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Court of Appeals
Division I
State of Washington

NO. 72598-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PATRICK KING,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JOHN H. CHUN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A statute does not create alternative means of committing a crime if the acts described do not vary significantly. The inclusion of mere surplusage in a criminal information neither creates an element of the crime that the State must prove, nor implicates concerns for a unanimous verdict. Here, the information charging defendant Patrick King with possessing burglary tools included the surplus language that he possessed a flashlight and a saw. The jury was instructed on a broader list of burglary tools, mirroring the criminal statute. Should King's conviction be affirmed, when different types of burglary tools do not constitute alternative means of committing the crime?

2. A defendant's affirmative acknowledgment of his criminal history relieves the State of its burden to prove, and the sentencing court to find, the validity of the defendant's criminal history by a preponderance of the evidence. Here, the State represented and King affirmatively acknowledged that his offender score was five. The trial court found that his offender score was five. Should King's sentence be affirmed?

3. RCW 10.73.160 and Title 14 RAP authorize the imposition of costs on appeal. Neither the statute nor the court rule requires an individualized assessment of indigency prior to the imposition of costs; instead, a defendant who is unable to pay costs on appeal may object to

costs under RAP 14.5 or seek remission pursuant to RCW 10.73.160(4).

Should King's preemptive objection to costs on appeal be denied?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Patrick King with Count One, Attempted Burglary in the Second Degree,¹ and Count Two, Possession of Burglary Tools.² CP 9-10. The State alleged that on October 31, 2013, King attempted to enter and remain unlawfully in a building with the intent to commit a crime against a person or property therein. CP 9. The State also alleged that King, in the same incident, possessed a tool or implement commonly used to commit burglary, under circumstances evincing the intent to use or employ it in the commission of a burglary. CP 9.

A jury convicted King of both crimes as charged. CP 11-12. King received a standard range sentence on the felony attempted burglary count.³ CP 47, 49. This appeal timely followed. CP 61.

¹ RCW 9A.28.020 (criminal attempt); RCW 9A.52.030 (second-degree burglary).

² RCW 9A.52.060 (burglary tools). The crime technically is named, "Having or Possessing Burglar Tools."

³ King also received a suspended sentence on his misdemeanor possession of burglary tools conviction. CP 54-56. He does not specifically challenge his misdemeanor sentence on appeal, except insofar as he contests the validity of the underlying conviction. Br. of App't at 1-4.

2. SUBSTANTIVE FACTS.

Just after 4:00 a.m. on October 31, 2013, City of Kent police officers responded to a burglary alarm at a CenturyLink facility on South 228th Street. 2RP 20, 23, 48-49, 70.⁴ The alarm system had been placed by the police after the fully fenced facility—which housed a large quantity of copper wire and other valuable material—reported a rash of break-ins over the previous month. 2RP 17-20, 24, 78, 84-85. To help CenturyLink prevent further burglaries, officers installed a trip line at the spot where most of the illegal entries had occurred, about a foot inside the perimeter fence and five feet off the ground. 2RP 19-22, 85. If the line were tripped, a magnet would separate, triggering a silent alarm directly to police radio along with the location of the intrusion. 2RP 21, 47, 62.

Officers began arriving at the facility within 30 seconds of the alarm being triggered. 2RP 27, 49. As he pulled up to the scene in his patrol car, Officer Whitley saw defendant Patrick King and another man, Bradley Bachmann, walking away from a hole in the fence toward a nearby trail. 2RP 37, 50-51. Both men were wearing yellow reflective vests. 2RP 51. Officer Whitley ordered them to the ground while he waited for backup to arrive. 2RP 53.

⁴ The verbatim report of proceedings is cited as follows: 1RP – Jun. 30, 2014; 2RP – Jul. 9, 10, and 17, 2014; 3RP – Jul. 31, 2014; and 4RP – Sep. 18, 2014.

King and Bachman dropped out of sight in the grass. 2RP 53-54. Bachman soon got up and fled through the hole in the fence, onto the CenturyLink campus. 2RP 54. King stayed on the ground as ordered. 2RP 54.

Officers approached King's position and took him into custody. 2RP 55. He apparently had removed his yellow vest and was wearing a single black glove. 2RP 54-55. Officer Whitley searched King incident to arrest and found a flashlight and small handsaw in his pocket. 2RP 55-56. When they searched the grass in the area where King had dropped to the ground, officers found King's yellow vest and a matching glove. 2RP 56. In the area where Bachman was last seen before fleeing, officers found an additional saw and a magnetic tool. 2RP 56.

Officer Mills initiated a canine track to search for Bachman. 2RP 73-74. Just inside the fence, they found Bachman's yellow vest. 2RP 74. Bachman was detained a short time later while climbing out of some nearby shrubbery. 2RP 81. He was soaking wet and very muddy. 2RP 81. Officers also observed that someone had set up several wooden pallets, as a makeshift bridge across a retention pond, located near the fence. 2RP 26-27, 72-73, 81.

Officer Prusa then inspected the fence and saw that pieces of wire used to repair the fence from a previous burglary had recently been cut.

2RP 30-31. She also saw a pair of plier-type wire cutters hanging from the fence. 2RP 30.

Additional facts and procedural history are set forth below as appropriate.

C. ARGUMENT

1. **THERE IS NO RISK THAT KING WAS CONVICTED BY A NON-UNANIMOUS JURY BECAUSE THE POSSESSION OF DIFFERENT BURGLARY TOOLS DOES NOT CONSTITUTE ALTERNATIVE MEANS OF COMMITTING THE CRIME OF POSSESSING BURGLARY TOOLS.**

King appears to assert that possessing a flashlight and a saw create alternative means of committing the crime of possessing burglary tools, under RCW 9A.52.060. He argues that because the State included these terms in the information charging him with that crime, it was error for the trial court to instruct the jury that it could find him guilty based on language mirroring the statute's broader prohibition on possessing several types of burglary tools. This discrepancy between the information and the trial court's instructions, he claims, raises the specter that he was convicted of an uncharged alternative means or by a non-unanimous jury. Br. of App't at 7-11.

This claim fails because the possession of various types of burglary tools under RCW 9A.52.060 does not create alternative means of

committing that crime. The reference in the information to a “saw” and a “flashlight” was mere surplusage. Because this reference was not repeated in the jury instructions, the information did not create additional elements that the State had to prove and no express statement of jury unanimity was required. King’s conviction should be affirmed.

a. Additional Facts.

The State charged King by information as follows:

Count 2 Possession of Burglary Tools

That the defendant Patrick Dennis King in King County, Washington, on or about October 31, 2013, did have in his possession a tool or implement commonly used for the commission of burglary, *to-wit: a flashlight and saw* under circumstances evincing an intent to use or employ or allow the same to be used or employed in the commission of a burglary.

CP 9 (second amended information) (emphasis added).

The trial court’s instructions to the jury did not mention a flashlight or saw, but instead mirrored the more general language of RCW 9A.52.060. Specifically, the trial court instructed the jury that a person commits the crime of possession of burglary tools when that person “possesses any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary[.]” CP 30 (Instruction 14). The trial court also instructed the jury that, in order to find King guilty, it would have to find as one element

of the crime that he “possessed an engine, machine, tool, false key, pick lock, bit, nippers or implement adapted, designed, or commonly used for the commission of burglary[.]” CP 31 (Instruction 15).

In closing argument, the prosecutor stated that King was “armed with tools to help him in [the commission of burglary], primarily the flashlight and the saw[.]” 2RP 114. She pointed out that he was also wearing work gloves and a yellow reflective vest. 2RP 117. She emphasized again that he had a flashlight to help him see in the dark, and asked rhetorically why he would possess a saw. 2RP 117.

The prosecutor then reviewed the “to convict” instruction with the jury. 2RP 118; CP 31 (Instruction 15). She recited the element that the defendant must possess a tool or implement adapted, designed, or commonly used for the commission of burglary, and argued that “the tool that’s being referred to is the flashlight and the saw[.]” 2RP 118. She also argued that while a flashlight and a saw may not be illegal to possess under general circumstances, they become illegal when possessed under the specific circumstances defined by the statute. 2RP 119.

Finally, she explained that other tools were found at the scene—for example, the wire cutters—and that the jury could infer King’s intent from the presence of those items. 2RP 119.

King's trial attorney then conceded that King had possessed a flashlight and a saw. 2RP 123-24. However, he argued that such items were just common tools, and that the State's evidence was insufficient to prove that they were *burglary* tools. 2RP 123-24.

b. Standard Of Review.

The Washington Constitution guarantees to all criminal defendants the right to a unanimous jury verdict. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); Wash. Const. art. I, § 22. This right may extend to the *means* by which the crime was committed, if the defendant is charged with—and the jury is instructed upon—an alternative means crime. Owens, 180 Wn.2d at 95. If sufficient evidence supports each alternative means, express jury unanimity is not required on appeal. Id. If insufficient evidence supports any alternative means, an express statement of jury unanimity is required in order to ensure a unanimous verdict. Id. (citing State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994)).

The mere inclusion of surplus language in a criminal information does not create an element of the crime that the State is required to prove, unless the surplus language is repeated in the jury instructions. State v. Tvedt, 153 Wn.2d 705, 718, 107 P.3d 728 (2005). Because surplus language in an information does not create elements of a crime, it follows

that such language cannot create alternative means; the State is not required to demonstrate jury unanimity as to facts contained in surplus language.

King's appeal thus turns upon the question of whether the possession of various burglary tools under RCW 9A.52.060 creates alternative means of committing that crime—a question of statutory interpretation reviewed *de novo*. Owens, 180 Wn.2d at 96; State v. Hayes, 182 Wn.2d 556, 560, 342 P.3d 1144 (2015). The court's fundamental objective in interpreting a statute is to ascertain and carry out the intent of the legislature. State v. Garcia, 179 Wn.2d 828, 836, 318 P.3d 266 (2014). The court's inquiry is informed by common sense; it will avoid absurd or strained results. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008).

c. The Possession Of Various Types Of Burglary Tools Does Not Create Alternative Means Under RCW 9A.52.060.

The legislature has not defined an “alternative means crime” or provided a list of such crimes. Owens, 180 Wn.2d at 96. But generally speaking, “an alternative means crime is one by which the criminal conduct may be proved in a variety of ways.” Id. The determination of whether a statute creates an alternative means crime must be made on an individual basis. Id.

The Washington Supreme Court recognizes certain principles guiding this analysis. First, the mere use of the disjunctive “or” in a list of methods of committing a crime does not necessarily create alternative means. Owens, 180 Wn.2d at 96 (citing State v. Peterson, 168 Wn.2d 763, 769, 770, 230 P.3d 588 (2010)). Second, statutory definitions do not create “means within a means.” Id. (quoting State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007)). Third, “alternative means should be distinguished based on how varied the actions are that could constitute the crime.” Id. at 97. In other words, where an individual’s conduct does not vary significantly between the various acts listed in a statute, the statute should not be interpreted to create alternative means.

In Owens, for example, the Washington Supreme Court examined the first-degree trafficking in stolen property statute, to determine how many alternative means it created.⁵ This statute provided:

A person who *knowingly* initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who *knowingly* traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

180 Wn.2d at 96 (quoting RCW 9A.82.050(1)) (emphasis added).

Noting that the statute employed the term “knowingly” in two locations, the court determined that it created only two alternative means:

⁵ The parties in Owens agreed that the statute created alternative means; at issue was how many alternative means it created. 180 Wn.2d at 96.

either (1) knowingly initiating, organizing, planning, financing, directing, managing, or supervising the theft of property for sale to others; or (2) knowingly trafficking in stolen property. Owens, 180 Wn.2d at 97-98 (quoting with approval State v. Lindsey, 177 Wn. App. 233, 241-42, 311 P.3d 61 (2013)).

Even though the first group superficially appeared to designate seven separate means of committing the crime, the court held that that group merely “represent[ed] multiple facets of a single means of committing the crime[.]” because all seven acts “relate[d] to different aspects of a single category of criminal conduct—facilitating or participating in the theft of property so that it can be sold.” Owens, 180 Wn.2d at 97-98 (quoting Lindsey, 177 Wn. App. at 241-42). That is, the terms were merely “definitional”; they did not designate significantly varying conduct and could not be held to create means within a means. Id. at 98 (quoting Lindsey, 177 Wn. App. at 242).

Turning to the crime of possessing burglary tools, it is apparent that the legislature did not intend the possession of different types of burglary tools to create alternative means. The statute provides:

Every person who shall make or mend or cause to be made or mended, or *have in his or her possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary* under circumstances evincing an intent to use or employ, or allow the

same to be used or employed in the commission of a burglary, or knowing that the same is intended to be so used, shall be guilty of making or having burglar tools.

RCW 9A.52.060(1) (emphasis added).

Among other things, this section prohibits, under certain circumstances, the “possession” of “any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary[.]” RCW 9A.52.060(1). As in Owens, these terms are plainly definitional. The conduct inherent in possessing such objects does not vary significantly. The terms listed represent multiple facets of committing a single category of criminal conduct—possessing burglary tools.

The statute may create *other* alternative means of committing the crime, such as “mak[ing] or mend[ing]” burglary tools, or perhaps “caus[ing] to be made or mended” burglary tools. RCW 9A.52.060(1). But whether the statute creates such other alternative means is not an issue before the Court in this appeal, because King was not charged with (nor was the jury instructed that it was required to find) those acts. CP 9, 31. The sole question is whether the legislature, by providing examples of various types of burglary tools, intended to create alternative means based on the possession of each type of tool. Common sense dictates that it did not. One who possesses a “false key” has engaged in conduct effectively

identical to one who possesses a “pick lock.” See RCW 9A.52.060(1).

The conduct proscribed under this statutory means is the *possession* of such tools. The possession prong of the statute does not create alternative means.

Because the possession of various burglary tools under RCW 9A.52.060 does not constitute alternative means of committing that crime, jury unanimity as to a specific tool was not required here. The inclusion of the words “saw” and “flashlight” in the information was mere surplusage; these references were not repeated in the jury instructions, which simply mirrored the statute. Compare CP 9 (second amended information) with CP 31 (Instruction 15) and RCW 9A.52.060(1). King’s conviction should be affirmed.

Finally, King assigns error on the basis that the inclusion of the terms “flashlight” and “saw” in the information violated his due process right to notice of the essential elements of the crime charged. Br. of App’t at 2. King does not actually brief this issue or explain how the inclusion of surplusage in the information violated his right to notice. His claim should be rejected on this basis alone. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court will not review assignment of error not actually briefed). Regardless, surplus language is, by definition, additional to the elements of the crime.

Because the right to notice applies to the elements of the crime,⁶ King's claim fails.

2. THE TRIAL COURT PROPERLY CALCULATED KING'S OFFENDER SCORE BASED ON THE STATE'S REPRESENTATIONS AND KING'S AFFIRMATIVE ACKNOWLEDGMENT THAT HIS OFFENDER SCORE WAS FIVE.

King argues that the trial court erred by calculating his offender score as "five." Specially, he claims that the State adduced insufficient evidence to support this finding. But the State made adequate representations of King's criminal history and he affirmatively acknowledged that the State's calculation of his offender score was correct. King's sentence should be affirmed.

a. Additional Facts.

Prior to sentencing, the State filed a presentence statement that included a document referred to colloquially as an "Appendix B," which listed King's felony and misdemeanor criminal history. Supp. CP __ (Sub No. 59, Presentence Statement at 10-12) (attached at Appendix A). The document listed King's five prior felony convictions:

⁶ See *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991) ("All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.").

Protection order violation	02/18/2007
Tampering with a witness	02/18/2007
Bail jumping	02/18/2007
Controlled substance possession – no prescription	07/23/2005
Controlled substance manufacture/deliver/possess with intent to manufacturer or deliver	11/11/1994

Supp. CP __ (Sub No. 59 at 10) (App. A at 10).

The “Appendix B” also identified King’s thirty misdemeanor prior convictions, committed in 1990, 1991, 1994, 1995, 1996, 1997, 1998, 2002, 2003, 2005, 2006, and 2007. Supp. CP __ (Sub No. 59 at 10-12) (App. A at 10-12).

King also filed his own presentence report, in which he affirmatively acknowledged that he had an offender score of five. CP 37. The document also affirmatively acknowledged that his standard range for his attempted burglary conviction was 12.75 to 16.5 months, based on his offender score of five. CP 37. He separately filed a request for an exceptional sentence below this standard range. CP 44-45.

At sentencing, the prosecutor stated that King had an offender score of five. 4RP 5. The prosecutor and the sentencing judge jointly recited that this offender score was based on King’s five prior felony

convictions, for violating a protection order, tampering with a witness, bail jumping, and two controlled substance violations. 4RP 5. King did not object. 4RP 5.

King's attorney requested that the court impose a Drug Offender Sentencing Alternative (DOSA) or an exceptional sentence. 4RP 6-9. King spoke on his own behalf, and acknowledged that he had only just been released from prison in 2010. 4RP 9.

The trial court denied King's request for a DOSA or exceptional sentence. 4RP 14-17. In particular, the court mentioned that it had reviewed King's "Appendix B," and that it was concerned about his lengthy criminal history:

Court: Mr. King, I want to share with you what's going through my mind right now. I mean it's a lot of different factors, but there are two primary ones. One is just paying your debt back to society for the crime, so having there be a punishment component to the sentence. But the other—and the other is, of course, you know, the protection of the public, but another key factor that I'm looking at is you, okay? What's best for you. *And I'm looking at—let me just share this with you, I'm looking at your Appendix B, I'll just come down—it's a long list of things dating back, you know?*

King: (laughs) Yeah.

4RP 14-15 (emphasis added).

Balancing all of these factors, the court imposed a low-end sentence of 12.75 months. CP 47, 49; 4RP 15-16. The judgment and sentence expressly noted that King's scoring criminal history (i.e., those "convictions constituting criminal history for the purposes of calculating the offender score" under "RCW 9.94A.525") was attached to the judgment and sentence, in another "Appendix B." CP 47. That document listed King's five prior felony convictions. CP 52. The trial court signed the document, indicating its satisfaction that the scoring felony convictions had been established. CP 52. Accordingly, the judgment and sentence indicated King's offender score of five. CP 47.

b. Standard Of Review.

The calculation off an offender score under the Sentencing Reform Act (SRA) is a question of statutory interpretation, reviewed *de novo*. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011); In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 5, 100 P.3d 805 (2004). As noted, a court's primary objective in interpreting a statute is to ascertain and give effect to the intent of the legislature. Garcia, 179 Wn.2d at 836. Courts will look first to the provision's plain language in order to garner legislative intent, but may also consider the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). If a

statute is ambiguous, courts may resort to statutory construction, legislative history, and relevant case law in order to discern legislative intent. Id.

The trial court's calculation of an offender score must further comply with constitutional due process. See State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). Issues of due process are likewise reviewed *de novo*. State v. Simpson, 136 Wn. App. 812, 816, 150 P.3d 1167 (2007).

c. The Trial Court Properly Calculated King's Offender Score Because The State Represented That King Had Five Prior Felony Convictions And King Affirmatively Acknowledged That His Offender Score Was Five.

The State agrees with King that the SRA generally requires the sentencing court to calculate an offender score by taking three steps: “(1) identify all prior convictions; (2) eliminate those that wash out; (3) ‘count’ the prior convictions that remain in order to arrive at an offender score.” State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010); see RCW 9.94A.525.

To satisfy the SRA and constitutional requirements, the sentencing court must find that a defendant's criminal history has been proven by a preponderance of the evidence. Ford, 137 Wn.2d at 479-80;

RCW 9.94A.500(1). The burden of proof is upon the State. Ford, 137 Wn.2d at 479-80.

A prosecutor's summary of a defendant's history of criminal convictions is prima facie evidence of the existence and validity of those convictions.⁷ RCW 9.94A.500(1). Generally, the State must further prove the convictions by a preponderance of the evidence. Ford, 137 Wn.2d at 479-80; RCW 9.94A.500(1). However, where a defendant affirmatively acknowledges his criminal history as presented by the State, the State is *not required* further to prove that history by a preponderance of the evidence. State v. Ross, 152 Wn.2d 220, 232-33, 95 P.3d 1225 (2004); Ford, 137 Wn.2d at 482-83; State v. McCorkle, 88 Wn. App. 485, 494 n.5, 945 P.2d 736 (1997), aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999); State v. Thomas, 57 Wn. App. 403, 410, 788 P.2d 24 (1990), overruled on other grounds by State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997). In other words, a defendant's affirmative acknowledgment of his criminal history, as presented by the State, is sufficient to satisfy a sentencing court's duty under the SRA and due process to find that the criminal history is valid.

⁷ The prosecutor's summary alone is insufficient to establish criminal history, unless a defendant affirmatively acknowledges his criminal history. State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012). Such affirmative acknowledgement relieves the State of its burden further to prove criminal history by a preponderance of the evidence. Id.

Ford, 137 Wn.2d at 482-83; see Hunley, 175 Wn.2d at 917; Ross, 152 Wn.2d at 233.

In this case, the State represented to the sentencing court that King had five prior felony convictions, giving him an offender score of five. Supp. CP __ (Sub No. 59, Presentence Statement at 10) (App. A at 10); 4RP 5. King affirmatively acknowledged the State's calculation of his offender score, by submitting his own pleadings, stating that his offender score was five. CP 37. The State thus was not required to submit any further evidence of his prior criminal convictions, nor was the court required to make any additional findings. King's claim should be rejected.

King also asserts that the trial court made insufficient findings that his criminal convictions had *not* washed out, under RCW 9.94A.525(2). Br. of App't at 12-17. King's argument fails under the plain language of that section and turns the presumption arising under the SRA washout provision—that prior convictions count toward an offender score unless shown otherwise—on its head.

The statute begins by providing that a defendant's "offender score" is "the sum of points accrued under this section[.]" RCW 9.94A.525. The statute then defines "[a] prior conviction" as "a conviction which exists before the date of sentence for the offense for which the offender score is being computed." RCW 9.94A.525(1). Having defined the terms

“offender score” and “prior conviction,” the statute then provides that certain prior convictions will not be included in the offender score, *if* certain conditions are met:

(b) Class B prior felony convictions . . . shall not be included in the offender score, *if* since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) . . . class C prior felony convictions . . . shall not be included in the offender score *if*, since the last date of release from confinement . . . 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.

RCW 9.94A.525(2)(b), (c) (emphasis added). The plain language and structure of these provisions thus establishes that a prior conviction counts toward an offender score *unless* certain conditions precedent have been satisfied.

King urges an opposite reading of the SRA washout provision. He claims that RCW 9.94A.525(2) provides that prior convictions “‘shall not be included’ *unless they have been shown to have not washed out.*” Br. of App’t at 13-14 (emphasis added). Neither the plain language of the SRA washout provision nor any authority supports King’s reading, that the default status of a prior conviction is that it has washed out. Indeed, case law establishes that a sentencing court’s first step is to identify all prior

convictions and then secondly to eliminate those that wash out. See Moeurn, 170 Wn.2d at 175 (“[T]he legislature intended the rules for calculating offender scores to be applied in the order in which they appear.”).

In this case, there was no basis to find that any of King’s convictions had washed out, because he was convicted of misdemeanor offenses continually on a near annual basis. Supp. CP __ (Sub No. 59, Presentence Statement at 10-12) (App. A at 10-12). Indeed, since 1990, King has never once spent five years in the community without committing and being convicted of a crime. Id. King admitted at sentencing that he had just been released from prison in 2010—based on this representation alone, at least four of his felony convictions (from 2005 and 2007) could not have washed out, because he could not have spent five crime-free years in the community prior to the current offense. 4RP 9. Regardless, if the legislature intended a prior conviction to wash out by default, it would have stated so. Because King’s interpretation is at odds with the plain meaning of the statute, it should be rejected.

Even if King is correct that the SRA establishes a presumption that a prior conviction has washed out, King’s claim still fails because he affirmatively acknowledged that his offender score was five. So even if the State would normally have had a duty to prove—and the trial court to

find—by a preponderance of the evidence that a conviction had *not* washed out, King relieved the State and the trial court of this duty by affirmatively agreeing to his offender score. Hunley, 175 Wn.2d at 917; Ross, 152 Wn.2d at 233; Ford, 137 Wn.2d at 482-83. King’s sentence should be affirmed.

Finally, should this Court agree with King that insufficient evidence supported the trial court’s calculation of his offender score, the appropriate remedy is to remand this case to give the State an opportunity to provide sufficient proof of King’s prior convictions. RCW 9.94A.530(2) dictates that “[o]n remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.” The Washington Supreme Court expressly has upheld this provision. See State v. Cobos, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014); State v. Jones, 182 Wn.2d 1, 11, 338 P.3d 278 (2014).

**3. THIS COURT MAY IMPOSE COSTS ON APPEAL
PURSUANT TO TITLE 14 RAP AND RCW 10.73.160.**

In the event that his appeal is denied, King preemptively asks this Court not to impose costs on appeal, arguing that this Court must make

findings of his ability to pay before imposing costs. Br. of App't at 17-18. A party that "substantially prevails on review" may be awarded costs upon filing a cost bill. RAP 14.1(f), 14.2. A party may object to items in the cost bill by filing and serving an objection within 10 days of receipt. RAP 14.5. While the resolution of King's preemptive objection to appellate costs is better left to the procedure contained in RAP 14, the State addresses King's claim below.

RCW 10.73.160 authorizes an award of costs on appeal. Under that statute, this Court "may require an adult or a juvenile convicted of an offense . . . to pay appellate costs." RCW 10.73.160(1). Such costs "shall be requested in accordance with the procedures contained in Title 14 of the rule of appellate procedure[.]" Id. at (3). The award of costs "shall become part of the trial court judgment and sentence." Id.

The statute authorizes trial courts to remit costs in cases of financial hardship:

(4) A defendant or juvenile offender who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant, the defendant's immediate family, or the juvenile offender, the sentencing court may remit all or part

of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.73.160(4).

The Washington Supreme Court considered the validity and application of this statute in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). The court noted that RCW 10.73.160 does not expressly require consideration of ability to pay before costs are awarded. Id. at 238. Such consideration is not constitutionally required:

. . . RCW 10.73.160(4) provides that a defendant who is not in contumacious default may petition at any time for remission of the payment of costs or any unpaid portion The statute thus contemplates the constitutionally required inquiry into ability to pay, the financial circumstances of the defendant, as well as the burden payment will place on defendant and his or her immediate family

Moreover, common sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay.

Id. at 242 (footnote omitted).

In the instant case, King notes that the sentencing court declined to impose non-mandatory legal financial obligations. Br. of App't at 18. He appears to imply that this decision should be construed to mean that he is

unable to pay costs on appeal. King provides no authority establishing that a trial court's decision not to impose discretionary fines is sufficient to establish the inability to pay costs on appeal. To the extent that King so claims, his argument should be rejected.

In fact, King retained private counsel for his defense at trial. See Supp. CP __ (Sub No. 6, Notice of Appearance). While the trial court did ultimately find King indigent and unable to afford to retain appellate counsel, see Supp. CP __ (Sub No. 77, Order of Indigency), this finding does not control the award of costs on appeal. RAP 15.2(f) provides that the presumption of indigency continues only "throughout the review." The Court in Blank thus rejected the claim that an award of appellate costs is controlled by this provision: "[A]n award of costs under RCW 10.73.160 is made after review is completed; thus, there is no conflict with the rule, which provides for a presumption of indigency only 'throughout the review.'" 131 Wn.2d at 251.

Moreover, the trial court's finding of indigency addressed a different question. In deciding whether to appoint counsel pending appeal, the court must apply the definition of indigence set out in RCW 10.101.010. State v. Johnson, 179 Wn.2d 534, 556, 315 P.3d 1090 (2014).

Under that definition, a person is “indigent” if, among other tests, he has an income less than 125% of the federally established poverty level. RCW 10.101.010(3) et seq. That a person may be indigent under this definition does not necessarily mean that he lacks ability to make modest payments toward legal financial obligations.

Over time, King’s financial situation will likely change. He will presumably be able to obtain employment in some capacity. As Blank points out, a determination of his ability to pay should be made if and when enforced collection or any sanction is imposed for nonpayment, based on the information that will then be available. 131 Wn.2d at 242.

King primarily relies on State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). That decision was based on the statute that governs imposition of costs at sentencing. Under that statute, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). The court construed this language as an imperative, requiring the sentencing court to undertake an individualized inquiry into the defendant’s current and future ability to pay before imposing legal financial obligations. Blazina, 182 Wn.2d at 837-38.

The statute governing appellate costs, RCW 10.73.160, contains no such imperative. To the contrary, that statute provides that the costs “be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure.” Id. at (3). That procedure involves no consideration of indigence. State v. Obert, 50 Wn. App. 139, 142-43, 747 P.2d 502 (1987); see State v. Nolan, 141 Wn.2d 620, 623, 8 P.3d 300 (2000). The statutory basis for the holding in Blazina is thus absent in this case. Within constitutional limits, the wisdom of imposing costs must be determined by the legislature, not the courts. Blank, 131 Wn.2d at 252-53.

Further, there is a significant difference between costs at trial and costs on appeal. Trial costs result from a proceeding initiated by the State. The appeal in this case, however, was initiated by the defendant. The costs of this decision are properly borne by the defendant, not the taxpayer. Non-indigent parties regularly make financial sacrifices in order to exercise their right to appeal. They must weigh these in deciding whether to exercise that right. There is no reason why indigent defendants should be entirely freed from any such sacrifices. To the extent that the defendant has ability to pay, he should do so. If the costs create financial hardship, he can seek remission under RCW 10.73.160(4).

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm King's convictions and sentence for Attempted Burglary in the Second Degree and Possession of Burglary Tools, and to deny King's preemptive request for non-imposition of costs on appeal.

DATED this 2nd day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JACOB R. BROWN, WSBA #44052
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

State's Presentence Report

FILED

14 JUL 25 AM 9:00

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 13-1-14122-8 KNT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

PATRICK DENNIS KING,

Defendant.

No. 13-C-14122-8 KNT

9-5

PRESENTENCE STATEMENT OF
KING COUNTY PROSECUTING ATTORNEY

CCN: 1831889

DOB: 12/29/1970

SEX: Male

<u>CNT</u>	<u>Charge</u>	<u>Crime Date</u>
1	Attempted Burglary In The Second Degree <u>Conviction Date:</u> 07/10/2014	10/31/2013 <u>Verdict:</u> Guilty by Jury
2	Possession Of Burglary Tools <u>Conviction Date:</u> 07/10/2014	10/31/2013 <u>Verdict:</u> Guilty by Jury

*** CT-2 NON FELONY/AMENDED INFO***

SENTENCING DATE: September 5, 2014

SENTENCING JUDGE: The Honorable John Chun

DEFENSE ATTORNEY: Kenan L. Isitt/PRIVATE

ATTACHMENTS: THE FOLLOWING ATTACHMENTS ARE INCORPORATED BY REFERENCE INTO THIS PROSECUTOR'S STATEMENT:

- INFORMATION
- CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE
- PROSECUTING ATTORNEY SUMMARY AND REQUEST FOR BAIL
- PLEA AGREEMENT
- SENTENCING REFORM ACT SCORE SHEET
- APPENDIX B
- STATE'S SENTENCE RECOMMENDATION

DANIEL T. SATTERBERG
Prosecuting Attorney

BY: _____
Deputy Prosecuting Attorney

CRIMINAL DIVISION

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
v.)	No. 13-C-14122-8 KNT
)	
PATRICK DENNIS KING,)	
)	
Defendant.)	AMENDED INFORMATION
)	
)	

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse PATRICK DENNIS KING of the following crime[s], which are of the same or similar character, and which are based on the same conduct or a series of acts connected together or constituting parts of a common scheme or plan: **Attempted Burglary In The Second Degree, Possession Of Burglary Tools**, committed as follows:

Count 1 Attempted Burglary In The Second Degree

That the defendant Patrick Dennis King in King County, Washington, on or about October 31, 2013, did attempt to enter and remain unlawfully in a building, located at 7235 S 228 St Auburn, in said county and state, with intent to commit a crime against a person or property therein;

attempt as used in the above charge means that the defendant committed an act which was a substantial step towards the commission of the above described crime with the intent to commit that crime;

Contrary to RCW 9A.28.020 and 9A.52.030, and against the peace and dignity of the State of Washington.

Count 2 Possession Of Burglary Tools

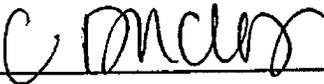
That the defendant Patrick Dennis King in King County, Washington, on or about October 31, 2013, did have in his possession a tool or implement commonly used for the commission of burglary, to-wit: flashlight and saw under circumstances evincing an intent to use or employ or allow the same to be used or employed in the commission of a burglary;

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Contrary to RCW 9A.52.060, and against the peace and dignity of the State of Washington.

DANIEL T. SATTERBERG
Prosecuting Attorney

By:



Candice M. Duclos, WSBA #42662
Deputy Prosecuting Attorney

LODI

CAUSE NO.

NOV 7 2013

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE RJC

Matt Lorette is a Detective with the Kent Police Department and has reviewed the investigation conducted in Kent Police Department case number 13-14270.

There is probable cause to believe that: Patrick D King (12/29/1970) and Bradley J Bachmann (04/24/1981) committed the crime of Burglary 2nd, RCW 9A.52.030.

This belief is predicated on the following facts and circumstances:

On 10/31/13 at 0407 hours Kent Police officers responded to Century Link located at 7235 S 228th St, which is in the city of Kent, county of King and State of Washington. The officers were responding to a burglary in progress that was triggered by a voice activated radio dispatch (VARDA) alarm. The alarm trip indicated there was entry near the east perimeter fence. For the VARDA alarm to be activated a subject had to be inside the fenced area of the property. Officer Whitley was in the immediate area and went traveled down the Interurban trail, which borders the business property on the east side.

When Officer Whitley arrived he used a spotlight to illuminate the fence line and observed two males walking away from the business towards the trail. Both subjects were wearing yellow reflective clothing. One male continued walking north bound in the high grass while the other subject stood still. Officer Whitley ordered the subjects to lie down on the ground and both subjects complied.

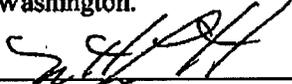
Officer Whitley advised other officers of the circumstances and waited for backup. While waiting for additional officers to arrive he heard police sirens approaching. It appeared one of the suspects, later identified as Bradley Bachmann, became nervous and looked around. Bachmann quickly jumped up and ran back towards the fence line. Officer Whitley yelled at him to stop, but he continued to run back into the Century Link business by going through an open hole in the fence. As he ran through the fence he shed his yellow reflective jacket. The suspect who remained lying on the ground was arrested and identified as Patrick King. King invoked his rights and wished to speak to a lawyer. A search of King's person resulted in the discovery of a flashlight and a small saw in his pants pocket.

Officer Mills and his K9 partner "Ghost" conducted a track in an attempt to locate the suspect who fled into the business. Officer Whitley located a hack saw and a magnetic tool where he had first seen the suspect who fled (Bachmann). The K9 track ended without capturing the suspect however at 0513 hours Officer Mills later located Bradley Bachmann just south of the business at 6838 S 234th St with another subject. Bachmann was covered in mud and had scratches on him. Bachmann claimed that he and the other subject were looking for a dog. Officer Whitley responded to Officer Mills location and immediately and positively identified Bachmann as the suspect he had seen flee back into the business. Bachmann was arrested and advised of his rights. He still claimed he was in area looking for dog and said explained being muddy because he fell down. When confronted about running back into the business he did not deny the accusation but remained stoic. Bachman did not want to answer any questions regarding the hack saw and magnetic tool located in the area where he was first observed. Bachman apologized but when asked why he did not explain.

A pair of bolt cutters was also found near the fence where Officer Whitley had seen Bachman run. It appeared the bolt cutters were used to gain entry into the business. It appeared only property was damaged and there was no loss.

The aforementioned occurred within the City of Kent, County of King and State of Washington.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 31st day of October, 2013, at the City of Kent, King County, Washington.



Detective Matt Lorette
Certification for Determination
of Probable Cause

Dan Satterberg
Prosecuting Attorney
W.554 King County Court
Seattle, Washington.

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2 CAUSE NO. 13-C-14121-0 KNT
3 13-C-14122-8 KNT

4 PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
5 CONDITIONS OF RELEASE

6 The State incorporates by reference the Certification for Determination of Probable Cause
7 prepared by Matthew Lorette of the Kent Police Department for case number 13-14270.

8 **Defendant Bachmann**

9 Pursuant to CrR 2.2(b)(2)(i),(ii), the State asks that bail be set at \$5,000, as set at first
10 appearance. The defendant was apprehended after an alarm was tripped at Centurylink in Kent
11 indicating a burglary in progress. When police arrived, the defendants were both told to get on
12 the ground to which they complied. When Defendant Bachmann heard sirens approaching, he
13 jumped up and took off running back inside the fenced area of the business. A K-9 attempted to
14 locate him but to no avail. The defendant was apprehended a short time later. The defendant's
15 criminal history includes convictions for VUCSA (2011), DUI (2011) and Negligent Driving
16 First Degree (2005).

17 **Defendant King**

18 Pursuant to CrR 2.2(b)(2)(i),(ii), the State asks that bail remain at \$5,000, as set at first
19 appearance. He currently has two pending DWLS 3 matters, one of which he had an outstanding
20 warrant at the time of his arrest. He also has three pending charges for Possession of Drug
21 Paraphernalia and VUCSA x2 in Bothell Municipal Court. The defendant has 10 warrants since
22 2006. The defendant's criminal history includes convictions for Bail Jumping (2007), Tampering
23 with a Witness (2007), VNCO (2007 x7, including 6 misdemeanor convictions and one felony
24 conviction), VUCSA (2005, 1994), Assault Fourth Degree (2006), DUI (2006), Negligent
Prosecuting Attorney Case
Summary and Request for Bail
and/or Conditions of Release - 1

Daniel T. Satterberg, Prosecuting Attorney
CRIMINAL DIVISION
Maleng Regional Justice Center
401 4th Avenue North, Suite 2A
Kent, WA 98032-4429
(206) 205-7400 FAX (206) 205-7475

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Driving First Degree (1998, 1991), No Valid Operator's License (1997, 1996, 1994, 1991 x2, 1990), Disorderly Conduct (1991), and Resisting Arrest (1991).

The State further requests that the co-defendants have no contact with each other and with Centurylink in Kent.

Signed and dated by me this ___ day of November, 2013.



Lena Smith, WSBA #41246
Deputy Prosecuting Attorney

POST-TRIAL STATEMENT: CONVICTIONS AND PENALTIES

Date: July 22, 2014

Defendant: PATRICK DENNIS KING Cause No.: 13-C-14122-8 KNT
Trial Judge: Chun Verdict Date: 7/10/14

Jury trial Bench trial VERDICT(S): Guilty on both counts

Count I Attempted Burglary 2nd Degree (name of crime) Count III Count V
Count II Possession of Burglary Tools Count IV Count VI

SPECIAL FINDING(S)/ VERDICT(S):

- Firearm, RCW 9.94A.533 Count(s)
Deadly Weapon other than firearm, RCW 9.94A.533 Count(s)
Sexual Motivation, RCW 9.94A.835 Count(s)
Domestic Violence, RCW 10.99.020 Count(s)
Aggravating circumstances, RCW 9.94A.535 Count(s)
Methamphetamine Offense, Minor Present, RCW 9.94A.605 Count(s)
Other: Count(s)
DISMISSAL: Upon sentencing for Count(s), the State moves to dismiss Count(s) in this cause.

CONDITIONS OF RELEASE ON APPEAL: Pursuant to CrR 3.2(h) and RCW 9.95.062 the State recommends

- denial of conditions of release/ stay of sentence pending appeal. Reasons:
that appeal bond be set at \$ cash or surety and the following additional conditions: supervision by the Department of Corrections subject to standard Dept. of Corrections rules, appropriate no contact provisions, not possess any firearms, no law violations, other:

MAXIMUM TERMS:

Maximum on Count(s) 1 is not more than 5 years each and \$ 10,000 fine each.
Maximum on Count(s) 1 is not more than 364 days each and \$ 5,000 fine each.
Maximum on Count(s) is not more than years each and \$ fine each.

- MANDATORY MINIMUM TERM(S) pursuant to RCW 9.94A.540 only for Count(s) is years each.
MANDATORY ENHANCEMENT TERM(S) pursuant to RCW 9.94A.533 for Count(s) is months each; for Count(s) is months each. This/these additional term(s) must be served consecutively to each other and to any other term.
MANDATORY DRIVER'S LICENSE REVOCATION. RCW 46.20.285; RCW 69.50.420.

SENTENCE RECOMMENDATION is incorporated in attached form(s).

Candice M. Duclos (handwritten signature)

Candice M. Duclos, WSBA #42662
Deputy Prosecuting Attorney

King

Version 20121231

BURGLARY SECOND DEGREE

attempted

RCW 9A.52.030
CLASS B - NONVIOLENT

OFFENDER SCORING RCW 9.94A.525(16)

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Burglary Second Degree or Residential Burglary Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 183.

ADULT HISTORY:

Enter number of Burglary 1 felony convictions x 2 = _____
Enter number of Burglary 2 and Residential Burglary felony convictions x 2 = _____
Enter number of felony convictions 5 x 1 = 5

JUVENILE HISTORY:

Enter number of Burglary 1 felony dispositions x 2 = _____
Enter number of Burglary 2 and Residential Burglary felony dispositions x 1 = _____
Enter number of serious violent and violent felony dispositions x 1 = _____
Enter number of nonviolent felony dispositions x 1/2 = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other Burglary 1 felony convictions x 2 = _____
Enter number of other Burglary 2 and Residential Burglary felony convictions x 2 = _____
Enter number of other felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? + 1 = _____

Total the last column to get the Offender Score (Round down to the nearest whole number)

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SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL III	2m	5m	8m	11m	14m	19.5m	25.5m	38m	50m	99.5m
	1 - 3	3 - 8	4 - 12	9 - 12	12+ - 16	17 - 22	22 - 29	33 - 43	43 - 57	51 - 68

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 20 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 167 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 170.
- ✓ For sentencing alternatives, see page 160.
- ✓ For community custody eligibility, see page 168.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 165.

75% = 12.75 mon -
16.5 mon

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

**APPENDIX B TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)**

Defendant: **PATRICK D KING**FBI No.: **909890WA5** State ID No.: **WA15442691**DOC No.: **735131**This criminal history compiled on: **November 13, 2013**

- None known. Recommendations and standard range assumes no prior felony convictions.
 Criminal history not known and not received at this time. WASIS/NCIC last received on 10/31/2013

Adult Felonies

Offense	Score	Disposition
07-1-02326-3 protection order viol-felony	02/18/2007	WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
07-1-02326-3 tampering with a witness	02/18/2007	WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
07-1-02326-3 bail jumping	02/18/2007	WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
05-1-01700-7 cont sub-possess no prescript	07/23/2005	WA Clark Superior Court - Guilty 11/30/2005 20 dys, cr 6 dys, balance 14 dys community service
94-1-01781-6 cont subst vio a: mfg/delvr/p	11/11/1994	WA Yakima Superior Court - Guilty 04/19/1995 35 days 12 m supv

Adult Misdemeanors

Offense	Score	Disposition
07-1-02326-3 protection order violation (g)	02/18/2007	WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
07-1-02326-3 protection order violation (g)	02/18/2007	WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
07-1-02326-3 protection order violation (g)	02/18/2007	WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.

**APPENDIX B TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)**

Defendant: **PATRICK D KING**FBI No.: **909890WA5**State ID No.: **WA15442691**DOC No.: **735131****Adult Misdemeanors**

Offense	Score	Disposition
07-1-02326-3 02/18/2007 protection order violation (g)		WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
07-1-02326-3 02/18/2007 protection order violation (g)		WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
07-1-02326-3 02/18/2007 protection order violation (g)		WA King Superior Court - Guilty 10/05/2007 16m doc cts 5&6, 29m doc ct 7. cts 5,6&7 conc w/each other. 12m jail suspd cts 1,2,4,8,10&11. serve 12m jail on cts 1,2,4&8, no jail on cts 10&11. cts 1,2&4 are conc w/each other & consec to cts 5,6&7. ct 8 is consec to cts 1,2,4,5,6&7.
16135 BO 12/08/2006 dwls 3rd degree		WA Bothell Municipal Court - Guilty
27508 KI 11/24/2006 assault 4th degree		WA Kirkland Municipal Court - Guilty
C00657892 WS 11/11/2006 dui		WA South Division Snohomish County District Court - Guilty
29301 BG 08/07/2006 dwls 3rd degree		WA Battle Ground Municipal Court - Guilty
205018N CK 07/15/2005 family non-support		WA Clark County District. Court - Guilty
50549 VP 04/30/2003 driving while suspended 3rd		WA Clark County District. Court - Guilty
38365 CM 12/18/2002 dwls 3rd degree		WA Camas/Washougal Municipal Court - Guilty
124411 WS 02/15/1998 negligent driving 1st degree		WA Lower Kittitas District Court - Guilty
41933 ZP 09/27/1997 no valid oper license w/out i		WA Zillah Municipal Court - Guilty
41590 ZP 10/22/1996 no valid oper license w/out i		WA Zillah Municipal Court - Guilty
122536C WS 04/06/1996 dwls 3rd degree		WA South Division Snohomish County District Court - Guilty
C00000456 MP 12/07/1995 dwls 3rd degree		WA Everett District Court - Guilty
C00002167 LW 07/27/1995 dwls 3rd degree		WA Lynnwood Municipal Court - Guilty

**APPENDIX B TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)**

Defendant: **PATRICK D KING**FBI No.: **909890WA5** State ID No.: **WA15442691**DOC No.: **735131****Adult Misdemeanors**

Offense	Score	Disposition
C00072599 YP dwls 3rd degree	11/11/1994	WA Yakima County District Court - Guilty
C00072853 YP dwls 3rd degree	10/25/1994	WA Yakima County District Court - Guilty
C00067302 YP no valid drivers license	05/08/1994	WA Yakima County District Court - Guilty
31080/B BO disorderly conduct	09/27/1991	WA Northeast District Court - Guilty
31080/B BO resisting arrest	09/27/1991	WA Northeast District Court - Guilty
30569/B BO negligent driving	06/24/1991	WA Northeast District Court - Guilty
30568/B BO no valid drivers license	06/24/1991	WA Northeast District Court - Guilty
30568/B BO failure to comply - 2 or more	06/24/1991	WA Northeast District Court - Guilty
30450/B BO no valid drivers license	06/15/1991	WA Northeast District Court - Guilty
30450/B BO failure to comply - 2 or more	06/15/1991	WA Northeast District Court - Guilty
6430182 WS no valid drivers license	11/22/1990	WA Everett District Court - Guilty

Juvenile Felonies - None Known**Juvenile Misdemeanors - None Known****Comments**

STATE'S SENTENCE RECOMMENDATION
(USE FOR NON-SEX OFFENSE, NON-DOSA SENTENCES OF OVER ONE YEAR ONLY)

Date of Crime: October 31, 2013
Defendant: PATRICK DENNIS KING

Date: July 22, 2014
Cause No: 13-C-14122-8 KNT

The State recommends that the defendant be sentenced to a term of total confinement in the Department of Corrections as follows:

14.5 Months on Count 1 ; _____ Days/months on Count _____ ;
_____ Days/months on Count _____ ; _____ Days/months on Count _____ ;

with credit for time served as provided under RCW 9.94A.505. Terms to be served *concurrently/consecutively* with each other. Terms to be served *concurrently* with: Count 2. Terms to be consecutive to any other term(s) not specifically referred to in this form.

WEAPONS ENHANCEMENT - RCW 9.94A.533: The above recommended term(s) of confinement do not include the following weapons enhancement time: _____ months for Ct. _____, _____ months for Ct. _____, _____ months for Ct. _____; which is/are mandatory, served without good time and served consecutive to any other term of confinement.

_____ **ENHANCEMENT** _____ months for Ct. _____.

TOTAL LENGTH OF CONFINEMENT recommended in this cause, including all counts and enhancements is 14.5 months.

This is an agreed recommendation.

NO DRUG OFFENDER SENTENCE ALTERNATIVE (DOSA) - RCW 9.94A.660:

- Defendant is not legally eligible for DOSA because current sex or violent offense; prior violent offense within 10 years or any prior sex offense; weapon enhancement; subject to final deportation order; not small quantity of drugs;
- more than one prior DOSA within 10 years; felony DUI or physical control.
- Defendant is eligible but DOSA is not recommended because _____.

EXCEPTIONAL SENTENCE: This is an exceptional sentence, and the substantial and compelling reasons for departing from the presumptive sentence range are set forth in the attached form or brief.

NO CONTACT: For the maximum term, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties, with: Century Link.

MONETARY PAYMENTS: Defendant shall make the following monetary payments pursuant to RCW 9.94A.753 and RCW 9.94A.760.

- Restitution as set forth in the "Plea Agreement" page and _____.
- Court costs; mandatory \$500 Victim Penalty Assessment and \$100 DNA collection fee; recoupment of cost for appointed counsel.
- King County Local Drug Fund \$_____; \$100 lab fee (RCW 43.43.690).
- Fine of \$_____; \$1,000 fine for VUCSA; \$2,000 fine for subsequent VUCSA.
- Costs of incarceration in K.C. Jail at \$50 per day (RCW 9.94A.760(2)).
- Emergency response costs \$_____ (RCW 38.52.430); Extradition costs of \$_____;
- Other: _____.

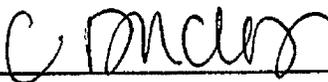
COMMUNITY CUSTODY: for qualifying crimes the defendant shall serve a term of community custody set forth below.

- Serious violent offense: 36 months (a range of 24 to 36 months if crime committed before 8/1/2009).
- Violent offense: 18 months
- Crimes against persons or violation of Ch. 69.50 or .52: 12 months (a range of 9 to 12 months if crime committed before 8/1/2009).

Community Custody includes mandatory statutory conditions as well as discretionary conditions set by the court or Dept. of Corrections. The State recommends the court impose these discretionary conditions:

- Obtain an alcohol/substance abuse evaluation within 30 days of release and follow all treatment recommendations.
- Enter into within 30 days of release, make reasonable progress in, and successfully complete state-certified Domestic Violence treatment.
- Other: _____.

MANDATORY CONSEQUENCES: HIV blood testing (RCW 70.24.340) for any prostitution related offense, or drug offense associated with needle use. DNA testing (RCW 43.43.754). Revocation of right to possess a FIREARM (RCW 9.41.040). DRIVER'S LICENSE REVOCATION (RCW 46.20.285; RCW 69.50.420). REGISTRATION: Persons convicted of some kidnap/unlawful imprisonment offenses are required to register pursuant to RCW 9A.44.130.



Candice M. Duclos, WSBA#42662
Deputy Prosecuting Attorney

NON-FELONY PLEA AGREEMENT AND STATE'S RECOMMENDATION

Date of Crime: October 31, 2013
Defendant: PATRICK DENNIS KING

Date: July 22, 2014
Cause No: 13-C-14122-8 KNT

The State of Washington and the defendant enter into this PLEA AGREEMENT which is accepted only by a guilty plea. This agreement may be withdrawn at any time prior to entry of the guilty plea. The PLEA AGREEMENT is as follows:

[] This is part of an indivisible agreement that includes cause number(s): _____.

On Plea To: As charged in Count(s) _____ of the [] original [] _____ amended information. FOUND GUILTY AT TRIAL

[] With Special Finding(s): [] domestic violence, RCW 10.99.020; [] other _____; for count(s) _____.

[] DISMISS: Upon disposition of Count(s) _____, the State moves to dismiss Count(s) _____.

[X] REAL FACTS: The parties have stipulated that the facts set forth in the certification(s) for determination of probable cause and prosecutor's summary are real and material facts for purposes of this sentencing.

Sentence may not exceed 364 days of confinement (for gross misdemeanor) or 24 months of probation on each count, with the exception of sentences pursuant to RCW 46.61.5055, which may include up to 5 years of probation.

The STATE RECOMMENDS, pursuant to RCW chapter 9.95:

[] Imposition of sentence on Count(s) _____ be DEFERRED for a period of _____ months, on the FOLLOWING CONDITIONS:

[X] Sentence of 364 days in the King County Jail on Count(s) _____ concurrent/consecutive, but execution SUSPENDED with a probation termination date of 24 months, on the FOLLOWING CONDITIONS:

[X] SERVE 0 days on Count 2 and _____ days on Count _____ in [] the King County Jail; [] Work/ Education Release, attending Enhanced CCAP if not working; [] Electronic Home Detention; [] King County Community Work Program (Work Crew); [] Enhanced CCAP; with credit for all days served solely on this cause. Terms to be served concurrently/consecutively with each other. Terms to be served concurrently/consecutively with _____. Terms to be consecutive to any other term not referenced on this page.

[] This is an agreed recommendation.

[X] MONETARY CONDITIONS: court costs, victim penalty assessment, recoupment for appointed counsel, WSP lab fee of \$100, incarceration costs, [] \$100 DNA collection fee, and _____.

[X] RESTITUTION: The defendant shall pay restitution in full to the victim(s) on charged counts and

[] agrees to pay restitution in the specific amount of \$ _____.
[] agrees to pay restitution _____.

[] Complete _____ hours of COMMUNITY RESTITUTION [] within 6 months of sentencing; [] by _____.

[X] UNSUPERVISED PROBATION [] SUPERVISED PROBATION under the jurisdiction of and subject to standard rules of supervision of the Washington Department of Corrections or King County Probation Department (not available for most crimes).

[X] Have NO LAW VIOLATIONS.

[X] Have NO CONTACT WITH:

[X] CRIME VICTIM(S) Century Link as a condition of sentence [] and RCW 10.99 or RCW 26.50.
[] MINORS, EXCEPT WITH SUPERVISION

[] Do not possess or use ALCOHOL OR NON-PRESCRIBED DRUGS.

[] Obtain [] ALCOHOL/ SUBSTANCE ABUSE EVALUATION [] MENTAL HEALTH EVALUATION within 30 days of sentencing and comply with recommended TREATMENT, including taking prescribed medication.

[] Enter within 30 days of sentencing and complete a state-certified DOMESTIC VIOLENCE TREATMENT program.

[] OTHER: _____.

The State's recommendation will increase in severity if additional criminal convictions are found or if the defendant commits any new charged or uncharged crimes, fails to appear for sentencing or violates the conditions of release. The recommendation assumes that prior convictions have been fully disclosed and are set forth in Appendix B.

Maximum on Count(s) 2 is not more than 364 days each and \$5000 fine each.

MANDATORY CONSEQUENCES: HIV test for any offense specified in RCW 70.24.340; DNA test (as required by RCW 43.43.754); Revocation of right to possess a FIREARM (RCW 9.41.040) for some domestic violence offenses; DRIVER'S LICENSE REVOCATION (RCW 46.20.285; RCW 69.50.420); OFFENDER REGISTRATION (RCW 9A.44.130,.140).

C. [Signature]

Defendant

Deputy Prosecuting Attorney, WSBA #42662

Attorney for Defendant, WSBA# 35317

Judge, King County Superior Court

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Travis Stearns, the attorney for the appellant, at travis@washapp.org, containing a copy of the Brief of Respondent, in State v. Patrick Dennis King, Cause No. 72598-0, 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.

Dated this 2 day of July, 2015.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Name:
Done in Seattle, Washington