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

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN CROSS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 08-1-01990-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the offender score was correctly calculated where the defendant had not been crime free in the community for five years after his first offense so that it counted in his offender score?
2. Whether, even if the offender score had been in error, the only remedy is to remand for resentencing based upon what the State is able to prove at the new sentencing hearing?
3. Whether there was sufficient evidence to show that the officer had a reasonable fear the defendant would carry out his threat?

B. STATEMENT OF THE CASE.

1. Procedure

On April 24, 2008 the defendant Kevin Cross was charged with two counts of unlawful possession of a firearm in the first degree, and one count of resisting arrest based on an incident that occurred on the 23rd Day of April, 2008. CP 1-2. An Amended Information filed June 19, 2008 added a misdemeanor count of Harassment and a misdemeanor count of obstructing a law enforcement officer. CP 22-24.

The case proceeded to trial and the defendant was convicted of all counts. CP 174-177.

At a sentencing hearing on October 24, 2008 the State filed certified copies of the defendant's prior felony convictions and also provided the court with a copy of a DISCIS printout that listed both felony and misdemeanor convictions. CP 236-242; RP 10/24/08, p. 11, ln. 22-25. The defense objected to the DISCIS printout, but the court admitted it. RP 10/24/08, p. 12, ln. 1-10.

Based on an offender score of 6, the court sentenced the defendant to 75 months, the high end of the standard range. RP 10/24/08, p. 10, ln. 9-11; p. 17, ln. 4 to p. 18, ln. 1.

This appeal was timely filed on October 31, 2008. CP 198-218.

2. Facts

On April 23, 2008 Tacoma Police Officer Lopez-Sanchez pulled a vehicle over for reckless driving. RP 09/29/08, p. 226-232. He arrested the driver for reckless driving and driving with a suspended license. RP 232, ln. 4-6. The driver began resisting the officer and reached into the vehicle toward the center console. RP 09/29/08, p. 233, ln. 18 to p. 234, ln. 18. Officer Lopez-Sanchez forcibly removed the driver from the vehicle. RP 09/29/08, p. 234, ln. 19 to p. 235, ln. 19.

The passenger in the vehicle, Kevin Cross, was moving around in his seat, extremely nervous, hands physically shaking, sweating profusely from his forehead, cheeks mouth and nose, with his face flushed. RP

09/29/08, p. 236, ln. 10-21. The defendant, Cross, was initially fidgeting around with both of his hands, which then went directly to his waistband. RP 09/29/08, p. 237, ln. 3. Officer Lopez-Sanchez could not see whether or not there was anything in the waistband or how far Cross was reaching. RP 09/29/08, p. 237, ln. 4-9.

Officer Lopez-Sanchez was still struggling with the driver and feared that Cross was reaching for a weapon. RP 09/29/08, p. 237, ln. 11 to p. 238, ln. 3. Officer Lopez-Sanchez told the defendant to put his hands where the officer could see them and the defendant did not comply. RP 09/29/08, p. 238, ln. 4-8. For safety reasons Officer Lopez-Sanchez made a decision to get away from the vehicle as fast as he could to get as far away from Cross as possible and pulled the driver away with him, but with the driver still struggling. RP 09/29/08, p. 239, ln. 1-18. As he did so, he lost sight of the defendant and also heard a slapping sound come from the car like an object striking another object. RP 09/29/08, p. 239, ln. 1-24.

Officer Lopez-Sanchez was ultimately able to handcuff the driver during this process. RP 09/29/08, p. 242, ln. 13-25. At that point, the defendant stepped out of the vehicle and turned and ran even though Officer Lopez-Sanchez told him to stop. RP 09/29/08, p.243, ln. 20-23. Officer Lopez-Sanchez gave chase. RP 09/29/08, p.243, ln. 23-25.

Officer Lopez-Sanchez repeatedly ordered the defendant to stop, but he did not. RP 09/29/08, p. 246,ln. 21-25. The defendant cut through several yards and an alley. RP 09/29/08, p. 247, ln. 5-10. The defendant continued running and jumped over a six to eight foot wooden fence and ended up in the backyard of a house, reached another fence, couldn't get over it and stopped and turned to face the officer. RP 09/29/08, p. 249, ln. 8-19. Then the defendant put his fists up in an offensive stance like he was ready to fight. RP 09/29/08, p. 249, ln. 19 to p. 250, ln. 22.

Officer Lopez-Sanchez fired his electronic control tool (taser) at the defendant, but missed as the defendant moved slightly to the left. RP 09/29/08, p. 251, ln. 3 to p. 252, ln. 23. Officer Lopez-Sanchez then used a leg sweep maneuver to take the defendant to the ground, where the defendant continued to struggle with him. RP 09/29/08, p. 253, ln. 7 to p. 255, ln. 9. Officer Lopez-Sanchez then applied his taser directly to the defendant, after which the defendant gave up and stopped fighting. RP 09/29/08, p. 255, ln. 9-17.

Officer Lopez-Sanchez was able to handcuff the defendant and walk him to the patrol car of Officer Williams who was now in the area looking for them. RP 09/29/08, p. 256, ln. 7-24. During this the defendant was calm, but continued to insult Officer Lopez-Sanchez every way he could. RP 09/29/08, p. 256,ln. 12-16.

While in the back of Officer Williams's patrol car the defendant said if he wasn't in handcuffs that he would kick Officer Williams's ass. RP 09/29/08, p. 331, ln. 2-4. Officer Williams testified that he took the threat seriously even though the defendant was handcuffed and in the back of his car because he has been assaulted by subjects in handcuffs in the past and was concerned the defendant would make an attempt to assault the officers when he was removed from the vehicle at the jail for booking. RP 09/29/08, p. 332, ln. 13 to 333, ln. 24.

Officer Williams found a loaded .357 Magnum revolver in the glove box of the vehicle the defendant had been in. RP 09/29/08, p. 334, ln. 12-24. In the center console, Officer Lopez-Sanchez found a loaded semi-automatic firearm in a holster. RP 09/29/08, p. 262, ln. 5-22.

C. ARGUMENT.

1. THE DEFENDANT'S 1991 CONVICTION
COUNTED FOR PURPOSES OF HIS OFFENDER
SCORE.

The Sentencing Reform Act provides that when calculating an offender score, Class C prior felonies (except sex offenses) shall not be included in the offender score if since the last date of release from confinement or entry of the judgment and sentence, the offender has spent five consecutive years in the community without committing any crime that subsequently results in a conviction. *State v. Smith*, 65 Wn. App.

887, 890-91, 830 P.2d 379 (1992) (citing Former RCW 9.94A.360(2) (1991) (recodified as RCW 9.94A.525)).

The defendant claims that his 1991 conviction for assault in the third degree should not have counted for his offender score because the State provided inadequate proof of intervening misdemeanor convictions between that offense and his 1996 conviction for residential burglary. Br. App., p. 9ff. The defendant claims that the State's submission of a computer generated DISCIS printout was insufficient evidence.¹

However, because the defendant did not spend five years crime free in the community after his 1991 assault third conviction, the defendant's claim as to the evidentiary value of the DISCIS printout is irrelevant.

Here, the defendant was sentenced on July 10, 1991 to 90 days of confinement on cause number 91-1-00243-8 for assault in the third degree.² CP 243. Assault in the third degree is a Class C felony per RCW

¹ In violation of RAP 10.3(a)(6) the defendant has failed to cite to the relevant portion of the record regarding this issue. Specifically, the defendant has failed to cite to the copy of the DISCIS printout itself. CP 236-242. Accordingly the court should decline to consider this issue. See *S&S Const., Inc. v. ADC Properties LLC*, ___ Wn. App. ___, 211 P.3d ___ (2009). The document was not designated as part of the record by the defendant. All of the documents submitted by both the prosecution and the defense in support of their respective arguments at sentencing were filed as a single document. The State has designated that document in its Supplemental Designation of Clerk's Papers.

² The criminal history paragraph of the judgment and sentence in this case, Cause No. 08-1-01990-1, contains two scrivener's errors and incorrectly lists the date of the sentence as 5-7-92 and the date of the crime as 7-10-1991. Compare CP 188, para. 2.2, ln. 1 with CP 243. The parties recognized this error at the sentencing hearing. RP 10/24/08, p. 15, ln. 8 to p. 16, ln. 7.

9A.36.031(2). He was subsequently convicted under cause number 96-1-02751-2 for a residential burglary that occurred on July 6, 1996. CP 254.³ The time between July 10, 1991 and July 6, 1996 is less than five years.⁴ Thus, the defendant was not crime free in the community for five years after his 1991 conviction. Because the time between the defendant's 1991 assault sentence and his commission of the 1996 burglary was less than five years, there is no need to determine the date of his release from incarceration, whether he had any violations that resulted in his probation being revoked, or whether he had any intervening misdemeanor offenses. The defendant's 1991 conviction for assault in the third degree counts for his offender score because he was not crime free in the community for five years after he committed his 1991 assault in the third degree.

³ In the Report of Proceedings, trial counsel for the defendant refers to that offense as being from August 8, 1996. RP 10/24/08, p. 16, ln. 7-9. However, that reference was mistakenly made to the date of sentence, not the date the offense was committed. See CP 254.

⁴ Four days less than five years.

2. THE PROPER REMEDY IS TO REMAND FOR RESENTENCING WITH AN ACCURATE OFFENDER SCORE BASED UPON WHAT THE STATE CAN PROVE AT THE RESENTENCING.

The defense claims that,

If a defendant raises a specific objection to the existence of prior convictions and the State fails to prove those convictions, the appropriate remedy is to remand for resentencing on the existing record.

Br. App., p. 11.

In support of that proposition, the defendant relies upon *State v. Rivers*, 130 Wn. App. 689, 705-06, 128 P.3d 608 (2005) (citing *State v. Lopez*, 147 Wn.2d 515, 523, 55 P.3d 609 (2002); *In re Personal Restraint of Cadwallader*, 155 Wn.2d 867, 867-77, 123 P.3d 456 (2005); *State v. Ford*, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999)). The defendant also relies upon *State v. Wilson*, 113 Wn. App. 122, 139, 52 P.3d 554 (2002) (citing *State v. McCorkle*, 137 Wn.2d 490, 497, 973 P.2d 461 (1999)).

However, in 2008 the Legislature apparently took issue with the line of cases relied upon by the courts in *Rivers* and *Wilson* as in 2008 it adopted statutory amendments to the SRA in order to abrogate that line of authority. See Laws of Washington 2008 c 231 § 1-4. Section 1 specifically discusses the legislature's intent to amend the statutes in light of the cases listed above. Laws of Washington 2008 c 231 § 1. Sections

2-4 modify RCW 9.94A.500, .525, and .530 respectively. RCW

9.94A.530(2) now provides in its final sentence that:

On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

Thus even if the State did fail to prove the defendant's criminal history, the correct and only remedy available to the defendant is a remand for a new resentencing based on all the history the State is able to prove at the new hearing.

3. SUFFICIENT EVIDENCE SUPPORTED THE CONVICTION FOR HARASSMENT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d

632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...] great deference [. . .] is to be given the [trier’s] factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

To establish harassment the State was required to prove the following elements:

- 1) That on or about the 23rd day of April, 2008 the defendant knowingly threatened to cause bodily injury immediately or in the future to Officer Jared Williams, and
- 2) That the words or conduct of the defendant placed Officer Jared Williams in reasonable fear that the threat would be carried out;
- 3) That the defendant acted without lawful authority; and
- 4) That the acts occurred in the State of Washington.

RCW 9A.46.020; WPIC 573; CP 169.

The defendant claims that the evidence was not sufficient to show that officer Williams had a reasonable fear that Cross would carry out his threat. Br. App., p. 6ff.

The fact finder uses an objective standard to determine whether the victim's fear is reasonable. See *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (citing *State v. Ragin*, 94 Wn. App. , 411, 972 P.2d 519 (1999)). Thus the State must prove that the evidence was sufficient for the jury to find that it was reasonable for the victim to believe that the defendant would carry out his threat against the victim. See *Barragan*, 102 Wn. App. 759.

Here, the defendant was hostile, agitated, and directed obscenities at Officer Williams and called Officer Williams names when he attempted to Mirandize the defendant. RP 09/30/08, p. 330, ln. 14-19. Officer Williams testified that the defendant told him he would kick the officer's ass if the defendant wasn't in handcuffs. RP 09/30/08, p. 331, ln. 3-4. At the point he made that threat, the defendant was in the back of the patrol car in handcuffs while the officer was in the driver's seat. RP 09/30/08, p. 332, ln. Officer Williams was asked if he took the threat seriously, and he indicated that he did because in the past he has been assaulted by subjects in handcuffs. RP 09/30/08, p. 332, ln. 13-17. Such suspects can still kick, or bite, or headbutt and do things to assault other than with their hands. RP 09/30/08, p. 332, ln. 17-19. Officer Williams said he was not concerned that the defendant would assault him while the defendant was detained in the back of the patrol car, but that he was concerned the defendant would do so when an opportunity arose once he was out of the car when they took the defendant to the jail to book him. RP 09/30/08, p. 332, ln. 23 to p. 333, ln. 10.

The jury had already heard how the defendant had fled a considerable distance and another Officer Lopez-Sanchez had to forcibly subdue him by forcing the defendant to the ground and applying a taser after the defendant got cornered and took an offensive stand with Officer

Lopez-Sanchez. RP 09/29/08, p. 243 to p. 256. Officer Williams expressly testified that he was aware that the defendant fled, and that Officer Lopez-Sanchez was able to locate and detain the defendant after a chase. *See* RP 09/30/08, p. 326, ln. 20 to p. 328, ln. 21. Where Officer Williams also helped Officer Lopez-Sanchez search the defendant it is reasonable for the jury to infer that the two discussed how the defendant was subdued. RP 09/30/08, p. 328, ln. 18-25.

Based on Officer William's testimony, there was sufficient evidence for the jury to find that Officer Williams had a reasonable fear that the defendant would attempt to assault him when he removed the defendant from the vehicle.

D. CONCLUSION.

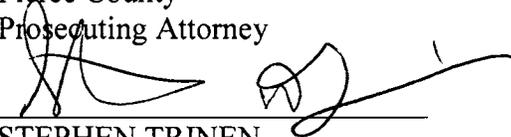
The defendant committed his 1996 residential burglary before he had been crime free in the community after his conviction for his 1991 assault third degree conviction. Accordingly, his 1991 conviction counted for purposes of his offender score. Even if there had been an error in the offender score, based on the legislative amendments to the SRA the remedy would be to remand the matter for resentencing, based upon the criminal history the State would be able to prove at the new hearing.

There was sufficient evidence for the jury to find that Officer Williams had a reasonable fear that the defendant would carry out his

threat where he would have to remove the defendant from the vehicle for booking purposes and where the defendant had been resistive and combative with officers, remained hostile and insulting and Officer Williams had previously been assaulted by persons in handcuffs.

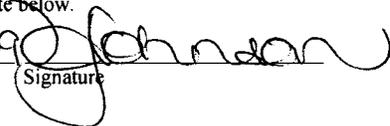
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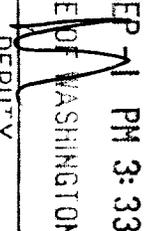
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/1/09 
Date Signature

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