67558-3

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NO. 67558-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Oliver Weaver's case was remanded for a new sentencing hearing before the trial court. At the new hearing, the court ruled that it violated double jeopardy to impose two convictions upon Weaver for the same incident. Despite this double jeopardy finding, the court listed both convictions on Weaver's judgment and sentence.

The court also imposed an exceptional sentence above the standard range. It imposed this sentence even though at the time of Weaver's trial, there was no statutory procedure for empaneling a jury to decide the aggravating factors on which the exceptional sentence was based.

In imposing the exceptional sentence, the court relied on an aggravating factor that was identical to an element of one of the charged offenses. Additionally, the court had not instructed the jury that its findings on the aggravating factors must be based on unanimous agreement that the additional facts apply to a specific charged crime. The court never instructed the jury that it did not need to be unanimous to answer "no" to the special verdict findings. Each error undermines the exceptional sentence.

Finally, the prosecution claimed that Weaver's offender score included two felony convictions from the early 1980s. It offered municipal court computer worksheets to allege Weaver had misdemeanor convictions that stopped the earlier felony convictions from "washing out" of the offender score calculations. The prosecution did not offer reliable evidence showing what convictions occurred, and did not meet its burden of proving Weaver's criminal history. Weaver's case must be remanded for further sentencing proceedings.

B. ASSIGNMENTS OF ERROR.

1. The judgment and sentence erroneously lists two offenses of conviction even though the court ruled that multiple punishments for these two convictions would violate double jeopardy.

2. The court improperly imposed an exceptional sentence based on the jury's finding of an aggravating factor when the court lacked statutory authority to submit the aggravating factor to the jury.

3. The court lacked authority to impose an exceptional sentence based on the aggravating factor that the complainant was a child at the time of the incident, when an element of the crime

was that the complainant's was a child between 12 and 14 years old.

4. The court's imposition of an exceptional sentence violated Weaver's constitutional and statutory right to a unanimous jury verdict because the jury was not instructed that its special verdict needed to be based on a unanimous finding that the aggravating factor applied to specific charged crime.

5. The court denied Weaver due process of law by failing to instruct the jury that its special verdict findings did not need to be unanimous to answer "no."

6. The prosecution failed to meet its burden of proving Weaver's criminal history by reliable evidence as required by the due process clause.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. It violates double jeopardy to enter convictions for two offenses that constitute a single crime. Here, the court found that it would violate double jeopardy to impose punishment for both offenses of conviction, but it listed both offenses in the judgment and sentence. Where two convictions violate double jeopardy, was the court required to strike one of the convictions from the judgment and sentence?

2. After Weaver's trial, the Legislature changed the statutory scheme for imposing an exceptional sentence. At Weaver's trial, the court created its own procedure and empaneled a jury to decide whether the State proved an aggravating factor. Did the court lack statutory authority to impose an exceptional sentence based on a jury finding when the then-existing statute did not permit such a procedure?

3. An exceptional sentence may not be based on a fact that is inherent in the underlying crime. An essential element of rape of a child in the second degree is that the complainant was between 12 and 14 years old. The court based its exceptional sentence in part on the jury's finding that the complainant "was a child" at the time of the incident. Was it impermissible to impose an exceptional sentence based on the complainant's youth when her age was an element of the crime?

4. Aggravating factors permitting an exceptional sentence must be proved to a unanimous jury beyond a reasonable doubt. The court asked the jury whether the State proved two aggravating factors for "either crime charged." The court did not instruct the jury that it needed to unanimously agree as to which crime the factor applied. Does the failure to obtain unanimous jury agreement on

the aggravating factor undermine the court's authority to impose an exceptional sentence?

5. Although the jury must unanimously agree to find an aggravating factor was proven beyond a reasonable doubt, the court may not require the jury to be unanimous to vote "no" and find that the aggravating factor does not apply. The court did not instruct the jury that it did not need to be unanimous to find the aggravating factor was not proven. Did the failure to properly instruct the jury on the requirements of reaching a verdict for the aggravating factor undermine the validity of the jury's findings?

6. The prosecution bears the burden of proving a person's criminal history prior to the court's imposition of a sentence. The prosecution asserted that Weaver's two felony convictions from the early 1980s counted in his offender score because he had not spent 10 years in the community without any criminal convictions. Did the State fail to present reliable evidence showing that Weaver had been convicted of misdemeanor offenses?

D. STATEMENT OF THE CASE.

In the course of Oliver Weaver's direct appeal, the Supreme Court remanded his case for further proceedings because the prosecution had failed to prove Weaver's criminal history. CP 32

(State v. Weaver, 171 Wn.2d 256, 258, 251 P.3d 876 (2011)). He had been convicted after a jury trial of one count of second degree rape of a child and one count of second degree rape, both of which rested on the same event. RP 23;[1] CP 5-6. The incident occurred in 2002. CP 5-6.

At the original sentencing hearing in 2005, the court treated the two offenses of conviction as the same crime and expressed its intent to merge them, but it listed both offenses on Weaver's judgment and sentence. 4/8/05RP 372-73 (transcript from original sentencing hearing); CP 19-20. The Supreme Court ruled that Weaver could raise the issue of double jeopardy at his resentencing hearing. CP 35; 171 Wn.2d at 260 n.2d.

Weaver's original sentence was imposed as an exceptional sentence under former RCW 9.94A.712. CP 20, 23. RCW 9.94A.712 required the court to impose an indeterminate sentence and allowed the court to set a minimum term that was greater than the standard sentencing range under the exceptional sentence procedures of RCW 9.94A.535.

The court submitted a special verdict to the jury asking: (1) in either charged crime, was the complainant, R.T., a child at the

[1] "RP" refers to the sentencing hearing held on July 7, 2011.

time of the incident and (2) in either charged crime, was R.T. impregnated as a result of the crime. CP 165. The court did not ask the jury to explain whether its decision applied to both charged crimes or to one specific one, and imposed an exceptional sentence based on the jury's findings. CP 20.

At Weaver's 2011 resentencing hearing, the prosecution asserted that Weaver had two prior burglary convictions from 1981 and 1984 that should be counted in his offender score. CP 47; RP 11. The prosecution claimed Weaver had been convicted of crimes in municipal court in the time intervening between 1985 and 2002. RP 10. It offered docket sheet printouts from four municipal court cases to prove the felony convictions had not washed out from the offender score calculation. RP 8, 10. Weaver objected to the lack of proof of his prior convictions. RP 13.

The court deemed the State's proof of Weaver's criminal history sufficient without specifying what convictions he had. RP 16. The court imposed an exceptional sentence above the standard range based on the jury's factual findings. CP 37; RP 26, 30. The court also agreed that it would violate double jeopardy to impose sentences on Weaver for both offenses, because they were based on a single incident and involved the same elements. RP 26.

Despite the court's double jeopardy ruling, it included both offenses as convictions on Weaver's judgment and sentence. CP 36-37.

E. ARGUMENT.

1. **The judgment and sentence does not reflect the double jeopardy determination rendered by the sentencing court.**

When two offenses merge because they are the same offense for purposes of double jeopardy, simply imposing a sentence on one offense is an inadequate remedy. State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010); State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009); State v. Womac, 160 Wn.2d 643, 658, 160 P.3d 40 (2007); State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008) ("proper remedy for double jeopardy violations, including the one here, is vacating the offending convictions."); U.S. Const. amends. 5, 14; Wash. Const. art. I, § 9

As the Supreme Court explained in Turner,

> To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction-nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

169 Wn.2d at 464-65.

Here, the sentencing court correctly ruled that Weaver was convicted of two identical offenses based on a single act and it would violate double jeopardy to impose punishment for both offenses. RP 17. The court agreed that one conviction would be dismissed. RP 17.

The prosecutor told the court that under controlling law, it did not need to actually dismiss one offense but should not include it on the judgment and sentence. RP 17. Instead the prosecutor asked the court to sentence Weaver for a single offense. The court asked, "are you sure that that's the right approach?" RP 17. The prosecutor insisted it was his office's policy and "I believe there's case law to support it." RP 18.

Although the prosecutor's statement of the law was contrary to Turner, the court did not heed the prosecutor's advice to exclude mention of the other conviction on the judgment and sentence. The judgment and sentence listed both offenses. CP 36. It stated that Weaver was convicted of both offenses, but imposed sentence only on one of the two offenses. CP 36, 40.

In Turner, the Supreme Court clearly explained that a double jeopardy violation requires the court to vacate one of the offending

convictions. It does not permit the court to list the conviction as if it remained a valid conviction on the judgment and sentence.

The judgment and sentence improperly lists two convictions even though the court intended to vacate and dismiss one offense based on the double jeopardy violation. CP 36, 37. The judgment and sentence should be amended so that only a single punishment is imposed based on one conviction.

2. **The court imposed an exceptional sentence that was not authorized by statute or jury verdict**

a. The court lacked statutory authority to impose a sentence that exceeded the standard range.

The court's sentencing authority is derived solely from statute. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). A court does not have inherent authority to impose an exceptional sentence. Pillatos, 159 Wn.2d at 469 ("no such inherent authority exists" for court to create own sentencing procedures). It would "usurp the power of the legislature" for the court to create a procedure to impose an exceptional sentence that is not authorized by statute. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005); overruled in part on other grounds,

Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

Washington's scheme for imposing exceptional sentences, set forth in former RCW 9.94A.535 (2002), was invalidated by Blakely v. Washington, 542 U.S. 296, 308, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In response, the Legislature revised the procedure by which a court may impose an exceptional sentence. This revision occurred after Weaver's trial occurred.

Effective April 15, 2005, the court was required to present aggravating factors to a jury. Pillatos, 159 Wn.2d at 465 (citing Laws of 2005, ch. 68). "Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537." RCW 9.94A.535.

Weaver was sentenced under the indeterminate sentencing scheme of former RCW 9.94A.712 (2002),[2] which permitted a court to impose a minimum term greater than the standard range. State v. Clark, 156 Wn.2d 880, 891, 134 P.3d 188 (2006). Because Weaver's sentence rested on an exceptional minimum term without extending the maximum permissible sentence, this sentence does not violate the Sixth Amendment if it was based on judicial fact-

finding. Id. But "there are statutory constraints" that prohibit a judge from imposing a minimum sentence above the standard range. State v. Hopkins, 137 Wn.App. 441, 459 n.4, 154 P.3d 250 (2007).

At the time the incident occurred underlying Weaver's conviction, former RCW 9.94A.712(3) (2002) authorized a court to impose a statutory minimum sentence outside of the standard range "pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence." The State sought an exceptional minimum sentence against Weaver under RCW 9.94A.535. CP 8. At the time of the original sentencing, the State acknowledged that Blakely had cast doubt on the validity of Washington's exceptional sentence scheme, but claimed the court had authority to impose an exceptional sentence anyway. CP 10-11. At Weaver's re-sentencing, the prosecution claimed that the court did not err in empaneling a jury and creating its own procedures for imposing an exceptional sentence. CP 49 n.2.

Weaver's trial occurred in February 2005, at a time when there was no statutory authority to seek and rely on a jury verdict authorizing a sentence above the standard range. A similar scenario occurred in State v. Doney, 165 Wn.2d 400, 198 P.3d 483

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[2] Recodified as RCW 9.94A.507. See Laws 2008, ch. 231, § 56 (effective

(2008). In Doney, the defendant pled guilty in March 2005, and the court empaneled a jury to decide aggravating factors and imposed an exceptional sentence. Even though the later-enacted exceptional sentencing scheme would allow for a jury trial on the aggravating factors, the Supreme Court held that the sentence must be vacated because the court lacked authority to retain a jury at the time the plea and sentencing proceedings occurred.

At Weaver's February 2005 trial, the court submitted an aggravating factor to the jury as authority for imposing a minimum sentence that would be greater than the standard range. CP 92; CP 165. The court crafted its own procedure to seek such a verdict at the State's request. CP 92. The prosecution "agreed" that a jury finding was necessary for the court to impose an exceptional minimum sentence. Id. No authorizing statute allowed the court to submit aggravating factors to a jury at the time of Weaver's sentence.

The jury returned its verdict on February 23, 2005, finding Weaver guilty of the charged offenses and answering "yes" to the special verdict form authorizing additional punishment. The court imposed an exceptional minimum sentence on April 18, 2005, and

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Aug. 1, 2009).

reimposed the same exceptional minimum sentence on July 8, 2011. CP 20, 23, 40; RP 30, 38.

The court relied on the jury's factual findings to impose this sentence. RP 24. The prosecution acknowledged that the law had changed, but claimed that the courts have now decided that the procedure employed by the court was correct. CP 49-50 n.2. Contrary to the prosecutor's depiction of the case law, courts have agreed that a trial court lacks "inherent authority" to create its own sentencing procedures. Pillatos, 159 Wn.2d at 469. Courts have also agreed that under RCW 9.94A.537, the remedy for a sentence that was entered without authority of law is to conduct a new sentencing proceeding. See Doney, 165 Wn.2d at 403-04. Here, the court based its sentence upon the jury's findings but it lacked statutory authority to empanel a jury on these aggravating factors. RP 26. Thus, the court's sentence was not authorized by law and cannot stand.

b. The aggravating factor of the age of the complainant could not be a valid basis for an exceptional sentence under count one, because age was an essential element of the offense.

An exceptional sentence may not be imposed based on "the very facts which constituted the elements of the offense proven at

trial." State v. Ferguson, 142 Wn.2d 631, 648, 15 P.3d 1271 (2001). Facts that fall within the definition of an element of the crime cannot support a sentence above the standard range. State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

In count one, Weaver was charged with second degree rape of a child, for which an essential element was "that R.T. was at least twelve years old but was less than fourteen years old at the time" of the incident. CP 177 (Instruction 7). One of the aggravating factors relied on by the judge was that R.T. was "a child at the time of the commission of the crime in either count one or count two." CP 165 (special verdict form).

Because the complainant's age was an element of this offense, it cannot also serve as a basis for an exceptional sentence. Stubbs, 170 Wn.2d at 126-28; Ferguson, 142 Wn.2d at 648. Furthermore, as a child between 12 and 14 years old, it cannot be said that R.T.'s age was so significantly different than the typical case of second degree rape of a child that an exceptional sentence could be warranted. See Stubbs, 170 Wn.2d at 126 (severity of injuries cannot be basis for exceptional sentence in assault case unless far exceed what statute contemplates). This

aggravating factor cannot justify an exceptional sentence for count one. CP 5.

c. The jury's verdict does not rest on a unanimous finding that the aggravating factor applies to the count on which Weaver was sentenced.

The State bears the burden of proving each factual element of an offense beyond a reasonable doubt to a unanimous jury, including aggravating factors that authorize additional punishment. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) ("As for aggravating factors, jurors *must be unanimous* to find that the State has proved the existence of the aggravating factor beyond a reasonable doubt." (emphasis in original)). The inviolate right to trial by jury requires a jury to reach a unanimous verdict based on accurate instructions. See State v. Williams-Walker, 167 Wn.2d 889, 225 P.2d 913, 918 (2010); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 21, 22.

When separate charges may rest on the same act, the jury must be instructed to consider each charge separately. State v. Borsheim, 140 Wn.App. 357, 365, 165 P.3d 417 (2007). The jury's verdict must rest on unanimous agreement of the acts necessary for each conviction. State v. Vander Houwen, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) ("In the absence of a unanimity jury instruction,

each juror could have convicted Vander Houwen based on different criminal acts"); see also State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) ("In 'multiple acts' cases, the jury must unanimously agree as to which incident constituted the crime charged.").

Here, Weaver was charged with two offenses but the jury received a special verdict form that applied to "either count one or count two." CP 183 (Instruction 13). Instruction 13 stated:

> You will also be furnished with a special verdict form. If you find the defendant not guilty of both counts one and two, do not use the special verdict form. If you find the defendant guilty of **either count one or count two**, you will then use the special verdict form and fill in the blanks with the answer "yes" or "no" according to the decisions you reach. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

(emphasis added).

The special verdict form asked the jury to decide two questions, and repeated the direction from Instruction 13 that the

answers could apply to "**either count one or count two**." CP 165 (emphasis added).[3]

Based on these instructions, the jury was not required to have the same count in mind when answering the two questions necessary for the aggravating factor. Instead, the jury was directed to consider "either count one or count two."

By instructing the jurors that their answers to the questions could be based on either count, the court did not ensure the jury verdict rested on unanimous agreement that the aggravating factor applied to a particular count. Consequently, there was no affirmative finding that the aggravating factor was proven unanimously for a certain count as required. See Goldberg, 149 Wn.2d at 893.

d. The aggravating factors are flawed based on the wrong unanimity instruction.

In addition to offering no assurance that the jurors were unanimous about which count applied to which factual question presented in the special verdict form, the court's instructions did not

[3] The special verdict form asked: (1) "Was R.T. a child at the time of the commission of the crime in either count one or count two?" and (2) "Did the defendant impregnate R.T. as a result of the commission of the crime in either count one or count two?" CP 165.

accurately explain the process for reaching a verdict that was not unanimous.

When the jury is asked to make an additional finding to support an aggravated sentence, the jury need not be unanimous to vote "no," and find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010); Goldberg, 149 Wn.2d at 894. In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form, addressing an additional aggravating factor, must be unanimous for either a "yes" or "no" answer. Bashaw, 169 Wn.2d at 145; Goldberg, 149 Wn.2d at 894. This Court held that such an instruction is incorrect, and unanimity is required only when the jury answers "yes." Id.

In Bashaw, the jury instruction on the special verdict stated:

> Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

169 Wn.2d at 148. Relying upon Goldberg, the court ruled:

> [T]he jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for that determination. That was error.

Id. at 147 (italics in original, internal citation omitted).

The flawed unanimity instruction here was identical to that utilized in Bashaw and was equally erroneous. Instruction 12 told the jury that "each of you must agree to return a verdict." CP 182. Instruction 13 similarly told the jury that it must be unanimous to answer "yes." CP 183. It further implied that the same unanimity was required to answer "no," and the court did not correct that misimpression by telling the jury that the requirement that "each of you must agree to return a verdict," did not apply to the special verdict form.

Jury instructions must be read as a whole. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The adequacy of jury instructions is a question of law that is reviewed de novo. Id. at 626-27.

The unanimity requirement does not apply in order for a special verdict to be answered in the negative, both as a matter of settled law and because of policy considerations. Bashaw, 169 Wn.2d at 147. Further, an error in the special verdict instruction requires vacation of the verdict so obtained and resentencing without regard to the special verdict. See Id. at 146-47 ("Where . . .

a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality"). Under article I, sections 21 and 22, the special verdict form authorizes the precise punishment imposed by the court and the court may not construe a special verdict to be based on anything other than what was expressly instructed. Williams-Walker, 167 Wn.2d at 899.

Here, the jury was affirmatively instructed that unanimity was required to answer "yes" to the special verdict. The jury was not told that in order to answer "no," they did not need to be unanimous. Further, the instructions read as a whole told the jury that (a) unanimity was required for acquittal; and (b) because this was a criminal case, unanimity was required to return a verdict. The error, therefore, is factually indistinguishable from the error that occurred in Bashaw.

Also as in Bashaw, it is impossible for this Court to speculate that the jury's answer to the special verdict would have been the same if the error had not occurred. The "flawed deliberative process" prevents this Court from being able to "say with any consequence" what would have occurred if the jury had been

properly instructed. 169 Wn.2d at 146-47. The flawed unanimity instruction provides an additional basis to invalidate the exceptional minimum term imposed by the court.

e. The court improperly calculated Weaver's offender score by relying on computer printouts of alleged prior convictions.

When calculating an offender score, prior class C felonies wash out "if, since the last date of release from confinement ... or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction." Former RCW 9.94A.525(2)(b). Second degree burglary is a class B felony. RCW 9A.56.030(2). Before a court can include a Class B felony in a person's offender score, the court must determine the person has not spent ten crime-free years from the date of release from confinement to the date of the next offense. RCW 9.94A.525(2).

Due process requires the State bear the burden of proving an individual's criminal history and offender score by reliable evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). Absent an explicit acknowledgement of criminal history, the prosecution must prove prior convictions facts or information establishing that history by a preponderance of evidence. State v.

Mendoza, 165 Wn.2d 913, 929, 205 P.3d 113 (2009). The court must specify what prior convictions it finds have been proven. Id.; RCW 9.94A.500. Proof of criminal history may not rest upon mere allegation to satisfy the fundamental requirements of due process under the Fourteenth Amendment and Article I, section 3 of the Washington Constitution.

"It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." Mendoza, 165 Wn.2d at 920. The best evidence is a certified copy of the judgment and sentence. Id. When the prosecution does not provide a certified copy of the judgment and sentence, it bears the burden of showing that the best evidence is unavailable. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

For example, the prosecution may supply testimony from a court administrator explaining the court files have been destroyed and only a docket sheet remains. State v. Blunt, 118 Wn.App. 1, 5, 71 P.3d 657 (2003). The prosecution offers inadequate proof when it fails to explain why it has not offered a certified judgment and sentence. State v. Rivers, 130 Wn.App. 689, 705, 128 P.3d 608 (2005). The prosecution's statement of criminal history does not

suffice, because it is merely an accusation and not evidence of an established fact. Mendoza, 165 Wn.2d at 920.

The prosecution offered computer printouts of docket worksheets from municipal courts in an effort to prove Weaver's prior burglary convictions had not "washed out." Exs. 6-9. Unlike Blunt, the prosecution did not present any testimony explaining that these records were the best evidence available. Instead, the prosecutor merely asserted his understanding that Seattle Municipal Court "and apparently Ferndale Municipal Court, they only keep their judgment and sentences for a very short period of time." RP 10.

In Chandler, the prosecutor submitted docket sheets showing prior convictions for a felony DUI. State v. Chandler, 158 Wn.App. 1, 240 P.3d 159 (2010). The court found it was "troubling" that the prosecutor did not offer evidence that these docket printouts were the best evidence available. Id. at 7.

Even though the Chandler Court was troubled by the limited evidence, it ruled that there was sufficient basis to infer the prosecution had diligently worked to obtain any available records and accepted these docket printouts to prove the prior convictions. Here, the prosecutor cited Chandler as authority showing docket

printouts were all he needed to provide. However, Chandler does not excuse the prosecution from failing to diligently provide proof of contested prior convictions.

In order to count as a prior conviction that interrupts the wash out period, the State needed to prove that the convictions were for a crime, not a traffic infraction. The court made no finding of what crime Weaver was convicted. Instead the court cursorily said, "I do accept the Seattle Municipal Court dockets as the admissible proof of the conviction" belonging to Weaver. RP 16.

The court did not explain that it found Weaver was convicted of a particular crime, as opposed to a traffic infraction, in the municipal court dockets. RP 16. The computer worksheets do not clearly explain what crime or infraction Weaver was convicted of committing. They use abbreviations that have ambiguous meaning. Exs. 6-9. No witness testified about what the information means or how it is entered. The court made no specific findings about what the docket printouts showed. RP 16. The prosecution's failure to offer evidence explaining the reliability of the docket sheets as well as the court's failure to expressly find that Weaver had prior criminal convictions between 1985 and 2002 that prevented his burglary convictions from the early 1980s from washing out

undermines the sentence imposed. The State did not meet its burden of proof by its assertions coupled with documents of unsupported reliability. The prosecution's failure to meet its burden of proof requires resentencing without reliance on the unproven criminal history allegations. Mendoza, 165 Wn.2d at 930.

F. CONCLUSION.

For the reasons stated above, Mr. Weaver respectfully asks this Court to remand his case for resentencing and direct the court to strike one of the offenses that violates double jeopardy, recalculate Weaver's criminal history based on the State's failure to prove the burglary convictions have not washed out, and strike the exceptional sentence because it rests on findings obtained without authority of law.

DATED this 22nd day of February 2012.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. OLIVER WEAVER, Appellant.	)))))))))	NO. 67558-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] OLIVER WEAVER 268865 AIRWAY HEIGHTS CC PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF FEBRUARY, 2012.

X_____

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