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CLERK OF COURTS
STATE OF WASHINGTON

28273-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH EARLYSTAR SAM, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Defense Counsel rendered ineffective assistance by failing to offer a jury instruction regarding an affirmative defense.
2. The trial court erred in determining defendant's criminal history and the corresponding offender score for purposes of sentencing.

II.

ISSUES PRESENTED

- A. Did defense counsel render ineffective assistance when counsel offered the WPIC approved jury instruction regarding an affirmative defense, yet the trial court does not utilize that instruction in its instructions to the jury?
- B. Did the trial court violate defendant's due process right when it found that the State had provided sufficient evidence to support its conclusions regarding criminal history and the corresponding offender score calculation?

III.

STATEMENT OF THE CASE

For purposes of this appeal, the State accepts the defendant's statement of the case.

IV.

ARGUMENT

- A. DEFENSE COUNSEL DID OFFER THE "REASONABLE BELIEF" AFFIRMATIVE DEFENSE JURY INSTRUCTION TO THE TRIAL COURT AS PART OF THE DEFENDANT'S PROPOSED INSTRUCTIONS TO THE JURY.

The defendant claims on appeal that his trial counsel was ineffective for failing to request an instruction on the statutory defense of "reasonable belief" as set out in RCW 9A.44.030. This claim disregards the fact that defense counsel did include Washington Pattern Instruction Criminal ("WPIC") 19.03 in the defendant's proposed instructions to the jury. CP 29-37. On appeal, defendant has sought to indirectly supplement the record by referring to a telephone call defendant's appellate counsel had with his trial counsel. Despite suggestions to the contrary, the court file reflects that defendant's trial counsel was effective and actually did

include the subject instruction in the “Defendant’s Proposed Instructions to the Jury” filed June 9, 2009. CP 29-37.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test: the defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to “an objective standard of reasonableness based on consideration of all of the circumstances.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine

confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

Here, defendant has failed to establish that he suffered ineffective assistance of counsel since his counsel did file the “reasonable belief” WPIC with the trial court at the time of trial. Defense counsel then presented a strong and compelling argument that defendant should be acquitted based upon his reasonable belief that Ms. Best had consented to the sexual acts based upon the evidence produced. The jury is the final judge of the credibility of the evidence admitted for it to review and determine whether the burden of proof has been met. Here, the jury determined that the State met its burden of proof and found Mr. Sam guilty of the second degree rape despite a compelling and thorough presentation of his reasonable belief defense. Accordingly, the jury’s verdicts should be affirmed.

B. THE TRIAL COURT PROPERLY INCLUDED DEFENDANT'S PRIOR JUVENILE CONVICTIONS IN HIS OFFENDER SCORE, YET THERE WAS STILL A MISCALCULATION JUSTIFYING A RESENTENCING WITH A SCORE OF EIGHT.

A trial court's calculation of an offender score is reviewed *de novo*. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). RCW 9.94A.589(1)(a) provides that a defendant's offender score is calculated by adding together the current offenses and the prior convictions. The trial court counts the prior juvenile convictions of a defendant as one-half point each. RCW 9.94A.525(7). The State bears the burden of proving a defendant's prior convictions by a preponderance of the evidence. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). The best evidence of a defendant's prior conviction is a certified copy of the prior judgment and sentence. *Id.*, at 519 (citing *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). When the State alleges the existence of prior convictions and the defense does not object or agrees with the State's depiction of the defendant's criminal history, the defendant waives the right to challenge the criminal history after the sentence is imposed. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861,

874, 50 P.3d 618 (2002). Thereafter, sentencing courts can rely upon that defense acknowledgement of prior convictions without further proof. RCW 9.94A.530(2).

Mr. Sam agreed to the inclusion of his three prior juvenile convictions when he was sentenced in three separate causes #00-1-02742-8, 04-1-03458-3 and 03-1-03996-0. Hence, defendant entered the sentencing in this case with the trial court legally able to rely upon defendant's prior acknowledgements of his juvenile convictions to calculate his current offender score. *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007). Defendant's objection to the inclusion of his juvenile convictions in his offender score in this case triggered the trial court's review of the certified copies of his prior convictions to determine his current offender score.

Here, the defendant objected at sentencing to the alleged prior juvenile convictions based upon his lack of memory of those cases. Nevertheless, the State provided certified copies of each of the defendant's prior convictions. The trial court found that the evidence established the defendant's prior convictions, including the juvenile dispositions, by a preponderance of the evidence. Accordingly, the trial court calculated

defendant's offender score with the prior juvenile convictions properly included.

Next, the defendant contends that the trial court miscalculated his offender score even with the prior juvenile convictions included. Defendant calculates that his offender score for this case, including the prior juvenile convictions, as a six (his prior adult felony convictions) plus one and one-half (his three prior juvenile convictions) plus one (his other current offense), as an eight. The State agrees that defendant correctly includes the convictions which count, so the resulting offender score is an eight and one-half (8.5). RCW 9.94A.525. The statute further provides that offender scores are to be "rounded down", so the correct offender score is "8." RCW 9.94A.525. The corresponding standard sentencing range is 180-245 months. Accordingly, the case should be remanded for the trial court to enter the proper offender score and impose a corresponding sentence.

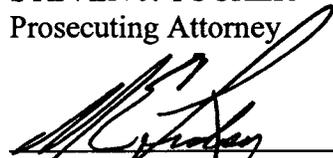
V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed and the case remanded for entry of a judgment and sentence with a proper offender score and a sentence based upon the corresponding range.

Dated this 29TH day of June, 2010.

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