

64407-6

64407-6

No. 64407-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RANDALL KNOWLES,

Appellant.

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

The Honorable Michael T. Downes

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Mr. Knowles' jury trial for possession of a stolen vehicle, prosecutorial misconduct in closing argument requires reversal of the defendant's guilty verdict.

2. The defendant's right to be present with counsel at the court's response to the jury inquiry was violated.

3. The trial court erred in denying the defendant's request for a DOSA sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether prosecutorial misconduct in closing argument, occurring where the prosecutor told the jury that the defendant could be convicted of possession of a stolen vehicle [which requires proof of knowledge] merely for the act of sitting inside or driving a car that was stolen, requires reversal of the defendant's guilty verdict.

2. Whether the defendant's right to be present with counsel at the court's response to the jury's inquiry (asking if knowledge is required to convict), was violated, which requires reversal, or at a minimum, exacerbated the prejudice of the misconduct in closing.

3. Whether the trial court erred in denying the defendant's request for a DOSA sentence because of his criminal history and desire to obtain reduced incarceration.

C. STATEMENT OF THE CASE

Randall Knowles was charged with possession of a stolen motor vehicle based on the fact that he was seen driving and exiting a Ford Mustang that was claimed to have been taken without permission from Best Auto Parts, a wrecking yard. CP 126-27. There was little evidence that the defendant actually knew he was in possession of a stolen vehicle as opposed to one he believed he had permission to drive. However, in closing argument, the prosecutor responded to this defense assertion, by telling the jury in rebuttal argument that it was not necessary to find that the defendant acted with "knowledge." 7/27/09RP at 232-34.

Although this argument was not objected to, it flagrantly misstated the law and impinged on the defendant's right to be convicted based on proof of every element of the offense charged, and is thus appealable. Reversal is required despite the fact that the jury was correctly instructed. The jury's inquiry amply demonstrates the confusion caused by the prosecutor's misconduct. CP 81.

Prior to sentencing, the court allowed the defense to obtain a DOSA evaluation. The court denied the DOSA request, agreeing with an evaluation that improperly relied on Mr. Knowles' criminal history to recommend against the proposed alternative sentence, on other

factors which inhere in the DOSA alternative sentence program's inherent aspects, and based on the court's incorrect recollection of the defendant's testimony at trial as contradicting his post-sentencing claims to the DOSA evaluator that he wanted to improve his life (in fact, the defendant had not testified at trial). 10/20/09RP at 7-10.

Mr. Knowles was instead given a term of 57 months incarceration. CP 19-31. He appeals. CP 5-19.

D. ARGUMENT.

1. **THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT IN CLOSING ARGUMENT, MISSTATING THE LAW BY TELLING THE JURY THAT MR. KNOWLES COULD BE CONVICTED MERELY BECAUSE HE WAS FOUND IN POSSESSION OF A VEHICLE THAT "WAS" STOLEN.**

a. The State's closing argument in context. During trial the defense cross-examined witnesses and elicited evidence tending to show as a whole that there was little indicia showing an innocent observer or driver of the car that the Mustang was stolen, including no entry damage to the vehicle or damage to the ignition. 7/27/09RP at 179, 187.

In closing argument, counsel argued that the State had not proved knowing possession of a stolen vehicle, having shown nothing more than facts that were compatible with Mr. Knowles' taking the car

with belief he had permission. 7/27/09RP at 187; 7/28/09RP at 216-232. This was the core of the defense closing argument, beginning with pointing out the fact that the key to the car that the defendant possessed was indeed not “shaved,” and would have not indicated to a person that the car was stolen. 2/28/09RP at 217.

The State, in rebuttal closing, responded to this argument, but exceeded the parameter of proper argument. The prosecutor told the jury two things that were legally and constitutionally false, and bolstered his incorrect pronouncement of what was “not required” to convict Mr. Knowles by mischaracterizing the defense closing argument.

First, the prosecutor told the jury that he believed it was “surreal” that the defense would admit that Mr. Knowles possessed the car key and drove the vehicle. The State announced that this was an admission to committing the crime charged. 7/27/09RP at 232-33.

The prosecutor then, after stating that the reasonable doubt definition in the instructions was “just to confuse,” told the jury that the defense argument regarding inadequate showing of indicia that the car was stolen made no sense, because

[y]ou could have a Lexus SUV be a stolen car and you could have the biggest piece of junk not be a stolen car. You don't know what a stolen car looks like. That's not what we're trying to prove.

7/27/09RP at 233. This mischaracterization (the defense plainly argued that a person driving the car would not recognize the car to be stolen, because of the absence of damage) bolstered the force of the prosecutor's improper argument telling the jury that knowledge was not required. Then the State told the jury that "[m]aybe [the defendant] didn't know [the car] was stolen at the time until the police came" and began questioning him, when he had left the car and was sitting in a patio area of a restaurant. 2/27/09RP at 234. This argument, which surely also contributed to the jury's later-expressed confusion, was substantially incorrect because the applicable law provides that the defendant must both have "knowledge" and be in possession of the vehicle. RCW 9A.56.068(1).

Finally, the State then essentially listed the elements of the crime it was telling the jury were needed to convict:

The facts are this. On June 5, somehow the Defendant got the key. He was driving the vehicle based on what you saw of the evidence and the Defense argument that I am submitting to you now. He possessed the vehicle and he did not have permission to drive it.

7/27/09RP at 234. The State therefore asked that the jury find the defendant guilty. 7/27/09RP at 234.

Mr. Knowles's counsel did not object to any of the above statements. However, the prosecutor's argument, in addition to being misconduct, was flagrant, unconstitutional, and "manifest" error.

b. The State committed misconduct. Mr. Knowles' due process rights to a fair trial and proof beyond a reasonable doubt were violated when the prosecuting attorney's closing argument misstated the law to effectively eliminate an element of the crime. According to statute, "A person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle." RCW 9A.56.068(1). Knowledge that a vehicle is stolen is an element of the crime of possession of a stolen vehicle. RCW 9A.56.140; 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 77 .21, at 177 (3d ed. 2008) (WPIC). "Possessing stolen property" is defined as "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1).

The jury in Mr. Knowles' criminal case was properly instructed that the crime of possession of a stolen vehicle requires proof that the defendant knew the vehicle was stolen. CP 91-93 (Jury instruction nos. 7, 8, 9).

However, the prosecuting attorney incorrectly argued to the jury that knowledge was not required, as is amply plain from Part D.1.a, above. The prosecutor's incorrect statement of the law eliminated an

element of the charged offense and thus impacted Mr. Knowles' constitutional right to proof of every element of the offense beyond a reasonable doubt.

First, the constitutional right to due process of law ensures that a criminal defendant receive a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1 §§ 3, 22. A prosecutor, as a quasi-judicial officer, has the duty to act impartially and seek a verdict free from prejudice and based on reason. State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). When a prosecutor commits misconduct, the defendant may be denied a fair trial and due process of law. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

To determine whether a prosecutor's comments in closing argument constitute misconduct, the reviewing court on appeal must decide if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Furthermore, where the misconduct impacts a specific constitutional right, such as the right to proof of every element of the offense beyond a reasonable doubt, the error is reviewed under the constitutional harmless error standard. See State v. Easter, 130 Wn.2d 228, 241-43, 922 P.2d 1285 (1996) (prosecutor's comment on

defendant's pre-arrest silence, and evasive behavior, as showing guilt); Belgarde, 110 Wn.2d at 511-12 (prosecutor's reference to defendant's post-arrest silence); State v. Curtis, 110 Wn.App. 6, 13-14, 37 P.3d 1274 (2002) (prosecutor elicited testimony that defendant exercised Miranda rights); State v. French, 101 Wn.App. 380, 386, 4 P.3d 857 (2002) (prosecutor's comment on fact defendant did not testify), review denied, 142 Wn.2d 1022 (2001).

Here, the issue is that the criminal defendant has the constitutional right to have the jury find every element of the crime. An accused person may only be convicted based upon proof of every element of the crime beyond a reasonable doubt. U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 21, 22. A conviction cannot stand if the jury is instructed in a manner that relieves the State of its burden of proof. State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999) (incorrect instruction on elements of charged crime).

Thus a prosecutor may not argue to the jury in a manner that misstates the law or eliminates the burden of proof of every element of the offense as properly stated in the instructions. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1983) (misconduct for prosecutor to argue accomplice liability in absence of accomplice liability instructions); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (misconduct for prosecutor to argue jury could only

acquit if found complainant was lying), review denied, 131 Wn.2d 1018 (1997).

A prosecutor's remarks may not be grounds for reversal if "they were invited or provoked by defense counsel and are in reply to his or her acts and statements." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). However, the State's comments above in the context of closing argument, amounted to prosecutorial misconduct. Allegedly improper comments are reviewed for misconduct "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). The prosecutor improperly, for some reason, emphatically and specifically misstated the basic law of this case. During deliberations, the jury was plainly confused by the prosecutor's improper closing argument. The jurors sent out an inquiry asking as follows:

Instruction No. 8. Question # 1. Does the defendant have to knowingly know the vehicle was stolen or just be in possession of the vehicle to prove or not approve question # 1.

CP 81. This jury was plainly confused about whether knowledge was required. Furthermore, Mr. Knowles had no opportunity to correct the jury's misimpression. The minutes and record and the jury inquiry

form fail to show that the defendant and counsel were consulted by the court during this critical stage of trial, as required by due process and the 6th and 14th Amendments. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); Supp. CP ____, Sub # 43 (trial minutes, minutes of July 28, 2009). Washington's CrR 6.15(f)(1) embodies this rule when it provides that the trial court shall respond to jury inquiries "in the presence of, or after notice to the parties or their counsel."

Violation of the rule against ex parte judicial communications to a jury, as occurred in this case, will require reversal only if the State proves to the appellate court that the error was harmless beyond a reasonable doubt. State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980). Here, as argued below, the jury's uncorrected misunderstanding of the law is one aspect of this case that compels reversal. This case involves a misstatement of the law by the prosecutor in closing argument that affirmatively misled the jury as to the elements of the crime require to convict, amounting to reversible misconduct.

c. The State's misconduct was flagrant, amounted to manifest constitutional error, and requires reversal. This Court will also review prosecutorial misconduct even in the absence of an

objection in the trial court where the misconduct is so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice. Belgarde, 110 Wn.2d at 507.

In addition, the Court of Appeals in State v. Reed, 25 Wn. App. 46, 48, 604 P.2d 1330 (1979), closely interlinked the prohibition on prosecutorial misconduct that impinged on a constitutional right to be misconduct of the “flagrant” variety, also requiring no objection to be challenged on appeal. Reed, 25 Wn. App. at 48-50. Mr. Knowles’ appellate challenge to the prosecutor’s improper comments on constitutional matters may be premised on RAP 2.5(a)(3), as manifest constitutional error. State v. French, 101 Wn. App. 380, 387, 4 P.3d 857 (2000); see, e.g., State v. Fleming, 83 Wn. App. 209, 213-15, 921 P.2d 1076 (1996) (comments on failure to testify, and improper argument that acquittal required jury to conclude State’s witnesses were lying, established manifest constitutional error, which was not harmless beyond a reasonable doubt). Either analysis permits Mr. Knowles to appeal the State’s misconduct in closing.

As a general principle, when prosecutorial misconduct is alleged, the defendant bears the burden of establishing its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) State v. Belgarde, 110 Wn.2d at 508. To prevail on the claim, a defendant must show that the improper conduct prejudiced the

outcome of his trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

A defendant establishes prejudice by demonstrating a “substantial likelihood” that the misconduct affected the jury’s verdict. Weber, 159 Wn.2d at 270; State v. Dhaliwal, 150 Wn.2d at 578. In this case, it is apparent that Mr. Knowles was unfairly prejudiced in his ability to argue for reasonable doubt on the question of knowledge. The jury’s expressed confusion shows this “substantial likelihood” that Mr. Knowles was not convicted based on proof of every element of the crime. Weber, 159 Wn.2d at 270; State v. Dhaliwal, 150 Wn.2d at 578.

Additionally, misconduct in closing argument that is flagrant, as argued herein, is deemed so because it is incurable. The State’s purposeful crafting of its incorrect argument in the heat of proper argument by the defense, and the prosecutor’s emphatic delivery of legal misstatements central to the case, exacerbated the gravamen of the misconduct to the level of ill-intentioned and flagrant. And, once the theme that Mr. Knowles’ mere act of being in the car rendered him guilty had been securely lodged in the minds of Mr. Knowles’ jury by the State’s forceful and convincing closing argument, no admonition by the trial court could have cured the resulting prejudice to the

defendant. It was a proverbial bell of outcome-determinative prejudice that once rung during rebuttal closing argument, could not have been “unrung.” State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991) (citing State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)).

Reversal is also required under a constitutional error standard. A well-settled body of law holds that constitutional error is presumed prejudicial unless the State shows that it is harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Certainly, omitting an element of the offense rises to that level of error and requires application of the constitutional harmless error standard.

Thus when a prosecutor's misconduct as occurred here impacts a constitutional right of the accused, the State must demonstrate the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Easter, 130 Wn.2d at 242. This Court must be convinced the error did not contribute to the jury verdict. Chapman, 386 U.S. at 24.

The State may counter that the jury is presumed to follow the court's instructions and thus the instructions cured any prejudice

caused by the prosecutor's improper statement of the law. But it is recognized that there is "grave potential" that the jury will be misled when the prosecutor misstates the law. Davenport, 100 Wn.2d at 763 (it is misconduct to explain the law to the jury in a way that conflicts with the instructions). And here, the jury's inquiry shows that the correct instructions of law may have had no effect on the misunderstanding of the law that the State provoked.

This Court, in this case, cannot be convinced beyond a reasonable doubt that the prosecutor's incorrect explanation of the law did not affect the jury's determination of guilt. Mr. Knowles' conviction for possession of a stolen vehicle must be reversed. Easter, 130 Wn.2d at 242-43.

2. THE TRIAL COURT ERRED IN DENYING MR. KNOWLES' MOTION FOR A DOSA SENTENCE.

a. A trial court must meaningfully consider a qualified defendant's DOSA request. A trial court must meaningfully consider a qualified defendant's DOSA request. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). In this case, the defense first objected at sentencing that the DOSA report based its failure to recommend Mr. Knowles for a DOSA based on his criminal history. 10/20/09RP at 3; Supp. CP. ____, Sub # 46 (DOSA

evaluation). It was and is noted that the existence of a criminal history in any pre-sentence report is not a disqualification for the DOSA program, and is of course likely the case for many defendants. The report, to which counsel objected to point out the report's improper basis including the weakness in the fact of the age of the convictions, ultimately offers no recognized rationale for not recommending a DOSA. 10/20/09RP at 2-3.

The defense pointed out that Mr. Knowles's drug addiction problems chronicled in the report showed a DOSA was plainly needed, but he had never been offered a DOSA and thus never had its structured, and difficult opportunity at drug rehabilitation, see Supp. CP. ____, Sub # 46 (pages 6-7), and the defendant pointed out himself that he was strongly motivated to faithfully pursue the treatment he needed for the drug problem he needed to cure so he would not keep committing crimes. 10/20/09RP at 5-6.

The DOSA report however, relies so strongly on essentially the defendant's criminal history that it states that the denial is recommended because of the defendant's "prior assaultive behavior [and] his long standing and well-established pattern of life choices." Supp. CP. ____, Sub # 46 (page 8). The defendant indeed has a prior criminal history and has made choices about drugs, all things the DOSA program is designed to address in its targeted sentencing

alternative. Every sentence in the DOSA report on Mr. Knowles merely refers back to these problems which reflect merely the fact that the defendant is legally eligible for the program at issue.

The DOSA reporter also notes that the defendant told him his primary motivation for wanting to complete drug treatment was so he could meet his family responsibilities, but the DOSA reporter dismissed these statements on the basis that they must be insincere, since the defendant plainly desired to have less incarceration. Supp. CP. ____, Sub # 46 (pages 7-8).

It is correct that of course Mr. Knowles's application sought less incarceration - he desired participation in the program called DOSA, under which a defendant serves one half of his sentence in prison and the other half in a substance abuse treatment program while on community custody. In re Albritton, 143 Wn. App. 584, 587, 180 P.3d 790 (2008). The DOS reporter's rationale, which relies on nothing more in the end than the reporter faulting the defendant for desiring what is, by legislation, precisely a component of what this sentencing option involves, cannot stand as some independent justification of the DOSA denial in the face of the later trial court error. Supp. CP. ____, Sub # 46 (pages 7-8); see RCW 9.94A.660 (DOSA imposes certain lesser terms of incarceration, and drug addiction treatment).

The trial court also concluded that Mr. Knowles' trial testimony had been inconsistent with the claims he had later made to the DOSA reporter about changing his life. The court stated:

Here's the problem I have. And this is – this was something that was indicated somewhat during the trial because I got to hear all the evidence. I heard you testify, and I heard you say things that were different from what you told Mr. Glans.

10/20/09RP at 7. However, the defendant had not testified at trial, as the defense pointed out. The court's response that there must have been other evidence, or argument, on the issues relevant to DOSA that the court was apparently relying on, is belied by the entire record on appeal. 10/20/09RP at 9-10.

b. Mr. Knowles asks this Court to review the sentencing court's ruling denying him a DOSA. Sentencing errors may be raised for the first time on appeal. State v. Paine, 69 Wn. App. 873, 881, 850 P.2d 1369 (1993). A defendant may appeal a standard range sentence if the sentencing court failed to follow a procedure required by the Sentencing Reform Act. State v. J.W., 84 Wn. App. 808, 811, 929 P.2d 1197 (1997) (citing State v. Mail, 121 Wn.2d. 707, 712, 854 P.2d 1042 (1993)). This Court may reverse a sentencing court's decision if it finds a clear abuse of discretion or misapplication of the law. State v. Porter, 133 Wn.2d 177, 181, 942

P.2d 974 (1997) (citing State v. Elliott, 144 Wn.2d 6, 17, 785 P.2d 440 (1990)).

As a general rule, a reviewing court will not reverse a trial court's decision not to grant a DOSA sentence. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing RCW 9.94A.585(1)). Nevertheless, a defendant may challenge the procedure by which the sentence was imposed, as every defendant is entitled to request the trial court to properly consider such a sentence and give the request meaningful consideration. Grayson, 154 Wn.2d at 342. Moreover, a defendant is entitled to a review of the denial of a DOSA request in order to correct a legal error or the trial court's abuse of discretion. State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003); State v. White, 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

A sentencing court abuses its discretion by refusing to exercise its discretion or by relying on an impermissible basis for its sentencing decisions. State v. Garcia–Martinez, 88 Wn. App. 322, 328-30, 944 P.2d 1104 (1997). Mr. Knowles requests this Court review the trial court's denial of a DOSA below. RAP 2.4; Garcia-Martinez, 88 Wn. App. at 330 (appellate review appropriate "where a defendant has requested an exceptional sentence below the standard range" and the trial court "has refused to exercise

discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.")

c. The sentencing court utilized a legally untenable basis for denying the DOSA sentence for reasons simply based on the defendant's eligibility for a DOSA itself. The Sentencing Reform Act required the sentencing judge determine Mr. Knowles' eligibility for a DOSA and use his or her discretion to impose the DOSA. RCW 9.94A.505(2)(a)(viii). Under the Sentencing Reform Act, the sentencing court is given discretion to impose a DOSA under RCW 9.94A.660 if certain eligibility requirements are met. State v. Williams, 112 Wn. App. 171, 177, 48 P.2d 354 (2002). The purpose of the DOSA statute is to provide "treatment-oriented sentences" for drug offenders. State v. Conners, 90 Wn. App. 48, 53, 950 P.2d 519, review denied, 136 Wn.2d 1004 (1998).

Under RCW 9.94A.660(1), a defendant is eligible for a DOSA if (1) his current offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon sentence enhancement; (2) his prior convictions do not include violent offenses or sex offenses; (3) his current offense is a violation of chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter

9A.58 RCW and involved only a small quantity of drugs; and (4) he or she is not subject to deportation.

Because Mr. Knowles was eligible for a DOSA, the sentencing court had a duty to exercise its discretion and either grant or deny the request under the criteria set forth by the Legislature. The legislature enacted RCW 9.94A.660 to address offenders' substance abuse problems. RCW 9.94A.660(1) provides only that the person requesting a DOSA have a felony conviction that is not a violent or sex offense and demonstrate he or she has a chemical dependency problem such that he or she would likely benefit from the sentencing alternative. In fact, under RCW 9.94A.660(2), following the period of incarceration, the statute contemplates the offender be released on community custody with the provision that the terms of release include "appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services." RCW 9.94A.660(2)(a).

In 1999, the Legislature expanded the underutilized DOSA program to include not only first time offenders but all felony drug and property offenders. SHB 1006. The Legislature stated, "This is a measure that gets tough on those who have a substance abuse problem, but also stops the revolving door to the prisons. It gives the

offender the treatment he needs so he is less likely to offend again, while still requiring confinement." Senate Bill Report, SHB 1006, at 3. Under these standards, the court below plainly erred here. Importantly, an improper basis for denial of a DOSA sentence will not necessarily be balanced by the presence of a brief reference to other grounds. As the Court stated in Grayson:

Although the trial judge declined to give a DOSA "mainly" because he believed there was inadequate funding to support the program, we recognize that the judge did not state that this was his "sole" reason. But he did not articulate any other reasons for denying the DOSA, and he specifically rejected the prosecution's suggestion that more reasons be placed on the record. Further, it is clear that the judge's belief that the DOSA program was underfunded was the primary reason the DOSA was denied. Considering all of the circumstances, the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error.

Grayson, at 342. Here, the trial court stated that it could not make the defendant do what he needed to do to turn his life around. 10/20/09RP at 7. With respect, this is no reasoning whatsoever, as the DOSA program is one legislative attempt in the sentencing phase of criminal trials to impose a combination of punishment and treatment that will hopefully enable persons, just such as the defendant, to "turn their lives around."

The court then said that, finally, the defendant had tended to "commit crimes." 10/20/09RP at 7. But as noted, DOSA anticipates

and often involves cases where the drug treatment program is designed to cease that very pattern of multiple past crimes the trial court referred to. This was an improper basis for denying a DOSA.

“As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable.” State v. Grayson, 154 Wn.2d at 338 (citing RCW 9.94A.585(1)). “However, an offender may always challenge the procedure by which a sentence was imposed.” Grayson, 154 Wn.2d at 338. A trial court abuses its discretion by categorically refusing to consider whether a DOSA sentence was appropriate. Grayson, 154 Wn.2d at 338.

This case is similar to Grayson which involved the court's categorical refusal to consider a DOSA request, by denying the DOSA on the basis that a funding shortage meant the effect of granting the sentencing alternative would be to cut the defendant's sentence in half. Grayson, 154 Wn.2d at 342-43. The Supreme Court stated in that case:

[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.

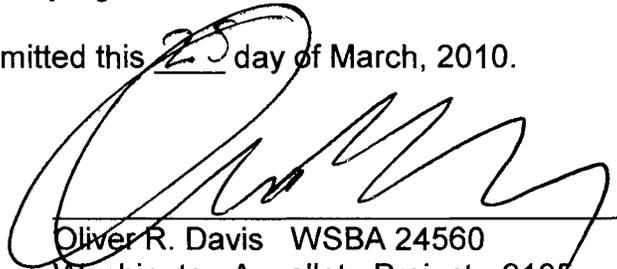
Grayson, at 342. In the present case, denying a DOSA because of Mr. Knowles' criminal history and the fact that the defendant desired a reduction in incarceration which is a prescribed part of the program,

is a legally untenable abuse of discretion. Grayson, 154 Wn.2d at 342-43.

E. CONCLUSION

Based on the foregoing, Mr. Knowles respectfully requests that this Court reverse both his judgment and sentence.

Respectfully submitted this 25 day of March, 2010.



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 64407-6-I
)	
)	
RANDALL KNOWLES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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EVERETT, WA 98201 | (X)
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| [X] | RANDALL KNOWLES
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