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NO. 71810-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARVIN G. KRONA,

Appellant.

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

On July 13, 2013, James Grout observed a gray Oldsmobile run into his fence and continue up the easement without stopping. Grout recognized the vehicle as being associated with the Krona family living at the end of the easement. Grout did not get a clear view, but observed that the driver was a male with black hair. Grout's next door neighbor, Rose Marquiss, observed a gray car driving up the easement towards the Krona residence with Marvin

Krona, defendant, slumped over in the driver's seat. After contacting the Adam Krona, Grout called 911 and reported the incident. RP (3/3/14) 54-65, 67-68, 75-79, 83-97; RP (3/4/14) 14-15.

Sheriff's Deputies Navarro, Johnson, and Koziol were dispatched to the location. Deputy Navarro was in field training with Master Patrol Deputy Johnson. Deputy Koziol was the backing officer at the scene. Deputy Navarro ran defendant's name through the Sheriff's computer system and saw there was an officer safety caution for threats to kill law enforcement and prior resisting arrest. As the deputies approached they observed a gray Oldsmobile in the field just north of the Krona residence. The driver's door was open and they could hear the door chime and the radio playing. The key was on, but the engine was not running. Defendant was slumped over behind the steering wheel in the driver's seat looking down. There were three full beer cans on the passenger seat and two empty beer cans on the floor board. RP (3/3/14) 110-115, 120-121, 136-137, 139; RP (3/4/14) 26-30, 33-34, 38-42, 60.

Defendant was placed under arrest. He appeared highly intoxicated. He had difficulty standing and had to be helped by the deputies. His speech was extremely slurred and the deputies could

smell a strong odor of intoxicants. Defendant was initially compliant, but when the deputies attempted to place defendant in the patrol car he became uncooperative. RP (3/3/14) 115-117, 122-123, 137, 139; RP (3/4/14) 30-31, 35, 41-43.

Defendant started screaming when he was in the patrol car. While being transported for medical clearance prior to booking in the jail, defendant began directing insults and threats at Deputies Navarro and Johnson. At one point defendant threatened to kill Deputy Johnson's family. On the way to the hospital defendant was transferred to an aid car and hospital security was notified. In the aid car defendant began directing insults and threats at the aid personnel. When he arrived at the hospital defendant was placed in a bed with four-point restraints. Defendant went in and out of consciousness and attempted to urinate on the hospital floor. Defendant directed insults and threats at the medical personnel. Defendant's insulting and threating statements continued for several hours. At one point, defendant looked directly at Deputy Navarro and said he would "find and kill your Indian ass." RP (3/3/14) 123-126, 132-133, 139-140; RP (3/4/14) 30-31, 35, 41-47.

Defendant was charged with driving while under the influence (DUI) and harassment. CP 135-136. The State brought a

motion in limine to permit testimony regarding Deputy Navarro's knowledge of the officer safety caution in the system for defendant's prior threats to kill officers and resisting arrest. The court granted the motion, finding that Deputy Navarro's state of mind was a material element. RP (3/3/14) 11-13. The court gave a limiting instruction when Deputy Navarro testified. RP (3/3/14) 80-82, 112-113.

A charge of 1st degree driving while license revoked (DWLR) was added for trial. CP 99-100. The jury found defendant guilty on all three charges. CP 56-59; RP (3/5/14) 4-7. Defendant was sentenced to the following: count 1, DUI, 60 months; count 2, harassment, 29 months; count 3, DWLR, 364 days. All counts to be served concurrently. CP 22-23, 25; RP (4/3/14) 12-14.

III. ARGUMENT

A. SUFFICIENCY OF THE EVIDENCE.

Defendant argues there was insufficient evidence presented at trial to establish (1) that he made a "true threat" to Deputy Navarro; and (2) that a reasonable criminal justice participant in Deputy Navarro's position would reasonably fear his threat. Brief of Appellant 6-13.

1. Legal Standard.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Fiser, 99

Wn. App. 714, 718, 995 P.2d 107 (2000). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

2. The Evidence Was Sufficient To Show That Defendant Made A True Threat.

Defendant argues there was insufficient evidence presented at trial to establish that he made a "true threat" to Deputy Navarro. Brief of Appellant 10-13. It is well established that the First Amendment does not protect "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 477–478, 28 P.3d 720 (2001).

Webster's Third New International Dictionary, defines "threat" as "an expression of an intention to inflict evil, injury, or damage on another." The statutory definition of threat includes stated intent to harm another person. RCW 9A.04.110(28)(a). Washington courts have defined the term "threat" when used in statutes that prohibit threats as prohibiting only "true threats." State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (holding that the bomb threat statute application is limited to true threats); J.M., 144 Wn.2d at 478 (noting that the harassment statute is defined as prohibiting only true threats). "True threats" are statements made in a context or under such circumstances that a reasonable person would interpret the statement as a serious expression of intention to inflict bodily harm. Kilburn, 151 Wn.2d at 43; State v. Smith, 93 Wn. App. 45, 48-49, 966 P.2d 411 (1998); State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998). The Washington Supreme Court has defined "true threat" as:

> [A] statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.

State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. The speaker of a true threat need not actually intend to carry out the threat. Kilburn, 151 Wn.2d at 46. "It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283. In the present case, the trial court instructed the jury:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat, rather than as something said in jest or idle talk.

CP 83 (Jury Instruction 18).

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. Johnston, 156 Wn.2d at 365. However, an appellate court must make an independent examination of the whole record, so as to assure itself that the

judgment does not constitute a forbidden intrusion on the field of free expression. Kilburn, 151 Wn.2d at 50. The appellate court is required to independently review only crucial facts—those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. Kilburn, 151 Wn.2d at 50–51. Thus, whether a statement constitutes a true threat is a matter subject to independent review. Johnston, 156 Wn.2d at 365. The rule of independent appellate review does not extend to factual determinations such as findings on credibility. Johnston, 156 Wn.2d at 365–366.

In the present case, defendant's statement directed at Deputy Navarro, that he would "find and kill your Indian ass," clearly constituted a threat. The threat was made in the contexts of defendant's continuous threats against everyone he came in contact with, and his threat to harm Deputy Johnson's family. Deputy Johnson was concerned about defendant's threats. RP (3/4/14) 44, 47. At the pretrial hearing to determining the admission of defendant's statements to police, the court found that during his contact with Deputy Navarro, defendant demonstrated a capacity to understand and provide meaningful responses when he was asked questions, despite his obviously intoxicated condition. CP 54; RP

(2/7/14) 27-30. In light of these facts, a reasonable person in defendant's position would foresee that the statement would be interpreted as serious expressions of intent to carry out the threat.

Defendant argues that the critical facts show that a reasonable person in his position would not believe that his threats would be taken seriously. Brief of Appellant 11-12. Defendant's reliance on State v. Kilburn, to support this argument is misplaced. The defendant in Kilburn was a middle school student who told fellow student K.J., "I'm going to bring a gun to school tomorrow and shoot everyone and start with you." Kilburn, 151 Wn.2d at 39. K.J. thought Kilburn might be joking because he had never done anything like that before. Id. K.J. testified that "he was acting kind of like he was joking, but I didn't know if he was joking or not." Id. at 53. The Court found that the facts showed that a reasonable person in the defendant's position would not foresee that his comments would be interpreted seriously and reversed the conviction. Id. at 53-54.

Here, there was no indication that defendant was joking. After repeatedly making offensive statements directed at law enforcement, hospital and medical personnel for several hours, defendant communicated directly his intent to cause harm to

Deputy Navarro. In light of the critical facts, a reasonable person in defendant's position would foresee that his statement would be interpreted as serious expressions of intent to inflict harm on Deputy Navarro. The statement directed at Deputy Navarro clearly constituted a true threat. A reasonable juror could infer that the statements were made as a serious expression of intention to carry out the threats and not as idle talk nor made in jest.

3. The Evidence Was Sufficient To Show That A Reasonable Criminal Justice Participant In Deputy Navarro's Position Would Reasonably Fear Defendant's Threat.

Defendant argues his statement did not constitute harassment because it was apparent that he could not carry out his threat and no reasonable criminal justice participant in Deputy Navarro's position would reasonably fear his threat. Brief of Appellant 8-10. As charged, defendant is guilty of harassment by knowingly threatening Deputy Navarro and placing him in reasonable fear of harm. RCW 9A.46.020(1)(a)(i), (b), (2)(b)(iii), (iv). The fear must be fear that a reasonable criminal justice participant would have under all the circumstances. RCW 9A.46.020(2)(b); CP 79 (Jury Instruction 15). Threatening words do not constitute harassment if it is apparent to the criminal justice

participant that the person does not have the ability to carry out the threat. RCW 9A.46.020(2)(b); CP 87 (Jury Instruction 22).

Defendant contends that it was not reasonable for Deputy Navarro to fear his threats because he was so intoxicated that he had to be taken to a hospital for medical clearance before being booked into jail. Brief of Appellant 8-9. This ignores the fact that intoxicated persons can and do harm others. Further, a reasonable trier of fact found that despite his obviously intoxicated condition, defendant demonstrated a capacity to understand and provide meaningful responses. CP 54; RP (2/7/14) 27-30. Evidence of defendant's voluntary intoxication may only be considered in determining defendant's mental state. RCW 9A.16.090; State v. Coates, 107 Wn.2d 882, 889-890, 735 P.2d 64 (1987); State v. Gabryschak, 83 Wn. App. 249, 252-253, 921 P.2d 549 (1996); CP 61; WIPC 18.10. A rational juror could find that a reasonable criminal justice participant would have been placed in reasonable fear from defendant's threat, regardless of his intoxication.

Defendant further argues that it was not reasonable for Deputy Navarro to fear the threat because he was handcuffed and restrained to a hospital bed at the time he made the threat. Brief of Appellant 9. This argument ignores the fact that defendant's threat

to Deputy Navarro was, "I will find and kill your Indian ass." RP (3/3/14) 126, 132. Harassment requires a threat to cause injury at a different time or place than the time and place where defendant makes the threat. City of Seattle v. Allen, 80 Wn. App. 824, 831, 911 P.2d 1354 (1996). No evidence was presented that defendant would not get out of jail at some point. Clearly, it was apparent to a reasonable criminal justice participant in Deputy Navarro's place that defendant would have the ability to carry out his threat at a different time or place.

Here, defendant's treat to find and kill Deputy Navarro was made in the context of Deputy Navarro's knowledge of the officer safety caution in the system for defendant's prior threats to kill officers, defendant's continuous threats directed at law enforcement, hospital and medical personnel, and his threat to harm Deputy Johnson's family. In the context and under the circumstances of the present case, a reasonable juror could find that a reasonable criminal justice participant in Deputy Navarro's place would have reasonably feared defendant's threat.

B. THE EVIDENCE REGARDING DEFENDANT'S PRIOR THREATS TO KILL OFFICERS WAS PROPERLY ADMITTED UNDER THE RULES OF EVIDENCE.

Defendant argues that evidence that he had previously threatened officers and resisted arrest should have been excluded because it was hearsay, unfairly prejudicial and improper propensity evidence. Brief of Appellant 19-29. The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. State v. Atsbeha, 142 Wn.2d 904, 913-914, 16 P.3d 626 (2001); State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

1. Testimony Regarding Defendant's Prior Threats to Officers Was Not Hearsay.

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). Here, the evidence of defendants' prior threats to officers was not offered for the truth of the matter asserted, but to show Deputy Navarro's state of mind. RP (3/3/14) 11-13, 113. Deputy Navarro's state of mind was material to the issue of whether he reasonably feared defendant's threat. The application of a court rule to the facts in a case is a question of law reviewed de novo. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

Defendant's reliance on State v. Edwards, 131 Wn. App. 611, 128 P.3d 632 (2006), is misplaced. In Edwards, over defense counsel's objection, the trial court admitted a detective's testimony regarding a confidential source's statements to the detective that Edwards was dealing crack cocaine. Id., at 614–615. The State argued the statements were not hearsay because they were offered to show their effect on the detective. Id., at 614. The Court of Appeals found that the detective's state of mind was not relevant to whether Edwards was guilty of possession of a controlled substance with intent to deliver and concluded that the source's statements were inadmissible hearsay. Id., at 615–616.

The facts in the present case are substantially different from Edwards. Deputy Navarro testimony regarding the officer safety caution in the system for defendant's prior threats to kill officers was offered to show Deputy Navarro's state of mind. RP (3/3/14) 11-13. The jury was instructed that "testimony about officer safety caution information may be considered by you only as to how it may relate to the deputy's state of mind and for no other purpose." RP (3/3/14) 113. Deputy Navarro's state of mind was relevant to an issue squarely before the jury; whether or not he reasonably feared defendant's threat. The testimony was not hearsay.

2. Testimony Regarding Deputy Navarro's Knowledge Of Defendant's Prior Threats To Officers Was Relevant To Show His State Of Mind.

While Evidence Rule 404(b)[1] prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion, the rule does permit the admission of prior misconduct for other purposes. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Before admitting ER 404(b) evidence, the trial court must determine that the evidence meets two distinct criteria: 1) it is logically relevant to a material issue before the jury, and 2) the probative value of the evidence outweighs its prejudicial effect. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999). A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for abuse of discretion. Foxhoven, 161 Wn.2d at 176; State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. McCreven, 170

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[1] 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.

Wn. App. 444, 457, 284 P.3d 793 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Powell, 126 Wn.2d at 258. Errors on rulings concerning admission of evidence under ER 404(b) are not of constitutional magnitude and do not result in automatic reversal. State v. Mezquia, 129 Wn. App. 118, 131, 118 P.3d 378, review denied, 163 Wn.2d 1046, 187 P.3d 751 (2005). "Instead, if an error is found, the reviewing court must then determine, within reasonable probability, whether the outcome of the trial would have been different but for the error." Id., citing State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The reviewing court will not disturb a trial court's ruling on the admissibility of evidence if it is sustainable on alternative grounds. State v. St. Pierre, 111 Wn.2d 105, 119, 759 P.2d 383 (1988); McCreven, 170 Wn. App. at 457.

Evidence is admissible under ER 404(b) if relevant for some purpose other than to show general character or propensity. State v. Herzog, 73 Wn. App. 34, 50, 867 P.2d 648 (1994). Relevant evidence need only make the existence or nonexistence of a material fact "more or less likely." ER 401; State v. Israel, 113 Wn. App. 243, 267, 54 P.3d 1218 (2002). The trial court is generally the proper court to weigh the relevance of evidence. Foxhoven, 161

Wn.2d at 176. Relevant evidence is generally admissible. ER 402. "It is not an abuse of discretion when the trial court correctly interprets the rules of evidence. Gresham, 173 Wn.2d at 422; Foxhoven, 161 Wn.2d at 174.

Finding that the officer's state of mind was a material element, the trial court permitted testimony regarding Deputy Navarro's knowledge of the officer safety caution in the system for defendant's prior threats to kill officers and resisting arrest. The court informed defendant that it would give a limiting instruction if drafted and proposed. RP (3/3/14) 11-13. If a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury on the purpose and use of ER 404(b) evidence. State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012); State v. Asaeli, 150 Wn. App. 543, 577 n. 35, 208 P.3d 1136 (2009). Defendant requested and the court gave a limiting instruction. RP (3/3/14) 80-82, 112-113. Here, the trial court did not abuse its discretion in admitting the challenged evidence for the purpose determining Deputy Navarro's state of mind.

3. The Probative Value Of The Evidence Outweighed Any Prejudicial Effect.

"Once a court has determined that evidence is relevant, the court must weigh any prejudice the evidence will have against its probative effect. ER 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982); Israel, 113 Wn. App. at 268. The trial court has discretion to balances the probative value of the evidence with its prejudicial effect. Herzog, 73 Wn. App. at 50. "The prejudice ER 404(b) seeks to avoid is not that the evidence tends to prove the defendant is guilty. The unfair prejudice is that the jury is induced to believe the defendant is a bad person and to infer that he is therefore guilty." State v. Trickler, 106 Wn. App. 727, 735, 25 P.3d 445 (2001) (dissent), citing State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). While defendant asserts that the testimony was highly prejudicial, he has not identified any unfair prejudice that outweighed the probative value of this evidence.

Here, the prejudicial nature of the testimony was slight while the probative value was high. The trial court did not abuse its discretion in admitting testimony regarding the officer safety caution in the system for defendant's threats to kill officers to show Deputy Navarro's state of mind. The jury was instructed on the limited use

of this evidence. The probative value of the evidence outweighed any prejudicial effect. A review of the entire record shows convincingly that the outcome of the trial would not have been affected had the challenged evidence been excluded. The trial court did not abuse its discretion in admitting the testimony.

C. DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED.

Defendant argues the admission of evidence of an "Officer Safety Caution" in the system regarding defendant for prior threats to kill officers violated his right to confrontation. Brief of Appellant 13-19. Alleged violations of the confrontation clause are reviewed de novo. State v. Tyler, 138 Wn. App. 120, 126, 155 P.3d 1002 (2007).

The Confrontation Clause only applies to those statements that are offered for the truth of what they assert – i.e., those statements that are also hearsay.

> One thing that is clear from Crawford is that the Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement. Crawford states: "The Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." And the only nontestimonial statements that it considers to be possible subjects of the Clause are "nontestimonial *hearsay*." (to the extent Confrontation Clause covers

> more than testimonial statements, its subject is hearsay.) In other words, the Clause restricts only statements meeting the traditional definition of hearsay.

U.S. v. Faulkner, 439 F.3d 1221, 1226 (10th Cir. 2006), citing Crawford v. Washington, 541 U.S. 36, 60, n. 9, 68, 124 S.Ct. 1354, 1369, 1374, 158 L.Ed.2d 177 (2004).

Washington Courts have squarely interpreted Crawford to exclude non-hearsay from Confrontation Clause claims. "[E]ven testimonial statements may be admitted if offered for purpose other than to prove the truth of the matter asserted." State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005); State v. James, 138 Wn. App. 628, 641, 158 P.3d 102 (2007) (the confrontation clause is not implicated by testimony that is not presented for the truth of the matter asserted).

> The Crawford Court specifically retained the pre-existing rule ... that "the Confrontation Clause ... does not bar the use of testimonial statements for the purposes other than establishing the truth of the matter asserted." There is no doubt that Washington decisions following Crawford recognize that "[w]hen out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no confrontation clause concerns arise."

In re Threders, 130 Wn. App. 422, 495, 123 P.3d 489 (2005) (citations omitted).

Here, evidence of the officer safety caution in the system for defendant's threats to kill officers was properly admitted to show Deputy Navarro's state of mind, not for the truth of the matter. RP (3/3/14) 11-13. The jury was instructed that it could only consider the testimony as it related to the deputy's state of mind and for no other purpose. RP (3/3/14) 113.

D. OFFENDER SCORE.

Defendant argues the trial court miscalculated his offender score at sentencing. Brief of Appellant 29-36. Defendant did not dispute his offender score at sentencing. RP (4/3/14) 3-12. A sentencing court's offender score calculation is reviewed de novo. State v. Wilson, 170 Wn.2d 682, 688, 244 P.3d 950 (2010).

1. Defendant's Offender Score For DUI.

Defendant does not challenge the score of 2 for his prior felony DUI convictions, the score of 5 for his prior non-felony serious traffic offense convictions, or the score of 1 because he was on community custody on July 13, 2013. Rather, he argues the Judgment and Sentence does not distinguish which prior convictions were used in calculating his DUI offender score. Brief of Appellant 31-32. The record clearly demonstrates that defendant's prior felony DUI convictions, his prior non-felony

serious traffic offense convictions, and his community custody status were correctly included in calculating defendant's offender score for felony DIU. CP 137, 138 (Exhibits 1-4); CP ___ (sub# 51, State's Sentencing Memorandum); RP (3/24/14) 5-7; RP (4/3/14) 3.

The SRA Offender Scoring for defendant's felony DUI was attached to the State's Sentencing Memorandum. Under Adult History defendant's two felony DUI convictions and five non-felony serious traffic offense convictions were included in defendant's score. Exhibit 1 is a certified copy of the Judgment and Sentence for defendant's two prior felony convictions for DUI. CP 138. Exhibit 3 includes certified copies of the Court Dockets for defendant's prior non-felony convictions for DUI and Reckless Driving. CP 137. One point was added because defendant was on community custody on the date the current offense was committed. RP (3/24/14) 6-7. The trial court properly included two points for defendant's prior felony DUI convictions, five points for his prior non-felony serious traffic offense convictions, and one point for being on community custody at the time of the current offense. This made defendant's offender score 8.

The State concedes that defendant's felony harassment conviction in the present case should not have been included under

other current offenses. Harassment is not among the statutorily specified convictions for offender score inclusion under RCW 9.94A.525(2)(e). State v. Jacob, 176 Wn. App. 351, 360, 308 P.3d 800 (2013); State v. Morales, 168 Wn. App. 489, 498, 278 P.3d 668 (2012); State v. Redd, 51 Wn. App. 597, 613, 754 P.2d 1041 (1988). However, a change in defendant's offender score by 1 would not change his sentence range for felony DUI because the standard sentence range for felony DUI for scores of both 8 and 9 is 60 to 60 months. CP ___ (sub# 51, State's Sentencing Memorandum). The trial court correctly imposed 60 months. Changing defendant's score would not reduce the length of his confinement. A case is moot when a court cannot provide effective relief. State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004).

2. Defendant's Offender Score For Harassment.

Defendant argues the evidence presented at sentencing shows that his 1985 Taking a Motor Vehicle without Permission (TMV) conviction and 1994 Attempt to Elude a Pursuing Police Vehicle conviction washed-out and should not have been included in calculating his offender score for his harassment conviction. Brief of Appellant 33-36. However, reducing the 29 month confinement on his harassment conviction would not reduce the

length of his confinement. Defendant's term of confinement on his harassment conviction is served concurrently with the 60 month term of confinement on his DUI conviction. CP 25. While a case is moot when a court can no longer provide effective relief, the appellate court may still reach a determination on the merits to provide guidance to lower courts if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur. Ross, 152 Wn.2d at 228.

In the present case, the record is sufficient to support the trial court's inclusion of defendant's 1985 TMV and 1994 Attempt to Elude convictions in calculating his offender score for harassment. Defendant's reliance on State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012), is misplaced. The Hunley Court held that RCW 9.94A.500 violated due process *only* to the extent it was applied to allow a prosecuting authority to establish prima facie evidence of the existence and validity of prior convictions with an *unsupported* criminal history summary. State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012) (emphasis added). Here, the prosecutor provided a sworn certification of defendant's criminal history summary and defendant's prior agreement to the summary of his criminal history.

Legal Specialist Gloria Parker certified that defendant's criminal history was determined by a review of databases maintained by federal and state agencies: NCIC, maintained by the FBI; WWCIC, maintained by the Washington State Patrol Criminal History Section; Judicial Information System; Department of Licensing; and Washington State Department of Corrections. CP ___ (sub# 51, State's Sentencing Memorandum, Appendix A, Prosecutor's Understanding of Defendant's Criminal History). Additionally, the prosecutor provided a copy of defendant's guilty plea in Snohomish County Superior Court case number 08-1-02882-2, entered on January 16, 2009. In his statement on plea of guilty, defendant agreed that the prosecutor's statement of his criminal history was correct. CP 138; Exhibit 2 (Statement of Defendant on Plea of Guilty, page 2, paragraph 6(c); Plea Agreement, page 1, paragraph 5). Defendant did not object to the admission of Exhibit 2 for sentencing. RP (3/24/14) 5-6. Except for the two DUI convictions under case number 08-1-02882-2, a Disorderly Conduct conviction on April 23, 2013, and the Driving While Suspended/Revoked conviction on July 13, 2013, the Prosecutor's Understanding of Defendant's Criminal History attached to the plea agreement is identical to the Prosecutor's

Understanding of Defendant's Criminal History certified by Gloria Parker.[2]

Class C felony convictions do not wash-out until the offender has spent five years in the community without being convicted of any new offenses. RCW 9.94A.525(2)(c). Misdemeanors as well as felony convictions interrupt the five-year wash-out period. In re Higgins, 120 Wn. App. 159, 164, 83 P.3d 1054 (2004). Subsequent to his 1985 TMC conviction defendant had misdemeanor convictions in 1986, 1987, 1988, 1989, 1991, 1992, and 1994. Subsequent to his 1994 Attempt to Elude conviction defendant had misdemeanor convictions in 1996, 1999, 2002, 2003, 2006, 2007, and 2008. On January 16, 2009, defendant was sentenced to 60 months confinement and 9 to 18 months Community Custody, in case number 08-1-02882-2. He started supervision with the Department of Correction when he was released from confinement in February 2013. Since 1985, defendant has not spent five years in the community without being convicted of a new offense. The evidence presented at sentencing was sufficient for the trial court's inclusion of defendant's 1985 TMV and 1994 Attempt to Elude convictions in calculating his offender score for harassment.

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[2] CP 138; Exhibit 2; CP ___ (sub# 51, State's Sentencing Memorandum).

IV. CONCLUSION

For the reasons stated above, defendant's convictions and sentence should be affirmed.

Respectfully submitted on January 20, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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Attorney for Respondent

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January 20, 2015

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

Re: STATE v. MARVIN G. KRONA
COURT OF APPEALS NO. 71810-0-I

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

JOHN J. JUHL, #18951
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

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

THE STATE OF WASHINGTON, Respondent, v. MARVIN G. KRONA, Appellant.	No. 71810-0-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20TH day of January, 2015, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 20th day of January, 2015

DIANE K. KREMENICH
Legal Assistant/Appeals Unit