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Division III
State of Washington

No. 96061-5

34729-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, RESPONDENT

v.

FREDRICK ORR, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence presented at trial was insufficient to support a conviction for first-degree burglary.

2. The trial court abused its discretion in denying Mr. Orr's motion to instruct the jury on the defense of others.

3. The sentence of life without the possibility of parole constitutes cruel and unusual punishment under both the federal and state constitutions.

4. The sentence of life without the possibility of parole violates the Equal Protection Clause.

## II. ISSUES PRESENTED

1. Whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of first degree burglary was proven beyond a reasonable doubt?

2. Did the trial court abuse its discretion when it refused to instruct the jury on the defense of another?

3. Does the imposition of a mandatory life sentence on a 42-year-old adult, under the Persistent Offender Accountability Act, RCW 9.94A.030 and .570, based upon prior strike convictions committed

when the adult was 21 and 23 years of age, violate the Eighth Amendment of the federal constitution and article I, section 14 of the state constitution?

4. Does the Persistent Offender Accountability Act's classification of Mr. Orr's prior strike convictions as "sentencing factors," rather than as "additional elements of the crime," violate his equal protection rights?

## III. STATEMENT OF THE CASE

Procedural history.

Fredrick Orr was charged by amended information in the Spokane County Superior Court with one count of second degree assault and one count of first-degree burglary. CP 38. Each offense included a deadly weapon enhancement. CP 38. The State provided pretrial notice of a potential life sentence under the Persistent Offender Accountability Act. CP 20. The matter proceeded to trial and Mr. Orr was convicted as charged. CP 180-181, 183, 184. The court sentenced Mr. Orr to life without the possibility of parole because he had two prior convictions for most serious offenses. CP 218, 224. This appeal timely followed.

Substantive facts.

On April 7, 2015, Nicholas Largent was living with his father at 2617 West Boone Avenue in Spokane. CP 144. Around 4:00 p.m., Mr. Largent observed a man in the alleyway, standing atop a discarded

refrigerator, holding a pipe. CP 145. The man, identified as Mr. Orr, appeared crazed. RP 146-47. Mr. Largent made contact with Mr. Orr who stated that there was a house on the block[1] with children inside who had holes drilled in their heads. RP 146.

Thereafter, Mr. Orr jumped over the alleyway fence into the neighbor's back yard (the Nelson residence) with the pipe. RP 146-47, 205-06. Mr. Largent became concerned and contacted his father, Dale Largent.[2] RP 147.

Liv Nelson lived at 2620 West Gardner, which was next door to the Largent household. RP 242. On the day of the incident, Ms. Nelson was preparing some food for her daughter. RP 242-43. She heard a loud banging noise coming from the back of her residence. RP 243. She exited the front door of her residence with her 2½ year old daughter, walked toward the backyard, and observed Mr. Orr exiting the rear door of her residence with

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[1] Shortly before the event, Mr. Orr surveilled the Nelson residence and then approached a neighbor and asked who lived at the Nelson residence. RP 226, 239. He appeared aggressive, "ticked off," and had a pipe in his hand. RP 227-28. The neighbor advised Mr. Orr he could call 911 if he had a problem. RP 229. Mr. Orr remarked that calling 911 and going through the legal system would take too much time. RP 229. Mr. Orr then inquired whether the Nelsons had any children and stated: "Well, I would hate for something to happen to these kids." RP 230.

[2] Dale Largent will be referred to as "Dale" for clarity. No disrespect is intended.

the metal pipe in his hand.[3] RP 243-44. She remarked: "[Mr. Orr] looked rageful and intent on hurting someone with that thing in his hands actually." RP 254. Thereafter, the defendant apologized and sat down. RP 245. Ms. Nelson, who was frightened,[4] walked past Mr. Orr into the rear door of her house and immediately called the police. RP 244-46, 250. Mr. Orr did not have permission to be in the Nelson home and he was not known to Ms. Nelson. RP 250

Contemporaneously with the event, Dale exited his garage, walked to the fence, heard a loud boom, and observed Mr. Orr entering the Nelson's residence. RP 167. Dale ran to his home, grabbed a pistol and ran back toward his neighbor's home. RP 167. As Dale made entry into his neighbor's backyard, he observed Mr. Orr exiting his neighbor's residence, as Ms. Nelson stood at the doorway and appeared terrified. RP 167-68, 171.

Dale asked Mr. Orr why he was there, Mr. Orr appeared angry and remarked, "I will deal with this," and then walked briskly toward Dale, with the metal pipe in his hand. RP 168, 173, 176-77. The defendant again remarked that someone was drilling holes in the heads of children inside the home. RP 169. Dale tried to calm Mr. Orr and reassure him that he had the

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[3] The metal bar appeared to be a leg from a campfire stove. RP 193.

[4] Neighbor, Katelynn Wills, observed Ms. Nelson during this time and she appeared terrified. Ms. Nelson yelled "Stop. Get out." RP 207.

wrong house. RP 169, 178. Mr. Orr then swung the metal pipe at Dale several times, including swings directed at his face.[5] RP 170, 208-09. Dale would have been struck had he not moved. RP 209. Dale subsequently pointed his pistol at Mr. Orr. RP 177, 184.

After the ordeal, Mr. Orr remarked several times that he had the wrong house. RP 181-82. Police took possession of Mr. Orr's pipe and it was shown to the jury at the time of trial. RP 264.

There was structural damage to the back door and frame after the incident. RP 246, 248.

Mr. Orr testified that prior to the incident, he was approached by an individual named "Sean"[6] on the street and was told that Sean's girlfriend was being extorted by someone named "Sasquatch." RP 282-83. Sean also allegedly told Mr. Orr that "Sasquatch" was holding children against their will. RP 285. Sean and Mr. Orr attempted to find "Sasquatch's" residence. RP 285-86. Apparently, an unidentified individual told the pair they could find "Sasquatch" at the Nelson residence. RP 304. As the pair approached the Nelson residence, "Sean" stayed behind as Mr. Orr walked toward the residence. RP 286-87. Mr. Orr subsequently knocked on the Nelsons'

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[5] Several of Dale's friends accompanied him when he confronted Mr. Orr. RP 170-71.

[6] "Sean's" last name was not provided at trial. RP 304.

windows. RP 288, 290. Mr. Orr stated he was "looking for the guy holding children against their will." RP 292. Mr. Orr admitted he kicked in the door of the Nelson residence because he observed handprints on the backdoor. RP 294-95, 303, 310. He also described his confrontation with Mr. Largent. RP 295-96.

On cross-examination, Mr. Orr admitted he did not see or hear any suspicious activity inside the Nelson residence and no one inside the home was in danger. RP 306, 308, 315. He also confirmed that he had the pipe to frighten or strike someone inside the Nelson residence and he was angry when he entered the home. RP 306, 309, 311. Mr. Orr also conceded that he told police after the incident: "all I know is I'm going to kick somebody's ass. I won't kill them, but they deserve an ass whopping."[7] RP 313-14.

There was no evidence presented at trial that Mr. Orr's assumptions regarding the residents of the Nelson household were credible or true.

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[7] The statements were previously ruled admissible at the time of trial. RP 8-9.

## IV. ARGUMENT

### A. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR FIRST-DEGREE BURGLARY, INCLUDING THE FINDING THAT THE DEFENDANT WAS ARMED WITH A "DEADLY WEAPON" WHEN HE ENTERED THE RESIDENCE.

Standard of review regarding sufficiency of the evidence.

Evidence is sufficient to convict if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A sufficiency of evidence challenge is reviewed de novo. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The standard of review for a sufficiency of the evidence claim in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Homan*, 181 Wn.2d at 106. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *Homan*, 181 Wn.2d at 106. In a sufficiency challenge, an appellate court's review is "highly deferential to the jury's decision." *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

The State may establish the elements of a crime by either direct or circumstantial evidence and both are equally reliable. *State v. Delmarter*,

94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). In addition, this Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Martinez*, 171 Wn.2d at 364.

Argument.

The defendant contends the State failed to carry its burden of proof regarding the first-degree burglary, alleging that Mr. Orr did not use the pipe as a deadly weapon. Appellant's Br. at 10-17.

As charged, the State was required to prove, among other elements, that the defendant was armed[8] with a deadly weapon or assaulted someone. RCW 9A.52.020(l)(a). The statutory definition for "deadly weapon" provides:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.[9]

RCW 9A.04.110(6).

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[8] "Armed" means the "weapon is readily available and accessible for use." *State v. Chiariello,* 66 Wn. App. 241, 243, 831 P.2d 1119 (1992).

[9] "'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]" RCW 9A.04.110(4)(b).

Where the weapon in question is neither a firearm nor an explosive, its status as a deadly weapon "rests on the manner in which it is used, attempted to be used, or threatened to be used." *In re Martinez,* 171 Wn.2d at 366. A totality of the circumstances approach is utilized when evaluating the evidence as to whether a non-per se weapon is deadly.[10] *Id.* at 367-68.

The *Martinez* court concluded that a weapon's potential for harm is alone insufficient for a deadly weapon finding under the statute. *See In re Martinez,* 171 Wn.2d at 368 n. 6; *cf., State v. Gotcher,* 52 Wn. App. 350, 354, 759 P.2d 1216 (1988) (the mere possession of a knife does not satisfy the statutory definition of a deadly weapon; there must be some manifestation of a willingness to use the knife before it can be found to be a deadly weapon).

For example, in *Martinez,* a deputy sheriff responded to a burglar alarm at an uninhabited farm building and found Martinez exiting it.

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[10] The Court disapproved of *State v. Gamboa,* 137 Wn. App. 650, 154 P.3d 312 (2007), which relied on whether the weapon itself was potentially capable of causing great bodily harm. *Id.* at 368 n. 6. However, the surrounding circumstances may inform whether the device, as used, constituted a deadly weapon. *See, e.g., State v. Skenandore,* 99 Wn. App. 494, 500, 994 P.2d 291 (2000) (the court held the evidence did not support a deadly weapon finding where the victim's red skin indentations faded within hours after being struck with a make shift spear and the jury was not able to observe the spear); *State v. Shilling,* 77 Wn. App. 166, 172, 889 P.2d 948 (1995), *review denied,* 127 Wn.2d 1006 (1995) (victim hit in the head with a bar glass was a deadly weapon under the circumstances).

*Martinez*, 171 Wn.2d at 357-58. Martinez immediately fled. *Id.* at 358. The deputy chased Martinez and tackled him. *Id.* After handcuffing Martinez, the deputy noticed that Martinez had an empty knife sheath on his belt. *Id.* Deputies later retraced Martinez's path and found a knife in the mud, about 15 feet from the farm shop. *Id.* Martinez identified the knife as his own. *Id.* However, no one testified to seeing Martinez use, reach for, or manifest any intent to use the knife. *Id.* at 368. The State relied exclusively on the unfastened sheath on his belt to prove that he attempted to use the knife. *Id.* at 369.

The Supreme Court held this evidence was insufficient for a rational fact-finder to find intent to use the weapon beyond a reasonable doubt. *Id.* The court noted that "[n]o one saw Mr. Martinez with the knife, and he manifested no intent to use it. Furthermore, no one saw Mr. Martinez reach for the knife at any time after he was apprehended." *Id.* at 368. Ultimately, the Court concluded that a weapon's potential for harm alone is insufficient for a deadly weapon finding under the statute. *See id.* at 368 n. 6.

As stated above, a deadly weapon, in pertinent part, is a "weapon, device, instrument, … which, under the circumstances in which it is used, *attempted to be used*, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6) (emphasis added). An attempt has been defined elsewhere in the statutes as requiring an intent

and a substantial step. *See* RCW 9A.28.020(1). Substantial step is conduct "strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wn.2d 443, 451-52, 584 P.2d 382 (1978). "Used" is defined as "employed in accomplishing something[.]" *People's Org. For Washington Energy Res. (Power) v. State of Wash. Utilities & Transp. Comm'n*, 101 Wn.2d 425, 430, 679 P.2d 922 (1984).

In the present case, the circumstances in which Mr. Orr attempted to use the pipe demonstrate the State presented sufficient evidence for a rational jury to properly find beyond a reasonable doubt that the pipe was a deadly weapon. A closer look at the totality of the circumstances shows that the pipe was readily capable of causing substantial bodily harm.[11] Mr. Orr manifested a clear intent to use the metal pipe on the inhabitants of the Nelson home and he took a substantial step toward that end. In his words, the inhabitants deserved an "ass whooping" and he was "going to kick somebody's ass," and admitted he had the pipe to scare or strike someone inside the residence.

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[11] *See, e.g.*, *State v. Barragan*, 102 Wn. App. 754, 761-62, 9 P.3d 942 (2000) (a pencil can be considered a "deadly weapon" when used in attempt to stab fellow prison inmate in the eye); *Schilling*, 77 Wn. App. at 171-72 (a glass was a "deadly weapon" when smashed against the backside of a patron's head); *Jones v. State*, 292 Ark. 183, 184-85, 729 S.W.2d 10 (1987) ("[i]t can hardly be doubted that a five foot length of iron pipe is capable of causing death or serious injury").

This intent was not only demonstrated by his testimony but his purposive actions before and during the incident. He began this undertaking in the downtown area of Spokane, and walked a considerable distance until he found the Nelson residence on the west side of Spokane. He appeared angry, "ticked off," and "crazed." Shortly thereafter, he was standing on top of an abandoned refrigerator surveilling the Nelson home before he transgressed into the backyard of that home. He forcefully and resolutely kicked the rear door of the Nelson's home to gain entry, with the metal pipe in hand, causing structural damage to the door and door frame. Fortuitously, Mr. Orr did not locate anyone inside and exited the same rear door carrying the metal pipe.

It is difficult to imagine any reason Mr. Orr possessed the pipe other than for use in a physical attack against the inhabitants of the residence. The pipe was readily capable of causing death or substantial bodily harm had Mr. Orr come into contact with anyone in the home. The fact that the only adult resident in the home at the time of the incident exited the home with her child in hand shortly before Mr. Orr's completed entry is of no consequence. It is no defense that true facts render the commission of a completed crime legally or factually impossible. *State v. Davidson*, 20 Wn. App. 893, 584 P.2d 401 (1978); RCW 9A.28.020(2).

The *Davidson* court in explaining the effect of the statute said:

> our statute eliminates both "factual" and "legal" impossibility as defenses to a prosecution for attempt, when the "conduct in which a person engages otherwise constitutes an attempt to commit a crime." … The use of the word "otherwise" indicates that it is now a crime to attempt to do an act which would otherwise not be criminal because of the true facts not known to the actor. The apparent reason is to punish his culpable intent.

*Davidson,* 20 Wn. App. at 897-98.

Here, at the time Mr. Orr unlawfully entered the home, he was unaware the home was unoccupied. His intent remained the same – "to kick some ass" and give the residents an "ass whooping." Mr. Orr intended to do what he believed was a criminal act (i.e., *attempted to use a deadly weapon* to commit substantial bodily harm upon the inhabitants of the residence) and it was criminal as to the facts as he perceived them.

It is wholly within the province of the jury to determine the persuasiveness and significance of the evidence. Here, the jury believed Mr. Orr was armed with a deadly weapon when he entered the Nelson residence. Sufficient evidence supported the jury's finding that the defendant committed first-degree burglary. Mr. Orr's claim of insufficiency fails.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO INSTRUCT ON THE DEFENSE OF ANOTHER AS THE DEFENDANT FAILED TO PRODUCE SUBSTANTIAL, CREDIBLE EVIDENCE FOR SEVERAL ELEMENTS OF THE DEFENSE.**

The defendant next asserts the trial court erred when it refused to instruct the jury on the defense of another. Appellant's Br. at 17-23. The trial court did instruct the jury on self-defense regarding the incident with Dale Largent. RP 401-03; CP 165-168.

Standard of review.

The standard of review on this issue depends on whether the trial court's refusal to give the jury instruction was based on law or fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 863 (1998). An appellate court reviews a denial of a jury instruction for abuse of discretion if based on a factual dispute, but de novo if based on a ruling of law. *Id.; State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). More specifically,

> [i]f the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo.

*Read*, 147 Wn.2d at 243.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*,

79 Wn.2d 12, 26, 482 P.2d 775 (1971). Stated otherwise, an abuse of discretion occurs when no reasonable judge would have reached the same conclusion. *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). Here, it appears the trial court denied the defense of another instruction based upon the factual determination that no credible evidence supported giving the instruction. Accordingly, this Court should review for an abuse of discretion.

A defendant is entitled to have the court instruct the jury on his theory of the case if some evidence supports the particular instruction.[12] *State v. Fisher*, 185 Wn.2d 836, 848, 374 P.3d 1185 (2016). Failure to do so is reversible error. *Id.* at 849. When evaluating a defendant's evidence in support of an instruction, the trial court must view it in the light most favorable to him or her. *Id*. at 849. Although this burden "is low, it is not nonexistent," and the defendant must produce some evidence showing that he or she has met the statutory requirements for claiming self-defense. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). "Evidence of self-defense is viewed from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *Id.* at 238. "This standard incorporates both objective and subjective elements."

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[12] A defendant is not entitled to an instruction that is not supported by the evidence. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

*State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). Generally, "[s]elf-defense finds its basis in necessity and generally ends with the cessation of the exigent circumstance which gave rise to the defensive act." *Janes*, 121 Wn.2d at 237.

In so doing, a trial court need not instruct the jury on self-defense or defense of another if no reasonable person in the defendant's shoes could have perceived a threat of great personal injury. *Walker*, 136 Wn.2d at 773. Before reaching such a conclusion, however, the trial court must determine whether the defendant produced any evidence to support his claim that he subjectively believed in good faith that another person was in *imminent* danger of great bodily harm and that this belief, viewed objectively, was reasonable. *Read*, 147 Wn.2d at 243. BLACK'S LAW DICTIONARY defines "imminent danger" as "[a]n immediate, real threat to one's safety" and as "[t]he danger resulting from an immediate threatened injury." 450 (9th ed. 2009). Webster's Dictionary defines "imminent" as "[a]bout to occur at any moment" and as "impending." WEBSTER'S II NEW COLLEGE DICTIONARY 553 (1995). In this regard: "A preemptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late." GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 133-34 (1998).

A trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense. *State v. Roberts,* 88 Wn.2d 337, 346, 562 P.2d 1259 (1977). Credible is defined as "worthy of belief or confidence; trustworthy." THE COMPACT EDITION OF THE ENGLISH DICTIONARY 1154 (1971). Evidence of self-defense may come "from 'whatever source' and … the evidence does not need to be the defendant's own testimony." *State v. Walker,* 164 Wn. App. 724, 729 n. 5, 265 P.3d 191 (2011).

A claim of defense of another is treated the same as a claim of self-defense. Thus, an "individual who acts in defense of another person, reasonably believing him to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the party whom he [or she] is defending was the aggressor." *State v. Bernardy,* 25 Wn. App. 146, 148, 605 P.2d 791 (1980); *accord State v. Penn,* 89 Wn.2d 63, 66, 568 P.2d 797 (1977).

In order to raise defense of another, the defendant bears the initial burden of producing some evidence that tends to prove that the assault occurred in circumstances amounting to defense of another. *See Janes,* 121 Wn.2d at 237. The evidence may come from any source. *State v. McCullum,* 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). In determining

whether the defendant has properly raised defense of another and is entitled to an instruction, the trial court must apply a subjective standard and view the evidence from the defendant's perspective as conditions appeared to him at the time. *Id.* at 488-89. In determining whether some evidence supported instructing the jury on self-defense or defense of others, an appellate court reviews the entire record in a light most favorable to the defendant. *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

Here, at the time of trial, the defense offered several instructions regarding defense of another. CP 101. After argument, the trial court denied the request and stated:

> THE COURT: I think the difficulty here is you have the subjective belief of the defendant and the evidence that has been presented doesn't necessarily line up with the subjective belief of the defendant. The hearsay that was -- I guess it's not hearsay because it wasn't used for the truth of the matter asserted, that being what people told him.[13] That went to his state of mind rather than to prove that someone really was within the home. There was an objection to that at trial and the Court found that wasn't hearsay because it was going to the defendant's belief.
>
> In order for self-defense to be appropriate, there has to be some evidence showing some aggressive threatening behavior or communication by the victim causing the defendant to act, and there has to be reasonable grounds to believe there was imminent danger. And, once again, here you have the subjective belief of the defendant and all the other evidence that has been presented doesn't match the subjective belief, that being what he witnessed when he

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[13] *See* RP 316-17.

> arrived at the house, the statements of the neighbors. And the only information he did receive was from two unidentified people and one person named Sean. And, again, those -- that evidence was just used for his subjective belief rather than the truth of the matter asserted.
>
> So the Court doesn't find that there is sufficient evidence that has been presented other than his subjective belief that there was an imminent threat to others. If there was this subjective belief and perhaps some additional evidence that may be sufficient but it doesn't appear there's any additional evidence other than this subjective belief. And that goes back to what the neighbors testified to, what the defendant indicated he saw as he went around the house, and even what he saw when he went inside the house. So the Court's going to maintain its earlier ruling.

RP 388-90.

The trial court did not err when it refused to instruct the jury on the defense of others.

First, the defendant did not provide *any* evidence, let alone any credible evidence, that individuals were in danger of *imminent* harm in the Nelson household. His sole basis for entering the home consisted of nothing more than a bare, unsupported conjecture based upon the various hearsay statements of two unidentified sources. A bare assertion is inadequate to support a self-defense claim. For instance, in *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987), evidence from police reports indicated that the defendant and a third party were in a knife fight, the victim approached the defendant, and the defendant then stabbed the

victim. *Id.* at 279-80. The defendant said he stabbed the victim in order to defend himself. *Id.* at 279-80. Our high court noted that there was no evidence that the victim "engaged in any threatening behavior which would make a credible self-defense claim available to Montoya" and that Montoya's "bare assertion that he was defending himself" was inadequate. *Id.* at 280.

Second, there was no showing by the defendant that whomever was in the residence was in imminent danger of being attacked and in danger of death or great bodily harm.[14] Initially, when he first spoke with a neighbor and expressed his concerns, the neighbor advised him to call 911. Mr. Orr remarked that calling 911 and going through the legal system would take too much time. Mr. Orr then surveilled the Nelson home from afar and then peered into the windows of the residence. Not seeing or hearing anything inside the home to substantiate his unbridled speculation, he trekked to the backdoor, pipe in hand, and kicked the door in. No exigent circumstance existed for his immediate action.

Mr. Orr was not entitled to instruct on the defense of another because the evidence, when viewed in a light most favorable to him, could

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[14] Even assuming *arguendo* that the jury was allowed to consider, for the truth of the matter asserted, his assertion that children were having holes drilled in their heads or a woman was being extorted, he produced no evidence that it was occurring *at the time* he entered the home.

not establish that any reasonably prudent person in his situation would have found it necessary to immediately kick the door in with the intent of striking one or more unidentified individuals inside the home. The trial court did not abuse its discretion and no error occurred.

**C. THE IMPOSITION OF A MANDATORY LIFE SENTENCE, BASED UPON TWO PREDICATE "MOST SERIOUS OFFENSES" COMMITTED WHEN THE DEFENDANT WAS 23 AND 21 YEARS OLD, DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE FEDERAL CONSTITUTION OR ARTICLE I, SECTION 14 OF THE STATE CONSTITUTION, BECAUSE IT IS ONLY THE CURRENT CONVICTIONS FOR WHICH THE DEFENDANT IS BEING PUNISHED.**

Mr. Orr next claims that his sentence of life without the possibility of parole violates the Eight Amendment of the federal constitution and article I, section 14 of the state constitution because the trial court did not consider Mr. Orr's "youthfulness" at sentencing regarding his prior two predicate offenses (separate first degree robbery and second degree robbery convictions). Appellant's Br. at 24-30.

Standard of review.

An appellate court reviews alleged constitutional violations de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

Whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not

eligible for any form of early release.[15] RCW 9.94A.570. A "persistent offender" is someone currently being sentenced for a "most serious offense," who also has two or more prior convictions for "most serious offenses." RCW 9.94A.030(37). RCW 9.94A.030(33) lists Washington's "most serious offenses," which includes any class A felony (first degree robbery, RCW 9.94A.030(33)(a); RCW 9A.56.200(2)), and second degree robbery, RCW 9.94A.030(33)(o).

Mr. Orr had the following criminal history at the time of sentencing:

| Crime | Date of Crime | Crime Type | Adult or Juv | Place of Conviction | Sent. Date |
|---|---|---|---|---|---|
| UNLW POSS FRARM | 122198 | NV | A | YAKIMA CO, WA | 070999 |
| ASSAULT 3 | 122198 | NV | A | YAKIMA CO, WA | 070999 |
| RES BURGLARY | 122198 | NV | A | YAKIMA CO, WA | 070999 |
| HARASSMENT | 122198 | NV | A | YAKIMA CO, WA | 070999 |
| RES BURGLARY | 122198 | NV | A | YAKIMA CO, WA | 070999 |
| **ROBBERY 1** | **050395** | **VIOL** | **A** | **KING CO, WA** | **071495** |
| VEH PROWLING 1 | 021495 | NV | A | KING CO, WA | 071495 |
| **ROBBERY 2** | **120793** | **VIOL** | **A** | **SPOKANE CO, WA** | **020494** |
| BURGLARY 2 | ARREST 060989 | NV | J | KING CO, WA | 091289 |

CP 216 (bold emphasis added to the prior strike offenses).

[15] Washington adopted the Persistent Offender Accountability Act (POAA), known as the "three strikes law," by initiative in 1993. *See State v. Thorne*, 129 Wn.2d 736, 746, 921 P.2d 514 (1996).

Mr. Orr's current convictions of first-degree burglary and second degree assault are strike offenses. RCW 9.94A.030(33)(a); RCW 9.94A.030(33)(b); RCW 9A.52.020(2).

The Eighth Amendment to the federal constitution bars cruel and unusual punishment while article I, section 14 of the state constitution bars cruel punishment. *State v. Witherspoon,* 180 Wn.2d 875, 887, 329 P.3d 888 (2014). Washington's constitutional provision is more protective than the Eighth Amendment's in this context. *Id.* Thus, if Mr. Orr's life sentence does not violate the more protective state provision, no need exists to further analyze the sentence under the Eighth Amendment. *Id.*[16]

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[16] In general, the Washington Supreme Court has consistently upheld the imposition of a mandatory life sentence without the possibility of parole for persistent offenders finding it not in violation of the federal or state constitutions. *See Witherspoon,* 180 Wn.2d at 887 (second degree robbery conviction as a strike offense not invalid under the Eighth Amendment and article I, section 14); *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008) (defendant sentenced to a life sentence following convictions for second degree assault, unlawful imprisonment, and violation of a no-contact order was not disproportionate to offenses, and thus did not violate state and federal constitutional prohibitions against cruel and unusual punishment); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996), (a life sentence under the POAA based on a conviction for second degree robbery and prior convictions of second degree robbery and second degree assault did not constitute cruel punishment); *State v. Manussier,* 129 Wn.2d 652, 921 P.2d 473 (1996), *cert. denied,* 520 U.S. 1201 (1997) (defendant's conviction for robbery and his underlying strike/predicate offenses of first and second degree robbery did not violate equal protection under the POAA).

To determine whether the punishment is proportionate to the crime and whether it is "cruel" under article I, section 14, an appellate court considers the four factors outlined in *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980). Namely, the court considers: "(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." *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996).[17] Although briefly mentioning the *Fain* factors, Mr. Orr does not discuss or analyze them. *See* Appellant's Br. at 23-24.

Notwithstanding, when analyzing Mr. Orr's sentence under the *Fain* factors, his sentence of life without the possibility of release for his third strike offense is proportionate to the crime.

Nature of the offenses.

With regard to his current convictions, the legislature has classified Mr. Orr's crimes of first-degree burglary and second degree assault as far

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[17] The defendant in *Fain* received a mandatory life sentence under the former habitual criminal statute, RCW 9.92.090; he was convicted of second degree theft for passing several bad checks for small amounts of money, and his two priors each involved writing a bad check for a small amount. 94 Wn.2d. at 389-90. The Supreme Court held that a life sentence for petty bad checks was disproportionate to the crime, constituting cruel punishment under article 1, section 14. *Id.* at 402.

more serious than the nonviolent, class C felony committed by *Fain*. First-degree burglary is a class "A" felony, punishable by life imprisonment, and is defined as a "violent offense" and a "most serious offense." RCW 9A.20.021(1)(a); RCW 9A.52.020(2); RCW 9.94A.030(55)(i); RCW 9.94A.030(33)(a). Second degree assault is classified as a "violent" offense and a "most serious offense." RCW 9.94A.030(55)(viii); RCW 9.94A.030(33)(b). It is a class "B" felony, with a statutory maximum sentence of 10 years. RCW 9A.20.021(1)(b).

Legislative purpose.

Concerning the second factor, the Court in *State v. Thorne,* explained that the purpose of the Persistent Offender Accountability Act includes the deterrence of criminals who commit three or more "most serious offenses" and the segregation of those criminals from the rest of society. 129 Wn.2d 736, 774-75, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The punishment in other jurisdictions.

Third, *Thorne* explained that the life sentence that criminals receive in Washington for their third, most serious offense is comparable to the punishment in "the majority of jurisdictions in this country." *Id.* at 775.

Punishment for the similar offenses in Washington.

First-degree burglary is but one of many class "A" felonies that carry a statutory maximum sentence of life in prison. RCW 9A.20.021(a). *See Rivers,* 129 Wn.2d at 712-113.[18]

With regard to Mr. Orr's second degree assault conviction, the court in *State v. Ames,* 89 Wn. App. 702, 709, 950 P.2d 514, *review denied,* 136 Wn.2d 1009 (1998), considered the *Fain* factors and concluded that a life sentence under the POAA was not grossly disproportionate to the defendant's second degree assault conviction and did not constitute cruel and unusual punishment. *Id.*

Therefore, unlike *Fain,* where the defendant's life sentence for being a habitual criminal contrasted sharply with the maximum of 10 years he could have received separately for petty check forgeries, Mr. Orr is not receiving a penalty "much in excess of that imposed for those crimes which society ordinarily regards as far more serious threats to life, health, and

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[18] With regard to Mr. Orr's prior strike convictions (first and second degree robbery), both are serious violent offenses. In *Witherspoon,* the defendant was sentenced to life in prison for a current conviction of second degree robbery. 180 Wn.2d 875. The Supreme Court analyzed the *Fain* factors as they pertain to second degree robbery, and concluded the defendant's sentence of life in prison without the possibility of release did not violate either article I, section 14 of the state constitution or the Eighth Amendment to the federal constitution. *Id.* at 889. It would necessarily follow that first degree robbery does not violate either constitutional provision.

property." *Fain*, 94 Wn.2d at 401. Mr. Orr's life sentences for the first-degree burglary and second degree assault are not grossly disproportionate to his crimes, and are therefore, not "cruel." Thus, as analyzed, none of the four *Fain* factors supports a ruling that Mr. Orr's sentence was unconstitutionally cruel.

> *Miller v. Alabama* and *State v. O'Dell*, which require sentencing courts to conduct individualized hearings for convicted juvenile offenders facing a possible life-without-parole sentence, are inapplicable to the present circumstance because Mr. Orr was 42 years old at the time of the commission of the current offenses, and recidivism statutes only punish the most current offense.

With regard to Mr. Orr's proportionality argument as applied to his sentence, he argues *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed .2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); and *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), pertain to him. Those cases are inapplicable as discussed below.

*Miller* held that "mandatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465 (emphasis added); *see also Graham*, 560 U.S. at 80 (holding that the Eighth Amendment prohibits a sentence of life without parole for juveniles

convicted of nonhomicide offenses); *Roper*, 543 U.S. at 578 (holding that imposing the death penalty on juveniles violates the Eighth Amendment).

In *Miller*, the Court observed that children are constitutionally different from adults for purposes of sentencing because juveniles have diminished culpability and greater prospects for reform and are thus less deserving of the most severe punishments. 567 U.S. at 471-72. The Court further noted that mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features. *Id*. at 478. The Court concluded that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," because by "making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id*. at 479.

In *Witherspoon*, our high court found that *Graham* and *Miller* "unmistakably rest on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release," but "Witherspoon was an adult when he committed all three of his strike offenses." 180 Wn.2d at 890. The Supreme Court found those cases are "readily distinguishable" for this reason. *Id.* That distinction applies equally here. Although Mr. Orr was in his twenties when he committed the first and second degree robberies, he argues that he had

the maturity of a juvenile when committing those offenses, which should have been considered by the trial court at the time of sentencing as a persistent offender.[19] This argument was not proffered in the lower court and there are no facts in the record to support that assertion.

A similar argument was rejected by this Court in *State v. Hart*, 188 Wn. App. 453, 457, 353 P.3d 253 (2015). In that case, Hart was convicted of second degree murder and second degree assault. Hart, age 27, had two "most serious offenses" consisting of an attempted first degree robbery at age 20 and a second degree assault at age 22. *Id.* at 463. Hart argued that under the POAA, the sentencing scheme failed to provide an individualized sentencing determination in cases where the defendants are "youthful" or mentally incapacitated was unconstitutional. *Id.* at 453.

Hart argued the Court should extend *Miller*, *Graham*, and *Roper*, to any case involving a "youthful" offender. *Hart*, 188 Wn. App. at 453. This Court rejected the argument stating:

> While Mr. Hart may have been "youthful" when he committed attempted first degree robbery at age 20 and second degree assault at age 22, he was not a juvenile. As noted by the Washington Supreme Court, "*Graham* and *Miller* unmistakably rest on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release." *Witherspoon,* 180 Wn.2d at 890. Mr. Hart was age twenty-

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[19] RCW 13.04.011(2) strictly defines a juvenile offender as someone *under* the *chronological* age of eighteen.

> seven, nine years after becoming an adult, when he murdered Mr. Lincoln. Thus, he was an adult when committing all three of his strike offenses.
>
> Mr. Hart argues we should consider and apply the emerging neuroscience discussed in *Miller* to "youthful" offenders aged 18 to 25. But he cites to no legal authority where a court has found a 20- or 22-year-old offender to be a juvenile. While "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," the *Roper* Court understood it had to draw a line somewhere. *Roper,* 543 U.S. at 574, 125 S.Ct. 1183 (stating the age of 18 is the line for which death eligibility should rest because it is the point where society draws the line for many purposes between childhood and adulthood).

*Id.* at 463-64.

Here, Mr. Orr asserts that the sentencing court should have been given an opportunity to consider that his prior strike offenses were committed when he was 21 and 23 years old before imposing a life sentence on the current offenses committed at age 42. In support of that contention, Mr. Orr relies on *O'Dell*, which held that "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like, who committed his offense just a few days after he turned 18." 183 Wn.2d. at 696. The *O'Dell* majority reasoned that categorically refusing to consider youth as a mitigating factor regarding an exceptional sentence downward does not take into account the "impulsivity, poor judgment, and susceptibility to outside influences … of specific individuals." *Id.* at 691.

*O'Dell* and the United States Supreme Court cases are inapposite to the present case because Mr. Orr was sentenced only for his most recent crimes, which he committed when he was 42 years old. CP 219. Similar claims have been advanced and rejected in other cases. For instance, in *United States v. Hunter*, 735 F.3d 172, 174 (4th Cir. 2013), the issue was whether the Armed Career Criminal Act (ACCA) enhancement, which was based on convictions for violent felonies Hunter committed as a juvenile, violated the Eighth Amendment's prohibition against cruel and unusual punishment under *Miller*.

The Fourth Circuit held that *Miller* and its progeny were not applicable to Hunter's case because the sentence for which he challenged punished *only* his adult criminal conduct. As stated by the court:

> When a defendant is given a higher sentence under a recidivism statute … 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.' *United States v. Rodriquez*, 553 U.S. 377, 386, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008). Instead, Defendant's enhanced sentence "'is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.'" *Id.* (quoting *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948)).

*Hunter*, 735 F.3d at 175.

Ultimately, that court held:

> In this case, Defendant is not being punished for a crime he committed as a juvenile, because sentence enhancements do

> not themselves constitute punishment for the prior criminal convictions that trigger them. Instead, Defendant is being punished for the recent offense he committed at thirty-three, an age unquestionably sufficient to render him responsible for his actions. Accordingly, *Miller's* concerns about juveniles' diminished culpability and increased capacity for reform do not apply here.

*Id.* at 176.

Likewise, in *United States v. Orona*, 724 F.3d 1297 (10th Cir. 2013), the defendant argued that use of a juvenile adjudication as a predicate offense for ACCA purposes violated the Eighth Amendment and conflicted with the Supreme Court's holdings in *Roper*, *Graham*, and *Miller*. The court rejected this argument stating: "[t]he problem with this line of argument is that it assumes Orona is being punished in part for conduct he committed as a juvenile." *Id.* The Tenth Circuit characterized this assumption as "unfounded," because the defendant was only being sentenced on the last offense committed by him.

The *Orona* court also rejected the defendant's argument that he was less morally culpable because the sentencing court relied on his prior juvenile convictions to enhance his sentence. The court found this argument unpersuasive:

> A juvenile's lack of maturity and susceptibility to negative influences, *see Roper*, 543 U.S. at 569, 125 S.Ct. 1183, cannot explain away Orona's decision to illegally possess a firearm when he was twenty-eight years old. And the third factor identified by the Court as differentiating juvenile and

> adult offenders, the greater likelihood "that a minor's character deficiencies will be reformed," *id.* at 570, 125 S.Ct. 1183, cuts against Orona's argument. Unlike defendants who receive severe penalties for juvenile offenses and are thus denied "a chance to demonstrate growth and maturity," *Graham*, 130 S.Ct. at 2029, ACCA recidivists have been given an opportunity to demonstrate rehabilitation, but have elected to continue a course of illegal conduct[.]

*Id.* at 1308; *see also United States v. Hoffman*, 710 F.3d 1228, 1233 (11th Cir. 2013) ("[n]othing in *Miller* suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence *as an adult*, after committing a further crime as an adult" (emphasis in the original)); *United States. v. Rich*, 708 F.3d 1135, 1141 (10th Cir. 2013) ("Regardless of the inability of minors to fully understand the consequences of their actions, adults facing enhanced sentences based, only in part, on acts committed as juveniles have had the opportunity to better understand those consequences but have chosen instead to continue to offend"); *United States v. Banks*, 679 F.3d 505, 508 (6th Cir. 2012) (distinguishing *Graham* in relation to a 33-year-old offender who "remained fully culpable as an adult for his violation and fully capable of appreciating that his earlier criminal history could enhance his punishment"); *United States v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010) (reasoning that the defendant was 25 years old at the time he committed his instant offense and *Graham* "did not call into question the constitutionality

of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult”).

Also, in *State v. Lawson,* 90 A.3d 1 (Pa. 2014), the court declined to apply *Miller* to an adult offender, who, under a recidivist statute, received a mandatory sentence of life without the possibility of parole based, in part, on a prior conviction for an offense he committed as a juvenile. In *Lawson,* the defendant argued that imposing the mandatory sentence required by the recidivist statute by using a prior juvenile conviction as a predicate offense violated *Miller*’s requirement that a sentencing court consider the mitigating qualities of youth and individual circumstances of the juvenile conduct before imposing a life sentence without the possibility of parole. The Court rejected the argument, concluding “*Miller* only addressed individuals who were juveniles *when* they committed the crime on which the current conviction is based.” *Lawson,* 90 A.3d at 6 (emphasis added).

Here, Mr. Orr was not being sentenced a second time for past crimes that he committed as a young adult, but instead, was being punished for his conduct as a 42-year-old adult. Mr. Orr was being held accountable for his conduct as an adult with knowledge that his past criminal convictions were potential strike offenses which could result in a potential life sentence. The issues in *Miller* and *O’Dell* that dealt with a juvenile’s diminished culpability at the time he or she commits a current crime are not at issue

here because Mr. Orr, who *is* an adult, is being punished with an enhanced sentence for his conduct *as* an adult.

Mr. Orr, at age 42, had the opportunity to rehabilitate himself after he committed "most serious offenses" as a young adult. Having failed to do so, the Superior Court correctly considered Mr. Orr's prior "youthful" offenses under the POAA as he continued his criminal activity well into his adulthood. Because Mr. Orr was not being punished for what he did as a juvenile at the current sentencing hearing and he has not provided any authority contrary to the federal and state court precedent cited above, his *Miller/O'Dell*-based Eighth Amendment and article I, section 14 argument fails. There was no error.

**D. THE DEFENDANT'S SENTENCE UNDER THE POAA DID NOT VIOLATE MR. ORR'S EQUAL PROTECTION OR RIGHT TO A JURY TRIAL.**

Mr. Orr next claims that his life sentence under the POAA violates his equal protection and right to a jury trial. Appellant's Br. at 31-35. More specifically, he argues there is no rational basis to label "most serious offenses" as "sentencing factors" to be proved by a preponderance of the evidence rather than be pleaded and proved to a jury beyond a reasonable doubt.

Under both the state and federal constitutions, persons similarly situated with respect to the legitimate purpose of the law must receive like

treatment. U.S. Const. amend XIV; Wash. Const. art. I, § 12; *Thorne,* 129 Wn.2d at 771. As discussed above, our Supreme Court has upheld the constitutionality of the POAA, including challenges based on equal protection principles. *Thorne,* 129 Wn.2d at 772 (holding that the state is justified in punishing a recidivist more severely than a first time offender); *Manussier,* 129 Wn.2d at 674 (public safety is a legitimate state objective when punishing recidivists).

A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless that classification also affects a semi-suspect class. *Thorne,* 129 Wn.2d at 771. Recidivist criminals are not a suspect class. *Manussier,* 129 Wn.2d at 673. In addition, recidivism need not be pleaded and proved to a jury beyond a reasonable doubt. In *Almendarez-Torres v. United States,* the Court held that prior convictions are sentence enhancements and not elements of a crime. Therefore, they need not be submitted to the jury because "the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." 523 U.S. 224, 243, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

In *Witherspoon,* the Supreme Court reaffirmed its adherence to the rule that the POAA procedures do not violate federal or state due process. Strike offenses need not be proved to a jury:

> We have long held that for the purposes of the POAA, a judge may find the fact of a prior conviction by a preponderance of the evidence. In [*State v.*] *Manussier,* 129 Wash.2d [652, 681-84, 921 P.2d 473 (1996),] we held that because other portions of the SRA utilize a preponderance standard, the appropriate standard for the POAA is by a preponderance of the evidence. We also held that the POAA does not violate state or federal due process by not requiring that the existence of prior strike offenses be decided by a jury. This court has consistently followed this holding. We have repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes. *See State v. McKague,* 172 Wn.2d 802, 803 n. 1, 262 P.3d 1225 (2011) (collecting cases); *see also In re Pers. Restraint of Lavery,* 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying *Apprendi,* we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); *State v. Smith,* 150 Wn.2d 135, 139, 75 P.3d 934 (2003) (prior convictions do not need to be proved to a jury beyond a reasonable doubt for the purposes of sentencing under the POAA).
>
> …
>
> Accordingly, it is settled law in this state that the procedures of the POAA do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offense be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.

180 Wn.2d. at 892-93; *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (recognizing that with the

exception of "the fact of a prior conviction," any fact that increases a penalty beyond the statutory maximum must be proved to a jury beyond a reasonable doubt); *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (*Apprendi* does not require prior convictions used to establish POAA status be proved to a jury); *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004) (no state or federal constitutional right to have prior convictions proved to a jury at sentencing); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001) (recognizing that United States Supreme Court decisions holding that recidivist factors need not be pled and proved beyond a reasonable doubt).

With regard to Mr. Orr's argument that there is no rational basis for the POAA's classification of prior convictions as "sentencing factors" rather than identifying them as additional elements of the crime, which he alleges violates his equal protection, this Court rejected an identical argument in *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010). In *Williams*, this Court held that there is a distinction between proof of a prior conviction as an element of a crime requiring the State to prove its existence to a jury beyond a reasonable doubt and proof of prior serious offenses for the POAA. The distinction is

rationally related to the purpose of the POAA and does not violate equal protection principles. *See also Smith*, 150 Wn.2d 135 (in establishing that a defendant is a persistent offender under the POAA, the federal and state constitutions do not require that prior convictions be proved to a jury beyond a reasonable doubt); *State v. Reyes-Brooks*, 165 Wn. App. 193, 207, 267 P.3d 465 (2011) (Division One of this court agreed with the *Williams* court and concluded that the distinction is rationally related to the purpose of the POAA); *State v. Langstead*, 155 Wn. App. 448, 456-57, 228 P.3d 799 (2010) ("We conclude recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense. We reject Langstead's equal protection challenge").

Therefore, Mr. Orr's sentence under the POAA was not a violation of equal protection. His claim fails.

**E. UNLESS DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision

> terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

(Emphasis added).

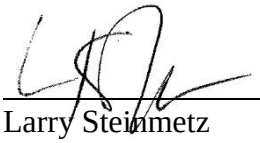
The trial court determined Mr. Orr to be indigent for purposes of his appeal. CP 252; 255-57. The State is unaware of any change in Mr. Orr's circumstances. Should Mr. Orr be unsuccessful on appeal, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

## V. CONCLUSION

For the reasons stated herein, the State respectfully requests this Court deny the defendant's claims for relief and affirm the judgment and sentence.

Dated this 9 day of August, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



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Attorney for Respondent

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

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| STATE OF WASHINGTON,<br><br>Respondent,<br>v.<br><br>FREDRICK ORR,<br><br>Appellant, | NO. 34729-0-III<br><br>CERTIFICATE OF MAILING |

I certify under penalty of perjury under the laws of the State of Washington, that on August 9, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Susan Gasch
gaschlaw@msn.com

| 8/9/2017 | Spokane, WA | |
|---|---|---|
| **(Date)** | **(Place)** | **(Signature)** |

## SPOKANE COUNTY PROSECUTOR

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