IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NO.
Court of Appeals NO. 33888-6-III

95380-5

Leopoldo Cuevas Cardenas
Appellant/Plaintiff

Vs.

State of Washington/David M. Sawyer/
Blaine Gibson and Jeffery B. Swan,

Respondents.

PETITION FOR REVIEW OF THE COURT OF APPEALS DIVISION III ARBITRARY AND UNCONSTITUTIONAL OPINION

Leopoldo Cardenas
Appellant/Plaintiff Pro Se
#819072
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

COMES NOW, Leopoldo Cuevas Cardenas, In Propia Persona, and respectfully petitions this Court to vacate the arbitrary and unconstitutional Opinion entered by the Court of Appeals, Division III on December 12, 2017, by Siddoway, J., Korsmo, J. and Lawrence-Berrey, A.C.J.

My appellate attorney was Lisa E. Tabbut, however I've not heard from her for the last 5 to 6 months. I am not sure whether if she is unable to assist me or she just decided not to assist me any more.

A. ARGUMENT

1. The Court Of Appeals Unpublished Opinion Is Arbitrary, Unconstitutional And Contrary To Law, And Not Supported By The Record.

The Court of Appeals states; "The State has reasonably cured or conceded several errors." Opinion at 1. The court, however failed to point out which errors the State has cured, and which errors the State has only conceded to. Moreover, I have not been provided with anything written or otherwise which would prove that anything has been "cured." The fact that I am still in prison is proof enough that nothing has been "cured."

Therefore, the court's Opinion is not supported by anything on the record thus far.

The court then states:

"The sole issues that remain are whether Mr. Cardenas's offender score was calculated incorrectly and whether resentencing is required. Although Mr. Cardenas points out a calculating error, an offsetting error leaves his offender score unchanged. Resentencing is not required. We remand for correction of the judgment and sentence." Opinion at 1. Nothing in these statements is supported by record or by law. In reaching this Opinion, however, the court is playing Devil's Advocate; is not basing its opinion on the record and evidence provided and, it violates both the United States and Washington State's Constitutions. It also violates the Sentencing Reform Act and Adult Sentencing Guidelines Manual as will be proven infra.

The court also states that the: "findings and conclusions in support of the trial court's decision at the CrR 3.5 hearing were entered." However, I have never received a copy of it. Therefore, the court's Opinion that this issue is now moot is incorrect, contrary to law, and unsupported by the record. Opinion at 3. It was me who challenged the trial court's decision at my CrR 3.5 hearing not my attorney. See Statement of Additional Grounds at 1-

Thus far, the Court of Appeals has denied me my Constitutional right to be present at all critical stages of these proceedings. State v. Davenport, 140 Wn. App. 925, 932-33, 167 P.3d 1221 (2007); See Garrison v. Rhay, 75 Wn.2d 98, 102, 449 P.2d 92 (1968) ("a critical stage is one in which there is a possibility that a dependant is or would be prejudiced in the defense of his case"). See Reply of Appellant at. The Court of Appeals failed to considered that the reasons used by the trial court to imposed a "top of the range" sentence of 51 months constituted an abuse of the court's authority, discretion and, jurisdiction because 51 months is for a second degree burglary not for attempted second degree burglary. See RCW 9.94A.410 Anticipatory offenses. "For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent." 75% of 51 months is 38.25 months. Therefore, the sentencing court exceeded it's authority in imposing 51 months by 12.75 months. This means 12.75 months of unlawful incarceration if my offender

score was 9+. It is not.

The Court of Appeals is aware that Mr. Soukup, Mr. Swan and Mr. Gibson listed and counted 14 convictions as my prior criminal history. Opinion at 5. Brief of Respondent at 7. Supplemental Brief of Appellant at 3. I challenged the legality of 5 of these convictions under Cause No. 86-1-50107-9 (First Degree Poss. of Stolen Property) and Cause No. 86-1-50132-0 (burglary 2°, theft 1°, burg. 2° and theft 2°). Statement of Additional Grounds at 8-9; 27-28. The court did addressed this issue. Rather, the court acknowledged that Counts I thru IV under Cause No. 86-1-50132-0 should of have been counted as one offense. However, the court then, improperly, and arguing for the State rather than remaining impartial states; "... under RCW 9.94A.525(16), since the present conviction is treated as one for burglary 2, two points are counted for each of his adult prior burglary 1 or burglary 2 convictions of which he has four." Opinion at 5. First, it shall be noted that this is not the Respondent's argument. Brief of Respondent at 1-8. The record does not support that I have any burglary 1 or four other burglaries than the ones already mention. The court is counting the two 1986 burglaries as four points, again.

The Court of Appeals also ignored that Cause No. 89-1-00385-0, burglary 2°, was run

concurrent with Cause No. 89-1-00775-0, Poss. of Cocaine and Poss. of a Pistol and it shall be counted as one prior, not three as it was counted, under RCW 9.94A.525(a)(i) and RCW 9.94A.598(1). See Appendix A.

Similarly, Counts I and II under Cause No. 98-1-02190-5 shall be counted as one prior, not two as it was counted, under the "same criminal conduct under RCW 9.94A.525(a)(i) and RCW 9.94A.589(1). These counts were also run concurrent. See Appendix B.

The Court of Appeals also ignored that Cause No. 88-1-00724-7, Willful Failure to Return to Work Release shall not be counted as a prior offense because this was repealed as a felony in 2001.

Therefore, out of ten priors counted by the court, Mr. Soukup, Mr. Swan, and Mr. Blaine only three shall be counted as priors for sentencing purposes. This shall make a prior offender score of seven and current offender score of 8 points. And this is why Mr. Soukup is asking the court to denied me the right to be present at my resentencing.

The State asked the court to denied me my right to be present at my resentencing hearing because: "it cost too much to transport the defendant to his resentencing and then back to prison..."

Brief of Respondent at 3-4. I am not here to pay for the State's mistakes. The State and courts have used and abused me all of my life. The abused ends right here, right now.

Although not found in the Respondent's brief the court of appeals persists that; "This doubling of points for the prior burglaries was pointed out by the prosecutor..." Opinion at 5. The court ignored the fact that I objected to the use of these priors under Cause No. 86-1-50107-9 and Cause No. 86-1-50132-0 because they are false and invalid. See Report of Proceedings at 239-244.

As proven above, when counted properly, using all the correct information followed by statutory law as the Legislature intended, and adhering to Sentencing Guideline principles, my offender score do not exceed 7 points.

The court of appeals is also incorrect that the sentencing court had the authority to used my prior convictions as aggravating factors to impose a 51 months sentence.

The State admitted as true all the claims raised in my Statement of Additional Grounds (SAG). The only reason a 3.5 hearing was held was because I, not Mr. Swan, filed a motion to dismiss. Mr. Swan did not cared about anything concerning my case except tried to get me to plea guilty to the false and illegal charge. That's why

No.
I started doing everything I could from within my confines to defend myself and, because the court refused to provide me with a different attorney or to allowed me to defend myself because Mr. Swan was "representing" me against my will. See Report of Proceedings (RP) at 4-11. Without any discovery having been made Mr. Swan was ready for trial. I was not. RP at 16-19; 21-26; 36-39; 44-47.

The court of appeals opinion that: "Any objection to admitting the screwdriver as evidence was waived. RAP 2.5(a)." is incorrect. One does not object to a court's denial of a motion, that ground is preserved to be presented on appeal. I cannot be held responsible for the ineffectiveness of Mr. Swan. I tried to get rid of him for a good reason.

The court's opinion that Deputy Swale; "...viewed security footage of a man trying to pry open the door - footage from which he could see the man's face and clothing 'pretty well'." is not supported by the record. Opinion at 8. See RP at 52. Deputy Swale "identified" the clothing. Deputy Swale arrested but in court he denied that he did arrest me. RP at 53. Then he stated: "... -- his physical appearance and clothing matched the description of my burglary suspect." However, there was no description of any suspect. RP

at 53-54. Then Deputy Swale admitted that he arrested right away upon contact. RP at 55-56. Deputy Swale also testified that he did not record the arrest because the Yakima County Sheriff's Office does not use cameras. RP at 58. Then Deputy Swale testified that the only reason he arrested me was because I stated that I only walked by the coffee shop= not because I looked like the person in the video. PP at 57-58; 59-60. The question here is why would the trial court and the appeals court reached a decision in favor of Deputy Swale without reviewing the video. RP at 62-70. Robert Castillo testified that his place was vandalized on October 24th, 2015 not on August 24th, 2015. RP at 105. Mr. Castillo testified was recorded by infrared cameras so its black and white and hard to distinguished anything with the lights on. RP at 108-109. He also testified the damage was committed at 3:26 am not at 6:30 a.m. RP at 111. He also testified that he did not recognized the man in the video but he recognized me in court. RP at 112-113. Deputy Swale testified he reviewed the video on October 24th 2015. RP at 123. He would have answered yes to anything Mr. Soukup would asked. Mr. Swale had two different stories. First he said that he arrested me because I had said "I only walked by the coffee shop= but his report read

that "I was nowhere near the coffeeshop." RP at 136. In fact deputy Swale didn't even take any notes on the day in question. RP at 141 lines 5 to 18. The person in the video is not me. RP at 143-148. Because the man on the video could not be positively identified by the jury or anybody else Mr. Soukup enlarged my booking photo poster size and place it next to the laptop screen for the jury to see. RP at 156-158.

Moreover, in his closing argument Mr. Soukup stated that the man in the video is Mr. Castillo not me. RP at 177-178. Superimposing my enlarge booking picture against the video was very prejudicial for me and it made a big impact on an already bias jury. RP 187-196. Looking at the video no reasonable person would have find me guilty beyond a reasonable doubt because the man in the video was masked. Two of the jury members, however, were friends of Mr. Castillo. The rest of them were relatives of police officers, detectives or knew Mr. Soukup. RP at 45-55; 55-62. The arrest was unconstitutional; the trial was rigged; and Mr. Swan proved himself to be a puppet of Mr. Soukup.

I am a victim of malicious prosecution. The State had no probable cause to arrest me, detained me and, no evidence that I had committed any

crime.

B. CONCLUSION

As proven above, the prosecutor, the court and even my own attorney, Mr. Swan, purposely and/or negligently failed to followed Sentencing Guidelines, and used misinformation in order to miscalculate the offender score and to imposed an illegal sentence. Therefore this Court must vacate the sentence, remand for resentencing after a proper recalculation following Sentencing Guidelines has been accomplished. I shall be allowed to attend my hearing.

This Court shall also overturned the conviction as unconstitutional and malicious.

Respectfully submitted this 27th day of December, 2017.

Leopoldo Cardenas
Appellant Pro Se

Certificate of Service

I certify under penalty of perjury that I have served a true and correct copy of the foregoing and all attachments, via U.S. Mail, addressed as follows:

Joseph Anthony Brusic
David Brian Trecy
Yakima Co. Prosecutor's Office
128 N 2nd St., Rm 329
Yakima, WA 98901

Renee S. Townsley
Clerk/Administrator
500 N Cedar St.
Spokane, WA 99201

Lisa Elizabeth Tabbut
Attorney at Law
PO Box 1319
Winthrop, WA 98862

this 27th day of December, 2017, at Walla Walla, WA 99362.

Leopoldo Cardenas
Appellant Pro Se

Cause No. 89-1-00385-0

&

Cause No. 89-1-00775-0

RCW 9.94A.525(2)(i)

" 9.94A.589

Same Criminal Conduct

AG
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FILE COPY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF BENTON

BENTON COUNTY
OFFICE OF COUNTY CLERK AND
CLERK OF SUPERIOR COURT
FILED
JAN 12 1990
E. KAY BROSA, CLERK

THE STATE OF WASHINGTON,

Plaintiff,

vs. 919072

LEOPOLDO CARDENAS aka
JOSE JUAN JIMENEZ
DOB: 10/9/63

Defendant.

No. 89-1-00385-0

JUDGMENT AND SENTENCE

JUDGMENT DOCKET
NO 89-9-01754-0

This matter having come before the Court for a sentencing hearing this date; the defendant having been convicted by:

( ) his/her guilty plea on , of
(x) jury verdict on 11/28/89 , of

Burglary in the Second Degree RCW 9A.52.030

committed on or about May 16, 1989 in Benton County, Washington; the defendant being present and represented by his attorney, Larry Zeigler ; the defendant having been asked if he wished to make a statement on his/her own behalf and to present any information in mitigation of punishment; and the Court being fully advised, makes the following:

FINDINGS OF FACT

1. The defendant's prior convictions are:

Burglary 2nd 2/22/86	4/11/86
Poss. Stolen Property 6/86	July 1986
Burglary 2nd 6/86	October 1986
Burglary 2nd 6/86	October 1986
Robbery 12/1/87	2/11/88
Failure to Return 7/22/88	7/25/88
Poss. Con. Substance 7/10/89	7/10/89
Unlaw. Poss. Pistol 5/7/89	7/10/89

2. Based on the foregoing criminal history, the presumptive sentencing range for the offense(s) for which the defendant was found guilty is as follows:

43-57 months

( ) 3. The defendant's current multiple offenses ( ) do not involve ( ) do involve the same criminal conduct.

( ) 4. The defendant was duly informed by special allegation and the court/jury finds/found that ( ) the defendant ( ) an accomplice was armed with a deadly weapon as defined by RCW 9.94A.125 at the time of the commission of the offense in count(s)____ and ____months is to be added to the presumptive sentencing range.

5. The maximum term for the offense(s) is:

10 years and/or $20,000 fine

(x) 6. The defendant owes restitution to the victim(s) in this case jointly and severally with_____ in the amount of $ 1,579.47. The following victims are entitled to restitution in these amounts:

Tom and Linda Denchel $250.00
601 Lincoln Court
Prosser, Wa 99350

Great American Ins. Co. $1,329.47
PO Box 21109
Seattle, Wa 98111
Claim #950-527291

7. The defendant has served_____days in confinement before sentencing which confinement was solely in regard to the offense(s) for which the defendant is being sentenced.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the defendant and the subject matter.

2. The defendant is guilty of the crime(s) of:

Burglary in the Second Degree RCW 9A.52.030

( ) 3. The defendant is a first time offender pursuant to RCW 9.94A.120(5), and the Court waives the imposition of a sentence within the presumptive sentencing range.

( ) 4. There are substantial and compelling reasons to justify an exceptional sentence. Findings are attached.

JUDGMENT AND SENTENCE

The Court having determined that no legal cause exists to show why judgment should not be pronounced, it is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The defendant shall be sentenced to a term of 57 Mont confinement to be served pursuant to RCW 9.94A.190 commencing Immediately

2. Credit for time served prior to this date of 103 days is given.

3. The defendant shall report to and be available for contact with the assigned community corrections officer as directed upon release from prison.

3A Sent. pursuant to run concurrent with Yakima Co. 89-1-00775-0

( ) 4. The defendant shall be on community placement for a period of one year upon either release from confinement or upon transfer to community custody. Conditions of community placement include that the defendant:

shall work at Department of Corrections-approved education, employment, and/or community service;

shall not consume controlled substances except pursuant to lawfully issued prescriptions;

shall pay community placement fees as determined by the Department of Corrections;

shall remain within/outside geographic boundaries as directed by Department of Corrections;

( ) shall not unlawfully possess controlled substances;

( ) shall not have direct or indirect contact with _____;

( ) shall participate in crime-related treatment or counseling services as directed by community corrections officers;

( ) shall not consume alcohol;

( ) shall have prior approval of community corrections officer before selecting or changing residence location or living arrangments;

( ) shall comply with the following crime-related prohibitions:

$20.50 BCSO
70.00 filing

5. The defendant shall pay court costs in the sum of $ 90.50, reimbursement of court appointed attorney fees of $ 500.00, a penalty assessment in the sum of $100 pursuant to RCW 7.68.035 and a fine of $_____. Said sums to be paid to the Benton County Clerk, 7320 West Quinault, Kennewick, Washington, or P.O. Box 1510, Richland, Washington by cash, cashier's check or money order in payments as scheduled by defendant's community corrections officer with full payment no later than 4 years post release.

6. The defendant shall make restitution as indicated in Finding of Fact #6 which shall be payable to the Clerk of Court, 7320 W. Quinault, Kennewick, Washington by cash, cashier's check or money order in payments as scheduled by the defendant's community corrections officer with full payment no later than 4 years post release.

7. The Court hereby retains jurisdiction over defendant for a period of ten (10) years to assure payment of the monetary obligations, and the Department of Corrections shall be responsible for assuring defendant's compliance with this provision. **To assure compliance the defendant is ordered to report to the Department of Corrections within 24 hours of release from confinement or date of this order to allow the Department of Corrections to monitor payments.**

( ) 8. Defendant shall not have contact with the victim(s) for a period of ten (10) years. A violation of this order is a criminal offense under RCW 9A.46 and will subject a violator to arrest.

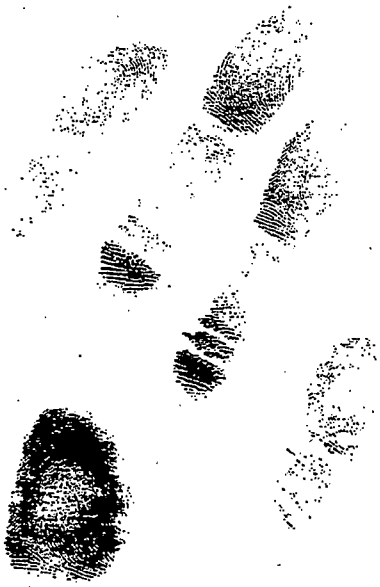
9. The following counts are dismissed:

DONE IN OPEN COURT this 12 day of ~~December~~ Jan 1990, 1989 in the presence of the defendant, his/her attorney and the (Deputy) Prosecuting Attorney.

_____
JUDGE

Sex: male
Race: hispanic

FINGERPRINTS
(Right four fingers taken simultaneously)



Dated: Jan 12, 1990
Fingerprints attested by:
Nancy Richman

WARRANT OF COMMITMENT

THE STATE OF WASHINGTON

TO: The Sheriff of Benton County and to the proper officers of the Department of Corrections.

The defendant has been convicted in the Superior Court of the State of Washington of the crime(s) of: RCW 9A.52.030

BURGLARY 2

and the Court has ordered that the defendant be punished by serving not more than: 57 MONTHS TO THE DEPARTMENT, CONCURRENT WITH YAKIMA COUNTY 89-1-00775-0. CREDIT 103 DAYS SERVED.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections;

and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

Dated this 12 day of JANUARY, 1990.

ALBERT J. YENCOPAL
JUDGE

E. KAY BACCA
CLERK

By Nancy Richman
DEPUTY

I, E. KAY BACCA, Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence and Warrant of Commitment in this action on record in my office.

Dated this 12 day of Jan, 1990.

E. KAY BACCA
CLERK

By Nancy Richman
DEPUTY

89-1-00385-0
STATE OF WASHINGTON
VS
LEOPOLDO CARDENAS AKA JOSE JUAN JIMENEZ

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ORIGINAL

FILED and Micro filmed

JUL 18 1989

BETTY McGILLEN, YAKIMA COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff,

NO. 89-1-00775-0

AMENDED

JUDGMENT AND SENTENCE (FELONY)

Roll No. 353 131

LEOPOLDO CARDENAS, Defendant.

SID NO.: WA 12912355

I. HEARING

1. A sentencing hearing in this case was held 7-10-89 DOB 10-12-63 M/F M RACE: M

2. Present were:
LEOPOLDO CARDENAS, Defendant
~~KENDRICK~~ EX OFF Mike Lynch, Defendant's Lawyer
STEVE KELLER SUPER., Deputy Prosecuting Attorney

3. Count(s) I have been dismissed by the court.

4. Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the court finds:

1. CURRENT OFFENSE(S): The defendant was found guilty on 7-10-89 (Date)
☐ by jury verdict
☒ by plea of guilty
☐ by court trial

Count No.: II Crime: POSSESSION OF A CONTROLLED SUBSTANCE: COCAINE
RCW: 69.50.401 Crime Code:
Date of Crime: 5-7-89 Law Enforcement Incident No. YPD #89-9106
Count No. III Crime: UNLAWFUL POSSESSION OF A PISTOL
RCW: 9.41.040(1) Crime Code:
Date of Crime: 5-7-89 Law Enforcement Incident No. YPD #89-9106
Count No. Crime:
RCW: Crime Code:
Date of Crime: Law Enforcement Incident No.

( ) Count(s) Includes a special verdict/finding for use of a deadly weapon.
( ) Counts Current offenses encompassed the same criminal conduct and count as one crime in determining the offender score.
( ) Additional current offenses are attached in Appendix A.

2. CRIMINAL HISTORY: Prior criminal history used in calculating the offender score (RCW 9.94A.360) is:

CRIME	SENTENCING DATE	ADULT/JUVENILE	CRIME DATE	CRIME TYPE
2° BURGLARY	4-11-86	A	2-22-86	NV
1° POSS. OF STOLEN PROP.	7-86	A	6-86	NV
2° BURGLARY	10-86	A	6-86	NV
2° BURGLARY	10-86	A	6-86	NV
2° ROBBERY	2-11-88	A	12-1-87	V
Failure to Return	7-22-88	A	7-25-88	NV

concurrent

( ) Additional criminal history is attached in Appendix B.

3. OTHER CURRENT CONVICTIONS Under other cause number used to determine offender score.

CRIME	CAUSE NUMBER

SENTENCING DATA:	OFFENDER SCORE	OFFENSE SCORE	RANGE	MAXIMUM TERM
Count No.: II	6	II	17- 22	5 Years
Count No.: III	6	III	17-22-27	5 Years
Count No.:				

( ) Additional current offense(s) sentencing information is attached in Appendix C.

5. EXCEPTIONAL SENTENCE: ( ) Substantial and compelling reasons exist which justify a sentence (above) (below) the standard range for Count(s) See Appendix D.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the crime(s) of: Ct.II: Possession of a Controlled Substance: Cocaine and Ct.III: Unlawful Possession of a Pistol

IV. ORDER

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IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below.

1. THE DEFENDANT shall pay the financial obligations as set forth in APPENDIX E. The defendant shall be under the jurisdiction to this court and the Department of Corrections, Community Corrections Office, Yakima, or such other office as may be designated, for up to 10 years for purposes of payment to the financial obligations. During the time payments remain due, the Office may order the defendant to report to a community corrections officer, remain within prescribed geographical boundaries, and/or notify the office of changes in address and employment.

2. OTHER orders and conditions follow on the attached pages of this Judgment. 32

Doc. P5

LEOPOLDO CARDENAS — WA 12912355

DEFENDANT'S NAME — SID NUMBER

CONFINEMENT OVER ONE YEAR

1. Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows:

22 Months for Count No. II
22 Months for Count No. III
____ Months for Count No. ____
____ Months for Count No. ____
____ Months for Count No. ____
____ Months for Count No. ____

(X) The terms in Counts II & III are concurrent for a total term of 22 months.
( ) The terms in Counts ____ are consecutive for a total term of ____ months.
( ) The sentence herein shall run (concurrently) (consecutively) with the sentence in ____

[X] Defendant shall comply with all the mandatory provisions of RCW 9.94A.120(8b) and as many of those in RCW 9.94A.120(8c) as deemed appropriate by his/her Community Corrections Officer.

CREDIT is given for 165 days served.

The following Appendices are attached to this Judgment and Sentence and are incorporated by reference:

( ) A. Additional Current Offenses.
( ) B. Additional Criminal History
( ) C. Current Offense(s) Sentencing Information.
( ) D. Exceptional Sentencing Findings of Fact and Conclusions
(X) E. Financial Order.

(F) It is here by ordered that the fire arm found in possession of the defendant and tagged as evidence number H01193 YPD case # 89-9100 is forfeited to the Yakima Police Dept.

DATE: JULY 10, 1989 — Stephen M Brown
(JUDGE) (JUDGE PRO TEM)

Presented by: — Approved as to form:

Deputy Prosecuting Attorney — Attorney for Defendant

THE STATE OF WASHINGTON — WARRANT OF COMMITMENT

To: The Sheriff of Yakima County.

The defendant LEOPOLDO CARDENAS has been convicted in the Superior Court of the State of Washington of the crime(s) of: CT.II: POSSESSION OF A CONTROLLED SUBSTANCE: COCAINE and CT.III: UNLAWFUL POSSESSION OF A PISTOL

and the court has ordered that the defendant be punished as set out in the attached Judgment and Sentence.

Defendant shall receive credit for time served as ordered.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections.

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

DATE: JULY 10, 1989

By the Direction of the Honorable
STEPHEN M. BROWN
(JUDGE) (JUDGE PRO TEM)

BETTY McGILLEN
Clerk

By: M. Dawn L. Hess
Deputy Clerk

No.

Cause No. 98-1-02190-5

Same Criminal Conduct
RCW 9.94A.525(2)(i)
RCW 9.94A.589

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99-9-3095-8

FILED
SEP 27 1999
KIM M. EATON, YAKIMA COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

'99 SEP 27 PM 4 53

The State of Washington,

Plaintiff,

vs.

LEOPOLDO CUEVAS CARDENAS,

Defendant.

NO. 98-1-02190-5

FELONY JUDGMENT AND SENTENCE

Confinement Over One Year

SID NO.: WA 12912355
Motor Vehicle Involved: Yes____ No____
D.L.#: _____
DOB: 11/12/62 SEX: MALE RACE: HISPANIC
SSN#: 537-08-4575; PCN:

I. HEARING

1.1 A sentencing hearing was held September 27, 1999. Present were the defendant; DOUGLAS B. ROBINSON, attorney for the defendant, and PATRICIA D. POWERS, Deputy Prosecuting Attorney.

1.2 Counts ____ was dismissed by the court under separate order.

1.3 The defendant was given the right of allocution and asked if any legal cause existed why judgment should not be entered. There being no reason why judgment should not be pronounced, the court finds:

II. FINDINGS

Based on testimony heard, statements by defendant and/or victims, argument of counsel, the pre-sentence report and case record to date, the court finds:

2.1 **CURRENT OFFENSE(S):** On September 27, 1999, the defendant was found guilty by a plea of guilty.

Count No. 1 Crime: FIRST DEGREE ROBBERY
RCW: 9A.56.190 and 9A.56.200(1)(a) and 9A.56.200(1)(b)
Date of Crime: December 6, 1998
Law Enforcement Incident No.: Yakima PD 98-22185

Count No. 2 Crime: FIRST DEGREE ROBBERY
RCW: 9A.56.190 and 9A.56.200(1)(a) and 9A.56.200(1)(b)
Date of Crime: December 6, 1998
Law Enforcement Incident No.: Yakima PD 98-22185

2.2 **SPECIAL FINDINGS:**

[ ] Counts_____ encompass the same criminal conduct and count as one crime in determining offender score.
[ ] Counts_____ includes a special verdict/finding for use of a **firearm**, attached hereto.
[x] Counts 1 and 2 includes a special verdict for use of a **deadly weapon other than a firearm.**
[ ] Counts_____ includes a special verdict/finding for **sexual motivation**, attached hereto.
[ ] Counts_____ includes a special verdict/finding for a **drug offense protected zone**, attached hereto.
Any firearm(s) seized from the defendant or used in the commission of the within offense(s) shall be forfeited pursuant to RCW 9.41.098 and disposed of by the above law enforcement agency.

2.3 **CRIMINAL HISTORY:** Prior criminal history used in calculating the offender score (RCW 9.94A.360) is:

CRIME	SENTENCING DATE	A/J	CRIME DATE	CRIME TYPE
Burglary 2	04-11-86	A	02-22-86	
Possession of Stolen Property 1	07-22-86	A	06-18-86	
Burglary 2	10-07-86	A	07-28-86	
Theft 1	10-07-86	A	07-28-86	
Theft 2	10-07-86	A	07-28-86	
Robbery 2	02-11-88	A	12-02-87	
Failure to Return to Work Release	07-22-88	A	06-09-88	
VUCSA-Poss Heroin	07-10-89	A	05-07-89	
Unlawful Possession of a Firearm	07-10-89	A	05-07-89	
Burglary 2	01-12-90	A	05-18-88	
Custodial Assault	02-06-90	A	11-23-89	

2.4 **OTHER CURRENT CONVICTIONS** under other cause number(s) used to determine offender score.

CRIME	CAUSE NUMBER
NONE	

2.5 **SENTENCING DATA:**

COUNT	OFFENDER SCORE	OFFENSE SCORE	STANDARD RANGE	ENHANCEMENT	ENHANCED RANGE	MAX TERM
1	9 + (12)		129-171 Months	24 Months	153-195 Months	Life
2	9 + (12)		129-171 Months	24 Months	153-195 Months	Life

2.6 **EXCEPTIONAL SENTENCE:** Substantial and compelling reasons exist which justify a sentence []above []below the standard range for Count(s)_____ as set forth in **APPENDIX D.** The prosecuting attorney [] has [] has not recommended a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is **GUILTY** of the counts and charges listed in paragraph 2.1 including Appendix A.

IV. SENTENCE AND ORDER - CONFINEMENT OVER ONE YEAR

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below.

4.1 **FINANCIAL:** The Defendant shall pay financial obligations and abide by the conditions as set forth in **APPENDIX E.** The defendant shall be under the jurisdiction of this court for up to 10 years for purposes of payment of the financial obligations. The defendant shall be under the supervision of the court and the Washington State Department of Corrections for up to 10 years for purposes of payment of the financial obligations ordered. The defendant shall report to the Department of Corrections, 210 North 2nd Street, Yakima, WA., within 24 hours of release from full or partial confinement. During the time payment remains due, the Department of Corrections may order the defendant to report to a community collection's officer, remain within prescribed geographical boundaries, and/or notify the department of changes in address or employment. Payments made to the department shall be transmitted daily to the Clerk of the Court.

4.2 **CONFINEMENT:** Defendant is sentenced to a term of total confinement in the custody of the Washington State Department of Corrections as follows:

174 ~~495~~ on Count No. 1, which includes 24 Months Deadly Weapon enhancement
174 ~~495~~ on Count No. 2, which includes 24 Months Deadly Weapon enhancement

The defendant shall receive credit for time served **on this charge only** and any good behavior as certified by the Yakima County Jail/Department of Corrections.

[x] The terms of Count 1 and Count 2 are concurrent for a term of ~~474~~ 150 Months. The terms of the deadly weapon enhancement (24 months in each count) in Count 1 and 2 are consecutive for a term of 48 months. The sentence term of ~~474~~ 150 months and the deadly weapon enhancement term of 24 months are consecutive for a total term of ~~240 Months~~. 198 MONTHS.

[ ] The terms in Counts _____ are consecutive.

[ ] The sentence herein shall run (concurrently)(consecutively) with the sentence in Cause No. _____.

[ ] WORK ETHIC CAMP: The court finds that the defendant is eligible and likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp operated by the Washington State Department of Corrections in accordance with the provisions of RCW 9.94A.137 and RCW 72.09.410.

4.3 **COMMUNITY PLACEMENT:** The defendant, by virtue of the offense committed, is not subject to community placement under RCW 9.94A.120.

4.4 **OTHER PROVISIONS:** *Other orders and conditions:*

NONE

4.5 **NOTICE TO DEFENDANT:** No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. For purposes of this section, "collateral attack" means any form of post-conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw a guilty plea, a motion for a new trial, and a motion to arrest judgment.

4.6 **APPENDICES:** The following **Appendices** are attached to this Judgment and Sentence and are incorporated by reference:

[ ] A - Additional Current Offense(s)
[ ] B - Additional Criminal History
[ ] C - Other Current Offense
[ ] D - Exceptional Sentence Findings
[X] E - Financial Order
[X] F - Firearm/Deadly Weapon Finding
[ ] G - Sexual Motivation Findings
[ ] H - Community Placement Order
[ ] I - Drug Offense Protect Zone Findings
[ ] J - Notification of Registration Requirement

DATED: September 27, 1999

James P. Hutton
JUDGE

Presented by:

PATRICIA D. POWERS
Deputy Prosecuting Attorney
Washington State Bar Number 6825

Approved as to form:

DOUGLAS B. ROBINSON
Attorney for Defendant
Washington State Bar Number _____

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4.7 **WARRANT OF COMMITMENT**

THE STATE OF WASHINGTON
TO: The Sheriff of Yakima County
TO: The Yakima County Department of Corrections
TO: The Washington State Department of Corrections

The defendant has been convicted in the Superior Court of the State of Washington of the crime(s) of:

COUNT 1 - FIRST DEGREE ROBBERY
COUNT 2 - FIRST DEGREE ROBBERY

and the court has ordered that the defendant be punished as set out in the attached Judgment and Sentence.

YOU ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By the Direction of the Honorable

DATED: September 27, 1999

/s/ JAMES P HUTTON
JUDGE

KIM EATON, Clerk

By: Sharon A Garrett
Deputy Clerk

FILED
DECEMBER 12, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. LEOPOLDO CUEVAS CARDENAS, Appellant.	)	No. 33888-6-III UNPUBLISHED OPINION

SIDDOWAY, J. — Leopoldo Cuevas Cardenas appeals his conviction and sentence for attempted second degree burglary. The State has reasonably cured or conceded several errors.

The sole issues that remain are whether Mr. Cardenas's offender score was calculated incorrectly and whether resentencing is required. Although Mr. Cardenas points out a calculation error, an offsetting error leaves his offender score unchanged. Resentencing is not required. We remand for correction of the judgment and sentence.

PROCEDURAL HISTORY

Leopoldo Cuevas Cardenas was charged with attempted second degree burglary after he tried to break into an espresso stand in Wapato on August 24, 2015. A CrR 3.5

hearing was conducted on the admissibility of a statement he made to Deputy Justin Swale before being arrested. At the conclusion of the hearing, the trial court found that Mr. Cardenas was not in custody at the time he made the statement and that he made it voluntarily. The court did not enter written findings or conclusions in support of its ruling at the time. It allowed Deputy Swale to testify concerning Mr. Cardenas's statement at trial.

A jury found Mr. Cardenas guilty. The trial court sentenced Mr. Cardenas to 51 months' incarceration based on an offender score of 9+.

At sentencing, the State asked the trial court to impose $260 in restitution for the damage to the espresso stand. Mr. Cardenas objected to the amount, claiming the victim was overcharged for the repairs. The trial court entered a $1 restitution award as a "place holder," observing that a hearing to determine restitution would be held at a later date. Report of Proceedings (RP)[1] at 259. That hearing never occurred.

Mr. Cardenas appealed. Among the assignments of error made in his opening brief was to the trial court's failure to enter findings and conclusions in support of its decision at the CrR 3.5 hearing. The State promptly moved this court to stay the appeal and remand the case to the trial court for entry of the findings and conclusions. The

[1] All citations to the Report of Proceedings are to the consecutively numbered two volume report that begins with proceedings taking place on September 8, 2015.

motion was granted and on remand, findings and conclusions consistent with the trial court's oral ruling were entered.

Upon completion of the briefing, the appeal was considered by the panel without oral argument.

ANALYSIS

Not counting Mr. Cardenas's assignment of error to the trial court's failure to enter findings and conclusions following the CrR 3.5 hearing, which is now moot, his opening and supplemental briefs make four assignments of error. The trial court is alleged to have erred in (1) imposing restitution, (2) misstating the maximum penalty for attempted second degree burglary in the judgment and sentence, (3) misstating dates in the criminal history of Mr. Cardenas set forth in the judgment and sentence, and (4) scoring too many offender points for Mr. Cardenas's crimes committed before July 1, 1986, that were served concurrently.

The State concedes that the trial court failed to conduct a hearing on the amount of restitution within 180 days of the sentencing hearing as required by RCW 9.94A.753(1) and that the remedy is to vacate the restitution order. *See State v. Grantham*, 174 Wn. App. 399, 406, 299 P.3d 21 (2013). We accept the State's concession.

The State also concedes that the judgment and sentence contains scrivener's errors. Section 2.5 incorrectly lists the maximum term for attempted burglary in the second degree as 10 years, when it is actually 5 years. RCW 9A.52.030(2),

9A.28.020(3)(c), 9A.20.021(1)(c). In addition, Mr. Cardenas's criminal history set forth in the judgment and sentence includes 9 entries in the "Date of Crime" column that do not match the dates in the criminal history packets prepared by the State for sentencing. The parties agree that the correct dates are as follows:

Crime	Date of crime listed in the judgment and sentence	Actual date of crime	Citation
Custodial Assault 90-1-00015-3	1-11-1990	**11-22-1989**	Supp. Br. of Appellant Appendix B; State's Ex. D
Second Degree Burglary 86-1-50132-0	7-28-1986	**6-18-1986**	Supp. Br. of Appellant Appendix A; State's Ex. D
Second Degree Burglary 86-1-50132-0	7-28-1986	**6-16-1986**	Supp. Br. of Appellant Appendix A; State's Ex. D
First Degree Theft (not FA) 86-1-50132-0	7-28-1986	**6-18-1986**	Supp. Br. of Appellant Appendix A; State's Ex. D
Second Degree Theft (not FA) 86-1-50132-0	7-28-1986	**6-16-1986**	Supp. Br. of Appellant Appendix A; State's Ex. D
First Degree PSP 86-1-50107-9	6-20-1986	**6-18-1986**	Supp. Br. of Appellant Appendix C; State's Ex. B
Second Degree Robbery 87-1-01598-5	12-2-1987	**12-1-1987**	Supp. Br. of Appellant Appendix D; State's Ex. A
Second Degree Burglary 86-1-00226-5	1-19-1986	**2-22-1986**	Supp. Br. of Appellant Appendix E; State's Ex. A
Willful Fail Return – Work Release 88-1-0024-7	6-9-1988	**4-25-1988**	Supp. Br. of Appellant Appendix F; State's Ex. A

We again accept the State's concession and will direct the trial court to make the corrections indicated.

The only remaining issue raised by Mr. Cardenas's briefs is whether his offender score was miscalculated.

Calculation of offender score

For convictions of crimes committed before July 1, 1986, all convictions that were served concurrently count as one offense in the defendant's offender score. RCW 9.94A.525(5)(a)(ii). Six of the 14 convictions included in Mr. Cardenas's criminal history were for crimes committed before July 1, 1986. Of those, the sentences for 4 (2 burglary convictions and 2 theft convictions for crimes committed in June 1986) were served concurrently and should be counted as a single offense for scoring purposes. The State agrees that the 4 convictions count as only 1 offense.

While Mr. Cardenas points to this scoring rule that causes four of his convictions to count as one, he ignores different scoring rules that cause four of his convictions to count as eight. Under RCW 9.94A.525(6), prior convictions are counted as if a defendant's attempted second degree burglary conviction was for a completed second degree burglary. And under RCW 9.94A.525(16), since the present conviction is treated as one for burglary 2, two points are counted for each of his adult prior burglary 1 or burglary 2 convictions—of which he has four. This doubling of points for the prior burglaries was pointed out by the prosecutor during the sentencing hearing. *See* Report of Proceedings (RP) at 239-40. The additional four points added under this rule more than offset the three point reduction for Mr. Cardenas's concurrently-served pre-July 1, 1986 convictions.

The State correctly argues that even if the four pre-July 1, 1986 crimes were correctly scored as a single offense Mr. Cardenas would still have an offender score of 9+, leaving his standard range unaffected. The State contends that resentencing is unnecessary because even if Mr. Cardenas had pointed out below that four of his convictions counted as one, the trial court would have imposed the same sentence.

When the sentencing court incorrectly calculates the standard range, remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)). This case is different, because there is no showing here that the offender score of 9+ is wrong. We cannot even determine that the sentencing court was mistaken about how many points above nine would be indicated by Mr. Cardenas's criminal history, because it appears no one thought it mattered.

The trial court offered the following reason for the sentence it imposed:

> [W]hen sentencing—and the legislature gives the court a range, then I think what a lot of judges do is kind of start in the middle of the range and then—determine whether there are factors that indicate that the range should be higher or lower. On the one hand this is probably a pretty routine attempted second degree burglary. But we do have I think a serious consideration here, given Mr. Cardenas' record. He has a long history of—theft and burglary. I'm not sure that—much has been learned through incarceration.
>
> But given—given the history, given his criminal history, I think a sentence closer to the top of the range is more appropriate than one at the bottom of the range.

I am going to sentence at the top of the range, 51 months.

RP at 252-53. Whether concurrently-served convictions for pre-July 1, 1986 crimes count as one offense or prior burglary 2s count as two, the decisive factor for the court—Mr. Cardenas's "long history of theft and burglary"—remains the same.

Mr. Cardenas has not demonstrated an error in calculating the offender score or any basis for remanding for resentencing.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Cardenas raises four.

Error to admit screwdriver because no probable cause to arrest; SAG at 11-13. Pretrial, Mr. Cardenas made a pro se motion to dismiss on the basis that Deputy Swale lacked probable cause to arrest him. The motion was denied. No objection was made when the screwdriver was later offered as evidence. Any objection to admitting the screwdriver as evidence was waived. RAP 2.5(a).

Mr. Cardenas's real quarrel appears to be with the trial court's ruling that Deputy Swale had probable cause to arrest. Where the facts and circumstances known to the arresting officer are sufficiently trustworthy to cause a reasonable officer to believe an offense has been committed, probable cause exists. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). A person is guilty of attempted second degree burglary if, with the intent to commit second degree burglary, "he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

As Deputy Swale testified at the CrR 3.5 hearing and at trial, upon responding to the report of the attempted burglary he traveled to the espresso stand; examined damage to a door that it appeared someone tried to pry open; spoke with the owner, who said it was new damage; and viewed security footage of a man trying to pry open the door—footage from which he could see the man's face and clothing "pretty well." RP at 51. He then drove around the area and within 20 minutes spotted Mr. Cardenas, whose appearance was consistent with the man on the security footage. When he approached Mr. Cardenas and told him nothing more than that he was investigating a burglary, Mr. Cardenas stated "he had only walked by the coffee shop." RP at 53. There was more than enough trustworthy information to cause a reasonable officer to believe an offense had been committed.

Ineffective assistance of counsel; SAG at 16-20. Mr. Cardenas next alleges ineffective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate that a lawyer's representation was deficient and that the deficient representation prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Cardenas generally describes alleged instances of ineffective assistance

(making no effort to secure the security video, doing nothing to prepare a defense, failing to file motions, and failing to object to leading questions). But in each case he either fails to identify a specific act or omission, or fails to demonstrate that an act or omission was both deficient and prejudicial. No ineffective assistance of counsel is shown.

Selective prosecution, prosecutorial misconduct, and insufficient evidence; SAG 20-26. Mr. Cardenas argues he was the victim of selective prosecution, that the prosecutor committed prosecutorial misconduct during closing argument, and that the State presented insufficient evidence to prove beyond a reasonable doubt that the man in the security video was him.

Mr. Cardenas contends he is the victim of selective prosecution based on his race. He did not claim race-based prosecution in the trial court, however, so under RAP 2.5(a)'s general rule, any claim of error was waived. The rule's exception for "manifest constitutional error," RAP 2.5(a)(3), does not apply. Although the asserted error is constitutional, it was never addressed or explored in the trial court, leaving Mr. Cardenas unable to demonstrate the actual prejudice that makes an error "manifest." *State v. Munguia*, 107 Wn. App. 328, 340-41, 26 P.3d 1017 (2001). Error, if any, was not preserved.

Mr. Cardenas argues that the following statements by the prosecutor during closing argument amounted to prosecutorial misconduct:

> [The espresso shop owner] went and looked at the security video, and he saw the defendant trying to break in. He saw the defendant taking a screwdriver and prying, over and over again, trying to open up that door. . . .
>
> . . . Dep. Swale came and responded. He saw the videos, he saw the pry marks, he took pictures of the door, where the defendant had tried to pry open the door.
>
> He left the scene, and about 20 minutes after that, five or six blocks away, easy walking distance, he saw the defendant walking along. And he contacted him and the defendant asked, "What are you contacting me for." He said, "I'm investigating the burglary." Deputy testified that's all he said, nothing about a coffee stand; "I'm investigating the burglary." And the defendant's response, which the defendant—which the deputy noted in his police report, put quotations marks around, was, "I was just walking by that coffee stand."

RP at 173-74. He claims conclusorily that the statements were prejudicial and unsupported by the record. While Mr. Cardenas asserts his innocence and that the shop owner did not see *him* on the security video, the prosecutor's statements are supported by evidence and reasonable inferences from the evidence. Mr. Cardenas provides no evidence or argument demonstrating prejudice.

Mr. Cardenas argues the State failed to prove beyond a reasonable doubt his identity as the attempted burglar or his felonious intent. In reviewing a claim of insufficiency, we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 750-51, 399 P.3d 507 (2017). A person acts with intent when he or she acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a).

The same evidence we describe above as supporting the trial court's finding of probable cause to arrest is substantial evidence that Mr. Cardenas attempted to enter the espresso stand with the intent to commit a crime. The use of a screwdriver to seek entry into a building is sufficient evidence of a defendant's intent to enter for illegal reasons. *State v. Brooks*, 107 Wn. App. 925, 929-30, 29 P.3d 45 (2001).

Offender score miscalculation; SAG 26-30. Finally, Mr. Cardenas argues that the trial court sentenced him based on a miscalculated offender score, making arguments different from those advanced by his appellate lawyer. He challenges the validity of his prior convictions and contends that some of his convictions "washed out." SAG at 27.

Prior convictions do not count toward the offender score if they have washed out as a result of crime-free time spent in the community. For class B felonies, an offender must spend 10 consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2)(b). For class C felonies, an offender must spend 5 consecutive crime-free years in the community for the felony to wash out. RCW 9.94A.525(2)(c).

At Mr. Cardenas's sentencing, the lawyers were aware that Mr. Cardenas believed some of his convictions had washed out. Certified copies of the judgment and sentences and Department of Corrections' records were available and both lawyers addressed the issue. As the prosecutor pointed out, "There isn't a span of five years as to any of these felony convictions." RP at 236. Even defense counsel stated he had reviewed the

criminal history and "[u]nfortunately, I don't see that under the [Sentencing Reform Act of 1981] there is anything for me to argue in terms of a washout. I did look at it carefully. Given the calculations I did not see any washouts." RP at 237.

Following Mr. Cardenas's release from custody for his first crime committed in 1986, he committed a crime every year through the year 1989, meaning—since the crime-free years must be consecutive—that the wash-out clock continually reset. His release from custody on August 5, 1996, started the clock running, but Mr. Cardenas then committed two first degree robberies in December 1998. He was not released from custody until June 1, 2012. At the time of the attempted second degree robbery on August 24, 2015, Mr. Cardenas had been crime-free in the community consecutively for only a little over three years—not enough to wash out a Class B or Class C felony.

Finally, as to Mr. Cardenas's challenges to the validity of his convictions,

> [A] criminal defendant generally has no right to contest the validity of a previous conviction in connection with a current sentencing. [*State v.*] *Ammons*, 105 Wn.2d [175,] 188, [713 P.2d 719, 718 P.2d 796 (1986)]. Requiring the State to make such a showing, or allowing the defendant to assert such a challenge, would turn the current sentencing proceeding into an appellate review of all of the defendant's prior convictions. *Id.* Consequently, a defendant seeking to challenge the validity of a prior conviction must exhaust established postconviction avenues of relief, such as a personal restraint petition.

State v. Irish, 173 Wn.2d 787, 789-90, 272 P.3d 207 (2012).

We affirm the conviction and remand with directions to vacate the award of restitution and correct the judgment and sentence in a manner consistent with this opinion.

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

Siddoway, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, A.C.J.