

NOV 13 2009  
COURT OF APPEALS

NO. 33649-9-II

*DM*

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RONALD MCCOMB,

Appellant.

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

APPELLANT'S REPLY BRIEF

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*P.M. 7-7-06*

**TABLE OF CONTENTS**

A. ARGUMENT ..... 1

    1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THIRD DEGREE ASSAULT DESPITE DEFENSE’S REQUEST ..... 1

        a. Where a trial court fails to properly instruct the jury regarding an element of the crime charged, the court commits a constitutional error that deprives the defendant of due process ..... 1

        b. Claims that neither element of the *Workman* test were met contradicts the evidence presented at trial..... 2

    2. THE TRIAL COURT ERRED IN FAILING TO GIVE THE JURY A PETRICH INSTRUCTION ..... 4

        a. A defendant may only be convicted by a unanimous jury ..... 4

        b. The two acts of assault alleged by the State were not a continuous course of conduct ..... 5

        c. The error in failing to instruct the jury on unanimity was prejudicial ..... 7

    3. STATE DID NOT PROVE THAT CONSENT WAS OBTAINED BY BOTH PARTIES, SO THE TELEPHONE CONVERSATIONS ADMITTED IN COURT VIOLATE THE PRIVACY ACT ..... 8

        a. Consent is required from all parties to a telephone call before it can be recorded ..... 8

        b. The court should not admit tape recordings of calls from the jail in violation of RCW 9.73.030..... 9

        c. The calls made from jail were private ..... 10

d. The telephone calls were not made from a State correctional facility .....	11
e. The telephone calls were not admissible since they did not convey threats .....	12
f. The erroneous admission of evidence was not a harmless error.....	13
4. THE PERSISTENT OFFENDER SENTENCE OF LIFE IN PRISON SHOULD BE VACATED .....	15
a. The SRA requires prior offenses treated as strikes be equivalent to current most serious offenses .....	15
b. Reliance on allegations in a guilty plea is not appropriate.....	17
c. Prior convictions should be proven to the jury beyond a reasonable doubt .....	18
d. The POAA violates the single subject rule .....	18
B. CONCLUSION .....	19

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

<u>Kadoranian v. Bellingham Police Dep't</u> , 119 Wn.2d. 190, 829 P.2d 1061 (1992) .....	11
<u>Pers. Restraint of Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005)	17
<u>State v. Everybodytalksabout</u> , 145 Wn.2d 456, 39 P.3d 294 (2002) .....	13
<u>State v. Faford</u> , 128 Wn.2d 476, 910 P.2d 447 (1996).....	8, 10, 11
<u>State v. Fjermestad</u> , 114 Wn.2d 828, 791 P.2d 897 (1990) .....	9

<u>State v. Hadran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989) .....	5
<u>State v. Jackson</u> , 70 Wn.2d 498, 424 P.2d 313 (1967) .....	3
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988) .....	4, 5, 7
<u>State v. Riley</u> , 137 Wn.2d 904, 976 P.2d 624 (1999) .....	1
<u>State v. Stephens</u> , 93 Wn. 2d 186, 607 P.2d 304 (1980) .....	4
<u>State v. Williams</u> , 94 Wn.2d 531, 617 P.2d 1012 (1980)...	8, 12, 13
<u>State v. Workman</u> , 66 Wash. 292, 119 P. 751 (1911) .....	5
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978) .....	i, 2

### **Decisions Of The Washington Court Of Appeals**

<u>State v. Ashcraft</u> , 71 Wn.App. 444, 859 P.2d 60 (1993) .....	5
<u>State v. Baird</u> , 83 Wn. App. 477, 922 P.2d 157 (1996) .....	10
<u>State v. Dean</u> , 113 Wn.App. 691, 54 P.3d 243, <u>review denied</u> , 67 P.3d 1132 (2002) .....	16
<u>State v. Doogan</u> , 82 Wn.App. 185, 917 P.2d 155 (1996) .....	5
<u>State v. Fiallo-Lopez</u> , 78 Wn.App. 717, 899 P.2d 1294 (1995) .....	6
<u>State v. Johnson</u> , 51 Wn. App. 836, 759 P.2d 459 (1988) .....	16
<u>State v. Loehner</u> , 42 Wn.App. 408, 711 P.2d 377 (1985), <u>review denied</u> , 105 Wn.2d 1011 (1986) .....	7
<u>State v. Stockmyer</u> , 83 Wn.App. 77, 920 P.2d 1201 (1996) .....	6

**Statutes**

Laws 2000, c 26 § 1.....16

RCW 9.73.030 .....i, 9, 12, 13

RCW 9.73.095(1).....11

RCW 9.94A.345.....15

RCW 9A.36.021 (1) (c).....2

RCW 9A.36.031 (d) .....2

**United States Constitution**

Amend. 14 .....1

Amend. 6 .....4, 7

**Washington Constitution**

Art. 1, § 22 .....4

**United States Supreme Court Decisions**

Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 3382,  
65 L.Ed. 392 (1980) .....1

Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623,  
60 L.Ed.2d 96 (1979) .....7

Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705,  
87 S.Ct. 824 (1967).....7

Harris v. United States, 536 U.S. 545, 153 L.Ed.2d 524,

122 S.Ct. 2406 (2002).....18

Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254,  
161 L.Ed.2d 205 (2005) .....18

**Federal Decisions**

Conde v. Henry, 198 F.3d 734 (9<sup>th</sup> Cir. 1999).....1

Johnson v. Hawe, 388 F.3d 676 (9<sup>th</sup> Cir. 2004) .....9

United States v. Anderson, 201 F.3d 1145 (9th Cir. 2000).....3

A. ARGUMENT.

1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THIRD DEGREE ASSAULT DESPITE DEFENSE'S REQUEST.

a. Where a trial court fails to properly instruct the jury regarding an element of the crime charged, the court commits a constitutional error that deprives the defendant of due process. Mr. McComb requested a third degree assault instruction and took exception to the court's failure to give the instruction. 4/14/05RP 330; 4/15/05RP 559. Jury instructions are sufficient only where they allow both parties to argue their theories of the case. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The trial court's denial of the requested instruction for the lesser included offense of third degree assault violated Mr. McComb's right to due process by precluding him from arguing his theory of the case (i.e. he negligently injured Ms. McComb when she pushed into the knife). U.S. Const. amend. 14; Conde v. Henry, 198 F.3d 734 (9<sup>th</sup> Cir. 1999) (precluding defense from arguing its theory of the case on a charge of kidnapping for robbery, violated defendant's right to counsel and relieved prosecution of its burden to prove its case beyond a reasonable doubt); see also. Beck v. Alabama, 447 U.S. 625, 627, 100 S.Ct. 3382, 65 L.Ed. 392 (1980) (death penalty may not be imposed when jury was not permitted to consider lesser

included non-capitol offense). By preventing Mr. McComb from arguing his theory of the case, the trial court erred in failing to give a third degree assault instruction.

b. Claims that neither element of the *Workman* test were met contradicts the evidence presented at trial. Under the two-pronged rule articulated in Workman, for a court to issue this instruction, each element of the lesser offense must be a necessary element of the offense charged, and the facts of the case must support the inference that the lesser crime was committed.” State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the first Workman prong, the prosecutor claims that because third degree assault requires proof of bodily harm, and second degree assault does not, the elements of the lesser offense are not necessary elements of the offense charged. SRB at 9.

Second degree assault is defined as “assault with a deadly weapon.” RCW 9A.36.021 (1) (c). A person is guilty of third degree assault if, “under the circumstances not amounting to assault in the first or second degree,” he,

with criminal negligence, causes bodily harm to another person “by means of a weapon or other instrument or thing likely to produce bodily harm.”

RCW 9A.36.031 (d).

Although the prosecution argues that assault with a deadly weapon is second degree assault or no assault at all, the Washington Supreme Court held that third degree assault is legally included in the definition of second degree assault. State v. Jackson, 70 Wn.2d 498, 503, 424 P.2d 313 (1967). It is, thus, appropriate to submit the third degree assault instruction to the jury if

the facts of a particular case are such that they will sustain a conviction for assault in the third degree.

Id. at 503.

There is evidence in the record upon which a jury could have found Mr. McComb guilty of negligence, as third degree assault requires. SRB 11. This principle is illustrated in United States v. Anderson, where a prisoner was charged with murder after his attempt to wrest a knife from a fellow inmate resulted in the latter's death. United States v. Anderson, 201 F.3d 1145 (9th Cir. 2000). The Ninth Circuit held that the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter, since the evidence on the record could support a finding of criminal negligence. Id. at 1151. Similarly, the facts of the case at bar, when viewed in a light most favorable to the requesting party, support the inference that Mr. McComb was guilty of criminal

negligence, since Ms. McComb testified that she “moved into [the knife]” the defendant held. 4/15/05RP 459, 487. There was, therefore, sufficient credible testimony to establish that Mr. McComb did not push the knife into his wife’s neck. 4/15/05RP 458. The refusal to instruct the jury on third degree assault improperly precluded Mr. McComb from arguing his theory of the case, so reversal is required.

2. THE TRIAL COURT ERRED IN FAILING TO GIVE THE JURY A PETRICH INSTRUCTION.

a. A defendant may only be convicted by a unanimous jury.

A criminal defendant has a constitutional right to a jury trial and a corresponding right to a unanimous jury verdict. Wash. Const. art. 1, § 22; U.S. Const. amend. 6; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). A defendant may only be convicted when a unanimous jury concludes that the criminal act charged in the information was committed. State v. Stephens, 93 Wn. 2d 186, 190, 607 P.2d 304 (1980). The prosecution presented evidence that Mr. McComb committed two separate assaults, but the court failed to give a Petrich instruction.

Where the State charges one count of criminal conduct and presents evidence of more than one criminal act, the State must elect a single act upon which to base the conviction. If the State

fails to elect a single act, the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Ms. McComb testified that the defendant kicked her in the side of the head when she confronted him about using her haircutting scissors to cut his tobacco. 4/15/05RP 448. She also testified that the defendant later held a knife to her neck in response to her announcement that she would leave him. 4/15/05RP 451, 455. Thus, there is evidence of two separate acts. Lack of assurance that the verdict was unanimous is a manifest error that can be raised for the first time on appeal. State v. Ashcraft, 71 Wn.App. 444, 859 P.2d 60 (1993).

b. The two acts of assault alleged by the State were not a continuous course of conduct. The unanimity rule applies when the State presents evidence of "several distinct acts." State v. Hadran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); State v. Doogan, 82 Wn.App. 185, 191, 917 P.2d 155 (1996). When the evidence involves conduct at different times and places, it tends to show separate, distinct acts. Hadran, 113 Wn.2d at 17 (citing Petrich, 101 Wn. 2d at 571); State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). However, when the evidence shows that a defendant was engaged in a series of acts intended to achieve the

same purpose, those acts constitute a continuous course of conduct. State v. Fiallo-Lopez, 78 Wn.App. 717, 724, 899 P.2d 1294 (1995). There was evidence that Mr. McComb was involved in two distinct assaultive acts: the act of kicking Ms. McComb in the head, and the later act of holding a knife to Ms. McComb's neck. The prosecution failed to elect one of the acts upon which to base its case, claiming that Mr. McComb's two alleged assaults on his wife were both part of a continuing, single offense. SRB at 17. The State asserts that since both events took place in the family home, between the same parties, and on the same day, the offense was continuous. SRB at 18. However, the acts occurred at different times and for entirely different reasons. The first act was committed by the in response to Ms. McComb's anger over the defendant's destruction of their daughter's backpack and his use of haircutting scissors to cut tobacco. 4/15/05RP 443-46. The second act was committed later and in response to Ms. McComb's statement she would leave the defendant, taking their daughter. 4/15/05RP 449. Both the lapse of time between the two acts and the difference in the circumstances surrounding each, establish the acts as separate and distinct. See State v. Stockmyer, 83 Wn.App. 77, 87, 920 P.2d 1201 (1996) (Petrich rule applies to assault cases where there are two distinct acts, each of which could constitute an

assault).

c. The error in failing to instruct the jury on unanimity was prejudicial. When a trial court violates a defendant's constitutional right, the jury verdict will only be affirmed if the error was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967); Kitchen, 110 Wn. 2d at 409. A unanimity error is presumed to be prejudicial. This presumption can only be overcome if no rational trier of fact could have a reasonable doubt as to any one of the incidents alleged. Kitchen, 110 Wn.2d. at 411-12, citing State v. Loehner, 42 Wn.App. 408, 711 P.2d 377 (1985), review denied, 105 Wn.2d 1011 (1986)). Because the court failed to give a Petrich instruction, some jurors could have found that Mr. McComb committed an assault if he held a knife to Ms. McComb's neck, while others could have found he committed an assault if he kicked Ms. McComb in the head. The error in failing to give the Petrich instruction was, therefore, not harmless, since the verdict failed to guarantee that all of the jurors were unanimous about which act constituted the second degree assault. Mr. McComb's conviction must be reversed and remanded for a new trial to ensure his right to an unanimous jury. U.S. Const. amend. 6; see Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979).

3. STATE DID NOT PROVE THAT CONSENT WAS OBTAINED BY BOTH PARTIES, SO THE TELEPHONE CONVERSATIONS ADMITTED IN COURT VIOLATE THE PRIVACY ACT.

a. Consent is required from all parties to a telephone call before it can be recorded. Conversations recorded in violation of the Washington Privacy Act (WPA) are not admissible in a criminal or civil trial. State v. Williams, 94 Wn.2d 531, 541, 617 P.2d 1012 (1980) (recording of phone conversations made without consent of both parties to the calls were inadmissible in a criminal trial); State v. Faford, 128 Wn.2d 476, 488, 910 P.2d 447 (1996) (evidence obtained in violation of the privacy act is inadmissible at criminal trial for any purpose, including impeachment); RCW 9.73.050. The State failed to show that Mr. McComb knew his calls were being recorded, arguing that he impliedly consented because he had received notice of the recording when he made the calls. SRB at 20-23.

The nature and content of the calls demonstrate, however, that they were not intended for outside parties to hear. The defendant had no other communication options, since he was held in jail, and thus was forced to either use the jail telephone or no telephone at all. Absent a clear choice made by Mr. McComb to consent to the recording, consent cannot be merely assumed.

Nevertheless, the court admitted transcripts of the phone conversations as evidence in violation of Mr. McComb's privacy rights. 4/13/05RP 53.

b. The court should not admit tape recordings of calls from the jail in violation of RCW 9.73.030. Mr. McComb argued that telephone calls he made to Ms. McComb from county jail should not be admitted at trial. Recording these calls without obtaining the consent of both parties violated the WPA. 4/13/05RP 48-50. The trial court nonetheless allowed some transcripts of the recorded telephone calls to be read at trial. 4/13/05RP 52-55. The purpose of the WPA, as recognized by the Washington Supreme Court, is to safeguard the private conversations of citizens from dissemination in any way. State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990). This reflects the legislative objective of protecting individuals from the disclosure of any secret illegally uncovered by law enforcement. Id. at 836. See also Johnson v. Howe, 388 F.3d 676 (9<sup>th</sup> Cir. 2004) (holding that the WPA "deliberately places the court system between the police and private citizen to protect against this type of [electronic eavesdropping]").

Washington "has recognized a strong policy of protecting the privacy of its citizens and the introduction of evidence obtained in

violation of the statutes is prohibited,” State v. Baird, 83 Wn. App. 477, 483, 922 P.2d 157 (1996). Mr. McComb’s private telephone conversations are entitled to the full protections of the WPA. As such, the trial court’s admission of Mr. McComb’s telephone conversations as evidence was improper.

c. The calls made from jail were private. Mr.

McComb intended his conversations to remain confidential and did not consent to the recording. The State contends that Mr. McComb’s telephone calls were not private, since neither party had reason to expect jail-made telephone calls to be private. Additionally, the State asserts that both parties consented tacitly to the recording of their conversations, since they were apprised of the recording in an automated message.

On the contrary, however, in State v. Faford, when a neighbor used a police scanner to listen to the defendant’s calls, including discussion of a marijuana growing operation, the Washington Supreme Court found the calls were private where the defendants clearly intended the information to remain confidential. State v. Faford, 128 Wn.2d 476, 488, 910 P.2d 447 (1996). The prosecution in Faford argued that the fact defendants were using cordless telephones, which were easily intercepted, showed that the calls were not private. The Washington Supreme Court rejected

this argument, however, holding that whether a telephone call was private depends upon the expectations and intentions of the parties to the call. Faford, 128 Wn.2d 485, (citing, Kadoranian v. Bellingham Police Dep't, 119 Wn.2d. 190, 829 P.2d 1061 (1992)).

In the case at bar, the prosecution claims that the nature of jail-made telephone calls by itself is enough to prove that the defendant should have known or expected the calls to be recorded. SRB at 20. The content of Mr. McComb's jail-made telephone calls to his wife demonstrate, however, that he intended the information to remain private. This Court should reject the admission of these telephone calls as evidence, as the Court did in Faford, since the State laid no substantial foundation upon which to show that Mr. McComb knew his calls were being recorded.

d. The telephone calls were not made from a State correctional facility. RCW 9.73.095 allows Department of Corrections employees to record calls from residents at State correctional facilities. "State correctional facility" means a facility that is under the control and authority of the department of corrections, and "used for the incarceration, treatment, or rehabilitation of convicted felons." RCW 9.73.095(1).

Mr. McComb made the recorded calls from the Cowlitz County Jail, which is a county facility used to hold those convicted

of misdemeanors or awaiting trial on felonies for which they have not yet been convicted. The trial court erroneously ruled that although the Cowlitz County Jail was not a state facility "the public policy to me seems to be the same." 4/13/05RP 54. However, the privacy act must be strictly construed. State v. Williams, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980). RCW 9.73.095 provides a strict definition of a state facility and does not make an exception for county facilities. The trial court ruling clearly oversteps the purpose of the statute, which is to limit recordings to state facilities, where prisoners have already been convicted of the crimes charged.

e. The telephone calls were not admissible since they did not convey threats. RCW 9.73.030(2) states

wire communications or conversations... (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands...may be recorded with the consent of one party to the conversation.

RCW 9.73.030(2)(b). Although the State argues Mr. McComb made unlawful demands of his wife during their conversations, Mr. McComb's conversations with Ms. McComb do not fall under the statutory exception. Even though Mr. McComb encouraged his wife to tell the prosecutor that no knife was involved in the incident, he did not threaten or demand anything from her.

The types of statements made by Mr. McComb to Ms. McComb on the telephone are not covered by the exception to RCW 9.73.030 (2)(b). State v. Williams 94 Wn.2d 531, 548, 617 P.2d 1012 (1980). In Williams, the Court reasoned that the legislature intended to establish protections for an individuals' privacy and to require the suppression of recordings related to unlawful matters if the recordings were obtained in violation of statutory requirements. To give effect to the legislative intent behind the statute, RCW 9.73.030(2) must be strictly construed. Mr. McComb's recorded conversations with his wife did not include threats of any nature; rather he asked Ms. McComb to help him with his case. See, e.g., 4/15/05RP 529.

f. The erroneous admission of evidence was not a harmless error. The erroneous admission of evidence is harmless only if the significance of the wrongly admitted evidence is minor compared to the evidence as a whole. State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002). The transcripts of the telephone calls between Mr. and Mrs. McComb were extremely prejudicial when compared to the evidence as a whole. This evidence consisted largely of the testimony of Ms. McComb, who admitted both that she was "blowing off steam" out of anger at the defendant, and that her

memory was hazy from the use of methamphetamine. 4/15/05RP 478, 484, 487, 501. Admitting to frequent drug use, Ms. McComb testified she was feeling "burnt out," and she was only "sort of" capable of remembering the most significant details on the day of the incident. 4/15/06RP 454. The State contends the admission of this evidence did not affect the outcome of the trial, and the rest of the evidence was enough to convict Mr. McComb. The other evidence cited, however, is limited to Ms. McComb's testimony. The State's argument relies heavily on the information expressed in the telephone conversations, and since this was a focal point in the State's argument, it is entirely reasonable to conclude that the telephone conversations played a critical role in the jury's decision.

Because the information conveyed in the telephone recordings was protected by the WPA, it was inadmissible as evidence. The error was not harmless, since the telephone recordings undoubtedly influenced the jury's determination of the case. The trial court abused its discretion in admitting evidence obtained in violation of the WPA, and Mr. McComb's conviction should therefore be reversed.

4. THE PERSISTENT OFFENDER SENTENCE OF  
LIFE IN PRISON SHOULD BE VACATED

a. The SRA requires prior offenses treated as strikes be equivalent to current most serious offenses. Mr. McComb contends that because the elements of the offense for which he was convicted in 1988 are not equivalent to those found in the second degree assault statute referenced in the provisions of the SRA governing his sentencing, a simple comparability analysis is required. AOB at 21-30. The State contends, however, all that is required is similarity in the name of the offense of conviction. SRB at 27-29. Such blind adherence to the form of the offense title rather than the substance of the offense itself is inconsistent with the policy directive of punishing offenders consistently based upon their conduct and their criminal history. RCW 9.94A.010.

Furthermore, the SRA specifically provides that "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. If this provision is to be given effect, it must mean that when the POAA defines second degree assault, it does so in accordance with the law in effect at the time of Mr. McComb's current offense. The legislative intent section of this statute further specified, "A decision as to whether a prior

conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed." Laws 2000, c 26 § 1. State v. Dean, 113 Wn.App. 691, 54 P.3d 243, review denied, 67 P.3d 1132 (2002).

This view animated the Court of Appeals treatment of the classification of pre-SRA offenses and the same policy considerations are appropriate in this circumstance.

We hold that to be consistent with the purpose of the SRA to avoid diverse treatment, the present classification of crimes should be used to determine the pre-SRA classification of the crime for offender score and sentencing purposes. Were we to uphold the State's position (classification should be according to the punishment as it was at the time the crime was committed), a person who had committed the crime of taking a motor vehicle in 1974 would be subject to a 10-year wash-out provision, while an individual who committed the same crime the following year would only be subject to a 5-year wash-out provision. Such a result would denigrate the uniform treatment of defendants which is at the very heart of the SRA.

State v. Johnson, 51 Wn. App. 836, 840, 759 P.2d 459 (1988).

Although subsequent amendments changed the classification procedures of pre-SRA offenses, the policy implications of treatment of the various versions of the offense are the same. If the offense as defined in 1988 would not constitute that same offense under the current version of the SRA, it should not be treated as such.

b. Reliance on allegations in a guilty plea is not appropriate.

The State argues that this Court should look beyond what was statutorily at issue in the allegations of second degree assault and instead substitute portions of Mr. McComb's earlier statement on plea of guilty. SRB at 30-31. That Mr. McComb's statement might be interpreted as contrary to the current assault statute does not answer the comparability question, however, because reliance facts beyond the elements of the offense charged is inherently suspect.

[W]hile it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.

Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837

(2005). Given the absence of a motive to contest allegations beyond that necessary to establish conviction, it is simply inconsistent with our evolving understanding of the scope of the right to due process to rely in subsequent proceedings on anything but the narrow, elementally based, allegations and associated admissions.

c. Prior convictions should be proven to the jury beyond a reasonable doubt. For the reasons outlined in his Opening Brief, Mr. McComb reiterates his commitment to the fundamental principle that prior convictions used to aggravate the sentence for Class B felonies must be proven to a jury beyond a reasonable doubt. AOB 30-45. The prior jurisprudential justifications for treating prior convictions differently than any other fact that increases an offender's sentence are no longer viable. See Shepard v. United States, 544 U.S. 13, 27-28, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring). As Justice Thomas indicated:

Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury a, and beyond a reasonable doubt requirements."

Id. at 28, quoting Harris v. United States, 536 U.S. 545, 581-82, 153 L.Ed.2d 524, 122 S.Ct. 2406 (2002) (Thomas, J., dissenting).

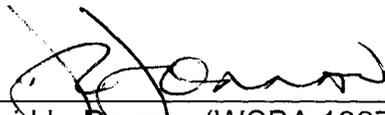
d. The POAA violates the single subject rule. For the reasons outlined in his Opening Brief, Mr. McComb reiterates his contention that the Persistent Offender Accountability Act failed to comply with the single subject requirement of the Washington Constitution and should be struck down. AOB at 50-56.

B. CONCLUSION.

Mr. McComb requests this court reverse his conviction and sentence, remanding for a new trial and sentencing in accordance with the claims addressed herein.

DATED this 6<sup>th</sup> day of July 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donnan", written over a horizontal line.

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