

FILED
COURT OF APPEALS
DIVISION II

08 DEC 17 PM 12:11

STATE OF WASHINGTON
BY _____

DEPUTY

NO. 37345-9-II
Cowlitz Co. Cause NO. 07-1-01525-3

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

STATE OF WASHINGTON,

Respondent,

v.

ALLEN RAY CLAYTON,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JAMES B. SMITH/WSBA #35537
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

	Page
I. IDENTITY OF THE MOVING PARTY	1
II. STATEMENT OF RELIEF SOUGHT.....	1
III. INTRODUCTION.....	1
IV. STATEMENT OF THE CASE	2
V. ISSUES ASSERTED ON APPEAL.....	6
i. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE REGARDING DRUG USE	6
ii. TRIAL COUNSEL’S PERFORMANCE WAS NOT INEFFECTIVE	9
a. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE FACT THE POLICE KNOCKED ON THE APPELLANT’S DOOR	10
b. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONY THE APPELLANT WAS ARRESTED FOR THE CRIME CHARGED..	11
c. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO DETECTIVE BLAIN’S TESTIMONY.....	13
d. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT WHEN THE APPELLANT’S WITNESSES WERE IMPEACHED	15

	e. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE TAGS.....	15
	f. EVEN IF TRIAL COUNSEL’S PERFORMANCE WAS AT TIMES DEFICIENT, THE OUTCOME OF THE TRIAL WAS NOT EFFECTED.....	16
iii.	THE APPELLANT AGREED TO THE COMPARABILITY OF HIS OREGON CONVICTION AT SENTENCING, AND HAS WAIVED THIS ISSUE FOR APPEAL	17
iv.	IF THIS COURT REACHES THE ISSUE OF COMPARABILITY, REMAND IS NECESSARY AS THE APPELLANT HAS RAISED A NEW ISSUE NOT PRESENTED TO THE TRIAL COURT	20
VI.	CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page
Cases	
<u>In re Personal Restraint of Pirtle</u> , 136 Wn.2d 467, P.2d 593 (1998)	9
<u>Spinelli v. Economy Stations, Inc.</u> , 71 Wn.2d 503, P.2d 240 (1967)	21
<u>State v. Aho</u> , 137 Wn.2d 736, P.2d 512 (1999)	12, 13
<u>State v. Alger</u> , 31 Wn.App. 244, P.2d 44 (1982)	14
<u>State v. Baldwin</u> , 109 Wn.App. 516, P.3d 1220 (2001)	7
<u>State v. Easter</u> , 130 Wn.2d 228, P.2d 1285 (1996)	10, 11
<u>State v. Ford</u> , 137 Wn.2d 472, P.2d 452 (1999)	20, 21
<u>State v. Kirkman</u> , 159 Wn.2d 918, P.3d 125 (2007)	13, 14
<u>State v. Lillard</u> , 122 Wn.App. 422, P.3d 969 (2004)	8
<u>State v. Lucero</u> , 140 Wn.App. 782, P.3d 1188 (2007)	17, 19, 20
<u>State v. Neal</u> , 144 Wn.2d 600, P.3d 1255 (2001)	7
<u>State v. Nelson</u> , 131 Wn.App. 108, P.3d 1008(2006)	15
<u>State v. Powell</u> , 139 Wn.App. 808, P.3d 1190 (2007)	7, 8, 9
<u>State v. Ross</u> , 152 Wn.2d 220, P.3d 1225 (2004)	17, 20
<u>State v. Slone</u> , 133 Wn.App. 120, P.3d 1217 (2006)	12, 14
<u>State v. Stenson</u> , 132 Wn.2d 668, P.2d 1239 (1997)	7, 8, 9, 10, 11
<u>State v. Tharp</u> , 96 Wn.2d 591, P.2d 961 (1981)	8

<u>State v. Thomas</u> , 109 Wn.2d 222, P.2d 816 (1987)	9, 10
<u>State v. Velasquez</u> , 67 Wn.2d 138, P.2d 772 (1965)	15, 16
<u>State v. White</u> , 81 Wn.2d 223, P.2d 1242 (1972)	9, 11, 12
<u>Warren v. Hart</u> , 71 Wn.2d 512, P.2d 873 (1967),.....	11, 12, 13

Statutes

RCW 9.94A.030(29).....	19
RCW 9.94A.525.....	19
RCW 9.94A.525(3).....	17
RCW 9.94A.589(1)(a)	18

Other Authorities

RAP 18.14 (e)(1)	1
------------------------	---

I. IDENTITY OF THE MOVING PARTY

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, hereafter respondent, is the moving party in this matter.

II. STATEMENT OF RELIEF SOUGHT

The respondent seeks an order, pursuant to RAP 18.14(e)(1), affirming appellant's conviction and dismissing the appeal filed by appellate defense counsel John Hays. The issues presented are factual and supported by the evidence or controlled by settled case-law, and the appellant's arguments to the contrary are without merit.

III. INTRODUCTION

The appellant was charged by information with kidnapping in the first degree, assault in the second degree, and felony harassment. Each of these counts was alleged to be a crime of domestic violence, and it was further alleged that the appellant was armed with a deadly weapon at the time of the commission of each count. CP 4. The case came on for trial on January 30, 2008 before the Honorable Judge James Warne. After hearing the evidence, the jury convicted the appellant of unlawful imprisonment, a lesser included offense of kidnapping in the first degree, acquitted him of assault in the second degree, and convicted him of felony harassment. The jury returned special verdicts finding the crimes were domestic violence,

and that the appellant had been armed with a deadly weapon. CP 26, 30, 31.

The appellant then came before the Honorable Judge Warne on February 5, 2008 for sentencing. Judge Warne sentenced the appellant to twelve months in prison, and an additional twelve months for the two deadly weapon enhancements. The total time imposed was twenty-four months in prison. CP 36. Following this, the instant appeal timely followed.

IV. STATEMENT OF THE CASE

In the late summer or early fall of 2007, Jessica White, the victim, met the appellant in Portland, Oregon. Though Ms. White was currently dating another man, she began a romantic relationship with the appellant. As Ms. White lived with her boyfriend in Vancouver, Washington, she would travel to the appellant's residence in Kelso to meet him. RP 37-43. Ms. White traveled to Kelso on a number of occasions, each time spending most of the time at the appellant's residence at 2411 Burcham Street. The appellant lived at this address with his mother and step-father. RP 40-43.

Late in the evening on December 1, 2007, the appellant called Ms. White and asked her to come visit him in Kelso. Ms. White did not wish to come to Kelso that evening, and told the appellant so. This upset the appellant, who became enraged and told Ms. White that if she did not

come to Kelso he would walk to Portland to meet her. RP 41. This behavior cajoled Ms. White into driving her boyfriend's truck up to Kelso.

After Ms. White left Vancouver for Kelso, Trooper Zach Casey of the Washington State Patrol stopped the appellant for walking on the side of Interstate 5 southbound outside of Kelso. RP 121. Trooper Casey was in the process of transporting the appellant off the interstate when Ms. White's truck passed by. The appellant told Trooper Casey that was his friend's truck. Trooper Casey then signaled to Ms. White to pull over, and the appellant got into her vehicle. RP 123.

The appellant's temper had evidently not cooled during his stroll on I-5, as he was still enraged when he got into Ms. White's truck. The appellant began berating Ms. White, referring to her by a variety of obscene terms. The appellant ordered Ms. White to drive him to Portland, but then changed his mind and instead demanded that she take him to his mother's house in Kelso. RP 42-43.

Perhaps angry at the lack of instant compliance with his commands, the appellant began throwing various items out of the window of Ms. White's moving vehicle. These included tax information and other important papers belonging to Ms. White. The appellant also, in his rage, found a bottle of soda and began dousing Ms. White and the inside of the truck with this liquid. RP 44. Unsurprisingly, the appellant's abuse did not

cease with they arrived at his mother's house. As Ms. White parked her truck, the appellant grabbed the keys and told her that she wasn't going anywhere and that he was going to kill her. The appellant then ordered Ms. White into his mother's house, telling her to go to the upstairs where a makeshift bedroom was set up for him. RP 45-46.

Once upstairs, the appellant repeated his threat to kill Ms. White, and forced her into the bedroom, shutting and locking the door. The appellant then drew a pocket-knife, holding it first to Ms. White's arm and then her throat, while again saying he was going to kill her. Once the appellant drew the knife, Ms. White realized his threats were very serious. RP 47-48. The appellant forced Ms. White to lie down on the floor, and then tied her up with various cords and cables. Once the appellant had hogtied Ms. White, he said he was going to kill her and then kill himself by "shooting up" drugs. RP 51. After this threat, the appellant used a syringe to inject something into his arm, then squirted blood out of the syringe onto the wall next to Ms. White's face. RP 55. Ms. White was fearful the appellant would inject her with drugs, but after a brief while he appeared to lose consciousness. RP 56.

When the appellant woke back up, he directed various other dire threats to Ms. White, stating he would cut off her head and other body parts. Eventually, the appellant tired of this abuse and untied Ms. White,

though he refused to allow her to leave the upstairs. RP 57-59. After a time, the appellant allowed Ms. White to go downstairs, but ordered her to return. Ms. White did go downstairs, and at one point went outside to smoke a cigarette with the appellant's parents.

As the morning went on, Ms. White regained her nerve and developed a plan to escape. She told the appellant she had to go downstairs to retrieve some medication, and then fled out the back door of the house. As the appellant still had her truck keys, she ran for the back fence and climbed over it. RP 61-66. Ms. White then wandered through the area in the wet and cold until she encountered two workmen. Due to her hysterical state, these men called the police. RP 66-67.

The workmen, along with the responding officers, saw that Ms. White appeared to be in a state of utter terror. The police knocked on the appellant's door, but no one answered. Soon after, the appellant's parents arrived and allowed the police to enter the home. The appellant was subsequently interviewed and arrested. A pocketknife and the victim's keys were found on the appellant's person. RP 136-151. Later that day, the police returned to the residence with a search warrant. Upstairs, in the bedroom where Ms. White was held captive, the police found what appeared to be blood spatter on the wall, as well as a syringe and various cords and cables used to bind the victim. RP 184-191.

The appellant then called his mother and step-father to testify. The step-father, Kenneth Couch, essentially stated that Ms. White had been at the residence and that he did not observe anything unusual. RP 284-305. The appellant's mother, Ms. Couch, also testified that Ms. White had been at the residence and that she did not see anything that seemed alarming. RP 321-345. Notably, on cross-examination, Ms. Couch expressed her opinion that the Kelso Police Department had planted evidence in her son's bedroom. RP 358-359.

The appellant then testified and offered, for the first time, his claim that he had in fact tied up and restrained Ms. White, but that it was for the purposes of sexual bondage. RP 386-387. On cross-examination, the appellant admitted he never mentioned the bondage defense to the police when he was interviewed. RP 415. Indeed, the appellant admitted that the first person to bring up the bondage defense was his mother, Ms. Couch. Id. The appellant was subsequently convicted.

V. ISSUES ASSERTED ON APPEAL

i. The Trial Court Did Not Abuse Its Discretion By Admitting Evidence Regarding Drug Use

The appellant argues the trial court abused its discretion by admitting evidence the appellant had used drugs during the commission of

the crime and appeared to be under the influence of drugs immediately after the crime.

On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The appellant cites to State v. Powell, 139 Wn.App. 808, 162 P.3d 1190 (2007), as a similar situation to the case at hand. However, Powell was a case where the defendant had consumed methamphetamine and then attempted to burglarize his girlfriend's home. 139 Wn.App. 815. Importantly, the drug use preceded the crime in Powell, and was admitted only to show the defendant's state of mind at the time. Id. at 818.

Here, the drug use by the appellant occurred *during* the crime, and was part of the res gestae of the offense. After the appellant had restrained Ms. White and threatened to kill her, he then injected himself with a syringe after making threats to kill himself and the victim, and sprayed blood from the syringe on the wall next to Ms. White. RP 51-55. The doctrine of res gestae holds that "a defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence

of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events.” State v. Lillard, 122 Wn.App. 422, 431-432, 93 P.3d 969 (2004); citing State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981). Under this theory, evidence of other acts, such as drug use, is admissible to complete the story of the crime and provide context for the events that occurred. Lillard, 122 Wn.App. at 432. The drug usage by the appellant was an inseparable part of the evidence against him, and was properly admitted by the trial court.

The inapplicability of Powell becomes even more apparent when considering the fact that the drug usage was not admitted to explain the appellant's state of mind. Rather, the evidence was admitted to show the reasonableness of the victim's fear and to corroborate her account of the crime. The victim stated the appellant injected himself with drugs while threatening and restraining her, and then sprayed blood on the wall. The police discovered a syringe and blood confirming her account of the crime. It was not “manifestly unreasonable” for the trial court to admit evidence that tended to corroborate a witnesses' testimony. See Stenson, 132 Wn.2d at 701.

Excluding this evidence would have resulted in the false impression that there was no physical evidence to support the victim's

statements, depriving the jury of the truth. This Court should hold the trial court properly exercised its discretion by admitting evidence of drug usage that was inextricably connected to the crime.

ii. Trial Counsel's Performance Was Not Ineffective

The appellant argues that trial counsel's performance fell below the standard guaranteed by the constitutions of the United States and the State of Washington. To prove this claim, the appellant must show that (1) trial counsel's performance was deficient and (2) this deficiency prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Counsel's performance becomes deficient when it falls below an "objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). There is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Thus, to prevail on this claim, the appellant must show that the trial court would have sustained the objections the appellant now desires, and that there is a reasonable probability the outcome of the trial would have been different. Stenson, 132 Wn.2d at 707-708. Importantly, while the law requires effective assistance of counsel, it does not, for obvious reasons, guarantee this assistance will be successful. State v. White, 81 Wn.2d 223,

225, 500 P.2d 1242 (1972). As will be seen, this claim is without merit and should be rejected by the Court.

a. Trial Counsel Was Not Ineffective for Failing to Object to the Fact the Police Knocked on the Appellant's Door

The appellant first asserts trial counsel was ineffective for failing to object to testimony that the police knocked on the appellant's door and he did not answer. The appellant argues this testimony amounted to a comment on his right to remain silent. This claim strains credulity.

Sgt. Lane testified that he knocked on the appellant's door three times and no one answered. Later, the appellant's parents arrived and let the police enter the residence. RP 139-141. The appellant provides no authority for the remarkable claim that knocking on a door is a comment on the silence. Given this, there is no reason to believe the trial court would have sustained an objection by trial counsel. Without such a showing, the claim of ineffective assistance cannot be sustained. Stenson, 132 Wn.2d at 707-708.

The appellant attempts to analogize the knock on the door to the case of State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). Easter is the case where the infamous "smart drunk" comment was found to constitute a comment on the right to remain silent. There, the police testified the defendant refused to answer questions and looked away. 130

Wn.2d at 241. Obviously, Easter does not apply. Sgt. Lane was not questioning the appellant when he knocked on the door. He was simply knocking on a door. Trial counsel was not ineffective for failing to object to such testimony.

b. Trial Counsel Was Not Ineffective for Failing to Object to Testimony the Appellant Was Arrested for the Crime Charged

The appellant argues at length that the bare mention of the fact the appellant was arrested for a crime is opinion evidence of guilt and therefore reversible error. Unsurprisingly, the appellant offers no authority for the extraordinary claim that it is improper in a criminal case for there to be testimony the defendant was actually arrested for a crime. The appellant cites to Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (1967), but this case provides no support for the absurd idea that it is improper to inform the jury in a criminal trial that the defendant was arrested for a crime.¹ Again, without such authority, the appellant cannot show that the trial court would have sustained an objection to this testimony, which is required by Stenson.

¹ If the appellant's argument were carried to its logical conclusion, a jury would not be informed that the prosecution had filed charges against the defendant, because this too would constitute an opinion that the person was guilty. Evidently in the system urged by the appellant, the jury would remain unaware why they were there and would have to conclude on their own whether they were serving on a criminal case or a civil action. The appellant's theory would also prevent the trial court from referring to the person on trial as "the defendant" lest this also constitute a grave and irresistible comment on guilt. While it is amusing to consider the appellant's argument, it is not supported by the law or logic.

Warren held that it was improper, in a civil case, for counsel to argue that there was no liability because the officer at the scene of a accident had held a “little baby court” and did not issue a citation. 71 Wn.2d at 518. That this is misconduct is unremarkable. That this holding does not mean what the appellant construes it to mean is undeniable.

The speciousness of this argument is apparent when considering the case of State v. Slone, 133 Wn.App. 120, 134 P.3d 1217 (2006). There, the court held that it was not improper for the jury to hear testimony a defendant was arrested and read his Miranda warnings. 133 Wn.App. at 126. The court further noted “jurors are generally aware that police systematically read arrestees their Miranda rights.” Id. at 128. Given this ruling, it cannot be said that trial counsel was ineffective for not objecting that the appellant was arrested.

Moreover, if trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). In closing, trial counsel forcefully argued there had in fact been a kidnapping and an assault with a deadly weapon. RP 441. However, trial counsel argued what had actually happened was that Ms. White’s accusations had resulted in the appellant’s false arrest and imprisonment. RP 442-443. This impassioned argument could not have

been made if there had not been testimony the police had arrested the appellant. As such, the failure to object was a matter of trial tactics entrusted to the sound discretion of trial counsel. See Aho, 137 Wn.2d at 745.

c. Trial Counsel Was Not Ineffective for Failing to Object to Detective Blain's Testimony

The appellant argues that trial counsel was ineffective for failing to object to Detective Blain's statements regarding the search warrant in this case. In particular, the appellant complains that Detective Blain used the term "victim," referred to the appellant's residence as "where the crime occurred," and stated he obtained the search warrant from a judge. These claims have no merit.

The use of the term "victim" by Detective Blain was perhaps not ideal. However, the Supreme Court has held in State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007), that reversal on this issue requires "a nearly explicit statement by the witness that the witness believed the accusing victim." Detective Blain's testimony clearly does not rise to the level required by Kirkman, and cannot be said to have influenced the outcome of the trial. See Kirkman, 159 Wn.2d at 937 (no prejudice where the jury was instructed that it was the sole judge of credibility, jury is presumed to follow the court's instructions.)

The lack of prejudice becomes even more apparent when State v. Alger, 31 Wn.App. 244, 640 P.2d 44 (1982), is considered. In Alger, the trial judge, rather than a police officer, referred to the complaining witness as “the victim.” The court found this to be harmless error. If use of the term by the judge presiding over the trial is harmless, use of the term by a police officer cannot be said to be prejudicial. The comment that the appellant’s residence was “where the crime occurred” is indistinguishable, and is similarly harmless. If trial counsel had objected, a curative instruction could have been given. The failure to do so is a clear indication that the testimony was fleeting and insignificant. Alger, 31 Wn.App. at 249.

Finally, contrary to the appellant’s claims, Detective Blain’s testimony that he wrote a search warrant and a judge approved it was relevant. The relevance was to show the jury that the police had acted lawfully and had not invaded the rights of the appellant. See Slone, 133 Wn.App. 120 (regarding testimony on Miranda warnings). This testimony was brief, and simply indicated that a judge had granted a search warrant. There was no testimony that a judge had found there was probable cause to believe a crime had been committed, which could be more properly characterized as opinion evidence of guilt. Under Kirkman and Alger, this testimony cannot be found to have prejudiced the appellant.

d. Trial Counsel Was Not Ineffective for Failing to Object When the Appellant's Witnesses Were Impeached

The appellant complains that trial counsel failed to object to testimony impeaching the appellant's witnesses at trial with the fact they refused to cooperate with the police's investigation of their son. The appellant argues, once again, this testimony constituted opinion evidence on the issue of guilt. However, this evidence was admissible to show the bias of these witnesses. See generally State v. Nelson, 131 Wn.App. 108, 125 P.3d 1008(2006). Again, the appellant fails to show the trial court would have sustained an objection to this testimony. As such, trial counsel was not deficient for failing to make frivolous objections.

e. Trial Counsel Was Not Ineffective for Failing to Object to Evidence Tags

The appellant's final assertion for ineffective assistance is that trial counsel should have objected to police evidence tags that were admitted as exhibits at trial. Again, the appellant claims these tags constituted opinion evidence on the issue of guilt. As with all the prior claims, this argument is without merit.

The Supreme Court considered the issue of evidence tags in State v. Velasquez, 67 Wn.2d 138, 406 P.2d 772 (1965). There, the Supreme Court held that "[o]nly by the most extreme construction could the tags be

said to have a testimonial content; on their face they appear to be merely identifying devices.” Velasquez, 67 Wn.2d at 143. This description is equally valid for the evidence tags that the appellant now complains about. The Court further held the tags had no real probative effect, and that any error was therefore harmless. Id. The same analysis applies here. Even assuming it was deficient for trial counsel not to object, this deficiency had no effect on the outcome of the case.

f. Even If Trial Counsel’s Performance Was At Times Deficient, the Outcome of the Trial Was Not Effected

If the Court should be persuaded that trial counsel’s performance was occasionally deficient, there has still been no showing of prejudice required to remand this case for a new trial. The errors complained about by the appellant are trivial when weighed against the totality of the trial record. Many of the error, if they are errors, consist of implied and subtle opinions on the issue of guilt. Given the outcome of the case, with acquittal on one charge and conviction of a lesser included offense for the other, the jury was obviously not swayed but whatever alleged opinion evidence they heard. The Court should dismiss this claim, as the errors are too trivial to show the required level of prejudice.

iii. The Appellant Agreed to the Comparability of His Oregon Conviction at Sentencing, and Has Waived this Issue for Appeal

The State agrees with the appellant that, generally, the sentencing court must determine whether foreign convictions are comparable to Washington felonies. RCW 9.94A.525(3). However, the right to have the State prove comparability may be waived where a defendant affirmatively agrees to the conviction counting towards his offender score. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); State v. Lucero, 140 Wn.App. 782, 788, 167 P.3d 1188 (2007).

In the instant case, the following colloquy occurred at the sentencing hearing:

STATE: Your Honor, we're on today for sentencing in Mr. Clayton's matter. My understanding is that Mr. Clayton is not contesting his criminal history from the State of Oregon. I think there is an argument—

DEFENSE: Oh, I'm sorry. I misspoke to you, Counsel. I said that I agree with you, that you're probably correct, but we would like to place an objection on the record. I don't mean to interrupt.

STATE: As to same criminal conduct?

DEFENSE: I guess I better address this. Your Honor, what I've seen that Mr. Smith has provided, it looks like the two sentences are – were run consecutive down there, and I think that creates a legitimate question about whether they are in fact same criminal conduct or they could be treated as two. I didn't mean to misstate that to you, Counsel.

RP 464.

An argument then proceeded over whether the two Oregon convictions, Theft in the First Degree and Unlawful Use of a Weapon, were the same criminal conduct and should therefore be treated as one point for sentencing. See RCW 9.94A.589(1)(a). The State asserted that the two were not same criminal conduct, while the appellant argued otherwise, stating: "I was going to ask Your Honor to treat them as same criminal conduct, and we don't know for a fact that those are a strike, I don't think, at this point." RP 468. The trial court ultimately ruled that the two convictions were not same criminal conduct and that the standard range was nine to twelve months. RP 471.

Appellant concedes that trial counsel agreed to the existence of the Oregon conviction. Brief at Appellant at 41. However, the appellant argues that the comparability of this conviction was not conceded. This argument ignores the clear meaning and import of the appellant's arguments before the trial court. There, the appellant argued that his convictions for Theft in the First Degree and the Unlawful Use of a Weapon should be treated as same criminal conduct. Trial counsel would not have made this argument, related to the offender score for prior felony convictions, if he was not agreeing that the convictions were both comparable to Washington felonies. If the conviction were for a misdemeanor, it would not be included in the offender score. See RCW

9.94A.525. If trial counsel were not agreeing to comparability, he would not have argued same criminal conduct, as this legal concept has no application to misdemeanor convictions.

Furthermore, trial counsel also argued and expressed concern that the Unlawful Use of a Weapon conviction may be a “strike” or most serious offense. A most serious offense conviction is necessarily a conviction for a felony. See RCW 9.94A.030(29). Again, if trial counsel were not agreeing to comparability, there would be no need to argue that the conviction was not a most serious offense. If trial counsel believed the prior conviction was for a misdemeanor, why would he be worried about the appellant incurring a second strike?

The situation before the Court is analogous to that in Lucero, 140 Wn.App. 722. There, the defendant argued before the sentencing court that one of his convictions had washed out. Then, on appeal, the defendant attempted to argue this conviction was not comparable to a Washington felony. The court noted that “by arguing it washed out, Lucero conceded the [conviction] would otherwise count toward his score. And by agreeing the score was at least 6, Lucero acknowledged the comparability of the burglary offense.” Id. at 789.

The court likewise rejected the claim there was some distinction between agreeing to a conviction’s inclusion in the offender score and

agreeing to comparability, holding that if “[Lucero] disagreed with the assertion that the crimes were comparable and should be included, he would not have argued for an offender score of 6 or limited his argument on the drug crime to the theory that it had washed out.”

As in Lucero, the appellant agreed to comparability at the time of sentencing, both by his statements and the nature of the arguments made to the trial court. Under Ross, the appellant thereby waived any challenge to comparability on appeal. This Court should reject any argument otherwise as being without merit.

iv. If this Court Reaches the Issue of Comparability, Remand is Necessary as the Appellant Has Raised a New Issue Not Presented to the Trial Court

In the instant appeal, the appellant argues his Oregon conviction for Unlawful Use of Weapon is not comparable to a Washington felony. However, as discussed previously, this argument was not advanced at the time of sentencing. As the appellant is now contesting an issue that was never addressed to the sentencing court, remand is proper under State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), if this Court finds the issue was not waived by the appellant.

In Ford, the Supreme Court held that under certain situations, the proper remedy for a sentencing dispute is a remand to the lower court for

further proceedings to determine the comparability or existence of prior convictions. The court noted that:

In the normal case, where the disputed issues have been *fully argued* to the sentencing court, we would hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced. *See State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997) . Under the present facts, however, while we necessarily hold that a sentence based on insufficient evidence may not stand, we recognize that defense counsel has some obligation to bring the deficiencies of the State's case to the attention of the sentencing court.

Id. at 458-459 (emphasis added). The court went on to hold that where “the defendant fails to specifically put the court on notice” of defects, remand for evidentiary hearing is appropriate. Id. at 485.

This holding was based on the concern that otherwise defendants would “purposefully fail to raise potential defects at sentencing in the hopes the appellate court will reverse without providing the State further opportunity to make its case.” Id. at 486. This decision comports with the general principle that an appellate court will require a specific objection at the trial level, so that the lower court has been afforded an opportunity to correct the error. Spinelli v. Economy Stations, Inc., 71 Wn.2d 503, 508, 429 P.2d 240 (1967).

Here, comparability was not disputed at the time of sentencing. Given this, Ford is controlling and the proper remedy, should the Court

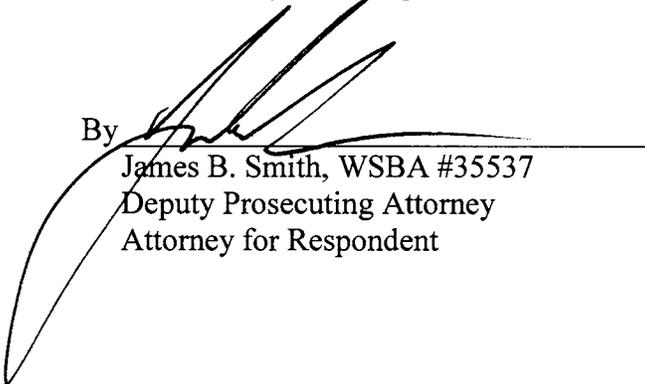
find the issue was not waived, is remand to the trial court for further hearings on the question.

VI. CONCLUSION

Based on the preceding argument, the State asks the Court to dismiss the instant appeal. The trial court did not abuse its discretion, nor was trial counsel ineffective. The State respectfully requests this Court affirm the judgment and sentence in this matter.

Respectfully submitted this 15th day of December, 2008.

SUSAN I. BAUR
Prosecuting Attorney
Cowlitz County, Washington

By 

James B. Smith, WSBA #35537
Deputy Prosecuting Attorney
Attorney for Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	NO. 37345-9-II
)	Cowlitz County No.
Respondent,)	07-1-01525-3
)	
vs.)	CERTIFICATE OF
)	MAILING
ALLEN RAY CLAYTON,)	
)	
Appellant.)	

I, Michelle Sasser, certify and declare:

That on the 15th day of December, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

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

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of December, 2008.

Michelle Sasser
Michelle Sasser

00 DEC 17 PM 12:11
STATE OF WASHINGTON
BY DEPUTY CLERK
COURT OF APPEALS
DIVISION II