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NO. 63227-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LYNNELL GOUDEAU,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT PROPERLY GRANTED GOUDEAU'S RIGHT TO REPRESENT HIMSELF	6
2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 6.1(d) FINDINGS	16
3. THE TRIAL COURT PROPERLY DETERMINED GOUDEAU'S SENTENCING SCORE	18
a. Goudeau Waived Any Claim Of Same Criminal Conduct	18
b. The Prior Convictions Were Not The Same Criminal Conduct	20
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Faretta v. California, 422 U.S. 806,
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1976)..... 6

Washington State:

In re Shale, 160 Wn.2d 489,
158 P.3d 588 (2007)..... 19

State v. Breedlove, 79 Wn. App. 101,
900 P.2d 586 (1995)..... 7, 8

State v. Candeo-Astorga, 79 Wn. App. 518,
903 P.2d 500 (1995)..... 16

State v. Hillman, 66 Wn. App. 770,
832 P.2d 1369 (1992)..... 17

State v. Jackson, 150 Wn. App. 877,
209 P.3d 553 (2009)..... 19

State v. Lillard, 122 Wn. App. 422,
93 P.3d 969 (2004)..... 7

State v. Madsen, 168 Wn.2d 496,
229 P.3d 714 (2010)..... 7, 8, 14, 15

State v. McGary, 37 Wn. App. 856,
683 P.2d 1125 (1984)..... 17

State v. Silva, 108 Wn. App. 536,
31 P.3d 729 (2001)..... 12

State v. Smith, 68 Wn. App. 201,
842 P.2d 494 (1992)..... 17

<u>State v. Vermillion</u> , 112 Wn. App. 844, 51 P.3d 188 (2002).....	7
---	---

Constitutional Provisions

Federal:

U.S. Const. amend. VI	6
U.S. Const. amend. XIV	6

Washington State:

Const. art. I, § 22.....	6
--------------------------	---

Statutes

Washington State:

RCW 9.94A.525	19, 21
RCW 9.94A.535	20
RCW 9.94A.589	13, 20, 21
RCW 9A.20.021	12
RCW 9A.36.011	14

Rules and Regulations

Washington State:

CrR 6.1.....	16, 18
RAP 2.5.....	19

A. ISSUES

1. A trial court may not deny a defendant's unequivocal, timely, and voluntary request to proceed pro se, after the defendant is advised of the general consequences of representing himself. Before trial and after he was fully advised as to the seriousness of the charge, the possible maximum penalty, and the existence of technical procedural rules governing his case, Goudeau expressly told the trial court that he wanted to represent himself. Did the trial court properly honor Goudeau's constitutional right to proceed pro se?

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court during the appeal and are consistent with the trial court's oral ruling. Has the trial court properly submitted written findings in this case?

3. A defendant waives his claim that the trial court failed to find that his prior convictions were the "same criminal conduct" when he did not raise the issue at sentencing. Goudeau did not raise this issue below and the record establishes that these prior

convictions were not the same criminal conduct. Is the issue waived?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Lynnell Goudeau was charged by amended information with two counts of First Degree Assault, with deadly weapon enhancements, for intentionally stabbing two men with knives, nearly killing them. CP 5-6. Goudeau represented himself in a bench trial before the Honorable Michael Hayden. CP 34. On March 2, 2009, the trial court convicted him as charged and then imposed a standard range sentence. 6RP¹ 67-73; CP 39-43. Goudeau appeals his conviction and sentence. CP 35.

2. SUBSTANTIVE FACTS

Lynnell Goudeau told his attorney that he wanted to represent himself at trial. 1RP 4. On August 26, 2008, Goudeau

¹ The Verbatim Report of Proceedings will be referred to as listed in the appellant's brief: 1RP (08/26/08 and 01/22/09, pro se motions before Judge Carey and Armstrong); 2RP (02/19/09, trial before Judge Hayden); 3RP (02/23/09, trial before Judge Hayden); 4RP (02/25/09, trial before Judge Hayden); 5RP (02/26/09, trial before Judge Hayden); 6RP (03/02/09, trial before Judge Hayden); 7RP (03/20/09, sentencing before Judge Hayden).

appeared before the Honorable Cheryl Carey to move to proceed pro se. Id. Judge Carey recommended that Goudeau not represent himself and questioned Goudeau about his ability to try a case. 1RP 4-5. Goudeau said that his only legal training came from his high school studies and that he had never represented himself before in a criminal matter. 1RP 5.

Judge Carey asked the prosecutor about the current charges. Id. The prosecutor stated that Goudeau was facing two counts of First Degree Assault, with deadly weapon enhancements on each count. Id. The prosecutor explained how the First Degree Assault convictions and enhancements would run consecutively. 1RP 6. The prosecutor believed Goudeau had six prior sentencing points, resulting in a standard range of 162 to 216 months, plus a 48 months deadly weapon enhancement. 1RP 7. The court asked Goudeau if he knew how much time that was. Id. Goudeau said that represented 15 years and nine months in custody. Id. The court then asked what the maximum penalties were for the offense. Id. The prosecutor stated that Goudeau faced a maximum sentence of life and up to \$50,000. Id.

In response, Goudeau said that he wanted "to go pro se without any delay." 1RP 8. Goudeau recognized that if he

represented himself no judge or attorney would help him try his case. Id. Judge Carey proceeded to quiz Goudeau on ways that the rules of evidence would apply to his case and how he would be able to cite legal authority without court or attorney advisement. 1RP 9. Goudeau admitted that he did not understand the criminal rules of procedure. 1RP 10.

Goudeau explained that he did not want any more continuances in his case. 1RP 10. Judge Carey said the trial may still be delayed even if he was representing himself. Id. She asked if Goudeau was open to advice, and then advised him not to represent himself. 1RP 11. Goudeau said that he understood, and then accepted a new appointed attorney. Id. Judge Carey said that she understood Goudeau's frustrations, but said that he was making a good decision not to represent himself. Id.

On January 22, 2009, Goudeau again directed his attorney to schedule a motion so that Goudeau could proceed pro se. 1RP 17. Goudeau asked the Honorable Sharon Armstrong to allow him to proceed pro se. 1RP 17-18. Like Judge Carey, Judge Armstrong asked Goudeau if he had ever represented himself in court. Id. Goudeau said that he had not, but that he knew "that no judge can stop me from going pro se." 1RP 18.

Judge Armstrong agreed that Goudeau had a constitutional right to proceed pro se, but said that she wanted him to understand that the rules of criminal procedure would apply to him if he represented himself, and that he would be treated by the trial court as if he were an attorney. Id. She gave multiple examples of court procedures he would be expected to perform. Id. Goudeau said that he understood. Id. Judge Armstrong asked why he was taking the risk of proceeding pro se. Id. Goudeau said that he was tired of trial continuances and wanted to represent himself. Id. However, Goudeau clarified that he understood that it would not be guaranteed that he would get an earlier trial date if he represented himself. 1RP 19.

Judge Armstrong explained that First Degree Assault was a strike offense, that three strike offenses could result in life in prison, and thus the consequence of being convicted for this offense was enormous. 1RP 19. Goudeau's counsel and the prosecutor both indicated their preference that Goudeau remain represented. 1RP 19-20. The prosecutor referenced the fact that Goudeau had previously been earlier evaluated for competency by Western State Hospital. 1RP 20-21.

Judge Armstrong indicated that she was not going to direct Goudeau for further evaluation at Western State Hospital. 1RP 21. The Court told Goudeau that the trial date was going to remain at February 9, whether he was represented by counsel or himself. 1RP 22-23. Judge Armstrong asked Goudeau whether knowing that the trial date would stay the same meant that he still wanted to proceed pro se or whether instead he wanted to keep the benefit of an attorney at trial. 1RP 23. Goudeau affirmed that he wanted to proceed pro se. 1RP 23. The court again confirmed Goudeau's request to represent himself, and that he understood the risks of representing himself, before it granted Goudeau's motion and appointed a standby trial counsel for Goudeau. 1RP 24.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY GRANTED GOUDEAU'S RIGHT TO REPRESENT HIMSELF.

Both the federal and state constitutions guarantee a defendant the right to self-representation. U.S. Const. amends VI and XIV; Washington Const. art. I, § 22; see also Faretta v. California, 422 U.S. 806, 818-19, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1976). This right is so fundamental it is afforded despite the

potential detrimental impact on both the defendant and administration of justice. State v. Madsen, 168 Wn.2d 496, ___, 229 P.3d 714, 718 (2010).

While the right to proceed pro se is neither absolute or self-executing, an equivocal, timely, voluntary, knowing, and intelligent request to proceed pro se must be honored by the trial court. Id.; State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002) (citing State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995)).

The grounds for a court to deny a defendant's right to self-representation are limited to finding that "the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences." State v. Madsen, 168 Wn.2d at ___, 229 P.3d at 718. To determine whether the defendant has a general understanding of the consequences of representing himself, the court should conduct a colloquy on the record that includes a discussion about: (1) the seriousness of the charge, (2) the possible maximum penalty involved, and (3) the existence of technical procedural rules governing the presentation of the accused's defense. State v. Lillard, 122 Wn. App. 422, 427-30, 93 P.3d 969 (2004).

After advisement of these consequences of self-representation, a trial court's ruling on a motion to proceed pro se is reviewed for abuse of discretion. Breedlove, 79 Wn. App at 106. While the court may defer a pro se motion until a more appropriate hearing, a trial court can only deny a motion as untimely if it comes right before trial. Madsen, 168 Wn.2d at ___, 229 P.3d at 718. Thus, if a defendant's unequivocal pro se motion is made well before trial, and if it is not accompanied by a motion to continue the trial, it is a right as a matter of law. Id.

Goudeau's motion to proceed pro se was made unequivocally, in a timely manner, voluntarily, and with a general understanding of the consequences. First, the desire to represent himself was unequivocal. Goudeau explained that he "want[ed] to go pro se without any delay." 1RP 8. After this motion, Judge Carey expressly advised him not to represent himself, so he withdrew his motion. 1RP 11. Months later, Goudeau renewed his motion to represent himself. 1RP 17. He told the court that he now knew "that no judge can stop [him] from going pro se." 1RP 18. When Judge Armstrong asked him why he was taking the risk of going pro se, Goudeau said that he was "willing to represent myself. . . I want to represent myself." 1RP 18. After a full colloquy

with the court, Goudeau indicated that "I want to go pro se."

1RP 23. As such, Goudeau made an unequivocal demand to exercise his constitutional right to represent himself at trial.

Second, the unequivocal demand was timely. Goudeau did not request a continuance of the trial date. 1RP 17-19. The court clarified that the trial date would remain the same. 1RP 23. Since the request was made weeks before trial, and it was not accompanied by a request for a continuance, Goudeau's pro se request was timely made.

Third, Goudeau's desire to represent himself was voluntary. His counsel indicated to the court that Goudeau had asked to make the motion. 1RP 17. Despite his attorney and the prosecution's preference that Goudeau have counsel, Goudeau expressed his clear desire to represent himself. 1RP 21-22. The court did nothing to encourage Goudeau's motion to proceed pro se. 1RP 18-20. Goudeau's motion to represent himself was made on his own initiative.

Finally, Goudeau made his decision to proceed pro se with a general understanding of the consequences of self-representation. The trial court, through two different judges, engaged in the colloquy necessary to advise Goudeau of: (1) the seriousness of

the charge, (2) the possible maximum penalty involved, and (3) the existence of procedural rules governing the presentation of his defense.

Before granting Goudeau's motion, Judge Armstrong explained the seriousness of being convicted of First Degree Assault, a strike offense. The court clarified how "the consequence of being convicted of a strike offense is enormous." 1RP 19. The court further explained how one convicted of three strike offenses could ultimately face life in prison without the possibility of release. 1RP 19. Judge Carey had already explained to Goudeau that he was facing years in prison and "way too much time" in this case. 1RP 7-11. Goudeau said that he understood the potential consequences of his charges.

Judge Carey explained to Goudeau that the maximum penalty for this offense is life and up to \$50,000. 1RP 7. The court made sure that Goudeau had no questions about the maximum penalty he faced on the two counts of First Degree Assault. 1RP 6-7.

Both judges also spent significant time advising Goudeau as to the existence of court procedural rules at trial. The court asked if Goudeau knew anything about the rules of evidence and gave

examples of how complex the rules can be. 1RP 8- 9. The court also explained how the rules of criminal procedure would govern his trial, as well. 1RP 10. Goudeau said that he understood that the court rules of evidence and procedure applied to him, that a trial judge will grant him no breaks as a non-attorney, and that he will be responsible for being aware of any law that applies in the case. 1RP 18. The court expressed to Goudeau that if he represented himself no judge or attorney could advise Goudeau on how to try his case. 1RP 4, 7. Goudeau said he understood. 1RP 8.

After this advisement of the general consequences of representing himself, Goudeau made his unequivocal and timely motion to proceed pro se. Goudeau's motion was voluntarily made. The trial court did not abuse its discretion in granting Goudeau's motion to proceed pro se. Indeed, since the unequivocal motion was made timely, it was a constitutional right that could not be denied by the trial court, as a matter of law.

Goudeau now argues that his right to counsel was denied by the trial court when it granted his motion to proceed pro se. Specifically, Goudeau claims that his request to go pro se was made without properly advising him as to the maximum penalty he faced, because the trial court did not explain that First Degree

Assault was a Class A felony or tell him the correct standard sentencing range for his charges. Goudeau argues that without this information he received an insufficient colloquy as to the maximum penalty in this case.

Goudeau relies on State v. Silva, 108 Wn. App. 536, 31 P.3d 729 (2001), to argue that his decision was not made with knowledge of the maximum potential penalties in the case. However, the holding in Silva supports the fact that Goudeau was advised of the "maximum penalty" he faced. See id. at 541-42. In Silva, this Court held that the potential standard sentencing range is not sufficient to explain the "maximum penalty" that a defendant faces by representing himself. Id. Instead, the "maximum penalty" that needs to be advised in a colloquy is the statutory maximum sentence. Id. at 541-42. The trial court expressly advised Goudeau that the statutory maximum sentence in this case was life in prison and \$50,000. 1RP 7.

These stated maximum penalties are the potential sanctions associated with a Class A felony. RCW 9A.20.021(1)(a). Accordingly, there was no need to delineate First Degree Assault as a "Class A felony" in the colloquy. Such express designation of the class of felony has never been required by case law and is not

a unique consequence of representing oneself at trial, like needing to know about court rules and procedures. The court further explained the potential life sentence that could potentially result from a First Degree Assault conviction by advising Goudeau that this was a strike offense. Thus, by discussing the statutory maximum penalty, the court already fully advised Goudeau of the "maximum penalty" associated with this type of case.

Next, Goudeau argues that when the prosecutor provided the wrong sentencing range during the colloquy, this affected his desire to proceed pro se. His claim fails because the sentencing range is not a necessary part of the colloquy and, even if it were, Goudeau was warned of a higher sentencing range than he actually faced, making his argument non-persuasive.

The court inquired about the standard sentencing range to show the seriousness of the charge. 1RP 5-7. The prosecutor indicated that the First Degree Assault convictions would double² in this case, meaning that the sentences would run consecutive. Id. During the colloquy, the court asked the prosecutor how much time

² The transcript indicates the prosecutor said "The assault ones in this case would double [sic]." 1RP 6. Both parties agree what was likely said was the word, "double" instead of "double" and that appears to mean that the First Degree Assault charges, upon conviction, would run consecutively as serious violent offenses. Petitioner's Brief at 3 n.2; RCW 9.94A.589.

Goudeau was facing. Id. After explaining that a second count would run consecutively, the prosecutor stated that Goudeau had a sentencing score of six points, setting the standard sentencing range at 210 to 264 months for a First Degree Assault conviction with a deadly weapon enhancement. 1RP 6-7; RCW 9A.36.011. However, after trial, Goudeau was scored at only four points, meaning that his overall standard range was 153 to 195 months, with the second conviction running consecutively. CP 40; RCW 9A.36.011. Accordingly, the prosecutor overestimated Goudeau's standard range during the colloquy. This overestimating by the prosecutor made the case appear even more serious and invalidates Goudeau's claim that this standard range information made him more likely to want to represent himself.

Goudeau also claims that the court should have denied his motion to proceed pro se because he was not a skilled litigator, lacked understanding of the rules of evidence and rules of procedure, and had questionable mental stability.

However, after Goudeau filed his appeal, our Supreme Court issued State v. Madsen, which has limited a trial court's discretion to deny a defendant's motion to represent himself at trial. 168 Wn.2d at ___, 229 P.3d at 719-21. In Madsen, the trial court

improperly denied Madsen's explicit request to proceed pro se despite the fact that he failed to understand legal concepts, disrupted the court, and had his competency questioned earlier by counsel. Id. "Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself . . . outweighs any resulting difficulty in the administration of justice." Id. at 719.

"A court may not deny pro se status merely because the defendant is unfamiliar with legal rules. . ." Madsen, 168 Wn.2d at ___, 229 P.3d at 720. While incompetency may be a legitimate basis to deny a request to proceed pro se, a trial court may not defer or deny a request to proceed pro se while a defendant is deemed competent to stand trial. Id. Even earlier questions of the defendant's competency cannot form a basis later to deny a defendant's right to proceed pro se, if he is currently competent. Id. at 718. It is even improper for a trial court to appoint a new attorney to evaluate the competency of a defendant who wants to represent himself "because lawyers are not mental health experts." Id. If a court doubts the defendant's competency, the court must first follow the statutory requirements to evaluate competency professionally. Id. Thus, the colloquy may help explain the general

advantages and disadvantages of self-representation, but a criminal defendant's ability to represent himself has no bearing on whether he should be allowed to proceed pro se. Id. at 720; see State v. Candeo-Astorga, 79 Wn. App. 518, 524-25, 903 P.2d 500 (1995).

Goudeau was competent and ready to proceed to trial when the court granted Goudeau's motion to proceed pro se. As such, the court would have violated Goudeau's constitutional rights if, due to the possible challenges that Goudeau might have in trying his own case, the court had denied Goudeau's motion to represent himself. Accordingly, the trial court fully advised Goudeau of the general consequences of proceeding pro se and then properly granted Goudeau's motion.

2. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 6.1(d) FINDINGS.

Goudeau asserts that the trial court failed to enter Findings of Fact and Conclusions of Law as required by CrR 6.1(d). On April 15, 2010, the trial court entered the required written findings. Supp. CP __ (Sub 118, Written Findings of Fact); Supp. CP __ (Sub 120,

Motion to Clarify Findings, 04/26/10); Supp. CP __ (Sub 121, Order Clarifying Findings, 04/26/10).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984).

The trial court convicted Goudeau in a bench trial on March 2, 2009. 6RP 67-73. Goudeau filed his appeal on March 18, 2010. The trial court issued its written findings of fact related to this conviction on April 15, 2010. Supp. CP __ (Sub 118).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Goudeau's appeal. There is no resulting prejudice. Hillman, 66 Wn. App. at 774; McGary, 37 Wn. App. at 861.

Goudeau cannot establish unfairness or prejudice resulting from the delayed entry of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp. CP ___ (Sub 118). The language of the findings is consistent with the trial court's oral ruling. 6RP 67-73. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Supp. CP ___ (Sub 115, Trial Prosecutor Declaration).

In light of the above, Goudeau cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 6.1(d) findings of fact and conclusions of law are properly before this Court.

3. THE TRIAL COURT PROPERLY DETERMINED
GOUDEAU'S SENTENCING SCORE.

a. Goudeau Waived Any Claim Of Same Criminal
Conduct.

Goudeau claims that the trial court failed to consider on the record at sentencing whether his two prior Second Degree Assault

convictions were of the same criminal conduct, as he alleges was required by RCW 9.94A.525(5)(a)(i). Since Goudeau did not object to or raise this claim at sentencing, he has waived this issue on appeal.

Generally, "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). RCW 9.94A.525(5)(a)(i) directs the sentencing court to consider whether prior concurrent sentences were factually of the same criminal conduct, so that they should be counted as just prior offense. However, when a defendant fails to raise an issue before the sentencing court regarding the wrong offender score due to prior convictions factually being of the same criminal conduct, per RCW 9.94A.525(5)(a)(i), he has waived the right to argue the matter on appeal. State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (citing In re Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007)).

Here, Goudeau did not raise the issue of "same criminal conduct" at sentencing that he now challenges on appeal. In fact, he did not object to any aspect of the sentencing score. 7RP 2.

Since the matter was not challenged below, it may not be raised now on appeal.

b. The Prior Convictions Were Not The Same Criminal Conduct.

In the event this Court does not find that Goudeau waived his claim, the sentencing score would be the same since the 2006 Second Degree Assault convictions involved different victims and are thus not the "same criminal conduct," per RCW 9.94A.589.³

Goudeau claims on appeal that the trial court did not properly consider whether his two 2006 Second Degree Assault convictions under Pierce County case number 06-1-04232-0

³ (1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "*Same criminal conduct,*" as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a) (emphasis added).

constituted the "same criminal conduct," as directed by RCW 9.94A.525⁴. Multiple assault convictions cannot constitute the "same criminal conduct," however, if each assault conviction involved a different victim. RCW 9.94A.589(1)(a).

The trial court was advised as a part of the State's sentencing packet that Goudeau was jailed in Pierce County Jail in 2006 on four counts of Second Degree Assault for stabbing four victims. CP 3; Supp. CP __ (Sub 104). The prosecutor informed the court that these four counts of Second Degree Assault in Pierce County cause number 06-1-04232-0 were for "trying to stab four different people with a knife." CP 4; Supp. CP __ (Sub 104). Goudeau was later convicted of two counts of Second Degree

⁴ (5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. *The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.*

RCW 9.94A.525(5).

Assault under this Pierce County cause number. CP 45; Supp. CP __ (Sub 104). These two convictions of Second Degree Assault under that cause number formed the basis for Goudeau's scored criminal history. Id.

Since each count in this prior 2006 Pierce County case had a different victim, each conviction could not be the "same criminal conduct." As such, the record indicates that had the trial court considered this fact, the sentencing score would remain the same. There was no error in the court's sentence.

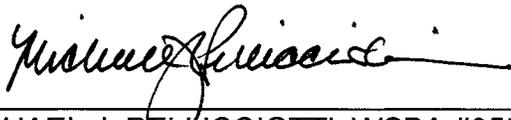
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Goudeau's conviction and sentence.

DATED this 8th day of June, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

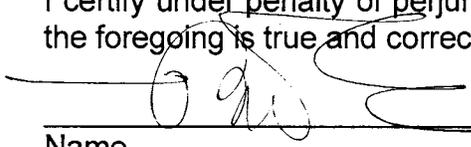
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen, Broman, & Koch, 1908 E. Madison St., Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. LYNNELL GOUDEAU, Cause No. 63227-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

07-08-10

Date