

NO. 66756-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY BRIAN WALKER,

Appellant.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE DOUGLASS NORTH

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether the definition of "true threat" is an element of felony harassment, such that the language defining the term must be included in the charging document and in the "to convict" jury instruction.

2. Whether the prosecutor committed misconduct in closing argument.

3. Whether the defendant's agreement as to his offender score and standard range bars review of his sentencing claim.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged with two counts for felony harassment. CP 1-2. He was convicted by a jury of a single count of felony harassment. CP 46-47. The defendant has nine prior felony convictions. CP 68. By agreement of the parties, the defendant's offender score was calculated as a six. 7RP<sup>1</sup> 4, 9; CP 63. The court imposed a standard range sentence of 29 months. CP 65.

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<sup>1</sup> The seven volume verbatim report of proceedings is cited as follows: 1RP--12/8/10, 2RP--12/9/10, 3RP--1/4/11, 4RP--1/5/11, 5RP--1/6/11, 6RP--1/7/11, and 7RP--2/18/11.

## 2. SUBSTANTIVE FACTS

Jason and Phui Cooper live in South Seattle next to the defendant, his girlfriend, her father, and two children. 4RP 13-16. Approximately a year before the charged incident, the defendant's family brought home a Chihuahua. 4RP 16. The dog was a problem, barking loudly at all hours of the night. 4RP 16-18, 32.

Jason (victim one) complained to the defendant and his girlfriend ten to twelve times about the dog barking during the night. 4RP 34. Although the interactions with the defendant were "friendly," Jason's complaints went unheeded. 4RP 35. The defendant would apologize, take the dog inside, but then the same thing would happen the next night. 4RP 35-36. Finally, getting no response to his complaints, Jason filed a complaint with animal control. 4RP 36. Jason had waited over a year to file a complaint because of his fear of the defendant after he had witnessed multiple fights between the defendant and his girlfriend. 4RP 37-38, 40.

The final straw occurred on June 28, 2010, when Jason was awakened at 1:30 in the morning by the defendant's dog. 4RP 40-41. Jason confronted the defendant's girlfriend and told her that he was going to call animal control. 4RP 41. He filed a report the

next morning. 4RP 42. The next contact Jason had with the defendant was a week later on July 4. 4RP 43.

In the early morning hours of July 4, Jason was awakened by the defendant banging on his door and yelling out "Fuck you mother fucker. Bitch as nigger. You little bitch. You don't like my dog, nigger...I'm going to kill you. I'm going to fuck you up."

4RP 45. In fear, Jason called 911. 4RP 50-51.

When officers arrived, the defendant was back in his house. 4RP 52. The defendant refused to come out of his house and proceeded to bombard the officers with obscenities, calling them all "bitches" and "mother fuckers." 4RP 75. The rest of the incident was caught on police videotape. See Exhibit 3; 4RP 94.

The defendant finally emerged from his house but he refused to cooperate with the officers as he was placed under arrest. 4RP 76-77. Officer Robert Cambronero was charged with transporting the defendant to the South Precinct. 4RP 97.

Because of the defendant's extremely hostile behavior, Officer Jacob Leenstra (victim two) was directed to follow Officer Cambronero in his patrol car. 4RP 97-98, 145. After driving just a few blocks, Officer Cambronero pulled over and called for an aid unit because the defendant was complaining that he was having

difficulty breathing and he kept faking that he was unconscious.

4RP 98, 148.

When aid units arrived, the defendant told them that Officer Leenstra had beaten him up. 4RP 99. Aid checked over the defendant and gave him a clean bill of health. 4RP 100. The defendant was then transported to the South Precinct. 4RP 149. However, instead of being taken out of the car and processed at the precinct, the decision was made to take the still volatile defendant straight to the King County Jail. 4RP 150. Officer Leenstra was ordered to ride with Officer Cambronero for safety reasons. 4RP 112, 150.

Once in the car, the defendant repeatedly threatened to kill Officer Leenstra. He called Officer Leenstra a "peckerwood," referring to a member of a white supremacist prison gang. 4RP 110. He bragged about how many guns he owned and said that he had been shot before. 4RP 109, 115. He threatened that when he got out of jail, he was going to hunt Officer Leenstra down and ambush him like several other officers who had been murdered recently. 4RP 116-17. He also said he was going to find out if Officer Leenstra had any family. 4RP 116. Officer Leenstra testified that he took the defendant's threats seriously. 4RP 117.

The defendant testified that he is an alcoholic who had been on the wagon for many months prior to July 4th. 4RP 165-66. However, according to the defendant, on July 3rd he went to a late night party at a motorcycle club and got drunk. 4RP 166; 5RP 6. At the club, he heard his girlfriend and her friends talking about how their men never stand up for them. 5RP 8. The defendant decided that he was going to talk to Jason--man to man--and tell him to only talk to him about problems with the dog. 5RP 8-9.

On the way home, the defendant hit a curb and damaged the wheel to his car causing it to make a loud noise as he drove home. 5RP 6. When he pulled up to his house and got out of the car he claims that he saw Jason and heard him say, "ah, not again," real loud. 5RP 7. The defendant then went next door to confront him. 5RP 8.

The defendant admits he was angry when he knocked on the door and that he called Jason a name because he would not open the door. 5RP 10. However, the defendant denied making any threats. 5RP 10.

A while later, after the defendant had returned home and just as he was putting on his pajamas, the police showed up. 5RP 10-11. The defendant claimed that he had no memory of what

happened from that point on and that he did not know he made any threatening statements until he was shown the videotape. 5RP 12.

Additional facts are included in the sections they pertain.

The defendant was convicted of felony harassment for the threats he made against Officer Leenstra. He was acquitted of felony harassment for the threats he made against Jason Cooper.

**C. ARGUMENT**

**1. THE TERM "TRUE THREAT" IS NOTHING MORE THAN A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME.**

The defendant contends that it is error not to include the following language in every charging document and "to convict" jury instruction involving a verbal threat:

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

He argues that this language is not merely definitional, but is an element of every criminal statute involving a verbal threat. This is inconsistent with existing case law. See e.g., State v. Johnston,

156 Wn.2d 355, 127 P.3d 707 (2006); State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010). The term "true threat" is a term of art used to describe the permissible scope of threat statutes for First Amendment purposes. The language describing what constitutes a true threat is definitional, no different from language used to define "intent," "recklessness" or "great bodily harm." This language need not be included in the charging document or the "to convict" instruction.

**a. The Charging Document And Jury Instructions.**

The State alleged by information that the defendant "knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Officer Leenstra, by threatening to kill Officer Leenstra, and the words or conduct did place said person in reasonable fear that the threat would be carried out." CP 1-2; RCW 9A.46.020.

The court gave the jury a "to convict" instruction that read in pertinent part:

To convict the defendant of the crime of felony harassment as charged in count II, each of the

following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 4, 2010, the defendant knowingly threatened to kill Jacob Leenstra immediately or in the future;
- (2) That the words or conduct of the defendant placed Jacob Leenstra in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the threat was made or received in the State of Washington.

CP 257; see also WPIC 36.07.02.

The court also gave the following definitional instruction:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

To do any act that is intended to harm substantially the person threatened or another with that person's health or safety.

*To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat rather than as something said in jest or idle talk.*

CP 59 (emphasis added); see also WPIC 2.24. The defendant proposed these same instructions. CP 35, 39.

**b. The Elements Of The Crime Of Harassment.**

A charging document is sufficient if it sets forth all elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). Jury instructions satisfy due process if the jury is "informed of all the elements of the offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted." State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). While a "to convict" instruction should contain all the essential elements of the crime, it "*need not contain all pertinent law such as definitions of terms.*" State v. Fisher, 165 Wn.2d 727, 754-55, 202 P.3d 937 (2009) (emphasis added).

As charged and convicted here, a person commits the crime of felony harassment if he knowingly threatens to kill immediately or in the future the person threatened, and the words or conduct place the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020. The statute sets out all the elements of the crime.

In defining the constitutional limits of the harassment statute, the Supreme Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d

36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Kilburn, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, at 44. The relevant question is whether a reasonable person in the defendant's position would foresee that, taken in context, a listener would interpret the statement as a serious threat. Kilburn, at 46. Here, the trial court gave an instruction incorporating that definition of "true threat." Because the instructions included all the elements in the "to convict" instruction, as well as a proper definitional instruction addressing First Amendment concerns, the defendant's argument fails.

This is consistent with Tellez, supra, and Atkins, supra, wherein the courts rejected the argument that the language defining a "true threat" must be charged in the information and included in the "to convict" instruction. See also State v. Sloan, 149 Wn. App.

736, 205 P.3d 172, rev. denied, 220 P.3d 783 (2009); State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008), rev'd. on other grounds, 169 Wn.2d 274 (2010). It is also consistent with this Court's decision in Johnston, supra.

Johnston was charged with threats to bomb under RCW 9A.01.160. At trial, Johnston proposed a definition of threat that included "true threat" language. The trial court refused to give the instruction. On appeal, Johnston challenged this decision. Johnston, 156 Wn.2d at 358, 364. Before the Supreme Court, Johnston and the State agreed that, for First Amendment purposes, the threats to bomb statute must be construed to limit its application to "true threats." Johnston, at 359, 363. The parties also agreed, and the Supreme Court concurred, that the jury instructions were erroneous because they did not define "true threat." Johnston, at 364, 366. This Court accordingly remanded the case, requiring that the jury be "instructed on the *meaning* of a true threat" on retrial. Johnston, at 366 (emphasis added).

In this case, the State does not dispute that it was required to prove that the defendant's threat was a "true threat." As instructed here, the jury was required to find beyond a reasonable doubt that the defendant "knowingly threatened to kill Jacob

Leenstra" and that the threat occurred "in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat." CP 57, 59. The defendant has cited no case, and the State has found none, holding that the language defining a "true threat" is a separate element that must be included in the charging document and the "to convict" jury instruction for felony harassment, or for any other crime that contains a threat element.<sup>2</sup> The defendant was properly charged and the jury was properly instructed on all the elements of the crime of felony harassment. The jury found beyond a reasonable doubt that his threat to kill Officer Jacob Leenstra was a "true threat."

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<sup>2</sup> The defendant's position is similar to that of a person charged with (for example) first-degree assault, which requires the intent to inflict "great bodily harm." See RCW 9A.36.011(1). The charging document and the "to convict" instruction must contain the statutory element of "great bodily harm," which will be defined for the jury as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." See WPIC 2.04, 35.04. See also State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) (generally a trial court must define technical words or expressions used in the jury instructions).

**2. THE DEFENDANT'S CLAIM OF MISCONDUCT IS NOT SUPPORTED BY THE LAW OR THE FACTS.**

The defendant claims the prosecutor committed such egregious misconduct that his conviction must be overturned and his complete failure to object below excused. The defendant's claim is not supported by the law or by the facts.

A defendant alleging prosecutorial misconduct must show (1) that the prosecuting attorney's conduct was improper and (2) that he was prejudiced thereby. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

In regards to the first requirement, it must be "clear and unmistakable" that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev'd on other grounds, 111 Wn.2d 641 (1985). It is the defendant who bears the heavy burden of establishing the impropriety of the prosecutor's conduct. State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984).

In regards to the second requirement, in order to sustain a claim of prosecutorial misconduct, a defendant must show that the misconduct had a prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Prejudice exists only where the defendant can prove that there is a substantial likelihood that the

misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Defense counsel's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by instruction to the jury. Fisher, 165 Wn.2d at 747.

**a. Allegation Number One.**

First, the defendant contends that it is improper for a prosecutor to argue that a defendant has tailored his testimony to the testimony of other witnesses he has observed testify, and that the prosecutor did so here. The defendant is incorrect on both fronts, and in any event, the issue has been waived.

In discussing factors the jury could use to gauge the credibility of the witnesses--including the defendant, the prosecutor stated the following:

So you have to think about what is their memory?  
What is it affected by? Well, everyone there that night was sober except for one person: The defendant. Everyone there seems to have a pretty clear memory of what happened except the defendant. What bias or motive does any of the officers have? They don't have any. They don't know the defendant from Adam.

The Coopers we talked about what motive do they have. The only person with a motive to ***tailor*** their testimony is the defendant."

5RP 65 (emphasis added). In rebuttal, the prosecutor discussed the inconsistencies between the defendant's testimony during direct examination and his testimony during cross-examination.

Specifically, the prosecutor explained that the defendant first said he worked every night so he never had contact with Jason Cooper at night, but then he later said he drank excessively every night.

5RP 88. When he realized "[t]his is a big inconsistency. I've got to figure out how to ***tailor*** my testimony. So, yeah, I go to work drunk. I go to work drunk." 5RP 88 (emphasis added).

Twelve years ago, the United States Supreme Court ruled in Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), that defendants who testify at trial can be treated just like any other witness who testifies; their credibility can be called into question for all the same reasons as any other witness. In other words, argument that a defendant's testimony is less credible because he had the opportunity to hear the other witnesses and tailor his testimony accordingly "does not infringe upon any rights guaranteed by the United States Constitution." State v. Miller, 110 Wn. App. 283, 40 P.3d 692 (citing Portuondo, supra), rev denied,

147 Wn.2d 1011 (2002). Subsequently, the defense bar attempted to circumvent the decision in Portuondo by claiming that the same arguments held valid under the United States Constitution were not valid under the Washington State Constitution. However, the Washington Supreme Court rejected this argument in State v. Martin, 171 Wn.2d 521, 252 P.3d 878 (2011).

In Martin, the Court was asked to "decide whether the protections afforded a defendant by article I, section 22 prohibit a prosecutor from indicating, via questioning, that a defendant has tailored his or her testimony to align with witness statements, police reports, and testimony from other witnesses at trial." Martin, 171 Wn.2d at 533. The Court rejected the defense argument, stating:

[W]e see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

Martin, at 534. Thus, under the current state of the law, it is perfectly appropriate for a prosecutor to argue that a defendant's

credibility may be based on his ability to tailor his testimony to the testimony of the other witnesses he has observed. A prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, rev. denied, 100 Wn.2d 1008 (1983). The defendant cites no case to the contrary.<sup>3</sup> Thus, his argument is incorrect under the law. Additionally, with no contravening law, the defendant's failure to object below bars review.

Failure to object to improper argument constitutes waiver unless the improper argument was so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wn.2d 24, 85-87, 882 P.2d 747 (1994). While the defendant may seek a different rule of law contrary to Portuondo, a prosecutor's argument cannot be said to have been "flagrant and

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<sup>3</sup> This is consistent with the United States Supreme Court's finding that there is no evidence that any State has ever attempted to affirmatively forbade comments on a defendant's opportunity to tailor his testimony to the testimony provided by other witnesses. See Portuondo, 529 U.S. at 65-67; see also State v. Hollister, 157 Wash. 4, 7, 288 P. 249 (1930) ("A defendant in a cause has no special privileges when he offers himself as a witness in his own behalf. His credit as a witness may be tested and his testimony impeached in the same manner and to the same extent as that of any other witness. While under the Constitution he cannot be compelled to give evidence against himself, it is not to violate the rule to ask him concerning his connection with other offenses similar to that for which he is on trial.").

ill-intentioned" when the argument comports with existing law. In short, this issue has been waived.

Finally, the defendant's claim is not supported by the facts. While the prosecutor used the term "tailor" in regards to the defendant's testimony--presumably why the defendant raised this issue, a full review of closing argument shows that the prosecutor did not argue that the defendant tailored his testimony based on the testimony of the other witnesses he had already observed. Rather, in arguing that the defendant tailored his testimony, the prosecutor was specifically referring to how his testimony changed from direct examination to cross-examination. This does not implicate the constitutional concerns that were contested in Portuondo and Martin, the right of the defendant to be present at trial and the argument that the prosecutor was using the right against him. The defendant's factual argument that the prosecutor was making such an improper argument is not supported by the record.

**b. Allegation Number Two.**

The defendant also claims that the prosecutor committed misconduct by misstating the law, that she impermissibly argued that in order to acquit the defendant the jury was required to find

that the State's witnesses were lying. The defendant is correct that it is an improper statement of the law to create a false dichotomy; to tell the jury that in order to acquit the defendant the jury is required to find that the State's witnesses are lying. See State v. Wright, 76 Wn. App. 811, 824, 888 P.2d 1214 (1995) (jurors do not need to "completely disbelieve" the State's witnesses in order to acquit a defendant, all that they need is to entertain a reasonable doubt that a defendant committed the crime); State v. Casteneda-Perez, 61 Wn. App. 354, 359, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991) (improper to equate an acquittal with a finding that witnesses must have lied), contrast, State v. Coleman, 74 Wn. App. 835, 838, 876 P.2d 458, rev. denied, 125 Wn.2d 1017 (1994) (a prosecutor does not commit misconduct by arguing that the jurors would have to disregard the evidence in order to reach a certain result).

Here, the defendant asserts the prosecutor made an improper argument simply by arguing that the State's witnesses were credible while there was reason to doubt the defendant's credibility. This is not improper--it is exactly what closing argument is for. The prosecutor never said that the only way they could

acquit the defendant was to find that the State's witnesses were lying.

Wright, supra, proves a good example that highlights the failures of the defendant's argument. In Wright, "the prosecutor argued that, to *believe* (as opposed to acquit) Wright, the jury would need to believe that the State's witnesses were *mistaken*." Wright, 76 Wn. App. at 824 (emphasis in original). This type of argument, the Court held, "is not objectionable and does not constitute misconduct." Id. It is "fundamentally different," the Court said, than arguing that to acquit a defendant the jury "must conclude" that the State's witnesses are lying. Id. The prosecutor here did nothing more than argue the credibility of the witnesses--including the defendant. She did not misstate the law or set up a false dichotomy. The defendant's claim to the contrary is not supported by the record and is not well taken.

Further, the defendant's failure to object bars review. If counsel believed the State's argument misstated the law, a simple objection and curative instruction would have rectified the problem. See Russell, 125 Wn.2d at 85-87 (where a curative instruction would have corrected the problem, the failure to object bars review). And finally, the defendant cannot prove prejudice. The

count on which the jury convicted did not depend on the credibility of the defendant--it was captured on videotape.

**3. THE DEFENDANT'S CLAIM THAT HE MUST BE RESENTENCED IS NOT PROPERLY BEFORE THIS COURT.**

The defendant contends that the trial court did not properly calculate his offender score. This claim should be rejected. The defendant agreed to the calculation of his offender score and thus the defendant's claim is not properly before the court.

The defendant has nine prior felony convictions listed as follows:

2002 Third-Degree Assault from King County

1992 Residential Burglary from King County

1992 VUCSA Possession with Intent to Deliver from King County

1990 VUCSA Possession with Intent to Deliver from King County

1988 Felon in Possession of a Firearm from King County

1983 First Degree Robbery from Hawaii

1983 Kidnapping from Hawaii

1983 Terroristic Threats from Hawaii

1981 Taking Motor Vehicle Without Permission from  
California

CP 68.

A defendant's offender score is made up of the sum of points accrued for prior felony convictions as dictated by the rules of RCW 9.94A.525. Out-of-state convictions shall be classified according to the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3). In the case of multiple prior convictions, each conviction is counted separately except under certain limited enumerated exceptions. RCW 9.94A.525(5)(a). One of these exceptions concerns pre-1986 convictions. In the case of multiple prior conviction for offenses committed before July 1, 1986, all adult convictions served concurrently are counted as one offense. RCW 9.94A.525(5)(a)(ii).

At sentencing, the parties agreed that the defendant's offender score was a six. 7RP 4, 9. They agreed that the defendant's four out-of-state felony convictions counts as a single point for purposes of his offender score. 4RP 4. The parties had determined that all four of these convictions were served concurrently. Id. Because the offenses occurred prior to July 1, 1986, and they were served concurrently, under RCW

9.94A.525(5)(a)(ii) the four convictions counted as only a single point. With five prior felony offenses from King County, and the one point for the four out-of-state convictions, the parties agreed the defendant's offender score was a six and his standard range 22 to 29 months. 7RP 4, 9; CP 63, 68. The defendant asked for a DOSA (drug offense sentence alternative) or "low end of the range, which should be the 22 months." 7RP 9. The court imposed a standard range sentence of 29 months. 7RP 17.

For the first time on appeal, the defendant claims that the trial court was required to determine the comparability of his out-of-state convictions.<sup>4</sup> This issue has been waived.

The Supreme Court has held that it is "not a violation of due process for a sentencing court to include prior out-of-state convictions the defendant had affirmatively acknowledged existed and were comparable." State v. Mendoza, 165 Wn.2d 913, 927-28, 205 P.3d 113 (2009) (citing State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004)). "Once a defendant acknowledges the

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<sup>4</sup> It should be noted that because his four out-of-state offenses counted as a single point, to have any effect on his offender score, there must be no comparable Washington felony offense to any one of his four out-of-state offenses. Any single comparable offense would count as one point and his offender score would remain the same.

existence and comparability of prior convictions, no further proof is necessary." Id. In situations such as exists here, "[a] defendant cannot challenge his sentence for the first time on appeal unless he shows that an error of fact or law exists within the four corners of the sentence." Id.

The record here is clear, the parties discussed how to count the defendant's offender score and came to an agreement as to the defendant's offender score and standard range. The defendant cannot show from the four corners of the sentence that his offender score was anything other than as calculated. Thus, this issue is not properly before the court.

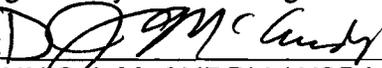
**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 4 day of January, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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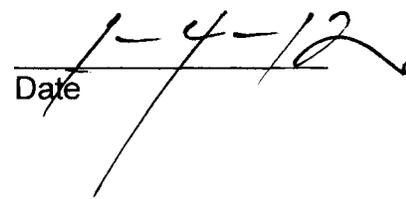
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. WALKER, Cause No. 66756-4-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



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Date