SUPREME COURT No. 92077-0

Court of Appeals No. 45656-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

NELSON G. HERNANDEZ, Petitioner

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

FILED IN COA ON AUGUST 13, 2015

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RULES

I. IDENTITY OF PETITIONER

Petitioner, Nelson G. Hernandez, asks this Court to accept review of the Court of Appeals decision, designated in part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Hernandez seeks review of the Court of Appeals decision filed July 14, 2015, which concluded the trial court did not exceed its statutory authority when, after remand for a specific sentence correction, it instead conducted a resentencing, adding consecutive sentences for theft and firearms convictions. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely made.

III. ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals Mandate To Resentence Regarding Particular Counts Precluded The Trial Court From Conducting A Resentencing On Counts Which Were Not Appealed From By The State And Were Not Found To Be Erroneous By The Court Of Appeals.

IV. STATEMENT OF THE CASE

Based on events that occurred in June 2009, Nelson Hernandez was charged by second amended information with 17 crimes:

Burglary First Degree	Counts 1, 10
Residential Burglary	Counts 2, 8, 11
First Degree Theft	Counts 4, 9, 14
Theft of a Firearm	Counts 5, 12
Unlawful Possession of a Firearm	Counts 6, 17
Possession of a Stolen Firearm	Count 13
Possession of Stolen Property	Count 15
Trafficking in Stolen Property	Count 16

CP 84-90.

After a jury trial, he was convicted of the following:

First Degree Burglary	Count 1
Residential Burglary	Count 2, 8, 11
First Degree Theft	Count 4, 14
Theft of a Firearm	Count 5, 12
Theft in the Second Degree	Count 9
Possession of a Stolen Firearm	Count 13
Possession of Stolen Property	Count 15
Trafficking in Stolen Property 1st Degree	Count 16
Unlawful Possession of A Firearm 2degree	Count 17

At the original sentencing, the trial court merged counts 1 and 2 and counts 14 and 15. Based on the State's argument, the court did not merge count 13, possession of a stolen firearm, with the sentence for count 12, theft of a firearm[1]. (CP 111-127). The judgment and sentence stated: "Sentences in Counts XII XIII, and XVII to run consecutively to each other. All other counts to run concurrently." (CP 95). The total period of confinement was 250 months.

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[1] See *State v. Nelson Hernandez,* partially published, 172 Wn.App. 537,542, 290 P.3d 1052 (2012).

Mr. Hernandez appealed and the State did not file a cross-appeal but rather, conceded that count 13, possession of a stolen firearm should have merged with count 12, theft of a firearm. (CP 119).

The Court of Appeals remanded the matter in the following manner:

> "[t]hus, we accept the State's concession, vacate those convictions, and remand for resentencing." *Hernandez,* 172 Wn.App. at 539.

And further on the unpublished portion of the opinion:

> "We remand for resentencing regarding those counts; therefore, we do not consider them in our discussion of calculating the offender score."

And in the concluding paragraph:

> "We affirm, but remand for vacation of the defendants' convictions for possession of stolen firearms."

At the resentencing hearing in 2013, the State argued for the first time, that Mr. Hernandez's sentence should include a consecutive sentence for count 5, in place of the vacated count 13. (RP 5). Defense counsel agreed the court was required by law to

impose consecutive terms for counts 5, 12, and 17. (RP 15-16). The court sentenced Mr. Hernandez to the same length of confinement, simply substituting the vacated count with count 5. Mr. Hernandez appealed. (CP 150).

On appeal, Mr. Hernandez argued the language from the appellate court directed the trial court to vacate the conviction for possession of a stolen firearm and resentence on that count. The appellate court had not directed the trial court to consider an issue, which would have allowed the court to exercise its discretion in a full resentencing. (Brief of Appellant, 6/7/2014 p. 5).

In its unpublished opinion, the Court of Appeals noted the difference in its directive language at the beginning of the opinion from the end of the opinion. *Slip Op.* * 5-6. The Court held, "[w]e are persuaded to rely on the language contained in our specific holding. And that holding remanded for resentencing. Thus, the trial court followed our broad remand to conduct a resentencing." *Slip Op. *6.*

Mr. Hernandez makes this timely petition.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations which govern the decision to grant discretionary review are set forth in RAP 13.4(b). Here, the Court

of Appeals opinion is in direct conflict with this Court's holding in *State v. Sims,* 171 Wn.2d 436, 256 P.3d 285 (2011).

In *Sims,* the defendant was assigned a SSOSA which included an unconstitutional sentencing condition. Sims challenged the condition on appeal. *Sims,* 171 Wn.2d at 44. The State did not cross-appeal, but rather, conceded the error. However, in its response brief, the State argued the case should be remanded for reconsideration of the entire sentence, including the SSOSA. The Court of Appeals accepted the concession and also held that, on remand, the trial court retained the discretion whether to reimpose the original SSOSA with constitutionally tailored conditions, or deny a SSOSA altogether. *Id.* at 441. Sims appealed to this Court.

In its analysis, this Court reasoned that because Sims challenged only one portion of his sentence, and the State did not cross-appeal, the State could not seek denial of the SSOSA on remand. This Court acknowledged that such relief could be available under RAP 2.4(a) if demanded by the necessities of the case, it found not only had such necessities had not been shown, instead, the necessities of the case demanded only that the trial court have the opportunity to revise the offending sentencing condition, and to hold otherwise would unnecessarily chill a

defendant's right of direct appeal. *Sims,* 171 Wn.2d at 446. This Court reversed the Court of Appeals and remanded for the limited resentencing granted on appeal. *Id.* at 449.

Similarly here, Mr. Hernandez exercised his right of appeal, challenging the authority of the trial court to do more than vacate the offending counts and refigure the commensurate diminution of incarceration time. The State did not cross-appeal what it later perceived to be an error in the sentencing, instead, waiting until the resentencing hearing to raise the issue for the first time.

As this Court pointed out in *Sims,* an "appellant is deemed to have waived any issues that are not raised as assignments of error and argued by brief." *Id.* at 441. It is incongruous for the Court to allow the State to have the benefit of reconsideration of other sentencing issues on remand, which were never raised in the Court of Appeals. Resentencing on the unchallenged portions of the sentence, in effect, grants affirmative relief to the State, for which it never filed notice of cross-appeal. *Sims,* 171 Wn.2d at 442.

Further, the trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. *State v. Kilgore,* 167 Wn.2d 28, 42, 216 P.3d 393 (2009). Here, the 2012 Court of Appeals opinion ordering the remand did not, in fact, direct

the trial court to fully resentence Mr. Hernandez. Rather, the summary introduction stated it wanted the counts vacated and Mr. Hernandez to be resentenced. However, in the body of the opinion, the Court made it evident that it wanted resentencing on the vacated counts. There was no opened-ended, full resentencing intimated in the Court's 2012 opinion.

Here, the Court of Appeals relied on its ruling in *Toney* to find "When our opinion states that we only "remand for resentencing", the resentencing court has broad discretion to resentence on all counts." *Slip Op. *5; State v. Toney,* 149 Wn.App. 787, 792, 205 P.3d 944 (2009). However, the Court too broadly read its original unpublished opinion. The issue there was whether RCW 9.94A.310 (1996) mandated firearm enhancements to run consecutively. *Id.* at 790. The Court agreed with *Toney* and "remanded for resentencing under 'proceedings consistent with this opinion.'" *Id.* at 791. The Court clearly granted authority for the trial court to exercise its discretion in the new judgment and sentence.

By contrast, the Court granted no such authority in Mr. Hernandez's case. The resentence proceeding should have been limited to the error complained of and conceded to on appeal. The

decision of the Court of Appeals conflicts with this Court's decisions in both *Kilgore* and *Sims*, and should be reviewed.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hernandez respectfully asks this Court to grant review of his petition and reverse the decision of the Court of Appeals.

Respectfully submitted this 13th day of August, 2015.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NELSON GEOVANY HERNANDEZ, Appellant.	No. 45656-7-II UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. JASON ANTHONY DELACRUZ, Appellant.	(Consolidated with No. 45723-7-II)

JOHANSON, C.J. — Jason A. Delacruz and Nelson G. Hernandez appeal their consecutive sentences for theft of a firearm. They primarily argue that the trial court exceeded this court's mandate on remand when it resentenced them to consecutive sentences on two counts of theft of a firearm. In a statement of additional grounds (SAG), Delacruz argues that there is insufficient evidence to support his conviction for first degree unlawful possession of a firearm and that his offender score is incorrect. Because we remanded for resentencing, we conclude that the trial court

did not exceed its authority and because Delacruz provides an insufficient record to enable us to decide the SAG issues, we affirm.

FACTS

I. BACKGROUND FACTS AND FIRST TRIAL

Delacruz and Hernandez were among a group of individuals who, over a two-day period, burglarized three homes. Among the items they stole were firearms, electronics, and sports paraphernalia.

A jury convicted Delacruz and Hernandez on 11 counts each, including two counts of theft of a firearm,[1] one count of possession of a stolen firearm (count XIII),[2] and one count of unlawful possession of a firearm (count XVII).[3] On count XVII, Delacruz was charged with first degree unlawful possession of a firearm based on a prior California conviction for first degree burglary.[4] The original sentencing court ordered only one of the two theft of a firearm convictions, the convictions for possession of a stolen firearm, and the convictions for unlawful possession of a firearm to run consecutively to each other and for all other counts to run concurrently.

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[1] RCW 9A.56.300.

[2] RCW 9A.56.310.

[3] Former RCW 9.41.040 (2005).

[4] CAL. PENAL CODE § 460. We assume that Delacruz's first degree unlawful possession of a firearm conviction was based on the trial court's determination that his prior first degree burglary conviction in California was a "serious offense" that elevated second degree unlawful possession of a firearm to a first degree offense. Although Delacruz argues in his SAG that his California conviction is what elevated his unlawful possession of a firearm conviction to a first degree offense, this fact is not clear from the record.

Delacruz and Hernandez appealed. *State v. Hernandez*, 172 Wn. App. 537, 290 P.3d 1052 (2012), *review denied*, 177 Wn.2d 1022 (2013). The State conceded that the convictions for one count of theft of a firearm should merge with one count of possession of a stolen firearm. In the published portion of the opinion we held that we "accept[ed] the State's concession, vacate[d] those convictions, and remand[ed] for resentencing." *Hernandez*, 172 Wn. App. at 539. We also said later in the unpublished portion of the opinion that we "accept the State's concession and we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft. . . . We remand for resentencing regarding those counts." *Hernandez*, No. 41707-3-II, slip op. at 9.

II. Resentencing Hearings

In December 2013, Delacruz and Hernandez were resentenced. At the resentencing hearings, the trial court vacated Delacruz's and Hernandez's convictions for possession of a stolen firearm. The State argued for the first time that under RCW 9.94A.589(1)(c), Delacruz's and Hernandez's convictions for two counts of theft of a firearm must run consecutively to each other and to their convictions for unlawful possession of a firearm. Delacruz argued that "it is clear that the Court can resentence" on his theft of a firearm conviction but that the resentencing court had discretion not to resentence on all counts if it chooses. Delacruz Report of Proceedings (RP) (Dec. 20, 2013) at 15. Hernandez agreed with the State, arguing that under the statute, it was proper for both theft of a firearm sentences to run consecutively. Delacruz and Hernandez both asked for sentences at the low end of the standard range.

The resentencing court relied on (1) the "language at the outset of [this court's] opinion," Delacruz RP (Dec. 20, 2013) at 19, on appeal where we "accept[ed] the State's concession,

vacate[d] those convictions [for possession of a stolen firearm], and remand[ed] for resentencing," *Hernandez*, 172 Wn. App. at 539, and (2) the fact that "[c]ounsel are both acknowledging that it's within my discretion to resentence or not" and agreed with the State, ordering that Delacruz's and Hernandez's sentences for theft of a firearm run consecutively to each other and to their sentences for unlawful possession of a firearm. Delacruz RP (Dec. 20, 2013) at 19. Both defendants were resentenced to the same total months of confinement that they received at their first sentencing. Delacruz and Hernandez appeal their sentences.

ANALYSIS

I. THE TRIAL COURT'S AUTHORITY TO RESENTENCE ON REMAND

Delacruz and Hernandez argue that the trial court exceeded its sentencing authority on remand.[5] The State argues that this court's mandate was a broad mandate to conduct any proceedings necessary to "lawfully resentence" the defendants.[6] Br. of Resp't at 7. Because we remanded for resentencing, we hold that the sentencing court did not err by ordering that both theft of a firearm convictions sentences must run consecutively.

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[5] Delacruz and Hernandez also argue that the trial court abused its discretion when it refused to consider imposing exceptional sentences below the standard range. Although a defendant is entitled to request an exceptional sentence below the standard range and a sentencing court abuses its discretion when it "'refuses categorically to impose an exceptional sentence below the standard range under any circumstances,'" *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)), neither Delacruz nor Hernandez requested an exceptional sentence below the standard range. Therefore, the trial court did not abuse its discretion.

[6] The State also argues that Delacruz's and Hernandez's sentences are not appealable because the resentencing court sentenced the defendants to standard range sentences, acted within its mandate from this court, and properly determined that RCW 9.94A.589(1)(c) requires consecutive sentences. Because we rule in favor of the State, we need not address its additional arguments.

A. STANDARD OF REVIEW AND RULES OF LAW

"The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). When our opinion states that we only "remand for resentencing," the resentencing court has broad discretion to resentence on all counts. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009) ("Toney's sentence was not final because our remand did not limit the trial court to making a ministerial correction. Rather, we unequivocally 'remand[ed] for resentencing.'" (quoting *State v. Toney*, noted at 95 Wn. App. 1031, 1999 WL 294615, at *1)).

RCW 9.94A.589(1)(c) provides,

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, . . . [t]he offender *shall serve consecutive sentences* for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(Emphasis added.)

Delacruz and Hernandez rely on the remand language in our prior opinion to support their claim that the resentencing court exceeded its authority. They argue that we remanded with "specific instructions" and that our mandate must be "strictly followed." Br. of Appellant Delacruz at 1; Br. of Appellant Hernandez at 5. The State argues that our remand language gave the resentencing court broad discretion to resentence Delacruz and Hernandez "lawfully." Br. of Resp't at 7. We conclude that the trial court acted within its authority because we remanded for resentencing.

In the first appeal, we specifically "held" that we "accept[ed] the State's concession, vacate[d] those [possession of a stolen firearm] convictions, and remand[ed] for resentencing."

Hernandez, 172 Wn. App. at 539. This statement suggests that we intended to give the resentencing court broad authority to conduct a new sentencing hearing. *Toney*, 149 Wn. App. at 792. Later in the opinion, we stated that we "accept the State's concession and we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft. . . . We remand for resentencing regarding those counts." *Hernandez*, slip op. at 9. For a second time we remanded for resentencing. But in contrast to this opinion's earlier statement, this excerpt suggests that we intended to limit the resentencing court's mandate only to the theft of the firearm conviction that was the subject of Delacruz's and Hernandez's first appeals. When we look at this opinion's conflicting language, we are persuaded to rely on the language contained in our specific holding. And that holding remanded for resentencing. Thus, the trial court followed our broad remand to conduct a resentencing.

II. STATEMENT OF ADDITIONAL GROUNDS

INSUFFICIENCY OF THE RECORD FOR FACTUAL COMPARABILITY ANALYSIS

In a SAG, Delacruz makes two additional arguments. Both arguments fail due to lack of a sufficient record for our review.

1. SUFFICIENCY OF THE EVIDENCE FOR FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM

First, Delacruz argues that the evidence is insufficient to support his conviction on one count of first degree unlawful possession of a firearm. Specifically, he argues that the State never proved that he had committed a prior, "serious offense" based on his California first degree

burglary conviction.[7] We do not address this argument on the merits because the record is inadequate to determine the merits of this claim.

It is the burden of the party presenting an issue for our review on appeal to provide a record sufficient to establish the alleged error. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (citing RAP 9.2(b)). We may decline to review an alleged error "'when faced with a material omission in the record.'" *Sisouvanh*, 175 Wn.2d at 619 (quoting *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999)).

We review a challenge to the sufficiency of the evidence at trial to determine whether, when "'viewed in the light most favorable to the prosecution, [the evidence] permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). A defendant commits first degree unlawful possession of a firearm when he "owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense." Former RCW 9.41.040(1)(a). A "serious offense" is defined by a list of offenses including "[a]ny crime of violence" and "any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense." Former RCW 9.41.010(12)(a), (o) (2001). The definition of a "crime of violence" includes second degree burglary, residential burglary, and second degree robbery. Former RCW 9.41.010(11)(a) (2001). Thus, we must decide whether Delacruz's

[7] Delacruz does not explicitly identify the comparability of his California burglary conviction as the error at issue. But based on his statements about "the comparability of the defendants [sic] out-of-state convictions" and the fact that a California burglary conviction is the only out-of-state conviction on his judgment and sentence, we presume that the California burglary conviction is the subject of his SAG. SAG at 3.

California first degree burglary conviction is comparable to a Washington conviction for second degree burglary or residential burglary.

Whether an out-of-state conviction is comparable to a Washington conviction is a question of law that we review de novo. *State v. Werneth*, 147 Wn. App. 549, 552, 197 P.3d 1195 (2008). When doing a comparability analysis of an out-of-state conviction, we apply a two-part test. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). We must first compare the elements of the out-of-state conviction with a similar Washington offense to determine if the offenses are "legally comparable." *State v. Olsen*, 180 Wn.2d 468, 472-73, 325 P.3d 187, *cert. denied*, 135 S. Ct. 287 (2014). Where the foreign offense is broader than the Washington offense, the two statutes are not legally comparable and we must determine whether they are factually comparable. *Olsen*, 180 Wn.2d at 473. A factual comparability analysis requires this court to ask "whether the defendant's conduct would have violated the comparable Washington statute." *Olsen*, 180 Wn.2d at 473.

In Washington, a defendant commits second degree burglary when he or she, "with intent to commit a crime against a person or property therein, . . . enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). A defendant commits residential burglary, similarly, when he "with intent to commit a crime against a person or property therein, . . . enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1).

In California, "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." CAL. PENAL CODE § 459. In California, a burglary is elevated to first degree burglary when it is of an "inhabited" dwelling or vessel. CAL. PENAL CODE § 460.

Considering the elements of these offenses, California's definition of burglary is not legally comparable to Washington's because it covers conduct that would not violate Washington's second degree and residential burglary statutes. In California, a person is guilty of burglary whether he entered and remained in the subject building, dwelling, or space either lawfully *or* unlawfully. CAL. PENAL CODE § 459. In contrast, Washington's second degree and residential burglary statutes explicitly require a person to enter or remain in the subject space *un*lawfully. RCW 9A.52.030(1), .025(1). A person who *lawfully* enters or remains in a space with intent to commit a crime commits a burglary in California but does not commit a burglary in Washington.

Division One of this court agreed with this analysis in *State v. Thomas*, 135 Wn. App. 474, 483, 144 P.3d 1178 (2006), where it accepted the State's concession that California's burglary statute is broader than Washington's because it does not require unlawful entry or remaining. We conclude, as Division One did in *Thomas*, that because California's definition of burglary covers lawful as well as unlawful entry and remaining, it covers more conduct than Washington's burglary statutes and is, thus, not legally comparable. Therefore, we must turn to factual comparability analysis.

When performing a factual comparability analysis, we may consider the "defendant's conduct, as evidenced by the indictment or information" as well as other evidence that was admitted or proven beyond a reasonable doubt in the out-of-state proceeding. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 258, 111 P.3d 837 (2005).

But Delacruz has not provided any record from his trial here or from his California conviction to permit this court to conduct a factual comparability analysis to determine whether his conduct in violating California's first degree burglary statute would violate a comparable

Washington statute. Nor can this court review the factual question of whether sufficient evidence existed from which a rational jury could have found the essential elements of first degree unlawful possession of a firearm. Therefore, we decline to consider this alleged error because Delacruz has not met his burden to provide sufficient record on appeal.

2. OFFENDER SCORE

Second, Delacruz argues that his sentence is improper because his California conviction for first degree burglary is not comparable to a similar Washington offense and, thus, may not be used to increase his offender score. For the same reasons discussed above, we also decline to address this argument because Delacruz has not presented sufficient evidence upon which we can conduct a factual comparability analysis of his out-of-state conviction.

We review the trial court's calculation of a defendant's offender score de novo. *Olsen*, 180 Wn.2d at 472. An illegal or erroneous offender score may be raised for the first time on appeal. *State v. Rice*, 159 Wn. App. 545, 571, 246 P.3d 234 (2011), *aff'd on other grounds*, 174 Wn.2d 884, 279 P.3d 849 (2012). The sentencing court may increase a defendant's offender score for an out-of-state conviction if the State meets its burden to show that the out-of-state conviction is "comparable" to a similar Washington offense. RCW 9.94A.525(3); *Olsen*, 180 Wn.2d at 472.

As discussed earlier, California's burglary statute is not legally comparable to Washington's. The next test is factual comparability. But Delacruz has not provided the indictment or information from his California conviction nor has he provided any evidence or documentation from which we can determine whether his conduct in that case would have violated Washington's burglary statute. Therefore, we decline to consider on the merits his argument about his offender score.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Melnick, J.
MELNICK, J.

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on August 13, 2015, I mailed, first class, postage prepaid USPS, or electronically served by prior agreement between the parties, a true and correct copy of the Petition for Review to:

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