Supreme Court No. 95874-2
Court of Appeals No. 75904-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN GREENHALGH,

Petitioner.

PETITION FOR REVIEW

KATHLEEN A. SHEA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Constitutional Provisions

Washington Statutes

Washington Rules

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Adrian Greenhalgh requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Adrian Greenhalgh*, No. 75904-3-I, filed April 16, 2018. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The due process provisions of the Fourteenth Amendment and of article I, section 3, require the State prove each element of an offense beyond a reasonable doubt. To convict Mr. Greenhalgh of vehicular assault the State had to prove Mr. Greenhalgh was the driver of the car that crashed. Where the State's evidence only established Mr. Greenhalgh was driving the car before the accident, and seated in the car after the accident, should this Court accept review to determine whether sufficient evidence supports Mr. Greenhalgh's conviction for vehicular assault?

2. Where a trial court's findings of fact do not support the offender score used to sentence an individual, reversal and remand for resentencing is required. Here, the trial court determined Adrian Greenhalgh had an offender score of 9, but the court's findings of fact indicate that five of the nine offenses wash out. Should this Court

accept review where the Court of Appeals looked beyond the trial court's findings of fact to affirm, in conflict with its decision in *State v. Ramirez*?[1]

3. Should this Court grant review where officers failed to inform Mr. Greenhalgh of his right to additional testing in violation of RCW 46.20.308?

4. Should this Court grant review where prosecutorial misconduct denied Mr. Greenhalgh his right to a fair trial?

C. STATEMENT OF THE CASE

Adrian Greenhalgh attended a concert with friends and later drove two friends and his brother, Antwon Greenhalgh,[2] to Silver Dollar Casino. RP 364, 366, 370. The men ate at the casino and left shortly after 4:00 a.m. RP 182, 371. The men did not drink alcohol at the casino because "last call" had occurred several hours earlier. RP 182.

Surveillance video from the casino shows the four men leaving the casino and returning to their car. Ex. 1 at 4:15:34. Shortly after the

[1] 190 Wn. App. 731, 733, 359 P.3d 929 (2015).

[2] Antwon Greenhalgh is referred to as Antwon throughout this petition for purposes of clarity only. No disrespect is intended.

men got in the car, a second car pulled up next to them. Ex. 1 at 4:20:38. One of Mr. Greenhalgh's friends, Lovely Child James Manuel, got out to speak with the men in the second car. Ex. 1 at 4:21:53. The second car left, but the surveillance video shows that one individual may have been left behind. Ex. 1 at 4:23:40.

A short time later, Mr. Greenhalgh pulled out of the parking lot. Ex. 1 at 4:28:27. However, he quickly realized he was unfit to drive and stopped the car. RP 343. A man, who appeared to know Mr. Manuel, asked for a ride home, and everyone agreed the man should drive. RP 344, 376. Unfortunately, the man immediately ran the car into a telephone pole and fled the scene of the accident. RP 347, 383. Mr. Manuel suffered a severe head injury in the crash. RP 169.

When the casino shift manager approached the car, Mr. Greenhalgh was sitting in the front driver's seat, attempting to restart the car in order to coast it back to the parking lot. RP 184, 383. However, no witnesses testified that Mr. Greenhalgh was driving at the time the car crashed into the telephone pole. Mr. Greenhalgh's blood alcohol level was found to be 0.12 three hours after the accident occurred. CP 314.

The jury convicted Mr. Greenhalgh of vehicular assault. CP 24. At sentencing, the court determined Mr. Greenhalgh had an offender score of 9 and specified the criminal history it used to calculate this score. CP 62. Based on an offender score of 9, the trial court sentenced Mr. Greenhalgh to the top of the standard range, imposing a total of 84 months imprisonment. CP 59. It also ordered Mr. Greenhalgh to pay $113,648.73 in restitution. CP 58.

The Court of Appeals affirmed. Slip Op. at 12.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review because the State did not prove Mr. Greenhalgh committed vehicular assault beyond a reasonable doubt.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. IV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

"It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." *State v. Huber*, 129 Wn. App. 499, 501, 119 P.3d 388 (2005) (quoting *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974)). In order to sustain a conviction, the State must prove the defendant was the actor. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986) (*citing State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951)).

Our courts' discussion of corpus delicti in criminal driving cases underscores the importance of establishing the identity of the driver in order to prove that a crime actually occurred. Typically, for the State to establish the corpus delicti of a crime, the State need only show that an injury or loss occurred and someone's criminal act caused that injury or loss. *Corbett*, 106 Wn.2d at 574. However, when "the fact that a crime occurred cannot be established without the identification of a particular person," the identity of the person must be established as part of the corpus delicti. *State v. Solomon*, 73 Wn. App. 724, 870 P.2d 1019 (1994); *see also State v. Hamrick*, 19 Wn. App. 417, 419, 576 P.2d 912 (1978).

Here, the State did not prove beyond a reasonable doubt that Mr. Greenhalgh was driving the car at the time of the crash. Surveillance video of the casino parking lot shows Mr. Greenhalgh get into the car and pull out of the lot. Ex. 1 at 4:24:03, 4:28:42. By the time the surveillance camera focused on the site of the accident, multiple individuals were out of the car. Ex. 1 at 4:31:57. Robert Nero, the casino shift manager, testified that he saw Mr. Greenhalgh in the driver's seat when he approached the car after the crash. RP 184. He observed Mr. Greenhalgh put the key into the ignition and saw the dashboard indicators light up, but the car did not start. RP 182. However, Mr. Nero did not see who was driving at the time of the crash. RP 200.

The only evidence presented as to who was driving at the time of the crash was provided by Mr. Greenhalgh and his brother, Antwon. As Antwon explained to the jury, acquaintances of Mr. Manuel pulled up next to them before they left the casino parking lot and began talking to Mr. Manuel. RP 338. The surveillance video supports Antwon's recollection of the events. Ex. 1 at 4:21:53.

These individuals left, but the surveillance video shows one person from the car may have been left behind. Ex. 1 at 4:23:40.

Antwon described how Mr. Greenhalgh narrowly missed hitting an electric meter while pulling out of the parking lot and immediately stopped the car. RP 341. Mr. Greenhalgh got out of the car to vomit, and a man who Mr. Manuel had been yelling to from the car before it stopped came over and asked for a ride home. RP 343. Mr. Manuel appeared to know this man and suggested the man drive. RP 343. Given that neither Mr. Greenhalgh nor Antwon felt fit to drive, Antwon agreed. RP 344. Mr. Greenhalgh returned to the car and sat in the back seat. RP 344.

Unfortunately, the man began swerving almost immediately and quickly ran into the telephone pole. RP 345. After the accident Mr. Greenhalgh left the scene and ran to get help. RP 347.

Mr. Greenhalgh's recollection of the events was similar to his brother's, and he explained that immediately after the accident he got out of the car and assessed the damage with the driver. RP 383. The driver fled the scene but left the keys behind, which Mr. Greenhalgh used to try and restart the car. RP 383. Mr. Greenhalgh believed that if he could start the car, he could coast back to the casino parking lot and get out of the way of traffic. RP 383. However, once he realized Mr. Manuel was badly injured, he ran to get assistance. RP 384. By the

time Mr. Greenhalgh returned to the car, the police had arrived. RP 219.

The State relied on the fact Mr. Greenhalgh was observed driving the car before the crash, and tried to move the car after the crash, to argue he was driving during the accident. RP 430. While the Court of Appeals noted the State is permitted to rely on circumstantial evidence, inferences based on such evidence "must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318, 325 (2013) (*citing Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911)); *see* Slip Op. at 6. The State's evidence in this case was merely speculative.

The only eyewitness testimony presented at trial showed Mr. Greenhalgh was not the driver of the vehicle at the time of the accident. The State's speculative assertions, that Mr. Greenhalgh must have been the driver because he was seen in the car before and after the accident, did not provide a basis upon which a rational trial of fact could have found, beyond a reasonable doubt, that Mr. Greenhalgh was driving the car at the time of the accident. This Court should grant review.

2. This Court should grant review because the trial court's findings of fact do not support Mr. Greenhalgh's offender score.

In *State v. Ramirez,* the Court of Appeals held that where a trial court's findings of fact do not support the offender score, reversal and remand for resentencing is required. 190 Wn. App. 731, 733, 359 P.3d 929 (2015). Here, the court's findings, as provided in "Appendix B" of the judgment and sentence, do not support an offender score of 9 because, according to the court's limited findings, several of the offenses wash out. CP 62. Reversal and remand for resentencing is therefore required under *Ramirez*.

The Court of Appeals determined *Ramirez* is distinguishable because in that case, the court's findings did not support the offender score even without considering the wash out provisions of RCW 9.94A.525. Slip Op. at 9. But the court's holding in *Ramirez* was not limited by *how* the trial court's findings failed to support the offender score. *Ramirez,* 190 Wn. App. 734. The court simply held that reversal is required where the findings do not. *Id*. In addition, the court suggested the wash out provisions were at issue in that case when it noted the earliest conviction had a sentencing date of 1996, whereas

Mr. Ramirez faced sentencing for the following two convictions 11 years later, in 2007. *Id*.

The State argued, as it did in *Ramirez*, that it relied on additional convictions, not contained within the findings, to obtain the offender score of 9. Resp. Br. at 15; *Ramirez*, 190 Wn. App. at 734 ("The State points to three additional misdemeanor convictions to explain how it calculated the offender score of 7."). But such a claim is irrelevant, because the court's findings of fact alone must support the offender score. *Ramirez*, 190 Wn. App. at 733.

The Court of Appeals' opinion conflicts with *Ramirez* because in Mr. Greenhalgh's case the court looked beyond the findings of fact to affirm. Slip Op. at 10. It held the trial court's oral comments were "inconsistent" with Mr. Greenhalgh having spent five years in the community without being convicted of a crime and that it was free to affirm on any basis supported by the record. Slip Op. at 10. But "[a] court's oral opinion is not a finding of fact." *State v. Hescock*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999) (citing *State v. Reynolds*, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996)). The court's oral statements were not incorporated into Appendix B and may not be

relied upon to find support for Mr. Greenhalgh's offender score under *Ramirez*.

The plain language of RCW 9.94A.525(c) directs that prior offenses "shall not be included in the offender score if, since the last date of release from confinement… the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction." *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent"). The term "shall" indicates a mandatory duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

The trial court was required to make the necessary findings that Mr. Greenhalgh had not spent five crime-free years from the date of release from confinement to the date of the next offense, pursuant to RCW 9.94A.525(2)(c), in order to include all of the convictions listed in Appendix B in Mr. Greenhalgh's offender score. Instead, the court's limited findings indicate that several of the convictions wash out. CP 62.

The Court of Appeals opinion finding Mr. Greenhalgh's offender score was properly calculated conflicts with its decision is *Ramirez* and this Court should accept review. RAP 13.4(b)(2).

3. Review should be accepted because the officers failed to inform Mr. Greenhalgh of his rights under RCW 46.20.308.

As explained in Mr. Greenhalgh's Statement of Additional Grounds for Review, he was denied his rights under RCW 46.20.308 when the officers failed to "failed to inform him of his right to additional tests by a professional of his choosing." *See State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980); *State v. Morales*, 173 Wn.2d 560, 269 P.3d 263 (2012). This statutory warning implicates constitutional issues. *Morales*, 173 Wn.2d at 568; U.S. Const. amends. IV, V, XIV; Const. art. I, §§ 3, 9.

4. Review should be accepted because prosecutorial misconduct denied Mr. Greenhalgh his constitutional right to a fair trial.

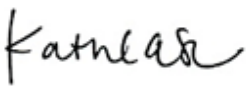
As further explained in Mr. Greenhalgh's Statement of Additional Grounds for Review, his constitutional right to a fair trial was violated by the prosecutor's misconduct. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

E. CONCLUSION

For all of the reasons stated above, this Court should grant review of the Court of Appeals opinion affirming Adrian Greenhalgh's conviction.

DATED this 16th day of May, 2018.

Respectfully submitted,



_____

Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

APPENDIX

COURT OF APPEALS, DIVISION I OPINION

April 16, 2018

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

STATE OF WASHINGTON, Respondent, v. ADRIAN DORELL GREENHALGH, Appellant.	No. 75904-3-I UNPUBLISHED OPINION FILED: April 16, 2018

VERELLEN, J. — The State charged Adrian Greenhalgh with vehicular assault. A jury found Greenhalgh guilty as charged, and the court imposed an 84-month standard range sentence.

Greenhalgh challenges the sufficiency of the evidence supporting his conviction. But viewed in the light most favorable to the State, there was sufficient evidence that he drove under the influence of intoxicating liquor and caused substantial bodily harm to another.

The sentencing court calculated Greenhalgh's offender score as 9. Because we may affirm on any basis supported by the record, and the judgment and sentence includes a list of his previous offenses, the court's offender score calculation is correct.

We affirm.

FACTS

On April 26, 2015, Adrian Greenhalgh, his brother Antwon,[1] and their friends Demarcus Simmons and Lovely Child "LC" Manuel went to a concert in downtown Seattle. They consumed alcohol throughout the night, and sometime around 2:30 a.m., they went to the Silver Dollar Casino in SeaTac to eat food and "sober up."[2] After approximately "an hour to an hour and a half,"[3] the casino shift manager asked the group to leave because they were being disruptive. Shortly after leaving the casino, Greenhalgh crashed a BMW sedan into a utility pole with Antwon, Simmons, and Manuel inside the car. Manuel suffered a serious brain injury and spent two months in the hospital.

The State charged Greenhalgh with vehicular assault, alleging that he drove while intoxicated and crashed into a utility pole, causing Manuel significant brain damage. A jury found Greenhalgh guilty, and the King County Superior Court imposed an 84-month standard range sentence.

Greenhalgh appeals.

---

[1] We refer to Antwon Greenhalgh throughout this opinion by his first name to avoid confusion.

[2] Report of Proceedings (Aug. 10, 2016) at 334.

[3] RP (Aug. 9, 2016) at 182.

ANALYSIS

I. Sufficiency of the Evidence

Greenhalgh argues the State did not prove he committed vehicular assault beyond a reasonable doubt.

A defendant's right to due process requires the State to prove each element of an offense beyond a reasonable doubt.[4] Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.[5] "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[6] "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence."[7] While inferences from the evidence must be based on more than speculation, the trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence.[8] We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of evidence.[9]

---

[4] State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995).

[5] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[6] Id.

[7] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

[8] State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

[9] Walton, 64 Wn. App. at 415-16.

A person commits vehicular assault when he or she operates a vehicle while under the influence of intoxicating liquor and causes substantial bodily harm to another.[10] The State must prove that the defendant's operation of a vehicle was a proximate cause of the victim's substantial bodily harm.

Here, there was sufficient evidence that Greenhalgh, who was intoxicated, drove the BMW into a utility pole, causing a severe brain injury to one of his passengers. Silver Dollar Casino surveillance cameras recorded the events immediately before and after the crash. The video showed the four men leaving the casino at 4:15 a.m. Greenhalgh and Antwon were both visibly intoxicated and had difficulty walking. The men spent nearly 15 minutes in the parking lot. When the sedan left the Casino parking lot, Greenhalgh was driving, Antwon was in the front passenger seat, Simmons was in the backseat behind the driver, and Manuel was in the backseat on the passenger side. Soon after the group left the casino in the early morning hours of April 27, 2015, Robert Nero, the casino's shift manager, learned a car had crashed outside. Nero went outside and saw that a BMW sedan had crashed into a utility pole. The surveillance video showed Nero going outside to investigate the crash within two minutes after Greenhalgh drove out of the parking lot. He approached the car and recognized the four men from the casino. Greenhalgh was in the driver's seat, trying to start the car. Nero saw Antwon in the passenger seat, reaching into his pants for what turned out to be a cellphone. Nero also noticed Simmons leaning into the backseat and shaking Manuel, who

---

[10] RCW 46.61.522(1)(b).

appeared unconscious. Greenhalgh got out of the car, and Nero told him that police were on the way.

King County Sheriff's Deputy Richard Dosio arrived and saw the crashed sedan, with smoke coming from the hood. No one was in either front seat, but Dosio saw Antwon get out of the rear passenger side, look at him, and put something in some bushes nearby. Dosio later found a liquor bottle in those bushes.

Nero identified Greenhalgh as the person in the driver's seat immediately following the crash, and deputies arrested him. Greenhalgh's blood was drawn nearly three hours after the crash, and his blood-alcohol level was 0.12. Drug recognition expert Deputy Mark Silverstein observed that Greenhalgh appeared intoxicated, his balance was poor, and he swayed approximately four inches from side to side.

Manuel sustained a serious brain injury and spent two months in the hospital. When he was discharged, he still had serious cognitive and memory problems and was unable to care for himself.

At trial, Greenhalgh and Antwon acknowledged they had consumed alcohol, and Greenhalgh drove the car when they left the casino. But they said that when Greenhalgh pulled out of the parking lot, he stopped the car, saw an acquaintance of Manuel's walking down the street, Manuel got out of the car to speak to the man, Greenhalgh got out of the car to vomit, and Manuel's acquaintance agreed to drive the car. According to Greenhalgh and Antwon, Greenhalgh got into the

backseat with Simmons and Manuel and the acquaintance got into the driver's seat, drove away erratically, and crashed into the pole. They testified that after the crash, the acquaintance immediately ran away. No one saw anyone other than Greenhalgh, Antwon, Simmons, and Manuel near the car after the crash. Greenhalgh found the car keys, got into the driver's seat and tried to start the car, to "coast the car back to the casino parking lot."[11] According to Greenhalgh, once he was unable to start the car, he walked across the street to a motel and asked an employee to call an ambulance. He also testified that he asked the motel employee for a room because "the vehicle was crashed," and the men would "need somewhere to go," but the motel employee said there was no vacancy.[12]

Considering the evidence as a whole, any rational fact-finder could conclude beyond a reasonable doubt that Greenhalgh was intoxicated and drove the car into the pole, injuring Manuel. The video evidence showed Greenhalgh in the driver's seat, driving out of the casino parking lot. The car crashed less than two minutes later. Within two minutes, Nero learned of the crash and walked outside to investigate. Within three minutes, Nero saw Greenhalgh in the driver's seat, trying to start the car's engine. Any rational juror could reasonably infer from the circumstantial evidence that Greenhalgh crashed the car.[13]

---

[11] RP (Aug. 10, 2016) at 383.

[12] RP (Aug. 10, 2016) at 387.

[13] Delmarter, 94 Wn.2d at 638 ("In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.").

Greenhalgh contends that this inference is speculative because no witness at trial testified to seeing Greenhalgh driving the car at the moment of impact. But his argument overlooks the compelling circumstantial evidence in the surveillance video which showed him stumbling away from the casino to the car, starting the car, driving away, and the short time that elapsed before crashing into the pole. Both Greenhalgh and Antwon admitted being intoxicated at the time. We do not disturb the fact-finder's credibility determinations on appeal. Additionally, Greenhalgh's testimony that he vomited and got into the backseat to sit with Simmons and Manuel is not credible because the photograph admitted at trial shows the backseat center armrest was down, making it impractical that three adult men fit into the backseat with the armrest down.

There was sufficient evidence Greenhalgh operated a vehicle under the influence of intoxicating liquor and caused substantial bodily harm to another.

II. Offender Score

Greenhalgh argues the court's findings of fact do not support its offender score calculation.

The State bears the burden of proving a defendant's criminal history by a preponderance of the evidence.[14]

To calculate an offender score, the sentencing court must "(1) identify all prior convictions; (2) eliminate those that wash out; (3) 'count' the prior convictions

---

[14] RCW 9.94A.500(1); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

that remain in order to arrive at an offender score."[15]

Here, the court's findings specifically incorporate appendix B of the judgment and sentence which lists Greenhalgh's convictions that contribute to his offender score. Greenhalgh's criminal history listed in appendix B reflects an offender score of 9. Each of his four adult felony convictions count as one point each, for a total of four points.[16] Greenhalgh's two adult misdemeanor DUI convictions score as one point each, for two additional points.[17] His seven juvenile convictions count as one half point each, for three and a half more points, rounded down to three.[18]

But Greenhalgh argues the findings do not establish that his class C felonies and serious traffic convictions prior to 2009 did not wash out under RCW 9.94A.525(2). His argument fails.

The Sentencing Reform Act of 1981 provides that an offender score is "the sum of points accrued under this section."[19] The statute then defines a "prior conviction" as "a conviction which exists before the date of sentencing for the offense for which the offender score is being computed."[20] The statute then

---

[15] State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

[16] RCW 9.94A.525(11); RCW 9.94A.030(26)(a).

[17] RCW 9.94A.525(11); RCW 9.94A.030(45)(a).

[18] RCW 9.94A.525(11).

[19] RCW 9.94A.525.

[20] RCW 9.94A.525(1).

provides that certain prior convictions will not be included in the offender score if certain conditions are met:

> (c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, *since the last date of release from confinement* (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, *the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.*
>
> (d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, *since the last date of release from confinement* (including full-time residential treatment) pursuant to a conviction, if any, or entry of judgment and sentence, *the offender spent five years in the community without committing any crime that subsequently results in a conviction.*[21]

Greenhalgh argues the sentencing court's findings of fact for the offender score calculation are incorrect because they do not address any potentially washed out convictions. He relies on State v. Ramirez, but there, the judgment and sentence itself, regardless of any wash out provisions, did not support the offender score.[22] Greenhalgh offers no compelling authority that Ramirez stands for a broader application.

---

[21] RCW 9.94A.525(2)(c), (d) (emphasis added).

[22] 190 Wn. App. 731, 734, 359 P.3d 929 (2015) ("Significantly, the State agrees that the criminal history as listed in appendix B does not support the offender score. The State points to three additional misdemeanor convictions to explain how it calculated the offender score of 7. Nonetheless, the State argues that it met its burden to prove criminal history because Ramirez 'affirmatively agreed in writing that his offender score was '7.' We reject this argument. The Supreme Court has emphasized "the need for an affirmative acknowledgement by the defendant of facts and information introduced for the purposes of sentencing" before the State will be excused from its burden of providing criminal history. There was no such affirmative acknowledgement in this case.")

Additionally, the record before the trial court was inconsistent with Greenhalgh having spent five years in the community without committing a crime.[23] He was incarcerated in 2009 for 65 months, and the current crime occurred in April 2015.

Greenhalgh suggests the score is incorrect because the sentencing court did not include the specific information regarding time served for each prior crime in its findings of fact. But "[w]e may affirm on any basis supported by the record,"[24] and here, the record is inconsistent with Greenhalgh spending "five years in the community without committing any crime that subsequently results in a conviction."[25]

We conclude the sentencing court properly calculated Greenhalgh's offender score.

---

[23] At sentencing, the court remarked: "And you have an offender's score of nine because you have a lengthy criminal history. You sit before me at about 28 years of age with an offender's score of nine, wherein in 2009 you were sentenced on, let's see, four different counts, the highest of which was 65 months. You were sentenced to the low end of the range for each of those charges, and that seems to be the only time you weren't getting in trouble. You get out, you're driving with a suspended license, which is another indication you can't follow a court's order, you can't stay out of trouble, no matter how many times we try and encourage you to realize that you're only harming yourself. You get stopped for a DUI, and then mere months later, this incident occurs." RP (Sept. 16, 2016) at 473.

[24] Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

[25] RCW 9.94A.525(2)(c), (d); see State v. Zamudio, 192 Wn. App. 503, 510-11, 368 P.3d 222 (2016) (reasoning that appellant's "suggestion that [his class C felonies] might have washed out is dubious at best").

III. Statement of Additional Grounds for Review

In a statement of additional grounds for review, Greenhalgh argues the State presented insufficient evidence, the police failed to inform him "of his right to additional tests by a professional of his choosing,"[26] and the State shifted the burden of proof in its closing argument.

i. Sufficiency of the Evidence

As addressed in Section I of this opinion, there was sufficient evidence for a rational fact-finder to convict Greenhalgh beyond a reasonable doubt.

ii. Informed Consent

Our Supreme Court has observed that officers "may obtain a blood alcohol test pursuant to a warrant regardless of the implied consent statute."[27] Police are required to notify individuals of their right to have separate testing when law enforcement chooses to exercise a blood draw through the implied consent statute, as opposed to a search warrant.[28] Here, it is undisputed that law enforcement obtained a warrant for Greenhalgh's blood, thus, his argument fails.

iii. Burden Shifting

A prosecutor may commit misconduct by arguing that the defense failed to present witnesses or explain the factual basis of the charges, or asserting the jury should find the defendant guilty because he did not present evidence to support

---

[26] Statement of Additional Grounds for Review at 1.

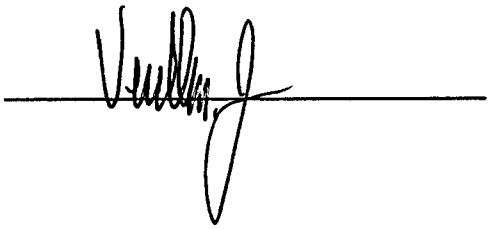
[27] City of Seattle v. St. John, 166 Wn.2d 941, 946, 215 P.3d 194 (2009).

[28] State v. Turpin, 94 Wn.2d 820, 824-25, 620 P.2d 990 (1980); State v. Morales, 173 Wn.2d 560, 569, 269 P.3d 263 (2012).

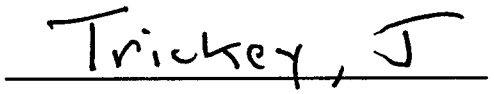
his theory of defense.[29] But merely mentioning "that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense."[30]

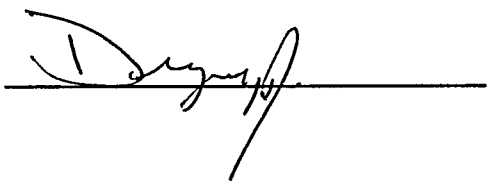
Here, Greenhalgh cites various portions of the State's closing argument in which it walked the jury through the jury instructions. The State did not argue the defense failed to present witnesses, or explain the factual basis of the charges, or ask the jury to find him guilty because he did not present evidence to support his theory of defense. His arguments fail.

We affirm.



WE CONCUR:





[29] State v. Jackson, 150 Wn. App. 877, 885, 209 P.3d 553 (2009).

[30] Id. at 885-86.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75904-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Amy Meckling, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[amy.meckling@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 16, 2018

WASHINGTON APPELLATE PROJECT

May 16, 2018 - 4:17 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75904-3
Appellate Court Case Title:	State of Washington, Respondent vs. Adrian Dorell Greenhalgh, Appellant
Superior Court Case Number:	15-1-03212-3

The following documents have been uploaded:

- 759043_Petition_for_Review_20180516161629D1328534_2544.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.051618-06.pdf

A copy of the uploaded files will be sent to:

- amy.meckling@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Kathleen A Shea - Email: kate@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180516161629D1328534