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DIVISION III
STATE OF WASHINGTON
By________

Supreme Court No. ________
Court of Appeals No. 28932-0-III

89382-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELODIO RIZO,

Petitioner.

PETITION FOR REVIEW

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

DAVID L. DONNAN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Ste 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF APPEAL

Mr. Rizo was convicted of robbery and assault and sentenced to life in prison without the possibility of parole and contends the evidence was inadequate, the multiple convictions for the same conduct violate double jeopardy and the jury was improperly instructed regarding the elements of first degree assault. Mr. Rizo further contends that his life sentence must be stricken because the evidence establishing his criminal history was improperly admitted and the procedures employed violated his rights to trial by jury, due process and equal protection of the law.

B. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Elodio Rizo, the appellant below, asks this Court to review the unpublished Court of Appeals opinion issued August 29, 2013. A copy of the Court's slip opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The evidence in support of the robbery and assault convictions was so inconsistent and conflicting that when viewed as a whole was insufficient to establish proof beyond a reasonable doubt of the elements of either first degree robbery or assault. Furthermore, the theft occurred peaceably and any force used was at a later time after they had left the store and were passing through the parking lot to their car, therefore, the facts do not establish robbery. Mr. Rizo asks this Court accept review

because the Court of Appeals opinion is inconsistent with the decisions of this Court and state and federal constitutional protections of due process of law and the right to trial by jury.

2. Mr. Rizo's conviction for first degree robbery was elevated to a higher degree by the same criminal conduct upon which his convictions for assault in the first degree were based. Where these offenses occurred in a single incident, in a short time frame, without any separate injury, and the assaults constituted the force necessary to establish the robbery, Mr. Rizo contends his multiple convictions violate the Double Jeopardy Clause of the Fifth Amendment and the Washington Constitution, article I, § 9. He asks this Court to accept review of the Court of Appeals opinion because the double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense has been violated.

3. First degree assault requires proof that the accused acted "with intent to inflict great bodily harm," however, the jury was instructed that an assault occurs "even though the actor did not actually intend to inflict bodily injury." Because the jury instructions gave conflicting direction with regard to this essential elements, the resulting verdict is flawed and requires reversal. Furthermore, because there was no conceivable reason to relieve the prosecution of its burden of proof with regard to the specific

intent to inflict great bodily injury by giving conflicting instructions, Mr. Rizo's representation was constitutionally flawed. This Court should accept review because the Court of Appeals opinion is implicates important constitutional rights and is inconsistent with the decisions of this Court.

4. At sentencing Mr. Rizo challenged the use of certain prior offenses included in his criminal history and the State sought to prove he committed the offenses using testimony regarding fingerprint comparisons from a variety of court documents. The State's witness acknowledged, however, that there were no uniform or accepted professional standards for making such comparisons. Mr. Rizo asks this Court of accept review of the Court of Appeals opinion and find the evidence insufficient to establish identity in the absence of such appropriate standards.

5. Mr. Rizo contends there is no rational basis for treating him and similarly-situated alleged recidivist criminals differently with regard to the burden of proof and right to jury, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment and Article I, § 12 of the Washington Constitution protections of a jury trial and proof beyond a reasonable doubt. This arbitrary classification violates the right of similarly situated people to be treated the same with regard to the legitimate purpose of the law. Mr. Rizo asks this Court to accept review

of the Court of Appeals opinion because it is inconsistent with the opinion so of this Court and the state and federal constitutions.

6. The Sixth Amendment and Article 1, sec 21, 22 right to jury trial, and the Fourteenth Amendment and Article 1, sec 10 right to due process of law, encompasses the right to a jury determination, beyond a reasonable doubt, of all facts which permit the imposition of a greater sentence than otherwise allowed by a verdict. Does the so-called "prior conviction" exception violate these fundamental constitutional standards.

D. STATEMENT OF THE CASE

Julia Pina and Elodio Rizo were shopping in the cologne department of the Sears store in Union Gap. RP 157-58. Timothy Englund was working as a loss prevention officer at the store with Rigoberto Cardenas and Kristina Fernandez. RP 151-56, 221-22. Englund was monitoring the surveillance cameras when he concluded Ms. Pina was acting suspiciously. RP 157.

After selecting several colognes, Ms. Pina placed them in her shopping cart and went to the men's department where she selected a shirt and put it on top of her purse. RP 159-61. Ms. Pina continued around the store with Mr. Rizo following, passing through several other departments before stopping in a back corner of the store. RP 161-62. Ms. Pina was observed moving the shirt out of the way, lifting her purse and putting the

cologne inside. RP 163-64. She then pushed the cart away and headed out the doors of the store with Mr. Rizo 8 to 10 feet behind. RP 165.

Mr. Cardenas waited outside the exit while Englund observed on the surveillance cameras. RP 163. When Englund saw Ms. Pina and Mr. Rizo leaving the store, he ran outside to assist Mr. Cardenas. RP 165, 187.

Outside the store, Mr. Cardenas ran toward Ms. Pina, identified himself and said "I need all my unpaid merchandise." RP 225-26. Englund also said he contacted Ms. Pina and asked for the cologne, to which she responded, "no, no, no." RP 165, 188. Both Cardenas and Englund said Mr. Rizo kept walking but then pulled his hand out of his pocket or waistband holding what appeared to be a silver revolver and fired one or two shots. RP 166-67, 227-29. Ms. Pina and Mr. Rizo continued on to their car which was parked nearby and drove away. RP 169-71.

Englund said the shots were directed at Mr. Cardenas, but Cardenas testified the events happened so quickly he immediately turned and ran. RP 166 189, 203, 207; 243-47. Because he had turned, Mr. Cardenas did not know where the gun was pointed when the shots were

allegedly. RP 247, 254. Investigating officers were unable to find any shell casings at the scene. RP 257.[4]

E. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE, BEYOND A REASONABLE DOUBT, THAT MR. RIZO WAS GUILTY OF ROBBERY AND ASSAULT AS CHARGED.

Mr. Rizo acknowledged that he was present when Ms. Pina stole items from Sears, but denied having, displaying or firing a gun in support of her unlawful efforts. RP 148-50, 462-74. Mr. Rizo reiterated at sentencing that, "I have never in my life used a firearm, otherwise the video shows that I've never had a weapon." RP 528. Because the evidence in support of this allegation was so inconsistent and conflicting, Mr. Rizo asks this Court to find that it was insufficient to establish proof beyond a reasonable doubt of either first degree robbery or assault. Furthermore, where the theft occurred peaceably, any force later used in the parking lot after they had left the store, do not establish robbery.

The constitutional guarantee of due process of law requires the State to prove each element of the crime that is charged. State v. Baeza,

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[4] Officers speculated a wall of the Sears building a few inches from the ground might have been a possible impact sights. RP 258, 278-80, 327. The officers were unable to confirm this was in fact an impact sight, however, and no tests were conducted, nor was there any evidence of paint or chipping below the spot that would have been indicative of impact. RP 269, 272, 284, 339-41.

100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The prosecutor's burden is clear.

> To successfully resist the challenge to the sufficiency of the evidence, the state must make out a prima facie case consisting of two elements: first, that the victim was put in fear of violence to his person or property; and second, that something of value was taken from his person or in his presence.

State v. McDonald, 74 Wn.2d 141, 143, 443 P.2d 651 (1968).

Although the loss prevention officers testified they believed they saw a weapon and heard shots, there was an overwhelming amount of contradictory evidence in the form of surveillance video and other witnesses which effectively precluded a finding of proof beyond reasonable doubt. First, Englund admitted he began to get excited as soon as he saw signs of potential theft and felt an adrenaline rush. RP 175, 195, 212-13. It took him 15 to 20 seconds to run from his location monitoring the surveillance cameras to the parking lot where he supposedly saw a gun and heard shots. RP 197. Another security guard who came upon the scene after the shooting described Englund as hysterical. RP 292.

As a result, Englund was not a state of mind conducive to either taking or relating particularly accurate observations and significant differences were identified in his description of what he thought he saw. RP 200-08, 214-17. Furthermore, although Englund thought he heard two

shots, other witnesses described hearing only one elongated reverberation where not immediately recognized as a gunshot. RP 293, 339.

Mr. Cardenas noted that the incident took only a split second. RP 240. He saw Mr. Rizo fumbling or playing with something in his waistband, but never saw him reach into his pocket. RP 241-42. He described Mr. Rizo as being approximately 8 feet away and quickly turned and ran. He had his back to Mr. Rizo, therefore, when he heard what he thought was a gunshot. RP 245-48. Kristina Fernandez also acknowledged that she "didn't really directly see [a gun]…." RP 306. In reviewing the video again during trial Ms. Fernandez admitted, "No, I didn't – I – I didn't see the gun there. I mean, I didn't – if from looking at that video, I – I can't see the gun,…" RP 308.
The investigating detective, Alba Levesque, also agreed that the video surveillance failed to show what if anything Mr. Rizo might have taken from his waistband after he left the Sears store.[8] RP 336. Finally, Ms. Pina, who was closer to Mr. Rizo than anyone and testified on behalf of the State, indicated she never saw a gun or knife. RP 414. In light of the significant gaps in the evidence, Mr. Rizo asks this Court to review whether any reasonable jury could find, beyond a reasonable doubt, the

[8] The detective identified what he believed to be smoke on the video, but he was unable to explain why there would not have been two such puffs of smoke if two shots had been fired as alleged. RP 337.

State had proven he had a gun or that he fired it at the loss prevention officers.

Mr. Rizo further contends the property was peacefully taken and any alleged use of force occurred only after leaving the store. Therefore, robbery was not established. State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005) (force that is used merely to affect an escape after property is peaceably taken does not satisfy the force element of robbery).

In the present case, Mr. Rizo and Ms. Pina affected their escape upon exiting the Sears store. RP 164, 223. The theft was complete when Ms. Pina reached the parking lot outside the store. It was only in an effort to avoid a subsequent detention, after he had already successfully reached a place of temporary safety, that Mr. Rizo allegedly used a firearm. RP 228 (they proceeded 18-20 feet into the parking lot, past Cardenas, when Mr. Rizo allegedly turned and fired). As in State v. Johnson, because the theft was completed when Ms. Pina exited the Sears and walked on past Mr. Cardenas into the parking lot, are insufficient to support a conviction for robbery. 155 Wn.2d 610-11.

Because the State failed to prove the essential elements of robbery and assault in the first, this Court should reverse Mr. Rizo's conviction. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

2. ELEVATING ROBBERY TO A HIGHER DEGREE BASED ON THE COMMISSION OF THE ASSAULT OFFENSES AND IMPOSING MULTIPLE PUNISHMENTS FOR THE INTERRELATED OFFENSES VIOLATES DOUBLE JEOPARDY

Mr. Rizo was convicted of robbery in the first degree and the offense was aggravated to first degree by Mr. Rizo's alleged use of a gun to accomplish the robbery. CP 21, 34-35. This was the same conduct which established assault in the first degree. CP 43-44. Mr. Rizo contends the pyramiding of these charges in this manner violates the constitutional prohibition against double jeopardy. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9; State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

A double jeopardy violation occurred here because the evidence required to support a conviction for one offense would have been sufficient to warrant a conviction for the other. Orange, 152 Wn.2d at 816; State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (conviction for criminal contempt barred prosecution for drug offense); Brown v. Ohio, 432 U.S. 161, 164, 100 S.Ct. 2221, 53 L.Ed.2d 187 (1977) ("separate statutory crimes need not be identical either in

constituent elements or actual proof in order to be the same within the meaning of the constitutional prohibition"); see also State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009).

Merger avoids multiple punishments in violation of the double jeopardy bar by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." State v. Collicott, 118 Wn.2d 649, 668, 827 P.2d 263 (1992).[11] When two crimes merge, the trial court convicts the defendant only of the one offense into which the other offenses merge. State v. Freeman, 153 Wn.2d 765, 774, 108 P.3d 753 (2005) (second degree assault committed in the course of a robbery can merge into the greater offense when it is a single act).

In Mr. Rizo's case, the proof of the two assault offenses was a necessary and integral to the proof which aggravated the robbery offense to robbery in the first degree in this case. CP 34, 43. The prosecutor's closing argument reiterated the interrelationship of the proof on this point. See RP 455-57. The conduct alleged to constitute the first degree assault was the force, utilizing the same firearm, which elevated the robbery to first degree.

The court must presume the legislature intended to punish these

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[11] "The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." State v. Parmelee, 108 Wn.App. 702, 710, 32 P.3d 1029 (2001).

offenses singly when there was no separate and distinct injury inflicted. See Freeman, 153 Wn.2d at 772-73; Johnson, 92 Wn.2d at 680. Like Johnson, the State pyramided charges here by prosecuting Mr. Rizo for first degree robbery, which is taking property from the presence of another by force or fear while "armed with a deadly weapon" or "display[ing] what appears to be a firearm..." in addition to the assaults with that same firearm. The proper remedy for this double jeopardy violation is to vacate the lesser conviction. State v. League, 167 Wn.2d 671, 223 P.3d 493 (2009). Johnson, 92 Wn.2d at 680; Womac, 160 Wn.2d at 656-58. The Court of Appeals opinion to the contrary warrants the review of this Court.

3. MR. RIZO'S RIGHT TO DUE PROCESS OF LAW AND A JURY VERDICT ON ALL THE ELEMENTS OF THE OFFENSE WAS VIOLATED WHEN THE TRIAL COURT GAVE CONFLICTING INSTRUCTIONS REGARDING THE MENTAL STATE REQUIRED FOR THE ASSAULT

Jury instructions must properly inform the jury of the applicable law. State v. Riley, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999); State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). The failure to properly instruct the jury on every element of the crime charged is an error of constitutional magnitude. See State v. Roberts, 142 Wn.2d 471, 500-01, 14 P.3d 713 (2000); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996).

First degree assault requires proof the accused acted "with intent to inflict great bodily harm." RCW 9A.36.011(1)(a). The mens rea of first-degree assault is the intent to inflict that great bodily harm. State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994). Intent requires one act "with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

In a prosecution for assault, therefore, an instruction which stated: "The court instructs the jury that the law presumes that every man intends the natural and probable consequences of his own acts," unconstitutionally relieves state of burden of proving intent as element of offense of first-degree assault. State v. Caldwell, 94 Wn.2d 614, 617-18, 618 P.2d 508 (1980). What the instruction in Cladwell did by implication, Instruction 19 in Mr. Rizo's case did expressly. CP 45. It told the jury it did not matter that "the actor did not actually intend to inflict bodily injury." Id. In defining the common law forms of assault for the jury, the jury was instructed that an assault occurs "even though the actor did not actually intend to inflict bodily injury." CP 45. This contradicted the requirements of the statute and place in constitutional doubt the verdict which resulted.

The jury instructions, read as a whole, failed to make the relevant legal standard manifestly apparent. State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). By telling the jury at one point that the specific

intent to inflict great bodily injury was required, and then telling the jury in the following instruction that it was irrelevant if the defendant intended to inflict any bodily injury at all, the verdict fails to ensure the jury has concluded, beyond a reasonable doubt, that all the elements of first degree assault were established. This form of error is presumed to be prejudicial. Clausing, 147 Wn.2d at 628; State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).[17] To relieve the prosecution of its burden to prove the specific intent required to establish first degree assault where the evidence with regard to the assault was vigorously contested, was inevitably prejudicial and warrants review by this Court.

4. THE COURT ABUSED ITS DISCRETION IN RELYING UPON FINGERPRINT COMPARISONS IN THE ABSENCE OF PROFESSIONAL STANDARDS

Mr. Rizo asked the court to reject the State's fingerprint identification evidence based on the lack of a record to support the scientific validity of the comparisons, citing e.g. ER 901(a). RP 490, 506; CP 13-15. The State's witness admitted there were no definitive regulations regarding the number of similarities needed to make an

[17] Neither waiver nor invited error preclude relief from this constitutional defective conviction. Defense counsel did not object to the court's proposed instructions to the jury, nor does the record indicate he proposed the erroneous instruction at issue here. RP 425-39. There was, however, no reasonable tactical or strategic reason for defense counsel to acquiesce jury instructions which misstated the prosecutor's burden of proof on an essential and disputed element. See e.g. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

affirmative conclusion in a fingerprint comparison. RP 491, 495.[18] In light of the absence of standards, Mr. Rizo argued for exclusion. RP 506-07; ROBERT H. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON § 901.05(1), at 901-12 (4th ed. 2008) ("Unless evidence is in fact what it purports to be, it is not relevant"); see also Judicial Council Cmt. 901, cited in 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 901.1, at 283 n. 3 (5th ed.2007). Notwithstanding the lack of standards, the sentencing judge admitted the comparisons. RP 508, 513-20, 527.

Contrary to the conclusions of the sentencing judge and the Court of Appeals, however, "the accuracy of latent print identification has been subject to intense debate." Simon Cole, Criminology: More than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 986 (Spring 2005).[20] Other scholars have also

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[18] Ms. Karp acknowledged that there is no standard for the number of points of likeness set either by the State of Washington or the FBI. RP 501. Furthermore, she explained that when looking for basic patterns she does not measure for relative position and that a bifurcation in the fingerprint could appear larger or smaller depending on the amount of pressure applied when the print was taken. RP 503-04. Even the presence of dirt on the finger could create the impression of a bifurcation that was not there. RP 504.

[20] The editor of the Journal of Forensic Identification published an article discussing the lack of standards measuring an examiner's ability to compare fingerprints and the likelihood of error. David L. Grieve, Possession of Truth, 46 J. Forensic Ident. 521 (1996). The first proficiency test produced by the principal organization of fingerprint examiners found only 44 percent of the participants correctly completed the test. J. Forensic Ident. at 524. The results were "alarming" according to the author, and the "forensic science community" was shocked and deemed the poor performance "unacceptable." Id. at 524-25. The test indicated that one in five latent print examiners

criticized the science underlying fingerprint identifications. "The field of forensic fingerprint identification suffers from an appalling lack of basic foundational research." Tara M. LaMorte, Comment: Sleeping Gatekeepers, United States v. Llera Plaza and the Unreliability of Forensic Fingerprint Evidence Under Daubert, 14 Alb. L.J. Sci. & Tech. 171, 179, 183 (2003); see also Katherine Schwinghammer, Note: Fingerprint Identification: How the "Gold Standard of Evidence Could be Worth Its Weight, 32 Am. Crim. L.Rev. 265, 266 (2005).

In light of the substantial ongoing debate in the professional community and the acknowledged lack of standards by the State's witness, Mr. Rizo contends the sentencing court abused its discretion in accepting the fingerprint testimony to find he had the criminal history upon which to sentence him to life in prison and he asks this Court to accept review.

5. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATED MR. RIZO'S RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE 1, § 12 OF THE WASHINGTON CONSTITUTION.

The Fourteenth Amendment to the United States Constitution and article I, § 12 of the Washington Constitution require that persons similarly situated with respect to the legitimate purpose of the law must

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do not have adequate knowledge, skill, or ability. Id. at 526.

receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771; State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991). There is no rational basis upon which to treat recidivist offenses differently by providing fewer procedural protections to those individuals with the most at stake.

Although facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, this Court declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001). This Court recently held, however, that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

Although the Legislature expressly provided that the purpose of the additional conviction "element" at issue in Roswell is to elevate the penalty for the substantive crime (RCW 9.68.090 "Communication with a minor for immoral purposes – Penalties"), there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

The recidivist fact here operates in the precise fashion as in Roswell. Mr. Rizo asks this Court to review this constitutional inconsistency again and hold there is no basis for treating the prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in the other.

6. MR RIZO'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE COURT IMPOSED A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE BASED ON PRIOR CONVICTIONS FOUND BY THE COURT BY A PREPONDERANCE OF THE EVIDENCE.

The POAA mandates a sentence of life in prison for a person convicted of certain specified offenses notwithstanding the otherwise applicable maximum sentence and those factual determinations with

regard to the POAA sentencing in this case were made by the trial judge by a preponderance of the evidence. CP 13-16; RCW 9.94A.030(37)(b). This procedure violated Mr. Rizo's right to due process of law and a jury determination of all the elements of the crime. See e.g. State v. Witherspoon, 171 Wn.App. 271, 286 P.3d 996 (2012), rev. granted, 177 Wn.2d 1007 (2013) (Quinn-Britnal, J., writing separately).

The statutory maximum penalty for the robbery and assault was a determinate sentence with the possibility of parole. In Mr. Rizo's case, however, the sentencing judge, not the jury, determined he had prior qualifying convictions and sentenced him to life without the possibility of parole. RP 490-530; CP 13-16. Mr. Rizo's sentence exceeds the maximum term permitted by the convictions for robbery and assault based upon the facts found by the jury in its verdict and therefore violates his federal constitutional right to due process of law and to a jury trial.[24] Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Cunningham v. California, 549 U.S. 270, 127 S.Ct.

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[24] The Due Process Clause that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides defendants with the right to trial jury. U.S. Const. amend VI. It is axiomatic then that a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to a 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77, quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

856, 166 L.Ed.2d 856 (2007). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

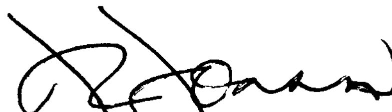
Facts that increase a defendant's maximum sentence, including prior convictions, are elements of a greater crime and must be pled and found by the jury beyond a reasonable doubt. Blakely, supra; Apprendi, supra. Mr. Rizo disputed the proof of identity with regard to the prior offenses and was entitled to determination by jury, upon proof beyond a reasonable doubt, before his sentence was increased to life without parole. RP 527. That sentence must be reversed.

F. CONCLUSION

For the foregoing reasons, and pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), this Court should grant review.

DATED this 29th day of September 2013.

Respectfully submitted:



DAVID L. DONNAN (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Petitioner

FILED
AUGUST 29, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 28932-0-III
v.	)	
ELODIO RIZO, aka DOMINGO RIZO REYES Appellant.	)	UNPUBLISHED OPINION

KORSMO, C.J. — Elodio Rizo challenges his convictions for first degree robbery and two counts of first degree assault–and resulting persistent offender sentence—on the basis of evidentiary sufficiency, evidentiary error, the merger doctrine, and *Blakely*[1] related arguments concerning his sentence. We affirm.

FACTS

This appeal arises from a shoplifting incident. On November 25, 2007, Elodio Rizo entered the Sears store in Union Gap accompanied by Julia Pina. Mr. Rizo and Ms. Pina moved toward the cologne department. They were observed by loss prevention officer Timothy Englund who was monitoring the store's security cameras. He watched Ms. Pina place several bottles of cologne in her shopping cart under her purse. She

[1] *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

APPENDIX

proceeded to the back of the store, where surveillance cameras captured Ms. Pina placing the cologne bottles inside her purse before she and Mr. Rizo exited the store.

When Mr. Englund witnessed Ms. Pina place the cologne in her purse, he directed his coworker Rigoberto Cardenas to wait outside the store's exit. Mr. Englund ran outside to join Mr. Cardenas when he saw Mr. Rizo and Ms. Pina exiting the store.

Mr. Cardenas approached the pair, identified himself, and said, "I need all my unpaid merchandise." Ms. Pina attempted to push Mr. Cardenas away, and she and Mr. Rizo started to walk past Mr. Cardenas. Mr. Englund also approached Ms. Pina, identified himself as a loss prevention officer and asked her to return the cologne. She refused.

Both security officers testified that Mr. Rizo kept walking, pulled his hand out of his pocket or waistband holding what appeared to be a silver revolver, and discharged one or two shots. Mr. Englund testified the shots were directed at Mr. Cardenas, while Mr. Cardenas testified he immediately turned to run when he saw the gun and therefore did not know where the gun was pointed when it was fired. Following the gunshots, Ms. Pina and Mr. Rizo got into their car and drove away.

The State charged Mr. Rizo with one count of first degree robbery and two counts of first degree assault. A jury found Mr. Rizo guilty of all three counts.

A fingerprint expert testified at sentencing that Mr. Rizo was the same person whose fingerprints were on two judgment and sentence forms that reflected earlier convictions for second degree assault. After finding by a preponderance of the evidence that Mr. Rizo had previously been convicted of the two prior second degree assaults, the trial court ruled that Mr. Rizo was a persistent offender and sentenced him to life in prison without the possibility of parole. The court declined a defense request to merge the assaults and the robbery.

Mr. Rizo timely appealed to this court.

ANALYSIS

This appeal challenges the sufficiency of the evidence, the trial court's finding that the convictions did not merge, and the jury instruction defining "assault." Mr. Rizo also challenges the finding that he was a persistent offender, claiming this finding violated his right to equal protection, his right to jury trial, and his right to have all the elements of the crime proven beyond a reasonable doubt. Each argument is addressed in turn.[2]

[2] Mr. Rizo also claims the trial court abused its discretion by relying on fingerprint comparisons to establish his identity for purposes of criminal history, alleging such reliance was inappropriate because there is a lack of standards regulating these comparisons. However, identification of individuals by the comparison of fingerprints is generally accepted in Washington State, and Washington courts have consistently held that fingerprints from previous judgment and sentences may be used to prove identity for purposes of establishing criminal history. *See e.g.*, *State v. Johnson*, 194 Wash. 438, 442, 78 P.2d 561 (1938); *State v. Ammons*, 105 Wn.2d 175, 190, 713 P.2d 719, 718 P.2d 796

Sufficiency of the Evidence

Mr. Rizo claims there was insufficient evidence to support all three convictions. We disagree, and conclude the State presented sufficient evidence to prove each of the three offenses.

Evidence is sufficient to support a verdict if the trier of fact has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Green*, 94 Wn.2d at 221.

Mr. Rizo first argues that the State failed to prove he possessed, displayed or discharged a gun, which was a necessary element of all three crimes as charged.

A person is guilty of first degree assault if he assaults another person with a firearm with the intent to inflict great bodily injury. RCW 9A.36.011(1)(a). "A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190. A person is guilty of first degree

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(1986); *State v. Thorne*, 129 Wn.2d 736, 783, 921 P.2d 514 (1996). Therefore, this argument is without merit and we do not address it in any further detail.

robbery if: "(a) In the commission of a robbery or of immediate flight therefrom, he or she: (i) Is armed with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly weapon; or (iii) Inflicts bodily injury." RCW 9A.56.200. To establish all three charged counts, the State had to prove that Mr. Rizo was armed with a firearm or displayed what appeared to be a firearm in the course of stealing the cologne, and that he assaulted Mr. Englund and Mr. Cardenas with a firearm.

There was sufficient evidence to prove that Mr. Rizo possessed, displayed, or fired a gun in the parking lot. Both loss prevention officers testified they believed they saw a gun in Mr. Rizo's hand, they both testified they heard gunshots, and Mr. Englund testified Mr. Rizo was pointing the gun towards Mr. Cardenas. Kristina Fernandez, another prevention loss officer who was monitoring the surveillance cameras at the time of the incident, testified she heard gunshots. Ms. Pina denied seeing a gun, but admitted she heard two "big booms." Additionally, Detective Alba Levesque testified that the video surveillance from the parking lot was consistent with Mr. Englund's and Mr. Cardena's version of events even though the gun could not be seen on the footage. This evidence was sufficient to show that Mr. Rizo had a gun and he fired it in the direction of the loss prevention officers.

Mr. Rizo also challenges the sufficiency of the robbery conviction on the grounds that the State failed to establish the use of force. He claims that he and Ms. Pina had

reached a place of temporary safety in the parking lot when they were stopped, the robbery was complete at that point, and therefore the force only occurred after the robbery had ended.

Washington has rejected the common law view of robbery that the force used during a robbery must be contemporaneous with the taking in favor of the modern transactional view of robbery. *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992). Under the transactional view, a taking can occur outside the presence of the victim, and the necessary force to constitute robbery can be found in the forceful retention of stolen property that was peaceably taken. *Id.* Washington's robbery statute simply requires that the force be used either to obtain or retain property or to overcome resistance to the taking. *State v. Johnson*, 155 Wn.2d 609, 611, 121 P.3d 91 (2005).

Mr. Rizo and Ms. Pina took the cologne peaceably from the store but when confronted in the parking lot, Ms. Pina pushed Mr. Cardenas and Mr. Rizo pulled out his gun. The force was used to retain the stolen property and escape the loss prevention officers. Under *Handburgh* and *Johnson,* robbery occurs when a defendant uses force to retain possession of property, even if the defendant initially took the property peaceably. *Handburgh*, 119 Wn.2d at 293; *Johnson*, 155 Wn.2d at 611. Mr. Rizo's argument that the force was not related to the robbery is without merit. There was force used to retain the property.

The State presented sufficient evidence to support all three convictions.

Double Jeopardy

Mr. Rizo next argues that his convictions for first degree robbery and first degree assault violate double jeopardy and the convictions should merge under *State v. Freeman,* 153 Wn.2d 765, 108 P.3d 753 (2005). The problem with this argument is that the Washington Supreme Court has held that first degree assault and first degree robbery convictions do not merge.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense. U.S. CONST. amend. V; CONST. art. I, § 9. A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one offense would have been sufficient to warrant a conviction for the other offense. *In re the Pers. Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004) (quoting *State v. Reiff,* 14 Wash. 664, 667, 45 P. 318 (1896)).

The merger doctrine avoids double punishment by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." *State v. Collicott,* 118 Wn.2d 649, 668, 827 P.2d 263 (1992). Merger is based on the double jeopardy clauses of the United States and Washington constitutions. *State v. Parmelee,* 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). "The merger doctrine is relevant only

when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." *Id.* When two crimes merge, the trial court convicts the defendant only of the one offense into which the other offense merges. *Id.* at 711.

The State charged Mr. Rizo with committing first degree robbery by:

> unlawfully [taking], from the person or in the presence of Rigoberto Cardenas and/or Timothy Englund working as employees of Sears, the property of another, perfume, against that person's will, by use or threatened use of immediate force, violence, or fear of injury to that person or his/her property or the person or property of anyone in order to obtain or retain the property taken, and in the commission of or immediate flight therefrom, you were armed with a deadly weapon, a firearm; or displayed what appeared to be a firearm or other deadly weapon.

Clerk's Papers (CP) at 60-61. The State also charged Mr. Rizo with two counts of first degree assault, alleging he assaulted both Mr. Englund and Mr. Cardenas with a firearm with the intent to inflict great bodily harm. At sentencing, the trial court found that the three counts did not encompass the same criminal conduct in determining the offender score pursuant to RCW 9.94A.589.

The merger doctrine is triggered when a completed second degree assault elevates robbery to the first degree. RCW 9A.56.200(l)(a)(i)-(ii); RCW 9A.56.190; RCW 9A.36.021(l)(c); *see State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212 (2008); *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005) (*Freeman* II). However, "an exception to merger applies where the offenses committed in a particular case have

independent purposes or effects." *State v. Freeman,* 118 Wn. App. 365, 371-72, 76 P.3d 732 (2003) (*Freeman* I). As our state Supreme Court explained:

> For example, when the defendant struck a victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery.

Freeman II, 153 Wn.2d at 779.

Although *Freeman* II held that a completed second degree assault that elevates robbery to the first degree requires merger, it also noted there was evidence that the legislature intended to punish first degree assault and first degree robbery separately:

> However, there is an important piece of evidence that recent legislatures intended to punish *first* degree assault and *first* degree robbery separately, at least under some circumstances. As the legislature is well aware, when a court vacates a conviction on double jeopardy grounds, it usually vacates the conviction for the crime that forms part of the proof of the other. This is because the greater offense "typically carries a penalty that incorporates punishment for the lesser included offence." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 28 (1995). But when a first degree assault raises a robbery to first degree robbery, the case is atypical. The standard sentence for first degree assault (in this case, 111 months) is considerably longer than the standard sentence for first degree robbery (in this case, 41 months). Given the fact of the current sentencing schema, it is unlikely the legislature intended this result. While this is not necessarily dispositive, it does weigh upon our analysis. *Cf. [In re Pers. Restraint of Burchfield,* 111 Wn. App. 892, 900, 46 P.3d 840 (2002)] (considering the seriousness level assigned by the legislature when determining how the legislature intended two related crimes to be treated).
>
> . . . .
>
> Accordingly, we conclude that there is evidence that the legislature did intend to punish first degree assault and robbery separately. But we find no

> evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.

Freeman II, 153 Wn.2d at 775-76 (citations omitted). Based on fact that the sentence for first degree assault is significantly greater than the sentence for first degree robbery, the *Freeman* II court concluded that the merger doctrine did not apply to the defendant's first degree assault and robbery convictions. *Id.* at 778-80. Given this precedent, Mr. Rizo's convictions do not merge.

Jury Instructions

Mr. Rizo next argues that the trial court erred by giving a conflicting instruction regarding the mental state required for first degree assault and that his trial counsel was ineffective for failing to object to the instruction. We review claimed errors of law in jury instructions de novo; an instruction that misstates the applicable law constitutes reversible error if it causes prejudice. *State v. Atkinson*, 113 Wn. App. 661, 667, 54 P.3d 702 (2002). However, we conclude that there was no instructional conflict and, thus, there was no instructional error or ineffective assistance.

The elements instructions, Jury instructions 18 and 26, provided that in order to convict Mr. Rizo of first degree assault, the jury had to find that four elements were proved beyond a reasonable doubt: (1) that Mr. Rizo assaulted Mr. Englund and Mr.

Cardenas, (2) the assault was committed with a firearm, (3) Mr. Rizo acted with intent to inflict great bodily harm, and (4) the acts occurred in Washington.

Jury instruction 19 defined "assault," providing:

> An assault is an act, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 45.[3]

Mr. Rizo contends that instruction 19 improperly informed the jury that it did not have to find that he acted with the specific intent to inflict bodily injury. He is incorrect. Instructions 18 and 26 informed the jury that in order to find Mr. Rizo guilty of assault, it had to find four elements including that (1) Mr. Rizo assaulted the two loss prevention officers and (2) Mr. Rizo acted with intent to inflict great bodily harm. Instruction 19 provided the jury with two of the three common law definitions of assault, including assault by creation of apprehension and fear of bodily injury even if the actor did not

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[3] Instruction 19 largely mirrors 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.50, at 547 (3d ed. 2008).

actually intend to inflict bodily injury. However, this instruction only defined the first element the jury had to find, that Mr. Rizo *assaulted* the two loss prevention officers. Instruction 19 did not change the fact that the elements instructions still required the jury to find that Mr. Rizo acted with intent to inflict great bodily harm when he committed the assault. Although the jury was instructed that one form of assault could occur without a showing of intent to inflict bodily injury, the elements instructions still told the jury that the only culpable form of assault was if Mr. Rizo acted with the intent to inflict great bodily harm. The jury instructions did not create a conflict for the jury. There was no instructional error.[4]

Persistent Offender Finding

Mr. Rizo's final two arguments concern the persistent offender finding. He argues the trial court violated his right to equal protection because the term "persistent offender" was classified as a sentencing aggravating factor rather than an element, and he also argues that the trial court violated his constitutional rights to a jury trial and proof beyond a reasonable doubt by finding he was a persistent offender based on prior convictions proved only by a preponderance of the evidence. However, this court has rejected the

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[4] Since there was no instructional error, Mr. Rizo's claim that trial counsel was ineffective for failing to challenge instruction 19 also fails because he has not shown that counsel's performance was deficient or resulted in actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 690-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

equal protection argument and both the United States Supreme Court and the Washington Supreme Court have rejected Mr. Rizo's second contention.

Under the Persistent Offender Accountability Act (POAA), chapter 9.94A RCW, the trial court must sentence a persistent offender to life in prison without the possibility of parole. RCW 9.94A.570; *State v. Knippling*, 166 Wn.2d 93, 98, 206 P.3d 332 (2009). A "persistent offender" is someone who, at the time of sentencing for a most serious offense conviction, has previously been convicted on two separate occasions of most serious offenses under RCW 9.94A.525. *See* former RCW 9.94A.030(36)(a) (2010). A "most serious offense" includes "[a]ny felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony." Former RCW 9.94A.030(31)(a) (2010). The State must prove the existence of a defendant's prior convictions by a preponderance of the evidence. In *re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005).

The equal protection clauses of the federal and state constitutions guarantee that persons similarly situated with respect to the legitimate purposes of the law must receive equal treatment. *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1996); *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996). Equal protection claims are reviewed under one of three standards based on the level of scrutiny required for the statutory classification: (1) strict scrutiny when a fundamental right is threatened; (2)

intermediate or heightened scrutiny when important rights or semisuspect classifications are involved; and (3) rational basis scrutiny when none of the above rights or classes is threatened. *Manussier*, 129 Wn.2d at 672-73.

Mr. Rizo maintains that the standard of proof for prior crimes that classify persistent offenders should be the same as the standard of proof for prior crimes that elevate the level of a crime. He relies on *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008), for the proposition that when a prior conviction alters the crime that may be charged, the prior conviction is an essential element that must be proved beyond a reasonable doubt. Mr. Rizo contends there is no rational basis for classifying a prior crime as an "element" to be proved beyond a reasonable doubt in some circumstances and as an "aggravator" to be proved with a preponderance of the evidence in other circumstances.

This court rejected a similar equal protection claim in *State v. Williams*, 156 Wn. App. 482, 234 P.3d 1174 (2010). There we noted that a defendant challenging the legislature's differing treatment of two classes of defendants must show that the differing treatment rests on "'grounds wholly irrelevant to the achievement of legitimate state objectives.'" *Id.* at 497 (quoting *State v. Thorne*, 129 Wn.2d at 771). This court found that the purpose of the persistent offender act is to protect public safety by putting the most dangerous criminals in prison and reduce the number of serious repeat offenders,

that the legislature's differing treatment of recidivists compared to other offenders was not irrelevant to the purpose of the act, and there was no equal protection violation. *Id.* at 498. Similarly, Division One of this court has rejected equal protection challenges to the POAA, holding "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense." *State v. Langstead,* 155 Wn. App. 448, 456-57, 228 P.3d 799 (2010). Considering this precedent, Mr. Rizo's equal protection challenge fails.

Mr. Rizo's final argument is that his constitutional right to a jury trial and proof beyond a reasonable doubt were violated when he was adjudicated a persistent offender based on prior convictions found by the court by a preponderance of the evidence.

A jury must determine any fact, other than the fact of a prior conviction, which increases the penalty beyond the standard range. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). A prior conviction does not have to be presented to a jury and proved beyond a reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 141-43, 75 P.3d 934 (2003); *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Instead, a sentencing court must simply find that the prior conviction exists by a preponderance of the evidence. *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). No additional safeguards are required to prove a

past conviction because a certified copy of a prior judgment and sentence is highly reliable evidence. *Smith*, 150 Wn.2d at 143 (quoting *Thorne*, 129 Wn.2d at 783).

Both the United States Supreme Court and the Washington Supreme Court have rejected Mr. Rizo's argument that prior convictions must be found by a jury and proved beyond a reasonable doubt.

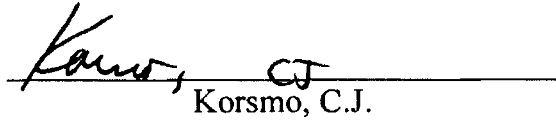
"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Blakely* maintained the *Apprendi* exception when it determined that most Washington aggravating factors must be submitted to a jury. *Blakely*, 542 U.S. at 301. The Washington Supreme Court recognizes that this exception confirms that prior felony convictions used to support a persistent offender sentence do not need to be proved to a jury beyond a reasonable doubt. *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001); *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007); *Roswell*, 165 Wn.2d at 193 n.5. Until such time as our Supreme Court overrules itself, this court is bound by its holding on this issue. *State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997).

In light of the controlling authority, this court lacks the ability to grant the relief Mr. Rizo requests.

No. 28932-0-III
State v. Rizo

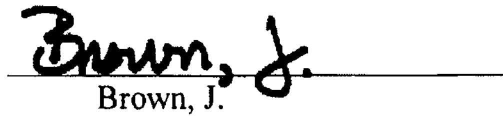
The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Korsmo, C.J.

WE CONCUR:



Brown, J.

Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	COA NO. 28932-0-III
v.	)	
	)	
ELODIO RIZZO,	)	
	)	
Petitioner.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES HAGARTY, DPA [James.Hagarty@co.yakima.wa.us] YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________
[X] DAVID TREFRY [TrefryLaw@WeGoWireless.com] ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________
[X] ELODIO RIZO 262034 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2013.

X_______________________________

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