

55405-1

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NO. 55405-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I

STATE OF WASHINGTON

Respondent,

v.

DEMETRIUS WILLIAMS,

Appellant.

BRIEF OF RESPONDENT

JANICE E. ELLIS
Prosecuting Attorney

Connie M. Crawley
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. The state's information alleged Bail Jumping and characterized the underlying offense as "Possession of Controlled Substance, a felony". Viewed liberally, does the information sufficiently set forth the elements of bail jumping? Has the defendant demonstrated he was prejudiced by any infirmity in the information?

Alternatively, is the information sufficient where it specifies all elements necessary to establish the illegality of the behavior charged? Is the information sufficient where it comports with the requirements of a sufficient information set forth in RCW 10.37.150?

2. Where the defendant proposed a "to-convict" instruction containing the same "error" he now asserts on appeal, does the doctrine of invited error bar his challenge? Has the defendant shown the court's "to-convict" instruction contains a "manifest" error? Assuming the "to-convict" instruction is somehow flawed, is the error harmless where it could not have contributed to the verdict?

3. Was the defendant's low-end standard range sentence authorized under Apprendi and Blakely? Were prior juvenile

adjudications properly counted in calculating the defendant's offender score?

II. STATEMENT OF THE CASE

The defendant was charged with possession of a controlled substance (cocaine). CP 102-03. When the defendant missed his omnibus hearing, a bench warrant issued for his arrest. By amended information, the state later added a count of bail jumping to the possession charge. CP 92.

The defendant later appeared for a pre-trial suppression hearing. At the conclusion of the suppression hearing, the trial court suppressed all evidence pertaining to the possession charge. RP (Decision on 3.5/3.6 Hearing) 9.

Immediately prior to trial, the state filed a second amended information charging the defendant with one count of bail jumping only. CP 86-87. A Snohomish County jury convicted the defendant of bail jumping.

This appeal follows.

III. ARGUMENT

A. THE INFORMATION SUFFICIENTLY SET FORTH THE ELEMENTS OF BAIL JUMPING.

The information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

CrR 2.1(a)(1). A charging document must allege sufficient facts to support every element of a crime. State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989). It does not need to state the statutory elements of an offense in the precise language of the statute, as long as it uses words that convey the same meaning and import as the statutory language. “The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). A liberal construction favoring validity is employed where, as here, an information is challenged for the first time on appeal. Kjorsvik, 117 Wn.2d at 103.

Here, the defendant was charged with bail jumping.

Washington’s bail jumping statute provides:

1) Any person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails to appear as required is guilty of bail jumping.

...

3) Bail jumping is:

a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

- b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
- c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;
- d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

RCW 9A.76.170.

The information on which the defendant was tried reads as follows:

BAIL JUMPING, committed as follows: That the defendant, on or about the 4th day of December, 2003, *being charged with Possession of a Controlled Substance, a felony*, and having been released by court order with the requirement of a subsequent personal appearance before Snohomish County Superior Court, a court of the State of Washington, for Omnibus Hearing on December 4, 2003, and knowing of the requirement of the subsequent personal appearance, did fail to appear as required, proscribed by RCW 9A.76.170(1), a felony.

CP 86-87 (emphasis added).

The defendant did not object to the above information. Because the defendant did not object to the information prior to verdict, the liberal construction rule of Kjorsvik applies here. Liberally construed, an information will be upheld if an “apparently missing” element may be fairly implied from language within the charging document. The test employed consists of two parts:

- 1) do the necessary facts appear in any form, or by fair construction can they be found in the charging document, and, if so,
- 2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

State v. Green, 101 Wn. App. 885, 889, 6 P.3d 53 (2000); quoting Kjorsvik, 117 Wn.2d at 105-06.

The defendant argues the information was defective because it did not inform him of the “precise underlying offense”. As the following will show, the defendant is not entitled to relief.

The elements of bail jumping are that (1) the defendant was held for, charged with or convicted of a particular crime; (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and (3) knowingly failed to appear as required. State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51, review denied, 141 Wn.2d 1018, 10 P.3d 1074 (2000).

The necessary fact, that the defendant was charged with a particular crime, is clearly stated in the information. What particular level of felony classification of the crime the defendant was charged with and for which he failed to appear, is not an “essential element of the offense.”

Several recent Washington decisions illustrate why the defendant is not entitled to relief here. In State v. Ibsen¹, the defendant was charged with bail jumping after he failed to appear at a pretrial hearing on a second degree assault charge. The charging document did not specify whether Ibsen had failed to appear on a felony or misdemeanor charge. Instead, the document merely alleged Ibsen had “been admitted to bail with the requirement of a subsequent personal appearance before Cowlitz County Superior Court”. Ibsen concluded the information was deficient for failing to include the underlying offense of bail jumping. Ibsen, 98 Wn. App. at 218.

More recently, a Washington court found an information alleging the defendant had failed to appear after he was released on bail “in Mason County Superior Court cause no. 98-1-00123-2” deficient. State v. Green, 101 Wn. App. 885, 888, 6 P.3d 53 (2000). Green concluded the charging document was only marginally better than the document disapproved in Ibsen:

[t]he only difference between the Ibsen information and the information here is that Green was told the superior court cause number of the underlying charge.

Green, 101 Wn. App. at 891.

¹ 98 Wn. App. 214, 989 P.2d 1184 (1999).

Green held a defendant cannot be made to “search for the file on his underlying charge.” Green’s conviction was reversed and the bail jumping was dismissed without prejudice.

The information here is completely different from the informations disapproved in lbsen and Green. In this case, the information stated the underlying crime was possession of a controlled substance. Moreover, the information indicated the underlying crime was a felony. Thus, unlike defendants lbsen and Green, the defendant here was not left to “guess” what crime comprised the underlying offense for bail jumping. Liberally construed, the information here contained all “necessary facts” such that the defendant is not entitled to relief here.

The defendant is not entitled to relief for an additional reason. The defendant has failed to show he was “actually prejudiced” by the information. Under the second Kjorsvik prong, this court may look outside the information to determine if the defendant suffered actual prejudice. State v. Goodman, 150 Wn.2d 774, 789, 83 P.3d 410 (2004); Kjorsvik, 117 Wn.2d at 117. Here, it is apparent from the record the defendant was not prejudiced.

The purpose of the essential elements rule is to give the defendant notice of the nature of the crime so that he can prepare an adequate defense. The defendant does not claim his defense would have been any different had he been informed the underlying offense was a class C felony. Nor does the record support that potential argument.

At the close of the evidence below, the defendant argued he should be found not guilty because he did not “knowingly act” when he failed to appear for court. RP (Trial). 94. Defense counsel argued that, due to the “fast-pace” of the defendant’s prior court appearance, the defendant may have been unaware of his duty to later appear:

This is a quick case. The calendar, about an hour long, between 25 and 50 defendants on each calendar, and those orders are signed quickly, passed back and forth, up, back, from the clerks to the judges, to the attorneys, around. Not a single person testified that they saw Mr. Williams sign that order. Not a single person testified they saw Mr. Williams receive a copy of that order It is possible he signed ... , with the papers passed around quickly, and never even knew he was supposed to appear on December 4.

RP (Trial) 96.

The level of the underlying felony is not pertinent to the defendant’s trial strategy. There is no indication the defendant’s trial strategy would have differed had he been aware of the level of

the underlying felony. The defendant has failed to show prejudice here.

The information here is also sufficient for the reason an essential element as been defined as “one whose specification is necessary to establish the very illegality of the behavior charged.” State v. Ward, 148 Wn.2d 803, 64 P.3d 1000 (2003). In Ward, the defendants were each charged with a felony violation of no contact order. Each information alleged the defendant violated the order by intentionally assaulting the victim. The informations did not specify that the assault did not amount to either a first or second degree assault.

Ward determined the crime at issue had dual purposes, 1) enhanced protection for victims of domestic violence, and 2) greater penalties for assaultive versus non-assaultive violations of no contact orders. The court found those dual purposes would not be advanced by requiring the State to prove the predicate assault was not a first or second degree assault. Ward, 148 Wn.2d at 813, 815. Accordingly, Ward held the language “does not amount to assault in the first or second degree ...” did not function as an essential element of felony violation of a no-contact order.

The crime implicated here is Bail Jumping. Bail Jumping is included in the chapter entitled "Obstructing Governmental Operation". RCW 9A.76. Although there is no statement of purpose in that chapter similar to that for domestic violence offenses, it is clear that the offenses contained in that chapter are directed at acts that impede law enforcement and the administration of justice. When a defendant fails to appear, two things happen. First it prolongs the time before the matter is resolved. The longer it takes to resolve the case, the longer a crime victim must wait to put the trauma and anxiety associated with the crime behind him or her. Second, many times a defendant's failure to appear for a scheduled court appearance results in issuance of a bench warrant, and a subsequent appearance, either because the defendant voluntarily appeared or was arrested on the warrant. This means more work the court would not otherwise have to perform, and potentially an increased volume in caseload at the time that the defendant is ultimately surrendered to the court. Thus it could be said that the Bail Jumping statute is aimed at reducing trauma to victims and promoting judicial economy. Under the analysis employed in Ward, whether the underlying offense was a

Class A, B, or C felony, would not promote either of these purposes. The information should be found sufficient here.

Finally, the information should be found sufficient here for the reason RCW 10.37.050 indicates an information is sufficient if it can be understood there from:

(6) That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

(7) That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.

RCW 10.37.050(6) and 7).

Moreover, “[n]either presumptions of law nor matters of which judicial notice is taken need be stated in an indictment or information.” RCW 10.37.150. Every court in the state is required to take judicial notice of the statutes of every state, including Washington. RCW 5.24.010.

Applying the foregoing statute, a Washington court found an Information charging “asking for or receiving a bribe” to be legally sufficient even though it did not allege that the matter sought to be influenced by the public official was “then pending or which may by law be brought before him... in his official capacity” in State v.

Whetstone, 30 Wn.2d 301, 191 P.2d 818, cert. denied, 335 U.S. 858, 69 S.Ct. 131, 93 L.Ed.2d 405 (1948). The court pointed out the specific statutes that gave the defendant, acting in his capacity as a public official, the authority to consider the issues alleged in the information. The court then held that the allegations in the information, together with the fact that the court could take judicial notice of those specific statutes, satisfied the requirements for a sufficient information. Whetstone, 30 Wn.2d at 311-312. Earlier the court had reached the same conclusion in State v. Bergfeldt, 41 Wash. 234, 83 P. 177 (1905) and State v. Klein, 19 Wash. 368, 53 P. 364 (1898).

Here, the information was sufficient because it alleged that the defendant was charged with a particular crime, Possession of a Controlled Substance, that he had been admitted to bail on that charge with a requirement that he appear in Snohomish County Superior Court, and knowing that he was required to appear, he failed to do so. Insofar as the defendant's underlying offense comprised a Class C felony, his Bail Jumping charge was also a Class C felony. RCW 69.50.401(d); RCW 9A.76.170(3)(c). The trial court could take judicial notice of that fact. As in the cases cited above, the alleged facts, taken together with the facts that the

court was required to take judicial notice of, rendered the information legally sufficient.

Should this court reject all of the foregoing arguments and determine the information was fatally defective, the appropriate remedy is dismissal without prejudice. State v. Sutherland, 104 Wn. App. 122, 15 P.3d 1051 (2001)(“[t]he proper remedy for a conviction based on a defective information is dismissal without prejudice to the State refiling the information”); quoting State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992); State v. Markle, 118 Wn.2d 424, 440-41, 823 P.2d 1101 (1992). In Sutherland the court determined the information charging the defendant with felony hit and run left out the essential element of knowledge the defendant had been involved in an accident. Sutherland, 104 Wn. App. at 132. It therefore dismissed the charge without prejudice. Sutherland, 104 Wn. App. at 135. In similar fashion, should this court find the classification of Possession of a Controlled Substance as a felony also requires a letter designation, the matter should be dismissed without prejudice to refile charges.

B. THE DOCTRINE OF INVITED ERROR FORECLOSES THE DEFENDANT'S CHALLENGE TO THE "TO-CONVICT" INSTRUCTION. HAVING FAILED TO OBJECT TO THE "TO-CONVICT" INSTRUCTION BELOW, THE DEFENDANT CANNOT SHOW MANIFEST ERROR HERE. ALTERNATIVELY, THE INSTRUCTION SET FORTH ALL ELEMENTS OF BAIL JUMPING, OR AT WORST, CONTAINED A HARMLESS ERROR.

At the close of the evidence, the court instructed the jury on the elements of bail jumping as follows:

To convict the defendant of the crime of bail jumping as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) *That the defendant was charged with Possession of a Controlled Substance;*
- 2) That the defendant had been released by a court order or admitted to bail with the requirement of subsequent personal appearance before that court;
- 3) That on or about the 4th day of December, 2003, the defendant knowingly failed to appear as required by a court; and
- 4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 75 (emphasis added).

During trial, the defendant asserted the court's "to-convict" instruction was confusing as to "what action should be knowing", but did not otherwise challenge the instruction. RP (Trial) 81. Indeed, the defendant proposed a "to-convict" instruction containing *identical* language regarding the underlying offense. In pertinent part, the proposed defense "to-convict" instruction provided:

To convict the defendant of the crime of Bail Jumping as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about the 4th day of December, 2003, the defendant failed to appear before a court;
- 2) *That the defendant was charged with Possession of a Controlled Substance;*

CP 107. (Defendant's Proposed Instruction as modified from WPIC 120.41.

1. Any Error In The Court's "To-Convict" Instruction Was Invited.

The defendant's proposed "to-convict" instruction and the court's "to-convict" instruction identically described the underlying offense for Bail Jumping. Assuming *arguendo* the court's instruction was in error, the doctrine of invited error prohibits the defendant from challenging the "to-convict" instruction here. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002)("the

invited error doctrine [applies] where, as here, the “to convict” instruction omitted an essential element of the crime”); State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990)(party may not request an instruction and later complain on appeal that the requested instruction was given).

2. Manifest Error Has Not Been Shown.

A party may raise “manifest error affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3). To establish that an error is “manifest,” the defendant must “show how, in the context of the trial, the alleged error actually affected the defendant’s rights.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). “Manifest” error has been characterized as error that is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Where the effects of an error are purely abstract and theoretical, the error cannot be raised for the first time on appeal. Lynn, 67 Wn. App. at 346.

Here, the defendant claims the “to-convict” instruction was deficient in failing to identify his underlying offense. In his brief, the defendant has not even attempted to show how the “to-convict” instruction comprised “manifest” constitutional error. Accordingly,

the defendant has not shown that he is entitled to review under RAP 2.5(a)(3).

The state is aware a Washington court recently allowed a defendant to challenge a "to-convict" instruction for Bail Jumping for the first time on appeal. State v. Pope, 100 Wn. App. 624, 629, 999 P.2d 51 (2000). In Pope, the "to-convict" instruction stated the defendant had been released by court order or admitted to bail with the requirement he subsequently appear "regarding a felony matter." Pope, 100 Wn. App. at 629. The "to-convict" instruction in Pope in no way identified the particular crime for which defendant Pope had failed to appear.

This case is different. Here, the "to-convict" instruction unambiguously informed the jury the defendant was charged with "possession of a controlled substance". Thus, the jury was not left to speculate what crime comprised the underlying offense for Bail Jumping. Rather, the "to-convict" instruction here indicated a particular crime (possession of a controlled substance) comprised the underlying offense. Unlike the "to-convict" instruction in Pope, the "to-convict" instruction here adequately set forth the elements of Bail Jumping such that it cannot be challenged for the first time on appeal.

3. Assuming *Arguendo* The “To-Convict” Instruction Was Somehow In Error, The Error Was Harmless.

The defendant claims a harmless error analysis is “never applicable” where the error is the omission of an element in a “to-convict” instruction. The defendant is wrong. Pope’s conclusion harmless error cannot be found has been repudiated. State v. Jennings, 111 Wn. App. 54, 63, 44 P.3d 1 (2002)(“an instruction that omits an element of the offense may ...[be] subject to a harmless error analysis”). Such instructional error is harmless where “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” Jennings, 111 Wn. App. at 64, quoting Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

A series of earlier Washington decisions are in accord with Jennings. State v. Carter, 4 Wn. App. 103, 480 P.2d 794, review denied, 79 Wn.2d 1001 (1971); State v. Hartley, 25 Wn.2d 211, 225, 170 P.2d 333 (1946); State v. Bilal, 54 Wn. App. 778, 783-84, 776 P.2d 153, review denied, 113 Wn.2d 1020 (1989). In each of the foregoing cases, the omission of an element from a jury instruction was held to be harmless error because there was overwhelming evidence concerning that element.

Here, this court should employ the reasoning of Jennings and the above cases in finding any error in the “to-convict” instruction harmless beyond a reasonable doubt. The error is harmless because, on this record, there is no reason to believe the jury would have rendered a different verdict on the Bail Jumping charge had it been instructed the underlying offense for Bail Jumping comprised a certain level of felony. The defendant defended the Bail Jumping charge on grounds the “knowledge” element was not met. RP (Trial) 94 (“there is ... good reason for you to doubt whether or not Mr. Williams knowingly acted in this case when he failed to appear...”). There is no reason to conclude the defendant would have employed a different, more effective trial strategy had the “to-convict” instruction for Bail Jumping stated the underlying possession of controlled substance charge comprised a C felony.

In sum, the doctrine of invited error defeats the defendant’s attempt to challenge the court’s “to-convict” instruction. The defendant has not shown the instruction comprised “manifest” error. The instruction sufficiently set forth the elements of Bail Jumping, or, alternatively, contained a harmless error for which the defendant is not entitled to relief.

B. NO SENTENCING ERROR OCCURRED BELOW.

Apprendi v. New Jersey² held that facts or elements which increase punishment beyond the statutory maximum must be proved to a jury beyond a reasonable doubt. More recently, Blakely v. Washington³ interpreted “the statutory maximum” as the high end of the pertinent standard range, or the maximum sentence the judge may impose on the basis of the facts reflected in the jury verdict. Blakely, 452 U.S. at 296.

Citing Apprendi and Blakely, the defendant claims the computation of his standard range sentence was not wholly derived from the jury’s verdict. As the following analysis will show, the defendant is wrong.

First of all, Apprendi and Blakely do not apply here because an exceptional sentence was not imposed in this case. The defendant’s standard range was 43-57 months. CP 8. The defendant received a low-end sentence of 43 months. CP 11. Insofar as the defendant’s sentence falls within the “statutory maximum” as defined by Blakely, he is not entitled to relief.

The defendant nonetheless argues his sentence was partly based on “judicial factfinding”. The defendant claims that, in

² 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

imposing his standard range sentence, the sentencing judge (rather than the jury) necessarily “found” he had failed to appear on a class B or class C felony. The defendant further claims the jury’s verdict left open the question whether he had failed to appear on a murder charge, a class A felony, or a misdemeanor or gross misdemeanor.

The defendant’s argument fails. For here, the jury found the defendant guilty of “Bail Jumping as charged in Count I”. CP 69. Count I of the state’s second amended information indicated the defendant had failed to appear after being charged with “Possession of a Controlled Substance, a *felony*”. Given these facts, the jury could not rationally have returned a guilty verdict had it concluded the underlying offense for Bail Jumping was a misdemeanor or gross misdemeanor.

Moreover, because the information specified the underlying offense was Possession of a Controlled Substance, there is no possibility the jury found the defendant guilty of Bail Jumping for failing to appear on a murder charge.

It is correct that, in determining the defendant’s offender score, the sentencing judge elected “Bail Jumping With Class B or C Felony” as opposed to “Bail Jumping With Class A Felony”. This

³ 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

election does not comprise “judicial factfinding” under Blakely. See State v. Hunt, ____ Wn. App. ____, 116 P.3d 450 (2005)(“Blakely does not impact Washington’s offender scoring system. Judicial fact finding is permitted when establishing recommended standard range sentences”).

The state recognizes this court arguably reached a contrary conclusion in a recent decision. State v. Jones, 126 Wn. App. 136, 107 P.3d 755 (2005). In Jones, this court found that, by adding a point to the defendant’s offender score due to his community placement status, the trial court violated the rule of Blakely.

The facts of Jones are different from the facts of this case. For, Jones recognized the determination whether a defendant was on community placement at the time of an offense involved “many variables” such that factual determinations were inevitable. Jones, 125 Wn. App. at 143.

This case is different. Here, the question whether the underlying Possession of Controlled Substance charge comprised an A, B, or C felony was not complex, and did not require the court to make factual determinations. Accordingly, Jones does not control. This court should conclude the defendant’s standard range

sentence was proper, having been wholly derived from the jury's verdict.

In any event, assuming *arguendo* the rule of Apprendi/Blakely somehow applies, the lowest sentence authorized by law was imposed. For here, the jury returned a verdict finding the underlying offense for Bail Jumping comprised a felony, and the court ordered a low-end standard range sentence for Bail Jumping With Class B or C Felony. Given these facts, the court's sentence cannot be said to exceed the "statutory maximum" for Bail Jumping with an underlying felony. The defendant's low-end standard range sentence was "wholly derived" from the jury's verdict, and should be affirmed.

Alternatively, the defendant argues for reversal of his sentence based on the use of juvenile adjudications in calculating his offender score. A recent decision of this court resolves this issue adverse to the defendant's position. State v. Weber, 127 Wn. App. 879, 112 P.3d 1287 (2005).

Weber held:

juvenile adjudications that meet constitutionally-required safeguards fall within the prior conviction exception set out in Almendaraz-Torres and upheld in Apprendi and Blakely.

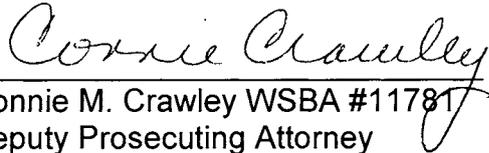
Consistent with Weber, this court should reject the defendant's challenge to the inclusion of two prior juvenile adjudications in his offender score.

IV. CONCLUSION

The defendant's conviction and sentence should be affirmed.

Respectfully submitted on September 26, 2005.

FOR JANICE ELLIS
Snohomish County Prosecutor



Connie M. Crawley WSBA #11781
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS WILLIAMS,

Appellant.

No. 55405-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20 day of September, 2005, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 26 day of September, 2005.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit