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Court of Appeals  
Division III  
State of Washington

32457-5-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DEVONN DESHEA KINSEY,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:  
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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the sentencing of the Appellant.

## **III. ISSUES**

1. Is the sentencing court's finding, that the Defendant's criminal history had been proven by a preponderance of evidence, clearly erroneous?
2. Shall this Court accept review on the imposition of legal financial obligations where no objection was made below? Did the court abuse its discretion in imposing these costs?

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

The Defendant was charged with felony harassment for threatening to shoot a police officer. CP 104, 149-53, 157-60. On

April 24, 2014, he was convicted by a jury. CP 66; RP<sup>1</sup> 132-34.

At trial, the Pasco Police officer testified that he used to work at Airway Heights as a correctional officer. RP 51. While threats in that position were common, they were also serious. RP 51. "I've seen it being carried out all the way to the extent of people making threats going to officers' houses, shooting their cars, shooting their houses." RP 51. "It is our job, but it's not our life. We still have our life, so we want to go home." RP 51.

At the sentencing hearing on April 29, 2014, defense counsel argued that the State had failed to meet its burden of proof as to the offender score. RP 139, 143. The Honorable Judge Salvador Mendoza, Jr. responded:

Sir, I did have the benefit of hearing the trial in this case. And the concerning thing about this is that you actually told the officer that you were serious about your threat, at first initially only threatening to, as you put it, kick his ass. You then indicated later that you wanted that when you got out, "Pop, pop, pop, pop, pop." Those were your words. And to make sure that he understood how serious you were about that, you then told him to look at your history. And so let's look at your history.

RP 141. The court then recited ten of the Defendant's prior felony

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<sup>1</sup> RP refers to the Verbatim Report of Proceedings for April 23, 24, and 29, 2014 prepared by Court Reporter Joseph D. King.

convictions. RP 141-42. "I remember the trial vividly." RP 142.

... when [the police officer] looked up that history, you put him in such fear that he has now, according to the information that he's provided, taken additional measures to protect his family, has had to put a security, another security system in his home. He's had to share your picture to his family, his children, because he's so afraid for their safety, because when you threaten someone, especially a law enforcement officer, in that specific way, I want to make sure, Devonn, you understand what you are doing. You are mortifying him or her. Do you understand that?

RP 142. *See also* CP 162.

The prosecutor explained that between the Thursday conviction and the Tuesday sentencing hearing, she did not have time to gather the various judgments and sentences from the previous convictions. RP 144. She handed forward for the court's review further documentation of the Defendant's criminal history from the prosecutor's file, which includes records of convictions from the Washington State Courts, the Pasco Police Department, and the Washington State Patrol. RP 145. Over the defense objection, the judge then considered and admitted the information. RP 145.

The prosecutor made copies and filed the documents which the court had reviewed. CP 7-47.

The Defendant was 31 years old on the date of sentencing.

CP 52. Including juvenile offenses, he had 26 convictions and had been committed to the Department of Corrections on four different dates. CP 8-14, 22. His criminal history is in the Benton-Franklin area, so that he was no stranger to the court. CP 8-47.

Judge Mendoza found the Defendant had an offender score in excess of nine points, resulting in a sentencing range of 51-60 months. CP 54. He imposed a sentence of 60 months. CP 59. The Defendant did not object to the court's imposition of legal financial obligations. RP 143-46.

## **V. ARGUMENT**

### **A. THE SENTENCING COURT DID NOT ERR IN FINDING THE DEFENDANT'S CRIMINAL HISTORY WAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE.**

The Defendant objects to the sufficiency of the proof in support of his offender score, not to the calculation of the offender score. Therefore, the question is a factual matter, and the proper standard is "clearly erroneous." *State v. Serrano*, 95 Wn. App. 700, 711, 977 P.2d 47 (1999). *See also In re Stenson*, 174 Wn.2d 474, 488, 276 P.3d 286 (2012).

The Defendant acknowledges that the State need only

demonstrate his criminal history by a mere preponderance of the evidence. Brief of Appellant at 4, *citing State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999) and RCW 9.94A.500(1).

The “best evidence” of a criminal conviction is a certified copy of the judgment and sentence. *State v. Ford*, 137 Wn.2d at 480. When the state does not provide the best evidence, other comparable evidence may be offered if the judgments are not available for some reason other than the serious fault of the proponent. *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). The sentencing court has the discretion to determine the admission of evidence. *State v. Detrick*, 55 Wn. App. 501, 503, 778 P.2d 529 (1989) (the trial court’s decision to admit evidence under the “best evidence” rule will not be disturbed on appeal absent an abuse of discretion). Here the court did not abuse its discretion by admitting the State’s evidence where the prosecutor did not have time in the two working days after the verdict to obtain the Defendant’s numerous judgments.

The State proved the criminal history with reports from the Washington Courts, the Pasco Police Department, and the Washington State Patrol. CP 7-47. In the face of the Defendant’s non-specific challenge, this evidence is sufficient to prove the

convictions under the mere preponderance standard. *Spinelli v. Economy Stations, Inc.*, 71 Wn.2d 503, 508, 429 P.2d 240 (1967) (requiring a specific objection to offer the trial court the opportunity to correct the record).

The Defendant argues that the timing was off, that the sentencing court ruled before the State presented its evidence. Brief of Appellant at 6. This is a trifling objection and it is unsupported by any legal citation. The evidence was presented *at the sentencing hearing*. The court announced that it had *considered* this evidence. Whether this came a few seconds before or after the court announced its ruling is of no matter. A court may reconsider its own ruling. Because the court announced that it considered this evidence within the same hearing, the evidence is part of the record supporting the sentence.

Although there is no error and no need for a resentencing hearing, the Defendant misstates the law on remedy.

The Defendant quotes *State v. Mendoza*, 165 Wn.2d 913, 920-21, 205 P.3d 113 (2009) for the proposition that at a resentencing, the State is held to the record that existed at the sentencing hearing. Brief of Appellant at 6. See also Brief of Appellant at 7 (*quoting State*

*v. Lopez*, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002) (holding that the state would not be granted a second opportunity to provide evidence it should have submitted in the second instance)). The rule that *State v. Mendoza* relies upon is known as the “no second chance” rule.

This case and the cases it relied upon are disfavored by subsequent case law. *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014); *State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014). The “no second chance” rule is not constitutionally based. *State v. Jones*, 182 Wn.2d at 281. Ensuring the accuracy of the criminal history does not implicate due process. *State v. Jones*, 182 Wn.2d at 283. The rule was the product of judicial economy, balancing accuracy with efficiency. *State v. Jones*, 182 Wn.2d at 282.

But legislative amendments in response to these cases have made clear that the legislative intent is for a sentence to “accurately reflect the offender’s actual, complete history.” *State v. Jones*, 182 Wn.2d at 281, (quoting LAWS OF 2008, ch. 231, § 1). Therefore “in those cases where relief is ordered in an appellate proceeding and the case remanded, [ ], under the statutory remand provision both parties have the opportunity to present any evidence relevant to

ensure the accuracy of the criminal history.” *State v. Jones*, 182 Wn.2d at 282-83.

If there were an error in the sentencing and a need to remand for resentencing, the State would not be prevented from providing every judgment and sentence for the prior convictions. However, there is no error in this case and no public policy served by the added expense of such a hearing.

**B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS WHERE THERE WAS NO TIMELY OBJECTION.**

For the first time on appeal, the Defendant challenges the court’s imposition of legal financial obligations, arguing that there is insufficient evidence of his present or future ability to pay.

Yesterday the Washington Supreme Court decided *State v. Blazina*, No. 89028-5 (Wash. Filed Mar. 12, 2015). It held that it is not error for a court of appeals to decline to reach the merits on a challenge to the imposition of LFO’s made for the first time on appeal. *State v. Blazina*, slip Op. at 2. “Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny.” *State v. Blazina*, slip Op. at 4. The decision to review is discretionary

on the reviewing court under RAP 2.5. *State v. Blazina*, slip Op. at 2. In other words, this Court may continue to apply its decision in *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014).

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This Court's reasons in *State v. Duncan* appropriately balance the efficient use of judicial resources with fairness.

While the *Blazina* opinion speaks to a national outcry for reform (slip. op. at 7), the remedy is not in a longer sentencing hearing to assess an ability to earn that may not be put to use until after many years of incarceration. As the *Duncan* opinion explains, at imposition, the State's burden of proof is so low. *State v. Duncan*, 18 Wn. App. at 250. At the moment the judge is considering the incarceration penalty for the offense, the offender should be trying to portray himself in the best light. Therefore, it is "unhelpful" to portray oneself as perpetually unemployed and irretrievably indigent. *State v. Duncan*, 18 Wn. App. at 250.

The remedy to this cry for reform is at the time of collections

when offenders could benefit from assistance in drafting a petition to remit all or part of the costs under RCW 10.01.160(4). While public defenders are appointed on the LFO docket when there is a risk of incarceration, their exposure to their client is brief. Offenders could benefit from a plain language court form similar to CR 08.0800 and CR 08.0810 which regards waiving interest on LFO's, but citing RCW 10.01.160(4) in order to request remission of the principal pro se.

Unless an offender is (1) permanently disabled and unable to earn at the time of sentencing or (2) not facing a term of incarceration, and neither of these conditions apply to Mr. Kinsey's situation, then sentencing is not the best time to address the offender's ability to pay LFO's. At sentencing, Mr. Kinsey was looking at a term of 51-60 months. He would not be earning income any time soon. In the five years that he is incarcerated, his circumstances may significantly change to improve or worsen his ability to pay. If he takes advantage of treatment and training in prison, his skill set will improve. In five years time, other circumstances such as his responsibilities and his health could change. The better time to assess his ability is after his release from prison.

The Defendant claims there is no support on the record for the

court's finding that he has the present or future ability to pay. Brief of Appellant at 10-12. This is not true. Because the State's burden is low, the fact that the Defendant is able-bodied and without apparent barriers (other than every offender's barrier, i.e. the criminal conviction) to employment, the record is sufficient.

The officer testified that when the car was stopped on suspicion of drive-by shooting, the occupants were ordered to exit. RP 52-56; CP 157-60. Once out of the car, the Defendant repeatedly kneeled and stood up. RP 56. He engaged in an intoxicated tirade. RP 57-58, 66. He threatened to "kick our ass[es]" and took a "fighting stance" which suggests a physically violent confrontation. RP 61. The officer believed him capable of carrying out the threat. RP 61. In other words, the Defendant is a 32 year old English speaker in apparent vigorous health with sufficient discretionary funds to spend on intoxicants. There was no challenge to his competency. On this record, he has the ability to pay \$100/mo.

The *Blazina* court states that sentencing courts should take into consideration other debts, like restitution. *State v. Blazina*, slip Op. at 11. There was no restitution in this case. CP 56-57; RP 143-44.

The Defendant notes that he was found indigent for purposes

of pursuing this appeal. Brief of Appellant at 12. There is a significant difference between one's ability to pay \$100/mo (CP 57) (which can be earned by mowing one lawn a week) and being immediately able to come up with the thousands of dollars necessary to retain an attorney and transcribe a record. In any case, indigency is a condition, not an ability. And it is not a static condition.

The Defendant challenges the imposition of discretionary costs. Brief of Appellant at 13-14. Even were a finding unsupported in the record, the authority does not require the striking of costs. At most, under the newest authority, the remedy would be a remand. *State v. Blazina*, slip Op. at 12.

## **VI. CONCLUSION**

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: March 13, 2015.

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