

No. 91297-1

NO. 43167-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES V. FARNSWORTH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold Johnson

No. 09-1-04643-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State present sufficient evidence?
2. Is the Most Persistent Offender statute constitutional and a matter for the trial court at sentencing?

B. STATEMENT OF THE CASE.

1. Procedure

Charles V. Farnsworth was arraigned on October 19, 2009, for his role in the October 15, 2009, robbery of the Harborstone Credit Union in Pierce County. He was charged in Pierce County cause 09-1-04643-5 with robbery in the first degree. CP 823. During the two years before trial, Mr. Farnsworth was very litigious. (*See the pro se pleadings designated by defendant, e.g. "Def.'s Motion to Dismiss Charge for Insufficiency of the Evidence," CP33-42; Def.'s Motion to Dismiss Counsel," CP 4-25, Declaration in Support of Motion to Dismiss for Speedy Trial Violation and Motion to Dismiss for Ineffective Representation," CP 220-221, Revised Supplemental Brief on First Revised Motion to Strike Prior Conviction, CP 245-259.*) These are a fraction of the pleadings filed by the defendant both before and during his *pro se* status. The case was ultimately called for trial September 20, 2011.

The trial court heard several motions prior to trial. These motions included the State's intent to admit defendant's 2004 robbery convictions

pursuant to ER 404(b). After significant briefing, including the *State's Motion to Admit ER 404(b) Evidence*, CP 260-312, 602-608, 609-615, 616-622, 814-822, the trial court concurred with the State and ruled the convictions were admissible. *See Order Denying Defendant's Motion to Suppress State's ER 404(b) Evidence*. CP 625-628. The *Order* included the court's findings and conclusions.

The case proceeded to trial with 20 witnesses being called and 90 exhibits being offered. CP 824-29. On October 27, 2011, the jury returned a verdict of guilty as charged to one count of robbery in the first degree. The State had previously informed the defendant by formal notice of his apparent Most Persistent Offender Status if convicted. CP 830. Because of the defendant's status as a "Three Striker," once again there was significant briefing. *See State's Sentencing Memorandum and Table of Contents*. CP 831-53. This briefing also included significant compilation of documents or exhibits. *See Exhibit Record for Sentencing, Declaration of Kawyne Lund, Exhibit list from 04-1-01330-7*. CP 742-810, 854-976 (*actual records*), 977-83 (*declaration*). These documents ultimately formed the basis for the court's ruling at sentencing.

At the sentencing hearing on February 24, 2012, the trial court evaluated all the information and concluded the defendant was a most persistent offender. Consequently, he sentenced the defendant to life without the possibility of parole. CP 683-694. Findings were entered on

March 9, 2012, carefully outlining what the court considered, concluded, and held. CP 695-707.

Though defendant has filed earlier pleadings with this Court, this is his direct appeal, which was timely taken.

2. Facts

On October 15, 2009, James McFarland walked into the Harborstone Credit Union in Pierce County and presented a demand note to the bank teller. CP 2-3. Mr. McFarland was wearing a woman's wig and large sunglasses as a disguise. He approached the line of teller Sarah Van Zuyt. She had already seen McFarland waiting in line and was suspicious of him given his odd appearance. RP Vol. 9: 478.

Upon approaching her teller window, McFarland "leaned into my counter, from what I remember, all the way into my counter...[p]ast my comfort zone, which would be where our doors would close on the teller line." RP Vol 9: 480. She testified she was scared and in shock and had trouble dialing 9-1-1. RP Vol. 9: 511-12. Her coworkers' observations of Ms. Van Zuyt corroborated that she clearly had been scared by her encounter with the bank robber. RP Vol. 9: 883.

Mr. McFarland immediately met the defendant in the parking lot driving a old, rather unique looking work truck. RP Vol. 11: 727. Law enforcement stopped the truck shortly after and recovered the wig, the sunglasses, and the cash from the bank. RP Vol. 10: 616; Vol. 11: 752;

Vol. 13: 1061. The defendant was arrested as the getaway driver and Mr. McFarland as the individual who entered the bank.

The defendant was transported to the police station for questioning. RP Vol. 12: 1049. After attempting to negotiate his way out of his arrest by volunteering information on other matters, he answered few questions about the robbery. RP Vol. 15: 1484-85. He claimed he knew nothing in advance of McFarland's intent to rob the bank. He stated he thought McFarland was merely going to get a loan so they could have money to buy drugs. RP Vol. 15: 1510. Both men are heroin addicts and had gone without drugs for some time; they were desperate to obtain money to get drugs. RP Vol. 14: 1373. When defendant was told by one of the detectives that they were facing robbery in the first degree, the defendant responded, "We didn't have a gun." The detective explained the law had changed and it was still first degree robbery without a gun. RP Vol. 15: 1484. The defendant looked quite shocked. *Id.* He would later be officially informed he was facing his third strike. CP 830.

Det. Griffith also spoke to the defendant that day. The defendant acknowledged that when McFarland exited the truck he was wearing a disguise of a wig and glasses. He also agreed that it seemed a bit suspicious to him. Vol. 12: 1051-52.

Det. Griffith contacted McFarland in the jail. The State had obtained a court order for a handwriting exemplar from Mr. McFarland. McFarland was very cooperative and completed the necessary documents. RP Vol. 13: 1083. The defendant would be a different matter.

Det. Griffith met with the defendant in the Pierce County Jail to obtain a handwriting exemplar pursuant to court order. The defendant became argumentative and refused to provide the handwriting sample. RP Vol. 13: 1080-81.

Ultimately, McFarland's exemplar and documents known to have been authored by the defendant were submitted to the Washington State Patrol Crime Lab, Questioned Documents Section. RP *Id.*: 1083. The document examiner, Brett Bishop testified. He testified that following examining the *pro se* pleadings of the defendant,¹ and the exemplar from Mr. McFarland, that Charles Farnsworth wrote the bank demand note and that McFarland did not. RP Vol. 12: 1028.

While trial was pending the defendant filed numerous pleadings, including a request to dismiss appointed counsel. CP 4-25. Eventually, on January 27, 2010, his motion to proceed *pro se* was granted. CP 26-27. He represented himself, with the benefit of stand by counsel, until near the

¹ Since defendant refused to give an exemplar, the State obtained an order allowing the court file to be used by the Crime Lab for the defendant's known handwriting sample. The file contained voluminous handwritten *pro se* pleadings signed and acknowledged by the defendant. CP 984-85, *Order Allowing Temp. Release of Court File...*

time the case was called for trial. CP 623-24. Stand by counsel was then appointed as conventional counsel.

The trial went forward and as alluded to above, a number of witnesses testified. An insurance manager who was at his office that was in the vicinity of the bank testified. He explained how he watched who he identified as the defendant and McFarland parking in the lot of his business. RP Vol. 11: 766-67. He testified that they were acting very odd and seemed inebriated. RP Vol. 11: 793. He also identified the defendant in court as the driver of the truck that the two men were ultimately arrested driving in following the robbery. RP Vol.11: 810-11. He explained that he approached the truck earlier, before the robbery, and the defendant clearly was attempting to avoid being seen, he talked with his hand to his face, through his fingers. RP Vol. 780.

Employees of the nearby Home Depot also testified. Each explained how their surveillance cameras worked and their observations of the two odd men that would later be determined to be the defendant and McFarland. RP Vol. 10: 638-73, Vol. 11: 837-47.

In addition to the evidence outlined above, McFarland testified for the State and explained that the defendant had been talking about robbing a business to get money for drugs. McFarland did not seek out a deal with the State at the inception, but did after a particularly offensive exchange between the two men occurred while they were at Western State Hospital pending evaluation. RP Vol. 15: 1427-28, 1430. He explained in his

testimony that the defendant "broke the code" by displaying the particularly lewd behavior that he directed at McFarland. RP *Id.*: 1433-34.

At trial, McFarland explained how the defendant obtained the wig that he wore into the bank and that it was the defendant who was actually supposed to do the robbery. The defendant continually backed out, and McFarland was quite drunk from trying to drown the affects of going without heroin, that he really couldn't drive. RP Vol. 15: 1380; Vol. 14: 1301. Ultimately, in a moment of frustration, McFarland grabbed the wig and glasses and went into the Credit Union. RP Vol. 14: 1306.

The evidence elicited by defense was after the State had already inquired of McFarland regarding his convictions for both attempted robbery in the first degree, and burglary in the first degree, and his accompanying sentence of 198 months. RP Vol. 14: 1258.

At trial, defense asked many questions of McFarland. He inquired into the specifics of his heroin habit, how much he used on a daily basis, whom he normally purchased from, how long he had used, and whether he had ever undergone rehabilitation. RP Vol. 13: 1263-65, 1267; Vol. 14: 1283. He asked him about his life at the Department of Corrections and how much of his life he had spent at DOC. In short, he successfully painted McFarland as a down and out drug addict and alcoholic who was avoiding his life without parole by testifying for the State. The testimony spanned two days and over 100 pages of cross-examination alone. RP Vol. 14: 1262-1373; Vol. 15: 1434-1445.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE

- a. The State presented sufficient evidence of 'force or fear' for robbery in the first degree
(Appellant's opening brief)

Evidence is sufficient if, when viewed in a light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Because it is the trier of fact's responsibility to resolve credibility issues and determine the weight of the evidence, we defer to it on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Defendant argues in his opening brief that the State failed to present sufficient evidence that his co-defendant, James McFarland, used force or threatened use of immediate force, violence, or fear of injury to

obtain or retain the money obtained from the victim credit union. The witness testimony indicates the State met its burden.

The teller that McFarland approached was Sarah Van Zuyt. Ms. Van Zuyt testified the defendant "leaned into my counter, from what I remember, all the way into my counter...[p]ast my comfort zone, which would be where our doors would close on the teller line." RP Vol. 9: 480. She was asked what, if anything, she said. She responded,

"...I couldn't say anything. There was, like a million things going through my mind that I wanted to say to him, and I could even get a word out.

Q: And why was that?

A: I was just scared, and I was in shock.

RP *Id.* 484. She was specifically asked why she gave him the money. RP *Id.* 485-86. She answered, "Because I didn't want anybody else to get harmed, and I didn't know what he was capable of doing." RP *Id.* She continued and explained there was a customer in another teller's line with "a young daughter[,] and I didn't want to put anybody else in jeopardy." RP *Id.*

She was also asked if she watched out a window or otherwise followed the robber after he left. She indicated she did not, "[b]ecause I was just in complete shock of what had happened. I was scared." RP *Id.* 511-12. She said her "whole body"... just "shook like crazy." RP *Id.* She also testified that she initially couldn't figure out how to call 911 she was so scared. RP *Id.* 512.

Ms. Van Zuyt's fear and anxiety were corroborated by fellow tellers. Ms. Hinnenkamp testified Ms. VanZuyt "was very upset" after the robbery. RP Vol. 11: 882-83. When asked about this behavior, she testified it was "very highly unusual" for Ms. Van Zuyt to appear so upset. RP *Id.* 883.

The defendant's role in the robbery was similarly cemented when Questioned Document Examiner Brett Bishop testified that it was his "conclusion that Charles Farnsworth wrote the questioned note and that James McFarland did not[.]" RP Vol. 12: 1028.

Based upon the teller's testimony and that of her fellow tellers, it is evidence that Mr. McFarland created sufficient fear and apprehension to accomplish the intended robbery. The record clearly supports the necessary element and defendant's claim should be denied.

b. The defendant was afforded a meaningful opportunity to cross-examine witness McFarland

The defendant argues that he was not able to meaningfully "test the credibility" of the witness. The lengthy record does not support this argument.

Mr. McFarland's testimony spans three separate volumes of transcripts. (RP Vols. 13, 14, & 15). There are over 100 pages of cross-examination alone. RP Vol. 14: 1262-1373; Vol. 15: 1434-1445. A

review of the record demonstrates that defense had plenty of opportunity to test Mr. McFarland's credibility.

Mr. McFarland repeatedly explained his bleak life and circumstances. He testified he and his brother had recently been evicted from the double-wide trailer they had been living not long before the bank robbery. RP Vol. 13: 1190. On numerous occasions, particularly in response to questions by defense, McFarland frankly acknowledged being both a heroin addict and an alcoholic. RP *Id.*² He said he and his brother were "at the bottom." RP *Id.* They had resorted to shoplifting or "boosting" to sustain themselves. RP *Id.* He was asked about his failed rehabilitation. RP Vol. 14: 1283. Counsel elicited Mr. McFarland's intent to steal a car that day but he was "so messed up" he couldn't do it. RP *Id.* 1296-97. He elicited he had been in custody since his arrest a year earlier. RP *Id.* 1275. He was asked in detail about his knowledge of the Department of Corrections and frankly admitted not only having been to prison, but having been there for a lengthy time--evidence he was not necessarily entitled to elicit. RP *Id.* 1351. Defense asked, "*You spent many, many years there [DOC] of your adult life.*" RP *Id.* 1351. Counsel even was allowed to ask Mr. McFarland's offender score under the SRA.

² In response to defense inquiries alone: RP Vol 15: 1264, 1266, 1279, 1280, 1331-32, 1357, 1360.

RP Vol. 13: 1338. Again, this testimony *followed* the State's admission of McFarland's convictions and lengthy sentence. RP Vol. 14: 1258.

Returning to the day of the crime, McFarland admitted he may of stolen the bike, though he did not recall doing so, and there was no evidence to indicate it was stolen. RP *Id.* 1336-37. He further admitted to stealing two bottles of wine that day to help stave off the effects of being "dope sick." RP *Id.* 1373.

In short, defendant was able to aptly demonstrate that McFarland was a long-time heroin addict, an alcoholic, had failed rehabilitation, had made a routine of stealing to support himself, was homeless with no means of support, had contemplated stealing a car on the day of the robbery, and in fact stole some merchandise that day. He further demonstrated that the witness was very familiar with the Department of Corrections, had a high offender score, and spent a large portion of his adult life incarcerated. It's difficult to imagine being able to paint a more dreary or unfavorable image of witness than was allowed. The record demonstrates that defendant was allowed to meaningfully cross-examine the State's witness. This claim should be rejected by the Court.

c. Was defendant allowed to inquire into witness McFarland's motivation?

As with the prior claims, we merely need to look to the record to determine the answer to this claim. McFarland complained he believed

Farnsworth had given statements incriminating him, but still did not volunteer to assist the State. RP Vol. 14: 1261. Unfortunately for Mr. Farnsworth, counsel opened the door to McFarland's primary motivation: the lewd acts and statements by the defendant while both men were at Western State Hospital. RP Vol. 15: 1430. Prior to that, McFarland had not said a word incriminating against Farnsworth, and was still contemplating taking "the beef" alone. RP *Id.* 1430, 1427-28. However, the witness found the defendant's acts at Western State so offensive, and so in violation of "the code" that he no longer was willing to go to prison for life alone. It was this event that motivated him to seek a deal from the State. RP *Id.* 1432-34.

Defense had wide latitude to inquire into the witness's motivation. RP Vol. 14: 1337-38. The witness repeatedly told defense he had a reason for cooperating. This answer was given a number of times in response to questions from defense as to the witness's reason for being a State's witness. RP *Id.* 1337-38, 1342-43.

The record does not support defendant's claim he was precluded from exploring the witness's motivation. This claim must be rejected.

- d. Defendant was allowed to meaningfully inquire into the witness's agreement with the State.

The defendant was allowed to significantly inquire into the witness's "deal." Mr. McFarland was clearly confused at one point as to

the exact crimes to which he had already entered a guilty plea. (*I entered a guilty plea to first degree robbery and first degree theft?* was his answer to counsel's first question on the topic. RP Vol. 14: 1347.) However, the court did not preclude the inquiry. Rather, the court precluded the admission of the guilty plea *document* on grounds it was too prejudicial, likely to confuse, and was not relevant. RP Vol. 15: 1400. This is a dramatically different circumstance.

It is undisputed that the thrust of the witness's testimony was that he was avoiding the "Three Strikes" statute and would not be sentenced to life without parole. Counsel was able to significantly inquire into the agreement, the witness's understanding of it, and more importantly the benefit he was to receive. Counsel even inquired to the more favorable classification benefits that may occur in DOC by not being classified as a three strikes convict. RP Vol. 14: 1348, 1350.

Based upon the elicited testimony, the jury was well informed of witness McFarland's "vulnerable status" and was able to consider it along with the multitude of other information provided. This argument should also be rejected.

- e. In view of the record, it was harmless error for trial court to prelude admission of the witness's convictions for crimes of dishonesty.

i. 2005 theft conviction

The State concedes that ER 609 provides for admission of witness

McFarland's 2005 theft conviction. However, in light of defendant's latitude in being able to examine the witness about his overall criminal history, the error was harmless.

A petitioner relying on a non-constitutional argument must demonstrate a fundamental defect which inherently results in a complete miscarriage of justice. *In re Cook*, 114 Wn.2d 802, 811, 792 P. 2d 506 (1990). For example, a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. *See, e.g., State v. Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). In the present case, the error of not admitting several of the witness's convictions is clearly harmless given the totality of his testimony and the evidence of the case.

As discussed above, the witness testified to numerous criminal violations and uncharged conduct--most of which would not have been admissible under ER 609. Additionally, the fact he was convicted of a crime can be inferred by the lay person from the fact that he readily admitted to spending a significant amount of time in the Department of Corrections. Any damage created by the failure to allow such testimony was clearly overwhelmed by the testimony that was ultimately elicited, including the robbery and burglary convictions. Given the nature of the testimony and the overwhelming evidence of defendant's guilt, defendant cannot substantiate a claim of error that resulted in a total miscarriage of justice.

ii. Possession of stolen property

McFarland's conviction for possession of stolen property is not similarly situated to the theft convictions. Defendant makes an argument for a "tolling" period to allow for defense's failure to follow the court rule. To the State's knowledge, the suggested "tolling" exception is not supported by law. ER 609 requires a party give notice of intent to use a conviction that is more than ten years old. The defendant did not comply. The court rule was not properly followed and therefore it was within the court's discretion to preclude its admission, creating no error.

Alternatively, any error was harmless based upon the totality of the record and does not provide a basis for a new trial.

- f. The State did not 'offer' defendant's prior robbery convictions.

There were numerous and lengthy pretrial motions in this case. One such motion surrounded the admissibility of the defendant's two prior robbery convictions. The defendant was convicted in 2004 of two separate robberies. CP 742-810. While there were some differences between the robberies, it was the defendant's use of a disguise that was relevant to the present robbery.

The State provided advanced notice of its intent to admit the convictions, as well briefing, and the matter was argued to the trial court. CP 814-822. Contrary to defendant's assertion, the State clearly

articulated proper grounds for seeking admission. The State did not seek to admit the convictions to portray the defendant as a "type" of person that committed robberies. Rather, the State moved to admit his prior robberies pursuant to ER 404(b) for the articulated purposes of: knowledge of the crime, modus operandi, motive, and to refute the absence of mistake. RP Vol. 3: 137-140.

The State did not seek to go into significant detail about the old robberies. Instead, the State argued that limited facts should be admitted, particularly given the defendant's apparent defense where he claimed at arrest that he had no idea that McFarland was going to rob the bank. He told arresting officers that he was there for a drug transaction and had no idea that McFarland was going to rob the bank, but rather thought maybe he was going to get a loan from somebody. RP *Id.* 137. Given this defense, the State was entitled to admit that defendant had been involved in previous robberies involving disguises using wigs and glasses.

After significant argument, the Court ultimately held the evidence of the prior robberies admissible in that it showed the defendant's knowledge of the impending robbery and refuted his statements to police that he had no idea what his co-defendant was going to do. CP 625-628.

It is undisputed the State mentioned defendant's prior robberies in its opening. RP Vol. 9: 10. The State clearly anticipated using the evidence exactly as earlier argued, that is to show the defendant was knowledgeable about the use of disguises in robberies, particularly the use

of wigs. Additionally to show that the idea to use a wig for the Harborstone robbery came from the defendant, thereby showing his advance knowledge of the anticipated robbery. RP *Id.* The only mention of the past robberies was the brief statement in opening. There was no further reference by the State or a state's witness. The State did not introduce or "offer" the evidence.

While the State did not *offer* evidence in its case, the State *commented* on it in its opening statement. The State ultimately elected to use the evidence in its rebuttal case and informed the court and opposing counsel this when asked by the court. RP Vol. 16: 1549. Upon hearing this, the defense apparently elected not to put on witnesses despite having repeatedly argued for their admission. When the court asked the jury to give its attention to defense counsel for his previously reserved opening, counsel responded by resting his case on behalf of the defendant. RP *Id.*, 1561. It was followed shortly by a motion to dismiss based on the State's mention of defendant's prior robberies in its opening. RP *Id.* 1675-76.

The motion was denied. The court held:

[A]rgument made in opening that's not supported by the evidence; on the other hand, the jury is instructed to follow the law as given to them by the court and to follow the evidence that is before them in terms of the testimony of the witnesses and the exhibits that are presented. They're presumed to follow those instructions.

RP *Id.* 1676-77. The court invited defense counsel to renew the motion at a later time. RP *Id.* Defendant did not renew the motion. The court's reasoning still applies and should be affirmed.

We presume that juries follow the instructions and consider only evidence that is properly before them. *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011) *citing State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962). We review a trial court's decision to deny a new trial for an abuse of discretion based on,

“ ‘the oft repeated observation that the trial judge,’
having ‘seen and heard’ the proceedings, ‘is in a better
position to evaluate and adjudge than can we from a cold,
printed record.’ ”

State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (*quoting State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

Again, as courts have said on other occasions, to maintain a contrary rule is to impeach the intelligence of the jury; it is to say that they will return a verdict on evidence which the court tells them they must not consider—a verdict they would not have returned had the inadmissible evidence been kept entirely from their knowledge.’

Id., 52.

The jurors are instructed to follow the law as given by the judge. Furthermore, that evidence can only come in the form of exhibits and testimony of the witnesses. In the present case, there was neither an exhibit nor a witness that testified or alluded to defendant's 2004 robbery convictions. The jury heard from 20 witnesses and received

approximately 47 exhibits. CP 824-29. Testimony alone spanned two weeks. In view of the totality of the evidence submitted, the inquiry is: Did the State's comment in opening so taint the entire trial such that the defendant did not receive a fair trial. Based upon the overwhelming evidence, the question must be answered with a 'no.'

In addition to the evidence adduced from the witnesses and contained in the earlier section of the brief regarding the sufficiency of the evidence, there was additional evidence as it related to demonstrating the defendant's knowledge and accomplice liability. For example, numerous witnesses described McFarland's disguise as eye-catching, unique, maybe even bizarre. Keeping in mind that he had the disguise on *before* he left the defendant, it seems hard to reasonably believe that the defendant was unaware of McFarland's intent. RP Vol. 15: 1420.

Mr. Naidoo testified the wig was "real big" and his glasses had what appeared to look like, "diamonds" and were really big. RP Vol. 9: 438. Ms. VanZuyt testified that upon spotting McFarland she was immediately suspicious. RP *Id.*, 478. She further described him as "wearing the awkward wig, dark sunglasses[,] which again, you don't need during the time of year that he came in..." RP *Id.* 486.

Teller Hinnenkamp also testified that McFarland looked "very suspicious" as he stood in line. RP *Id.* 868. She stated, when McFarland walked in it was kind of a stop-dead-in-your-tracks, very unusual and she continued to watch him." RP *Id.*

The insurance manager, Mr. Reed, identified the defendant in court as the man he contacted at the truck that didn't want to have contact with him. RP Vol. 11: 771, 780. He testified that Farnsworth talked to him through his hand and fingers in an attempt to hide his face. RP *Id.* He further described the various parking spots Farnsworth tried while waiting for McFarland. RP *Id.* 780-81.

There is also the very compelling statement that Mr. Farnsworth made to Det. Andren. Shortly after being transported to the police station, the detective informed him he was under arrest for robbery in the first degree. Det. Andren described the defendant's look as a "shocked expression," and that he "kind of sat back in the chair." Defendant then made the statement, "We didn't have a gun." RP Vol. 15: 1484. The detective explained the change in the law. RP *Id.*

When the evidence is viewed as a whole, overwhelming evidence was admitted. It cannot reasonably be said that the State's comments at the beginning of trial so tainted the jury that they disregarded all instructions from the court and convicted because of the single comment.

The State's mention of the defendant's prior convictions, in this case, was harmless beyond a reasonable doubt and his challenge to his conviction on this ground must fail.

Additionally, the trial court already entertained a motion for dismissal. The trial judge concluded that in light of the court's instructions, and from his vantage point having presided over the entire

trial, there was nothing to suggest the jury did not follow their instructions. For the same reasons the trial court denied defendant's motion, this Court should similarly reject defendant's argument.

- g. The State's evidence was relevant and not unduly prejudicial.

ER 404(b) is designed to preclude *inadmissible* evidence from being elicited in front of a jury. It is not designed for the wholesale exclusion of unpopular or disgraceful acts as argued by defendant. It is designed to preclude evidence that could confuse, mislead or waste time. It also cannot be disputed that the analysis is dependent on the nature of the case.

Defendant argues on appeal that the State presented him as a "criminal type" via Mr. McFarland. Defendant states McFarland called him a freeloader and a liar and cites RP Vol. 13: 1193 (*p. 23, Supplemental Brief.*) However, the only statement that appears is that of accusing him of being freeloader. RP *Id.* 1393. More importantly, it was in response to counsel's questions asking about the nature of his friendship with the defendant. Defense did not object. RP *Id.* Defendant cannot ask a question and then object when the answer is responsive and admissible. McFarland gave a rational basis for his conclusion, which again, was in direct response to the question posed by defense counsel. Counsel did not object that the response was non-responsive or otherwise contrary to the rules of evidence. Defendant cannot deprive the trial court of an

opportunity to rectify a perceived problem or engage in the balancing test of ER 403, and then complain later. Improper questioning cannot be urged as error unless the aggrieved party requested the trial court to correct it, by instructing the jury to disregard it, and claimed error for the court's refusal to do so. *State v. Johnson*, 60 Wn.2d 21, 371 P.2d 611, *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). In fact, defense counsel spent a fair amount of time eliciting similar responses from McFarland that he did not particularly care for the defendant. RP Vol. 14: 1271-74. The response was invited and defendant cannot now complain.

Similarly, the unfortunate display by the defendant while at Western State Hospital was also the result of counsel's specific inquiry. The witness repeatedly told defense counsel there was a reason why he elected to testify against the defendant. Counsel, however, repeatedly asked questions but refused to ask the reason, leaving it instead, for the State to elicit in re-direct. RP Vol. 14: 1337-38, 1342-43, 1427-28, 1430.

Defendant similarly argues that the statements he made in refusing to do the handwriting exemplar paint him in a bad light. However, it is undisputed that they were not in response to any questions that were designed to elicit a response. Mr. Farnsworth volunteered the statements and instead of merely refusing to do the exemplar, he chose to make additional comments. Defendant did not object to the admission of the statements and the comments were not prejudicial. Alternatively, any

error in admitting the statements was harmless under the circumstances of this case.

- h. The Defendant was not prejudiced by the chair in which he sat during trial.

Defendant contends that being made to sit in a chair that was different from either counsels' in some way detracted from the indicia of innocence.

The Court and the State noted on the record that it is unlikely the jury can notice the difference in chairs. RP Vol. 8: 387, 388. Unlike belly chains, or jail garb, there is nothing unduly prejudicial about the type of chair one sits in during trial. The chair does not speak to any particular criminal inclination or custody status. The corrections officer, Officer Lee, addressed the court and provided reasons why it was a valid security issue. RP *Id.* 386. Furthermore, counsel elected not to document the alleged impropriety by taking a photograph or otherwise specifically describing the situation. The court specifically invited counsel to document the nature of the chair and its appearance related to the position of the jury. RP Vol. 8: 389-90. The judge stated,

I look at it, and it does not appear to be something that someone would necessarily draw the conclusion, like handcuffs, or anklets, or a jail uniform that would clue a juror in automatically this person is in custody. The fact he's in a wooden chair or not in a wooden chair wouldn't necessarily draw I think the average person to that, that he's in custody or not in custody. That's not the conclusion that would be drawn from that in my estimation, looking at the chair and looking at the chair arrangement here. That he is

in a different chair, that could very well be from the juror's point of view because the softer chairs are hard on his back or whatever reasons there may be. But to draw the conclusion that that necessarily is because he is in custody, Mr. Whitehead, I don't think that's a necessary conclusion to be drawn. I think there's a lot more to be drawn from the charges that are pending than from the chair he's sitting. So I don't see this being a problem in this case, and my ruling will stand.

RP Vol. 8: 389-90. The defendant was not unduly prejudiced by being asked to sit in a chair that differed to some degree from that of counsel.

- i. There was no cumulative error such to have affected the outcome of the trial.

There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *RP Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998). Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal,

because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990).

A brief review of the significant evidence admitted in this case indicates that the verdict is untainted. First, there is little argument that a robbery of the credit union occurred. Several eye witnesses, including the victim teller, all describe the acts of Mr. McFarland and his successful attempt to obtain money from the bank by force or fear. Ms. Van Zuyt testified to her fear and her concern for other customers in the bank. Her coworker testified to her observations of Ms. Van Zuyt's obvious fear and shock immediately following the robbery. Other witnesses testified to the activities of the two men leading up to the robbery. The testimony leaves little doubt the men were acting together and were acting suspiciously. The employees of home depot and the insurance manager all describe highly suspicious behavior and an apparent desire to avoid detection or observation. Mr. Reed, the insurance manager, unequivocally places the defendant as the truck driver and therefore the one who is in charge of moving the truck all the times they try to hide. Lastly, but unquestionably most significantly, was the testimony of Brett Bishop, the Washington State Patrol document examiner. It was his professional opinion that there was only one author of the bank demand note: the defendant. RP Vol. 12: 1028. None of this evidence is challenged.

Based upon the overwhelming and undisputed evidence, it is evident that the defendant acted as an accomplice to Mr. McFarland in the commission of the robbery of Harborstone Credit Union. As a result, his conviction should be affirmed.

2. THE MOST PERSISTENT OFFENDER STATUTE IS CONSTITUTIONAL AND IS A SENTENCING MATTER FOR THE TRIAL COURT.
 - a. The Persistent Offender Accountability Act (POAA) is constitutional.

The POAA provides, in relevant part, that “[n]otwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release.” RCW 9.94A.570.

Statutes are presumed constitutional, and the burden is on the challenger to prove otherwise. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006).

The Washington State Supreme Court has already upheld the POAA as constitutional in response to a variety of challenges: rejecting challenges based upon substantive and procedural due process, *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996), Article II, Section 37 and Article II, Section 19 of the State constitution, the bill of attainder provisions of the federal and state constitutions, the separation of powers

doctrine of the state constitution, the equal protection clauses of the federal and state constitutions, and federal and state prohibitions against cruel and unusual punishment. *State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996). See *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001), the equal protection clauses of either the United States or Washington constitutions. *Thorne*, 129 Wn.2d at 771-72.

- b. The persistent offender determination is a matter for the trial court at sentencing.

Moreover, the Court has held that “the prior convictions used to prove that a defendant is a persistent offender need not be charged in the information, submitted to the jury, or proved beyond a reasonable doubt.” *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001); *Thorne*, 129 Wn.2d at 782-84. Rather, all that is required by the federal or State constitution is a sentencing hearing where the trial judge decides by a preponderance of the evidence whether the prior convictions exist. *Wheeler*, 145 Wn.2d at 121; *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

In the present case, Petitioner’s prior most serious offense convictions were not charged in the information or submitted to the jury

for proof beyond a reasonable doubt. Rather, they were found by the judge by a preponderance of the evidence. Because this is all that is required by the federal and State constitutions, *Wheeler*, 145 Wn.2d at 121; *Almendarez-Torres*, 523 U.S. 224; *Apprendi*, 530 U.S. 466, the court here did not violate defendant's right to due process as guaranteed by the Sixth Amendment and Fourteenth Amendments.

Therefore, the claim should be denied.

- c. The State must prove defendant's prior criminal history by a preponderance of the evidence.

“We hold that the State does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding.” *St. v. Ammons*, 105 Wn.2d 175, 187 (1986), *cert. denied*, 479 U.S. 930 (1986). The State does, however, have the burden of establishing a defendant’s criminal history by a preponderance of the evidence. RCW 9.94A.500. That statute provides,

“A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed. If the court is satisfied by a preponderance of the evidence that the defendant has criminal history, the court shall specify the convictions found to exist.”

Our Supreme Court has consistently held that the State meets its constitutional burden to prove prior convictions at

sentencing when it proves such convictions by a preponderance of the evidence. *St. v. Hunley*, 161 Wn. App. 919, 253 P.3d 448 (2011) Div II, citing *St. v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999). In *Ford*, the Court held the “State’s ‘bare assertions’, unsupported by evidence are insufficient to prove a defendant’s prior conviction.” *Hunley*, at 927, *Ford*, at 482. The *Ford* court held the facts relied upon in sentencing must have some basis in the record. There is significant documentation of both of defendant's 'strikes.' See exhibits accompanying State's Sentencing Memorandum. CP 854-976.

d. Defendant's 1984 vehicular manslaughter conviction is a most serious offense.

The controlling statute for analyzing this California conviction is RCW 9.94A.030(27)(u)³ which states:

Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection[.]

The statute directs us to examine the nature of the out of state conviction and compare it to Washington law at the time the out of state crime was committed. In this case, the certified Complaint from Ventura

County, California [CP 854-976, *States Exhibits for Sentencing*, # 5] states the defendant caused a fatal collision on January 18, 1984. In short, the defendant was driving while under the influence of alcohol and drugs, hit another car killing two people, Digna Marie Henket and Teresa Ramirez.

In the present case, the *Judgment on Conviction* is the controlling document. CP 854-976 #7. It plainly states both the citation to the California Penal Code [CPC or PC] Mr. Farnsworth was convicted of violating. It further specifies the title of crime, “vehicular manslaughter.” It sets his sentence at six years and remands him to the Department of Corrections, Chino” and rejects his request for placement at a rehabilitation center. Despite Defendant’s current protests, there is nothing unclear about the crime for which he was convicted. The confusion Defendant has with the statute may have more to do with a lack of understanding of how California codifies its crimes. For example, there is the Penal Code [PC], the Health and Safety Code [H&S], and the Vehicle Code [CVC or VC]. In this case, the California Legislature essentially created a “felony vehicular manslaughter statute with DUI as the predicate offense. Hence, both the P.C. Manslaughter statute is cited, as is the V.C. 23153(a), the DUI element.

Some legislative history is useful in underscoring that at the time

³ Is now RCW 9.94A.030(32)(u).

of the Defendant's unlawful conduct, January, 1984, California considered driving while under the influence of alcohol and/or drugs, and causing the death of a human being to be akin to the traditional forms of unlawful killing, e.g. murder and manslaughter, and not a traffic violation. In 1983, the California legislature clarified once and for all the code that should apply when death results from an intoxicated driver. It should be included with the other statutes that speak to unlawful killing, the Penal Code, with an underlying citation to the appropriate DUI statute. Whereas a driver charged with the lesser offense of driving while intoxicated is only charged under the vehicle code, i.e. 23153 VC. ***State v. Donald McFarland***, 765 P.2d 493, 496, *Cal. Supreme Crt., En Banc* (1989)(*Number & nature of counts that can be charged in cases of multiple victims from single collision*). It is this reasoning that results in the Defendant's judgment and sentence referencing both the penal code applicable to the unlawful killing of another, CPC 193(c)(3). (The subsections are transposed, there never has been a "(3)(c)" with PC 193 per law librarian P. Dolgenos of The Bernard E. Witkin State Law Library in Sacramento, CA) and the DUI provision, 23153(a) VC. In short, the defendant was convicted of precisely what the judgment and sentence says: vehicular manslaughter. Next, the California statute shall be subjected to a comparability analysis.

i. Comparability of Statutes

This Court must next compare the elements of the out of state conviction with those of the similar Washington crime in effect when the out of state crime was committed. *In Re: Restraint of Lavery*, 154 Wn.2d 249, 255 (2005).

The applicable Washington statute in effect on January 18,1984, is RCW 46.61.520—Vehicular homicide—penalty.

- (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, as defined by ...or by the operation of any vehicle in a reckless manner or with disregard for the safety of others, the person so operating such vehicle is guilty of vehicular homicide.
- (2) Vehicular homicide is a class B felony punishable under chapter 9A.20 RCW.

ii. Applicable Test: Legal and Factual Comparability

To determine comparability, Washington courts apply a test involving legal comparability and factual comparability. The present sentencing court must first compare the elements of each crime. If the elements are “substantially similar” *or* if the out of state crime is defined more narrowly than the Washington crime, the out of state conviction is

included in the score. *In re Pers. Restraint of Lavery*, 154 En.2d 249, 255 (2005)[Emphasis added].

Conversely, if the out of state crime is defined *more broadly* than the Washington crime, the court must then go to the second part of the comparability test and determine factual comparability. *St. v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)[Emphasis added]. If the court finds the out of state charge more narrow than the Washington counterpart, the analysis is over and the conviction counted. The State submits that has been accomplished in this case and no further analysis is required.

If, however, this Court finds the out of state more broad than Washington's, then the court proceeds to the next step. This step requires the sentencing court to determine whether the defendant's conduct would have violated the comparable statute, as evidenced by the indictment, information, or records of the out of state conviction. *Lavery*, 154 Wn.2d at 255.

As stated earlier, in the present case only the first step need be done. Even if this Court were to unnecessarily proceed to the second step, the California conviction would still be factually comparable to the existing Washington vehicular homicide statute in effect January, 1984.

iii. Sources of Information for Analysis

In general, the current sentencing court is limited to examining:

1. The statutory definition
2. The charging document
3. A written plea agreement
4. Transcript of plea colloquy
5. Any explicit factual finding by trial judge to which the defendant assented.

Shepard v. U.S., 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). In *Wilkoff v. Superior Court*, 696 P.2d 134, 38 Cal.3e 345, 696 P.2d 134 (1985), the 1983 California Legislature amended the homicide and drunk driving statutes to provide that an intoxicated driver who kills another person is not chargeable under the Vehicle Code, but under the manslaughter Penal Code. The primary issue on appeal in *Wilkoff* was the number and nature of charges based on the number of persons injured, i.e., one count per person killed, but not multiple separate counts of DUI per victim. The Court said the actus reus of vehicular manslaughter is homicide—the unlawful killing of a human being. While multiple counts of DUI were not chargeable for each person, multiple counts were chargeable for each person killed. *Wilkoff* at 137.

e. Applying Test to Present Case—California Conviction

i. Statutory Definition(s)

Mr. Farnsworth was convicted under California Penal Code, section 192(3)(c) [sic] citing to 23153(a) of the California Vehicle Code, the charging document provides the following:

- a. The defendant
- b. [Having proper jurisdiction], i.e. Ventura County, California on Jan. 18, 1984
- c. Willfully and unlawfully, and
- d. While under the influence of an alcoholic beverage and a drug
- e. And their combined influence
- f. Drive a vehicle
- g. And in so driving commit an act forbidden by law, (in Mr. Farnsworth's case, passing without sufficient clearance in violation of VC 21751)
- h. The driving of said vehicle, proximately caused death and bodily injury to
- i. Teresa Ramirez

**ii 192 PC Manslaughter is the unlawful killing of a human being without malice....
(3)(c) Vehicular—**

Driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to a felony, and with gross negligence; or....

iii. 23153(a)VC read:

It is unlawful for any person, while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a

vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

iv. 21751 VC Passing without sufficient clearance provided:

On a two-lane highway, no vehicle shall be driven to the left of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless the left side is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction.

f. Discussion

In examining the first recommended source stated above, the statutory definition, it is clear that 23153(a) VC provides the “driving under the influence” component [...while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, drive a vehicle] and while so driving do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle [VC 21751 provides the forbidden act]. And that act or neglect proximately caused (bodily injury to any person other than the driver), and PC 192 provides the actus reus, the unlawful killing of a human being, the homicide precisely stated in *Wilkoff*. The vehicle code

is not the charge *alone*. Counsel's interpretation of vehicular assault is incorrect. The 23153(a) citation, as previously stated, is the necessary predicate offense that enables PC 192(3)(c) to be the vehicular manslaughter statute.

g. Comparison of Elements

Next, we can examine another possible source, the "written plea agreement." The State obtained the "Felony Disposition Statement" from California. CP 854-976, *State's Exhs. at Sent. #6*. It appears to most closely resemble a guilty plea form in Washington. While Defendant is correct, section "E" of the statement does not include the defendant's initial's, it does show that both "preliminary hearing transcript" and "police reports" are checked as sources upon which the court can accept the plea. We cannot speculate as to the colloquy or representations made by the various parties, particularly when California is a state that uses the preliminary hearing system where fact evidence is taken in the form of testimony. The Felony Disposition Statement also includes other indicia the defendant agreed to sufficient facts to allow the court to accept his plea. Section "C" "Harvey Waiver," indicates the defendant agrees that "all facts and information relating to any and all counts, allegations...and considered by the court in determine sentence. Following that section, are Sections III and IV both which have signatures of the defendant, his

counsel, and the deputy district attorney. Again, it is reiterated and the defendant acknowledged that all had been explained and he asked the court to accept his plea.

Following review of that document, it is clear that “The Court f[ound] that:

1. Defendant and his attorney appeared in open court and the defendant entered his plea(s) and admission(s).
2. Defendant understands the nature of the charge(s) and the consequences of his plea(s) and admission(s).
3. Defendant has knowingly, intelligently, and understandingly waived his rights as set forth above.
4. Defendant’s waivers of his rights, and his plea(s) and admission(s) are free and voluntary.
5. *There is a factual basis for the plea.* (Emphasis added.)

The Court then “Ordered That:

1. Defendant’s plea(s) and admissions(s) are accepted.
2. The clerk file this document and incorporate it in the minutes of this case.”

The last notation, “incorporate in the minutes of this case” indicates that like our courts, the Judge who accepted Mr. Farnsworth’s plea had additional information available to him such that he made a judicial finding of sufficient facts. The findings are verities. Mr. Farnsworth cannot now ask *this* Court to find to the contrary.

clear: defendant's conduct regarding his California conviction would clearly be criminal in Washington State at the same time as Vehicular Homicide, RCW 46.61.520, in that:

On January 18, 1984, the defendant drove a car while under the influence of alcohol and drugs, violated the rules of the road and tried to pass another car headed the same direction he was, but without sufficient distance and as a result, he collided with an oncoming car, killing at least one person.

[Reading of entire charging document makes it clear he killed two women.

The State recognizes he plead to only one of the two counts.]

h. CHART: Comparison of Elements

The court shall compare the elements of the California law of vehicular manslaughter to that of the Washington statute at the pertinent time, RCW 46.61.520. (*See earlier in brief*).

<u>WA</u>	<u>CA</u>
●The Defendant	●The Defendant
●With appropriate jurisdiction	●With appropriate jurisdiction
● 0	●With gross negligence
●While under the influence of intoxicating liquor or any drug or combination of	●While under the influence of alcohol or drug,
●Drive any vehicle/Operate any vehicle	●Drive a car

- 0
- In driving commit an act forbidden by law (i.e., unsafely passing in vio. Of CVC 21751)
- And proximately cause
- That proximately caused
- Death within three years
- death /bodily injury
- of any person
- to another person

The State submits the statutes are nearly identical. First, as demonstrated, the elements of the two statutes on their face appear essentially identical. The defendant must be under the influence, drive a car, and those acts must be the proximate cause of the death of another person.

Second, any difference there may be between the statutes is the California statute is more narrow, i.e. requires more elements than its Washington counterpart.

For example, California required several additional specific findings.

1. That the defendant acted with gross negligence. There is no corresponding element in the Washington statute.
2. California requires the defendant commit ‘an act forbidden by law’ in addition to being under the influence. Washington has no such requirement.

The next suggested source, transcript of the plea, was not provided by California authorities. The final source, ‘explicit factual finding by the judge to which the defendant assented’ is a bit challenging given their form does not provide for a written statement adopted by the defendant. It however clearly cites the PC 192(3)(c) [sic] and in section ‘B’ notes, “*The defendant is entering (a plea to the most serious charge) (pleas to sufficient counts) to give the court adequate discretion to impose an appropriate sentence.*” This section is initialed by the Deputy District Attorney. The State submits that as a result of the Court’s order to incorporate the documents into the minutes of the case, obviously the charging document is included. As already outlined above, the language and specificity of the defendant’s acts clearly lay out the crime he committed and the factual basis.

The State directs the court to documents already referred to as well as the previous analysis that touches on the issue of factual comparison, and will not be repeated. Upon review of the documents and applicable statutes and case authority, the State has exceeded its burden of proving defendant’s California conviction by preponderance of the evidence. Additionally, the State has also proven the conviction is comparable to a then-existing Washington statute that equates to a most serious offense. His California conviction is both lawful and comparable. His conduct is

3. Washington law is also clearly more broad in that it allows vehicular homicide to be charged even if death does not result immediately or very soon after the collision. Washington allows for a defendant to be charged “if death of any person ensues within three years as a proximate result of injury proximately caused...” The California statute does not provide for a similar delay in charging.

i. Factual Comparison

This Court does not need to perform any further comparison, e.g. factual comparison, because the Washington statute is more broad than that which Mr. Farnsworth was convicted. However, even if this Court elects to perform what the State believes is the unnecessary factual comparison, the conduct designed to be punished under either statute *is* identical: drive a car impaired and proximately cause the death of another person and you are guilty.

There is little doubt that defendant’s conduct on January 18, 1984, would have violated the Washington vehicular homicide statute.

The defendant’s 1984 California conviction for “vehicular manslaughter” is comparable to Washington States then-existing “vehicular homicide” statute.

j. Vehicular Homicide is a Most Serious Offense

RCW 9.94A.030(r), states:

Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the

influence of intoxicating liquor or any drug as defined by...or by the operation of any vehicle in a reckless manner.

His 1984 California conviction for vehicular manslaughter is comparable to the similar Washington statute at the relevant time and therefore also counts as a most serious offense for purpose of determining his sentence.

D. CONCLUSION.

The defendant's conviction for first degree robbery should be affirmed. The State presented extensive evidence to support all elements of the charge, to include that Mr. McFarland used fear or threat of force to accomplish the robbery.

Throughout the trial defense was able to meaningfully cross-exam witness McFarland, his motivation to testify, and his agreement with the State regarding testifying.

Though the trial court committed error in not admitting the witness's 2005 theft convictions pursuant to ER 609, given the nature of the testimony, the error was harmless and the defendant was not prejudiced.

The court did not abuse its discretion in not admitting the witness's conviction for possession of stolen property because defense did not

comply with the court rule for seeking its admission. Alternatively, any error was harmless and the defendant was not prejudiced.

The State did not "offer" evidence of the defendant's 2004 robbery convictions. The State, however, did mention their existence in opening statement. However, no other mention of them occurred for the duration of the 20 witness case. Furthermore, the trial court entertained defendant's motion to dismiss on this basis and from the court's unique vantage, determined that it was not such an act to require dismissal and denied the motion. Due difference should be given to the court's vantage point and the ruling affirmed.

The evidence elicited from witness McFarland was not unduly prejudicial and was properly admitted.

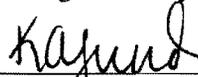
The defendant was not prejudiced by the nature of the chair in which he sat during trial.

The statute under which the defendant was sentenced, the Persistent Offender Accountability Act, or "Three Strikes," has been evaluated and tested and deemed constitutional. Similarly, the determination of whether a defendant is in fact a most persistent offender is one for the trial court at sentencing. The sentencing court in this matter properly evaluated defendant's past convictions and determined that they were lawful and proven by a preponderance of the evidence. The trial

court properly concluded the defendant was a most persistent offender and therefore sentenced him in accordance with the statute.

DATED: August 19, 2013.

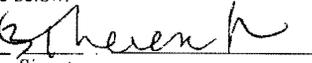
MARK LINDQUIST
Pierce County
Prosecuting Attorney



Kawyne A. Lund
Deputy Prosecuting Attorney
WSB # 19614

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/19/13 
Date Signature

PIERCE COUNTY PROSECUTOR

August 19, 2013 - 2:12 PM

Transmittal Letter

Document Uploaded: 431670-Respondent's Brief.pdf

Case Name: State v. Farnsworth

Court of Appeals Case Number: 43167-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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