

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

STATE OF WASHINGTON,	)	
	)	NO. 67413-7-I
Plaintiff,	)	
	)	STATEMENT OF ADDITIONAL
vs.	)	GROUND FOR REVIEW
	)	
MARCELIS KING,	)	
	)	
Appellant,	)	
	)	

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I, Macelis King, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief.

I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

**Additional Ground 1**

This Court is asked to review the appellants contention the trial court has entered an illegal or erroneous sentence in this matter. e.g., Moen, 129 Wn.2d at 543-48 (imposition of a criminal penalty

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not in compliance with sentencing statutes may be addressed for the first time on appeal). This Court has the power and duty to correct the error upon its discovery even where the parties not only failed to object but agreed with the sentencing judge, overruled in part by 137 Wn.2d 478; Moen, 129 Wn.2d at 545; State v. Roche, 75 Wn.App. 500, 878 P.2d 497 (1994) ("challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"). State v. Paine, 69 Wn.App. 873, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence that error can be addressed for the first time on appeal). see also State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) ("allowing the State to bring a motion to amend an erroneous sentence nearly two years after sentencing under CrR 7.8; State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997) (improperly calculated standard range is a legal error subject to review).

The justification for the rule is that it tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Paine, 69 Wn.App. at 884.

There are three principles that guide review of a challenge to an offender score. (1) a sentence in excess of statutory authority is subject to collateral attack (2) a sentence is excess if based upon a miscalculated offender score (upward departure) and (3) a defendant cannot agree to punishment in excess of that which the legislature has established. Goodwin, 146 Wn.2d 361, 50 P.3d 618 (2002).

Here, because the sentence imposed is based upon a miscalculation of Kings offender score (upward departure), the sentence imposed is in excess of the trial courts statutory authority.

Whether the sentencing court has exceeded its authority under the Sentencing Reform Act of 1981, chapter 9.94ARCW (SRA), is an issue of law. Murray, 118 Wn.App. 518, 77 P.3d 1188 (2003).

Under Washington State Law an offender score is calculated based on a defendants criminal history. RCW 9.94A.525, RCW 9.94A.589(1)), RCW 9.94A.030. For the purposes of determining an offenders criminal history category the term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by a guilty plea, trial, or plea of nolo contendere for conduct not part of the instant offense. See Am. Jur.2d Criminal Law Part One General Principle/ XV, Judgement and Sentence [§§ 858-871]/2 Federal Sentencing Guidelines [§§ 839-883], Determining Sentencing Range [§§ 858-871], Determining Criminal History [§§ 866-871] § 867. "a prior conviction is a conviction which exist before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed other current offenses within the meaning of RCW 9.94A.589". see RCW 9.94A.525. Criminal history is proven by certified copies of an offenders judgment and sentence or comparable evidence if the certified copy of the judgment and sentence are are unavailable. see Mendoza, 139 Wn.App. 693, 162 P.3d 439.

Here, at the time of sentencing King's adult and juvenile criminal history consisted of 4 adult felony convictions. Appendix B J&S at 2.2. A review of the history shows Kings unlawful possession of a firearm and controlled substance violation convictions washes because King did not commit another felony well over five years. see Appendix B J&S at 2.2; e.g., Villegas, 72 Wn.App. at 38; RCW 9.94A.360(2). Therefore at the time of sentencing King's offender score based upon his criminal history should have computed to a 2.

KINGS CURRENT OFFENSES ENCOMPASSED  
THE SAME CRIMINAL CONDUCT

King also argues that his offender score is incorrect because the trial court did not consider his two counts of assault in the second degree and his two counts of felony harassment to be "same criminal conduct." The question of same criminal conduct is a matter within the trial courts discretion State v. Anderson, 92 Wn.App. 54, 960 P.2d 975. A review of the trial courts determination of what constitutes same criminal conduct is for abuse of discretion or misapplication of the law. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993).

Under the law in effect at the time of King's conviction, multiple offenses were considered "the same criminal conduct" for sentencing purposes if they involved the same criminal intent, were committed at the same time and place, and involved the same victim. RCW 9.94A.589(1)(a). King contends that counts 1 and 3 meets this criteria and counts 2 and 4 meets this criteria and should therefore have been counted together in the offender score as a single offense.

Here, the trial court did not make a determination one way or the other as to whether these crimes meet this criteria. see Appendix B J&S at 2.1(i) and nor was there any argument advanced by Kings appointed counsel at the sentencing hearing therefore there is no analysis by the trial court in the record as to whether these crimes constitute same criminal conduct for sentencing purposes, however there is sufficient evidence in the trial court record to sustain a finding that the mutiple assaults and harassments should be treated as one offense each for sentencing purposes because Kings alleged criminal acts happened over a period of maybe ten minutes. The testimony

from victim Rosier was King stood outside his car window and pulled out a gun and played with it. 6RP35; Rosier also stated that he thought he was going to shoot them and refused to let them leave.

Testimony from victim Johnson was she dialed 911 on her cell phone but did not talk to the operator. 6RP186; Both Johnson and Rosier claimed they were afraid they were going to die during this incident. 6RP33,184; here, King's criminal intent did not change and nor did he pause, reflect, or either cease his criminal activity or proceed to commit a further criminal act, so his crimes were not sequential, but rather simultaneous or continuous. Moreover, the four counts occurred over approximately 10 minutes so it is unlikely that King formed an independent criminal intent.

While the trial court should have done the analysis on the record, the trial record is sufficient to sustain that Kings assault and harassment of Rosier are the same criminal conduct and Kings assault and harassment of Johnson are the same criminal conduct for sentencing purpose.

### Additional Ground 2

The evidence used to convict King of count V unlawful possession of a firearm in the first degree was insufficient under United States Supreme Court holdings in Jackson.

King challenges the sufficiency of the evidence relied upon by the trial court to find that [h]e had dominion and control over the vehicle where the firearm was found. Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) (quoting) *Jackson v. Virginia*, 442 U.S. 307, 61 L.Ed.2d 560 (1979). A claim of sufficiency admits the truth of the States evidence and all inferences that can reasonably be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). As the Supreme Court noted, "it is critical that our criminal law not be diluted by a standard of proof that

leaves the public to wonder whether innocent persons are being condemned. In re Winship, 398 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "The reasonable doubt standard is indispensable for it imposes on the trier of fact necessity of reaching a subjective state of certitude on the facts in issue." State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (1995) (quoting) Winship, 397 U.S. at 364.

There can be no doubt from the facts and evidence in the record that actual possession of the firearm found on the critical date was Michael Rosier. 4RP43; whom told the officer Sagiao he had a gun at his feet in his car, not King 4RP33,35; who was standing outside the drivers side window of Rosier's car. And it is clear from the record evidence that the only evidence used to convict King of this crime was Rosier's statement it was Kings gun. 4RP43; Admitting the truth of this evidence most favorable to the State no rational trier of fact could find King had dominion and control over the vehicle where the gun was found. State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 ("Constructive possession is established by proof that defendant had dominion and control over premises where the drugs are found").

Rosiers statement King owned the gun or put it in his car when officer Saglao arrived does not proof this. To possess means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature. see Landry, 257 F.2d at 431 (citing) United States v. Wainer, 170 F.2d 603. Mere proximity and an earlier momentary handling does not establish dominion and control over illegal contraband. Callhan, 77 Wn.2d at 31; possession entails "actual control, not a passing control which is only momentary handling. Callahan 77 Wn.2d at 29;

As the Ninth Circuit said, "where convicting presumptions are projected on possession the evidence of possession ought to be very clear to satisfy the test of guilt beyond a reasonable doubt." Julian v. United States, (9th Cir.) 391 F.2d 279; Rosier statement made to the arresting officer did not possess King of the firearm in question. If an inference of control is to be deduced from this statement made by the person whom vehicle the firearm was found in such control was too fleeting and shadowy to amount to possession of it and barely approaches the dignity of a guess. Landry, 257 F.2d at 432;

Marcelis King, Statement of Additional Grounds, addendum

(1) Officer Sagio said on the record at trial that he crept up to the Rosier vehicle slowly. When Rosier realized the police officer was behind him, he said there was a firearm in the car that was not his. The officer did not believe him. Rosier then said Marcelis threw the firearm in his car. Rosier and King did not know one another.

Sagio saw the firearm when he looked into the Rosier's car. It was on the floor under the driver's seat. Sagio then grabbed the firearm without wearing gloves, and the officer put the firearm on his own belt and walked around carrying the firearm at the scene for about forty five minutes. Another officer, Stevens, took the firearm from Sagio but he also had no gloves on.

In his closing argument, the prosecutor admitted that Sagio's DNA was on the gun, not King's.

(2) Also, the delay in the trial that occurred violated King's speedy trial rights under CrR 3.3 and the constitutional right to a speedy trial. It took one year for the trial to occur without his agreement to continuances. Delay occurred when the prosecution did not tell the defense about an interview it had with an important eyewitness whose testimony was not favorable to the prosecution, and when the State wanted to conduct DNA testing but without waiting for a defense expert to observe the testing. This issue was argued in the CrR 8.3 motion filed before trial.

### Additional Ground 3

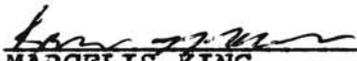
King finally contends the state violated his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I § 3 of the States Constitution when it withheld material evidence under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). King also contends the trial court abused its discretion when it denied Kings CrR 8.3 motion to dismiss for governmental misconduct and mismanagement and Brady violation. However, this courts review of this proceeding held on November 9, 2010 is not ripe for review because relevant portions of the trial verbatim has not been transcribed or transmitted to this court as required by the Rules of Appellate procedure therefore King is compelled to reserve his claim until those relvant portions of the record has been transcribed and transmitted to this court. see attached motion to supplement and correct the record.

### CONCLUSION

For the above stated reasons this court should find the trial courts calculation of Kings offender score is in error and his correct score is 3 based upon the washout and same criminal conduct provisions

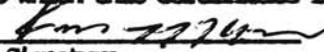
This court should also find the evidence used to convict King of Unlawful possession of a firearm in the first degree is insufficient and vacate this conviction.

DATED this 31st, day of July 2012.

  
\_\_\_\_\_  
MARCELIS KING  
COYOTE RIDGE CORRECTION CENTER  
POST OFFICE BOX 769  
Connell Washington 99326

**Certificate of Service:**

The undersigned certified that on the date below I caused to be mailed to the respondent's attorney of record true and correct copies of the document to which this certificate is attached.

6-7-12   
Date Signature

**FILED**  
KING COUNTY, WASHINGTON

**JUL 08 2011**

SUPERIOR COURT CLERK

BY: *Punnett* DEPUTY

COPY TO COUNTY JAN JUL 08 2011

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 10-C-05564-5 KNT
	)	
Vs.	)	<b>JUDGMENT AND SENTENCE</b>
	)	<b>FELONY (FJS)</b>
MARCELIS CHRISTOPHER KING	)	
	)	
Defendant,	)	

**I. HEARING**

*and JAMES BIBLE*

I.1 The defendant, the defendant's lawyer, JOE STLAURENT and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: \_\_\_\_\_

**II. FINDINGS**

There being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on 1/16/2011 by jury verdict of:

Count No.: I Crime: ASSAULT IN THE SECOND DEGREE/W/FIREARM  
 RCW 9A.36.021(1)(C) Crime Code: 01020  
 Date of Crime: 5/22/2010 Incident No. \_\_\_\_\_

Count No.: II Crime: ASSAULT IN THE SECOND DEGREE/W/FIREARM  
 RCW 9A.36.021(1)(C) Crime Code: 01020  
 Date of Crime: 5/22/2010 Incident No. \_\_\_\_\_

Counts No.: III & IV Crime: FELONY HARASSMENT/W/FIREARM  
 RCW 9A.36.021(1)(C) Crime Code: 00498  
 Date of Crime: 5/22/2010 Incident No. \_\_\_\_\_

Count No.: V Crime: UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE  
 RCW 9A.41.040(1) Crime Code: 00531  
 Date of Crime: 5/22/2010 Incident No. \_\_\_\_\_

[ ] Additional current offenses are attached in Appendix A

**SPECIAL VERDICT or FINDING(S):**

- (a)  While armed with a **firearm** in count(s) I-IV RCW 9.94A.533(3).
- (b)  While armed with a **deadly weapon** other than a firearm in count(s) \_\_\_\_\_ RCW 9.94A.533(4).
- (c)  With a **sexual motivation** in count(s) \_\_\_\_\_ RCW 9.94A.835.
- (d)  A V.U.C.S.A. offense committed in a **protected zone** in count(s) \_\_\_\_\_ RCW 69.50.435.
- (e)  **Vehicular homicide**  Violent traffic offense  DUI  Reckless  Disregard.
- (f)  **Vehicular homicide** by DUI with \_\_\_\_\_ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
- (g)  **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
- (h)  **Domestic violence** offense as defined in RCW 10.99.020 for count(s) \_\_\_\_\_.
- (i)  Current offenses **encompassing the same criminal conduct** in this cause are count(s) \_\_\_\_\_ RCW 9.94A.589(1)(a).
- (j)  **Aggravating circumstances** as to count(s) \_\_\_\_\_:

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): \_\_\_\_\_

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

Criminal history is attached in **Appendix B**.

One point added for offense(s) committed while under community placement for count(s) \_\_\_\_\_

**2.4 SENTENCING DATA:**

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	8	IV	53 TO 70 MONTHS	PLUS 36 MONTHS	89 TO 106 MONTHS	10 YRS AND/OR \$20,000
Count II	8	IV	53 TO 70 MONTHS	PLUS 36 MONTHS	89 TO 106 MONTHS	10 YRS AND/OR \$20,000
Counts III & IV	7	III	33 TO 43 MONTHS	PLUS 18 MONTHS	51 TO 61 MONTHS	5 YRS AND/OR \$10,000
Count V	7	VII	6 TO 89 MONTHS		67 TO 89 MONTHS	10 YRS AND/OR \$20,000

Additional current offense sentencing data is attached in **Appendix C**.

**2.5 EXCEPTIONAL SENTENCE**

Findings of Fact and Conclusions of Law as to sentence above the standard range:

Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) \_\_\_\_\_.

Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) \_\_\_\_\_.  The court would impose the same sentence on the basis of any one of the aggravating circumstances.

An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State  did  did not recommend a similar sentence (RCW 9.94A.480(4)).

**III. JUDGMENT**

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

The Court **DISMISSES** Count(s) \_\_\_\_\_

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: [ ] immediately; [ ] (Date): \_\_\_\_\_ by \_\_\_\_\_m.

67 months/days on count I; 43 months/days on count III; 67 months/day on count II  
67 months/days on count II; 43 months/days on count IV; ~~67 months/day on count III~~

The above terms for counts I-III are consecutive concurrent

W/ CREDIT FOR 415 DAYS SERVED IN RJC KENT

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to cause No.(s) \_\_\_\_\_

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: 36 months count I, 36 months count II, 18 months count III, 18 months count IV (108 months of enhancement) which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[ ] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 108 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): [ ] \_\_\_\_\_ day(s) or  days determined by the King County Jail. [ ] For nonviolent, nonsex offense, credit is given for days determined by the King County Jail to have been served in the King County Supervised Community Option (Enhanced CCAP) solely under this cause number. [ ] For nonviolent, nonsex offense, the court authorizes earned early release credit consistent with the local correctional facility standards for days spent in the King County Supervised Community Option (Enhanced CCAP).

4.5 NO CONTACT: For the maximum term of 10 years, defendant shall have no contact with Randy Johnson and Michael Rosier

4.6 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G. [ ] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [ ] COMMUNITY CUSTODY for qualifying crimes committed before 7-1-2000, is ordered for [ ] one year (for a drug offense, assault 2, assault of a child 2, or any crime against a person where there is a finding that defendant or an accomplice was armed with a deadly weapon); [ ] 18 months (for any vehicular homicide or for a vehicular assault by being under the influence or by operation of a vehicle in a reckless manner); [ ] two years (for a serious violent offense).

(b) [ ] COMMUNITY CUSTODY for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months.

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 10-C-05564-5 KNT
vs.	)	
	)	JUDGMENT AND SENTENCE,
	)	(FELONY) - APPENDIX B,
MARCELIS CHRISTOPHER KING	)	CRIMINAL HISTORY
	)	
	)	Defendant,
	)	

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
CONTROLLED SUBSTANCES VIOL	4/7/2006	ADULT	051088474	KING CO
CONT SUBST VIOL- SECTION (A)	10/22/1999	ADULT	991013961	KING CO
UNLAWFUL POSSESSION OF FIREARM	5/10/1996	ADULT	951085136	KING CO
ROBBERY 1 <sup>ST</sup> DEGREE	4/8/1991	ADULT	901071151	KING CO

The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: 7/8/11

  
 \_\_\_\_\_  
 JUDGE, KING COUNTY SUPERIOR COURT

**FILED**  
KING COUNTY, WASHINGTON

AUG 09 2011

SUPERIOR COURT CLERK  
KIM C. DUNNETT  
DEPUTY

*DOC*  
COMMITMENT ISSUED  
AUG 09 2011

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 10-C-05564-5 KNT

vs.

MARCELIS CHRISTOPHER KING,

ORDER AMENDING THE  
JUDGMENT AND SENTENCE

Defendant.

\* Clerks action \*

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THIS MATTER having come on regularly before the undersigned judge of the above entitled court upon motion of the State, for an order amending the Judgment and Sentence in the above entitled cause, and the court being fully advised that pursuant to RCW 9.94A.533 all firearm enhancements shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements. In section 4.4 of the Judgment and Sentence, the defendant was sentenced to 67 months confinement on counts I through V. In addition, the court imposed a mandatory term of 108 months for the special finding that the defendant was armed with a firearm in counts I through IV. Therefore, the total of all terms imposed in this cause is 175 months. The State moves for an order imposing the total time to be served as 175 months in Section 4.4 of the Judgment and Sentence; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Judgment and Sentence entered on July 8, 2011 is still in effect but is modified to impose a total term of 175 months of confinement.

DONE IN OPEN COURT this 9 day of <sup>Aug</sup> July, 2011.

  
The Honorable Cheryl Carey

ORDER AMENDING THE JUDGEMENT AND  
SENTENCE - 1

**ORIGINAL**  
Page 349

Daniel T. Satterberg, Prosecuting Attorney  
Norm Maleng Regional Justice Center  
401 Fourth Avenue North  
Kent, Washington 98032-4429

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