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Division III  
State of Washington  
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No. 35113-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

KEVIN MATHEW PHILLIPS,

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 16-1-00522-9

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BRIEF OF RESPONDENT  
[AMENDED]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS .....1

III. ARGUMENT .....2

    A. The State established the offender score by a  
preponderance of the evidence.....2

        1. The State met its burden to prove the  
defendant’s prior convictions.....2

        2. The defendant affirmatively acknowledged  
his criminal convictions and therefore  
waived any argument as to his allegation of  
disputed facts. ....5

    B. The trial court did not err in imposing an  
exceptional sentence based on the defendant’s  
multiple current offenses and high offender score.....7

IV. CONCLUSION.....9

TABLE OF AUTHORITIES

WASHINGTON CASES

*In re Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002).....5, 6  
*In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 243 P.3d 540 (2010).....3  
*State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999).....3  
*State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012).....3, 4  
*State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004).....6  
*State v. Zamudio*, 192 Wn. App. 503, 368 P.3d 222 (2016).....6

WASHINGTON STATUTES

RCW 9.94A.....2  
RCW 9.94A.030(11).....5  
RCW 9.94A.500.....4  
RCW 9.94A.500(1).....3  
RCW 9.94A.510.....2  
RCW 9.94A.530(1).....5  
RCW 9.94A.535.....7  
RCW 9.94A.535(2)(c) .....1, 7, 8, 9

## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

- A. The State established the offender score with sufficient proof; therefore, the trial court did not violate the defendant's due process rights.
- B. The trial court did not err in imposing an exceptional sentence under RCW 9.94A.535(2)(c) as the defendant was convicted of multiple current offenses and had a high offender score as required by statute.

## **II. STATEMENT OF FACTS**

The defendant was sentenced on March 1, 2017, on three separate Informations. In cause number 16-1-00740-0, the defendant was sentenced to 96 months for an Assault in the Second Degree – Domestic Violence with a Deadly Weapon Enhancement. CP 51; RP at 33, 36. In a separate information, Benton County Superior Court 16-1-00895-3, filed for one count of Unlawful Possession of a Controlled Substance, the defendant was sentenced to 24 months, concurrent with 16-1-00740-0. RP at 35-36. In the case underlying this appeal, cause number 16-1-00522-9, the defendant was sentenced to 60 months for a Felony Violation of a No Contact Order, with 42 months of that sentence to run concurrent with the other matters, leaving 18 months to run consecutive to 16-1-00740-0. CP 23-24; RP at 55.

At the time of his sentencing, the defendant signed a criminal history summary, dated September 20, 2016, which indicated his offender score was 9. CP 16. His offender score actually should have been noted as 11 for the offense of Felony Violation of a No Contact Order – Domestic Violence, because of how domestic violence offenses are scored. However, because the Sentencing Reform Act (SRA), RCW 9.94A, sentencing grid does not exceed 9, a score of 11 does not have any different standard range than a score of 9. *See* RCW 9.94A.510, Table 1 – Sentencing Grid. The criminal history summary signed by the defendant included details on the crime, date of offense, county and state of offense, date of conviction, category of offense, and whether the conviction was an adult or juvenile adjudication. CP 16. At the time of his sentencing, the defendant acknowledged by his signature on his Judgment and Sentence that his offender score was 11, and he acknowledged his criminal history therein, which was the same as on his offer letter detailing his criminal history summary. CP 16, 20, 26.

### **III. ARGUMENT**

- A. The State established the offender score by a preponderance of the evidence.**
  - 1. The State met its burden to prove the defendant's prior convictions.**

The State must prove a defendant's prior convictions by a preponderance of the evidence. RCW 9.94A.500(1). This standard is not "overly difficult to meet" and the State must just introduce evidence of some kind to support the alleged criminal history. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 568, 243 P.3d 540 (2010) (quoting *Ford*, 137 Wn.2d at 480-81).

The defendant claims that the State has failed to meet its burden to prove prior convictions at sentencing by a preponderance of the evidence and relies on *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012). Br. of Appellant at 6. In *Hunley*, the only evidence the prosecution offered for the criminal history of the defendant was a written statement of the prosecution's own summary of the defendant's convictions. *Id.* at 905. The defendant "neither disputed nor affirmatively agreed with the prosecutor summary" of his criminal offenses. *Id.* The *Hunley* court stated that even though the defendant failed to object, the State did not meet the preponderance standard when all they presented was an unacknowledged or uncorroborated criminal history. *Id.* at 909-10. There must be some affirmative acknowledgment of the facts and information alleged at sentencing to relieve the State of evidentiary obligations. *Id.* at 912 (citing *Ford*, 137 Wn.2d at 482-83).

*Hunley* is not analogous to the defendant's case. During the defendant's sentencing hearing, the State provided the court a document signed by the defendant stating that he was acknowledging that his criminal history as represented was true and accurate. CP 16; RP at 4. The defendant's signature on the criminal history is an affirmative acknowledgment of the facts and information alleged at the sentencing. The criminal history is complete in that it provides the court the crime, date of offense, county and state of conviction, the date of conviction, the category of offense, and whether it was an adult conviction or juvenile offense. CP 16. Further, the defendant signed his Statement on Plea of Guilty indicating he agreed to the offender score shown in the Amended Offer Letter (although that score was inaccurate, as noted above). CP 6, 14. A criminal history summary acknowledged by the defendant can be sufficient proof of prior convictions. *Hunley*, 175 Wn.2d at 913. There is no requirement that the criminal history summary be acknowledged by the defense attorney, nor stamped by the clerk, and the defendant cites no authority otherwise. The State has met its burden of proving the defendant's criminal history by a preponderance of the evidence. Further, the criminal history summary complies with RCW 9.94A.500 and is prima facie evidence of the existence and validity of the convictions; the

defendant's acknowledgement of the same makes it evidence proven by the preponderance standard.

**2. The defendant affirmatively acknowledged his criminal convictions and therefore waived any argument as to his allegation of disputed facts.**

A defendant's offender score, together with the seriousness level of his current offense, dictates the standard sentence range used in determining his sentence. RCW 9.94A.530(1). To calculate the offender score, the court relies on its determination of the defendant's criminal history, which the SRA defines as "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere . . . ." RCW 9.94A.030(11). When a defendant acknowledges his offender score and standard sentence range, he has waived his right to later argue that his offender score was miscalculated unless he can point to an actual legal error.

While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion. *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Waiver may be found where a defendant stipulates to incorrect facts. *Id.*

In *State v. Zamudio*, 192 Wn. App. 503, 504, 509-10, 368 P.3d 222 (2016). the defendant appealed his sentence, contending that the State miscalculated his offender score because some of his prior offenses “may have” washed out. The court held that case law that has previously permitted defendants to bring unpreserved sentencing errors up on the first time at appeal did not apply in Zamudio’s case, as Zamudio failed to demonstrate that any factual error had actually been made. *Id.* at 504. Defendant Zamudio claimed that his offender score was miscalculated as some of his prior convictions might have washed out. *Id.* at 510-11. Zamudio relied on *Goodwin* in his appeal, arguing that *Goodwin* allowed him to raise the sentencing error for the first time on appeal. *Id.* at 507, 509-10. The Court disagreed, stating that *Goodwin* involved an actual legal error, not just the possibility of an error in sentencing, as Zamudio was alleging. *Id.* at 511. The *Zamudio* court noted that *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004), controlled; *Ross* held that a defendant had a “threshold requirement” of showing “any arguable legal or factual error” before being able to raise an unpreserved challenge to sentencing on appeal. *Zamudio*, 192 Wn. App. at 510 (citing *Ross*, 152 Wn.2d at 232).

*Ross*, not *Goodwin*, holds in this case as well. The defendant did not object to his offender score or the calculation therefore at the time of his sentencing. He now asserts that some of his domestic violence history,

which he acknowledged at sentencing, might not have been pled and proven, and that some of the prior convictions might have been “same criminal conduct.” He points to no obvious factual errors in the State’s or court’s calculation of his offender score; he offers nothing more than “mights” and “maybes.” This is not enough to have the court consider for the first time on appeal whether there were factual errors to his offender score, and the Court should not consider his unpreserved appeal on that basis.

**B. The trial court did not err in imposing an exceptional sentence based on the defendant’s multiple current offenses and high offender score.**

RCW 9.94A.535 gives courts discretion to impose an exceptional sentence when there are substantial and compelling reasons to impose an exceptional sentence. An exceptional sentence is one that is outside the standard range. *Id.* RCW 9.94A.535(2)(c) allows a sentencing judge to impose an exceptional sentence when a defendant has a high offender score, combined with multiple current offenses, that would result in some of the current offenses going unpunished. By the plain language of the statute, it is clear that the defendant was facing sentencing on multiple current convictions (three), and he had a high offender score, as it was 11 on the matter at issue in this case. A score of 11 puts the defendant at two points higher than the top of the SRA grid. If an exceptional sentence had

not been granted, the defendant would have served no additional time for two of his three convicted offenses, so there was no error in imposing the exceptional sentence on one offense.

At the time of his sentencing on March 1, 2017, the defendant was before the judge for sentencing on three separate Informations. The defendant was convicted of, quite literally, “multiple [three] current offenses.” The crimes were committed at different times, against different victims, and had different ranges of punishment. Because two of the crimes were of a domestic violence nature, and because the defendant committed at least one of the offenses while on community custody, the defendant had an offender score on the Felony Violation of a No Contact Order that exceeded the SRA’s grid by two points. The defendant inarguably had a “high offender score” on the Felony Violation of a No Contact Order and had committed multiple current offenses per the plain language of RCW 9.94A.535(2)(c).

The defendant was sentenced to 96 months for Assault in the Second Degree – Domestic Violence with a deadly weapon enhancement, and 24 months for Unlawful Possession of a Controlled Substance to run concurrently with the 96-month sentence. CP 51; RP at 33, 35-36. Because the 24 months was run concurrent with the 96 months, the defendant received no additional punishment for that crime. The defendant also was

sentenced to 60 months for a Felony Violation of a No Contact Order and 42 months of that sentence was to run concurrent with the other matters, leaving 18 months to run consecutively. CP 23-24; RP at 55. Had this entire 60-month sentence been sentenced concurrently with the previously sentenced 96 months, it would have resulted in that offense going completely unpunished as well, just as the charge for Unlawful Possession of a Controlled Substance went unpunished. Without the exceptional sentence on the Felony Violation of a No Contact Order, two of his offenses would have been unpunished – “some of” [more than one of] his offenses, in other words. This type of situation is exactly why the legislature gives the courts discretion to use RCW 9.94A.535(2)(c) and the trial court did not err in imposing an exceptional sentence under RCW 9.94A.535(2)(c) in this case.

#### **IV. CONCLUSION**

Based upon on the aforementioned facts and authorities, the defendant’s appeal should be denied and the sentence affirmed.

**RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of December,  
2017.

**ANDY MILLER**  
Prosecutor

A handwritten signature in black ink, appearing to read 'AM', is written over a horizontal line that separates the signature from the typed name below.

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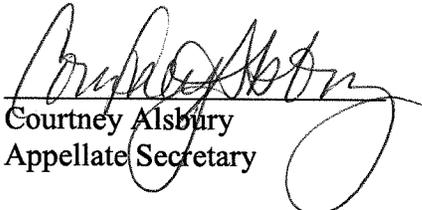
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 8, 2017.

  
Courtney Alsbury  
Appellate Secretary

**BENTON COUNTY PROSECUTOR'S OFFICE**

**December 08, 2017 - 8:41 AM**

**Transmittal Information**

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