

No. 44332-5-II

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

STATE OF WASHINGTON,

Appellant,

v.

DWAYNE PAUL STEWART,

Respondent.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Linda C.J. Lee, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR IN RESPONSE 1

B. ISSUES PRESENTED IN RESPONSE 1

C. STATEMENT OF THE CASE IN RESPONSE 2

 1. Procedural Facts 2

 2. Facts relating to offenses and entry of the pleas 3

D. ARGUMENT IN RESPONSE 5

 1. THE STATE’S APPEAL IS MOOT, THE STATE HAS NOT ARGUED TO THE CONTRARY AND IT CANNOT REMEDY ITS ERRORS FOR THE FIRST TIME IN REPLY 5

 a. Relevant facts 6

 b. The state’s appeal is moot 8

 2. THE TRIAL COURT DID NOT ERR IN APPLYING THE LEGISLATIVE DEFINITION OF “PRIOR CONVICTION,” THE PROSECUTION’S ARGUMENTS DO NOT WITHSTAND REVIEW AND THERE ARE MULTIPLE ALTERNATIVE GROUNDS UPON WHICH TO AFFIRM 11

 a. Relevant facts 12

 b. The trial court followed the law, the prosecution’s arguments ignore both plain statutory language and the rules of statutory construction and there are several alternate grounds upon which to affirm . . 13

E. CONCLUSION 24

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 442 P.2d 967 (1968) 8

Harris v. Charles, 171 Wn.2d 455, 256 P.3d 328 (2011) 18

In re Personal Restraint of Mines, 146 Wn.2d 279, 45 P.3d 535 (2002) .. 8

In re Sietz, 124 Wn.2d 645, 880 P.3d 34 (1994) 19, 21

In re the Personal Restraint of Van Delft, 158 Wn.2d 731, 147 P.3d 573 (2006), overruled in part and on other grounds by, Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009) 17, 18

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986) 11

State v. Bauer, 92 Wn.2d 162, 595 P.2d 544 (1979) 22

State v. Breazeale, 144 Wn.2d 829, 31 P.3d 1155 (2001) 19

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 11

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105, cert. denied sub nom., Gentry v. Washington, 516 U.S. 843 (1994) 8, 9

State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997) 22

State v. Wilson, 170 Wn.2d 682, 244 P.3d 950 (2010) 9

WASHINGTON COURT OF APPEALS

Matter of Lalande, 30 Wn. App. 402, 634 P.2d 895 (1981) 22

State v. Garrison, 46 Wn. App. 52, 728 P.2d 1102 (1986) 16, 17

State v. Goodin, 67 Wn. App. 623, 838 P.2d 135 (1992), review denied, 121 Wn.2d 1019 (1993) 10

State v. Harris, 148 Wn. App. 22, 197 P.3d 1206 (2008) 9

<u>State v. Langford</u> , 67 Wn. App. 572, 837 P.2d 1037 (1992), <u>review denied</u> , 121 Wn.2d 1007, <u>cert. denied</u> , 510 U.S. 838 (1993).	18
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005)	15
<u>State v. Sherman</u> , 59 Wn. App. 763, 801 P.2d 274 (1990)	8
<u>State v. Warfield</u> , 103 Wn. App. 152, 5 P.3d 1280 (2000)	16
<u>State v. Whitney</u> , 78 Wn. App. 506, 897 P.2d 374, <u>review denied</u> , 128 Wn.2d 1003 (1995)	18
<u>State v. Young</u> , 152 Wn. App. 186, 216 P.3d 449 (2009)	22

FEDERAL AND OTHER CASELAW

<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)	2, 3
--	------

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

RAP 10.3(c)	10
RCW 10.99.020	2, 23
RCW 9.92.080(2)	19
RCW 9.92.080(3)	19
RCW 9.94A.010	17
RCW 9.94A.030	13, 14, 22, 23
RCW 9.94A.525	13, 15-17, 19-21
RCW 9.94A.525(21)	14, 15, 20, 23
RCW 9.94A.530	2
RCW 9.94A.533	2
RCW 9.94A.589	2, 13, 15-21, 23
RCW 9.94A.825	2

RCW 9A.36.021(1)(c)	2
RCW 9A.36.031(1)(d)	2
RCW 9A.36.041	14
RCW 9A.36.041(1)(2)	2

A. ASSIGNMENTS OF ERROR IN RESPONSE

1. The state's appeal is moot.
2. The trial court did not err in following the statutory definition of "prior offense" which the prosecution completely fails to discuss in its claim.
3. The prosecution's argument violates multiple basic rules of statutory construction.
4. Even if the prosecution's claim were properly brought, the rule of lenity applies and requires interpreting the statutes in respondent Mr. Stewart's favor.
5. The prosecution cannot use a reply brief to remedy the defects in its opening brief.
6. The trial court's decision was also correct and this Court may also affirm because the statutory provision for a "prior adult conviction for a repetitive domestic violence offense" did not apply.

B. ISSUES PRESENTED IN RESPONSE

1. Is the state's appeal moot because, even if this Court agreed with the prosecution's claims, there would be no change whatsoever in the sentence imposed?

Is it further moot because the entire sentence has been served and the court's decision in calculating the offender score will not affect future courts' decisions?

2. Should this Court decline to expend its valuable resources on deciding a moot appeal where the appellant has failed to argue that such review is proper or that this is one of the rare cases in which such review is justified?
3. Has the state failed to show that the trial court erred by following the definition of "prior conviction" set forth in the offender score statute where the state does not even mention that definition, let alone explain why it should be ignored?

Further, should this Court reject the prosecution's claim when that claim ignores fundamental rules of statutory construction by ignoring an entire provision of a statute, failing to give effect to all parts of a statute and failing to even recognize - let alone harmonize - conflicting statutory

provisions?

4. RCW 9.94A.589, the statute upon which the prosecution's entire claim depends, provides the rules for sentencing when a defendant is conviction of multiple current "offenses," but has been held not to apply to a misdemeanor.

Should this Court reject the prosecution's claim when the prosecution has not shown that the statute upon which it relies should apply even though Mr. Stewart was not being sentenced for multiple felonies but rather a single felony and a single misdemeanor?

5. Is affirmance required where the prosecution has failed to make crucial arguments essential to support its claim for reversal and is precluded from trying to fix those errors in its claim for the first time in reply?
6. Should the trial court's decision also be affirmed because the other requirements for applying the provision for a "repetitive domestic violence offense" increase in the offender score were not met?

C. STATEMENT OF THE CASE IN RESPONSE

1. Procedural Facts

Respondent Dwayne P. Stewart was charged by information with one count of second-degree assault (domestic violence) with a deadly weapon enhancement and one count of fourth-degree assault (domestic violence). CP 1-2; RCW 9.94A.530, RCW 9.94A.533, RCW 9.94A.825, RCW 9A.36.021(1)(c), RCW 9A.36.041(1)(2), RCW 10.99.020.

On October 31, 2012, the prosecution filed an amended information charging one count of third-degree and one count of fourth-degree assault, both charged as a "domestic violence incident." CP 5-6; RCW 9A.36.031(1)(d). That same day, Stewart entered an Alford¹ plea to

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

the third-degree count and a guilty plea to the fourth-degree count. 1RP 6-8²; CP 8-17, 100-104.

Judge Lee initially sentenced Stewart to serve nine months of confinement with credit for time served on the third-degree count and a concurrent sentence on the fourth-degree count that was 264 days with 94 days suspended. 1RP 68; CP 21-39, 95-99. A hearing on the motion to correct the judgment and sentence was held on December 21, 2012, after which Judge Lee held a resentencing and reimposed the same sentence on both offenses. 2RP 18-21; CP 76-88.

The prosecution appealed and has filed an opening brief on appeal, challenging the decision on the motion to modify. CP 91-92; see Brief of Appellant State (“BOAS”) at 1-13. This pleading follows.

2. Facts relating to offenses and entry of the pleas³

The allegation was that the Mr. Stewart and his visiting brother had gone out, Stewart had gotten drunk and, after that, he had gotten into an argument with his wife. CP 3-4. It was further alleged that he grabbed his wife by the throat (not causing injury), pushed his wife down and was at some point brandishing a small knife which ended up causing a “superficial” cut on his stepson’s hand during the altercation. CP 2-3. There was some question whether the stepson had assaulted Stewart with a

²The verbatim report of proceedings in this case consists of two volumes, which will be referred to herein as follows:

the proceedings of October 31, 2012, as “1RP;”
the proceedings of December 21, 2013, as “2RP.”

³This statement of facts is taken from the Declaration for Determination of Probable Cause for the purposes of this appeal only. Stewart entered an Alford/Newton plea to the third-degree assault and thus retains the right to challenge the prosecution’s version of events regarding that offense in any future proceedings.

baseball bat at some point during the fight. CP 2-3; 1RP 15-16.

On October 31, 2012, the parties appeared before Judge Lee for entry of the pleas. 1RP 2. The prosecutor told the judge that the state had agreed to file an amended information in exchange for the pleas, so that the new charges were for one count of third-degree assault (domestic violence) and one count of fourth-degree assault (also domestic violence). 1RP 2.

The prosecutor's written statement explaining the reduction in sentencing included information that the victim did not want Stewart to go to prison and that, based on photos taken by police, there "may have been some possible problems establishing all elements of assault 2" as originally charged. CP 7.

During the plea colloquy, the court noted the standard range for the third-degree, felony offense was 9-12 months, and that the prosecution had agreed to recommend a sentence of 9 months for the offense, based on the plea. 1RP 5-6. The recommendation was also for the sentence to run concurrent with a standard-range sentence of 364 days with 94 days suspended for the misdemeanor fourth-degree assault. 1RP 6-8.

The judge read Mr. Stewart's statement regarding the third-degree assault plea into the record, as follows:

I do not believe I am guilty of the charge of assault in the third degree. However. . . I have reviewed the evidence with my attorney and believe I could be found guilty of the charge of assault in the second degree. Hence I am electing to plead guilty to the Amended Information and take advantage of the plea offer as proposed by the State.

1RP 11.

Regarding the fourth-degree assault, Stewart's statement was as follows, "[o]n September 20, 2012, I assaulted C.L.D. by grabbing her. She was my wife." 1RP 12.

Counsel for Stewart noted that the incident was "very uncharacteristic" of Stewart, who had no prior domestic violence convictions on his record at all. 1RP 15. Now that he was convicted of the crimes, counsel explained, Stewart was worried about reconciling with his wife because "a phone call could get him arrested." 1RP 16. Counsel also told the court that Stewart had no other family in the area and was going to be "basically homeless" when he got out of jail. 1RP 16.

The court imposed the sentence both parties had requested, ordering 9 months of custody for the third-degree assault and 364 days with some of the time suspended for the fourth-degree assault. 1RP 18. A few moments later, the parties returned to the record and counsel said she thought that the offender score might be wrong. 1RP 18-19. The parties agreed to set a later hearing on the issue. 1RP 22. More facts regarding the subsequent motion are contained in the argument section, *infra*.

D. ARGUMENT IN RESPONSE

1. THE STATE'S APPEAL IS MOOT, THE STATE HAS NOT ARGUED TO THE CONTRARY AND IT CANNOT REMEDY ITS ERRORS FOR THE FIRST TIME IN REPLY

In its opening brief on appeal, the prosecution asks this Court to reverse the decision of the lower court in calculating the offender score for the felony third-degree assault. BOAS at 1-12. This Court should decline to address this issue, because the state's appeal is moot.

a. Relevant facts

At the plea hearing, it was established that the standard range for the felony third-degree assault was 9-12 months. 1RP 6-8. In exchange for the pleas, the prosecution had agreed to recommend 9 months in custody for the felony, to run concurrent with a sentence of 364 days with 94 days suspended for the misdemeanor. 1RP 6-8. After the prosecutor made that recommendation, the court ordered those sentences. 1RP 6-12.

The parties then went off the record but returned later, at which point counsel noted that she thought there might be a problem with the “scoring” for the felony third-degree assault. 1RP 19-22. The prosecutor had calculated the standard range and the plea had been entered based on the offender score as a “3” but counsel thought there was an error of law so that possibly the offender score should have been a “2.” 1RP 19-22. Because it would change the standard range, and because counsel thought that it was probably just a matter of mutual mistake, counsel asked the court to set a motion to correct the sentence for the following week. 1RP 20-21.

Counsel made it clear that Mr. Stewart did not want to withdraw his pleas but just to ensure the correct standard range was used. 1RP 21. Counsel also told the court she would withdraw the motion if the law was different than what it appeared and no mistake had been made. 1RP 21-22.

The prosecutor who was present at the hearing was just filling in for the original prosecutor. 1RP 22. He agreed to setting the hearing for later, to get the original prosecutor involved and allow the court to hear

argument on the motion. 1RP 22.

It would be December before the parties would finally appear in front of Judge Lee regarding the offender score. 2RP 1. By that time, Stewart had filed a motion, detailing his arguments as to why the offender score was wrong as a matter of law. CP 44-48. The prosecution had similarly filed a response, now arguing that the court should not address the issue and also arguing that the offender score was correct. CP 49-61.

At the hearing, the parties detailed their arguments, which all involved the question of whether the current misdemeanor fourth-degree assault should be counted as one point towards the offender score calculation for the current felony third-degree assault. 2RP 1.⁴ The score indicated in the plea had counted that misdemeanor and thus had been a “3,” but the defense argued that the law did not support counting the misdemeanor as a point, so that the correct offender score was a “2.” 2RP 1-15.

Judge Lee ultimately ruled that the offender score should have been a “2.” 2RP 17. The judge then heard arguments on the sentence she should impose as a result of the change in offender score. 2RP 18-21. The prosecutor urged the court to simply reimpose the same sentence as before, noting that the original sentence of 9 months was within the standard range for the offense when that range was calculated with a “2.” 2RP 19. Judge Lee agreed, and the prosecutor told the court she would fill out the new judgment and sentence exactly the same as the original except

⁴More detailed discussion of the arguments is contained in the second argument, *infra*.

for the “2” offender score and the amount of credit for time served. 2RP 20-21.

b. The state’s appeal is moot

The prosecution’s sole contention on appeal is that the trial court erred in calculating the offender score for the third-degree assault as a “2” rather than a “3.” BOAS at 6-12. This Court need not address this claim, because the issue - and the state’s appeal - is moot.

An issue is moot if this Court cannot provide “effective relief” to the parties by issuing a decision. See State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105, cert. denied sub nom, Gentry v. Washington, 516 U.S. 843 (1994); see also, In re Personal Restraint of Mines, 146 Wn.2d 279, 283, 45 P.3d 535 (2002). The reason our courts do not address such cases is because issuing a decision when issues are “purely academic” is a needless expense of scarce judicial resources. See Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 73, 442 P.2d 967 (1968). It is only in a “rare case” that the Court will decide an issue which is moot, and then only if the party seeking review convinces the Court that the issue involves “matters of continuing and substantial public interest” which should really be addressed by the Court. 74 Wn.2d at 73-74.

The prosecution is the appellant in this case. It is thus the prosecution’s burden to establish not only that error occurred but also that the error compelled reversal. See, e.g., State v. Sherman, 59 Wn. App. 763, 768, 801 P.2d 274 (1990).

But the prosecution has not even mentioned the word “moot,” let alone tried to establish that the issue of the determination of the offender

score in this case is a “matter[] of continuing and substantial public interest” which this Court should address. BOAS at 1-12.

Further, the issue the prosecution raises in its appeal is clearly moot. Where the issue on appeal is the calculation of the offender score and the entire sentence is served before the appeal is decided, the appeal is generally considered “moot” because the appellate court’s ruling can have no effect. See Gentry, 125 Wn.2d at 616. It is only if a sentencing decision will have some future or continuing effect that an appeal from a sentence is not moot. See, e.g., State v. Harris, 148 Wn. App. 22, 27, 197 P.3d 1206 (2008).

Here, there is no future force or effect of the sentencing court’s decision in calculating the offender score. As this Court has noted, a sentencing court’s offender score calculation is not binding on any future court, especially because of the constant changes in our sentencing laws. Harris, 148 Wn. App. at 27.

Further, Mr. Stewart has served the entire sentence and was released into the community. See, e.g., Supp. CP ___ (Report from treatment provider, 5/24/13, showing evaluation out of custody in April of 2013).

The state’s appeal is also moot because a ruling by this Court will not have any effect on the sentence imposed. The remedy for an improperly calculated offender score is remand for resentencing with a corrected score. See State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010). In its brief, the prosecution is asking this Court to order either “the original count I sentence reinstated or the matter remanded for

resentencing of count I with an offender score of 3.” BOAS at 12.

But neither remedy will change the sentence. When the parties thought the offender score was a “3,” the prosecutor requested nine months in custody on count I and 364 days on count II, to run concurrently. 1RP 14. And that is exactly what the trial court imposed. 1RP 17-18; CP 27-28, 35-38. And even after the court changed the offender score to a “2,” the court reimposed exactly the same sentence of nine months/364 days concurrently. 2RP 19-20; CP 76-88.

Indeed, the prosecutor specifically *asked* the court to reimpose the 9-month sentence, albeit while maintaining an objection to the offender score calculation. See 2RP 19.

Thus, Judge Lee clearly expressed her judgment that 9 months in custody was the proper sentence for the crime, regardless whether the offender score was a “3” or a “2.” Remand for resentencing will not have any effect on the sentence. The question of whether the prosecution is correct in its theories is therefore “purely academic,” as this Court’s decision will not change the sentence the trial court imposes at all.

The prosecution’s only issue on appeal is moot. The prosecution has failed to argue that the issue is an issue of “continuing and substantial public interest” upon which this Court should rule - a prerequisite to such review. BOAS at 1-12.

And the prosecution is precluded from correcting its failure by making the argument for the first time in reply. RAP 10.3(c); State v. Goodin, 67 Wn. App. 623, 628, 838 P.2d 135 (1992), review denied, 121 Wn.2d 1019 (1993).

This Court should decline to address the issue presented by the prosecution, as it is moot.

2. THE TRIAL COURT DID NOT ERR IN APPLYING THE LEGISLATIVE DEFINITION OF “PRIOR CONVICTION,” THE PROSECUTION’S ARGUMENTS DO NOT WITHSTAND REVIEW AND THERE ARE MULTIPLE ALTERNATIVE GROUNDS UPON WHICH TO AFFIRM

Even if the prosecution had made any showing to establish that this Court should rule on the prosecution’s claim, the state still would not be entitled to relief, because the prosecution is simply wrong when it declares that the trial court erred in calculating the offender score below.

As a threshold matter, in general, a court’s decision to impose a standard range sentence cannot be appealed. See State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). However where, as here, a claim is made that the standard range was calculated due to an error of law, the issue is properly before the Court and the Court applies the de novo standard of review. See State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

Applying such review, this Court should affirm. Not only did the trial court follow the relevant law but the prosecution’s claims to the contrary ignore the very definition of “prior conviction.” Further, the prosecution’s arguments violate several fundamental rules of statutory construction. In addition, the statute the prosecution seeks to have this Court apply does not, especially because any ambiguity must be resolved in Mr. Stewart’s favor. Finally, the trial court’s decision may be affirmed on several alternative grounds.

a. Relevant facts

A few moments after the judge imposed the 9-month/364 day sentences that both parties had requested, the parties came back on the record and counsel noted that she thought there might be a problem with the “scoring” for the third-degree offense. 1RP 19-22. Counsel explained that she had relied on the prosecutor’s calculation of the offender score as a “3” rather than a “2” for the third-degree assault, but it appeared that the prosecutor had counted the current fourth-degree assault misdemeanor as a point, something counsel thought was incorrect. 1RP 19-22. Mr. Stewart did not want to withdraw his pleas but counsel thought that the score was simply an error that both parties could agree to fix. 1RP 21-22. She asked the court to set the case on for a hearing on the issue the following week, and the prosecutor agreed. 1RP 21-22.

At the subsequent hearing in December, counsel argued that the offender score should be a “2” rather than a “3” as the parties had originally believed. 2RP 1. The difference was in counting the current fourth-degree assault, a misdemeanor in the offender score. 2RP 1. The question was whether the current misdemeanor was an “adult prior conviction for a repetitive domestic violence offense, as defined in RCW 9.94A.030,” which was pled and proven after August 1, 2011, so that it should count as one point in the offender score for the felony charge. 2RP 2-3.

Counsel pointed to the statutory definition of a “prior conviction” contained in the offender score statute as “a conviction which exists before the date of sentencing for the offense for which the offender score is being

computed.” 2RP 2. Because the misdemeanor did not exist before the sentencing on the felony and was instead a current offense, counsel argued, that current fourth-degree assault did not meet the definition of “prior conviction” for the purposes of counting it towards the felony offender score. 2RP 2.

For its part, the prosecution was now questioning whether the court should address the issue. 2RP 3, 10. The prosecution also relied on RCW 9.94A.589, a sentencing statute which indicated that current convictions are counted the same as prior convictions in some cases. 2RP 3, 10.

In ruling on the issue, Judge Lee noted that she had read all of the relevant statutes “multiple times” and that she could “see both sides’ arguments,” depending on the order in which the statutes were read. 2RP 17. She concluded, however, that the specifics of RCW 9.94A.525 “as to whether the assault 4 DV actually counts as a point or not” controlled. 2RP 17. The judge held that the current misdemeanor offense was not a “prior” adult conviction for “a repetitive domestic violence offense, as defined in RCW 9.94A.030,” and concluded that the offender score should be a “2” rather than a “3.” 2RP 17.

At the resentencing based on the change in offender score, the court reimposed the same 9-month sentence it had previously imposed, at the prosecutor’s request. 2RP 19-21.

- b. The trial court followed the law, the prosecution’s arguments ignore both plain statutory language and the rules of statutory construction and there are several alternate grounds upon which to affirm

Even if the state’s appeal was not moot, the prosecution would not

be entitled to relief. The state's whole appeal is based on the claim that the trial court erred in finding that the current misdemeanor conviction for fourth-degree assault was not a prior adult conviction for a "repetitive domestic violence offense" under RCW 9.94A.525(21). BOAS at 1-13.

In asking this Court to agree, however, the prosecution ignores crucial statutory language and the rules of statutory construction. Further, the prosecution is applying a statute which it does not - and cannot - show applies.

To understand the flaws in the prosecution's claim, it is necessary to discuss the relevant law. Assuming for argument's sake that the third-degree conviction was for a "felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven,"⁵ the offender score statute for such a felony, RCW 9.94A.525(21), provides, in relevant part:

Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011.

RCW 9.94A.525(21)(c).

RCW 9.94A.030(41) defines "repetitive domestic violence offense" as including not only felonies but also a "[d]omestic violence assault that is not a felony offense under RCW 9A.36.041." RCW 9.94A.030(41). Thus, even a misdemeanor conviction - like the fourth-degree assault here - may increase the offender score on a current domestic

⁵Whether the third-degree assault meets this definition is discussed in more detail *infra*.

violence felony, provided that misdemeanor is an “adult prior conviction for a repetitive domestic violence offense.”

On appeal, the prosecution’s argument is that the *current* misdemeanor fourth-degree assault should be deemed a “prior adult conviction for a repetitive domestic violence offense” under RCW 9.94A.525, the offender score statute, because of the operation of another statute, RCW 9.94A.589(1)(a). BOAS at 1-12. The trial court found that “current” does not mean “prior” and the state asks this Court to overturn that ruling. BOAS at 1-13.

But the prosecution has neglected to mention - let alone discuss - the crucial, clear definition of “prior conviction” contained in the *same statute providing for the offender score calculation* - RCW 9.94A.525. In addition to setting forth the provision for the counting of a misdemeanor as a point if it is for a “prior adult conviction for a repetitive domestic violence offense,” RCW 9.94A.525 specifically defines the very term the prosecution claims the trial court erred in defining:

A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.

RCW 9.94A.525(1) (emphasis added).

The prosecution’s failure to discuss the Legislative definition of “prior conviction” is telling. It is a fundamental rule of statutory construction that a court will look at **all** relevant language in a statute, giving effect and meaning to each word. State v. Roggenkamp, 153

Wn.2d 614, 621, 106 P.3d 196 (2005). Yet the prosecution is effectively asking this Court to completely ignore the language of RCW 9.94A.525(1), the Legislature’s expression of what a “prior conviction” should be where, as here, the offender score provisions of the same statute apply.

Further, if a statute is plain on its face, this Court will give effect to that language, giving meaning to each word. See, e.g., Roggenkamp, 153 Wn.2d at 621. And as this Court has recently noted, the Court will assume the Legislature means what it says. See, State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000).

Here, the Legislature used plain language in defining the term “prior conviction” in RCW 9.94A.525(1). A prior conviction for the purposes of that statute is **“a conviction which exists before the date of sentencing for the offense for which the offender score is being computed.”** RCW 9.94A.525(1) (emphasis added). The current misdemeanor conviction did not meet that definition. The trial court did not err in so holding.

Indeed, even if the language was not plain, looking at another part of the statute, the Legislature’s intent that a “prior” conviction for the purposes of setting the calculations for an offender score under that statute rather than RCW 9.94A.589 are made clear. The “prior conviction” definition, was added in 1986, to the predecessor of the current RCW 9.94A.525. See State v. Garrison, 46 Wn. App. 52, 56, 728 P.2d 1102 (1986). Prior to that time, there was confusion about the definition of a “prior conviction,” so that in Garrison, the Court was asked to address

whether crimes committed before the current offense but not adjudicated until after it should be deemed “prior convictions” for purposes of sentencing. Garrison, 46 Wn. App. at 54.

And indeed, the intent of the Legislature on this point is proven further by other language of the statute. Under RCW 9.94A.525(2)(f), “[p]rior convictions for a repetitive domestic violence offense” will not be counted as 1 point and will instead “wash out” of the offender score “if, since the last date of release from confinement or entry of judgment and sentence, the offender had spent ten consecutive years in the community” without a conviction. RCW 9.94A.525(2)(f). It would be nonsensical to refer to a “[p]rior conviction” as having been ten consecutive crime-free years before the current conviction if the definition of “prior conviction” was intended to include current convictions, as the prosecution here claims.

The trial court did not err in following the relevant statutory definition of “prior conviction” and the prosecution’s claim, made without even mentioning that definition or applying any of the relevant, basic rules of statutory construction, fails.

There is another fatal flaw in the prosecution’s claim that RCW 9.94A.589 controls. That statute, titled “[c]onsecutive or concurrent sentences,” is part of the Sentencing Reform Act (SRA), the Act providing the sentencing scheme for felonies in this state. See RCW 9.94A.010; In re the Personal Restraint of Van Delft, 158 Wn.2d 731, 739, 147 P.3d 573 (2006), overruled in part and on other grounds by, Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009).

And the SRA does not apply to misdemeanors. Van Delft, 158 Wn.2d at 739; see State v. Whitney, 78 Wn. App. 506, 897 P.2d 374, review denied, 128 Wn.2d 1003 (1995). Nor does RCW 9.94A.589. VanDelft, 158 Wn.2d at 739 n. 4; see State v. Langford, 67 Wn. App. 572, 837 P.2d 1037 (1992), review denied, 121 Wn.2d 1007, cert. denied, 510 U.S. 838 (1993).

Thus, in Langford, the Court rejected the defendant's argument that the predecessor to RCW 9.94A.589 applied and mandated specific procedures when a trial court ran a sentence for a misdemeanor concurrent to sentences for felony convictions. 67 Wn. App. at 587. "[S]ince the Sentencing Reform Act applies to felony sentences only," the Court held, the predecessor statute to RCW 9.94A.589 did not apply and could not "limit the discretion of the judge." 67 Wn. App. at 588.

It is against this backdrop that RCW 9.94A.589 must be read. That statute provides, in relevant part:

whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. PROVIDED, that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then the current offenses shall be counted as one crime.

RCW 9.94A.589. It follows that, when RCW 9.94A.589 refers to sentencing "for two or more current offenses," it is referring to the only offenses for which the SRA applies - felonies. Here, Mr. Stewart was being sentenced under the SRA for one current offense which is a felony, not "two or more." The fourth-degree misdemeanor was a misdemeanor. The two sentencing schemes "are distinct." Harris v. Charles, 171 Wn.2d

455, 464, 256 P.3d 328 (2011). Indeed, a sentencing court has far more discretion in imposing a misdemeanor sentence than it does with felonies. See RCW 9.92.080(2) and (3).

Even if the prosecution had attempted to show that the provisions of RCW 9.94A.589 should apply where the trial court is imposing a sentence for a single felony and a single misdemeanor, the issue then becomes one of conflicting statutes and ambiguity. It is a basic rule of statutory construction that “[t]he court must reconcile apparently conflicting statutes and give effect to each of them, if this can be achieved without distortion of the language used.” State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). Further, where the Court is construing the language of penal statutes, the “rule of lenity” requires the Court to resolve any statutory ambiguities in favor of the defendant, absent legislative intent to the contrary.” See In re Sietz, 124 Wn.2d 645, 652, 880 P.3d 34 (1994).

Here, even if the Court were to ignore the other defects in the prosecutor’s argument, at best the interplay of RCW 9.94A.525 and RCW 9.94A.589 is confusing. In addition to ignoring the relevant statutory definition of “prior conviction” in RCW 9.94A.525(1), the prosecution fails to mention other language in that statute which describes the Legislature’s opinion of how that statute and RCW 9.94A.589 should work when both apply. Under RCW 9.94A.525(1), convictions

entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.

Thus, in defining “prior offense” in RCW 9.94A.525(1), the

Legislature also made it clear that current offenses are not converted to “prior” offenses for the purposes of calculating the offender score when RCW 9.94A.589 applies. Instead, the Legislature chose to deem them “other current offenses” for the purposes of RCW 9.94A.589.

But “other current offenses” are treated the same as “prior” offenses and all are counted under RCW 9.94A.589, which provides:

whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score. PROVIDED, that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then the current offenses shall be counted as one crime

Thus, if RCW 9.94A.589 applies, the sentence range is calculated as if all convictions are prior convictions, regardless whether they would be otherwise be deemed “current” or “prior.” But under RCW 9.94A.525(1), only a conviction which existed prior to the sentencing for the current conviction is defined as a “prior conviction,” and such convictions are specifically deemed “current” for the purposes of RCW 9.94A.589.

Thus, after plainly defining “prior conviction” in RCW 9.94A.525(1), and setting forth a requirement that a misdemeanor be an “adult prior conviction for a repetitive domestic violence offense” before it can increase the offender score under RCW 9.94A.525(21), the Legislature then declared that a conviction meeting the definition of “prior conviction” under RCW 9.94A.525(1) will be treated as an “other current offense” if RCW 9.94A.589 applies. But an “other current offense” is treated the same as a prior offense under RCW 9.94A.589 for the purposes of calculating the offender score.

The prosecution cites only the language of RCW 9.94A.589 and declares that, because of that statute, the current fourth-degree assault must count as a prior conviction and, by extension, an adult prior conviction for a repetitive domestic violence offense. This interpretation, however, requires the Court to ignore the plain language of RCW 9.94A.525(1), defining “prior conviction” for the purposes of determining the offender score. If there is a possibility to harmonize the statutes, it would be to declare that RCW 9.94A.525(1) defines “prior conviction” for the purposes of all of the provisions of that statute, while the more general provisions of RCW 9.94A.589 applies only to felony convictions. That is the only way to make sense of the two statutes, honor the language of RCW 9.94A.525(1) and ensure that the apparent intent of the Legislature is given effect. Further, this Court must resolve any ambiguity in application of a criminal sentencing statute in the defendant’s favor. In re Sietz, 124 Wn.2d at 652.

Of course, this Court need not address the ambiguity which exists when RCW 9.94A.589 applies, because that statute only applies when there are multiple current felonies, not when there is a single felony and a single misdemeanor.

The state’s claims of error on appeal should be rejected. The state has failed to discuss the crucial definition of “prior conviction,” contained in the relevant offender score statute, even though that definition is highly relevant and supports the decision the trial court made. Further, the state’s entire argument rests on application of a statute which the prosecution fails to show applies.

The trial court did not err in following the definition of “prior conviction” contained in the offender score statute and in concluding that the current fourth-degree assault conviction did not meet that definition. The prosecution has not met its burden of showing to the contrary, and this Court should so hold.

Finally, there are several other grounds upon which this Court can affirm. This Court may affirm on any grounds supported by the record. See State v. Young, 152 Wn. App. 186, 189 n. 5, 216 P.3d 449 (2009). And this includes grounds the trial court did not consider. See State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

Here, there are many such grounds. First, the offender score enhancement requires that the prior adult conviction is for a “repetitive domestic violence.” As the Supreme Court has declared, giving effect to each word of the statute is “a requirement of one of the most basic rules of statutory construction.” State v. Bauer, 92 Wn.2d 162, 595 P.2d 544 (1979). There is no definition of frequency required for a domestic violence offense to be “[r]epetitive.” RCW 9.94A.030(41). At the least, however, for something to be “repetitive” it must have occurred more than once. See, e.g., Matter of Lalande, 30 Wn. App. 402, 405, 634 P.2d 895 (1981) (noting that litigation is “repetitive” in part if the issues in it have been adjudicated at least once).

The charges in this case arose from the very same incident, and Mr. Stewart has no prior convictions involving domestic violence. The current fourth-degree assault was not a “repetitive” domestic violence offense, and the trial court’s decision may therefore be upheld on that ground.

The trial court's decision may also be upheld on the grounds that the requirements of RCW 9.94A.525(21) were not met for either the felony or misdemeanor assault in order for the misdemeanor assault to be counted as a point under that provision. Both counts were charged as involving "a domestic violence incident **as defined in RCW 10.99.020.**" CP 1-2 (emphasis added). RCW 9.94A.525(21), however, specifically requires that a prior conviction only qualifies "where domestic violence **as defined in RCW 9.94A.030,** was plead and proven after August 1, 2011." RCW 9.94A.525 (emphasis added). Thus, yet another prerequisite to counting the misdemeanor did not apply, because neither that count nor the felony count was properly charged.

The prosecution's claim does not withstand review. The basic rules of statutory construction, the language the prosecution fails to discuss and the fact that RCW 9.94A.589 does not apply unless there are multiple current felony offenses are all fatal to the prosecution's claim. This Court should so hold or should affirm on the other grounds presented.

E. CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the trial court below.

DATED this 12TH day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Response Brief to opposing counsel at the Pierce County Prosecutor's office, via this Court's portal upload and to Mr. Dwayne Stewart, in care of Christine Stewart, P.O. Box 1184, Franklin, LA. 70538.

DATED this 12th day of August, 2012.

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