

**FILED**

**JUN 20 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B.

**NO. 29378-5-III**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**SAMUEL EDWARD OSBORNE**

**APPELLANT.**

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**RESPONDENT'S BRIEF**

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**ASSIGNMENTS OF ERROR**

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### **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Grant County Prosecuting Attorney's Office is the Respondent herein.

### **II. RELIEF REQUESTED**

Reversal is not warranted and Appellant's convictions must be affirmed.

### **III. ISSUES**

1. Was the State relieved of its burden of proving each and every element of the crimes charged beyond a reasonable doubt when one "to convict" instruction defined an element term and a similar "to convict" instruction did not?
2. Was the appellant's offender score and sentencing range sufficiently shown and proven?

### **IV. STATEMENT OF THE CASE**

Appellant, Samuel Osborne and his co-defendant, Charles Mitchell, were apprehended by law enforcement on the afternoon of May 29, 2010 at a remote area in Warden, Washington. Grant County Sheriff's Office Corporal Rick LaGrave, who was on motorcycle patrol, saw the vehicle that

the two men were in on a road off of the highway, heading toward the remote former missile site where two shop buildings belonging to Mr. Jones and Mr. Echols were situated. RP 08/18/10 at 29, 20, 36, 86. Mr. Jones had reported seeing a similar van on the property just days before and Corporal LaGrave was aware of the vehicle description. RP 08/18/10 at 30, 31, 88. Mr. Jones had experienced recent metal thefts from his property and had been in contact with deputies Mitchell and Gregg just the day before. RP 08/18/10 at 86-89. It was during one of those recent contacts with Mr. Jones, that Mr. Echols also discovered that items had been moved and removed from his shop. RP 08/19/10 at 74-76. Because of the recent thefts, the remoteness of the area, and the distinctive similarity of the vehicle, Corporal LaGrave called for back-up. RP 08/18/10 at 39, 60.

Both Mr. Osborne and Mr. Mitchell were located more than fifteen to twenty minutes after they had arrived at the site. RP 08/18/10 at 50-53. Mr. Mitchell was located hiding in the sagebrush, laying flat out, and Mr. Osborne was discovered hiding beneath a blue tarp in Mr. Echols' shop. RP 08/18/10 at 51-53, 80, 67-68. Distinctive bundles of copper wire similar to copper taken from Mr. Jones were located in the van which Mr. Mitchell had driven to the site, as were copper pipes, copper wire and other items similar

to items taken from Mr. Jones' property. RP 08/19/10 at 12-17, 22-26, 53-54, 65-68, 102, 104. Mr. Osborne was charged by amended information with two counts of burglary in the second degree, each with an alternate count of attempted burglary in the second degree relating to the two buildings on the property, as well as with theft in the third degree with an alternate count of possession of stolen property and malicious mischief in the first degree for the metal thefts and damage done to Mr. Jones' property. CP 11-14.

The case proceeded to jury trial on August 18, 2010. Appellant was found guilty of two counts of attempted burglary in the second degree. RP 08/20/10 at 38, 42. He now appeals the jury's verdicts arguing that the State did not prove each and every element of the crimes for which he was found guilty, and that his offender score was not validly ascertained.

## **V. ARGUMENT**

### **A. THE JURY INSTRUCTIONS READ AS A WHOLE WERE PROPER AND CORRECT AND THE APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL.**

Appellant was charged in count two with attempted burglary in the second degree as an alternative to count one, burglary in the second degree. Similarly, he was charged in count four with attempted burglary in the

second degree as an alternative to count three, burglary in the second degree.

Instruction number 7 as given to the jury reads in its entirety:

COUNT 2: ATTEMPTED BURGLARY IN THE SECOND DEGREE

A person is guilty of attempt to commit a crime when, with intent to commit that crime, he does any act which is a substantial step toward commission of that crime. A “substantial step” is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

To convict the defendant of the crime of attempted burglary in the second degree, as charged in Count 2, the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about May 29, 2010, the defendant did an act which was a substantial step toward commission of burglary in the second degree.
2. That the act was done with the intent to commit burglary in the second degree.
3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty as to Count 2.

On the other hand, if after weighing the evidence, you have a reasonable doubt as to any one of these elements, then you should return a verdict of not guilty as to Count 2. CP 27.

Instruction number 9 as given to the jury reads in its entirety:

COUNT 4: ATTEMPTED BURGLARY IN THE SECOND DEGREE

To convict the defendant of the crime of attempted burglary in the second degree, as charged in Count 4, the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about May 29, 2010, the defendant did an act which was a substantial step toward commission of burglary in the second degree.

2. That the act was done with the intent to commit burglary in the second degree other than any incident of burglary in the second degree found by you to establish an element of Count 1 or Count 2.

3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then you should return a verdict of guilty as to Count 4.

On the other hand, if after weighing the evidence, you have a reasonable doubt as to any one of these elements, then you should return a verdict of not guilty as to Count 4. CP 29.

Appellant argues that by defining “substantial step” in instruction 7, but failing to do so in instruction 9 relieved the State of its burden of proving each and every element of the crime of attempted burglary in the second degree as alleged in Count 4.

Element 2 in instruction 9 makes it abundantly clear that the second charge of attempted burglary that the jury is to consider differs only in that they must find a separate and distinct act of attempted burglary apart from any act of attempted burglary that they used to find either count 1 or count 2. The lack of a specific definition of substantial step in instruction number 9 does not cancel, discharge, or dismiss the fact that the jury was asked to find that the appellant committed an act which was a substantial step. Nor is

there any indication that they would disregard or waive the earlier definition provided for them in instruction number 7. Jurors are presumed to follow jury instructions as a whole, and jury instruction number 1 specifically stated that to the jurors in its last sentence; “The lawyers may emphasize particular instructions, but you should consider them as a whole.” CP 20. Jury instructions satisfy the demands of a fair trial if, when read as a whole, they correctly tell the jury of the applicable law and are not misleading. *State v. Prado*, 144 Wn.App. 227, 181 P.3d 901 (2008). Inapposite is appellant’s reliance upon *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002), in which the Court found that the jury instruction for an accomplice, which instructed the jury that they must find the defendant assisted with “a” crime, relieved the State of its burden of proving that the defendant assisted with “the” crime.

The jury instructions in Mr. Osborne’s case were not misleading and there is no reason to believe that the jurors would have applied a different definition of “substantial step” in Count 4 when it was defined in instruction 7, and referenced in instruction 9. Additionally the jury had been told that they must consider the instructions as a whole, as well as to what the sole distinction was between the two alleged crimes in element 2 of instruction 9.

B. THE SENTENCING COURT CORRECTLY DETERMINED THE APPELLANT'S OFFENDER SCORE AND SENTENCING RANGE.

At the August 31, 2010 sentencing of Mr. Osborne, the State requested the high end of the range given the appellant's lengthy criminal history including three prior burglaries<sup>1</sup>, two other felonies, two thefts, twelve other gross misdemeanors, seven misdemeanors, and six other crimes, classification unknown. RP 08/31/10 at 2. Appellant's trial attorney, Mr. Terrillion, argued that Mr. Osborne's felony criminal history was fairly old, and that the crimes that prevented his felonies from washing out were mostly "DUI and driving related stuff". Counsel used this as one of his justifications for requesting the low end of the range. RP 08/31/10 at 3. The sentencing judge made specific enquiry of defense counsel "(d)oes defendant have any contest with the State's calculation of his offender score at 9?" to which defense counsel responded, "(n)o Your Honor, we agree with that sentence range." *Id.* Furthermore defense counsel handed the court a judicial information system printout that he had put together showing Mr. Osborne's criminal history to illustrate his point about the non-felony nature of the crimes that Mr. Osborne had recently committed. *Id.*

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<sup>1</sup> Under the sentencing guidelines, each of Mr. Osborne's prior burglaries counted as two points in calculating his offender score for these crimes.

This matter was re-noted for sentencing correction on November 8, 2010. At that hearing, it was noted that based upon the information provided by defense counsel at the August 31<sup>st</sup> hearing, the appellant had additional criminal history that the State had been unaware of. RP 11/08/10 at 1. Since Mr. Osborne had previously scored as a 9, which is the top of the scoring range, it did not change his score, and would thus not change his sentencing range. It was decided to transport Mr. Osborne to address the correction and to secure his fingerprints and signature on the judgment and sentence. *Id.* This has not as yet been addressed pending appellant's appeal.

The State must meet its burden to prove prior convictions by presenting at least some evidence unless the defendant affirmatively acknowledges his criminal history. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999). While the appellant's prior criminal history was not specifically proven at the sentencing hearing, it were referenced by the State, acknowledged by the appellant, and substantiated with a printout proffered by the appellant's counsel in his argument for the low end of the range. The State would argue that these affirmative acts on the part of the appellant acknowledge his offender score and waive his objection to the court's

finding. A defendant's acknowledgment of his criminal history must be affirmative to constitute waiver. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009). A defendant who not only fails to specifically object to the State's representations regarding a defendant's prior convictions, but who actually agrees with the State's depiction of the defendant's criminal history specifically waives the right to challenge such history after the sentence is imposed. *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007), *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). Thus Mr. Osborne cannot now be heard to object to that which he previously affirmatively adopted. Therefore this Court should reject appellant's argument that his score was miscalculated.

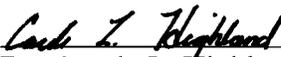
## VI. CONCLUSION

Based on the foregoing, the State respectfully requests this Court deny Osborne's appeal and affirm his convictions.

DATED THIS 16<sup>th</sup> day of June, 2011.

Respectfully submitted:

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