71628-0 71628-0

No. 71628-0-I

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

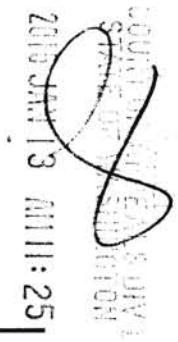
STATE OF WASHINGTON,

Respondent,

v.

DARYL LAMAR BERRY,

Appellant.



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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Mr. Berry did not waive his right to challenge the error that occurred when the trial court added a point to his offender score based on the State's unproven assertion that he was on community custody at the time of the current alleged offenses because he never "affirmatively acknowledged" that he was on community custody

The State effectively concedes that it did not meet its burden to prove that Mr. Berry was on community custody at the time of the current offenses. But the State argues Mr. Berry waived his right to raise this challenge because he "affirmatively acknowledged" that he was on community custody by merely asserting that his offender score was a five. SRB at 17. The State misunderstands what constitutes an "affirmative acknowledgement" for the purposes of waiving the right to challenge an offender score calculation.

Because the State bears the burden to prove the facts underlying the sentence, "[i]t is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." State v. Mendoza, 165 Wn.2d 913, 926, 205 P.3d 113 (2009) (citing State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). The SRA expressly places this burden on the State because it is "inconsistent with the principles underlying our system of

justice to sentence a person on the basis of crimes that the State either could not or chose not to prove." Ford, 137 Wn.2d at 480 (citation omitted).

When the State fails to meet its burden of proof at sentencing, the defendant may challenge the offender score for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

A defendant waives his right to challenge the State's failure to meet its burden of proof at sentencing only if he "affirmatively acknowledges" the necessary facts, thereby obviating the need for the State to produce evidence. Mendoza, 165 Wn.2d at 920; RCW 9.94A.530(2). The mere failure to object to the prosecutor's factual assertions does not constitute such an acknowledgement. Mendoza, 165 Wn.2d at 928. Instead, the Washington Supreme Court has "emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing." Id.

A defendant must affirmatively acknowledge the specific, relevant, underlying facts and not merely agree with the State's offender score calculation in order to waive his right to challenge the offender score on appeal. A defendant is not "deemed to have

affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation." Id.

In State v. Lucero, 168 Wn.2d 785, 787, 230 P.3d 165 (2010), at sentencing, the defendant recited a standard sentencing range that was apparently based on the inclusion of a California burglary conviction in the offender score. The Supreme Court held he did not thereby "affirmatively acknowledge" that his California conviction was comparable to a Washington felony. Id. at 789. At most, he *implicitly* acknowledged that his offender score included the California burglary conviction. Id. But "[t]hat is not the 'affirmative acknowledgement' of comparability that Mendoza requires." Id. Instead, the defendant must *explicitly agree* to the asserted facts in order to waive his right to challenge them on appeal. Id.

This case is indistinguishable from Lucero. Here, defense counsel asserted Mr. Berry's offender score was a five but she never affirmatively acknowledged that he was on community custody at the time of the current offenses. CP 76-80. Thus, she did not "affirmatively acknowledge" the facts that the State was required to prove to support the community custody point. At most, she *implicitly*

acknowledged that his offender score included the community custody point. Lucero, 168 Wn.2d at 789. But "[t]hat is not the 'affirmative acknowledgement' . . . that Mendoza requires." Id. Because counsel did not *explicitly agree* that Mr. Berry was on community custody, he did not waive his right to appeal the offender score on that basis. Id.

The State relies on State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000), but that case is distinguishable. The question in Nitsch was whether the defendant waived his right to challenge the trial court's failure to find that multiple current offenses involved the same criminal conduct for purposes of the offender score. Id. at 517-18. Application of the same criminal conduct inquiry in regard to multiple current offenses "involves both factual determinations and the exercise of discretion." Id. at 523. A defendant's "failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion" waives the right to challenge the offender score on this basis. Nitsch, 100 Wn. App. at 520-21.

The principles at issue in Nitsch are not at issue here. Under the SRA, multiple current offenses are *presumed* to be separate conduct to be counted separately in the offender score unless the court determines they encompass the same criminal conduct. State v. Graciano, 176

Wn.2d 531, 539, 295 P.3d 219 (2013); RCW 9.94A.589(1)(a).[1] The burden is on *the defendant* to establish that multiple current offenses encompass the same criminal conduct because "a 'same criminal conduct' finding favors the defendant by lowering the offender score below the *presumed* score." Graciano, 176 Wn.2d at 539. Thus, the State's burden to prove criminal history at sentencing does not include establishing that *current* offenses constitute separate conduct. Id. at 539. The defendant is the moving party and bears the burden to come forward with sufficient facts to warrant the exercise of discretion in his favor. Id. Logically, then, the defendant's failure to raise the issue at sentencing amounts to a waiver of the right to challenge the same criminal conduct determination on appeal.

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[1] RCW 9.94A.589(1)(a) provides:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. . . .

But these same principles do not apply when discussing sentencing facts that *the State* is required to prove. As stated, *the State* bears the burden to prove that the defendant was on community custody if it seeks to add a point to the offender score on that basis. See Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 480-83. If the State fails to meet its burden, and the defendant does not explicitly acknowledge that he was actually on community custody, the defendant may raise the issue for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

Because Mr. Berry did not explicitly acknowledge that he was on community custody, he did not waive his right to appeal the trial court's decision to add a point to the offender score on that basis.

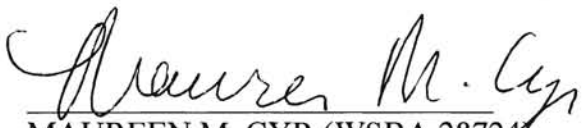
B. CONCLUSION

The State appropriately concedes that, under the Washington Supreme Court's recent opinion in State v. Gunderson, __ Wn.2d __, 337 P.3d 1090 (2014), the trial court's decision to allow the jury to hear Ms. Stump's inflammatory allegations that Mr. Berry had assaulted her numerous times in the past was erroneous. For the reasons provided in the opening brief, and given the conflicting testimony at trial, this error was not harmless. The convictions must be reversed.

The State also appropriately concedes that the trial court erred in adding a point to the offender score based on the prior misdemeanor conviction for "harassment dv." Mr. Berry must be resentenced.

Finally, for the reasons given above and in the opening brief, the trial court erred in adding a point to the offender score based on the unproven allegation that Mr. Berry was on community custody at the time of the current offenses. Mr. Berry did not "affirmatively acknowledge" that he was on community custody and thus he did not waive his right to raise this challenge.

Respectfully submitted this 9th day of January, 2015.



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	)	NO. 71628-0-I
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	)	
DARYL BERRY,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **REPLY 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] STEPHANIE GUTHRIE, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF JANUARY, 2015.

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