

Cross-App. Brief

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

NO. 41234-9-II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER AHLSTEDT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00061-1

BRIEF OF RESPONDENT

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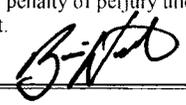
SERVICE	Ms. Jennifer Sweigert Nielsen, Broman & Koch 1908 E. Madison Street Seattle, WA 98122	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: July 15, 2011, at Port Angeles, WA 
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I. COUNTERSTATEMENT OF THE ISSUES:

1. Did the trial court err when it barred the State from introducing the defendant's prior robbery convictions under ER 609 when less than ten years had lapsed between his parole date for said convictions and the date he testified in the underlying case?
2. Did the trial court commit reversible error when it failed to memorialize its findings of fact and conclusions of law after a CrR 3.5 hearing that determined whether the defendant's recorded statements to law enforcement were admissible, even though (1) its oral ruling sufficiently set forth its findings/conclusions, (2) the defense never opposed the ruling and actually requested that the statements be played in their entirety, and (3) the defense did not challenge the trial court's ruling on appeal?
3. Did the defendant receive ineffective assistance of counsel when his attorney refrained from calling an expert witness when (1) the attorney had reservations about the proffered expert's qualifications, (2) several lay witnesses offered the same testimony as the proffered expert, *i.e.* the victim was acting erratically and appeared to be under the influence of drugs, and (3) the expert's proffered testimony would not have assisted the defense of a general denial?
4. Did the deputy prosecuting attorney commit reversible error when he conducted a brief demonstration with the aid of the lead investigator during his rebuttal argument?
5. Did the sentencing court err when it accepted testimony regarding a record produced by the California Department of Corrections that showed the nature of the defendant's confinement and the dates of his release from the correctional system?

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II. STATEMENT OF THE CASE:

FACTS

In February 2009, Chad Beauchesne was in the process of moving from Sequim to Silverdale, Washington. RP (7/6/2010) at 102; RP (7/7/2010) at 54. To facilitate the move, Christopher Ahlstedt (the defendant) allowed Beauchesne to borrow his truck and flatbed trailer over the Valentine's Day weekend. RP (7/6/2010) at 102-04; RP (7/7/2010) at 35, 54; RP (7/8/2010) at 108, 136-37, 158. Ahlstedt informed Beauchesne he needed the equipment back to start a new job the following Monday.^{1,2} RP (7/7/2010) at 35; RP (7/8/2010) at 137.

At some point during the weekend, Ahlstedt phoned Beauchesne to ask how the move was going. RP (7/7/2010) at 35. Beauchesne replied he was exhausted. RP (7/6/2010) at 104; RP (7/7/2010) at 36; RP (7/8/2010) at 137. Ahlstedt recommended that Beauchesne stay in Silverdale if he was too tired to drive the heavy equipment back to Sequim. RP (7/6/2010) at 104; RP (7/7/2010) at 36; RP (7/8/2010) at 137. After the call,

¹ Ahlstedt worked as a general and landscape contractor. RP (7/8/2010) at 133.

² The parties dispute when Beauchesne had to return the truck and trailer. Beauchesne testified he was suppose to return the equipment on Sunday, February 15, 2009. RP (7/7/2010) at 35. Ahlstedt testified Beauchesne was suppose to return the equipment on Saturday, February 14, 2009. RP (7/8/2010) at 137.

Beauchesne believed Ahlstedt had arranged to use another vehicle for Monday's job. RP (7/8/2010) at 36. *See also* RP (7/8/2010) at 137.

Beauchesne did not return Ahlstedt's truck and trailer until the late evening on Monday, February 16, 2009. RP (7/6/2010) at 104-05; RP (7/7/2010) at 17, 35, 55; RP (7/8/2010) at 158. When Beauchesne arrived at Ahlstedt's property, the residence was dark. RP (7/6/2010) at 106; RP (7/7/2010) at 18. Beauchesne tried to call Ahlstedt, but Ahlstedt never answered. RP (7/6/2010) at 106; RP (7/7/2010) at 18, 48. Beauchesne left the truck and trailer in the driveway.³ RP (7/6/2010) at 106; RP (7/7/2010) at 18. Beauchesne and his girlfriend, Sara Hughes, then left the property to visit another friend. RP (7/6/2010) at 106; RP (7/7/2010) at 18, 55.

Later that evening, Ahlstedt inspected the vehicle and discovered the "drop jack" had been damaged and he could not separate the truck from its trailer. RP (7/7/2010) at 19, 55; RP (7/8/2010) at 139, 158. Ahlstedt immediately phoned Beauchesne and angrily reported the damage. RP (7/7/2010) at 18-19, 48, 55. Beauchesne promised to fix or replace the damaged part. RP (7/7/2010) at 19, 37.

³ Ahlstedt testified he found the truck with its doors open, its lights on, its keys in the ignition, and its gas tank empty. RP (7/8/2010) at 138, 158.

After a quick dinner, Beauchesne and Hughes returned to Ahlstedt's property to see if Beauchesne could fix the damaged jack. RP (7/7/2010) at 19, 21, 37, 56. The parties dispute what happened next.

According to Beauchesne and Hughes,^{4, 5} Beauchesne called Ahlstedt to let him know he had returned to the property to work on the trailer. RP (7/6/2010) at 87; RP (7/7/2010) at 19, 48. After Beauchesne fixed the part he believed was damaged, he called Ahlstedt a second time. RP (7/7/2010) at 21, 37, 56. When Ahlstedt exited the residence, he rapidly approached Beauchesne saying "I should kill you punk." RP (7/7/2010) at 21-22, 43, 58. Beauchesne heard the clicking sound of a knife being opened. RP (7/7/2010) at 22, 40. Ahlstedt then stabbed Beauchesne in the stomach.⁶ RP (7/7/2010) at 22, 39. Beauchesne immediately collapsed.⁷ RP (7/7/2010) at 22, 60. After Ahlstedt's wife,

⁴ Both Beauchesne and Hughes admitted they consumed various controlled substances on the evening of February 16, 2009. *See* RP (7/7/2010) at 32-34, 36, 67-70.

⁵ Beauchesne admitted he had a prior conviction for third-degree theft. RP (7/7/2010) at 31, 42. Hughes admitted she received a lenient sentence, in an unrelated matter, for her promise to testify truthfully against the defendant. RP (7/7/2010) at 64, 67. Hughes also admitted she initially told police that she did not know who Merryman was in an effort to prevent her from being picked-up on a warrant. RP (7/7/2010) at 65-66, 68, 74.

⁶ Hughes testified it looked like Ahlstedt had punched Beauchesne. RP (7/7/2010) at 58, 72. While she saw Ahlstedt standing over Beauchesne with a knife, she never saw the knife go into Beauchesne's stomach. RP (7/7/2010) at 59-60, 71-72.

⁷ Beauchesne testified he never said anything to Ahlstedt or provoked him in any way. RP (7/7/2010) at 22-23. *See also* RP (7/7/2010) at 58-59, 66, 77-78. Beauchesne said he was unarmed at the time of the attack. RP (7/7/2010) at 22. *See also* RP (7/7/2010) at 59.

Sarah Merryman,⁸ escorted the defendant back inside the residence, Beauchesne climbed into his truck and Hughes drove to the hospital. RP (7/7/2010) at 24, 40, 59, 61-63.

According to Ahlstedt and others who lived on the property,⁹ Beauchesne called Ahlstedt saying he was outside and there was nothing wrong with the truck. RP (7/8/2010) at 106, 141, 160. When Ahlstedt exited his residence, Beauchesne was acting in an erratic manner.¹⁰ RP (7/8/2010) at 56-59, 65, 69-71, 109. Ahlstedt approached Beauchesne and led him to the part of the trailer that was broken. RP (7/8/2010) at 71, 109, 142. As the two men approached the “drop jack,” Beauchesne suddenly lunged at Ahlstedt. RP (7/8/2010) at 60-61, 72, 145-46. Ahlstedt grabbed Beauchesne and pushed him into a debris pile. RP (7/8/2010) at 61, 80-81, 146. Ahlstedt told Beauchesne “this isn’t the time or place, if you want to fix this at a later time you’re more than welcome but you need to leave now.” RP (7/8/2010) at 147, 162. *See also* RP (7/8/2010) at 113. Ahlstedt claimed he never saw a knife except the one that was lying on the ground

⁸ At the time of the incident, Merryman was not married to Ahlstedt. In an effort to distinguish between the defendant and his wife, the State refers to Merryman by her maiden name. The State means no disrespect.

⁹ Both Ahlstedt and Merryman admitted they discussed Merryman’s testimony the night before the defense presented its case. *See e.g.* RP (7/8/2010) at 116-21.

¹⁰ One witness, Sheila Perkins, testified she believed Ahlstedt was on drugs. RP (7/8/2010) at 58.

following the scuffle.¹¹ RP (7/8/2010) at 146-48, 161-62. When Ahlstedt accompanied his wife back inside the residence, Beauchesne dusted himself off, jumped inside the driver's seat of his truck, and drove away. RP (7/8/2010) at 62, 74-75, 113-14, 147, 162-63. At no point did Beauchesne appear to be injured. RP (7/8/2010) at 65, 114, 147, 162. Ahlstedt denied stabbing Beauchesne. RP (7/8/2010) at 156, 161.

At the hospital, Dr. Charles Bundy tended to Beauchesne's injury: a three to four inch laceration of the abdominal wall through which his intestine could protrude. RP (7/7/2010) at 6. *See also* RP (7/6/2010) at 66. The injury also lacerated Beauchesne's colon,¹² resulting in a half-liter loss of blood. RP (7/7/2010) at 7. A subsequent drug screen revealed Beauchesne had amphetamines, benzodiazepines, opiates, and tetrahydrocannabinol (THC) in his system. RP (7/7/2010) at 14.

On February 17, 2009, at approximately 12:00 a.m., hospital personnel informed law enforcement of the stabbing. RP (7/6/2010) at 65, 88; RP (7/7/2010) at 85. Responding officers observed a large slice/gash to the left quadrant of Beauchesne's stomach. RP (7/6/2010) at 66. The

¹¹ Only Merryman claimed Beauchesne was holding a knife when he allegedly lunged at her husband. RP (7/8/2010) at 111.

¹² Dr. Bundy testified his greatest concern was the injury to the colon because if left untreated there was risk of a "[m]assive inter-abdominal infection, peritonitis and sepsis[.]" Peritonitis is a severe inflammation of the abdominal cavity from infection. Sepsis is an overwhelming inflammatory process caused by bacteria leaking into the abdominal cavity. The injury is potentially life threatening. RP (7/7/2010) at 7-8.

officers took pictures of Beauchesne's injuries. RP (7/6/2010) at 69, 73-75, 90-91.

After law enforcement interviewed Hughes, police officers obtained a warrant to search Ahlstedt's residence. RP (7/6/2010) at 83; RP (7/7/2010) at 86, 93, 97-98. After a forceful entry, officers located Ahlstedt. RP (7/6/2010) at 84; RP (7/7/2010) at 89, 98. The officers quickly placed Ahlstedt in restraints and took him into custody. RP (7/6/2010) at 84; RP (7/7/2010) at 89, 98, 120.

A subsequent search of the residence produced a bloody "Kershaw" knife on the nightstand in Ahlstedt's bedroom. RP (7/7/2010) at 98-101, 110-12. DNA testing revealed the blood on the blade belonged to Beauchesne. RP (7/8/2010) at 27, 89. Additional testing of the knife's handle revealed Ahlstedt's DNA.¹³ RP (7/8/2010) at 32.

On February 17, 2009, at approximately 3:45 a.m., Sergeant Lyman Moores interviewed Ahlstedt at the Clallam County Jail. RP (7/7/2010) at 120. After advising Ahlstedt of his constitutional rights, Ahlstedt agreed to speak with Moores. RP (7/7/2010) at 120. Ahlstedt admitted that (1) he was upset with Beauchesne because the jack on the back of his trailer was damaged, and (2) he owned a "Kershaw" knife. *See*

¹³ DNA testing excluded Beauchesne as a "substantial contributor" of DNA found on the knife's handle. RP (7/8/2010) at 29, 38-40, 96-97, 101.

Trial Exhibit 36, 36A. Ahlstedt denied stabbing Beauchesne and claimed he did not know why Beauchesne had fallen down. *See* Exhibit 36, 36A.

While in jail, Ahlstedt made several alarming phone calls. RP (7/7/2010) at 141, 145; Trial Exhibit 40. Prior to each call, a recording advised the individuals that their conversation was being recorded. RP (7/7/2010) at 139-40, 144.

On December 14, 2009, Ahlstedt phoned Merryman. Exhibit 31, 40. These calls revealed Ahlstedt's plan to arrange Beauchesne's absence at trial:

Ahlstedt: Remember when Squirrel said uh, he might be able to arrange something.

Merryman: He might be able to arrange something?

Ahlstedt: Where somebody took a trip and they didn't come back?

Merryman: I. Uh, this is frustrating. I'm on the freeway, I can't pull over and I can't understand anything you're saying.

Ahlstedt: About somebody not coming to court.

Merryman: Yeah, yeah I remember that.

Ahlstedt: Put it in play.

Trial Exhibits 31, 40. Four days later, the police arrested Merryman on an unrelated matter. RP (7/7/2010) at 130-32. A subsequent search of her

person produced a letter that Ahlstedt asked her to deliver to a third party.

RP (7/7/2010) at 130-32. The letter read:

HP,

What is up my brother + friend[?] I wish I could talk with you[,] but that just [ain't] going to happen right now. I will be setting my trial date in the morning for that shit [that] happened with [Beauchesne.] He is going to come and lie then try to sue my estate while I am doing a double life for this bullshit. ...

Now I am in a tight spot [between a] rock + hard place. I do have a 2001 Ford F350 truck worth 7 to 10K. I would be willing to let out so this problem of mine would go away. I understand if you have other things to do[,] but you have to understand double life for a lie. I have done enough shit in my life to get that, but not for some pu[n]k ass lame weak pi[e]ce of shit [lying] fuck. ...

My life will be over in a few weeks if I don't get some help. ...

I hope you don't trip about this letter but it was sent out with my lawyer['s] ok. ...

My lawyer think[s] if [Beauchesne] doesn't show for court I will walk[.] What do you think[?] This is a funny world we live [in.] You just never know what might or might not happen. It's a nice day to go for a walk. They have me in a box for now. I just don't want to stay in it. Can you do a little something for a good white boy down on his luck[?] ...

Trial Exhibit 37. *See also* RP (7/8/2010) at 166-67; RP (7/12/2010) at 28-30. On December 22, 2009, Ahlstedt again phoned his wife. RP (7/7/2010)

at 146. During this conversation, Merryman told Ahlstedt that “Squirrel” needed a map. *See* Trial Exhibit 32, 40.

Detective John Hollis contacted Merryman, saying he needed to speak with her about “Squirrel.” RP (7/8/2010) at 173. Without further comment, Merryman immediately disclosed that she and Ahlstedt did not want to hurt Beauchesne. RP (7/8/2010) at 173. Instead, she claimed their plan was to get someone to come to court and testify that Beauchesne was lying about the alleged stabbing. RP (7/8/2010) at 173. *See also* RP (7/8/2010) at 122-27.

PROCEDURAL HISTORY

The State charged Ahlstedt with two felony counts: (1) Assault in the First Degree, and (2) Intimidating a Witness. CP 110-11, 115-16.

On June 15, 2010, the State sought permission to introduce the defendant’s prior robbery convictions out of California under ER 609.¹⁴ RP (6/15/2010) at 16. The trial court expressed its concern that the prior convictions fell outside ER 609’s ten-year window. RP (6/15/2010) at 16-18. The State argued the applicable ten years had not lapsed because the California correctional system did not parole Ahlstedt until January 30,

¹⁴ The defense conceded Ahlstedt’s criminal history was likely admissible under ER 609. RP (6/15/2010) at 16.

2002. RP (6/15/2010) at 17-19. The trial court reserved its ruling. RP (6/15/2010) at 19-22.

On July 1, 2010, the State, again, argued that Ahlstedt's prior robbery convictions were admissible under ER 609. RP (7/1/2010) at 2-4. *See also* RP (7/8/2010) at 169-172. The defense claimed the robbery convictions were "highly prejudicial" and the "prejudicial value would certainly outweigh the probative value for the State." RP (7/1/2010) at 8. The trial court reserved its ruling until it heard the evidence introduced at trial. RP (7/1/2010) at 10-12.

On the morning of trial, the court entertained additional motions in limine. The State moved the trial court to preclude the defense from calling Mike Flynn, a certified chemical dependency professional, as an expert witness. RP (7/6/2010) at 9. The State argued Flynn lacked the requisite qualifications to discuss the specific pharmacological effects drugs had on an individual's system. RP (7/6/2010) at 9-11.

The defense admitted it had reservations regarding Flynn's qualifications. RP (7/6/2010) at 10. However, the defense explained Beauchesne was allegedly under the influence of a "drug cocktail" at the time of the assault and it wanted Flynn "to describe what kind of behaviors he would expect to see" in a person who allegedly ingested four or five "high-powered narcotics." RP (7/6/2010) at 11.

The trial court granted the State's motion to exclude the expert, but explained it might reconsider its ruling:

If, however, there is some foundational testimony, for example someone identifies that Mr. Beauchesne acted in a certain fashion and then Mr. Flynn can somehow establish he's familiar with one, the drugs and, two, those sorts of behavior and, three, they are consistent among those who are using those drugs, then his testimony might be allowed. But we'll address that outside the presence of the jury first.

RP (7/6/2010) at 12. The defense said it would lay the necessary foundation. RP (7/6/2010) at 12. However, it never called Flynn to testify during the trial. RP (7/8/2010) at 52-172.

The trial court then revisited its earlier ruling regarding the admissibility of Ahlstedt's prior convictions under ER 609. RP (7/6/2010) at 31. The trial court expressed its concern that the robbery convictions were too prejudicial to be admitted for impeachment purposes. RP (7/8/2010) at 4. In light of this ruling, the State did not introduce Ahlstedt's robbery conviction on cross-examination. RP (7/8/2010) at 156-68.

After jury selection, the parties conducted a CrR 3.5 hearing to determine whether Ahlstedt's statements during a recorded police interview were admissible at trial. RP (7/6/2010) at 32-33. The State introduced the testimony of Sergeant Lyman Moores. RP (7/6/2010) at 37-

42. The defense agreed Ahlstedt's statements were admissible and affirmed its intent to play the entire recorded interview at trial.¹⁵ RP (7/6/2010) at 48-49. The trial court found Ahlstedt knowingly, intelligently, and voluntarily decided to speak with law enforcement after being advised of his constitutional rights. RP (7/6/2010) at 50. Its oral ruling included detailed findings of fact and conclusions of law. RP (7/6/2010) at 50. However, these findings/conclusions were never memorialized in writing.

At trial, the witnesses testified to the facts described above. Ahlstedt never argued self-defense, instead he denied an assault occurred. RP (7/6/2010) at 13; RP (7/8/2010) at 82, 131. According to Ahlstedt, Beauchesne fell on his own knife and initiated a subsequent investigation/prosecution to pay for his costly medical bills. RP (7/12/2010) at 39-40, 49, 51.

On rebuttal, and in response to Ahlstedt's closing remarks, the deputy prosecutor attempted to recreate the scenario proposed by the defense. RP (7/12/2010) at 61-62. The State requested the trial court's permission for the lead investigator to join the deputy prosecutor in front of the jury. RP (7/12/2010) at 61. The trial court granted the request. RP

¹⁵ The defense previously agreed that the recording should be played in its entirety. RP (7/6/2010) at 24.

(7/12/2010) at 61. The two men demonstrated Ahlstedt's claim that Beauchesne fell on his own blade was implausible. RP (7/12/2010) at 61-62. The defense never objected to this brief illustration. RP (7/12/2010) at 61-62.

The trial court instructed the jurors that the lawyers' remarks, statements, and arguments were only intended to help them understand the evidence, and they must disregard any argument that did not comport with their understanding of the evidence introduced at trial. RP (7/6/2010) at 52-53; CP 77-78. The jury subsequently found Ahlstedt guilty of first-degree assault and intimidating a witness. RP (7/12/2010) at 71-72; CP 49-63, 74, 77.

At sentencing, the parties disputed Ahlstedt's offender score. The State argued Ahlstedt's offender score consisted of 13 points. RP (9/23/2010) at 73. The State calculated the high score based on Ahlstedt's numerous felony convictions out of California. RP (9/23/2010) at 73. While these convictions occurred between 1980 and 1992, the State argued they did not "washout" because Ahlstedt never lived in the community for ten years without committing additional offenses. RP (9/23/2010) at 73. *See also* RP (7/1/2010) at 4.

The State introduced numerous certified documents to substantiate its calculation. *See* Sentencing Exhibits 1-13. One of these exhibits was a

“969b prison packet” that was prepared by the California Department of Corrections and documented the nature of Ahlstedt’s confinement, parole release dates, parole revocations, subsequent re-confinement dates, and re-release dates.¹⁶ See Sentencing Exhibit 2; RP (9/23/2010) at 30-38.

To facilitate the sentencing court’s understanding of the information listed in the 969b form, the State introduced the testimony of Mr. Al Tyson. RP (9/23/2010) at 20-54, 67-70. Mr. Tyson served as a deputy district attorney in Los Angeles County for 32 years and reviewed “hundreds” of 969b forms because the documents were “absolutely essential” to determine when an offender had been released from prison. RP (8/12/2010) at 3-5; RP (9/23/2010) at 20-26. Ahlstedt affirmed he was finally released on parole in January 2002. RP (9/23/2010) at 63.

The sentencing court found the State successfully proved Ahlstedt had an offender score of 13 points. RP (9/23/2010) at 80-84. While the sentencing court said Tyson’s testimony was helpful, it found the prison packet clearly established the California Department of Corrections did not release Ahlstedt into the community until January 30, 2002. RP (9/23/2010) at 82-83.

¹⁶ The trial court recognized that the information pertaining to Ahlstedt’s prior criminal history was important to determine whether it had “washed out.” RP (8/12/2010) at 7.

The State argued the court should order Ahlstedt's two sentences to run consecutive to one another pursuant to its authority under RCW 9.94A.535(2)(c). RP (9/23/2010) at 87. The defense argued the two sentences should run concurrently and that the court should impose a sentence at the low end of the standard range. RP (9/23/2010) at 88-90. In support of its position, the defense informed the court that the jury believed the most persuasive evidence against Ahlstedt was the evidence that he arranged for Beauchesne's absence from trial. RP (9/23/2010) at 89. The court imposed a concurrent, standard range sentence that totaled 318 months confinement. RP (9/23/2010) at 92; CP 52.

Ahlstedt appeals. The State cross-appeals, challenging the trial court's ruling that Ahlstedt's prior robbery convictions were inadmissible under ER 609.

III. ARGUMENT:

A. THE DEFENDANT'S ROBBERY CONVICTIONS WERE ADMISSIBLE UNDER ER 609.

In April 1992, Ahlstedt was convicted of two counts of robbery. CP 66, 125; Sentencing Exhibits 2-3. *See also* CP Supp. (State's Supplemental Memo on ER 609 at 1, 23; Sentencing Memo at 2,). As a result, he received an 11-year sentence. CP 125; Sentencing Exhibits 3. *See also* CP Supp. (State's Supplemental Memo on ER 609 at 23).

Although Ahlstedt was paroled and released to the community, the State of California regularly revoked his parole and returned him to the custody of its Department of Corrections. CP 66, 125; Sentencing Exhibit 2. *See also* CP Supp. (State's Supplemental Memo on ER 609 at 16-19). The total amount of time Ahlstedt spent on parole for his two robbery convictions was four months and 15 days. CP Supp. (State's Supplemental Memo on ER 609 at 2). The State of California finally released him back into the community on January 30, 2002.¹⁷ CP 66, 125; Sentencing Exhibit 2. *See also* CP Supp. (State's Supplemental Memo on ER 609 at 19). Ahlstedt testified at trial in the present matter on July 8, 2010. *See* RP (7/8/2010) at 133-168.

If a criminal defendant decides to testify at trial, the State may attack his/her credibility with any prior convictions involving crimes of dishonesty:

For purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime *shall* be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime ... involved dishonesty or false statement, regardless of the punishment.

ER 609(a)(2) (emphasis added). Robbery is a crime of dishonesty. *State v. Rivers*, 129 Wn.2d 697, 705, 921 P.2d 495 (1996). Thus, Ahlstedt's prior

¹⁷ His sentence was discharged on 7/17/2002.

robbery convictions were per se admissible. *See* ER 609(a)(2); *Rivers*, 129 Wn.2d at 705.

However, the trial court erred when it found the convictions were inadmissible after it weighed their probative value against their prejudicial effect. The court rule requires a trial court to balance the probative/prejudicial value of impeaching convictions in only two scenarios: (1) if more than ten years has lapsed from the date of the conviction or release from confinement, whichever is later; or (2) if the conviction was something other than a crime of dishonesty. *See* ER 609(a)(1), 609(b).

While California's correctional system paroled Ahlstedt several times for his prior robbery convictions, it repeatedly revoked his release for numerous parole violations. Thus, the trial court correctly recognized that less than ten years had lapsed between Ahlstedt's final release and the date he testified at trial in the present case. RP (7/1/2010) at 10-12. *See State v. Anderson*, 31 Wn. App. 352, 641 P.2d 728 (1982) (recognizing the ten year period under ER 609(b) does not begin until the defendant is released on parole); *In re Higgins*, 120 Wn. App. 159, 163-64, 83 P.3d 1054 (2004) (confinement for community supervision violations is confinement pursuant to the original felony). Because less than ten years had expired between Ahlstedt's final parole and the date he testified at

trial, the court erred when it weighed the prejudice/probative value of the impeaching convictions. The prior robbery convictions were automatically admissible under ER 609(a)(2). *See State v. Russell*, 104 Wn. App. 422, 434, 16 P.3d 664 (2001) (a prior crime of dishonesty that occurs within ten years of the date a defendant testifies at trial is automatically admissible to impeach the defendant credibility).

If a new trial is necessary, this Court should instruct the trial judge to admitted Ahlstedt's prior robbery convictions pursuant to ER 609(a)(2).

**B. ABSENCE OF WRITTEN FINDINGS/CONCLUSIONS
DOES NOT REQUIRE REMAND OR REVERSAL.**

Ahlstedt claims remand/reversal is necessary so the trial court can memorialize its CrR 3.5 ruling in written findings of fact and conclusions of law. *See* Brief of Appellant at 29-30. This argument is unpersuasive because (1) the trial court's oral ruling sufficiently explains its findings/conclusions, (2) the defense never opposed the trial court's ruling and affirmed its own intent to introduce Ahlstedt's recorded statements to law enforcement, and (3) the defense did not raise an appellate challenge to the trial court's ruling. Under the present facts, remand is not necessary.¹⁸

¹⁸ The State has since filed proposed CrR 3.5 findings of fact and conclusions. A copy of this document has been provided to Ahlstedt's trial and appellate counsel.

The trial court's failure to enter written findings after a CrR 3.5 hearing does not require an appellate court to reverse a conviction and dismiss the charges. If a trial court's oral decision sufficiently sets forth its reasons denying a motion to suppress, the appellate court may simply resolve the issue on the record before it. *See, e.g., State v. Riley*, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993); *State v. Smith*, 67 Wn. App. 81, 86-87, 834 P.2d 26 (1992), *aff'd*, 123 Wn.2d 51 (1993).

If the trial court's oral decision is insufficient, the appellate court may examine the record and make its own determination, or the appellate court may remand the issue to the trial court for the purpose of entering appropriate findings and conclusions. *See, e.g., State v. Chakos*, 74 Wn.2d 154, 160, 442 P.2d 815 (1968), *cert. denied*, 393 U.S. 1090 (1969) (remand for entry of findings); *State v. Davis*, 34 Wn. App. 546, 550, 662 P.2d 78, *review denied*, 100 Wn.2d 1005 (1983) (same).

Since findings may be entered even after the brief of appellant is filed, counsel for appellant should bring the absence of findings to the trial court's attention as soon as discovered so that the appeal need not be delayed. *State v. Nelson*, 74 Wn. App. 380, 393, 874 P.2d 170, *review denied*, 125 Wn.2d 1002 (1994); *State v. Moore*, 70 Wn. App. 667, 671-72, 855 P.2d 306 (1993).

Here, the trial court's oral ruling sufficiently sets forth its reasons permitting the State to introduce Ahlstedt's statements to law enforcement. RP (7/6/2010) at 50. Additionally, Ahlstedt did not seek to suppress the statements, arguing the recorded interview should be played in its entirety because he believed it was exculpatory. RP (7/6/2010) at 24, 48-49. Finally, Ahlstedt does not challenge the admission of his statements to law enforcement on appeal. *See* Brief of Appellant at 29-30. This Court has the necessary information to resolve the issues on appeal. Thus, the absence of findings/conclusions does not require remand, reversal, or dismissal.

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Ahlstedt argues his attorney provided ineffective assistance when he failed to call an expert witness to explain an individual that is under the influence of methamphetamine may suffer delusional episodes and initiate a conflict. *See* Brief of Appellant at 10-17. Ahlstedt claims this testimony was important because it would have provided a credible explanation for the victim's behavior prior to the assault. *See* Brief of Appellant at 12, 15-16. This argument fails.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient

performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, the outcome at trial would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Washington's appellate courts maintain a strong presumption that trial counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

Generally, whether to call a witness is a matter of legitimate trial tactics. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). The failure to provide expert testimony is only deficient when the expert was necessary to explain something a lay witness could not. *State v. Thomas*, 109 Wn.2d 222, 231-32, 743 P.2d 816 (1987).

Here, there was ample testimony regarding Beauchesne's use of controlled substances prior to the assault. RP (7/7/2010) at 14, 32-34, 36, 67-70. Furthermore, several witnesses described Beauchesne's erratic behavior prior to the incident, and one witness claimed the victim was

acting like he was on “hard core drugs.” RP (7/8/2010) at 56-59, 65, 69-71, 109. Supplemental testimony from an individual, who even the defense had reservations regarding his qualifications, *see* RP (7/6/2010) at 10, would have been cumulative.

Additionally, Ahlstedt’s defense at trial was a “general denial” – *i.e.* that he did not stab Beauchesne. RP (7/1/2010) at 3; RP (7/6/2010) at 13; RP (7/8/2010) at 82, 131; RP (7/12/2010) at 33-58. Thus, the proffered expert’s testimony was largely irrelevant because it only supported a theory of self-defense, *i.e.* that Beauchesne was the aggressor and Ahlstedt was forced to defend himself. However, Ahlstedt repeatedly refused to pursue a self-defense theory. RP (7/1/2010) at 3; RP (7/6/2010) at 13; RP (7/8/2010) at 82, 131; RP (7/12/2010) at 33-58. Defense counsel was effective when he made a tactical decision not to advance two antagonistic defenses, especially when self-defense contradicted the defendant’s version of events.

Finally, the record does not explain why the defendant decided against calling the proffered expert at trial. The record only shows the defense had reservations about the expert’s qualifications. RP (7/6/2010) at 10. However, it is possible the attorney believed testimony from four individuals regarding Beauchesne’s drug-induced, erratic behavior was sufficient to provide credibility to the defendant’s explanation of events.

The fact a jury rejected this is not sufficient to support an ineffective assistance of counsel claim. *See State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011) (stating that whether a “strategy ultimately proved unsuccessful is immaterial” and that “hindsight has no place in an ineffective assistance analysis” when discussing the deficient performance prong of a claim of ineffective assistance of counsel).

The proffered expert’s testimony was cumulative and irrelevant. Furthermore, the defense made a tactical decision not to call its proffered expert. Because Ahlstedt has not explained how the proffered expert could have assisted his general denial that an assault occurred, his claim of ineffective assistance fails.

D. THE STATE’S REBUTTAL WAS PROPER.

Ahlstedt argues the deputy prosecutor committed misconduct when he and the lead investigator conducted a brief demonstration during the State’s rebuttal argument. *See* Brief of Appellant at 17-22. This argument is without merit because the argument was proper and the demonstration was not evidence. Instead, the demonstration was a reasonable inference based on the evidence introduced at trial.

In rebuttal, the deputy prosecutor made the following argument:

Mr. Troberg: ... Now, with the Court’s permission I will ask Detective Hollis to come up here –

The Court: You may.

Mr. Troberg: -- this is the knife and under Mr. Ahlstedt's version of events, let's say I'm Mr. Ahlstedt I'm obviously not as tall as he is but let's say Chad Beauchesne is acting up, he has a knife, somehow I don't see that he has a knife although I'm not really sure how it's possible considering it's his right hand, and I take Mr. Beauchesne and throw him on the ground. What is the normal thing people do? What would you do? You put out your hands to protect yourself. You don't stab yourself in the gut like that, put your hands down like that, drop the knife so you don't fall on anything. That's what people do and that's why Mr. Ahlstedt's version of events – thanks, [detective] you can go ahead and sit down – is contrived, glib and improbable.

RP (7/12/2010) at 61-62. The defense never objected to this demonstration. RP (7/12/2010) at 61-62.

The burden rests on the defendant to show that the prosecuting attorney's conduct was (1) improper, and (2) prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice occurs only if there is a substantial likelihood that the conduct affected the jury's verdict. *Fisher*, 165 Wn.2d at 747.

The defense waives any challenge to the alleged misconduct if it fails to make an objection at trial. *Fisher*, 165 Wn.2d at 747. A defendant may only raise the issue for the first time on appeal if the error was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” that cannot be cured with a jury instruction. *Fisher*, 165 Wn.2d

at 747 (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

In the context of closing arguments and rebuttal, the prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *Fisher*, 165 Wn.2d at 747 (citing *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006)). Washington’s appellate courts review alleged improper comments in the context of the entire argument. *Fisher*, 165 Wn.2d at 747. If the defense failed to request a curative instruction, the appellate court is not required to reverse. *Fisher*, 165 Wn.2d at 747.

Here, the deputy prosecutor’s extremely brief reenactment was proper. The deputy prosecutor’s demonstration was performed in response to Ahlstedt’s claim Beauchesne fell on his own knife. *See e.g.* RP (7/12/2010) at 39-40, 49, 51. The illustration was based on testimony that Beauchesne lunged at Ahlstedt and the defendant’s claim that he never saw a knife. *See* RP (7/8/2010) at 60-61, 72, 80-81, 145-48, 161-62. The deputy prosecutor asked the jurors to make their own reasonable inferences regarding the plausibility the defendant’s claim. RP (7/12/2010) at 61-62. This was proper. *See State v. Kroll*, 87 Wn.2d 829, 845-46, 558 P.2d 173 (1977) (State permitted to perform a brief demonstration during its final arguments because the reenactment was a reasonable inference

from the evidence introduced at trial). *See also People v. Caldaralla*, 163 Cal.App.2d 32, 45-46, 329 P.2d 137, 145-46 (1958) (prosecutor's use of a police inspector to illustrate how and where the victim was shot held proper); *People v. Attema*, 75 Cal. App. 642, 648, 652-53, 243 P. 461, 464 (1925) (prosecution's reenactment of the shooting to show where victim was standing when shot was proper).

Ahlstedt confuses the admissibility of experimental evidence introduced at trial with an illustration used in closing argument. *See* Brief of Appellant at 18-22. With proper foundation, experimental evidence (e.g. a video reenactment) introduced at trial establishes a fact not otherwise in evidence. In contrast, an illustration during closing remarks is not evidence. Rather, it demonstrates for the jury a reasonable inference that may be drawn from the evidence. Here, the deputy prosecutor's brief illustration was a reasonable inference based upon the evidence introduced at trial. There was no error.

However, even if this Court assumes the argument was improper, it is highly unlikely it affected the jury's verdict. First, the demonstration was a mere fraction of the State's closing remarks. *See* RP (7/12/2010) at 16-33, 56-68. Second, the trial court specifically instructed the jurors that the lawyers' arguments were not evidence, and they must disregard any argument that was inconsistent with their understanding of the evidence

introduced at trial. RP (7/6/2010) at 52-53; CP 77-78. *See State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994) (appellate courts presume the jury follows its instructions). Finally, the defense informed the sentencing court that the jury believed the most persuasive evidence against Ahlstedt was the fact he tried to arrange Beauchesne's absence from trial. RP (9/23/2010) at 89. The State's brief demonstration did not substantially affect the jury's deliberations.

The defense never objected to the State's demonstration. RP (7/12/2010) at 61-62. Thus, the defense waived any challenge to the demonstration on appeal. *Fisher*, 165 Wn.2d at 747. Ahlstedt cannot show the State's argument was so flagrant and ill intentioned because it was a reasonable inference based upon the evidence introduced at trial. The illustration did not constitute evidence and likely had little impact on the ultimate verdict. Ahlstedt's claim of prosecutorial misconduct fails.

E. THE COURT PROPERLY DETERMINED THE DEFENDANT'S OFFENDER SCORE.

Ahlstedt claims the sentencing court violated his right to a jury trial because a judge found that his prior California felony convictions should be included in his offender score calculation. *See* Brief of Appellant at 22-28. Ahlstedt argues the sentencing court made findings that went far "beyond the 'fact of a prior conviction' in determining

whether his prior convictions were subject to Washington’s ‘wash out’ provisions.” *See* Brief of Appellant at 23, 26. This argument fails.

The sentencing court recognized that Ahlstedt had an extensive criminal history:¹⁹

- (1) Defendant was convicted and sentenced in California of three counts of Burglary 2d, on July 18, 1980. The elements of the California burglaries are comparable to the Washington offense of Burglary 2d degree.
- (2) Defendant was convicted and sentenced on April 30, 1987 of three counts of California Burglary in the First Degree. The elements are comparable to Washington[‘s] Residential Burglary.
- (3) Defendant was convicted and sentenced in California on April 15, 1992, case No PA007877 to Robbery First Degree with a Firearm Enhancement, of which the elements are comparable to Washington Robbery First Degree with a Firearm Enhancement.
- (4) Defendant was also convicted and sentenced in California on April 15, 1992, cause No. PA007877, Robbery in the Second Degree, of which the elements are comparable to Washington Robbery in the Second Degree.
- (5) Defendant was convicted and sentenced in California on February 19, 1992 cause No SA008330, Assault GBI (Great Bodily Injury) for which the elements are comparable to Assault Second Degree in Washington.

¹⁹ In his opening brief, Ahlstedt cites the sentencing court’s comment regarding a 1992 burglary conviction. *See* Brief of Appellant at 23 (citing RP (9/23/2010) at 23)). However, this burglary conviction was not included in Ahlstedt’s offender score because it was not comparable to a Washington felony because it only involved an entry into a vehicle. *See* CP 66; *See also* CP Supp. (Sentencing Memo at 2).

- (6) Defendant has other California convictions, but the State acknowledges that the other convictions either ‘wash out’ as comparable to Washington Class C felonies or are not comparable to Washington felonies, and so do not count on Defendant’s offender score.
- (7) Defendant entered the California Department of Corrections in 1986, and except for very brief periods of unsuccessful parole lasting only a few weeks, was not finally released into the community until January 30, 2002. The time Defendant spent in California Rehabilitation Center (CRC) and California Medical Facility (CMC) was in confinement pursuant to his sentence on the above felony convictions, and does not count as time in which he was released in the community.
- (8) Defendant committed Misdemeanor and Gross Misdemeanor crimes in Washington State on or about November 30, 2008 for which he was convicted.²⁰
- (9) Between July 1980 and the date he committed the offense in this cause, Defendant has spent five years crime free in the community, but has not spent ten years crime free in the community.

CP 65-66. *See also* Sentencing Exhibits 1-12; CP Supp. (Sentencing Memo at 1-9). Based on these findings, the sentencing court concluded Ahlstedt had an offender score of thirteen points:

- (1) Defendant has the following prior criminal history in his point score: Three Burglary Second degree convictions from 1980; three comparable Residential Burglary convictions from 1987; a Robbery First

²⁰ These misdemeanors and gross misdemeanors include: third degree theft, unlawful possession of marijuana, and negligent driving. *See* Sentencing Exhibits 9-12.

Degree conviction with Firearm enhancement from 1992; a Robbery Second conviction from 1992; and a comparable Assault Second degree conviction from 1992.

- (2) Scoring the Assault First Degree, the Defendant's prior criminal history and the current offense of Intimidation of a Witness make an offender score of thirteen.
- (3) Scoring the Intimidation of a Witness, the Defendant's prior criminal history and the current offense of Assault in the First Degree make an offender score of ten.

CP 66-67. *See also* RP (9/23/2010) at 80-84.

Under Washington's determinant sentencing scheme, once a defendant has been convicted of a felony, the sentencing judge determines the defendant's standard range sentence based on the seriousness level of the current offense and the defendant's offender score. *State v. Jones*, 159 Wn.2d 231, 236, 149 P.3d 636 (2006) (citing former RCW 9.94A.530(1), .510). A defendant's offender score is determined by his or her other convictions, with the scoring of those prior convictions dependent upon the nature of the current offense. *Jones*, 159 Wn.2d at 236 (citing former RCW 9.94A.525). One criterion that affects an offender score calculation is the "wash-out" provision under RCW 9.94A.525(2)(b) (2008):

Class B prior felony convictions ... shall not be included in the offender score if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of

judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(Emphasis added). Here, the sentencing court properly determined that the State's certified records clearly established Ahlstedt had not spent ten crime free years in the community. RP (9/23/2010) at 80-84; CP 65-67. Ahlstedt, himself, testified he was not finally released on parole for his robbery convictions until January 2002. RP (9/23/2010) at 63. Thus, Ahlstedt's California convictions, which are comparable to Class A and B felonies in Washington, did not washout and were properly included in his offender score. There was no error.

For purposes sentencing, a jury is not required to determine the existence of a defendant's prior felony convictions. *See Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *United States v. O'Brien*, -- U.S. --, 130 S.Ct. 2169, 2174, 176 L.Ed.2d 979 (2010); *State v. Magers*, 164 Wn.2d 174, 193, 189 P.3d 126 (2008); *State v. Thieffault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007); *State v. Jones*, 159 Wn.2d 231, 236-48, 149 P.3d 636 (2006); *State v. Lavery*, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005); *State v. Smith*, 150 Wn.2d 135, 141-43, 75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001); *State v. Thorne*, 129 Wn.2d

736, 781-82, 921 P.2d 514 (1996). Thus, it follows that a jury is not required to determine whether a prior conviction washes out of a defendant's offender score calculation.

The Washington Supreme Court has held the "prior conviction exception" broadly encompasses determinations that necessarily flow from an offender's prior convictions:

To give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts "intimately related to [the] prior conviction" such as the defendant's community custody.

Jones, 159 Wn.2d at 241. The Supreme Court also noted that an increased sentence pursuant to RCW 9.94A.525 is not exceptional sentences and, thus, falls squarely within the prior conviction exception carved out by the U.S. Supreme Court. *Jones*, 159 Wn.2d at 241-42 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (judicial fact-finding permitted when establishing the standard range sentence)). *Accord Apprendi*, 530 U.S. at 489-90 (declining to overrule its prior case law pertaining to recidivist sentencing provisions).

In *State v. Jones*, the Supreme Court rejected the argument that "the prior conviction exception applies only when the prior conviction may be determined with ease and/or without challenge." 159 Wn.2d at 244

n. 8 (citing *United States v. Santiago*, 268 F.3d 151, 156 (2nd Cir. 2001) (“While the *Almendarez-Torres* exception to the *Apprendi* rule ... typically involves a relatively uncontested record, this is by no means always the case. The determination of ‘the fact of a prior conviction’ implicitly entails many subsidiary findings[.]”). The *Jones* court considered whether a community placement determination fell within the prior conviction exception. In answering “yes,” it held that a sentencing judge “may rely on the judgment and sentence from the prior crime, the criminal history submitted, and *those documents flowing from the prior conviction and sentence, such as the presentence report and department of corrections’ records.*” 159 Wn.2d at 244-45 (emphasis added).

Here, the sentencing court considered a record that directly flowed from Ahlstedt’s prior robbery convictions – *i.e.* the 969b prison packet. *See* Sentencing Exhibit 2. Questions pertaining to Ahlstedt’s release on parole from his robbery convictions, or the nature/duration of his confinement pursuant to his California sentences, involve facts “that are intimately related to [the] prior conviction.” *See Jones*, 159 Wn.2d at 241. Thus, the Sentencing court did not err to the extent it considered certified documents “flowing from the prior conviction and sentence, such as ... department of correction records.” *See Jones*, 159 Wn.2d at 244-45. There was no error.

Ahlstedt cites *Shepard v. United States*, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), for the proposition that a sentencing court may review nothing more than the record of conviction, jury instructions, bench trial findings, or a defendant's admissions when determining whether a prior conviction washes out of an offender score. *See* Brief of Appellant at 26. However, the *Shepard* decision is easily distinguished.

In *Shepard*, the issue was whether a sentencing court could review police reports and a complaint filed in a prior unrelated cause, in order to determine whether a “non-generic”²¹ burglary was comparable to a “generic”²² burglary. 544 U.S. at 16-18. If the sentencing court determined the defendant's conviction for a prior “non-generic” burglary actually involved a “generic” burglary, then it could have enhanced the defendant's sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2000).²³ *Shepard*, 544 U.S. at 15-18. Because the record available to the sentencing court in *Shepard* did not clarify which crime the defendant actually committed, the U.S. Supreme Court limited the

²¹ A “non-generic burglary” is a burglary that is defined more broadly than a “generic burglary” and may include entries into boats and cars. *Shepard*, 544 U.S. at 17.

²² A “generic burglary” is an “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Shepard*, 544 U.S. at 16-17.

²³ 18 U.S.C. § 924(e) (2000) mandates a minimum 15-year prison sentence for anyone possessing a firearm after three prior convictions for drug offenses or violent felonies. The act makes a burglary a violent felony only if committed in a building or enclosed space (“generic burglary”). *Shepard*, 544 U.S. at 15.

sentencing court's examination to the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings entered by the original fact finder. *Shepard*, 544 U.S. at 15, 20-21. Without this limitation, the sentencing court would have found facts/elements that the original fact finder was required to find under *Apprendi* and its progeny. *See Shepard*, 544 U.S. at 24-26.

Here, unlike *Shepard*, the sentencing court did not seek to determine what crime Ahlstedt committed in California. Instead, the issue was whether Ahlstedt's 1992 robbery convictions washed out of his offender score. RP (9/23/2010) at 80. There was no question that Ahlstedt's prior convictions were comparable to Class A and B felonies in Washington. RP (9/23/2010) at 81. The only question in dispute was when the State of California released Ahlstedt to the community. This question flowed directly from his prior conviction. *Jones*, 159 Wn.2d at 244-45.

The argument Ahlstedt advances on appeal, that a sentencing court may only review certified copies of a judgment and sentence, jury instructions, bench trial findings, or a defendant's admissions, fails to give full effect to the "prior conviction" exception. *See Jones*, 159 Wn.2d at 241. This Court should reject such a narrow application of the prior conviction exception.

Additionally, Ahlstedt fails to recognize that the sentencing court made its findings based solely on the certified exhibits introduced at the sentencing hearing:

The document in Exhibit 2 certainly indicates there was a parole that was granted on January 30, 2002, and that there was custody prior to that. While certainly it was helpful to have that specific point and some of the abbreviations pointed out, I think the document is pretty clear on that. Mr. Ahlstedt, whether he was in treatment with the California penal institutions or just incarcerated has not had 10 years in the community crime free.

RP (9/23/2010) at 82-83. There is nothing in the record to show the sentencing court considered any testimony pertaining to internet photos of various correctional/treatment facilities. *See* RP (9/23/2010) at 80-83.

Finally, Ahlstedt admitted he was not released on parole until January 2002. RP (9/23/2010) at 63. Based on this admission, ten years had not expired between his paroled release for the 1992 robberies and his subsequent convictions in 2008 and 2010. As such, Ahlstedt's prior convictions never washed out. The trial court did not err when it calculated Ahlstedt's offender score.

The sentencing court did not impose an enhanced or aggravated sentence. Instead, it imposed a standard range sentence pursuant to its offender score calculation. The trial court did not err when it considered a record prepared by the California Department of Corrections, which was

intimately related and flowed directly from a prior conviction and sentence. There was no error.

CONCLUSION:

Based on the arguments above, the State respectfully requests that this Court affirm Ahlstedt's conviction and sentence.

However, if a re-trial is necessary, the State respectfully request that this Court reverse the trial judge's decision excluding Ahlstedt's prior robbery convictions under ER 609.

DATED this 15th day of July, 2011.

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