

NO. 66150-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES M. DENSMORE,

Appellant.

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BRIEF OF RESPONDENT

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I. ISSUES

(1) Evidence showed that the defendant committed a sophisticated burglary. In closing argument, the prosecutor referred to him as “a criminal.” Was this argument so flagrant and prejudicial that it can be challenged for the first time on appeal?

(2) Was defense counsel ineffective for failing to object to this argument, when an objection could have highlighted the argument for the jury?

(3) The trial court imposed an exceptional sentence based on two factors: (i) the defendant’s high offender score would lead to one of the counts going unpunished, (ii) his prior misdemeanor history resulted in a standard range sentence what would be clearly too lenient. Did the court err in considering the second factor, where (a) application of this factor does not rest on any factual determinations beyond those set out in the jury verdict and the defendant’s criminal history and (b) since the first factor is unchallenged, consideration of the second factor did not affect the range of available sentences?

II. STATEMENT OF THE CASE

On the morning of February 17, 2009, the owner of Jay’s Market in Lake Stevens discovered that his store had been

burglarized overnight. The burglars cut into a safe and stole \$4,345.44. RP 32-35. The store was equipped with a door alarm, surveillance cameras, and two motion detectors. RP 32-39.

Film from one of the surveillance camera showed that three burglars had entered the store at around 4:50 a.m. and left at around 5:00 a.m. RP 60. The burglars wore masks, so they could not be identified from the film. RP 105-06. They entered by breaking through a wall. RP 30-31. Inside the store, they walked to a position just outside the detection area of the motion detectors. They then dropped down so that their motion would not be detected. RP 48-49.

At trial, the principle witness identifying the defendant was Andrea Huntley. At the time of the crime, she was herself a drug user and thief. She had formerly lived with Tyler and Byron Bowman. The defendant, James Densmore, was Byron Bowman's best friend. RP 77-78, 93.

Ms. Huntley testified that at around 5 a.m. on February 17th, she received a phone call from the defendant. He asked her to come pick him up. She found the defendant and Byron Bowman hiding behind some bushes near Jay's Market. She picked them up and brought them to her apartment. There, the dumped out a

duffle bag of money and divided it. Mr. Bowman gave her \$150. They left behind a surveillance camera taken from Jay's Market. RP 82-85, 114-16, 135. Ms. Huntley disclosed these facts to police after she was arrested for vehicle prowling on March 26, 2009. RP 79.

Police obtained call records for the defendant's cell phone. They showed that starting at around 5 a.m. on February 17th, there were several calls in rapid succession from the defendant's phone to a particular phone number. Starting at 6 a.m., there were several calls in rapid succession to Ms. Huntley's number. RP 127-28.

A jury found the defendant guilty of second degree burglary and first degree theft. 1 CP 52-53. The defendant had 17 prior felony convictions and 18 misdemeanor convictions. Most of the felony convictions were for burglary or attempted burglary. He had offender scores of 18 for the burglary and 10 for the theft. (Some of the prior felony convictions did not count towards the offender scores.) This resulted in standard sentence ranges of 15-68 months for the burglary and 43-57 months for the theft. 1 CP 1-2; RP 198-99.

The court imposed exceptional sentences of 120 months' confinement on each count, to be served concurrently. 1 CP 4. The court relied on two aggravating factors: (1) The defendant had committed multiple current offenses and his high offender score resulted in some of the offenses going unpunished. (2) The defendant's prior unscored misdemeanor convictions resulted in a presumptive sentence that was clearly too lenient. 1 CP 11-12.

III. ARGUMENT

A. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY REFERRING TO THE DEFENDANT AS A "CRIMINAL," SINCE THAT CHARACTERIZATION WAS SUPPORTED BY THE EVIDENCE.

The defendant claims that his conviction should be reserved because of prosecutorial misconduct. The principles governing this claim are well-established. Prosecutorial misconduct requires reversal only if, in light of the entire record, there is a substantial likelihood that it affected the jury verdict, thereby denying the defendant a fair trial. State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984).

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. The failure to object to a prosecuting attorney's improper remark

constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). “The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 619 (1990), cert. denied, 498 U.S. 1046 (1991).

The defendant claims that the prosecutor committed misconduct by referring to him as a “criminal.” “In closing argument, the prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence.” State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986). Even stronger references have been held proper when justified by the evidence. See, e.g., State v. McKenzie, 145 Wn.2d 44, 57 ¶ 20, 134 P.3d 221 (2006) (not misconduct to refer to defendant as “rapist”); State v. Hunter, 35 Wn. App. 708, 715, 669 P.2d 489, review denied, 100 Wn.2d 1030 (1983) (not misconduct to refer to defendant as “pimp”). The evidence in the present case supported an inference

that the defendant committed burglary, which is a crime. It was therefore proper to refer to him as a “criminal.”

The evidence, however, showed more than this. The crime in this case was not a casual burglary, but a sophisticated one. The store that was burglarized had door alarms, motion detectors, and surveillance cameras. RP 36-39. The burglars entered by breaking through a wall, thereby bypassing the door alarms. RP 30-31. They carefully moved through the store in a way that bypassed the motion detectors. RP 48-49. They wore masks to prevent identification by the surveillance cameras. RP 105-06. At least two of them wore gloves, presumably to avoid leaving fingerprints. RP 49. They brought tools to break into a metal safe. RP 30. It is reasonable to infer that the perpetrators of this crime were experienced burglars, familiar with the practices and procedures of criminals.

The prosecutor used this inference to refute an argument raised by defense counsel. Counsel had argued that Ms. Huntley’s testimony was implausible, because the defendant had no reason to trust her. “[S]he’s not friends with this guy; she’s just an acquaintance. No reason to protect Mr. Densmore at all.” RP 60. The prosecutor responded that he trusted her as a fellow criminal:

I don't know about you guys, but I don't expect that I would get a call at 6:00 in the morning from James Densmore when he has just committed a burglary. I don't think I'm the person that he thinks, Hey, who can I call to get me out of a jam that won't call the police? I doubt that.

I think that he goes, Who do I know who is a criminal like myself, who won't rat on me when I call them and say, Come pick me up, or who will just come and pick me up.

It's a culture. They have a code. He is her best friends' dad's friend. He and her best friend's dad ... need her to come pick them up. They're a block away.

RP 171.

This argument was supported by the evidence. Ms. Huntley had testified that she was "part of the criminal element." She testified that it was "kind of the code" not to tell police about criminal acts. RP 107-08. The prosecutor was entitled to argue that given the degree of sophistication shown by commission of this burglary, the defendant was familiar with this "code" and willing to rely on it. Arguing such an inference falls within the prosecutor's "wide latitude" to argue inferences from the evidence.

The defendant claims that this argument was an appeal to passion and prejudice. The cases that he cites involve overtly emotional appeals. State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993) (referring to "war on drugs" in which "our own streets"

were the “battlefield”); State v. Belgrade, 100 Wn.2d 504, 755 P.2d 174 (1988) (referring to organization to which defendant belonged as “a deadly group of madmen”). The prosecutor’s reference to the defendant as a “criminal” in no way resembles these remarks.

The defendant also claims that the prosecutor was arguing “criminal propensity.” This claim as well is unfounded. No evidence was introduced at trial showing that the defendant had committed other crimes, apart from inferences that could be drawn from the circumstances of this crime. The prosecutor did not claim that there was such evidence. She did not argue that because the defendant was a criminal, he probably committed this burglary. Her argument was exactly the converse: because he committed this burglary, he was a criminal who was evidently familiar with the practices of criminals. Consequently, there was nothing implausible about him relying on a fellow criminal to help him out when his getaway arrangements fell through.

If the prosecutor’s argument is considered improper at all, the impropriety was subtle. Had any objection been raised, any improper inferences could have been corrected by an appropriate instruction. Any impropriety in the argument is not so flagrant or prejudicial that it can be challenged for the first time on appeal.

B. DEFENSE COUNSEL COULD HAVE MADE A REASONABLE TACTICAL CHOICE NOT TO HIGHLIGHT THE PROSECUTOR'S ARGUMENT BY OBJECTING.

The defendant next claims that defense counsel's failure to object to the prosecutor's argument constituted ineffective assistance. To establish this claim, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance resulted in prejudice. State v. Grier, 171 Wn.2d 17 ¶ 40, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish deficient performance, the defendant must show that the challenged acts were "outside the broad range of professionally competent assistance." Strickland, 466 U.S. at 690. There is a strong presumption that counsel's actions were reasonable. Grier, 171 Wn.2d at 33 ¶ 41. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Id. ¶ 42.

There are valid tactical reasons not to object to a prosecutor's closing argument.

Counsel's decision to object during the prosecutor's summation must take into account the possibility that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor's words in their minds. Thus, the question

we have to ask is not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection.

Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). “A decision not to object during summation is within the wide range of permissible professional legal conduct.” In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).

Under the circumstances of the present case, these tactical concerns were particularly acute. For the reasons already discussed, counsel could properly have believed that an objection was unlikely to be successful. Also, any improper implications in the prosecutor's argument were subtle. Counsel could legitimately be concerned that a “curative instruction” would do more harm than good.

Even if counsel's performance could be considered deficient, the defendant cannot show prejudice. To establish this, “the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. Here, it was obviously the prosecutor's theory that the defendant

was a criminal. There is no reason to believe that the jurors were swayed when the prosecutor referred to him as one. Accordingly, there is no reasonable probability that a curative instruction would have changed the outcome of the case.

The defendant does cite one case in which defense counsel's failure to object to a prosecutor's closing argument was held to be one of multiple acts that established ineffective assistance of counsel. State v. Horton, 116 Wn.2d 909, 68 P.3d 1145 (2003). There, the prosecutor clearly expressed a personal opinion in closing argument: "This prosecutor believed that [the defendant] got up there and lied." On appeal, the State conceded that there was no legitimate reason for counsel's failure to object (thus failing to point out the possibility that an objection would have highlighted the improper argument). Id. at 921. This court held that this argument "significantly exacerbated" the prejudice resulting from counsel's other deficient acts. Id. at 922.

The facts of the present case are not comparable to those in Horton. Any impropriety in the prosecutor's argument was far more subtle. There were valid tactical reasons for counsel's lack of objections. The defendant has not alleged any other area of

deficient performance. Under these circumstances, counsel's lack of objection does not constitute ineffective assistance.

Ultimately, the defendant's ineffective assistance claim adds very little to his position. If a prosecutor's argument cannot be challenged for the first time on appeal, it is highly unlikely that the failure to challenge it at trial would constitute ineffective assistance. The argument can be challenged for the first time on appeal if it was flagrant and prejudicial. Gentry, 125 Wn.2d at 640. If the argument was not flagrant, defense counsel could reasonably decide not to highlight it with an objection. If it was not prejudicial, failure to object to it could not constitute ineffective assistance. An ineffectiveness claim is thus either unnecessary (if the prosecutor's argument was flagrant and prejudicial) or unfounded (if the argument was not flagrant or not prejudicial). Here, the argument was neither flagrant nor prejudicial, so the defendant can establish neither deficient performance nor prejudice.

C. THE SENTENCE IMPOSED BY THE TRIAL COURT WAS PROPER.

The defendant also challenges the trial court's decision to impose an exceptional sentence. The court relied on two

aggravating factors: the defendant's high offender score and his misdemeanor history.

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(b) The defendant's prior unscored misdemeanor ... history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535(2).

The defendant does not challenge the trial court's application of the "unpunished offense" aggravating factor set out in subsection (2)(c). Brief of Appellant at 23. The defendant also acknowledges that the *statute* authorizes the trial court's findings as to both factors. *Id.* at 20. He nevertheless argues that the application of the "unscored misdemeanor history" factor set out in subsection (2)(b) was constitutionally impermissible.

The governing rules are correctly set out in the defendant's brief. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and provided beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). For purposes of this rule, “the ‘statutory maximum’ ... is the maximum sentence a judge may impose solely on the basis for the facts reflected in the jury verdict or admitted by the defendant.” Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Although the defendant has correctly stated the rules, his application of them is incorrect, for two reasons. First, whether a sentence is “clearly too lenient” is not a “fact,” but an exercise of sentencing discretion. Second, under the circumstances of this case, the existence of this factor did not increase the maximum sentence that the judge could impose.

1. Whether A Sentence Is “Clearly Too Lenient” Is A Discretionary Judgment That Can Be Made By The Sentencing Judge, Not A Factual Issue That Must Be Decided By The Jury.

“A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). Whether a particular sentence is or is not “too lenient” is not a “phenomenon.” A “finding” on that point does not reflect a determination that any event did or will

happen. Rather, it reflects discretion as to what sentence is appropriate. The only facts necessary to support this exercise of discretion are the defendant's current offenses and his prior misdemeanor convictions. So long as a sentence falls within the range determined by the crimes found by the jury and the defendant's criminal history, the court is authorized to make a legal judgment of what circumstances warrant an exceptional sentence. State v. Alvarado, 164 Wn.2d 556, 567 ¶ 23, 192 P.3d 345 (2008).

Admittedly, the Supreme Court has held in a different context that jury findings are required to determine whether a sentence is "clearly too lenient." State v. Hughes, 154 Wn.2d 118, 110 P.2d 192 (2005). That case involved former RCW 9.94A.390(2)(f), which allowed imposition of an exceptional sentence if "the operation of the multiple offense policy results in a presumptive sentence that is clearly too lenient." The court interpreted this factor as requiring that the sentence be based on one of two factual bases: "(1) egregious effects of defendant's multiple offenses or (2) the level of defendant's culpability resulting from the multiple offenses." Hughes, 154 Wn.2d at 137 ¶ 29. Because an exceptional sentence required these factual findings, "it is not merely a legal conclusion, nor does it entail solely the

existence of prior convictions.” Id. Consequently, that aggravating factor could not be used to support an exceptional sentence without jury findings as to these facts.

It is tempting to conclude that the phrase “clearly too lenient” has the same meaning in the context of the “unscored misdemeanor history” factor as it does in the context of the former “free crime” factor. Such a conclusion would, however, be wrong. To begin with, the “unscored misdemeanor history” factor was enacted in 1995, long before Hughes. Laws of 1995, ch. 316, § 2(2)(h). At that time, a standard range sentence was considered “clearly too lenient” “whenever the defendant’s high offender score is combined with multiple current offenses so that a standard sentence would result in ‘free’ crimes – crimes for which there is no additional penalty.” State v. Smith, 123 Wn.2d 51, 55-56, 864 P.2d 1371 (1993). Application of this factor thus depended solely on the existence of prior offenses and the nature of the current offenses.

In Hughes, the Supreme Court overruled the interpretation of the “free crimes” factor set out in Smith. Hughes, 154 Wn.2d at 140 ¶ 36. That overruling, however, sheds no light on the legislative intent of a statute enacted ten years earlier. The legislature is presumed to be familiar with judicial interpretation of statutes.

State v. Ervin, 169 Wn.2d 815, 825 ¶ 19, 239 P.3d 354 (2010). When a 1995 statute used the phrase “clearly too lenient,” it can be presumed that the legislature intended the same meaning that the Supreme Court had given that phrase in Smith, two years before. Under that interpretation, the decision of whether a sentence was “clearly too lenient” rested on the nature of the prior convictions and the current offense.

Even after Hughes, the Supreme Court has not construed the “unscored misdemeanor history” factor to require any determination of “egregious effects” or “extraordinary culpability.” Rather, that finding can be based solely on the number and nature of the prior convictions, considered in connection with the nature of the current convictions. See State v. Clarke, 156 Wn.2d 880, 895-96 ¶¶ 29-30, 134 P.3d 188 (2006). Unlike the factor involved in Hughes, this aggravating factor is “merely a legal conclusion” and does “entail solely the existence of prior convictions.” Consequently, it can be imposed without any jury findings, other than those inherent in the guilty verdict.

As the defendant points out, Division Three of this court has held that the “unscored misdemeanor history” aggravating factor

requires jury findings. State v. Saltz, 137 Wn. App. 376, 154 P.3d 282 (2007). This court reasoned as follows:

The *fact of the existence* of misdemeanor history is an objective determination. However, the existence of misdemeanor criminal history is subjective in the “too lenient” context because, like in multiple offense policy cases, an additional determination must be made: that a standard range sentence would clearly be too lenient, because of the serious harm or culpability given the number or nature of unscored misdemeanors, which would not be accounted for in accounting the sentencing range.

Id. at 582 ¶ 14 (court’s emphasis).

This reasoning reflects two analytical errors. First, the requirement for jury findings does not turn on whether the issue is “objective” or “subjective.” Rather, it turns on whether the issue involves a factual determination (which must be made by juries) or the exercise of sentencing discretion (which is normally made by judges).

Second, application of this aggravating factor does not require a factual finding of “serious harm or culpability.” Rather, it can be based solely on the elements of the prior misdemeanors and the current offenses. Clarke, 156 Wn.2d at 895-96 ¶¶ 29-30. Division Three was thus mistaken in concluding that this aggravating factor requires specific jury findings. This court should

reject that holding. Instead, this court should uphold the constitutional validity of RCW 9.94A.535(2)(b). In the present case, the trial court properly relied on that factor as the basis for an exceptional sentence.

2. When The Jury Verdict And The Defendant's Criminal History Justify A Sentence Within A Range, The Selection Of A Particular Sentence Within That Range Does Not Constitutionally Require Further Jury Findings.

Even if the “unscored misdemeanor history” factor would require jury findings in isolation, it does not require such findings when it is applied in combination with another valid aggravating factor. This is again because of the definition set out in Apprendi: a fact requires a jury finding only if it increases the penalty beyond the prescribed statutory maximum. Apprendi, 530 U.S. at 490. Here, there was a separate valid aggravating factor: the defendant's high offender score would result in some of the current offenses going unpunished. The Supreme Court has already held that this aggravating factor does not require jury findings, because it rests solely on criminal history and calculation of the offender score. Alvarado, 164 Wn.2d at 569 ¶ 25.

When a valid aggravating factor exists, the court is entitled to impose any sentence up to the maximum allowed for the particular

crime category. The only limitation on this authority is review for abuse of discretion. State v. Ritchie, 126 Wn.2d 388, 392-93, 894 P.2d 1308 (1995); see State v. Sao, 156 Wn. App. 67, 80, 230 P.2d 277 (2010), review denied, 170 Wn.2d 1017 (2011). Consequently, the existence of the “unpunished offense” factor in the present case allowed the trial court to impose a sentence between 51 and 240 months. (51 months would result from concurrent sentences at the bottom of the standard range for each count; 240 months would result from consecutive sentences of the statutory maximum for each count). Based on the single aggravating factor, the court had full discretion to select any sentence within this broad range. The existence of another aggravating factor was only relevant insofar as it influenced the court’s exercise of this discretion. When the existence of a fact does not alter the maximum available sentence, no jury finding is required as to that fact.

Again, Division Three’s decision in Saltz is contrary to this argument. As in the present case, there was a valid finding of another aggravating factor – there, “rapid recidivism.” Saltz at 585 ¶¶ 22-23. Division Three nonetheless held that a jury finding was necessary to support application of the “unscored misdemeanor history” factor. Id. at 583-84 ¶ 18. It does not appear that the State

pointed out the critical difference between the constitutional status of single and multiple aggravating factors. The decision does not discuss this point. Consequently, Division Three's decision should have no persuasive value on this issue.

Of course, this constitutional analysis does not alter the statutory rights of defendants. For most aggravating factors, the legislature has required jury findings, whether or not multiple factors exist. RCW 9.94A.535(3). This precludes the court from entering such findings, even in situations where doing so would be constitutionally permissible. With regard to the "unscored misdemeanor history" factor, however, the legislature has chosen *not* to require jury findings. RCW 9.94A.525(2)(b). That decision must be respected whenever it is constitutionally permissible. In the present case, neither the constitution nor the statute requires jury findings. The court was therefore entitled to impose sentence based on its own findings.

3. Even If Consideration Of The “Unscored Misdemeanor History” Aggravating Factor Was Improper, There Is No Reason To Believe That The Trial Court Would Impose A Different Sentence Absent Consideration Of That Factor, Since The Court Would Still Be Entitled To Consider The Defendant’s Criminal History.

Assuming that this court nonetheless holds that the trial court erred in considering the “unscored misdemeanor history” factor, this court must determine the appropriate remedy. The defendant’s brief correctly sets out the governing standard: If the trial court considered an improper factor, the appellate court may nonetheless uphold the sentence if it is satisfied that the trial court would have imposed the same sentence based solely on proper factors. State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1986).

Here, the trial court found that each of the aggravating factors “individually and together support the imposition of an exceptional sentence in this case.” 1 CP 12, conclusion of law no. 8. Such statements are persuasive but not conclusive. See Smith, 123 Wn.2d at 58 n. 8. The court’s oral opinion does indicate that the court gave substantial weight to the defendant’s misdemeanor history. RP 198-99.

This does not mean, however, that the court considered an “improper factor.” The court not only may, but should consider the

defendant's criminal history. in determining the appropriate sentence. RCW 9.94A.500. The defendant's misdemeanor convictions are part of his criminal history. See RCW 9.94A.030(11) (*defining "criminal history.") Thus, the court was entitled to consider the defendant's misdemeanor history, whether or not that history justified application of a specific aggravating factor. Even if that application of the "uncharged misdemeanor" facto is considered improper, there is no reason to believe that the trial court would impose a different sentence after consideration of the defendant's extensive criminal history. The sentence should be upheld.

4. If The Case Is Remanded For Re-Sentencing, The Trial Court Should Still Be Allowed To Impose Consecutive Standard-Range Sentences Based On The "Unscored Misdemeanor History" Factor.

Finally, if the case is remanded for re-sentencing, the scope of the trial court's authority on remand should be clarified. The defendant appears to argue that the "unscored misdemeanor history" factor could not be considered at all. Such a limitation would not be appropriate. Apprendi and Blakely do not limit a sentencing judge's authority to impose consecutive sentences, if each individual sentence is within the allowable maximum. Oregon

v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009);
State v. Vance, 168 Wn.2d 754, 230 P.2d 1055 (2010).

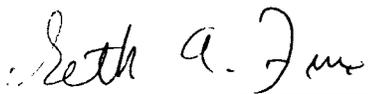
In the present case, the trial court imposed concurrent sentences of 120 months on each count. This was not, however, the only way open to the court to impose a 120-month sentence. The court could have imposed a standard range sentence on each count and run them consecutively for a total of 120 months. RP 200. Such a sentence could be based on application of the “unscored misdemeanor history” factor. The statute allows it, and there is no constitutional impediment to applying the statute when consecutive sentence are involved. If the case is remanded, this option should remain open.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on June 7, 2011.

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