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SUPREME COURT NO. _____
NO. 63223-0-I

FILED

OCT 29 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEROY JONES,

Petitioner.

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FILED
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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OCT 06 2010

King County Prosecutor
Appellate Unit

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

The Honorable Monica Benton, Judge

AMENDED PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Leroy Jones requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Jones, No. 63223-0-I, filed September 7, 2010. A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Defense counsel failed to contact two eyewitnesses before trial. Both supported appellant's claim of self-defense. One was discovered during trial, but defense counsel was unable to incorporate her testimony into opening statements or make it the focal point of his cross-examination of other witnesses. The other was not contacted in any way by either side until after appellant's conviction. Was defense counsel ineffective in preparing for and conducting trial?

2. Out of state convictions do not count as "strikes" under the Persistent Offender Accountability Act (POAA)¹ unless they are legally comparable to a Washington most serious offense. Appellant was convicted of aggravated assault in Florida, where diminished capacity was not a defense available to negate the element of intent, as it would have been in Washington. Did the court err in finding appellant's Florida conviction legally comparable?

¹ RCW 9.94A.570.

3. Under the POAA, the court imposed a sentence of life without parole based on prior convictions not proved to a jury beyond a reasonable doubt. Does appellant's sentence violate the Sixth and Fourteenth Amendments?²

C. STATEMENT OF THE CASE

The King County prosecutor charged Leroy Jones with second-degree assault with a deadly weapon. CP 1. The jury found Jones guilty and the court imposed a sentence of life without possibility of parole under the POAA. CP 79, 887, 896.

Jones was involved in a fight with Taurian Alford near a bus stop in Seattle. 4RP³ 26-35, 92, 123. Within minutes, several of Alford's friends joined the fray and began beating and kicking Jones so severely that bystanders felt compelled to tell them to stop because the police were coming. 4RP 144; 5RP 22.

When the police arrived, Jones was being held on the ground against his will and had a small knife in his hand. 6RP 46-47. He continued

² This Court has held there is no right, under our either our state constitution or the federal constitution, to a jury determination of prior convictions at sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). To preserve the issue for federal review in the event the law changes, however, Jones raises the issue herein.

³ There are 13 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – 4/3/2008; 2RP – 4/7/2008 (morning session); 3RP – 4/7/2008 (afternoon session); 4RP – 4/8/2008; 5RP – 4/9/2008; 6RP – 4/10/2008; 7RP – 4/14/2008, 8RP – 6/27/2008; 9RP – 7/31/2008; 10RP – 10/17/2008; 11RP – 1/21/2009; 12RP – 3/5/2009; 13RP – 3/6/2009.

struggling and did not drop the knife until police used the Taser. 6RP 50. Alford and his friends had minor cuts. 4RP 98-99; 5RP 19, 24; 6RP 54. Jones had abrasions and blood on his lip. 5RP 47.

The defense theory was that Jones acted in self-defense when he pulled out his knife after Alford's three companions began beating and kicking him. 7RP 117-18. The State argued Jones attacked Alford with the knife. 7RP 98. The main disputed issue at trial was when each witness saw the knife in Jones' hand. Alford's cousin T'Shaun Hill, known as Bennett, testified he could see Jones' knife from 15 feet away as he chased Alford before the fight began. 4RP 30. Peter Schwab and Gus Iverson, who were on their way back to work after a coffee break at the time, testified Jones had a knife when the pair first engaged, before the others joined the fight. 4RP 140-41; 5RP 30, 36. Erik Fierce and Endre Veka, on the other hand, heard Alford mention a knife as he ran past, but did not see a weapon until after Alford's friends joined the fight. 4RP 96-97, 119, 123, 133.

During testimony by Detective Timothy Devore, it was revealed he recorded statements by eyewitnesses Schwab, Fierce, and Lori Brown that were never disclosed to the defense. 5RP 61. The detective testified he relayed the statements to the prosecutor, but the prosecutor did not have them in the file. 5RP 58, 60-61. Brown's name and phone number was in the discovery provided to the defense, but neither side contacted her. 5RP

69. A continuance was granted and Brown ultimately testified she never saw a knife. 6RP 14; 7RP 19; CP 182 (Brown's statement to Detective Devore). She heard someone say "knife" only after three other people joined the fight. 7RP 26; CP 182. She also saw jabbing motions consistent with a knife, but only after the three others joined. 7RP 27; CP 182. At that point, she testified, the individual with the knife was trying to protect himself. 7RP 27-28.

The trial court found Brown's testimony "tends to negate the defendant's guilt," but denied a mistrial because it found a three-day continuance was sufficient. 6RP 13-14, 28. Defense counsel objected he was still not prepared and was unable to form a coherent trial strategy including opening statement and cross-examination of all witnesses based on Brown's exculpatory testimony. 6RP 15-18; 7RP 8.

After Jones was convicted, he moved for a new trial on several grounds including ineffective assistance of trial counsel. CP 216, 234. Jones argued his first attorney was ineffective in failing to interview Brown and also Michael Hamilton, another eyewitness listed in the discovery but never contacted by either side. CP 216, 234. Hamilton would have testified Jones pulled the knife in self-defense after Alford attacked him. CP 222-23. Both Hamilton and his companion at the time agreed that a latecomer would have the mistaken impression that Jones

was the aggressor. CP 225, 233. “It was going to look like two guys subdued a man with a knife. . . . I witnessed more of a self-defense.” CP 225. Hamilton also said had he been contacted sooner, he would have been able to contact his companion. CP 234.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. JONES WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Jones asks this Court to grant review because defense counsel failed to contact or call eyewitnesses with exculpatory testimony, in violation of Jones’ Sixth Amendment right to effective assistance of counsel. Whether his constitutional right to counsel was violated under these circumstances presents a significant question of constitutional law and public interest. RAP 13.4(b)(3), (4). Review is additionally warranted because, in rejecting Jones’ ineffective assistance claim, the Court of Appeals usurped the role of the jury in determining witness credibility, in conflict with this Court’s opinions in State v. Montgomery, 163 Wn.2d 577, 589-91, 183 P.3d 267 (2008), Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989), and James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). RAP 13.4(b)(1).

A claim of ineffective assistance of counsel rests upon two prongs: deficient performance and prejudice. State v. Thomas, 109 Wn.2d 222, 225-

26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

“Failure to investigate or interview witnesses. . . is a recognized basis upon which a claim of ineffective assistance of counsel may rest.” State v. Ray, 116 Wn. App. 531, 806 P.2d 1220 (1991) (citing, inter alia, State v. Visitacion, 55 Wn. App. 166, 174, 776 P.2d 986 (1989)). That failure is “especially egregious” when the evidence that would have been uncovered is exculpatory. State v. Weber, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004)). Defense counsel in this case failed to investigate two eyewitnesses to the events.

Here, both the trial court and the Court of Appeals found it unnecessary to definitively address the question of performance because of their conclusions on the prejudice prong. CP 888-89, 890; Jones, slip op. at 7-8. However, in each case, the court usurped the role of the jury in assessing the credibility of witness testimony. Because the jury would have been entitled to believe Hamilton and Brown, the failure to investigate and present their exculpatory testimony was ineffective assistance that prejudiced Jones.

a. Jones Was Prejudiced By His Attorney's Failure to Investigate Exculpatory Witnesses.

The prejudice prong of an ineffective assistance claim is satisfied when there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 694. Reasonable probability is the proper standard, rather than "more likely than not" because the new trial standard assumes a fair trial has already occurred, whereas the potential for ineffective assistance undermines that assumption. Id. at 693-94. Here, had counsel investigated and presented Brown and Hamilton's testimony, there is a reasonable probability Jones would have been acquitted. First, Brown and Hamilton would have given exculpatory testimony. Second, a jury would have been entitled to believe that testimony.

Both Brown's and Hamilton's accounts were exculpatory because they supported Jones' self-defense claim. Lori Brown testified she never saw a knife. 7RP 19; CP 182 (Brown's statement to Detective Devore). She heard someone say "knife" and saw jabbing motions only after three other people joined the fight when the individual with the knife was trying to protect himself. 7RP 26-28; CP 182. The trial court concluded her statement was exculpatory. 6RP 13. Hamilton's statement was even more

directly exculpatory. He would have testified Jones pulled the knife in self-defense after Alford attacked him. CP 222-23.

In a claim of ineffective assistance in a criminal trial, the question to be asked is “whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” Strickland, 466 U.S. at 695. Since the jury is the sole judge of credibility of witnesses, a jury would have been entitled to believe Hamilton’s testimony. Montgomery, 163 Wn.2d at 595 (citing jury instruction with approval.) If even one juror found Hamilton more credible than the other witnesses, the jury would have had to find a reasonable doubt and an acquittal would have been the result. See Strickland, 466 U.S. at 694-95 (in assessing prejudice, courts should presume jury would “reasonably, conscientiously, and impartially” apply governing law and standards).

The reason the court examines the totality of the evidence is that some factual determinations may have been unaffected by the errors. Strickland, 466 U.S. at 695. However, here, Hamilton’s testimony directly affects the only disputed fact: whether Jones acted in self-defense. Thus, the court’s assessment of the totality of the evidence presented cannot find that the error did not affect certain essential factual questions. To hold that there was no prejudice in this case, the court must find that no reasonable person

would have believed Hamilton's account. The reasons offered by the courts below do not support such an extreme analysis.

First, the courts below rejected Jones' claim of prejudice because Hamilton's testimony contradicts that of other eyewitnesses. But the mere fact of conflict between eyewitness accounts does not make it implausible for anyone to believe Hamilton. There is nothing inherently incredible about Hamilton's testimony; he was a neutral observer, unrelated to any of the parties, who happened to be passing by. Contra Dorsey v. King County, 51 Wn. App. 664, 675, 754 P.2d 1255 (1999) (defendant not prejudiced by failure to present girlfriend's testimony because jury would probably view her as untrustworthy).

Regardless of whether it directly contradicts other witnesses, his testimony remains exculpatory, and the failure to investigate was prejudicial. See Hawkman v. Parratt, 661 F.2d 1161, 1168-69 (8th Cir. 1981). In Hawkman, defense counsel failed to interview eyewitnesses whose testimony would have partially impeached the victim's testimony but also supported a potential defense of intoxication. Id. The court concluded Hawkman was prejudiced because his attorney failed to interview these witnesses before advising his client to plead guilty. Id. at 1169. Similarly, Hamilton's testimony would have both supported Jones' claim of self-defense and impeached the testimony of other witnesses. CP 222-25. Like

Hawkman, Jones was prejudiced by the failure to contact Hamilton before trial.

The courts below also erred in finding no prejudice because Hamilton's testimony conflicted with the defense theory of the case. 10RP 52; Jones, slip op. at 7-8. It would likely have resulted in a different theory of self-defense, but Hamilton's testimony would have been that he saw Jones use the knife to defend himself. CP 225. The fact that, at trial, Jones was unable to frame his defense around this testimony, due to the failure to investigate it, merely underscores the prejudice.

Although Brown's statement was discovered mid-trial and she ultimately testified, Jones was also prejudiced by the delay. Jones' trial counsel explained that, had he known of Brown's testimony, it would have been the centerpiece of the defense's case and the focal point of cross-examination of other witnesses. 6RP 15. Richard Hansen's expert declaration also supported Jones' claim that the failure to interview Brown before trial, so as to incorporate her statement into the defense, rather than tack it on as an afterthought, was ineffective. CP 116. Most importantly, Brown's version of events should have been presented to the jury during opening statements, when the jury is fresh and has yet to begin forming opinions about the case. CP 116.

In a trial where counsel's deficient performance led to the jury not hearing exculpatory evidence, the Sixth Amendment right to counsel is violated because the result of the trial is rendered unreliable. See Strickland, 466 U.S. at 687. The outcome of Jones' trial depended on which eyewitnesses, all of whom gave slightly different accounts of the events, the jury believed. If defense counsel had investigated and incorporated into the defense two witnesses who corroborated Jones' claim of self-defense, there is a reasonable probability the jury would have found a reasonable doubt. Strickland, 466 U.S. at 694. Counsel's failure to investigate these witnesses in time to incorporate them into the defense prejudiced Jones. Thus, the trial court erred in denying Jones' motions for a mistrial and a new trial on this basis. CP 888-89; 6RP 14.

b. Review Is Warranted to Determine Whether the Court May Usurp the Jury's Role in Assessing Witness Credibility.

In determining that Hamilton's exculpatory testimony was not credible, the courts below invaded the province of the jury. This case brings to the fore the conflict between the strong tradition that witness credibility is a matter left entirely to the jury and cases holding that a judge may determine that a witness is not credible in weighing prejudice. Compare Montgomery, 163 Wn.2d at 589-91 (discussing role of jury as the sole arbiter of factual questions such as witness credibility); State v. West, 139

Wn.2d 37, 983 P.2d 617 (1999) (prejudice prong of the test for ineffective assistance of counsel “necessarily requires the court to judge the credibility of the new evidence”).

Even at the time West was decided, four justices of this court rejected its holding. 139 Wn.2d at 47-52. “Perhaps it is old-fashioned, but I believe that the constitution demands that a criminal defendant’s credibility is a matter better left to the unanimous, contemporaneous assessment of twelve jurors than to the retrospective guesswork of a single judge acting ‘as a thirteenth juror.’” Id. at 52 (Alexander, J., dissenting). The credibility of a defense witness is no different. Jones asks this court to grant review and hold that a jury should determine the credibility of Brown and Hamilton’s exculpatory testimony.

2. THE COURT OF APPEALS HOLDING CONFLICTS WITH THIS COURT’S DECISIONS IN LAVERY AND STOCKWELL.

Jones was sentenced to life in prison without the possibility of parole under the Persistent Offender Accountability Act (POAA). CP 894, 896. The POAA mandates this sentence when an offender has previously been convicted of two “most serious offenses.” RCW 9.94A.030(32); RCW 9.94A.570. Convictions from other jurisdictions are included only if they are both legally and factually comparable. State v. Thiefault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007); In re Pers. Restraint of Lavery, 154

Wn.2d 249, 255, 111 P.3d 837 (2005). Jones' sentence rested in part on Florida convictions for aggravated assault and battery. 13RP 22. The trial court ruled the Florida convictions were legally comparable based on the statutory elements but without regard to the availability of defenses. 13RP 22.

Under this court's decisions in Lavery and State v. Stockwell, 159 Wn.2d 394, 397, 150 P.3d 82 (2007), "when there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time, the elements may not be legally comparable." Stockwell, 159 Wn.2d at 397 (citing Lavery, 154 Wn.2d at 256-57). In Lavery, this court held a federal robbery offense was not legally comparable to its Washington counterpart. 154 Wn.2d at 256-57. The court reasoned that the federal crime was broader than the Washington offense because the federal offense required proof of only general intent, while in Washington, robbery requires specific intent to steal. Id. Because of the different required intent, diminished capacity and several other defenses would be recognized in Washington, but would not be available for the federal robbery. Id. The court then concluded the elements of the offenses were not substantially similar. Id.

Jones argued below that his Florida assault was not legally comparable to its Washington counterpart because the defense of diminished

capacity was not available to him in Florida, and thus the intent elements were not the same. See, e.g., Evans v. State, 946 So.2d 1 (Fla. 2006); Chestnut v. State, 538 So.2d 820, 820 (Fla. 1989) (holding that diminished capacity is not a viable defense); contra State v. Eakins, 127 Wn.2d 490, 496, 902 P.2d 1236 (1995); State v. Kolesnik, 146 Wn. App. 790, 801, 192 P.3d 937 (2008) (diminished capacity defense was valid trial strategy in assault case). “Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged.” State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). Thus, in Washington, diminished capacity may negate the intent element of assault.

Because there is no way to know whether Jones’ Florida conduct would have constituted a crime in Washington without engaging in additional fact-finding in violation of his right to a jury trial, Jones may not be sentenced as a persistent offender on the basis of his Florida aggravated assault and battery convictions. See Blakely v. Washington, 542 U.S. 296, 301, 303-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 477, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

The Court of Appeals rejected this argument, declaring this Court’s discussion in Stockwell and Lavery to be mere dicta. Jones, slip op. at 19. Review is warranted to resolve the conflict with Stockwell and Lavery and

clarify whether the availability of defenses that negate the intent element of a crime must be considered in determining whether the elements of the crime are legally comparable. RAP 13.4(b)(1), (3), (4).

3. JONES' PERSISTENT OFFENDER SENTENCE VIOLATES HIS RIGHT TO DUE PROCESS.

Any fact, other than the fact of a prior conviction, that increases the penalty beyond the standard range must be determined by a jury. U. S. Const. amends. 6, 14; Apprendi, 530 U.S. at 490; Blakely, 542 U.S. at 303-04. The State did not prove Jones' prior convictions or his identity beyond a reasonable doubt to a jury: Nonetheless, the court sentenced him as a persistent offender to life without parole, based on these judicially determined facts. Therefore, that sentence is invalid because it violates Jones' Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process.

This court has held that there is no right, under our either our state constitution or the federal constitution, to a jury determination of prior convictions at sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). However, Apprendi's "fact of a prior conviction," exception to the rule requiring jury verdicts originated in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), a decision which has since been criticized by a majority of the United States Supreme

Court. See Shepard v. United States, 544 U.S. 13, 27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring) (“[A] majority of the Court now recognizes that Almendarez-Torres was wrongly decided.”); Apprendi, 530 U.S. at 490; State v. Wheeler, 145 Wn.2d 116, 124-37, 34 P.3d 799 (2001) (Sanders, J., dissenting).

Because the Almendarez-Torres exception should be rejected, the sentencing court lacked authority to impose a persistent offender sentence without a jury finding that Jones had constitutionally valid prior convictions. Jones’ persistent offender sentence therefore should be vacated and the matter remanded for a standard sentence under RCW 9.94A.505.

This continuing validity of the Almendarez-Torres “fact of a prior conviction exception” to the m Apprendi-Blakely rule requiring jury verdicts warrants review under RAP 13.4(b)(3) and (4) as a significant question of both constitutional magnitude and public interest.

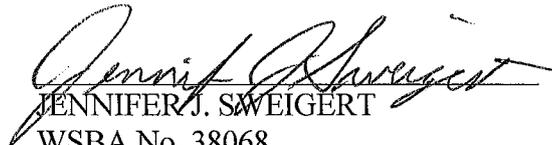
E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and presents significant questions of constitutional law and public interest. Jones requests this Court grant review under RAP 13.4(b)(1), (3), (4).

DATED this 6th day of October, 2010.

Respectfully submitted,

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Appendix A

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

STATE OF WASHINGTON,)	No. 63223-0-I
)	
Respondent,)	
)	
v.)	
)	
LEROY A. JONES,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: September 7, 2010
_____)		

ELLINGTON, J. — Leroy Jones was convicted of first degree assault with a deadly weapon. The trial court determined that this was Jones' third "most serious offense" and imposed a sentence of life without parole under the Persistent Offender Accountability Act (POAA). Jones argues primarily that the trial court erred in denying his motion for a new trial or dismissal based on ineffective assistance of counsel and governmental mismanagement, and erred in imposing a POAA sentence. We affirm.

BACKGROUND

On the afternoon of September 10, 2007, Leroy Jones was involved in a fight with Taurian Alford near a bus stop in downtown Seattle. Within minutes, three of Alford's friends, including T'Shaun Bennett and Devin Wilturner, ran up and joined the fight. When the police arrived, they saw that Jones had a knife in his hand and was being restrained by the others. He continued struggling and did not drop the knife until a police officer tasered him.

Jones was charged with second degree assault with a deadly weapon. At trial, the State argued that Jones attacked Alford with the knife, and that Alford's friends intervened to save him. The defense theory was that Jones pulled out his knife in self-defense only after Alford's friends attacked him.

The State produced a number of eyewitnesses. Alford's cousin T'Shaun Bennett testified he saw Alford and Jones arguing on the street and then heard Alford shout that Jones had a knife. Bennett saw the knife in Jones' hand as Jones chased Alford down the street. Bennett ran up and saw Jones on top of Alford, trying to stab him. Bennett and Wilturner struggled with Jones until the police arrived.

The State next presented eyewitness testimony of coworkers Endre Veka, Erik Fierce, Peter Schwab, and Gus Iverson. They testified they were returning to their office on the way back from a coffee break when Alford came running up to them and said "someone was chasing him,"¹ or "he's trying to stab me."² At first they were skeptical of Alford's motives, but within seconds they saw Jones run up and attack Alford. They saw two more young men join the fight, apparently trying to subdue Jones. The four coworkers gave slightly varying descriptions of the events, including the point at which they noticed the knife, but all agreed that Alford appeared primarily to be defending himself.

The State sought a material witness warrant for Alford but was unable to secure his presence for trial. Alford's mother testified she had sent him to live with family in Missouri after this incident.

¹ Report of Proceedings (RP) (Apr. 8, 2008) at 138.

² Id. at 87.

Detective Tim DeVore testified that on September 13, 2007 he took taped statements from three witnesses to the fight: Peter Schwab, Erik Fierce, and Lori Brown. The prosecutor and defense counsel had copies of written statements of Schwab and Fierce, but no copies of the taped statements. Defense counsel moved for a mistrial. The court denied the motion but granted a continuance to allow defense counsel to locate Brown and to recall Schwab and Fierce for further cross-examination.

Brown, a government employee who was waiting at the bus stop when the fight began, testified for the State. She said she saw one man chasing another. The one being chased stopped and stood his ground, and the two started to fight. She was not watching closely and did not see any weapons, but she heard someone say something about a knife after other men joined the fight. Fierce, Schwab and DeVore appeared again for recross examination.

Jones did not testify. The sole defense witness was Mark Forbes, a transportation supervisor who was working nearby when the fight occurred. Forbes testified he saw two men walking together. They started arguing and then fighting. He saw three other men join the fight, and heard someone say he "had a knife."³ He then noticed a knife cupped in the hand of one of the men. Forbes thought the man with the knife seemed to be protecting himself from the others.

The jury found Jones guilty as charged. The prosecutor notified defense counsel he believed this was Jones' third "most serious offense" and that he would seek a life sentence under the POAA. Jones' counsel moved to withdraw because he believed he

³ RP (Apr. 14, 2008) at 70.

may have been ineffective. Jones then obtained new counsel and moved for a new trial on the basis of ineffective assistance, discovery violations under CrR 4.7, and governmental mismanagement under CrR 8.3(b). The trial court denied the motion for a new trial or dismissal and, after determining that the conviction amounted to a third strike, sentenced Jones to life in prison without parole. Jones appeals.

DISCUSSION

Ineffective Assistance Of Counsel

Jones argues the trial court erred in denying his motion for a new trial because his counsel was ineffective in failing to adequately investigate his criminal history and in failing to investigate two witnesses.

A decision to grant or deny a new trial based on a claim of ineffective assistance of counsel will not be disturbed absent a manifest abuse of discretion.⁴ “To demonstrate ineffective assistance of counsel, the defendant must show: (1) that his counsel’s performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.”⁵ This means the defendant “must affirmatively prove prejudice, not simply show that ‘the errors had some conceivable effect on the outcome.’”⁶ Both prongs ‘must be met to satisfy the test.’⁷

⁴ State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

⁵ State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (quoting Strickland v. Washington, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

⁶ State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (emphasis omitted) (quoting Strickland, 466 U.S. at 693).

Jones contends his attorney inadequately investigated his Florida criminal history and failed to advise him the Florida assault conviction was a strike crime in Washington. Jones relies primarily on State v. Crawford.⁸

Crawford was charged with first degree robbery and second degree assault. He had a Washington conviction for second degree robbery and a Kentucky conviction for first degree sex abuse. Both the prosecutor and defense counsel were initially unaware of the Kentucky conviction.⁹ The prosecutor offered to recommend a sentence at the low end of the standard range of 57 to 75 months. Even after learning of the Kentucky conviction, neither the prosecutor nor defense counsel investigated whether it counted as a strike, and did not engage in further plea negotiations.¹⁰ Crawford and his attorney thus went to trial believing that his standard range was 57 to 75 months. After Crawford was found guilty, the prosecutor determined that the Kentucky conviction was a strike, making him subject to a life sentence under the POAA.¹¹

Crawford moved for a new trial or dismissal, arguing that had he known prior to trial that he faced a potential life sentence, he would have accepted the prosecutor's plea offer.¹² Defense counsel explained that she had not investigated the Kentucky conviction because she assumed it was a misdemeanor. The trial court denied Crawford's motion to dismiss and imposed a mandatory life sentence under the

⁷ State v. Brockob, 159 Wn.2d 311, 345, 150 P.3d 59 (2006).

⁸ 159 Wn.2d 86, 147 P.3d 1288 (2006).

⁹ Id. at 90.

¹⁰ Id. at 91.

¹¹ Id.

¹² Id.

POAA.¹³ Division Two of this court vacated the judgment and concluded Crawford did not receive procedural due process or effective assistance of counsel.¹⁴

The Washington Supreme Court reversed, holding that “[p]rocedural due process does not require that a criminal defendant receive pretrial notice of a possible life sentence under the POAA.”¹⁵ The court further held that although defense counsel’s performance in failing to investigate was deficient, Crawford was unable to demonstrate prejudice.¹⁶ The court reasoned that (1) there was no indication the prosecutor was willing to offer Crawford the option of pleading guilty to a nonstrike offense, (2) it was highly speculative to conclude the prosecutor would charge a defendant with a nonstrike offense in this case, (3) the POAA grants no discretion to judges or prosecutors in the sentencing of persistent offenders, and (4) Crawford presented no mitigation evidence.¹⁷

Jones’ argument is that his counsel was deficient in failing to advise him that the Florida assault conviction was a strike, and he was prejudiced because he would have accepted the State’s plea offer to the nonstrike offense of third degree assault. The State responds that unlike Crawford, Jones’ defense counsel repeatedly advised him his present conviction was potentially a third strike.

Assuming Jones’ attorney did not meet his obligation under Crawford to investigate whether the prior conviction was a strike crime, he nonetheless advised

¹³ Id. at 92.

¹⁴ Id.

¹⁵ Id. at 93.

¹⁶ Id. at 99.

¹⁷ Id. at 100–01.

Jones he could be facing a third strike. Yet Jones refused the plea offer and said he did not care if he was sentenced to life in prison. Jones later expressed an interest in pleading guilty to assault in the fourth degree, but there is no evidence the State ever offered that option or would have been willing to do so.

Moreover, 10 years ago, Jones was charged with robbery in the second degree. His attorney advised him he was facing a third strike if convicted. Jones entered an Alford¹⁸ plea to a reduced charge of assault in the third degree to avoid a third strike conviction. Jones thus cannot establish ineffective assistance of counsel because he can establish no prejudice. The trial court entered findings of fact that defense counsel's performance was not inadequate and that Jones was not prejudiced in any event. The record supports these findings. The ineffective assistance claim fails.

Jones also contends he received ineffective assistance because defense counsel failed to contact eyewitnesses Michael Hamilton and Lori Brown prior to trial. Without stating whether this omission constituted deficient performance, the trial court concluded Jones was not prejudiced because Brown ultimately testified and Hamilton's proposed testimony was not exculpatory.

We agree. Brown's testimony at trial was similar to that of the other eyewitnesses, and was not exculpatory. And although Hamilton placed Jones as the one being tackled, this testimony would not likely have changed the outcome of the trial because it contradicted four other eyewitnesses. Further, Hamilton's testimony that he saw the older man display a knife when the fight started and before the other men

¹⁸ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

joined the fight was detrimental to the defense.

Jones also argues defense counsel was ineffective by failing to object to the testimony of Alford's mother Julia Buchanan, who stated that she sent Alford to live with family in Missouri partially because she was afraid for him to testify. "[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted."¹⁹ "Only in egregious circumstances, on testimony central to the State's case, will failure to object constitute incompetence of counsel justifying reversal."²⁰

Jones, relying on State v. Bourgeois,²¹ contends that Buchanan's testimony unfairly and prejudicially bolstered Alford's credibility and that the jury likely viewed it as substantive evidence of guilt. In Bourgeois, witnesses admitted they were reluctant to testify out of fear of retaliation. The prosecutor argued in closing that a reasonable fear of retaliation made their testimony credible. The court held that unless a witness's credibility has been attacked, it is improper to mention fear of testifying in order to bolster credibility.²² The error, however, was deemed harmless.²³

¹⁹ Saunders, 91 Wn. App. at 578 (internal citations omitted).

²⁰ State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

²¹ 133 Wn.2d 389, 945 P.2d 1120 (1997).

²² Id. at 400-01.

²³ Id. at 403-05.

Bourgeois is distinguishable. First, the State did not expressly use Buchanan's testimony to bolster Alford's credibility. Second, Alford did not testify at trial, and his credibility was not directly at issue. Third, Buchanan's testimony was not central to the State's case.²⁴ Even assuming there was no tactical reason not to object, the result of the trial would not have been different had defense counsel objected.

Discovery Violation

Jones argues the trial court erred in denying his CrR 4.7 motion for a mistrial based on a discovery violation. Jones brought the motion after discovering that Detective DeVore had taken taped statements from eyewitnesses Peter Schwab, Erik Fierce, and Lori Brown which had not been provided to the defense.

The trial court ruled this violated CrR 4.7(a)(1)(i), which requires the prosecutor to provide any written or recorded statements of its witnesses to the defense "to protect against surprise that might prejudice the defense."²⁵ The court granted a three day continuance so the statements of Schwab and Fierce could be reviewed and Brown could be located and interviewed. Brown subsequently testified for the State, and Schwab and Fierce were recalled for further cross-examination.

CrR 4.7(h)(7)(i) provides that if a party fails to comply with the discovery rules, the court may order discovery, grant a continuance, dismiss the action, or enter any other order it deems just under the circumstances. "[A] trial judge has wide latitude when imposing sanctions for discovery violations and ruling on motions for a new

²⁴ In his reply brief, Jones argues that this testimony was central to the State's case because Buchanan's son Bennett was a key witness. But Buchanan is Alford's mother, not Bennett's mother.

²⁵ State v. Smith, 67 Wn. App. 847, 851, 841 P.2d 65 (1992).

trial.”²⁶ Courts may dismiss criminal actions under CrR 4.7 where the State’s inexcusable failure to act with due diligence infringes on the defendant’s rights.²⁷ The court’s ruling will not be disturbed on appeal absent a showing of abuse of discretion.²⁸

Jones argues the continuance was an insufficient remedy. Noting that Schwab’s statements were inconsistent regarding the moment he saw the knife, Jones contends late disclosure of Schwab’s statement prejudiced him because he was unable to utilize these inconsistencies in his opening statement and in cross-examination of Schwab and other witnesses. In addition, Jones contends he did not have sufficient time to retain Dr. Geoffrey Loftus, who would have opined that Schwab’s later testimony was not based on an accurate perception of events. Jones further contends he was prejudiced by the late disclosure of Lori Brown’s statement, which tended to negate guilt.

But the new information did not change the defense theory, and did little or nothing to bolster it. Schwab said he saw a pointy object in Jones’ hand as he approached Alford, and saw that it was a knife before Alford’s friends joined in. Fierce said that he noticed the knife after the others joined the fight. And Lori Brown testified that she did not watch the fight closely and did not see a knife, but noticed someone making jabbing motions as if he had a knife. Dr. Loftus’ testimony regarding the validity of Schwab’s memories would have been speculative. Finally, the jury heard from several witnesses who gave inconsistent testimony. The trial court did not abuse its discretion in its choice of remedy for the State’s CrR 4.7 violation.

²⁶ State v. Dunivin, 65 Wn. App. 728, 731, 829 P.2d 799 (1992).

²⁷ See State v. Price, 94 Wn.2d 810, 814–15, 620 P.2d 994 (1980).

²⁸ Dunivin, 65 Wn. App. at 731.

Governmental Misconduct

Jones argues the trial court erred in denying his CrR 8.3(b) motion to dismiss based on the State's oversight in failing to disclose the tapes. CrR 8.3(b) provides that the court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Dismissal is an extraordinary remedy that has been limited to "truly egregious cases of mismanagement or misconduct by the prosecutor."²⁹ Governmental misconduct, however, "need not be of an evil or dishonest nature; simple mismanagement is sufficient."³⁰ "A trial court's power to dismiss charges is reviewable under the manifest abuse of discretion standard."³¹

Here, the court did not abuse its discretion in denying the extraordinary remedy of dismissal. As discussed above, the trial court properly granted a continuance to remedy the error, and the defense did not suffer prejudice.

Jones further argues the trial court erred in denying his motion to dismiss under CrR 8.3(b) based on the State's misrepresentations regarding his criminal history and its legal ramifications. He contends the prosecutor misrepresented his criminal history by mistakenly listing a robbery conviction in Florida. After it was discovered Jones had been convicted of aggravated assault rather than robbery, the prosecutor told the court he did not believe it was a strike offense. Jones contends the prosecutor knew or

²⁹ State v. Koerber, 85 Wn. App. 1, 4–5, 931 P.2d 904 (1996) (quoting State v. Duggins, 68 Wn. App. 396, 401, 844 P.2d 441 (1993)).

³⁰ State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997) (emphasis omitted) (quoting State v. Blackwell, 120 Wn.2d. 822, 831, 845 P.2d 1017 (1993)).

³¹ Id. at 240.

should have known the charged offense would result in a third strike, and that the prosecutor's misrepresentation of the law affirmatively misled him into going to trial rather than attempting a plea bargain. The State responds that although the prosecutor misunderstood the legal impact of Jones' criminal history, he made no intentional misrepresentations and there was no arbitrary action or mismanagement because the prosecutor accurately advised the defendant before trial that his criminal history included two Florida convictions.

The court did not abuse its discretion in finding that this error was not sufficiently egregious as to warrant dismissal. There is no indication the prosecutor's misrepresentation was intentional. Moreover, an offender has no constitutional or statutory right to pretrial notice of the possibility of being sentenced as a persistent offender.³² Jones' contention that he rejected the State's plea offer because the prosecutor misled him is not persuasive. His counsel advised him repeatedly that he was very concerned that the prior conviction was a strike. Despite this advice, Jones told his counsel he would not accept a plea bargain. Moreover, Jones' argument that the prosecutor should have known both Florida convictions were strikes runs counter to his argument (addressed below) that the court erred in sentencing him to life in prison under the POAA because one prior was not a strike.

Aggressor Instruction

Jones argues the court erred by giving the jury an aggressor instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another

³² Crawford, 159 Wn.2d at 94.

person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.^[33]

An aggressor instruction should be used with care.³⁴ "Nevertheless, it is not error to give one when there was credible evidence from which the jury could reasonably have concluded that it was the defendant who provoked the need to act in self-defense."³⁵ When there is conflicting evidence as to whether the defendant's conduct precipitated a fight, the instruction is appropriate.³⁶ "[T]he provoking act must also be related to the eventual assault as to which self-defense is claimed."³⁷

Jones argues the aggressor instruction was not justified because the State's theory was that Jones attacked Alford with a knife from the very beginning of the encounter, so that the fight with Alford was one ongoing assault and there was no separate provoking conduct. Jones further argues that even if he was aggressive toward Alford, he had the right to defend himself against Alford's friends.

The State responds that the aggressor instruction was made necessary by the defense theory, which was that there were two different assaults: first, the fight between Jones and Alford alone, which did not involve a knife and could not constitute assault in the second degree, and second, when Jones was attacked by Alford's friends and pulled a knife in self-defense. The State contends the jury was properly instructed

³³ Clerk's Papers at 72.

³⁴ State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

³⁵ State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

³⁶ Riley, 137 Wn.2d at 910.

³⁷ State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989).

that Jones could not provoke the altercation by tackling Alford and then stabbing him in self-defense after Alford's friends came to assist him.

There was strong evidence that Jones began the altercation by tackling Alford, and thus the evidence was in conflict as to whether Jones precipitated the altercation. Given the defense theory, the court did not err in giving the aggressor instruction.

Prior Juvenile Convictions

Jones argues the trial court erred in refusing to admit State witness T'Shawn Bennett's prior juvenile convictions for third degree possession of stolen property, third degree malicious mischief, and three convictions for second degree taking a motor vehicle under ER 609(d). Admission of evidence under ER 609(d) is reviewed for abuse of discretion.³⁸

Under ER 609(d), evidence of juvenile adjudications is generally not admissible unless the offense "would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." ER 609(d) "requires a positive showing that the prior juvenile record is necessary to determine guilt."³⁹ In State v. Gerard,⁴⁰ the court held that the trial court did not abuse its discretion in excluding the juvenile convictions of the State's witness, noting that the defendant did not give any reason for admissibility beyond

³⁸ State v. Gerard, 36 Wn. App. 7, 11, 671 P.2d 286 (1983).

³⁹ Id. at 12.

⁴⁰ 36 Wn. App. 7, 671 P.2d 286 (1983).

general impeachment and that such evidence would be of dubious value in a bench trial.⁴¹

Jones contends the juvenile convictions were necessary evidence because without them Bennett, Alford, and the others were unfairly sanitized, leading the jury to discredit Jones' self-defense claim. But Jones presents no persuasive reason why Bennett's prior juvenile adjudications would be necessary for a fair determination of Jones' guilt, apart from a general attack on credibility. Refusing to admit the evidence was not an abuse of discretion, and in any event, there is no reasonable probability the omission of this evidence materially affected the outcome, especially given the adverse testimony of the witnesses who had no criminal history.

Cumulative Error

Jones argues that cumulative error denied him a fair trial. A defendant may be entitled to a new trial when errors, even though not individually reversible, cumulatively result in a trial that was fundamentally unfair.⁴² This standard has not been met.

POAA Sentence

Jones argues the trial court erred in concluding his Florida convictions for aggravated battery and aggravated assault were legally comparable to Washington offenses and constituted strikes for purposes of sentencing. The POAA mandates a sentence of life without parole if the offender has a current conviction for a "most serious offense" and two prior convictions "whether in this state or elsewhere, of

⁴¹ Id. at 12.

⁴² State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score."⁴³

In determining the comparability of a foreign offense, the court applies a two part test:

A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute.^[44]

The State bears the burden of proving that prior convictions from other jurisdictions are comparable to Washington crimes.⁴⁵ "Courts conduct de novo review of a sentencing court's decision to consider a prior conviction as a strike."⁴⁶

Jones does not dispute that he was convicted of aggravated battery and aggravated assault in Florida. Nor does he dispute that the elements of both crimes in Florida are comparable to the "most serious offense" of assault in the second degree in Washington.⁴⁷ The State contends the analysis ends there. But Jones argues the

⁴³ RCW 9.94A.030(34), .570.

⁴⁴ State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

⁴⁵ In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005).

⁴⁶ Thiefault, 160 Wn.2d at 414.

⁴⁷ In Washington, RCW 9A.36.021(1)(c) and (e) provide that "[a] person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . (c) [a]ssaults another with a deadly weapon; or . . . (e) [w]ith intent to commit a felony, assaults another." Fla. Stat. Ann. 784.021(1)(b) defines "aggravated assault" as "an assault . . . [w]ith an intent to commit a felony." Fla. Stat. Ann. 784.045(1)(a)(2) states that "[a] person commits aggravated battery who, in committing battery . . . [u]ses a deadly weapon."

Florida offenses are not comparable because diminished capacity is not an available defense in Florida and that the availability of this defense directly impacts the element of intent.

Jones relies on two relatively recent Washington Supreme Court cases, In re Personal Restraint of Lavery⁴⁸ and State v. Stockwell.⁴⁹ The issue in Lavery was whether the crime of federal bank robbery is comparable to robbery in the second degree in Washington. The court began its analysis by stating that when “the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.”⁵⁰ The court then stated:

The crime of federal bank robbery is a general intent crime. The crime of second degree robbery in Washington, however, requires specific intent to steal as an essential, nonstatutory element. Its definition is therefore narrower than the federal crime's definition. Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington. Among the defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication, (2) diminished capacity, (3) duress, (4) insanity, and (5) claim of right.⁵¹

The court held that because the intent elements of federal bank robbery and second degree robbery are not the same, the offenses are not substantially similar and are not legally comparable for POAA sentencing purposes.

⁴⁸ 154 Wn.2d 249, 111 P.3d 837 (2005).

⁴⁹ 159 Wn.2d 394, 150 P.3d 82 (2007).

⁵⁰ Lavery, 154 Wn.2d at 255.

⁵¹ Id. at 255–56 (citations omitted).

In Stockwell, the court considered whether a conviction for first degree statutory rape under a former statute is comparable to the present offense of first degree rape of a child. The defendant argued the new statute is not comparable because it added an element of nonmarriage, and therefore criminalizes less conduct and provides a defense not available under prior law. The court concluded that first degree statutory rape is a strike under POAA.⁵² In its analysis, the court reiterated that “if the elements of the strike offense and the elements of the foreign (or prior) crime are comparable, the former (or prior) crime is a strike offense.”⁵³ Then, citing Lavery, the court added that “when there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time, the elements may not be legally comparable.”⁵⁴ But because the court concluded that the crimes were comparable since nonmarriage is an implied element of the crime of first degree statutory rape, this statement is dicta.

The State argues that the discussion in Lavery and Stockwell should not be read to require sentencing courts to identify all possible defenses available in the foreign jurisdiction in conducting a comparability analysis.⁵⁵ Relying on State v. Berry,⁵⁶ the State further argues that “expanding the comparability analysis beyond an elemental analysis would unnecessarily complicate an already difficult process.”⁵⁷ Moreover,

⁵² Stockwell, 159 Wn.2d at 400.

⁵³ Id. at 397.

⁵⁴ Id.

⁵⁵ RCW 9.94A.525(3).

⁵⁶ 141 Wn.2d 121, 5 P.3d 658 (2000).

⁵⁷ Id. at 132.

according to the State, this process would likely result in the exclusion of nearly all foreign convictions.

The dicta regarding comparability in Lavery and Stockwell is just that: dicta. We strongly doubt the court intended its discussion of available defenses as anything other than a means of distinguishing specific intent crimes from general intent crimes. If we were to accept Jones' argument, sentencing courts would be required to analyze the criminal jurisprudence of other states to insure that there were no defenses available in Washington that were unavailable in the state of conviction.⁵⁸ Furthermore, Jones' argument runs counter to the plain language of RCW 9.94A.525(3) that "out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." The statute contains no language suggesting that defenses must also be identical.

Because Jones' two Florida convictions are for crimes identical to the elements of Washington's assault in the second degree, no further analysis is required. The trial court properly found that Jones is a persistent offender and sentenced him to life in prison under the POAA.

⁵⁸ The State also argues that Jones is incorrect in asserting that there was no diminished capacity defense in Florida at the time of his prior convictions. In State v. Bias, 653 So.2d 380, 383 (Fla. 1995), the Florida Supreme Court held that expert opinion was admissible to show that voluntary intoxication, combined with a mental disease or defect, prevented the defendant from forming the specific intent to commit the crime. But the court specifically reiterated that "expert evidence of diminished capacity is inadmissible on the issue of mens rea" and cautioned that the defense of voluntary intoxication cannot be used as a label for what in reality is a diminished capacity defense. Id. at 382. Thus, Jones is correct that diminished capacity was not an available defense in Florida. But because we hold that the comparability analysis is limited to the elements of the crime rather than the availability of defenses, this is of no consequence.

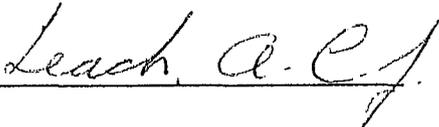
Sentencing Without Jury Determination of Valid Priors

Jones argues that the court lacked authority to impose a persistent offender sentence without a jury finding that he had constitutionally valid prior convictions. He contends that the sentence violated his Sixth Amendment right to jury trial and his Fourteenth Amendment right to due process. The Washington Supreme Court has held there is no right under the state or federal constitution to a jury determination of prior convictions at sentencing.⁵⁹

Affirmed.



WE CONCUR:





⁵⁹ State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003).