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Division III  
State of Washington  
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NO. 35316-8-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

BRYAN JACK ROSS CROW,

Appellant.

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BRIEF OF RESPONDENT

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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> .....	1
II. <u>STATEMENT OF THE CASE</u> .....	2-8
III. <u>ARGUMENT</u> .....	8
<u>RESPONSE TO ALLEGATION I. – TESTIMONY ELICITED FROM VARIOUS WITNESSES REGARDING THE LEGAL ABILITY TO POSSESS A FIREARM WAS NOT A COMMENT OF THIS DEFENDANT’S RIGHT TO A FAIR TRIAL</u> .....	8-16
<u>RESPONSE TO ALLEGATION II. - THE TRIAL COURT HAD BEFORE IT CROW’S CRIMINAL HISTORY. THIS IS EVIDENCED BY THE COURT’S RULING AT THE TIME OF SENTENCING. THE PROOF OF THAT HISTORY WAS EVIDENT AND SUFFICIENT. NO RESENTENCING IS NECESSARY</u> .....	16-19
IV. <u>CONCLUSION</u> .....	19

TABLE OF AUTHORITIES

PAGE

**Cases**

In re Pers. Restraint of Adolph, 170 Wn.2d 556, 243 P.3d 540 (2010).... 18

In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) .. 10

Lopez, 147 Wn.2d at 519 ..... 17

Scott, 110 Wn.2d at 688..... 8

State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999)..... 12

State v. Booker, 143 Wn.App. 138, 176 P.3d 620 (2008) ..... 18

State v. Braham, 67 Wn.App. 930, 841 P.2d 785 (1992) ..... 15

State v. Brooks, 45 Wn. App, 824, 727 P.2d 988 (1986) ..... 12

State v. Bruton, 66 Wn.2d 111, 401 P.2d 340 (1965)..... 13, 14

State v. Couet, 71 Wn.2d 773, 430 P.2d 974 (1967) ..... 12

State v. Davis, 176 Wn.App. 849, 315 P.3d 1105 (2013)..... 12

State v. Drummer, 54 Wn. App. 751, 775 P.2d 981 (1989) ..... 18

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999)..... 18

State v. Fisher, 108 Wn.2d 419, 430 n.7, 739 P.2d 683 (1987)..... 18

State v. Gerdts, 136 Wn.App. 720, 150 P.3d 627 (2007) ..... 10

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ..... 11

State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989) ..... 12

State v. Johnston, 143 Wn.App. 1, 19, 177 P.3d 1127, 1137 (2007)  
(quoting Madison, 53 Wn.App. at 763) ..... 10

State v. Lamar, 180 Wn.2d 576, 327 P.3d 46, 51 (2014) ..... 8

State v. Madison, 53 Wn.App. 754, 770 P.2d 662 (1989) ..... 10

State v. McCorkle, 88 Wn.App. 485, 945 P.2d 736 (1997)..... 18

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) ..... 8, 10

State v. McPhee, 156 Wn.App. 44, 230 P.3d 284 (2010)..... 13

State v. Nguyen, 165 Wn.2d 428, 197 P.3d 673 (2008) ..... 9

<u>State v. Perez</u> , 69 Wn. App. 133, 847 P.2d 532 (1993) .....	18
<u>State v. Portee</u> , 25 Wn.2d 246, 170 P.2d 326 (1946).....	13
<u>State v. Price</u> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	13
<u>State v. Rivers</u> , 130 Wn.App. 689, 128 P.3d 608 (2005) (citing <u>State v. Lopez</u> , 147 Wn.2d 515, 55 P.3d 609 (2002)) .....	17
<u>State v. Rockett</u> , 6 Wn.App. 399, 493 P.2d 321 (1972).....	10
<u>State v. Rye</u> , 2 Wn.App. 920, 471 P.2d 96 (1970).....	10
<u>State v. Tollett</u> , 71 Wn.2d 806, 810, 431 P.2d 168 (1967) .....	13
<u>State v. Weaver</u> , 60 Wn.2d 87, 371 P.2d 1006 (1962) .....	12
<u>State v. Withers</u> , 8 Wn.App. 123, 504 P.2d 1151 (1972) .....	13
<u>State v. Witherspoon</u> , 180 Wn.2d 875, 883, 329 P.3d 888 (2014) .....	11
<b>Other Authorities</b>	
<u>Tot v. United States</u> , 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943)	12
<b>Rules</b>	
RAP 2.5(a)(3).....	8, 9
RCW 9A.56.140(1).....	10

## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant sets forth his issues as follows:

1. Police testimony invaded the province of the jury and deprived Mr. Crow of his Sixth and Fourteenth Amendment right to a jury trial.
  - a. The Court of Appeals should review de novo this manifest constitutional error.
  - b. The prosecutor improperly relied on profile evidence amounting to a “nearly explicit” opinion that Mr. Crow knew the firearm he possessed was stolen.
  - c. If the constitutional error is not manifest, Mr. Crow’s attorney provided ineffective assistance by failing to object.
2. The trial court erred by finding that Mr. Crow had an offender score of four

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

The State’s response is as follows:

1. This alleged error was not preserved, there was no objection to this testimony in the trial court. It was also a trial tactic.
2. The testimony of the officers was not “profile” testimony. It addresses the issue of knowledge regarding Count 2 Possession of a Stolen Firearm. The testimony did not infringe on any right of the defendant.
3. There was no error in the determination of the defendant’s offender score. The Court itself discussed the offenses and the dates of the defendant’s prior crimes as did the State and the defendant did not dispute that history.

## II. STATEMENT OF THE CASE

At trial there was testimony taken from two officers who had contact with and arrested the defendant on the date of this offense and one detective who did follow-up work on the case confirming the weapon seized was stolen. All three officers discussed to some extent the ability to obtain a firearm if that person had the restrictions Crow has.

One of those, Officer Taylor, had had numerous previous contacts with Crow. This was a subject of discussion before trial when Crow filed his motion in limine under ER 609 to exclude reference or use of that history. It was discussed again during trial. RP 28-44, 157-58. It even came up again during the evidentiary hearing regarding the use and admission of the "COBAN" video. RP 131-32. Crow's counsel brings it up at another hearing before the court stating "...he's mentioned that he's contacted Crow twenty times, prior violent offenses, former or an active Surenos gang member, multiple times convicted felon." The discussion regarding this defendant's history and contacts with this officer continued for over six pages. RP 155-61 Trial counsel was concerned with indications of prior crimes and brought to the court's attention again the fact that there had been use of prior contact information as well as the fact that there was an outstanding warrant for Crow at the time of this contact. RP 15-56.

Officer Taylor testified that he approached Crow as close as he felt was a “comfortable” distance and called out his name. Crow turned and looked directly at Officer Taylor then immediately took off running away from the officer. Taylor yelled “stop, you’re under arrest” and reached for his taser.<sup>1</sup> RP 172. Officer Taylor was in full uniform and was driving a marked patrol car at the time. RP 175. As Officer Taylor was attempting to apprehend Crow he was in close proximity, within ten feet. While in the act of deploying his taser Officer Taylor observed Crow reach into his waistband with his right hand and pull out a firearm. RP 176-77, 1099-200. The officer through his years of service and training knew it was a firearm. He observed Crow immediately throw this firearm to the ground as he continued to run from Officer Taylor. Officer Taylor threw down his taser and drew his service revolver. He had been trained that where there was one weapon there was two. RP 176-77. Officer Taylor ceased chasing Crow so that he could take possession of this now discarded gun that was lying on the ground. At the same time Taylor was advising other officers of what was occurring. RP 177. Officer Taylor subsequently ran the serial numbers from the weapon Crow had thrown to the ground and it was reported as stolen by the Seattle police department. When checked this weapon was found to have rounds of ammunition in the chamber. RP

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<sup>1</sup> The word “tazer” is found throughout this VRP, the company name and generically used word should actually be Taser which is what the State shall use “taser.”

191-2.

Taylor was questioned by the State regarding the method and location a person can legally purchase a firearm. There was a brief discussion regarding the fact that given Crow's legal status he would be unable to purchase a firearm from a commercial or private seller in the state of Washington. The mandate of an initiative passed in 2014 had made it a requirement for all legal sales of firearms in this State have a background check conducted on the purchaser before the sale can be legally made. Any legal transfer or sale of a firearm, specifically the one thrown down by Crow, would have been recorded. The officer testified that even if the seller did not know that the person to whom the sale was made could not legally own the gun sold, it would/could be a criminal act on the part of the seller RP 193-5

When asked if there were any legal means by which a person could transfer, sell or give a gun to Crow, Officer Taylor answered 'No'. RP 195.

Kristen Drury the forensic laboratory supervisor for the Yakima Police Department subsequently tested the firearm that had been thrown down by Crow and determined that this gun was fully operational. RP 222, 225-227, 228-29.

On cross-examination Crow's own attorney asked questions of

Officer Taylor regarding how his client was supposed to know that the gun he was in possession of was stolen:

HEILMAN-SCHOTT: You testified about the firearm that was recovered. The serial numbers, and I understand from your testimony, the serial numbers weren't ground off?

TAYLOR: Correct.

HEILMAN-SCHOTT: How is --- how is someone supposed to know if a gun is stolen or not?

TAYLOR: There's two ways. Obviously, the direct knowledge would be if they stole it, but a lot of times the way that I found people that know the firearm was stolen that they buy it illegally. If they buy it on the street from somebody who's not a legitimate gun salesman, buy it for a cheap price, most of the people that I come into contact with stolen firearms will say they bought it from somebody for fifty bucks, a hundred bucks. They assume that it's stolen based on the fact that it's not a legitimate gun sale and they're buying it so cheap. RP 198-99.

In response to questions asked on cross-examination, on redirect examination of Officer Taylor the State asked the officer about the methods a person who may not legally obtain a firearm may or could obtain a firearm. In his response Officer Taylor did not reference Crow nor did Crow object to any of this testimony. That examination is as follows:

TAYLOR: From my training and experience, they either will steal them or they will buy them from somebody that is selling them illegally on the street.

CLEMENTS: Okay and how are those illegally obtained firearms, where do they typically come from in your training and experience?

TAYLOR: Burglaries, vehicle prowls, things like that.

CLEMENTS: In your training and experience, do fleeing

suspects often attempt to discard stolen property when they're being pursued?

TAYLOR: Yes.

CLEMENTS: Why is that?

TAYLOR: Because nobody wants to be caught with stuff that they know they shouldn't have.

CLEMENTS: In your training and experience, what actions are indicative of somebody knowing something is stolen property?

TAYLOR: Typically, they're going to try to distance themselves as much as possible from it. They'll tell you stuff like I have no idea about it, I don't know anything about it, I don't know who I got it from or they'll give you very vague answers. I got it from Bob, over there, around this time. There's no specifics that you're able --- what they try to do is make it so there's no specifics that you can follow up with to confirm whether they knew or not knew or did not know that it was stolen.

CLEMENTS: So, discarding and flight are pretty common?

TAYLOR: Correct. RP 201-02.

...

CLEMENTS: ...Okay. In your training and experience, what percentage of people apprehended are prohibited people with firearms are those guns stolen?

TAYLOR: Pretty high percentage. I would --- I couldn't guess a number, but I would say the majority.

CLEMENTS: Okay. And --- and in the case where those firearms are not reported, is there a reason that sometimes they're not reported as stolen or not in the system?

TAYLOR: A lot of times we come across firearms that are unregistered. Maybe they don't have an owner attached to it because they've been sold or transferred prior to Initiative 594 so there's not a record or the person who had the burglary with the firearms stolen doesn't have their serial numbers, so they're not able to list it. So, we're not able to confirm that the firearm is in fact stolen.

Prior to the testimony that Crow now objects to, which is set forth below, he testified that Officer Booker Ward was the second officer whose

testimony Crow now objects to. At the time of trial Crow did not object to any of the following testimony. That testimony is as follows:

CLEMENTS: Okay. In your training and experience, how do prohibited persons get firearms?

WARD: Usually through burglaries, vehicle prowls, some way of that nature.

CLEMENTS: Okay, what percentage are stolen in your training and experience that turn up in prohibited person's hands?

WARD: I would say a high percentage.

CLEMENTS: Okay, based on Mr. Crow's status of being convicted of a serious offense at the time of the arrest, were there any lawful means at that time for Bryan Crow to receive a firearm or possess a firearm?

WARD: Any, no he shouldn't have been able to. Not with the background checks and that kind of stuff.

CLEMENTS: Okay, was there any lawful means which another person could give a prohibited person, such as Mr. Crow, a firearm?

WARD: No.

CLEMENTS: No?

WARD: I don't believe so. You'd have to ---once again, do the background checks and that kind of stuff and transfers and... – RP 220

Immediately after this exchange the State moved for admission of the "Coban" video, Crow objected. Crow's trial counsel did not ask any questions of this witness.

Finally, Det. Deloza was asked a similar question by State's counsel regarding how a prohibited person would be capable of receiving a firearm. The totality of this officer's testimony is as follows:

CLEMENTS: In your training and experience, what percentage of firearms possessed by prohibited persons are

stolen?

DELOZA: It's hard --- it's hard to say because a lot of the guns that are reported, not every has the serial numbers on them, but a lot of people --- most of the people that I know that are prohibited from having firearms obviously they're not allowed to have them so they had to get them somewhere else and most of them are stolen. RP 240

The trial court set forth the basis for the sentence it imposed. It stated Crow's criminal history including the nature and dates of the crimes. Crow did not object to that recitation. RP 340-41.

### III. ARGUMENT

#### **Response to allegation I. – Testimony elicited from various witnesses regarding the legal ability to possess a firearm was not a comment of this defendant's right to a fair trial.**

At no point during this trial did Crow object to the line of questioning he now challenges on appeal. State v. Lamar, 180 Wn.2d 576, 327 P.3d 46, 51 (2014) "RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred."

State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995) "As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest" - i.e., it must be

"truly of constitutional magnitude". Scott, 110 Wn.2d at 688."

"The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review." State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) "In general, an error raised for the first time on appeal will not be reviewed. An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. A "manifest" error is an error that is "unmistakable, evident or indisputable." An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" "that the asserted error had practical and identifiable consequences in the trial of the case." (Id, Citations omitted.)

The next major problem with this allegation is that the testimony is not "profile" testimony and it does was not a "nearly explicit" opinion that the defendant knew the firearm he was in possession of was stolen. The testimony was specific in that it addressed the ability of felons to possess or obtain firearm in this State based on the laws of this State. And the three officers training and knowledge as to how any person who had the "restriction" on their ability to own a firearm, as did Crow, would come into possession of such a weapon.

There is a strong presumption of effective assistance, and Crow bears the burden of demonstrating the absence of a legitimate strategic or tactical reason for the challenged conduct. McFarland, 127 Wn.2d at 336. Decisions on whether and when to object are "classic example[s] of trial tactics." State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Johnston, 143 Wn.App. 1, 19, 177 P.3d 1127, 1137 (2007) (quoting Madison, 53 Wn.App. at 763). It is a legitimate trial tactic to forego an objection in circumstances where counsel wishes to avoid highlighting certain evidence. In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Where a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection would likely have succeeded. State v. Gerdts, 136 Wn.App. 720, 727, 150 P.3d 627 (2007).

This allegation is a challenge to the sufficiency of the evidence. "The essence of the crime is possession of stolen property, knowing it to be stolen. RCW 9A.56.140(1). The State need not prove actual knowledge. It is satisfactory to show the accused knew facts sufficient to put him on notice that the property was stolen. State v. Rockett, 6 Wn.App. 399, 402, 493 P.2d 321 (1972); State v. Rye, 2 Wn.App. 920,

471 P.2d 96 (1970).

The questions in this trial, once again, were necessary so that they jury would have an understanding of how the defendant would know that what he had in his hand was a stolen item. There was no confession, no statements, no ground off serial numbers, etc. Therefore the State had to prove to this jury that the methodology in this State for acquiring a weapon was restricted in a manner such that Crow could not just go buy a gun, no one could just give him a gun, sell him a gun, transfer possession of a gun without themselves committing a felony therefore, for Crow to have a gun in his possession, which clearly he did, meant that the weapon had to come from some secondary; street; black market where the person who was transferring, selling or giving this firearm to Crow would be subjecting themselves to a felony or they did not care because it was already an item that was illegal to have, i.e. stolen property.

Evidence is sufficient if, after viewing it in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307,319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)); see also State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). A defendant challenging sufficiency of the evidence at trial admits the truth of the State's evidence and all reasonable

inferences therefrom. Witherspoon, 180 Wn.2d at 883. This court defers to the fact finder's determination of the persuasiveness of the evidence. State v. Davis, 176 Wn.App. 849, 861, 315 P.3d 1105 (2013), rev'd on other grounds. A verdict may be supported by either circumstantial or direct evidence, as both may be equally reliable. State v. Brooks, 45 Wn. App, 824, 826, 727 P.2d 988 (1986).

A jury may draw inferences from evidence so long as those inferences are rationally related to the proven facts. State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). A rational connection must exist between the initial fact proven and the further fact presumed. Jackson, 112 Wn.2d at 875. An inference should not arise when other reasonable conclusions follow from the circumstances. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). The jury may infer from one fact the existence of another essential to guilt, if reason and experience support the inference. Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943). Nevertheless, essential proofs of guilt cannot be supplied by a pyramiding of inferences. State v. Bencivenga, 137 Wn.2d at 711; State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962).

Washington case law assists in determining what facts are rationally related to a finding of constructive knowledge of stolen goods. Mere possession of stolen property is not enough to justify a conviction.

State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); State v. Withers, 8 Wn.App. 123, 128, 504 P.2d 1151 (1972). One factor which may be considered is if a defendant possesses recently stolen property, usually from a few hours to a few months, this is slight corroborative evidence of other inculpatory circumstances tending to show guilt will allow a trier of fact to infer that the defendant had constructive knowledge of the theft. State v. Portee, 25 Wn.2d 246, 254-55, 170 P.2d 326 (1946); State v. McPhee, 156 Wn.App. 44, 62, 230 P.3d 284 (2010).

Here the gun was reported stolen by the owner in October of 2015 in Bellevue, Washington and the defendant was found to be in possession of that weapon in Yakima, Washington on June 13, 2015. RP 245-9, CP 176. The appearance had been altered by changing the grips. RP 248-9.

The reason the State elicited the facts it did from these officers, most specifically the testimony regarding Crow's tossing away the weapon as he fled, is that behavior indicating guilty knowledge may inculcate a defendant, such as: giving a fictitious name to a potential buyer of the stolen goods, State v. Tollett, 71 Wn.2d 806, 810, 431 P.2d 168 (1967); hiding the stolen property. McPhee, 156 Wn.App. at 63; flight, State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27 (2005), review denied:

Evidence of flight is generally admissible as tending to show guilt, but the inference of flight must be "substantial and real" not "speculative,

conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Bruton, 66 Wn.2d at 112-13.

This is not a case where the State's attorney attempted to bolster his case by introducing propensity evidence, this is made clear by the fact that very experienced trial counsel for Crow did not object to the testimony of these officers.

Further, as can be seen throughout the trial the strategy of defense counsel was to highlight what he clearly believed was a significant issue and that was that the State had no actual proof that Crow knew the gun was stolen, counsel pointed this out on every occasion that he could. The testimony of the officers was permissible. Trial counsel used it to his advantage, the problem is that the evidence which the jury could reasonably rely upon was such that they could easily infer that Crow knew this gun was stolen.

It is easy to see why a trial attorney would let the "speculation" regarding *all felons possess stolen weapons* in; it makes the fact that there was no actual proof that Crow knew the gun that he had in his possession was stolen much more apparent. There was little to no argument by

defendant in closing regarding the “mere” possession charge, the drum beat by trial counsel was look at what was said from the stand and you the jury will remember that there was not one “cold hard fact” that was testified to that would indicate that Crow knew or for that matter should have known that the gun was stolen.

Crow cites State v. Braham, 67 Wn.App. 930, 841 P.2d 785 (1992) as dispositive of the “profile” allegation. Braham is distinguishable on the facts and the law. It does however set out the glaring error in Crow’s case, Braham objected to the profile information, Crow did not. The facts of Braham make it clear that the declared expert opined directly regarding the guilt of the defendant. In Crow’s case the information which was elicited from the officers, when taken in context and in totality, was not profile but the State proffering a reasonable basis for Crow, a person with restricted gun rights, having knowledge that the gun was stolen. This is not common knowledge as it clearly was information that would assist the jury.

Crow uses Braham to support his argument that defense counsel was ineffective for failing to object to the officer’s testimony. Braham, however, is inapplicable here. In Braham, the court addressed the admissibility of the evidence based on the defendant's evidentiary

challenges. Here, Crow raises the challenge as ineffective assistance of counsel.

**Response to allegation II. - The trial court had before it Crow's criminal history. This is evidenced by the court's ruling at the time of sentencing. The proof of that history was evident and sufficient. No resentencing is necessary.**

The defendant's criminal history was the basis for a motion in limine to exclude the use or mention of those prior offenses. The parties and the court were well aware of those prior offense. RP 28-43, 338, 339-41.

This court need look no further than the statement made by the trial court at sentencing:

...Another factor that was included in the community custody order was that he maintain law abiding behavior and having been convicted of four prior felonies, there's no conceivable way that Mr. Crow would have understood that he could in any case possess a firearm. And, in this particular circumstance, the jury was quite clear that he was in possession of a firearm.

The Court also takes into consideration his prior criminal history, which in this Court's opinion is rather significant. We have a charge as a juvenile of unlawful possession of a firearm in the second degree, that having been committed on May 14, 2010.

We have three felony convictions since adulthood. October 8, 2012, he was --- he was engaged in felony bail jumping, in essence failed to show up for Court at a time when he had been ordered to. He acquired a strike offense, assault in the second degree with a deadly weapon for a crime allegedly or for a crime actually committed on August 10, 2013 and then just about three months later was charged with assault in the third degree, actually he wasn't charged,

he committed the crime of assault in the third degree, which is a felony charge and those are significant because it shows a history of criminal violence and it shows a history of use of firearms or deadly weapons and at a time when he's not to be in possession of those.

Those are the aggravating factors that the Court finds in this particular circumstance. The Court then looks to mitigating circumstances in this case and frankly, I can't find any mitigating circumstances. I'm not aware of any. This was not a case of mistaken identity. This isn't a situation where Mr. Crow has demonstrated any remorse for his actions. It is not a case that he has shown any indication that he's going to stop with his criminal activity and frankly, the prior criminal history would lead me to believe that he would continue with this type of criminal history, especially as it deals with firearms or deadly weapons, and that simply can't be tolerated.

So, the Court is going to impose a sentence of forty-eight months on Count 1. I'm going to impose a sentence of twenty-nine months on Count 2 for a total of seventy-seven months. RP 340-41 (Emphasis added.)

It is clear from this statement and subsequent ruling by the trial court that it was familiar with the criminal history of Crow. The trial court would not have had that level of detail it was just looking at the "boilerplate" information set out in the judgment and sentence.

The State must prove the existence of a prior conviction by a preponderance of the evidence. State v. Rivers, 130 Wn.App. 689, 697, 128 P.3d 608 (2005) (citing State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002)). The best evidence of a prior conviction is a certified copy of the judgment and sentence, and "[t]he state may introduce other comparable evidence only if it is shown that the [certified copy] is

unavailable for some reason other than the serious fault of the proponent." Lopez, 147 Wn.2d at 519; Rivers, 130 Wn.App. at 698.

This court will review an offender score de novo unless it involves factual or discretionary determinations. State v. Booker, 143 Wn.App. 138, 141, 176 P.3d 620 (2008). The factual question of whether the prior conviction exists and is a conviction of the defendant is reviewed for substantial evidence. See State v. McCorkle, 88 Wn.App. 485, 492–93, 945 P.2d 736 (1997). "Substantial evidence exists where there is a 'sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.'" State v. Finch, 137 Wn.2d 792, 856, 975 P.2d 967 (1999)

The existence of a prior conviction is a question of fact, and the State must prove the existence of these prior convictions by a preponderance of the evidence. Id. at 479-80; In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010).

A resentencing is not necessary and need not be ordered when the appellate court is convinced that the trial court would impose the same sentence on remand. 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).”

#### IV. CONCLUSION

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 4<sup>th</sup> day of June 2018,

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DECLARATION OF SERVICE

I, David B. Trefry state that on June 4, 2018 emailed a copy, by agreement of the parties, of the Respondent's Brief, to:

Jodi R. Backlund and Manek Mistry  
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of June, 2018 at Spokane, Washington.

By: s/David B. Trefry  
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# YAKIMA COUNTY PROSECUTORS OFFICE

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## Transmittal Information

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**Superior Court Case Number:** 15-1-00881-7

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