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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

SAMMY WEAVER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 19-1-00289-1

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Weaver alleges several points against the sufficiency of the evidence to support the jury's verdict of guilty for the crime of burglary in the first degree. The State contends that the evidence was sufficient in each incidence.
 - a) Weaver contends that he did not have notice that he was trespassed from the NAPA store when he entered it on August 6th. However, there is overwhelming contrary evidence that supports the jury's contrary finding.
 - b) Weaver contends that the store employees engaged him in conversation after he had unlawfully entered the store in violation of the trespass order and that, therefore, it was not unlawful for him to remain in the store. However, Weaver's argument should fail because Weaver was in no way coerced, tricked or invited to remain in the store. Instead, employees simply placated him with hopes that police would soon arrive.
 - c) Weaver contends that the evidence is insufficient to prove that he intended to commit a crime in the NAPA store and asserts two reasons to support his contention. First, Weaver contends that there is insufficient evidence that he intended to commit misdemeanor harassment; and, second, he contends because the threatened party did not find out about the threat until after Weaver left the store, there is insufficient evidence that Weaver intended to commit the harassment inside the store. The State addresses these arguments separately, below:
 - i) The evidence is insufficient to prove that Weaver intended to commit misdemeanor harassment when he entered the store.

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- ii) Weaver contends that because the threatened party did not find out about the threat until after Weaver had left the store, the evidence was insufficient to prove that he intended to commit the crime of harassment inside the store as opposed to some other place. The State contends that the crime of burglary occurred when Weaver entered unlawfully with the intent to commit the crime
- 2. Weaver contends that because the store employees did not immediately eject him from the premises but instead placated him while awaiting the arrival of police, there was insufficient evidence to prove that he remained unlawfully in the building and that, therefore, it was error to instruct the jury on this alternative means of committing burglary. The State contends that there was sufficient evidence for the jury to find that Weaver remained unlawfully with the intent to commit harassment against a person in the building.
- 3) Weaver contends that the trial court erred at sentencing because it accepted the prosecutor's assertion that due to numerous misdemeanor convictions, Weaver's prior felony convictions had not washed for the purposes of calculating Weaver's offender score. Weaver acknowledged his felony convictions and did not object to the prosecutor's assertion that they had not washed. However, because there was no corroborating proof of the misdemeanor convictions, the State concedes that this case must be remanded for resentencing.

B. FACTS AND STATEMENT OF THE CASE

On August 6, 2019, Weaver entered the NAPA store in Mason County, Washington, with the intent to threaten bodily harm against one

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or more of the employees inside the store. RP 117, 126, 139, 207. The employees of the store, including the manager, had previously told Weaver that he was not welcome at the store and not to return to it. RP 108-09, 139, 184. On at least one occasion, an employee had physically ejected Weaver from the premises. RP 183-84, 186

Despite the exclusion order, Weaver returned to the store while wearing a large sheath knife on his hip. RP 134, 197, 207, 211, 225. Once inside the store in violation of the exclusion order, Weaver immediately confronted a store employee by the name of Schamerhorn. RP 117, 210. In addition to prior incidents at the store, Weaver once had a confrontation with Schamerhorn at Schamerhorn's home owner's association. RP 115-16, 127-28. This confrontation resulted in Schamerhorn punching Weaver in the face, apparently knocking him out. RP 116.

When Weaver entered the NAPA store on August 6 in violation of the exclusion order, he purportedly did so to confront the store employees about a transaction the employees had recently had with a woman who had purchased oil at the store. RP 107, 117, 207. Weaver apparently met the woman for the first time on the same day. RP 207.

When Weaver entered the store, he went directly Schamerhorn, who was working behind the counter, and confronted him. RP 210. When the conversation became heated, Weaver pulled the knife from its sheath and held it in a threatening manner under the counter where Schamerhorn could not see it. RP 138, 200. Because the conversation was heated, and because Weaver had been previously ordered not to return to the store, Schamerhorn called his manager and put Weaver on the phone with the manager. RP 188-89.

Weaver had been a problem in the past and had violated the no trespass order in the past, but he always left the scene before police could arrive and contact him. RP 106, 107, 109. There were customers in the store at the time and the manager wanted to prevent the confrontation from escalating, so he placated Weaver and offered to speak with him in person the next day. RP 189. The phone call lasted less than a minute, after which Weaver left the store. RP 210.

After Weaver left the store, another employee told Schamerhorn about the knife that Weaver was holding under the counter. RP 118, 122. Schamerhorn became concerned because he felt threatened by Weaver and believed that Weaver might actually carry out the threat. RP 122, 127. A

store employee had called 911, and he watched Weaver as he drove away and reported Weaver's whereabouts to the 911 operator. RP 129. While fleeing the store, Weaver pointed a fake gun at the employee. RP 140. The employee believed that the gun was real, so he dived into a ditch. RP 140, 163, 167.

Weaver was suspicious that the store may have called the police due to the incidents at the store, so he took evasive actions to avoid contact with responding police. RP 139, 210-22. But because the employee was watching and reporting Weaver's whereabouts to the 911 operator, a police officer was able to locate Weaver, who refused to yield to the officer. RP 154-55. Nevertheless, the officer succeeded in taking Weaver into custody. RP 152-56.

Police recovered the sheath knife from Weaver's person, and after obtaining a search warrant police found the fake gun in Weaver's car. RP 100-02, 155-56.

Because the store had lawfully excluded Weaver from the premises of the NAPA store, and because Weaver entered the store while armed with a deadly weapon and with the intent to commit the crime of harassment against Schamerhorn or other employees inside the store, the

State charged Weaver with burglary in the first degree. CP 11-12.

Because Weaver pointed a fake gun at the other employee, the State also charged Weaver with harassment. CP 11-12.

The jury convicted Weaver for both counts as charged. CP 47, 49.

Further facts are supplied where relevant in the argument sections below.

C. ARGUMENT

1. Weaver alleges several points against the sufficiency of the evidence to support the jury's verdict of guilty for the crime of burglary in the first degree. The State contends that the evidence was sufficient in each incidence.

Weaver raises four separate arguments against the sufficiency of the evidence. Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier*, 157 Wash.2d 1, 8, 133 P.3d 936 (2006).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v.*

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v.*

Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622

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P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

- a) Weaver contends that he did not have notice that he was trespassed from the NAPA store when he entered it on August 6th. However, there is overwhelming contrary evidence that supports the jury's contrary finding.

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In the first of his four sufficiency of the evidence arguments, Weaver contends that the employees at the NAPA store “permitted his entry and then conspired to keep him in the store for as long as possible” and that, therefore, there is insufficient evidence “to establish an unlawful entry.” Br. of Appellant at 15. However, the record refutes Weaver’s contention.

A merchant business may lawfully exclude a person from its premises. *State v. Kutch*, 90 Wn. App. 244, 951 P.2d 1139 (1998). Testimony at trial proved that on July 24th store employee Schamerhorn told Weaver that he was trespassing, that he “was not welcome” at the store, and to leave the store. RP 109. Another employee of the NAPA store, Brian Kaufman, testified that on a date he thought was July 25, he had to physically escort Weaver from the premises and that he, also, told Weaver he was not to return to the property. RP 183-84, 186. Another employee, Mr. Datus, testified that during the two weeks prior to the August 6th incident Weaver “was told multiple times by our manager, as well as other employees” that he was banned from the store. RP 139.

Witnesses testified that despite being banned from the store, during the two weeks prior to the August 6th incident Weaver had been in the

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store on a few occasions. RP 139, 184, 191. However, on those occasions Weaver did not stay in the store long enough for employees to do anything about the trespass violations. RP 191-92. So, the workers at the NAPA store planned to call the police the next time Weaver appeared at the store, and they planned to try to stall him long enough for police to arrive. RP 189-92.

Weaver's trial testimony contradicts his current contention that the store employees waived their prior exclusion of Weaver from the premises. RP 206-27. There is no testimony or other evidence to support a contention that the store employees did anything to prevent Weaver from leaving the store – instead, the record shows only that the manager spoke with Weaver on the phone, partially with the hope that Weaver would still be at the store when the police arrived. RP 189-93. At trial, Weaver testified and denied that he had ever been trespassed from the store. RP 208. He denied that he had been physically removed from the store. RP 217. He denied being trespassed from the store, denied that he was ever escorted from the store, and denied that he was told not to return to the store. RP 219-20. Thus, Weaver's testimony contradicts his current argument that – because the store employees had inconsistently enforced

his exclusion – he had no way of knowing whether the order was in effect August 6 when he threatened Mr. Schamerhorn. Weaver’s testimony that he had never been trespassed from the store is inconsistent with his current contention that the store’s inconsistent enforcement of the exclusion constituted a waiver or that he was confused as to whether it was in effect.

Still more, Weaver testified that when he left the store, he was suspicious that the employees had called the police. RP 201. So, rather than go straight home, he took an evasive route through the McDonald’s parking lot. RP 212. Weaver explained that he had a suspicion the police would show up. RP 221. Weaver admitted that he drove through the McDonald’s parking lot to avoid contact with police. RP 222.

A fact-finder “may infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight.” *State v. Cordero*, 170 Wn. App. 351, 369, 284 P.3d 773 (2012) (quoting *State v. Cantu*, 156 Wn.2d 819, 830, 132 P.3d 725 (2006) (internal quotation omitted)).

- b) Weaver contends that the store employees engaged him in conversation after he had unlawfully entered the store in violation of the trespass order and that, therefore, it was not unlawful for him to remain in the store. However, Weaver’s argument should fail

because Weaver was in no way coerced, tricked or invited to remain in the store. Instead, employees simply placated him with hopes that police would soon arrive.

Weaver cites *State v. Cordero*, 170 Wn. App. 351, 284 P.3d 773 (2012), to support his contention that “[e]ven where a person’s initial entry into a building is unlawful, he does not ‘remain’ unlawfully if he is thereafter detained by someone with authority over the premises.” Br. of Appellant at 16. But the facts of the instant case are clearly distinguished, because in *Cordero* the defendant was held in the premises against his will, but here the overwhelming evidence shows that Weaver entered and remained voluntarily in the NAPA store. *See, e.g.*, Weaver’s testimony at 206-228.

There is no evidence to suggest that store employees did anything to lure Weaver into the store, and after Weaver entered the store, the employees did nothing to keep him there other than to placate him while waiting for police to arrive. RP 129, 189-90. Immediately before Weaver left the store, the store manager spoke to him on the phone and invited him to return the next day to discuss the matter in person. RP 192-93. The store manager spoke to Weaver on the telephone because Weaver seemed

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agitated and the manager wanted to try to keep the situation from escalating. RP 189. The store manager testified that “it was also a kind of way to keep him at the store, because he had been trespassed before” and police had been called to respond to the store. RP 189.

If Weaver had returned to the store the next day in response to the manager’s invitation, then on the next day during the period that Weaver entered the store in response to the manager’s invitation, Weaver’s appellate claim that the trespass order had been waived or rescinded would have merit. But the manager’s telephone conversation had no effect on the fact that Weaver entered the store unlawfully on August 6 and that he remained there unlawfully after entering. Weaver was not coerced, tricked, or invited to enter the store or to remain unlawfully prior to speaking with the manager on the phone. The manager’s willingness to speak with Weaver is not a waiver of the previously imposed exclusion or the unlawful entry and harassment that had already occurred. Thus, substantial evidence supports a finding that Weaver remained unlawfully, at least for a time, inside the NAPA store. *See, e.g., State v. Cordero*, 170 Wn. App. 351, 367, 284 P.3d 773 (2012).

- c) Weaver contends that the evidence is insufficient to prove that he intended to commit a crime in the NAPA store and asserts two reasons to support his contention. First, Weaver contends that there is insufficient evidence that he intended to commit misdemeanor harassment; and, second, he contends because the threatened party did not find out about the threat until after Weaver left the store, there is insufficient evidence that Weaver intended to commit the harassment inside the store. The State addresses these arguments separately, below:

- i. The evidence is insufficient to prove that Weaver intended to commit misdemeanor harassment when he entered the store.

Weaver contends that there is insufficient evidence to prove that his unlawful entry into the NAPA store was done with the intent to commit a crime against a person or property therein. Br. of Appellant at 18-22. Weaver cites and quotes RCW 9A.52.040 to support his argument that such criminal intent is negated “where the ‘entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.’” Br. of Appellant at 18-19. The State contends that the evidence “satisfactory to the trier of fact” in the instant case proves Weaver’s criminal intent.

The NAPA store employees had clearly communicated to Weaver that he was no longer welcome to enter the store. RP 126, 139, 184, 186.

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Yet, despite the exclusion order, Weaver entered the store repeatedly and confronted the employees. RP 107, 109, 183-84, 186, 191. Weaver had a prior confrontation with employee Schamerhorn that had resulted in violence. RP 106, 110, 115-16, 127-28. So, when Weaver entered the store unlawfully on August 6, he entered the store with a large sheath knife on his hip and immediately confronted Schamerhorn. RP 117, 119, 122, 197, 198, 211. The mere fact that Weaver was wearing a large sheath knife under these circumstances was itself a threatening gesture and was sufficient for the jury to conclude that Weaver entered the store with the intent to harass Schamerhorn. The subsequent fact that Weaver drew the large sheath knife from its sheath and held it in a threatening manner while confronting Schamerhorn further supports the jury's conclusion that Weaver entered and remained unlawfully in the store with the intent to commit the crime of harassment against Schamerhorn. RP 138.

Significantly, the jury verdict at issue here is for first degree burglary in violation of RCW 9A.52.020, not harassment. On the facts of this case, to convict Weaver of this charge the jury had to find that Weaver entered or remained unlawfully in the NAPA store with the *intent* to commit a crime against a person therein, irrespective of whether a crime

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against a person was actually completed. *Id.* The facts described above are overwhelming evidence from which any jury could find beyond a reasonable doubt that Weaver unlawfully entered the NAPA store with the *intent* to commit the crime of harassment against Schamerhorn.

But even if proof of a completed crime against a person were required to prove the crime of burglary, that proof is present here where there is proof that Weaver committed the crime of harassment against Schamerhorn. Relevant to the facts of the instant case, the crime of harassment is committed when a person, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person and by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020.

As relevant to the instant case, our courts have held that the mere act of displaying a weapon can in itself be sufficient evidence to prove the communication of a threat. *See, e.g., State v. Bright*, 129 Wn.2d 257, 270, 916 P.2d 922 (1996); *State v. Lubers*, 81 Wn. App. 614, 620-21, 915 P.2d 1157 (1996). Similarly, merely taking a fighting stance is sufficient to communicate a threat to do bodily harm. *State v. Burke*, 132 Wn. App.

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415, 421, 132 P.3d 1095 (2006). In *State v. Pinkney*, 2 Wn. App. 2d 574, 411 P.3d 406 (2018), raising one's fist to another person and growling was sufficient to prove the crime of harassment.

Here, Weaver's act of bringing the knife and wearing it on his hip when he entered the store unlawfully was threatening. The mere act of wearing it where it could be seen could be interpreted as communicating a threat, but regardless whether merely wearing it constitutes a sufficient threat, taking the knife from its sheath and holding it with the blade up during a heated confrontation was clearly the communication of a threat to do bodily harm. RP 138; *State v. Bright*, 129 Wn.2d 257, 270, 916 P.2d 922 (1996); *State v. Pinkney*, 2 Wn. App. 2d 574, 411 P.3d 406 (2018); *State v. Burke*, 132 Wn. App. 415, 421, 132 P.3d 1095 (2006); *State v. Lubers*, 81 Wn. App. 614, 620-21, 915 P.2d 1157 (1996).

- ii. Weaver contends that because the threatened party did not find out about the threat until after Weaver had left the store, the evidence was insufficient to prove that he intended to commit the crime of harassment inside the store as opposed to some other place. The State contends that the crime of burglary occurred when Weaver entered unlawfully with the intent to commit the crime.

In violation of an exclusion order, Weaver unlawfully entered the NAPA store. RP 109, 126, 139, 183-84, 186. He wore a large sheath knife when he entered the store. RP 134, 197, 198, 211. He immediately confronted Schamerhorn, who was an employee of the store and was standing behind the counter inside the store. RP 117, 210. While confronting Schamerhorn inside the store, Weaver drew the large sheath knife from its sheath and held it in a threatening manner. RP 138. These facts are more than sufficient for the jury to have concluded that Weaver unlawfully entered and remained in the store with the intent to communicate a threat to a person or persons inside the store. *State v. Bright*, 129 Wn.2d 257, 270, 916 P.2d 922 (1996); *State v. Pinkney*, 2 Wn. App. 2d 574, 411 P.3d 406 (2018); *State v. Lubers*, 81 Wn. App. 614, 620-21, 915 P.2d 1157 (1996). This fact is proved regardless of when or where the additional crime of actual harm to the person threatened might eventually occur.

2. Weaver contends that because the store employees did not immediately eject him from the premises but instead placated him while awaiting the arrival of police, there was insufficient evidence to prove that he remained unlawfully in the building and that, therefore, it was error to instruct the jury on this alternative means of committing burglary. The State contends that there was sufficient evidence for the jury to find that

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Weaver remained unlawfully with the intent to commit harassment against a person in the building.

The court instructed the jury that the crime of burglary is committed when a person enters *or remains* unlawfully in a building with the intent to commit a crime against a person or property therein. CP 30, 35. Weaver contends that the jury's verdict of guilty must be reversed because, he contends, there is insufficient evidence that he *remained* unlawfully in the building. Br. of Appellant at 24-26. To support this argument, Weaver relies on his factual theory that the NAPA employees implicitly invited Weaver to remain in the store because they did not eject him but instead attempted to keep him calm while waiting for police to arrive. *Id.* at 26; RP 189.

Factually, the record shows that Weaver *both entered and remained* in the NAPA store unlawfully with the intent to commit a crime against a person – particularly Schamerhorn – inside the store. These facts have already been discussed above in some detail in response to Weaver's other arguments. But specifically in regard to the current argument, there was a history of hostile, violent contact between Weaver and Schamerhorn, and there was a history of disruptive, confrontational

contacts between Weaver and other employees at the NAPA store. RP 107, 109, 110-16, 126, 128, 139, 183-84, 186, 191-92.

The evidence is overwhelming that Weaver entered the store unlawfully in violation of the store's exclusion order. In the context of the factual history between Weaver and Schamerhorn and other employees of the store, the fact that Weaver entered unlawfully with a large knife on his hip to confront Schamerhorn is evidence that Weaver intended to harass Schamerhorn and others in the store. There were several innocent customers in the store, as well as several employees. RP 125, 130, 131, 148-49, 197. Weaver was extremely angry. RP 203. Particularly because Weaver was armed with a deadly weapon, the mere fact that store employees tried to placate Weaver so as not to escalate the situation -- and to instead await the arrival of police rather than to confront Weaver immediately upon his illegal entry -- does not support Weaver's appellate argument that the store employees invited him to remain in the store. During his trial testimony, Weaver never claimed that the exclusion order was waived; instead, he denied that he had ever been barred from the premises. RP 217, 219-20.

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As a matter of law, burglary is an alternative means crime that can be committed by entering or remaining unlawfully inside a building with the intent to commit a requisite crime. *State v. Allen*, 127 Wn. App. 125, 131-32, 110 P.3d 849 (2005). The threshold test for whether a unanimity instruction is required for an alternative means crime is whether there is sufficient evidence to support each alternative means presented to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where sufficient evidence supports two alternative means, the jury need not unanimously decide on one. *Id.*

As argued in response to Weaver's other claims against sufficiency of the evidence, there was substantial evidence from which the jury could find beyond a reasonable doubt that Weaver remained in the store unlawfully with the intent to commit a crime against a person.

3. Weaver contends that the trial court erred at sentencing because it accepted the prosecutor's assertion that due to numerous misdemeanor convictions, Weaver's prior felony convictions had not washed for the purposes of calculating Weaver's offender score. Weaver acknowledged his felony convictions and did not object to the prosecutor's assertion that they had not washed. However, because there was no corroborating proof of the misdemeanor convictions, the State concedes that this case must be remanded for resentencing.

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At sentencing, the prosecutor informed the court that Weaver had two prior felony convictions that counted in his offender score that would count toward his offender score for the purposes of sentencing. RP 308. Weaver's attorney acknowledged the prior felony convictions. RP 308-09. Later in the proceedings, the prosecutor mentioned that Weaver's felony convictions would have otherwise washed if not for a lengthy misdemeanor history. RP 311. Weaver's attorney remained silent as to whether they had washed due to the passage of time. *Id.* No corroborating judgment and sentence or criminal history report was presented for the record to show that the felony convictions had not washed.

The State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). This includes the burden to prove that prior convictions have not washed out for the purpose of calculating a defendant's offender score. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 875-76, 123 P.3d 456 (2005).

Accordingly, the State concedes that this case should be remanded to the trial court for the State to present corroboration that Weaver's prior

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felony convictions have not washed, unless Weaver acknowledges his prior misdemeanor convictions and offender score.

D. CONCLUSION

Because there is sufficient evidence to support the jury's guilty verdicts in this case, the State asks that Weaver's convictions be sustained on this issue.

However, the State concedes that this case should be remanded to the trial court for resentencing after Weaver's prior misdemeanor convictions and offender score are acknowledge by Weaver or proved by corroborating evidence.

DATED: June 15, 2020.

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