

NO. 66977-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PAUL RAYMOND LEWIS,

Appellant.

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STATE OF WASHINGTON
DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court abuse its discretion in rejecting the defendant's "for cause" challenge to juror number 31?

2. The defendant was convicted of attempted first-degree robbery and second-degree assault. At trial, the defendant claimed that he acted in self defense even though he stabbed the victim in the back while he lay motionless on the ground. Defense counsel called a psychologist to help explain that due to the defendant's mental illness, his actions may have been justified. Can the defendant now prevail in a claim that this tactical decision constitutes ineffective assistance of counsel?

3. Do the defendant's convictions for attempted first-degree robbery and second-degree assault violation double jeopardy?

4. After the defendant was convicted of two felony offenses, his fingerprints were taken. Has the defendant shown that there is any authority supporting his proposition that a search warrant or its equivalent is required to take a convicted felon's fingerprints?

5. Jurors need to be unanimous in finding the existence of a deadly weapon sentencing enhancement. Has the defendant shown that the jury instructions he approved here, did not properly inform the jurors that they needed to be unanimous in returning a finding that the defendant was armed with a deadly weapon?

6. Has the defendant shown that existing case law should be overruled, and that prior convictions under the persistent offender accountability act must now be found beyond a reasonable doubt by a jury?

7. Has the defendant shown that existing case law should be overruled, and the persistent offender accountability act held unconstitutional under the equal protection clause?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with attempted first-degree robbery with a deadly weapon enhancement, and with second-degree assault with a deadly weapon enhancement. CP 7-8. A jury found the defendant guilty as charged. CP 52-54. As a persistent offender, the defendant received a mandatory life sentence. CP 116-24.

2. SUBSTANTIVE FACTS

Fifty-one-year-old Paul Rodrick lives in a mobile home in the South Park area of Seattle with his yellow lab, Widens. 7RP¹ 115-16, 120, 190. Despite loss of muscle and strength due to a degenerative disc

¹ The verbatim report of proceedings is cited as follows: 1RP--1/12/11, 2RP--1/13/11, 3RP--1/18/11, 4RP--1/31/11, 5RP--2/1/11, 6RP--2/1/11, 7RP--2/2/11, 8RP--2/3/11, 9RP--2/7/11, 10RP--2/8/11, 11RP--2/9/11, 12RP--3/10/11, 13RP--3/25/11, and 14RP--4/1/11.

disease, Rodrick spends part of his time volunteering at a local community center and food bank. 7RP 117-18. Disabled, Rodrick cannot even lift five pounds over his head. 7RP 118.

At approximately 1:30 a.m., on August 27, 2009, Rodrick took his dog, grabbed his bicycle and rode to the Georgetown Shell Station to buy some cigarettes and a single beer. 7RP 121-25. When he exited the store, Rodrick put his wallet in his rear pants pocket. 7RP 125-27.

As Rodrick began to leave, the defendant approached him and asked for a cigarette. 7RP 129. Knowing what it was like to not have much, Rodrick gave the defendant a cigarette and asked him if he wanted to share his beer. 7RP 130-31. The two then went and sat down on a nearby ledge to share the beer. 7RP 134. As the two sat and chatted, the defendant reached over and touched Rodrick's wallet and then pulled out a utility knife and ordered Rodrick to hand over his money. 7RP 135-36. Dumbfounded, Rodrick did not comply immediately. 7RP 141. Instead of repeating his demand, the defendant began slashing at Rodrick with the knife. 7RP 141.

The defendant stabbed Rodrick's arm. 7RP 142-43. As Rodrick struggled with the defendant to keep from getting stabbed again, the two men fell to the ground. 7RP 142-43. At one point, as Rodrick lay

motionless on the ground, the defendant stabbed him in the back near the spinal cord. 7RP 142-43.

During the course of the assault, an ambulance happened down the street. 7RP 146; 8RP 39. The driver, Roseanne Washington, watched as the defendant drug Rodrick across the pavement, held him down, and continued to assault him. 8RP 41-44. As Washington drove closer, and Erin Carnahan, a nearby resident, approached the defendant, he stopped his assault and walked away. 8RP 44, 46, 64. However, a short time later, as Rodrick lay on the ground covered in blood and motionless, the defendant returned and continued his assault. 8RP 46-48. Although Washington could not see an object in the defendant's hand, he described the defendant hitting Rodrick in his abdomen and side. 8RP 44, 47. After the assault, the defendant took off his bloodstained shirt and fled on foot. 8RP 47-49.

When Washington reached Rodrick, his vital signs were "very poor," with "definitely a possibility" of death. 8RP 53-54. Rodrick was transported to Harborview Medical Center where he underwent emergency surgery. 8RP 5, 9. Rodrick suffered from multiple stab wounds, including wounds to his back, chest, abdomen, side and both arms. 8RP 7-9.

The defendant was apprehended a few blocks from the scene after a police dog track and foot pursuit. 7RP 34-36. The defendant did not

comply with commands to stop. 7RP 36. Although the defendant had a large amount of blood on him, officers observed no injuries on the defendant other than a few minor cuts to his hands. 7RP 10, 38, 99. DNA testing confirmed the presence of Rodrick's blood on the defendant's cell phone and clothing. 8RP 25-28.

The defendant, who lives ten minutes from the store, admitted meeting Rodrick at the Shell station but testified to a very different encounter. 8RP 109, 112. First, the defendant testified that he suffers from a mental disability and doesn't like being around people because of the time he has spent in prison. 8RP 110. Earlier that day he had been to see his counselor and was in an "agitated" mood. 8RP 114. After the appointment, he ran around town for awhile, returned home, drank a beer and then took some of his medication. 8RP 114-16. He then decided to go for a walk. 8RP 117.

The defendant testified that he went to the Shell station to hang out and to get another beer. 8RP 117, 120-21. As the defendant drank his beer, he saw Rodrick arrive at the store. 8RP 121-22. The defendant asked Rodrick for a cigarette, was provided one, and then Rodrick asked the defendant if he wanted to share a beer. 8RP 122-24. The defendant claims the two talked for about 20 minutes at which time things became

loud because Rodrick wanted to buy some crack cocaine and the defendant said he just wanted to go home. 8RP 126-28.

As the defendant started to walk away, he claims that Rodrick then attacked him from behind with a knife. 8RP 131-34. The defendant claims he was able to grab the knife away from Rodrick at which point he blacked out. 8RP 135. He claims he has no memory of stabbing Rodrick. 8RP 135.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S "FOR CAUSE" CHALLENGE OF JUROR NUMBER 31.

The defendant contends that the trial court abused its discretion in denying his "for cause" challenge of juror number 31. This claim must be rejected for two reasons. First, the defendant accepted the panel with juror number 31 without exercising all of his peremptory challenges; thus, this issue has been waived. Second, the defendant cannot show that the court abused its discretion in refusing to excuse for cause juror number 31.

a. Voir Dire And The Defendant's Failure To Excuse Juror Number 31.

During voir dire, the jurors were asked if there was anything in particular that the parties should know about. 5RP 84. Juror number 31

responded "I don't think that I really assume that anybody is innocent, that they must have done something. That's why they're here." 5RP 85. The following colloquy then occurred:

Q: Right, but you're probably not the only one who has got something brewing in the back of their mind. We all have biases and prejudices. So really you have a feeling maybe he did this, he did something for him to be sitting there in that chair. As the judge said you have these preconceived notions but you need to put those biases aside, start them at zero because he's innocent until proven guilty. Do you think you can do that?

A: I would do the best that I could because it's not, you know, anything about this case or anything in particular.

Q: So my question is, what's the best that you can do?

A: I would listen absolutely to everything that's said and deliberate, but I think --

Q: What if I don't produce enough evidence and in your mind you're thinking I don't think the State proved its case beyond a reasonable doubt, I'm not satisfied, what's the verdict?

A: It would be hard to say without hearing everything.

Q: Okay. If you were past a certain point where you were not satisfied with the State's burden of proof in this case beyond a reasonable doubt, could you find that man not guilty?

A: Potentially.

Q: Thanks.

A: I don't know what else to say.

Q: Can you unbiasedly, if that's even a word, listen to the evidence and apply the law, put your biases and preconceived notions aside?

A: Yeah, the best that anyone can.

5RP 85-87. The court then asked the following questions:

Q: Let me just ask you the question sort of differently because I have slightly more latitude to some extent than the attorneys. That is, the law says that a person must be presumed innocent and the only person at trial who has a burden is the prosecuting attorney. They're the only one who has a burden. In our system, the defense has no obligation. So if you were seated on the case, could you sit back and evaluate the evidence, based on the evidence that you heard in court, and then just make a decision based on whether or not that evidence proved the State's case, or is this a real thing that's very difficult? Would you find yourself requiring the defense to do something that this court may not instruct on and say no matter, I cannot find this person innocent just because he's here?

A: I wouldn't say I could never find somebody innocent if that answers your question. It's very difficult.

Q: Juror number 31, I'm sensing that you have got a lot of doubt in your mind about this process. I'm not trying to get you to commit at all in any way, but I am going to ask a final question, and you can share with me your concerns because you're the one who raised it, and I appreciate your honesty.

Do you feel that you couldn't set that aside, that the belief that if somebody sits in this room that they must have done something?

A: I think I would still have that feeling, but I would be trying to follow the instructions as a juror and do what I was supposed to do. I couldn't 100 percent say. It would be lingering in the back of my mind, I would be trying to

focus on the point that I was given, like did the State prove this case, did it follow that.

Q: And the reason why is each of you will just listen to the evidence, each of you will have instructions, and when I swear you in as jurors on this case, I will ask you to take an oath that you will follow the law regardless of what you personally think or believe. So, I'm just wondering, juror number 31, would you be able to follow those instructions?

A: Yes.

5RP 88-89. The court then indicated that it would not excuse juror number 31 for cause. 5RP 89.

When it came time to exercise peremptory challenges, the defendant did not exercise a challenge to juror number 31. 5RP 91-95. In addition, the defendant did not use all of his six allotted peremptory challenges. See CrR 6.4(e). When the defendant accepted the panel as constituted, he still had a peremptory challenge he could have exercised on juror number 31. 5RP 91-95.

b. This Issue Has Been Waived.

In Washington, dating back a century; the rule is that a party accepting a juror without exercising its available challenges cannot later challenge that juror's inclusion on the jury or show prejudice. State v. Jahns, 61 Wash. 636, 638, 112 P. 747 (1911); State v. Tharp, 256 Wn.2d 494, 500, 256 P.2d 482 (1953); State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957); State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d

180 (1969); Martini ex rel. Dussault v. State, 121 Wn. App. 150, 175, 89 P.3d 250 (2004), rev. denied, 153 Wn.2d 1023 (2005).² Here, the defendant had peremptory challenges left to use. He knowingly left the challenged juror on the jury. He is thus barred from raising the issue on appeal.

c. A Valid Exercise Of Discretion.

A party has the constitutional right to a fair trial by a panel of impartial jurors. State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). To protect this right, a party may have a juror excused "for cause" if the trial judge is of the opinion that grounds for challenge are present. Latham, 100 Wn.2d at 63; CrR 6.4; RCW 4.44.130; RCW 4.44.170.

² Although not cited by the defendant, dicta in two cases suggest the possibility of a contrary rule. Prior to 2000, where a defendant's challenge for cause was denied, but the defendant exercised a peremptory challenge on the same juror, an appeal could be had and the court's action in denying the "for cause" challenge was presumed prejudicial even though the juror did not sit on the case. In Washington, this was referred to as the Parnell rule. See State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1970). In United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), the Supreme Court abrogated this rule in the federal court system, holding that the presumption of prejudice no longer exists where a defendant peremptorily excuses the juror he tried to excuse for cause; he must prove actual prejudice. In dicta, the Court suggested that a defendant could leave the challenged juror on the panel, with peremptory challenges remaining, and still appeal. In State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001), the Washington Supreme Court adopted the reasoning of Martinez-Salazar and abrogated the Parnell rule. In doing so, the Court included the same dicta from Martinez-Salazar. Importantly, the Courts in Fire and Martinez-Salazar were faced with a different situation than exists here. In both cases, the defendants peremptorily excused the challenged juror. The Court in Fire did not abrogate the more than 100 year requirement in Washington that a defendant cannot raise the issue on appeal if he did not peremptorily excuse the challenged juror and he had peremptory challenges remaining.

A party may raise a challenge "for cause" for "actual bias." Latham, at 63. Actual bias is defined "as the existence of a state of mind which satisfies the judge that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." Latham, at 63 (citing RCW 4.44.170). It is not required that a juror be totally ignorant of the facts and issues involved in a case. Latham, at 63. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Latham, at 63.

When a challenge for actual bias is made, the factual question for the trial judge is whether the prospective juror's state of mind is such that he or she can try the case fairly and impartially. Otis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 752-53, 812 P.2d 133 (1991). The challenging party has the burden of proving the facts necessary to the challenge by a preponderance of the evidence. Otis, 61 Wn. App. at 754 (citing Bourjaily v. United States, 483 U.S. 171, 176, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)). The denial of a challenge for cause is a matter addressed to the sound discretion of the trial judge. State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). This discretion includes the power to weigh the credibility of the prospective juror and choose among reasonable but competing inferences. Otis, at 753-54 (citing State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). The exercise of this

discretion must be based on the probability of bias, not the possibility of bias. Otis, at 754 (citing Noltie, 116 Wn.2d at 839).

This Court reviews a trial court's decision on actual bias in the same way as it reviews any other factual determination by a trial court. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981); Noltie, 116 Wn.2d at 840. Rather than reach its own de novo decision, this Court defers to the trial court's decision. Noltie, at 840; Rupe, 108 Wn.2d 749. It is required that this Court take the evidence in the light most favorable to the prevailing party below, "which...means that the appellate court must accept the trial judge's decision regarding the credibility of the prospective juror. . .as well as the trial judge's choice of reasonable inferences." Otis, 61 Wn. App. at 756.

As the Supreme Court stated:

[T]he trial court is in the best position to determine a juror's ability to be fair and impartial. It is the trial court that can observe the demeanor of the juror and evaluate and interpret the responses. Considerable light will be thrown on the fairness of a juror by the juror's character, mental habits, demeanor, under questioning and all other data which may be disclosed by the examination. A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the

person to be a juror. . . Unless it very clearly appears to be erroneous, or an abuse of discretion, the trial court's decision on the fitness of the juror will be sustained.

Noltie, 116 Wn.2d at 839.

Applying these principles to the present case, it is clear that the trial judge did not abuse her discretion in denying the defendant's "for cause" challenge alleging "actual bias."

Juror number 31 merely expressed what many, if not most jurors, think when they walk into a courtroom for a criminal trial--the person sitting next to defense counsel must have done something to put themselves in that position. This does not mean juror number 31 would ignore the court's instructions on the burden of proof. In fact, when specifically asked, "Can you unbiasedly, if that's even a word, listen to the evidence and apply the law, put your biases and preconceived notions aside," juror number 31 responded, "Yeah, the best that anyone can." 5RP 87. When the court asked directly, "would you be able to follow those instructions," juror number 31 responded unequivocally, "yes." 5RP 89.

The situation here is not unlike many other cases this Court has reviewed. In State v. David, a juror stated that "she had formed an opinion as to David's guilt" based upon the media coverage she had seen. State v. David, 118 Wn. App. 61, 70, 74 P.3d 686 (2003), sentence reversed at,

154 Wn.2d 1032 (2005). In an attempt to rehabilitate the juror, the prosecutor asked the juror whether she could presume David's innocence. The juror responded that "it would be difficult" but that she felt she could do it. David, at 70. This Court reiterated the principle that "equivocal answers alone do not require that a juror be removed." David, at 71 (citing Rupe, 108 Wn.2d at 749), see also, Noltie, 116 Wn.2d at 839-40 (neither "equivocal answers" nor the "mere possibility of prejudice" is sufficient to warrant the removal of a juror for cause).

In State v. Gosser, a retired state patrolman was allowed to be a juror despite his answer that he would believe a police officer over the defendant. State v. Gosser, 33 Wn. App. 428, 432-34, 656 P.2d 514 (1982). The court noted that while a juror may hold preconceived ideas, the juror need not be disqualified if he or she can put those notions aside and decide the case on the evidence given at trial and the law as given by the court. Gosser, at 434. The court in Gosser determined that the trial court did not abuse its discretion by allowing the juror to serve because while the juror may have had a "preference in favor of a police officer's testimony," the record showed that the juror could likely decide the case on the evidence. Gosser, at 434.

Under the law, it is the defendant's burden to prove juror number 31 possessed actual bias, not the mere possibility of such. The

Supreme Court has stated that is simply not enough. Noltie, 116 Wn.2d at 840. The determination was for the trial judge, who viewed the juror and considered the entire record and was in the best position to determine whether juror number 31 possessed actual bias. Under the circumstances here, this Court cannot say that the trial court abused its discretion in denying the challenge for cause.

2. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT.

The defendant claims that his trial counsel was constitutionally ineffective for deciding to call Doctor Kenneth Muscatel as an expert witness. Specifically, he claims that Doctor Muscatel's testimony undercut his self-defense and diminished capacity defenses. This claim has no merit. The defendant had no diminished capacity defense, and without Doctor Muscatel's testimony, he had no viable self-defense claim either. Defense counsel faced a case with particularly strong evidence and a defendant who insisted upon going to trial. Counsel made the tactical decision to call Doctor Muscatel as a witness in order to pursue the defendant's claim of self-defense. This was a reasonable, and possibly the only viable defense theory--that the defendant acted in self-defense and his overreaction was the result of his skewed perceptions caused by his mental illness.

a. The Situation Defense Counsel Faced.

Unquestionably, with two independent civilian witnesses, the State's case was quite strong. At the same time, the defendant was facing severe punishment--a life sentence as a persistent offender if he was convicted of *either* of the offenses charged. At the beginning of trial, defense counsel put on the record that the defendant's prior counsel had proposed a deal whereby the defendant would plead guilty to certain charges with a 120 month sentence recommendation. 1RP 3. However, the defendant would not accept anything greater than a plea deal involving at most a 60 month sentence.³ 1RP 3. Counsel recognized this was not a reasonable possibility. 1RP 3-4. The trial court also recognized the situation and stated that in the "ideal world," this case would not go to trial but that the defendant was insisting upon exercising that right. 3RP 27.

Recognizing that a plea was unlikely, and that it would be difficult to combat the State's evidence, the defense hired Doctor Kenneth Muscatel as an expert witness and clinical psychologist to conduct a forensic mental evaluation of the defendant. 1RP 6; 9RP 8-9. Defense counsel recognized it was highly unlikely that a claim of self-defense by itself could prove successful. 1RP 19. Even if the jurors believed the defendant's version of

³ 60 months represents the maximum sentence for a class C felony, such as assault in the third degree.

events, self-defense would not support such a gross overreaction on the part of the defendant in stabbing a defenseless individual in the back while he lay motionless on the ground. 1RP 19. Therefore, defense counsel came up with a hybrid theory to support his defense. Specifically, counsel asserted that due to the defendant's mental illness, as Doctor Muscatel would testify, the defendant's extraordinary use of force could be explained and justified. 1RP 19-20; 2RP 24. "Essentially," defense counsel stated, the defense is one of "self-defense," "with some mental illness to fill in that claim." 2RP 24; 3RP 37-38. Counsel intended to use Doctor Muscatel's testimony to help explain how the defendant's perceptions, affected by his mental illness, justified the defendant's claim that he was defending himself. 3RP 37-38; 4RP 5-6.

Doctor Muscatel conducted a forensic mental health evaluation of the defendant. 9RP 9, 12-15. After reviewing the defendant's past medical records and conducting his evaluation, Doctor Muscatel opined that the defendant suffered from a major depressive disorder. 9RP 15-16. He described the defendant as being suspicious of others, paranoid to a degree, and with mood instability. 9RP 21. Doctor Muscatel admitted, as would any psychologist, that a mental health diagnosis is based in large part on a person's self-reporting. 9RP 16. As he aptly put it, "[n]one of us can read his mind." 9RP 16.

Doctor Muscatel also discussed the potential side effects of medication the defendant was taking, side effects that include nervousness, memory loss, irritability and emotional liability. 9RP 17, 20-21. He indicated that these side effects could be exacerbated if one consumed alcohol while on the medication--as the defendant did. 9RP 21.

When asked to opine about the defendant's mental state at the time of the incident, Doctor Muscatel stated that "if in fact his version of events is the one that you find credible and reliable, then really what the mental state applies to is his reaction or overreaction because of how badly cut up this individual was. 9RP 31. If one assumed that Rodrick's version was accurate, then Doctor Muscatel admitted that the defendant's mental state was not very relevant. 9RP 31. In other words, as Doctor Muscatel stated, if it was the defendant who attempted to rob and assault Rodrick, then there was nothing about his mental state that would be relevant to a determination in the case--he initiated the willful acts. 9RP 32. But, if Rodrick initiated the assault, then the defendant's mental disorder could help explain why he reacted the way he did to the threat he was confronted with. 9RP 32-33, 36.

Doctor Muscatel also admitted that there was no complete mental defense available because the defendant's claim of self-defense showed that he was goal oriented when he acted. 9RP 35-36. Doctor Muscatel

explained that he could not opine that the defendant was unable to form intent sufficient to support a claim of diminished capacity. 9RP 36, 39.

b. Standard Of Review.

To establish an ineffective assistance of counsel claim, a defendant must prove that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant such that there is a reasonable probability that the proceedings would have turned out differently without counsel's errors. Strickland v. Washington, 466 U.S. 668, 687-95, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A reviewing court begins with the strong presumption that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). It is the defendant's burden to overcome this presumption. Strickland, 466 U.S. at 689; Thomas, 109 Wn.2d at 225-26. For a defendant to overcome this presumption, he must prove by a preponderance (1) that his trial counsel's performance was so deficient that it fell outside the wide range of objectively reasonable behavior based on consideration of all the circumstances of the case; and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. Strickland, at 689; Thomas,

at 225-26. If the defendant fails to prove either prong of this test, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Legitimate trial tactics cannot form the basis of an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. It is simply insufficient to argue that because a trial tactic failed to sway the jury, the decision was not legitimate. State v. Curtiss, 161 Wn. App. 673, 703, 250 P.3d 496 (citing State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011)), rev. denied, 172 Wn.2d 1012 (2011).

Generally, an attorney's decision to call a witness to testify is "a matter of legitimate trial tactics," which "will not support a claim of ineffective assistance of counsel." In re Monschke, 160 Wn. App. 479, 492, 251 P.3d 884 (2010) (citing State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981)). With the "highly deferential" standard employed by the court, the presumption that the calling of a witness is reasonable exists "until the defendant shows in the record the absence of legitimate or tactical reasons supporting the trial counsel's conduct." Monschke 160 Wn. App. at 490 (citing Thomas, 109 Wn.2d at 226).

c. Defense Counsel's Tactical Decision.

Defense counsel was placed in an untenable position--he represented a client who insisted on proceeding to trial against all odds.

Independent civilian witnesses saw the defendant brutally assault a defenseless, motionless man as he lay on the ground. The victim was stabbed repeatedly, including a stab wound to the victim's back that could have proven fatal. With these facts, and a mental defense unavailable to him, defense counsel made a wise tactical decision to pursue a hybrid type self-defense claim, taking the defendant's testimony and trying to justify the defendant's actions with evidence he suffered from a mental illness.

When a specific *mens rea* is an element of the crime charged, a defendant may present evidence that he did not possess the ability to form the particular *mens rea* at the time of the crime. State v. Greene, 92 Wn. App. 80, 106, 960 P.2d 980 (1998), aff'd in part, rev. in part on other grounds, 139 Wn.2d 64 (1999). This is called a "diminished capacity defense" and it requires that evidence be presented of a mental condition which actually prevents the defendant from forming the requisite intent necessary to commit the crime charged. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). A defendant must produce expert testimony on the issue. State v. Eakins, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995).

Defense counsel correctly did not pursue a diminished capacity defense for two obvious reasons. First, the defendant testified that he had no memory of the assault. Therefore, he could not provide evidence to support a claim that he could not form the requisite intent. Second, in

evaluating the defendant's mental condition, and reviewing the facts of the case, Doctor Muscatel did not find sufficient evidence to support a mental defense. The defendant's assertion on appeal that the calling of Doctor Muscatel undercut his diminished capacity defense is incorrect; there was no evidence supporting such a defense and defense counsel did not pursue such a defense.

Defense counsel did pursue self-defense and obtain a jury instruction that provided the law:

It is a defense to a charge of Assault in [the] Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured by someone, and ***when the force is not more than is necessary.***

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 74 (emphasis added); WPIC 17.02. The jury was also instructed as follows:

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 77; WPIC 17.04.

Even with the defendant testifying that he acted in self defense, defense counsel recognized that he had a tremendous problem; a person can use no more force than is necessary to defend one's self. See e.g., State v. Brigham, 52 Wn. App. 208, 209, 758 P.2d 559 (Although displaying a knife may have been a reasonable response to the physical altercation initiated by the victim, the character of the encounter changed when the defendant stabbed the victim to death and, at that point, his use of force became excessive as a matter of law. Thus, the defendant was not entitled to a self defense instruction), rev. denied, 111 Wn.2d 1026 (1988).

Here, the evidence showed the defendant stabbed an unarmed motionless man in the back. This was the purpose in calling Doctor Muscatel. Counsel used Doctor Muscatel's testimony in an attempt to show that due to the defendant's mental illness, his perceptions were skewed such that he acted with what he believed was reasonable force.

The fact that the defense failed does not mean the attempt was not a reasonable strategy. See Curtiss, 161 Wn. App. at 703.⁴

d. Overwhelming Evidence.

Finally, to prevail in his claim, the defendant must prove that the calling of Doctor Muscatel actually prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. Strickland, at 689; Thomas, at 225-26. This, the defendant cannot do. The evidence in this case was overwhelming. Without Doctor Muscatel's testimony, there was no defense to the charges. Even accepting the defendant's testimony that Rodrick attacked him, there was no evidence presented to legally justify the defendant stabbing Rodrick in the back while he lay motionless on the ground. The defendant's ineffective assistance of counsel claim simply has no merit.

⁴ The defendant also complains that the self-defense claim pertained only to the assault charge, and therefore, the strategy was bad because he still faced a life sentence if convicted of attempted robbery. What the defendant fails to recognize is that he testified he did not attempt to rob Rodrick. If the defendant's testimony was believed, that he was attacked, he would have been acquitted of the attempted robbery charge. However, he still had to face the assault charge. This is what defense counsel was trying to negate.

3. THE DEFENDANT'S CONVICTIONS FOR ATTEMPTED FIRST-DEGREE ROBBERY AND SECOND-DEGREE ASSAULT DO NOT VIOLATE DOUBLE JEOPARDY.

The defendant claims that his convictions for attempted first-degree robbery and second-degree assault violate double jeopardy. He argues that because the second-degree assault elevated the robbery to first degree, the doctrine of merger requires vacation of the assault conviction. This claim should be rejected. As charged, the State was not required to prove that the defendant committed second-degree assault in order to elevate attempted robbery to attempted first-degree robbery; thus, the merger doctrine does not apply.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Washington State Constitution bar multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). If the legislature

intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. Id. at 368.

The Washington Supreme Court has set forth a three-part test for determining whether multiple punishments were intended by the legislature. State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005). First, the court examines the language of the relevant statutes to determine whether the legislation expressly permits or disallows multiple punishments. Id. at 771-72. Should this step not result in a definitive answer, the court then turns to the two-part "same evidence" or "Blockburger"⁵ test, which asks whether the offenses are the same "in law" and "in fact." Id. at 772. Finally, if applicable, the court considers the merger doctrine. Id. at 772-73.

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the court presumes the legislature intended to punish both offenses through a greater sentence for the greater crime. Id. at 772-73. Even where the merger doctrine applies, both convictions may be allowed to stand if there is an independent purpose or effect to each. Id. at 773.

⁵ United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

In State v. Zumwalt, a case consolidated under State v. Freeman, the Supreme Court considered whether convictions for first-degree robbery and second-degree assault violated double jeopardy under the merger doctrine. Freeman, 153 Wn.2d at 778-80. Zumwalt was charged with both crimes after he punched the victim in the face and robbed her. Id. at 770. The first-degree robbery charge was based upon the infliction of bodily injury alternative means, and the second-degree assault charge was based upon the reckless infliction of bodily harm alternative means. State v. Zumwalt, 119 Wn. App. 126, 131, 82 P.3d 672 (2003), aff'd sub nom. State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). The only facts that elevated the robbery to first degree also established the separate assault charge. Id. at 132. The Supreme Court concluded that the two convictions merged for double jeopardy purposes because "as charged and proved, without the conduct amounting to assault, Zumwalt would have been guilty of only second degree robbery." 153 Wn.2d at 778. The Court, however, refused to adopt a per se rule, and held that whether the merger doctrine applied would be decided on a case-by-case basis. Id. at 778-80.

Since Freeman, this Court has addressed whether attempted first-degree robbery and second-degree assault violate double jeopardy under the merger doctrine. In State v. Esparza, 135 Wn. App. 54,

143 P.3d 612 (2006), rev. denied, 161 Wn.2d 1004 (2007), co-defendant Beaver and an accomplice had entered a jewelry store, pointed their guns at the customers and store employees, and announced that it was a robbery. When a jeweler emerged from his office, Beaver pointed his gun at him. Id. at 57-58. Beaver was convicted of attempted robbery in the first degree and assault in the second degree. Id. at 58.

On appeal, Beaver claimed that these convictions violated double jeopardy. This Court rejected that claim, observing that "the State was not required to prove Beaver committed the crime of second degree assault in order to elevate the attempted robbery to attempted first degree robbery." Id. at 66.

Because the robbery involved that alleged use of a firearm, the State only had to prove that Beaver was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon. Here, it was charged and proved that Beaver was armed with a deadly weapon, therefore elevating the attempted robbery to first degree attempted robbery. Since it was unnecessary under the facts of this case for the State to prove that Beaver engaged in conduct amounting to second degree assault in order to elevate his robbery conviction, and because the State did prove conduct not amounting to second degree assault that elevated Beaver's attempted robbery conviction, the merger doctrine does not prohibit Beaver's conviction for both attempted first degree robbery and second degree assault.

Id. at 66 (footnote omitted).

The court distinguished Freeman because of the different way the crimes were charged and proved at trial. "As charged and proved, Zumwalt was guilty of first degree robbery because he inflicted bodily injury (assaulted) the victim in furtherance of the robbery. In short, under the facts of the case, the State was *required* to prove that Zumwalt engaged in conduct amounting to second degree assault in order to elevate his robbery conviction to first degree robbery." Id. at 65-66 (emphasis added).

The Washington Supreme Court subsequently discussed and approved of the analysis in Esparza:

There, Division One of the Court of Appeals held that a person convicted of attempted first degree robbery under the "[d]isplays what appears to be a firearm or other deadly weapon" prong of the robbery statute and second degree assault under the "[a]ssaults another with a deadly weapon" prong of the assault statute arising out of the same incident can permissibly be punished for having committed both offenses, thus distinguishing Zumwalt. RCW 9A.56.200(1)(a)(ii); RCW 9A.36.021(1)(c).

Importantly, the elevated charge at issue in Esparza was attempted first degree robbery. Proof of an attempted robbery requires only proof of intent to commit robbery and a substantial step toward carrying out that intent. RCW 9A.28.020(1). The Court of Appeals recognized that any number of actions proved at Esparza's trial constituted a substantial step toward the attempted robbery and thus, the assault was not necessary to elevate the charge to first degree.

State v. Kier, 164 Wn.2d 798, 806-07, 194 P.3d 212 (2008).

Under Esparza and Kier, the defendant's double jeopardy claim fails. As charged and proved here, the jury had to find that the defendant did an act that was a substantial step toward the commission of robbery in the first degree, and that the act was done with the intent to commit robbery in the first degree. CP 7-8, 63. The jury was instructed that a "person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or inflicts bodily injury." CP 64. As charged and proved here, the jury had to find that the defendant intentionally assaulted Paul Rodrick, and that the defendant thereby recklessly inflicted substantial bodily harm on Paul Rodrick. CP 7-8, 72. Thus, as charged and proved, proving that the defendant was armed with a deadly weapon while attempting to commit a robbery was sufficient to prove attempted first-degree robbery. However, the defendant's second-degree assault conviction was not based on a deadly weapon. It was not required that the State prove second-degree assault, as charged, to prove attempted first-degree robbery. Unlike the case in Zumwalt, where the robbery was based upon an alternative means that required an assault, the act that constituted the second-degree assault, in this case, the defendant's act of stabbing Rodrick and causing substantial bodily harm was not necessary to elevate the attempted robbery.

Instead of citing Esparza, the defendant relies on In re Francis, 170 Wn.2d 517, 242 P.3d 866 (2010). However, in Francis, the attempted first-degree robbery charge was based upon the alternative means that Francis inflicted bodily injury upon the victim--just like the situation in Zumwalt. Id. at 524. The court held that the merger doctrine applied because "Francis' second degree assault conduct was also charged as an element of the first degree robbery charge." Id. at 524. The court acknowledged that its holding would have been different had the State charged the attempted robbery based upon a different alternative means:

The State also argues the second degree assault conduct need not be part of the attempted first degree robbery charge because Francis was armed with and/or displayed a deadly weapon (a baseball bat) in his attempt, and thus his attempted robbery is alternatively elevated to the first degree pursuant to RCW 9A.56.200(1)(a)(i) and (ii). But again, the State didn't charge Francis with attempted first degree robbery based upon those alternative grounds, but rather based upon the infliction of bodily injury, RCW 9A.56.200(1)(a)(iii). The State has great latitude and discretion when it chooses what it will charge a defendant. But once the State has charged the defendant, short of a timely amendment, the State is stuck with what it chose.

Id. at 527.

The court distinguished Esparza based on this same ground:

Esparza held that when the State charges a defendant with an attempt crime *but does not specify what the substantial step is*, for double jeopardy analysis, the court need not assume the assault conduct is the substantial step when other conduct would also satisfy

that requirement. *Id.* at 61-64, 143 P.3d 612. But here the State charged Francis with *specific* conduct—inflicting bodily injury on Jacobsen—to satisfy the statutory element to raise the attempted robbery to the first degree. *See* RCW 9A.56.200(1)(a)(iii). The second degree assault conduct is inseparable from the attempted first degree robbery *as it was charged*.

Id. at 526 n.5 (emphasis in original). Francis is consistent with Esparza and Kier and does not support the defendant's double jeopardy claim.

The defendant's argument also fails for a second reason. Even where merger is found, two convictions will not violate double jeopardy if they have an independent purpose or effect. Freeman, 153 Wn.2d at 772. "Offenses may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." Id. at 778-79.

Here, while the defendant's initial assault upon Rodrick may have been incidental to the robbery, that ended quickly. Rodrick lay non-responsive in the middle of the road when the defendant walked away. His attempt to rob Rodrick was complete. However, the defendant returned, and with no attempt to rob Rodrick, he repeatedly stabbed Rodrick, nearly killing him. This was a separate and distinct injury and purpose than the attempted robbery. In fact, it played no part in the

defendant's attempt to rob Rodrick. Therefore, the two crimes are appropriately punished separately.

4. THERE IS NO LEGAL SUPPORT FOR THE CLAIM THAT A SEARCH WARRANT OR AN EQUIVALENT COURT ORDER NEEDS TO BE OBTAINED IN ORDER TO TAKE THE FINGERPRINTS OF A CONVICTED FELON.

The defendant was convicted on February 9, 2011. 11RP. On March 10, 2011, the parties appeared in court for the defendant to provide his fingerprints. 12RP 2. Defense counsel informed the court that the defendant wanted to know why the State needed a set of his prints as he knew that the State already had a set of his prints on file. 12RP 3. Other than that, defense counsel did not object to the defendant providing his prints, stating, "Your Honor, there's no good faith basis to oppose the State's motion to make the prints." 12RP 3. While the court then told the defendant that it would order him to comply if he did not voluntarily provide his prints, no order was entered and the defendant provided his prints. 12RP 3-5. Subsequently, in sentencing the defendant as a persistent offender, the State used the prints as part of the evidence used to prove the defendant had two or more prior "most serious offenses." 14RP 6-23. The defendant did not move to suppress evidence of the prints or object that the prints were obtained illegally without a warrant. For multiple reasons, the defendant's claim that a search warrant or an

equivalent court order needs to be obtained in order to take a convicted felon's prints should be rejected.

First, this issue was never raised in the trial court. The defendant did not raise this issue when his prints were taken and he did not raise this issue when the prints were admitted into evidence at sentencing. The defendant does not address how he can raise this issue for the first time on appeal. Under State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) this issue has been waived.

Second, the defendant makes no reasoned argument to support his position. Literally, in three conclusory statements, the defendant makes his case. First, he cites to State v. Garcia-Salgado, 176 Wn.2d 176, 240 P.3d 153 (2010), for the proposition that the taking of a biological sample for DNA testing invades a person's private affairs under Article I, section 7, and therefore a search warrant is required to obtain a biological sample. Second, he cites to State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007), and claims that the taking of fingerprints is equivalent to the taking of a biological sample, ergo, he asserts, the only way to obtain fingerprints is by way of a search warrant or equivalent court order. Def. br. at 17. This "logical connection" has no basis in law. This Court need not consider arguments that are not developed in the briefs and for

which a party has not cited authority. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(5).

The defendant is correct, generally a warrant or equivalent court order is needed to obtain a biological sample from a person for DNA testing. This is the holding of Garcia-Salgado, a case where the State obtained a biological sample from a pretrial detainee for use at his subsequent rape trial. Id. at 184-85. Such an "intrusion into the body," the Court held, is protected by the constitution. Id. No case has ever extended this rationale to fingerprints.

The reference in Surge, that fingerprints and DNA are similar, was made in regards to the fact that both are used as a means of identification. Surge, 160 Wn.2d at 74-75. The Court did not hold that fingerprints are a privacy interest protected under article I, section 7. In fact, the State has found no case--and the defendant has cited none--that has held that fingerprints are protected under any state constitution or the United States Constitution. Where no authority is cited in support of a proposition, the court is not required to search out authority, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken. State v. Young, 89 Wn.2d

613, 625, 574 P.2d 1171 (1978) (citing DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Additionally, in Surge, the Court discusses the analysis that must be done to determine if there is a "private affair" protected under article I, section 7. Surge 160 Wn.2d at 71-72. This analysis focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Id. at 71 (citing State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994)). This includes examining the historical treatment of the interest asserted. Id. at 72. The defendant conducts no such analysis here. "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

In fact, the defendant's argument is similar to the argument rejected by this Court in State v. Collins, 152 Wn. App. 429, 438-42, 216 P.3d 463 (2009), rev. denied, 168 Wn.2d 1020 (2010). Collins argued that the obtaining of a voice exemplar required a warrant or equivalent court order because it was a private affair protected by article I, section 7. In declining to even consider the claim, this Court stated:

Collins' argument on this issue is limited to citing several cases holding that the nonconsensual collection and analysis of blood or urine invokes privacy concerns. He otherwise fails to address any of the relevant inquiries in a

private affairs determination. He has thus provided us no basis for consideration of his argument.

Collins, at 400 (citing Palmer v. Jensen, 81 Wn. App. 148, 913 P.2d 413 (1996)) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration").⁶

Finally, the defendant completely ignores this statement from Surge: "[t]he constitutionality of fingerprinting convicted persons is unquestioned." Surge, at 78 (citing State v. Olivas, 122 Wn.2d 73, 106, 856 P.2d 1076 (1993)).

Even if the taking of fingerprints is considered a search of a private affair, the "search" here was lawful. In Surge, multiple convicted felons challenged the taking of biological samples for DNA testing. While the taking of a biological sample is an intrusion of the body and therefore a protected private affair generally requiring a search warrant, the Supreme

⁶ This Court also rejected the defendant's Fourth Amendment argument noting that in United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973), the Supreme Court held that a directive to provide a voice exemplar does not infringe upon any interest protected by the Fourth Amendment because no person can have a reasonable expectation of privacy in his voice:

Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

Id. at 14.

Court held that due to the lessened expectation of privacy of convicted felons, the taking of a biological sample of convicted felons does not require a search warrant. Surge, at 80-82. Thus, if a search warrant is not needed for an actual intrusion into a person's body--if that person is a convicted felon--to obtain a biological sample for DNA testing, then it cannot be argued that fingerprinting of a convicted felon--an act that does not intrude into the person's body, cannot possibly require a warrant.

And finally, even if the defendant's argument had merit, his remedy would still fail. All of his prior "most serious offenses" were King County offenses with full documentation supporting that the defendant committed the prior offenses. See sentencing exhibits 1-7. The fingerprints were just one piece of that evidence--a non-critical piece of evidence. Any error in admitting the print evidence was harmless.

5. THE JURORS WERE INFORMED THAT THEY NEEDED TO BE UNANIMOUS IN REGARDS TO THE SPECIAL VERDICTS.

The defendant claims that the jurors were not informed that they had to be unanimous as to the special verdicts. The defendant is mistaken.

For counts I and II, the defendant was charged with being armed with a deadly weapon during the commission of the underlying crimes. CP 7-8; RCW 9.94A.602 and RCW 9.94A.533(4). The jury instructions provided that "[f]or purposes of a special verdict the State must prove

beyond a reasonable doubt that [the] defendant was armed with a deadly weapon at the time of the commission of the crime of Count I and Count 2." CP 79 (instruction 22). The instructions added that "[y]ou will be given the exhibits admitted in evidence, these instructions, two verdict forms, and two special verdict forms for recording your verdict[s] Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision." CP 80-81 (instruction 23). Further, the jurors were instructed that "[a]s jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 59 (instruction 2). The defendant agreed to the giving of these instructions. 10RP 3.

a. The Issue Is Waived.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). In other words, a claim of trial court error cannot be raised "if the party asserting such error materially contributed thereto." In re K.R., 128 Wn.2d at 147. Such material contribution may include acquiescence as well as direct participation. See State v. Bailey, 114 Wn.2d 340, 787 P.2d

1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). The invited error doctrine bars a claim even if that claim impacts a constitutional right. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). Accordingly, the invited error doctrine bars consideration of this issue here. See also State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (failure to object bars review), rev. granted, 172 Wn.2d 1004 (2011), contrast, State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011).

b. The Jury Instructions Are Accurate.

In reviewing the propriety of jury instructions, the instructions must be read in a straightforward and commonsense manner. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). Rather, instructions are sufficient if they are readily understood and not misleading to the ordinary mind. State v. Meneses, 169 Wn.2d 586, 592, 238 P.3d 495 (2010). Instructions are viewed as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Here, the defendant refers to instruction 22 and asserts that the instruction does not inform the jurors that they must be unanimous to find

the defendant was armed with a deadly weapon. However, in making this argument, the defendant ignores all the other instructions. Specifically, instruction 23 informs the jurors that they are being provided four verdict forms--two for the underlying crimes and two for the deadly weapon enhancements. The instruction then tells the jurors that they must all agree to return a verdict. Read as a whole, the instructions here accurately state the law.

c. The Remedy Sought By The Defendant Is Unavailable.

The defendant cites to State v. Siers, 158 Wn. App. 686, 244 P.3d 15 (2010), rev. granted, 171 Wn.2d 1009 (2011) in arguing that due to the alleged instructional error as to the sentence enhancements, the underlying convictions for attempted first-degree robbery and second-degree assault must be reversed. This claim is nonsensical and is not supported by any law. Siers is a case involving a faulty charging document. It has no application to this case.

Siers was charged with second-degree assault. No aggravating circumstance was charged in the information. The State took the position that aggravating circumstances need not be charged in the information. Siers, 158 Wn. App. at 691. Still, the State pursued the aggravator at trial

and the jury answered "yes" on the special verdict form.⁷ Despite the jury's finding, the sentencing court did not impose an exceptional sentence.

On appeal, Siers challenged his conviction claiming that the State was required to charge the aggravating circumstance in the Information and that the failure to do so required vacation of his underlying conviction. This Court agreed, holding that "when the defendant had to defend at trial against an uncharged factor that was the 'functional equivalent' of an element" the remedy is vacation of the underlying conviction. Siers, at 700.

Here, the deadly weapon enhancements were properly charged in the Information. The defendant did not have to defend against an uncharged allegation. His reliance on Siers in seeking the remedy of vacation of the underlying conviction is without merit.

6. THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL IN DETERMINING WHETHER A DEFENDANT IS A PERSISTENT OFFENDER.

The defendant claims that he has a constitutional right to have a jury determine whether he is a persistent offender. This argument has

⁷ The aggravating circumstance pursued was that "[t]he defendant committed the offense against a victim who was acting as a good samaritan." Siers, at 690; RCW 9.94A.535(3)(w).

been rejected by both the United States Supreme Court and the Washington Supreme Court.

In Almendarez-Torres v. United States, the United States Supreme Court rejected the argument that recidivist factors need to be charged in an indictment, proven to a jury, or proven beyond a reasonable doubt.

Almendarez-Torres v. United States, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). On at least four separate occasions, the Washington State Supreme Court has agreed; specifically finding that prior convictions used to prove that a defendant is a persistent offender need not be submitted to a jury and proved beyond a reasonable doubt. State v. Theifault, 160 Wn.2d 409, 158 P.3d 580 (2007); State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 124 S. Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799, cert. denied, 535 U.S. 996 (2001); State v. Manussier, 129 Wn.2d 652, 921 P.2d 743 (1996), cert. denied, 520 U.S. 1201 (1997).

Subsequent to Almendarez-Torres, the United States Supreme Court concluded that factual matters relating to the charged crime that enhance a sentence must be proved to a jury. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The Court held that the finding that Apprendi committed the crime charged because of racial bias, a factor used to enhance his sentence, should have been

determined by the jury, not the sentencing court. In so holding, the Court refused to overturn Almendarez-Torres, specifically stating that their decision did not apply to the question of whether a defendant has a prior conviction. Apprendi, 530 U.S. at 489-90. "Other than the fact of a prior conviction," the Court said, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, at 489-90.

Two years later, in Ring v. Arizona, the Supreme Court held that in a capital case a jury, rather than a judge, must determine whether aggravating circumstances exist allowing for imposition of a death sentence. Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Again, the Court had the opportunity to overrule Almendarez-Torres, but again the Court neither specifically overruled Almendarez-Torres nor held that prior convictions needed to be determined by a jury.

In State v. Smith, the Washington Supreme Court reviewed its prior decisions regarding recidivism factors in light of defense arguments that somehow Apprendi and Ring required that a jury determine whether a defendant has prior convictions. Again, the Supreme Court reaffirmed that prior convictions need not be proved to a jury in order to establish that a defendant is a persistent offender. Smith, 150 Wn.2d at 141-43. The

Court fully analyzed Almendarez-Torres, Apprendi, and Ring, and concluded that the holding of Almendarez-Torres was still valid.

The United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2351, 159 L. Ed. 2d 403 (2004), did not change this fact. All the Court in Blakely did was reaffirm the holding of Apprendi and expand its application to sentences below the statutory maximum but beyond the statutory sentence range.

This case requires us to apply the rule we expressed in Apprendi v. New Jersey. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Blakely, 124 S. Ct. at 2536.

Nothing in Blakely purports to modify the "prior conviction" exception of Almendarez-Torrez and Apprendi. See State v. Rivers, 130 Wn. App. 689, 692-93 n.3, 695-96, 128 P.3d 608 (2005), rev. denied, 158 Wn.2d 1008 (2006); State v. Jackson, 129 Wn. App. 95, 105 n.10, 117 P.3d 1182 (2005), rev. denied, 156 Wn.2d 1029 (2006); State v. Hunt, 128 Wn. App. 535, 542, 116 P.3d 450 (2005), rev. denied, 160 Wn.2d 1001 (2007); State v. Alkire, 124 Wn. App. 169, 176-77, 100 P.3d 837 (2004), review granted in part, remanded, 154 Wn.2d 1032 (2005).

The United States Supreme Court has ruled that there is no Federal Constitutional right to have a jury determine recidivist factors. The Washington State Supreme Court has agreed. The United States Supreme Court is the final arbiter of controversies arising under the Federal Constitution and their decision is binding on this Court. State v. Chrisman, 100 Wn.2d 814, 816, 676 P.2d 419 (1984); State v. Laviollette, 118 Wn.2d 670, 826 P.2d 684 (1992). Thus, this Court must reject the defendant's claim that he is entitled to have a jury determine whether he is a persistent offender.

7. THE PERSISTENT OFFENDER STATUTE DOES NOT VIOLATE PRINCIPLES OF EQUAL PROTECTION.

The defendant contends that the Persistent Offender Accountability Act (POAA), chapter 9.94A.570 RCW, is unconstitutional. He bases his claim on the fact that when proof of a prior conviction is an element of a crime, the State must prove its existence to a jury beyond a reasonable doubt, but when the same conviction is a prior persistent offender offense requiring a life sentence, a judge may determine the existence of the prior conviction by a preponderance of the evidence. This, the defendant contends, violates the equal protection clause of the Fourteenth Amendment and article I, section 12 of the Washington Constitution. This claim must be rejected. This issue has been repeatedly raised and rejected

by cases the defendant neither addresses, nor cites. See State v. Langstead, 155 Wn. App. 448, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010); State v. Williams, 156 Wn. App. 482, 234 P.3d 1174, rev. denied, 170 Wn.2d 1011 (2010); State v. Reyes-Brooks, 165 Wn. App. 193, 267 P.3d 465 (2011).

Under the POAA, trial courts are required to sentence "persistent offenders" to life imprisonment without the possibility of parole. RCW 9.94A.570. A "persistent offender" is a person who had been convicted of a "most serious offense" and, before the commission of the offense, has been convicted as an offender on two separate occasions of most serious offenses. RCW 9.94A.030. A "most serious offense" includes second-degree assault, attempted first-degree robbery and second-degree robbery. RCW 9.94A.030(32). Thus, the defendant's two current felony convictions, and his four prior second-degree robbery convictions all qualify as most serious offenses. CP 122. Thus, the court found the defendant is a persistent offender.

a. The Equal Protection Clause.

The equal protection clause⁸ is not intended to ensure complete equality among individuals or classes. Rather, the equal protection clause

⁸ U.S. Const. amend. XIV; Wash. Const. art. I, § 12.

prohibits governmental classifications that impermissibly discriminate among similarly situated groups. In re Silas, 135 Wn. App. 564, 145 P.3d 1219 (2006); State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992).

Under the equal protection clause, persons similarly situated with respect to the legislative purpose of the law must receive like treatment. State v. Shawn P., 122 Wn.2d 553, 561, 859 P.2d 1220 (1993).

b. The Standard Of Review.

Equal protection challenges are analyzed under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis. Manussier, 129 Wn.2d at 672-73. Recidivist criminals are not a semi-suspect class; thus, the proper test to apply where only a liberty interest is asserted is the rational basis test. Id.

The rational basis test "is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause." Shawn P., 122 Wn.2d at 561. In fact, "[o]nly in the rarest of cases will a statute fail to survive rational basis review." More v. Washington State Dept. of Retirement Systems, 133 Wn. App. 581, 585-86, 137 P.3d 73 (2006) (citing DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998)).

Under a rational basis test, the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives. Shawn P., at 561. A "presumption of

constitutionality exists for the statute in question." Arnold v. Dept. of Retirement Sys., 74 Wn. App. 654, 665, 875 P.2d 665 (1994), rev. on other grounds, 128 Wn.2d 765 (1996). The burden is on the party challenging the classification to show that it is "purely arbitrary." Coria, 120 Wn.2d at 172. The challenging party must prove that the statute is unconstitutional beyond a reasonable doubt. Forbes v. Seattle, 113 Wn.2d 929, 941, 785 P.2d 431 (1990).

Two other caveats are important to any equal protection argument. First, if there is a legitimate objective for the classification, then there need not be a perfect fit between the objective and the means employed; all that is required is a rational relationship. DeYoung, 136 Wn.2d at 144. In other words, a statute survives rational basis review even if it is to some extent both under-inclusive and over-inclusive. Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 901, 83 P.3d 999 (2004).

Second, "[o]ne who challenges a statute under the rational basis test must do more than merely question the wisdom and expediency of the statute." Coria, at 174. "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." Id. "[S]tatutes do not offend [the federal or state constitutions] unless they are invidiously discriminatory." Northshore Sch. Dist. No. 417 v. Kinnear, 84 Wn.2d 685, 722, 530 P.2d 178 (1974),

overruled on other grounds by Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978).

c. Not Similarly Situated.

The defendant contends that persons charged with certain felony offenses where a prior conviction is an element of the crime, for example, unlawful possession of a firearm (see RCW 9.41.040, hereinafter UPFA) or felony violation of a no-contact order (see RCW 26.50.110, hereinafter FVNCO) and persons who are persistent offenders are similarly situated with respect to the legislative purpose of the law. The defendant is incorrect.

For example, the UPFA statute serves two purposes. First, the statute defines certain classes of persons that the legislature has determined should not be allowed to possess a firearm. This includes persons found guilty, or not guilty by reason of insanity, of any felony offense, persons who have been involuntarily committed for mental health treatment, persons found guilty of certain domestic violence misdemeanor offenses, persons under a certain age, and persons pending trial for serious offenses. Second, the statute provides that it is a criminal offense for persons in these classifications to possess a firearm.

On the other hand, the purpose of the POAA is to improve public safety by imprisoning the most serious recidivist offenders--a purpose that

the Supreme Court has held is a legitimate state objective. Manussier, at 674. The POAA is the legislature's appropriate "attempt to define a particular group of recidivists who pose a significant threat to the legitimate state goal of public safety. Id.

In sum, statutes like the UPFA statute deal with deterring certain behavior, for example, prohibiting certain persons from possessing or owning a firearm. The POAA deals solely with the amount of punishment the most serious recidivist criminals should receive based on the class of the current crime committed, and the class and number of the prior crimes committed. There is a purpose for treating prior convictions differently under different statutes, and thus, a person subject to one statute is not similarly situated in regards to the legislative purpose of the other statute.

d. A Rational Basis.

The defendant's argument that there is no rational basis for the legislature's differing treatment of persons charged with UPFA or FVNCO and persons being sentenced as a persistent offender ignores the distinction between a prior conviction that actually alters or defines the crime charged, and a prior conviction that is used solely to establish recidivism.

Under the POAA, the recidivist fact of a prior conviction is used like all recidivist facts of prior convictions throughout the Sentencing

Reform Act; the prior conviction dictates the amount of punishment to be imposed upon a jury's finding that the underlying offense has been committed. Here, the defendant would still be guilty of attempted robbery and assault whether or not the State proved that he had been convicted of multiple robberies in the past.

On the other hand, the legislature chose to prohibit convicted felons from possessing a firearm, thus making the prior conviction an element of the crime. The fact that persons with a prior conviction of a certain type can be charged with a higher degree of crime (for example, the charging of UPFA in the first or second degree depends on the nature of the prior offense), does not change the fact that the conviction for the current crime is based on proof of the prior conviction. It is certainly rational for the legislature to elevate the crime of unlawful possession of a firearm for those felons who have committed more serious prior offenses.

The fact that the legislature has chosen to handle these situations differently is not wholly irrational. Making certain actions a crime based on prior convictions or making the crime more serious based on specific recidivist facts evinces a legislative intent to deter specific conduct. Increasing punishment for felonies by taking recidivism into account reflects a generalized legislative choice to protect the public. The defendant can point to no invidious discrimination, nor can he support his

claim that the different treatment of the fact is wholly irrelevant to the legislative purposes of each statute.

Further, the defendant's equal protection argument, taken to its logical conclusion, would invalidate not only the POAA, but the entire sentencing scheme of the SRA in general – all prior convictions would have to be treated as "elements" of the current crime, charged in the Information and proven to a jury beyond a reasonable doubt. But Washington courts have repeatedly rejected such claims. See In re Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998) (no equal protection violation when legislature changed its view of criminal punishment, resulting in offenders being subject to different punishment schemes); State v. Ross, 152 Wn.2d 220, 240-41, 95 P.3d 1225 (2004) (same); Manussier, supra (POAA passes rational basis test and thus does not violate equal protection clause in regards to offenses that count as a most serious offense); Langstead, supra (POAA does not violate equal protection where other crimes treat prior conviction as an element); Williams, supra; Reyes-Brooks, supra.

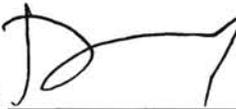
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 10 day of April, 2012.

Respectfully submitted,

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By: 

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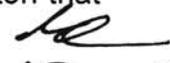
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LEWIS, Cause No. 66977-0-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington


04-12-10-12

Date