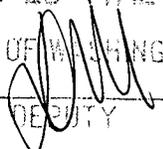


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 41612-3-II

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

STATE OF WASHINGTON,
Respondent,

v.

MATTHEW VERNON PRICE,
Appellant.

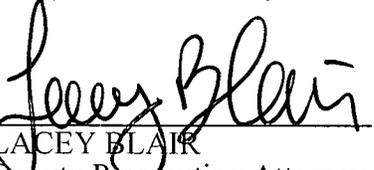
APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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T A B L E

Table of Contents

PLAINTIFF’S COUNTERSTATEMENT OF THE CASE 1

RESPONSE TO ASSIGNMENTS OF ERROR 3

 1. The out-of-court statements of the defendant were properly admitted. 3

 2. There was no violation of Double Jeopardy and there was no error in increasing score based on this. 5

 3. There was sufficient evidence to support the Possession of Stolen Property conviction. 7

 4. The case should be remanded back for sentencing. 8

 (A) Criminal history was no proven or acknowledged 8

 (B) The court must either empanel a jury to determine if the sentence is too lenient or sentence within the standard range 9

 (C) The judge did not order a change in early release time 10

 (D) The DOSA denial can be addressed at re-sentencing 10

CONCLUSION 11

TABLE OF AUTHORITIES

Table of Cases

In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005) 8

Blakely v. Washington, 542 U.S. 296 at 301, 124 S.Ct. 2531 (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)) 9

State v. Athan, 160 Wn.2d 364, 158 P.3d 27 (2007) 4

State v. Bergeron, 105 Wn.2d 1, 15-16, 711 P.2d 1000 (1985) 6

<i>State v. Braun</i> , 82 Wn.2d 157, 162, 509 P.2d 742 (1973)	4
<i>State v. Broadway</i> , 133 Wn.2d 118, 129, 942 P.2d 363 (1997)	3
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	7
<i>State v. Cyrus</i> , 66 Wn. App. 502, 506 n. 4, 832 P.2d 142 (1992), <i>review denied</i> , 120 Wn.2d 1031 (1993)	4
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	7
<i>State v. Ellison</i> , 36 Wn. App. 564 (1984)	3
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	7
<i>State v. Hughes</i> , 154 Wn.2d 118, 137, 140, 142, 110 P.3d 192 (2005) . . .	9
<i>State v. Hunley</i> , 161 Wn. App. 919, 253 P.3d 448 (2011)	9
<i>State v. Hutchinson</i> , 85 Wn. App. 726, 938 P.2d 336 (1997)	4
<i>State v. Johnson</i> , 100 Wn.2d 607, 628-629, 674 P.2d 145 (1983)	5
<i>State v. Laviollette</i> , 60 Wn. App. 579, 583, 805 P.2d 253 (1991)	5
<i>State v. Lopez</i> , 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (<i>quoting [State v.] Ford</i> , 137 Wn.2d [472,] 480, 973 P.2d 452 [(1999)])	8
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997)	7
<i>State v. Ng</i> , 110 Wn.2d 32, 38, 750 P.2d 632 (1988)	4
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	7
<i>State v. Saltz</i> , 137 Wn. App. 576, 154 P.3d 282 (2007)	10
<i>State v. Sargent</i> , 111 Wn.2d 641, 647, 762 P.2d 1127 (1998)	

<i>citing Miranda v. Arizona</i> , 384 U.S. 463, 444 , 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	3
<i>State v. Sweet</i> , 138 Wn.2d 466, 980 P.2d 1223 (1999)	5
<i>State v. Tresenriter</i> , 101 Wn. App. 486, 495-496, 4 P.3d 145 (2000)	6
<i>State v. Vannoy</i> , 25 Wn. App. 464, 467, 610 P.2d 380 (1980)	4
<i>State v. Walton</i> , 64 Wn. App. 410, 415-16, 824 P.2d 533, <i>review denied</i> , 119 Wn.2d 1011 (1992)	7
<i>State v. Wolfer</i> , 39 Wn. App. 287, 290, 693 P.2d 154 (1984), <i>review denied</i> , 103 Wn.2d 1028 (1985)	4
<i>Washington v. Recuenco</i> , 548U.S. 212, 126 S.Ct. 2546 (2006)	9

STATUTES

RCW 9A.52.030(1)	5
RCW 9A.52.050	5
RCW 9A.56.020(1)	5
RCW 9.94A.537	9
RCW 9.94A.585	9, 10

Table of Court Rules

CrR3.5	4
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PLAINTIFF'S COUNTER STATEMENT OF THE CASE

On July 24, 2010, Tony's Shortstop Shell Gas Station in Montesano, Grays Harbor County was burglarized sometime in the morning between 3:06 am and 4:28 am. (RP at 34, 100) Mr. Kim reports that approximately \$3,000 in merchandise was stolen during the break in. (RP at 35). This includes 41 cartons of cigarettes made by Camel and Winston, 4 rolls of Copenhagen chewing tobacco, and 265 lottery scratch off lottery tickets from the following games: \$5 Seahawk, \$3 Cash Cube, \$2 Wild Bingo, \$3 Cash City, and \$20 Washington Millionaire. (Exhibit 37). Mr. Kim also reports there was approximately \$4,000 in damage done to the building and equipment. (RP at 35). Officer Staten obtained surveillance video from the victim business which was shown to the jury.(RP at 87).

Law enforcement placed an article in the Daily World asking for tips on the break in, which was published on July 27, 2010. (RP at 55). On July 28, 2010 Roberta Falkner, the girlfriend of Matthew Price, called the Montesano Police Department to inform them that Matthew Price, herein, Defendant Price, may have had something to do with the break-in. (RP at 56). She said she found some unscratched "Wild Bingo" and "Cash Cube" lottery tickets in Defendant Price's drawer.(RP at 55). These were recovered by the officers during a search of the residence and matched up as those taken from the burglarized business. (RP at 102). She testified that he did not have a job nor money to purchase so many tickets. (RP at

55). Ms Falkner said that Defendant Price was not home all that night and was dropped off at 10:00 a.m. by a woman in a green Chevy pick-up truck. (RP at 57). The same green Chevy pick-up that was used in the Burglary and was owned by a co-defendant's son. (RP at 70).

Co-Defendant Mary Stutesman testified that she and the defendant and her boyfriend (Simpson) went to Montesano to burglarize a business. (RP at 71). They parked their truck at the nearby grocery store. (RP at 73). The defendant checked on the front of the gas station but said there were people close by and they couldn't get in that way. (RP at 73). At some point the defendant and Ms. Stutesman bought cigarettes at another nearby gas station. (Exhibit 17). They then moved the truck to sit kitty corner to the burglarized business. (RP at 75). The defendant then got out of the vehicle with tools and walked to the burglarized business. (RP at 77). After about 20 minutes or so Ms. Stutesman drove the truck around to the back of the business and picked the two men up. (RP at 78).

Ms. Stutesman testified that Defendant Price received cigarettes and scratch tickets for his participation in the Burglary. (RP at 79). She also testified that at no time did he try to stop the Burglary or try and call the police or leave the scene and stop his involvement. (RP at 84). Later on that day Defendant Price then asked Ms. Stutesman for more cigarettes from the Burglary because "he had them sold." (RP at 80).

Video surveillance from the victim business and a nearby business show the defendant and another person outside the front of the victim store

at 3:06am. (Exhibits 17, 18). Video surveillance from inside the victim business show an individual in a hooded sweatshirt stealing cigarettes, scratch tickets and various items from behind the counter and the back of store and placing the items into a duffle bag. (Exhibit 17). The hooded sweatshirt has sheet rock dust all around the hooded area. (Exhibit 17). The video clearly shows the defendant walking around the gas station that was burglarized. (Exhibit 17; RP at 117). The hooded sweatshirt, bag, tools and pants used in the burglary were recovered at co-defendant Simpson's house. (Exhibit 22, 26, 28, 30, 35). One of the burglary participants is seen wearing a distinct jacket which was recovered at Defendant Price's home. (Exhibit 32).

RESPONSE TO ASSIGNMENTS OF ERROR

1. The out-of-court statements of the defendant were properly admitted.

Miranda warnings were developed to protect the defendant's Fifth Amendment right not to make incriminating confessions or admissions to police officers while in the coercive environment of police custody.

Miranda warnings are only required if a suspect is (1) in-custody, and (2) subject to interrogation (3) by an agent of the State. *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1998) citing *Miranda v. Arizona*, 384 U.S. 463, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Statements are only admissible at trial in the prosecution's case in chief if the prosecution can prove a voluntary waiver of *Miranda* Rights. See, e.g., *State v. Ellison*, 36 Wn. App. 564 (1984); *State v. Broadway*, 133 Wn.2d 118, 129, 942 P.2d

363 (1997). The burden is upon the State to prove the voluntariness of a statement. It need only do so, however, by a preponderance of the evidence. *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973); *State v. Athan*, 160 Wn.2d 364, 158 P.3d 27 (2007). The trial court's finding of voluntariness is binding on appeal where the record contains substantial evidence supporting that conclusion. *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988); *State v. Wolfer*, 39 Wn. App. 287, 290, 693 P.2d 154 (1984), *review denied*, 103 Wn.2d 1028 (1985); *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980). "Substantial evidence" is evidence that is sufficient to persuade a fair-minded person. *State v. Cyrus*, 66 Wn. App. 502, 506 n. 4, 832 P.2d 142 (1992), *review denied*, 120 Wn.2d 1031 (1993). Substantial experience with the criminal justice system will support the conclusion that the defendant appreciates the gravity of the *Miranda* warnings. *See, e.g. State v. Hutchinson*, 85 Wn. App. 726, 938 P.2d 336 (1997) (in 12 preceding years, defendant had been *Mirandized* on at least five separate occasions, and on each occasion had acknowledged those rights, waived them, and answered questions).

In the current case there was no evidence presented at either the CrR3.5 hearing or the jury trial that Defendant Price's rights were violated and that his statements were not voluntary. To state otherwise is purely speculation with no factual basis to support it whatsoever. Defendant Price was given *Miranda* warnings at the appropriate times and then he knowingly, voluntarily, and intelligently waived those rights. He

voluntarily chose to speak with the officers regarding this burglary and his statements were properly admitted into evidence at trial.

2. There was no violation of Double Jeopardy and there was no error in increasing score based on this.

Burglary anti-merger statute clearly expresses the intent of Legislature that “any other crime” committed in the commission of a burglary does not merge with the offense of...burglary when a defendant is convicted of both. *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999). “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.” RCW 9A.52.050 “Second degree burglary requires entering or remaining unlawfully in a building with intent to commit a crime, RCW 9A.52.030(1); theft requires wrongfully obtaining or exerting unauthorized control over property with the intent to deprive the owner of that property. RCW 9A.56.020(1). Moreover, the anti-merger statute precludes theft from being a lesser included offense of burglary. RCW 9A.52.050. Thus, under the *Blockburger* test, no double jeopardy violation is present.” *State v. Laviollette*, 60 Wn. App. 579, 583, 805 P.2d 253 (1991). The mere fact that evidence of possession of stolen property is used to circumstantially prove unlawful entry with intent to commit a theft, does not make possession of stolen property a lesser included offense of Burglary in the Second Degree. *State v. Johnson*, 100 Wn.2d 607, 628-629, 674 P.2d 145

(1983), overruled on other grounds by, *State v. Bergeron*, 105 Wn.2d 1, 15-16, 711 P.2d 1000 (1985) . Even if the burglary and other crime involve the same criminal conduct, the trial court has discretion to punish burglary separately from the other crime. *State v. Tresenriter*, 101 Wn. App. 486, 495-496, 4 P.3d 145 (2000).

Regarding punishment, *State v. Tresenriter* is an example of how the anti-merger statute applies and contemplates both charging and sentencing. “*Tresenriter* was convicted of burglary, and nine counts of theft of a firearm, and one count of possession of stolen property, the trial court had discretion to apply the burglary anti-merger statute and punish the burglary separate from the theft counts and the stolen property count.” *State v. Tresenriter*, 101 Wn. App. 486, 495-496, 4 P.3d 145 (2000).

It is clear from both Legislative intent and case law regarding the anti-merger statute that Burglary and any other crime used in furtherance of the burglary do no merge and do not create double jeopardy. In addition, the anti-merger statute contains both sentencing and charging language. The only charges that could have merged were Theft 2nd Degree and Possession of Stolen Property 2nd Degree. However the state did not pursue the 3rd count of Theft and so there is no merger or double jeopardy issue in this case. The court properly submitted both counts to the jury for consideration.

3. There was sufficient evidence to support the Possession of Stolen Property conviction.

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); *see also 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*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court will 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, *review denied*, 119 Wn.2d 1011 (1992). Credibility determinations are within the sole province of the jury and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *see also State v. Myers*, 133 Wn.2d 26, 941 P.2d 1102 (1997).

The court must accept the evidence and view it in a light most favorable to the state. In the current case, defendant Simpson put \$3,695.04 in stolen merchandise into a green duffel bag which defendant Price took possession of. This includes approximately \$1,021 in scratch lottery tickets which are identifiable by serial number. Defendant Simpson was successful in stealing this amount of property and he shared the fruits

of this crime with Defendant Price. In fact, some of these tickets and cigarettes were also found in Defendant Price's residence. In addition, Defendant Price furthered the crime of possession of stolen property and was an accomplice to it. By asking for cigarettes and lottery tickets for the burglary, he encouraged the crime of possession of stolen property in the 2nd degree and was an accomplice to that crime as well as the burglary. It is clear from the video surveillance that Defendant Price was the lookout and aided in the Burglary. It is also clear from the record that there was more than enough evidence to find Defendant Price guilty of both Burglary and Possession of Stolen Property 2nd Degree.

4. The case should be remanded back for sentencing.

(A) Criminal history was not proven or acknowledged

At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). “ ‘The best evidence of a prior conviction is a certified copy of the judgment.’ ” *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting [*State v. Ford*, 137 Wn.2d [472,] 480, 973 P.2d 452 [(1999)]). It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. *Ford*, 137 Wn.2d at 480. *Ford* and its progeny make clear that, unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by presenting at least some evidence.

State v. Hunley, 161 Wn. App. 919, 253 P.3d 448 (2011).

In the current case, it is clear that the defendant did not acknowledge his criminal history and that the state did not provide certified copies of judgments and sentences. Therefore the case should be remanded for sentencing and entry of proof of criminal history.

(B) The court must either empanel a jury to determine if the sentence is too lenient or sentence within the standard range.

Any sentence outside the standard range is subject to the guidelines set out in RCW 9.94A.585 and the procedure set out in RCW 9.94A.537. In *Blakely*, the United States Supreme Court held that “ ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ ” *Blakely v. Washington*, 542 U.S. 296 at 301, 124 S.Ct. 2531 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). In *Hughes*, the Washington Supreme Court examined the aggravating factor and the court held that the “clearly too lenient” conclusion is a factual determination, rather than a legal one and that the too lenient determination is a factual finding that cannot be made judicially. *State v. Hughes*, 154 Wn.2d 118, 137, 140, 142, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548U.S. 212, 126 S.Ct. 2546 (2006). Unless a defendant consents to judicial fact-finding, a sentencing court's finding that a presumptive sentence is “too lenient” taints an exceptional sentence

based on this factor. *State v. Saltz*, 137 Wn. App. 576, 154 P.3d 282 (2007).

Here, it is clear that even with no proof of prior criminal history, the judge imposed an exceptional sentence based on RCW 9.94A.585. However case law requires that the clearly too lenient determination must be made by a jury and that was not done in this case. Therefore this case should be remanded for sentencing and the court should either empanel a jury to determine if the sentence is too lenient or the defendant should be sentenced within the standard range.

(C) The judge did not order a change in early release time.

During sentencing the sentencing judge made a comment regarding his possible frustration with the statutory good time (earned early release) allowed. There is no evidence in the record that this was an order of any kind. This was merely a comment made by the court.

(D) The DOSA denial can be addressed at re-sentencing.

At re-sentencing the sentencing judge can state on the record that he does not feel a DOSA is appropriate as this is a discretionary decision.

CONCLUSION

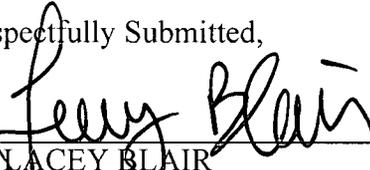
For the reasons set forth, this conviction must be affirmed.

However, the case should also be remanded for sentencing.

DATED this 27 day of September, 2011.

Respectfully Submitted,

By:



LACEY BLAIR
Deputy Prosecuting Attorney
WSBA #39341

LB/

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STATE OF WASHINGTON BY [Signature] DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 41612-3-II

v.

DECLARATION OF MAILING

MATTHEW VERNON PRICE,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 27th day of September, 2011, I mailed a copy of the Brief of Respondent to Jordan B. McCabe, McCabe Law Office, P. O. Box 6324, Bellevue, WA 98008-0324, by depositing the same in the United States Mail, postage prepaid.

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

DATED this 27th day of September, 2011, at Montesano, Washington.

Barbara Chapman