

**FILED**  
**Apr 03, 2017**  
Court of Appeals  
Division III  
State of Washington

NO. 33888-6-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEOPOLDO CUEVAS CARDENAS,

Appellant.

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BRIEF OF RESPONDENT

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David B. Trefry WSBA #16050  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH A. BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2nd St. Rm. 329  
Yakima, WA 98901-2621

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u> .....	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u> .....	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u> .....	2
II. <u>STATEMENT OF THE CASE</u> .....	2
III. <u>ARGUMENT</u> .....	2
<u>Response to allegation one – restitution</u> .....	2
<u>Response to allegation two – findings and conclusions</u> .....	2
<u>Response to allegation three- scrivener’s error maximum penalty</u> .....	3
<u>Response to allegation four – incorrect criminal history dates</u> .....	4
<u>Response to allegation five – incorrect offender score</u> .....	4
IV. <u>CONCLUSION</u> .....	8

TABLE OF AUTHORITIES

PAGE

**Cases**

State v. Carter, 127 Wn.2d 836, 842, 904 P.2d 290 (1995) ..... 5

State v. Johnson, 69 Wn. App. 528, 849 P.2d 662 (1993)..... 5

State v. Perez, 69 Wn. App. 133, 140, 847 P.2d 532 (1993) ..... 6

State v. Creekmore, 55 Wn. App. 852, 783 P.2d 1068 (1989).....6

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has set forth several assignments of error in his opening and supplemental briefs. These are set forth by Appellant as follows;

Opening brief:

1. The trial court erred in imposing restitution.
2. The trial court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c).
3. The judgment and sentence contains a scrivener's error on the maximum penalty for attempted burglary in the second degree.

Supplemental brief:

1. The judgment and sentence contains multiple errors for the dates of Mr. Cardenas' criminal history.
2. The sentencing court erred as a matter of law in failing to properly characterize Mr. Cardenas' four June 1986 burglary and felony theft convictions as a single offense for scoring purposes.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The Court did err when it imposed restitution when the defendant disputed the amount. The State concedes this issue and agrees to strike the restitution from the judgment and sentence.
2. This allegation has been resolved, the case was remanded and findings and conclusions have been entered.
3. The judgment and sentence does contain a scrivener's error, the State concedes this issue and agrees to submit an ex parte order to correct this error.
4. The judgment and sentence does contain incorrect dates for the dates of Cardenas' previous crimes. The State concedes this allegation and once again agrees to correct this allegation with an ex parte order.
5. The sentencing court did err in the method it characterized the

four prior Burglary's from 1986, the State concedes this issue. The defendant will still have an offender score in excess of 9 points, the trial court would clearly impose the same sentence so the court need not remand for resentencing. The judgment and sentence can be corrected through an ex parte order that merely indicates the 1986 crimes are to be scored as a single offense.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed within the body of this brief.

## III. ARGUMENT

### **Response to allegation one. The trial court should have set the issue of restitution for a hearing.**

The State concedes that the trial court should have set a hearing for the issue of restitution, it did not. The State has reviewed the records regarding restitution in this case and has determined that it will waive the imposition of restitution and agree to strike this from the Judgment and Sentence.

### **Response to allegation two – Entry of Findings and Conclusions.**

This court agreed to stay and remand this case to the trial court to allow for the entry of findings of fact and conclusions of law, this has been done and they have been submitted to this court.

This allegation is moot.

**Response to allegation three – Scrivener’s error, maximum penalty for attempted burglary.**

There is a scrivener’s error regarding the maximum penalty that may be imposed for Attempted Burglary in the Second Degree.

Appellant is correct, because this crime was charged under RCW 9A.28.020, and the base crime, Burglary in the Second Degree is a class B felony, the statute mandates that the attempt is a class C, felony.

There is no need for this court to “remand this case for resentencing” as Appellant requests. This error as with the other above can easily be remedied by this court ordering that an ex parte order be entered in the trial court correcting the judgment and sentence to reflect “5” not “10” for the maximum term that can be served for this attempted burglary.

The cost to “remand for resentencing” a case for a ministerial item such as this scrivener’s error is significant. A remand for resentencing requires the State to arrange transportation for the defendant from prison and then transport the defendant back to prison, appointment of counsel for the resentencing, house the defendant while in the Yakima County jail, the Prosecutors office and the trial court both incur costs associated with a resentencing. It costs money to conduct a new hearing for these minor matters that can be corrected with not prejudice to the defendant, by way

of an order mandated by this court.

This court also incurs added expense when the inevitable new appeals is filed when the trial court does as it is ordered and just addresses these minor matters but the defendant is again dissatisfied with the outcome and appeals yet again.

**Response to allegation four – The dates of Cardenas’ previous crimes were incorrectly listed. They were correctly listed in documents the State filed to support the sentence imposed.**

Here again the State concedes that the judgment and sentence contains the incorrect dates of occurrence for the defendant’s prior crimes in section 2.3. These should be corrected as set forth in the Appellant’s supplemental brief.

However, once again there is no need for this court to remand this case to the trial court for to allow for a resentencing of Cardenas. This too can be fixed with an order from this court for the trial court to submit in the form of an order the correct dates for the past criminal acts of Cardenas. There is no need to transport the defendant from prison to have this dates corrected. As stated above the cost for such a resentencing is significant.

**Response to allegation five – the burglaries from 1986 should count as a single offense for scoring purposes.**

The amendment to the statute that that allows for these convictions

to count separately occurred after Cardenas committed these crimes. The crimes themselves occurred prior to July 1, 1986 and therefore they could have been scored as “1” for the current judgment and sentence.

However, due to the enormous number of prior convictions that this Appellant has there is no change in his offender score which will have an effect on this sentence range. As can be seen from the extracted section of the defendant’s judgment and sentence even if the four burglaries are scored as “1” his offender score is still “9+.” There for the standard range would not change.

Remand is not always required if this court determines that the outcome in the trial court would be the same. See, State v. Carter, 127 Wn.2d 836, 842, 904 P.2d 290 (1995), remand for an evidentiary hearing not needed when it would not be likely that a different result, conviction of Carter, would occur; State v. Johnson, 69 Wn. App. 528, 849 P.2d 662 (1993);

Review of an exceptional sentence is governed by RCW 9.94A.210(4). An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standard of review: (1) Are the reasons given supported by the evidence in the record? As to this, the standard of review is "clearly erroneous". (2) Do the reasons given justify a departure from the standard range? The standard of review on this is as a "matter of law". (3) Is the sentence clearly too excessive or too lenient? The

standard of review is "abuse of discretion".  
(Citations omitted.)

State v. Perez, 69 Wn. App. 133, 140, 847 P.2d 532 (1993);

We are satisfied that the trial court would have followed the State's recommendation and imposed the same sentence absent the improper factor. Therefore, we need not remand for further consideration. State v. Fisher, 108 Wn.2d 419, 429-30, 430 n.7, 739 P.2d 683 (1987). State v. Drummer, 54 Wn. App. 751, 760, 775 P.2d 981 (1989).

State v. Creekmore, 55 Wn. App. 852, 783 P.2d 1068 (1989), "A like disparity, however, does not necessitate a remand "when we are satisfied that the judge would have imposed the same sentence absent the improper factor." State v. Drummer, supra at 760 (210-month disparity; record did not support finding that victim was particularly vulnerable).

We are satisfied the court would have imposed the same sentence even if it had not considered earned early release."

This case is similar to Creekmore, the court herein stated:

SENTENCING 11/18/15  
THE COURT: All right.

Okay.

Well, generally speaking, when sentencing -- and the legislature gives the court a range, then I think what a lot of judges do is kind of start in the middle of the range and then -- determine whether there are factors that indicate that the range should be higher or lower. On the

one hand this is probably a pretty routine attempted second degree burglary. But we do have I think a serious consideration here, given Mr. Cardenas' record. He has a long history of -- theft and burglary. I'm not sure that -- much has been learned through incarceration. But given -- given the history, given his criminal history, I think a sentence closer to the top of the range is more appropriate than one at the bottom of the range. I am going to sentence at the top of the range, 51 months. Credit for time served to be determined. RP 252-3.

**2.3 Criminal History:** Prior criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	Adult or Juvenile	Type of Crime
First Degree Robbery 98-1-02190-5	9-27-1999	Yakima, WA	12-6-1998*	Adult	V
First Degree Robbery 98-1-02190-5	9-27-1999	Yakima, WA	12-6-1998*	Adult	V
Second Degree Burglary 89-1-00385-0	1-12-1990	Benton, WA	5-16-1989	Adult	NV
Custodial Assault 90-1-00015-3	2-6-1990	Benton, WA	1-11-1990	Adult	NV
Second Degree Burglary 86-1-50132-0	10-7-1986	Franklin, WA	7-28-1986**	Adult	NV
Second Degree Burglary 86-1-50132-0	10-7-1986	Franklin, WA	7-28-1986**	Adult	NV
First Degree Theft (not FA) 86-1-50132-0	10-7-1986	Franklin, WA	7-28-1986***	Adult	NV
Second Degree Theft (not FA) 86-1-50132-0	10-7-1986	Franklin, WA	7-28-1986***	Adult	NV
First Degree PSP 86-1-50107-9	7-22-1986	Franklin, WA	6-20-1986	Adult	NV
Cont Sub - mfg/del/pos 89-1-00775-0	7-10-1989	Yakima, WA	5-7-1989****	Adult	Drugs
UPFA 89-1-00775-0	7-10-1989	Yakima, WA	5-7-1989****	Adult	NV
Second Degree Robbery 87-1-01598-5	2-11-1988	Yakima, WA	12-2-1987	Adult	V
Second Degree Burglary 86-1-00226-5	4-11-1986	Yakima, WA	1-19-1986	Adult	NV
88-1-00724-7 88-1-00724-7 88-1-00724-7	7-22-1988	Yakima, WA	6-9-1988	Adult	NV

The Court finds the above-listed concurrent prior convictions (indicated by \*, \*\*, \*\*\* and \*\*\*\*) are not the same criminal conduct under RCW 9.94A.525(5)(a)(i), and shall count separately.

IV. CONCLUSION

For the reasons set forth above the appellant has correctly addressed several errors that occurred at the time of his sentencing. However, the State does not agree with Appellant that court must remand and allow a “resentencing.”

In fact, this court need not and should not remand this case for resentencing. This court merely needs to order that the actions necessary to fix the errors be done by order of the trial court without the need to remand and transport this defendant, thereby allowing a “resentencing” and all of the implicit costs associated with that action.

Respectfully submitted this 4<sup>th</sup> day of April 2017,

By: s/ David B. Trefry  
DAVID B. TREFRY WSBA# 16050  
Senior Deputy Prosecuting Attorney  
P.O. Box 4846  
Spokane, WA 99220  
Telephone: 1-509-534-3505  
E-mail: [David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)

DECLARATION OF SERVICE

I, David B. Trefry state that on April 3, 2017 2017, I emailed by agreement of the parties a copy of the State's Motion to for Extension of Time to: Lisa E. Tabbut, at [ltabbutlaw@gmail.com](mailto:ltabbutlaw@gmail.com)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3<sup>rd</sup> day of April, 2017 at Spokane, Washington.

s/ David B. Trefry  
DAVID B. TREFRY, WSBA #16050  
Deputy Prosecuting Attorney  
Yakima County, Washington  
P.O. Box 4846, Spokane WA 99220  
Telephone: (509) 534-3505  
[David.Trefry@co.wa.yakima.us](mailto:David.Trefry@co.wa.yakima.us)