No. 41795-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MADDAUS,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 09-1-01772-1

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Substantive facts.

Robert Maddaus was a drug dealer. He supplied many people, including Shawn Peterson. [RP 496, 646, 960, 1042][1] On November 13, 2009, Maddaus was away from his home; only his friend Jessica Abear was at the residence when three or four armed individuals broke in. One held her at gunpoint while the others ran into the back of the house. They all left after three or four minutes [RP 647-49], taking with them five pounds of methamphetamine, a quantity of marijuana, and $30,000 in cash. [RP 498, 962, 1044].

When Maddaus was made aware of the robbery, he suspected Abear of complicity. In an effort to extract information from her, he hit her in the head with the butt of a gun, sprayed her with bear mace, ripped off her clothes, shot her with a paintball gun, and aimed the firearm at her foot and pulled the trigger, although the weapon did not fire. [RP 654-55] Abear escaped while Maddaus was calling his supplier, telling the supplier he needed a place to take Abear and torture the information out of her. [RP 656-57]

[1] Unless otherwise noted, all references to the Report of Proceedings are from Volumes 6 through 18 of the trial transcript, beginning on January 12, 2011.

Maddaus was upset and became obsessed with discovering who was responsible for stealing from him and punishing those persons. [RP 501, 963, 1011, 1043, 1325] He said that whoever did it would die. [RP 1065-66]

Corina Charo only met Maddaus once, but was friends with several people in the drug culture who were friends or associates of his, including Matthew Tremblay. [RP 917-19] Charo discovered a muffled and apparently nearly indecipherable voicemail on her phone. [RP 920-22, 1062] A group of people associated with Maddaus heard the message and Tremblay asked for a copy of it. [RP 923] Maddaus obtained a copy of the recording on November 15, 2011. [RP 1333] The recording, which was not played during the trial, apparently concerned unknown persons discussing a robbery. Maddaus thought Peterson's voice was on the recording and questioned him. [RP 1333] Later in the day, Maddaus called Tremblay to help him question Peterson again. [RP 1334]

At about 8:30 p.m. on November 15, 2009, Peterson received the last of a number of telephone calls from Maddaus. He left his home, telling his girlfriend, Randi Henn, who was the mother of his infant daughter, that he was going to meet Maddaus to confront a suspect in the robbery. [RP 500-01]

At approximately 12:30 to 1:30 a.m. on November 16, Maddaus brought the voicemail recording to the home of his friends and customers, Daniel Leville and Falyn Grimes, at 1819 Capitol Way, Apt. 4, in Olympia. [RP 1041-42, 1060, 1334] Maddaus wanted Leville to enhance the recording in an effort to identify the voices. [RP 1060, 1282] With him was Peterson, with his wrists in handcuffs in front of his body, a coat or sweatshirt draped over the connecting chain. [RP 1057] Maddaus had a gun with him. [RP 1057-59] When Peterson asked Maddaus to remove the handcuffs, he refused. [RP 1061] Maddaus believed Peterson's voice was on the recording, [RP 1283] but he also wanted to speak to Aaron Hudspeth, whose voice he also believed was recorded. He said that whoever committed the robbery was going to die. [RP 1065-66]

Also present with the group at 1819 Capitol Way was Jesse Rivera, a friend of Leville's, who came nearly every night between 10:00 and 11:00 p.m. when he got off work. [RP 1054] All of them were drinking and smoking both methamphetamines and marijuana. [RP 1285, 1342]

When Maddaus refused to remove the handcuffs, Peterson walked out the front door. Tremblay told Maddaus that Peterson

had left. Maddaus followed after him, trailed by Tremblay. [RP 1341-42] Leville followed them out as far as the front porch, and saw Peterson walking away from Maddaus' car, which was parked on the street, Maddaus following with a gun in his hand. [RP 1072] Leville, Grimes, and Rivera were in the apartment when they heard five gun shots. [RP 1073]

Tremblay had gathered together some items and put them in a bag before leaving the apartment. He put the bag in Maddaus' car and then heard four or five gunshots. He saw Maddaus pointing a gun in Peterson's direction, with smoke coming from it. Peterson turned and ran down the street away from Maddaus. [RP 1343-44] Tremblay got behind the wheel of Maddaus' car and drove up beside Maddaus to pick him up. After driving a short distance, Maddaus told Tremblay to stop; Maddaus ran back to where Peterson lay on the street and aimed the gun at his head. There was no shot. Maddaus got back in the car, telling Tremblay that the gun had jammed. [RP 1344-51, 1375-76] Because Tremblay wasn't driving well and the car kept stalling, they traded places in the vehicle and Maddaus drove to I-5 heading south. [RP 1352, 1377] They went to the home of a friend of Maddaus, where Maddaus put the gun and other handcuffs, among other items, into

a storage container. [RP 1359] Maddaus poured gasoline over his hands and arms to destroy any traces of gunshot residue, then took a shower and went to sleep. [RP 1360]

Just before 3:00 a.m. on November 16, James Albert, who lived in the neighborhood of 1819 Capitol Way, woke to the sound of at least five gunshots. He looked out his window and saw a sedan speeding toward his house. It turned onto a side street where the driver got out and walked around the front of the car to the passenger side and got in. The car drove away very fast, tires squealing. [RP 525-27] He identified the car as possibly a Volkswagon Jetta, a dark color, and coming from the direction of the gunshots. [RP 531]

Michael Wallace, who also lived in the area, was watching a movie in his living room with his girlfriend, Holly McClure, when he heard five gunshots. He went out his front door and saw a person running down the road, but never saw that person's face. Wallace followed, but the person got into a car and it drove away. He tried to keep up but had to abandon the chase. [RP 534-35, 540, 548-49]. McClure had also gone outside; she told him there was a person lying in the road. Wallace had her call 911 and went to the victim. The victim was handcuffed, bleeding, and gasping for

breath, unable to speak. He died before the police arrived. [RP 535-36]

Police received the call of the shooting at 2:43 a.m. on November 16, 2009. The first officer at the scene, Olympia Police Officer Robert Krasnican, identified the victim by the driver's license in his wallet: Shaun Allen Peterson. [RP 620, 625] Later the same day Dr. Eric Kiessel performed an autopsy. [RP 595-96] Peterson suffered a gunshot wound through the neck which put a hole in the jugular vein, [RP 605-06] one through the chest that perforated both lungs, [RP 607-08] and one through the left forearm, which may have been from the same bullet which penetrated the neck, [RP 609, 612] as well as some superficial wounds. [RP 615] The first two would each have been fatal. One of the shots struck the victim from the back and one from the left side. [RP 613]

The investigation into this murder produced further information. Maddaus owned a dark green VW Jetta, which was not at his residence. [RP 791] Tremblay was located and arrested. [RP 794] He gave a statement to the police, in which he described the killing and the flight from the scene. [RP 798-99] He showed them where Maddaus had stored the gun, and with the owner's permission the storage container was searched. None of the items

Maddaus had put there were still in the container. [RP 803-04] Maddaus' residence was searched pursuant to a search warrant; officers located two paintball guns, at least one paintball strike on the wall, and the faint odor of pepper spray. [RP 816-17] Also located in the residence was a .380 caliber Lorcin handgun, a box of .380 caliber ammunition, a set of handcuffs, and keys. [RP 821-23]

The cartridge cases from the crime scene were identified by a firearm examiner from the Washington State Patrol Crime Lab as approximately .30 caliber or 7.62 Tokarev, an uncommon ammunition manufactured in China. [RP 749] Leville, who had had some experience with firearms when in the Army, thought the weapon that Maddaus was carrying the night of the murder was made by an Eastern Bloc country. [RP 1058-59]

On November 27, 2009, police made arrangements with an associate of Maddaus', Robert Russell, to notify them when he would be giving Maddaus a ride in his vehicle. Officers stopped the vehicle and Maddaus was taken into custody. [RP 831] Several items were taken from Maddaus and a search pursuant to a warrant was later conducted on the vehicle. [RP 834, 836] In addition to more than $35,000 in cash, and quantities of controlled

substances, the car contained a loaded 9 mm semiautomatic handgun, found underneath the floor mat on the passenger side where Maddaus had been sitting. [RP 894-95] There was also a passport in Maddaus' backpack, and a blonde wig was found in the car when it was searched. [RP 844, 896] The passport was in the name of Chad Walker Vogt. An Olympia detective obtained a court order requiring Maddaus to put on the wig. He was photographed wearing it. The photograph of Maddaus in the wig matched the photograph of Vogt in the passport. [RP 845-46, Exhibits 148, 149A, 149B]

Sometime in mid-November, 2009, Maddaus had two individuals take his VW Jetta to Dale Carter, who painted cars and worked on auto bodies. Maddaus had already left an Acura there to be worked on, but told Carter to interrupt that job and get the Jetta fixed and painted right away. [RP 850, 853-56]

Maddaus contacted several people in an effort to establish a false alibi for the time of the killing. Theodore Farmer, who worked as a tattoo artist when he wasn't in jail, and who was working with the drug task force in an effort to mitigate charges in Pierce County, received a phone call from Maddaus on the evening of November 15, 2009. Maddaus said he wasn't able to talk at the time, but he

would either speak to Farmer in person or would be in jail. [RP 1235-36, 1240-41] On November 26, Maddaus went to Farmer's house wearing a blonde wig and asked Farmer to say Maddaus was at his place between midnight and 3:00 a.m. on the night of the murder. [RP 1245-46]

Shawn Ruth, who had met Maddaus through her son, was contacted by Chelsea Williams. [RP 1435, 1437] Williams was such a close friend of Maddaus' that he called her his niece. [RP 1411] Williams made an attempt to get Ruth to say that Maddaus had been at her home. He had not, and Ruth refused to lie for him. [RP 1438-39]

On December 16, 2009, Williams came to the residence of Leville and Grimes. Maddaus called her from the jail on her phone and had her hand the phone to them so he could speak to them. Because he was not to have contact with either of them, and the phone calls from the jail were recorded, Leville was instructed to use the name "Steve" and Grimes was to respond to "Sherry." [RP 1081-83, 1203] Maddaus wanted to make sure Leville and Grimes would not talk to the police. [RP 1084]

Maddaus told Leville that he had shot Peterson. He told Grimes that he would be able to talk his way out of this. [RP 1203]

In his case in chief, Maddaus offered the testimony of a number of witnesses including several who testified that Tremblay had told or implied to them that he (Tremblay) was the killer, not Maddaus: Miguel Rodrigues, who had an offender score of seven, [RP 1621, 1623], Kyle Collins, who was beginning a sentence of 120 months for a long list of convictions, [RP 1648, 1669], Kenneth Carlson, who was using drugs with Tremblay at the time, [RP 1711-12], and Larry Corbin, who had been convicted of forgery, theft, and violation of a no-contact order. [RP1734, 1736]

2. Procedural facts.

Maddaus was charged with and tried for nine crimes. The fifth amended information was filed during the trial. [CP 21-23] He was found guilty of first degree felony murder while armed with a firearm, two counts of unlawful possession of a firearm, attempted kidnapping, second degree assault, and four counts of witness tampering. The jury returned special verdicts finding that he was armed with a firearm when committing the felony murder, attempted kidnapping, and second degree assault. [RP 2080-82, CP 451-462]

C. ARGUMENT.

1. The affidavit for the search warrant for Maddaus' residence provided sufficient facts that a reasonable magistrate could find probable cause. The warrant was drawn with sufficient particularity to satisfy both the Fourth Amendment and article I, section 7, of the Washington constitution.

In general, a search executed with a lawfully issued warrant based on probable cause is reasonable. State v. Grenning, 142 Wn. App. 518, 531, 174 P.3d 706 (2008). Probable cause is established where an affidavit supporting a search warrant provides sufficient facts such that a reasonable person would conclude that there is a probability that the defendant engaged in criminal activity. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); *see also* State v. Cole, 128 Wn,2d 262, 268, 906 P.2d 925 (1995). There must be a nexus between the place to be searched and the criminal activity. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Facts that, standing alone, do not support probable cause may provide probable cause when viewed together with other facts. Cole, 128 Wn.2d at 286. The facts contained in affidavits of probable cause need not meet the same standards governing admissibility of evidence at trial. State v. Withers, 8 Wn. App. 123, 125, 504 P.2d 1151 (1972).

If there are doubts as to the existence of probable cause, they may be resolved in favor of issuing a search warrant. Vickers, 148 Wn.2d at 180-09. Where a search warrant is issued, the defendant bears the burden of establishing that the search was unreasonable. State v. Hopkins, 113 Wn. App. 954, 958, 55 P.3d 691 (2002). A magistrate exercises judicial discretion in determining whether to issue a warrant. Vickers, 148 Wn.2d at 108. A challenge to a search warrant is reviewed for abuse of discretion. Cole, 128 Wn.2d at 286. Great deference is afforded to the trial court's determination of probable cause. State v. Cord, 103 Wn.2d 361, 366, 693 P.2d 81 (1985). The magistrate may draw commonsense inferences from the facts presented in an affidavit and need not examine the affidavit in a hypertechnical manner. State v. Creelman, 75 Wn. App. 490, 494, 878 P.2d 492 (1994). After reviewing the factual determination of the magistrate judge, the appellate court will review de novo whether the qualifying information, as a whole, amounts to probable cause. In re Detention of Petersen, 145 Wn.2d 789, 800, 42 P.3d 952 (2002). When the court reviews a denial of a suppression motion, it determines whether the findings of fact are supported by

substantial evidence and then whether the conclusions of law are supported by the findings of fact. Grenning, 142 Wn. App. at 531.

a. The affidavit for the search warrant established a nexus between Maddaus' home and evidence of crimes.

The affidavit for the search warrant established that Shaun Peterson had been shot to death on November 16, 2009, shortly before 2:45 a.m. He was handcuffed at the time of his death. Witnesses saw white males leaving the scene in a black VW Jetta, *circa* 2002, immediately following the gunshots. Located at the scene were bullet casings, a cell phone, and blood. No bullets or bullet fragments were located in the body. Peterson was a dealer in methamphetamine and Robert Maddaus was his supplier. [CP 5-6]

Maddaus was known to drive a dark green Volkswagon Jetta, which matched the description of the car seen leaving the scene of the murder. [CP 6, 7] He was also known to have been in possession of a handgun at the time of the shooting. [CP 7] There had been phone calls during the evening between Maddaus and Peterson, [CP 6] and a recording in which Maddaus was intensely interested had been played from a computer. [CP 7]

When Maddaus and Tremblay fled the scene of the murder they went to 10919 Highway 12 in Rochester. Maddaus placed some items in a storage container there. [CP 7] Officers searched that container on November 17, 2009, but the items were not there. [CP 7, 8] Maddaus' girlfriend told police she had stayed with Maddaus at his residence, 10220 179th Ave. SW, which is approximately one mile from 10919 Highway 12, the night of November 16, leaving on the morning of the 17th. Maddaus was home when she left. [CP 8] On the 17th, police had gone to Maddaus' residence, but neither he nor his car was there. [CP 7]

Therefore, what the police knew at the time they applied for the search warrant was that Maddaus had been identified as the shooter. He was missing. The murder weapon and the VW Jetta were missing. There was blood at the scene and it was possible that the shooter would have blood on him or his clothing. Drugs were involved, and the theft of drugs and money was a motive for the murder. Phones and computers had been used for various purposes during the evening. Maddaus had placed some items in a storage container, which were no longer there. He was known to have been at his own home, approximately a mile from the place where he had stored his items, after he had put them in the storage

containers. The residence where Maddaus had been before the shooting had been searched; none of the missing items—or Maddaus—were found there. [CP 8]

It was clearly a logical inference that it was likely that the items sought would be at Maddaus' residence. Contrary to Maddaus' argument, the affidavit does not rely on a general assumption that a criminal would have evidence of the crime in his home. Here the issuing judge could reasonably infer that since the items were not located in other places where they were known to have been, and Maddaus had last been seen at his own residence, that the items might logically have been left there.

Maddaus relies on State v. Thein, *supra*, to support his argument that there was no nexus between the crime and Maddaus' residence. In Thein, police had obtained a search warrant for Thein's home based on an affidavit which set forth almost exclusively boilerplate language that it is common practice for drug dealers to keep drugs and records of their transactions in their homes. There were no facts that specifically indicated that Thain would have any of the items sought at his home. In Maddaus' case, the affidavit indicates that Maddaus was likely to have in his possession evidence of the crime of first degree murder

and second degree assault. Places where he was known to have been were searched and the evidence was not found. His home was the one remaining place where he was known to have been shortly after the murder. There was most certainly a nexus between the crime and the place to be searched. The affidavit did not rely on a general assumption that murderers keep evidence of their crimes in their homes.

Even had the search of Maddaus' home lacked a constitutional basis, which it did not, it would have been harmless error. The evidence admitted at trial included a pistol which was not the murder weapon, a box of ammunition for that pistol, a paintball splatter, testimony about the smell of pepper spray, and a purse that contained items belonging to Jessica Abear. [RP 1263-65] Given the overwhelming amount of other evidence which was presented at trial, this evidence is downright innocuous.

"Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). If the untainted evidence is "so overwhelming that it necessarily leads to a finding of guilt," the harmless error test is satisfied. Id., at 426.

b. The affidavit provided both probable cause and sufficient specificity to support the warrant for all of the items listed.

Probable cause for issuing a search warrant is evaluated on a case-by-case basis, applying general rules to specific situations. Thein, 138 Wn.2d at 149. General exploratory searches are unreasonable. Id. A determination that a warrant meets the particularity requirement of the Fourth Amendment is reviewed de novo. State v. Stenson, 132 Wn.2d 668, 691, 940 P.2d 1239 (1997). The person executing the warrant must be able to identify the property to be seized with reasonable certainty. Id., at 691-92.

> General warrants, of course, are prohibited by the Fourth Amendment. "The problem [posed by the general warrant] is not that of intrusion, per se, but of a general, exploratory rummaging in a person's belongings. . . "

Id., at 691 (citing to other cases). When the precise identity of items to be sought cannot be determined at the time the warrant is issued, a generic or general description is sufficient when probable cause is shown and it is impossible to give a more specific description. Id., at 692.

Maddaus challenges probable cause and specificity for several items or categories of items.

i. Clothing.

Maddaus argues that the affidavit provides no basis for the search for clothing with blood evidence or specific items of clothing. An issuing magistrate is permitted commonsense inferences and is not to view the facts in a hypertechnical manner. Creelman, 75 Wn. App. at 494.

The affidavit here established that there was blood at the scene of the murder. [CP 5] The affiant sought a search warrant for evidence that included "any clothing with apparent blood evidence; and clothing that matches the description given by witnesses to include blue jeans, a dark colored hooded sweatshirt, a dark colored baseball style hat." The judge issuing this warrant was justified in inferring that if there was blood at the scene there was a good chance the shooter got blood on him. The specific items of clothing were identified by witnesses; it is a reasonable inference that the description was of the clothing worn by Maddaus. There was no need to search for anyone else's clothing.

ii. Firearms.

Maddaus argues that there was probable cause to seize the murder weapon but not other firearms. It is not clear how the officers were to identify the murder weapon at the house and leave

all other weapons behind. No bullets were recovered during the autopsy. Four empty casings were found at the scene. [CP 6] The State knows of no firearms expert who can identify a particular gun as having fired specific cartridges just by looking at it. A warrant is not impermissibly broad simply because it lists categories or general classifications. Stenson, 132 Wn.2d at 692.

While Tremblay told officers that Maddaus had a handgun earlier in the evening, he only said that immediately after the shooting he saw Maddaus holding a gun pointed at Peterson. [CP 7] In addition, it is a reasonable conclusion that a person who would kill another is a danger to society, and any firearms should be seized to remove access to weapons. Packaging for handguns and bullets, the bullets themselves, and any spent casings are all evidence relevant to Maddaus' possession of the weapon that killed Peterson.

iii. Materials potentially protected by the First Amendment.

Notes and records to establish dominion and control: Maddaus argues that these materials cannot be helpful to the investigation. He does not provide any basis for prohibiting the police from obtaining relevant evidence to corroborate information they received from other sources. A person who has dominion and

control over specific premises can be inferred to have dominion and control over the property in the premises. State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). If witnesses who identified the residence as Maddaus' disappeared before trial, these documents show that Maddaus had dominion and control of the home at the time of the killing.

Notes and records relating to the distribution or sales of controlled substances.

The affidavit established that Maddaus was a drug dealer and that drugs and money had recently been stolen from him. [CP 5] Maddaus was seeking the person responsible and was believed to have made threats to kill people he suspected of involvement. [CP 8] Therefore, any documents relating to Maddaus' drug activities would be relevant to establishing not only motive, but the contacts that could logically lead to further information about the crime.

Any computers, media storage devices, cell phones, that could be used to communicate between the victim and suspect or could contain an (sic) recording of subjects speaking about the robbery of Robert Maddaus.

According to the affidavit, Tremblay told the police that there was *at least* one laptop and one desktop computer at 1819 Capitol Way S, #4, before the shooting. [CP 7] He did not say there

weren't others. Further, it is reasonable to infer that communications or relevant information could be on computers other than the ones at the apartment before the killing. Throughout the affidavit are mentions of Maddaus making numerous calls.

Shaun Peterson was dead from gunshot wounds. The evidence the police had pointed to Maddaus as the shooter. Any communications concerning the theft of drugs and money from Maddaus, communications between Maddaus and anyone he contacted in relation to finding the culprit, any records he created or possessed that would be relevant to the murder—all of these are evidence pertinent to the murder investigation, as well as the second-degree assault allegation. There is certainly probable cause for any electronic device that could store or communicate information. As noted above, the police could not determine at the house what was relevant and what was not, and it is not unconstitutional for them to seize all such devices to determine the contents.

Maddaus argues that no witnesses specifically mentioned disks, thumb drives, and similar devices. No witness specifically mentioned that the missing VW Jetta had tires, either, but it is a reasonable assumption that it did and seizing the tires with the rest

of the car would be permissible. Any components of a computer system would be relevant to the information that the police were seeking.

Maddaus asserts that the only cell phone that would be relevant to the investigation is the one that he used to communicate with certain people. He does not explain how the police are to know which one that is without seizing and examining all phones in the residence.

Surveillance equipment

Maddaus maintains that the affidavit does not refer to the surveillance equipment that, as testified to at trial, was present in the apartment on Capitol Way. It is true that nothing about the surveillance equipment appears in the section of the affidavit titled "probable cause," although at the very beginning the affiant stated under oath that he believed certain evidence of the crime existed, and that list included the missing surveillance equipment. Because this is the only item in the warrant not supported by probable cause, the severability doctrine should apply.

"Under the severability doctrine, 'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized

pursuant to valid parts of the warrant." State v. Perrone, 119 Wn.2d 538, 556, 834 P.2d 611 (1992). There must be a "meaningful separation" in the language of the warrant—a "logical and reasonable basis for the division of the warrant into parts which may be examined for severability." Id., at 560. Here the court must only excise one clause from the list of items to be seized. The remaining items of evidence are supported by probable cause. This search warrant is not the sort of search warrant prohibited by the Fourth Amendment or the Washington constitution.

> "It would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well."

State v. Maddox, 116 Wn. App. 796, 807, 67 P.3d 1135 (2003) (quoting Perrone, 119 Wn.2d at 556).

Packaging, receipts, or documentation of handcuffs.

Maddaus was suspected of handcuffing his victim before shooting him. Even if no handcuffs were found, evidence that he had purchased or possessed them, in the form of receipts or packaging, would be relevant to the investigation. This challenge raises hypertechnicality to an extreme.

Drugs and paraphernalia.

Maddaus was known to be a drug dealer, and the information the police had was that he committed the killing to avenge the theft of a large amount of drugs and cash. Evidence of drugs in his home would be relevant and significant evidence of the extent of his operation and corroborate or discredit the statement of the witnesses.

With the exception of the surveillance equipment, every piece of evidence sought pursuant to the search warrant was supported by probable cause and described with sufficient particularity to satisfy constitutional restraints. The findings of fact entered by the trial court in denying the motion to suppress, and the findings of fact support the conclusions of law. [CP 2-3]

A defendant bears the burden of proving that a search warrant was unreasonable. Hopkins, 113 Wn. App. at 958. Maddaus has not done so.

> 2. Although the court failed to conduct a hearing to weigh the necessity of the restraints against possible prejudice, there is nothing in the record to show that any juror noticed the restraint device and thus the error is harmless.

In his factual summary of this issue, Maddaus refers to events which occurred on January 3 and 4, 2011, indicating that

jurors could see the restraints he was wearing. The jury venire present on those dates was discharged when it was discovered two potential jurors had made prejudicial statements to others on the jury panel. [01/05/11 RP 262-266] Anything that might have been seen by a potential juror at that time has no relevance to the trial.

Before that jury venire was stricken, Maddaus raised an objection to a leg brace but not to the shock device. [01/03/11 RP 50] He was concerned that when he walked to the witness stand the brace would be obvious. The court ruled that the jury would not be brought into the courtroom until Maddaus was in place on the witness stand, noting that this procedure had been followed for a long time. [01/03/11 RP 50-51] Defense counsel's response was, "Okay. Thank you, Your Honor." [01/03/11 RP 51]

On the second day of the trial, January13, defense counsel informed the court that Maddaus thought the jury could see the shock device worn on his leg under his pants. This comment was made at the very beginning of the court day, and the jury was not in the courtroom, nor had it seen Maddaus at all that day. [RP 628] Counsel advised the court that Maddaus was wearing tighter clothing that day than on the previous day. The judge did not notice it, but in order to insure that the jurors did not see the device,

she placed pieces of cardboard which resembled exhibits in such a manner that they masked the defendant's legs from view. [RP 628-29] The prosecutor informed the court that he had information from the corrections staff that Maddaus had looser pants that he could have worn but he chose not to. The implication was that Maddaus was either attempting to create a reversible error or a situation in which the restraints would be removed and he would have the possibility of escaping. [RP 629-30] No further reference was made to the shock device on the record for the remainder of the trial. There is no indication that any juror ever noticed any restraining device.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002). Restraints are disfavored because they may impact the constitutional right to the presumption of innocence, State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one's own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on

the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring safety and order in the courtroom. State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (citing to State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981).

A trial court has broad discretion to provide security and ensure decorum in the courtroom. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. Damon, 144 Wn.2d at 691-92. The trial court here did not do an on-the-record weighing of the necessity of the restraint against the possibility of prejudice to the defendant. It did arrange the courtroom so that the defendant's legs were not visible to the jury and ensured that he would not have to walk where the jury could see him.

In State v. Flieger, 91 Wn. App. 236, 955 P.2d 872 (1998), the court found a legitimate distinction between a shock box which does not restrain physical movement and cannot be seen by jurors from other restraint methods which are visible. In that case it did

not matter because the shock box worn by the defendant had been noticed by the jurors. Id., at 242.

Errors which infringe on a defendant's constitutional rights are presumed prejudicial. Flieger, 91 Wn. App. at 243. Like other constitutional errors, a claim of unconstitutional shackling is subject to a harmless error analysis. Jennings, 111 Wn. App. at 61. The State bears the burden of showing that the shackling did not influence the jury's verdict. Damon, 144 Wn.2d at 692.[2] "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Guloy, 104 Wn.2d at 425.

Here there is nothing in the record to show that any juror suspected that Maddaus was wearing a shock device on his leg beneath his pants. His legs were shielded from the jury in a manner which would not seem contrived in a courtroom and he never moved from his seat when the jury was in the courtroom. The "legitimate distinction" found by the Flieger court is applicable in this case. The court in Hutchinson found that because the jury

[2] In State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), the court said that the defendant must show that the shackling influenced the jury's verdict. Because the jury in that case never saw the defendant in shackles, he could not show prejudice.

never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. Hutchinson, 135 Wn.2d at 888. Similarly, the court in Jennings held that the stun gun the defendant was wearing was not visible to the jury and the error was harmless. Jennings, 111 Wn. App. at 61. The court in Damon found that the jury must have observed the restraint chair in which the defendant was seated, and therefore the error was not harmless. Damon, 144 Wn.2d at 693.

Here there is nothing in the record to suggest that anyone on the jury ever even suspected that Maddaus was wearing a shock device, and therefore the court's failure to weigh the necessity against the prejudice is harmless error.

3. The trial court did not restrict Maddaus' cross-examination of Daniel Leville in a manner that violated his Sixth Amendment right of confrontation.

Under the Sixth Amendment right of confrontation, a defendant has the right to cross-examine State witnesses to elicit facts that tend to show bias, prejudice, or interest; however, the trial court has discretion to determine the scope or extent of such cross-examination. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). The court may decline to allow cross-examination where the circumstances only remotely tend to show the prejudice

or bias of the witness, or where the evidence is "merely argumentative or speculative." Id. The court has the authority to set limits to cross-examination that is repetitive or marginally relevant. State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009).

The more important a witness is to the decision the jury must make, the greater the scrutiny applied to that witness's credibility. Id. A criminal defendant has great latitude to cross-examine State witnesses to show motive and credibility. Id., at 835. This right is not without limitations, however. State v. Ahlfinger, 50 Wn. App. 466, 474, 749 P.2d 190 (1988). A trial court's ruling on the scope of cross-examination will not be disturbed absent a manifest abuse of discretion. State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987). Whether a defendant's confrontation right has been denied is determined on a case by case basis depending on the surrounding circumstances and the evidence admitted at trial. Ahlfinger, 50 Wn. App. at 474.

In this case, Maddaus wanted to show that Leville had received a favorable plea agreement, or had not been charged with crimes he had committed, in exchange for his testimony against Maddaus. His theory was that the State wanted to convict

Maddaus and Leville would say whatever the prosecution wanted him to say in exchange for his own crimes going uncharged or for getting a favorable plea bargain on the crimes for which he was charged.

In a pretrial motion, argued on December 21, 2010, Maddaus argued to the court that he wanted details of the plea agreement between the State and Leville. He asserted that drugs were found in his car and apartment but no charges had been filed. The State apparently took the position that there was insufficient evidence upon which to charge Leville, but there was no plea agreement to provide to the defense. [12/21/10 RP 60-61] Maddaus complained that it was unfair that he (Maddaus) was charged with crimes, whereas other people were not. Defense counsel was convinced that there was an unwritten plea agreement between the State and several persons, including Leville, and he asked the court to order the State to put that agreement in writing and provide him a copy. [12/21/10 RP 65] The State responded that the defense had been provided with all written plea agreements, and there were no unwritten agreements. All grants of immunity had been provided in writing or, if verbal, were memorialized in police reports which the defense had. [12/21/10

RP 68] Defense counsel insisted that the prosecutor was lying and that if a witness was not charged with crimes which defense counsel thought should have been charged, there must have been a plea agreement. [12/21/10 RP 71] He believed these uncharged crimes should be made part of a formal agreement about which he could cross-examine the witnesses. [12/21/10 RP 72]

The court directed that the defense receive a signed copy of all written plea agreements and grants of immunity even if unsigned copies had been provided. [12/21/10 RP 75] The court further disagreed with defense counsel that uncharged crimes were necessarily part of an unwritten plea agreement, and expressed the opinion that Maddaus could cross-examine those witnesses about their arrests and whether they were charged with crimes as a result. The scope of that cross-examination was to be determined at trial. [12/21/10 RP 76]

At trial, Leville acknowledged that drugs had been found in a vehicle, but he denied that it was his car or that he had been in it. He claimed to be unsure about drugs being found in his apartment because he was in custody at the time the apartment was searched. He said his attorney had read a portion of the report to him and told him "there were 3.6 issues." [RP 1127] The State

objected because Maddaus was getting into specific instances of misconduct prohibited by ER 608. The court found that while Maddaus had gotten into evidence that there was an arrest and the reason for the arrest, under ER 608 the matter was not relevant. [RP 1128-29] The defense position was that it was not fair that Leville had not been charged with drug offenses. The court ruled that specific instances of conduct could not be offered to prove truthfulness or the lack thereof, and any further inquiry about those crimes would repetitive as well. [RP 1129-30]

When cross-examination resumed, defense counsel asked Leville about the plea bargain he received; as a result, a considerable amount of property that was seized pursuant to a search warrant was returned to him. [RP 1130-32] Leville testified that he believed the items were seized because the police thought they were stolen, but were returned to him because they were not stolen and had no connection to the homicide. He admitted he did not know if his understanding was correct. [RP 1132] He went on to testify that he got his property back after the plea agreement was signed and that he had not yet been sentenced on his charges, and wouldn't be sentenced until after he testified. [RP 1133-34]

Defense counsel asked no further questions about other crimes or plea agreements.

ER 608(b) provides:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.

For impeachment purposes, under ER 608, evidence of a witness's prior bad acts is admissible only if it is probative of his character for truthfulness. Drug offenses are not probative of truthfulness because they have little to do with a person's credibility. State v. Cochran, 102 Wn. App. 480, 486-87, 8 P.3d 313 (2000). The court was correct to limit the defense inquiry into Leville's drug offenses.

On the other hand, bias may be shown by extrinsic evidence. That evidence is subject to the hearsay rule. When a witness testifies pursuant to a plea agreement, that fact may be explored on cross-examination. KARL B. TEGLAND, WASHINGTON

PRACTICE: COURTROOM HANDBOOK ON EVIDENCE ch. 6 at 318-19 (2010-11). Here, Maddaus did question Leville about the plea agreement; he didn't get the answers he wanted, but he had the opportunity to ask the questions and the court did not limit him in that area. It is not clear from the context of the cross-examination, however, whether Maddaus was seeking to establish that Leville was lying in order to take advantage of a favorable plea agreement or that he had made the agreement in order to get his property back. In any event, he got before the jury the fact of the plea agreement and Leville's understanding of it. The defense had been provided with copies of all plea agreements, and if there was anything in the agreement that was different from Leville's account, Maddaus was free to offer that agreement or question Leville specifically about it.[3]

In short, the trial court properly limited Maddaus' attempts to get in prior bad acts to show untruthfulness under ER 608, but did not prevent him from asking all the questions he chose to ask to establish bias. Maddaus' claim that it just wasn't fair for Leville to escape charges on drug offenses is completely irrelevant to

[3] In his Supplemental Motion and Declaration to Continue, filed December 17, 2010, defense counsel asserted that Leville made an agreement that was signed and filed. [CP 211 n. 2].

showing bias or untruthfulness. He also complains that the court should have let him ask Leville about the State's failure to charge him with crimes, but it is not clear how that is relevant. Leville would have had no control over what the prosecutor chose to charge. Maddaus did inquire into the plea agreement without limitation. He is unhappy that Leville did not say he entered a plea agreement which included a promise by the State to forego charging him with certain crimes, but he offers no evidence in the record that such was the case. Defense counsel's belief is not evidence.

The court's ruling in no way inhibited the defense from arguing its theory of the case: that there was no murder, but rather an accidental killing by Matthew Tremblay. [RP 2017] Counsel argued that the State witnesses were not credible. [RP 2018] He specifically talked about Leville—that he did not come forward with his information but was arrested at a casino [RP 2035], that he got a plea agreement, reduction in sentence, and reduction in charges [RP 2036], that he testified about events he never told the police about [RP 2039], that he made up testimony to help his girlfriend [RP 2040], that he was lying about the gun he said Maddaus possessed [RP 2049], and that he was just plain lying [RP 2063].

The court did not improperly limit Maddaus' cross-examination of Leville as to bias. It did not limit his cross-examination as to bias at all.

> 4. The record contains nothing to suggest that the State had any responsibility for the letter containing confidential attorney-client information, that the privilege was compromised, or that Maddaus suffered any prejudice because the prosecuting attorney's office received the document. The case should not be remanded for an evidentiary hearing.

Maddaus maintains in his opening brief that the fact that a copy of a letter he wrote to his attorney is "presumed governmental misconduct" and the court should have held a hearing to determine how the copy came to be made and sent to the prosecuting attorney's office. Opening Brief at 42. He is asking this court to remand to the Superior Court for such a hearing.

Maddaus does not provide any authority for either of his assertions that governmental misconduct is presumed or that a trial court is required to hold a hearing on an issue simply because the defendant asks for one. He cites to Harvey v. Obermeit, 163 Wn. App. 311, 261 P.3d 671 (2011), a case which addressed valid service of pleadings in a civil case. Division I of the Court of Appeals found that a court "may" abuse its discretion if it fails to hold an evidentiary hearing when an issue of fact exists, presented

by affidavits, which require the court to make a determination of witness credibility. Id., at 327. He further cites to State v. Diemel, 81 Wn. App. 464, 914 P.2d 779 (1996). In that case, Diemel was accused of third degree rape. His victim was in counseling for several months afterward, and at trial he moved the court to review the therapist's records in camera and order disclosure of any which would help his defense, which was consent. The trial court denied the motion. The Court of Appeals began its discussion with the general rule that whether to "hold an in camera hearing to determine the scope of discovery of privileged records is that the decision is within the discretion of the trial court." Id., at 467. The trial court was affirmed. Neither of these cases stand for the proposition that the court is required to conduct an evidentiary hearing when a dispute arises.

Maddaus' argument presumes intentional misconduct on the part of the government. The record does not support that presumption. The copy of Maddaus' letter was mailed to the prosecutor's office without a return address and received on December 14, 2010. [CP 283] The letter was written in August or September. [12/21/10 RP 54] When the receptionist—whose job duties included opening incoming mail and distributing it

appropriately—realized what it was he notified the prosecutor handling this case. [CP 290] A copy was made for the defense attorney, the original was sealed and kept in a secure place [CP 283, 290], and it was, pursuant to the court's order, given to the Sheriff's department to hold as evidence on December 21. [12/21/10 RP 75] The prosecutor did not read it. [CP 283].

Defense counsel had a long list of questions he wanted answered and he had definite opinions. [12/21/10 RP 50-56] What is not clear is why he was unable to investigate these questions on his own. If he had uncovered any wrong-doing, he could have filed a motion to dismiss based on that evidence and the court would have been justified in ordering an evidentiary hearing. But all he presented to the court were his suspicions; he wanted the court to somehow investigate those suspicions for him. He has presented no authority that a court has an obligation to investigate the defense case for the defendant.

Maddaus cites to State v. Garza, 99 Wn. App. 291, 994 P.2d 868 (2000), to support his contention that it was an abuse of discretion for the court to refuse to hold a hearing. In Garza, the record established that officers in the jail had conducted intensively thorough searches of the cells and the inmates after they

discovered evidence of an attempt to escape. In doing so they seized the inmates' personal property, including material covered by the attorney-client privilege. The trial court found that the material had been withheld for a substantial period of time and at least one officer had read some of the material. Three of the inmates brought motions to dismiss their cases. The motions were denied. Id., at 293-295. The Court of Appeals remanded for further fact-finding. Id., at 302.

Maddaus' situation is different from that in Garza. He brought his motion pursuant to CrR 8.3(b) [CP 308], as did the defendants in Garza. That rule provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The Garza court noted that to support a dismissal the defendant must show two things; (1) arbitrary action or governmental misconduct, and (2) resulting prejudice which affected his right to a fair trial. "Dismissal of charges is an extraordinary remedy available only when there has been prejudice

to the rights of the accused which materially affect his or her rights to a fair trial. . . . Dismissal is not justified when suppression of evidence will eliminate whatever prejudice is caused by the action or misconduct." Garza, 99 Wn. App. at 295 (internal cites omitted).

Maddaus has not shown any arbitrary action or misconduct on the part of any State agent. He had all kinds of theories, but it seems unlikely that if a jail employee had copied and read his document that employee would have waited two or three months to anonymously mail it to the prosecutor. It is more likely that Maddaus, who had shown himself to be willing to tamper with evidence and create what he hoped would be impediments to his trial (see the following section of this argument), arranged to send the letter himself in an attempt to compromise the prosecution.

Maddaus asserts that if there was State action, prejudice is presumed. He cites to State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963). In Cory, the jail authorities had placed microphones in the conference room where inmates met with their attorneys. The conversations were listened to and recorded. Id., at 372. The court there presumed prejudice because there was no way to know exactly what had been overheard. State v. Baker, 78 Wn.2d 327,

333, 474 P.2d 254 (1970). That is not the case with Maddaus. The trial court knew exactly what confidential information was at issue.

Before a court can find prejudice, there must be a nexus between official misconduct and the rights of a defendant. Baker, 78 Wn.2d at 333. Even if there had been misconduct, which the State denies, there must be some right of the defendant affected by the misconduct. Id., at 332. Maddaus has failed to show any prejudice. He has not pointed to a single instance in the record where his right to a fair trial was impinged upon by the prosecutor receiving that letter. Even had some State actor read the letter, there is no per se rule that "any government intrusion into private attorney-client communications establishes a Sixth Amendment violation of a defendant's right to counsel. Garza, 99 Wn. App. at 298, citing to Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977).

In State v. Webbe, 122 Wn. App. 683, 94 P.3d 994 (2004), Webbe's attorneys had waived the attorney-client privilege without his permission in a competency proceeding. The court and counsel for both sides took scrupulous care to isolate the disclosures and none of the information was used in the actual hearings. The court there found that a "presumption of prejudice arises when the

process loses its character as a confrontation between adversaries." Id., at 694. Webbe argued that prejudice should be presumed because it would be difficult for him to prove whether the State gained any advantage from seeing the material. The court said:

> This argument is unconvincing. Webbe cites no authority for the notion that the difficulty of establishing prejudice is relevant to whether such a showing is required at all. Further, we disagree with Webbe's premise. If the prosecutors had made use of the notes in any fashion, it would likely be evident from the record.

Id., at 697.

Maddaus has not even claimed that his case was prejudiced. He relies, without justification, on a presumption of prejudice. He has failed to show either government misconduct or prejudice. The court did not abuse its discretion by refusing to hold a hearing where Maddaus had nothing but suspicions and had done no investigation of his own.

> 5. Maddaus did not object to the admission of the recorded calls at trial and cannot raise it for the first time on appeal. Further, he was the person who purposely circumvented the safeguards in place on the jail phone system to prevent inmates from speaking to third parties who did not hear the announcement that the call was being recorded, and therefore should be precluded from arguing error on appeal.

Telephone calls made by jail inmates are recorded. Both the inmate and the person receiving the call hear a recorded announcement that the call is being recorded. If either party does not agree to being recorded, he or she can simply terminate the call. [RP 1464-66] The phone system was designed to prevent three-way calls by terminating the call when it detected a second number being dialed. However, if someone blew into the receiver while that second number was being dialed, the system would not detect the second call and would not disconnect. [RP 1509-10] Maddaus did exactly that. He called Chelsea Williams, who then dialed Theodore Farmer while Maddaus blew into the phone to mask the sound of the dialing. [RP 1504-05, 1507] Naturally, Farmer did not hear an announcement that the call was being recorded.[4] Maddaus also spoke to Grimes and Leville, by calling Williams and having her hand the phone to them, and because Maddaus was not supposed to talk to them, they used false names.

[4] Farmer testified that he knew the calls were being recorded. [RP 1248] Maddaus told him during one of the calls that "these f----- phone calls are recorded all the way, right?" [RP 1476]

[RP 1082-83, 1427] Obviously, the announcement that the call was being recorded was not played.[5]

RCW 9.73.030 provides:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communications regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
>
> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

The statute then lists some exceptions, not applicable here, and in subsection (3) provides that if a party to a communication hears an announcement that the communication is being recorded, consent will be presumed. Thus the announcement at the beginning of each telephone call made from the jail.

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[5] Leville testified that he knew the conversation was being recorded. [RP 1083] Grimes had been in jail and would have known calls from the jail were recorded, particularly since Maddaus instructed them to use false names. [RP 1200,1203, 1205]

RCW 9.73.050 prohibits the use of information obtained in violation of RCW 9.73.030:

> Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

While it is true that a defendant has standing to assert the rights of other persons under this statute, State v. Williams, 94 Wn.2d 531, 546, 617 P.2d 1012 (1980), there are several reasons Maddaus cannot claim the protection of these statutes.

First, Maddaus did not object at trial to the admission of the recorded telephone conversations. [RP 1468] Generally, arguments not raised at the trial level will not be considered on appeal unless they concern a manifest error affecting a constitutional right. RAP 2.5(a), State v. Sengxay, 80 Wn. App. 11, 15, 906 P.2d 368 (1995). The prohibition against recording a person without his consent is statutory, not constitutional. A defendant waives his ability to appeal the admission of a recording

made without consent if he fails to object at trial. Id., citing to State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). This court should not consider his argument.

Second, these telephone calls were not private communications. To find a violation of the privacy act, "[t]here must have been (1) a private communication transmitted by a device, which was (2) intercepted by use of (3) a device designed to record and/or transmit, (4) without the consent of all parties to the private communication." State v. Christensen, 153 Wn.2d 186, 192, 102 P.3d 789 (2004). Because the statute does not define a private communication, the courts have resorted to the dictionary definition, which is "belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public." State v. Townsend, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (citing to other cases and Webster's dictionary).

A communication, then, is private when the parties expect that it is private and when that expectation is reasonable. Christensen, 153 Wn.2d at 193. Factors to consider in determining the reasonableness of the expectation of privacy include the length

and subject of the conversation, the location and the potential presence of third parties, the role of the non-consenting party, and the relationship of that party to the one who consented. Id. The Christensen court repeated a longstanding principle that the mere possibility of technological intrusion is not enough to make a communication non-private. Id.

In this case there was more than the possibility of recording. Maddaus knew the calls were being recorded because he heard the announcement. Williams heard the announcement. Both Farmer and Leville testified that they knew the conversations were being recorded. Grimes had been in jail, can be presumed to know that phone calls from the jail are recorded, and in any event would have known because there would be no other reason for Madduas to instruct her and Leville to use false names. Nobody in these conversations had any expectation of privacy, let alone a reasonable one. Therefore the conversations were not private and do not fall under the protection of the Privacy Act.

Finally, even if the admission of these recordings was error, if there were ever an instance of invited error, this would be it. The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. "This court will deem an

error waived if the party asserting such error materially contributed thereto." In the Matter of the Dependency of K.R. v. DSHS, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). Maddaus deliberately blew into the receiver to prevent the phone system from disconnecting his call, knowing the announcement about the call being recorded would not be made. He certainly knew that Leville and Grimes would not hear it. Farmer, Leville, and Grimes would not have been recorded at all had Maddaus not flouted jail rules and manipulated the phone system. To permit him to benefit from his misconduct would be a major miscarriage of justice.

6. The prosecutor did not commit prosecutorial misconduct in closing argument.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the

jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. State v. Russell, 125 Wn.2d 24, 86, 87, 882 P.2d 747 (1994). *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991).

a. Initial closing argument.

Maddaus asserts that the prosecutor was expressing a personal opinion about Maddaus' credibility when he said:

> Any bias or prejudice that the witness may have shown, and you can consider the reasonableness of witness's statements in the context of the other evidence. Consider, for example, Mr. Maddaus' testimony that he—what did he say? He asked to put the handcuffs on Mr. Peterson? And Peterson did? I mean, that's poppycock.[6] That's unreasonable under the law. That's crazy. Nobody voluntarily puts handcuffs on themselves, and besides, we have evidence, of course, that Mr. Peterson was literally under the gun at the time the cuffs were put on him.

[RP 1984] It is difficult to see how this is an expression of a personal opinion. That is a general observation about the nature of the defendant's testimony, placed in the context of that testimony. It must be clear and unmistakable that the prosecutor is expressing a personal opinion before the remark will be considered a personal opinion. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). A prosecutor may make inferences from the evidence, "including inferences as to why the jury would want to believe one witness over another." State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). That applies to the credibility of the defendant. Id., at

[6] Poppycock: empty talk or writing; nonsense. Merriam-Webster's Collegiate Dictionary 906 (10th ed. 1998)

291. Referring to specific evidence which demonstrates that the defendant lied is not expressing a personal opinion, even if the prosecutor uses the words "poppycock," "unreasonable," and "crazy."

b. Rebuttal argument.

The remaining remarks to which Maddaus objects occurred during rebuttal argument.

> Counsel for the accused's argument was a reminder of the distractions that sometimes people create when they're passengers in a vehicle. You're driving down the highway, and you're focused on paying attention to what's going on in front of you and keeping your eye on the rear-view mirror, and someone says, "Look over there. Look over there." That's what the argument was about. It was all about everything but the proof of Mr. Maddaus' guilt. It was all about all these other people, Tremblay and Rivera and this and that, nothing about the fact of Mr. Maddaus himself.

[RP 2075-76]

> Theodore Farmer testified about this would-be alibi. He also testified that there's a lot of people in the drug world like him. There's people that will do things for him. Ladies and gentlemen, this defendant was the only person with a motive. He was the only person that got a disguise, that had his car painted, that got a false ID, that was on the run, and developed a false alibi, the only one that did those things to cover up his guilt. What you heard in the defense case, those witnesses from the defense in the defense argument, was the last gasp of this defendant, the last gasp, the last effort to try to convince you of what he's not. The last gasp. Nothing else would work, but according to

> Mr. Maddaus, "You know how smart I am." And he got people that he's associated with that he can reward to come before you ladies and gentlemen, because he's smarter than you, and he's trying to get away with murder. Don't let that happen.

[RP 2076-77].

> I'm not suggesting Mr. Wilson of wrongdoing; I'm just suggesting that Mr. Wilson, like Chelsea Williams, was duped into being this defendant's agent. "I've got somebody that's got this information." "Oh, we'll go talk to that person."

[RP 2074]

Counsel for the defense had just spent a considerable amount of time, 44 pages of transcript, calling the State witnesses, particularly Tremblay, liars. For examples see RP 2020-21, 2023-25, 2028, 2034. The remarks made by the prosecutor neither disparaged the defense counsel or his team. He did paint the defendant in a distinctly unflattering light, but the entire purpose of the trial was to prove that Maddaus committed first degree murder as well as a number of lesser offenses. Everything he said was based upon the evidence or a response to the defense closing argument. Maddaus' characterization of these comments on appeal is not justified by the record. Disparaging a defense counsel's

argument is significantly different from disparaging the defense counsel; that is not a prohibited attack on counsel.

Even if the prosecutor's remarks had been improper, they are not grounds for reversal where provoked by the defense counsel or are a pertinent reply to counsel's statements. State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006), citing to Russell, 125 Wn.2d at 86. Further, even if any of the comments were error, the harmless error applies when a prosecutor's remarks implicate any constitutional right other than to a fair trial. State v. Toth, 152 Wn. App. 610, 614-15, 217 P.3d 377 (2009). An error is harmless when a reviewing court is convinced beyond a reasonable doubt that the error did not affect the verdict. Id., at 615. The State bears the burden of establishing that the error was harmless. Id.

The jury had heard many witnesses over a number of days. There was a huge number of exhibits. Closing arguments took all morning and part of the afternoon. [02/02/11 RP] It is simply not reasonable to believe that these remarks would have affected the verdict.

Maddaus did not object to any of the remarks which he now claims are prejudicial. None of them were improper, but even if they had been, an objection and a curative instruction would have

eliminated any prejudice. His argument on this issue is without merit.

> 7. The State concedes that the Maddaus' two attempts to convince Theodore Farmer to give him a false alibi count as one unit of prosecution and only one of the two convictions for witness tampering against Farmer should stand.

Maddaus was convicted of two counts of tampering with a witness for calls he made to Theodore Farmer on November 26 and December 16, 2009. [CP 22-23, 441-42, 459-60]

A defendant may not be convicted more than once for the same offense. What constitutes the "same offense" depends upon the unit of prosecution for that offense. State v. Thomas, 158 Wn. App. 797, 800, 243 P.3d 941 (2010), citing to State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010). Multiple convictions for the same offense would expose a defendant to double jeopardy, which violates both the Washington and the United States constitutions. Claims of constitutional violations are reviewed *de novo*, as are determinations of the unit of prosecution for a particular offense. Thomas, 158 Wn. App. at 800.

In Hall, the defendant had called or attempted to call the victim more than 1200 times in an attempt to convince her to either testify falsely or not testify at all. Hall, 168 Wn.2d at 729. He was

charged with four counts of tampering with a witness and convicted of three. Id. Hall argued, and the Supreme Court agreed, that the statute intended to criminalize the attempt to convince the witness, not the length of the process or number of particular acts it took to do so. Id., at 731. Under the facts of that case, the Hall court found that the 1200-plus calls comprised only one unit of prosecution and reversed two of his convictions. In Thomas, the defendant made 29 calls from the jail to the victim, trying to convince her to change her testimony. The Thomas court also found these to be a single course of conduct, forming only one count of witness tampering. Thomas, 158 Wn. App. at 802. The Hall court did leave open the possibility that under some circumstances multiple attempts to convince a witness to change his or her testimony could constitute more than one unit of prosecution, Hall, 168 Wn.2d at 737-38, but the State agrees here there is no evidence of any factors that would overcome the general rule.

> 8. Theodore Farmer was a potential witness in the case against Maddaus, and thus Maddaus' request that Farmer provide him with a false alibi constituted witness tampering.

In November of 2009 Farmer was arrested in Pierce County for possession of methamphetamine, and the Thurston County Drug Task Force had offered him the opportunity to work for it. He was to become an informant for the task force and make three controlled buys; in exchange, his sentence in Pierce County would be reduced to the time he had already served. [RP1235-36] Farmer offered up the name of Robert Maddaus. [RP 1235] To fulfill his obligation, he made a telephone call to Maddaus on November 15, 2009, in an effort to purchase methamphetamine. [RP 1238] Farmer was unable to reach Maddaus, but he received a return call on the evening of the 15th. Maddaus told Farmer he couldn't talk right then but that he would either talk to Farmer in person or he'd be in jail. [RP 1240-41]

As part of the investigation, law enforcement officers obtained the phone records of Maddaus' accounts. The calls were scrutinized thoroughly and testimony was offered about many of them, beginning on November 13. [RP 1448-1460] It is a reasonable assumption that Farmer would at some time have been contacted about the call he made to Maddaus and the return call he received. Because Maddaus also called Farmer from the jail, a call which was recorded, investigators were led to Farmer directly.

Nevertheless, anybody who called Maddaus or received a call from him in the days immediately preceding and the time immediately after the murder was a potential witness. Maddaus had reason to think the police would eventually be speaking to Farmer, which was most likely the reason he chose him to set up a false alibi, knowing that he could get to Farmer before the police would.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.* (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas,119 Wn.2d at 201. "Circumstantial evidence and direct evidence are equally reliable . . . " State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). There was sufficient evidence that Farmer was a potential witness to satisfy the elements of RCW 9A.72.120.

9. The trial court correctly refused to instruct the jury on third degree assault as an inferior-degree offense of second degree assault.

The State does not dispute a defendant's right to an inferior-degree instruction when the law and the facts of the case permit. Amendments V, VI, and XIV of the federal constitution require the trial court to give a requested instruction when the lesser included offense is supported by the evidence. Vujosevic v. Rafferty, 844 F.2d 1023 (1988). This right protects a defendant who might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because it wishes to avoid setting him free. Keeble v. United States, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 93 s. Ct. 1993 (1973).

Under current Washington law, the defendant's right to an inferior-degree instruction is, in addition to his federal rights, a statutory right. RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

See also State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). This right applies when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). An inference that only the lesser offense was committed is justified "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" Id., at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

The party requesting the inferior-degree instruction must point to evidence that affirmatively supports the instruction and may

not rely on the possibility that the jury will disbelieve the opposing party's evidence. Fernandez-Medina, 141 Wn.2d at 456; State v. Leremia, 78 Wn. App. 746, 755, 899 P.2d 16 (1995).

A trial court's refusal to give a lesser included offense instruction is reviewed for abuse of discretion when the decision is based upon the facts of the case. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds*, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997). When there is evidence to support the defendant's guilt solely on the lesser charge, the trial court's refusal to instruct on the lesser charge compromises a defendant's ability to present his theory to the jury and can constitute reversible error. State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981).

The court in Maddaus' trial declined to give the inferior-degree instruction based on the facts of the case. "The court believes that based on the fifth Amended Information that there is no evidence of criminal negligence or assault in the fourth degree, that it's simply assault in the second degree or not guilty. So again, I decline to give that." [RP 1952] This ruling is reviewed for abuse of discretion. Lucky, 128 Wn.2d at 731.

In Fernandez-Medina, 141 Wn.2d at 454-55, the court explained the difference between inferior-degree offenses and lesser-included offenses, concluding that they differ only with respect to the legal prong of the test. In that case, both the State and the defendant had agreed that the legal component of the test was satisfied. Id., at 455. That is the situation here. The State agrees that third and fourth degree assault are inferior degrees of second degree assault. The State disagrees that there was evidence that Maddaus committed only third or fourth degree assault.

Assault in the third degree, RCW 9A.36.031, can be committed in several ways. The only two that apply to the facts of this case are subsection (1)(d)—negligent infliction of bodily harm to another by means of a weapon or other instrument or thing likely to produce bodily harm, and (1)f)—negligent infliction of bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. Fourth degree assault is simply an assault that doesn't rise to the level of first, second, or third degree. RCW 9A.36.041. Abear testified that Maddaus hit her in the head with the butt of a gun, sprayed her with bear mace, ripped off her clothes, shot her with a paintball gun, and aimed the

firearm at her foot and pulled the trigger, although the weapon did not fire. [RP 654-55] Maddaus testified that Abear was holding a can of bear mace. He grabbed it and it accidentally went off. [RP 1824]

Before a defendant is entitled to an inferior-degree instruction, "[o]ur case law is clear . . . that the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456. Maddaus' argument is the latter. Only he and Abear were present and only the two of them testified about what happened during the assault. He argues that the jury might have believed that he inflicted substantial pain that lasted long enough to cause considerable suffering, or that he used a weapon or other instrument likely to produce bodily harm. Opening brief at 60-61. But this simply relies on the jury disbelieving the State's evidence as well as his own testimony. There was no evidence presented to affirmatively support third degree assault, or fourth degree assault for that matter. Snatching the mace from Abear's hand was not a "scuffle." Opening brief at 58. It was not an assault at all. Based on the evidence presented,

the court was correct. Maddaus was guilty of second degree assault or nothing at all. [RP 1952]

In State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009), this court found it was error to instruct the jury on third degree rape where the defendants were on trial for second degree rape. "The trial court may not instruct on third degree rape as an inferior degree offense to second degree rape when the defendant contends that the intercourse was consensual and the victim testifies that the intercourse was forced." Id., at 71-72. Here Maddaus testified that there was no assault and the victim testified to what would be second degree assault. The trial court was correct to deny the requested inferior-degree instruction.

Maddaus argues that "even if one juror believed that the paintball gun did not qualify under the statutory definition," he could have been convicted of third-degree assault if the jury had been so instructed. Opening brief at 61. This supports the State's position that he was relying on the jury disbelieving the evidence that was presented, not that there was affirmative evidence of third degree assault. His argument is more an insufficiency of the evidence than that there was evidence to support the giving of an inferior-degree instruction. Maddaus further argues that the State never proved

that the pistol was an operable firearm, as defined in Instructions 30 and 32. [CP446, 448] However, he does not explain how the operability of the firearm is relevant to the degree of assault, as opposed to the firearm enhancement. Again, that is a sufficiency of the evidence argument.

In his brief, Maddaus conducts a Gunwall[7] analysis and reaches the conclusion that the Washington constitution protects a defendant's right to have the jury consider inferior-degree offenses. The State does not necessarily disagree. Maddaus has not explained, however, how RCW 10.61.003 fails to provide a constitutionally acceptable right, or how the statute falls short in protecting that right. If he is arguing that an inferior-degree instruction must be given any time a defendant requests one, whether it is appropriate or not under the authorities listed above, the State does disagree. He has presented no compelling argument for that position.

> 10. A unanimity instruction pertaining to the second degree assault and attempted kidnapping charges was unnecessary because the acts alleged to constitute the assault formed a continuing course of conduct, and because the kidnapping charge could only have pertained to Abear.

[7] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Maddaus argues that a unanimity instruction should have been given pertaining to the charges of second degree assault and attempted kidnapping. The adequacy of jury instructions are reviewed de novo as a question of law. State v. Boyd, 137 Wn. App. 910, 922, 155 P.3d 188 (2007). Instructions are sufficient when they are supported by substantial evidence, permit the parties to argue their theories of the case, and read as a whole, correctly inform the jury of the applicable law. Id.

When the State charges a defendant with a single count of a crime, but presents evidence of more than one act that would constitute the crime, the court must instruct the jury that it is required to unanimously agree on an act that proves the crime beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to give such an instruction is constitutional error that can be raised for the first time on appeal. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Maddaus did not request a unanimity instruction at trial. [CP 388-396]

Where the acts constituting the crime form a continuing course of conduct, however, a unanimity instruction is not required. To determine whether the acts constitute "one continuing offense",

the facts are to be evaluated in a commonsense manner. Petrich, 101 Wn.2d at 571; *see also* State v. Boyd, 137 Wn. App. 910, 923, 155 P.3d 188 (2007). To make this evaluation, the court should consider "(1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

a. Second degree assault charge.

Maddaus asserts that each weapon that he used to assault Abear constitutes a separate act and that the State should have been required to elect one as the basis of the charge. However, all of these instruments were used at the same time and place and against the same victim. Evaluated in a commonsense manner, this was one assault.

Further, by charging assault with a deadly weapon, and instructing the jury only that a firearm was a deadly weapon, the State narrowed the choice down to the striking with the butt of the gun and the attempt to shoot Abear in the foot. Even those two acts were so close in time that they form one continuous course of conduct and a unanimity instruction was not necessary.

b. Kidnapping charge.

Maddaus argues that the jury instructions were unclear as to whether Abear or Peterson was the victim of the attempted kidnapping. The jury instruction clearly shows otherwise.

Instruction 21, the to-convict instruction for attempted kidnapping, charged that the crime occurred on November 13, 2009. [CP437] All of the evidence was that the attempted kidnapping of Abear occurred on November 13. [RP 567, 573, 647] On the other hand, all of the evidence about the kidnapping of Peterson was that it occurred on November 15th and 16th. [RP 500, 534, 1334-36] No juror would have thought the attempted kidnapping charge referred to Peterson.

> 11. The jury instructions for second degree assault and attempted kidnapping contained all of the essential elements of the crimes and did not relieve the State of its burden to prove every element of the offenses beyond a reasonable doubt.

a. Deadly weapon definition.

The instructions given to the jury did not define "deadly weapon," except for Instruction 30, which used the language of WPIC 2.06: A firearm, whether loaded or unloaded, is a deadly weapon. [CP 446] Maddaus complains that this somehow relieved the State of the duty to prove all elements of second

degree assault beyond a reasonable doubt. He hypothesizes that the jury could have been confused about whether the paintball gun was a deadly weapon and convicted him even if they did not believe the firearm was a deadly weapon. On the contrary, the instructions make it clear that the State was alleging that the firearm was the only deadly weapon used in the assault. Maddaus was charged in the information only with assaulting Abear with a semi-automatic pistol. [CP 22] It would have been error for the court to instruct that other instruments can be deadly weapons because that would have been putting an uncharged element before the jury. The jury was properly instructed that a firearm is a deadly weapon.

Maddaus further assumes in his argument that the State must prove that the firearm was operable, but he cites to no authority for that assumption. A firearm is a deadly weapon per se under RCW 9A.04.110(6), but the definition does not require that it be a working firearm. Hitting Abear with the butt of the gun did not require that it be capable of firing a bullet. The firearm must be operable to support a firearm enhancement, State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other*

grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), but not to support a second degree assault conviction.

b. Substantial step instruction.

Maddaus takes issue with Instruction 22 [CP438], which is WPIC 100.05 verbatim. That instruction says: "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." First, Maddaus asserts that this instruction differs from the definition of substantial step adopted by the court in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). What the Workman court said was, "We therefore hold it would be proper for a trial court to include in its instruction to a jury in the crime of attempt the qualifying statement that in order for conduct to be a substantial step it must be strongly corroborative of the actor's criminal purpose." Id., at 452. Workman did not change the WPIC, nor is WPIC 100.05 inconsistent with that case. State v. Gatalski, 40 Wn. App. 601, 613, 699 P.2d 804, *review denied*, 104 Wn.2d 1019 (1985).

Next, Maddaus applies the holdings in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000), that accomplice instructions must make it clear that the defendant participated in "the" crime rather than "a"

crime, to the substantial step instruction. However, those cases were addressing the intent and knowledge element of accomplice liability, not what constitutes a substantial step toward accomplishing "the" crime. Maddaus' argument is not applicable to the instruction at issue here.

12. Maddaus was not denied effective assistance of counsel.

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." Stenson, 132 Wn.2d at 705. As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id., at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." Strickland at 689; *See*

also State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Further,

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland at 694-95.

> "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." United States v. Necoechea, 986 F.2d 1273, 1281 (1993), *citing to* Strickland v. Washington, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the

effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the

adversarial process, not merely on the existence of error by defense counsel. Id. At 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

Maddaus argues that his counsel was ineffective in doing or failing to do something regarding a number of issues previously raised in his brief. Those asserted deficiencies include failing to object to the restraints Maddaus wore during trial, failing to object to the jail recordings where third parties were recorded, failing to object to certain jury instructions or to propose others, and failure to object to the prosecutor's closing argument. As argued above, there was no error, or it was harmless, and therefore there was no ineffective assistance of counsel.

The only new complaint in this section of Maddaus' brief is that his attorney should have objected to testimony from Detective Johnstone that Abear had given him a statement that was consistent with her trial testimony. He cites to several cases,

including Gochicoa v. Johnson, 118 F.3d 440 (5th Cir. 1997), United States v. Martinez, 176 F.3d 1215 (9th Cir. 1999), State v. Martinez, 105 Wn. App. 775, 20 P.3d 1062 (2001), and State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003). All of these cases, however, concerned hearsay statements of witnesses who did not testify at trial. In Maddaus' case, Abear testified and was subject to lengthy cross examination. [RP 671-688, 690]

Hearsay is defined in ER 801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Maddaus argues that the following constituted inadmissible hearsay:

> Q: (By Mr. Bruneau) Well, did you—the subject matter of your interview, was it similar to her testimony here at trial?
>
> A. Yes, it was.

[RP 826]

Maddaus asserts that this is hearsay which improperly bolsters Abear's testimony. The State disagrees. First, it isn't hearsay. Hearsay is a statement. ER 801. Detective Johnstone did not convey any statement made by Abear. He merely said that his interview of her covered the same subject matter as her

testimony. Second, it couldn't bolster her testimony because it didn't convey anything that she said. Third, the testimony was offered for the purpose of laying a foundation for Exhibits 110-114, which were photographs of Abear's injuries. [RP 826] Defense counsel properly did not object to that statement.

There is no merit to any of Maddaus' claims of ineffectiveness of counsel.

> 13. The firearm enhancements were supported by the verdicts of the jury. Even if that were not true, he did not object at the trial court level and because he cannot establish a manifest error affecting a constitutional right, this court should not address his claim.

RCW 9.94A.533 provides for a term of confinement, in addition to the standard range sentence, to be imposed when the defendant was armed with a firearm (subsection (3)) or a deadly weapon other than a firearm (subsection (4)). A sentencing enhancement must be based upon a jury finding. State v. Walker-Williams, 167 Wn.2d 889, 897, 225 P.3d 913 (2010). Maddaus received three firearm enhancements based upon special jury verdicts that he was armed with a firearm at the time he committed the murder, the second degree assault, and the attempted kidnapping. [CP 452, 455, 457]

For first degree murder and attempted kidnapping, the charging language alleged that "the defendant was armed with a deadly weapon, a firearm." For second degree assault the charging language read: "[T]he defendant was armed with a deadly weapon, a firearm, to wit: a semi-automatic pistol." [CP 21-22] The murder and assault charges referenced RCW 9.94A.533(3), which specifies the time to be added when the defendant was armed with a firearm. The attempted kidnapping charge references RCW 9.94A.602, which was recodified by ch. 28 § 41, LAWS OF 2009 as RCW 9.94A.825. That statute provides;

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having

> a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

In each of the special jury verdicts, the jury answered "yes" to the question whether, at the time of the commission of the named offense, Maddaus was "armed with a deadly weapon—firearm, as charged in count . . . ". [CP 452, 455, 457] The jury was given the following instructions:

> Instruction No. 31
>
> For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes in Counts I, III, and IV.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

[CP 447]

> Instruction No. 32
>
> A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

[CP 448]

In the closing instruction, No. 33 [CP 449-50], the jury was told to answer special verdict forms if it found the defendant guilty

of the corresponding charges, but it did not refer either to firearms or deadly weapons.

Maddaus argues that the firearm enhancements were improperly imposed because he was not charged with a firearm enhancement, but only a deadly weapon enhancement, and the jury was not instructed on firearm enhancements, but rather deadly weapon enhancements.

The State does not dispute that a defendant must be given notice in the charging language that the firearm enhancement is being sought. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). In this case, each of the relevant counts charged that Maddaus was armed with a firearm. Counts I and IV cited to RCW 9.94A.533(3), which specifies the additional time to be imposed for a firearm enhancement. Only Count II cites to what is now RCW 9.94A.825, which is set forth above. There cannot be any serious doubt that Maddaus had notice that the State was seeking a firearm enhancement on all three counts.

The most recent authority from the Supreme Court regarding firearm and deadly weapon enhancements comes from State v. Walker-Williams, *supra.* The holding came down to this:

> [O]nly three options exist. First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies.

Id., at 901.

Maddaus' position apparently is that because the words "deadly weapon" were included in the charging language and the special verdicts, the court must stop reading there and ignore the word "firearm." That is elevating form over substance to an absurd degree. A firearm is a category of deadly weapon and the verdict forms made it clear the jury was finding that the weapon was a firearm. In the cases consolidated in Walker-Williams, the verdict forms only used the words "deadly weapon." Walker-Williams, 167 Wn.2d at 893-94, 898. The State agrees that if the word "firearm" had not been on the special verdict forms, only the lesser deadly weapon enhancement would apply. But there can be no doubt the jury found that Maddaus was armed with a firearm in each of the three counts. The jury was instructed on the definition of firearm and there was evidence of a firearm in all three offenses.

Maddaus further argues that because the jury was not instructed as to the meaning of the word "armed" the State was

relieved of the obligation to prove beyond a reasonable doubt that Maddaus was armed at the time. However, even without the instruction, the State did prove that Maddaus was armed.

A person is armed "'if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. . . . There must be a nexus between the defendant, the crime, and the weapon." State v. Gurske, 155 Wn.2d 134, 137-38, 118 P.3d 333 (2005) (internal cites omitted.) The evidence pertaining to the first degree murder charge showed that Maddaus held the gun in his hand, it fired, and Shawn Peterson died as a result of the bullets fired from the gun into his body. There can be no question as to possession, nexus to the crime, and operability of the firearm. Regarding the second degree assault charge, Maddaus held the gun in his hand and hit Abear with it. As to the attempted kidnapping, he held the gun in his hand and used it to control Abear. There is no possibility that the jury was confused about whether Maddaus was armed. The evidence did not even suggest a situation which would create doubt as to whether Maddaus was armed. The State was not, in fact, relieved of its duty to prove that he was armed.

Maddaus did not object below to the instructions, or lack of instructions, that he now challenges. In general, an appellate court does not review claims of error not raised before the trial court. RAP 2.5(e), State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To raise a claim for the first time on appeal, "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" Id., citing to State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). To constitute a manifest constitutional error there must be actual prejudice—"practical and identifiable consequences in the trial of the case.'" Id., quoting Kirkman, 159 Wn.2d at 935. Even a manifest constitutional error can be harmless. Id. The State bears the burden of establishing that the error is harmless.

Even if there was error, which the State does not concede, none of Maddaus' arguments demonstrate that he was in any way prejudiced. The firearm enhancements were clearly based upon jury findings that he was armed, and with a firearm. This court should not address this claim at all, but even if it finds a manifest constitutional error, it was harmless.

14. Both of Maddaus' prior strike offenses were proved by the State.

Maddaus first argues that his 1995 conviction for possession of a controlled substance with intent to deliver, while armed with a firearm, to which he pled guilty, does not constitute a most serious offense, or strike, under RCW 9.94A.030(u). That subsection applies to felony convictions prior to December 2, 1993; the State agrees that this provision does not apply. RCW 9.94A.030(31)(t) includes among most serious offenses "[a]ny other felony with a deadly weapon verdict under RCW 9.94A.825." He argues that because there was no statute with that number in 1995, his 1995 conviction cannot be a verdict pursuant to RCW 9.94A.825. He further argues that a finding of guilty entered pursuant to a plea of guilty is not a verdict.

In 1995, the definition of a most serious offense was codified as RCW 9.94A.030(23). It included as a strike "[a]ny other felony with a deadly weapon verdict under RCW 9.94A.125." Former RCW 9.94A.030(23)(t). RCW 9.94A.125 was recodified by ch. 10 § 6, LAWS OF 2001, as RCW 9.94A.602. RCW 9.94A.602 was recodified by ch. 28 § 41, LAWS OF 2009, as RCW 9.94A.825. In all of these codifications, the language was identical to the present

RCW 9.94A.825, which is set forth in the preceding section of this argument. Therefore, the law applicable has remained exactly the same since 1995, with the exception of the number at the top of the statute. His 1995 conviction qualified as a most serious offense in 1995 and that designation has not changed.

Maddaus also argues that because he pled guilty in 1995, there is no verdict to qualify under RCW 9.94A.825. That section is titled "deadly weapon special verdict—definition." It provides two ways for a court to impose an enhancement. "The court shall make a finding of fact . . . " or the jury finds by special verdict that the defendant was armed with a deadly weapon. Therefore, a finding by the court is a verdict for the purpose of RCW 9.94A.030(31)(t). On the Judgment and Sentence for the 1995 conviction, the trial court entered a finding that Maddaus was armed with a firearm. [CP 499]. That 1995 conviction counts as a strike.

Maddaus asserts that the State failed to prove that the person convicted in that 1995 cause was him, arguing that the State must prove more than that the names are identical. He asks the court to disregard the rule of State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986), which is that identity of names is sufficient

unless the defendant declares under oath that he is not the person named in the prior conviction. Id., at 190. He argues that this rule was not meant to apply where a life sentence without the possibility of parole is at issue, but the context of Ammons, to which he refers in his opening brief at page 103, was discussing the constitutionality of the prior convictions. Id., at 187.

In any event, the State did provide more than a similarity of names. The 1995 Judgment and Sentence contains Maddaus' date of birth, 09/18/69, the same date of birth on the charging document in the present case. [CP 21, 499] There is also a Washington state identification number on the charging document of 13188161; on the 1995 Judgment and Sentence it is 131188161. Id. Clearly one or the other is a typographical error, but they are so similar that it boggles the mind to think that they refer to two different people. Finally, of course, there are fingerprints on the final page of the 1995 Judgment and Sentence. [CP 505] Maddaus signed on two pages of that document. [CP 504-05] There is much more than an identity of names to show that Maddaus was the person convicted in 1995.

Finally, Maddaus contends that he did not waive his right to have the State prove his prior strike offenses. That argument does not seem to be relevant, since the State provided certified judgments and sentences for both. [CP 499-507, 509-14] It's unclear what more he expected the State to produce.

At the sentencing hearing, the prosecutor referred to documents he filed the day before containing a summary of Maddaus' criminal history and the attached certified judgments and sentences for his prior offenses. [CP 463-540] The court asked, "Is there a dispute as to his criminal history?" Defense counsel answered, "No, Your Honor, there's not." Maddaus now claims his attorney was not speaking for him and thus he didn't waive his right to have the State prove his criminal history, and that this language isn't sufficient to do so in any event.

RCW 9.94A.530(2) provides:

> In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537 [which refers to aggravating factors]. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material

> facts, the court must either not consider the fact or grant an evidentiary hearing on the point. . . .

Any court is justified in believing that defense counsel speaks for his client. That is his job. Counsel in this case had been speaking for Maddaus for more than a year. And while Maddaus is correct that he has no obligation to volunteer information, when a judge asks flat out if he disputes the criminal history presented, and his counsel answers that he does not, the court is further justified in taking that as an acknowledgment of his criminal history. However, since certified judgments and sentences of his prior convictions were filed, they were proved independently of his attorney's statements. "The best evidence of a prior conviction is a certified copy of the judgment." State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010).

> 15. The United States Supreme Court, the Washington Supreme Court, and the Washington Court of Appeals have all determined that a defendant's equal protection rights are not violated when the sentencing judge, rather than a jury, determines that the defendant has prior convictions which require sentencing as a persistent offender. Maddaus presents no new argument that would justify overruling these precedents.

An offender's prior convictions are taken into account in determining the standard sentencing range for any given offense. RCW 9.94A.510. For each classification of crimes, there is a statutory maximum that the court may impose. RCW 9A.20.021. Even so, a persistent offender must be sentenced to confinement for life without the possibility of parole. RCW 9.94A.570. Persistent offenders are defined in RCW 9.94A.030(36). Relevant to this case, they include persons convicted of a most serious offense and who have two prior convictions for most serious offenses. RCW 9.94A.030(36(1)(i) and (ii). Most serious offenses are listed in RCW 9.94A.030(31) and include any class A felony or attempt to commit a class A felony, second degree assault, and any felony with a deadly weapon verdict. Maddaus had prior convictions for unlawful possession of a controlled substance with intent to deliver while armed with a deadly weapon [CP 499-505] and two counts of second degree assault [CP 509-14]. First degree murder, for which he was convicted in the trial at issue, is a class A felony, and attempted first degree kidnapping also qualifies as a most serious offense because it is an attempt to commit a class A felony. RCW 9A.40.020, RCW 9.94A.030(a).

The State filed a sentencing memorandum listing all of Maddaus' prior convictions, attaching certified copies of the judgments and sentences. [CP 463-540] At sentencing, the court asked defense counsel if there was a dispute as to the criminal history and counsel replied, "No, Your Honor, there's not." [02/08/11 RP 124]

In his opening brief, Maddaus discusses the difference between prior offenses which are elements of a crime and prior offenses which are aggravators that permit the court to enter a sentence beyond the standard range. He argues that there is no rational difference between the two, and therefore since the former must be pled and proved to a jury while the latter may be determined by the court alone, his equal protection rights have been violated. The United States Supreme Court, the Washington Supreme Court, and the Washington Court of Appeals all disagree with him.

The Washington Supreme Court has found a rational basis for differentiating between persistent offenders and nonpersistent offenders under the Persistent Offender Accountability Act. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996). "Initiative

593 easily passes a rational basis scrutiny and does not, therefore, violate either the federal or state equal protection clauses." Id.

Maddaus cites to State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008), which held that where a prior conviction alters the crime that may be charged—there communication with a minor, for which a first offense is a gross misdemeanor while a prior conviction of a sex offense raises it to a class C felony—that conviction is an element of the offense and must be proved to the jury. Id., at 194. An aggravator raises the statutory range for the punishment, but is not an element of the crime. Id.

The Persistent Offender Accountability Act passed constitutional muster in State v. Thorne, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996). The court there held that it did not violate equal protection guarantees. Id. That case was decided before Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Neither of those cases required that prior convictions which were not elements of the offense to be proved to the jury. "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." Blakely, 542 U.S. at 301. In State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007), the defendant argued that a jury should make the decision as to whether his out-of-state conviction was comparable to a most serious offense. The court disagreed, stating:

> This court has repeatedly rejected similar arguments and held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.

Id., at 418.

Division One of the Court of Appeals addressed the issue raised by Maddaus in State v. Langstead, 155 Wn. App. 448, 228 P.3d 799 (2010). That court concluded that the rational basis test applied, which Maddaus does not dispute, and found that there is a rational reason to distinguish between prior convictions as elements of the crime and as aggravators for sentencing purposes. Id., at 456-57. Maddaus argues that the purpose of both is to punish repeat offenders more harshly and protect the public and therefore there is no reason to distinguish between the two. Opening Brief at 109. But there are repeat offenders and there are repeat offenders. Some are worse than others. The Langstead court concluded that:

> [R]ecidivists like Langstead are not situated similarly to recidivists like Roswell. The recidivists whose prior felony convictions are used as aggravators necessarily must have prior felony convictions before they commit the current offense. This is not true of the recidivists Langstead uses as a comparison group.

Langstead, 155 Wn. App. at 456-57.

Maddaus attempts to place himself in the Roswell class, where the prior conviction is an element of the offense, by calling a most serious offense a "super-felony." Opening Brief at 109, 111. There is no such thing as a "super-felony." "This court has held that the distinction between life sentences with and without parole is not significant." State v. Rivers, 129 W.2d 697, 714, 921 P.2d 495 (1996), citing to In re Grisby, 121 Wn.2d 419, 427, 853 P.2d 901 (1993). The murder and attempted kidnapping charges are felonies under any circumstances. Maddaus' prior convictions did not elevate either crime to a higher classification, nor can he obliterate the distinction between elements and aggravators by inventing a new term for a third strike.

> [T]he purpose of the law is to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore

> public trust in our criminal justice system by directly involving the people in the process. RCW 9.94A.392. The rational basis test requires only that the statute's means are rationally related to its goal, not that the means are the best way of achieving the goal. . . The classification of criminals as "persistent offenders" based on having committed three serious offenses is rationally related to the goals enunciated in the Act. A state is justified in punishing a recidivist more severely than it punishes a first offender. . . .

Thorne, 129 Wn.2d at 771-72 (internal cites omitted).

Maddaus is a good illustration of the reason the Persistent Offender Act was passed. He is serving a life sentence without the possibility of parole because he refused to stop committing serious offenses, not because he committed a "super-felony."

> 16. Maddaus did not have the right, under the Sixth and Fourteenth Amendments, to have a jury determine that he had two prior convictions for most serious offenses.

Maddaus maintains that the jury must determine the existence of his two prior strike convictions before he can be sentenced to life in prison without the possibility of parole, and the failure to submit the question to the jury violates his right to a jury trial. To support this assertion he cites to Apprendi and Blakely. The problem is that he does not cite correctly to those cases. Apprendi held:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*.[8] *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. *With that exception*, we endorse the statement of the rule set forth in the concurring opinions in that case: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. . . . "

Apprendi, 530 U.S. at 490 (emphasis added).

Blakely clarified that the statutory maximum is the maximum sentence the judge could impose based only on facts either admitted by the defendant or found by the jury. It did not change the rule of Apprendi, but rather applied the rule:

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, . . .: "*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."

Blakely, 542 U.S. at 301 (emphasis added, internal cite omitted).

Maddaus asserts that this question is not controlled by Almendorez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). It doesn't matter whether that

[8] Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 C. Ct. 1215 (1999).

case applies or not. The issue *is* controlled by Apprendi and Blakely. The constitution does not require that the fact of a prior conviction be determined by a jury.

17. A life sentence without the possibility of parole does not violate a defendant's state due process rights.

Maddaus argues that his state constitutional right to due process has been violated because the judge, rather than the jury, determined that he had two prior convictions that counted as strikes. Our Supreme Court has held that the procedural requirements under the Sentencing Reform Act (SRA) satisfy procedural due process under both the federal and state constitutions. Manussier, 129 Wn.2d at 685. The Persistent Offender Accountability Act (POAA) was enacted as an amendment to the SRA and must be read in light of the SRA. Thorne, 129 Wn.2d at 763, 777.

The State is not going to spend the time to address Maddaus' argument that Wash. Const. art. 1, sec. 3 is more restrictive than its federal counterpart, because even if that is true, the courts have held that a judicial determination of a persistent offender sentence is constitutionally sufficient.

Prosecutors have no discretion under the POAA. The sentence of life without parole is mandatory when the current conviction and a predetermined number of prior convictions are for most serious offenses. Thorne, 129 Wn.2d at 763-64. A prosecutor may plea bargain but cannot agree not to allege prior convictions as part of the plea agreement. RCW 9.94A.421(6). The POAA defines which crimes are considered "most serious" and which offenders are considered "persistent offenders" in a manner understandable to the ordinary person. Thorne, 129 Wn.2d at 770.

Maddaus argues that allowing judicial fact-finding by a preponderance of the evidence makes it more likely that a life sentence without parole will be erroneously imposed than if a jury makes that finding. It is not clear how that would be. A judge who daily imposes criminal sentences and reviews and signs judgments and sentences would logically be in a better position to accurately determine if a prior conviction was for a most serious offense than a jury untrained in the law. Juries do not decide the law, but only the facts. The fact of a conviction is not something up for debate. There is either a judgment or there is not. Whether it qualifies as a most serious offense is not a mistake a judge is likely to make, even under a preponderance of the evidence standard.

In State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006), the court, discussing the Almendarez-Torres conclusion that prior convictions were not elements of the crimes at issue, said, "[T]he Supreme Court recognized that a defendant's recidivism 'is a traditional, if not the most traditional, basis for a sentencing court[ ]' to increase the reoffender's current sentence." Jones, 159 Wn.2d at 240. It further noted that the court in Apprendi had reaffirmed the idea that "a prior conviction need not be determined by a jury because of the procedural safeguards attached to any fact of prior conviction and due to the traditional use by states of recidivism facts to provide for sentence enhancements." Id.

Only two questions of fact are relevant to a sentence imposed under the POAA: (1) whether certain kinds of prior convictions exist, and (2) whether the defendant was the subject of those convictions. Thorne, 129 Wn.2d at 783.

> [W]e fail to see how the presence of a jury would be necessary. Prior convictions are proved by certified copies of the judgment and sentence . . . and identity (if contested) can be proved by fingerprints. The sentencing judge can make those determinations. While technically questions of fact, they are not the kinds of facts for which a jury trial would add to the safeguards available to a defendant. In fact, judges decide such questions of fact routinely at SRA sentencing proceedings. A certified copy of a judgment and sentence is highly reliable evidence. . .

> We find no constitutional bar to the provision of the SRA which allows a trial court to conduct the sentencing proceedings.

Id., (internal cites omitted).

"The best evidence of a prior conviction is a certified copy of the judgment." State v. Ford, 137 Wn.2d at 480, In re Pers. Restraint of Adolph, 170 Wn.2d at 566. Certified copies of the judgments and sentences from Maddaus' prior convictions were provided to the court at sentencing. Even if he were correct that some better procedure for imposing a life without parole sentence exists, he has not established that he was in any way prejudiced by the procedure in this case. He did not raise any objection in the trial court, and a constitutional claim may be raised for the first time on appeal only if it is manifest. RAP 2.5. Even if there were error, it is not manifest.

Maddaus points to no real reason for his assertion that the judicial determination of his persistent offender status violated the Washington constitution's due process provision. He is understandably dismayed to find himself in prison for life, but that is not because of a failure of due process. No court has held that the

POAA violates due process and there is no reason that this court should.

D. CONCLUSION.

Based upon the foregoing authorities and argument, the State respectfully asks this court to affirm all of Maddaus' convictions with the exception of one count of witness tampering.

Respectfully submitted this 4th day of January, 2012.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on the date below as follows:

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--AND TO--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of January, 2012, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

January 04, 2012 - 10:08 AM

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