68613-5

68613-5

NO. 68613-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID OGDEN,

Appellant.

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

The Honorable Richard D. Eadie, Judge
The Honorable Theresa Doyle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's right to present evidence in his defense necessary rebut the State's evidence.

2. The trial court erred when it counted appellant's prior out-of-state conviction in his offender score.

3. The trial court erred in entering unlawful community custody terms for first degree robbery and second degree attempted robbery.

4. The court's high-end standard range sentence, plus community custody, on attempted first degree robbery exceeds the standard range for the offense.

Issues Pertaining to Assignments of Error

1. The appellant was charged with robbery and two counts of attempted robbery. To rebut the defense of diminished capacity, the State attempted to demonstrate the appellant's actions were intentional because he committed the crimes to support his prescription drug habit. Despite permitting evidence to support this theory, the trial court summarily denied the appellant's motion to allow evidence that had a source of income in the form of disability benefits. Did the trial court's exclusion of this evidence deny the appellant his constitutional right to present a defense?

2. Did the court err when it included a Colorado burglary conviction in the appellant's offender score?

3. Did the sentencing court err in entering unlawful community custody terms on two of the three counts of conviction?

4. Does the sentence for attempted first degree robbery exceed the standard range for the offense?

B. STATEMENT OF THE CASE[1]

1. Procedural facts

The State charged David Ogden with first degree robbery (count one), attempted first degree robbery (count two), and attempted second degree robbery (count three) for three incidents occurring on October 9 and October 12, 2010.[2] CP 1-5, 165-70. Following a jury trial at which Ogden's primary defense was diminished capacity, he was convicted as charged. CP 55-57.

The court sentenced Ogden to concurrent standard range terms based on an offender score of 13 and to community custody on each count. CP 145-53, 174-82; 8RP 27-28, 35. Ogden appeals.

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[1] This brief refers to the verbatim reports as follows: 1RP – 12/5/11; 2RP – 12/6 and 12/7/11; 3RP 12/8/11; 4RP – 12/14/11; 5RP – 12/15/11; 6RP – 12/19/11; 7RP – 12/20/11; and 8RP – 3/29/12.

[2] Ogden was charged under two separate case numbers but the cases were joined for trial. CP 173.

2. Testimony of State's witnesses

Saturday October 9, 2010 was a slow morning at Cathay Bank in Seattle's International District. 2RP 47, 57. Loan officer Mia Chong therefore noticed when a man came into the bank, took a brochure, and left without interacting with anyone. 2RP 48. Chong noticed the man in part because he was not of Chinese descent like most of the bank's customers. 2RP 52, 55.

Teller Tiffany Lin also saw the man come in and take a brochure. 2RP 59. An hour later, the man returned, this time wearing a hat and sunglasses. 2RP 61. The man handed Lin a note stating, "[t]his is a robbery" and "[y]ou have 10 seconds." 2RP 61-62. Lin put about $250 from her cash drawer into the man's paper bag. 2RP 62; 3RP 91. The man told Lin to step back and hurried away, dropping his note on the way out. 2RP 62-63, 66. Ten days later, after Ogden had been arrested, Lin identified him from a photomontage.[3] 2RP 68-71; 4RP 361-64.

Karyssa Gibbs was a teller at a US Bank branch located inside an Albertson's grocery store on Seattle's north side. 4RP 257-59. The afternoon of October 9, a nervous-acting man approached the window of Gibbs's coworker, Tiffany Bell, and attempted to push a notebook through the tray under the glass "bandit barrier." 4RP 259, 284. Believing

[3] Lin was unable to recognize Ogden at the time of trial. 2RP 74.

something was amiss, Gibbs asked the man to remove his sunglasses. The man responded "[y]eah, right," and walked away quickly. 4RP 260.

Bell testified the man passed her a napkin bearing the words "[t]his is a robbery" and other words written in what appeared to be black crayon. 4RP 282. The man then attempted to shove a notebook under the bandit barrier and mumbled she should put the money in the notebook. 4RP 285, 297. The man left after Gibbs became involved. 4RP 283-84, 286.

Gibbs and Bell recalled the man wore a brown hooded sweatshirt with a distinctive design. 4RP 261-62, 287. Bell testified a notebook and sunglasses found during searches of Ogden's apartment and truck appeared similar to the robber's.[4] 4RP 291, 353, 359. A Seattle police officer testified he watched security footage of a man matching the suspect's description driving away in a mid-1980s Chevrolet pickup truck. 4RP 275.

Three days later, Seattle waterfront restaurant Anthony's Fish Bar was closing when a man walked up to the counter. 3RP 93-94. Cashier Haydee Ramon told him the restaurant was closed, but the man repeatedly pushed a small paper bag toward Ramon. 3RP 96, 101-02, 114. After Ramon told the man "I am not touching your bag," the man reached inside

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[4] Bell was unable to pick Ogden from a photomontage. 4RP 299-300.

the bag, stated he had a gun, and told Ramon to put the money in the bag. 3RP 97.

Ramon asked, "[A]re you for real?" and then screamed to alert staff in the adjoining sit-down restaurant. 3RP 98. She told one of the dishwashers, Antaurus Wilson, to follow the man. 3RP 98-100, 126, 128. Wilson lost sight of him after he entered the parking garage across the street, but a garage employee told Wilson a man was hiding near the elevators. 3RP 129, 140-41. Wilson tackled the man when it appeared he was about to flee. 3RP 129-30, 142.

Wilson escorted the man, Ogden, back to Anthony's, where Ramon and the police were waiting. 3RP 100, 110. Ogden told police they had the wrong man and he had seen another man fleeing. 3RP 103, 130. Ramon, however, recognized the man's face and clothing. 3RP 101. Police later found a paper bag with writing on it near the parking garage elevators. 3RP 134-35, 157-58.

Seattle police officers handed over Ogden to Port of Seattle police.[5] 3RP 168. Ogden told Port police officer Jason Kleiner to be careful of his arm, which was recently broken. 3RP 168-69. Officer

[5] The port had jurisdiction over the incident because Anthony's is located on Port of Seattle property. 3RP 152.

Kleiner read Ogden his Miranda[6] warnings and put Ogden in his patrol car to take him to the Port of Seattle police station. 3RP 172-73. Kleiner allowed Ogden to sit unbelted because his arm hurt, but Ogden hit his head and arm on the patrol car partition when Kleiner stopped suddenly. 3RP 174. Kleiner therefore contacted the Seattle Fire Department to offer Ogden medical aid. 3RP 175. Ogden told the evaluating firefighter that he had already been to the hospital for his arm and his head was not injured. 3RP 175. According to Kleiner and the firefighter, Ogden did not appear intoxicated, confused, or disoriented and was generally cooperative. 3RP 182, 184, 212.

Seattle and Port of Seattle detectives interviewed Ogden shortly thereafter. 3RP 223. Ogden told detectives he used heroin in the past but was prescribed methadone and had been off heroin for three months. 3RP 225; 4RP 326. Ogden told detectives where he lived and that he owned a white pickup truck but had recently totaled it in an accident.[7] 3RP 226; 4RP 326.

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[6] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[7] Police obtained a warrant to search Ogden's apartment as well as his truck, a white 1990 GMC pickup truck, which was impounded October 10 following the accident. 4RP 357, 379-84.

The detectives showed Ogden still photos from a video of one of the October 9 robberies. 3RP 227-28. Ogden said the jacket the robber wore did not look like something he owned. 3RP 228. A few days after his arrest, Ogden refused to participate in a lineup. 4RP 385-86.

3. Diminished capacity defense, rebuttal, and State's theory of motive

Psychologist Anthony Eusanio evaluated Ogden's ability to form the intent to commit the charged crimes. 4RP 416; see CP 85 (Instruction 19 on diminished capacity). Ogden had incomplete memories of the incidents and confused details with those of similar incidents occurring in California years earlier. 5RP 433, 471. Eusanio opined that at the time of the incidents, Ogden was suffering from an impaired state of consciousness that likely interfered with his ability to act with intent. 5RP 416, 420.

Eusanio testified at the time of the incidents Ogden was suffering from post-traumatic stress disorder (PTSD) and was also impaired by the interaction of several prescription medications. 5RP 419-21, 432, 441. The PTSD may have caused Ogden's consciousness to "dissociate" under stress. 5RP 442. In addition, a variety of psychoactive medications may have led to a condition known as "substance-induced delirium." 5RP 433-44, 492. Ogden's fragmentary memories of the incidents supported

Eusanio's theory; he explained that if brain function is so impaired that it limits the ability to form memories, cognitive functioning will also be severely impaired. 5RP 433-44; 6RP 575.

Dr. Eusanio administered various psychological tests to Ogden. The "validity scales" for such tests indicated Ogden may have been exaggerating his symptoms, which made the test results potentially -- although not necessarily -- unreliable. 5RP 435-39, 461-63, 465-66, 528. But in addition to the tests, Eusanio relied on other sources of information, including his interview with Ogden and 3,500 pages of medical and mental health records from various institutions and health care providers. 5RP 421-26. Eusanio acknowledged that while Ogden's self-report may have been unreliable, documentation of his behavior and symptoms over the years corroborated his report. 5RP 426-27, 449-50.

Moreover, Eusanio found Ogden's actions during the robbery incidents bizarre and self-defeating, indicating he may have acted while in a state of dissociated consciousness. 5RP 456-58. While Eusanio believed Ogden was probably not in a severely dissociated state for four days, he could have experienced varying degrees of consciousness during that time. 5RP 542-43.

In diagnosing possible substance-induced delirium, Eusanio relied in part on the report of pharmacology expert Dr. Robert Julien. 5RP 520-

21. Julien testified that as of the month before the incidents Ogden was prescribed methadone (narcotic pain-reliever), hydroxyzine (antihistamine with sedative effect similar to Benadryl) oxycodone (narcotic pain-reliever), Ambien ("knockout" sleeping pill), Robaxin (sedative marketed as a muscle relaxant), Klonopin (tranquilizer similar to Valium), Neurontin (sedative used in treatment of chronic pain) and Wellbutrin (anti-depressant). The combination of all or some of these medications could have inhibited Ogden's ability to form memories, which would also suggest severely impaired thinking.[8] 6RP 561-80.

Like Dr. Eusanio, Dr. Julien acknowledged oxycodone is habit-forming and that Ogden's reports indicated he was told on September 27 that he would not be prescribed more. 5RP 500; 6RP 624-25. While Ogden would likely be able to obtain the medication through illicit means, it would cost Ogden more than if prescribed. 5RP 500; 6RP 626. Julien acknowledged Ogden's apartment building was a "shelter" for indigent men and therefore, Julien assumed, Ogden was not "of means." 6RP 626.

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[8] Ogden's experts acknowledged that if Ogden was taking the drugs as prescribed he would have run out of certain medications by the time of the October 2010 incidents. 5RP 493-98; 6RP 590-94. On the other hand, Eusanio testified Ogden had a history of non-compliance with recommended dosages, and in any event, based on Ogden's treatment records, he took an average of four to six medications on any given day. 5RP 529-31.

On redirect, defense counsel asked Julien whether, based on his review of 1,000 pages of Ogden's medical records, Ogden was "disabled." 6RP 627. The State objected that such testimony went beyond the scope of cross-examination, but defense counsel argued the evidence was necessary to establish that because of his disability, Ogden has a source of income. 6RP 628. The court sustained the objection without explanation. 6RP 628.

Ogden did not testify. After Ogden rested, the State presented the testimony of Dr. Ray Hendrickson, a Western State Hospital psychologist. 6RP 629. Hendrickson opined that if Ogden suffered from PTSD, it was not severely symptomatic, and that in any event Ogden's behaviors could not be explained by PTSD. 6RP 647, 652-53, 662-63. While the interaction of various medications and PTSD could cause memory loss, the robber's complex behavior indicated a higher level of thinking than that hypothesized by Ogden's experts. 6RP 656-57, 666-70. Hendrickson also disputed the defense experts' opinions that a lack of memory of an act necessarily precluded the ability to intend to engage in that act. 6RP 704.

C. ARGUMENT

1. THE TRIAL COURT DENIED OGDEN THE RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED EVIDENCE NEEDED TO REBUT THE STATE'S THEORY OGDEN'S INDIGENCY SUPPLIED THE MOTIVE TO COMMIT THE CHARGED CRIMES.

The court erred in excluding evidence that Ogden was medically or psychologically "disabled" and thus had a source of income. Such evidence was necessary to rebut the State's claims that Ogden needed to commit the robberies to support a prescription painkiller habit and that therefore the jury should reject Ogden's claim he did not have the necessary mental state to be found guilty of the charged crimes. Because the exclusion of the evidence affected the jury's verdicts on all counts, this Court should reverse Ogden's convictions.

i. The trial court erroneously excluded evidence that Ogden was eligible for disability benefits to rebut the State's theory his indigency drove him to commit robbery.

The Sixth and Fourteenth Amendments and article 1, § 21 of the Washington Constitution guarantee an accused the right to defend against the State's allegations. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 338 U.S. 14, 19, 87 S. Ct. 1920, 18 L.

Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

Additionally, under the Rules of Evidence, an accused also has the right to present relevant evidence tending to establish or rebut the State's proof of a material fact. ER 401.

The constitutional right to present evidence is subject only to the following limitations: (1) the evidence sought to be admitted must be relevant; and (2) the accused's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. Washington, 388 U.S. at 16; State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992).

In other words, a court must permit an accused to present even minimally relevant evidence unless the State demonstrates a compelling reason for exclusion. But no State interest is compelling enough to preclude evidence with high probative value. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); Hudlow, 99 Wn.2d at 16; State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

The "open door doctrine" permits a party to conduct otherwise improper cross-examination and to introduce inadmissible evidence to

explain or contradict the initial evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing Karl B. Tegland, 5 Wash. Prac. 41 (3rd Ed. 1989)), review denied, 129 Wn.2d 1007 (1996). The doctrine is rooted in fairness. "'It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.'" Avendano-Lopez, 79 Wn. App at 714 (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

Here, the State presented evidence that Ogden, who had suffered a serious arm injury, had been cut off from prescription painkillers a few weeks before the charged crimes. 5RP 500; 6RP 625-26. The State used this to support a theory that Ogden needed money to secure the drugs through more costly illicit channels. The State was, correspondingly, allowed to suggest to the jury that Ogden was in dire financial straits and therefore had incentive to rob the banks and restaurant. But when the defense sought to introduce evidence suggesting that, in fact, Ogden had a reliable income, the court sustained the State's objection. 6RP 627-28.

It is well established that an accused must be permitted to rebut the State's evidence with relevant evidence and to present the full story to avoid misleading the jury. Gefeller, 76 Wn.2d at 455. As the Gefeller Court stated,

> Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

Id. The court's ruling, which it did not explain, denied Ogden the right to present relevant evidence material to his defense and left the jury with only part of the story regarding Ogden's financial situation

ii. The exclusion of testimony regarding Ogden's potential source of income was not harmless beyond a reasonable doubt.

The exclusion of evidence material to Ogden's defense violated his due process right to present a defense. State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The trial court prevented Ogden from presenting evidence that his financial situation was not as grim as the State portrayed it. The State's argument was a crucial component in rebutting Ogden's diminished capacity defense. 5RP 500 (cross examination of Dr. Eusanio regarding motivation to commit crimes); 6RP 625-26 (cross examination of Dr. Julien regarding motivation to obtain money for oxycodone and regarding Ogden's apparent financial status); 7RP 751 (closing argument

acknowledging that while the State did not have to prove motive, Ogden's need for money to supply his oxycodone habit supplied the motive for the robberies). As a result, the State cannot prove beyond a reasonable doubt that the jury would have rendered a guilty verdict had Ogden been permitted to rebut the State's claims. Guloy, 104 Wn.2d at 425. Even under a non-constitutional harmless error standard, there is a reasonable likelihood that such evidence could have led to a different result on all charges. See State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006) (trial court's ruling excluding testimony not harmless because it hampered defendant's ability to challenge credibility of key State witness and improperly permitted jury to conclude "'once a dealer, always a dealer.'").

2. THE SENTENCING COURT ERRED IN COUNTING OGDEN'S NON-COMPARABLE COLORADO BURGLARY CONVICTION AS A POINT IN HIS OFFENDER SCORE.

This Court reviews a sentencing court's offender score calculation de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). The State does not meet its burden through bare assertions. State v. Ford, 137 Wn.2d 472, 482, 973

P.2d 452 (1999); see also State v. Hunley, 161 Wn. App. 919, 927, 253 P.3d 448 (2008 amendments to RCW 9.94A.500 and .530 unconstitutionally shift to defendant burden of proof relating to defendant's prior history), review granted, 172 Wn.2d 1014 (2011).

Under the Sentencing Reform Act, a foreign conviction is included in a defendant's offender score if it is "comparable" to a Washington felony. RCW 9.94A.030(11); RCW 9.94A.525 (3). To determine whether there is comparability, a court must first consider whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the conduct underlying the foreign offense would have violated the Washington statute. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Thiefault, 160 Wn.2d at 415.

According to the materials submitted by the State, the 1988 Colorado judgment and sentence indicates that Ogden pleaded guilty to second degree burglary occurring on or about August 20, 1987. No details

of the crime are provided. Supp. CP ___ (sub no. 90, case no. 10-1-9065-3 SEA, State's Brief re: Comparability, at Ex. A).

In a sentencing memorandum and at the sentencing hearing, the prosecutor argued that the Colorado statute was comparable either to second degree burglary or (because it did not exclude motor homes or boat homes) first degree vehicle prowl in Washington. Supp. CP ___ (sub no. 90, supra, at 3); 8RP 6-7. Ogden disputed his offender score, although defense counsel focused his argument on the request for an exceptional sentence downward, which was ultimately denied. 8RP 7-8, 16-20, 25. Without analyzing the comparability of the four out-of-state offenses proposed by the State, the court found Ogden's offender score was 13 points, consistent with the State's theory. 8RP 38.

The trial court erred, however, when it counted the second degree burglary conviction as a point. Under Colorado law,

> A person commits second degree burglary if he **knowingly breaks an entrance into**, enters unlawfully in or enters or remains unlawfully in a building or occupied structure with intent to commit therein a crime against a person or property.

Former C.R.S.A. 18-4-203(1) (1981) (emphasis added).

Under Washington law,

> A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property

> therein, he enters or remains unlawfully in a building other than a vehicle.

Former RCW 9A.52.030 (1975). "Enter" means "the entrance of the person, or the insertion of any part of his or her body, or any instrument or weapon held in his or her hand and used or intended to be used to threaten or intimidate a person or to detach or remove property." RCW 9A.52.030(4) (current statute reflecting definition in effect since 1975). The first degree vehicle prowl statute likewise requires a person to enter or remain unlawfully, and is subject to the same definition. RCW 9A.52.095.

The Colorado statue is broader than its Washington counterpart because it permits conviction if a person "knowingly breaks an entrance into." This is considered a separate means from unlawful entry. Gonyea v. People, 195 P.3d 1171, 1174 (Colo. App., 2008) (noting that even though parties argued whether or not an entry occurred, Gonyea also "broke an entrance" into the restaurant by pulling away duct-taped cardboard covering from open window); see also Armintrout v. People, 864 P.2d 576, 582 (Colo., 1993) (there are three alternative ways of committing burglary under the statute; proof of a "breaking" is not required to find unlawful entry). Consistent with Gonyea, moreover, common sense dictates that one may break an entrance into a building without entering that building even under Washington's comparatively

broad statutory definition of "enter." For example, a rock tossed through a window would not constitute an "entry" under the Washington statutes, but it could under the Colorado statute.

Because the Colorado statue is broader, the State was therefore required to prove the underlying conduct would have nonetheless been considered a felony in Washington. RCW 9.94A.525(3); Thiefault, 160 Wn.2d at 415. It did not. The sentencing court therefore erred to the extent it found the Colorado charge comparable to its closest Washington counterpart.

This Court should remand for resentencing based on a properly calculated offender score. See State v. Wilson, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (remedy for a miscalculated offender score is resentencing using correct offender score).

3. THE COURT IMPOSED AN EXCESSIVE COMMUNITY CUSTODY TERM ON COUNT ONE AND ERRED IN IMPOSING COMMUNITY CUSTODY ON COUNT THREE.[9]

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Statutory construction

[9] The sentence on count two is erroneous as a whole.

is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Under RCW 9.94A.701(2), a court is directed to sentence an offender to 18 months of community custody if he is convicted of a "violent offense that is not considered a serious violent offense." First degree robbery and attempted first degree robbery are both considered violent offenses, not "serious violent" offenses, under RCW 9.94A.030(54)(a)(i). The court therefore erred in sentencing Ogden to 36 months rather than 18 months of community custody for the robbery and attempted robbery counts. CP 178.

The court also erred by imposing an 18-month term of community custody for attempted second degree robbery. While second degree robbery is considered a violent offense under RCW 9.94A.030(54)(a)(xi), attempted second degree robbery is not. See State v. Becker, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990) (while for purposes of offender score calculation second degree robbery is treated the same as the completed offense, it is not defined as a violent offense under RCW 9.94A.030). Nor is attempted second degree robbery considered a "crime against persons" for purposes of the 12-month community custody term under RCW 9.94A.701(3)(a). Leach, 161 Wn.2d at 186-89 (holding list of such crimes under RCW 9.94A.411 is exclusive and does not include attempts to

commit such crimes). The community custody term on count three should be stricken.

4. THE COURT'S HIGH-END STANDARD RANGE SENTENCE FOR ATTEMPTED FIRST DEGREE ROBBERY EXCEEDS THE STANDARD RANGE FOR THE OFFENSE

Ogden was convicted of attempted first degree robbery under count two and sentenced to 128 months of incarceration, plus 18 months of community custody. CP 177-78. The standard range for that offense is 96.75 to 128.25 months, reflecting the standard range for first degree robbery and the seventy-five percent modifier for inchoate crimes. RCW 9.94A.510; RCW 9.94A.533(2). But attempted first degree robbery is a class B felony, with a corresponding maximum sentence of 120 months. RCW 9A.20.021(1)(b); RCW 9A.28.020(3)(a).

In the event that this Court does not reverse Mr. Ogden's convictions, this Court should remand for resentencing to a combined term of incarceration and community custody that does not exceed the statutory maximum for attempted first degree robbery. See RCW 9.94A.701(9) ("term of community custody . . . shall be reduced . . . .whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime").

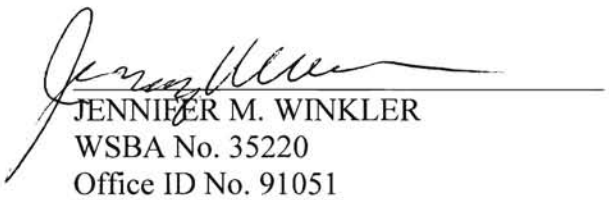
D. CONCLUSION

Reversal of all counts is required because the trial court improperly excluded evidence regarding Ogden's source of income, which was crucial to rebutting the State's case against him. Alternatively, this Court should remand for resentencing based on a reduced offender score, to correct the erroneous community custody terms, and to impose a sentence on count two that does not exceed the statutory maximum.

DATED this 30TH day of October, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68613-5-I
	)	
DAVID OGDEN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF OCTOBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID OGDEN
DOC NO. 920222
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99236

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER 2012.

x Patrick Mayovsky