

NO. 49104-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

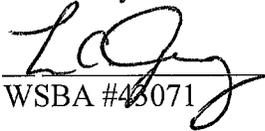
CYRUS NELSON PLUSH, II,
Appellant.

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

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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TABLE

Table of Contents

I. COUNTER STATEMENT OF THE CASE	1
a. Procedural History	1
b. Statement of Facts.....	1
II. RESPONSE TO ASSIGNMENTS OF ERROR	4
1) Prejudice by Amended Information	4
2) Prosecutorial Misconduct Allegations	11
3) Defendant's Criminal Record.....	18
4) Imposition of Appellate Costs.....	24
III. CONCLUSION	25

TABLE OF AUTHORITIES

State Cases

<i>State v. Schaffer</i> , 120 Wash.2d 616, 619, 845 P.2d 281 (1993)...	5, 8, 9, 10
<i>State v. Irizarry</i> , 111 Wash.2d 591, 592, 763 P.2d 432 (1988).....	5
<i>State v. Markle</i> , 118 Wash.2d 424, 432, 823 P.2d 1101 (1992).....	5, 6, 7
<i>State v. Pelkey</i> , 109 Wash.2d 484, 487, 745 P.2d 854 (1987).....	5, 6, 7, 9
<i>State v. Leach</i> , 113 Wash.2d 679, 695–96, 782 P.2d 552 (1989).....	6
<i>State v. Kjørsvik</i> , 117 Wash.2d 93, 105–07, 812 P.2d 86 (1991)	6
<i>State v. James</i> , 108 Wash.2d 483, 490, 739 P.2d 699 (1987)	7, 8, 20
<i>State v. Purdom</i> , 106 Wash.2d 745, 748, 725 P.2d 622 (1986)	7
<i>State v. Gosser</i> , 33 Wn. App. 428, 656 P.2d 514 (1982)	8, 10
<i>State v. Brown</i> , 74 Wn.2d 799, 447 P.2d 82 (1968).....	8, 9, 13
<i>State v. Wilson</i> , 56 Wash.App. 63, 65, 782 P.2d 224 (1989), <i>review</i> <i>denied</i> , 114 Wash.2d 1010, 790 P.2d 167 (1990)).....	8, 9
<i>State v. Mahmood</i> , 45 Wash.App. 200, 724 P.2d 1021, <i>review denied</i> , 107 Wash.2d 1002 (1986).....	9
<i>State v. Coles</i> , 28 Wash.App. 563, 573, 625 P.2d 713, <i>review denied</i> , 95 Wash.2d 1024 (1981).....	12
<i>State v. Huson</i> , 73 Wash.2d 660, 663, 440 P.2d 192 (1968), <i>cert. denied</i> , 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969).....	12
<i>State v. Dhaliwal</i> , 150 Wash.2d 559, 79 P.3d 432 (2003).....	12, 13
<i>State v. Pirtle</i> , 127 Wash.2d 628, 672, 904 P.2d 245 (1995), <i>cert. denied</i> , 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).....	12
<i>State v. Russell</i> , 125 Wash.2d 24, 86, 882 P.2d 747 (1994), <i>cert. denied</i> , 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).	13
<i>State v. Suarez–Bravo</i> , 72 Wash.App. 359, 367, 864 P.2d 426 (1994)....	13
<i>State v. Hoffman</i> , 116 Wash.2d 51, 94–95, 804 P.2d 577 (1991).....	13
<i>State v. Jones</i> , 71 Wash.App. 798, 808, 863 P.2d 85 (1993), <i>review</i> <i>denied</i> , 124 Wash.2d 1018, 881 P.2d 254 (1994).....	14
<i>State v. Bergstrom</i> , 162 Wn.2d 87, 92, 169 P.3d 816 (2007).....	18
<i>State v. Ammons</i> , 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986).....	18
<i>State v. Ford</i> , 137 Wn.2d 472, 477, 973 P.2d 452 (1999).....	19, 20, 21
<i>In re Pers. Restraint of Adolph</i> , 170 Wn.2d 556, 566, 243 P.3d 540 (2010).....	19, 20
<i>State v. Mendoza</i> , 165 Wn.2d 913, 920, 205 P.3d 113 (2009).....	19, 20
<i>In re Pers. Restraint of Williams</i> , 111 Wn.2d 353, 357, 759 P.2d 436 (1988).....	21
<i>Brooks v. Rhay</i> , 92 Wash.2d 876, 877, 602 P.2d 356 (1979).....	21

Statutes

RCW 9.94A.360.....19
RCW 9.94A.370.....19
RCW 9.94A.500.....19
RCW 9.94A.530.....21

Rules

CrR 2.1(e) 7

Other

Washington Constitution Article 1, Section 225, 7

I. COUNTER STATEMENT OF THE CASE

a. Procedural History

The Appellant was originally charged by Information filed on February 29, 2016. CP 1. During the pendency of the case, the Appellant filed a variety of motions and requests. During one of the Appellant's motions, he indicated that the violation dates were incorrect on the original information. The State thereafter provided notice that the State would be filing an Amended Information reflecting the corrected time frame of the Appellant's failure to register as a sex offender. CP 55. An order allowing the Amended Information to be filed was entered on April 25, 2016. CP 62.

The trial commenced on May 5, 2016. The Appellant was found guilty as charged on that same day. CP 130. The Appellant was sentenced to on June 3, 2016. CP 167-178.

b. Statement of Facts

On or about November 5, 2015, the Appellant was arrested and held in custody until January 14, 2016, when he was released. Prior to being released, the Appellant registered his address with the Grays Harbor County Sheriff's Office because he was required to do so due to being convicted of a sex offense. CP 4 and Trial RP 26. The Appellant registered his address as 209 ½ East Wishkah Street, #218 in Aberdeen, Washington. CP 4 and Trial RP 26. The Appellant had subsequently been evicted from that address following his arrest in November of 2015 while he had been in custody. CP 4 and Trial RP 43, 44, 48-49.

On January 24, 2016, Detective Hudson of the Aberdeen Police Department attempted to verify the Appellant's registered address on Wishkah. CP 4 and Trial RP 42. Detective Hudson found that a new tenant was living in the apartment and had been since December of 2015. CP 4 and Trial RP 42. Detective Hudson then made contact with the apartment manager, James Rutz, who verified that the Appellant had been

evicted following his arrest in November of 2015. CP 4 and Trial RP 43, 48.

Follow-up was then assigned to Detective Jeff Weiss of the Aberdeen Police Department on February 1, 2016. CP 4 and Trial RP 68. Detective Weiss made contact with the Appellant over the phone to advise him that he was needing to verify the Appellant's whereabouts since he was no longer living at 209 ½ East Wishkah, Apt. 218 and that the Appellant needed to register his current address with the Sheriff's Office. CP 4-5 and Trial RP 69. Detective Weiss thereafter contacted Leanna Ristow of the Sheriff's Office to check whether or not the Appellant had updated his address. CP 5 and Trial RP 69-70. After verifying that the Appellant had not updated his address with the Sheriff's Office, Detective Weiss issued probable cause for the Appellant's arrest for failure to register. Trial RP 70. The Appellant was arrested on February 25, 2016. Trial RP 71.

Detective Weiss was not on duty when the Appellant was brought into custody, therefore, Detective Jason Perkinson of the Aberdeen Police Department was the officer who made contact with the Appellant following his arrest. Trial RP 76. Detective Perkinson contacted the Appellant on February 26, 2016, the day after he was taken into custody. Trial RP 77. In his interview with the Appellant, Detective Perkinson obtained information that the Appellant had been in custody for 18 days during the time between when he was initially released on January 14, 2016 and when he was arrested on February 25, 2016. Trial RP 80. Detective Perkinson established that the Appellant was released initially on January 14, 2016 when he registered his address on Wishkah, then was arrested again on February 4, 2016. Trial RP 80. The Appellant was then released again on February 22, 2016 and arrested four days later on February 25, 2016. Trial RP 80.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) Prejudice by Amended Information

A criminal defendant is to be provided with notice of all charged crimes. *State v. Schaffer*, 120 Wash.2d 616, 619, 845 P.2d 281 (1993). Under article 1, section 22 of the Washington Constitution, “the accused shall have the right ... to demand the nature and cause of the accusation against him”. *Id.* As the Supreme Court of Washington has often noted, “[i]t is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.” *State v. Irizarry*, 111 Wash.2d 591, 592, 763 P.2d 432 (1988); *accord State v. Markle*, 118 Wash.2d 424, 432, 823 P.2d 1101 (1992); *State v. Pelkey*, 109 Wash.2d 484, 487, 745 P.2d 854 (1987).

In enforcing the state constitution's notice provision, the Supreme Court of Washington has avoided technical rules. *Schaffter*, 120 Wash.2d at 620. Instead, the Court has tailored its jurisprudence toward the precise evil that article 1, section 22 was designed to prevent—charging documents which prejudice the

defendant's ability to mount an adequate defense by failing to provide sufficient notice. *State v. Leach*, 113 Wash.2d 679, 695–96, 782 P.2d 552 (1989). For example, in *Pelkey*, the Supreme Court of Washington adopted a per se rule limiting the ability to amend an information once the State has rested its case “unless the amendment is to a lesser degree of the same charge or a lesser included offense.” *Pelkey*, 109 Wash.2d at 491. Any greater amendment “necessarily prejudices” the defendant's rights under the state constitution. *Id.*; accord *Markle*, 118 Wash.2d at 436–37.

Other cases from the Court have also emphasized the relationship between article 1, section 22 and prejudice. *See, e.g., State v. Kjorsvik*, 117 Wash.2d 93, 105–07, 812 P.2d 86 (1991) (When an information is challenged for the first time on appeal, the conviction will not be overturned if a fair reading of the charging document reveals the necessary elements and the defendant fails to demonstrate that he or she was “actually prejudiced”.); *Leach*, 113 Wash.2d at 696

(“Technical defects not affecting the substance of the charged offense do not prejudice the defendant and thus do not require dismissal.”); *State v. James*, 108 Wash.2d 483, 490, 739 P.2d 699 (1987) (under facts of case, amendment caused no “specific prejudice”); *State v. Purdom*, 106 Wash.2d 745, 748, 725 P.2d 622 (1986) (as a matter of law, substantial rights prejudiced when court denies defendant's request for a continuance following an amendment on day of trial).

Consistent with the Supreme Court of Washington cases interpreting article 1, section 22 of our Constitution, CrR 2.1(e) allows amendments which do not prejudice a defendant's “substantial rights”. Because CrR 2.1(e) “necessarily operates within the confines of article 1, section 22”, the possibility of amendment will vary in each case. *Pelkey*, 109 Wash.2d at 490; *Markle*, 118 Wash.2d at 437. For example, when a jury is involved and the amendment occurs late in the State's case, impermissible prejudice could be more likely. *Pelkey*, 109 Wash.2d at 490. On the other

hand, impermissible prejudice is less likely: where the amendment merely specif[ies] a different manner of committing the crime originally charged[,] or charge[s] a lower degree of the original crime charged, *State v. Gosser*, 33 Wn. App. 428, 656 P.2d 514 (1982); *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968).

According to the Supreme Court of Washington in *State v. Schaffer*, it is for the trial court to judge each case on its facts, and reversal is required only upon a showing of abuse of discretion. *Schaffer*, 120 Wash.2d 616 at 621-22 (citing *State v. James*, 108 Wash.2d 483, 490, 739 P.2d 699 (1987); *State v. Wilson*, 56 Wash.App. 63, 65, 782 P.2d 224 (1989), *review denied*, 114 Wash.2d 1010, 790 P.2d 167 (1990)). Several cases from the Court of Appeals support this analysis of the Supreme Court of Washington as well. In *Wilson*, the trial court granted the State's motion to amend the information to include a third count of indecent liberties on the day of the trial. *Id.* at 622. The Court of Appeals upheld Wilson's conviction finding “no specific

evidence ... to support a claim of prejudice”. *Wilson*, 56 Wash.App. at 65. Similarly, a midtrial amendment was allowed in *State v. Mahmood*, 45 Wash.App. 200, 724 P.2d 1021, *review denied*, 107 Wash.2d 1002 (1986), which added a new theory of criminal liability. When making the amendment, the State indicated that a later witness would offer testimony supporting the new theory. The Court of Appeals upheld this amendment because there was no showing that Mahmood was “misled or surprised”. *Mahmood*, 45 Wash.App. at 205.

As found by the Supreme Court of Washington in *State v. Schaffer*, there is no need to redraw the line established in *Pelkey* to a point earlier in the criminal process. The longstanding court rule, CrR 2.1(e), amply delineates the constitutional boundaries applicable to amendments during the State's case. *See also State v. Brown*, 55 Wash.App. 738, 780 P.2d 880 (1989), *review denied*, 114 Wash.2d 1014, 791 P.2d 897 (1990) (Amendment on first day of trial did not create prejudice because “reduced charge involved the same evidence

and presented no problems for the preparation of Brown's defense.”); *State v. Gosser*, 33 Wash.App. 428, 435, 656 P.2d 514 (1982) (“Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial.”). *Schaffer*, 120 Wash.2d 616 at 623. If a defendant is prejudiced by an amendment, then he or she should be able to demonstrate this fact. *Id.*

Here, the Appellant cites many of the same cases as the Respondent in his argument that he was prejudiced because he was forced to choose between his right to a speedy trial or being adequately prepared for trial. However, the Appellant fails to identify any actual prejudice. The Appellant received notice of the amendment being sought by the Respondent, which merely clarified the dates he was out of compliance with his duty to register that were actually identified by the Appellant himself, on April 18, 2016. CP 55. Therefore, the Appellant was aware of the amendment

13 court days and 17 actual days prior to his trial on May 5, 2016. Given that most of the cases on this issue address amendments that occurred during the course of the trial or even after the State had rested and are still upheld as not prejudicing the defendants/appellants in those cases, the Respondent fails to see where the Appellant could possibly have been prejudiced with so much advanced notice of the amendment.

Furthermore, the charge itself did not change, remaining a charge of Failure to Register as a Sex Offender, so the nature and cause of the accusation did not change either. CP 1-2 and CP 63-64. Under the case law, the Appellant was given sufficient notice of the amendment and was not prejudiced in his ability to prepare for trial. Therefore, the trial court did not err in allowing the State to file the amended information and the Appellant was not forced to choose between his right to a speedy trial or being adequately prepared for trial.

2) Prosecutorial Misconduct Allegations

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial. *State v. Coles*, 28 Wash.App. 563, 573, 625 P.2d 713, *review denied*, 95 Wash.2d 1024 (1981); *State v. Huson*, 73 Wash.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). In order to establish prosecutorial misconduct, an Appellant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where “ ‘there is a substantial likelihood the instances of misconduct affected the jury's verdict.’ ” *Dhaliwal*, 150 Wash.2d at 578 (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a

curative instruction could not have remedied. *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).

In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect. *State v. Suarez–Bravo*, 72 Wash.App. 359, 367, 864 P.2d 426 (1994). The Court of Appeals reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wash.2d at 578; *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wash.2d 51, 94–95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by the

evidence and prejudice the defendant. *State v. Jones*, 71 Wash.App. 798, 808, 863 P.2d 85 (1993), *review denied*, 124 Wash.2d 1018, 881 P.2d 254 (1994).

Here, the State charged a date range of on or about January 18, 2016 to on or about February 26, 2016 in which the State alleged that the defendant had failed to register. CP 63-64. The State correctly argued that the State did not need to prove the entire time charged that the defendant failed to register because he was in custody during some of that period of time. Trial RP 112. The State merely needed to show that there was a period of three days within that period from January 18, 2016 to February 26, 2016 in which the defendant failed to register.

The State argued that there were two time periods that the jury could have found that the defendant failed to register – January 18, 2016 to February 4, 2016, a period of 18 days, and February 22, 2016 to February 25, 2016, a period of 4 days. Trial RP 113. Testimony in the trial established that

there was a three day/72 hour period that the defendant had to register with the county by contacting the Sheriff's Office. Trial RP 19-20. There was also testimony that if a person had a duty to register prior to being arrested, the arrest would not negate that registration requirement. Trial RP 35. Testimony and evidence established that the defendant registered with the Sheriff's Office on January 14, 2016. Trial RP 22.

Testimony and evidence further established that he had registered his address as 209 ½ East Wishkah Street, Apt. 218 in Aberdeen, Washington. Trial RP 26. Testimony established that the defendant was not at that address when an address verification was conducted and that he had not updated the Sheriff's Office with a new address or registered as transient. Trial RP 31. Testimony established that a new tenant who did not know the defendant was living at the defendant's registered address since December, showing that the defendant had listed an address that he was no longer living at when he registered that

address on January 14, 2016. Trial RP 42. Testimony further established that the defendant had been evicted by the apartment manager after the defendant was incarcerated in November of 2015. Trial RP 43, 44, 48-49.

Testimony established that the defendant believed he was not in violation of his duty to register even though he had been evicted from the property because he was still receiving mail at the address. Trial RP 77-78. Testimony established that the defendant was in custody during the time period charged from February 4, 2016 until February 22, 2016. Trial RP 80, 83. Testimony established that other than that period of time – February 4, 2016 to February 22, 2016 – the defendant was not in custody and would have had a duty to register his address or register as transient. Trial RP 87. There was further testimony and evidence presented about the defendant's arrest back in November of 2015 and his release on January 15, 2016, which is when he

registered his address as 209 ½ East Wishkah, Apt. 218 despite having been evicted already. Trial RP 95. Testimony and evidence further established that the defendant was arrested on February 4, 2016 and released on February 22, 2016 until he was taken back into custody on February 25, 2016. Trial RP 95-6.

The evidence clearly established that there were two periods in which the defendant had failed to register properly – both by registering an address at which he no longer lived because he had been evicted and by failing to update the Sheriff's Office that he had become transient. The defendant had multiple opportunities to properly register, but simply chose not to, apparently because he felt he had been wrongfully evicted. He was in violation after the initial three days passed from his release on January 14, 2016 and he was no longer living at or able to live at 209 ½ East Wishkah, Apt. 218 due to being evicted. Thereafter, he was in violation after he failed to provide the

Sheriff's Office with a new address or register as transient.

There was no objection by the defendant or his stand-by counsel, Mr. Kupka, during the State's closing and the evidence established, not just by inference, but by actual facts through testimony and documentation that the defendant failed to register during both periods of time. The State made no statements that are unsupported by the evidence or that prejudiced the defendant in any way. Therefore, there was no prosecutorial misconduct committed and the Appellant's conviction must stand.

3) Defendant's Criminal Record

The Court of Appeals reviews a sentencing court's calculation of an offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). "Prior convictions are used to determine the offender score which in turn is used to determine the applicable presumptive standard sentence range." *State v.*

Ammons, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986) (citing former RCW 9.94A.360 (1984); former RCW 9.94A.370 (1984)). “[I]llegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). “[U]se of a prior conviction as a basis for sentencing under the [Sentencing Reform Act of 1981] is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence.” *Id.* at 479–80; *see also* RCW 9.94A.500(1) (stating the preponderance standard). Accordingly, “ ‘[i]t is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.’ ” *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010) (quoting *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009)).

“[T]he State must provide evidence of a defendant's criminal history, generally a certified copy of the judgment and sentence, unless the defendant

affirmatively acknowledges the criminal history on the record.” *Mendoza*, 165 Wn.2d at 930. “[T]he court may rely on the defendant's stipulation or acknowledgement of prior convictions to calculate the offender score.” *State v. James*, 138 Wn.App. 628, 643, 158 P.3d 102 (2007). Agreement with the ultimate sentencing recommendation is not deemed an affirmative acknowledgement of the prosecutor's asserted criminal history. *Mendoza*, 165 Wn.2d at 928.

“[T]he best method of proving a prior conviction is by the production of a certified copy of the judgment, but ‘other comparable documents of record or transcripts of prior proceedings’ are admissible to establish criminal history.” *Adolph*, 170 Wn.2d at 568 (quoting *Ford*, 137 Wn.2d at 480). “The State must establish the conviction's existence by a preponderance of the evidence, but that burden is ‘not overly difficult to meet’ and may be satisfied by evidence that bears some ‘minimum indicia of reliability.’ “ *Adolph*, 170 Wn.2d at 569 (quoting *Ford*, 137 Wn.2d at 480–81). “[I]t is

‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’ “ *Ford*, 137 Wn.2d at 480 (quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). RCW 9.94A.530(2) provides, “In determining any sentence[,] ... *the trial court may rely on no more information* than is admitted by the plea agreement, or admitted, acknowledged, or *proved in a trial or at the time of sentencing.*” (Emphasis added). Furthermore, “[i]t has been the consistent holding of this court that the existence of an erroneous sentence requires resentencing.” *Brooks v. Rhay*, 92 Wash.2d 876, 877, 602 P.2d 356 (1979).

Here, the State submitted a stipulation at trial that the Appellant had been convicted of a Class A felony sex offense in Cowlitz County under Cause Number 91-8-406 on or about April 1, 1992. Trial RP 88-89 and CP 65. Furthermore, at the sentencing hearing June 3, 2016, it is clear that there had been a

discussion between the parties – the State, the defendant, and the defendant’s stand-by counsel – regarding the defendant’s criminal history and that parties had agreed that the criminal history listed in the Statement of Prosecuting Attorney. Sentencing RP 17 and CP 142-149, 150-157. Furthermore, the record clearly reflects that the State had the Judgment and Sentences for the defendant’s convictions that were used to cross-reference and correct the information listed in the Statement of Prosecuting Attorney. Sentencing RP 17. The parties agreed on the record that the State had erroneously listed the defendant’s 1994 convictions as being in Adams County, which should have been Cowlitz County. Sentencing RP 17.

The State further advised the trial court that, while the county had been incorrectly identified, the cause number was correct as verified by the Judgment and Sentence for those crimes. Sentencing RP 17-18. Furthermore, corrections were made by the State by agreement between the parties before the sentencing

hearing had started on the Judgment and Sentence.

Sentencing RP 18 and CP 167-178. The Appellant made no objection at the time as to his criminal history and did not otherwise challenge the sentence as listed in the Statement of Prosecuting Attorney and the Judgment and Sentence.

The Appellant merely argued with the trial court that he should receive a reduced sentence because he was innocent and entrapped. Sentencing RP 19-20. The Appellant, thereafter, became angry with the Court, stating “This is fucking crazy” and refused to sign the Judgment and Sentence. Sentencing RP 22. The transcript clearly show that the Appellant was merely upset with the Court for telling him that they were done as far as listening to his arguments about being innocent and entrapped for the reason why he refused to sign the Judgment and Sentence and not because he was in disagreement with his criminal history as set forth in the document by agreement between the parties.

If the Court, however, does not feel that the record is sufficient to support a finding that the State established the defendant's criminal history by a preponderance, then the proper remedy would be to remand the case back to the trial court for resentencing, not a dismissal as requested by the Appellant.

4) Imposition of Appellate Costs

The Respondent defers to the Court regarding any waiver of appellate costs for the Appellate as an indigent defendant. The trial court found the defendant to be indigent in this case and also waived all non-mandatory fees and costs at sentencing due to the defendant's criminal history and lack of substantial work history. Sentencing RP 21 and CP 189-190. The Respondent has no information that the Appellate's financial situation has changed since the case was before the trial court.

CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the convictions and the sentence in this case.

DATED this 22nd day of August, 2017.

Respectfully Submitted,

BY: 
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Transmittal Information

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