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Washington State Supreme Court

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No. 92508-9

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

STEPHEN ANTHONY BAILEY,

Petitioner.

ON APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Cause No. 07-1-02207-0 / COA No. 32545-8-III

The Honorable Michael G. McCarthy, Judge

PETITION FOR REVIEW

STEPHEN ANTHONY BAILEY, DOC777393
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

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A. IDENTITY OF PETITIONER

Stephen Anthony Bailey asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in State v. Bailey, No. 32545-8-III, filed October 13, 2015. A copy of the decision is attached in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. FOR PURPOSES OF CALCULATING MR. BAILEY'S OFFENDER SCORE, CAN THE TRIAL COURT USE A PRIOR CONVICTION THAT WAS IMPROPERLY OBTAINED IN ADULT COURT? Here, related to the prior conviction, the Court of Appeals ruled the trial court failed to obtain proper waivers transferring jurisdiction from juvenile court to adult court. State v. Bailey, 179 Wn.App. 433, 335 P.3d 942 (2014). For purposes of sentencing under the SRA, does this render the prior conviction a nullity (void) and preclude it from being included in the calculation of Mr. Bailey's offender score?
 - a. Alternatively, because of the defective transfer, if the prior conviction was improperly obtained in adult court, but stands as a juvenile conviction, was Mr. Bailey convicted as an "offender" within the meaning of RCW 9.94A.030(34)? Here, if he was not convicted as an "offender," did the trial court error when it included the prior conviction in the calculation of his offender score?

2. DID THE TRIAL COURT ERROR IN FINDING THE PRIOR CONVICTIONS FOR TAKING A MOTOR VEHICLE WITHOUT PERMISSION AND ATTEMPTING TO ELUDE DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT? Here, it is unknown whether the two crimes at issue constitute the same criminal conduct. Based on the defendant's intent, when viewed objectively, and fact that said intent did not change from one crime to the next, and if the attempt to elude was in furtherance of taking a motor vehicle, do the two crimes constitute the same criminal conduct? Should this Court remand the issue to make that determination and whether the offender score and sentence should be reduced accordingly?

D. STATEMENT OF THE CASE

In *State v. Bailey*, the Court of Appeals reversed Mr. Bailey's sentence as a persistent offender, finding his prior 1998 conviction for second degree robbery could not be used to sentence him as a persistent offender under the Persistent Offender Accountability Act (POAA). 179 Wn.App. 433, 335 P.3d 942 (2014). This current appeal and petition for review stems from Mr. Bailey's resentencing following that decision. CP 1767.

At resentencing, Mr. Bailey argued his prior 1998 conviction for second degree robbery that was the subject of the Court of Appeals opinion should not be counted at all in his offender score. RP 13-14; CP 7.

Mr. Bailey also argued that his prior convictions for taking a motor vehicle without permission (TMVWP) and attempting

to elude constituted the same criminal conduct. The judgment and sentence from those two prior offenses showed an offense date of November 7, 2000, and neither box was checked indicating whether the offenses were or were not the same course of conduct. RP 15. The sentencing court disagreed stating, "In order for them to be the same course of criminal conduct don't they have to share the same intent? ... And the intent to steal is not the same as the attempt to elude." RP 17. The court included both convictions in calculating the offender score by counting them separately. RP 45; CP 7.

The court sentenced Mr. Bailey to 300 months based on an offender score of nine. RP 41-42. Mr. Bailey argued his offender score should only be six. RP 22.

On appeal, Mr. Bailey argued the Court of Appeals invalidated (made void) his prior 1998 robbery conviction in its 2014 opinion in the previous appeal -- when it concluded he "was not fully informed of the rights he waived and no written finding was entered that transfer (to adult court) was in the best interest of the juvenile or public," and therefore it cannot be included in the calculation of his current offender score. Mr. Bailey also argued the case should be remanded to determine if the prior convictions for taking a motor vehicle without permission and attempting to elude

constituted the same criminal conduct.

The Court of Appeals affirmed, holding that it did not invalidate Mr. Bailey's 1998 prior robbery conviction and that the trial court properly concluded the TMWP and Attempting to Elude did not constitute the same criminal conduct. See Attached opinion pgs. 5 & 7.

Because the Court of Appeals opinion is obviously wrong and conflicts with its earlier decision in the same case, and raises a significant constitutional issue that is of substantial public interest, this Court should accept review, reverse Mr. Bailey's sentence, and remand for resentencing under a correct offender score. RAP 13.4(b)(1), (3) & (4).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE TRIAL COURT ERRED WHEN IT INCLUDED A 1998 PRIOR ROBBERY CONVICTION IN MR. BAILEY'S CRIMINAL HISTORY (OFFENDER SCORE); WHEN THE PRIOR CONVICTION WAS HELD TO BE DEFECTIVE ON JURISDICTIONAL GROUNDS, i.e., not properly transferred to adult court, RENDERING IT A NULLITY (VOID). ALTERNATIVELY, IF THE PRIOR CONVICTION STANDS AS A JUVENILE CONVICTION BECAUSE OF THE DEFECTIVE TRANSFER, MR. BAILEY WAS NOT CONVICTED AS AN OFFENDER WITHIN THE MEANING OF RCW 9.94A.030(34), AND THEREFORE THE PRIOR CONVICTION CANNOT BE USED WHEN CALCULATING HIS OFFENDER SCORE.

The inclusion of a prior conviction in an offender score requires one to be an offender. The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, requires the sentencing court to calculate a defendant's offender score by the sum of points

accrued under RCW 9.94A.525. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The State is required to prove the defendant's criminal history to the sentencing court by a preponderance of the evidence. RCW 9.94A.500(1); State v. Ford, 137 Wn.2d 472, 479-81, 973 P.2d 452 (1999); State v. Ammons, 105 Wn.2d 175, 185-86, 713 P.2d 719 (1986).

A sentence based on an incorrect offender score calculation is a sentence in excess of that authorized by the statute. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). Although the prosecution may agree to sentencing recommendations, the sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range. RCW 9.94A.460; Ross, 152 Wn.2d at 229.

For purposes of the SRA, an "offender" is defined as:

"Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.

RCW 9.94A.030(34). This means a juvenile can be an offender only if he or she "committed a felony" and the "case is under (adult) jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110." Id.

In the present case, prior to the remand for resentencing the Court of Appeals held Mr. Bailey's transfer to adult court on the 1998 robbery charge was defective because (1) there was no evidence the waiver of juvenile court jurisdiction was knowing and intelligent, and (2) the juvenile court failed to enter findings that declination of juvenile court jurisdiction was in the best interest of Mr. Bailey or the public. *State v. Bailey*, 179 Wn.App. 433, 436, 335 P.3d 942 (2014)(citing *State v. Saenz*, 175 Wn.2d 167, 174-75, 283 P.3d 1094 (2012)).

The Bailey Court also stated emphatically, "Accordingly, we reverse the robbery sentence." *Id.* "A prior conviction is a conviction which exists before the date of the sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1)(emphasis in underline added). A prior conviction that has been reversed no longer exists. See *In Re Domanski*, 24 Wn.2d 137, 138, 163 P.2d 593 (1945)(when court ordered judgment reversed and new trial granted, thereby reversing judgment in full, judgment entered was a nullity and of no legal effect). This same reasoning applies to judgments obtained on jurisdictional defects. Similarly, since Mr. Bailey's 1998 robbery conviction was transferred to adult court on invalid waivers — jurisdiction in adult court was

lacking. The Bailey Court realized this and reversed the 1998 robbery sentence, rendering it a nullity and of no legal effect (void on jurisdictional grounds). Therefore, it cannot be counted in Mr. Bailey's offender score.

The Court of Appeals rests its opinion that Mr. Bailey's offender score is correct on a statement that "The prior appeal ... resulted in a determination that Mr. Bailey was not an "offender" under the POAA." See Appendix A, pg. 5. This holding is counter-intuitive (nonsensical) and conflicts with the prior appeal because an "offender" under the POAA is the same as an "offender" under the SRA. RAP 13.4(b)(1) & (2). If the 1998 prior robbery conviction cannot be included in the offender score (criminal history) for purposes of the persistent offender status, it likewise cannot be included in the offender score for purposes of calculating a defendant's standard range sentence. The prior conviction was obtained on an invalid waiver -- a statutory and constitutional defect, as well as a jurisdictional defect that renders the conviction a nullity. As such, the conviction cannot be used as prior criminal history when calculating Mr. Bailey's offender score under the SRA, which includes the POAA. *State v. Ammons*, 105 Wn.2d at 185-86.

This error is obvious and represents a clear and

significant question of law under the State and federal constitutions, and is a substantial public interest issue that should be determined by this Court. RAP 13.4(b)(3) & (4). Invalid waivers related to criminal trials and convictions impact important constitutional rights and protections, and therefore this Court should consider whether the State can legally use defective convictions under the SRA -- an issue that is of great public interest.

Finally, the Court of Appeals asserts that Mr. Bailey's prior appeal "was not a collateral attack on the 1998 robbery conviction," and therefore the "court did not invalidate the robbery conviction in its reversal of the POAA sentence." See Appendix A, pg. 5. Despite this point, a "invalid judgment" is one entered by a court which lacks the inherent power to make or enter the order involved. *State v. Zavala-Reynoso*, 127 Wn.App. 119, 123-24, 110 P.3d 827 (2005). When the Bailey Court held the transfer waivers defective and reversed Mr. Bailey's 1998 robbery sentence, it, in effect, deemed the prior conviction to be invalid because the trial court lacked the power to make the transfer order -- a jurisdictional defect because the adult court lacked the power to convict and sentence Mr. Bailey (a 16 yr. old juvenile at the time). Because the prior conviction is invalid, it should not have been included

in Mr. Bailey's offender score and, contrary to the Court of Appeals' assertion that he must file a collateral attack challenging the prior conviction, "the court has the power and duty to correct an erroneous sentence, upon its discovery." McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955). The Court of Appeal should have recognized the invalid conviction and remanded for resentencing. Accordingly, this Court should recognize the error, accept review, and remand for resentencing.

2. THE CASE SHOULD BE REMANDED TO DETERMINE IF THE PRIOR CONVICTIONS FOR TAKING A MOTOR VEHICLE WITHOUT PERMISSION AND ATTEMPTING TO ELUDE CONSTITUTE THE SAME CRIMINAL CONDUCT.

A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a); State v. Anderson, 92 Wn.App. 54, 61, 960 P.2d 975 (1998). "Same Criminal conduct" is indicated when two or more crimes that require the same criminal intent are committed at the same time and place and involve the same victim. RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The Legislature intended that courts construe the phrase, "same criminal conduct," narrowly. *State v. Grantham*, 84 Wn.App. 854, 858, 932 P.2d 657 (1997). To determine if two crimes share a criminal intent, the focus is on whether the defendant's intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts should also consider whether one crime furthered the other. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Appellate courts review a trial court's finding that the offenses did not constitute the same criminal conduct for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Here, it is unknown whether the two crimes at issue constituted the same criminal conduct. But the trial court's conclusory statement that the two crimes cannot be the same course of conduct because "the intent to steal is not the same as the attempt to elude" (RP 17) is an incomplete statement of law on this issue. If the defendant's intent, viewed objectively, did not change from one crime to the next, and if the attempt to elude was in furtherance of taking a motor vehicle, the two crimes would constitute the same criminal conduct. The case should be remanded to make that determination

and the offender score and sentence should be reduced accordingly.

F. CONCLUSION

For the reasons stated, this Court should accept review and the matter should be remanded for resentencing based on an offender score which does not include the prior 1998 conviction for robbery in the second degree and to determine whether the prior convictions for taking a motor vehicle without permission and attempting to elude constitute the same criminal conduct.

Dated this 27th day of December, 2015.

x MR. S.A.S.B
STEPHEN ANTHONY BAILEY, DOC777393
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CERTIFICATE OF SERVICE / MAILING

I, Stephen Anthony Bailey, hereby certify and declare that I served a true and correct copy of the following document(s): PETITION FOR REVIEW, on opposing counsel, as follows:

- U.S. Mail First Class Postage Prepaid
Deposited in the AHCC/Prison Mailbox as Legal Mail
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- Inter-Institution Mail/AHCC
- Hand Delivered By:

TO: Joseph Anthony Brusich
David Brian Trefry
Yakima County Prosecutor's Office
128 N 2nd Street, Rm 329
Yakima, WA 98901-2621

I, Stephen Anthony Bailey, certify and declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

EXECUTED this 27th day of December, 2015, at Airway Heights, Spokane County, Washington.

X MR. S.A.S.B #777393
Stephen Anthony Bailey, DOC777393
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APPENDIX A

- 1) State v. Stephen Anthony Bailey,
COA Cause No. 32545-8-III,
Filed October 13, 2015
(Unpublished Opinion).

Appendix A

FILED
OCTOBER 13, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 32545-8-III
Respondent,)	
)	
v.)	
)	
STEPHEN ANTHONY BAILEY,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Stephen Bailey once again appeals his sentence in this first degree assault case, arguing that our previous decision excluded a 1997 robbery¹ conviction from the offender score. The previous decision spared Mr. Bailey from a sentence of life in prison without possibility of parole when it determined that he did not qualify as an “offender” in the 1997 case, but it did not invalidate that conviction. We affirm.

FACTS

The offender scoring issues in this appeal concern three separate cases, although only one of those cases is before this court. Mr. Bailey is appealing from convictions for first degree assault and witness tampering that arose out of a series of 2007 incidents.

¹ Although this conviction was not adjudicated until the following year, we will refer to it as the 1997 robbery. Mr. Bailey also has a 1996 juvenile court adjudication for second degree robbery that we will refer to as the 1996 robbery. There was some confusion of the two robberies during the resentencing hearing.

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This case previously was before this court in *State v. Bailey*, 179 Wn. App. 433, 335 P.3d 942 (2014). In that action we reversed a persistent offender sentence predicated in part on a 1997 second degree robbery conviction in adult court for an offense committed when Mr. Bailey was 16. The case was remanded for sentencing as a non-persistent offender. *Id.* at 443.

At the resentencing, the trial court concluded that Mr. Bailey's offender score was 9 for the assault count and 7 for the intimidation count. The 1997 robbery was included in the offender score calculation for both offenses despite a defense argument that the conviction was void. The court imposed a standard range sentence of 300 months on the first degree assault count and a concurrent 75 month term on the witness intimidation.

Due to its inclusion in the offender score, the second case presenting an issue in this appeal is the 1997 robbery conviction. A third case at issue involves convictions from 2000 for second degree taking of a motor vehicle and attempting to elude. Those offenses, which both occurred on September 20, 2000, were scored separately at the resentencing hearing over defense objection.

Mr. Bailey promptly again appealed his sentence to this court.

ANALYSIS

This appeal presents the questions of whether the trial court erred by including the 1997 robbery in the offender score and whether the two 2000 convictions constituted the same criminal conduct. We address the claims in the stated order.²

A felony sentence under the Sentencing Reform Act is determined by the seriousness of the offense and the offender's criminal history. RCW 9.94A.530(1). All felony or misdemeanor convictions, regardless of the court that entered them, constitute the criminal history. RCW 9.94A.030(11). With the exception of some offenses that include misdemeanors in the calculation of an offender score, only felony convictions—whether from juvenile or adult court—will count in the calculation of an offender score. RCW 9.94A.525. Which offenses count in the offender score, and how they are counted, will vary with the offense being scored. *Id.* The two questions presented in this appeal involve these scoring rules.

² Mr. Bailey also filed a Statement of Additional Grounds in which he alleges that the threat of a third “strike” offense affected his trial tactics and his counsel was ineffective at sentencing by not insisting that the sentencing judge read the trial transcript before imposing sentence. He does not present sufficient argument to explain how his trial was prejudiced and what counsel could have done about the issue before appeal. We also are unaware of any authority compelling a sentencing judge to read the trial transcript before sentencing. Accordingly, the two claims are without merit and we will not further address them.

1997 Robbery

Mr. Bailey argues that this court invalidated this robbery conviction in its 2014 opinion in the previous appeal, thereby removing the offense from his criminal history. As a subsequent opinion of this court makes clear, the 1997 conviction was not invalidated when it was deemed unusable for persistent offender status.

The intervening opinion is *State v. Inocencio*, 187 Wn. App. 765, 351 P.3d 183 (2015). There the defendant contended that two of his prior convictions committed before his 18th birthday should not be counted in his offender score because they had been entered by the adult court instead of a juvenile court. *Id.* at 767. This court disagreed, noting that the issue in earlier cases involving transfer of jurisdiction from superior court to adult court had revolved around the question of whether or not the defendant was shown to be an “offender” under the Persistent Offender Accountability Act (POAA). *Id.* at 771-777 (discussing *State v. Saenz*, 175 Wn.2d 167, 283 P.3d 1094 (2012) and *State v. Knippling*, 166 Wn.2d 93, 206 P.3d 332 (2009)).

Inocencio noted that while the prosecution must establish the criminal history, the defendant bears the burden of establishing the invalidity of a prior conviction. 187 Wn. App. at 776.³ However, a conviction cannot be collaterally attacked during the sentencing of an unrelated case. *Id.* (citing *State v. Ammons*, 105 Wn.2d 175, 188, 713

³ This rule is subject to two exceptions—a prior offense that either is invalid on its face or has been unconstitutionally obtained. 187 Wn. App. at 777.

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State v. Bailey

P.2d 719 (1986)). Instead, the offender must seek post-conviction relief. *Id.* at 776-777. In most instances, however, the ability to collaterally attack a conviction will be restricted by RCW 10.73.090 *et seq.*

Mr. Bailey makes the same argument here that Mr. Inocencio made, and our answer is the same as in that case. The prior appeal of this matter resulted in a determination that Mr. Bailey was not an “offender” under the POAA. However, that appeal was not a collateral attack on the 1997 robbery conviction. RCW 10.73.090 *et seq.* Instead, it was an appeal of the assault conviction and ensuing persistent offender sentence. *Bailey*, 179 Wn. App. at 443. This court did not invalidate the robbery conviction in its reversal of the POAA sentence.

The trial court correctly determined that the 1997 robbery conviction counted in the offender score calculation of the current sentences.

2000 Eluding and Taking a Motor Vehicle Convictions

Mr. Bailey also argues that the trial court should have counted the two 2000 convictions committed on the same day as one offense under the same criminal conduct scoring rule. The trial court correctly determined that there was not a unity of victims or intent, and, therefore, the two offenses count separately.

For past offenses committed at the same time, the current sentencing court has discretion to treat them as a single offense for the purpose of scoring the current convictions. RCW 9.94A.525(5)(a)(i). The defendant bears the burden of proving that

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State v. Bailey

prior crimes should be counted as the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). “Same criminal conduct” means that the offenses occurred at the same time and same place, had the same victim, and have the same criminal intent. RCW 9.94A.589(1)(a). Offenses have the same criminal intent when, viewed objectively, the intent does not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). “Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts have also looked at whether one crime furthers the other or whether the offenses were part of a recognized plan or scheme. *Dunaway*, 109 Wn.2d at 215 (furtherance test); *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) (same scheme or plan).

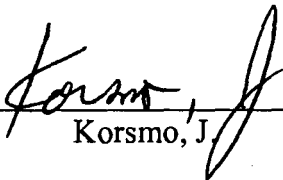
The trial court’s same criminal conduct ruling is reviewed for abuse of discretion because it involves a factual inquiry. *Graciano*, 176 Wn.2d at 535-536. Thus, “when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result. But where the record adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 537-538 (citation omitted). This exception “is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

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State v. Bailey

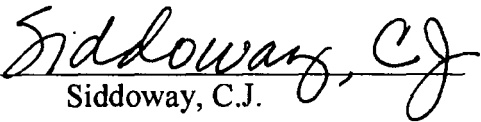
Here, the trial court concluded that the defense failed to establish that the pair of 2000 offenses shared the same intent or involved the same victim, even while noting that it was theoretically possible if the stolen vehicle had been a police car. Report of Proceedings at 17-18. Mr. Bailey never contended that the prior offense involved a police vehicle nor did the defense present any other evidence suggesting that the two offenses involved the same victim. Accordingly, the trial court properly concluded that the two crimes did not constitute the same criminal conduct.

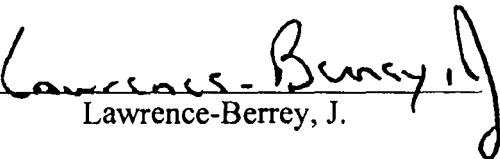
The offender score was properly calculated. The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Siddoway, C.J.


Lawrence-Berrey, J.