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

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**STATE OF WASHINGTON,** Respondent,

**v.**

**KEVIN CROSS,** Appellant.

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# APPELLANT'S BRIEF

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Cross' motions to dismiss the harassment charges for lack of evidence.
2. The trial court erred by convicting Cross of harassment without sufficient evidence that the officer suffered from a reasonable fear that Cross would carry out his threat.
3. The trial court did not properly calculate Cross' offender score.
4. The trial court improperly included a 1991 third-degree assault conviction in Cross' offender score without sufficient proof that this conviction did not wash out.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Cross of harassment where there was insufficient proof that Officer Williams had any reasonable fear that Cross could or would actually carry out his conditional threat.
2. The trial court erred by accepting the State's submission of a computer-generated printout as the sole proof that Cross had

committed disputed misdemeanors that prevented Cross' 1991 third-degree assault conviction from washing out.

## III. STATEMENT OF THE CASE

On April 23, 2008, Officer Samuel Lopez-Sanchez conducted a traffic stop of an SUV driven by Joshua Mullens. RP4 227, 232. Kevin Cross was the front-seat passenger in the vehicle. RP4 231.

When Officer Lopez-Sanchez determined that Mullens did not have a license or registration, he ordered Mullens from the vehicle and placed him under arrest for reckless driving and driving without a license. RP4 231-2. While being handcuffed, Mullens pulled away from Lopez-Sanchez and reached into the vehicle toward the center console. RP4 233-4. Lopez-Sanchez pulled Mullens back and away from the vehicle, eventually handcuffing him and placing him in the patrol car. RP4 234-5, 239, 243.

During the struggle with Mullens, Cross remained inside the vehicle. Lopez-Sanchez said that he could see Cross "fidgeting" and saw him reach toward his waistband, then he heard a "slapping sound" from inside the vehicle. RP4 235, 237, 240. He said he ordered Cross to raise his hands in the air, but Cross did not respond. RP4 238. As he finally secured Mullens, Lopez-Sanchez turned to see Cross run away from the

scene. RP4 243. He yelled to Cross to stop and then gave chase. RP4 243.

Lopez-Sanchez caught up to Cross and fired his taser toward him—he missed. RP4 251-2. He kicked Cross' legs out from under him, struggled with him, and fired his taser directly on Cross. RP4 255. He then handcuffed Cross wand walked him back to the scene of the traffic stop. RP4 256.

Back at the scene, Officer Jared Williams had arrived to assist and Lopez-Sanchez turned Cross over to him. RP4 257. It was determined that Cross had two warrants outstanding for his arrest. RP4 282.

Williams placed the handcuffed Cross in the back of his patrol car and advised him of his rights. RP5 329-30. Cross was yelling obscenities at the officer throughout. RP5 330. At one point, Cross said: "I would kick your ass if I weren't in handcuffs." RP5 331. But Cross was in handcuffs and was secured in the back compartment of the patrol car at the time. RP5 333. Williams did nothing to further secure Cross and testified that he "was not concerned with being directly assaulted." RP5 333, 360, 362. Williams said he felt "if he let his guard down," Cross "could have taken the opportunity to cause harm." RP5 368-9.

A search of the SUV revealed a 9 mm semi-automatic pistol in the center console and a .357 magnum revolver in the glove compartment.

RP4 261-62, 266-67. After finding the weapon in the glove compartment, Lopez-Sanchez came to believe that the "slapping sound" he heard was the sound of the glove compartment being closed. RP4 269.

Mullens told Lopez-Sanchez that the SUV was his sister, Reiko Mullens', car. RP4 259. He said he had never seen the guns before and did not know they were there—he speculated that the guns belonged to his sister. RP4 271-3. Mullens said he had been on his way to confront his sister's former boyfriend and another woman, who he said had been harassing Reiko, but denied that he planned on using the guns. RP4 274.

Reiko Mullens testified at trial that she had placed the guns in the car and that she had not told her brother or Cross that they were in the SUV. RP6 424-25, 426, 517. Reiko said she had asked Mullens to take her car to take Cross home that day. RP6 423. Reiko admitted that she had initially told Officer Lopez-Sanchez that she did not own any guns, and testified that this was technically true, since she had not yet finalized their purchase. RP6 471, 429.

Following a jury trial, Cross was convicted of one count of unlawful possession of a firearm in the first degree, resisting arrest, harassment, and obstruction.[1] RP8 676-77.

At sentencing, Cross objected to the inclusion of a 1991 third-degree assault being included in his offender score, arguing that the State had failed to provide sufficient evidence that Cross had not been crime free for five years after this class C felony, which should therefore wash out. RP 10/24/08 12, 16. The State submitted a DISCUS printout to the court as proof that Cross had committed misdemeanors during the relevant time and that therefore the 1991 felony did not wash out. RP 10/24/08 17. Cross objected to the DISCUS printout, arguing that the State must provide judgments to prove the convictions. RP 10/24/08 12, 16. The objection was overruled and the court ruled that the assault conviction did not wash out and would be included in the offender score. RP 10/24/08 17, CP 188. Cross was given the maximum standard-range sentence, with the misdemeanor sentences concurrent. RP 10/24/08 25, CP 191.

This appeal timely follows.

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[1] One count of unlawful possession of a firearm was dismissed by the judge during closing argument due to lack of evidence. RP7 605.

## IV. ARGUMENT

**ISSUE 1: THE TRIAL COURT ERRED BY CONVICTING CROSS OF HARASSMENT WHERE THERE WAS INSUFFICIENT PROOF THAT OFFICER WILLIAMS HAD ANY REASONABLE FEAR THAT CROSS COULD OR WOULD ACTUALLY CARRY OUT HIS CONDITIONAL THREAT.**

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver,* 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

RCW 9A.46.020(1) provides in relevant part that a person is guilty of harassment if:

> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

In this case, the State failed to provide sufficient evidence that officer Williams had a "reasonable fear that the threat will be carried out." Cross moved to dismiss the harassment charge both before trial and at the

close of the State's evidence. RP2 109, RP6 501, CP 25-56. The motions were denied. RP2 109, RP6 502.

The harassment charge arose from Cross' blustering statement to Officer Williams when he was placed in the police car. After Officer Williams placed the handcuffed Cross into the backseat of his patrol car and seated himself on the other side of the bullet-proof glass divider, Cross allegedly said: "I would kick your ass if I weren't in handcuffs." RP5 331, 333. Williams did nothing in response to the threat, proceeding as planned to deliver Cross to the jail. RP5 360, 362.

Officer Williams testified that he was "not concerned with being directly assaulted." RP5 333. However, he later testified that he believed "if he let his guard down," Cross "could have taken the opportunity to cause harm." RP5 368-69.

None of Officer Williams' actions bear out his alleged concern after the threat. Although he had cuffs for Cross' feet, Williams did not restrain Cross' legs. RP5 360. Officer Williams did not call for backup for help transporting Cross into the Jail for booking, but rather did this on his own. RP5 362. All he could claim was that he "kept his eyes on" Cross at booking. RP5 333. He did not book Cross for harassment. RP5 362.

In *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), the court reversed a harassment convicted based on the lack of evidence that the person threatened had actually been placed in reasonable fear that the threat made would be carried out. C.G. was acting out in class, became angry, used profanity, and kicked her desk. 150 Wn.2d at 606. C.G. left the room with the vice principal, yelling obscenities as she went. 150 Wn.2d at 606. Finally, C.G. said to the vice principal, "I'll kill you Mr. Haney, I'll kill you." 150 Wn.2d at 607. The vice principal testified that C.G.'s threat "caused him concern" and that, "based on what he knew about C.G., she might try to harm him or someone else in the future." 150 Wn.2d at 607. The court held that "the State must prove that the victim was placed in reasonable fear that the same threat, i.e., 'the' threat, would be carried out." 150 Wn.2d at 609.

As in *C.G.*, there is insufficient evidence to convince a reasonable jury in this case that Officer Williams had a reasonable fear that Cross would carry out his threat. First, the threat was conditional on something that was never going to happen—"if I weren't cuffed." Second, Cross was physically controlled the entire time, making it impossible for him to carry out a threat to inflict bodily harm.

Like the vice-principal in *C.G.*, Office Williams never actually testified that he believed Cross would carry out the threat he made. To the

contrary, he said he was "not concerned with being directly assaulted." RP5 333. Like the victim in C.G., Williams only alludes to a vague concern that "if he let his guard down," Cross might "take the opportunity to cause harm." RP5 368-69.

Finally, the officer's own actions do not show any fear or concern on his part. He continued following the threat as though no threat had been made. He did not place additional restraint on Cross, he did not call for backup, he did not take any precautions against a threat.

Like in *C.G.*, the State failed to prove in this case that the victim of the threat, Officer Williams, had a reasonable fear that the threat could be carried out and thus, the harassment conviction must be reversed.

**ISSUE 2: THE TRIAL COURT ERRED BY ACCEPTING THE STATE'S SUBMISSION OF A COMPUTER-GENERATED PRINTOUT AS THE SOLE PROOF THAT CROSS HAD COMMITTED DISPUTED MISDEMEANORS THAT PREVENTED CROSS' 1991 THIRD-DEGREE ASSAULT CONVICTION FROM WASHING OUT.**

At sentencing, Cross asserted that his offender score should be calculated as five, one less than the State calculated, because his prior 1991 third-degree assault conviction had washed out after five years without committing a crime. RP 10/24/08 16. The State argued that there had been intervening misdemeanor offenses and submitted as proof a

DISCUS report.[2] RP 10/24/08 11-12. Cross objected to the DISCUS report, contesting the existence of the prior misdemeanors, arguing that a judgment and sentence was the proper proof and that the report was not sufficient to satisfy the State's burden. RP 10/24/08 12, 17. Cross argued that the 1991 conviction washed out. RP 10/24/08 16.

The trial court ruled that the DISCUS report provided proof by a preponderance of the evidence of the intervening misdemeanor convictions and set Cross' offender score at six, including the disputed 1991 conviction. RP 10/24/08 12, 17; CP 188.

The State has the burden of proving a defendant's offender score by a preponderance of the evidence. *State v. Lopez,* 147 Wn.2d 515, 519, 55 P.3d 609 (2002). The SRA expressly places the burden on the State to introduce evidence of some kind to support the alleged criminal history, as it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove." *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). The best evidence of a prior conviction is a certified copy of the judgment and sentence, but other comparable

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[2] Interestingly, the State provided certified copies of judgments and sentences for all the felony convictions. RP 10/24/08 11-12.

documents (typically court-certified) may be introduced if the judgment and sentence is not available for some reason other than the serious fault of the proponent. *Lopez,* 147 Wn.2d at 519; *State v. Rivers,* 130 Wn.App. 689, 701, 128 P.3d 608 (2005), *review denied,* 158 Wn.2d 1008 (2006); *cert. denied,* 127 S.Ct. 1882 (2007); *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994). The State may introduce other comparable documents of record or transcripts to establish criminal history. *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994).

If a defendant disputes the existence of a prior conviction and the State offers evidence less reliable than a certified judgment and sentence or other comparable documents, the State "must present additional evidence to carry its burden of proving the convictions by a preponderance of the evidence." *Rivers,* 130 Wn.App. at 701-02. If a defendant raises a specific objection to the existence of prior convictions and the State fails to meet its burden to prove those convictions, the appropriate remedy is to remand for resentencing on the existing record. *Rivers*, 130 Wn.App. at 705-06. When the State fails to carry its burden of proof after a specific objection, it is not provided a further opportunity to do so on remand. *State v. Wilson*, 113 Wn.App. 122, 139, 52 P.3d 545 (2002).

In this case, the defendant did dispute the existence of the misdemeanors and the inclusion of the 1991 assault conviction in his

offender score. Yet, the State did not provide sufficient evidence to the trial court to support its representations of intervening misdemeanor convictions that would prevent the 1991 class C felony from washing out under RCW 9.94A.525(2)(c). Cross specifically objected to the use of a DISCUS printout as evidence of intervening misdemeanor convictions and requested that the State provide judgment and sentences for the alleged prior convictions before the 1991 convictions was used in the calculation of his offender score. The State failed meet its burden of proof of the prior intervening misdemeanor conviction.

Therefore, the trial court erred when it found that the misdemeanor convictions were proved by a preponderance of the evidence based solely on the DISCUS printout and included the 1991 conviction in calculating Cross' offender score. The trial court also erred by including the 1991 conviction in its calculation of Cross' offender score. Therefore, this case must be remanded for re-sentencing without the 1991 assault conviction.

## V. CONCLUSION

The harassment conviction should be dismissed due to the lack of evidence to prove that Officer Williams had a reasonable fear that Cross would carry out his conditional threat. Further, the trial court improperly determined Cross' offender score because it included a 1991 class C felony which should wash out without sufficient proof that any crime was

committed in the five years following. The case should be remanded for re-sentencing without the harassment conviction and with an offender score of 5.

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