

**FILED**  
FEB 27 2006  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

78355-1

Supreme Court No. \_\_\_\_\_  
(COA No. 55374-7-1)

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
GORDON BERGSTROM,  
  
Petitioner.

---

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

The Honorable John P. Erlick

---

PETITION FOR REVIEW

---

JASON B. SAUNDERS  
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER ..... 1

B. COURT OF APPEALS DECISION ..... 1

C. ISSUES PRESENTED FOR REVIEW..... 1

D. STATEMENT OF THE CASE..... 2

    1. Procedural Facts ..... 2

    2. Argument on Appeal ..... 6

    3. Court of Appeals Decision ..... 7

E. ARGUMENT ..... 8

    1. WHEN A DEFENDANT MAKES A SPECIFIC OBJECTION TO THE CALCULATION OF HIS OFFENDER SCORE, HE PLACES THE STATE ON NOTICE TO PROVE PRIOR CONVICTIONS AND THE STATE IS PRECLUDED FROM HAVING A SECOND BITE AT THE APPLE FOLLOWING REMAND ..... 9

    2. MR. BERGSTROM REQUESTS THIS COURT ACCEPT REVIEW OF HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ..... 16

F. CONCLUSION..... 20

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

*In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 123 P.3d 456  
(2005)..... 8, 10, 13-15

*In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1996)..... 16

*In re Pers. Restraint of Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992)..... 16

*State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995)..... 16

*State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 9-12, 15

*State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002)..... 8, 10-12, 14, 15

*State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995)..... 16

*State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997)..... 16

*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) ..... 16

**Washington Court Of Appeals Decisions**

*State v. Rice*, 48 Wn.App. 7, 737 P.2d 726 (1987)..... 17

*State v. Rivera*, 95 Wn.App. 132, 974 P.2d 882 (1999)..... 17

*State v. Saunders*, 91 Wn.App. 575, 958 P.2d 364 (1998) ..... 20

**United States Supreme Court Decisions**

*Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574  
(1997)..... 17-19

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674  
(1984)..... 16

**Washington Constitution**

Wash. Const. art. 1, § 22..... 16

**United States Constitution**

U.S. Const., amend 6 ..... 16

**Statutes - Revised Code Of Washington**

RCW 9.94A.530 ..... 13, 14

**Court Rules**

RAP 13.3..... 1

RAP 13.4..... 1, 8, 15, 20

A. IDENTITY OF PETITIONER.

Petitioner Gordon Bergstrom, Appellant below, asks this Court to accept review of the Court of Appeals decision on appeal, as designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), Mr. Bergstrom seeks review of the Court of Appeals unpublished decision in State v. Gordon Bergstrom, No. 55374-7-1 (November 28, 2005). The opinion was filed on November 28, 2005, and is attached to this petition as Appendix A. A Motion for Reconsideration was denied on January 25, 2006, a copy of which is attached to this petition as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. At sentencing, the State has the burden to prove the existence of prior out-of-state convictions, and if the defendant objects to the use of prior convictions and the State is placed on notice that it must prove the prior convictions, upon reversal the State will not be given a second bite at the apple at resentencing to prove what it had notice of and opportunity to prove at the initial sentencing. Here, Mr. Bergstrom specifically objected to the use of prior convictions, arguing specific prior convictions encompassed the same course of criminal conduct. Rather than prove the

prior convictions were not the same course of criminal conduct, the State asserted the defendant had the burden to prove the prior convictions were the same course of criminal conduct. Is remand for resentencing with an opportunity for the State to have a second chance to prove prior convictions were not the same course of criminal conduct the proper remedy, when the State had specific notice of the objection, had opportunity to prove the prior convictions, but rather erroneously misinformed the sentencing court the defendant had the burden of proof?

2. Mr. Bergstrom requests this Court accept review of his ineffective assistance of counsel claim he argued in his statement of additional grounds for review. When the trial judge violates a pre-trial ruling precluding reference to a prior robbery conviction as stipulated by the parties, must trial counsel confer with his client concerning the alternatives of requesting a mistrial or curative instruction or otherwise properly object when the evidence was prejudicial to his client?

D. STATEMENT OF THE CASE.

1. Procedural Facts.<sup>1</sup> On December 17, 2002, Appellant Gordon Bergstrom helped his brother, Tracy Bergstrom, move out of his ex-

---

<sup>1</sup> The facts are further set forth in the Court of Appeals opinion, pages 1-3, and Appellant's Opening Brief, 3-5, and are incorporated by reference herein.

girlfriend's house back to their mother's house. 4/14/04RP at 74-75.

Tracy testified he packed his hunting and fishing equipment, including his marine flare gun. 4/14/04RP at 93. Tracy testified Gordon had no idea the flare gun was packed in the car, since Tracy had all the boxes already packed by the time Gordon arrived to help him move. *Id.* Both Tracy and Gordon were tired after the move and left some of Tracy's belongings in the car, including hunting/fishing equipment, a baseball bat, a baseball glove, and other items. 4/14/04RP at 75.

On December 18, 2002, Gordon and Tracy stopped at a gasoline station to get gasoline and cigarettes before they drove to West Seattle for a construction job. 4/14/04RP at 76. When Tracy and Gordon were robbed by a young man at the gasoline station, they returned to their car and started to chase the robber. 4/14/04RP at 76-77. They saw two police patrol cars and drove erratically to draw attention, then parked on the curb by the juvenile. 4/14/04RP at 77-78. When the officers stopped, the Bergstroms explained they had been robbed by the young man and the young man was arrested. 4/14/04RP at 78.

Seattle Police Officer John Davidge testified Gordon Bergstrom was very agitated about being robbed. 4/14/04RP at 20. Davidge saw two baseball bats near the center console and, because he was concerned for

officer safety, he and other officers had Gordon and Tracy exit their car and patted them down for weapons. 4/14/04RP at 22-23.

Officer Davidge discovered two live 12-gauge shotgun shells and a 12-gauge flare in the coat that Gordon wore (Tracy's hunting jacket). 4/14/04RP at 24-26. A flare gun was discovered under the driver's seat. *Id.* at 27. Gordon admitted he was a former felon and was not allowed to carry a firearm. *Id.*

Gordon was arrested for unlawful possession of a firearm in the first degree, handcuffed and taken to the police station. 4/14/04RP at 47. Mr. Bergstrom did not believe the flare gun was a firearm. 4/14/04RP at 48.

During pre-trial motions, defense counsel stipulated Bergstrom committed a prior felony, a necessary element of unlawful possession of a firearm in the first degree, and therefore counsel agreed the jury should not hear that Mr. Bergstrom previously committed a robbery. 4/12/04RP at 5-6. The trial court granted the motion, concluding,

So as I understand it, there is going to be a stipulation as to the predicate crime.

...

Unidentified, just saying the predicate crime element has been established.

...

Robbery only comes in if Mr. Bergstrom himself takes the stand.

*Id.* at 6. The parties and the court agreed on the stipulation. *Id.*

On April 13, 2004, the prospective jurors were sworn and the trial court introduced the case and parties. 4/13/04RP at 15. The trial court informed the jury that Mr. Bergstrom was charged with the crime of unlawful possession of a firearm in the first degree, “previously having been convicted in Washington of the crime of robbery in the first degree, a serious offense, . . .” *Id.* at 16. After the court completed its colloquy and jury voir dire was completed and the jury released for recess, the trial court noted for the record that it had erroneously read the predicate crime of first degree robbery in violation of the stipulation and *in limini* motion. *Id.* at 19. The court elaborated,

As soon as I did it – and I normally do a run-through on these, and I figured I just wasn’t going to bother with a run-through because I knew what I was going to say, and then I got into the sentence, and I just did a big “oops” in my head.

4/13/04RP at 19-20. Defense counsel informed the court that he would have preferred the robbery conviction had not been referred to, deferred to the court for mistrial. *Id.* at 20. The court remarked,

I don’t know that it gives rise to a mistrial either. All I can do is offer my apologies. It was an error on my part, and I was trying to get the jury through, and I just read the information. I should have stricken it from the information, because I read directly from the information.

*Id.* at 20. Defense counsel, without conferring with his client, stated his

opinion was to just leave it and not request a curative instruction. *Id.* at 20-21.

Following a jury trial, Mr. Bergstrom was found guilty as charged. 4/15/04RP at 7. At sentencing, Mr. Bergstrom argued his offender score was a “7,” arguing some of his prior convictions encompassed the same course of criminal conduct. Judge Erlick imposed a standard range sentence based on an offender score of “11.”

2. Argument on Appeal. On appeal, Mr. Bergstrom argued that the sentencing court incorrectly calculated his offender score and impermissibly placed the burden on him to prove his prior convictions did not encompass the same course of criminal conduct. Appellant’s Opening Brief (“AOB”) at 5-12. Instead, the court improperly placed the burden on Mr. Bergstrom, ruling because Bergstrom had failed to show the prior convictions encompassed the same course of criminal conduct he had no choice but to count the prior convictions separately. AOB 9-11. The remedy was remand for resentencing without another opportunity to prove the prior convictions did not encompass the same course of criminal conduct. AOB 10-14. In his statement of additional grounds for review, Mr. Bergstrom argued he received ineffective assistance of counsel for his defense counsel’s failure to notify him of his right to request a mistrial

when the trial court violated the pre-trial motion to preclude reference to the predicate crime of first degree robbery.

3. Court of Appeals Decision. The Court of Appeals agreed with Mr. Bergstrom that the sentencing court erroneously placed the burden on him to prove the prior convictions encompassed the same course of criminal conduct. Slip op. at 1, 4. The Court of Appeals also agreed that Mr. Bergstrom properly objected to his offender score and the sentencing court should have held an evidentiary hearing to resolve the factual dispute but instead sentenced Bergstrom using the disputed fact in the calculation of his offender score. Slip op. at 4. But the Court rejected Mr. Bergstrom's argument the State should be precluded from introducing new evidence at resentencing. Slip op. at 4. The Court found the fact that Bergstrom's counsel had at an earlier stage agreed to the State's calculation of the offender score, the State reasonably relied upon the agreement on the score, such that despite Mr. Bergstrom's subsequent objection, the State should have another opportunity to supplement the record on remand. Slip op. at 5. The Court of Appeals also ruled the record did not indicate a mistrial would have been granted and the error was not so prejudicial to support a motion for mistrial when the trial court named the predicate crime in violation of the pre-trial order. Slip op. at 6.

E. ARGUMENT.

In the instant case, the Court of Appeals properly reversed Bergstrom's sentence and remanded the case for resentencing because the trial court erroneously placed the burden on the defendant to prove prior convictions did not constitute the same course of criminal conduct. Slip op. at 4. Although Mr. Bergstrom made a specific objection concerning prior convictions at sentencing, the Court of Appeals nevertheless remanded his case for an evidentiary hearing, giving the State an opportunity to supplement the record on remand to prove the prior convictions. Slip op. at 5.

Mr. Bergstrom asks this Court to accept review under RAP 13.4(b)(1), because the Court of Appeals decision is directly contrary to this Court repeated holdings "remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the state's evidence of the existence or classification of a prior conviction;" otherwise if the defendant has objected, the State will be held to the existing record and the case will be remanded for resentencing without allowing the State to produce further evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 878, 123 P.3d 456 (2005), citing *State v. Lopez*, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002), *State v. Ford*, 137

Wn.2d 472, 485, 973 P.2d 452 (1999).

1. WHEN A DEFENDANT MAKES A SPECIFIC OBJECTION TO THE CALCULATION OF HIS OFFENDER SCORE, HE PLACES THE STATE ON NOTICE TO PROVE PRIOR CONVICTIONS AND THE STATE IS PRECLUDED FROM HAVING A SECOND BITE AT THE APPLE FOLLOWING REMAND.

In the instant case, Mr. Bergstrom's defense counsel submitted a November 3, 2004, presentence report indicating a standard range sentence of 87 to 116 months. On November 5, 2004, defense counsel explained to the court that Mr. Bergstrom was in poor health but no mitigating factor existed to give him a sentence under the standard range. 11/5/04RP at 3-5. Accordingly, defense counsel requested Mr. Bergstrom be placed on electronic home monitoring ("EHM"). *Id.* at 7. The sentencing court denied an exceptional sentence below the standard range but gave defense counsel additional time to determine whether the court had authority to place Mr. Bergstrom on EHM. *Id.* at 12.

At the November 17, 2004, sentencing hearing, the State and defense counsel agreed EHM was only available for persons with sentences of one year or less. 11/17/04RP at 3-4. Mr. Bergstrom objected to the calculation of his offender score. 11/17/04RP 4. The deputy prosecutor argued to the court that *Mr. Bergstrom* had the burden of proving his prior convictions constituted the same course of criminal

conduct. 11/17/04RP at 7, 9. The deputy prosecutor also argued below that because a prior King County sentencing court did not find the offenses constituted the same course of criminal conduct, the current sentencing court should follow the presumption in the absence of any evidence to the contrary. *Id.*

The Court of Appeals correctly recognized the trial court erred in shifting the burden to Bergstrom to prove his offender score requiring remand for resentencing (Slip op. at 1). But the Court of Appeals impermissibly gave the prosecutor another opportunity to prove the prior convictions which is contrary to this Court's precedent in *Ford, Lopez*, and *Cadwallader, supra*.

The Court of Appeals even recognized that the sentencing court then had an obligation to hold an evidentiary hearing to resolve the dispute, ruling

Bergstrom objected to his offender score, and the sentencing court, instead of holding an evidentiary hearing to resolve the dispute, sentenced Bergstrom using the disputed score because Bergstrom did not provide proof to support his objection. Because the court erred in placing the burden of proof on Bergstrom, rather than on the State, we remand for resentencing.

Slip op. at 4. Rather than following this Court's precedent "if the defendant has objected, the State will be held to the existing record and the case will be remanded for resentencing without allowing the State to

produce furthered evidence,” the Court of Appeals instead ruled, “it would be inequitable to preclude the State from introducing evidence on remand.” Slip op. at 5.

The Court of Appeals recognized that this Court in *Lopez* held when the State fails to meet its burden at the initial sentencing hearing after a specific objection it may not have another opportunity to produce evidence. Slip op. at 4, citing *Lopez*, 147 Wn.2d at 520. But without any authority whatsoever, the Court of Appeals refused to follow *Lopez*, finding although the objection was made and the State failed to produce the evidence, this can be distinguished from *Lopez* because in this case, defense counsel had originally come to the same offender score calculation and Mr. Lopez did not object until the next sentencing hearing. Slip op at 5. The Court of Appeals ruled, “the State should not be penalized for the court’s error.” Slip op. at 5.

This ruling is contrary to logic and contrary to the public policy concerns fully elaborated in *Lopez* and *Ford*, which control in this matter. First, the State was directly responsible for sentencing court’s error and very much should be penalized for leading the court down a primrose path. The deputy prosecutor at the sentencing hearing below was put on notice to prove the prior convictions because Mr. Bergstrom properly objected to

his offender score. Instead of proving the prior convictions, the deputy prosecutor argued Mr. Bergstrom had the burden of proving his prior convictions. 11/17/04RP at 7, 9. The deputy prosecutor also argued below that because a prior King County sentencing court did not find the offenses constituted the same course of criminal conduct, the current sentencing court should follow the presumption in the absence of any evidence to the contrary. *Id.* It was the prosecutor's fault the court erred in shifting the burden to Mr. Bergstrom. Accordingly, the Court of Appeals decision is contrary to this Court's holdings in *Lopez* and *Ford*.

In essence, the Court of Appeals sanction of the State's actions at the initial sentencing sends the wrong message – “the State can misguide the sentencing court below, misadvise the court that the defendant has the burden at sentencing, and then if challenged on appeal, the Court of Appeals will remand, allow the State to produce additional evidence on remand, because the trial court made the ruling not the State.” When the trial court's ruling follows the State's very misguidance concerning the burden of proof, the State should not be given another chance to prove up prior convictions that were specifically objected to by the defendant.

Secondly, and again without any authority cited, the Court of Appeals faulted Mr. Bergstrom for failing to specifically object to his prior

convictions at an earlier time. Slip op at 5 (“Because Bergstrom agreed to the standard range in a presentence report and failed to object to the score until the second sentencing hearing – and only after his sentencing recommendations were rejected – the State is permitted to supplement the record on remand.”) An objection to the offender score calculation is proper and timely as long as it is done before a sentence is imposed. Mr. Bergstrom objected to the State’s calculation of his offender score before the trial court imposed a sentence. That is a timely objection and the objection was sufficiently specific to place the State on notice.

Thirdly, Mr. Bergstrom even asked the court if he could have his defense counsel retrieve the prior convictions to prove same course of criminal conduct at an evidentiary hearing as required under RCW 9.94A.530(2). 11/17/04RP at 10. Rather than grant an evidentiary hearing or not consider the disputed facts under RCW 9.94A.530(2), the sentencing court told Mr. Bergstrom he was “reticent to continue this . . . and I just don’t have any evidence to justify at this point another continuance.” *Id.* Instead, the sentencing ruled Mr. Bergstrom could instead perhaps seek post-sentencing relief. *Id.*

This Court in *Cadwallader* recently ruled, a sentencing court can rely on acknowledgment of prior convictions without further proof under

RCW 9.94A.530(2), but if there is an objection, as there was in the instant case, the court can no longer sit still without further proof. 155 Wn.2d at 874. As the *Cadwallader* Court correctly instructs, “[a]cknowledgement includes *not objecting* to information included in presentence reports.” *Id.* But importantly, if there is any objection or dispute to a sentencing fact, the court has only two possible paths – 1) do not include the disputed fact, or 2) hold an evidentiary hearing to resolve the dispute. *Id.* (citing RCW 9.94A.530(2)).

When Mr. Bergstrom specifically objected and disputed prior convictions, the State, rather than asking the court for a continuance to prove up the priors with a prior information of certification for determination of probable cause, shamelessly argued, “I don’t have the certified judgments and sentences, so I can’t argue different victim or whatever, I don’t know.” 11/17/04RP at 7. The State argued Mr. Bergstrom had the burden instead of the State, acknowledging “we [the State] don’t have those judgements and sentences. We don’t have any of the underlying facts.” 11/17/04RP at 7, 9.

In *State v. Lopez*, the State argued it had offered to provide copies of judgments and sentences and should not be penalized for the sentencing court’s error in proceeding without them. 147 Wn.2d at 523. The

Supreme Court disagreed, finding that although the State alleged Lopez was a persistent offender it was “nevertheless completely unprepared to prove his prior offenses.” *Id.* at 523. The prosecutor’s conduct in the instant case is worse than the conduct in *Lopez* – in both cases the prosecutor failed to have judgments and sentences to prove prior convictions, but where the prosecutor in *Lopez* offered to provide copies later, the prosecutor in the instant case can only admit it has nothing to prove up the prior convictions and does not offer to provide the court with any documentation, but rather tried to switch the burden to Mr. Bergstrom. 11/17/04RP at 7, 9. Permitting the State another opportunity to prove the priors it sought to allege in the calculation of Bergstrom’s offender score after a specific objection and even a request that Bergstrom’s defense counsel get the evidence himself to prove the priors constituted the same course of criminal conduct is far greater than any defendant should have to do.

Because the Court of Appeals decision in the instant case is contrary to this Court’s holding in *Ford*, *Lopez*, and *Cadwallader*, this Court should accept review. RAP 13.4(b)(1).

2. MR. BERGSTROM REQUESTS THIS COURT ACCEPT REVIEW OF HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The state and federal constitutions guarantee criminal defendants reasonable effective representation by counsel at all critical stages of trial. U.S. Const., amend 6; Wash. Const. art. 1, § 22; *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984). To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705- 06, 940 P.2d 1239 (1997) (citing *State v. Brett*, 126 Wn.2d 136, 198-99, 892 P.2d 29 (1995)). Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996) (citing *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

Evidence likely to elicit an emotional response rather than a rational decision is unfairly prejudicial. *State v. Rivera*, 95 Wn.App. 132, 974 P.2d 882 (1999) (citing *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987)). The probative value of admitting evidence of specific crimes is negligible, while the risk that the jury's decision would be made on an improper basis is great. *Rivera*, 95 Wn.App. at 138. In the instant matter, counsel agreed not to mention that Mr. Bergstrom had a prior first degree robbery and agreed by stipulation that the element had been proven. 4/12/04RP at 5-6.

In *Old Chief v. United States*, the United State Supreme Court noted,

The term “unfair prejudice,” as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged. . . . Committee Notes to Rule 403 explain, “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” . . . Such improper ground certainly include . . . generalizing a defendant’s earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged. . . . As then-Judge Breyer put it, “Although . . . ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged – or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment – creates a prejudicial effect that outweighs ordinary relevance.”

*Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997).

In *Old Chief*, the defendant was charged with assault and unlawful possession of a firearm because he was previously convicted of a felony. 117 S.Ct. at 647. Because the prior conviction was a felony assault, the defendant moved for an order precluding mention of the specific prior felony by reading the Indictment, during jury selection or any other time during trial, except to say he was convicted of a crime punishable by imprisonment exceeding one year. *Id.* at 647-48.

In *Old Chief*, the State refused to so stipulate, the jury convicted the defendant, and he appealed. *Id.* at 648. The United States granted the petition for writ of certiorari “because the Courts of Appeals have divided sharply in their treatment of defendants’ efforts to exclude evidence of the names and natures of prior offenses in cases like this.” *Id.* at 649.

The Supreme Court found the evidence relevant as an element of the crime since to prove unlawful possession of a firearm, the State had to prove the defendant guilty of a felony. 117 S.Ct. at 649. But the Court found the prejudicial effect outweighed the probative value and could “overpersuade” the jury to prejudge the defendant. *Id.* at 650-54. The Court reversed the trial court, ruling the trial court abused its discretion in

allowing the prosecution to refer to the specific felony predicate offense when defense counsel offered to stipulate to the element, since the jury only needed to know the defendant was guilty of a prior felony. 117 S.Ct. at 655-56. Specifically, the *Old Chief* Court concluded,

In this case, as in any other which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.

*Id.* at 655. Accordingly, *Old Chief* held a trial court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over defendant's objection. *Id.* at 649-55.

In the instant case, Mr. Bergstrom and the deputy prosecutor agreed to stipulate to the predicate crime as a felony, but the trial court spurned the concession and admitted the specific predicate crime over Bergstrom's objection in violation of *Old Chief*. The jury heard that Mr. Bergstrom had a prior first degree robbery conviction, and accordingly, a great risk existed that unfair prejudice from evidence of a prior violent crime and a strike crime would substantially outweigh the proffered evidence's relevance.

Mr. Bergstrom requests this Court accept review of this case and remand his case for a new trial because the jury heard prejudicial evidence that the court earlier precluded, which likely impacted the jury's determination of his guilt for unlawful possession of a firearm in the first degree. Mr. Bergstrom argues that without the court's utterance of the prior first degree robbery conviction in violation of the pre-trial motion, the jury would likely have acquitted him. *State v. Saunders*, 91 Wn.App. 575, 580, 958 P.2d 364 (1998). Because Mr. Bergstrom was on trial for possession of a flaregun, the admission of evidence he had previously committed a first-degree robbery was prejudicial and constitutes reversible error. At the very least, Mr. Bergstrom argues, trial counsel should have conferred with Mr. Bergstrom of his options or at a minimum request a mistrial or curative instruction.

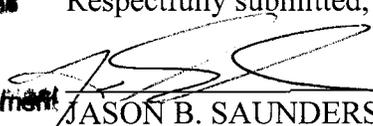
F. CONCLUSION.

Based on the foregoing, Petitioner Gordon Bergstrom respectfully requests that review be granted pursuant to RAP 13.4(b).

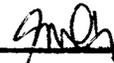
DATED this 16<sup>th</sup> day of February, 2006.

~~Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.~~

Respectfully submitted,

  
JASON B. SAUNDERS (WSBA 24963)  
Washington Appellate Project (91052)  
Attorneys for Petitioner

~~I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.~~

~~  
Name~~

~~FEB 16 2006  
Date~~

~~Done in Seattle, Washington~~

## **APPENDIX A**

RECEIVED

NOV 28 2005

Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 55374-7-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
GORDON DAVID BERGSTROM,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: November 28, 2005

---

**COLEMAN, J.**—Gordon Bergstrom appeals his sentence for unlawful possession of a firearm, alleging that the sentencing court incorrectly calculated his offender score. Bergstrom, though represented by an attorney, objected pro se on the same ground to the sentencing court. The court ruled that because Bergstrom had not put forward evidence demonstrating the error, the court would use the offender score in the presentence reports. Because the court erred in shifting the burden to Bergstrom to prove his offender score, we remand for resentencing.

Bergstrom attracted police attention by driving erratically after he had been robbed at a gas station. While other police officers were questioning and later arresting the robbery suspect, a police officer talked to Bergstrom and his passenger. The pair

was excited due to the robbery, and when the officer viewed objects in the car that could be used as weapons, he told them to exit the car and patted them down. The officer found two live shotgun shells and a flare in Bergstrom's coat pocket. The officer asked Bergstrom if there was a firearm in the car, and Bergstrom denied having any firearms because he, as a convicted felon, was not allowed to have a firearm. After inspecting the car and finding a flare gun under the driver's seat, the officer arrested Bergstrom for first degree unlawful possession of a firearm.

Prior to the start of his jury trial, Bergstrom stipulated to his predicate crime (robbery), and the trial court and both parties discussed that Bergstrom's prior robbery conviction would not be mentioned in the jury's presence. The trial court, however, in its introduction to the jury mentioned the robbery conviction to explain why Bergstrom was prohibited from possessing a firearm. Bergstrom's attorney did not object to this violation of the pretrial arrangement. The jury found Bergstrom guilty of first degree unlawful possession of a firearm.<sup>1</sup>

The sentencing court considered presentence reports from both the State and Bergstrom, and the reports proffered identical sentencing ranges. At the initial sentencing hearing, Bergstrom's counsel sought an exceptional sentence below the standard range due to Bergstrom's medical problems, but the court denied this motion because there was no statutory basis to support it. Defense counsel then requested

---

<sup>1</sup> At trial, Bergstrom testified that he did not believe a flare gun is a firearm. In his pro se statement of additional grounds for review, Bergstrom cites an Arizona case holding that a flare gun is not a deadly weapon as a matter of law. In re Robert A., 199 Ariz. 485, 19 P.3d 626 (2001). This case is not on point and has no precedential value in Washington; thus, we do not disturb the jury's finding of fact here.

that Bergstrom serve his term in electronic home monitoring (EHM), and the court continued the sentencing hearing to allow the parties to brief the issue.

At the second hearing, the State and defense counsel both informed the court that there was no legal authority to support Bergstrom's request to serve his sentence on EHM. Bergstrom then objected pro se, for the first time, to the calculation of his offender score, claiming his score should be lower because some of his prior convictions should be considered the same criminal conduct. Bergstrom's attorney did not join his motion, explaining that she refused to advocate a position contrary to the position being advanced by her client.

The State was not prepared to present evidence to support its version of Bergstrom's criminal history because before that point in time, the State and defense had affirmatively represented identical standard ranges. The State relied on its presentence report to argue that the prior sentencing courts had not considered Bergstrom's convictions to be the same criminal conduct and noted that because sentencing had already been continued, his pro se objection was untimely. The court stated that because Bergstrom had not put forward any evidence to support his objection, it would go forward with sentencing using the score in the presentence reports. The court sentenced Bergstrom to 87 months, and this timely appeal followed.

#### Offender Score Calculation

Bergstrom argues that it was error for the court to use a disputed offender score without conducting an evidentiary hearing. The State argues that any objection to the score could only be raised by defense counsel, because Bergstrom was represented

and had no right to hybrid representation. Because Bergstrom's counsel did not object, the State argues that Bergstrom waived his right to appeal.

While it is true that a defendant does not have a right to hybrid representation, hybrid representation is not in itself unconstitutional. And though a trial court does not deprive a defendant of any constitutional right to be heard if it fails to consider pro se motions from an adequately represented defendant, a court should make every effort to hear such motions. State v. Blanchey, 75 Wn.2d 926, 938, 454 P.2d 841 (1969). The court here did consider Bergstrom's pro se motion even though he was adequately represented by an attorney. The court heard Bergstrom's pro se motion and ruled upon it, but erred in placing the burden of proof upon him to establish his offender score.

Bergstrom objected to his offender score, and the sentencing court, instead of holding an evidentiary hearing to resolve the dispute, sentenced Bergstrom using the disputed score because Bergstrom did not provide proof to support his objection. Because the court erred in placing the burden of proof on Bergstrom, rather than on the State, we remand for resentencing.

Bergstrom argues that on remand, the State should be precluded from supplementing the record to support its offender score calculation. In general, if the State does not meet its burden at the sentencing hearing, it is precluded from introducing new evidence at resentencing. State v. Lopez, 147 Wn.2d 515, 520–21, 55 P.3d 609 (2002), review denied, 153 Wn.2d 1004 (2005). Remand for an evidentiary hearing, with opportunity for either party to introduce evidence, is appropriate only if the defendant failed to raise a specific objection at sentencing. Lopez, 147 Wn.2d at 520.

Under these circumstances, however, it would be inequitable to preclude the State from introducing evidence on remand. While in Lopez there was no suggestion that the parties had agreed on the offender score prior to the defendant's specific objection, here Bergstrom's presentence report agreed with the State's calculation and he did not bring an objection until after his two sentencing recommendations had been rejected by the sentencing court. Defense counsel's unwillingness to join Bergstrom's objection further demonstrates the agreement on the score that had been, until the moment of Bergstrom's pro se challenge, reasonably relied upon by the State. Although the court erred in placing the burden on Bergstrom, the State should not be penalized for the court's error. Because Bergstrom agreed to the standard range in a presentence report and failed to object to the score until the second sentencing hearing—and only after his sentencing recommendations were rejected—the State is permitted to supplement the record on remand.

Ineffective Assistance of Counsel

In his pro se statement of additional grounds for review, Bergstrom alleges ineffective assistance of counsel because his attorney did not notify him of "mistrial rights" arising from the trial court's violation of the pretrial arrangement prohibiting references to Bergstrom's prior robbery conviction.

To prove ineffective assistance of counsel, Bergstrom must establish that his trial attorney's representation was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). In determining whether a defendant has met the first prong of this test, "scrutiny of counsel's

performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” Thomas, 109 Wn.2d at 226.

A mistrial is appropriate only if an error or misconduct is so prejudicial that it could not be cured by any other method, and thus, the defendant did not receive a fair trial. State v. Hopson, 113 Wn.2d 273, 284–85, 778 P.2d 1014 (1989). “Only those errors which may have affected the outcome of the trial are prejudicial.” State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (quoting State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

While the record confirms that the trial court did refer to Bergstrom’s prior robbery conviction, this error was not so prejudicial as to support a motion for mistrial. Bergstrom does not establish that the trial court’s error likely affected the jury’s verdict, or otherwise denied him of a fair trial. Even assuming the error was prejudicial, a curative instruction could have corrected the error had either party objected. Because a motion for a mistrial based on this error would not have been successful, Bergstrom’s attorney was not deficient in failing to notify Bergstrom about his right to move for a mistrial. Bergstrom cannot meet the first prong of the Strickland test; thus, we affirm his conviction.

We affirm Bergstrom’s conviction, but remand for resentencing, permitting either party to introduce evidence.

Columan, J

WE CONCUR:

Schneider, J

Cox, CJ

## **APPENDIX B**

RECEIVED

JAN 25 2006

Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 55374-7-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
GORDON DAVID BERGSTROM,	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
Appellant.	)	
<hr/>		

The appellant, having made a motion for reconsideration, and the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 25<sup>th</sup> day of January 2006.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2006 JAN 25 AM 9:43

  
\_\_\_\_\_  
Judge