) Burglary 2 (RCW 9A.52.030);

32 (xiii) Malicious Mischief 1 (RCW 9A.48.070);

33 (xiv) Malicious Mischief 2 (RCW 9A.48.080);

34 (xv) Theft of a Motor Vehicle (RCW 9A.56.065);

35 (xvi) Possession of a Stolen Motor Vehicle (RCW 9A.56.068);

36 (xvii) Taking a Motor Vehicle Without Permission 1 (RCW
37 9A.56.070);

38 (xviii) Taking a Motor Vehicle Without Permission 2 (RCW
39 9A.56.075);

40 (xix) Extortion 1 (RCW 9A.56.120);

- 1 (xx) Extortion 2 (RCW 9A.56.130);
- 2 (xxi) Intimidating a Witness (RCW 9A.72.110);
- 3 (xxii) Tampering with a Witness (RCW 9A.72.120);
- 4 (xxiii) Reckless Endangerment (RCW 9A.36.050);
- 5 (xxiv) Coercion (RCW 9A.36.070);
- 6 (xxv) Harassment (RCW 9A.46.020); or
- 7 (xxvi) Malicious Mischief 3 (RCW 9A.48.090);

8 (b) That at least one of the offenses listed in (a) of this
9 subsection shall have occurred after July 1, 2008;

10 (c) That the most recent committed offense listed in (a) of this
11 subsection occurred within three years of a prior offense listed in
12 (a) of this subsection; and

13 (d) Of the offenses that were committed in (a) of this
14 subsection, the offenses occurred on separate occasions or were
15 committed by two or more persons.

16 (38) "Persistent offender" is an offender who:

17 (a)(i) Has been convicted in this state of any felony considered
18 a most serious offense; and

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

27 (b)(i) Has been convicted of: (A) Rape in the first degree, rape
28 of a child in the first degree, child molestation in the first
29 degree, rape in the second degree, rape of a child in the second
30 degree, or indecent liberties by forcible compulsion; (B) any of the
31 following offenses with a finding of sexual motivation: Murder in the
32 first degree, murder in the second degree, homicide by abuse,
33 kidnapping in the first degree, kidnapping in the second degree,
34 assault in the first degree, assault in the second degree, assault of
35 a child in the first degree, assault of a child in the second degree,
36 or burglary in the first degree; or (C) an attempt to commit any
37 crime listed in this subsection (38)(b)(i); and

38 (ii) Has, before the commission of the offense under (b)(i) of
39 this subsection, been convicted as an offender on at least one
40 occasion, whether in this state or elsewhere, of an offense listed in

1 (b)(i) of this subsection or any federal or out-of-state offense or
2 offense under prior Washington law that is comparable to the offenses
3 listed in (b)(i) of this subsection. A conviction for rape of a child
4 in the first degree constitutes a conviction under (b)(i) of this
5 subsection only when the offender was sixteen years of age or older
6 when the offender committed the offense. A conviction for rape of a
7 child in the second degree constitutes a conviction under (b)(i) of
8 this subsection only when the offender was eighteen years of age or
9 older when the offender committed the offense.

10 (39) "Predatory" means: (a) The perpetrator of the crime was a
11 stranger to the victim, as defined in this section; (b) the
12 perpetrator established or promoted a relationship with the victim
13 prior to the offense and the victimization of the victim was a
14 significant reason the perpetrator established or promoted the
15 relationship; or (c) the perpetrator was: (i) A teacher, counselor,
16 volunteer, or other person in authority in any public or private
17 school and the victim was a student of the school under his or her
18 authority or supervision. For purposes of this subsection, "school"
19 does not include home-based instruction as defined in RCW
20 28A.225.010; (ii) a coach, trainer, volunteer, or other person in
21 authority in any recreational activity and the victim was a
22 participant in the activity under his or her authority or
23 supervision; (iii) a pastor, elder, volunteer, or other person in
24 authority in any church or religious organization, and the victim was
25 a member or participant of the organization under his or her
26 authority; or (iv) a teacher, counselor, volunteer, or other person
27 in authority providing home-based instruction and the victim was a
28 student receiving home-based instruction while under his or her
29 authority or supervision. For purposes of this subsection: (A) "Home-
30 based instruction" has the same meaning as defined in RCW
31 28A.225.010; and (B) "teacher, counselor, volunteer, or other person
32 in authority" does not include the parent or legal guardian of the
33 victim.

34 (40) "Private school" means a school regulated under chapter
35 28A.195 or 28A.205 RCW.

36 (41) "Public school" has the same meaning as in RCW 28A.150.010.

37 (42) "Repetitive domestic violence offense" means any:

38 (a)(i) Domestic violence assault that is not a felony offense
39 under RCW 9A.36.041;

1 (ii) Domestic violence violation of a no-contact order under
2 chapter 10.99 RCW that is not a felony offense;

3 (iii) Domestic violence violation of a protection order under
4 chapter 26.09, 26.10, (~~26.26~~) 26.26B, or 26.50 RCW that is not a
5 felony offense;

6 (iv) Domestic violence harassment offense under RCW 9A.46.020
7 that is not a felony offense; or

8 (v) Domestic violence stalking offense under RCW 9A.46.110 that
9 is not a felony offense; or

10 (b) Any federal, out-of-state, tribal court, military, county, or
11 municipal conviction for an offense that under the laws of this state
12 would be classified as a repetitive domestic violence offense under
13 (a) of this subsection.

14 (43) "Restitution" means a specific sum of money ordered by the
15 sentencing court to be paid by the offender to the court over a
16 specified period of time as payment of damages. The sum may include
17 both public and private costs.

18 (44) "Risk assessment" means the application of the risk
19 instrument recommended to the department by the Washington state
20 institute for public policy as having the highest degree of
21 predictive accuracy for assessing an offender's risk of reoffense.

22 (45) "Serious traffic offense" means:

23 (a) Nonfelony driving while under the influence of intoxicating
24 liquor or any drug (RCW 46.61.502), nonfelony actual physical control
25 while under the influence of intoxicating liquor or any drug (RCW
26 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an
27 attended vehicle (RCW 46.52.020(5)); or

28 (b) Any federal, out-of-state, county, or municipal conviction
29 for an offense that under the laws of this state would be classified
30 as a serious traffic offense under (a) of this subsection.

31 (46) "Serious violent offense" is a subcategory of violent
32 offense and means:

33 (a)(i) Murder in the first degree;

34 (ii) Homicide by abuse;

35 (iii) Murder in the second degree;

36 (iv) Manslaughter in the first degree;

37 (v) Assault in the first degree;

38 (vi) Kidnapping in the first degree;

39 (vii) Rape in the first degree;

40 (viii) Assault of a child in the first degree; or

1 (ix) An attempt, criminal solicitation, or criminal conspiracy to
2 commit one of these felonies; or

3 (b) Any federal or out-of-state conviction for an offense that
4 under the laws of this state would be a felony classified as a
5 serious violent offense under (a) of this subsection.

6 (47) "Sex offense" means:

7 (a)(i) A felony that is a violation of chapter 9A.44 RCW other
8 than RCW 9A.44.132;

9 (ii) A violation of RCW 9A.64.020;

10 (iii) A felony that is a violation of chapter 9.68A RCW other
11 than RCW 9.68A.080;

12 (iv) A felony that is, under chapter 9A.28 RCW, a criminal
13 attempt, criminal solicitation, or criminal conspiracy to commit such
14 crimes; or

15 (v) A felony violation of RCW 9A.44.132(1) (failure to register
16 as a sex offender) if the person has been convicted of violating RCW
17 9A.44.132(1) (failure to register as a sex offender) or 9A.44.130
18 prior to June 10, 2010, on at least one prior occasion;

19 (b) Any conviction for a felony offense in effect at any time
20 prior to July 1, 1976, that is comparable to a felony classified as a
21 sex offense in (a) of this subsection;

22 (c) A felony with a finding of sexual motivation under RCW
23 9.94A.835 or 13.40.135; or

24 (d) Any federal or out-of-state conviction for an offense that
25 under the laws of this state would be a felony classified as a sex
26 offense under (a) of this subsection.

27 (48) "Sexual motivation" means that one of the purposes for which
28 the defendant committed the crime was for the purpose of his or her
29 sexual gratification.

30 (49) "Standard sentence range" means the sentencing court's
31 discretionary range in imposing a nonappealable sentence.

32 (50) "Statutory maximum sentence" means the maximum length of
33 time for which an offender may be confined as punishment for a crime
34 as prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute
35 defining the crime, or other statute defining the maximum penalty for
36 a crime.

37 (51) "Stranger" means that the victim did not know the offender
38 twenty-four hours before the offense.

39 (52) "Total confinement" means confinement inside the physical
40 boundaries of a facility or institution operated or utilized under

1 contract by the state or any other unit of government for twenty-four
2 hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

3 (53) "Transition training" means written and verbal instructions
4 and assistance provided by the department to the offender during the
5 two weeks prior to the offender's successful completion of the work
6 ethic camp program. The transition training shall include
7 instructions in the offender's requirements and obligations during
8 the offender's period of community custody.

9 (54) "Victim" means any person who has sustained emotional,
10 psychological, physical, or financial injury to person or property as
11 a direct result of the crime charged.

12 (55) "Violent offense" means:

13 (a) Any of the following felonies:

14 (i) Any felony defined under any law as a class A felony or an
15 attempt to commit a class A felony;

16 (ii) Criminal solicitation of or criminal conspiracy to commit a
17 class A felony;

18 (iii) Manslaughter in the first degree;

19 (iv) Manslaughter in the second degree;

20 (v) Indecent liberties if committed by forcible compulsion;

21 (vi) Kidnapping in the second degree;

22 (vii) Arson in the second degree;

23 (viii) Assault in the second degree;

24 (ix) Assault of a child in the second degree;

25 (x) Extortion in the first degree;

26 (xi) Robbery in the second degree;

27 (xii) Drive-by shooting;

28 (xiii) Vehicular assault, when caused by the operation or driving
29 of a vehicle by a person while under the influence of intoxicating
30 liquor or any drug or by the operation or driving of a vehicle in a
31 reckless manner; and

32 (xiv) Vehicular homicide, when proximately caused by the driving
33 of any vehicle by any person while under the influence of
34 intoxicating liquor or any drug as defined by RCW 46.61.502, or by
35 the operation of any vehicle in a reckless manner;

36 (b) Any conviction for a felony offense in effect at any time
37 prior to July 1, 1976, that is comparable to a felony classified as a
38 violent offense in (a) of this subsection; and

1 (c) Any federal or out-of-state conviction for an offense that
2 under the laws of this state would be a felony classified as a
3 violent offense under (a) or (b) of this subsection.

4 (56) "Work crew" means a program of partial confinement
5 consisting of civic improvement tasks for the benefit of the
6 community that complies with RCW 9.94A.725.

7 (57) "Work ethic camp" means an alternative incarceration program
8 as provided in RCW 9.94A.690 designed to reduce recidivism and lower
9 the cost of corrections by requiring offenders to complete a
10 comprehensive array of real-world job and vocational experiences,
11 character-building work ethics training, life management skills
12 development, substance abuse rehabilitation, counseling, literacy
13 training, and basic adult education.

14 (58) "Work release" means a program of partial confinement
15 available to offenders who are employed or engaged as a student in a
16 regular course of study at school.

Passed by the Senate March 13, 2019.

Passed by the House April 16, 2019.

Approved by the Governor April 29, 2019.

Filed in Office of Secretary of State April 30, 2019.

--- END ---

ATTACHMENT B

SENATE BILL REPORT

SB 5288

As Reported by Senate Committee On:
Law & Justice, February 21, 2019

Title: An act relating to persistent offenders.

Brief Description: Sentencing for persistent offenders.

Sponsors: Senator Darneille.

Brief History:

Committee Activity: Law & Justice: 2/14/19, 2/21/19 [DPS, DNP].

Brief Summary of First Substitute Bill

- Removes robbery in the second degree from the list of three-strike offenses requiring a life sentence without parole.
- Requires resentencing of offenders previously sentenced to life without parole as a result of a conviction for robbery in the second degree.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5288 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Kuderer and Salomon.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; Holy and Wilson, L..

Staff: Shani Bauer (786-7468)

Background: In Washington, a persistent offender must be sentenced to life in prison without parole when the person is convicted of a most serious offense on three separate occasions or when the person is convicted of certain sex offenses on at least two separate occasions. These offenses are generally referred to as three-strike or two-strike offenses.

Three-strike offenses—most serious offenses—include:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- assault in the second degree;
- assault of a child in the second degree;
- child molestation in the second degree;
- controlled substance homicide;
- extortion in the first degree;
- incest when committed against a child under age fourteen;
- indecent liberties;
- kidnapping in the second degree;
- leading organized crime;
- manslaughter in the first degree;
- manslaughter in the second degree;
- promoting prostitution in the first degree;
- rape in the third degree;
- robbery in the second degree;
- sexual exploitation;
- vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, or by the operation of any vehicle in a reckless manner;
- any other class B felony offense with a finding of sexual motivation; and
- any other felony with a deadly weapon verdict.

Two-strike offenses include:

- rape in the first degree;
- rape of a child in the first degree;
- child molestation in the first degree;
- rape in the second degree;
- rape of a child in the second degree;
- indecent liberties by forcible compulsion;
- any of the following when committed with sexual motivation: murder in the first or second degree, homicide by abuse, kidnapping in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, or burglary in the second degree; and
- an attempt to commit any of the above crimes.

Assault in the second degree is a class B felony and includes circumstances not amounting to assault in the first degree—intent to inflict great bodily harm—and where the person intentionally assaults another and recklessly inflicts substantial bodily harm.

Robbery in the second degree is a Class B felony. A person commits robbery in the second degree when the person unlawfully takes personal property from another by the use or threatened use of force in circumstances not amounting to robbery in the first degree. A person is guilty of robbery in the first degree when the person is armed with a deadly weapon

or what appears to be a deadly weapon, the person inflicts bodily injury, or when the person commits robbery against a financial institution.

Summary of Bill (First Substitute): Robbery in the second degree is deleted from the definition of a most serious offense, thereby removing the offense as a three strike offense.

Any offender previously sentenced as a persistent offender when one of the offenses resulting in life without parole was robbery in the second degree shall be entitled to a resentencing hearing. At resentencing, the court must sentence the offender as if robbery in the second degree was not a most serious offense at the time the original sentence was imposed.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (First Substitute): Assault in the second degree is restored as a most serious offense for the purposes of determining whether an offender is a persistent offender.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: There have been several movements over time to address the three-strikes law. I-593 in 1993 came about when there was a concern about a very high crime rate. Research has not shown that laws such as these make a difference in the crime rate.

Offenders should be held accountable, but should not have to spend their entire life in prison. Fifty-three percent of those serving life for a three-strike offense are over the age of fifty and have a reduced recidivism rate.

There is racial disparity in how the persistent offender statute is enforced. Four percent of the population is African American yet a disproportionate number have been convicted as persistent offenders. Several offenders could be resentenced with a significant cost savings for taxpayers.

CON: These two offenses are especially serious and significant for the person who is a victim. This is not the second time they have committed these serious offenses, but the third. There needs to be a point where we protect the community from these individuals.

OTHER: We are generally opposed to the bill as drafted, but amenable to looking at robbery 2. Assault 2 runs the gamut from a fist fight to strangulation. Assault 2 is also regularly plead down from an assault 1.

This could potentially require a large number of offenders to be brought back for resentencing which would be a cost for local government. We should not forget that many of

these individuals were involved in crimes that involved victims. While victims may not be here to testify, it is the prosecutor who will hear from the victim when the offender is granted resentencing. The prosecutor has discretion whether to seek a third strike which already prevents egregious cases.

Persons Testifying: PRO: Senator Jeannie Darneille, Prime Sponsor; Adam Paczkowski, Washington Defenders Association.

CON: James McMahan, Washington Association Sheriffs and Police Chiefs.

OTHER: Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying: No one.

ATTACHMENT C

5288-S AMS PADD S2657.1

SSB 5288 - S AMD 161
By Senator Padden

ADOPTED 03/13/2019

1 Beginning on page 15, line 17, strike all of section 2

SSB 5288 - S AMD 161
By Senator Padden

ADOPTED 03/13/2019

2 On page 1, line 1 of the title, after "offenders;" insert "and"

3 On page 1, beginning on line 1 of the title, after "9.94A.030"
4 strike all material through "date" on line 3

EFFECT: Removes provisions requiring offenders be resentenced if Robbery 2 was used as a basis for finding the offender was a persistent offender prior to the effective date of the bill.

--- END ---

ATTACHMENT D

SENATE BILL REPORT

ESSB 5288

As Passed Senate, March 13, 2019

Title: An act relating to removing robbery in the second degree from the list of offenses that qualify an individual as a persistent offender.

Brief Description: Removing robbery in the second degree from the list of offenses that qualify an individual as a persistent offender.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senator Darneille).

Brief History:

Committee Activity: Law & Justice: 2/14/19, 2/21/19 [DPS, DNP].

Floor Activity:

Passed Senate: 3/13/19, 29-20.

Brief Summary of Engrossed First Substitute Bill

- Removes robbery in the second degree from the list of three-strike offenses requiring a life sentence without parole.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5288 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Kuderer and Salomon.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; Holy and Wilson, L...

Staff: Shani Bauer (786-7468)

Background: In Washington, a persistent offender must be sentenced to life in prison without parole when the person is convicted of a most serious offense on three separate occasions or when the person is convicted of certain sex offenses on at least two separate occasions. These offenses are generally referred to as three-strike or two-strike offenses.

Three-strike offenses—most serious offenses—include:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- assault in the second degree;
- assault of a child in the second degree;
- child molestation in the second degree;
- controlled substance homicide;
- extortion in the first degree;
- incest when committed against a child under age fourteen;
- indecent liberties;
- kidnapping in the second degree;
- leading organized crime;
- manslaughter in the first degree;
- manslaughter in the second degree;
- promoting prostitution in the first degree;
- rape in the third degree;
- robbery in the second degree;
- sexual exploitation;
- vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, or by the operation of any vehicle in a reckless manner;
- any other class B felony offense with a finding of sexual motivation; and
- any other felony with a deadly weapon verdict.

Two-strike offenses include:

- rape in the first degree;
- rape of a child in the first degree;
- child molestation in the first degree;
- rape in the second degree;
- rape of a child in the second degree;
- indecent liberties by forcible compulsion;
- any of the following when committed with sexual motivation: murder in the first or second degree, homicide by abuse, kidnapping in the first or second degree, assault in the first or second degree, assault of a child in the first or second degree, or burglary in the second degree; and
- an attempt to commit any of the above crimes.

Assault in the second degree is a class B felony and includes circumstances not amounting to assault in the first degree—intent to inflict great bodily harm—and where the person intentionally assaults another and recklessly inflicts substantial bodily harm.

Robbery in the second degree is a Class B felony. A person commits robbery in the second degree when the person unlawfully takes personal property from another by the use or threatened use of force in circumstances not amounting to robbery in the first degree. A person is guilty of robbery in the first degree when the person is armed with a deadly weapon

or what appears to be a deadly weapon, the person inflicts bodily injury, or when the person commits robbery against a financial institution.

Summary of Engrossed First Substitute Bill: Robbery in the second degree is deleted from the definition of a most serious offense, thereby removing the offense as a three strike offense.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: There have been several movements over time to address the three-strikes law. I-593 in 1993 came about when there was a concern about a very high crime rate. Research has not shown that laws such as these make a difference in the crime rate.

Offenders should be held accountable, but should not have to spend their entire life in prison. Fifty-three percent of those serving life for a three-strike offense are over the age of fifty and have a reduced recidivism rate.

There is racial disparity in how the persistent offender statute is enforced. Four percent of the population is African American yet a disproportionate number have been convicted as persistent offenders. Several offenders could be resentenced with a significant cost savings for taxpayers.

CON: These two offenses are especially serious and significant for the person who is a victim. This is not the second time they have committed these serious offenses, but the third. There needs to be a point where we protect the community from these individuals.

OTHER: We are generally opposed to the bill as drafted, but amenable to looking at robbery 2. Assault 2 runs the gamut from a fist fight to strangulation. Assault 2 is also regularly plead down from an assault 1.

This could potentially require a large number of offenders to be brought back for resentencing which would be a cost for local government. We should not forget that many of these individuals were involved in crimes that involved victims. While victims may not be here to testify, it is the prosecutor who will hear from the victim when the offender is granted resentencing. The prosecutor has discretion whether to seek a third strike which already prevents egregious cases.

Persons Testifying: PRO: Senator Jeannie Darneille, Prime Sponsor; Adam Paczkowski, Washington Defenders Association.

CON: James McMahan, Washington Association Sheriffs and Police Chiefs.

OTHER: Russell Brown, Washington Association of Prosecuting Attorneys.

Persons Signed In To Testify But Not Testifying: No one.

ATTACHMENT E

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,)	No. 98496-4
)	
Respondent,)	ORDER
)	
v.)	Court of Appeals
)	No. 52450-3-II
ALAN DALE JENKS,)	
)	
Petitioner.)	
_____)	

Department II of the Court, composed of Chief Justice Stephens and Justices Madsen, González, Yu, and Whitener, considered at its September 8, 2020, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is granted only on the persistent offender sentence issue. Any party may serve and file a supplemental brief within 30 days of the date of this order, see RAP 13.7(d).

DATED at Olympia, Washington, this 9th day of September, 2020.

For the Court


CHIEF JUSTICE

Attach. E-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH HARPER,

Appellant.

NO. 37153-1-III

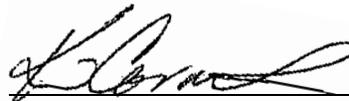
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 15, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Skylar Brett
skylarbrettlawoffice@gmail.com

9/15/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

September 15, 2020 - 3:17 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Joseph Terry Harper
Superior Court Case Number: 17-1-04571-4

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