

No. 92293-4

No. 46140-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN R. CASE,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 13-1-01870-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether by stipulating that he had two prior convictions for violation of a no-contact order, Case relieved the State of the burden of proving that element of felony violation of a no-contact order, regardless of the statutory basis of the orders at issue in the prior convictions.
2. Whether sidebars violated the defendant's or the public's right to a public trial.
3. Whether defense counsel provided ineffective assistance of counsel for failing to object to (1) the leg restraint he was required to wear during trial, and (2) Officer Herbig's testimony that he terminated his questioning of Case because there was no "meaningful interaction."
4. Whether the trial court erred by including in Case's criminal history prior convictions previously accepted by the same court as proven or acknowledged.

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case.

C. ARGUMENT.

1. By stipulating to two prior convictions of violating a no-contact order, Case relieved the State of the burden of proving that element of felony violation of a no-contact order. Further, the statutory basis of the no-contact orders at issue in the prior convictions is not an element of the current offense and need not be submitted or proved to the jury.

Case argues that because the State did not prove to the jury that the no-contact orders at issue in his two prior convictions for violation of a no-contact order were based on the requisite statutes,

there was insufficient evidence to support his conviction for felony violation of a post-conviction no-contact order, domestic violence.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Id. In considering a sufficiency challenge, the reviewing court can consider all evidence, even evidence an appellate court determines was wrongly admitted. Lockhart v. Nelson, 488 U.S. 33, 40-41, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).

It is not apparent from the record which party proposed it, but the parties stipulated that Case had two prior convictions for violation of a no-contact order. Trial RP 6, 66. The stipulation was admitted as Exhibit 5 and read as follows:

The parties have agreed that certain facts are true. You must accept as true the following facts: The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order or no-contact order issued under the Washington State law.

Trial RP 66; Exhibit 5.

When the parties stipulate to the facts that establish an element of the charged crime, the jury need not find the existence of that element, and the stipulation therefore constitutes a waiver of the “right to a jury trial on that element,” *United States v. Mason*, 85 F.3d 471, 472 (10th Cir. 1996), as well as the right to require the State to prove that element beyond a reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

State v. Humphries, S. Ct. No. 88234-7, slip op. at 5-6 (October 23, 2014). If a defendant offers to stipulate to prior convictions which form an element of an offense, rather than allowing the State to put evidence regarding those convictions before the jury, the trial court abuses its discretion if it refuses to accept the stipulation. Old Chief v. United States, 519 U.S. 172, 191-92, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); State v. Johnson, 90 Wn. App. 54, 63, 950 P.2d 981 (1998).

Case argues that the underlying statutory basis of the orders which were at issue in his prior convictions is an element of the offense for which he was on trial and that his stipulation did not, apparently, apply to that element. He cites to State v. Carmen, 118 Wn. App. 655, 77 P.3d 368 (2003); State v. Arthur, 126 Wn. App.

243, 108 P.3d 169 (2005); and State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005). The court in Carmen held that the underlying statutory basis of the orders in the prior convictions related to the admissibility of the evidence and was not an essential element of the crime of felony violation of a no-contact order. 118 Wn. App. at 655. In Arthur, a different division of the Court of Appeals made a contrary finding, that the validity of the orders at issue in the prior convictions was an element of the felony offense. 126 Wn. App. at 249-50. The Supreme Court referred to both cases in Miller, and said, "We . . . hold that the validity of the no-contact order is not an element of the crime. To the extent the cited cases are inconsistent, they are overruled." 156 Wn.2d at 31. Case's argument that Arthur is still good law is incorrect.

The jury was not asked to decide if the previous convictions were issued under the requisite statutes. The pertinent jury instructions were Instructions 8 and 9.

A person commits the crime of violation of a court order when he or she knows of the existence of a no contact order, and knowingly violates a provision of the order and the person has twice been previously convicted for violating the provisions of a court order.

Instruction No. 8, CP 51.

To convict the defendant of the crime of violation of a no contact order as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 18, 2013, there existed a no contact order applicable to the defendant;

(2) That the defendant knew of the existence of this order;

(3) That on or about said date, the defendant violated a provision of this order;

(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and

(5) That the defendant's act occurred in the State of Washington.

Instruction No. 9, CP 51-52.

Case did not object to these instructions, RP 65. He does not assign error to them on appeal.

Case is incorrect that the statutory basis of the orders he was convicted of violating on previous occasions is an element of the offense for which he was on trial. Even if it were, it is not logical to believe that he was stipulating only to the fact of the convictions and not to the validity of the underlying orders, particularly when he did not object to jury instructions which did not require the State to prove it.

2. Sidebars held during the trial did not implicate the public trial rights of Case or the public. The sidebars did not violate the defendant's right to be present.

Several sidebars were held during this trial, two of them during voir dire, Trial RP at 7-8, three during the evidentiary portion of the trial, Trial RP 12, 36, 50, and one following the reading of the instructions to the jury. Trial RP 79. The court made a record later of the content of the sidebars. Trial RP 7-8, 59-62, 79.

Case argues that these sidebars violated both his public trial right and that of the public, although he does not make any particular distinction between the two. He also asserts that the sidebars violated his right to be present.

- a. Public trial.

Case argues that his right to a public trial, guaranteed by both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court held the above-described sidebars. He did not object in the trial court to any of them.

A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been

violated, prejudice will be presumed. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). “Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011). The initial question is whether the challenged proceeding even implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012).

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Case sets forth the factors to be considered in that analysis in his Opening Brief at 18.

The Bone-Club analysis is not required unless the public is “fully excluded from the proceedings within a courtroom,” Lormor, 172 Wn.2d at 92 (citing to Bone-Club), 128 Wn.2d at 257, or when jurors are questioned in chambers. Id. (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167

Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

[A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93. Case's argument presumes that the sidebars constituted a closure of the courtroom, but under this definition, the courtroom was never closed and there was no requirement for a Bone-Club analysis.

Sidebars do not implicate the right to a public trial, and therefore do not violate that right. In State v. Love, the court applied the experience and logic test of State v. Sublett, *supra*; it held that a sidebar is not a closure of the courtroom and challenges to members of the jury venire at a sidebar do not implicate the right to a public trial. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013). This division of the Court of Appeals agreed with that analysis and held the defendant's public trial rights were not violated by exercise of peremptory challenges at sidebar. State v. Dunn, 180 Wn. App. 570, 574, 321 P.3d 1283 (2014). The practice of conducting peremptory challenges by writing them on paper

similarly does not violate the defendant's public trial right. State v. Webb, ___ Wn. App. ___, 333 P.3d 470, 473 (2014).

The Supreme Court has considered the issue of whether sidebars implicate the defendant's right to a public trial and concluded that they do not. State v. Smith, ___ Wn.2d ___, 334 P.3d 1049, 1051 (2014). In Smith, the sidebars concerned evidentiary issues and were held in the hallway outside the courtroom; they were recorded. Id. at 1051-52. The court again applied the experience and logic test of Sublett and found that sidebars do not implicate the public trial right. Id. at 1055-56.

The above-cited cases did not specifically address the public's right to an open trial, but it logically follows that if the public trial right is not even implicated by sidebars, the public's right has not been violated.

b. Right to be present.

A criminal defendant has the right to be present at all critical stages of the trial. Love, 176 Wn. App. at 920. The State does not dispute that voir dire, the taking of evidence, and the instructing of the jury, when the sidebars in this case occurred, are critical stages. Case did not object in the trial court to the sidebars.

Appellate courts will not hear challenges for the first time on appeal unless the issue presents a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). Before the court will consider the claimed error, the record must be sufficient to permit it to do so. Love, 176 Wn. App. at 921. A constitutional error is “manifest” when the defendant is actually prejudiced by it. Id. In Love, the Court of Appeals concluded that the defendant failed to show any prejudice from the jury challenges at sidebar. “He was present beside his counsel during the information gathering phase of voir dire and apparently had the opportunity to provide any input necessary to whether to pursue any challenges for cause.” Id. The court also said, in dicta:

We question, although we do not decide, whether Mr. Love has established he was not present. As we have just determined, the courtroom was not closed by the sidebar conference and Mr. Love was admittedly in the courtroom during jury selection. If “present” means standing beside counsel, he might be correct, but there has been no authority presented suggesting that presence has such a meaning. He was in the courtroom which was “open” to him.

Love, 176 Wn. App. at 921, n. 9.

The Ninth Circuit Court of Appeals has addressed whether sidebars during voir dire violate the defendant’s constitutional right to be present. United States v. Reyes, 764 F.3d 1184 (9th Cir.

2014). In that case the judge had briefly questioned a prospective juror at sidebar and had held seventeen other side bars during jury selection. The court found no constitutional violation. “Reyes was able to observe the composition of the jury on an ongoing basis and correct any mistakes made by his lawyer in exercising his peremptory challenges because the district court struck each juror in open court.” Id at 1196.

Because Case did not object below, he must show a manifest constitutional error, and he does not do so. There is no split of authority in this state—all the court which have considered the issue have found that sidebars do not implicate the public trial right or violate a defendant’s right to be present. Consequently, there is no violation in this instance.

3. Case fails to establish either that his counsel’s performance was below standard or that he was prejudiced by it.

Case maintains that his trial attorney rendered ineffective assistance of counsel in two respects—failure to object to the leg restraint Case wore during trial, and failure to object to the testimony of Officer Herbig that he discontinued his interview of the

defendant because it was not resulting in any meaningful interaction.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. 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, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

a. Failure to object to restraints.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002). Restraints are disfavored because they may impact the constitutional right to the presumption of innocence, State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one's own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring

safety and order in the courtroom. State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (citing to State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981)).

A trial court has broad discretion to provide security and ensure decorum in the courtroom. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. State v. Damon, 144 Wn.2d at 691-92.

In State v. Flieger, 91 Wn. App. 236, 955 P.2d 872 (1998), the court found a legitimate distinction between a shock box which does not restrain physical movement and cannot be seen by jurors from other restraint methods which are visible. In that case it did not matter because the shock box worn by the defendant had been noticed by the jurors. Id., at 242.

Errors which infringe on a defendant's constitutional rights are presumed prejudicial. Flieger, 91 Wn. App. at 243. Like other constitutional errors, a claim of unconstitutional shackling is subject to a harmless error analysis. Jennings, 111 Wn. App. at 61. The State bears the burden of showing that the shackling did not

influence the jury's verdict. Damon, 144 Wn.2d at 692.¹ “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The court in Hutchinson found that because the jury never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. Hutchinson, 135 Wn.2d at 888. Similarly, the court in Jennings held that the stun gun the defendant was wearing was not visible to the jury and the error was harmless. Jennings, 111 Wn. App. at 61. The court in Damon found that the jury must have observed the restraint chair in which the defendant was seated, and therefore the error was not harmless. Damon, 144 Wn.2d at 693.

The trial court in this case found that in general the design of the courtroom caused concern for the safety of witnesses or others

¹ In State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), the court said that the defendant must show that the shackling influenced the jury's verdict. Because the jury in that case never saw the defendant in shackles, he could not show prejudice.

coming in front of the bar and that the sheriff's office lacked the staff to adequately secure the courtroom should problems occur. Trial RP 4-5. He did not make any findings specific to Case.

As Case argues, his attorney specifically waived any objection to the leg restraint which the defendant wore. Trial RP 5. Because he did not challenge the restraint below, he cannot do so on appeal. RAP 2.5(a)(3). Instead, he claims ineffective assistance of counsel for failing to object. He argues that there was no tactical reason to fail to object, Appellant's Opening Brief at 31, but he does not point out any reason to object, either, other than the general right to be free of restraints. Counsel could well have reasoned that the leg restraint, which was not visible to the jury, Trial RP 5, made little difference one way or the other, and if he objected to everything he diluted the impact of his objections to things that mattered.

Even if counsel's performance were substandard, however, Case must show that he was prejudiced by his attorney's error. He has not offered any explanation of how that would be so and no prejudice is apparent. The record of the trial does not indicate a single instance of any problems with the leg restraint. There is no evidence that the jury saw the restraint. Case did not testify, and

even if he had, the court indicated it would arrange for him to move about the courtroom while the jury was absent so that the restraint would not be detected. Case does not argue that he was unable to consult with his attorney or otherwise participate in the trial because of the restraint. He has shown no prejudice, and thus no ineffective assistance of counsel.

a. Failure to object to Officer Herbig's testimony.

Case asserts that Officer Herbig expressed a "bald opinion" that Case was lying and the State's witnesses were telling the truth. Appellant's Opening Brief at 34. Again, he does not challenge the admission of the evidence directly, because he did not object below, but rather claims that his counsel was ineffective for failing to object.

Officer Herbig was asked by the prosecutor if Case had made any statements about his contact with the victim, and the officer replied:

He essentially stated that he denied having any contact with her, and when I pointed out the obvious presence of not only civilian witnesses but security guards and other disinterested parties that would have no basis for, in my opinion, lying or fabricating, he said that they were essentially lying, and at that point I terminated my questioning because I didn't feel we were going to have any sort of meaningful interaction.

Trial RP 46-47.

“The general rule is that no witness, lay or expert, may testify ‘testify to his opinion as to the guilt of the defendant, whether by direct statement or inference.’” Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Such testimony invades the province of the fact-finder and is unduly prejudicial. Id.

However, testimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.

Id. at 578. Opinion testimony is defined as “testimony based on one’s belief or idea rather than on direct knowledge of the facts at issue.” State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001).

Case cites to State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985), to support his argument that the officer’s statement here is an opinion that he is guilty. In Carlin, a police officer had testified that a tracking dog could detect on the defendant a “guilt scent,” which he described in detail as a scent common to people who are fearful or have a “prey type of odor.” Id. at 702-03. The Carlin court

found that to be “arguably” an improper opinion without finding that it was. *Id.* at 703. See also Seattle v. Heatley, 70 Wn. App. 573, 683-84, 854 P.2d 658 (1993) (“[T]he court in *Carlin* did not expressly decide that the ‘fresh guilt scent’ testimony actually constituted an opinion on the defendant’s guilt. . . . Instead, the court held that even if the testimony was error, it was harmless beyond a reasonable doubt.”)

Calling the testimony of Officer Herbig an opinion that Case was guilty is a stretch. The officer said that based on his observation the witnesses had no basis for fabricating their story and since Case said they were all lying, there was no point in continuing the interview. Trial RP 47. That is scarcely the direct comment on guilt that is prohibited by either the Sixth Amendment or the Washington Constitution, Article I, § 21. It was based upon evidence which the officer identified.

Defense counsel quite likely failed to object because he did not find the testimony objectionable. “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. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted). Case argues that this was

critical evidence, Appellant's Opening Brief at 34, but that is not apparent. The critical evidence came from the eyewitnesses who identified Case as the person yelling at the victim or approaching the bus she had just boarded. It cannot be reasonably said that this testimony was so prejudicial that it had a major impact on the verdict. Even if counsel had objected, it is unlikely that the court would have stricken the testimony. It is even more unlikely that, without this testimony, the jury would have acquitted.

There was no ineffective assistance of counsel.

4. It was not error for the court to rely on court records to calculate the defendant's offender score. Even if it was error, it was harmless.

Case argues that his sentence should be vacated and the matter remanded for resentencing because the court did not grant a hearing, pursuant to RCW 9.94A.530(2), when he objected to the State's statement of criminal history. Appellant's Opening Brief at 35. RCW 9.94A.530(2) provides, in pertinent part, that if the defendant disputes material facts, the court must either not consider those facts or hold an evidentiary hearing on them.

In this matter, the State produced a summary of Case's prior convictions at the sentencing hearing. CP 70. Based on that summary, the offender score was calculated at seven. *Id.* The

State had provided a similar summary to defense counsel pretrial when making a plea offer, Sentencing RP 8, and anticipated that the defendant would agree that it was correct. Sentencing RP 8-9. Defense counsel objected to the offender score only because the State had not produced "direct evidence of those convictions." Sentencing RP 9-10. The State asked for a continuance to obtain those documents. Sentencing RP at 10. Instead of addressing that request, the judge consulted the court's electronic data base, called Liberty, and reviewed the judgment and sentence in Case's most recent prior conviction. Sentencing RP 10. The court found that the criminal history listed in that judgment and sentence was consistent with the summary that the State provided. Sentencing RP 11. "So I'm finding that the criminal history that's been provided today is accurate and complete and that the offender score is seven." Sentencing RP 11.

Case did not object to any specific facts, and did not claim that the criminal history as summarized in the Prosecutor's Statement on Prior Record and Offender Score, CP 70, was inaccurate. He merely objected to the fact that the State had not produced some independent verification of that history. Therefore,

RCW 9.94A.530(2) is not applicable. There were no disputed facts upon which to hold a hearing or for the court to disregard.

The defendant has no burden to produce evidence of his criminal history. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010). The State bears the burden of proving prior convictions by a preponderance of the evidence. Id. The rules of evidence do not apply at sentencing hearings. ER 1101(c)(3). Due process requires that the court not rely on information that is “false, lacks a minimum indicia of reliability, or is unsupported in the record.” State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999).

To prove prior convictions, the State may offer certified copies of judgment and sentences, but it may also introduce equivalent evidence. Adolph, 170 Wn.2d at 566, citing to Ford, 137 Wn.2d at 480. “The existence of a prior conviction is a question of fact.” Adolph, 170 Wn. 2d at 566. The State is required to prove prior convictions by evidence that bears the minimum indicia or reliability referred to in Ford. Adolph, 170 Wn.2d at 569. In Adolph, the court found that the Judicial Information System (JIS) database was a reliable source of information comparable to a certified

judgment and sentence and could be relied on to prove prior convictions. Id. at 570.

In the sentencing at issue here, the court relied on a judgment and sentence filed with the court in Case's most recent conviction. A court's official records should be considered at least as reliable as information in JIS, since court records are the source of the information in JIS. The criminal history in that case had been accepted by the court and certainly had "minimum indicia of reliability." The real difference here is that the court *sua sponte* obtained the documentation to support the State's summary of Case's prior convictions. While it is true that the State does have the burden, it makes little sense to reject the documentation because it was "produced" by the court rather than the State. The burden was never placed on the defendant. Case does not dispute its accuracy.

Even if this court determines that it was error for the sentencing court to rely on other court documents to calculate Case's offender score, it was harmless. An error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected."

State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

If this matter is remanded for resentencing, as Case requests, the State would be allowed to produce the documents supporting the criminal history summarized in CP 70. RCW 9.94A.530(2) provides, in relevant part:

On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

RCW 9.94A.530(2). See also State v. Cobos, 178 Wn. App. 692, 700-01, 315 P.3d 600 (2013). The result will be exactly the same and it will have consumed scarce resources.

The sentence in this matter should be affirmed.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Case's conviction and his sentence.

Respectfully submitted this 24th day of November, 2014.



Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

November 24, 2014 - 8:56 AM

Transmittal Letter

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