

34762-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMES DUNLEAVY,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA 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 Walla Walla County Prosecutor, is the Respondent herein.

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the trial and conviction of the Appellant.

## **III. ISSUES**

1. Has the Defendant shown that the superior court's response to a jury inquiry (to review the evidence and instructions and continue to deliberate) actually prejudiced the outcome of this case?
2. Is there sufficient evidence that the Defendant unlawfully entered a building where the victim's undisputed testimony is that he had not given the Defendant permission to enter and that the Defendant entered the victim's jail cell to steal?
3. Was the court justified on relying upon the Defendant's acknowledgement of the offender score?
4. Should costs be assessed if the State substantially prevails on appeal?

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

The Appellant/Defendant James Dunleavy was charged with assault in the second degree, burglary in the second degree, and theft in the third degree. The jury convicted him of the latter two counts. CP 1-3. CP 36-50.

On February 14, 2016, the Defendant was incarcerated at the Walla Walla County Jail in Unit E. RP 4, 6, 20. In Unit E, there are eight rooms or cells capable of housing two inmates per cell; the rooms open into a day room. RP 20, 24. In Unit E, the cell doors are open from about six in the morning until nine at night. RP 14. However, if inmates shut the door, they will be locked inside and “stuck in there.” RP 16, 23-24.

Inmates are notified of jail policies at booking and can receive the rules in a printed two-page hand-out. RP 20-22, 43. “[F]irst and foremost, they are not supposed to go into each other’s cell.” RP 20. The policy reads: “Do not enter a cell that’s not assigned.” RP 22. Cells are assigned, and each inmate can expect privacy in that assigned space. RP 21. Although inmates have been known to enter each other’s cells with the residents’ permission, this is against jail policy and can result in jail infractions. RP 13-14, 21, 47, 66-67. If a separate crime occurs during the trespass, the supervising sergeant will refer the matter for prosecution as a burglary. RP 55, 68.

At the time of the offense, inmate Kemp LaMunyon had only been in custody for a month and a half. RP 9-10. He got along well with inmate John Owen, and he believed he was getting along with the Defendant. RP 9-10, 62. However, there was an apparent power imbalance. Mr. LaMunyon was giving away his commissary to the Defendant. RP 4-5, 62. Inmates have few possessions. They are issued clothing and bedding, and they can purchase commissary if there is money on their accounts. RP 24. Commissary is currency<sup>1</sup> for the incarcerated. RP 193.

On the day of the assault, the Defendant asked Mr. LaMunyon for a tortilla. RP 5. Mr. LaMunyon said he did not have enough to share and that the Defendant would have to wait until Mr. LaMunyon could purchase more commissary. RP 5. The Defendant became aggressive and attempted to dominate him, saying, “how you can’t give a brother a tortilla,” and that he “was going to smash [Mr. LaMunyon] out.” RP 5.

Mr. Owen and the Defendant brutally attacked Mr. LaMunyon in turns. RP 6, 8, 40-41, 57. At the time, all cell doors were open. RP 12. Most of the inmates were walking laps, getting some exercise. RP 13, 28-29, 66. Mr. LaMunyon was standing by Mr. Owen’s cell. RP 29, 39-40. The

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<sup>1</sup> See also [https://en.wikipedia.org/wiki/Prison\\_commissary](https://en.wikipedia.org/wiki/Prison_commissary);  
<https://www.theguardian.com/us-news/2016/aug/22/ramen-prison-currency-study>.

assault began at about 4 pm by rooms 4 and 5 and moved into the entryway of the unit. RP 13, 25. It was recorded. RP 25-26.

As the assault unfolded, as it was occurring, the defendant slipped into the victim's cell, [ ], grabbed something, put it in his waistband, made his way back out of the unit, stood underneath the television and stood there for quite some time as the rest of the people in the unit started to clean up the remnants of the assault.

RP 57. Mr. LaMunyon's cellmate Kenny Whitmarsh was sitting in his cell reading. RP 4, 28, 41, 48. The Defendant did not have permission to enter the cell. RP 5. And he had stolen Mr. LaMunyon's commissary. RP 5, 29, 40-41.

After the assault, inmates Lonnie Montoya and Mr. Whitmarsh said they would make sure nobody stopped him from hitting the button if Mr. LaMunyon needed medical attention. RP 6, 17, 100-01. But the Defendant told Mr. LaMunyon he did not need medical attention. RP 6. When Mr. LaMunyon asked how the Defendant could say that, the Defendant said, "Do you want to get beat up again?" RP 6, 17. The Defendant and Mr. Owen forced Mr. LaMunyon into the shower against his will in order to wash off the blood. RP 15-16, 41, 49, 58-60 (the Defendant can be heard on the tape twice instructing Mr. LaMunyon to clean himself up.).

Eventually, the jail staff (Mr. Chilton) entered to distribute medication

to the inmates, and the injury was reported. RP 49. On the video recording, all the inmates, with the conspicuous exception of the Defendant, can be seen paying attention to the staff investigation. RP 43-44.

Mr. LaMunyon was taken to the hospital for a CAT scan where he was diagnosed with multiple facial fractures, a concussion, and some lacerations. RP 6-7, 42, 61. At trial, five months after the assault, Mr. LaMunyon testified that his fractures had not yet healed, and he had developed a clicking in his jaw. RP 8. He has been prescribed anxiety medications related to the assault. RP 8.

After the State's evidence was presented, the court heard and denied a motion to dismiss. RP 80-82. Then defense called a single witness, inmate Lonnie Montoya.

Mr. Montoya has been booked into jail 30-40 times. RP 98. In all of his many incarcerations, he did not meet Mr. LaMunyon until the period around this incident. RP 107. "I don't know how many times he has been incarcerated," but LaMunyon acted like "he was better than the rest of us." RP 88, 99. Mr. Montoya explained that inmates are not supposed to testify against each other. RP 102, 113. But Mr. LaMunyon testified against the Defendant and wants justice. RP 3-19, 197. Mr. Montoya made no bones

about his aversion for Mr. LaMunyon. RP 88, 99, 105.

Mr. Montoya is well known to the jail staff and has a reputation for untruthfulness. RP 116-17. Additionally, he was in the Defendant's debt. RP 17 (promised to put money on the Defendant's books when he was released). As a defense witness, he testified, "I want to make this real clear: Dunleavy had nothing to do with the fight between John and LaMunyon." RP 89.

Mr. Montoya wanted the jury to believe that Mr. LaMunyon had been antagonizing Mr. Owen the morning of the assault and challenging him to a contest of strength. RP 86-88, 105. But Mr. Owen was approximately 6'2" and 245 pounds; Mr. LaMunyon was half a foot shorter and 100 pounds lighter. RP 60-61. And Mr. LaMunyon can be seen on the video trying to make peace with Mr. Owen. RP 147.

In closing, the prosecutor noted that Mr. Owen attacked as Mr. LaMunyon was walking away from him and toward his own cell and the Defendant. RP 147. Thus the ambush was not a contest of any kind. It did, however, prevent Mr. LaMunyon from returning to his cell and guarding his property. RP 147. The video shows Mr. LaMunyon offering his hand to Mr. Owen to shake. RP 147. And Mr. Montoya said he tried to intercede or

distract Mr. Owen. RP 88-89. It was to no avail, because the fight was not motivated by any real animus between Owen and LaMunyon; rather it was a “clearly synchronized” “distraction, a diversion” to allow the Defendant an opportunity to burglarize Mr. LaMunyon’s cell, thus making the Defendant complicit in the injury inflicted by Mr. Owen. RP 146-47.

During deliberations, the jury inquired: “Are the Walla Walla county jail policies legally binding? Are they considered law? What if we are not unanimous on a certain count?” CP 5.

The court’s instructions do not instruct that jail policies are binding law. They provide that, to convict of the charged burglary, the jury must find an unlawful entry or remaining in a building. CP 26. A “building” includes “any dwelling” or “other structure used for lodging of persons.” CP 24. The instructions also advise that jurors should not surrender their honestly held positions in order to reach a unanimous verdict. CP 11, 35.

The court responded: “You are to review the evidence, the exhibits, and the instructions and continue to deliberate in order to reach a verdict.” CP 5.

## V. ARGUMENT

- A. THE COURT'S UNCHALLENGED INSTRUCTION TO THE JURY (TO REVIEW THE INSTRUCTIONS AND EVIDENCE) DID NOT MANIFESTLY DEPRIVE THE DEFENDANT OF HIS RIGHT TO A UNANIMOUS JURY.

The Defendant claims the superior court's response to a jury question was error. Appellant's Opening Brief (AOB) at 4-7. Because the defense did not preserve this error below, he must show manifest constitutional error to receive review. RAP 2.5(a)(3). To demonstrate such an error, the defendant must show the alleged error *actually prejudiced* his rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

To prevail on a claim of improper judicial interference with the verdict, a defendant "must establish a reasonably ***substantial possibility*** that the verdict was ***improperly influenced*** by the trial courts intervention." *State v. Watkins*, 99 Wash.2d 166, 178, 660 P.2d 1117 (1983). This requires an ***affirmative showing*** and may ***not*** be based on ***mere speculation***. We consider the totality of circumstances regarding the trial court's intervention into the jury's deliberations. *Watkins*, 99 Wash.2d at 177-78, 660 P.2d 1117; *State v. Boogaard*, 90 Wash.2d 733, 739-40, 585 P.2d 789 (1978).

*State v. Ford*, 171 Wn.2d 185, 188-89, 250 P.3d 97, 99 (2011) (emphasis added). The Defendant cannot show that the court's "pretty stock answer" (RP 182) directing the jury to review the instructions and continue to deliberate actually prejudiced his right to a fair trial.

During deliberations, the jurors sent the court this inquiry:

Are the Walla Walla county jail policies legally binding? Are they considered law? What if we are not unanimous on a certain count?

CP 5; RP 182. The judge and parties met. RP 182. Defense counsel suggested that the jurors could be directed to a particular exhibit in response to the first two questions. RP 182-83. She made no comment on proposals for answering the final question. RP 182-84. The Defendant made no objection to the court's eventual response:

You are to review the evidence, the exhibits, *and the instructions* and continue to deliberate in order to reach a verdict.

CP 5 (emphasis added); RP 183-84.

The jury instructions require unanimity to reach a verdict. CP 35 (“Because this is a criminal case, each of you must agree for you to return a verdict.”). They also specifically instruct that jurors should not surrender their positions in order to reach a unanimous verdict.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourselves, but only after you consider the evidence impartially with your fellow jurors. During your deliberations you should not hesitate to re-examine your own views and change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest

belief about the value or significance of evidence, solely because of the opinions of your fellow jurors, nor should you change your mind just for the purpose of reaching a verdict.

CP 11; RP 134-35.

The jury began deliberations at 1:30 after returning from lunch. RP 171. The jury sent out two inquiries, received responses, and reached a verdict on three counts before the afternoon's end. RP 176-81, 182-84. The court instructed the bailiff to bring the jury back at 4:55 *if they had not reached a verdict by then*. RP 184. We do not know precisely when, but the jury returned sometime before 4:55 with a verdict. The jury acquitted on the most serious charge and convicted on two others. RP 184-85. It is hard to interpret, as the Defendant would like, that the jury's question expresses any frustration or deadlock *after such a short period of deliberation*.

The Defendant argues that "the accompanying questions suggest that jurors were struggling with the burglary charge." AOB at 6. This is highly unlikely. As defense counsel observed, the jury's questions were readily and fully answered by a closer reading of the instructions. RP 182-83. The court provided no instruction that jail policies had any legal effect. More likely than not, the jury was struggling with the acquitted count, which regarded the complex legal concept of complicity.

The Defendant relies on *State v. Boogaard*, 90 Wn.2d 733, 585 P.2d 789 (1978), arguing that the court's response here was indistinguishable from that in *Boogard* and effectively pressured the jury into reaching a decision. AOB at 5-6. This is improbable. The facts in that case are eminently distinguishable.

The *Boogaard* jury was deliberating on a single count of theft in the second degree. *State v. Boogaard*, 90 Wn.2d at 733-34. The opinion suggest the state's case was very weak. *State v. Boogaard*, 90 Wn.2d at 735 ("it cannot be said, upon the record, that no reasonable juror could have entertained a doubt with respect to the state's proof").

The *Boogaard* jury began its deliberations in midafternoon and continued into the night until sometime after 10 p.m.. *State v. Boogaard*, 90 Wn.2d at 735. By then the trial judge had been relieved by a night duty judge, and there was no court reporter on duty. *Id.*

The judge was faced with the necessity of deciding whether to allow the jury to continue to deliberate until it reached a verdict, which might be very late, or to recess the jury until the following day (which was Veteran's Day, a holiday for court personnel as well as for the public generally) or to the next court day (to which the appellant's counsel had indicated he would object) or to declare a mistrial.

*Id.* The jury would have felt the same pressure, wanting to be finished with

their service before the holiday.

Feeling the pressure of time, the *Boogaard* judge inquired and learned that the jury vote was 10-to-2. *Id.* The judge then summoned the jury to the courtroom and asked each juror individually if he or she could reach a verdict in a half an hour. *Id.* One of the jurors was not confident that this was possible. *Id.*

The questioning of individual jurors, with respect to each juror's opinion regarding the jury's ability to reach a verdict in a prescribed length of time, after the court was apprised of the history of the vote in the presence of the jurors, unavoidably tended to suggest to minority jurors that they should "give in" for the sake of that goal which the judge obviously deemed desirable namely, a verdict within a half hour.

*State v. Boogaard*, 90 Wn.2d at 736.

The facts are very different in the instant case. Here the jury decided three counts in a short afternoon in the middle of the week. The *Boogaard* jury deliberated on a single count for approximately the twice the time it took Mr. Dunleavy's jury to reach a verdict on three counts.

The court here had no intention of holding the jurors overnight or into the next day. The judge intended to release the jurors after a single afternoon and before 5 p.m.. RP 84 (expressing a concern that testimony be completed in the morning in order to provide the jury sufficient time to deliberate); RP

128 (“we want to make sure that we’re complying with labor law as well.”); RP 184 (“We will give them until five minutes to 5:00, unless they really, really, really want to keep going.”). The following day was July 27, a Wednesday, and not a holiday. There was not the same pressure on either the jury or court as there had been in the *Boogard* case.

And there was no inquiry into the vote and no individual questioning.

The Defendant claims that the court’s response suggested a need for agreement or that minority jurors should “give in” for the sake of reaching a verdict. AOB at 6-7. This is not reasonable. In fact, the court’s response only referred the jury to the previous instructions which are form WPIC’s. The instructions specifically tell jurors not to surrender their positions in order to reach a unanimous verdict. CP 11.

The Defendant claims that the instructions given prior to deliberations may not be repeated during deliberations. AOB at 6-7. No authority or rationale is provided for this bizarre claim. The law remains the law. The instructions remain the instructions.

The Defendant cannot show that this mundane reminder to the jurors to review their instructions deprived him of his right to a jury trial.

B. THERE WAS SUFFICIENT EVIDENCE FOR THE BURGLARY CONVICTION.

The Defendant challenges the sufficiency of the evidence for his burglary conviction. “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). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

The superior court reviewed the sufficiency of the evidence at the close of the State’s case and denied the motion to dismiss. RP 80-82.

The Defendant relitigates the claim on appeal. In particular, the Defendant challenges whether a cell can be a building and whether his entry

was unlawful. AOB at 7-12. The elements of burglary in the second degree include an unlawful entry or unlawful remaining in a building. CP 21, 26; RCW 9A.52.030. Entry is unlawful when it is without license, invitation, or privilege. CP 23; RCW 9A.52.010(2). Remaining is unlawful when the defendant exceeds the scope of the license or privilege to enter such that license is expressly or impliedly terminated. *State v. Allen*, 127 Wn. App. 125, 133, 110 P.3d 849, 852 (2005). A “building” includes “any dwelling” or “other structure used for lodging of persons.” CP 24; RCW 9A.04.110(5) and (7).

Throughout his incarceration, Mr. LaMunyon dwelled in his cell. He used it for lodging. Both the policies of the jail and the practices of the inmates demonstrated that an inmate had a degree of privacy in his own cell, at least against the intrusions of other inmates who were not assigned to the space.

Mr. LaMunyon testified that the Defendant did not have permission to enter. RP 5. That is undisputed. The Defendant certainly did not have permission to steal, such that if he had any license to enter, his theft exceeded the scope of his license. RP 5; *State v. Crist*, 80 Wn.App. 511, 514, 909 P.2d 1341 (1996), *citing State v. Thomson*, 71 Wn.App. 634, 638-41, 861 P.2d 492

(1993) (unlawful remaining occurs when conduct violates the limits of the invitation, license or privilege). The victim's testimony is accepted on review as credible. It is undisputed.

The Defendant relies upon the definition of "building" in *State v. Thomson*, 71 Wn. App. 634, 642, 861 P.2d 492 (1993). In that case, the charge was not burglary, but rape. A woman invited the defendant Thomson to sleep in her guest bedroom. *State v. Thomson*, 71 Wn. App. at 636. She rebuffed his sexual advances and then went into her bedroom and locked the door. *Id.* Thomson broke through the door and raped her. *Id.* He was convicted of rape in the first degree for "feloniously entering the building or vehicle where the victim is situated." *State v. Thomson*, 71 Wn. App. at 637. The court found that the victim's dwelling was her entire house, and Thomson had been invited in.

The case does not assist the Defendant. Here Mr. LaMunyon's entire dwelling was his single cell. The Defendant had not been invited in.

The statute in *Thomson* is also different. The rape statute looks only at unlawful entry only, not unlawful remaining. *State v. Howard*, 127 Wn. App. 862, 876, 113 P.3d 511 (2005) (*State v. Thomson* distinguished unlawful entry from unlawful remaining). The burglary statute is satisfied by

unlawful remaining.

“Unlawful remaining” occurs when (1) a person has lawfully entered a dwelling pursuant to license, invitation or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the dwelling.

*State v. Douglas*, 128 Wn. App. 555, 567, 116 P.3d 1012, 1019 (2005).

When someone exceeds the implied scope of the invitation, for example by committing a theft therein, the remaining is unlawful. *State v. Collins*, 110 Wn.2d 253, 261-62, 751 P.2d 837 (1988).

The Defendant argues that inmates have no expectation of privacy against other inmates. AOB at 9-10. However, he provides no authority in that regard. The only cases he cites regard inmates' expectation of privacy **against correctional facility officials**. *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (inmate challenging *officer* search of his prison locker in a standard shakedown for contraband); *Block v. Rutherford*, 468 U.S. 576, 589, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) (inmate challenging *jail* practice of random, irregular cell shakedown searches); *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 1883, 60 L. Ed. 2d 447 (1979) (prison detainees challenging federal facility practice requiring detainees remain outside their cells during routing shakedown inspections *by prison*

*officials*). This is entirely distinguishable from the circumstances in our case.

Inmates are informed that they, not correctional officers, are not permitted to enter a cell that is not assigned. And inmates can lock all others out of their assigned cell simply by closing the door during daytime hours.

The Defendant argues that, because the jail is unable to catch every violation that occurs, this gives him an “implied license” to enter any cell of his choosing. AOB at 13-14. As Sergeant Cooper testified, correctional officers “can’t be everywhere all the time so occasionally we don’t” catch every violation. RP 67.

[W]e can’t watch everything. It’s like traffic infractions. They go on all the time. Do you catch them all? No, you catch as many as you can.

RP 67. The Defendant argues that any testimony about entries that occur trumps the State’s evidence about what is licensed or lawful. This is not the legal standard. The Defendant argues that, unless every violation is caught and enforced, there is no violation of law and everything is impliedly permitted. That is not reasonable. The State’s witnesses testified to the jail rule and the Defendant’s lack of license to enter or remain in another’s cell. Mr. LaMunyon testified that the Defendant did not have permission to enter his cell. He did not have a right to take the victim’s property. This was theft.

The Defendant asks that this Court distinguish *State v. Kalac*, 195 Wn. App. 1060 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 486 (2017) (unpublished, nonbinding but citable authority under GR 14.1). AOB at 14-19. Although the Court need not rely upon this case to uphold the conviction, the case is indistinguishable.

The Defendant claims that it is significant that Kalac was on lockdown when he entered another inmate's cell to assault him. It is not. Kalac's escape from his cell and tampering with a lock suggests an additional facility violation. But it does not imply that Kitsap and Walla Walla jails have a different set of rules regarding other inmates' security and privacy.

The Defendant claims that it is significant that the pod in *Kalac* was contained on two floors. It is not. Both upper and lower level inmates shared a common area. The different levels took turns using the day room. But none of the inmates in either facility, Kitsap or Walla Walla county jail, are "allowed into another inmate's cell."

Finally, the Defendant again claims there is a "local custom" that inmates have implied license to enter anyone's cell with or without permission. AOB at 16. This is pure invention. It is not the record. It does not respect the legal standard on review.

The burglary conviction is supported by sufficient evidence.

C. THE COURT WAS JUSTIFIED IN RELYING UPON THE DEFENDANT'S ACKNOWLEDGMENT OF HIS OFFENDER SCORE.

For the first time on appeal, the Defendant challenges his offender score. It is apparent from the sentencing transcript that this issue was well resolved between the parties. The Defendant does not claim that his offender score was illegally or erroneously calculated. He does not claim that he does not have a 9+ score. The complaint is only one of form, i.e. that the prosecutor omitted filing the certified copies of previous judgments. However, the sentencing judge may rely on what the Defendant admits and acknowledges. AOB at 20, citing *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). The challenge is without merit.

The Defendant acknowledged his score at sentencing. Therefore, while the court is not bound by an erroneous legal concession, the same is not true for a mere question of form over substance. *In re Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). Because the Defendant does not claim that he does not have a 9+ score, the challenge is a waste of resources. At a resentencing, the State will simply provide the J&S's (almost entirely from the same clerk's office) or the Defendant will sign a stipulation. *State v.*

*Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014) (the State may present supplemental evidence at a remand). This is the kind of claim that is waived when not properly preserved by objection.

His score is over the maximum of nine points. CP 38 (eight adult felonies and four juvenile felonies). RCW 9.94A.510 (sentencing grid only goes up to nine points); RCW 9.94A.525(7) (one point for each prior adult felony and ½ point for each prior juvenile felony). The prosecutor noted the score as “well over the maximum.” RP 196. The Defendant did not object.

The prosecutor noted that since his recent, previous sentencing, the parties had discovered scoring errors that had since been corrected. RP 196-97. (Perhaps the parties mistakenly believed his criminal history washed out. RCW 9.94A.525(2).) In the interim, the Defendant had received the benefit of the error in repeated sentencings.

... his last offense was a VUCSA, and due to scoring errors, he ended up getting jail time instead of prison time. He would have been looking at 12 to 24 months rather than 0 to six months which is what he was sentenced to. So in that way he has already received the benefit of a considerable bargain that may not have been planned.

Another thing, he had several thefts, Theft Seconds which also would have resulted in prison time that were reduced to Theft Third because of, again, this mistake in the sentencing grid scoring.

RP 196-97. The Defendant did not object to this recitation of events.

Defense counsel read the Defendant's letter into the record. RP 190-91. In it, he acknowledged the term he was facing would be three to five years. RP 191, line 18. The only scenario under which he could serve a term of five years is with a score of 9. RCW 9.94A.510, .515, .729(3)(d). Thus he implicitly acknowledged his score and range.

When the court asked how many cases he was still paying LFO's on, the Defendant said he had five good years of sobriety in the community, but he still has outstanding debt on "at least six" cases. RP 191, 201.

The judge was justified in relying upon the Defendant's acknowledgement of the score.

D. NOMINAL APPELLATE COSTS ARE APPROPRIATE IN THIS CASE.

The Defendant requests that, in the event the State substantially prevails on appeal, the Court not impose appellate costs on him due to a single factor, i.e. ability to pay.

In this case, the Defendant has good employment history and no physical disability. RP 201 (concrete work, carpentry work, landscaping). His circumstances include the unremarkable facts of LFO debt and dependent children. With his significant criminal history, it is not surprising that he has

LFO debt. However, the number will be inflated due to the AOC software which automatically adds interest. Most counties waive interest. All but one of the 12 Defendant's felonies come out of Walla Walla county. The Walla Walla county clerk has a longstanding practice of waiving interest upon the payment of the principal. Therefore, the debt on the Defendant's continued indigency report is almost certainly inflated. LFO debt can also be remitted. RCW 10.01.160(4). The superior courts are becoming highly sensitive about collections, as is apparent from the sentencing record here. RP 202 (imposing only the mandatory LFO's and setting a payment schedule of only \$20/mo).

So the Defendant has the future ability to pay. And a party's ability to pay is only one factor for the Court's consideration.

When the courts refuse to impose costs of any kind on a criminal defendant due to his financial circumstances, it unacceptably induces appeals, contrary to ABA Criminal Justice Standard 21-2.3, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993).

**Standard 21-2.3. Unacceptable inducements and deterrents to taking appeals**

(a) Administration of a system of elective appeals presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have

identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons.

(b) Examples of unacceptable inducements for defendants to appeal are:

(i) absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal;

...

The Court should consider how its decision on costs in this case and other cases affect the choices of criminal defendants to file appeals, regardless of merit. Even nominal cost should be sufficiently high in order to have any deterrent value. Should the State substantially prevail, and if the Court is inclined to impose less than full cost, the State would recommend costs comparable to those imposed after trial, i.e. \$500-1000.

## **VI. CONCLUSION**

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

DATED: June 5, 2017.

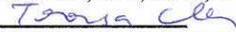
Respectfully submitted:



Teresa Chen, WSBA#31762  
Deputy Prosecuting Attorney

Jodi Backlund  
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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED June 5, 2017, Pasco, WA



Original filed at the Court of Appeals, 500 N.  
Cedar Street, Spokane, WA 99201

**June 05, 2017 - 5:13 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34762-1  
**Appellate Court Case Title:** State of Washington v James David Dunleavy  
**Superior Court Case Number:** 16-1-00200-2

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