

 ORIGINAL

No. 37585-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH JACKSON,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Kenneth D. Williams, Judge
Cause No. 08-1-00007-8

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The defendant claims that the prosecutor committed misconduct requiring reversal.
2. The defendant claims that prosecutor improperly injected his personal opinion into the proceedings.
3. The defendant claims that the prosecutor improperly shifted the burden of proof.
4. The defendant claims that the prosecutor improperly commented on the defendant's constitutional right against self-incrimination.
5. The defendant claims that the prosecutor improperly argued that acquittal required that the jury find that Trooper Nelson lied under oath.
6. The defendant claims that the defendant was denied his right to a fair jury trial because the jury did not determine whether or not he was the same individual alleged in prior offenses by the State.
7. The defendant claims that the defendant was denied his right to a jury's determination of all facts that justified the penalty for his offenses.
8. The defendant claims that the trial court erred by sentencing the defendant to a prison term greater than that permitted by the jury's verdict.
9. The defendant claims that the trial court erroneously sentenced the defendant with an offender score of eight.
10. The defendant claims that the trial court erred by adopting Finding of Fact No. 2.2 of the Judgment and Sentence as presented in the Appellant's Opening Brief at Page 2.

11. The defendant claims that the trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence as presented in the Appellant's Opening Brief at Page 2.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the prosecutor improperly injected his personal opinion into the proceedings requiring reversal. Assignments of Error Nos. 1-5.
2. Whether the prosecutor's argument unconstitutionally shifted the burden of proof. Assignments of Error Nos. 1-5.
3. Whether the prosecutor's argument unconstitutionally commented on the defendant's right against self-incrimination. Assignments of Error Nos. 1-5.
4. Whether the prosecutor's comments to the jury to ask themselves why Trooper Nelson would lie were so flagrant and ill-intentioned that the prejudice created could not be overcome with a curative instruction. Assignments of Error Nos. 1-5.
5. Whether the prosecutor's use of certified court documents to prove the defendant's identity was a violation of his due process and his right to a jury trial. Assignments of Error Nos. 6-11.
6. Whether the trial court's findings of the defendant's adult and juvenile criminal history, and that the defendant was on Community Custody at the time of the offense should be vacated. Assignments of Error Nos. 6-11.
7. Whether the trial court should have found that the defendant's prior convictions of DUI and Reckless Driving from January 2, 2002 constituted the same criminal conduct. Assignments of Error Nos. 6-11.

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts the defendant's recitation of the substantive and procedural facts set forth in his opening brief at pages 5 through 9.

D. ARGUMENT

I. THE PROSECUTOR DID NOT COMMIT MISCONDUCT REQUIRING REVERSAL.

A. The prosecutor did not convey his personal opinion on the officers' credibility.

The defendant correctly asserts that it is misconduct for a prosecutor to convey his or her personal opinion as to the credibility of a witness under *State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003). Likewise, the defendant correctly asserts that there is misconduct under *State v. Price*, 126 Wn.App. 617, 653, 109 P.3d 27 (2005), when a prosecutor clearly expresses his or her personal opinion rather than arguing reasonable inferences from the evidence presented at trial. However, under *State v. Stith*, 71 Wn.App 14, 21, 856 P.2d 415 (1993), the court held that a prosecutor may still comment on a witness's veracity provided that it is not an expression of personal opinion, and if it is not meant to incite a jury's passion. Additionally, the *Stith* court held that a prosecutor is entitled to reasonably respond to a defendant's attempts to

impugn the credibility of a State's witness. *Id.* (citing *State v. Graham*, 59 Wn.App. 418, 428-429, 798 P.2d 314 (1990)). The *Graham* court also held that, “[a]llegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Id.*

In the instant case, when the prosecutor addressed the veracity of the four law enforcement officers during closing arguments, RP 40 (03/13/2008), those assertions were directly related to defense counsel's cross-examination of Trooper Nelson. Defense counsel inquired whether the officer had been trained to observe accurately and write accurate reports. RP 62 (03/12/2008). Counsel further elicited testimony regarding each officer's training presented during direct examination. RP 40-41, 93-95, 106-107 (03/12/2008); RP 9-10 (03/13/2008). Even in the instance where the prosecutor stated “I think maybe she might have ulterior motives,” in reference to Ms. Greene's testimony, the State would submit that there was no error. RP 41 (03/13/2008). Simply because a prosecutor uses the words “I think,” it does not automatically constitute error. *State v. Hoffman*, 116 Wn.2d 51, 94, 804 P.2d 577 (2005). The Washington Supreme Court held in *Hoffman* that a prosecutor's statements, even if in error by virtue of form, are still proper if they are supported by the evidence, and of a nature that the court can correct the error by way of a

curative instruction, if one is requested. *Id.* The *Hoffman* court further held that for purposes of closing arguments, a “prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence.” *Hoffman*, 116 Wn.2d at 95. In the instant case, the prosecutor’s statement, “I think maybe she might have ulterior motives,” was made in direct reference to evidence that Ms. Greene was in a romantic relationship with the defendant, and that she had been drinking that night. RP 30-31 (03/13/2008). Though the argument could have been more carefully worded, it was directly related to evidence elicited during the trial, and no curative instruction was requested. And because of Ms. Greene’s admissions to being in a romantic relationship with the defendant, one could reasonably infer that she might have an ulterior motive with her testimony that she was driving, and not the defendant. RP 30 (03/13/2008).

B. The prosecutor did not shift the burden of proof.

The defendant asserts in his brief that the State unconstitutionally shifted the burden of proof by asking the jury to compare the weight of testimony between the State’s four witnesses and the Defendant’s one witness. Defendant’s Opening Brief at 12. The defendant also correctly cites *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir., 2006) to support the assertion that a prosecutor commits misconduct when he or

she improperly shifts the burden of proof during closing arguments. The *Perlaza* case, however, is distinguishable from the instant case. In the *Perlaza* case, the prosecutor told the jury during closing arguments that upon their entry to the jury chambers for deliberation, the presumption of innocence then became the presumption of guilt. In the instant case, the prosecutor asked the jury to compare the testimony given by all witnesses at trial in direct reference to and quoting an instruction read to the jury explaining that it was their duty to weigh and consider the credibility of each witness's testimony. *See* Jury Instruction #1; WPIC 1.02 (Exhibit A); RP 39-40 (03/13/2008). Asking the jury to properly follow the court's instruction is not improper, neither does it constitute an attempt to shift the burden of proof. To suggest otherwise would create a situation that would unduly burden all prosecutors and their efforts to effectively advocate their cases.

C. The prosecutor did not comment on the defendant's constitutional right against self-incrimination.

The defendant further argues that the State improperly commented on the defendant's right to remain silent on two separate occasions: (1) when the prosecutor claimed that there was no evidence to corroborate Ms. Greene's testimony, RP 41 (03/13/2008), and (2) when the prosecutor stated "no one has shown any evidence that the defendant was not

intoxicated, nor that the witness was not intoxicated.” RP 47 (03/13/2008). The defendant claims that this was a comment on his right to remain silent because it improperly caused the jury to focus on the defendant’s silence, since the defendant “would have been the logical person to present the missing evidence.” Defendant’s Opening Brief at 14.

The defendant cites to *State v. Fiallo-Lopez*, 78 Wn.App. 717, 899 P.2d 1294 (1995) as their authority, but the *Fiallo-Lopez* case is distinguishable from the instant case. In the *Fiallo-Lopez* case, the defendant was arrested as part of a drug sting, and presented no case at trial. The prosecutor in that case made comments that no evidence had been presented to explain Fiallo-Lopez’s presence at the scenes of the drug sting. *Fiallo-Lopez*, 78 Wn.App. at 729. Because all of the witnesses at trial were testifying on behalf of the State, the only person who could have presented the evidence mentioned by the prosecutor was Fiallo-Lopez himself. *Id.*

A more appropriate and analogous case to the immediate one would be *State v. Ashby*, 77 Wn.2d 33, 459 P.2d 403 (1969). In the *Ashby* case, the prosecutor made the comment “Has anyone disputed that particular evidence that those articles were sold to Mr. Ashby?” *Ashby*, 77 Wn.2d at 37. The *Ashby* court ruled that such a statement was not error, noting that other people aside from the defendant could have provided

such testimony, and the statement could therefore be equally applied to those other people and not solely the defendant. *Id.* The *Ashby* court further went on to quote the ruling from *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926), “Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his.”

In the instant case, the record reflects that there were three people in the defendant’s vehicle: the defendant, Ms. Greene, and one other passenger, Evelyn Fresnares. RP 56, 88, 98-99 (03/12/2008); RP 12-14, 26, 31 (03/13/2008). The defendant could have called Ms. Fresnares to testify on his behalf. Ms. Fresnares could have corroborated Ms. Greene’s story, or presented other testimony to suggest that the defendant was neither driving nor intoxicated. Ms. Fresnares was never called as a witness. Yet, her name, and her presence in the vehicle were referred to numerous times during the course of trial by multiple witnesses. RP 56, 88, 98-99 (03/12/2008); RP 12-14, 26, 31 (03/13/2008). Therefore the argument that no one had corroborated Ms. Greene’s testimony, or had presented evidence showing that the defendant was not intoxicated, was proper, as there was clearly and obviously someone other than the

defendant who could have presented that evidence. Because the prosecutor made no direct reference to the defendant or any specific person for that matter, the prosecutor's argument was not a comment on the defendant's right to remain silent. The defendant's claim is without merit.

Even if the court agrees that this was a comment on the defendant's right to remain silent, under *Fiallo-Lopez*, such error may not automatically constitute grounds for reversal. *Fiallo-Lopez*, 78 Wn.App. at 729. The appellate court may find that the error is harmless if it is convinced that the jury would have reached the same verdict regardless of error. *Id.* (quoting *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988) (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986)). In the instant case, the State presented testimony from four separate law enforcement officers, all of whom testified that the defendant appeared to be extremely intoxicated. Additionally, on cross examination, Ms. Greene was asked "Isn't it true that you were *also* drinking that night?" RP 30 (03/13/2008) (emphasis added). Ms. Greene responded, "Yes." RP 30 (03/13/2008). The form of the question is one that implies that others in the vehicle were drinking that night. At that point in the trial, the officers' testimony regarding the defendant's intoxication was uncontroverted, and

Ms. Greene's statement only further corroborated the assertion that the defendant had been drinking that night. Therefore, even if the State erred here, under *Fiallo-Lopez*, the error is harmless since it would not have materially affected the jury's verdict.

D. The prosecutor did not argue that acquittal required the jury to find that Trooper Nelson lied under oath.

The defendant further argues that the State committed misconduct by arguing that acquittal required the jury to find that Trooper Nelson lied under oath. Defendant's Opening Brief at 15. This argument is also without merit. Under *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), it is improper for the State to argue that acquittal requires a finding that a witness provided false testimony. However, *Fleming* is distinguishable from the instant case. In the instant case, the prosecutor asked the jury, on rebuttal, to ask themselves why Trooper Nelson would lie about the identity of the driver. RP 59 (03/13/2008). Coincidentally, this is very similar to the argument presented by prosecutors in the *Fiallo-Lopez* case, where the prosecutor stated, "And if you question the officers' motives, if you think that the cops -- to use a popular defense term, the cops are lying, ask yourselves, don't you think they would have done a much better job?" *Fiallo-Lopez*, 78 Wn.App. at 730. The *Fiallo-Lopez* court ruled that this comment was not misconduct, that it was not an

argument implying that acquittal required the jury to find that the officers were lying, and that it was merely an argument by the prosecutor that the witnesses' testimony was supported by the evidence. *Fiallo-Lopez*, 78 Wn.App. at 731. The defendant's claim is without merit.

In the instant case, the prosecutor did not suggest that the jury could acquit if and only if Trooper Nelson was lying. Rather, the prosecutor was responding to the defendant's assertion during closing arguments that Trooper Nelson's recollection was unreliable, that Trooper Nelson had allegedly left out key pieces of information in his report, and that Trooper Nelson had allegedly falsely signed a document that he had read the defendant certain rights. RP 55-57 (03/13/2008).

"Prosecutors are entitled to make a fair response to the arguments of defense counsel." *State v. Gaworski*, 138 Wn.App. 141, 159, 156 P.3d 288 (2007) (citing *State v. Russell*, 125 Wn.2d 24, 88, 882 P.2d 747 (1994)). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Graham*, 59 Wn.App. at 428 (citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)). In the instant case, the defendant directly attacked the credibility of Trooper Nelson, and even implied that

he had committed perjury. RP 55-57 (03/13/2008). The prosecutor was therefore entitled to respond appropriately on rebuttal.

E. There is no cumulative error that requires reversal in the instant case.

Cumulative error occurs when there are “several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Additionally, it is the defendant’s burden to prove that the errors made by the State at trial materially affected the defendant’s right to a fair trial. *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986); *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986). In the instant case, the prosecutor did not express his personal opinion; the prosecutor did not shift the burden of proof; the prosecutor did not comment on the defendant’s right to remain silent; and the prosecutor did not indicate to the jury that acquittal required them to find that Trooper Nelson lied. The defendant’s claim of cumulative error is without merit.

In the instant case, all remarks made by the prosecutor at issue were directly in reference to facts contained within the record at trial, or were directly in response to defense argument. Additionally, the evidence in the instant case was so overwhelming, that there is no possibility that

any prosecutorial error would have materially affected the jury's verdict. The State presented evidence from four different independent witnesses, much of which was uncontroverted at trial. The defense presented one witness, whose credibility was severely questionable due to both inconsistencies in her story, and a lack of evidence to corroborate her story. Because the defendant has failed to show that there was any error on the part of the prosecutor, and that the accumulation of such error was enough to materially affect the outcome of the case, the claim of cumulative error is without merit.

II. THE TRIAL COURT PROPERLY DETERMINED THE DEFENDANT'S CRIMINAL HISTORY AND OFFENDER SCORE.

A. The State proved prior adult and juvenile felonies at the sentencing hearing.

A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. *State v. Ford*, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999).

A sentencing court's calculation of an offender score is reviewed de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P. 3d 1192 (2003).

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*. 155 Wn.2d 867, 876, 123 P.3d 456 (2005).

Sentencing courts can rely on defense acknowledgement of prior convictions without further proof. *Cadwallader*, 155 Wn.2d at 873. Furthermore, the State is entitled to rely on representations advanced by defense counsel. *State v. Bergstrom*, 162 Wn.2d 87, 96, 169 P.3d 816 (2007).

A written stipulation signed by counsel for both parties is binding on the parties and the court. *Reilly v. State*, 18 Wn.App. 245, 253, 566 P.2d 1283 (1977). “A stipulation is ‘[a]n express waiver . . . conceding for the purposes of the trial the truth of some alleged fact,’ with the effect that ‘one party need offer no evidence to prove it and the other is not allowed to disprove it.’” *State v. Wolf*, 134 Wn.App. 196, 199, 139 P.3d 414 (2006).

In the instant case, the defendant stipulated to the four prior DUIs and the State presented certified copies of the judgments and sentences on all prior adult and juvenile felonies. The State met its burden of proof beyond a reasonable doubt on the prior DUI convictions, which were presented to the jury in the bifurcated trial via the stipulation and its burden of preponderance of the evidence by presenting certified copies of prior non-DUI convictions at the time of sentencing.

B. The trial judge did not abuse his discretion by not determining that the defendant's January 2002 offenses comprised the same criminal conduct.

RCW 9.94A.589(1)(a) defines "same criminal conduct" as two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. If two offenses are the same criminal conduct, then together they merit only one offender score point. *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000).

In *State v. Wright*, 76 Wn.App. 811, 828-29, 888 P.2d 1214 (1995), *review denied*, 127 Wn.2d 1010, 902 P.2d 163 (1995), the court ruled that under former RCW 9.94A.360(6)(a)(i), the current sentencing court has the discretion to determine whether concurrently served prior offenses should be counted as one offense or as separate offense using the "same criminal conduct" analysis. The court also held that a current court was not bound by a previous court's ruling as to how prior offenses were scored. Because the trial court in *Wright* failed to exercise its discretion under Former RCW 9.94A.360(6)(a)(i) to rule on the same criminal conduct issue, Division One of the Court of Appeals remanded for re-sentencing.

Under Former RCW 9.94A.400(1)(a), a defendant's current offenses must be counted separately in determining the offender score

unless the trial court finds that some or all of the current offenses encompass the same criminal conduct. *State v. Anderson*, 92 Wn.App. 54, 61, 960 P.2d 975 (1998), *review denied* 137 Wn.2d 1016, 978 P.2d 1099 (1999). In *Anderson*, Division One of the Court of Appeals treated the trial court's calculation of Anderson's offender score as an implicit determination that his offenses did not constitute the same criminal conduct. *Anderson*, 92 Wn.App. At 62. The court stated that it would not disturb an implicit determination absent an abuse of discretion or misapplication of the law. *Id.* The court in *Anderson* found that Anderson's objective intent for his crimes did not remain the same and because such finding is neither a misapplication of the law nor an abuse of discretion, the trial court's finding was not disturbed on appeal. *Id.*

In the instant case, the trial court stated:

Well, the difficulty the Court has obviously with the offender score is it's - - somewhat limited. The maximum sentence under this particular charge is 5 years or 60 months. It would appear to me that the State has the better argument in terms of whether or not they're the same criminal conduct in terms of the 02 causes, and I would note that the record on that indicates that the convictions were for driving while under the influence, reckless driving, hit and run unattended vehicle, as well as driving while license suspended.

Certainly those can occur at different times, different places, although the same date.

I think the intent is somewhat different. The hit and run intent is to frankly not stick around and be responsible under the laws of the State for any sort of damage which may have been done as a result of the accident. The accident may have occurred as a result of driving under the influence or recklessly, but those are distinct crimes for purposes of that.

It is clear that the court did conduct a “same criminal conduct” analysis under RCW 9.94A.589(1)(a) and determined that the 02 offenses did not constitute the same criminal conduct. The trial court did not abuse its discretion.

III. NOT ALL FACTS RELATING TO PRIOR CONVICTIONS NEED BE PROVED TO A JURY BEFORE THE PRIORS CAN ENHANCE A SENTENCE.

A. This court is not bound to limit the application in Washington of the Almendarez-Torres exception for the fact of a prior conviction.

“[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 U. S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403, 409 (2004) *citing Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000).

In *State v. Van Buren*, 123 Wn.App. 634, 645, 98 P.3d 1235 (2004), the court held that the record of a defendant's criminal felony and misdemeanor convictions, need not be proved to a jury beyond a reasonable doubt before it can be taken into consideration by the sentencing judge.

RCW 9.94A.535(2)(c) states when an exceptional sentence may be imposed by a court without findings of fact by a jury:

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

In *State v. Alvarado*, Docket 81069-9, filed 9-18-08, the court held that the trial court properly applied RCW 9.94A.535(2)(c) in concluding that some of Alvarado's offenses would go unpunished absent the exceptional sentence and that application of the statute in this case did not violate Alvarado's sixth Amendment right to a jury trial under *Blakely v. Washington*, 542 U.S. 29, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

In the instant case, the standard range for the felony DUI with an offender score of eight (8) is 62 to 82 months. Certified copies of all prior judgments and sentences evidencing convictions were provided to the

court for sentencing purposes. In addition, the defendant stipulated to the four prior DUIs. Defendant's exhibits 2-5. Supp. CP. The defendant was sentenced to the statutory maximum of 60 months. The defendant did not receive an enhanced sentence; there were no facts that increased the penalty for the crime beyond the prescribed statutory maximum that needed to be decided by a jury. The court relied on prior convictions alone to determine the sentence to impose and imposed below the standard range but at the statutory maximum of 60 months.

An Appellate Court reviews a sentencing court's calculation of an offender score de novo. *State v. Rivers*, 130 Wn.App. 689, 699, 128 P.3d 608 (2005), *review denied* 158 Wn.2d 1008 (2006), *cert. denied*, 127 S.Ct. 1882, 167 L.Ed.2d 370 (2007). A certified copy of the judgment and sentence is the best evidence to establish the existence of a prior conviction. *Rivers*, 130 Wn.App. at 698-99.

In the instant case, the State presented, to the court, certified copies of all the defendant's prior convictions, both juvenile and adult.

B. The State did prove the prior DUIs to the jury beyond a reasonable doubt in a bifurcated trial.

Defendant's argument that the State should be required to prove all prior convictions beyond a reasonable doubt to a jury is without merit.

Not all facts relating to prior convictions need be proved to a jury before

the priors can enhance a sentence. *Blakely, supra*. Moreover, the sentence was not enhanced in the instant case. The sentence was merely the statutory maximum, which was below the standard range with an offender score of 8.

C. The *Almendarez-Torres* exception does not apply to the instant case.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 227, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the court concluded that subsection (b)(2) of 18 U.S.C § 1326 is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime and neither the statute nor the Constitution require the Government to charge the factor that it mentions, an earlier conviction, in the indictment.

1. The State is not required to establish identity to the jury beyond a reasonable doubt before using the defendant's prior conviction on non-DUI offenses to enhance the defendant's sentence.

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person or ordinary judgment, in carrying on his

everyday affairs, of the identity of a person should be received and evaluated.

State v. Huber, 129 Wn.App. 499, 501-02 , 119 P.3d 388 (2005), *citing State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The **Huber** court went on to say that, The State can met this burden in a variety of specific ways including admissible booking photographs, booking fingerprints, eyewitness identification, or “arguably, distinctive personal information.” **Huber**, 129 Wn.App. at 503, *footnotes and citations omitted*.

In the instant case the non-DUI certified copies of the prior convictions were not required to be proven beyond a reasonable doubt to the jury. The certified copies of the prior convictions were presented to the court. The court could see from those certified copies of prior convictions that there was distinctive personal information that matched distinctive personal information that was set forth in the certified copies of the prior DUIs, to which the defendant stipulated and which were presented to the jury.

Moreover, the defendant’s sentence was not enhanced. He was merely sentenced to the statutory maximum of 60 months; he did not receive an exceptional sentence. There is no requirement that the defendant’s prior convictions be proved to the jury in the instant case,

other than the prior DUIs, which the State did and to which the defendant stipulated.

The judicial fact finding with regards to the defendant's identity on the non-DUI prior convictions did not violate the defendant's constitutional right to a jury trial under the Sixth Amendment pursuant to *Blakely, supra*. The resulting sentence was not improper.

2. Proof of community custody

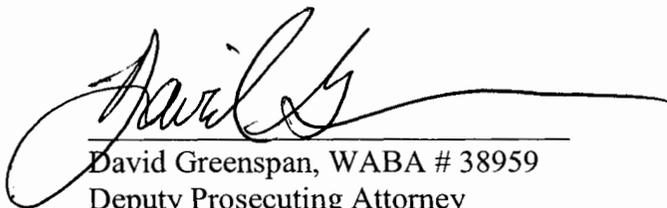
The State concedes that it did not prove beyond a reasonable doubt, or even by a preponderance, that the defendant was on community custody at the time of the current offense. Hence, the State does not object to this court remanding for re-sentencing with and offender score of seven (7).

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm the defendant's conviction.

DATED this 13th day of November, 2008, at Port Angeles, Washington.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David Greenspan", written over a horizontal line.

David Greenspan, WABA # 38959
Deputy Prosecuting Attorney
Attorney for Respondent

WPIC 1.02 Conclusion of Trial--Introductory Instruction
NO. _____

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our State constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you

that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,
Respondent,
vs.
ELIJAH F. JACKSON,
Appellant.

NO. 37585-1-II

AFFIDAVIT OF SERVICE BY MAIL

U

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 13th day of November, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

MR. DAVID C. PONZOHA, CLERK
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OLYMPIA, WA 98501

[Signature: Doreen Hamrick]
Doreen Hamrick

SUBSCRIBED AND SWORN TO before me this 13 day of November, 2008

[Signature: Jenna L. Henderson]
(PRINTED NAME:) _____
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 12-15-18