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

STATE OF WASHINGTON,

Respondent,

vs.

Curtis M. Smith,

Appellant.

Grays Harbor Superior Court

Cause No. 06-1-00147-1

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by failing to properly define driving “in a reckless manner.”
2. The trial court erred by giving instructions on the “wanton or willful” standard without clarifying that these instructions did not apply to the charge of Attempting to Elude.
3. The trial court erred by giving Instruction No. 7, which reads as follows:

In order to find that the defendant drove in a manner indicating a wanton or willful disregard for the lives or property of others, you must find:

1. that the defendant had a wanton or willful disregard for the lives or property of others; and
2. that the defendant drove in a manner indicating a wanton or willful disregard for the lives or property of others.

You may infer that the defendant had a wanton or willful disregard for the lives or property of others if evidence of the defendant’s driving supports such an inference. However, any inference drawn from such evidence is not binding upon you, and may be rebutted by other evidence including evidence of the defendant’s mental state.

Instruction No. 7, Supp. CP.

4. The trial court erred by giving Instruction No. 8, which reads as follows:

“Willful” means acting intentionally and purposely, and not accidentally or inadvertently.

“Wanton” means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm the person or property of another.

Instruction No. 8, Supp. CP.

5. The trial court erred by giving a permissive inference instruction.

6. The trial court erred by giving Instruction No. 9, which reads as follows:

“A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.

This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.”
Instruction No. 9, Supp. CP.

7. Mr. Smith was denied the effective assistance of counsel.

8. The trial court erred by failing to properly determine Mr. Smith’s criminal history and offender score.

9. The prosecutor failed to establish that Mr. Smith had criminal history.

10. The trial court erred by entering Finding of Fact No. 2.2, which set forth Mr. Smith’s criminal history as follows:

Crime	Date Of Sentence	Sentencing Court (Court and State)	Date Of Crime	Adult or Juvenile	Type Of Crime
Residential Burglary	2004	Grays Harbor Cty, WA	05/07/04	Adult	Felony
Assault 2 nd Degree	2004	Grays Harbor Cty, WA	05/07/04	Adult	Felony
Attempted Taking Motor Vehicle Without Permission	2004	King Cty, WA	12/06/03	Adult	GM

VUCSA-Possession of a C.S.	2002	Grays Harbor Cty, WA	5/20/02	Adult	Felony
Burglary 2 nd Degree	2002	Grays Harbor Cty, WA	5/14/02	Adult	Felony
Driving Under the Influence	1996	North Pacific Cty Dist. Ct., WA	08/13/96	Adult	GM

CP 2, 3.

11. The trial court erred by sentencing Mr. Smith with an offender score of 5.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Curtis Smith was charged with Attempting to Elude a Pursuing Police Vehicle, which requires proof that he drove “in a reckless manner.” The trial court did not provide the jury with the correct definition of this phrase, which is “driving in a rash or heedless manner, indifferent to the consequences.” Instead, the court gave instructions relating to reckless driving, which incorporates a “wanton or willful” standard. The court did not tell the jury that the “wanton or willful” standard did not apply to the Attempting to Elude charge.

The court also gave a permissive inference instruction, allowing the jury to find that Mr. Smith drove in a reckless manner if he exceeded the speed limit.

Mr. Smith’s attorney did not object to the incorrect combination of instructions and did not propose the correct instructions.

1. Did the trial court err by failing to correctly define driving “in a reckless manner?” Assignments of Error Nos. 1, 2, 3, 4, 6.

2. Did the trial court err by setting forth the “wanton or willful” standard for reckless driving without clarifying that this standard did not apply to the crime of Attempting to Elude? Assignments of Error Nos. 1, 2, 3, 4, 6.

3. Did the trial court improperly use a permissive inference instruction? Assignments of Error Nos. 1, 3, 5, 6.

4. Was Mr. Smith denied the effective assistance of counsel when his attorney failed to object to the court's improper instructions? Assignment of Error No. 7.

5. Was Mr. Smith denied the effective assistance of counsel by his attorney's failure to propose correct instructions? Assignment of Error No. 7.

At sentencing, the prosecuting attorney alleged that Mr. Smith had numerous prior convictions. Mr. Smith did not admit or acknowledge any prior convictions. No presentence report was requested or submitted, and the prosecution did not offer any evidence supporting its allegations of prior convictions. Despite this, the court found that Mr. Smith had four prior felonies and two prior gross misdemeanors. The court determined that Mr. Smith had an offender score of five. It did not explain how it reached this result.

6. Did the trial court err by failing to properly determine Mr. Smith's criminal history? Assignment of Error No. 8-11.

7. Did the trial court err by failing to properly determine Mr. Smith's offender score? Assignment of Error No. 8-11.

8. Did the trial court err by sentencing Mr. Smith with an offender score of five? Assignment of Error No. 8-11.

9. Did the prosecuting attorney fail to establish that Mr. Smith had criminal history? Assignment of Error No. 9.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Curtis Smith was charged in Grays Harbor County Superior Court with Attempting to Elude a Pursuing Police Vehicle on February 24, 2006. CP 1. At the jury trial, the court gave a “to convict” instruction that included an element of Attempting to Elude as driving “in a reckless manner.” Instruction No. 6, Supp. CP. The “to convict” instruction was followed by two instructions explaining the “wanton or willful” standard of reckless driving:

INSTRUCTION No. 7.

In order to find that the defendant drove in a manner indicating a wanton or willful disregard for the lives or property of others, you must find:

1. that the defendant had a wanton or willful disregard for the lives or property of others; and
2. that the defendant drove in a manner indicating a wanton or willful disregard for the lives or property of others.

You may infer that the defendant had a wanton or willful disregard for the lives or property of others if evidence of the defendant’s driving supports such an inference. However, any inference drawn from such evidence is not binding upon you, and may be rebutted by other evidence including evidence of the defendant’s mental state.

INSTRUCTION No. 8.

“Willful” means acting intentionally and purposely, and not accidentally or inadvertently.

“Wanton” means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm the person or property of another.

Supp. CP.

The court did not tell the jury that these instructions did not apply to the Attempting to Elude charge. Supp. CP

The court also instructed the jury that it could find Mr. Smith drove in a reckless manner if it determined that he was speeding:

INSTRUCTION No. 9.

“A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.

This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.” Supp. CP.

The court also gave lesser-included instructions on “reckless driving.” Instructions Nos. 10, 11, 12; Supp. CP. There is no indication in the record that Mr. Smith requested any of these instructions. RP(5/2/06)79. The defense did not object or take exception to any of the instructions. RP(5/2/06)79.

The jury returned a verdict of guilty. RP (5/2/06) 100.

At sentencing, the state filed a “Statement of Prosecuting Attorney,” which alleged that Mr. Smith had numerous prior convictions. Supp. CP. Mr. Smith did not admit or acknowledge any of these prior convictions, although defense counsel did say that Mr. Smith had “long term involvement with the law in terms of breaking the law.” RP(5/22/06) 3-5. No presentence report was requested or filed, and the state did not

present any evidence at sentencing to establish Mr. Smith's prior convictions. RP(5/22/06)3-7.

Without explanation, the court found that Mr. Smith had four prior felonies and two prior gross misdemeanors, and calculated his offender score as five. CP 2-3. Mr. Smith was sentenced on May 22, 2006, and he appealed. CP 2-8, 9-16.

ARGUMENT

I. THE TRIAL COURT FAILED TO CORRECTLY DEFINE DRIVING "IN A RECKLESS MANNER," AN ESSENTIAL ELEMENT OF ATTEMPTING TO ELUDE.

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error

did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Under RCW 46.61.024(1),

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

The phrase “in a reckless manner,” although not defined by the motor vehicle code, is “well settled.” *State v. Roggenkamp*, 153 Wn.2d 614 at 621-622, 106 P.3d. 196 (2005).¹ “ ‘[D]riving in a reckless manner’ means ‘driving in a rash or heedless manner, indifferent to the consequences.’ ” *Roggenkamp*, at 622, quoting *State v. Bowman*, 57 Wn.2d 266 at 270, 271, 356 P.2d 999 (1960).

This differs from the definition of “reckless driving,” which means driving “in willful or wanton disregard for the safety of persons or property...” RCW 46.61.500. Indeed, in 2003, the legislature amended the eluding statute, which had previously included a “wanton or willful”

¹ Although *Roggenkamp* discussed the meaning of the phrase as used in the vehicular homicide and vehicular assault statutes, its reasoning is (for the most part) applicable in this context as well.

standard. Compare RCW 46.61.024 with former RCW 46.61.024; see Laws of 2003 Chapter 101 Section 1.

In this case, the court did not define the phrase “in a reckless manner” using the standard outlined in *Roggenkamp, supra*. Instead, the court used instructions applicable to the prior version of RCW 46.61.024.² Jury Instructions Nos. 7 and 8 outline the requirements for applying the “wanton or willful” standard under the prior statute; they do not define the offense with which Mr. Smith was charged.³ Supp. CP.

The jury may have viewed the “wanton or willful” standard as less onerous than *Roggenkamp’s* “rash/heedless and indifferent” standard. Accordingly, it is impossible for the state to establish that the error was harmless beyond a reasonable doubt, as required by *Brown, supra*. Because of this, the conviction must be reversed and the case remanded

² Under that statute, which was effective until July 27, 2003, “[a]ny driver of a motor vehicle who wilfully [sic] fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful [sic] disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.” Former RCW 46.61.024.

³ The “willful or wanton” instructions were not completely irrelevant, since the trial court also gave a lesser included instruction on reckless driving. See Instructions Nos. 11 and 12. However, the court did not tell the jury that Instructions Nos. 7 and 8 went with 11 and 12, and not with the offense of attempting to elude. Supp. CP. There is no indication in the record that the defense requested the lesser-included instructions. RP(5/2/06)79.

for a new trial. At trial, the court should define the phrase “in a reckless manner” as set forth in *Roggenkamp, supra*.

II. THE TRIAL COURT RELIEVED THE STATE OF ITS BURDEN BY IMPROPERLY USING A PERMISSIVE INFERENCE INSTRUCTION.

A permissive inference jury instruction is unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact upon which it depends. *State v. Randhawa, supra*, at 75. If the instruction relieves the state of its burden to prove every element beyond a reasonable doubt, the instruction violates due process. *Randhawa*, at 76. The problem with a permissive inference instruction is that it invites the jury to disregard all evidence besides the proved fact in determining whether an element has been established beyond a reasonable doubt. *Schwendeman v. Wallenstein*, 971 F.2d 313 at 316 (9th Cir. 1992).

In *Schwendeman v. Wallenstein, supra*, the 9th Circuit noted that there was “plenty of evidence” to support the conviction for vehicular assault based on reckless driving:

[A]fter having spent two hours with six companions at a local tavern drinking beer, playing pool and dancing, Schwendeman and his friends left the tavern in his pickup truck... By his own admission, Schwendeman drove 37 miles per hour in a 25-mile-per-hour zone. According to the state's evidence, he drove in excess of 39 miles per hour and one of his passengers testified he drove in excess of 50 miles per hour. He swerved back and forth on the road, he said to avoid hitting potholes, but there was other

testimony that he was purposely trying to hit the potholes. He lost control of the truck and hit a telephone pole, causing injuries to his passengers.

Schwendeman v. Wallenstein, at 314-315.

Despite this evidence (which was sufficient to sustain the conviction), the 9th Circuit reversed because “as sometimes occurs, the jury was not given a simple set of instructions which would have permitted them to consider all of the evidence and arrive at a verdict.” *Schwendeman v. Wallenstein*, at 315. Instead, the jury was given a permissive inference instruction allowing them to conclude the defendant drove recklessly if they found that he was speeding. The trial court’s use of this instruction required reversal, despite the sufficiency of the other evidence of reckless driving:

As we have said, there is ample evidence from which the jury could have found reckless driving. Schwendeman was driving an open-bed truck with passengers in the back at night down a road with potholes, swerving from side to side and exceeding the speed limit.

But instruction number 7 isolated speed as the only circumstance needed to permit the jury to find reckless driving and thereby convict Schwendeman. The jury was told, in effect, that it could ignore all the other evidence, consider only the evidence of Schwendeman's speed, and if it found Schwendeman was exceeding the speed limit, that was enough to convict him - not of speeding, but of reckless driving.

By focusing the jury on the evidence of speed alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which Schwendeman was convicted without considering all the evidence presented at trial.

Schwendeman v. Wallenstein, at 316.

In *Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996), the defendant was charged with vehicular assault and vehicular homicide based on reckless driving. The 9th Circuit described sufficient evidence to sustain the conviction:

The State presented testimony from four eyewitnesses who were traveling in the same direction as the defendant[.] They testified that prior to the collision Hanna's Mustang and another vehicle...were traveling northbound... at approximately 80 to 100 m.p.h. Three eyewitnesses testified Hanna was traveling at this speed while trailing the blue car by only one-to-three car lengths. [Two eyewitnesses] stated the two cars appeared to be "racing" or "chasing" each other.

[Three eyewitnesses] observed the collision. They stated the two cars were speeding in the left lane when they approached a slower moving car. Just prior to passing the slower vehicle, the driver of the blue car tapped the brakes. Hanna's Mustang then came into contact with the blue car and swerved across the median into opposing traffic colliding with [another vehicle.]

...The defense [presented testimony from] a truck driver... [who] testified the Mustang and the blue car were going "highway speeds" prior to the collision.

Hanna testified he was traveling in the left lane at 75 m.p.h. when the blue car appeared and began to jog left and right in front of him. Hanna then slowed to 60 m.p.h. before the car cut him off and Hanna was forced to hit the brakes and spin onto the median and into opposing traffic.

...Both the defense and prosecution also presented testimony from accident reconstruction experts who verified the respective versions of the accident.

Hanna v. Riveland, at 1034, *some alterations in original*.

Despite the sufficient evidence, the 9th Circuit reversed the conviction, citing *Schwendeman v. Wallenstein*, *supra*. The basis for the

reversal was a permissive inference instruction that allowed the jury to find recklessness based on proof of speeding:

In the case before us, the jury was entitled to convict based on a single unqualified jury instruction... As in *Schwendeman*, the jury here could have convicted Hanna “without considering all relevant evidence.”...

Although there was substantial evidence to support Hanna’s conviction, Instruction 9 permitted the jury to convict based only on Hanna’s admission of speeding. Yet, speeding alone, cannot support a conviction for vehicular manslaughter and vehicular assault. To be convicted of these crimes, the government must prove beyond a reasonable doubt that Hanna drove in a reckless manner; Instruction 9 relieved the government of this burden.

Hanna v. Riveland, at 1034

In this case, the court used the same permissive instruction that was found to be erroneous in *Randhawa*, *Schwendeman v. Wallenstein*, and *Hanna v. Riveland*. Although the evidence here was sufficient to sustain a conviction, the instruction permitted the jury to ignore all the evidence and find recklessness based solely on the fact that Mr. Smith drove above the speed limit.

It was error for the court to give the permissive inference instruction. *Randhawa*, *supra*. Accordingly, the conviction must be reversed and the case remanded for a new trial.

III. IF THE INSTRUCTIONAL ISSUES ARE NOT PRESERVED FOR REVIEW, THEN MR. SMITH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*. The defendant must show a reasonable probability that, but for counsel’s

errors, the result of the proceeding would have been different. *Holm, supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, driving "in a reckless manner" was an essential element of the offense. Despite this, Mr. Smith's attorney did not object to the court's failure to correctly define the phrase, did not offer the correct definition, and acquiesced to the court's confusing use of instructions on the irrelevant "willful and wanton" standard. RP(5/2/06) 79.

Furthermore, Mr. Smith's attorney failed to object to the improper permissive inference instruction. This instruction allowed the jury to ignore the evidence and focus solely on Mr. Smith's speed as proof of recklessness.

These failures constituted deficient performance: a reasonably competent trial attorney would have been familiar with the applicable law, would have proposed proper instructions if the prosecution and court did not, and would have objected to instructions that impermissibly altered the prosecutor's burden of proof. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Smith was prejudiced by the error. The combined instructions on recklessness were confusing and misstated the law. As a result, the jury was not able to properly interpret the “to convict” instruction, and may have applied a lesser standard than that required under *State v. Roggenkamp, supra*.

Furthermore, defense counsel's failure to object to the permissive inference instruction allowed the jury to find recklessness based solely on Mr. Smith's speed, in violation of *Randhawa, Schwendeman v. Wallenstein*, and *Hanna v. Riveland*.

Mr. Smith was denied the effective assistance of counsel.

Strickland, supra. The conviction must be reversed, and the case remanded for a new trial.

IV. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MR. SMITH'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record..."

RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and "shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration." RCW 9.94A.030(13). To establish criminal history, "the 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." RCW 9.94A.530(2). Acknowledgement includes "not objecting to information stated in the presentence reports." RCW 9.94A.530(2). Presentence reports are

documents prepared by the Department of Corrections (at the court's request) under RCW 9.94A.500.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999). The appellate court reviews the calculation of an offender score de novo. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004).

A trial court's findings are reviewed for substantial evidence. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Rogers Potato*, at 391; *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005). It is more than "a mere scintilla" of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003).

In this case, the state filed a "Statement of Prosecuting Attorney," which alleged that Mr. Smith had numerous prior convictions. Supp. CP. Mr. Smith's attorney agreed that his client had "long term involvement with the law in terms of breaking the law," but did not specifically admit or acknowledge any of these prior convictions. RP(5/22/06) 3-5. No

presentence report was ordered or prepared under RCW 9.94A.500, and so Mr. Smith's failure to object to the prosecutor's allegations cannot be held against him under RCW 9.94A.530(2).

Despite the absence of any evidence, the judgment and sentence included a finding that Mr. Smith had four prior felony convictions and two prior gross misdemeanors. CP 2-3. There is no indication in the record of how the court arrived at this finding. RP(5/22/06) 2-7. Because the state produced no evidence establishing these convictions, and because Mr. Anderson never admitted or acknowledged them, the court's finding is unsupported and must be stricken. *Rogers Potato. supra.*

Despite finding only four prior felonies, the court inexplicably calculated Mr. Smith's offender score as five, and determined his standard range to be 4-12 months. CP 3. The court did not indicate how it reached this result. RP(5/22/06) 2-7. Given his four prior felonies and the washout period for serious traffic convictions such as the 1996 DUI, Mr. Smith should have been sentenced with an offender score of four, not five.⁴ *See* RCW 9.94A.525(2).

⁴ Under the court's findings on the issue of criminal history, Mr. Smith's DUI would have washed out in 2001. RCW 9.94A.525(2).

CERTIFICATE OF MAILING

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

Curtis M. Smith
1658 Schmidt Road
Grayland, WA 98547

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 November 8, 2006

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 November 8, 2006.

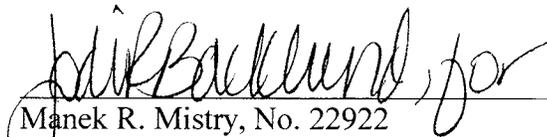
Jodi R. Backlund, No. 22917
Attorney for the Appellant

CONCLUSION

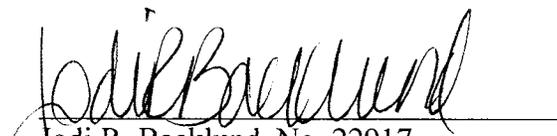
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial. If the conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on November 8, 2006.

BACKLUND AND MISTRY



Manek R. Mistry, No. 22922
Attorney for the Appellant



Jodi R. Backlund, No. 22917
Attorney for the Appellant

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