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NO. 34835-7-II
Cowlitz Co. Cause NO. 05-1-01388-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent/Cross-Appellant,

v.

TED JENSEN,
Appellant.

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STATE OF WASHINGTON

**BRIEF OF RESPONDENT/CROSS-
APPELLANT**

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A. ASSIGNMENTS OF ERROR

Answers to Appellant's Assignments of Error

1. The record is sufficiently complete, and Jensen's rights to appeal, to effective assistance of counsel, and to due process were not violated.
2. The trial court properly admitted evidence at trial.
3. The failure of the trial court to enter written findings regarding the CrR 3.5 hearing was harmless error as trial court's oral findings and conclusions are sufficient to allow effective appellate review.

Cross Appellant's Assignments of Error

1. The trial court erred when it required the State to prove Jensen's community custody status to a jury beyond a reasonable doubt.
2. The trial court miscalculated Jensen's offender score and standard range and therefore erred in sentencing Jensen to 264 months in prison.

Issues Pertaining to Assignments of Error

1. Does 23 minutes of missing testimony require reversal of a conviction resulting from nearly two days of testimony? (Appellant's Assignment of Error 1 and 2.)
2. Can the trial court reconstruct 23 minutes of missing testimony and supplement the record with a narrative report of that portion of the proceedings? (Appellant's Assignment of Error 1 and 2.)
3. Is a statement hearsay if it is testified to by a police officer to explain why he collected an item of evidence? (Appellant's Assignment of Error 3 and 4.)

4. Is a statement of a declarant hearsay if it is offered against the declarant? (Appellant's Assignment of Error 3 and 4.)
5. Is a statement excluded by the hearsay rule if it is made by a person's associates or member of the person's close community regarding the existence of a dating relationship involving the person? (Appellant's Assignment of Error 3 and 4.)
6. Is the failure of the trial court to enter findings of fact and conclusions of law regarding a CrR 3.5 hearing harmless error if the court's oral findings and conclusions are sufficient for appellate review? (Appellant's Assignment of Error 5 and 6.)
7. Does *Blakely* require the State to prove to a jury beyond a reasonable doubt that a defendant was on community custody at the time of the offense before a judge may add a point to the defendant's offender score pursuant to RCW 9.94A.525(17)? (Cross Appellant's Assignment of Error 1)
8. Must a case be remanded for resentencing if the trial court's sentence was based upon an incorrect offender score when the trial court stated it would alter the sentence if the offender score was found to be incorrect on appeal? (Cross Appellant's Assignment of Error 2.)

B. STATEMENT OF THE CASE

1. FACTUAL BACKGROUND

On November 1, 2005, the victim Gery Snapp was 56 years old and was living in his motor home in the Wal-Mart parking lot on Ocean Beach Highway in Longview, Washington. RP 100-01. He had met the appellant Ted Jensen in the parking lot a couple of days earlier. RP 103. Jensen was living in his car in the same parking lot. RP 104. The two

men initially got along and had dinner at the Salvation Army together. RP 103-04. On the way back from dinner, they picked up a woman named Susan Meyer. RP 104. After that evening, Ms. Meyer stayed with Snapp in his motor home. *Id.*

Soon after, Jensen and Snapp stopped getting along. RP 105. Snapp had allowed Jensen to stay at his motor home one night, and the two men had a disagreement. *Id.* From that point on, Jensen was no longer welcome in Snapp's motor home. *Id.* The motor home had a driving compartment, a front room that includes a kitchen, and a back bedroom. RP 106. Ms. Meyer slept in the front room on a sofa that was folded down into a bed. RP 107, 243. There was a side entrance to the motor home. *Id.* Also staying in the parking lot during this time period were Charles and Trudi Wade, who slept in a van parked to the rear of Snapp's motor home. RP 109, 145. According to Mr. Wade, Jensen was interested in Ms. Meyer, and Ms. Meyer led Jensen on. RP 158.

During the early morning hours on November 1, Snapp was awakened by loud music. RP 110. The battery in Snapp's motor home was dead so the only light he had was from a flashlight and from the parking lot lights. RP 111. Snapp, wearing only a T-shirt, jeans, and a

pair of socks, tried to look out the motor home door to see where the music was coming from. RP 111-12. He could not see anything so he opened the side door of the motor home and stood on the lower step. RP 112. He shined the flashlight outside and saw Jensen who was saying something to him. RP 113.

As Snapp turned to go back into the motor home to put some shoes on, Jensen stabbed him in the back. RP 113-16. Snapp fell to the sofa bed in the motor home, and Jensen attacked him. RP 116. Snapp tried to fight Jensen off. RP 116-17. Jensen stabbed Snapp repeatedly and said, "You'll always remember Monk 'cause I'm gonna kill ya." RP 117-18. Snapp remained on the bed for the entire struggle and believed that Jensen would carry out his threat to kill him. RP 118.

Snapp began hitting Jensen in the head with the flashlight. *Id.* Jensen then got up and left the motor home. RP 120. Snapp was in a lot of pain and there was blood spurting everywhere so he went out to the curb. *Id.* Snapp was eventually taken to the hospital where he had surgery and remained for 12-13 days. *Id.* For two months afterwards, his stab wounds needed to be packed twice a day. RP 120-21. According to the surgeon who operated on Snapp, Dr. Dane Moseson, the

most serious injury was a stab wound near the heart. RP 175. There were also potentially life-threatening stab wounds to the abdomen. RP 175. There was also a stab wound that passed through the rib cage, where Snapp's bowels were hanging out. RP 176. There were also two stab wounds on the left hand, the forearm, the left knee, the right ankle and the back of the right shoulder. RP 180. At least one stab wound was on only half an inch away from Snapp's heart. RP 185.

On the night of this incident, Susan Meyer was sleeping in the main room of the motor home. RP 244. She awoke to Snapp saying that Jensen was in the parking lot with the loud music on. RP 244-45. Ms. Meyer saw Snapp go out of the motor home with a flashlight. RP 245. Ms. Meyer could hear Snapp and Jensen talking over the music. RP 246. She heard Jensen ask Snapp if she was there, and Snapp told Jensen she was not. RP 247. Jensen kept asking the same question, and Snapp kept denying Ms. Meyer was there until she saw Snapp back at the motor home door. RP 247. He was at the base of the stairs and still had the flashlight. RP 248-49. He was facing the front of the motor home. RP 249. Jensen was standing face-to-face with Snapp. RP 249-50. Jensen turned and saw Ms. Meyer inside the motor home. RP 250. Snapp then

turned toward the motor home and started to come up the steps. RP 251.

According to Ms. Meyer, Jensen followed Snapp inside the motor home.

Id.

Snapp told Jensen to leave, and Ms. Meyer told Jensen she did not want to go with him. *Id.* Ms. Meyer then saw the two men “plunging” at each other – Jensen with the knife and Snapp with the flashlight. RP 253. As Jensen stabbed Snapp, Snapp backed toward the sofa bed, eventually lying across Ms. Meyer’s feet. RP 256. Ms. Meyer heard Jensen say he was going to kill Snapp. RP 257. When Jensen was done stabbing Snapp, Jensen offered a hand to Ms. Meyer who refused to go with him. RP 258.

On the night of this incident, Trudi Wade was sleeping in the van near the motor home after having used heroin earlier the day before. RP 147. During this incident, Trudi was awakened by screaming from the motor home. RP 147-48. She could hear Jensen saying that he was “going to kill ‘em” and “something to the effect of, it’s time to die or how do you feel about dying....” RP 148-49. Ms. Wade told her husband to go investigate. RP 149. Ms. Wade then looked and saw her husband and Jensen running out behind the motor home. RP 149. Ms. Wade heard

Jensen say to her husband that he was next. *Id.* She saw Jensen run one way and her husband run toward Wal-Mart. *Id.* Ms. Wade saw Snapp outside the motor home with blood all over him. RP 150. He was saying he had been stabbed and looked scared. *Id.* Ms. Wade told Ms. Meyer to grab a blanket, and Ms. Wade ran to a nearby restaurant to call 911. RP 150-51.

According to Mr. Wade, he had also used heroin the previous evening and was awakened by his wife alerting him to the disturbance in the motor home. RP 159. Mr. Wade heard what sounded like somebody pushing somebody around and yelling. *Id.* He heard someone yell, “now you did it, you’re going to die....” *Id.* He looked out the van window and could see the motor home moving back and forth. RP 160. When Mr. Wade got out of the van, he saw Snapp standing in the middle of the road trying to wave down a car, saying “help me somebody” and that he had been stabbed ten times. *Id.* Mr. Wade turned around and heard Jensen say, “you’re next.” RP 160-61. Mr. Wade ran and called 911. RP 162.

Edward Nelson, a security guard for Wal-Mart, was parked on the east side of the parking lot during this incident. NRP¹ 1. He saw headlights flash from a car parked on the west side and saw a man he later identified as Jensen walk from the car to the motor home. *Id.* The man was out of Nelson's vision for 20-30 seconds and then the man walked to the car then to the motor home again. *Id.* The man then got in his car and drove to Wal-Mart's main entrance. *Id.* Nelson drove to the front entrance and saw Jensen, whose head was split open. *Id.* Jensen said a guy in the motor home hit him with a big flashlight and threw urine on his car. *Id.* Jensen said he took a knife away from the man and stabbed him because he was being attacked. *Id.* Jensen asked Nelson to call the police and an ambulance. *Id.*

Jensen was eventually transported to the hospital where Longview Police Officer Mike Rabideau was assigned to stay with him until he was transported to the police station. RP 299-300. Rabideau escorted Jensen to the x-ray room. RP 300. On the way, Jensen said the "methies" had

¹ "NRP" refers the Narrative Report of Proceedings on February 2, 2006, before Hon. James Warne.

messed with the wrong man and “after 35 years, I’m finally getting some respect.” RP 301.

Detectives Tim Deisher and Doug Kazensky interviewed Jensen at the Longview Police Department. RP 196-97, 273-80. Jensen claimed that Snapp flashed the motor home lights at him when Jensen parked near the motor home. RP 202. Jensen admitted playing music loudly outside the motor home and yelling for Ms. Meyer. RP 200. Jensen said Snapp came out of the motor home and poured urine into Jensen’s car. *Id.* Jensen said he got out of the car and that Snapp hit him twice in the head with a flashlight. *Id.* Jensen then claimed that Snapp pulled out a knife which Jensen claimed he was able to get away from Snapp. *Id.* He was likewise able to kick the flashlight out of Snapp’s hand. RP 208. Jensen then went into what he called the Martial Arts Kado and stabbed Snapp what he estimated to be six to 18 times. RP 200, 210.

Jensen claimed he was a black belt in karate. RP 208. Jensen said that he was in love with Susan Meyer and was looking for a place for the two of them to live. RP 202-03. Jensen claimed that he thought Ms. Meyer needed help that night. RP 203. He also claimed they had a sexual relationship. *Id.* According to Jensen, after stabbing Snapp, he

tried to convince Ms. Meyer to go with him, and then he got in his car and drove off. RP 211. Jensen also told the detectives he did not go into the motor home during the stabbing. RP 212.

William White testified that around the date of the stabbing he worked at an automotives store near the Wal-Mart. RP 167. He informed officers investigating the stabbing that there were no security cameras outside of the store. RP 168. White had previously met Jensen when Jensen applied for a job at the store. *Id.* On the day after the stabbing, Jensen called White from the jail asking if his application “was still good.” RP 168-69. Jensen told White that he had been jumped in the Wal-Mart parking lot and that there was a stabbing. RP 170.

Detectives searched the area where the stabbing and the aftermath occurred but were unable to find a knife. RP 215, 280. A knife was later found on Jensen’s person, but it was never determined whether the knife was the same one that was used in the stabbing. RP 298. After the stabbing, the inside of the motor home was covered with blood. RP 258.

2. PROCEDURAL BACKGROUND

Jensen was charged by information with assault in the first degree, harassment and vehicle prowling in the first degree. CP 5-7. A deadly

weapon enhancement was specially alleged in each count. *Id.* A jury found Jensen guilty as charged. CP 101-06. At the initial sentencing on May 5, 2006, the trial court found the State had proven to the court that Jensen was on community custody at the time of the offenses for which he was convicted. RP 432-33. However, the trial court ruled that before it could add a point to Jensen's offender score the State was required to prove his community custody status to a jury beyond a reasonable doubt. *Id.* Therefore, the trial court did not add a point to Jensen's offender score based upon his community custody status. CP 112.

The court found that Jensen's standard range on the charge of assault in the first degree with a deadly weapon enhancement was 210-264 months. CP 112. The court ran the three deadly weapon enhancements concurrent to each other. CP 115. The court also stated that if the case were to be remanded for a recalculation of the offender score with the extra community custody point, Jensen's range would be 226-284 months and that the court would impose 255 months, near midpoint of the range. RP 446.

On May 12, 2006, the trial heard Jensen's motion on an issue regarding the calculation of "good time." RP 449-450. Jensen filed a

timely notice of appeal, and the State filed a timely notice of cross appeal. CP 120-21. On August 18, 2006, the trial court heard Jensen's motion to clarify the judgment and sentence. CP 126-35. Jensen argued that the judgment and sentence did not reflect with enough clarity that his deadly weapon enhancements were to run concurrent to each other. *Id.* The State filed a motion for relief from judgment and argued that the deadly weapon enhancements were required to run consecutively. RP 136-139. The court agreed with the State and resentenced Jensen (still without the extra community custody point) to 264 months in prison on the charge of assault in the first degree. CP 141-49.²

On November 30, 2006, the trial court wrote a letter to counsel for the State explaining that Jensen's appellate counsel had notified him that the recording of the trial testimony of witness Ed Nelson had not been recorded on the court's video hard drive; therefore, there was no record of Nelson's testimony. CP 150. The State made several attempts to enlist

² The State filed a motion to supplement the report of proceeding which was granted by Commissioner Schmidt on April 26, 2007, and a supplemental statement of arrangements. However, the State has yet to receive the verbatims on these supplemental hearings at the time of filing so it is unable to cite to the relevant portions of the record.

the aid of Jensen's trial counsel in recreating Nelson's brief testimony; however, as the record below indicates, the attorney refused to participate since he had moved out of state. CP 152-178. The State filed a motion to supplement the record with the trial court and notified Jensen's trial and appellate counsel of the hearing on the motion. CP 152, 179-80. On January 26, 2007, the trial court granted the State's motion and supplemented the record on review. NRP 1.

C. ARGUMENT

1. THE RECORD IS SUFFICIENTLY COMPLETE, AND JENSEN'S RIGHTS TO APPEAL, TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS WERE NOT VIOLATED.

Jensen alleges that the State has failed to provide a complete record and argues that reversal of his conviction is required because the failure to provide a complete record violates his rights to appeal, to effective assistance of counsel and to due process.

Due process requires "a record of sufficient completeness" for review of the errors raised by a criminal defendant. *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899, *cert. denied*, 374 U.S. 850, 83 S.Ct. 1914, 10 L.Ed.2d 1070, *cert. denied*, 374 U.S. 852, 83 S.Ct. 1919, 10 L.Ed.2d 1073 (1963); *State v. Larson*, 62 Wn.2d 64, 67,

381 P.2d 120 (1963). The absence of a portion of the record is not reversible error unless the defendant can demonstrate prejudice. *State v. Miller*, 40 Wn.App. 483, 488, 698 P.2d 1123, *review denied*, 104 Wn.2d 1010 (1985).

In Jensen's case, the trial court is missing approximately 23 minutes of the record, which includes the testimony of Ed Nelson, the security guard. RP 193, NRP 1. Given that there was nearly two days of testimony which consisted entirely of the State's case-in-chief and given the substance of Nelson's brief testimony, the record is sufficient for appellate review. NRP 1. Especially given the trial court's supplementation of the record with the narrative report of Ed Nelson's testimony, Jensen has not demonstrated the necessary prejudice to prevail on this issue. NRP 1.

Jensen cites two cases in support of his contention that his conviction should be reversed on this basis. However, each case is distinguishable from Jensen's. In *Larson*, the court reporter's notes for the entire trial were lost. *Larson*, 62 Wn.2d at 65, 381 P.2d 120. In *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003), the trial court failed to record nearly all of the defendant's testimony which included his entire

defense of diminished capacity based upon drug use. The reviewing court reversed this conviction because the missing testimony was “critical” to Tilton’s defense. *Tilton*, 149 Wn.2d at 783-86, 72 P.3d 735.

The same cannot be said of the “missing” testimony (now reconstructed) in Jensen’s case. Jensen gave detailed accounts of his self-defense claims to the detectives who testified at length during the trial. Additionally, Susan Meyer was an eyewitness to the stabbing. Jensen cannot demonstrate prejudice warranting a reversal of his conviction.

The constitution does not guarantee a criminal appellant a perfect verbatim record on appeal. *State v. Thomas*, 70 Wn.App 296, 299, 852 P.2d 1130 (1993); *Mayer v. Chicago*, 404 U.S. 189, 194, 92 S.Ct. 410, 30 L.Ed.2d (1971); *Draper v. Washington*, 372 U.S. 487, 497, 83 S.Ct. 774, 30 L.Ed.2d (1963). "Alternate methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *State v. Jackson*, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976) (quoting *Draper*, 372 U.S. at 495).

2. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE AT TRIAL.

Jensen argues that the trial court erred in admitting certain evidence at trial. A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The burden is on the appellant to prove an abuse of discretion. *State v. Hentz*, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983)).

Whether a statement constitutes hearsay is a question of law that is reviewed de novo. *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001). Even if an appellant meets his burden of proving that the trial court abused its discretion in admitting hearsay statements, reversal is required only if the error was not harmless. *Id.*

(a) Testimony of Officer Buchholz

Jensen argues that the trial court erred in admitting a portion of the testimony of Officer Alan Buchholz. At trial, Officer Buchholz identified

a photograph that he had taken at the crime scene of the locking mechanism of the victim's motor home door. RP 305. The prosecutor asked Officer Buchholz why, at the time he took it, he believed this photograph was significant. RP 305-06. The defense objected, arguing that the question called for hearsay. RP 306. The prosecutor argued that the answer was offered to show why the officer believed the locking mechanism of the motor home door was significant to the investigation.

Id.

The trial court did not sustain the objection but rather instructed the jury as follows:

All right, ladies and gentlemen. I'm going to allow this testimony, not because it's true or not true. That's not the issue. It's simply to allow you to understand why the officer did what he did.

Id. Officer Buchholz was allowed to answer the question and testified as follows:

Someone had said during the time that I was there that the front door to the motor home had been ripped open, so I went over and tested the lock on the door, this lock right here. And the door was standing open, as it's seen in the picture, but the locking mechanism was locked.

Id. The photograph was then admitted without objection. *Id.*

Jensen argues this portion of Officer Buchholz's argument is inadmissible as hearsay. Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). As noted by Jensen in his opening brief, out-of-court statements not offered to prove the truth asserted, but rather offered as a basis for inferring something else, do not qualify as hearsay. In Jensen's case, the statement overheard by Officer Buchholz was merely a "verbal act". The significance of verbal acts "lay not in the truth of any matter asserted therein but in the fact they were made." *State v. Gillespie*, 18 Wn.App. 313, 315, 569 P.2d 1174 (1977), review denied 89 Wn.2d 1019.

In *Gillespie*, the defendant argued that the trial court erred in admitting the testimony of a detective that he was given consent to search the defendant's residence. *Gillespie*, 18 Wn.App. at 315, 569 P.2d 1174. The Court of Appeals held that this argument had no merit. *Id.* It held that the statements were "offered to explain the officer's involvement in the case and his subsequent actions in seizing the stolen items." *Id.* Likewise, in Jensen's case, the statement Officer Buchholz testified over-hearing regarding the motor home door was offered not for the truth of the

matter asserted but rather to explain Officer Buchholz's involvement in the investigation of the stabbing and his subsequent actions in photographing the door of the motor home. Because the statement overheard by Officer Buchholz was not offered to prove the truth of the matter asserted, it was not hearsay, and Jensen cannot meet his burden of showing that the trial court abused its discretion in admitting the statement.

Even if this court finds that the trial court abused its discretion in allowing the testimony, the court properly instructed the jury that the statement overheard by Officer Buchholz was not to be considered for the truth of the matter asserted but rather to explain why Officer Buchholz did what he did. RP 306. The jury is presumed to follow the instructions of the court. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) *cert. denied* 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446. That presumption prevails until it is overcome by a showing otherwise. *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990). Jensen has not shown otherwise; therefore, his conviction should not be reversed on this basis. Furthermore, any error in admitting the evidence was harmless.

(b) Testimony of Officer Rabideau

Jensen argues that the trial court erred in admitting a portion of the testimony of Officer Rabideau. Officer Rabideau testified that while at the hospital on the morning after the stabbing, Jensen told him “the methies had messed with the wrong man” and “after 35 years, I’m finally getting some respect” RP 300-01.

The trial court properly ruled during pre-trial motions in limine that Jensen’s statements to Officer Rabideau were admissible as a statement of the declarant’s then existing state of mind. RP 62-63. An out-of-court statement is not excluded by the hearsay rule if it is a:

... statement of the declarant’s then existing state of mind. Emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

...

ER 803(a)(3).

Furthermore, even if the statements were not admissible as evidencing his then existing state of mind, Jensen’s statements to Officer Rabideau were admissions of a party opponent. A reviewing court may uphold a trial court's evidentiary ruling on the grounds the trial court used

or on other proper grounds the record supports. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). An out-of-court statement is not considered hearsay if it is offered against a party and is the party's own statement. ER 801(d)(2) (admissions by party opponent).

Because the Jensen's statement to Officer Rabideau was not hearsay as a statement of his then existing state of mind or as an admission by a party opponent, Jensen cannot meet his burden of showing that the trial court abused its discretion in admitting the statement. Furthermore, any error in admitting such evidence was harmless.

(c) Testimony of Trudi Wade

Jensen argues that the trial court erred in admitting a portion of the testimony of Trudi Wade, claiming the testimony was hearsay. Jensen assigns error to a small portion of Trudi Wade's testimony in which she is asked about her understanding of any relationship between Jensen and Susan Meyer. RP 145-46. Trudi Wade testified that Meyer had just met Jensen "from what they both told me" and that Jensen "had feelings for her, but she didn't share them back." RP 146-47. Trudi Wade gained this knowledge when she, her husband Charles Wade, Jensen, Meyer and

the victim were all living together in the Wal-Mart parking lot over the three weeks leading up to the stabbing. RP 145-47.

However, Jensen makes no specific argument that the trial court abused its discretion and cites no authority. An argument not supported by any authority need not be considered on appeal. *Stewart v. State*, 92 Wn.2d 285, 300, 597 P.2d 101 (1979); *Palmer v. Jensen*, 81 Wn.App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997).

As the trial court noted when overruling Jensen's objection to Trudi Wade's testimony, the testimony regarding Trudi Wade's knowledge of the relationship between Jensen and Susan Meyer was not offered to prove the truth of the matter asserted and therefore was not hearsay. Rather than being offered to prove that Jensen had unrequited feelings for Susan Meyer, the testimony was offered to show Trudi Wade's viewpoint of the events that followed.

Furthermore, Trudi Wade's testimony regarding her personal knowledge of the relationship between Jensen and Susan Meyer was admissible as an exception to the general hearsay rule, under ER 803(a)(19). The rule reads in pertinent part as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

ER 803(a)(19). Additionally, this testimony is not prejudicial in light of the later testimony of Charles Wade that Jensen was interested in Ms. Meyer and that Ms. Meyer led Jensen on. RP 158. Defense counsel did not object to Mr. Wade's testimony. *Id.*

As such, Jensen has not met his burden of proving an abuse of discretion by the trial court. Furthermore, any error by the trial court is harmless error.

(d) Testimony of William White

Jensen argues that the trial court erred in admitting a portion of the testimony of William White. White testified that he worked near the Wal-Mart at an automotives store where Jensen had previously applied for a job. RP 167-68. White testified that on the day after the stabbing, Jensen called White at the store, inquiring into the status of his application. RP 168-69. White testified that Jensen told him that he had

been jumped in the Wal-Mart parking lot and that there had been a stabbing. RP 169-70.

Jensen objected at trial. RP 1169. The State argued that it was a statement against Jensen's interest. *Id.* The trial court overruled the objection. *Id.* The State concedes that the statement is not a "statement against interest" under ER 804(b)(3), since the declarant (Jensen) was available at trial. However, as argued above, a reviewing court may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Again, an out-of-court statement is not considered hearsay if it is offered against a party and is the party's own statement. ER 801(d)(2).

Because Jensen's statements to White were admissions of a party opponent and were therefore hearsay, the trial court did not abuse its discretion in admitting them at trial. Even if this court finds that the trial court erred, any error was harmless.

3. ANY FAILURE OF THE TRIAL COURT TO ENTER WRITTEN FINDINGS REGARDING THE CrR 3.5 HEARING WAS HARMLESS ERROR.

CrR 3.5 requires the trial court to enter findings of fact and conclusions of law after any hearing as to whether a defendant's are admissible at trial. A trial court's failure to comply with this rule is error, but such error is harmless if the court's oral findings and conclusions are sufficient for appellate review. *State v. France*, 121 Wn.App. 394, 401, 88 P.3d 1003 (2004) (citing *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999)).

In Jensen's case, the record fails to reflect that the trial court entered findings and conclusions.³ However, the trial court's oral findings and conclusions are sufficient for appellate review of Jensen's case. At the CrR 3.5 hearing, the State called five witnesses to testify: Detectives Tim Deisher and Doug Kazensky and Officers Mike Watts,

³ Trial counsel for the State and for the defense each signed as approving the findings and conclusions prepared by the State and submitted them for signing by the trial judge after the trial but before Jensen's opening brief was filed. However, for reasons that are not evident, either the trial court never signed the findings or they were not properly filed. In any event, those facts are not part of the record on appeal.

Mike Rabideau, and Chris Angel. RP 31-57. Jensen waived his right to testify at the hearing. RP 57-58.

(a) The trial court found that there were no disputed facts.

The trial court found that none of the facts were disputed. RP 60. On November 1, 2005, during the early morning hours after the stabbing at the Wal-Mart Parking lot in Longview, Officer Watts of the Longview Police Department arrived at the scene and came into contact with the defendant Ted Jensen. RP 49. Jensen told Watts he was the guy they were looking for. RP 51. Watts asked Jensen to tell him what happened, and Jensen made statements regarding the incident. RP 51-52. The parties agree Jensen was not in custody at that time. RP 59.

Later that date, Officer Rabideau of the Longview police department was walking with Jensen down the hallway of the hospital. RP 54. Rabideau was not questioning Jensen. *Id.* Jensen made spontaneous statements to Rabideau. RP 54-55. The parties agree these statements were not in response to any interrogation. RP 59.

At about 10 a.m. on that same date, Detectives Tim Deisher, Doug Kazensky and Robert Huhta of the Longview Police Department, were assigned to investigate a reported stabbing at the Wal-Mart parking lot in

Longview. RP 31-32, 42. Jensen had been transported to the police department from a local hospital. RP 32-33. Jensen was placed in a holding cell while waiting for the detectives. RP 33-34, 42. Deisher, Kazensky and Huhta interviewed Jensen in an interview room at the police department. RP 32, 43. At the time the interview began, the detectives had not placed Jensen under arrest. RP 32. The detectives did not tell Jensen he was free to go. RP 32. Jensen was not in handcuffs during the interview. RP 32-33.

When Jensen got to the interview room he began talking to the detectives. RP 34. Deisher stopped him and read Jensen *Miranda*⁴ warnings. RP 34-35, 43-44. Jensen replied that he did not understand why he was being read *Miranda* warnings. RP 35, 44. Deisher told him that it was because he was investigating the stabbing and that Jensen could be the suspect or could be the victim. RP 35, 44. Jensen said that he was the victim. RP 35, 44. Deisher asked if Jensen understood his rights. RP 35. Jensen said that he understood his rights but that if there was a chance that he was going to be arrested then he wanted to exercise his 5th

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Amendment rights. RP 35, 44. Because Jensen invoked his rights, the detectives terminated the interview at that time. RP 36, 44.

The detectives took Jensen back to the holding cell, allowing him to use the bathroom on the way. RP 36. Jensen was not free to leave at that time. RP 36-37. Jensen remained in the holding cell for just a couple of minutes before he initiated a conversation with the detectives. RP 37, 44. He stated he wanted to tell them his side of the story. RP 37, 44. The detectives took Jensen back to the interview room, and Deisher told Jensen that he would talk to him but he needed to make sure that he was freely and voluntarily talking to Deisher and that he had waived his rights. RP 37-38, 44-45.

Jensen said that he was retracting his 5th Amendment rights and said he wished to voluntarily speak. RP 38, 45. Deisher reread *Miranda* warnings to Jensen and asked if Jensen understood them. RP 39, 45. Jensen said that he did, and Deisher asked him if he was willing to talk to the officers. RP 39, 45. Jensen said he was. RP 45. The detectives then questioned Jensen about the events surrounding the stabbing. At no point during the remainder of the interview did he invoke his right to

remain silent or ask for an attorney. RP 45-46. No threat of force or any coercion was used during the interview. RP 46.

(b) The trial court orally concluded that Jensen's statements to were voluntary and therefore admissible.

At the CrR 3.5 hearing, Jensen essentially conceded that he was not in custody at the time of his statement to Watts. RP 59. Likewise, he also essentially conceded that he was not being interrogated at the time of his statements to Rabideau. RP 59. Therefore, *Miranda* warnings were not required prior to questioning, and the statement is admissible.

At the time of Jensen's statements to Detectives Deisher, Kazensky and Huhta, it is evident from the testimony of the detectives that Jensen was in custody and was being interrogated. It is also clear from the trial court's oral findings that it was finding that, prior to the interrogation, Deisher properly read *Miranda* warnings to Jensen. RP 60. Likewise, the court concluded that Jensen invoked his right to remain silent, and the detectives terminated the interview. *Id.* The trial court then concluded that Jensen reinitiated the conversation with the detectives. *Id.* The officers then properly established whether there was any equivocation in Jensen's statement that he wanted to tell them his side of the story by re-reading him *Miranda* warnings. RP 60-61. Jensen stated that he

understood those rights and agreed to speak with the detectives. *Id.*

Finally, the trial court explicitly concluded that Jensen's statements were voluntarily and admissible. RP 61.

The trial court oral findings and conclusions are sufficient to show its reasoning on the issue of whether Jensen's statements to the police were voluntary. Again, although the trial court did err in failing to enter findings and conclusions regarding the CrR 3.5 hearing, such error is harmless because the court's oral findings and conclusions are sufficient for appellate review.

4. THE TRIAL COURT ERRED WHEN IT REQUIRED THE STATE TO PROVE JENSEN'S COMMUNITY CUSTODY STATUS TO A JURY BEYOND A REASONABLE DOUBT.

When calculating a defendant's offender score, one adds a point if the defendant was on community custody at the time he committed the offense for which he was convicted. RCW 9.94A.525(17)⁵. At sentencing in Jensen's case, the trial court found that the State had proven to the court that Jensen was on community custody at the time of the

⁵ RCW 9.94A.525(17) reads as follows: "If the present conviction is for an offense committed while the offender was under community placement, add one point." *See also State v. Crandall*, 117 Wn.App. 448, 71 P.3d 701 (2003) (community custody is a subset of community placement; therefore a sentencing court properly adds a point to an offender score if the defendant is on community custody at the time of the current crime).

offenses for which he was convicted. RP 432-33. However, the trial court ruled that before it could add a point to Jensen's offender score the State was required to prove his community custody status to a jury beyond a reasonable doubt under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury); RP 432-33. The trial court's calculation of an offender score is reviewed de novo. *State v. Soper*, 135 Wn.App. 89, 104, 143 P.3d 335 (2006).

At the time of sentencing, there was a split within Division Two on the issue of whether *Blakely* required the State to prove a defendant's community custody status to a jury before the court could add a point to the defendant's offender score. *See State v. Hochhalter*, 131 Wn.App. 506, 128 P.3d 104 (2006); *see also State v. Giles*, 132 Wn.App. 738, 132 P.3d 1151 (2006). In *Hochhalter*, the majority of a panel held that *Blakely* required the community custody point to be proven to a jury. *Hochhalter*, 131 Wn.App. at 521-22, 128 P.3d 104. In *Giles*, a panel held that issue was properly decided by the trial court. *Giles*, 132 Wn.App. at 744, 132 P.3d 1151

However, since Jensen's sentencing, our Supreme Court has resolved this issue in *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006).

It concluded:

[B]ecause community custody is directly related to and follows from the fact of a prior conviction and ... that the attendant factual determinations involve nothing more than a review of the nature of a defendant's criminal history and the defendant's offender characteristics, such a determination is properly made by the sentencing judge.

Jones, 159 Wn.2d at 234, 149 P.3d 636.

As such, in Jensen's case, having found that the State proved at sentencing that Jensen was on community custody at the time he committed the offenses for which he was being sentenced, the trial court erred by not adding a point to Jensen's offender score. Jensen's offender score should have been seven rather than six on the assault and six rather than five on the harassment and vehicle prowl. CP 112, 142. Based upon this error, the case should be remanded for recalculation of Jensen's offender score.

5. **THE TRIAL COURT MISCALCULATED JENSEN'S OFFENDER SCORE AND STANDARD RANGE AND THEREFORE ERRED IN SENTENCING JENSEN TO 264 MONTHS IN PRISON ON THE ASSAULT, 70 MONTHS ON THE HARASSMENT, AND 60 MONTHS ON THE VEHICLE PROWL.**

(a) The sentenced imposed

As argued in the previous section, the trial court erred in calculating Jensen's offender score as six rather than seven on the assault and five rather than six on the harassment and vehicle prowling.⁶ Due to this error, the trial court initially found that Jensen's total standard range on the assault was 210 - 264 months in prison (162 - 216 months plus the 48-month deadly weapon enhancement on the assault). CP 112. The trial court sentenced Jensen to approximately midpoint of the standard range on the assault charge – 240 months. CP 112. The trial court found that the harassment and vehicle prowling were the same criminal conduct as the assault and also ran the deadly weapon enhancement on each count concurrent to the other deadly weapon enhancements. CP 115.

(b) The amended sentence

The State filed a motion for relief from judgment and argued that the deadly weapon enhancements were required to run consecutively. CP 136-139. The court agreed with the State and resentenced Jensen (still without the extra community custody point). CP 141-49. The court

⁶ Because the sentence for the assault is by far the longest of the three sentences, the State will follow through its sentencing argument as applied to the assault only for clarity and brevity's sake.

found his base standard range was still 162 – 216 months. CP 142. However, with the deadly weapon enhancements running consecutively, his enhancements totaled 72 months. CP 142, 145. The trial court sentenced Jensen to a 192-month base standard range sentence plus consecutive deadly weapon enhancements of 48 months, 12 months and 12 months for a total of 264 months in prison. CP 142, 145.

(c) The proper sentence

Had the trial court properly calculated Jensen’s offender score as seven on the assault, Jensen’s correct base standard range would have been 178 - 236 months. His total standard range (including the consecutive deadly weapon enhancements totaling 72 months) would have been 250 – 308 months in prison.

Jensen may argue that the 264-month sentence imposed is still within the proper standard range. However, a sentencing court acts without statutory authority when it imposes a sentence based upon a miscalculated offender score. *Soper*, 135 Wn.App. at fn. 11, 143 P.3d 335; *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). This is true even where the sentence imposed is actually within the correct standard range where the sentencing judge has specifically indicated on

the record it intended to sentence the defendant at a particular point within the standard range. *In re Goodwin*, 146 Wn.2d 868, 50 P.3d 618 (2002); *Matter of Johnson*, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997).

In Jensen's case, 264 months is nearly midpoint of the standard range on the assault (with the deadly weapon enhancements) based upon the incorrect offender score of six. Given the split within Division Two at the time of sentencing, the trial court anticipated that the community custody point would be an issue on appeal. RP 445-46. The trial court found that if Jensen's offender score was later found to have been seven (on the assault), the court would still sentence Jensen to mid-point of the correct range. *Id.* Mid-point of the correct range (250 – 308 months) is 279 months.

Because the trial court acted without statutory authority when it imposed Jensen's sentence based upon a miscalculated offender score, and because the trial court stated its intent that Jensen be sentenced to the middle of the standard range regardless of his offender score, Jensen's case should be remanded for resentencing.

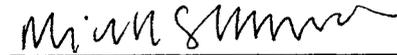
D. CONCLUSION

For the reasons stated above, Jensen's convictions should be affirmed. However, the case should be remanded for recalculation of Jensen's offender score and resentencing.

Respectfully submitted this 9th day of May, 2007.

SUSAN I. BAUR
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Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	NO. 34835-7-II
)	Cowlitz County No.
Appellant,)	05-1-01388-2
)	
vs.)	CERTIFICATE OF
)	MAILING
TED JENSEN,)	
)	
Respondent.)	
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I, Audrey J. Gilliam, certify and declare:

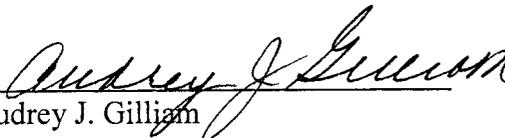
That on the 9 day of May, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent/Cross-Appellant addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Valerie Marushige
Attorney at Law
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of May, 2007.


Audrey J. Gilliam