

No. 34114-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Victor Evenson,**

Appellant.

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FILED  
COURT OF APPEALS  
DIVISION II  
07 MAR 13 PM 1:20  
STATE OF WASHINGTON  
BY DEPUTY

Grays Harbor Superior Court

Cause No. 04-1-00318-3

The Honorable Judge Gordon L. Godfrey

**Appellant's Reply Brief**

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## ARGUMENT

Respondent has been granted permission to “supplement” the record with material not previously filed with the trial court.

Commissioner’s Ruling, dated 2/23/07. Appellant has filed a motion to modify that decision, along with a demand for an evidentiary hearing. In the interim, however, argument is presented here addressing the supplemental material.

Under RCW 9.94A.530(2), “[T]he trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” The burden is on the state to establish a defendant’s criminal history. *State v. Ford*, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

The document with which Respondent plans to “supplement” the record is a judgment and sentence captioned with the name “Benji. T. Evenson.” The judgment and sentence itself is not signed, although the fingerprint page is signed by “Benji T. Evenson.” The judgment and sentence includes “Victor Thomas B. Evenson” as an alias for Benji T. Evenson. This name does not appear in the caption or on the first page. On the copy received by appellate counsel, there are no perceptible fingerprints.

Appellant has not admitted or acknowledged that he has ever used the name “Benji T. Evenson” as an alias. The fact that the state can produce a document in which a person named “Benji T. Evenson” used as an alias a name similar<sup>1</sup> to-- but not identical to-- appellant’s, does not prove that the appellant has ever used another name, much less the particular name “Benji T. Evenson.”

Since the appellant has not admitted or acknowledged the alleged prior history, and has not admitted or acknowledged facts allowing use of the Pacific County judgment and sentence, the burden is on the state to prove that appellant is the “Benji T. Evenson” named in the document. Proof that “Benji” uses an alias is insufficient.

Because the state has failed to provide any facts tying the Pacific County Judgment and Sentence to appellant, it cannot be used to calculate appellant’s offender score. The state has failed to carry its burden. *Ford, supra.*

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<sup>1</sup> Compare CP 4 “Victor Thomas Evenson,” with Pacific County Judgment and sentence for Benji T. Evenson, listing “Victor Thomas B. Evenson.”

**I. RESPONDENT HAS CONCEDED THAT REMAND IS APPROPRIATE.**

Respondent concedes that the offender score is incorrect, and that the case should be remanded for resentencing using a correct offender score. Brief of Respondent, pp. 1-2.

Respondent “believes” that Mr. Evenson has an offender score of 8, and that the omission of four prior felonies was merely a “scrivener’s error.” Brief of Respondent, p. 1. Respondent did not file a motion pursuant to CrR 7.8(a) (relief from judgment for clerical mistake), or seek permission for such a motion under RAP 7.2(e) after acceptance of review. Nor did Respondent cross-appeal the trial court’s findings on Mr. Evenson’s criminal history.

The state did not even assign error to the trial court’s findings; the findings are thus verities on appeal.<sup>2</sup> *State v. Rankin*, 151 Wn.2d 689 at 709, 92 P.3d 202 (2004). Accordingly, the state is estopped from arguing that the trial court’s findings on criminal history may be relitigated on remand. Instead, Respondent is stuck with the findings.

The only issue on appeal is the calculation of the correct offender score, based on the trial court’s unchallenged findings. Given the

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<sup>2</sup> It is unclear that Respondent could assign error to findings without filing a cross-appeal. See RAP 10.3(b): “If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.”

unchallenged findings on criminal history, Mr. Evenson has an offender score of five. RCW 9.94A.525. His sentence must be vacated and the case remanded for resentencing with an offender score of five.

**II. FAILURE TO OBJECT TO BARE ALLEGATIONS DOES NOT CONSTITUTE ACKNOWLEDGEMENT.**

Respondent next implies that Mr. Evenson's failure to object at sentencing constitutes an acknowledgment of prior convictions and a waiver of the same criminal conduct issue. Brief of Respondent, p. 1. This argument erroneously implies that the prosecutor's Statement of Criminal History is a "presentence report."

By statute, a presentence report is a document prepared at the court's request by the Department of Corrections. RCW 9.94A.500. No presentence report was requested by the court or filed by DOC in this case. The Statement of Criminal History relied upon by Respondent contains nothing more than allegation. As the Supreme Court made clear in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.  
*State v. Ford, supra, at* 482.

Respondent's reliance on the prosecuting attorney's bare assertions is misplaced. Although the written statement prepared by the prosecuting attorney is undoubtedly helpful to both parties and to the court, it does not constitute proof under RCW 9.94A or under *Ford, supra*.

If this court finds that Mr. Evenson had four prior malicious mischief charges (despite the absence of these charges in the unchallenged findings on criminal history), it must remand for a determination of whether or not the charges comprised the same criminal conduct.

**III. IF THE ISSUES ARE WAIVED, MR. EVENSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Evenson stands on the arguments set forth in the opening brief.

**CONCLUSION**

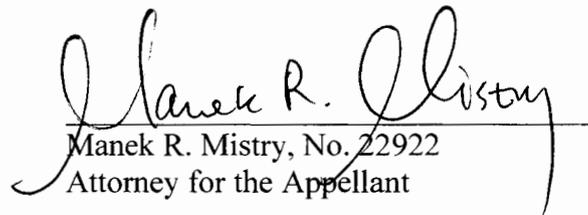
Mr. Evenson's judgment and sentence is void on its face, because the unchallenged criminal history does not support an offender score of 9. Because Respondent has not moved for relief from what it claims is a scrivener's error, has not cross-appealed the trial court's findings, and has not assigned error to the trial court's finding, the findings on criminal history are verities on appeal. The sole issue for this court is calculation of the correct offender score, given the unchallenged findings. Under RCW 9.94A.525, the correct offender score is five. The sentence must be

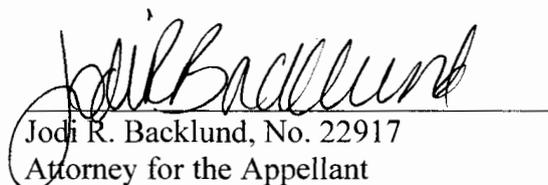
vacated and the case remanded for resentencing with an offender score of five.

In the alternative, if this court finds that Mr. Evenson had four prior convictions for malicious mischief, it must vacate the sentence and remand for the trial court to determine whether or not the prior offenses were the same criminal conduct. *State v. Wright*, 76 Wn.App. 811, 888 P.2d 1214 (1995).

Respectfully submitted on March 12, 2007.

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STATE OF WASHINGTON  
BY *[Signature]*

DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Victor Evenson, DOC # 735528  
Staford Creek Correction Center  
191 Constantine Way  
Aberdeen, WA 98520

and to:

Grays Harbor County Prosecuting Attorney  
102 West Broadway Ave., RM 102  
Montesano, WA 98563-3621

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 12, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 12, 2007.

*[Signature]*  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant