Supreme Court No. 102602-1
COA No. 56287-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS GIANCOLI

Petitioner.

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

PETITION FOR REVIEW

Jessica Wolfe
Attorney for Dennis Giancoli
WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Foreign Statutes

Constitutional Provisions

Other Authorities

A. INTRODUCTION

Dennis Giancoli and his co-defendant Christopher Conklin were convicted of the same crimes; raised identical arguments on appeal; and secured the same concessions on those arguments from the State. Mr. Conklin's appeal was heard by Division One, which reversed all of his "strike" convictions. Mr. Giancoli's appeal was heard by Division Two, which refused to afford him the same relief.

Mr. Giancoli is a third-striker who will die in prison if this Court does not act to correct this gross miscarriage of justice. Review is warranted on this ground alone.

Review is further warranted to assess the constitutionality of three-strikes sentences, which are imposed in a racially disparate manner and fail to comport with evolving standards of decency.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Dennis Giancoli, the petitioner, asks this Court to review the opinion of the Court of Appeals in *State v. Giancoli*, No. 56287-1-II (Oct. 31, 2023) pursuant to RAP 13.4(b).

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Giancoli and his co-defendant Mr. Conklin raised the same legal challenges on appeal. In both appeals, the State conceded errors occurred in securing each of the "strike" convictions. By chance, Mr. Conklin's case was transferred from Division Two to Division One and heard first. Based on the State's concessions, Division One reversed all of Mr. Conklin's "strike" convictions. Division Two refused to afford Mr. Giancoli the same relief. Review is warranted to correct this gross miscarriage of justice and violation of equal protection. U.S. Const. amend. XIV.

2. This Court struck down the death penalty under article I, section 14 because a statistical study demonstrated it was

administered in an arbitrary and racially biased manner and this, combined with other jurisdictions' practices, showed it did not comport with evolving standards of decency.

a. Data from the Caseload Forecast Council show that 37% of those serving death-in-prison sentences under the three-strikes law are Black, even though Black people make up only 4.4% of Washington's population. Moreover, only ten other states impose death-in-prison sentences under similar recidivist schemes. Given these circumstances, the constitutionality of the three-strikes law is a significant question of law that merits review. RAP 13.4(b)(3).

b. Approximately 38% of those sentenced to die in prison for a second-degree assault "strike" offense are Black, and no other state in the nation includes crimes comparable to Washington's second-degree assault in the list of offenses that result in death-in-prison sentences. Whether the inclusion of second-degree assault as a

"strike" offense is constitutional is a significant question of law that merits this Court's review. RAP 13.4(b)(3).

3. Eyewitness identification that was obtained by impermissibly suggestive police procedures must be excluded pursuant to due process. U.S. Const. amend. XIV; *Manson v. Braithwaite*, 432 U.S. 98, 114, 97 S. Ct. 3342, 53 L. Ed. 2d 140 (1977). In *State v. Derri*, this Court held that in assessing the element of suggestibility, courts "must apply relevant, widely accepted modern science on eyewitness identification." 199 Wn.2d 658, 675, 11 P.3d 1267 (2022). This Court further held modern science dictates that "identification procedures should be administered in a double-blind fashion, meaning the administrator does not know who the suspect is." *Id.* at 675, 680. Disregarding this precedent, Division Two held that the absence of a double-blind procedure here was not impermissibly suggestive, because there was no evidence it "made any difference." Op. at 15. In doing so, Division Two disregarded *Derri*'s directive to apply modern science in

evaluating eyewitness procedures, warranting this Court's review. RAP 13.4(b)(1). Review is further warranted as single-blind procedures appear routine in Pierce County despite its widely acknowledged suggestibility, raising an issue of substantial public interest. RAP 13.4(b)(4).

4. Any fact, other than a prior conviction, that increases the mandatory minimum or maximum sentence is an essential element of the offense. *State v. Allen*, 192 Wn.2d 526, 538, 431 P.3d 117 (2018); *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Alleyne v. United States*, 570 U.S. 99, 116, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); U.S. Const. amend. V, VI. Lack of notice of an essential element requires reversal of the conviction. *State v. Siers*, 158 Wn. App. 686, 244 P.3d 15 (2010), *rev'd on other grounds in State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012). Here, the Court of Appeals concluded that lack of notice required reversal of the firearm enhancements on the assault convictions. Op. at 19–21. The firearm enhancements

increased the maximum and minimum penalties, and therefore were essential elements of the assaults. However, the Court of Appeals refused to reverse the assault convictions, warranting this Court's review as a significant question of constitutional law. RAP 13.4(b)(3).

5. Due process requires sufficient evidence to sustain a conviction. *Jackson v. Virginia*, 443 U.S. 307, 317–18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) U.S. Const. amend. XIV. In *State v. Recuenco*, this Court stated the definition of a "firearm" under RCW 9.41.010(12) required the State to prove a firearm's "operability." 163 Wn.2d 428, 437, 180 P.3d 1276 (2008). However, the Court of Appeals has struggled to apply *Recuenco*, variously holding that a firearm's operability is a required showing, *see State v. Pierce*, 155 Wn. App. 701, 714, 230 P.3d 237 (2010), and conversely that *Recuenco's* statement is dicta. *State v. Olsen*, 10 Wn. App. 2d 731, 737, 449 P.3d 1089 (2019); *State v. Tasker*, 193 Wn. App. 575, 581–82, 373 P.3d 310 (2016). Here, Division Two held the State was not

required to prove the handgun Mr. Giancoli was accused of possessing was operable, even though the gun was never fired nor found. Review is appropriate to clarify that *Recuenco* requires the State to prove the operability of a firearm to sustain an unlawful possession conviction. RAP 13.4(b)(1), (2).

D. STATEMENT OF THE CASE

1. Mr. Giancoli commits his first strike at age 17 and his second strike at 21, and then commits no violent offenses for nearly 30 years.

Mr. Giancoli is of mixed heritage: his father is white and his mother is Indigenous, affiliated with the Cree First Nations. CP 268. Mr. Giancoli grew up on the Muckleshoot Reservation. *Id.*

Both Mr. Giancoli's father and mother were physically abusive and neglectful. CP 267–68. He spent time in foster care and was a runaway. CP 270.

When Mr. Giancoli was 17, he hit a corrections staff member at Green Hill School, a juvenile detention facility. CP 272. He was charged with second degree assault, convinced to

agree to the declination of jurisdiction, and convicted in adult court. CP 272. This was Mr. Giancoli's first "strike" offense.

When Mr. Giancoli was released, he was only 18 years old with no family or home to return to. CP 272. He joined the Native Gangster Bloods and became addicted to drugs and alcohol. CP 272–73.

Shortly after he turned 21, Mr. Giancoli broke into several houses to steal food and clothing and use the shower. CP 273. He was arrested and pled guilty to burglary in the first degree—his second strike. *Id.*

In the decades since, Mr. Giancoli has been in and out of prison for crimes related to his addiction. CP 347. However, he was not been convicted of a violent crime for nearly thirty years. *Id.*

2. Arlen Stebbins and John Fryer are assaulted in the middle of the night by two unidentified men.

Arlen "Corky" Stebbins owned property in Lakebay. 7/19/2021 RP 662. Mr. Stebbins left the property "dormant"

and was an "absentee landlord." 7/19/2021 RP 669; 8/2/2021 RP 495.

In November 2019, Mr. Stebbins and his friend John Fryer drove out to the property. 7/19/2021 RP 670. They were surprised to find several things missing. 7/19/2021 RP 670, 681, 693–94. They decided to stay in a mobile home on the property for several nights. 7/19/2021 RP 701–702, 709–10.

At around 4:00 a.m., Mr. Stebbins and Mr. Fryer awoke to see a man standing over them holding what appeared to be a handgun. 7/19/2021 RP 711, 715; 7/29/2021 RP 449. Mr. Fryer variably described the man as looking "Mexican or Italian, Greek, something like that" as well as "Caucasian," "white," and "kinda Hispanic." 7/29/2021 RP at 451; Exhibit 58A at 3:43. By contrast, Mr. Stebbins definitively described this man as "white," as well as "about 6' tall" and "kind of grizzly." 7/12/2021 54; 7/19/2021 RP 721.

The man asked them where "Larry" was, and insisted the owner of Mr. Stebbins' property was actually "Larry."

7/19/2021 RP 712, 715; 7/29/2021 RP 448. Mr. Stebbins protested that he, not "Larry," was the owner of the property. 7/19/2021 RP 715.

A second man appeared, carrying a rifle. 7/19/2021 RP 716. Mr. Stebbins described this second man as shorter than the first man and blonde with a blond mustache, while Mr. Fryer described the second man as clean shaven. 7/19/2021 RP 721, 789; 7/29/2021 RP 456–57.

The two men ordered Mr. Stebbins and Mr. Fryer out of the house at gunpoint. 7/19/2021 RP 717. Once outside, the men ordered them to get into a black Escalade. 7/19/2021 RP 723; 7/29/2021 461. Mr. Fryer later told the 911 operator it was obvious the two men thought he and Mr. Stebbins were "squatting" on the property. Exhibit 1Q at 5 (CAD log); Exhibit 58 at 21:20.

When Mr. Stebbins protested, one of the men—Mr. Stebbins and Mr. Fryer did not agree on which one—hit Mr. Stebbins in the face with their gun. 7/19/2021 RP 728;

8/2/2021 RP 515–16. Mr. Fryer took that opportunity to flee. RP 7/29/2021 467. As he was running, he heard bullets and turned briefly to see the man with the rifle firing after him. 7/29/2021 RP 467–69. He ran into the woods surrounding the property, located a neighbor, and called 911. 7/29/2021 RP 47–76, 469.

After Mr. Fryer escaped, the man with the rifle approached Mr. Stebbins and shot him in his legs. 7/19/2021 RP 732. Mr. Stebbins ran and hid in the woods as the two men drove away. 7/19/2021 RP 735–40. He later called 911 and was transported to the hospital for treatment. 7/19/2021 740, 752.

A Pierce County Sheriff's deputy got a call of a home invasion involving a black Escalade. 7/21/2021 RP 17, 19. Shortly after, he drove by a car matching this description. 7/21/2021 RP 18–20. The windows were darkly tinted and the deputy could not see the driver or how many passengers were inside. 7/21/2021 RP 37–38. When the Escalade turned the

corner and took off, the deputy chased after it. 7/21/2021 RP 21–22. The chase ended when the Escalade blew a tire and the driver fled the car. 7/21/2021 at 50, 57, 59.

3. Mr. Giancoli is arrested, but Mr. Fryer does not identify him; Mr. Stebbins only identifies Mr. Giancoli after learning of his arrest and viewing his Facebook profile.

Police arrested Dennis Giancoli behind an apartment complex near where the Escalade blew a tire. 7/21/2021 RP 146–47. They arrested a second man, Christopher Conklin, in the nearby woods. 7/21/2021 RP 63.

Police retrieved Mr. Fryer to see if he could identify Mr. Giancoli or Mr. Conklin. Mr. Fryer stated Mr. Giancoli "looked like a completely different person, completely" and did not identify him as one of his assailants. 8/2/2021 RP 517. However, Mr. Fryer thought Mr. Conklin was the man who shot at him with the rifle. 7/29/2021 RP 482.

Later that day, construction workers found a rifle in pieces on the side of the road. 7/27/2021 RP 87, 92. However,

the supposed handgun was never recovered. 7/19/2021 RP 717; 7/29/2021 RP 449.

After Mr. Giancoli and Mr. Conklin were booked into jail, Mr. Stebbins' wife looked them up on jail's website. Motions in Limine Exhibit #11 at 44. She then found their profiles on Facebook. *Id.* at 45. She showed the profile photos to Mr. Stebbins, who became convinced the two men in the profiles were his assailants. *Id.*

Two weeks after the incident, a detective compiled "six-pack" photo montages that included Mr. Giancoli and Mr. Conklin. 7/12/2021 RP 23; Motions in Limine Exhibits #1–10. Mr. Stebbins picked Mr. Giancoli as one of his assailants. 7/12/2021 RP 26. Mr. Stebbins did not tell the detective that he had seen Mr. Giancoli's Facebook profile, and the detective did not learn this information for another ten months. 7/12/2021 RP 31–32.

4. Following a jury trial, Mr. Giancoli is convicted of several strike offenses and sentenced to die in prison.

Both Mr. Giancoli and Mr. Conklin were charged with five "strike" offenses: two counts of assault in the first degree, one count of burglary in the first degree, and two counts of kidnapping in the first degree, all with firearm enhancements. CP 16–19 (amended information). Mr. Giancoli was also charged with unlawful possession of a firearm in the first degree, eluding a pursuing police vehicle, and intimidating a witness. CP 18.

Mr. Giancoli and Mr. Conklin were tried together. The key issue was identity: whether Mr. Giancoli and Mr. Conklin were Mr. Stebbins and Mr. Fryer's assailants.

The jury convicted both Mr. Giancoli and Mr. Conklin of all charged counts, with the exception of intimidating a witness, on which the jury found Mr. Giancoli guilty of the lesser-included offense of witness tampering. CP 192–209. Because Mr. Giancoli was previously convicted of two "strike" offenses,

the court reluctantly imposed a death-in-prison sentence. CP 463; 9/17/21 RP 823, 828.

5. Division One reverses all of Mr. Conklin's strike convictions, while Division Two denies Mr. Giancoli relief on the same legal grounds and affirms his death in prison sentence.

On appeal, Mr. Giancoli and Mr. Conklin both argued that the assault convictions merged with the kidnapping convictions, and that the kidnapping and burglary convictions violated their constitutional rights to jury unanimity and notice. The State conceded error on these arguments in both cases.

The appeals were not consolidated, and Mr. Conklin's appeal was transferred from Division Two to Division One to "expedite review." *State v. Conklin*, No. 84634-5-II, Order Transferring Cases (Oct. 21, 2022). Mr. Conklin's case was decided first, and Division One reversed all of his strike convictions based on the State's concessions. *See State v. Conklin*, No. 84634-5-I (May 8, 2023) (unpublished).

The State filed a motion for reconsideration, arguing Division One erred by vacating the assault convictions on merger grounds. The State asserted it only meant to concede the merger of the assault with the kidnapping convictions if Division One was not inclined to reverse the kidnapping convictions on other grounds. However, Division One declined to reconsider its opinion, and this Court denied review. *State v. Conklin*, No. 84634-5-I, Order Denying Mot. for Reconsideration (June 29, 2023); *State v. Conklin*, No. 1022387, Order Terminating Review (Nov. 8, 2023).

Mr. Giancoli urged Division Two to follow the lead of Division One, noting that the State had conceded the merger issue and arguing that justice required the same outcome in both appeals. While Division Two reversed Mr. Giancoli's kidnapping and burglary convictions, as well as all firearm enhancements, it declined to follow Division One's lead in vacating the assault convictions. Op. at 17–22. As a result, Mr. Giancoli still had three "strikes." *Id.* at 21–22. While

acknowledging that "it would be ideal for codefendants to receive the same treatment," Division Two held that because the State "clarified its position at oral argument," Mr. Giancoli had no right to the same outcome as his co-defendant. *Id.* at 22.

Division Two also affirmed Mr. Giancoli's sentence of life without the possibility of release, reasoning that such a sentence did not offend "evolving standards of decency" because this Court had converted death penalty sentences to life sentences in *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Op. at 24.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review is warranted because the disparate outcomes of Mr. Conklin and Mr. Giancoli's appeals is a miscarriage of justice that violates equal protection.

This case was overcharged to the hilt. The prosecution reached too far, stretching its evidence across too many counts and encouraging the jury to convict on uncharged and unsupported alternatives. On appeal, the prosecution

acknowledged as much, conceding errors occurred in securing *each* of Mr. Giancoli's and Mr. Conklin's strike offenses at trial.

On appeal, Mr. Conklin initially only challenged the constitutionality of the eyewitness identification. However, *after* Mr. Giancoli's opening brief was filed, Mr. Conklin filed a supplemental brief adopting the same legal arguments. It was these identical arguments that ultimately led to the prosecution's concessions in both cases.

By pure chance, Mr. Conklin's appeal was transferred from Division Two to Division One and heard first. In response to the State's concessions, Division One reversed all of Mr. Conklin's strike convictions. When the State contested this outcome, Division One appropriately held the State to the consequences of its concessions.

Division Two refused to grant Mr. Giancoli the same relief. Instead, it allowed the State to "clarify" its position at oral argument and limit its previous concessions. Op. at 22. As

a result, Mr. Giancoli remains a third-striker and is sentenced to die in prison. By contrast, Mr. Conklin has likely served his time on his remaining conviction, a Class C felony.

This disparate outcome flows purely from division transfer and timing. It does not reflect the culpability of the parties or any difference in their claims. In fact, Mr. Conklin is clearly the more culpable party; it was him, not Mr. Giancoli, who shot after Mr. Fryer and shot Mr. Stebbins in the legs.

Division Two acknowledged this disparate outcome was not "ideal." Op. at 22. This was a flagrant understatement. Leaving Mr. Giancoli to die in prison while his co-defendant walks free is a gross miscarriage of justice that implicates equal protection principles. *See State v. Handley*, 115 Wn.2d 275, 290–91, 796 P.2d 1266 (1990); U.S. Const. amend. XIV.

Division Two recognized as much in *State v. Oeung*, where Ms. Oeung's more culpable co-defendant was granted an opportunity for resentencing after his case was transferred from Division Two to Division One. *State v. Oeung*, 2021 WL

1550310 at *7, 17 Wn. App. 2d 1021 (Apr. 20, 2021) (unpublished). Recognizing that Ms. Oeung was an accomplice and "a young woman of color," and that the sentencing judge had expressed discomfort in imposing the original sentence, Division Two held it would be a "gross miscarriage of justice" to deny her the same opportunity for resentencing. *Id.* All three judges agreed with this outcome, *even though* "the applicable law does not directly support this result." *Id.* (Maxa, J., concurring).

Like Ms. Oeung, Mr. Giancoli was less culpable and a person of color; further, both the sentencing judge and victim expressed discomfort in sentencing him to die in prison. 9/17/21 RP 823, 828. Additionally, unlike in *Oeung*, the State *conceded error* in this case. It is unclear why Division Two deemed Mr. Giancoli undeserving of the same basic fairness

here. This Court must take review to correct this injustice. RAP 13.4(b)(3), (4).

2. Review is required because Mr. Giancoli's death-in-prison sentence is cruel punishment under article I, section 14 as it is imposed in a racially disparate manner and does not comport with evolving standards of decency.

Three-strikes sentences are imposed under the Persistent Offenders Accountability Act (POAA) in a racially disproportionate manner, and these sentences do not comport with evolving standards of decency as compared to other jurisdictions' practices. Review is therefore warranted for this Court to consider if a three-strikes death-in-prison sentence violates article I, section 14 of the Washington Constitution. RAP 13.4(b)(3). At a minimum, this Court should consider whether the POAA is unconstitutional as administered for those convicted of second-degree assault. *Id.*

In *Gregory*, this Court held the death penalty violated article I, section 14 as administered. *State v. Gregory*, 192 Wn.2d 1, 5, 427 P.3d 621 (2018); *id.* at 36 (Johnson, J.,

concurring). This Court cited a statistical study demonstrating that in Washington, Black defendants were more than four times as likely to be sentenced to death as other defendants. *Id.* at 12. This Court also noted that local, national, and international trends disfavored capital punishment, signaling that the death penalty did not comport with evolving standards of decency. *Id.* at 23-24.

This Court further held that mathematical precision as a regression analysis was not required to show unconstitutional racial discrimination. *Gregory*, 192 Wn.2d at 20-23. This Court took "judicial notice of implicit and overt racial bias against black defendants in this state." *Id.* at 22. Two years later, this Court reaffirmed its recognition of systemic racial bias, including "the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems." Supreme Court Ltr. to the Legal Community, 1 (Jun. 4, 2020).

After *Gregory*, people who committed aggravated murder, including multiple aggravated murders, now receive

the same sentence as those convicted of lesser crimes under the POAA. *Gregory*, 192 Wn.2d at 36; *State v. Moretti*, 193 Wn.2d 809, 835, 446 P.3d 609 (2019) (Yu, J., concurring). Accordingly, Division Two erred by concluding *Gregory*'s remedy for people convicted of aggravated murder precludes consideration of the constitutionality of three-strikes death-in-prison sentences. Op. at 24.

Rather, as Justice Yu has noted, "[t]he principles set forth in *Gregory* compel us to ask the same questions about a life sentence without the possibility of parole. Is it fairly applied? Is there a disproportionate impact on minority populations? Are there state constitutional limitations to such a sentence?" *Moretti*, 193 Wn.2d at 840 (Yu, J., concurring).

The answers to these questions are: (1) No, the POAA is not fairly applied; (2) Yes, there is a disproportionate impact on minority populations; and (3) Yes, there are state constitutional limitations to such a sentence, under any article I, section 14 framework. *See* Br. of Appellant at 80–109 (analyzing the

constitutionality of the POAA pursuant to the "as administered" analysis of *Gregory*, the categorical analysis of *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), and the disproportionality analysis of *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980)) (arguments incorporated by reference).

The POAA has a strikingly disproportionate impact on populations of color. The Caseload Forecast Council (CFC) has tracked the race of all defendants sentenced under the Act since the law went into effect.[1] The Sentencing Guidelines Commission (SGC) compiled the first fifteen years' worth of data (through June 2008) and found only 52.2% of defendants sentenced under the three-strikes law were white, while 40.4% were Black. State of Washington Sentencing Guidelines Commission, *Two-Strikes and Three-Strikes: Persistent Offender Sentencing in Washington State Through June 2008*,

[1] *See* https://www.cfc.wa.gov/Publications.htm.

10 (February, 2009).[2] A report the next year concluded that, as of 2009, only 47% of three-strikes defendants were white, while 39.6% were Black. Columbia Legal Services, *Washington's Three Strikes Law: Public Safety & Cost Implications of Life Without Parole*, 8 (2009).[3] At the time, only 3.9% of the state's population was Black. *Id.* at 7.

Stark racial disproportionalities continued after 2009. By 2021, Black people made up 41% of those sentenced to die in prison under the three-strikes law, while white people made up only 52%. Appendix ("Appx.") at 16.[4]

The Legislature recently removed second-degree robbery from the list of strike offenses, and made the amendment

---

[2] Available at: https://www.cfc.wa.gov/PublicationSentencing/PersistentOffender/Persistent_Offender_asof20080630.pdf.

[3] Available at: https://columbialegal.org/wp-content/uploads/2019/03/CLS-Report_Washingtons-Three-Strikes-Law.pdf.

[4] The Appendix is attached to Mr. Giancoli's opening brief in the Court of Appeals and compiles data from the inception of the POAA through fiscal 2021. The Appendix further explains the sources and data compilation process.

retroactive, partly because of concerns about racial disproportionality. Nina Shapiro, *Legislature moves to resentence up to 114 people serving life without parole under Washington's three-strikes law*, Seattle Times (Apr. 8, 2021).[5] But, even excluding those who will be resentenced following the removal of second-degree robbery as a strike, 272 defendants remain subject to death in prison as a result of the three-strikes law. Appx. at 6–15, 17. Of those defendants, 54% are white and 37% are Black. *Id.* Currently, only 4.4% of the Washington population is Black.[6] Appx. at 19.

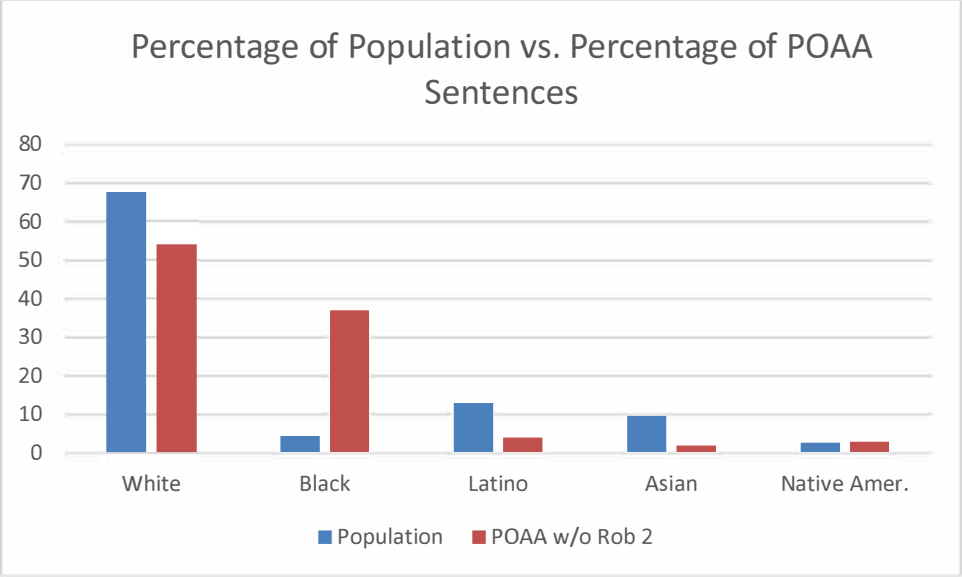
Indeed, Black people are overrepresented relative to their share of the population by a factor of **8.4** (37 ÷ 4.4). And while

---

[5] Available at: https://www.seattletimes.com/seattle-news/politics/up-to-114-people-serving-life-without-parole-to-get-resentenced-as-washington-legislature-eases-three-strikes-law/.

[6] *See* https://www.census.gov/quickfacts/fact/table/WA/PST045221. The Census Bureau notes its total of all races slightly exceeds 100% because the Bureau draws its numbers from different data sources. *Id.*

Black defendants remain strikingly overrepresented, white defendants remain underrepresented. Appx. at 20.



While this substantial racial disparity on its own violates society's standards of decency, *see Gregory*, 192 Wn.2d at 24, other jurisdictions' laws also show that the POAA does not comport with "evolving standards of decency that mark the progress of a maturing society." *Id.* at 23 (quoting *Fain*, 94 Wn.2d at 397. Although many other states enacted three-strikes statutes and other recidivist schemes, Washington is one of only eleven states in the nation that mandates a death-in-prison sentence for a third strike. Appx. at 21–30 (listing statutes).

Other states increase either the minimum term or the total sentence, but do not mandate life without the possibility of parole upon a third most serious offense. *Id.* And internationally, only 20% of the world's countries allow death-in-prison sentences for *any* crime, including aggravated murder. *Id.* at 5.

This Court should also consider accepting review of the issue of whether a death-in-prison sentence is unconstitutional for defendants with second-degree assault strikes. There is even greater racial disproportionality in this context, and it appears *no* other state includes a comparable crime in its list of strike offenses for death-in-prison sentences, demonstrating our law is inconsistent with evolving standards of decency.

As noted above, racially disproportionate administration of the law with respect to second-degree robbery strikes influenced the Legislature's decision to remove that crime from the list of most-serious offenses. Shapiro, *supra*. The same problem raised constitutional concerns. *State v. Jenks*, 197

Wn.2d 708, 728, 487 P.3d 482 (2021) (Yu, J., concurring) (citing Const. art. I, § 14).

The constitutional infirmities identified with respect to second-degree robbery strikes also exist with respect to second-degree assaults. While the three-strikes law as a whole is administered in an unconstitutionally racially disproportionate manner, the disparity is even greater for those convicted of second-degree assault. After removing those sentenced for second-degree robbery, there are 179 people with second-degree assault strikes who have been sentenced to death in prison under the POAA.[7] Appx. at 6-15, 18. Of those, only 90 are white. *Id.* In other words, while white people make up 67.5% of Washington's population, they constitute only 50% of those sentenced to die in prison for a second-degree assault strike. Appx. at 18-20. And Black people with second-degree

[7] This number excludes those convicted of assaults with deadly weapon enhancements or sexual motivation enhancements. Such enhancements on their own render any class B felony a strike. RCW 9.94A.030(32)(r), (s).

assault strikes are overrepresented relative to their share of the population by a factor of **8.6** (38 ÷ 4.4). Thus, the relative disproportionality with respect to second-degree assault sentences is even more striking than for the POAA as a whole.

The POAA is also even more out of step with evolving standards of decency for second-degree assault strikes. Of the ten other states that mandate death in prison for repeat offenders, it appears *none* includes a crime comparable to Washington's second-degree assault in the list of strike offenses. Ga. Stat. Ann. § 17-10-7(b); Ga. Stat. Ann. § 17-10-6.1(a); La. Rev. Stat. § 15:529.1(3)(b); La. Rev. Stat. § 14:2B; La. Rev. Stat. § 14:34.1; La. Rev. Stat. § 14:35; Ma. Stat. 279 § 25(b); Miss. Code § 99-19-83; Miss. Code § 97-3-7; Mont. Code Ann. § 46-18-219; Mont. Code Ann. § 45-5-202; N.C. Gen. Stat. Ann. § 14-7.7; N.C. Gen. Stat. Ann. § 14-7.12; N.C. Gen. Stat. Ann. § 14-33(c)(1); S.C. Stat. § 17-25-45; S.C. Stat. § 16-3-600; Tenn. Code Ann. § 40-35-12; Tenn. Code Ann. § 40-35-118; Wis. Stat. Ann § 939.62; Wis. Stat. Ann § 940.19;

Wyo. Stat. Ann. § 6-10-201; Wyo. Stat. Ann. § 6-2-501; Wyo. Stat. Ann. § 6-2-502.[8] This situation cannot be squared with our state's ostensibly strong protection against cruel punishment. Const. art. I, § 14; *Gregory*, 192 Wn.2d at 23–24. This Court should therefore accept review of whether the POAA as a whole, or as applied to those with second-degree assault strikes, is unconstitutional. RAP 13.4(b)(3).

3. This Could should accept review because Division Two misapplied this Court's holding in *State v. Derri.*

Due process requires the exclusion of evidence of eyewitness identification that (1) was obtained by impermissibly suggestive police procedures and (2) lacks reliability under the totality of the circumstances. U.S. Const. amend. XIV; *Manson v. Braithwaite*, 432 U.S. 98, 114, 97 S. Ct. 3342, 53 L. Ed. 2d 140 (1977). In *State v. Derri*, this Court

[8] It is conceivable that second-degree assault could be a strike offense in Louisiana. *See* La. Rev. Stat. § 14:34.1; La. Rev. Stat. § 14:35.

held that in assessing these factors, courts "must apply relevant, widely accepted modern science on eyewitness identification." 199 Wn.2d 658, 675, 11 P.3d 1267 (2022). Considering widely accepted modern science, the *Derri* Court specifically concluded "identification procedures should be administered in a double-blind fashion, meaning the administrator does not know who the suspect is," because research has demonstrated this is the only way to "prevent the tester from unintentionally influencing the outcome of the results." *Id.* at 675, 680.

Here, the State was permitted to introduce evidence that Mr. Stebbins identified Mr. Giancoli from a "six pack" photo montage and also allowed Mr. Stebbins to identify Mr. Giancoli in court. 7/12/2021 RP 87–92; 7/19/2021 RP 760; CP 70. However, the montage was impermissibly suggestive because it was not administered in double-blind fashion. Further, Mr. Stebbins' identification lacked reliability under a totality of the circumstances, primarily because Mr. Stebbins and his wife had looked up Mr. Giancoli's Facebook profile after learning his

name from the jail inmate roster. Motions in Limine Exhibit #11 at 44--45; *Derri*, 199 Wn.2d at 689 n.25.

Division Two held that the absence of a double-blind procedure was not impermissibly suggestive in this case, because there was no evidence it "made any difference here." Op. at 15. Accordingly, the Division Two did not reach the question of whether Mr. Stebbins' identification was otherwise reliable. *Id.*

In dismissing the significance of the procedure employed here, Division Two disregarded *Derri*'s directive that single-blind procedures are suggestive. Further, Division Two erroneously required Mr. Giancoli to make some affirmative showing that a double-blind procedure would have made a "difference." *Derri* imposes no such requirement in assessing the suggestiveness of a police procedure. Further, such a showing is impossible to make on an appellate record. As this Court noted in *Derri*, cues from a tester in a single-blind scenario "can be subtle, transferred unconsciously, and result

simply from the expectations of the experimenters." *Id.* at 680. Accordingly, the administering detective and Mr. Stebbins were likely unaware of any impact, and such impact would not be evident from testimony or police reports. This is why, in part, *Derri* requires courts to take their cue from widely accepted science, as opposed to the witnesses' own assessment of reliability.

Review is warranted here due to Division Two's misapplication of the *Derri* framework. RAP 13.4(b)(1). Review is further warranted as the record suggests that a single-blind procedure is routine in Pierce County. The detective who administered the photo montages was highly experienced, having worked with the Pierce County Sheriff's Department for 28 years. 7/12/2023 RP 21. He testified that, per protocol, he both created and administered the montages in this case. *Id.* This was despite the fact that it has been nearly a decade since the Washington Association of Prosecuting Attorneys identified double-blinded procedures as a "minimum standard" for

eyewitness identification. Wash. Ass'n. of Prosecuting Attys, Model Policy: Eyewitness Identification — Minimum Standards 3 (2015).[9] Accordingly, review is further warranted as a matter of substantial public interest to clarify to local jurisdictions the critical importance of double-blind procedures in eyewitness identification. *See* RAP 13.4(b)(4).

4. Review is needed to clarify that reversal of firearm enhancements requires reversal of the underlying conviction.

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 143 L.

[9] Available at: https://waprosecutors.org/wp-content/uploads/2019/04/2015-Eyewitness-ID-Policy.pdf

Ed. 2d 311 (1999)). There is thus "no 'principled basis' for treating a fact that increase[s] the maximum authorized term of punishment differently from the elements constituting the base offense." *State v. Allen*, 192 Wn.2d 526, 538, 431 P.3d 117 (2018) (quoting *Apprendi*, 530 U.S. at 476). There is also "no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum." *Alleyne v. United States*, 570 U.S. 99, 116, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Accordingly, any "fact other than proof of a prior conviction that increases the mandatory minimum sentence *is an element of the offense*." *Allen*, 192 Wn.2d at 534 (emphasis added).

These constitutional maxims hold true regardless of how the legislature labels particular "facts" that increase the punishment range. It applies whether the relevant facts are described as "elements of the offense, sentencing factors, or Mary Jane"—or, as relevant here, "sentencing enhancements." *See Ring v. Arizona*, 536 U.S. 584, 610, 122 S. Ct. 2428, 153 L.

Ed. 2d 556 (2002) (Scalia, J., concurring). "The essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." *Alleyne*, 570 U.S. at 116–17.

Here, the State charged Mr. Giancoli with several strike offenses, including two counts of first-degree assault, with firearm enhancements. CP 66–69. This "enhancement" added a mandatory five years of "total confinement" consecutive to each standard range sentence. RCW 9.94A.533(3)(a), (e). This "enhancement" thus raised both the minimum and maximum penalties on the assaults. *Alleyne*, 570 U.S. at 116–17.

Because proof that Mr. Giancoli or an accomplice was "armed was a firearm" was an "aggravating fact [that] produced a higher range," this enhancement was "an element of a distinct and aggravated crime." *Alleyne*, 570 U.S. at 116–17. Put another way, the State charged Mr. Giancoli with two counts of first degree assault while "armed with a firearm"—"aggravated

crime[s]" with a higher standard range than the base offenses. *See id.; Allen*, 192 Wn.2d at 534.

Here, Division Two struck the firearm enhancements due to lack of notice in the information, but did not reverse the underlying assault convictions. Op. at 19–21. However, because firearm enhancements are in fact *elements* of the charged "aggravated crimes," *see id.,* the appropriate remedy is clear. Failure to give proper notice of an element of the crime requires reversal of the conviction. *State v. Vangerpen*, 125 Wn.2d 782, 794, 888 P.2d 1177 (1995).

The Court of Appeals applied this remedy in the analogous case of *State v. Siers*, 158 Wn. App. 686, 244 P.3d 15 (2010), *rev'd on other grounds in State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012). There, the State presented an uncharged "aggravating factor" to the jury, which returned a guilty verdict on the aggravator. *Id.* at 690–92. Citing *Apprendi* as well as its progeny *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and *State*

v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008), the Court of Appeals agreed with the premise that "aggravating circumstances *are essential elements of a crime* because they are facts exposing the defendant to potential punishment above the statutory maximum." *Id.* at 695 (emphasis in original). The Court of Appeals held that "[t]he remedy for a charging document that omits an essential element is reversal and dismissal of the charges without prejudice, *not* a remand to enter a conviction on a lesser-included offense." *Id.* at 693 (emphasis in original) (citing *Vangerpen*, 125 Wn.2d at 792–93).

The same is true here. The jury did not find Mr. Giancoli guilty of assault in the first degree; it found him guilty of assault in the first degree while *armed with a firearm.* To remand with instructions to strike the firearm enhancement, instead of reversing the underlying conviction, would be akin to entering a conviction on a "lesser-included offense." *Id.* This

in turn "would be a usurpation of the jury's function." *Vangerpen*, 125 Wn.2d at 794.

While this Court reversed *Siers*, it did so on alternative grounds, reasoning that aggravators need not be charged in an information because they were not "the functional equivalent of an essential element." *Siers*, 174 Wn.2d at 282. Conversely, this case concerns sentencing enhancements, which this Court has held must be charged in the information. *Recuenco*, 163 Wn.2d at 434. Further, this Court has unanimously acknowledged that its decision in *Siers* is in tension with U.S. Supreme Court precedent, stating "[w]e have yet to fully weave *Apprendi* into the fabric of our case law" and that *Siers'* reasoning "derives from "pre-*Apprendi* case law." *State v. McEnroe*, 181 Wn.2d 375, 389–90, 333 P.3d 402 (2014).

This Court should take review to consider whether, under the constitutional precedents of this Court and the U.S. Supreme Court, firearm enhancements are elements of the charged offenses, and if reversal of an enhancement due to lack

of notice therefore requires reversal of the entire conviction. RAP 13.4(b)(3).

5. Review is required because there is Court of Appeals split on whether this Court's opinion in *State v. Recuenco* requires the State to prove a firearm is operable.

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. *Jackson v. Virginia*, 443 U.S. 307, 317–18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)); *see also* U.S. Const. amend. XIV. To convict an individual of unlawful possession of a "firearm," the State must prove that the defendant owned, possessed, or controlled "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(12); RCW 9.41.040(1)(a). The State must prove the firearm is a "gun in fact," rather than a "toy gun," a "gun-like object," or a permanently disabled gun. *State v.*

Olsen, 10 Wn. App. 2d 731, 737, 449 P.3d 1089 (2019); *State v. Padilla*, 95 Wn. App. 531, 535, 978 P.2d 113 (1999).

This Court has stated this definition requires the State to prove to the jury that the firearm is operable. *Recuenco*, 163 Wn.2d at 437; *see also State v. Pierce*, 155 Wn. App. 701, 714, 230 P.3d 237 (2010). However, the Court of Appeals has developed a split of authority on whether *Recuenco* requires the State to prove operability, *Pierce*, 155 Wn. App. at 714, or whether *Recuenco*'s statement is merely dicta. *Olsen*, 10 Wn. App. 2d at 449; *State v. Tasker*, 193 Wn. App. 575, 581–82, 373 P.3d 310 (2016).

Here, the State never proved the handgun Mr. Giancoli was accused of possessing was operable. The gun was never fired or found. Yet Division Two declined to require the

element of operability and held there was sufficient evidence to sustain Mr. Giancoli's conviction. Op. at 16.

This Court should take review to clarify *Recuenco's* holding and resolve the Court of Appeals split regarding the element of operability. RAP 13.4(b)(1), (2).

F. CONCLUSION

For the reasons stated above, this Court should accept review.

G. CERTIFICATE OF COMPLIANCE

In compliance with RAP 18.17(b), counsel certifies that this petition contains 6,647 words (word count by Microsoft Word). A motion to file an overlength petition for review is filed concurrently with this brief.

DATED this 30th day of November, 2023.

Respectfully submitted,

/s Jessica Wolfe

Jessica Wolfe
Attorney for Dennis Giancoli
State Bar Number 52068

Washington Appellate Project
(91052)
1511 Third Ave, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

Filed
Washington State
Court of Appeals
Division Two

October 31, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DENNIS RAY GIANCOLI, Appellant.	No.56287-1-II UNPUBLISHED OPINION

GLASGOW, C.J.— Two men broke into Arlen Stebbins's house, tried to abduct Stebbins and his friend, John Fryer, at gunpoint, shot Stebbins, and tried to shoot Fryer. Stebbins and Fryer escaped. After police arrested Dennis Ray Giancoli as a suspect in the case, they listed him on a publicly available jail roster. Stebbins's wife then looked up pictures of Giancoli on social media and showed them to Stebbins. Stebbins later identified Giancoli to police as one of his attackers.

Before trial, Giancoli sought to exclude evidence about Stebbins's identification of him, including any in-court identification, because Stebbins's preview of social media pictures was highly suggestive. The trial court admitted the pretrial identification evidence and Stebbins identified Giancoli at trial as one of his assailants.

The jury convicted Giancoli of multiple charges, including two counts of first degree assault, one count of first degree burglary, and two counts of first degree kidnapping. Those charges were also all most serious "strike" offenses under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570. The jury found Giancoli was armed with a firearm during the assaults, burglary, and kidnappings. The jury also convicted Giancoli of first degree unlawful possession of a firearm, attempting to elude a pursuing police vehicle, and witness tampering.

Because Giancoli was convicted of multiple most serious offenses and his criminal history included two prior most serious offenses, the trial court sentenced Giancoli to life without the possibility of release as a persistent offender. The trial court also imposed 300 months of consecutive firearm sentencing enhancements on top of the life sentence.

Giancoli appeals. He argues that admitting Stebbins's pretrial and in-court identifications of him violated due process. He contends that there was insufficient evidence to convict him of unlawful possession of a firearm. Giancoli raises numerous issues related to his burglary and kidnapping convictions, and he asserts that the assault convictions merge into the kidnapping convictions. Giancoli also challenges his firearm sentencing enhancements. Finally, he argues that his mandatory life without the possibility of release sentence violates article I, section 14 of the Washington Constitution because he committed his first most serious offense when he was 17. Giancoli does not challenge his attempt to elude or witness tampering convictions on appeal.

The State concedes that we should reverse the burglary and kidnapping convictions. And it concedes that the assault convictions would otherwise merge with the kidnapping convictions if the kidnapping convictions are not reversed.

We accept the State's concessions regarding the burglary and kidnapping convictions, reverse those convictions, and remand for the trial court to vacate Giancoli's convictions for first degree burglary and first degree kidnapping. We also reverse the firearm sentencing enhancements. We otherwise affirm.

FACTS

I. BACKGROUND

Stebbins owned a property on the Key Peninsula where he stored extra tools and vehicles. He visited the property every few weeks. In November 2019, after noticing disturbances and missing items at the property, Stebbins and his friend Fryer decided to sleep in a mobile home on the property. The home had little furniture, so the two slept on couch cushions on the floor of the dining room.

Around 4:00 a.m., Stebbins and Fryer woke up to two men with guns standing over them. The men were looking for someone named Larry. One man was taller and carried a handgun; the shorter man carried a rifle. Giancoli was later identified as the tall man carrying the handgun and Christopher Conklin was identified as the man with the rifle. The men ordered Stebbins and Fryer outside, but told them to leave their wallets and cell phones behind in the trailer. The men directed them to get into a black Escalade at the end of the driveway. Both Stebbins and Fryer thought the men intended to kill them.

Giancoli struck Stebbins in the head with the gun when Stebbins objected, causing Stebbins to bleed profusely from a head wound. In the confusion, Fryer ran away and Conklin shot after him with the rifle but missed. After Fryer escaped, Conklin shot Stebbins in the legs. Stebbins somehow managed to flee and hide in the woods.

Both Stebbins and Fryer were eventually able to contact law enforcement. Police later pursued a black Escalade that wove in and out of oncoming traffic. After a flat tire disabled the Escalade near an apartment complex, Giancoli and Conklin fled on foot into a wooded area. Police recovered Giancoli and Conklin from the woods.

II. INVESTIGATION

Police brought Fryer to the apartment complex, where he identified Conklin as the man with the rifle, but he could not identify whether Giancoli was the man with the handgun. Stebbins did not participate in the identification at the apartment complex because he was at the hospital. Police arrested both Conklin and Giancoli.

Shortly after these events, Stebbins's wife looked up the names of the men arrested on a publicly available jail roster, then researched their social media profiles. She showed Stebbins pictures of Giancoli and Conklin from their social media pages.

In early December 2019, roughly two weeks after the incident, a detective showed Stebbins two photo montages to see if Stebbins could identify his assailants. The detective knew that Giancoli and Conklin were the suspects in the case. Stebbins signed an admonition that the montage may not contain a picture of his assailant and that he was not required to identify a suspect.

Each photo montage consisted of six jail booking photographs on a single page. One montage contained images of Giancoli and five people with similar characteristics, the other contained images of Conklin and five people with similar characteristics. Stebbins identified Giancoli and Conklin as his assailants. Several months later, the detective learned that Stebbins had previously seen their social media pictures.

Stebbins's DNA was found in several places inside the Escalade. Giancoli's DNA was on both the Escalade's steering wheel and a cigarette butt found on the porch of the mobile home. Law enforcement also recovered a .22 caliber rifle and several bullets from along the route that police pursued the Escalade. And police found .22 caliber rounds in a backpack in the Escalade,

as well as discharged .22 caliber casings on Stebbins's property. The handgun was never recovered.

The State charged Giancoli with two counts of first degree assault, one count of first degree burglary, and two counts of first degree kidnapping, all with firearm sentencing enhancements. The burglary charge alleged that Giancoli entered or remained unlawfully within a building with intent to commit a crime therein, and that while doing so, Giancoli "or an accomplice[] was armed with a firearm, to-wit: a rifle." Clerk's Papers (CP) at 67. The kidnapping charges alleged that Giancoli abducted Stebbins and Fryer with intent to "hold [each victim] as a shield or hostage," or "to inflict bodily injury on [each victim]," or "to inflict extreme mental distress on [each victim] or a third person," while Giancoli or an accomplice was armed with a rifle. CP at 67-69. The State also charged Giancoli with attempting to elude a pursuing police vehicle and first degree unlawful possession of a firearm. The State later added a charge of witness intimidation based on events while Giancoli was in jail awaiting trial.

III. Motions Regarding Identification Evidence

Before trial, the State moved to admit the photo montages shown to Stebbins. Giancoli opposed the motion and moved to prohibit any pretrial or in-court identifications by Stebbins and Fryer as "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." CP at 43. In particular, Giancoli argued that an in-court identification by Stebbins would not be reliable. Giancoli reasoned that Stebbins's wife's research tainted the pretrial photo montage identification, and that any in-court identification would be "highly suggestive" while Giancoli sat at the defense table. CP at 44.

The State argued that Stebbins's pretrial identification was not impermissibly suggestive because no state actor directed him to view the social media pictures of Giancoli and Conklin. "[L]aw enforcement did not show Mr. Stebbins the Facebook photos nor did they direct him or his wife to conduct their own research." CP at 58. And the State argued that there was "nothing unduly suggestive about the photo montages" the detective administered. *Id.*

The trial court reasoned based on *State v. Knight,* 46 Wn. App. 57, 729 P.2d 645 (1986), that "due process principles regarding suggestive photographic identifications have no application to pretrial photographic identification procedures engaged in by private citizens." Verbatim Rep. of Proc. (VRP) (July 12, 2021) at 87. Thus, it would be proper to suppress pretrial identification evidence "only where the State in some manner instigated and encouraged or counseled or directed or controlled the conduct." *Id.* at 88. "[A]nd the evidence does not show that in this case." *Id.*

The trial court ruled that the photo montages and Stebbins's pretrial identification of Giancoli were admissible. And it denied Giancoli's motion to prohibit an in-court identification. The trial court found "that Mrs. Stebbins was acting on her own" when "she did her own research." *Id.* at 91. "[A]lthough the charging documents were generated by the State of Washington, the [c]ourt doesn't find that the State encouraged her in any way." *Id.* The trial court also found that Stebbins's identification was reliable under the totality of the circumstances. The trial court stated that defense counsel was free to cross-examine Stebbins about his wife's research and the fact that "he saw a photograph," so "the objection goes more to the weight that the jury should give to the evidence rather than its admissibility." *Id.* at 90.

IV. TRIAL

A. Testimony about the Incident

Giancoli and Conklin were tried as codefendants. At trial, Stebbins and Fryer testified consistent with the sequence of events recited above. Stebbins testified that he woke up around 4:00 a.m. to a man standing over him with a gun in one hand. A kitchen light was on, so there was some light allowing Stebbins to see. Although Stebbins was not familiar with firearms, he believed the gun pointed at him was a revolver. He primarily recalled staring down the barrel.

Fryer, who had personal experience with handguns, said that the gun was "a darkened brass" color, looked like it was made of metal, and was roughly seven inches long and five inches tall. VRP (July 29, 2021) at 453. He believed that it was a ".45 semiautomatic weapon" instead of a revolver, but he agreed that the man carrying it needed only one hand to hold it. *Id.* at 449.

Stebbins described the man with the handgun, who he later identified as Giancoli, as a "[t]all guy, kind of grizzly" and wearing a "ball cap." VRP (July 19, 2021) at 721. Fryer said the man with the handgun was about six feet tall and possibly Caucasian, although he looked "Mexican or Italian, [or] Greek." VRP (July 29, 2021) at 451. He recalled that the man wore a beanie, "hadn't shaved in awhile," and had gray facial hair. *Id.* at 452.

Stebbins identified Giancoli in the courtroom as the man with the handgun. Stebbins also explained to the jury that shortly after he got shot, his wife researched the jail roster for the names of the men arrested. She then looked up their names on social media. Stebbins testified that after looking at several pictures on social media, he believed both men were his assailants. This was before he had identified the men from the photo montages for the police.

Before the close of evidence, the parties stipulated that Giancoli had a prior conviction for a serious offense that prevented him from lawfully possessing a firearm.

B. Jury Instructions and Closing Arguments

The trial court instructed the jury that it could decide what weight to give eyewitness identification testimony. The trial court told the jurors that they could weigh credibility based on factors including the witness's "capacity for observation, recall[,] and identification," their opportunity to observe the perpetrator, their emotional state, their ability to describe the perpetrator, and "[a]ny other factor relevant to this question." CP at 131.

The jury also received instructions about the elements and means of committing the charged offenses. A person commits first degree burglary by unlawfully entering or remaining in a building with intent to commit a crime therein, if they are armed with a deadly weapon or assault a person. RCW 9A.52.020(1). Even though the State charged Giancoli only with first degree burglary using a deadly weapon, the instructions stated that the jury could convict Giancoli of first degree burglary if he "was armed with a deadly weapon *or assaulted a person*." CP at 144 (emphasis added).

Next, the instructions directed that the jury could convict Giancoli of first degree kidnapping if it found that he abducted Stebbins and Fryer with intent to inflict bodily injury *or extreme mental distress*. The instructions told the jury it did not need to be "unanimous as to which of the alternative [means of kidnapping] has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." CP at 150, 152.

Several instructions addressed Giancoli's possession or use of firearms. To convict Giancoli of unlawful possession of a firearm, the jury had to find that he had "previously been convicted of a serious offense" and that he "knowingly had a firearm in his possession or control." CP at 170. "Possession means having a firearm in one's custody or control." CP at 174. The instructions also stated that for the purpose of the special verdict forms for the firearm sentencing enhancements, the State had to prove that Giancoli "was armed with a firearm at the time" he committed the relevant offenses. CP at 190. The instructions explained that "If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved." *Id.* Even though the information alleged that Giancoli was armed with a rifle for the firearm sentencing enhancements, the instructions did not direct the jury that it had to find that Giancoli or an accomplice was armed with a rifle to convict him of the firearm sentencing enhancements.

The State mentioned Giancoli used a handgun several times during closing argument. First, the prosecutor stated that the jury could convict Giancoli of unlawful possession of a firearm because both Stebbins and Fryer "testified about how he had a pistol that day" before summarizing their testimony describing the handgun. VRP (Aug. 3, 2021) at 657. And when discussing the special verdict forms for the firearm sentencing enhancements, the prosecutor explained that the relevant question was whether the State "proved beyond a reasonable doubt that [Giancoli and Conklin] were armed." *Id.* at 666. "And you heard the evidence in the case that one had a pistol and one had a rifle." *Id.* The prosecutor then told the jury that if one participant is armed with a firearm, all of the accomplices are also armed.

During defense closing argument, counsel conceded that the State had proved that Giancoli attempted to elude police in the Escalade. However, counsel argued that different men driving a different black Escalade committed the offenses at Stebbins's property. Counsel argued that Stebbins's identification was unreliable because of poor lighting in and around the mobile home, and counsel emphasized inconsistencies between Stebbins's initial description of the man with the handgun and Giancoli's appearance at trial. Counsel contended that Stebbins identified Giancoli from the photo montage because of his wife's social media search for the men arrested for the attack.

C. Verdict and Sentencing

The jury convicted Giancoli of two counts of first degree assault, one count of first degree burglary, and two counts of first degree kidnapping. It entered special verdicts finding that Giancoli was armed with a firearm during those offenses. The jury also convicted Giancoli of attempting to elude police, first degree unlawful possession of a firearm, and the lesser included crime of witness tampering instead of witness intimidation.

Giancoli had two prior convictions for most serious or "strike" offenses. *See* RCW 9.94A.030(32).[1] One prior conviction was for a second degree assault committed when he was 17 years old. Although Giancoli was a juvenile, he was convicted in adult court. The other prior conviction was for a first degree burglary committed when he was 21. Because Giancoli's current convictions included most serious offenses, the trial court imposed a sentence of life without the possibility of release. Giancoli argued at sentencing that the POAA was unconstitutional as applied

[1] The statutory list of most serious offenses has been codified as different subsections since Giancoli's offenses but the relevant language has not changed, so we cite to the current subsection.

because his first "strike" offense occurred when he was 17 years old, but the trial court rejected this argument and did not believe it had discretion to impose a different sentence. Each most serious offense, as well as the burglary conviction, also carried a 60-month firearm sentencing enhancement that had to run consecutively to the life sentence and to the other enhancements for an additional 300 months.

Giancoli appeals his convictions and sentence.

Conklin also appealed, and we transferred Conklin's case to Division One. *State v. Conklin*, No. 84634-5-I, slip op. at 1 (Wash. Ct. App. May 8, 2022) (unpublished), https://www.courts.wa.gov/opinions/ pdf/846345.pdf. Division One concluded that Conklin failed to show the pretrial and in-court identifications were improper. *Id.* at 8-9. It also accepted several concessions from the State. That court first accepted the State's concession that Conklin's first degree assault convictions merged with his kidnapping convictions. *Id.* at 3. Then Division One reversed the kidnapping and burglary convictions, also based on State concessions. *Id.* at 3-5. That court concluded that Conklin's only remaining conviction was for unlawful possession of a firearm. *Id.* at 6. It remanded for the trial court to vacate the other convictions for assault, burglary, and kidnapping and to resentence Conklin on the remaining unlawful possession of a firearm conviction. *Id.* at 1. The State moved to reconsider, arguing that Conklin's assault convictions should remain intact. Division One denied reconsideration.

ANALYSIS

I. IDENTIFICATION EVIDENCE

Giancoli argues that Stebbins's identifications violated Giancoli's right to due process because the identification was obtained through impermissibly suggestive procedures and lacked

reliability. He contends that the photo montage was impermissibly suggestive because it should have been administered in a double-blind procedure and Stebbins should have been shown the images sequentially, not simultaneously. In contrast to his arguments below, Giancoli now argues that the social media search affected *only* the reliability of Stebbins's identification. He asserts that Stebbins's in-court identification was tainted for the same reasons "as it had no independent origin." Br. of Appellant at 40. We disagree.

As an initial matter, the State implies that Giancoli is confined to his argument below about only the social media research tainting the identifications. The case Giancoli uses to challenge other aspects of the photo montage procedure, *State v. Derri*, was published a year after his trial. 199 Wn.2d 658, 511 P.3d 1267 (2022). Although we may decline to consider new *issues* raised for the first time on appeal, the same is not true for new *authority*. *Walla Walla County Fire Prot. Dist. No. 5 v. Washington Auto Carriage, Inc.*, 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987) ("There is no rule preventing an appellate court from considering case law not presented at the trial court level."). Giancoli argued below that the pretrial identification procedure was impermissibly suggestive and unreliable; he maintains that claim on appeal, buttressed by authority that the Washington Supreme Court published after his trial. Thus, we consider Giancoli's arguments that are based on the analysis in *Derri*.

A. Principles of Eyewitness Identifications

It is well established that "the due process clause of the Fourteenth Amendment compels exclusion of eyewitness identification evidence" that "was obtained by an unnecessarily suggestive police procedure" *and* "lacks reliability under the totality of circumstances." *Derri*, 199 Wn.2d at 673; *see State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). If a pretrial identification

procedure is inadmissible, a later in-court identification by the same witness is admissible only if the in-court identification "has an independent origin" from the tainted procedure. *State v. Hilliard*, 89 Wn.2d 430, 439, 573 P.2d 22 (1977). Whether an identification procedure was impermissibly suggestive or was unreliable are conclusions of law that we review de novo. *Derri*, 199 Wn.2d at 676.

To exclude evidence of a police identification procedure, a defendant must first show by a preponderance of the evidence that the procedure was impermissibly suggestive. *Id.* at 674. Without that showing, the inquiry ends. *Vickers*, 148 Wn.2d at 118. If the procedure was impermissibly suggestive, we then consider whether there was "'a very substantial likelihood of irreparable misidentification'" under the totality of the circumstances. *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). Factors that affect reliability include the witness's opportunity to view the person at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the person, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Id.* at 114-15. Further, "the corrupting effect of the suggestive identification itself" can weigh against reliability. *Id.* at 114.

The Supreme Court recently held in *Derri* that a court examining whether an identification procedure was impermissibly suggestive "must apply relevant, widely accepted modern science on eyewitness identification at each step of the test." 199 Wn.2d at 675.

> [W]e now know that identification procedures should be administered in double-blind fashion, meaning the administrator does not know who the suspect is. Police should give preidentification admonitions informing the witness that the perpetrator may or may not be in the montage and the witness should not feel compelled to

> make a selection. They should never show the same suspect to the same witness over the course of multiple identification procedures. They should construct a photomontage in such a way that the suspect is not the only individual pictured who closely matches the description of the perpetrator. And they should avoid giving feedback to witnesses that might inflate confidence levels.

Id. at 677. These factors are each "potentially suggestive," but not automatically dispositive. *See id*. at 679, 682.

A combination of several factors rendered the identification procedure in *Derri* impermissibly suggestive. Among other issues, a detective administered the montages while knowing which image was the suspect, one witness was shown two montages where the defendant was the only common photo, the detective discussed the montages with the witnesses, and a federal agent who attended the identifications made comments "suggest[ing] unconscious confidence-bolstering." *Id.* at 682. The Supreme Court held that "each identification procedure" was impermissibly suggestive "for one or more of the reasons discussed above," but the identifications were nevertheless reliable under the totality of the circumstances. *Id.* at 685.

B. Whether the Photo Montage Procedure in This Case Was Impermissibly Suggestive

Giancoli asserts that the photo montage procedure was impermissibly suggestive because it was not administered in a double-blind fashion and because Stebbins viewed the photos simultaneously. We disagree.

The *Derri* opinion originally said that police should "present photomontages sequentially, rather than simultaneously." *State v. Derri*, No. 100038-3, slip op. at 21 (June 23, 2022), https://www.courts.wa.gov/opinions/pdf/1000383.pdf. That sentence has since been removed from the opinion. Ord. Amending Op., *State v. Derri*, No. 100038-3, at 1 (Wash. Sept. 9, 2022),

https://www.courts.wa.gov/opinions/pdf/1000383.pdf. Thus, a witness simultaneously viewing the images of a montage does not currently weigh in favor of suggestibility.

Giancoli also argues that the photomontages were impermissibly suggestive because they were not performed in a double-blind fashion. The *Derri* court found multiple factors contributed to suggestiveness and it did not say that one factor is or should be dispositive. *See* 199 Wn.2d at 679. Here, the detective who administered the photomontages knew which people had been arrested. But this is the *only* remaining *Derri* factor that Giancoli identifies as weighing in favor of impermissible suggestiveness in this case. He points to no other factor, nor does he point to any evidence that the lack of double-blind presentation made any difference here. We conclude that the photomontages were not impermissibly suggestive here. We thus need not reach reliability. *Vickers*, 148 Wn.2d at 118. We affirm the trial court's order admitting Stebbins's pretrial and in-court identifications of Giancoli.

II. UNLAWFUL POSSESSION OF A FIREARM

Giancoli argues that the State did not present sufficient evidence to support the unlawful possession of a firearm conviction. He asserts that the State never proved that he "possessed a 'gun in fact'" because Stebbins and Fryer gave conflicting descriptions of the handgun. Br. of Appellant at 66 (quoting *State v. Olsen*, 10 Wn. App. 2d 731, 737, 449 P.3d 1089 (2019)). He suggests the State had to prove the handgun was operable. We disagree.

To assess the sufficiency of the evidence, we ask whether, viewing the evidence in the light most favorable to the State, "'any rational trier of fact could have found guilt beyond a reasonable doubt.'" *State v. Frahm*, 193 Wn.2d 590, 595, 444 P.3d 595 (2019) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A defendant challenging the sufficiency of the evidence

admits the truth of the State's evidence, and we draw all reasonable inferences in favor of the State. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017).

A person is guilty of first degree unlawful possession of a firearm when they own, possess, or control "any firearm after having previously been convicted . . . of any serious offense." Former RCW 9.41.040(1) (2019). "Possession means having a firearm in one's custody or control." CP at 174. A "firearm" is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder," but excludes distress signals and construction tools. Former RCW 9.41.010(11) (2019). We recently dismissed an argument that the State had to prove a firearm was operable to convict a defendant of unlawful possession of a firearm. *Olsen*, 10 Wn. App. 2d at 738.

Here, sufficient evidence supported the conviction for unlawful possession of a firearm. Stebbins and Fryer both said that Giancoli held a handgun. Stebbins, who was unfamiliar with firearms, thought that the gun was a revolver but clearly recalled the sight of the gun's barrel pointed at his face. Fryer, who was more familiar with firearms, believed the gun was a semiautomatic and .45 caliber, described its approximate size, and stated that it was made of metal and not plastic. Giancoli offered no evidence that the gun was a toy. Taking the State's evidence as true and viewing the evidence in the light most favorable to the State, a reasonable jury could find that Giancoli possessed a firearm. And the parties stipulated that he had previously been convicted of a serious offense. We hold that sufficient evidence supports Giancoli's conviction for first degree unlawful possession of a firearm.

III. First Degree Burglary Conviction

Giancoli asserts that we must reverse his conviction for first degree burglary because the information charged him with only one alternative means of committing the burglary but the jury was instructed on two. And he raises several other grounds for reversing the burglary conviction. The State concedes that we should reverse the burglary conviction because the jury was instructed on an uncharged alternative means. Thus, the State does not address Giancoli's other arguments. We accept the State's concession.

A person commits first degree burglary if they enter or remain unlawfully in a building with intent to commit a crime therein, and the person or an accomplice is either "armed with a deadly weapon" or "assaults any person." RCW 9A.52.020(1). "It is error to instruct the jury on alternative means that are not contained in the charging document." *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013). But if "other instructions clearly limit the crime to the charged alternative," the error is harmless. *Id.*

Here, the jury was instructed on an uncharged alternative means. The information alleged that Giancoli committed a burglary only while armed with a deadly weapon. But the jury was instructed that it could convict Giancoli if he or an accomplice "was armed with a deadly weapon *or* assaulted a person." CP at 144 (emphasis added). And the other instructions did not clearly limit the jury to considering whether Giancoli was armed with a deadly weapon during the burglary, as opposed to assaulting a person. We accept the State's concession and remand for the trial court to reverse Giancoli's burglary conviction and the attached firearm sentencing enhancement.[2]

[2] Giancoli also argues that we must reverse the burglary conviction because insufficient evidence supported the alternative means that he *entered* the building with intent to commit a crime and the jury did not receive a unanimity instruction. Entering and remaining unlawfully in a building are

IV. First Degree Kidnapping Conviction

Giancoli next argues that we must reverse his convictions for first degree kidnapping. He asserts that there was not sufficient evidence to support the extreme mental distress alternative means that the State charged for each kidnapping count and the jury did not receive a unanimity instruction. The State concedes that we must reverse Giancoli's kidnapping convictions for those reasons. We agree and accept the State's concession.

When a jury is instructed about alternative means of committing a crime, "[a] general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence." *State v. Woodlyn*, 188 Wn.2d 157, 165, 392 P.3d 1062 (2017). "If there is insufficient evidence to support *any* of the means, a 'particularized expression' of jury unanimity is required." *Id.* (quoting *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). In other words, we must "revers[e] if it is impossible *to rule out the possibility* the jury relied on a charge unsupported by sufficient evidence." *State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009).

First degree kidnapping occurs when a person abducts another with intent to commit another offense, such as inflicting bodily harm or extreme mental distress. RCW 9A.40.020(1). Here, the State expressly told the jury that it did not have to be unanimous about whether bodily injury or extreme mental distress supported the first degree kidnapping conviction. Under the extreme mental distress means, the State must prove the defendant intended to inflict more mental distress than a reasonable person would feel when restrained by deadly force. *State v. Garcia*, 179 Wn.2d 828, 843, 318 P.3d 266 (2014). The State points to no testimony in the record to support

---

not alternative means of committing burglary. *State v. Smith*, 17 Wn. App. 2d 146, 157, 484 P.3d 550 (2021), *review denied,* 198 Wn.2d 1005, 493 P.3d 747. Because we reverse the burglary conviction on other grounds, we need not address this argument further.

this means, and the State concedes that sufficient evidence did not support the extreme mental distress alternative means. Thus, we accept the State's concession and remand for the trial court to reverse Giancoli's kidnapping convictions and the attached firearm sentencing enhancements.[3]

V. REMAINING FIREARM SENTENCING ENHANCEMENTS

Two firearm sentencing enhancements remain attached to the assault convictions after the reversal of the burglary and kidnapping convictions. Giancoli contends that the jury instructions and the State's closing argument allowed the jury to find the firearm sentencing enhancements based on the handgun, but his information charged only enhancements based on the rifle. Thus, according to Giancoli, the enhancement findings could have improperly relied on an uncharged factual basis. For the first time in his reply brief, Giancoli contends that if we reverse the firearm sentencing enhancements we must also reverse the underlying assault convictions. The State contends that "any discrepancy between the information and the jury instructions was harmless." Br. of Resp't at 22. We reverse the firearm sentencing enhancements but affirm the assault convictions.

"Defendants must be informed of the charges against them, including the manner of committing the crime." *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013). *See* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. As we explained above with regard to Giancoli's burglary conviction, it is error to instruct the jury on alternatives that are not contained in the information. *Brewczynski*, 173 Wn. App. at 549. But the error is harmless if "other instructions clearly limit the crime to the charged alternative." *Id.*

[3] Giancoli has not challenged the sufficiency of the evidence to support the other alternative means of committing first degree kidnapping, abducting another with intent to inflict bodily harm.

For example, in *State v. Jain*, the information charged the defendant with two counts of money laundering related to two specified properties in Granite Falls and Mill Creek. 151 Wn. App. 117, 122-23, 210 P.3d 1061 (2009). The trial court then admitted evidence of money laundering activities related to five other properties that were not identified in the information, and the jury instructions "did not require . . . the jury to find that Jain's money laundering involved any specific properties." *Id.* at 123. Division One reversed because the jury "could have returned a guilty verdict by finding that Jain committed acts not charged in the information, specifically acts relating to properties other than the Granite Falls and Mill Creek properties." *Id.* at 124.

Here, the information charged that, while committing the attached offenses, Giancoli or an accomplice was "armed with a firearm, to-wit: a rifle." CP at 66-67. The information did not mention the handgun, but there was extensive testimony at trial describing the handgun's size and color. The instructions explained that if one participant in a crime was armed with a firearm, all accomplices were also considered armed, even if there was only one firearm. But the jury instructions did not specify that the jury could convict Giancoli for the firearm sentencing enhancements based only on the rifle. And during closing arguments, the prosecutor implied that the jury could find that Giancoli was armed based on either the rifle *or* the handgun. VRP (Aug. 3, 2021) at 666 ("[Y]ou heard the evidence in the case that one had a pistol and one had a rifle."). We cannot tell whether the jury found, for purposes of the firearm sentencing enhancements, that Giancoli was armed with the handgun, which was not charged in the information, or the rifle, which was.

Had the State not elected to specifically identify the rifle as the firearm supporting the firearm sentencing enhancements in the charging document, there would be no error. Nothing in

the firearm sentencing enhancement statute requires the State to specify an individual firearm in the charging document. *See* former RCW 9.94A.533(3) (2018). But the decision to specify a firearm in the information led to an error in this case. Although *Jain* addressed crimes, not enhancements, the State's charging decision here created an analogous situation because the State elected to identify the rifle as the relevant firearm in the information, then argued based on both the rifle and the handgun in closing argument, and did not limit the jury to relying on the rifle in the instructions about the enhancement. The State has not shown that other instructions were limited to the charged alternative, the necessary showing for harmless error in this context. *Brewczynski*, 173 Wn. App. at 549.

Giancoli's assertion that we must also reverse the underlying assault convictions is a novel argument raised for the first time in his reply brief. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *see* RAP 10.3(c). We therefore remand for the trial court to vacate the firearm sentencing enhancements but affirm the underlying assault convictions.

VI. SENTENCING ISSUES

A. Merger

Giancoli argues that his convictions for first degree assault merge with his convictions for first degree kidnapping. He reasons that the State used the threat of deadly force that constituted the assault to also elevate the kidnapping charges to the first degree. "Absent the evidence of the assault," he "could have only been convicted of the lesser crime of kidnapping in the second degree." Br. of Appellant at 47. Thus, he asserts that we must vacate the assault convictions. The State initially conceded this issue in its briefing. But the State clarified at oral argument that, if we

reverse the kidnapping convictions, the State would no longer concede that the merger doctrine applied. As discussed above, we reverse the kidnapping convictions. We agree with the State that the merger doctrine no longer applies.

"[T]rial courts merge crimes to avoid *doubly punishing* behavior." *State v. Wilkins*, 200 Wn. App. 794, 805, 403 P.3d 890 (2017) (emphasis added); *see also State v. Whittaker*, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016) (explaining that the merger doctrine applies *at sentencing* to correct double jeopardy violations). As discussed above, the State concedes that there was not sufficient evidence to support the extreme mental distress alternative means of kidnapping and that we must reverse Giancoli's kidnapping convictions. On remand, there will be no kidnapping convictions for the assaults to merge with. *See State v. Aguilar*, __ Wn. App. 2d ___, 534 P.3d 360, 376-77 (2023) (declining to reach double jeopardy arguments after reversing the convictions that implicated double jeopardy on other grounds). And Giancoli does not otherwise prevail on any challenge to his assault convictions.

We hold that our reversal of the first degree kidnapping convictions renders the merger doctrine inapplicable. We acknowledge that Division One reversed Conklin's assault convictions and that it would be ideal for codefendants to receive the same treatment. Although Division One declined to reconsider its opinion, here, the State clarified its position at oral argument and expressly limited the concession on the merger issue. We affirm Giancoli's convictions for first degree assault.

B. POAA Sentence

Giancoli asserts that his life without the possibility of release sentence under the POAA is cruel punishment that violates article I, section 14 of the Washington Constitution because he

committed his first most serious offense when he was 17 years old. He also argues that the POAA sentence is categorically unconstitutional and disproportionate because POAA sentences are imposed in a racially disproportionate manner. We disagree.

The procedural basis for Giancoli's POAA sentence is functionally identical to *State v. Reynolds*, ___ Wn.2d ___, 535 P.3d 427, 431 (2023) . In that case, the Washington Supreme Court addressed the constitutionality of a mandatory sentence of life without the possibility of release under the POAA that was predicated on a "strike" offense that Reynolds committed when he was 17. *Id.* Reynolds pleaded guilty to first degree assault in adult court when he was 17 years old. *Id.* He committed his second set of "strike" offenses, first degree burglary and robbery, when he was 21 years old. *Id.* And he committed his third set of "strike" offenses, first degree burglary and second degree attempted rape, when he was 33 years old. *Id.* at 431-32.

Reynolds appealed his POAA sentence under article I, section 14 of the Washington Constitution, arguing that the sentence was categorically barred and unconstitutionally disproportionate when imposed on offenders who committed their first most serious offense as a juvenile. *Id.* at 432. The Supreme Court disagreed, emphasizing that Reynolds' previous criminal conduct aggravated his sentence but "his punishment is for his adult conduct." *Id.* at 438 (relying on *State v. Moretti*, 193 Wn.2d 809, 826, 446 P.3d 609 (2019), which held that a reviewing court considers the defendant's culpability at the time of the third most serious offense, not the first). Thus, the life without possibility of release sentence was not categorically unconstitutional nor unconstitutionally disproportionate.[4] *Id.* at 436-37.

[4] Because article I, section 14 is more protective than the Eighth Amendment, the Supreme Court did not separately discuss Reynolds' Eighth Amendment claim. *Reynolds*, 535 P.3d at 438 n.11.

Like Reynolds, Giancoli was prosecuted in adult court for the "strike" offense he committed when he was 17, second degree assault. He then committed two other most serious offenses at the ages of 21 and 49, second degree burglary and first degree assault. And he raises many of the same arguments that Reynolds did before the Supreme Court. *See Reynolds*, 535 P.3d at 432(explaining that Reynolds' Eighth Amendment and article I, section 14 challenges were based "on the fact that he committed his first strike as a juvenile rather than as an adult"). Thus, *Reynolds* and *Moretti* control. Giancoli has not established that his sentence was unconstitutional on the basis that he committed his first most serious offense as a juvenile prosecuted in adult court.

Giancoli also asserts that life without the possibility of release sentences are imposed in a racially disproportionate manner and do not comport with evolving standards of decency, rendering the sentences unconstitutional. Giancoli relies on *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), which ruled the death penalty unconstitutional on these grounds. *Gregory* held that the death penalty was unconstitutional largely because the penalty was "unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant," and failed to serve "any legitimate penological goal." 192 Wn.2d at 5. In contrast, the Supreme Court held in *Reynolds* that life without the possibility of release sentences for serious offenders satisfy the penological goals of retribution, deterrence, and incapacitation. *Reynolds*, 535 P.3d at 436. And the Supreme Court's remedy in *Gregory* was to convert all death sentences to life without the possibility of release. 192 Wn.2d at 35-36. As a result, we cannot conclude that life sentences without the possibility of release offend our evolving standards of decency in the same way that death sentences do without contradicting the Supreme Court's resolution of *Gregory*. *Id.*; *Reynolds*, 535 P.3d at 437-38.

In sum, a mandatory life without the possibility of release sentence is not unconstitutional when the defendant was convicted or pleaded guilty to all three most serious offenses in adult court. We therefore affirm Giancoli's sentence.

CONCLUSION

We remand for the trial court to vacate Giancoli's convictions for first degree kidnapping and first degree burglary, as well as the firearm sentencing enhancements. We otherwise affirm Giancoli's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Lee, J.

Price, J.

FILED
5/8/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER HOWARD CONKLIN, Appellant.	No. 84634-5-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Christopher Conklin appeals from multiple felony convictions for assault in the first degree, burglary in the first degree, kidnapping in the first degree, and unlawful possession of a firearm in the second degree. We accept the State's concessions as to instructional, evidentiary, and sentencing errors on all convictions except for unlawful possession of a firearm in the second degree and the imposition of the DNA[1] fee at sentencing. Accordingly, we remand for the trial court to vacate the erroneous convictions, resentence Conklin on the remaining charge, and determine whether the DNA fee is proper.

[1] Deoxyribonucleic acid.

FACTS

Christopher Conklin was charged with two counts of assault in the first degree, one count of burglary in the first degree, two counts of kidnapping in the first degree, and one count of unlawful possession of a firearm in the second degree. All of the charges except unlawful possession of a firearm carried additional firearm sentencing enhancements. Prior to trial, Conklin filed motions in limine seeking to prohibit the State from introducing in-court identifications of Conklin by the two named victims. He argued the separate pretrial identification procedures used with each witness were impermissibly suggestive. The trial court denied the motion with regard to witness Arlen Stebbins but reserved the issue as to witness John Fryer. During trial, the State did not seek an in-court identification from Fryer. The jury convicted Conklin on all charges.

Conklin timely appealed.

ANALYSIS

I. State's Concessions of Error and Issues for Remand

Conklin's opening brief assigned error to the trial court's rulings on the identification procedures used with each of the named victims and the imposition of the DNA fee at sentencing. Conklin then filed a supplemental brief that raised several instructional and evidentiary challenges to the kidnapping, assault, and burglary charges. The State properly conceded error on all issues except those relating to identification by the witnesses and, as such, we only briefly analyze the conceded errors here.

The State expressly agrees with the argument and authority set out in Conklin's supplemental brief. Accordingly, the charges of assault in the first degree with firearm enhancements must merge with those of kidnapping in the first degree. Under the double jeopardy clause, the State may not impose multiple punishments for the same offense. State v. Berg, 181 Wn.2d 857, 864, 337 P.3d 310 (2014). Courts utilize the merger doctrine "'to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions.'" Id. (quoting State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983)). "Even if crimes would otherwise merge, they can be punished separately if they had an independent purpose or effect." State v. Davis, 177 Wn. App. 454, 465, 311 P.3d 1278 (2013). The parties are in accord that the State relied on the acts of shooting at Fryer and Stebbins as a basis for the elements of assault and the "intent to inflict bodily injury" element of kidnapping. Conklin further notes there was no independent purpose or effect because the State argued the assault was intended to force Fryer and Stebbins into a vehicle as a basis for the kidnapping conviction; no other purpose or effect of the shooting was argued or presented. To avoid a double jeopardy violation, the assaults must merge with the kidnapping charges.

Conklin next avers, and the State concedes, that his convictions for kidnapping in the first degree must then be reversed because the State did not provide sufficient evidence to support both of the alternative means. "When a defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether 'sufficient evidence supports each

alternative means.'" State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) (quoting State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010)). Under Washington law, there are five alternative means under which a jury may find a person guilty of kidnapping in the first degree. RCW 9A.40.020(1).

Here, the court instructed the jury that it could find Conklin guilty of kidnapping if it found he intentionally abducted Stebbins with the intent to either: (1) inflict bodily injury, or (2) inflict extreme mental distress. The parties agree there is insufficient evidence to support the second alternative means, that Conklin intended to inflict extreme mental distress. An intent to inflict extreme mental distress "is an intention to cause more mental distress than a reasonable person would feel when being restrained by the threat of deadly force," while the analysis of the level of distress focuses on "the mental state of the defendant rather than the actual resulting distress." State v. Garcia, 179 Wn.2d 828, 843, 318 P.3d 266 (2014). The State concedes that, even in the light most favorable to its position, the statements regarding the kidnapping charges that it relied upon in closing argument are insufficient to demonstrate an intent to inflict more extreme emotional distress than a reasonable person would feel when being restrained by threat of deadly force.

Conklin next contends his conviction for burglary in the first degree must be reversed because the jury was instructed on an uncharged alternative means. Because this is a manifest error affecting a constitutional right, we may review this assignment of error for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003). "Generally, the crime upon which the jury is

instructed is limited to the offense charged in the information," except where a jury is instructed on a lesser included offense. Id. at 539. If the State omits an alternative means of a crime in the information, "it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence." Id. at 540.

The State charged Conklin with burglary in the first degree, alleging he "unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter[ed] or remain[ed] unlawfully in a building" while armed with a deadly weapon. However, at trial, the court instructed the jury it could find Conklin guilty of burglary in the first degree if it found that he "was armed with a deadly weapon or assaulted a person." (Emphasis added.) While this "error may be harmless if other instructions clearly and specifically define the charged crime," that is not the case here. See Id. at 540. The State concedes the court erred in instructing the jury on an uncharged alternate means and that reversal is necessary.

Finally, the State agrees that remand is appropriate so that the trial court may determine whether Conklin has already paid the mandatory DNA fee pursuant to a prior felony conviction. RCW 43.43.7541 requires that every sentence for a felony "must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." The trial court found Conklin indigent and waived all discretionary fines; if it concludes on remand that Conklin previously paid the DNA fee, it should be stricken from the judgment and sentence.

We accept the State's concessions on these errors and remand for the court to resentence Conklin after merging the charges of assault in the first degree with those of kidnapping and vacating the convictions for kidnapping in the first degree and burglary in the first degree. On remand, the court should also determine whether the DNA fee is appropriate here or should be waived as previously paid.

II. Witness Identification

Conklin also assigns error to the trial court's handling of his pretrial motions to suppress an identification by Fryer obtained using a "show-up" procedure, and any in-court identification of Conklin by Stebbins. Because the State relied on the testimony of both Fryer and Stebbins to prove Conklin unlawfully possessed a firearm, now the only remaining conviction, we address each argument in turn.

We review decisions on the admissibility of evidence for an abuse of discretion. State v. Birch, 151 Wn. App. 504, 514, 213 P.3d 63 (2009). A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. Id. Under the due process clause of the federal constitution, eyewitness identification evidence must be excluded if it: "(1) was obtained by an unnecessarily suggestive police procedure and (2) lacks reliability under the totality of the circumstances." State v. Derri, 199 Wn.2d 658, 673-74, 511 P.3d 1267 (2022).

A. Show-Up Identification

Conklin first argues Fryer's identification of Conklin as one of the perpetrators should have been suppressed because the pretrial "show-up" identification procedure was impermissibly suggestive.[2] "Show-up identification is typical shortly after a crime occurs when police show a suspect to a witness or victim." Birch, 151 Wn. App. at 513. Show-up procedures are "not per se impermissibly suggestive," rather, the defendant must demonstrate "that the procedure was unnecessarily suggestive." State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). However, we need not analyze whether Conklin has met this burden because Fryer never identified Conklin in court.

The day after Fryer testified about participating in a show-up identification of a suspect on the same day as the incident, the court asked the prosecutor if he intended "to ask Mr. Fryer whether he recognizes either of the defendants;" the prosecutor confirmed he would not be seeking such an identification. The court stated, "Okay. Then that won't be an issue." Because there was no in-court identification admitted, there is no error. While Fryer described participating in the show-up, he never connected the show-up, or any description of the suspects he saw, to Conklin.[3] Conklin fails to demonstrate a basis for relief on this challenge.

[2] While Conklin frames this assignment of error as the trial court denying his motion to suppress, the record reflects that the court reserved on the issue. The court never made a subsequent ruling (written or oral) granting or denying the motion.

[3] At trial, the State informed the judge that it would not seek to elicit an in-court identification from Fryer, and it did not do so during Fryer's testimony. However, in its closing argument, the State asserted that Fryer identified Conklin the morning of the incident in the police show-up procedure. While there is no testimony to support this statement, Conklin does not assign error to this comment and, as such, the issue is not before us.

B. Photo Montage Identification

Conklin also argues the court should have suppressed the in-court identification by Stebbins because the pretrial photo montage identification by law enforcement was impermissibly unreliable. He asks us to revisit the case State v. Knight, 46 Wn. App. 57, 729 P.2d 645 (1986). There, Division Two of this court held that where a pretrial photographic identification procedure is impermissibly suggestive due to the actions of private citizens, exclusion is not required. 46 Wn. App. at 59. Rather, suppression is only necessary where the State "'instigated, encouraged, counseled, directed, or controlled the conduct.'" Id. at 59-60 (quoting State v. Agee, 15 Wn. App. 709, 713-14, 552 P.2d 1084 (1976)). Conklin does not argue that the State controlled or directed the pretrial conduct, but rather that changes to information access and social media necessitate new guidance. We disagree.

"An out-of-court photographic identification violates due process if it so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). Here, Conklin contends the police photo montage procedure was impermissibly suggestive because, prior to viewing the montage, Stebbins's wife "had used the county jail roster to learn the names of the individuals arrested in connection with the incident," then "used social media to find photos of Mr. Conklin . . . and showed them to Stebbins." Conklin also notes that Stebbins described the suspect on the night of the incident as having "orange blond" hair and a "blond, more blonder mustache." The officer who created the photo montage did not add

blond hair or a blond mustache in the search criteria, though he stated "it may have already been defaulted to there."

Conklin roots this challenge in Stebbins's exposure to the results of his wife's online research prior to the police photo montage. This alone is insufficient to demonstrate the procedure used by police was unnecessarily suggestive. Rather, the private investigation by Stebbins's wife goes to the weight, not the admissibility, of the identification he later made when police presented the photo montage. Conklin had the opportunity to cross-examine Stebbins on the procedure, including the change in his description of the alleged intruder, and the record reflects that he did so at length. Stebbins admitted that, prior to viewing the police montage, he "viewed some photographs that [his] wife found" based on names published by the State on "the jail roster." Stebbins also acknowledged that Conklin, at the time of trial, had dark hair, a dark mustache, and a dark beard. Stebbins conceded that, in his interview with officers only hours after the incident, he identified the alleged intruder as "a man with orange-blond hair" and a "blonder than blond mustache."

Conklin fails to meet his burden to demonstrate that the photo montage procedure utilized by law enforcement was unnecessarily suggestive. Further, he was able to cross-examine Stebbins at length about his wife's outside research and the inconsistencies in his various identifications and descriptions. As such, the court did not abuse its discretion in admitting the eyewitness identification evidence from the police photo montage.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion.

Hayes, ACJ

WE CONCUR:

Coburn, J.

Cheung, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 56287-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Theodore Cropley, DPA
[Theodore.Cropley@piercecountywa.gov]
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: November 30, 2023

WASHINGTON APPELLATE PROJECT

November 30, 2023 - 2:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56287-1
Appellate Court Case Title:	State of Washington, Respondent v. Dennis Ray Giancoli, Appellant
Superior Court Case Number:	19-1-04526-6

The following documents have been uploaded:

- 562871_Motion_20231130141101D2112190_9088.pdf
  This File Contains:
  Motion 1 - Waive - Page Limitation
  The Original File Name was washapp.113023-10.pdf
- 562871_Petition_for_Review_20231130141101D2112190_8256.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.113023-11.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- Theodore.Cropley@piercecountywa.gov
- pcpatcecf@piercecountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Jessica Constance Wolfe - Email: jessica@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20231130141101D2112190