

COURT OF APPEALS
DIVISION II

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No. 37585-1-II

STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Elijah Jackson,

Appellant.

Clallam County Superior Court

Cause No. 08-1-00007-8

The Honorable Judge Kenneth Williams

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

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ASSIGNMENTS OF ERROR

1. The prosecuting attorney committed misconduct requiring reversal.
2. The prosecuting attorney improperly injected his personal opinion into the proceedings.
3. The prosecuting attorney unconstitutionally shifted the burden of proof.
4. The prosecuting attorney unconstitutionally commented on Mr. Jackson's exercise of his right to remain silent.
5. The prosecuting attorney improperly argued that acquittal required the jury to believe Trooper Nelson was lying.
6. Mr. Jackson was denied his constitutional right to a jury trial because the jury did not determine whether or not he was the same person named in some of the criminal history alleged by the state.
7. Mr. Jackson was denied his constitutional right to a jury determination of all facts that increased the penalty for his offenses.
8. The trial court erred by sentencing Mr. Jackson to a prison term greater than that permitted by the jury's verdict.
9. The trial court erred by sentencing Mr. Jackson with an offender score of eight.
10. The trial court erred by adopting Finding of Fact No. 2.2 of the Judgment and Sentence, which reads as follows:

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J adult, juvenile	Type of Crime
1	Physical Control		Pierce Co.	3/26/2005	A	GM
2	DUI		Kitsap Co.	6/8/04	A	GM
3	DUI		Pierce Co.	3/20/04	A	GM
4	DUI		Pierce Co.	1/02/02	A	GM
5	Reckless Driving		Pierce Co.	1/2/02	A	GM
6	Hit&Run Attended		Pierce Co.	1/2/02	A	GM
7	Protection Order Violation		02-1-298-5; Clallam Co.	7/11/2002	A	NV
8	Burglary II		97-8-00430-1 Clallam Co.	7/25/1997	J	NV
9	Burglary II		97-8-00249-9 Clallam Co.	5/6/1997	J	NV
10	Burglary II		97-8-00154-9	3/31/1997	J	NV

The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): _____

11. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence, which reads as follows:

2.3 SENTENCING DATA:

Count	Offender Score	Seriousness Level	Standard range (not including enhancements)	Plus enhancements	Total standard range (including enhancements)	Maximum term
1	8	√	62-82 mo.		62-82 mo.	60 mo.
TOTAL ENHANCEMENTS to be served consecutively (RCW 9.94A.310(3)(e) and (4)(e))				_____ months		

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecuting attorney commits misconduct by injecting his or her personal opinion into the proceedings. Here, the prosecutor injected his personal opinion into the proceedings by telling the jury that the testimony of Trooper Nelson and the other officers was accurate and true. Did the prosecutor commit reversible misconduct? Assignments of Error Nos. 1-5.

2. The state may not shift the burden of proof during closing argument. The prosecutor here suggested in closing that the jury could resolve the case by weighing the state's evidence against Mr. Jackson's evidence. Did the prosecutor's argument unconstitutionally shift the burden of proof? Assignments of Error Nos. 1-5.
3. The state may not comment on an accused person's exercise of the constitutional right to remain silent. Here, the prosecutor commented on Mr. Jackson's decision not to testify, by pointing out evidence that logically would have been provided through his testimony. Did the prosecutor's argument unconstitutionally comment on Mr. Jackson's exercise of his constitutional privilege against self-incrimination? Assignments of Error Nos. 1-5.
4. The state may not argue that acquittal requires the jury to determine that state witnesses are lying or mistaken. Here, the prosecutor argued that acquittal required the jury to find that Trooper Nelson lied in his testimony. Was the prosecutor's misconduct so flagrant and ill-intentioned that the prejudice could not have been alleviated with a curative instruction? Assignments of Error Nos. 1-5.
5. Any fact that increases the penalty for an offense must be proved to a jury beyond a reasonable doubt. The state did not prove to the jury that Mr. Jackson was the same person named in prior convictions, or that he was on community custody at the time of this offense, yet the trial judge used this information to enhance his sentence. Did the use of this information violate Mr. Jackson's right to due process and his right to a jury trial? Assignments of Error Nos. 6-11.
6. A sentencing judge may consider no more information than is admitted, acknowledged, or established at trial or at sentencing. The state did not prove, and Mr. Jackson did not admit or acknowledge that he had any prior adult or juvenile felonies, or that he was on community custody at the time of the offense. Must the court's findings (that Mr. Jackson had prior adult and juvenile felonies and that he was on community custody at the time of the offense) be vacated? Assignments of Error Nos. 6-11.

7. Multiple offenses are the same criminal conduct if they occur at the same time and place, involve the same criminal intent, and involve the same victim. Two of Mr. Jackson's prior offenses met this test. Should the court have found that Mr. Jackson's DUI and Reckless driving convictions from January 2, 2002 constituted one offense? Assignments of Error Nos. 6-11.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Elijah Jackson, Rose Greene, and Evelyn Fresnares were in a car stopped by WSP Trooper Allen Nelson for erratic driving. RP (3/12/08) 43-45, 56; RP (3/13/08) 26. According to Nelson, Mr. Jackson was the driver. RP (3/12/08) 43-45, 53. Nelson described Mr. Jackson as intoxicated, belligerent, and uncooperative. RP (3/12/08) 45-47. Another officer arrived, and Mr. Jackson was eventually subdued (using a hair hold). RP (3/12/08) 48. He continued to kick, spit, and bang his head after being placed in the rear of Nelson's car, and was eventually hobbled. RP (3/12/08) 54-55. Nelson took him to the jail and placed him in a holding cell. RP (3/12/08) 60. Because of Mr. Jackson's demeanor, Nelson did not ask him to take a breath test. RP (3/12/08) 61.

Nelson admitted that he made errors in his written report. First, he wrote that the stop occurred near the Bogachiel bridge; it actually occurred at the Calawah bridge. RP (3/12/08) 68-69. He recorded the wrong time for his arrival at the jail. RP (3/12/08) 71. He signed a form indicating that he'd read the implied consent warnings to Mr. Jackson, when in fact he had not read the warnings. RP (3/12/08) 73-74.

Mr. Jackson was charged with felony DUI, Driving While License Suspended in the First Degree, and Obstructing a Law Enforcement

Officer. CP 30-31. His trial was bifurcated into a guilt phase and a sentencing phase (for the Felony DUI charge). RP (3/12/08) 15. At trial, Nelson was the only person to identify Mr. Jackson as the driver. RP (3/12/08) 41-92. Nelson and three other officers testified to Mr. Jackson's apparent level of intoxication. RP (3/12/08) 41-92; 93-111; RP (3/13/08) 9-16.

Mr. Jackson's girlfriend Rose Greene testified that she had been the driver. RP (3/13/08) 25-27. She testified that she pulled over at the Calawah boat ramp to throw up, and that Mr. Jackson scooted over from the passenger seat to the driver's side to see if she was ok. RP (3/13/08) 28. She said that it was at this point that Nelson arrived. RP (3/13/08) 28-29.

Mr. Jackson did not testify. *See* Report of Proceedings, *generally*.

In his closing argument, the prosecuting attorney made the following comments while discussing credibility:

In the State's case you heard testimony from 4 law enforcement officers. These are officers, who have been trained, extensively, every single one of them had considerable experience. One of the things that they are trained to do is observe and to report those observations accurately. Every single one of them did so and every single one of them corroborated the other's testimony. There were not any inconsistencies there.

Now, let's think about the Defendant's witness. One witness. Whom you heard testify for 10, maybe 15 minutes total... Let's not also forget that there was not a single shred of testimony in this case to corroborate her story.

RP (3/13/08) 40-41.

Later in his argument, the prosecutor said “[O]nce again, I remind you no one has shown any evidence that the Defendant was not intoxicated, nor that the witness was not intoxicated.” RP (3/13/08) 47.

Near the end of his first closing argument he summarized as follows:

Four officers all very accurate with the same testimony, all corroborate one another. Yes, only one of them actually saw the vehicle in motion. Does that make a difference though? No. Because his testimony was accurate and true. Defense had one witness.

RP (3/13/08) 48.

During his rebuttal closing, he made the following remark:

First question I would like you to ask yourself, what possible reason would Trooper Nelson have to lie or make something up that this man was driving that vehicle.

RP (3/13/08) 59.

Mr. Jackson was convicted, and the court held a brief penalty phase trial. RP (3/13/08) 67-68; 73-81. Mr. Jackson stipulated that he was the person named in four prior DUI convictions, which the prosecutor introduced as exhibits at the penalty phase. Exhibits 2-5, Supp. CP.

Mr. Jackson did not stipulate to any prior convictions besides those included in the prosecutor’s exhibits. Nor did he stipulate that he was on community custody at the time of the offense. Mr. Jackson’s attorney disputed the prosecutor’s calculation of the offender score (eight points), arguing that two of the prior serious traffic offenses should score as the

same criminal conduct. RP (4/4/08) 6-7. The prosecutor did not introduce proof—either to the jury or to the judge—that Mr. Jackson had other prior offenses or that he was on community custody at the time of the offense.

See RP (4/4/08) generally.

The trial judge made the following findings on Mr. Jackson's criminal history:

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J adult, juvenile	Type of Crime
1	Physical Control		Pierce Co.	3/26/2005	A	GM
2	DUI		Kitsap Co.	6/8/04	A	GM
3	DUI		Pierce Co.	3/20/04	A	GM
4	DUI		Pierce Co.	1/02/02	A	GM
5	Reckless Driving		Pierce Co.	1/2/02	A	GM
6	Hit&Run Attended		Pierce Co.	1/2/02	A	GM
7	Protection Order Violation		02-1-298-5; Clallam Co.	7/11/2002	A	NV
8	Burglary II		97-8-00430-1 Clallam Co.	7/25/1997	J	NV
9	Burglary II		97-8-00249-9 Clallam Co.	5/6/1997	J	NV
10	Burglary II		97-8-00154-9	3/31/1997	J	NV

[x] The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525. ...

[] The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): _____

CP 15.

2.3 SENTENCING DATA:

Count	Offender Score	Seriousness Level	Standard range (not including enhancements)	Plus enhancements	Total standard range (including enhancements)	Maximum term
1	8	√	62-82 mo.		62-82 mo.	60 mo.
TOTAL ENHANCEMENTS to be served consecutively (RCW 9.94A.310(3)(e) and (4)(e))				_____ months		

CP 15.

Mr. Jackson was sentenced to 60 months in the custody of DOC, and he appealed. CP 3, 4, 19.

ARGUMENT

I. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT REQUIRING REVERSAL.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused person's right to a fair trial. *Boehning, supra*, at 518. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.¹ *See, e.g., State v. Easter*, 130 Wn.2d 228 at 242, 922 P.2d 1285 (1996). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, 64 Wn.2d 1, 186 P.3d 1038 (2008). The state must show that any reasonable jury

¹ Misconduct may be reviewed absent an objection from defense counsel if it creates a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Perez-Mejia*, 134 Wn. App. 907 at 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504 at 510-12, 755 P.2d 174 (1988).

would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204 at 222, 181 P.3d 1 (2008).

Where prosecutorial misconduct does not create a manifest error affecting a constitutional right, the accused person must show both improper conduct and prejudicial effect. *State v. Henderson*, 100 Wn. App. 794 at 800, 998 P.2d 907 (2000). Prejudice is established by when there is a substantial likelihood that the misconduct affected the verdict. *Henderson*, at 800. In the absence of an objection, the court will review misconduct only if it is “so flagrant and ill-intentioned” that no curative instruction would have negated the misconduct’s prejudicial effect. *Henderson*, at 800.

A. The prosecuting attorney committed misconduct by conveying his personal opinion on the officers’ credibility.

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909 at 921, 68 P.3d 1145 (2003). Misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Price*, 126 Wn.App. 617 at 653, 109 P.3d 27 (2005); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990).

Here, the prosecutor expressed a clear personal opinion on the credibility of the officers. First, the prosecutor argued that the officers were trained to observe and to report their observations accurately, and that “[e]very single one of them did so...” RP (3/13/08) 40-41. Second, the prosecutor argued that the officers were “all very accurate with the same testimony,” and that the jury should believe Nelson’s testimony despite the lack of corroboration “[b]ecause his testimony was accurate and true.” RP (3/13/08) 48. By expressing his personal opinion that Nelson had observed and reported his observations accurately, and that Nelson’s testimony was “accurate and true,” the prosecutor committed misconduct.

This misconduct prejudiced Mr. Jackson, and was so flagrant and ill-intentioned that no curative instruction would have eliminated its effect. The primary issue at trial—the identity of the driver—boiled down to a credibility contest between Nelson and Rose Greene. *Henderson, supra, at* 804. By putting his thumb on the scale, the prosecutor improperly influenced the jury to decide this critical issue based on improper considerations. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Henderson.*

B. The prosecuting attorney unconstitutionally shifted the burden of proof.

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 at 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149 at 1171 (9th Cir., 2006). Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663 at 672, 132 P.3d 1137 (2006); *see also Perlaza*, at 1171.

Here, the prosecuting attorney shifted the burden of proof. Instead of discussing the state's burden to prove each element beyond a reasonable doubt, the prosecutor twice asked the jury to compare the state's case (testimony provided by four law enforcement officers) with Mr. Jackson's evidence (provided by one witness.) RP (3/13/08) 40-41, 47. The prosecutor also pointed out "that there was not a single shred of testimony in this case to corroborate her [Ms. Greene's] story." RP (3/13/08) 41.

By asking the jury to weigh the officers' testimony against that presented on behalf of Mr. Jackson, and by pointing out the lack of

additional corroboration for Mr. Jackson's case, the state unconstitutionally shifted the burden of proof and violated Mr. Jackson's right to due process. This error was not trivial, formal, or merely academic. *State v. Gonzales Flores*. Only one officer (Nelson) testified that he saw Mr. Jackson driving; his credibility was undermined by the inaccuracies in his report. RP (3/12/08) 68-69, 71, 73-74.

The prosecutor's burden-shifting argument made it more likely that the jury would improperly vote to convict Mr. Jackson by simply comparing the state's evidence with Mr. Jackson's evidence. Because the state's evidence on the driver's identity was less than overwhelming, the constitutional error was not harmless beyond a reasonable doubt. Accordingly, the convictions for DUI and DWLS must be reversed and the charges remanded for a new trial.

C. The prosecuting attorney commented on Mr. Jackson's constitutional privilege against self-incrimination.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 9; *Easter*, at 238. A prosecutor's comment on an accused person's right to remain silent violates the Fifth Amendment. *State v. Holmes*, 122 Wn.App. 438 at 445, 93 P.3d 212 (2004); *State v. MacDonald*, 122 Wn. App. 804 at 812, 95 P.3d 1248 (2004). Error of this

type is prejudicial and requires reversal unless the state establishes beyond a reasonable doubt that the error is harmless; to meet this standard, the state must show beyond a reasonable doubt that “any reasonable jury would reach the same result absent the error, [and that] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Easter*, at 242.

The prosecutor commented on Mr. Jackson’s silence on two occasions. First, the prosecutor pointed out that Mr. Jackson presented no evidence to corroborate Ms. Greene’s testimony. Second, the prosecutor pointed out that Mr. Jackson had not presented evidence denying he was intoxicated. RP (3/13/08) 47.

Mr. Jackson himself would have been the logical person to present the missing evidence; thus the prosecutor’s comments encouraged the jury to focus on Mr. Jackson’s exercise of his right to remain silent at trial. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 899 P.2d 1294 (1995). By directing the jury to Mr. Jackson’s silence, the state violated Mr. Jackson’s constitutional privilege against self-incrimination. *Holmes, supra*.

As noted above, the identity of the driver was not established by overwhelming evidence. Only Trooper Nelson testified that Mr. Jackson was the driver, and his testimony was undermined by inaccuracies in his report. RP (3/12/08) 68-69, 71, 73-74. Thus it cannot be said that the

error was trivial, formal, or merely academic. *Gonzales-Flores, supra*.

Accordingly, the convictions for DUI and DWLS must be reversed and the case remanded for a new trial. *Holmes, supra*.

D. The prosecuting attorney committed misconduct by arguing that acquittal required the jury to find that Trooper Nelson lied under oath.

It is misconduct for a prosecutor to argue that acquittal requires the jury to find that prosecution witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn. App. 209 at 213, 921 P.2d 1076 (1996). Prosecution arguments of this sort are *per se* flagrant and ill-intentioned. *See Fleming at 214* (Because the prosecutor's "improper argument was made over two years after the opinion" setting forth the rule, the court "therefore deem[s] it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.")

In this case, the prosecutor argued on rebuttal closing that acquittal required the jury to determine that Trooper Nelson was lying:

First question I would like you to ask yourself, what possible reason would Trooper Nelson have to lie or make something up that this man was driving that vehicle.
RP (3/13/08) 59.

This misconduct was flagrant and ill-intentioned under *Fleming, supra*. Furthermore, as noted above, Nelson's credibility was critical. By suggesting that acquittal required the jury to find Nelson a liar, the

prosecutor severely prejudiced Mr. Jackson's case. Accordingly, the convictions must be reversed and the case remanded for a new trial.

Fleming, supra.

E. Cumulative misconduct requires reversal.

Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *Henderson*, at 804-805. In this case, the prosecutor committed numerous instances of misconduct. Two of the violations infringed Mr. Jackson's constitutional rights; two were so flagrant and ill-intentioned that they could not have been resolved through the use of curative instructions. Considered together, the cumulative misconduct requires reversal, even if each instance were not sufficiently egregious to require reversal on its own. *Henderson, supra.* Accordingly, the convictions must be reversed and the cases remanded for a new trial.

II. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. JACKSON'S CRIMINAL HISTORY AND OFFENDER SCORE.

A. The state did not prove Mr. Jackson had any prior adult or juvenile felonies, or that he was on community custody at the time of this offense.

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...

Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.”

RCW 9.94A.500(1).

“Criminal history” means more than just a list of prior felonies (although it is often treated as such). Instead, “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).

The state does not meet its burden to establish an offender’s criminal history through “bare assertions, unsupported by evidence.” *State v. Ford*, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999). Furthermore, an offender’s “failure to object to such assertions [does not] relieve the State of its evidentiary obligations.” *Ford*, at 482. This rule is constitutionally based, and thus cannot be altered by statute: requiring the offender to

object when the state presents no evidence “would result in an unconstitutional shifting of the burden of proof to the defendant.” *Ford, supra*, at 482.

Here, the state alleged a number of prior offenses in its sentencing brief. State’s Sentencing Brief, Supp. CP. It alleged that Mr. Jackson was on community custody at the time of this offense in a supplemental brief. Supplement to State’s Sentencing Brief, Supp. CP. Mr. Jackson stipulated that he was the person named in Exhibits 2-5, which outlined the alleged prior DUI convictions for purposes of the jury’s special verdict. Exhibits 2-5, Supp. CP; RP (3/13/08) 72. He did not stipulate to any adult or juvenile felony convictions, and did not agree that he was on community custody at the time of the current offense. *See* RP (3/13/08). The state did not present evidence of any prior adult or juvenile felony convictions; nor did it provide testimony establishing that Mr. Jackson was on community custody at the time of the offense. *See* RP (3/13/08), (4/4/08).

Despite the lack of evidence, the trial court found that Mr. Jackson had a prior adult felony (Violation of a No Contact Order) and three prior juvenile felonies (Burglary in the Second Degree). Finding No. 2.2, CP 15. The court also found that Mr. Jackson was on community custody. Finding No. 2.2, CP 15. The court did not provide any explanation for these findings.

Because no evidence supports the court's findings on criminal history, they must be vacated and the case remanded for a new sentencing hearing. *State v. Mendoza*, 139 Wn. App. 693, 162 P.3d 439 (2007), review granted at 163 Wn.2d 1017 (2008).

B. The trial judge abused his discretion by failing to find that any of Mr. Jackson's January 2, 2002 offenses comprised the same criminal conduct.

Under RCW 9.94A.525, the sentencing court is required to analyze multiple prior convictions to determine whether or not they are based on the same criminal conduct:

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. RCW 9.94A.525(5)(a)(i).

Under RCW 9.94A.589(1)(a), "same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. The sentencing court is

not bound by prior determinations, but must exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Wright*, 76 Wn.App. 811 at 829, 888 P.2d 1214 (1995), *interpreting former* RCW 9.94A.360(6)(a).

The sentencing court may not presume prior cases should be counted separately. RCW 9.94A.525 permits the court to presume prior cases were separate if the sentences were “imposed on separate dates, or in separate counties or jurisdictions,” or if charges were filed “in separate complaints, indictments, or informations...” RCW 9.94A.525. The statute does not mention other prior cases not meeting these conditions. Where the legislature specifically designates the things to which a statute applies, there is an inference that omissions were intentional. *Queets Band of Indians v. State*, 102 Wn.2d 1 at 5, 682 P.2d 909 (1984). In such cases, “the silence of the Legislature is telling.” *Queets Band of Indians, supra*, at 5. In other words, *expressio unius est exclusio alterius* – specific inclusions exclude implication. *State v. Sommerville*, 111 Wn.2d 524 at 535, 760 P.2d 932 (1988). Applying this rule to RCW 9.94A.525, the statute does not allow the court to presume prior cases were separate unless they stem from different charging documents, were filed in different counties, or were sentenced on different dates. RCW 9.94A.525; *Sommerville, supra*. This is consistent with the burden of proof, which

requires the state to establish that multiple prior convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wn.App. 361 at 365, 921 P.2d 590 (1996), *review denied at* 131 Wn.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wn.2d 74, 750 P.2d 620 (1988) (*Jones I*), and *State v. Gurrola*, 69 Wn.App. 152, 848 P.2d (1993), *review denied at* 121 Wn.2d 1032, 856 P.2d 383 (1993).

RCW 9.94A.589(1)(a) requires analysis of whether the offender's criminal intent, objectively viewed, changed from one crime to the next. *State v. Haddock*, 141 Wn.2d 103 at 113, 3 P.3d 733 (2000); *see also State v. Anderson*, 72 Wn. App. 453 at 464, 864 P.2d 1001 (1994). Sometimes, this will require determination of whether one crime furthered another. *Haddock*, at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365 at 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wn.2d 177 at 183, 942 P.2d 974 (1997).

Mr. Jackson was found to have three convictions stemming from a single incident on January 2, 2002: a DUI, a Reckless Driving, and a Hit and Run Attended. CP 15. Nothing in the record contradicts the common-sense interpretation of this set off offenses, that the three crimes occurred at the same time and place as part of an ongoing and

uninterrupted criminal episode, with a single criminal objective.² Thus the sole question under RCW 9.94A.589(1)(a) is whether the three offenses involved multiple victims.

The DUI and Reckless Driving involved a single victim—the public at large. The Hit and Run Attended charge necessarily involved a separate victim. Accordingly, the DUI and Reckless Driving should have been considered the same criminal conduct. The trial judge did not find any of the three charges were one offense. Finding No. 2.2, CP 15. The sentence must be vacated and the case remanded for a new sentencing hearing. At the new hearing, the sentencing court must consider the DUI and the Reckless driving to be one offense.

III. FACTS “RELATING TO” PRIOR CONVICTIONS MUST BE PROVED TO A JURY BEFORE THE PRIORS CAN ENHANCE A SENTENCE.

A. This Court should limit application in Washington of the *Almendarez-Torres* exception for “the fact of a prior conviction.”

Any fact that increases the penalty for a crime must be proved to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v.*

² The objective criminal intent is not the same as the *mens rea* element of the offense. *State v. Flake*, 76 Wn. App. 174 at 180 n. 1, 883 P.2d 341 (1994).

Recuenco, 163 Wn.2d 428 at 440, 180 P.3d 1276 (2008), citing Wash. Const. Article I, Section 21.³

The *Blakely* rule includes an exception for “the fact of a prior conviction.” *Apprendi v. New Jersey*, 530 U.S. 466 at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).⁴ The exception stems from *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The continuing validity of the exception is in doubt.⁵ Until the Supreme Court formally reverses *Almendarez-Torres* and until our State Supreme Court reconsiders its decision in *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003) (holding that the state constitution does not confer a right to a jury determination of prior convictions), it is appropriate to limit the exception.

B. In Washington, prior convictions are sometimes characterized as elements that must be proved to a jury beyond a reasonable doubt.

³ By contrast, harmless error analysis does apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

⁴ See also *State v. Thieffault*, 160 Wn.2d 409 at 418, 158 P.3d 580 (2007).

⁵ See, e.g., *State v. Mounts*, 130 Wn. App. 219, 122 P.3d 745 at 746, n. 10 (2005), quoting Justice Thomas’ observation in *Shepard v. United States* at p. 1264 that *Almendarez-Torres* “has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”

In Washington, prior convictions are sometimes treated as facts that must be proved to a jury beyond a reasonable doubt. For example, in this case, the trial court properly bifurcated the trial and required the state to prove that Mr. Jackson had four prior DUI-type offenses to aggravate the current DUI to a felony. Similarly, the existence of prior convictions elevating a misdemeanor to a felony must be proved to a jury beyond a reasonable doubt in other contexts as well.⁶ *State v. Oster*, 147 Wn.2d 141 at 148, 52 P.3d 26 (2002); *see also State v. York*, ___ Wn.App. ___, ___ P.3d ___ (2008); *State v. Arthur*, 126 Wn. App. 243, 108 P.3d 169 (2005). In *State v. Lopez*, 107 Wn. App. 270, 27 P.3d 237 (2001), Division III reversed a UPF 1⁷ conviction where defense counsel failed to move for dismissal despite the lack of proof of a prior serious offense.

Thus in some cases, prior convictions are viewed as elements of the offense (*see, e.g., Oster, York, Arthur, and Lopez*), while in others prior convictions are viewed as sentencing factors (*Smith, supra*). But the distinction between elements and sentencing factors is no longer viable:

[W]hen the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is

⁶ The issue in *Oster* was whether it to remove the existence of the prior convictions from the “to convict” instruction and place them in a separate special verdict form.

⁷ RCW 9.41.040.

the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense. *Apprendi* at 494 n. 19.

This is one reason why a majority of U.S. Supreme Court justices have recognized that *Almendarez-Torres* was wrongly decided. This Court should recognize the inconsistency between cases like *Oster* and *York* on the one hand, and *Smith* on the other, and require the state to prove prior offenses beyond a reasonable doubt to a jury.

C. The *Almendarez-Torres* exception applies only to the *existence* of a prior conviction, not to other facts "relating to" the conviction.

The exception relates only to "the *fact* of a prior conviction;" that is, its existence: "In applying *Apprendi*, we have held that the *existence* of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt." *In re Lavery*, 154 Wn.2d 249 at 256, 111 P.3d 837 (2005), *emphasis added*. This is because "a certified copy of a prior judgment and sentence is highly reliable evidence." *Lavery*, at 257. The exception *does not* allow judicial determination of other facts relating to prior convictions.⁸ For example, in *Lavery* the state sought to prove that a

⁸ *But see State v. Jones*, 159 Wn.2d 231 at 241, 149 P.3d 636 (2006) (*Jones II*) ("To give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts "intimately related to [the] prior conviction" such as the defendant's community custody status.")

prior federal bank robbery was equivalent to second-degree robbery in Washington. This Court noted that the two offenses were not legally coextensive, and refused to remand for a judicial determination of the facts underlying the federal conviction. *Lavery*, at 256-258. Similarly, the Supreme Court has refused to extend judicial factfinding to facts beyond the mere existence of a prior conviction:

While the disputed fact here [the underlying evidence supporting a conviction for burglary] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* [*v. United States*] and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. *Shepard v. United States*, *supra*, at 25, citing, *inter alia*, *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999).

The *Shepard* court limited the trial court's factual inquiry into the underlying facts to “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *Shepard* at 26.

1. The trial court should have required the state to establish “identity” to the jury beyond a reasonable doubt, before using his alleged prior non-DUI offenses to enhance his sentence.

The relationship between a prior conviction and the person on trial—that is, the question of “identity”—is a fact beyond the mere existence of the prior conviction. “Identity” is comprised of two parts—

the identity of the person previously convicted, and the identity of the person currently on trial. Proof of identity can be through “otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information.” *State v. Huber*, 129 Wn. App. 499 at 503, 119 P.3d 388 (2005), *footnotes and citations omitted*. As these methods of proof demonstrate, proving “identity” requires the kind of fact-based inquiry for which juries are suited; it involves facts beyond mere existence of a prior and is not suitable for judicial factfinding.

Whether a prior conviction is characterized as an element (as in *Oster, supra*) or as a sentencing factor (as in *Smith, supra*), the identity of the person named in the prior and the identity of the person currently on trial involve facts that must be proved to a jury beyond a reasonable doubt.⁹ A judge could not constitutionally remove the “identity” issue

⁹ Although this Court has not addressed the issue, Division II of the Court of Appeals has ruled that the “fact” of a prior conviction under *Almendarez-Torres* includes the offender’s identity. See *State v. Lewis*, 141 Wn. App. 367 at 393, 166 P.3d 786 (2007); *State v. Rudolph*, 141 Wn. App. 59 at 63, 168 P.3d 430 (2007); *State v. Ball*, 127 Wn. App. 956, 113 P.3d 520 (2005).

from the jury's consideration in *Oster*; the same must be true of the issue when it is characterized as a sentencing factor.¹⁰

Here, in addition to the prior DUIs and related offenses, the state alleged three juvenile felonies (all Burglary II) and an adult conviction for violation of a protection order.¹¹ Despite the absence of a waiver, the “identity” issue—the identity of the offender convicted of the prior offenses and the identity of the person on trial for the current offense—was not submitted to the jury for these offenses. Instead, the court implicitly found that Mr. Jackson's identity matched the identity of the person named in the prior convictions. CP 15. This judicial factfinding violated Mr. Jackson's constitutional right to a jury trial under the Sixth Amendment, and the resulting sentence was improper. Under *State v. Recuenco, supra*, the error is not subject to harmless error analysis. Accordingly, Mr. Jackson's aggravated sentence must be vacated, and the case remanded for sentencing without inclusion of these prior non-DUI offenses.

¹⁰ See *State v. Womac*, 160 Wn.2d 643 at 662 n. 11, 160 P.3d 40 (2007) (“[F]or Sixth Amendment purposes, elements and sentencing factors must be treated the same as both are facts that must be tried to the jury and proved beyond a reasonable doubt.”)

¹¹ Mr. Jackson stipulated to the “identity” issue with regard to the prior DUIs and related offenses.

2. The trial court should have required the state to prove to the jury beyond a reasonable doubt that Mr. Jackson was on community custody at the time of this offense (included for preservation of error).

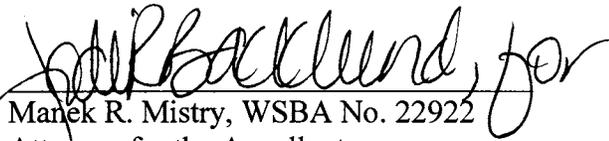
Our Supreme Court has held that judicial factfinding is permitted for an enhancement based on an offender's community custody status at the time of the offense. *Jones II, supra*. This holding will stand or fall with the *Almendarez-Torres* exception. Accordingly, Mr. Jackson provides no additional argument beyond that set forth above.

CONCLUSION

For the foregoing reasons, Mr. Jackson's convictions must be reversed. The obstructing charge must be dismissed with prejudice, and the driving charges must be remanded for a new trial. In the alternative, if the convictions are not reversed, the DUI sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on September 12, 2008.

BACKLUND AND MISTRY


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


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

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF MAILING

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

Elijah Jackson, DOC #845364
Washington Corrections Center
P. O. Box 900
Shelton, WA 98584

and to:

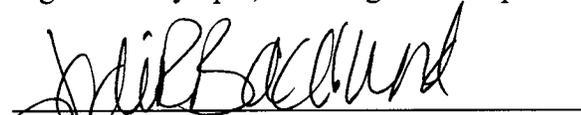
Clallam County Prosecuting Attorney
223 E. 4th Street, Suite 11
Port Angeles, WA 98362-0149

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

All postage prepaid, on September 12, 2008.

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 September 12, 2008.



~~Manek R. Mistry, WSBA No. 22922~~

Attorney for the Appellant

WSBA 22917