NO. 44744-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

GEOFFREY ROBERT LAWSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00713-4

BRIEF OF RESPONDENT

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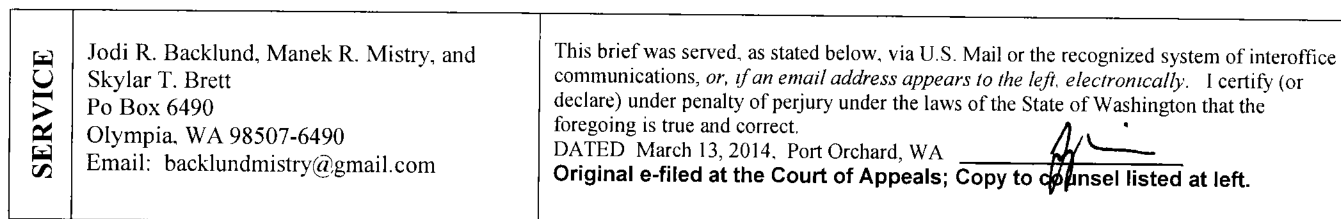

SERVICE	Jodi R. Backlund, Manek R. Mistry, and Skylar T. Brett Po Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 13, 2014, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Lawson's claim that he received insufficient notice of the charged offenses is without merit because the charging document included attached statements of probable cause that provided the factual basis of the charged crimes?

2. Whether the trial court properly denied Lawson's request for a bill of particulars when the charging document and discovery fully described all the evidence the State intended to use at trial?

3. Whether Lawson's claim of insufficient evidence must fail when the evidence, viewed in a light most favorable to the State, would lead a rational jury to find all the elements of the charged offenses beyond a reasonable doubt?

4. Whether Lawson's claim that the evidence on the burglary count included multiple acts and the jury should have been given a unanimity instruction is without merit because the evidence showed a continuing course of conduct and therefore no instruction was required?

5. Whether Lawson's claim that the evidence was not sufficient to prove each alternative means is without merit because the jury was provided with sufficient evidence on each and every alternative means?

6. Whether the trial court abused its discretion by admitting ER 404(b) evidence of three prior incidents when it found that the misconduct occurred, the purpose was to show a common scheme or plan, motive and/or lack of accident or mistake, that the evidence was relevant to prove an element of the crime, and when it carefully determined that the probative value outweighed the prejudicial effect?

7. Whether the court properly determined Lawson's offender score and standard range based on certified copies of his prior convictions?

8. Whether the trial court properly assessed legal financial obligations when, (1) the court's actions were consistent with Washington case law, and (2) Lawson failed to object below and thus failed to preserve the issue for appeal?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Geoffrey Robert Lawson was charged by second amended information filed in Kitsap County Superior Court with the following charges: (1) Burglary in the Second Degree, with a special allegation of sexual motivation and an aggravating circumstance of rapid recidivism; (2) Attempted Voyeurism; (3) Burglary in the Second Degree, with a special allegation of sexual motivation, aggravating circumstances of rapid

recidivism, victim present during burglary, and invasion of privacy; (4) Voyeurism (5) Burglary in the First Degree with a special allegation of sexual motivation, aggravating circumstances of rapid recidivism, victim present during burglary, and invasion of privacy; (6) Assault in the Second Degree; and, (7) Attempted Voyeurism. CP 2-7. After jury trial, Lawson was found guilty as charged, including the special allegations and aggravating circumstances, except for Assault in the Second Degree (Count VI). CP 10-21. The Defendant received a standard range sentence. CP 10-21. This appeal followed.

B. FACTS

The Defendant was charged based on three separate incidents: (1) May 17, 2012 at Harrison Medical Center; (2) June 2, 2012 at Barnes and Nobel; and June 19, 2012 at Harrison Medical Center. CP 1-9. The Defendant was caught in the women's restroom in each of these incidents; public restrooms with clearly marked signs on the door, explicitly stating they were exclusively for women. RP (1/16/13-1/17/13) 273, 297.

On May 17, 2012, Ronald Burrows, an environmental service technician for Harrison Medical Center, went into the public women's restroom to clean it. RP (1/17/13) 335. When he started to open the door to the handicapped stall, Lawson came out and startled him. RP (1/17/13) 335. Mr. Burrows then followed him out and tried to catch him, but the

Defendant "just took off." RP (1/17/13) 335.

Leon Smith, who is the security manager for Harrison Medical Center, reviewed the video from the hospital security cameras and identified the Defendant as the individual who was found in the women's restroom by Mr. Burrows. RP (1/17/13) 289-290. Lawson was also seen on video entering the hospital through the loading dock. RP (1/17/13) 290-291. Mr. Smith took a screen shot of the Defendant's face and distributed the picture to his security staff as well as hospital personnel. RP (1/17/13) 290. During an approximately 4 hour period, the Defendant is seen on video going in and out of the women's restroom, staying in the restroom for hours, while countless women enter and exit. RP (1/22/13) 426.

On June 2, 2012, Amy Starkey went into the women's restroom at the Barnes and Nobel store in Silverdale. RP (1/17/13) 272. She used the toilet in the second stall and then washed her hands. RP (1/17/13) 272. At this point, she saw a man looking over the first stall, into the main bathroom area. RP (1/17/13) 272. Ms. Starkey made eye contact with the Defendant before he ducked behind the stall door. RP (1/17/13) 272. She also saw him through the slats in the stall. RP (1/17/13) 272. There are three stalls in this bathroom and the stall she used shared a dividing wall with the stall the Defendant was in. RP (1/17/13) 273.

The assistant store manager, Elizabeth Kennedy King, made a copy of the video from their store security cameras and provided it to law enforcement. RP (1/17/13) 278. The video shows the Defendant sneaking around the restroom entrance[1] then eventually entering and exiting the women's restroom. RP (1/17/13) 258-259.

On June 19, 2013, Lawson returned to the same handicapped stall in the same women's restroom at Harrison Medical Center. RP (1/17/13) 367. Jennifer Kappes, a female security guard, was using the handicapped stall when someone tried to force their way in. RP (1/17/13) 368. She looked under the stall and saw that the person was wearing a large pair of brown, men's dress shoes. RP (1/17/13) 368. After finishing up, she then went to inform her supervisor. RP (1/17/13) 368.

Mr. Nace, the supervising security guard on duty, viewed the Defendant on the video camera system in the women's restroom and left his security room to make contact with him. RP (1/17/13) 346. Mr.Nace confronted the Defendant and attempted to escort him to the security office when Lawson then attempted to escape.[2] RP (1/17/13) 347. Lawson

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[1] "It showed a male gentleman walk up to the "T" section area, kind of look around, check over his shoulders a couple times, look, look, walk up. He used the water fountain, took another quick look over his shoulders, and immediately headed left over into the female latrine."

[2] Mr.Nace stated, "I confronted him. I asked him to come with me. I took him by his left arm, I believe. As we walked towards the lobby, another officer walked up and took his right hand. As we rounded the corner, he decided to try to not be held or he tried to get away, so we held him."

began shoving, pulling, and trying to free his arms, at one point kicking Mr. Nace in the knee, which sent him to in pain to the ground. RP (1/17/13) 347. It took several security guards to restrain the Defendant until law enforcement arrived and during this time they discovered a pair of size-12 black, women's high heel shoes on the Defendant. RP (1/22/13) 439.

Prior to trial, the State filed an original Information, a First Amended Information, and a Second Amended Information. CP 1-9; CP (TBD) (Information and First Amended Information).[3] Attached to the Information was a "Supplemental Certificate of Probable Cause" and a "Statement of Probable Cause", which provided the factual basis for the crimes charged for the incidents arising out of Harrison Medical Center. CP (TBD) (Information). The First Amended Information added charges stemming from the Barnes and Nobel incident. CP (TBD) (Information). Attached to the First Amended Information was an "Incident/Investigation Report" by Deputy Breed that provided the factual basis for the charges stemming from the June 2, 2012 incident. CP (TBD) (First Amended Information).

The Defendant filed a motion requesting a bill of particulars on December 28, 2012. CP 319-325. On January 4, 2013, the court held a

[3] See the State's Supplemental Designation of Clerk's papers, filed simultaneously with

hearing and ultimately denied the Defendant's motion because full discovery had been issued and the defendant was provided all the facts concerning which evidence the State intended to use at trial. RP (1/4/13) 84-86.

During trial, the State's theory for the burglaries was clearly based on the Defendant entering or remaining unlawfully in the women's restrooms, not the hospital building or the Barnes and Nobel store. RP (1/24/13) 557. The State also argued that by entering through the loading dock of the hospital on May 17, 2013, this showed the Defendant's intent to commit voyeurism in the women's restroom. RP (1/24/13) 560.

Additionally, the State presented evidence of three prior incidents at trial for the limited purposes of showing a common scheme or plan, motive, and/or lack of accident or mistake. RP (1/16/13) 162-252. Prior to trial the court reviewed briefs from both parties, conducted a hearing, and memorialized its ruling in a Findings of Fact and Conclusions of Law, allowing the State to present this evidence for these limited purposes. CP 30-197; RP (10/8/12) 26-32; CP 464-473.

After the jury's verdict, the State filed certified copies of two prior judgment and sentences to prove the Defendant's convictions from a February 27, 2012 Voyeurism conviction in Kitsap County Superior Court

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this brief.

and a November 13, 2009 Voyeurism conviction in King County Superior Court. CP 746-756; CP 758-767. The court used these to calculate the Defendant's offender score and sentenced him to a standard range sentence of 176 months. RP (3/15/13) 11. The court also imposed legal financial obligations, which were not opposed at the time of sentencing and the entry of the judgment and sentence. CP 16; RP (3/15/13) 1-53.

III. ARGUMENT

A. LAWSON'S CLAIM THAT HE RECEIVED INSUFFICIENT NOTICE OF THE CHARGED OFFENSES IS WITHOUT MERRIT BECAUSE THE CHARGING DOCUMENTS INCLUDED ATTACHED STATEMENTS OF PROBABLE CAUSE THAT PROVIDED THE FACTUAL BASIS OF THE CHARGED OFFENSES.

Lawson argues that he was not provided notice due to an insufficient charging document. This claim is without merit because appellant ignores the fact that the State filed an Information and a First Amended Information that had attached statements of probable cause, which outlined the specific conduct that constituted the charged crimes.

Washington has adopted the federal standard of review of liberal construction in favor of the validity of charging documents where challenges to the sufficiency of a charging document are initially raised after verdict. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). It is a two prong test: (1) do the necessary facts appear in any form, or by

fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? *Id.* at 105-106.

A charging document is constitutionally sufficient if it defines the crime sufficiently to apprise an accused person with reasonable certainty of the nature of the accusation. *State v. Grant*, 89 Wn.2d 678, 686, 575 P.2d 210 (1978) (*citing State v. Royse*, 66 Wn.2d 552, 403 P.2d 838 (1965)). The "essential elements" rule requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged. *State v. Leach*, 113 Wn2d 679, 689, 782 P.2d 552 (1989). If the necessary elements are neither found nor fairly implied in a charging document, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn.App 347, 131 P.3d 343 (2006).

The original Information included a "Supplemental Certificate for Determination of Probable Cause" by Deputy Prosecuting Attorney Kellie L. Pendras as well as a "Statement of Probable Cause" by Bremerton Police Detective Kenny D. Davis. CP (TBD) (Information). The attached probable cause certificates included specific facts from the June 19, 2012 and May 17, 2012 incidents at the Harrison Hospital in Bremerton. The First Amended Information included a supplemental certificate of

probable cause titled "Incident/Investigation Report" signed under penalty of perjury by Kitsap County Sheriff's Deputy Fred Breed. CP (TBD) (First Amended Information). This report provided the specific facts from the June 2, 2012 incident at the Barnes and Noble store in Silverdale. CP (TBD) (First Amended Information). The Second Amended Information, ultimately the final charging document which the state preceded to trial on, was nearly identical to the First Amended Information, however, it corrected the date for Count I to May 17, 2012 – the first incident at Harrison Hospital. CP 1-9. The Second Amended Information did not have any attached documents. CP 1-9.

Appellant alleges that the charging document for the charges of Burglary, Burglary in the First Degree, and Voyeurism was factually deficient. The statement filed with the original Information states, "On 5-17-12, Geoffrey Lawson was witnessed by housekeeper Ronald Burrows in the women's bathroom at Harrison Hospital." CP (TBD) (Information). Furthermore, it states, "Lawson had been discovered in the women's restroom hiding in the handicapped stall...The subject was discovered hiding in the stall by one of the hospital housekeepers. The security video was checked and the black male was observed to have entered the women's restroom and according to the time stamp, he was in the women's restroom for over two hours before he was discovered." CP

(TBD) (Information). The supplemental certificate filed by the Deputy Prosecuting Attorney states, "In the prior incident where the Defendant was discovered in the women's restroom (May 17, 2012), the security footage shows that he was in there for over two hours before being discovered." CP (TBD) (Information).

The statement of probable cause from the original Information goes on to detail the second incident at Harrison Hospital on June 19, 2012 in which the defendant was found again in the restroom and eventually apprehended by staff. The statement provides that Officer Davis spoke with Jennifer Kappes who advised that she was in the handicapped stall in the women's restroom while someone tried to push the stall door open and then fled the bathroom. CP (TBD) (Information). Kappes noted the subject was wearing dark pants and a large size brown men's shoes. CP (TBD) (Information). Charles Nace stated that he was advised that the black male who was seen in the women's restroom the week before was at the hospital again that morning. CP (TBD) (Information). Nace checked the security monitors and observed the black male subject exiting the women's restroom in the lobby; he then alerted other officers and responded to the area. CP (TBD) (Information). Nace then contacted Lawson and identified himself as hospital security and attempted to escort him to the security office. CP (TBD) (Information). Lawson then became

combative and was trying to break away. CP (TBD) (Information). Lawson continued to struggle as they fell to the ground and Nace believed he was kicked in the knee. CP (TBD) (Information). Nace was in a great deal of pain from the knee injury and was taken to the emergency room for treatment. Kappes advised she observed the struggle between Lawson, Nace, and Muir and identified Lawson by his clothes and shoes as the suspect trying to open the stall in the women's restroom. CP (TBD) (Information). She also stated that they found black women's high heel shoes on Lawson. CP (TBD) (Information).

Finally, in the report attached to the First Amended Information, the narrative outlines the probable cause for the incident at the Barnes and Noble on June 2, 2012. Amy Starkey tells the Deputy that she went into the women's restroom and after she finished she was at the sinks and saw a male subject peering over the stall door, she saw the subject's eyes and the top of his head, and he was in the stall adjacent to the stall she had used. CP (TBD) (First Amended Information). She subsequently located the subject outside the restroom and pointed him out to her husband. CP (TBD) (First Amended Information). A video of the incident was provided to the Deputy and he identifies the defendant going in and out of the women's restroom. CP (TBD) (First Amended Information).

The defendant was arraigned on these informations[4] and thus, was given complete notice of the charges. Further, the charging documents in this case included a complete description of the elements and the charged crimes as well as a description of the specific conduct that constituted the crimes.

B. THE TRIAL COURT PROPERLY DENIED LAWSON'S REQUEST FOR A BILL OF PARTICULARS BECAUSE THE CHARGING DOCUMENT AND DISCOVERY FULLY DESCRIBED ALL THE EVIDENCE THE STATE INTENDED TO USE AT TRIAL.

Lawson next claims that the trial court should have granted the his motion for a bill of particulars. This claim is without merit because the facts were readily accessible to the defendant; he was provided a sufficient charging document which included attached statements of probable case as well as full discovery.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ...." Article 1,§ 22 of the Washington State Constitution, which contains language almost identical to the federal constitution, provides: "[i]n all criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him. ..."

[4] Information RP (7/19/12) 1-3; Second Amended Information RP (12/3/12) 1-3.

The function of a bill of particulars is to "amplify or clarify particular matters considered essential to the defense." *State v. Allen,* 116 Wn.App. 454, 460, 66 P.3d 653 (Div. 3 2003), quoting *State v. Noltie,* 116 Wn.2d 831, 845, 809 P.2d 190 (1991). This constitutional right of a criminal defendant to be appraised with reasonable certainty as to the charges against him is ordinarily satisfied by a charging document which charges a crime in the language of the statute, where the crime is defined with certainty within the statute. *State v. Merrill,* 23 Wn.App. 577, 580, 597 P.2d 446, *review denied,* 92 Wn.2d 1036 (Div. 3 1979); *State v. Grant,* 89 Wn.2d 678, 686, 575 P.2d 210 (1978). In judging the sufficiency of a charging document, though, the law is clear that the prosecuting authority need not allege its supporting evidence, theory of the case or whether or not it can prove its case. *United States v. Buckley,* 689 F.2d 893 (1982), *cert. denied,* 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983); *State v. Bates,* 52 Wn.2d 207, 324 P.2d 810 (1958). In this case, the Defendant was provided a sufficient charging document which included attached statements of probable case signed under penalty of perjury, as discussed previously in section A. CP (TBD) (Information and First Amended Information).

A bill of particulars is not necessary when the means of obtaining the facts are readily accessible to the defense or the facts are already

known to him or her. *See United States v. Kaplan,* 470 F.2d 100 (7th Cir. 1972), *cert. denied,* 410 U.S. 966, 35 L.Ed.2d 701, 93 S.Ct. 1443 (1973). In *State v. Paschall,* 197 Wn. 582, 85 P.2d 1046 (1939), the court held that it was not prejudicial error to deny a motion for a bill of particulars when the state's attorney had disclosed to the defendant's attorney practically all of the facts concerning which evidence the government intended to use at trial.

In this case, the court conducted a hearing on the Defendant's request for a bill of particulars. RP (1/4/13) 84-86. The state made clear that the defense had received full discovery at that point and there was no dispute from the Defendant that this had occurred. RP (1/4/13) 84-86. The court then posed additional questions of the state to further clarify facts that the State was relying on for each count. RP (1/4/13) 85-86. The court inquired as to which buildings the State was alleging the Defendant committed the burglaries and the State responded that in Count 1 it was Harrison Hospital, Count 3 it was Barnes and Noble, and Count 5 it was a second incident at Harrison Hospital on a different date. RP (1/4/13) 85-86. The court then asked whether the state had any evidence that the Defendant was trespassed from those buildings at the time of the incidents and the State responded that they did not. RP (1/4/13) 86. The court found that the discovery issued as well as the supplemental information provided

at the hearing was sufficient and the Defendant's motion was denied.

Thus, the charging documents were not vague due to the attached statements of probable cause and further, the Defendant was provided all the facts concerning which evidence the State intended to use at trial.

C. LAWSON'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL WHEN THE EVIDENCE, VIEWED IN A LIGHT MOST FAVORABLE TO THE STATE, WOULD LEAD A RATIONAL JURY TO FIND THE ELEMENTS OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT.

Lawson next claims that there was insufficient evidence for the burglary counts and Count IV Voyeurism conviction. This claim is without merit, because taking the evidence in the light most favorable to the State, there was an overwhelming amount of direct and circumstantial evidence to prove these counts beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence supporting a criminal conviction, the question is whether, viewing the evidence in the light most favorable to the State, "any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). To determine whether the State has produced sufficient evidence to prove each element of the offense, the court must begin by interpreting the underlying criminal

statute. Statutory interpretation is a question of law, which is reviewed *de novo*. *Id.*

1. There is sufficient evidence to support the conviction for Count IV Voyeurism.

A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he knowingly views another person without that person's knowledge and consent while the person being viewed in a place where he or she would have a reasonable expectation of privacy. RCW 9A.44.115(2)(a).

RCW 9A.44.115(1)(c) states that a "place where he or she would have a reasonable expectation of privacy" is either a "place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance." RCW 9A.44.115(1)(c)(i),(ii). Further, "view" is defined as, "the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity." RCW 9A.44.115(1)(e).

There was more than sufficient evidence to support a voyeurism conviction for the incident on June 2, 2012 at the Barnes and Noble store in Silverdale. Amy Starkey testified that she went into the women's restroom, into the second stall, used the restroom and then washed her hands. RP (1/17/13) 272. She stated that she felt like she still needed to use the restroom, so she turned to go back in and saw a man looking over the first stall, into the main bathroom area. RP (1/17/13) 272. Ms. Starkey went on to describe how she and the Defendant made eye contact and then he ducked behind the stall door. RP (1/17/13) 272. She also saw him through the slats in the stall. RP (1/17/13) 272. Ms. Starkey testified that there are three stalls in this bathroom. RP (1/17/13) 273. Although Ms. Starkey did not see him look at her while she was actually using the toilet, she also testified that she would not have seen him if he was looking at her because she did not "make a habit out of looking around to see if a man is in the restroom looking at you" while she uses the toilet. RP (1/17/13) 275. Her testimony makes it clear that he had the capability and was in a position to view her, based on his positioning when she saw him peering over the stall as she washed her hands.

Looking at both the testimony of Ms. Starkey and the circumstantial evidence it is clear that the Defendant viewed Ms. Starkey in a place (the women's restroom) where she had a reasonable expectation

of privacy. Ms. Starkey used a toilet in the second stall, pulling down her pants and underwear to do so, which is place where she clearly has an expectation of privacy. Additionally, this expectation is not limited to just the toilet area but by entering a women's restroom Ms. Starkey was in a place where she expected to be safe from casual or hostile intrusion or surveillance. Being viewed by a man in a women's restroom is an intrusion that women reasonably feel safe from when they enter.

Additionally, the Defendant viewed her when he peered over the stall and they made eye-contact. Based on his positioning, peering over the wall of the first stall, it is also reasonable to conclude that the Defendant was able to view Ms. Starkey in the second stall while she was using the toilet. Ms. Starkey had a reasonable expectation of privacy from being viewed by the Defendant both when she entered the restroom and when she entered the stall to use the toilet.

Furthermore, ER 404(b) evidence was admitted to specifically show his motive and/or his common scheme or plan. Three prior incidents were admitted to show Lawson's motive or intent when he entered this women's restroom. Ronda Allen-Baron testified that she was using the women's restroom at the Tabernacle Church in Seattle when she saw a small mirror under her stall and when she spotted it, and then the person slowly pulled it back into the adjacent stall. RP (1/16/13) 163. She said

she then went to confront the individual in the handicapped stall and could see the Defendant with his pants down touching himself. RP (1/16/13) 165. Similarly, Paige Harkness testified that when she was in the women's restroom at the Norm Dick's building in Bremerton she looked behind her as she was using the toilet and could see the Defendant's face looking at her. RP (1/16/13) 227-228.

With the three incidents that make up this case and the three prior incidents, it is obvious that the Defendant also has a common scheme or plan; he enters women's restrooms in public places, commonly uses a handicapped stall, and then views women in the adjacent stall. He also was found or seen with women's high heeled shoes in three incidents, which he used to disguise the fact that he was a man, allowing him to remain in the women's restrooms for hours. RP (1/16/13) 231; RP (1/16/13) 179; RP (1/22/13) 439.

The ER 404(b) evidence shows that Lawson has a common scheme or plan when he goes into women's restrooms and his motive is to view women. Thus, with the direct and circumstantial evidence from the incident in this case, coupled with the evidence of prior misconduct, there is more than sufficient evidence to convict the Defendant of voyeurism in Count IV.

2. Voyeurism is a crime "against persons or property" and therefore there was sufficient evidence to prove the burglary convictions.

For the crimes of burglary, the State proved that the Defendant had the "intent to commit a crime against persons", specifically the crime of voyeurism, based on the plain and ordinary definition of the phrase.

Appellant mistakenly relies on RCW 9.94A.411 for the definition of the phrase "a crime against a person" for purposes of the burglary statute and inaccurately posits that *State v. Devitt*, 152 Wn. App. 907, 218 P.3d 647 (2009) is authority for such a conclusion. While RCW 9.94A.411 does provide a list of "crimes against persons", the purpose of the statute is to outline prosecution standards, not as a definition for the term required to prove burglary.

In fact, the term "a crime against a person" is not specifically defined by the criminal code, and absent a statutory definition, a term is generally accorded its plain and ordinary meaning unless a contrary legislative intent appears. *State v. Snedden*, 112 Wn.App 122, 47 P.3d 184 (2002); *Cowiche Canyon Conservancy*, 118 Wn.2d at 813, 828 P.2d 549 (1992). If an unambiguous term is undefined in a statute it should be given its plain meaning derived from the statutory language. *State v. Riles*, 135 Wn.2d 326, 340, 957 P.2d 655 (1998). A plain and ordinary definition of the phrase "a crime against a person" encompasses an offense involving

unlawful injury or threat of injury to the person or physical autonomy of another. *State v. Barnett*, 139 Wn.2d 462, 469, 987 P.2d 626 (1999).

Voyeurism is more akin to the crime of indecent exposure analyzed in *State v. Snedden*, 112 Wn.App 122, 47 P.3d 184 (2002) than the crime of obstructing analyzed in *Devitt*. The crime of voyeurism specifically requires that the defendant "knowingly views *another person* without that *person's* knowledge and consent while the *person* is viewed in a place where *he or she* would have a reasonable expectation of privacy." RCW 9A.44.115(2)(a)(emphasis added). In this case, the video of the incidents at Harrison Medical Center show numerous women going in and out of the women's restroom while the Defendant is in the same restroom. In the Barnes and Noble incident, Amy Starkey is clearly the victim and she even filed a victim impact statement describing the impact the incident had on her. CP 649.

Voyeurism explicitly requires "another person" in order for it to be committed and thus, it clearly constitutes a crime against a person based on the plain and ordinary definition of the term.

3. There is sufficient evidence to prove Count v. Burglary in the First Degree because the defendant assaulted the security officer while in immediate flight therefrom the women's restroom.

RCW 9A.52.020 states: A person is guilty of burglary in the first

degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime…assaults any person. In this case, the Appellant alleges that there is insufficient evidence to show that the Defendant assaulted any person "in immediate flight therefrom", however, it is clear that the Defendant assaulted Mr. Nace in an attempt to escape the hospital after he was caught in the women's restroom.

Mr. Nace testified that on June 19, 2012 he viewed the Defendant on the video camera system in the women's restroom and left his security room to make contact with him. RP (1/17/13) 346. Mr.Nace stated, "I confronted him. I asked him to come with me. I took him by his left arm, I believe. As we walked towards the lobby, another officer walked up and took his right hand. As we rounded the corner, he decided to try to not be held or he tried to get away, so we held him." RP (1/17/13) 347. The Prosecutor asked specifically about him trying to get away: "So when you say he started to try to get away, what was he doing?" RP (1/17/13) 347. Mr. Nace responded: "Shoving, pulling, trying to free his arms. I think at one point he either kneed me in the knee or kicked me in the knee, that's when I went down on the ground." RP (1/17/13) 347.

It is clear that the Defendant knew he was going to be apprehended for going into the women's restroom and when hospital security attempted to detain him he "tried to get away" by "shoving, pulling, trying to free his arms", which explicitly shows he was in immediate flight therefrom the entering or remaining unlawfully in the women's restroom when his intent was to commit voyeurism. Therefore, there was sufficient evidence to prove Burglary in the First Degree.

Therefore, looking at the evidence in a light most favorable to the State, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt for each crime in which the defendant was convicted.

D. LAWSON'S CLAIM THAT THE EVIDENCE ON THE BURGLARY COUNT INCLUDED MULTIPLE ACTS AND THE SHOULD HAVE BEEN GIVEN A UNANIMITY INSTRUCTION IS WITHOUT MERIT BECAUSE THE EVIDENCE SHOWED A CONTINUING COURSE OF CONDUCT AND THEREFORE NO INSTRUCTION WAS REQUIRED.

Lawson next contends that the evidence shows two different acts that would each support a conviction for Count I, Burglary in the Second Degree – (1) entering through the hospital loading dock area and (2) entering and remaining in the women's restroom. However, this reasoning is flawed because the trier of fact could not conceivably find that he had

the "intent to commit a crime" without entering the women's restroom, therefore, entering the building is the same course of conduct as entering the restroom and no instruction was required.

A trial court's failure to provide a unanimity instruction is one of constitutional magnitude and can be considered on appeal despite a defendant's failure to raise it below. *State v. Moultrie*, 143 Wn.App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). The proper standard of review for constitutional error is "harmless beyond a reasonable doubt". *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705.

To convict on a criminal charge, the jury must be unanimous that the defendant committed the criminal act. If the State presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). By requiring a unanimous verdict on one criminal act, it protects a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt. *State v. Camarillo*, 115 Wn.2d 60, 63–64, 794 P.2d 850 (1990).

No unanimity instruction or election is required, however, when multiple acts are part of a continuing course of conduct. *State v. Love,* 80 Wn.App. 357, 360–61, 908 P.2d 395, *review denied*, 129 Wn.2d 1016, 917 P.2d 575 (1996*)*. To determine whether criminal conduct constitutes a continuing course of conduct, the facts must be evaluated in a commonsense manner and the court should consider whether the acts occurred at different times and places. *Love*, at 361; *State v. Fiallo–Lopez*, 78 Wn.App. 717, 899 P.2d 1294 (1995). Evidence that a defendant engaged in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts. *Fiallo–Lopez*, at 724.

In this case, the Defendant entered through the loading dock, which was implicitly not open to public. RP (1/17/13) 290-291. But it is nonsensical to conclude that he could have had the intent to commit a crime in the hallways of hospital. His intent was to commit a voyeurism, which can only be done in a place where there is a reasonable expectation of privacy, and the only evidence of Lawson being in a place of privacy is the women's restroom. It is impossible to conclude that he committed a burglary by simply entering through the loading dock and wandering around the public areas of the hospital. Similar to *Fiallo–Lopez,* Lawson engaged in a series of actions (entering through the loading dock and then

entering the women's restroom) intended to secure the same objective (to commit the crime of voyeurism).[5]

Furthermore, it was never in dispute that the Defendant entered the women's restroom or the hospital through the loading dock on that date. There was clear video evidence and the Defendant never denied entering through the loading dock or denied entering the women's restroom. The issue for Count I was whether he had the requisite intent to commit a crime.

A commonsense view of the evidence brings this case within the continuing course of conduct exception. Thus, the trial court properly refused to require either an election or a unanimity instruction.

E. LAWSON'S CLAIM THAT THE EVIDENCE WAS NOT SUFFICIENT TO PROVE EACH ALTERNATIVE MEANS IS WITHOUT MERIT BECAUSE THE JURY WAS PROVIDED WITH SUFFICIENT EVIDENCE ON EACH AND EVERY ALTERNATIVE MEANS.

In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *accord State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *State v. Franco*, 96 Wn.2d 816, 639 P.2d 1320 (1982);

[5] To find the Burglary in Count V, the jury was presented with essentially identical facts

State v. Simon, 64 Wn.App. 948, 831 P.2d 139 (1991).

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. Evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could conclude the essential elements beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because it is inferred that the jury rested its decision on a unanimous finding as to the means. *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *State v. Franco*, 96 Wn.2d 816, 639 P.2d 1320 (1982); *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976).

1. There was sufficient evidence to prove that the defendant unlawfully remained in the buildings.

While burglary is an alternative means crime, there was proof that the Defendant entered unlawfully and remained unlawfully in a building, so the court's instruction on both alternative means was proper.

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as Count I aside from how the Defendant entered the hospital.

The facts of *State v. Allen*, 90 Wn.App. 957, 955 P.2d 403 (1998) are akin to the facts in this case. The defendant in that case entered a public school and then proceeded to enter a classroom with the intent to commit a crime. The Court of Appeals held that there was sufficient evidence to uphold a conviction of Burglary in the Second Degree because even though defendant may have had implied permission as a member of public to enter public school, where defendant extended scope of any implied permission by entering classroom, it is unlawful to enter a place not generally open to public without prior arrangement. *Id.; see also State v. Davis*, 954 P.2d 325 (1998).

Similarly, the State did not allege that the defendant did not have a right as a member of the general public to enter Harrison Medical Center or Barnes and Noble. The allegation was that he exceeded this implied permission by entering the women's restroom, which is not a place generally open to the public. Several witness testified that there is a sign on these restrooms explicitly stating that they are for women; Amy Starkey for the incident on June 2, 2012 and Leon Smith for the incidents on May 17, 2012 and June 19, 2012. RP (1/16/13-1/17/13) 273, 297.

Appellant relies on a lack of evidence to show the Defendant "entered" unlawfully, however, *Allen* specifically found that although someone has implicit permission to enter a building open to the general

public, it is not lawful to exceed the scope of that permission by *entering* a classroom that is not open to the general public. Appellant provides no authority showing that his analysis is correct, that the Defendant's entry in the bathroom can only be evidence of unlawfully remaining.

Therefore, there was sufficient evidence that the defendant both entered the women's restroom when he went through the door that explicitly said 'women' on the front and there was also sufficient evidence that he unlawfully remained by staying in the restroom for up to several hours.

2. There was sufficient evidence to prove that the defendant viewed the victim's "intimate areas".

While voyeurism is an alternate means offense, in this case there was sufficient evidence, when viewed in the light most favorable to the state, that a rational trier of fact could find that the Defendant both (a) viewed another person who is in place where she would have a reasonable expectation of privacy, and (b) viewing the intimate areas of another person beyond a reasonable doubt. RCW 9A.44.115(2).

Appellant alleges that there was no evidence that the jurors could conclude that the Defendant viewed Ms. Starkey's "intimate areas". Amy Starkey testified that she went into the women's restroom, into the second stall, used the restroom and then washed her hands. RP (1/17/13) 272. She

stated that she felt like she still needed to use the restroom, so she turned to go back in and saw a man looking over the first stall, into the main bathroom area. RP (1/17/13) 272. Ms. Starkey went on to describe how she and the defendant made eye contact and then he ducked behind the stall door. RP (1/17/13) 272. She also saw him through the slats in the stall. RP (1/17/13) 272. Ms Starkey testified that there are three stalls in this bathroom. RP (1/17/13) 273.

Looking at both the testimony of Ms. Starkey and the circumstantial evidence[6] viewed in the light most favorable to the state, it is clear that a rational trier of fact could find that Defendant viewed Ms. Starkey's "intimate areas". Ms. Starkey used the toilet in the stall directly next to the one in which the defendant was in. To do so, she would have to remove her pants, thus exposing her intimate areas. Because the Defendant was seen peering over the stall, based on the circumstantial evidence it is reasonable to conclude that he had the ability to view her while she was using the toilet. Additionally, there was ER 404(b) evidence presented to show a common scheme or plan, motive, and/or a lack of accident or mistake. CP 464-473. This evidence coupled with the direct and circumstantial evidence presented is more than sufficient for the jurors to

[6] WPIC 5.01: The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other. CP 510.

conclude that the defendant viewed Ms. Starkey's intimate areas.

Thus, submitting both alternative means to the jury did not violate the defendant's constitutional right to a unanimous verdict.

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING ER 404(B) EVIDENCE OF THREE PRIOR INCIDENTS WHEN IT FOUND THAT THE MISCONDUCT OCCUREED, THE PURPOSE WAS TO SHOW A COMMON SCHEME OR PLAN, MOTIVE AND/OR LACK OF ACCIDENT OR MISTAKE, THAT THE EVIDENCE WAS RELEVANT TO PROVE AN ELEMENT OF THE CRIME, AND WHEN IT CAREFULLY DETERMINED THAT THE PROBATIVE VALUE OUTWEIGHED THE PREJUDICIAL EFFECT.

Lawson next claims that the trial court improperly admitted propensity evidence in this case. This claim is without merit because the court properly followed the four-part test, concluding that the evidence was admissible for three independent purposes.

The court reviews the correct interpretation of an evidentiary rule *de novo* as a question of law. *See State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See State v. Lough*, 125 Wn.2d at 856, 889 P.2d 487 (1995). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86

(2009). Evidentiary errors under ER 404 are not of constitutional magnitude. Therefore, the court must determine within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred. *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982).

1. The Court properly interpreted ER 404(b) under the four-part test in *Lough*.

ER 404(b) provides, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The above list is not exclusive. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *State v. Grant*, 83 Wn.App. 98, 105, 920 P.2d 609 (1996). ER 404(b) does not merely provide for the possible admission of prior "crimes," but also by its clear language deals with the admissibility of other non-criminal "acts" as well.

To admit evidence under ER 404(b), a trial court must follow a four-part test: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the proffered evidence is introduced; (3) determine that the evidence is relevant to prove an element of the crime; and (4) find that its probative value outweighs its

prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

In this case, the court went through the proper four part test for each of the seven prior acts the State sought to admit during a hearing on the admissibility, which was also memorialized in findings of facts and conclusions of law that was signed off by all parties. RP (10/8/12) 26-32; CP 464-473. In fact, the court found that three prior incidents were not admissible, distinguishing these from the four that were found to be admissible based on the four part test, demonstrating that the court meticulously considered each of the incidents and made a detailed finding that the four admissible incidents occurred by a preponderance, met an exception under ER 404(b), that the evidence was relevant, and that the probative value outweighed the prejudicial nature of the evidence. Thus, the trial court properly interpreted the rule in this case and the question is whether the court abused its discretion.

2. The Court properly admitted the prior misconduct under ER 404(b) for three specific purposes.

The second prong of the test is the court must identify a purpose for which the evidence is admissible, other than to show propensity. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). While appellant does not make it clear in their brief, presumably their first exception to the

trial court's decision to admit ER 404(b) evidence is based on the court improperly admitting it for the purpose of showing a lack of accident or mistake, and even if the evidence was admissible for this purpose then the trial court should have conditioned this admissibility. However, the prior incidents were admitted under three exceptions, not just to show a lack of accident or mistake.

In this case, the State sought to admit seven prior incidents of misconduct for the limited purpose of showing a common scheme or plan, motive, and/or a lack of accident or mistake. RP (10/18/12) 26-32; CP 464-473. The Washington Supreme Court noted in *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995), a leading case in this area, that evidence of prior misconduct to show a common scheme or plan may be admissible in certain cases and upheld the trial court's decision:

> The existence of a design or plan may not be proved just by similarity of result, but may be proved circumstantially by evidence that the defendant had performed acts having "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."

Lough *at 856, quoting* People v. Ewoldt*, 7 Cal.4th 380, 402, 867 P.2d 757 (1994).* Additionally, prior acts of misconduct are admissible to rebut a claim of accident or to rebut any material assertion by a party is a well-established exception to ER 404(b). *See State v. Gogolin*, 45 Wn.App.

640, 727 P.2d 683 (1986); 5 Karl B. Tegland, Washington Prac. Evidence § 114, at 391, § 117, at 411 (3rd Ed.1989). Similarly, courts have routinely held that evidence is admissible to show motive; for example, in *State v. Matthews*, 75 Wn. App. 703, 812 P.2d 119 (1991) evidence of the defendant's financial condition was relevant to show a motive for robbery.

The Defendant did assert that the witnesses had mistaken the purpose for him being in the women's restroom. Proving that the Defendant's purpose or intent in entering the women's restroom was for the purpose of sexual gratification, or in the case of burglaries to commit a crime, is a material issue in this case. The Defendant continually claimed that he was not in these restrooms for that purpose and that his intent was not to commit a crime or sexual gratification. For instance, he asks Ms. Starkey:

> Q. Thank you. While you were -- did you notice anything out of the ordinary, while you were using the restroom?
> A. No.
> Q. Had you seen anything -- seen me looking at you, at any point in time, while you were in the restroom, other than what you've already testified to?
> A. No.

RP (1/16/13-1/17/13) 275. Similarly, he asks Mr. Burrows:

> Q. So did you observe me doing anything else, other than scared you, when I came out of the restroom?
> A. Did I observe you? No. I didn't know you were in there, until you came out.

RP (1/16/13-1/17/13) 337.

The defense in this case essentially relied on the assertion that his intent was not to go in to the women's restroom for this purpose and it was properly admitted to show a lack of accident or mistake.

If the only purpose the prior misconduct was admissible was to rebut a claim of accident or mistake then the court could have followed the procedure cited in *State v. Fisher*, 165 Wn.2d 745, 202 P.3d 937 (2009), however, the evidence was also admissible to show motive and a common scheme or plan. RP (10/18/12) 26-32; CP 464-473. Appellant does not assert that the trial court erred in admitting the evidence for these reasons, and based on the court's findings, it is clear that the court properly admitted the evidence for these purposes as well. Therefore, even if the court improperly admitted the evidence under the exception to show a lack of accident or mistake, it did admit the evidence for two other valid reasons and so the error would be harmless and have had no effect on the outcome of the trial.

3. The Court properly weighed the danger of prejudice versus the probative value on the record and in the findings of fact and conclusions of law.

Once it is determined that the evidence is admissible for one of these purposes, the court must determine whether the danger of undue prejudice from its admission outweighs the probative value of the evidence. ER 404(b). In *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76

(1984), the court emphasized the importance of making a record of this determination so that there can be an effective appellant review and because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue.

In this case, the court admitted four prior incidents, although the State only used evidence of three incidents at trial. After going through each of the seven incidents, the court concluded by enunciating the balancing of the probative value verses the prejudicial effect:

> I've stated why the evidence is relevant, and I do believe that with the omission of those acts that I've omitted that -- that the probative value outweighs its prejudicial effect, although any evidence against you obviously is prejudicial. I don't believe that it is the type of evidence which is unfair to the defendant's case, at least with respect to those items that I've ruled admissible.

RP (10/8/12) 32.

Additionally, the trial court went through each incident independently, with very specified reasons for their inclusion or exclusion. For example, "I'm worried about this matter being the subject of a trial within a trial to the prejudice of Mr. Lawson" RP (10/8/12) 31, "it does have a tendency to show it's more probative than prejudicial in having a tendency to show" RP (10/8/12) 30, and "In view of those factors, I think the evidence is more probative than prejudicial on the issues of his intent, the absence of a mistake, and the issue of sexual motivation" RP (10/8/12) 29. Furthermore, the court's analysis and conclusions are memorialized in

the Findings of Facts and Conclusions of Law. CP 464-475.

Clearly, the trial court specifically weighed the prejudice against the probative vale for each prior act of misconduct that was admitted at trial.

4. Even if the evidence was improperly admitted, the error would be harmless.

Evidentiary errors are prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). Even assuming *arguendo* that the court did abuse it's discretion in admitting the ER 404(b) evidence, there is not a reasonable probability that the outcome at trial would have been different.

Of the six counts the defendant was convicted of, the State presented lengthy videos of each of the three incidents, clearly showing the Defendant stalking the restrooms, intentionally entering the women's restroom, and numerous eye witnesses that caught him in the women's restroom in each of the three incidents.

In this case, the evidence is overwhelming and even if the admission of the ER 404(b) evidence was improper, the error was harmless.

G. THE TRIAL COURT PROPERLY DETERMINED LAWSON'S OFFENDER SCORE AND STANDARD RANGE BASED ON CERIFIED COPIES OF HIS PRIOR CONVICTIONS.

Lawson next claims that the State failed to meet its burden of establishing the Defendant's criminal history for purposes of determining the offender score. This claim is without merit because the State filed certified copies of the Defendant's judgment and sentences of his prior convictions that factored into his offender score.

The trial court must conduct a sentencing hearing before imposing a sentence on a convicted defendant. RCW 9.94A.500(1). A defendant's offender score affects the sentencing range and is generally calculated by adding together the defendant's current offenses and the prior convictions. RCW 9.94A.589(1)(a). In determining the proper offender score, the court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). The purpose of this limitation is "to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information." *State v. Herzog*, 112 Wn.2d 419, 431–32, 771 P.2d 739 (1989); Wash. Const. art. I, § 3

The State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999). While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." *Ford*, 137 Wn.2d at 480, 973 P.2d 452. "The best evidence of a prior conviction is a certified copy of the judgment." *Id.* at 480, 973 P.2d 452.

The Defendant only had two prior convictions that affected the calculation of his offender score: the February 27, 2012 Voyeurism conviction in Kitsap Superior Court and the November 13, 2009 Voyeurism conviction in King County Superior Court. CP 720-741. As part of the State's sentencing memorandum and proposed judgment and sentence, filed on March 11, 2012, attached as Exhibit 1, is a certified copy of the judgment and sentence from King County Superior Court Voyeurism conviction. CP 746-756. Additionally, Exhibit 2 is the judgment and sentence from the Kitsap County Voyeurism conviction. CP 758-767.

The State provided the "best evidence" of the prior convictions which were factored into the calculation of the Defendant's offender score and thus, the Defendant's criminal history was clearly established.

H. THE TRIAL COURT PROPERLY ASSESSED LEGAL FINANCIAL OBLIGATIONS WHEN, (1) THE COURT'S ACTIONS WERE CONSISTENT WITH WASHINGTON CASE LAW, AND (2) LAWSON FAILED TO OBJECT BELOW AND THUS FAILED TO PRESERVE THE ISSUE FOR APPEAL.

Lawson claims the trial court should not have imposed legal financial obligations (LFO) in this case. This claim is without merit because there is no authority to support the appellant's claim that the court must inquire into his present or future ability to pay at the time; additionally, the issue of LFOs is not ripe; and finally, the Defendant is precluded raise the issue of LFOs for the first time on appeal.

As the Appellant correctly acknowledges, Washington courts have previously rejected the arguments he raises in the present case – that the court must inquire into the Defendant's present or future ability to pay at the time of sentencing. *See* App.'s Br. at 41, *citing e.g., State v. Blank*, 131 Wn.2d. 230, 239, 930 P.2d 1213 (1997). Washington courts have held that it is not constitutionally necessary for the trial court to inquire into the defendant's ability to pay, his or her financial resources, and whether there is no likelihood that the defendant's indigency will end prior to including repayment obligation in the judgment and sentence. *State v. Blank*, 131 Wn.2d. 230, 239, 930 P.2d 1213 (1997). The Appellant thus essentially is asking this court to ignore numerous Washington cases on

this issue. This Court should decline the issue.

Additionally, challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. *Compare State v. Ziegenfuss*, 118 Wn.App. 110, 112, 74 P.3d 1205 (2003) ("Because [the defendant] has not yet failed to pay her legal financial obligations ... her argument is not yet ripe for review."), *review denied*, 151 Wn.2d 1016, 88 P.3d 965 (2004), and *Baldwin*, 63 Wn.App. at 310, 818 P.2d 1116 ("[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation."), with *Bertrand*, 165 Wn.App. at 404–05, 267 P.3d 511 (reviewing the merits of the trial court's sentencing conditions because a disabled defendant was ordered to commence payment of legal financial obligations within 60 days of entry of judgment and sentence while still incarcerated). There is nothing in the record reflecting the State's attempts in this case and thus, any challenge to the order requiring payment of legal financial obligations in this case is not yet ripe for review.

Furthermore, the Defendant did not object to the imposition of the legal financial obligations below. *See* RP (3/15/13) 49-52. This Court has recently held that a reviewing court need not address (or allow a defendant

to raise) a claim regarding his ability to pay his legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn.App. 906, 301 P.3d 492 (2013), citing RAP 2.5.

Despite the Defendant's inability to contest these issues, in regards to the requirement for the Defendant to pay court-appointed attorney's fees, the Defendant did in fact have counsel representing him for a significant period of time. The Defendant was represented from the date of the initial charging in June of 2012 until November 14, 2012 when he elected to go *pro se*. RP (11/14/12) 46. His court-appointed attorney filed a motion to dismiss, a response to the State's ER 404(b) motion and a motion for severance. CP 198-206, 187-197, 226-229. He was also appointed with a court-appointed investigator from the date he went *pro se* until sentencing. Therefore, the court-appointed attorney fees were properly imposed.

Finally, in regards to the discretionary fees imposed, the Appellant incorrectly states that the court imposed a domestic violence and crime lab fee. The judgment and sentence does not impose those fees. CP 16.

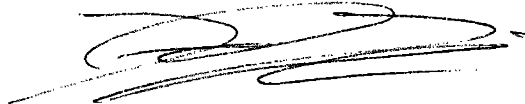
Therefore, the court should decline the issue of addressing legal financial obligations imposed because the Defendant did not object at the time, the issue is not ripe, and the case does not support the Appellant's claim.

IV. CONCLUSION

For the foregoing reasons, Lawson's conviction and sentence should be affirmed.

DATED March 13, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



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March 13, 2014 - 2:48 PM

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