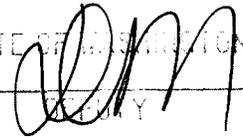


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STATE OF WASHINGTON
BY 

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

NO. 40772-8-II

STATE OF WASHINGTON,

Respondent,

vs.

ALVIN WITHERSPOON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00496-9

BRIEF OF RESPONDENT

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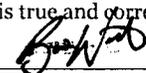
SERVICE	Jodi Backlund/Manek Mistry Backlund & Mistry PO Box 6490 Olympia, WA 98507	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: March 16, 2011, at Port Angeles, WA 
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WPIC 37.04 40

I. STATEMENT OF THE ISSUES:

1. Whether there is sufficient evidence to support Mr. Witherspoon's conviction for second-degree robbery.
2. Whether there is sufficient evidence to support Mr. Witherspoon's conviction for witness tampering based on two of three alleged means; and whether the absence of a unanimity instruction was harmless.
3. Whether Mr. Witherspoon received effective assistance of counsel.
4. Whether the trial judge committed reversible error when (1) it denied Mr. Witherspoon's request for a new attorney, and (2) it accepted the State's proffered standard to determine whether Mr. Witherspoon was a persistent offender.
5. Whether the information sufficiently advised Mr. Witherspoon of the essential elements of second-degree robbery.
6. Whether a life sentence without the possibility of parole constitutes cruel and unusual punishment.
7. Whether there is sufficient evidence to support the finding that Mr. Witherspoon is a persistent offender.
8. Whether the procedure that allows a trial judge, rather than a jury, to determine if a defendant is a persistent offender violates constitutional guarantees of equal protection.
9. Whether the procedure that allows a trial judge, rather than a jury, to determine if a defendant is a persistent offender violates his right to a jury trial.
10. Whether the procedure that allows a trial judge, rather than a jury, to determine if a defendant is a persistent

offender violates the Washington constitution's due process clause.

II. STATEMENT OF THE CASE:

Pursuant to RAP 10.3(b), the State accepts the factual and procedural history in Mr. Witherspoon's opening appellate brief, except where it is supplemented and corrected in the following argument.

III. ARGUMENT:

A. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION.

Mr. Witherspoon claims there is insufficient evidence to support his conviction for Robbery in the Second Degree (count I). *See* Brief of Appellant at 27-28. The claim is without merit.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime were proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Appellate courts draw all reasonable inferences from the evidence in favor of the State, and they interpreted them most strongly against the defendant. *Id.* "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This Court should

reverse a conviction for insufficient evidence only when no rational trier of fact could have found that all of the elements of the crime were proved beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

When evaluating the sufficiency of the evidence, circumstantial evidence and direct evidence are equally probative. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

This Court should find there is sufficient evidence to support Witherspoon's conviction for second-degree robbery.

1. There is sufficient evidence to prove Witherspoon accomplished the robbery by "the use or threatened use of immediate force, violence, or fear of injury."

Mr. Witherspoon claims the State failed to prove that he used "force or fear" to complete the crime charged. *See* Brief of Appellant at 27. According to Witherspoon, the State was obligated to prove "actual force or actual fear allowed [him] to obtain or retain possession of the

stolen property.” See Brief of Appellant at 28. This argument is unfounded.

RCW 9A.56.190 provides “[a] person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.” (Emphasis added.) Additionally, “[s]uch force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases *the degree of force is immaterial.*” RCW 9A.56.190 (emphasis added). The instructions, in the present case, included this statutory language. See Instruction 10 (CP 54);¹ Instruction 11 (CP 55).²

¹ **Instruction 10:** “A person commits the crime of robbery in the second degree when he unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person’s will by the *use or threatened use* of immediate force, violence, or fear of injury to that person or to that person’s property. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases *the degree of force is immaterial.*” (Emphasis added).

² **Instruction 11:** “To convict the Defendant of the crime of ROBBERY IN THE SECOND DEGREE as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about the 12th day of November, 2009, the Defendant unlawfully took personal property from the person or in the presence of another; (2) That the Defendant intended to commit theft of the property; (3) That the taking was against that person’s will by the Defendant’s *use or threatened use* of immediate force, violence, or fear of injury to that person or to that person’s property or to the person or property of another; (4) That force or fear was used by the Defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking; and (5) That any of these acts occurred in the State of Washington. . . .” (Emphasis added).

A robbery encompasses any “taking of ... property [that is] attended with circumstances of terror, or such threatening by menace, word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person.” *State v. Shcherenkov*, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008) (quoting *State v. Redmond*, 122 Wash. 392, 393, 210 P. 772 (1922)). “The determination of whether intimidation was used is based on an *objective test* of whether an ordinary person in the [victim’s] position could reasonably infer a threat of bodily harm from the defendant’s acts.” *Id.* at 625 (quoting 67 Am.Jur.2d *Robbery* § 89, at 114 (2003)) (emphasis added).

In addition, the statutory definition of “threat” applies to robbery offenses. RCW 9A.04.110; *Shcherenkov*, 146 Wn. App. at 625. Under that provision, a “[t]hreat’ means to communicate, directly *or indirectly* the intent” to take the applicable action. RCW 9A.04.110(27) (emphasis added). In the robbery context, the “‘threatened use of immediate force, violence, or fear of injury’ means a direct *or indirect* communication of the intent to use immediate force, violence, or cause injury.” *Shcherenkov*, 146 Wn. App. at 625 (citing *State v. Gallaher*, 24 Wn. App. 819, 821-22, 604 P.2d 185 (1979)) (emphasis added).

Ms. Pittario testified she came home in the mid-afternoon to find an unknown vehicle parked in her driveway. RP (4/12/2010) at 19-20. The vehicle was facing toward the street, and the driver's side door was wide open. RP (4/12/2010) at 21, 41. Inside the vehicle a person, unknown to Ms. Pittario, was constantly looking over her shoulder, waiting for someone. RP (4/12/2010) at 21, 38. When Ms. Pittario exited her vehicle, a strange man, Witherspoon, quickly approached her with a hand behind his back. RP (4/12/2010) at 22-23, 39. Ms. Pittario was alarmed and asked Witherspoon what he was hiding behind his back. RP (4/12/2010) at 23, 39-40. Witherspoon told her it was a "pistol." RP (4/12/2010) at 23, 40, 46. Ms. Pittario believed the stranger had been in her home where she kept firearms. RP (4/12/2010) at 24, 44. Ms. Pittario testified that she let the man go after he said he had a gun. RP (4/12/2010) at 46, 48. When Witherspoon jumped into his car, Ms. Pittario recognized her personal belongings in the back seat of the vehicle. RP (4/12/2010) at 24-25, 40, 43-44, 47, 49. Witherspoon fled the scene at a high rate of speed. RP (4/12/2010) at 25-26, 46. These facts, and their reasonable inferences, clearly support Witherspoon's conviction for second-degree robbery.

In *State v. Shcherenkov*, this Court recognized "[a]ny ... threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction." 146 Wn. App. at 626 (quoting

State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992)). In *Shcherenkov*, the defendant robbed four different banks. 146 Wn. App. at 622-23. In three of the four robberies, the defendant only showed the bank tellers a note stating that he was robbing them. *Id.* at 622-23, 628-29. In the fourth robbery, the defendant's note instructed the teller not to make any sudden moves and that he would be watching her. *Id.* at 623, 629. Because the defendant concealed his hands in his pockets during each robbery, this Court concluded "the jury could have reasonably found that he was deliberately insinuating that he had a weapon. *Id.* 622-23, 629. Under these circumstances, this Court held the jury's conclusion the defendant threatened to use immediate force was supported by sufficient evidence. *Id.*

Here, Witherspoon insinuated that he had a weapon. He quickly approached Ms. Pittario with his hands behind his back.³ RP (4/12/2010) at 22-23, 39. He said he had a gun.⁴ RP (4/12/2010) at 23, 40, 46. Ms. Pittario did not know this individual, who had come from the inside of her home where she kept firearms. RP (4/12/2010) at 22, 44. Under the "objective test of whether an ordinary person in the [victim's] position

³ The trial judge stated this fact "in itself is going to cause some fear or concern." RP (5/24/2010) at 9.

⁴ The trial judge stated that such a statement "would scare anybody." RP (5/24/2010) at 9.

could reasonably infer a threat of bodily harm from the defendant's acts", a jury could reasonably find Witherspoon accomplished the robbery via an implied threat to use immediate force, violence, or fear of injury. *Shcherenkov*, 146 Wn. App. at 625 (quoting 67 Am.Jur.2d *Robbery* § 89, at 114 (2003)). It is of no consequence Ms. Pittario courageously gave chase to Witherspoon after he fled the scene, RP (4/12/2010) at 25; or, due to the speed in which everything occurred she was unsure if she felt fear for own safety,⁵ RP (4/12/2010) at 46. *See Redmond*, 122 Wash. at 393-94 ("it is not necessary that actual fear be strictly and precisely proved, 'for the law, in odium spoliatoris, will presume fear where there appears to be just ground for it'").

After viewing the evidence, and all reasonable inferences, in a light most favorable to the State, a rational trier of fact could have found Witherspoon committed a robbery via an implicit threat to use immediate force, violence, or fear of injury. The jury was entitled to believe the State's evidence. Although Witherspoon and his fiancée both testified the defendant never said he had a gun, the jury was entitled to disbelieve their

⁵ Ms. Pittario testified it is not her nature to experience fear for herself, but she did fear the loss of her property. RP (4/12/2010) at 46, 48.

testimony.⁶ There is sufficient evidence to sustain Witherspoon's conviction. This Court should affirm.

2. Mr. Witherspoon's statement that he had a pistol behind his back was not a confession. Thus, it did not require independent proof under the corpus delicti rule.

Mr. Witherspoon claims the State failed to prove the *corpus delicti* of the crime independent of his statements. *See* Brief of Appellant at 29-30. This argument is not persuasive.

Under the corpus delicti rule, a defendant's confession is inadmissible unless the State has established the commission of the crime through independent proof. *State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996); *State v. Dyson*, 91 Wn. App. 761, 763, 959 P.2d 1138 (1998). The purpose of the doctrine is to prevent convictions based on false confessions. *Ray*, 130 Wn.2d at 680; *Dyson*, 91 Wn. App. at 763.

However, statements made by the defendant while the crime is in progress are not confessions, or post-crime statements, that require corroboration for purposes of corpus delicti. *State v. Pietrzak*, 110 Wn. App. 670, 680-81, 41 P.3d 1240 (2002) (citing *Dyson*, 91 Wn. App. at 763). Other jurisdictions have also held such pre-crime statements need

⁶ The trial court properly admitted Witherspoon's prior conviction for residential burglary, a crime of dishonesty, pursuant to ER 609.

not be corroborated. *See e.g. Warszower v. United States*, 312 U.S. 342, 347, 61 S.Ct. 603, 85 L.Ed. 876 (1941); *Castillo v. State*, 614 P.2d 756, 759 (Alaska 1980); *State v. Johnson*, 821 P.2d 1150, 1162-63 (Utah 1991).

As the U.S. Supreme Court noted:

The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admission after the fact.

Warszower, 312 U.S. at 347.

Witherspoon's argument is based on the premise that his statement to Ms. Pittario constituted a confession. This is incorrect. The statement was made while the robbery was in progress. *See* RP (4/12/2010) at 22-25, 39-40, 42-44, 46-47, 49. As stated above, a jury could reasonably infer that Witherspoon told Ms. Pittario he had a gun in order to retain the stolen property through the implicit threat to use force, violence, or fear of injury.

Witherspoon cites no authority for the proposition that statements made during the course of the crime amount to a confession or admission. By definition, a confession is an expression of guilt as a past act. *Dyson*, 91 Wn. App. at 763 (citing *State v. Saltzman*, 241 Iowa 1373, 1379-82, 44

N.W.2d 24, 27-28 (1950) (statements made as part of the res gestae of a crime are neither admissions nor confessions); *Opper v. United States*, 348 U.S. 84, 90, 75 S.Ct. 158, 99 L.Ed. 101 (1954) (explaining that admissions of essential facts of the crime “subsequent to the crime are of the same character as confessions,” thus requiring corroboration)). No such confession is involved in this case.

Mr. Witherspoon made his statement that he had a pistol while he committed a crime. His statement was not made after the fact because the robbery was still in progress. This Court should affirm.

B. SUFFICIENT EVIDENCE ESTABLISHED THE DEFENDANT COMMITTED WITNESS TAMPERING VIA TWO ALLEGED MEANS; AND THE LACK OF A UNANIMITY INSTRUCTION WAS HARMLESS ERROR.

Mr. Witherspoon argues his witness tampering conviction (count III) should be overturned because there is insufficient evidence to support two of three alternative means presented to the jury. *See* Brief of Appellant at 31-34. The State concedes it failed to present evidence with respect to one alleged alternative. However, the State (1) presented sufficient evidence to prove beyond a reasonable doubt two of the alleged means, and (2) confined its argument to the only two means it offered

evidentiary support. Thus, the lack of a unanimity instruction was harmless.

There are three ways a defendant can commit witness tampering: if he/she attempts to induce a person to (1) testify falsely or withhold testimony, (2) absent himself/herself from an official proceeding, or (3) withhold information from a law enforcement agency. RCW 9A.72.120(1)(a)-(c); *State v. Lobe*, 140 Wn. App. 897, 902-03, 167 P.3d 627 (2007). Here, the information and the jury instructions alleged all three alternatives. CP 22;⁷ Instruction 17 (CP 61).⁸

⁷ **Count III: Tampering with a Witness – Aggravated Circumstances.** On or about the 12th to the 17th day of November 2009, in the county of Clallam, State of Washington, the above-named Defendant did attempt to induce Viola Conklin, [sic] a person who the Defendant knew was a witness, or a person whom the Defendant had reason to believe was about to be called as a witness in an official proceeding, or a person whom the Defendant had reason to believe was about to be called as a witness in an official proceeding, or a person whom the Defendant had reason to believe may have had information relevant to a criminal investigation, or a person whom the Defendant had reason to believe may have had information relevant to the abuse and neglect of a minor child, to testify falsely, and/or to unlawfully withhold testimony, and/or to absent himself/herself from such proceedings, and/or to withhold from a law enforcement agency information which he/she has relevant to a criminal investigation and/or to withhold from a law enforcement agency information which he/she has relevant to the abuse and neglect of a minor child; contrary to Revised Code of Washington 9A.72.120(1), a Class C felony[.] (Emphasis added).

⁸ **Instruction 17:** To convict the Defendant of the crime of TAMPERING WITH A WITNESS as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about the 12th to the 17th of November, 2009, the Defendant attempted to induce a person to [(a)] testify falsely or, without right or privilege to do so, withhold any testimony[,] or [(b)] absent himself or herself from any official proceeding[,] or [(c)] withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; ...

In Washington, criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21. “In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime.” *Lobe*, 140 Wn. App. at 903 (citing *State v. Green*, 94 Wn.2d 216, 230-35, 616 P.2d 628 (1980)). However, the law permits appellate courts to affirm a conviction even when substantial evidence does not support one of the means mentioned in the jury instructions, so long as there is no danger the jury based its verdict on the unsupported alternatives. *Id.* at 905. *See also State v. Johnson*, 132 Wn. App. 400, 410, 132 P.3d 737 (2006) (reviewing court upheld burglary conviction where it could determine that jury’s verdict was based on only one means, supported by substantial evidence); *State v. Rivas*, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), *review denied*, 140 Wn.2d 1023, 5 P.3d 9 (2000), *overruled on other grounds*, *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007) (reviewing court upheld assault conviction finding no danger jury’s verdict rested on an unsupported alternative means).

In support of count III, the State played a recorded phone conversation between Witherspoon and his fiancée, Violet Conklin.⁹ Exhibit 40. During the conversation, Witherspoon told his fiancée (1) he

⁹ Ms. Conklin was with the defendant at the time of the offense and subsequent arrest. RP (4/12/2010) at 21, 38, 61, 79; RP (4/13/2010) at 10-11, 55-56, 69, 82.

did not want her speaking with law enforcement, Exhibit 40 at 3; (2) he intended to shield her from criminal liability, Exhibit 40 at 4; and (3) the story he wanted her to share with third parties, which placed the responsibility for the crime on an imaginary hitchhiker, Exhibit 40 at 5-6. In its closing, the State focused its argument on the fact Witherspoon told his fiancée not to speak with the police and the fabricated story he wanted her to share with others. RP (4/13/2010) at 120, 134-35. The State neither argued, nor presented evidence that the defendant encouraged his fiancée to absent herself from any proceedings.

Under a sufficiency of the evidence standard, which admits the truth of the State's evidence and allows all reasonable inferences, there is no doubt the jury based its guilty verdict on only two of the three alleged alternatives. The State never argued or attempted to prove that Witherspoon tried to persuade Conklin to absent herself from the proceedings. Instead, the State focused on the fact that Witherspoon wanted Conklin to (1) testify falsely or withhold information, *see* Exhibit 40 at 5-6, and (2) withhold information from a law enforcement agency, *see* Exhibit 40 at 3. Thus, the lack of a unanimity instruction was harmless error. *Lobe*, 140 Wn. App. at 907-13 (Hunt, J., dissenting). This Court should affirm.

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Witherspoon argues his attorney rendered ineffective assistance of counsel because (1) he failed to seek a lesser included instruction for Theft in the First Degree; (2) he failed to preserve the corpus delicti issue for purposes of appeal; and (3) he represented the defendant when there might be a conflict of interest. *See* Brief of Appellant at 34-44. These arguments are without merit.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Grier*, -- Wn.2d --, -- P.3d --, 2011 WL 459466 at 8 (2011). A claim of ineffective assistance involves a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 8 (quoting *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Under this standard, an attorney's performance is deficient if it falls "below an objective standard of reasonableness." *Grier*, 2011 WL 459466 at 9. The threshold for the deficient performance prong is high because of the deference afforded to the decisions of defense counsel in the course of representation. *Id.* To prevail on an ineffective assistance claim, a defendant must overcome "a strong presumption that counsel's performance was reasonable." *Id.* Accordingly, the defendant bears the burden of establishing deficient performance. *Id.*

To satisfy the prejudice prong, the defendant must establish that "there is a reasonable probability that, but for the deficient performance, the outcome at trial would have been different." *Grier*, 2011 WL 459466 at 9. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.*

Ineffective assistance of counsel is a fact-based determination. *Grier*, 2011 WL 459466 at 9. However, "[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." *Id.* at 10.

1. Mr. Witherspoon is not entitled to a lesser-included offense instruction on first-degree theft.

A defendant has a statutory right to have lesser-included offenses presented to the jury if (1) all the elements of the lesser offense are necessary elements of the charged offense (the legal prong), and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). RCW 10.61.006; *Grier*, 2011 WL 459466 at 14; *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); *Shcherenkov*, 146 Wn. App. at 629-30.

Under the legal prong, an instruction on the lesser offense is proper “only if the charged crime ‘could not be committed’ without also committing the lesser offense. *State v. Roche*, 75 Wn. App. 500, 510, 878 P.2d 497 (1994). Under this test, a lesser-included instruction is inappropriate when alternative means exist by which the charged crime can be committed, one of which would not result in the commission of the alleged lesser-included offense. *Id.* Accordingly, if second-degree robbery can be committed by alternative means, one of which would not result in the commission of first-degree theft, no lesser-included instruction is available. *Id.* at 510, 511 n. 8.

Robbery is statutorily defined as:

A person commits robbery when he unlawfully takes personal property from [1] the person of another *or* [2] in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property.... Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking[.]

RCW 9A.56.190 (emphasis added).

The elements of first-degree theft are: (1) wrongfully obtaining or exerting unauthorized control over, (2) the property of another, (3) with the intent to deprive him of such property, (4) valued in excess of \$5000 *or* “taken from the person of another regardless of the value.” RCW 9A.56.020(1)(a); RCW 9A.56.030(1)(a), (b).

Under the robbery statute, robbery can be committed by two alternative means: (1) taking property “from the person of another” or (2) taking property “in his presence”. RCW 9A.56.190. Under the theft statute, first-degree theft can be committed by two alternative means: (1) taking property valued in excess of \$5000 or (2) taking property from the person of another. RCW 9A.56.030(1)(a), (b). A comparison of the elements in both offenses reveals two reasons why first-degree theft is not a lesser-included offense of second-degree robbery. *Roche*, 75 Wn. app. at 511.

First, one alternative means of committing robbery is taking property in the presence of another, which is not an element of first degree

theft. *Roche*, 75 Wn. app. at 511. Second, under either means of committing robbery, the property need not exceed a value of \$5000, which is an alternative means of committing first-degree theft. *Id.*

Because robbery can be committed without committing first degree theft when a person takes property: (1) in the presence of another person, or (2) valued at less than \$5000, first degree theft is not a lesser included offense of second-degree robbery. *Roche*, 75 Wn. app. at 511. Accordingly, the legal prong cannot be satisfied and Witherspoon is not entitled to a lesser-included instruction. *Id.*

Additionally, Witherspoon cannot meet the factual requisite of the test. The factual prong requires that “the evidence ... permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *Shcherenkov*, 146 Wn. App. at 630 (quoting *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)). The appellate court must review the evidence presented in a light most favorable to the party requesting the instruction. *Id.* However, 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. *Id.*

Here, the primary difference between the crimes of first-degree theft and robbery is the use or threatened use of force. *Roche*, 75 Wn. app.

at 511. The evidence in this case permits a jury to rationally find Witherspoon obtained Ms. Pittario's jewelry and other belongings *without* such a threat – *i.e.* telling her that he had a gun. Additionally, Witherspoon did not take the property from Ms. Pittario's person, as required by first-degree theft; rather he stole/retained the property in Ms. Pittario's presence. RP (4/12/2010) at 24-25, 40, 43-44. Finally, there is nothing in the record to establish whether the value of the property exceeded \$5,000.

Because Mr. Witherspoon was not entitled to a lesser-included offense instruction on first-degree theft, his attorney was not ineffective when he did not request the instruction. Mr. Witherspoon is unable to satisfy the first prong of an ineffective assistance claim. This Court should affirm.

2. Even if Mr. Witherspoon is entitled to a lesser-included instruction, he may nevertheless elect to forgo such an instruction.

Assuming Witherspoon is entitled to a lesser-included instruction, he may nevertheless choose to forgo such an instruction. *Grier*, 2011 WL 459466 at 14.

Again, an analysis of effective assistance begins with a “strong presumption that counsel’s performance was reasonable.” *Grier*, 2011 WL 459466 at 15. To rebut this presumption, the defendant bears the burden of

establishing the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *Id.* Although risky, an all or nothing approach was a legitimate strategy to secure an acquittal.

At trial, Witherspoon’s attorney argued the State had not proved beyond a reasonable doubt that the defendant obtained/retained possession of stolen property “by the use or threatened use of immediate force, violence, or fear of injury.” RP (4/13/2010) at 124-27, 131-33. Acquittal on count I was a real possibility: the victim did not see a gun, RP (4/12/2010) at 40; the victim said she was not afraid of the defendant, RP (4/12/2010) at 46, 48; the police never recovered a gun, RP (4/12/2010) at 99; and the defense witnesses denied Witherspoon said he had a gun, RP (4/13/2010) at 57, 63, 80. Even the trial judge stated it was a “close issue” whether the defendant committed the crime by the use or threatened use of force, violence or fear of injury. RP (5/24/2010) at 7-10.

Consequently, Witherspoon and his defense counsel could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal with respect to count I. *Grier*, 2011 WL 459466 at 15. While this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel’s initial calculus, hindsight has no place in an ineffective assistance claim. *Id.* (citing *State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) (“The defendants cannot have it both ways;

having decided to follow one course at trial, they cannot on appeal no change their course and complain that their gamble did not pay off.”)). In sum, Witherspoon cannot meet his burden of proving deficient performance. This Court should affirm.

3. Mr. Witherspoon’s counsel provided effective assistance even though he did not contest testimony/evidence under the corpus delicti rule.

As noted above, the present case did not involve a confession. Witherspoon’s statement that he was concealing a “pistol” behind his back was during the course of the crime and did not require independent corroboration. *Pietrzak*, 110 Wn. App. at 680-81 (citing *Dyson*, 91 Wn. App. at 763). Mr. Witherspoon cannot demonstrate that his attorney’s performance was deficient on this basis.

4. Mr. Witherspoon’s attorney was free from any conflict of interest.

A conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant in the context of a particular representation. *State v. Fualaau*, 155 Wn. App. 347, 362, 228 P.3d 771 (2010). The burden is on the defense to demonstrate, from the record, that an actual conflict of interest adversely affected his attorney’s performance. *Id.* (citing *Mickens v. Taylor*, 535 U.S. 162, 173-

74, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003)).

The Washington Supreme Court has held that even where a defendant “has demonstrated the possibility that his attorney was representing conflicting interests,” the defendant nevertheless “failed to establish an actual conflict” where he did not demonstrate how his attorney’s conflict of interest affected his attorney’s performance at trial. *Fualaau*, 155 Wn. App. at 362. Although a defendant need not demonstrate that the outcome of the trial would have been different but for the conflict, the defendant must show that “some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” *Id.* (quoting *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008)). Witherspoon has not satisfied this burden.

Furthermore, “[t]he mere possibility of a conflict of interest is not sufficient to impugn a criminal conviction.” *Fualaau*, 155 Wn. App. 364. Thus, the possibility that an attorney may have to testify for/against the client in the future, a situation that did not arise, does not create an actual conflict of interest, particularly where such testimony would occur only after the attorney ceased active representation or where there is no

certainty that such testimony will occur at all. *Id.* Accordingly, the mere possibility that Witherspoon's attorney might be called to testify did not create an actual conflict of interest.

Witherspoon's attorney filed a motion to withdraw. RP (12/30/2009) at 3. The trial court recognized that defense counsel believed he "may be called as a witness for the limited purpose that the [defense] witness, Ms. Conklin, tried to contact [him] at his office[.]" RP (12/30/2009) at 3-4. The trial attorney explained he did speak with the witness, but that he did not have a substantive discussion because he was preoccupied with other matters. RP (12/30/2009) at 4. This was the "limited purpose" why he might be called to testify. RP (12/30/2009) at 4. The trial court properly denied the motion. RP (12/30/2009) at 4. The trial court reasoned that the information outlined in the motion and obtained via its inquiry did not justify a withdrawal. RP (12/30/2009) at 5. Aside from the fact that a mere possibility of a conflict of interest does not support a motion to withdrawal, *see State v. Davis*, 141 Wn.2d 798, 861, 10 P.22d 977 (2000), the trial court correctly determined that defense counsel's limited contact with the witness would not be an issue at trial. RP (12/30/2009) at 5.

Mr. Witherspoon has failed to demonstrate an actual conflict of interest that prevented his attorney from following a particular defense

strategy. Witherspoon's attorney remained free of any conflict that would compromise the duties he owed the defendant. The representation was not deficient. This Court should affirm.

D. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR.

1. The trial court did not violate Mr. Witherspoon's right to counsel.

Mr. Witherspoon argues the trial court violated his Sixth Amendment right to counsel when it denied his request to appoint new attorney. *See* Brief of Appellant at 41. Witherspoon suggests the trial court did not conduct a sufficient inquiry. *See* Brief of Appellant at 43-44. The argument is without merit.

This Court reviews the denial of a request for new counsel for abuse of discretion. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); *In re Pers. Restraint of Stenson*, 132 Wn.2d 710, 733-34, 16 P.3d 1 (2001). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds.

“To justify appointment of new counsel, a defendant ‘must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or complete breakdown in communications between the attorney and the defendant.’” *Varga*, 151

Wn.2d at 200 (quoting *Stenson*, 132 Wn.2d at 734). In considering a request for appointment of new counsel, the trial court should consider: (1) the reasons given for the dissatisfaction with counsel, (2) the court's evaluation of counsel, (3) the effect of substitution on the proceedings, (4) the extent of the conflict, (5) the adequacy of the inquiry, and (6) the timeliness of the request. *Stenson*, 132 Wn.2d at 734.

Witherspoon moved the court to have new counsel appointed. RP (12/30/2009) at 5-6. As presented above, the primary basis for the motion was the belief that his attorney would have to serve as a witness in his case. RP (12/30/2009) at 5, 7. The trial court patiently listened to Witherspoon's explanation why he needed a new attorney. RP (12/30/2009) at 7. The trial court carefully explained the contact between the defense witness and his attorney did not necessarily create a conflict of interest. RP (12/30/2009) at 8-9. Witherspoon was satisfied with this explanation. RP (12/30/2009) at 9. Again, the trial court left the door open to review the matter in the future. RP (12/30/2009) at 8-9. Witherspoon never re-raised the issue.

Additionally, Witherspoon felt he needed a continuance to ensure his attorney was prepared to represent him in a "third strike case." RP (12/30/2009) at 9. The trial court informed the defendant that he had continued the case to March 29, 2010, per an agreement of the parties. RP

(12/30/2009) at 9. *See also* RP (12/30/2009) at 2-3. The defendant confirmed this was acceptable and agreed to waive his right to a speedy trial. RP (12/30/2009) at 9-10. The trial was continued, which afforded the defense investigator additional time to speak with evidence and uncover “evidence” that was not timely provided to the State. *See* RP (4/12/2010) at 4-5; RP (4/13/2010) at 90.

Witherspoon never alleged a complete breakdown in communication with his attorney. He fails to demonstrate the trial court abused its discretion when it denied the motion for new counsel. The trial court adequately inquired into the reasons for and the extent of the alleged conflict. RP (12/30/2009) at 4-9. The trial court granted a continuance to ensure the defense had sufficient time to prepare for a “third strike case”. RP (12/30/2009) at 9-10. Finally, the trial court noted a new attorney at the late stage would inflict a hardship on the defendant. RP (12/30/2009) at 5. There is no error. This Court should affirm.

2. The trial court remained fair and impartial throughout the proceedings.

In a desperate effort to overturn his conviction, Mr. Witherspoon alleges the trial judge violated the “appearance of fairness” doctrine. *See* Brief of Appellant at 46-48. This Court should reject this argument.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonable person, who knows and understands all the relevant facts, would conclude that the parties received a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010); *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). If the defendant claims an appearance of fairness violation, he or she has the burden to provide evidence of a judge's actual or potential bias. *Gamble*, 168 Wn.2d at 187-88; *State v. Perala*, 132 Wn. App. 98, 113, 130 P.3d 852, *review denied*, 158 Wn.2d 1018 (2006).

Witherspoon cites two portions in the record that he believes supports his claim that the trial judge suffered from actual or potential bias. *See* Brief of Appellant at 48. First, Witherspoon alleges the trial judge represented him in the past, but continued to preside over the proceedings despite his objections. *See* Brief of Appellant at 48 (citing RP (4/12/2010) at 15-16). Second, he alleges the trial judge revealed his bias when he said he would "impose a life sentence because he trusted the prosecutor." *See* Brief of the Appellant at 48 (citing RP (5/24/2010) at 34). The State submits the defense distorts the record, removes the alleged statements from their proper context, and ignores rulings that were favorable to the defense.

(a) *The alleged prior representation.*

Prior to the start of trial, and in the interest of fairness, Judge Craddock Verser informed the parties that he *recognized* the name “Witherspoon”:

THE COURT: Well, let’s bring in our jury panel – there was one other thing, I don’t know this for sure but the name Witherspoon rang a bell with me, it may be 15 years ago I represented Mr. Witherspoon as a Defense attorney, I don’t know or not, I was working with the Defender’s Office.

MR. OAKLEY: Have you [the defendant] ever had any matters in Jefferson County?

THE COURT: No it was over here.

MR. OAKLEY: He has had prior matters in Clallam County.

THE COURT: Does that bother anybody?

MS. SOUBLET: --

THE DEFENDANT: What year?

THE COURT: I have no idea, just the name sounded familiar. I don’t even remember what it was about, if or what it was about, but the name sounded familiar so I always disclose that that’s a possibility.

THE DEFENDANT: Let me consult my attorney, Your Honor.

THE COURT: Ms. Soublet, did you hear what I just said?

MS. SOUBLET: I did, Your Honor.

THE COURT: The name sounded familiar.

THE DEFENDANT: Your Honor, would that have been a juvenile matter?

THE COURT: Could have been.

THE DEFENDANT: Your Honor, I have objections.

THE COURT: Okay. Let's bring in our jury panel.

RP (4/12/2010) at 15-16.

First, the State believes there is a typographical error in the verbatim report of proceedings. The statement, "Your Honor, I have objections," does not match the context and tone of the proceedings. The State submits the defendant actually said: "Your Honor, I have [no] objections." This explains why the judge answered in the affirmative and commenced the trial. This Court may correct the typographical error. *See e.g. State v. Russell*, -- Wn.2d --, -- P.3d --, 2011 WL 662927 at 3 n.1 (2011).

Second, the trial judge raised the issue because he wanted to dispel any possible violation of the appearance of fairness. The name sounded familiar to the trial judge, a former defense attorney, so he disclosed that it was possible he represented the defendant in the past. He asked if the "possibility," that he may have represented the defendant, concerned

either party. Thus, he sought the support of both sides to continue presiding over the trial. This was fair and proper.

Third, it is not clear the trial judge actually represented the defendant. The record only establishes that the trial judge was familiar with the name “Witherspoon.” Neither the trial judge, nor the defendant apparently recognized one another. The trial judge could not remember any specifics from the case, or if he had in fact previously represented the defendant. It is unlikely that the trial judge had any actual prejudices that he harbored against Witherspoon.

This Court should hold the present example does not show actual or potential judicial bias. There is no violation of the “appearance of fairness” doctrine.

(b) The alleged blind faith in the prosecutor.

At sentencing, the State argued Witherspoon was a persistent offender. The State produced two judgment and sentences that showed the defendant had committed two prior crimes that constituted “most serious offenses.” See Exhibits 3, 4. The difficulty the State experienced was proving Witherspoon was the same defendant named in two judgment and sentences filed in Snohomish County: 99-1-01322-5 (Exhibit 3) and 94-1-00711-9 (Exhibit 4).

The State called an expert witness to testify regarding fingerprint comparisons. The expert explained Witherspoon's fingerprints matched the prints on the 99-1-01322-5 judgment and sentence (Exhibit 3). RP (5/24/2010) at 18-20, 24-26. The 1999 judgment and sentence included a conviction for Residential Burglary (count III) and a special verdict that the defendant employed a deadly weapon. Exhibit 3.

The State also introduced into evidence the 1994 judgment and sentence. Exhibit 4; RP (5/24/2010) at 28. The 1994 judgment and sentence included a conviction for First Degree Burglary (count I). The 1994 judgment and sentence also identified previous criminal history for which the defendant was sentenced on August 8, 1992. The State introduced this 1992 Snohomish County judgment and sentence filed on August 8, 1992 (Exhibit 2). The State, also, established that Witherspoon's fingerprints matched the prints on the 1992 judgment and sentence. RP (5/24/2010) at 21.

The State argued (1) Witherspoon's two prior convictions in 1999 and 1994 constitute "most serious offenses", (2) Mr. Witherspoon's present conviction for second-degree robbery was a third "most serious offense", and (3) Mr. Witherspoon did not contest that he was the named defendant in the 1999 and 1994 causes. RP (5/24/2010) at 29. The State

submitted the appropriate sentence was life in prison without earned early release under RCW 9.94A.570. RP (5/24/2010) at 29.

The defense argued there was no testimony regarding the 1994 judgment and sentence. RP (5/24/2010) at 30. However, the defense conceded there was a similarity of names and the document was relevant for purposes of sentencing. RP (5/24/2010) at 30.

The trial court expressed its surprise that the State summoned a fingerprint expert to testify. RP (5/24/2010) at 30. The State informed the court that the law does not require such testimony. RP (5/24/2010) at 30. The State advised the court that the statute required the defendant to first “testify under oath that he’s not the person named in those convictions” before the burden shifts to the State. RP (5/24/2010) at 30. The State explained it elicited the fingerprint testimony to further bolster its case that Mr. Witherspoon had committed three “most serious offenses.” RP (5/24/2010) at 30.

The parties disputed whether the defendant must first deny being the same defendant identified in the prior J&S. RP (5/24/2010) at 32-33.

The trial court then engaged in the following reasoning:

THE COURT: Okay. First, with reference to Exhibit 3, the 1999 judgment and sentence, the officer testified to that one and made the comparisons with the fingerprints and it has the same birth date on the one, July 22nd, 1974 as the presentence report investigation had which was

July 22nd, 1974 as well. There's no question that the – that Count 3 of that judgment and sentence has a special verdict or finding for the use of a deadly weapon which was a firearm returned in reference to that count. And so the State has established with Exhibit 3 that Mr. Alvin Witherspoon was convicted of one of the most serious offenses in Snohomish County Superior Court in 99-1-1322-5. Which was filed on – the judgment and sentence was filed on February 17th, 2000.

The other issues [i]s whether the Court can make the same determination with reference to Count 1 of the judgment and sentence which was entered in Snohomish County cause number 94-1-711-9, and that was issued on July 18th of 1994. And that crime in Count 1 is burglary in the first degree, another of the most serious offenses as defined by the statute, which would make that a strike offense. There is – in that one they have his birthday as September 22nd, 1974 not July 22nd [19]74, and there are no finger prints on that one to connect – to positively identify Alvin Witherspoon that's here today as being the Alvin Witherspoon that was convicted of that.¹⁰ So, that's far more suspect.

I don't know what the burden is. I'll take Ms. Soublet at her word, I should have read this I guess, I wasn't anticipating this sort of problem. I'll take Ms. Soublet at her recitation of the law saying that there's got to be some reason for me to doubt that that is the Alvin Leslie Witherspoon that's before me today. And I don't have that. I believe that it is the same person in light of the presentence investigation as well as the certified copy that's entered.

¹⁰ This statement is not supported by the record. On the last page of the 1994 judgment and sentence, Mr. Witherspoon's date of birth is correctly identified as July 22, 1974. *See* Exhibit 4. The 1994 judgment also includes the defendant's fingerprints. *See* Exhibit 4. The State cannot explain why the deputy prosecutor did not (1) elicit fingerprint comparison testimony from its witness regarding this judgment and sentence, or (2) seek to correct the record with respect to the date of birth.

With the burglary in the first degree from 1994 and the residential burglary while armed with a deadly weapon from 1999, the State has established with this second robbery that Mr. Witherspoon is a persistent offender and I don't have any choices.

RP (5/24/2010) at 33-35.

First, Mr. Witherspoon's claim that the trial judge said "he would impose a life sentence because he trusted the prosecutor", *see* Brief of Appellant at 48, is patently false. The record does not support such a claim.

Second, the record only supports that the trial judge accepted the State's position that the court must have some reason to doubt that Mr. Witherspoon was not the same defendant identified in the 1999 and 1994 cause numbers. *See* RP (5/24/2010) at 35. This was a fair and correct statement of the law. *State v. Knippling*, 166 Wn.2d 93, 100, 206 P.3d 332 (2009) (applying a preponderance of the evidence standard when determining whether a defendant is a persistent offender).

Third, the record demonstrates the trial judge's disdain for the Persistent Offender Accountability Act (POAA):

THE COURT: ... I've never done a persistent offender sentencing, we just don't have that many in Jefferson County. Over the last week I looked at the statute and I was looking at the case law of what kind of discretion if any I had. I don't. I don't have any discretion. I don't take any pleasure, Mr. Witherspoon, in sentencing you as a persistent offender. That's a choice that was made in the

filing decision and the decision that went to trial. The jury found you guilty of robbery in the second degree. A very, very close call in my opinion but there was – as I ruled earlier this morning, there’s evidence to support it. And the jury accepted that evidence and found that the State had proved you guilty of robbery in the second degree beyond a reasonable doubt.

The arguments that I should arrest judgment are – quite frankly they were appealing to me. I said this young man is 37 years old I think you are now, is that right -- ... 36 years. I didn’t think you should go to prison [for] the rest of your life and I don’t mind putting that on the record but I have no discretion at all. And I would have to bend the law to vacate the – I believe to vacate the finding of guilt on second degree robbery, and I can’t do that. If I did that, I would be betraying what the oath I took when I became a judge. I can’t let what I personally feel interfere with what the law says I have to do.

RP (5/24/2010) at 42-43. If there were any bias, it would have favored Mr. Witherspoon. However, despite the trial judge’s desire to impose a more lenient sentence, he followed the law. This Court should hold that the alleged violation does not show actual or potential judicial bias. There is no violation of the “appearance of fairness” doctrine.

(c) The record demonstrates the trial judge exercised his discretion to ensure both parties received a fair trial.

The record shows Mr. Witherspoon had two residential burglary convictions that were admissible under ER 609. RP (04/13/2010) at 50-52;

Exhibit 3. The trial court permitted the State to introduce only one of the two convictions:

THE COURT: ... I should put this on the record as well, recognizing that because this is a residential burglary charge that the prejudicial effect is extreme of having a prior residential burglary. I think two of them would be so prejudicial that I think it would be too prejudicial or extremely prejudicial to Mr. Witherspoon to have the fact that he was convicted of two residential burglaries in 1999 before the jury. And so I'm trying to balance it somewhat to allow some impeachment, but not as prejudicial as it could be. ... I think that's the fairest way to do it, balancing the probative value of that versus the prejudicial impact to Mr. Witherspoon.

RP (04/13/2010) at 52-53. This is just one of many examples that reveal how the trial judge sought to follow the law and ensure both parties received a fair trial. This Court should hold that the trial judge maintained an appearance of fairness throughout the trial and sentencing.

E. THE INFORMATION WAS SUFFICIENT AND INFORMED THE DEFENSE OF THE SECOND DEGREE ROBBERY CHARGE.

Mr. Witherspoon challenges his conviction on the basis the information was insufficient. *See* Brief of Appellant at 44-46. According to Witherspoon, the information was defective because it did not include specific facts supporting the allegation that he used or threatened to use force to obtain or retain stolen property. *See* Brief of Appellant at 45-46. The argument is not persuasive.

The accused in a criminal case enjoys a constitutional right to notice of the alleged crime the State intends to prove. U.S. Const. amend VI; Wash. Const. art. I, § 22. This notice is formally given in the information. CrR 2.1(a)(1) (“[T]he information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”)

The information must allege every element of the charged offense. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). The law imposes this requirement so “that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.” *Id.* (quoting *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). Failure to allege each element means the information is insufficient to charge a crime and must be dismissed. *Id.* The defendant is entitled to bring a constitutional challenge to the information at any time before final judgment. *Id.*

The elements need not be alleged in the exact words of the statute so long as the information alleges the elements of the crime in terms equivalent to or more specific than those of the statute. *Nonog*, 169 Wn.2d at 226. “More than merely listing the elements, the information must allege the particular facts supporting them.” *Id.* (citing *Leach*, 113 Wn.2d at 688). *See also State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The requirement is to charge in language that will “apprise an accused person with reasonable certainty of the nature of the accusation.” *Id.* (quoting *Leach*, 113 Wn.2d at 686). Failure to provide the facts “necessary to a plain, concise and definite statement” of the offense renders the information deficient.” *Id.* (citing *Leach*, 113 Wn.2d at 690).

This Court must apply a liberal construction rule when considering challenges to the information raised for the first time on appeal. *Nonog*, 169 Wn.2d at 226-27. This rule prevents “sandbagging” on the part of the defense. *Id.* When a defendant challenges the information for the first time on appeal, this court employs a two part test. First, whether the elements “appear in any form, or by fair construction can they be found, in the charging document.” *Id.* (quoting *Kjorsvik*, 117 Wn.2d at 105). This Court reads the information as a whole, according to common sense and including facts that are implied, to see if it “reasonably apprise[s] an accused of the elements of the crime charged.” *Id.* (quoting *Kjorsvik*, 117 Wn.2d at 109). Second, whether defendant can show that the unartful language resulted in prejudice. *Id.* (citing *Kjorsvik*, 117 Wn.2d at 106).

Under the first prong of the test – the essential elements prong – this Court looks to the face of the charging document itself. *Kjorsvik*, 117 Wn.2d at 105-6. Here, the information stated:

On or about the 12th day of November, 2009, in the County of Clallam, State of Washington, the above-named Defendant, with intent to commit theft thereof, did unlawfully take personal property that the Defendant did not own from the person of another, to-wit: B. Pittario, or in said person's presence against said person's will by the use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another; contrary to Revised Code of Washington 9A.56.210(1) and 9A.56.190, a Class B felony....

CP 21. The information pleads the essential elements of the crime of second-degree robbery. *See* RCW 9A.56.190; WPIC 37.04. *See Kjorsvik*, 117 Wn.2d at 110-11.

The second prong of the analysis may look beyond the face of the charging document to determine if the accused actually received notice of the charges that he must prepare to defend against. *Id.* "It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges." *Id.*

Mr. Witherspoon claims the information does not survive appellate review because "it did not provide a description of the specific conduct of the defendant that allegedly constituted the crime" *See* Brief of Appellant at 46. This argument is disingenuous.

Witherspoon was aware of the specific facts the State would use to establish the element in question: that he used or threatened to use

immediate force, violence, or fear of injury. The motion for determination of probable cause read:

Alvin Witherspoon came around the front of her house with one hand behind his back. [Ms. Pittario] asked [Witherspoon] what he had behind his back and he said a pistol. [Witherspoon] jumped into the driver's seat of this maroon car. [Ms. Pittario] approached the car and saw two shoe boxes that she also recognized that had been inside her home. [Witherspoon] sped away."

CP. Supp. Furthermore, Witherspoon could have sought a bill of particulars if there was any genuine confusion regarding the State's case. The remedy for a lack of specificity was to request a bill of particulars. CrR 2.1(c); *Leach*, 113 Wn.2d at 687 ("[A] charging document which states the statutory elements of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. A defendant may not challenge a charging document for "vagueness" on appeal if no bill of particulars was requested at trial.").

The argument proffered by the defense invites "sandbagging". This Court should reject Witherspoon's claim that a new trial is warranted based upon the information, a document that he did not contest until this appeal. The information properly advised the defense of the essential elements of second-degree robbery; and the defense cannot establish prejudice because (1) it was aware of the facts the State would rely upon

to establish that the defendant employed force or the threat of force, and (2) it never requested a bill of particulars. This Court should affirm.

F. THE SENTENCE IMPOSED DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Mr. Witherspoon challenges the constitutionality of the Persistent Offender Accountability Act (POAA), the law under which he was sentenced. *See* Brief of Appellant at 48-55. Specifically, he claims the sentence imposed constitutes cruel and unusual punishment. The Washington Supreme Court has repeatedly affirmed the constitutionality of the POAA, and has expressly held a life sentence without the possibility of parole does not constitute cruel punishment. *See e.g. State v. Rivers*, 129 Wn.2d 697, 712-15, 921 P.2d 495 (1996); *State v. Manussier*, 129 Wn.2d 652, 674-679, 921 P.2d 473 (1996).

The Eighth Amendment to the U.S. Constitution bars cruel and unusual punishment. Article I, Section 14 of the Washington constitution bars cruel punishment.

In *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980), the Washington Supreme Court held the state constitutional provision barring cruel punishment is more protective than the Eighth Amendment. *Rivers*, 129 Wn.2d at 712. Because Witherspoon's sentence under the POAA does

not violate the more protective state constitutional guarantee against cruel punishment, this Court need not examine the defendant's claim under the Eighth Amendment. *Id.*

Fain enunciated four factors to be considered in analyzing claims of cruel punishment. Those factors are: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *Rivers*, 129 Wn.2d at 713 (citing *Fain*, 94 Wn.2d at 397).

In *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996), the Washington Supreme Court applied the *Fain* factors to the POAA and concluded that it did not violate Article I, Section 14. *Rivers*, 129 Wn.2d at 713 (citing *Thorne*, 129 Wn.2d at 772-77). After applying the *Fain* factors to Witherspoon's case, this Court should reach the same conclusion. *See id.* at 713-15.

First, the offense committed by Witherspoon is a "most serious offense" under the statute. RCW 9.94A.030(31)(o). The specific nature of a robbery includes the threat of violence against another person. RCW 9A.56.190. Witherspoon's crime, involved an implied threat of violence toward another person and therefore is a most serious offense. *See Rivers*, 129 Wn.2d at 713.

The second factor that must be considered under the *Fain* is the purpose behind the sentencing statute. The Supreme Court has held that a legitimate purpose of the persistent offender law includes deterrence of criminals who commit three “most serious offenses” and the segregation of those criminals from the rest of society. *Rivers*, 129 Wn.2d at 713 (citing *Thorne*, 129 Wn.2d at 775).

The third factor considers the punishment the defendant would receive in other jurisdictions. Washington’s so-called “three strikes” law is similar to state and federal legislation throughout the United States. *Rivers*, 129 Wn.2d at 714. It is likely Witherspoon would have received a similar, harsh sentence for his third serious offense under the majority of jurisdictions in this country. *See id.* The penalties vary, but many include life sentences for three-time offenders. *Id.* The Washington Supreme Court has held that the distinction between life sentences with and without parole is not significant. *Id.* (citing *In re Grisby*, 121 Wn.2d 419, 427, 853 P.2d 901 (1993)).

The final factor requires an analysis of the punishment Witherspoon might receive for other offenses in this jurisdiction. Under the POAA, all defendants who are convicted of a third “most serious offense” receive sentences of life imprisonment without possibility of parole. *Rivers*, 129 Wn.2d at 714. The offenses that are the basis of the

convictions and sentence in this appeal are all “most serious offenses,” which the people of this state have determined call for serious punishment. *Id.* The Washington Supreme Court has previously held that a life sentence imposed upon a defendant who, after being convicted of robbery, was determined to be a habitual criminal / persistent offender was not cruel and unusual punishment. *Rivers*, 129 Wn.2d at 714; *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001); *State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976).¹¹ See also *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (sentence of life imprisonment for three minor theft felonies did not constitute cruel and unusual punishment).

Based upon consideration of the *Fain* factors, and clear established case law, this Court should hold that a sentence of life imprisonment without possibility of parole is not grossly disproportionate to the offense committed in this case. This Court should affirm.

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¹¹ The *Lee* Court held: Appellant’s sentence does not constitute cruel and unusual punishment. The life sentence contained in RCW 9.92.090 is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime. Appellant’s prior convictions were for robbery, two burglaries in the second degree, and assault in the second degree. He received the life sentence for the second robbery conviction. His punishment is not disproportionate to the underlying offense. 87 Wn.2d at 937. *Accord Rivers*, 129 Wn.2d at 714-15.

G. SUFFICIENT EVIDENCE SUPPORTS THE FINDING THE DEFENDANT IS A PERSISTENT OFFENDER.

Mr. Witherspoon argues there is insufficient evidence to support his life sentence. *See* Brief of Appellant at 55-58. Specifically, Mr. Witherspoon claims there is insufficient evidence to establish he is the same individual named in the 1994 and 1999 Snohomish County judgment and sentences. *See* Brief of Appellant at 58. The record contradicts the claim.

Superior court judges are required to sentence persistent offenders to life in prison without the possibility of parole. RCW 9.94A.570; *State v. Knippling*, 166 Wn.2d 93, 98, 206 P.3d 332 (2009).

In order to establish Witherspoon's status as a persistent offender, the State needed to prove he was convicted as a most serious offender on two prior and separate occasions. This is because in "[t]he State bears the burden of proving by a preponderance of the evidence the existence of prior convictions, whether used for determining an offender score or as predicate strike offenses for purposes of the POAA." *Knippling*, 166 Wn.2d at 100 (citing *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005)). *See also State v. Lewis*, 141 Wn. App. 367, 393, 166 P.3d 786 (2007) (citing *State v. Ford*, 137 Wn.2d 472, 479-

80, 973 P.2d 452 (1999) (applicable standard of proof for the trial court's finding of prior conviction is by the preponderance of the evidence).

Under a preponderance standard, this Court reviews the evidence in the light most favorable to the State. *Lewis*, 141 Wn. App. at 393. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.* at 394 n. 19. Circumstantial evidence and direct evidence are equally reliable. *Id.*

Here, the trial court possessed certified copies of three judgment and sentences out of Snohomish County. Exhibits 2, 3, 4. Exhibit 3 revealed that the defendant had committed a residential burglary with a firearm, a strike offense under RCW 9.94A.030(31)(t). Exhibit 4 demonstrated the defendant had committed a first-degree burglary, a strike offense under RCW 9.94A.030(31)(a).

Mr. Witherspoon's full name (Alvin Leslie Witherspoon), birthday (7/22/1974), and SID No. (WA15782364) were correctly identified on the 1999 and 1994 judgment and sentence.¹² *See* Exhibit 3, 4.

Additionally, the State introduced fingerprint comparison analysis with respect to a 1999 judgment and sentence. This testimony concretely

¹² The trial court's statement that the date of birth on the 1994 judgment and sentence is not supported by the record. *See* Exhibit 4. The last page of Exhibit 4 correctly states Mr. Witherspoon's date of birth as July 22, 1994. *See* Exhibit 4. The State suspects the confusion is derived from a pre-sentence investigation report that incorrectly stated the birth date. *See* RP (5/24/2010) at 31.

established that Witherspoon was the same individual named on the 1999 judgment and sentence. RP (5/24/2010) at 15-20, 24-26. The 1999 judgment and sentence also referenced the 1994 judgment (Exhibit 4) in its prior criminal history. *See* Exhibit 3.

The State also introduced fingerprint comparison analysis with respect to a 1992 judgment and sentence (Exhibit 2). This testimony established that Witherspoon was the same individual named in the 1992 judgment and sentence. RP (5/24/2010) at 21. The 1994 judgment and sentence referenced the 1992 judgment in its prior criminal history. *See* Exhibit 4.

Finally, Witherspoon never denied that he was the same individual named in the certified court documents.

The trial court reviewed the available evidence, the certified documents and the testimony regarding the fingerprints, which allowed it to match the previous convictions to Witherspoon. This Court should hold the evidence was sufficient, under a preponderance standard, to find Witherspoon was a persistent offender. *See Lewis*, 141 Wn. App. at 393-94.

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H. PERSISTENT OFFENDER SENTENCING DOES NOT VIOLATE CONSTITUTIONAL SAFEGUARDS OF EQUAL PROTECTION .

Mr. Witherspoon next argues the trial judge's finding that prior convictions exist violated his equal protection rights under the Fourteenth Amendment and Article I, Section 12. *See* Brief of Appellant at 58-63. He argues that it is arbitrary to distinguish between: (1) the cases that require a jury to find, beyond a reasonable doubt, the existence of a prior conviction when said conviction is an element of an offense; and (2) the cases that allow a judge to find, by a preponderance of the evidence, the existence of prior convictions when a defendant is sentenced as a "persistent offender" under RCW 9.94A.570. This Court should reject the argument.

Under the Fourteenth Amendment and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *State v. McKague*, -- Wn. App. --, 246 P.3d 558, 571 (2011) (citing *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996)). A statutory classification that implicates physical liberty is not subject to the intermediate level of scrutiny under the equal protection clause unless the classification also affects a semi-suspect class, which is not the case here. *McKague*, 246 P.3d at 571 (citing *State v. Thorne*, 129 Wn.2d 736, 771,

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921 P.2d 514). Rather, persons such as Witherspoon, who are “persistent offenders” under RCW 9.94A.570, are neither a suspect nor a semi-suspect class. *McKague*, 246 P.3d at 571 (citing *Manussier*, 129 Wn.2d at 673). Thus, Witherspoon’s challenge to his life sentence imposed under the POAA is subject to rational basis review.

A statute survives rational basis review if the statute is rationally related to achieve a legitimate state interest and the classification does not rest on grounds that are wholly irrelevant to achieving the state interest. *McKague*, 246 P.3d at 571. The burden is on the party challenging the classification to show that it is “purely arbitrary.” *Id.* (citing *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992)).

The Washington Supreme Court has already held that the State has a rational basis for distinguishing between “persistent offenders” and “non-persistent offenders” under the POAA. *McKague*, 246 P.3d at 572 (citing *Manussier*, 129 Wn.2d at 674; *Thorne*, 129 Wn.2d at 771-72). It is also well established that the less strict procedural safeguards given to “persistent offenders” during the fact-finding process of determining prior convictions do not violate any constitutional rights under *Almendarez-Torres*, *Apprendi*, or their progeny. *McKague*, 246 P.3d at 572. While Witherspoon may disagree with the legislature’s distinction between two classes of defendants and its decision to afford less strict procedural

safeguards to one class, there is nothing unconstitutional about this practice under the current law. Witherspoon's equal protection challenge fails. *Id.*

Witherspoon bases his equal protection challenge on *State v. Roswell*.¹³ This Court has already determined that *Roswell* is inapposite to an appeal that challenges, on an equal protection basis, the procedure that permits a judge to determine whether a defendant is a persistent offender under the POAA. *See McKague* at 572. This Court should adhere to its recent precedent, reject the argument, and affirm.

I. A JUDGE MAY DETERMINE THE EXISTENCE OF PRIOR CONVICTIONS.

Mr. Witherspoon argues that the trial court violated his constitutional rights when it sentenced him as a "persistent offender" under RCW 9.94A.570 because the judge, not a jury determined the existence of his prior convictions through a preponderance of the evidence. *See* Brief of Appellant at 63-67. This argument also fails.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution "entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *State v.*

¹³ 165 Wn.2d 186, 196 P.3d 705 (2008).

McKague, -- Wn. App. --, 246 P.3d 558, 569 (2011) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Although the right to a jury trial and the prosecution's burden of proof beyond a reasonable doubt are "constitutional protections of surpassing importance", *McKague*, 246 P.3d at 569 (quoting *Apprendi*, 530 U.S. at 476), the Supreme Court has decided that these protections do not apply when determining the existence of prior convictions. *McKague*, 246 P.3d at 569 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)). See also *Apprendi*, 530 U.S. at 490 ("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.") (emphasis added); *U.S. v. O'Brien*, -- U.S. --, 130 S.Ct. 2169, 2174, 176 L.Ed.2d 979 (2010) (recognizing exception carved out by *Almendarez-Torres*); *U.S. v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) (recognizing the U.S. Supreme Court has chosen not to overrule *Almendarez-Torres* and unmistakably carved out an exception for "prior convictions"), *cert denied*, 532 U.S. 966, 121 S.Ct. 1503, 149 L.Ed.2d 388 (2001).

The Washington Supreme Court follows this federal constitutional rule:

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This court has repeatedly ... 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.

McKague, 246 P.3d at 569 (quoting *State v. Thieffault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007)). See also *State v. Roswell*, 165 Wn.2d 186, 193 n. 5, 196 P.3d 705 (2008) (recognizing the "prior conviction exception" of *Almendarez-Torres*); *State v. Smith*, 150 Wn.2d 135, 143, 156, 75 P.3d 934 (2003) (holding that the federal and state constitutions do not require a jury, rather than a judge, to find the existence of prior convictions beyond a reasonable doubt), *cert denied*, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004); *State v. Wheeler*, 145 Wn.2d 116, 124, 34 P.3d 799 (2001), *cert denied*, 535 U.S. 996, 122 S.Ct. 1559, 152 L.Ed.2d 482 (2002)

Most recently, this Court affirmed the ability of a judge, rather than a jury, to determine prior convictions for purposes of the persistent offender sentencing:

(1) existing case law does not give [the defendant] the right to have a jury decide whether he is the same defendant who committed the crimes resulting in his prior convictions used as strike offenses to establish his persistent offender status under the POAA and, thus, subject him to life imprisonment without parole for his new crime; (2) identity is a fact so "intimately related to [the] prior conviction," under *Jones*, as to be virtually inseparable from the finding of the existence of a prior conviction; (3) the *Almendarez-Torres* fact-of-the-prior

conviction exception to the *Apprendi* / *Blakely* jury trial requirement necessarily includes identity; and (4) thus, *Apprendi* and *Blakely* do not require a jury to decide the identity component of the fact of a prior conviction. Therefore, the sentencing court may, as it did here, find by a preponderance of the evidence that the perpetrator of the present crime is the same person as the perpetrator of a prior crime used as a strike offense for POAA sentencing purposes.

McKague, 246 P.3d at 570 (quoting *State v. Rudolph*, 141 Wn. App. 59, 71-72, 168 P.3d 430 (2007), *review denied*, 163 Wn.2d 1045, 190 P.3d 54 (2008)). This Court is bound by these precedential holdings. Thus, it should reject Witherspoon's invitation to disregard established precedent that rejects the right to a jury in sentencing hearings conducted under recidivist statutes like the POAA.

The trial court did not violate Witherspoon's constitutional rights when the sentencing judge found the existence of Witherspoon's prior convictions by a preponderance of the evidence for purposes of the POAA.

J. A LIFE SENTENCES WITHOUT THE POSSIBILITY OF PAROLE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE WASHINGTON CONSTITUTION.

Mr. Witherspoon claims the procedure that permits a trial judge, rather than a jury, to determine whether an offender has prior convictions for "most serious offenses" violates Washington's due process clause

under Art. I, Section 3. *See* Brief of Appellant at 67-75. Witherspoon appears to argue that Art. I, Section 3 offers greater protections than its federal counterpart. *See* Brief of Appellant at 69-70. He then asks this Court to employ a three-factor balancing test to find existing sentencing procedures under RCW 9.94A.570 violate due process. *See* Brief of Appellant at 70-75. The argument is without merit.

First, the Washington Supreme Court has determined that the *Matthew v. Eldridge*¹⁴ three-factor balancing test is not appropriate in criminal cases. *State v. Heddrick*, 166 Wn.2d 898, 904 n. 3, 215 P.3d 201 (2009) (citing *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2527, 120 L.Ed.2d 353 (1992) (“the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules”). This Court should reject Witherspoon on this basis alone.

Second. The Washington Supreme Court has expressly stated its previous opinions that affirmed the constitutionality of the POAA were based upon its state procedural due process analysis. “In *Thorne*, *Manussier*, and *Rivers*, the Washington Supreme Court based its *state procedural due process* analysis in part on the similarity of state and federal standards, a similarity unsettled by *Apprendi* and its progeny.” *Wheeler*, 145 Wn.2d at 124 (emphasis added).

¹⁴ 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)

Third. The Washington Supreme Court has held “[t]he *Gunwall*”¹⁵ factors do not favor an independent inquiry under article I, Section 3 of the state constitution.” *Manussier*, 129 Wn.2d at 679. The *Manussier* Court reasoned:

[*Gunwall* f]actors (1) and (2) indicate co-extensive state and federal protections, inasmuch as the text of Const. art. I, § 3 and the Fifth and Fourteenth Amendments to the Federal Constitution are identical. Factors (3) and (4) similarly indicate no broader protection under the state constitution since ‘[t]his court traditionally has practiced great restraint in expanding state due process beyond federal perimeters.’ ‘Although no controlling, federal decisions regarding due process are afforded great weight due to the similarity of the language.’ ... Factor (5) always favors independent state analysis because ‘[t]he state constitution *limits* powers of state government, while the federal constitution *grants* power to the federal government.’ Factor (6) does not favor independent state constitutional interpretation because [the POAA], although subject to considerable public debate and analysis, is no more a matter of *particular* state concern than any other law challenged on due process grounds.

129 Wn.2d at 679-680. The *Manussier* Court then concluded the POAA did not violate substantive or procedural due safeguards under the federal or state constitution. *Id.* at 685.

Finally, the Washington Supreme Court has definitively held that neither the United States Constitution, nor the Washington Constitution requires a jury, rather than a judge, to find the existence of prior

¹⁵ *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

convictions beyond a reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 143, 156, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004). *Accord State v. McKague*, -- Wn. App. --, 246 P.3d 558, 572 (2011).

When the trial court did not violate Art. I, Section 3 when it, rather than a jury, determined Mr. Witherspoon was a persistent offender. This Court should affirm.

IV. CONCLUSION:

Based upon the arguments above, the State respectfully requests that this Court affirm Mr. Witherspoon's conviction and sentence.

RESPECTFULLY SUBMITTED this 16th day of March 2011.



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