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COURT OF APPEALS
DIVISION II

No. 38437-0-II

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

STATE OF WASHINGTON
BY E
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STATE OF WASHINGTON,
Respondent,

v.

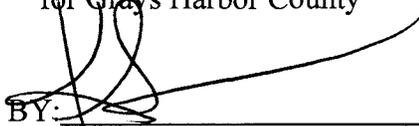
JACOB N. SHERMAN,
Appellant.

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

THE HONORABLE JUDGES F. MARK MCCAULEY,
DAVID L. EDWARDS, AND GORDON L. GODFREY

BRIEF OF RESPONDENT

H. STEWARD MENEFFEE
Prosecuting Attorney
for Grays Harbor County

BY: 

KATHERINE L. SVOBODA
Deputy Prosecuting Attorney
WSBA # 34097

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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COUNTER STATEMENT OF THE CASE

Procedural History

The defendant was charged by Information on June 6, 2008 with one count of Assault in Violation of a No Contact Order contrary to RCW 26.50.110. (CP 45-46). A Second Amended Information was filed on September 17, 2008 alleging felony Violation of a No Contact Order by alternate means, either an assault in violation of a no contact order or third or subsequent violation. (CP 21). The defendant was found guilty as charged on September 18, 2009. (CP 54). The defendant was given a standard range sentence on October 13, 2008. (CP 24-31).

Factual Background

On February 26, 2008, the Hoquiam Municipal Court entered a domestic violence no contact order in Cause No. 8-0007 restraining the defendant from having any contact with McKayla Smith or coming within 100 feet of her residence. (9/18/08 RP at 14; Exhibit 1). The expiration date on the order is June 30, 2008, and there was no evidence the order had been quashed prior to the expiration date. (Exhibit 1). The defendant has twice been convicted for previous violations of a no contact order. These convictions were in Thurston County Superior Court cause 05-1-2263-2 and Thurston County District Court cause 4DV-00505. (Exhibits 2 and 3).

On May 27, 2008, at approximately 2:30 AM, Hoquiam officers were dispatched to a report of a domestic violence assault at the Lincoln Common Apartments. (9/18/08 RP at 43-44). A neighbor called to report there was someone yelling “[p]lease don’t hurt me. Please don’t hurt my son. (9/18/08 RP at 43). Upon arrival, the officers observed a shirtless subject walking from the stairway leading to the apartment who was later identified as the defendant, Jacob Sherman. (9/18/08 RP at 44-45, 52; 8/25/08 RP at 24).

Officer Salstrom asked the defendant to stop and the defendant complied. (8/25/08 RP at 24). The defendant was not handcuffed or restrained in any way. (8/25/08 RP at 25). The defendant did not ask to leave. (8/25/08 RP at 25). The defendant was asked his name and he replied. (8/25/08 RP at 24).

After other officers obtained information from the victim, Office Salstrom asked the defendant if he had bitten the victim. (8/25/08 RP at 24-25). The defendant said that he had bitten the victim during sexual activity after she bit his thumb. (8/25/08 RP at 25). The defendant was detained for approximately five minutes. (8/25/08 RP at 25).

Officer Mitchell located the victim in Apartment D-104, later identified as the protected party, McKayla Smith. (9/18/08 RP at 52-53). He advised she was crying and visibly shaking and she seemed fearful

when he contacted her. (9/18/08 RP at 53). Officer Mitchell observed a bite mark on Smith's right forearm, he could see teeth impressions with scrapes, and the officer saw several cuts on the inside of Smith's lip and cheeks. (9/18/08 RP at 53). The injuries appeared to be fresh. (9/18/09 RP at 53).

Smith and the defendant dated for a time beginning in July 2007. (9/18/08 RP at 14). In February 2008, Smith was the protected party in a no contact order issued by the Hoquiam court. This order restrained the defendant. (9/18/08 RP at 14-15). Smith stated she believed the order between her and the defendant had expired, although there was no evidence she had petitioned to have it lifted. (9/18/08 RP at 31). On May 27, 2008 the defendant showed up and Smith's apartment and they had an argument. (9/18/08 RP at 16-17).

Smith said the verbal argument escalated, and the defendant had ripped three tee-shirts off of her, squeezed her face, grabbed her by the neck, slapped her, and bit her on the arm. (9/18/08 RP at 18-26). Smith tried to get the defendant to leave several times and he would not go. (9/18/08 RP at 17-18).

She said he arrived and they began arguing at about 11 p.m. Smith said that at about midnight the defendant ripped her tank top shirt she was wearing off of her, breaking both of the straps. Smith stated she

put on another white tee-shirt and they started bickering again. Smith said the defendant ripped that shirt as well and then later a gray Calvin Klein shirt. Smith stated she then went to her van to warm it up with the intention of leaving. (9/18/08 RP at 18). However, the defendant followed her to the van, and, when Smith realized she forgot her keys and began to exit the van, the defendant grabbed her by the throat and started choking her. (9/18/08 RP at 18-19, 23). Smith said she bit him on the knuckle to get him to let go. (9/18/08 RP at 24). Smith said she told the defendant to stop, and a neighbor came out and spoke to her. (9/18/08 RP at 24-25). Smith told the neighbor it was because she was planning on leaving. Some time during this altercation the defendant bit her on the right forearm, leaving visible teeth imprints.

Smith stated she went back to the apartment to retrieve her children. (9/18/08 RP at 25). Smith said somehow she ended up back in her bedroom when she went to get her youngest son. The defendant choked her and held her face, causing the cuts to the inside of her mouth. (9/18/08 RP at 25-26). Smith said she started banging on the floor to get some help. (9/18/08 RP at 25). Smith said one of the neighbors came upstairs and knocked on the door, and she was able to get away from the defendant to answer the door. (9/18/08 RP at 26).

Smith testified that she received cuts on the inside of her mouth and her lip, and a bite mark on her arm that bruised. (9/18/08 RP at 26).

Timothy and Erin Brashar lived directly beneath Smith. (9/18/08 RP at 60, 77). On the night in question, Erin heard Smith outside crying. (9/18/08 RP at 62). Smith told Erin she was okay but she “was crying really hysterical.” (9/18/08 RP at 62). Later, Erin heard stomping that seemed a deliberate attempt to get her attention. (9/18/08 RP at 63-64). Erin could hear Smith screaming and her husband went upstairs. (9/18/08 RP at 62). When Timothy was going upstairs, he heard Smith “screaming to call the cops.” (9/18/08 RP at 76). Erin then called 911. (9/18/08 RP at 63). Timothy identified the defendant as being the person in the apartment with Smith. (9/18/08 RP at 77).

RESPONSE TO ASSIGNMENTS OF ERROR

The defendant was not “in custody” for *Miranda* purposes.

“In *Miranda* the United States Supreme Court defined custodial interrogation as ‘questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way’.”¹ “Custody” was reexamined by the United States Supreme Court in *Berkemer v. McCarty* and an objective

¹*State v. Heritage*, 152 Wash.2d at 217, *citing Miranda*, 384 U.S. at 44.

test was adopted.² The test is, would a reasonable person in a suspect's position have felt that his or her freedom was curtailed to the degree associated with formal arrest?³ "*Berkemer* 'rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone'."⁴ Thus, if the questioning is part of a "routine, general investigation in which the defendant voluntarily cooperated but is not yet charged," *Miranda* warnings are not required.⁵ The person's freedom to move must be curtailed to a degree associated with formal arrest for the person to be "in custody" for the purposes of *Miranda*.

In *Heritage*, the defendant, a juvenile was contacted by the park security officers wearing their "uniforms". The officers did not physically detain or search anyone and immediately made it clear they did not have the authority to arrest. The encounter was found to be analogous to a

²*Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984).

³*Berkemer*, 468 U.S. at 441-42.

⁴*State v. Short*, 113 Wash.2d 35, 41, 775 P.2d 458 (1989) *citing* *Heinemann v. Whitman Cy.*, 105 Wash. 2d 796, 718 P.2d 789 (1986) *citing* *Berkemer*, 486 U.S. at 435 n.22.

⁵*Short*, 113 Wash.2d at 461, *citing* *State v. Harris*, 106 Wash.2d 784, 789, 725 P.2d 975 (1986).

Terry stop, not custodial interrogation, and *Miranda* warnings were not required.⁶

In *Short*, a law enforcement officer was undercover and elicited questions from a person later charged with a crime. The defendant was not charged at the time of the conversation and was unaware the person to whom he was speaking was a law enforcement officer. The officer did not arrest the defendant and did not intend to during the conversations. Therefore, *Miranda* warnings were not required.⁷

In *Harris*, the defendant, later charged with first degree murder, voluntarily made contact with the police regarding the victim's death. During some of the defendant's initial statements to the police he was not the focus of the investigation. Even if the defendant had refused to cooperate during these statements he would not have been arrested or curtailed. Because the conversations "did not appear to have limited the defendant's freedom of action to a degree associated with formal arrest", *Miranda* warnings were not required.⁸

"In custody" and "seized"(not free to leave) are not the same thing.

⁶*Heritage*, 152 Wash.2d at 219.

⁷*Short*, 113 Wash.2d 35.

⁸*Harris*, 106 Wash.2d at 790.

A so-called *Terry* detention is a seizure, but not an arrest. A person who is only subjected to a routine stop pursuant to *Terry* need not be given *Miranda* warnings prior to questioning.⁹ This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less “police dominated,” and does not lend itself to deceptive interrogation tactics.¹⁰

A *Terry* detention is a seizure for investigative purposes.

To justify a *Terry* stop under the Fourth Amendment and art. I, § 7, a police officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 276 P.2d 445 (1986). Probable cause is not required for a *Terry* stop because a stop is significantly less intrusive than an arrest. *Id.*; *Brown v. Texas*, 443 U.S. 47, 50, 99 S.Ct. 2637, 61 L.Ed.2 357 (1979)(same)¹¹

⁹ *State v. Huynh*, 49 Wn.App. 192, 201, 742 P.2d 160 (1987); *State v. Walton*, 67 Wn.App. 127, 130, 834 P.2d 624 (1992).

¹⁰ *State v. Cunningham*, 116 Wn.App. 219, 228, 65 P.3d 325 (2003); *State v. Walton*, 67 Wn.App. 130 61 L.Ed.2d 357 (1979)(same).

¹¹ *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999) (overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127, S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

In this case, the officers were responding to a possible domestic violence assault. Upon arrival, at 2:30 AM, they observed the defendant coming from the reported location without a shirt. The officers certainly had enough information that a crime had occurred in order to justify a temporary detention of the defendant. The officers had the right to detain the defendant for a reasonable period of time as they had a reasonable, articulable suspicion that the defendant was involved in some way with the incident they were there to investigate, due to the timing and the defendant's proximity to the scene.

The very brief investigative stop of the defendant, does not equate to being "in custody" pursuant to *Miranda*. Therefore, the defendant's statement is admissible and the trial court's ruling should be affirmed.

The trial court did not abuse its discretion by denying motion to bifurcate the alternative means.

The defendant charged by the Amended Information with two counts, Assault in Violation of a No Contact Order and Violation of a No Contact Order-- Third or Subsequent Offense, on August 25, 2008. (CP at 47-48). The defendant filed a Motion to Sever these counts on September 11, 2008. (CP at 49-51). Realizing that these were not properly separate counts, but alternate means of the same crime, the State moved to amend

the Information a second time, alleging one count with alternative means. (9/17/2008 RP at 43). This motion was granted on September 17, 2008, rendering the defendant's Motion to Sever moot. (CP at 21).

After the Motion to Amend was granted, defense counsel requested that any evidence of the prior violations be presented to the jury after the State's case in chief. (9/17/2008 RP at 51). This would have put the question of guilt on the Assault in Violation of a No Contact Order to the jury without the alternative means. The judge correctly asked counsel what would happen if the jury found the defendant not guilty of Assault in Violation of a No Contact Order. (9/17/2008 RP at 51). There is no legal procedure that allows one alternative to go to the jury and then the other, jeopardy would have certainly attached when the jury was sworn; therefore, if the defendant was acquitted on the Assault in Violation of a No Contact Order the State could not have then submitted the Third or Subsequent Offense to them without running afoul of double jeopardy.

The defendant was not entitled to bifurcation.

In *Old Chief v. United States*, 519 U.S. 172, 191, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the United States Supreme Court recognized that a defendant may be prejudiced by evidence regarding a prior conviction and held that he may stipulate to the fact that he has a prior conviction in order to prevent the State from introducing evidence concerning details of the prior conviction to the jury. However, the Court in *Old Chief* did not hold that a jury must be completely shielded from any reference to the

prior offense, only that when a defendant stipulates to a prior conviction the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction. *Id.* at 191 n. 10, 117 S.Ct. 644. In *State v. Gladden*, 116 Wash.App. 561, 566, 66 P.3d 1095 (2003), Division Three of the Court of Appeals distinguished *Old Chief* and held that a defendant cannot stipulate to the existence of an element and remove it completely from consideration by the jury. Both cases recognize that the prejudicial nature of evidence regarding prior convictions must be balanced against the crucial role that elements, even prior conviction elements, play in the determination of guilt.¹¹

It is well established that admission of prior convictions, while prejudicial, does not necessarily deprive a defendant of a fair trial.¹²

In *State v. Oster*, the Court examined a “to convict” jury instruction that omitted the prior convictions element of the charged crime.¹³ Oster was charged with a felony violation of a domestic violence no contact order, a crime that is a gross misdemeanor unless the defendant has prior convictions for the same crime.¹⁴ The Court found that the trial court did not abuse its discretion when it bifurcated the to convict jury instructions with regard to prior offenses.

However, in *Roswell*, the Court does not find that *Oster* provides

¹¹*State v. Roswell*, 165 Wash.2d 186, 194-5, 196 P.3d 705 (2008).

¹²*State v. Roswell*, 165 Wash.2d at 195.

¹³*State v. Oster*, 147 Wash.2d 141, 142-43, 52 P.3d 26 (2002).

¹⁴*State v. Oster*, 147 Wash.2d at 143.

authority for a “bifurcated trial.”¹⁵ The *Roswell* court ruled as follows:

Courts should strive to afford defendants the fairest trial possible. In *Oster*, we affirmed the trial court's effort to limit the possible prejudice that stems from evidence of prior convictions. We did not, however, hold that the defendant had a *right* to bifurcated jury instructions. We have specifically held that such bifurcation is constitutionally permissible but not required. *State v. Mills*, 154 Wash.2d 1, 10 n. 6, 109 P.3d 415 (2005). And we certainly did not suggest that defendants have a right to waive their right to a trial by jury on certain elements so as to prevent the jury from hearing prejudicial evidence. Courts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue. *Pettus v. Cranor*, 41 Wash.2d 567, 568, 250 P.2d 542 (1952) (citing *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939)).¹⁶

In this case, the defendant did not stipulate to his prior convictions, and the State was entitled to present them to the jury during its case-in-chief.

There is sufficient evidence to support the defendant's conviction.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt.¹⁷ The applicable standard of review is whether, after reviewing the evidence in

¹⁵*State v. Roswell* at 196.

¹⁶*State v. Roswell* at 196.

¹⁷*State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.¹⁸ Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it.¹⁹ All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant.²⁰ In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal."²¹

There is sufficient evidence proving a No Contact Order existed on May 27, 2008, and restrained the defendant.

The victim, McKayla Smith, identified the defendant as Jacob Nathaniel Sherman. (9/18/08 RP at 13). Smith further testified that the Hoquiam Municipal Court had issued a No Contact Order in February 2008 which protected her and restrained the defendant. (9/18/08 RP at 14-15). Smith mistakenly believed that the order expired after three months; however, the No Contact Order clearly states its expiration date as June

¹⁸*State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

¹⁹ *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988).

²⁰ *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

²¹*State v. Carmillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

30, 2008. (9/18/08 RP at 31; Exhibit 1).

In order to convict, a jury must be convinced beyond a reasonable doubt, and “[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.”²² The evidence in this case, shows that on May 27, 2008 there was a No Contact Order in existence that restrained the defendant from contacting the victim, McKayla Smith.

There was no evidence presented that would indicate the charges had been dismissed or that the defendant had been acquitted. In fact, there was no evidence to indicate any change in the status of the No Contact Order. The order was valid on its face.

There was sufficient evidence that the defendant had two prior convictions for Violation of a No Contact Order.

The State was unable to obtain a certified copy of the judgment and sentence from Thurston County District Court in cause 4DV-00505 as the court clerk was unable to locate the file. (9/17/08 RP at 59). However, she provided a certified copy of the docket entry kept pursuant to CrRLJ 7.2(d) regarding the conviction. (Exhibit 2). The trial court ruled this evidence admissible at trial.(9/17/08 RP at 59-60).

Although the best evidence of a prior conviction is a certified copy

²²WPIC 4.01

of the judgment and sentence, the State may introduce other documents of record or transcripts of prior proceedings to establish a defendant's criminal history.²³

CrRLJ 7.2(d) provides that when a defendant is sentenced "[a] record of the sentencing shall be made. The sentencing and judgment records of the courts of limited jurisdiction shall be preserved in perpetuity, either in an electronic or hard copy format...[t]he record of the sentencing proceedings shall be prima facie evidence of a valid conviction in subsequent proceedings...in superior court."

This document was sufficient to prove the defendant's prior conviction under Thurston County cause 4DV-00505 .

There was sufficient evidence to link the defendant with the convictions in Thurston County cause 4DV-00505 and 05-1-2263-2.

The State was able to establish through testimony, the defendant's full name, date of birth, and address as: Jacob Nathaniel Sherman, d/o/b 4-27-86, 2435 Queets Avenue in Hoquiam. (9/18/08 RP at 13, 45-46).

Further, Deputy Osgood identified the fingerprints from the arrest cards as

²³*State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999); *State v. Morley*, 134 Wash.2d 588, 611, 952 P.2d 167 (1998) (meeting the State's burden by introducing the entire court-martial record); *State v. Aronhalt*, 99 Wash.App. 302, 306, 309, 994 P.2d 248 (2000) (certified verdict forms, judgments, clerk minute entries, and court orders support existence of prior convictions).

belonging to the defendant. (RP at 101-104. Exhibits 13, 14, 15).

For cause 4DV-00505, the docket entry describes the defendant as: Jacob Nathaniel Sherman, date of birth 4-27-86, with the address 2435 Queets in Hoquiam. (Exhibit 2). Further, this exhibit describes the violation as a "Protection Order Violation," the violation date was 5-3-04, and the defendant was found guilty on 8-9-04.

The fingerprint card, Exhibit 14, which matched Mr. Sherman, shows that the defendant was arrested on 5-3-04 for a domestic violence court order violation. Taken as a whole, this is more than enough evidence to establish the conviction in cause 4DV-00505 belongs to the defendant.

The same is true with the Judgment and Sentence in cause 05-1-2263-2. The J&S gives an offense date of 11-26-05, this correlates with the fingerprint card, Exhibit 13, that shows the defendant was arrested for the same crime on 11-26-05. Using the name, date of birth, fingerprints and address is sufficient to prove this conviction belongs to the defendant.

The sentencing was proper in this case.

"A criminal history summary relating to the defendant from the prosecuting authority...shall be prima facie evidence of the existence and

validity of the convictions listed therein.”²⁴ At sentencing, the trial court may rely on information that is acknowledged. “Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.”²⁵

The defendant argues that, under our Supreme Court’s holding in *Ford*, a defendant does not acknowledge the correctness of an offender score simply by failing to object at sentencing.²⁶ His claim is that by requiring the defendant to object to his criminal history it constitutes an “unconstitutional shifting of the burden of proof to the defendant” under *Ford*. But the defendant’s reliance on *Ford* is misplaced. The *Ford* court found that the “State’s argument that *Ford* must point to facts in the record to prove the challenged classification is erroneous turns the burden of proof on its head.”²⁷

In *Ford*, a defendant’s criminal history included prior out-of-state convictions and a “bare assertion” by the State that the defendant’s prior

²⁴RCWA 9.94A.500

²⁵RCWA 9.94A.530(2).

²⁶*State v. Ford*, 137 Wash.2d 472, 973 P.2d 452 (1999).

²⁷*State v. Ford*, 137 Wash.2d at 482.

out-of-state convictions would be classified as felonies under Washington law.²⁸ Thus, Ford dealt purely with the issue of the classification of prior convictions and held that a defendant did not "acknowledge" the State's position regarding the classification of prior out-of-state convictions by failing to object at sentencing.²⁹ But Ford also noted that failing to challenge facts and information introduced at sentencing is an "acknowledgment" that the trial court may rely on in sentencing.³⁰ Subsequent cases support this limited application of the Ford decision.³¹

Here, unlike Ford, we are dealing with an unchallenged factual assertion by the State that the defendant had been convicted of prior offenses committed in the State of Washington. By not objecting to the calculation of his offender score or requiring that the State prove

²⁸*State v. Ford* at 482.

²⁹*State v. Ford* at 482-83.

³⁰*State v. Ford* at 482-83.

³¹ See *State v. Nitsch*, 100 Wash.App. 512, 520, 997 P.2d 1000 ("This is not an allegation of pure calculation error, as in Ford Rather, it is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion."), *review denied*, 141 Wash.2d 1030, 11 P.3d 827 (2000); *State v. J.A.B.*, 98 Wash.App. 662, 667, 991 P.2d 98 ("Unlike Ford, here there is no suggestion that the offenses were committed outside the state. Consequently, there is no need to establish the elements of the crimes, which in any event are easily discernible by reference to Washington statutes."), *review denied*, 141 Wash.2d 1020, 10 P.3d 1074 (2000).

the existence of his prior convictions, the defendant "acknowledged" the correctness of his prior criminal history.

At no time has the defendant claimed that these prior convictions do not exist or that his offender score has been miscalculated. He argues only that the State failed to produce certified copies of the judgment and sentence documents pertaining to his acknowledged prior criminal convictions.

If the Court remands this case for resentencing, the State should not be limited to the record, as the defendant made no objection to his criminal history at sentencing. The closing of the record remedy applies only when a defendant has preserved this issue by timely and specifically objecting to the use of alleged prior convictions and putting the State to its burden of proof and alerting the sentencing court to the issue.³² In *State v. Mendoza*,³³ the court held that a failure to object does not waive legal errors leading to the sentencing court's imposition of an excessive sentence. But here, the defendant does not

³²See *State v. Bergstrom*, 162 Wash.2d 87, 93, 169 P.3d 816 (2007) ("if the defense does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant's prior convictions, then the State may not present new evidence at resentencing").

³³*State v. Mendoza*, 139 Wash.App. 693, 701-02, 162 P.3d 439 (2007), *review granted*, 163 Wash.2d 1017, 180 P.3d 1292 (2008).

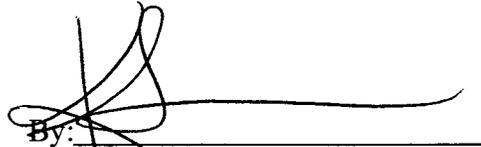
raise a legal challenge to his sentence nor has he demonstrated that the sentence imposed is unlawful or excessive. The defendant does not claim that his offender score was miscalculated nor does he assert that he does not have the listed prior felony convictions. He claims only that the trial court erred when it correctly calculated his standard sentence range based on an undisputed offender score of five without requiring the State to present certified copies of the prior judgments.

The State asks that the original sentencing be affirmed, or that, in the alternative, that the State be allowed to present additional evidence at a resentencing hearing.

CONCLUSION

For the reasons stated above, the State asks this Court to affirm the decisions of the trial court and the verdict of the jury.

Respectfully Submitted,


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

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DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 38437-0-II

v.

DECLARATION OF MAILING

JACOB SHERMAN,

Appellant.

DECLARATION

I, MARYBETH HRANAC hereby declare as follows:

On the 10th day of November, 2009, I mailed a copy of the Brief of

Respondent to Jodi R. Backlund and Manek R. Mistry, Backlund & Mistry, 203 Fourth Avenue East, Suite 404, Olympia, WA 98501-1189, and Jacob Sherman 891684; Monroe Correctional Complex, P. O. Box 777; Monroe, WA 98272-0777, by depositing the same in the United States Mail, postage prepaid.

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

DATED this 10th day of November, 2009, at Montesano, Washington.

[Signature]