

NO. 34921-3-II

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

STATE OF WASHINGTON,  
Respondent,

v.

DARRELL D. JOHNSON,  
Appellant.

10:00 AM  
COURT OF APPEALS  
DIVISION II  
OJHR -6 PM 1:32  
STATE OF WASHINGTON  
BY ~~DEPUTY~~

PM 3/5/07

APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF RESPONDENT

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Prosecuting Attorney  
for Grays Harbor County



BY: \_\_\_\_\_  
KATHERINE L. SVOBODA  
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## **ISSUES PRESENTED**

1. Whether or not a unanimity instruction was required.
2. Whether or not the offender score used at sentencing was proper.

## **STATEMENT OF THE CASE**

### *Procedural Facts*

The defendant was charged by Information with one count of Trafficking in Stolen Property in the First Degree on October 7, 2005. (CP at 1-2). The defendant was convicted, as charged, at jury trial on January 10, 2006. (CP at 30-31). He was subsequently sentenced on May 1, 2006. (CP at 3-10).

### *Substantive Facts*

On July 28, 2005, Deputy Kevin Schrader was called to the residence of Daniel Burnett. Burnett's sons, Jeff and Charlie, reported that their father had been in the hospital at Harborview Medical Center for the previous five weeks. (1/10/06 RP at 3-4, 14-15, 58-60). They came by to check the residence and found that someone had gone through the house and stolen a large number of items. (1/10/06 RP at 3-4, 14-15, 58-60). Among the items missing were Harley Davidson motorcycle parts, a guitar and accessories. (1/10/06 RP at 3-4, 14-15, 58-60). The motorcycle parts were later recovered in the possession of David Shaver. (1/10/06 RP at 7-8). Shaver stated that he had received the items from the defendant. (1/10/06 RP at 23-26). At the January 10, 2006 trial, Shaver testified that this transaction happened at the end of the summer or “about two months

ago or so.” (1/10/06 RP at 24). The defendant, in turn, stated that he had purchased the items from Jonathan Finney, who had lived at the Burnett residence for a period of time prior to Mr. Burnett's hospitalization. (1/10/06 RP at 31-32).

On July 21, 2005, the defendant went to Rosevear's Music Center in Aberdeen. He traded a guitar and accessories belonging to Dan Burnett toward the purchase of another guitar from Rosevear's. Mr. Burnett's guitar was recovered and identified. Employees at Rosevear's, Don Stone and Les Blue, have identified the defendant as the individual who sold them the guitar. (1/10/06 RP at 38-40, 47-51). The Burnett's identified the guitar sold by the defendant as being the guitar that belonged to their father. (1/10/06 RP at 16-17, 61-62).

### **ARGUMENT**

**1. There was no need of a unanimity instruction in this case.**

In this case, the State charged a specific incident in the Information. (CP at 1-2). The date of the offense in the information is July 21, 2005. (CP at 1-2). Throughout the trial, the only evidence of a July 21, 2005 transaction was related to the sale of the guitar to Rosevear's. While the prosecutor did reference the stolen motorcycle parts in closing argument, this was only in reference to the “knowingly” element. (1/10/06 at 73). The prosecutor prefaced the comments about the motorcycle parts

with “...and what we have heard today would indicate he knew it was stolen property.” (1/10/06 at 73).

The appellate court generally presumes the jury follows its instructions. *State v. Sanchez*, 122 Wn.App. 579, 590, 94 P.3d 384, 389 (2004); *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). In this case the jury was instructed regarding the specific date of the sale of the guitar. (CP at 24-29). The evidence regarding motorcycle parts was only used to prove what the defendant knew about the property in his possession. Also, there was no testimony that the sale of parts occurred on July 21. Instead, Shaver testified that it happened just about “two months” before the January trial.

If the jury followed the court’s instructions, as is presumed, then the only incident at issue was the July 21 trafficking of the stolen guitar and the instructions were proper as given.

**2. The offender score used at sentencing was proper.**

RCW 9.94A.530(2) states that “[i]n determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is...admitted, acknowledged, or proved in a trial or at the time of sentencing...[a]cknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.”

In this case, the defendant did not object to the criminal history presented in the presentence report of the State. As RCW 9.94A.530(2) references plural reports, the State's report should be encompassed by RCW 9.94A.530(2). The defendant and his attorney were given a chance to address the court at sentencing and neither objected to the substance presented by the State. As no issue was raised at sentencing, there is no issue on appeal. *See* RAP 2.5(a); *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996) (general rule that issues not raised in the trial court may not be raised for the first time on appeal).

Here, using the Statement of Prosecutor, the offender score was correctly calculated at 3. The defendant has three previous felony convictions, counting one point each. (CP at 36-39). The defendant's 1983 Theft in the First Degree conviction does not wash out. RCW 9.94A.525(1) provides "Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) 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." The defendant was sentenced on Theft in the First Degree on September 23, 1983; however, he was convicted of VUCSA and sentenced on August 25, 1992, less than ten years later.

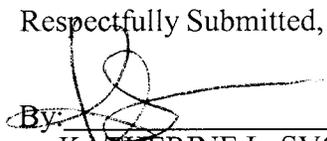
This history supports the court's finding of the defendant's offender score, as the VUCSA conviction prevents wash-out of the Theft in the First Degree conviction.

**CONCLUSION**

For the above reasons, the State respectfully requests that the verdict of the trial court be affirmed.

DATED this 5 day of March, 2007.

Respectfully Submitted,

By:   
KATHERINE L. SVOBODA  
Deputy Prosecuting Attorney  
WSBA #34097

KLS/jfa

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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DIVISION II

STATE OF WASHINGTON,

Respondent,

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**DECLARATION OF MAILING**

DARRELL D. JOHNSON,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 5<sup>th</sup> day of March, 2007, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Darrell D. Johnson, #279026; Stafford Creek Corrections Center; 191 Constantine Way; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman