

No. 40222-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS HAROLD COOK
Appellant.

STATE OF WASHINGTON
BY
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FILED
COURT OF APPEALS
DIVISION TWO

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Thomas McPhee, Judge
Cause No. 09-1-00915-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State committed prosecutorial misconduct?
2. Was there sufficient evidence to uphold Mr. Douglas Cook's conviction for malicious mischief in the second degree?
3. Whether the Court miscalculated the appellant's offender score?

B. STATEMENT OF THE CASE.

The Respondent accepts the Appellant's Statement of the Case with the following additions and clarifications. On May 25, 2009, Ms. Diane Kelly was visiting her father Robert Cook at his residence at 16039 Tilley Road South, Tenino, Washington; she visited him often to take care of him (Robert Cook was 83 years old at the time of this incident) after her mother passed away in 2005. [RP 48-9]. Ms. Kelly would visit her father four or five times a week and would clean his house, keep track of his medications, do his laundry and related other tasks. [RP 49].

On the same property, the defendant Douglas Cook lived in a separate mobile home several hundred feet away from the residence of his father Robert Cook. [RP 48]. Ms. Kelly described that the defendant (her brother) would use their Dad's car and ask

him for money. [RP 50]. Ms. Kelly described her relationship with the defendant as “pretty much nonexistent”. [RP 51].

When she visited her father on May 25, 2009, she was driving her 1997 Ford Contour which she described as having no damage and being in good condition when she arrived there around noon. [RP 52-3]. She had been there for about 15 minutes, had cleaned some things and then sat at a picnic table with her father by his carport. [RP 53]. Then Ms. Kelly described the defendant’s actions as follows:

“He pulled in, stopped the truck – well, slammed on the brakes, got out, was screaming at me with his fists clenched and – and his face all red. And anyway, he was screaming and everything. And then he gets back in his truck, pulls away, and then guns it into my car.”

[RP 54].

She then described how he “rammed” her car as follows:

“He pulled forward about 70 feet, put it in reverse, and put his foot on the gas and gunned it right into my car.”

[RP 54].

Ms. Kelly further testified that she was standing “probably seven feet” away from her vehicle when the defendant “rammed” her car. [RP 54]. Ms. Kelly then described her brother’s actions after he hit her car as follows, “He got out, was pulling some of the taillight off of his car – or truck and throwing it on the ground

and said, now maybe you'll leave me alone, something to that effect.”

[RP 55].

Ms. Kelly described the defendant's vehicle as a small red Toyota pick-up that was “all faded and beat up and old.” [RP 53-4]. Ms. Kelly said the defendant then got back in his vehicle and went down the hill to his mobile home. [RP 56]. Ms. Kelly called 911. [RP 56]. Ms. Kelly testified that the damage to the vehicle was extensive: one of the doors was “busted” and “pushed in”, the door window would not work and part of the back door was also smashed; she testified that it would have cost \$2,700 to fix. [RP 57]. Instead of paying to have the vehicle fixed, she sold it without any professional repairs for \$500. [RP 60-1].

Thurston County Sheriff's Office (TCSO) Deputy Anderson responded to the 911 call. [RP 90]. When he arrived at the residence, Deputy Anderson described the demeanor of Ms. Kelly as follows,

“She was – she was pretty shaken and upset. She wasn't – she wasn't crying at the time, but her voice was pretty shaky, and it was – it was apparent that something traumatic had taken place before my arrival.”

[RP 91].

Deputy Anderson described the damage to Ms. Kelly's car,

"It had some damage to the front right corner. It would be the front right fender, as well as the front of the passenger's side door. There was broken glass, taillight fragments, and there was – it was apparent that – by looking at the ground, you could see that the car had been moved sideways approximately two feet where it had been struck by another – apparently a vehicle."

[RP 92].

Deputy Anderson contacted Robert Cook but Mr. Cook would not answer any questions about what he had seen; Robert Cook was uncooperative with the deputy. [RP 105].

Washington State Patrol (WSP) Trooper Orf testified in his role as an Accident Reconstructionist. [RP 111-5]. After reviewing the police reports, TCSO scene photographs, and statements of Ms. Kelly, Trooper Orf opined that the defendant's truck was traveling between 10 and 13 miles per hour in reverse with no sign of hard braking when it collided with Ms. Kelly's vehicle. [RP 116]. Trooper Orf described this as a "relatively fast" speed for driving a vehicle in reverse. [RP 116].

During closing argument, defense counsel argued,

“So what parts of this are corroborated? Well, the only person who can say – who has said anything about where Mr. Cook came from is Ms. Kelly. There was another person who saw this, but for whatever reason, his – what he saw has not been presented to you. He either refused to cooperate or the State chose not to bring him. We don’t – but Robert Cook saw it. He was – according to Ms. Kelly, he was sitting right next to her.”

[RP 172].

In rebuttal, the State argued,

Ms. Gailfus: “If this were an accident, he would have gone to her and said, “woops, sorry.” There’s no proof, no proof that he was not angry at her. In fact, we have proof that he was. We have her testimony, which is proof beyond a reasonable doubt if you believe that she’s credible. The defense suggests that there’s a motive to make this up. Why would she do that? She has a family. She was helping her dad. He (the defendant) was not a part of her life. That’s what she testified to. Why would she go to this huge trouble to create this giant made-up story? Why would she do this, to come here to have to testify before you? Is that reasonable? I submit to you that it’s not reasonable. I submit to you that you have to ignore the evidence to believe that. What more do you need? If you believe his story, you – and he didn’t really have a story, did he? And I want to talk about that. Robert Cook wasn’t here. That’s right. The dad wasn’t here. They have subpoena power, too. He asked why we didn’t call him. We have –

Mr. Jimerson: Objection, Your Honor. She’s implying that we have any obligation to produce evidence.

The Court: The objection is sustained.

Ms. Gailfus: Your Honor, may I have a side bar?

The Court: No.

Ms. Gailfus: Thank you. The defense doesn't have to call any witnesses. They don't. Robert Kelly (sic) wasn't here. That's true. Why? We don't know. We don't know why he wasn't here. We can all speculate about that. But you have no evidence either way about why he wasn't here.

She saw what she saw; she felt what she felt; she heard what she heard. And the evidence here is corroborated. And you would have to ignore that evidence to find this defendant not guilty. This was not a happy, careful person accidentally bumping into his sister's vehicle. This was an angry malicious act, intending to annoy, vex, or harm her. And he did so. I would ask that you find him guilty.

The Court: Thank you, Ms. Gailfus.

[RP. 182-3].

After the jury was excused to begin deliberations, defense counsel made a motion for a mistrial based on the above comment by the State. [RP 191-2]. The Court denied the motion for mistrial; in part, stating:

"I note that the defendant did not ask for a curative instruction at the time that he made his objection. Had such been requested, it would have been given. But in those circumstances, the court has a delicate balance to reach, that being drawing attention to a statement that is objectionable or simply ruling and moving on. Accordingly, my practice, and I believe the best practice under the circumstances, is to not sua sponte offer a curative instruction that emphasizes the inappropriate argument but rather simply to rule sustaining the objection unless the

aggrieved party requests a curative instruction, and that wasn't done here. So the motion is denied.

I have made this ruling without seeking any briefing on the issue by either party. But I have made the ruling after carefully reviewing the record, because it is immediately before me. If there are additional authorities, Mr. Jimerson, that you would ask me to consider, you may seek reconsideration and file a brief in support of it."

[RP 194-5].

No motion to reconsider was filed by defense counsel and no further argument was heard by the Court on this issue. The Jury returned a verdict of guilty to the crime of malicious mischief in the second degree and a special verdict form finding that the defendant was a family member of Ms. Kelly (pursuant to the domestic violence laws). [RP 197].

On December 11, 2009, the Court sentenced the defendant to a standard range sentence of 21 months with other appropriate conditions of sentence. [RP238-41]. The defendant agreed that his correct sentencing range was 17-22 months with an offender score of 8 and also agreed that the statement of criminal history was correct; the defendant requested a standard range sentence of 17 months. [RP 222, 229-31].

C. ARGUMENT.

I. The State did not commit prosecutorial misconduct.

On appeal, a criminal defendant has the initial burden of establishing prosecutorial misconduct by showing that a prosecutor's conduct was improper and prejudicial. *State v. French*, 101 Wn. App. 380, 386, 4 P.3d 857, 860 (2000). Courts review a prosecutor's allegedly improper remarks in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *French*, 101 Wn. App. at 385 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) *cert. denied*, 120 S. Ct. 285 (1999)). In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). In some instances it is improper for a prosecutor to comment on the defendant's failure to call a witness at trial.

State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718, 724 (1991). However, even if a prosecutor makes improper comments, reversal is not warranted unless the defendant was prejudiced by such comments. See *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (In order to establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and the improper conduct prejudiced his right to a fair trial). Additionally, even if prejudice can be shown, reversal is not required if the prosecutor's comments were a pertinent reply to provocation by defense counsel. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); *State v. Dixon*, 150 Wn. App. 46, 61, 207 P.3d 459, 467 (2009).

In this case, the prosecutor did not commit misconduct by commenting on the lack of defense witnesses because the defendant was not prejudiced. Furthermore, even if the defendant was prejudiced, reversal is not required because the comment was a pertinent response to provocation by defense counsel.

Even improper and prejudicial prosecutorial comments do not require reversal if provoked, unless they exceed a pertinent reply. *Davenport*, 100 Wn.2d at 760; *Dixon*, 150 Wn. App. at 61. A prosecutor is provoked when the defense improperly utilizes the

“missing witness doctrine” against the State. See *French*, 101 Wn. App. at 388-9. The missing witness doctrine allows a party to comment on a party’s failure to call a witness when calling the witness would produce evidence that would logically and naturally support his or her case. *Id.* at 388-89 (citing *State v. Frazier*, 55 Wn. App. 204, 211-12, 777 P.2d 2 (1989)). However, a defendant may not raise the doctrine when the missing evidence is unimportant or cumulative. *Id.*; see also *Dixon*, 150 Wn. App. at 55. In addition, the doctrine applies only if the witness's absence is not satisfactorily explained. *Dixon*, 150 Wn. App. at 55. Lastly, the doctrine applies only if the missing witness is particularly under the control of the party rather than being equally available to both parties. *Id.*

This question of availability does not mean that the witness is in court or is subject to the subpoena power. *Blair*, 117 Wn.2d at 490.

For a witness to be "available" to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185, 188 (1968). The rationale for this requirement is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be. *Id.* (quoting 5 A.L.R.2d 893, 895-96 (1949)).

In *French*, the defense attorney pointed out that the State had failed to call as witnesses four police officers who responded to the crime scene. 101 Wn. App. at 388, 384. In closing, the defense attorney said, “there’s something going on here that you don’t understand and the State has not proven. They dropped the ball on it. . . . They haven’t called the witnesses and it’s not my duty to do that.” *Id.* at 388. In rebuttal the prosecutor argued that, “[i]f you wanted to hear from the other officers, fine, the defense can call them as well as we can.” *Id.*

The court determined that the missing witness doctrine was an improper argument by defense counsel because both parties could have called the officers and their testimony was cumulative. *Id.* at 389. The court then held that by arguing this improper theory

against the State, the prosecutor was provoked to respond and the response “did not exceed a pertinent reply.” *Id.* at 390.

Just as in *French*, the defense attorney in this case provoked the prosecutor’s comments by improperly asserting the “missing witness doctrine.” In closing the defense said:

“So what parts of this are corroborated? Well, the only person who can say – who has said anything about where Mr. Cook came from is Ms. Kelly. There was another person who saw this, but for whatever reason, his – what he saw has not been presented to you. He either refused to cooperate or the State chose not to bring him. We don’t – but Robert Cook saw it. He was – according to Ms. Kelly, he was sitting right next to her.”

[RP 172].

In rebuttal, the State argued,

What more do you need? If you believe his story, you – and he didn’t really have a story, did he? And I want to talk about that. Robert Cook wasn’t here. That’s right. The dad wasn’t here. They have subpoena power, too. He asked why we didn’t call him. We have –

Mr. Jimerson: Objection, Your Honor. She’s implying that we have any obligation to produce evidence.

The Court: The objection is sustained.

Ms. Gailfus: Your Honor, may I have a side bar?

The Court: No.

Ms. Gailfus: Thank you. The defense doesn't have to call any witnesses. They don't. Robert Kelly (sic) wasn't here. That's true. Why? We don't know. We don't know why he wasn't here. We can all speculate about that. But you have no evidence either way about why he wasn't here.

She saw what she saw; she felt what she felt; she heard what she heard. And the evidence here is corroborated. And you would have to ignore that evidence to find this defendant not guilty.

This was not a happy, careful person accidentally bumping into his sister's vehicle. This was an angry malicious act, intending to annoy, vex, or harm her. And he did so. I would ask that you find him guilty.

The Court: Thank you, Ms. Gailfus.

[RP. 182-3].

Thus, just as in *French*, the defense attorney attempted to argue that evidence was missing and the State failed to prove corroboration of its case because it did not call Mr. Robert Cook. Mr. Cook's defense attempted to utilize the missing witness doctrine arguing that the State failed to call as witness Robert Cook and implied that it was not the defense's duty to do call such witnesses. Just like *French*, the use of the missing witness doctrine by the defense was improper. Any testimony from the appellant's father would likely have been unimportant or cumulative. Deputy Anderson explained that Mr. Robert Cook would not answer his questions and was uncooperative; thus, this explains the witness's

absence from trial and shows that Mr. Robert Cook not “under the control of the State or C.M.” See *Dixon*, 150 Wn. App. at 55 (the doctrine applies only if the witness's absence is not satisfactorily explained and if the missing witness is particularly under the control of the party). Clearly, Mr. Robert Cook was the father of the appellant and of Ms. Kelly.

Because the defense improperly asserted the “missing witness doctrine,” the prosecutor was provoked to respond. See *French*, 101 Wn. App. at 388-9. The prosecutor responded only as necessary to refute the defense’s accusations noting that just like in *French*, if the defense wanted to hear from Mr. Robert Cook they could have called him. As such, the prosecutor’s response was provoked and “did not exceed a pertinent reply.” *Id.* at 390. In light of the defense having opened the door and invited the prosecutor’s remark, the appellant cannot show that this remark was “so flagrant and ill-intentioned” that a curative instruction would not have neutralized the alleged prejudice. *State v. Barrow*, 60 Wn. App. at 869, 876, 809 P.2d 209 (1991).

In addition, after the Court sustained the objection, the State reiterated that the defense is not required to call any witnesses. The State’s closing argument was neither flagrant, nor ill-

intentioned and any error was curable by instruction. The contested comment was made in isolation, rather than a pattern of attacks. Defense counsel never requested a curative instruction.

Finally, the jury instructions also reinforced the proper burden of proof and instructed the jury that counsel's arguments were not evidence. *State v. Traweek*, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986) ("the jury instructions negated the prejudicial effect of the improper remarks"). The trial court specifically instructed the jury that (1) the lawyer's statements were not evidence, (2) the jury must disregard any statement or argument not supported by the evidence, (3) Mr. Douglas Cook was presumed innocent and that presumption continued throughout the trial unless the jury found the presumption overcome by the State's evidence beyond a reasonable doubt, (4) the State bore the entire burden of proving its case, (5) Mr. Cook bore no burden to prove reasonable doubt, and (6) the jury could not use the fact that Mr. Cook had not testified to infer guilt or to prejudice him in any way. [RP 146-56]. The jury is presumed to follow the court's instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

The Court carefully considered the defense motion for a mistrial and correctly found that the State had simply responded to

Mr. Cook's argument that the State had not called Mr. Robert Cook; Judge McPhee ruled in part, after quoting what defense counsel had argued in closing statements, that:

Under the circumstances of raising that argument, I am of the opinion that the argument offered by the prosecutor was not argument that rises to the level of inappropriateness or prejudice such that a mistrial would be an appropriate remedy; I'm going to deny that motion".

[RP 194].

Therefore, the Court was correct in not granting a mistrial based on the appropriate response of the deputy prosecutor in her closing argument to the provocation of defense counsel in his closing argument.

2. Mr. Douglas Cook was properly convicted of malicious mischief in the second degree based upon sufficient evidence to prove the charge beyond a reasonable doubt.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be

not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question 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*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas, supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not

the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

In order to convict a person of malicious mischief in the second degree under RCW 9A.48.080, the State must prove a person “knowingly and maliciously [c]ause[d] physical damage to the property of another in an amount exceeding two hundred fifty dollars.” RCW 9A.48.070(1)(a). The appellant alleges that there was not sufficient evidence that he knowingly and maliciously damaged his sister’s car; he alleges in the appellant’s brief that it was an “accident”.

The evidence in the case supported that the appellant was angry at his sister both before and after he hit and damaged her car. The appellant’s comment after he hit Ms. Kelly’s vehicle that maybe now she would leave him alone is very telling; the defendant never states that he had accidentally run into her vehicle. The evidence presented at trial was that he hit her car hard enough that the car moved sideways two (2) feet; again, this does not support someone who had accidentally bumped someone’s car. The appellant substantially damaged his sister’s car, causing \$2,700 in estimated damages. Ultimately, as the defendant did not testify, the

jury weighed the credibility of the state's witnesses, the evidence of the defendant's demeanor both before and after the he struck his sister's vehicle and the physical evidence at the scene of the crime demonstrating both how fast and how hard he struck her vehicle. Based on the direct and circumstantial evidence, the Jury found that the State had proved beyond a reasonable doubt that Mr. Douglas Cook knowingly and maliciously damaged his sister's vehicle. Based on the overwhelming evidence in this case and the above case law, there was clearly sufficient evidence as a matter of fact and law to support the conviction for malicious mischief in the second degree.

3. The court did not miscalculate Mr. Cook's offender score.

Mr. Cook argues that the trial court may have included offenses that "wash out" from his offender score pursuant to RCW 9.94A.525(2)(b)(c) and (f). The appellant references correctly that the State at sentencing had referred to Mr. Cook's "criminal history, as we discussed, includes 11 felonies, 13 misdemeanors and gross misdemeanors spanning from 1987 to 2009." [RP 223].

Before that statement occurred, the State had handed to the Court and defense counsel a more extensive list of criminal history

with judgments and sentences. [RP 220]. The following discussion then occurred between the Court and the parties:

The Court: Well, what I'm going to do, Mr. Jimerson, is interrupt you here and take a short recess while you address with your client the criminal history that you've received here. I need to have that declared with certainty at the time that we impose the sentence

Mr. Jimerson: Yes, Your Honor.

The Court: -- and determine what the standard range is. So my intention is to at some point in this process ask you if you agree with that history and then ask Mr. Cook if he also concurs that it accurately states his history. So why don't you go over that with him, and Ms. Gailfus, if you would stand by to answer any questions that Mr. Jimerson might have.

[RP 221].

After the recess, defense counsel agreed with the statement of criminal history and stated that he reviewed all of the judgment and sentences and they do "appear to correspond with his statement of criminal history". [RP 222]. The deputy prosecutor then discussed the defendant's lengthy criminal history. This extensive history was already made part of the record in the Pre-Trial Court Report [Plaintiff's Supp. CP 1] and partially in the State's Trial Memorandum [Plaintiff's Supp. CP 2, page 3]. Defense counsel agreed to the offender score of 8 (based on eleven prior

felony convictions) and argued for a low-end sentence of 17 months. [RP 229-31].

Mr. Cook is correct that a defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). Here, however, Mr. Cook's attorney affirmed to the court that there was no issue regarding the State's list of prior offenses. "A sentencing court may rely on a stipulation or acknowledgement of prior convictions without further proof." *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 873, 123 P.3d 456 (2005).

In *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007), the Court discussed the various scenarios that can result when an offender score is challenged on appeal.

Where the sentencing court's offender score determination is challenged on appeal for insufficient evidence of prior convictions, the case law provides three approaches to analyze the issue, assuming the defendant has not pleaded guilty.

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to "specifically object" before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence.

.

Second, if the defense does not 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.

.....

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after a sentence is imposed.

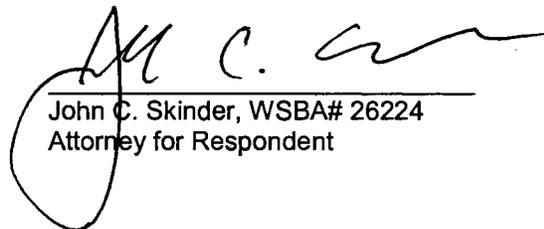
Id., at 93-94, cites omitted.

Because Mr. Cook, through his attorney, acknowledged that he had eleven (11) prior felony convictions and a corresponding offender score of eight (8), he has waived any right to challenge his criminal history on appeal. If this Court disagrees and finds that that Mr. Cook did not waive this argument at his sentencing, then the State would request that the matter be remanded for resentencing as requested by the appellant.

D. CONCLUSION.

The State respectfully asks this court to affirm the defendant's conviction and sentence.

Respectfully submitted this 14th day of SEPTEMBER 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: DAVID C. PONZOHA, CLERK
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950 BROADWAY, SUITE 300
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TACOMA, WA 98402-4454

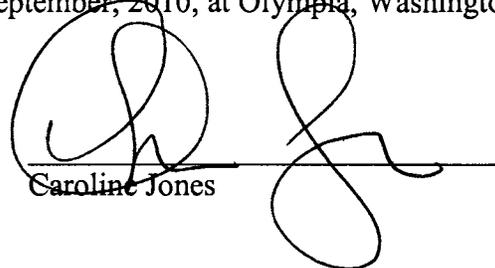
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STATE OF WASHINGTON
BY _____

--AND--

PATRICIA A. PETHICK
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of September, 2010, at Olympia, Washington.



Caroline Jones