

NO. 44533-6-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JIMMY PERKINS,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Did the prosecutor commit misconduct that was flagrant and ill-intentioned, and did it prejudice the appellant despite the trial court's instruction to disregard his statements regarding how the appellant's behavior during cross examination made him feel?
2. Was it error for the prosecutor to discuss the appellant's behavior during his testimony?
3. Did the prosecutor shift the burden of proof of self-defense when he argued the reasonable person standard as directed by the language of the defense?
4. Did the prosecutor make an improper argument when he argued against the reasonableness of the appellant's actions from the jury instructions?
5. Given the amount of evidence that came out during trial against the appellant, did the prosecutor's improper comment about defense counsel alter the outcome of the case?
6. Was it error for the trial court to add a point to the appellant's offender score when the crime was committed while he was in custody on probation violation and agreed to his score and criminal history?

II. SHORT ANSWERS

1. No. While irrelevant to the determination of the case, the comments were based on the appellant's own behavior during cross examination and the prosecutor moved away from any

personal invocation following the trial court's admonishment to the jury.

2. No. It is permissible for parties to comment upon any witness's behavior during their own testimony.
3. No. Self-defense is a defense rooted in the idea that the jury is to consider what a reasonable person would do in the defendant's situation, knowing all the attendant circumstances.
4. No. The prosecutor based his arguments on the reasonableness standard set forth in the jury instructions.
5. No. While improper to disparage the role of defense counsel, it is not reversible error because the comment was rooted in the evidence that came out at trial and it was neither flagrant nor ill-intentioned.
6. No. Because the appellant was in custody not for a new crime, but for violations of his community custody, he was still on community custody at the time he committed the current crime.

III. FACTS

John Mayfield was in custody at the Cowlitz County Jail at the same time Jimmy Perkins was serving a Department of Corrections (DOC) sanction. They were both housed in A pod of the jail and shared the same bunkhouse. RP 58. There were call buttons available in the pod for inmates to call jailers if they felt their safety was at risk. RP 153-54.

There was tension between the two men. RP 29-30. The two men had a disagreement over perceived liberties Perkins took with Mayfield's commissary items. RP 30, 96. Mayfield told Perkins to leave him alone. RP 190.

Following the disagreement, Mayfield had concern Perkins had tampered with his water bottles. He took the water bottles out of his bunkhouse to throw away. RP 97. Perkins was near the garbage can and started to hit Mayfield when he approached. RP 34-36, 94, 98. Perkins sucker punched Mayfield, RP 36, 208. Mayfield eventually placed Perkins in a chokehold to protect himself. RP 36, 38, 98-101.

The two men were separated. Mayfield then proceeded to walk around the perimeter of the pod to blow off steam. RP 104. This happened for nearly 20 minutes. RP 52. At one point, Perkins motioned for Mayfield to enter the bunk house to fight. Exhibit 1 RP 108. Perkins yelled to Mayfield: "shut up or take care of it." RP 201. Mayfield declined and continued to walk around the pod.

Perkins then took the fight to Mayfield. Exhibit 1; RP 68-69. He took off his slippers, an act typically performed by inmates who intend to fight in order to gain traction on the floor, and ran at Mayfield before taking a fighting stance. RP 68, 152-53. Every moment of this was

captured on video. Exhibit 1, 61-68, 99-110, 152-54. Perkins then punched Mayfield multiple times in the left side of his face before they both ended up on the floor. RP 108-109.

Jailers then entered the pod and separated the two men. RP 57-64. They found an injured and dazed Mayfield attempting to scoot away from Perkins. RP 65. Exhibit 2, 4, 6, 151. Mayfield suffered a fracture to his check that required surgery. Exhibit 2; RP 121, 165-70, 181-83.

Perkins was tried and convicted of Assault in the second degree. He was sentenced to 62 months and 18 months community custody. RP 372. His offender score included one point because he committed the assault while on community custody. Perkins did not object to his criminal history nor did he object to his offender score at the time of sentencing. In fact, he stipulated to his score. RP 368-69.

IV. ARGUMENT

I. PROSECUTORIAL MISCONDUCT

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Magers*, 164 Wash.2d 174, 191, 189 P.3d 126 (2008); *State*

v. Warren, 165 Wash.2d 17, 26, 195 P.3d 940 (2008). The defendant establishes prejudice by proving there is a substantial likelihood the instances of alleged misconduct affected the jury's verdict. *Magers*, 164 Wash.2d at 191, 189 P.3d 126.

Where a defendant objected to an alleged instance of misconduct, the court should evaluate the trial court's ruling for abuse of discretion. *State v. Gregory*, 158 Wash.2d 759, 809, 147 P.3d 1201 (2006). The failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994), *cert denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995); *accord State v. Fisher*, 165 Wash.2d 727, 747, 202 P.3d 937 (2009).

A prosecutor does have wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wash.2d 438, 448, 258 P.3d 43 (2011). Still a prosecutor must seek convictions based on probative evidence and sound reason. *State v. Casteneda-Perez*, 61 Wash.App. 354, 363, 810 P.2d 74 (1991). In making his case to a jury, a prosecutor should not use arguments calculated to inflame the passions or

prejudices of the jury. *State v. Brett*, 126 Wash.2d 136, 179, 892 P.2d 29 (1995).

1. The prosecutor's comments were based on the appellant's behavior during testimony.

References to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct. *State v. Belgarde*, 110 Wash.2d 504, 507-08, 755 P.2d 174 (1988).

While the prosecutor's reference to how the appellant's behavior made him feel during his cross examination was irrelevant to the trial, the appellant's behavior was not. Indeed, the State and defense were both allowed to make arguments based on in-court behavior. *State v. Gregory*, 158 Wash.2d 759, 860, 147 P.3d 1201 (2006). Jury Instruction 1, as read to the jury by the trial court states, in relevant part:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; *the manner of the witness while testifying*; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that

affect your evaluation or belief of a witness or your evaluation of his or her testimony. (emphasis added).

The appellant improperly assumes that because his behavior in court was the type that would suggest he had violent tendencies it should not have been discussed. Had the appellant not acted aggressively during cross examination his behavior would not have been discussed, but he did. The appellant cannot act in a way that places him in peril and then cry foul.

Despite video evidence that showed the appellant run across the common area of the jail pod and attack the victim, the appellant claimed he did so in self-defense. The state had to prove beyond a reasonable doubt that he did not act in self-defense. Here, the prosecutor argued from the aggressor instruction. Instruction 14. The instruction states a defendant cannot claim self-defense if he started the fight:

No person may, by any intentional act, reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, the self-defense is not available as a defense.

Arguments must be taken in the context and circumstances of the entire trial and record. Magers, 164 Wash.2d at 191, 189 P.3d 126. The

appellant highlights only those areas of the record that would support his contention and not the entire context of the argument. The entire relevant portion of that argument went thus:

The point of everything is that the defendant is the aggressor. He was and is the aggressor. You did see his temper. You did see how quickly he was to rise to anger, and that is suggestive of someone who's going to go attack someone. It is very suggestive of someone who is going to attack someone. When he's caught in certain areas where he's unable to change his story or talk his way out of it, the defendant was—quickly resorted to flashing anger, quickly. And if that didn't work for him, then he used diverting tactics. RP 346.

This argument was the same as the argument made prior to the prosecutor's attestation of his own fear during cross-examination. The prosecutor argued that because the appellant bided his time, motioned for Mayfield to come to him, calculated the right time to was the aggressor and attacker, and that he bided his time, calculating the right time to jump Mayfield, he was the aggressor in the attack and not entitled to claim self-defense. The prosecutor used the appellant's threatening nature during his testimony not to inflame the passions of the jury, but as an example of the level of calculation he took before attacking John Mayfield.

I thought I was going to be attacked, and did I? Did I jump over that box and punch him? I didn't. I was a little concerned, but I didn't punch him. Twenty minutes he waited as John Mayfield walked around. RP 340.

The statement was made within the context of the aggressor argument, not in the context of whether the jury should convict based on the prosecutor's feelings. The court instructed the jury that the prosecutor's feelings were to be disregarded and no further mention of them was made. This returned the jury's attention to the primary argument—that of whether or not the appellant was the aggressor. Enough evidence showed that indeed he was.

Still, the appellant argues that the court should have ordered the jury to disregard any reference to the appellant's demeanor even though the jury instructions are clear they can use such behavior when considering the credibility of the testimony and the evidence given as a whole. It is the appellant's burden to show there was a substantial likelihood the instance of alleged misconduct affected the jury's verdict. *Magers*, 164 Wash.2d at 191, 189 P.3d 126. He has failed to do so.

2. The prosecutor's comments were based on the appellant's behavior during his testimony and were not intended to inflame the prejudice of the jury.

It was not error for the prosecutor to comment upon the credibility of the appellant's testimony. Nor was it error to discuss his behavior during that testimony.

It is error to submit evidence to the jury that has not been admitted at trial. Consideration of any material by the jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced. *State v. Pete*, 152 Wash.2d 546, 555, 98 P.3d 803 (2004); *In Re Glassmann*, 175 Wash.2d 696, 705, 286 P.3d 673 (2012)(where the prosecutor presented copies of the defendant's booking photos that had not been admitted into evidence for the jury to review when considering the defendant's guilt was error); *State v. Rinke*, 70 Wash.2d 854, 862, 425 P.2d 658 (1967)(it was prejudicial when a newspaper editorial and cartoon critical of court decisions and liberal probation policies was inadvertently sent to the jury).

Comments that encourage the jury to render a verdict on facts not in evidence are improper. *State v. Stover*, 67 Wash.App. 228, 230–31, 834 P.2d 671 (1992). A prosecutor has “no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” *State v. Case*, 49 Wash.2d 66, 71, 298 P.2d 500 (1956). Reversal is not required, however, unless there is a substantial likelihood that the improper comments, remarks, or argument affected the jury's verdict. *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997).

In a discussion of the video (Exhibit 1) that was admitted into evidence, the prosecutor pointed to the discrepancies within the appellant's story and what was shown to happen during the live recording of the event. RP 297-305. In one portion of that argument, the prosecutor discussed the appellant's actions during cross-examination.

And this is a key discrepancy—he said that John was in this corner, and yesterday I had him point out on this map that John was in this corner. John was in this corner when he kicked off his slippers. And John was in this corner, getting in his stance to fight him. And here's another thing. When I had him pinpoint it on that, and he couldn't get out of that statement, as a person who knew he was caught in that statement, he wanted to divert your attention. He wanted you to think, "oh, my goodness. He was really being intimidated by John Mayfield." So, what does the defendant do? "Tell your client, tell your victim to quit intimidating me." And what did you guys all do? You all turned and looked at the doors. You looked out there, and you forgot for a brief moment what he was saying. RP 302.

Attorneys are permitted to discuss the behavior and actions of witnesses during their testimony at trial. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *Gregory*, 158 Wash.2d at 860, 147 P.3d 1201. Indeed, the jury was advised by Instruction 1 that they could consider those aspects of testimony in their deliberations of the case.

When a defendant chooses to testify, a jury must be able to consider his credibility. If, as the United States Supreme Court held in *U.S. v. Robinson*, 485 U.S. 25, 33, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another, the State should be permitted to discuss a defendant's behavior as he testified during trial. This is especially so if the defendant impugns the credibility of the complaining witness as often as the appellant did in the present case.

Here, the prosecutor did not give an opinion on the appellant's credibility. Neither did the prosecutor discuss issues and events outside those that took place during trial. Nowhere in the record is it suggested that the appellant took exception with the prosecutor's characterization of his behavior as diversion tactics. Consequently, appellant has failed to show that the comments were either improper or resulted in any prejudice.

3. Self-defense is viewed through the reasonable person standard.

It is a question for the trial court to address whether a defendant has presented evidence of self-defense. *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997). To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-

defense. Once that has been done, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *Walden*, 131 Wash.2d at 473-74. The degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *Walden*, 131 Wash.2d at 747, 932 P.2d 1237.

While the prosecutor did argue that alternatives to assault existed for the appellant to use, as came out in evidence, he did not mischaracterize the law of self-defense. Self-defense is viewed through the reasonably prudent person standard, a permissible area for argument. *Walden*, 131 Wash.2d at 473-74, 932 P.2d 1237. Appellant's complaint would remove any ability for the state to argue against the reasonableness of the force used or the option of self-defense at all. Essentially, appellant contends the state should not be allowed to argue against self-defense once it has been alleged.

If the state is held to prove the absence of self-defense beyond a reasonable doubt it must be allowed to discuss the reasonableness of the force used and whether that force was actually used in self-defense. Indeed, instruction 13, as read to the jury, states clearly that:

The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

This is the argument the prosecutor made as he pointed out all the options and all the circumstances available or known to the appellant at the time of the assault. It was a permissible argument on the issue of whether the appellant acted reasonably within that situation and it did not shift the burden of proof.

4. The prosecutor based his arguments against self-defense on the reasonableness standard.

The State must prove that the defendant did not act in self-defense beyond a reasonable doubt. This can be done by any number of ways, but always done through argument of the evidence before the jury and the reasonable person standard. *Walden*, 131 Wash.2d at 473-74, 932 P.2d 1237. A defendant may claim self-defense, but his actions and the degree of force he uses will always be limited to “what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” *Walden*, 131 Wash.2d at 474, citing *State v. Bailey*, 22 Wash.App. 646, 650, 591 P.2d 1212 (1979).

The appellant again contends that the State is not allowed to argue its theory of the case by making reasonable inferences from the evidence and the jury instructions. A prosecutor does have wide latitude to argue reasonable inferences from the evidence. *Thorgerson*, 172 Wash.2d at 448, 258 P.3d 43.

Here, the prosecutor discussed the differences between unfettered use of violence and the justified use of violence for self-defense. The prosecutor argued:

Now, his (Mayfield) being attacked—that is a really, really important distinction here yet, again, and this whole idea of what’s self-defense all about. That the defendant had to have reasonable grounds for believing that he is being attacked and to stand his ground. Is being attacked. That’s the present tense. Right then, right there, he gets to defend himself. Not something in the future, not something an hour and a half later. Then. Right then, right now, present tense—is being. That’s what has to be going through his brain. Is being attacked. That’s what justifies his right to go and beat up John Mayfield.

You saw the video. Was he being attacked? No. What he did was—he kicked off his slipper, went around these tables, and went at John Mayfield who was not expecting him. The person being attacked was John Mayfield, and John Mayfield was allowed to pick the defendant up and put him on the ground. He was allowed to do that...

The defendant is not allowed to kick off his slippers and track him (Mayfield) over this area and fight him. He’s not allowed to do it. Because he is not being attacked. He is the attacker.

The prosecutor argued the law as provided to the jury in the jury instructions. In fact, the language the appellant complains of was taken directly from Instruction 14A, which instructs the jury that a person has the right to stand his ground and defend himself if he is in a place where he has a right to be. But that instruction does not provide a defendant unrestricted license to beat people up simply because he is in a place he has a right to be. Rather, the instruction clearly states that a defendant can use lawful force if he “has reasonable grounds for believing that he is being attacked.” The prosecutor directed the jury’s attention to the word “is” because it was important to understand every nuance of self-defense. The prosecutor made clear that the defendant had to reasonably believe that he was being attacked at that very moment, presently, as “is” is the third person singular, present tense of the verb “to be.”

This was a permissible argument and did not shift the burden. Moreover, because the appellant failed to object to the remarks, any errors he complains of are waived unless he is able to establish the remarks were so flagrant and ill-intentioned they caused an enduring and resulting prejudice that an instruction to the jury cured the prejudice. *Thorgerson*, 172 Wash.2d at 443, 258 P.3d 43. The appellant has not shown that the prosecutor’s argument was flagrant and ill-intentioned. Nor

has he shown that permissible argument was error. Consequently, his claim fails.

5. The prosecutor's improper comment is not reversible error because it was not flagrant and ill-intentioned.

It is improper for a prosecutor to make a disparaging comment about the role of defense counsel or to impugn defense counsel's integrity. *State v. Thorgerson*, 172 Wash.2d 438, 451, 258 P.3d 43 (2011). But if the improper comments can fairly be said to focus on the evidence before the jury, misconduct is unlikely to have occurred. *Thorgerson*, 172 Wash.2d at 451.

In rebuttal closing, the prosecutor discussed the appellant's behavior on the stand and the implications it had on his credibility. When he made these comments he also discussed the behavior of defense counsel. The state made the following comments:

When he's caught in certain areas where he's unable to change his story or talk his way out of it, the defendant quickly resorted to flashing anger, quickly. And if that didn't work for him, the he used diverting tactics. That's what his defense counsel did here earlier. And that's what they get paid to do. Come here and divert your attention from what really happened. RP 346.

The diversion referred to by the prosecutor happened during a particularly incriminating moment on cross examination of the appellant.

The appellant had just admitted Mayfield did not attack him. When that happened he attempted to distract both the prosecutor and the jury by claiming the victim, John Mayfield, was standing outside the courtroom intimidating him. RP: 247-54. The appellant interrupted to the prosecutor's questioning to state:

APPELLANT: why is your witness trying to intimidate me, your honor, now by standing outside that window and staring at me. Oh, now, he's walking away. RP 253

The court instructed the appellant to answer the prosecutor's question, but before he could do so his counsel interrupted in much the same way. RP 254.

DEFENSE COUNSEL: Pardon me, Your Honor, I'm going to—is Mr.—is that Mr. Mayfield out there?

APPELLANT: That's Mr. Mayfield, yes, staring at me.

PROSECUTOR: I don't see him anywhere.

DEFENSE COUNSEL: Well, you don't, Your Honor—I mean, but I just want to double-check on it, please.

TRIAL COURT: Continue with the questioning. I—I've got control of the courtroom. I'm fine, thank you.

The prosecutor then returned to questioning the appellant. He asked the appellant about when the boiling point occurred. The appellant agreed that it occurred when Mayfield was doing nothing more than

walking around the jail pod. RP: 255. It was this instance to which the prosecutor referred during his closing argument and now the issue here.

The prosecutor's comment about defense counsel's role was improper. *Thorgerson*, 172 Wash.2d at 451. However, the improper comment was not likely to have altered the outcome of the case.

Because the appellant failed to object to the comments made by the prosecutor so they should be reviewed to determine whether the appellant showed that they were flagrant and ill-intentioned and caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Russell*, 125 Wash.2d at 86, 882 P.2d 747.

In *Thorgerson*, where the prosecutor planned in advance a closing argument purposefully intended to disparage the role of the defense counsel, the Supreme Court held that while the prosecutor went beyond the bounds of acceptable behavior his comments did not likely alter the outcome of the case. 172 Wash.2d at 452. There, the prosecutor planned an argument, evidenced by his cross examination and failure to object to specific, inadmissible evidence that referred to defense counsel tactics as "sleight of hand" and "bogus." 172 Wash.2d at 451-52. Despite the prosecutor's own tactics and remarks, the Court held that the victim's testimony was consistent throughout the trial and with other witnesses,

and the improper remarks told the jury to disregard evidence the prosecutor deemed irrelevant. 172 Wash.2d at 452; *See Also Warren*, 165 Wash.2d at 29-30, 195 P.3d 940 (though improper for prosecutor to describe defense counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing the comments were not flagrant and ill-intentioned an instruction could not have cured them).

Here, the prosecutor's comments were limited to unexpected events that occurred during the appellant's testimony, and were not part of a pre-planned argument. Both appellant and defense counsel participated in the actions taken to direct the jury's attention to something other than the appellant's condemning testimony. The prosecutor made a brief reference to defense counsel's role when discussing these actions and behavior when discussing the credibility of the appellant's testimony. The prosecutor did not call defense counsel's actions bogus or disingenuous.

Taken in the context of the entire trial and the entire argument, with the understanding that the jury had be instructed that the prosecutor's arguments were not evidence and only intended to assist with the application of the law, these statements did not alter the outcome of the

trial. In addition to testimony from several witnesses who observed or suffered the appellant's attack, the jury viewed a video of the assault. The appellant has failed to show how the statement was flagrant and ill-intentioned and how it prejudiced the outcome of his case. *Thorgerson*, 172 Wash.2d at 452; Warren, 165 Wash.2d at 26.

II. OFFENDER SCORE

6. The appellant's offender score was accurately determined.

Interpretation of the Sentencing Reform Act is a question of law and is reviewed de novo. *State v. Jones*, 172 Wash.2d 236, 242-43, 257 P.3d 616 (2011).

If the present conviction is for an offense committed while the offender was under community custody, a sentencing court should add one point to the offender score. RCW 9.94A.525(19). It is true that community custody is tolled if a defendant is in custody for any period of time. RCW 9.94A.171(2). However, there are exceptions, as RCW 9.94A.171(3)(a) states:

any period of community custody shall be tolled during any period of time the offender is in confinement for any reason unless the offender is detained pursuant to RCW 9.94A.740 or RCW 9.94A.631 for the period of time prior to the hearing or for confinement pursuant to sanctions imposed for violation of

sentence conditions, in which case, *the period of community custody shall not toll.* (emphasis added).

Here, the appellant was detained on a DOC violation under RCW 9.94A.740, thus his term of community custody was not tolled. Even if he had been placed in custody for a violation and then subsequently found not to have committed the violation, the time he spent in custody awaiting that decision would not have been tolled. *State v. Donaghe*, 172 Wash.2d 253, 266, 256 P.3d 1171 (2011).

Appellant overlooks this exception and instead contends *State v. Crawford*, 164 Wash.App. 617, 267 P.3d 365 (2011) controls his case. In *Crawford*, the defendant was in custody on new criminal charges, not a violation of his community custody. Therefore his time in community custody was properly tolled and he was not under community custody for sentencing purposes.

The current case is distinguishable. Here, the appellant was in custody on a violation of his community custody, a fact overlooked in his argument. Because of this, he was under community custody for the purposes of calculating his offender score and thus his offender score properly calculated.

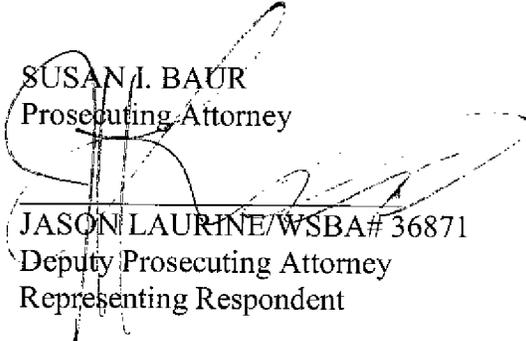
Putting all of that aside, the appellant agreed and stipulated on the record to the State's rendition of his criminal history and his offender score. There is a general rule that an appellant may challenge an illegal or erroneous sentence for first time on appeal. *In re Personal Restraint of Call*, 144 Wash.2d 315, 331, 28 P.3d 709 (2001). But when an appellant has affirmatively and expressly agreed to his score and his criminal history he has waived his right to challenge the trial court's reliance on his representations. *In re Personal restraint of Connick*, 144 Wash.2d 442, 463-64, 28 P.3d 729 (2001). Consequently, the appellant has waived his right to complain about this issue.

V. CONCLUSION

For the above reasons, the State respectfully requests the appellant's appeal be denied and that his sentence remain because his offender score was properly determined.

Respectfully submitted this 10 day of January, 2014.

SUSAN I. BAUR
Prosecuting Attorney

By 
JASON LAURINE/WSBA# 36871
Deputy Prosecuting Attorney
Representing Respondent

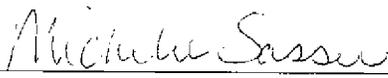
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January ¹⁴16, 2014.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 10, 2014 - 1:19 PM

Transmittal Letter

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