NO. 72428-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CLAYTON RUSSELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE TANYA L. THORP

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Washington State:

Statutes

Federal:

Washington State:

Other Jurisdictions:

Other Authorities

A. ISSUES PRESENTED

1. A unanimity instruction is required when a defendant commits multiple acts, but not when his actions entail a continuing course of conduct. The State proved that defendant Clayton Russell committed second-degree burglary by entering unlawfully and taking property from the floor and built-in storage closet of a carport. Were Russell's actions part of a continuing course of conduct? If not, was the failure to give an instruction harmless when no reasonable juror could have doubted that Russell took property from both parts of the carport?

2. A sentencing court may look to facts underlying an out-of-state prior conviction in order to determine whether it is comparable to a Washington offense, so long as those facts were charged and admitted to by the defendant. The State of California charged Russell with unlawfully entering a dwelling and two commercial structures with the intent to commit larceny. He pleaded guilty to three counts of burglary and expressly admitted in his plea statement that he had entered each building unlawfully. Did the sentencing court below properly determine that Russell's three California burglary convictions were comparable to convictions for burglary in Washington?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Clayton Russell with one count of Residential Burglary.[1] CP 1. The State alleged that, on September 7, 2013, Russell did enter and remain unlawfully in a dwelling, with the intent to commit a crime against a person or property therein. CP 1.

A jury was unable to agree if Russell committed Residential Burglary and convicted him instead of the inferior degree crime of Burglary in the Second Degree.[2] CP 62-63. The trial court imposed a Drug Offender Sentencing Alternative. CP 79.

2. SUBSTANTIVE FACTS.

In September of 2013, Kristine Kane and Christian Bell were in the process of moving out of their former residence. 2RP 108-09; 3RP 130-31.[3] On September 7, they drove together to return a U-Haul truck, leaving behind multiple items of personal property. 2RP 115-17; 3RP 132-33. They left the items in the carport, a structure fully connected to

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[1] RCW 9A.52.025(1) ("A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.").

[2] RCW 9A.52.030(1) ("A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling."). Second-degree burglary is an inferior degree of Residential Burglary. State v. McDonald, 123 Wn. App. 85, 89, 96 P.3d 468 (2004).

[3] The verbatim report of proceedings is cited as follows: 1RP – Jun. 30, 2014; 2RP – Jul. 2, 2014; 3RP – Jul. 7, 2014; 4RP – Jul 8, 2014 and Aug. 15, 2014; 5RP – Aug. 1, 2014.

the front of their house. 2RP 110-11, 115; 3RP 132-33, 135-36; Ex. 1, 4. They had typically used the carport for parking and storage. 2RP 111. In particular, they used to keep items such as recycling and garbage bins in two closets, physically built into the back of the carport (and, in turn, the house). 2RP 111, 113; 3RP 136; Ex. 1, 4.[4]

On the floor of the carport, near the left-hand closet, they left a laser printer, a box of wedding and childhood pictures, gardening tools, and toys. 2RP 116-17; 3RP 132-33, 135. Inside the left-hand closet, they left Bell's compound bow and arrow. 3RP 133-35. Bell distinctly remembered putting the bow in the left-hand closet, because Kane had always required him to keep the bow and arrow in the carport—in the *right-hand* closet. 3RP 134. Because he had already cleaned out the right-hand closet as part of the moving process, he left the bow in the left-hand closet instead. 3RP 135. The fact that he had not put it in its usual place stood out in his mind. 3RP 134.

When they returned from the rental company, they discovered that their property was missing from the corner of the carport. 2RP 117-18; 3RP 137-38. A neighbor told them that she had seen a red Jeep pull into their carport and later drive off. 2RP 104-07, 118-19; 3RP 140. Kane

[4] Exhibits 1 and 4 depict the storage closets at the back of the carport. 2RP 110-11; 3RP 135-36. As is apparent from the photographs—as well as Kane and Bell's testimony—the carport, storage closets, and home all form a single structure.

called the police while Bell left to look for any sign of the red Jeep or their property. 2RP 118-19; 3RP 139-41, 231.

As he drove through a nearby neighborhood, Bell saw a punching bag in a yard that resembled one belonging to his son, which had been left near the carport. 3RP 137-38, 140-41. He also saw a red SUV parked in the driveway. 3RP 142. Defendant Clayton Russell was standing in the driveway and Bell confronted him about taking their things. 3RP 141-42. Russell apologized, went into the house, and brought out Bell's compound bow. 3RP 143-44. Russell also told Bell that he would return the remainder of the property. 3RP 143. Russell then left in the red SUV. 3RP 145.

Meanwhile, Kane was still back at the residence. 3RP 231-32. Russell drove up the driveway in the red SUV, apologized, and began returning some of their property from his car. 3RP 231-34. He asked her not to call the police. 3RP 234. When she told him that she already had called the police, he left without returning all of the property. 3RP 234.

Later that day, police located Russell's red SUV parked at an intersection in north Seattle. 3RP 165. There was no one in the car and it had no license plates displayed. 3RP 166. Kane and Bell were brought to the scene and identified the vehicle, as well as some additional items of theirs, inside the vehicle. 3RP 167-68, 234-35.

Police then located Russell at a car wash, elsewhere in north Seattle. 3RP 169-71, 184-86. He claimed that he had found the victims' property on the side of the road, and had thought that it was free for the taking. 3RP 171; Ex. 18 at 00:38-00:50; Ex. 19 at 00:51-01:24, 03:52-04:06.[5] He claimed that he had left his car on the side of the road because he thought that his license was suspended and he was worried about being pulled over. 3RP 173, 189; Ex. 18 at 05:11-05:40; Ex. 19 at 03:01-03:28. When asked why there were no license plates on his car, he said that it was because he had just gotten the car. 3RP 173; Ex. 18 at 05:47-05:56. He also claimed that he did not have license plates because he needed to get an emissions test, and that he had not had time to put the plates on his car. Ex. 19 at 11:40-12:30.

Additional facts and procedural history are set forth below as appropriate.

[5] Russell's statements to officers were captured on in-car audio/video. The State filed transcripts of the portions of the videos that it intended to play at trial. 2RP 88; CP 105-15 (Transcript of In-Car Video, Officer Escalante), 116-28 (Transcript of In-Car Video, Officer Fishel). The videos were marked and admitted as Exhibits 18 (Officer Fishel) and 19 (Officer Escalante); see also 3RP 176-78 (publishing Exhibit 18 for jury), 195-96 (publishing Exhibit 19 for jury). The transcripts themselves were not admitted at trial, see 2RP 93, but they provide the best record of what portions of the video were played in court. While some parts of the videos were suppressed or redacted, the portions depicting Russell's statements regarding his interactions with the victims and the condition of his vehicle were ruled admissible. 2RP 77-78, 85-87, 89-91.

C. ARGUMENT

1. THE TRIAL COURT WAS NOT REQUIRED TO ISSUE A UNANIMITY INSTRUCTION BECAUSE RUSSELL COMMITTED A CONTINUING COURSE OF CONDUCT.

Russell asserts that his conviction for second-degree burglary could have violated his right to a unanimous verdict, because there was no unanimity instruction below. His argument rests on two premises: (1) taking property from two locations in a single carport constitutes multiple acts; and (2) only the storage closet portion of the carport is a "building" within the meaning of the second-degree burglary statute. Thus, he argues, the jury could have been non-unanimous as to which act he committed and could have convicted him of burglary for taking property from a part of the carport that was not legally a building.

Russell's claim should be rejected because both of his premises are incorrect. First, this was not a multiple-acts case. Russell took property from the floor and built-in closet of the carport in a single incident, as part of a continuing course of conduct. Because Russell did not commit multiple acts, no unanimity instruction was required.

Second, the floor and built-in storage closet of the carport—both of which were physically attached to the victims' home—were part of a single "building" for purposes of the burglary statute. Even if Russell's

conduct could legitimately be characterized as multiple acts, there is no risk that the jury convicted Russell based on a legally insufficient act.

Finally, even assuming for the sake of argument that Russell committed multiple acts and that one of them was legally insufficient to support the charge, the lack of a unanimity instruction was harmless because no reasonable juror could have doubted that Russell took property from the storage closet—an act that Russell concedes was sufficient to sustain a conviction for second-degree burglary.

a. Additional Facts.

The trial court instructed the jury that, in order to convict Russell of second-degree burglary, it would have to find beyond a reasonable doubt:

> (1) That on or about September 7, 2013, the defendant unlawfully entered or remained unlawfully in a building other than a dwelling;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
>
> (3) That this act occurred in the State of Washington.

CP 51 (Instruction 18); see RCW 9A.52.030(1); see also WPIC 60.04.

The trial court also instructed the jury on the meaning of the term, "building":

> Building, in addition to its ordinary meaning, includes any dwelling or fenced area. Building also includes any other structure used mainly for lodging of persons, for carrying on business

> therein, or for the use, sale or deposit of goods. This definition of building applies only to the Burglary in the Second Degree charge[.]

CP 47 (Instruction 14); see RCW 9A.04.110(5); see also WPIC 2.05.

Russell proposed instructions on the lesser included offense of trespass, but did not propose a unanimity instruction. CP 19-27.

In closing argument, the State urged the jury to find that by entering the attached carport, Russell had entered a dwelling and committed Residential Burglary. 4RP 276-78. If the jury disagreed that the attached carport was a dwelling, the State argued, it could at least find that Russell had entered a building and committed Burglary in the Second Degree. 4RP 278. The State did *not* argue that Russell had committed multiple acts of burglary by entering the carport and opening the storage closet; instead, the State referred to these locations collectively as "a structure used for the sale or deposit of goods." 4RP 278.

Russell's trial attorney then conceded to the jury that Russell had taken the property, but argued that he had thought it had been abandoned. 4RP 289, 292, 296. She also argued that the carport and storage closet were neither a "dwelling" nor "building" for purposes of burglary. 4RP 296. At most, they constituted a "premises" for purposes of trespass. 4RP 296. The jury disagreed in part and found Russell guilty of Burglary in the Second Degree. CP 62-63.

b. By Entering The Carport And Opening The Storage Closet, Russell Engaged In A Continuing Course Of Conduct, Constituting Burglary In The Second Degree.

As noted, Russell's claim should be rejected because he engaged in a continuing course of conduct, so a unanimity instruction was not required. Further, because the carport and storage closet are part of a single building for purposes of the second-degree burglary statute, there is no risk that the jury convicted him of a legally insufficient act. Finally, even if Russell's conduct entailed multiple acts and one of those acts was insufficient to constitute burglary, Russell's conviction should be affirmed because no reasonable juror could have doubted that he committed second-degree burglary by entering the storage closet.

i. The trial court was not required to issue a unanimity instruction because this case did not involve multiple acts.

When the State presents evidence of several distinct acts, any of which could form the basis for the crime charged, the trial court must ensure that the jury reaches a unanimous verdict on one particular act. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), modified in part by State v. Kitchen, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). This rule applies only to cases involving several distinct acts; it does not

apply where the evidence instead indicates a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

To determine whether the defendant's actions entailed distinct acts or a continuing course of conduct, courts evaluate the facts in a commonsense manner, and consider "(1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010). In other words, "evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred[,]" while "evidence that a defendant engage[d] in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct[.]" Id. (quotation marks and citation omitted) (alterations supplied).

Here, the evidence established that Russell simply drove his car into the carport and loaded it with the victims' property. He took some items from the corner of the carport, near the closet, and some items from inside the closet. 2RP 115-17; 3RP 132-33, 135. He accomplished this crime in a single sequence (the neighbor described the suspect as driving into the carport, turning around so that the car was backed-into the carport, and then leaving) and over a short period of time—no more than 30 to 60 minutes. 2RP 104-07, 117, 118-19; 3RP 132, 137, 140. There was no

evidence that Russell made multiple trips to the house. Viewed in a commonsense manner, Russell's crime was part of a continuing course of conduct. He was not entitled to a unanimity instruction.

ii. An attached carport is a "building" for purposes of the second-degree burglary statute.

Even assuming for the sake of argument that Russell committed multiple acts by taking property from the floor and closet of the carport, Russell's conviction should be affirmed because the entire carport qualifies as a "building" for purposes of the second-degree burglary statute. Thus, there is no risk that the jury convicted Russell based on a legally insufficient act.

Whether the attached carport is a "building" for purposes of RCW 9A.04.110(5) is a question of statutory interpretation, reviewed *de novo*. See State v. Johnson, 159 Wn. App. 766, 770, 247 P.3d 11 (2011). The court's fundamental purpose in interpreting a statute is to ascertain and give effect to the intent of the legislature. City of Seattle v. Fuller, 177 Wn.2d 263, 269, 300 P.3d 340 (2013). Courts will seek to determine the plain meaning of the statute "from all that the legislature has said in the statute" and related provisions. Id. Courts will give undefined terms their ordinary meaning, and may look to the dictionary. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010).

In State v. Johnson, 132 Wn. App. 400, 407-09, 132 P.3d 737 (2006), the court held that a garage without a door (i.e., with only three walls) was a "building" for purposes of second-degree burglary. Noting that RCW 9A.04.110(5) expressly defines "building" in part according to its "ordinary meaning," the court looked first to the dictionary definition of a building:

> [a] constructed edifice designed to stand more or less permanently, covering a space of land, usu[ally] covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure-distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.

Id. at 408 (quoting Webster's Third New Int'l Dictionary 292 (1969)).

The court held that the three-walled garage fell under the ordinary meaning of building because it was permanent and immobile, covered a space of land, had a roof, and served as a storehouse or other useful structure. Id. at 408. Moreover, even though the garage lacked a door, it was still "more or less completely enclosed." Id.

Even if the garage was not a building in the ordinary sense, the Johnson court held that it otherwise fell under the broader definition of building contained in RCW 9A.04.110(5), which also defines a building as "'any other *structure* used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods.'" 132 Wn. App.

at 408 (quoting RCW 9A.04.110(5)) (emphasis added). "Structure" was defined in the dictionary as "'something constructed or built.'" Id. (citation omitted). "Goods" were defined as "'tangible moveable personal property having intrinsic value.'" Id. at 408-09 (citation omitted). Because the garage in Johnson was used to store tools, lawn equipment, and other items, it qualified for this broader, legislative definition of building. Id. at 409.

The carport in the instant case is likewise a building in the ordinary sense. It was physically attached to a permanent structure—the house. 2RP 110-11; 3RP 135-36; Ex. 1, 4. It had a roof, which was plainly visible in the photographs admitted at trial. Ex. 1, 4. It was also a storehouse or other useful structure, used for parking and for storing goods. 2RP 111. While it had fewer walls than the garage in Johnson, because of its permanent and immobile nature, connection to a house, and use, the carport was a building in the ordinary meaning.

Even if not a building in the ordinary meaning, the carport certainly was a building within the broader definition contained in RCW 9A.04.110(5), i.e., a "structure used for . . . the use . . . or deposit of goods." Just as in Johnson, the carport was used to store tools and lawn equipment. 2RP 115; 3RP 132-33; see Johnson, 132 Wn. App. at 409. It was also used to store cars. 2RP 111. Because Russell's conduct in

stealing property from both the floor and closet of the carport constituted burglary, there is no risk that the jury convicted him based upon legally insufficient conduct.

iii. Any error in the failure to provide a unanimity instruction was harmless because no reasonable juror could have doubted that Russell committed second-degree burglary by entering and stealing property from the storage closet.

The failure to give a unanimity instruction in a multiple-acts case is harmless if no reasonable juror could have had a reasonable doubt about each of the incidents alleged. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). Even assuming for the sake of argument that Russell committed multiple acts, and that taking property from the floor of the carport was insufficient to constitute burglary, the lack of a unanimity instruction was harmless because no reasonable juror could have doubted that he also took property from the storage closet—an act that Russell concedes constituted burglary. Br. of App't at 9.

Bell recalled specifically that he had put his compound bow in the storage closet, because he remembered that it was strange that he had put it in the left-hand closet instead of the right-hand closet, as usual. 3RP 133-35. The reason he had put it in the left-hand closet was that he had already cleaned out the right-hand closet. 3RP 135. When Bell

confronted Russell, Russell apologized and gave him back the bow. 3RP 143-44. Russell admitted to the police that he had returned the bow. Ex. 18 at 4:33-04:39. Russell's trial attorney even conceded in closing argument that Russell had returned the bow to Bell. 4RP 292. The jury could not reasonably have doubted this evidence.

The jury also could not reasonably have disbelieved that Russell took property from the floor of the carport. Kane and Bell left property on the floor, including a printer, lawn tools, photographs, and toys. 2RP 115-17; 3RP 132-33, 138. Bell later saw some of this property in Russell's car. 3RP 147-49. Russell also returned some of this property to Kane, when he drove back to the house. 3RP 232-33.

The only evidence to the contrary was Russell's incredible explanation to the police, captured on video—that he simply had found the property on the side of the road. 3RP 171; Ex. 18 at 00:38-00:50; Ex. 19 at 00:51-01:24, 03:54-04:06. This explanation was completely at odds with the testimony of both victims and their neighbor, none of whom had any motive to lie about where Russell had obtained the property. Russell's explanation was especially incredible in light of Bell's testimony, who compellingly and convincingly testified that he remembered putting the bow in the closet before leaving to return the U-Haul.

Russell's explanation was also beset by inconsistencies. For example, he told the police that he had left his car at the intersection because he was afraid of being pulled over for a suspended license. 3RP 173, 189; Ex. 18 at 05:11-05:40; Ex. 19 at 03:01-03:28. Yet he had just driven to Kane and Bell's residence to steal their property, as well as to another house, and then back to the victims' residence. A reasonable juror would have concluded that Russell left his vehicle at an intersection because he actually was concerned that the victims could identify his vehicle, not because he was worried about driving with a suspended license.

Russell also gave inconsistent explanations to the police for why his car had no license plates. At one point, he told police that it was because he had just gotten the car. 3RP 173; Ex. 18 at 05:47-05:56. At another point, he claimed that it was because he needed an emissions test, or that he had not had time to put the plates on his car. Ex. 19 at 11:40-12:30. A reasonable juror would not have believed Russell.

Finally, the verdict shows that the jury necessarily disbelieved Russell's explanation. His attorney argued in closing that Russell merely had found the property in a box in the driveway. 4RP 289. The jury

rejected this explanation by convicting him of burglary, which, under the State's theory, required the finding that he had at least entered the carport.[6]

Because the jury could not reasonably have doubted that Russell took property from the storage closet in addition to the floor of the carport, any failure to give a unanimity instruction was harmless beyond a reasonable doubt. Russell's conviction should be affirmed.

2. THE TRIAL COURT PROPERLY FOUND THAT RUSSELL'S PRIOR CONVICTIONS FOR BURGLARY WERE FACTUALLY COMPARABLE TO BURGLARY IN WASHINGTON.

Russell asserts that the trial court erred by examining the facts underlying his convictions for burglary in California, in finding that they were comparable to Washington offenses. He claims that this factual inquiry violated his Sixth Amendment right to a determination of facts by a jury. Russell's claim fails because he was charged with and specifically pleaded to the facts that made his California convictions comparable. The trial court permissibly considered these facts in determining that his California convictions were comparable, and properly calculated his offender score.

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[6] As the prosecutor argued to the jury in rebuttal:

> [Defense counsel] in closing argument made a lot of statements like maybe the property was in the driveway, maybe it was on the side of the road. We know where the property was. It was in the corner of the carport. And I just want you to consider during your deliberations how far Mr. Russell had to go up that driveway and into that carport in order to get those items.

4RP 297.

a. Additional Facts.

Prior to sentencing, the State filed certified copies of documents establishing Russell's prior convictions in California.[7] CP 132-83 (State's Sentencing Memorandum). These included copies of the information charging him with crimes in California,[8] his plea statement and sentence, and clerk's minutes memorializing his guilty plea and sentence. CP 141-44 (Original Information), 153-55 (Guilty Plea and Sentence), 158-62 (Clerk's Minutes).

The documents established that in February of 2002, the State of California charged Russell in Orange County Superior Court with several crimes, including:

> Count 1: On or about March 5, 2001, CLAYTON HARRISON RUSSELL . . . , in violation of Section 459-460(a) of the Penal Code (BURGLARY FIRST DEGREE – INHABITED DWELLING), a FELONY, did *willfully and unlawfully* enter an inhabited dwelling house, and trailer coach and inhabited portion of a building inhabited by ED THAETE with the intent to commit LARCENY.
>
> [. . .]
>
> COUNT 3: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 459-460(b) of the Penal Code (BURGLARY SECOND DEGREE – COMMERCIAL STRUCTURE), a FELONY, did *willfully and unlawfully* enter a

[7] The documents are appended to this brief as follows: Appendix A – Information; Appendix B – Guilty Plea and Sentence; Appendix C – Clerk's Minutes.

[8] The documents included an original information and several amended informations. CP 141-51. The clerk's minutes clarify that Russell pleaded guilty to crimes charged in the original information. CP 158.

> IDENTITY SKATE SHOP located at 7884 LA PALMA AVE, BUENA PARK under the dominion and control of IDENTITY SKATE SHOP with the intent to commit LARCENY.
>
> [. . .]
>
> COUNT 5: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 459-460(b) of the Penal Code (BURGLARY SECOND DEGREE – COMMERCIAL STRUCTURE), a FELONY, did *willfully and unlawfully* enter a ROBINSON'S MAY located at 300 BREA MALL WAY, BREA under the dominion and control of ROBINSON'S MAY with the intent to commit LARCENY.

CP 141-42 (emphasis added).

Russell pleaded guilty to these crimes in May of 2002. CP 153-55, 158-62. In his plea statement, he admitted the following facts:

> On or about 3-5-01 while in Orange County, I *willfully and unlawfully* entered an inhabited dwelling with the intent to commit larceny. Further on 3-5-01 while in Orange County I *willfully and unlawfully* entered 2 separate commercial structures, Identity Skate Shop, Robinson's May, with the intent to commit larceny . . . .

CP 154 (emphasis added). He admitted to these facts under penalty of perjury. Id.

The Orange County Superior Court sentenced Russell on May 28, 2002, to one year in jail and other conditions. CP 155.

The State argued below that Russell's California conviction for first-degree burglary was comparable to a conviction in Washington for Residential Burglary, and that his two California convictions for second-degree burglary were comparable to convictions for second-degree

burglary. 5RP 4-5. Despite the submission of the certified records from California, Russell argued that the State had failed to prove that the convictions existed at all, and that his offender score should be zero. 5RP 7-8.

The trial court reviewed the certified records submitted by the State. 5RP 8-9. The trial court found that the State had proven the existence of Russell's California convictions by a preponderance of the evidence.[9] 5RP 8-9. Based on the facts admitted to in Russell's plea statement, the trial court then found that the first-degree burglary conviction was comparable to Residential Burglary and that the two second-degree burglary convictions were comparable to second-degree burglary in Washington. 5RP 8-11.

Russell thus had three prior felony points. Because his current conviction was for second-degree burglary, each point for a prior burglary conviction was doubled by statute, giving him an offender score of six. See RCW 9.94A.525(16); see also CP 77 (Judgment and Sentence). The trial court sentenced Russell based on this offender score to a Drug Offender Sentencing Alternative. CP 77, 79 (Judgment and Sentence).

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[9] The State, when submitting the certified records to the trial court, had re-ordered the documents in order to fit them into separate appendices for the criminal information, plea statement and sentence, and clerk's minutes—the trial court noted however that the certification stamp was for 19 pages and that this matched the number of pages submitted. 5RP 9; see CP 156.

b. Standard Of Review.

An appellate court reviews a sentencing court's calculation of an offender score *de novo*. State v. Moeurn, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010). Whether a sentence violates a defendant's Sixth Amendment right to a jury trial is a claim that likewise is reviewed *de novo*. State v. Mutch, 171 Wn.2d 646, 656, 254 P.3d 803 (2011).

c. The Trial Court Properly Examined Facts That Russell Had Admitted To In His California Plea Statement.

Under the Sentencing Reform Act (SRA), a sentencing court employs a grid to calculate a defendant's standard sentencing range, according to the crime's seriousness level and the defendant's offender score. RCW 9.94A.505-.530; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued under RCW 9.94A.525, based on a defendant's history of criminal convictions. Under RCW 9.94A.525(3), "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." The burden to prove the validity and comparability of an out-of-state conviction is on the State. Ford, 137 Wn.2d at 480.

Washington courts employ a two-prong test for determining the comparability of an out-of-state conviction. State v. Morley, 134 Wn.2d

588, 605-06, 952 P.2d 167 (1998). Under the legal prong, if the elements of the out-of-state crime for which the defendant was convicted are identical to or narrower than the Washington statute, the out-of-state conviction is comparable and the conviction counts toward the offender score. Id. at 606. If, however, the out-of-state statute is broader than the Washington statute, the court proceeds to a factual inquiry, and considers whether the conduct for which the defendant was convicted would have violated the comparable Washington statute. Id.

The Washington Supreme Court has imposed limitations on this process, in light of decisions of the United States Supreme Court. In In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005), for example, the court observed that Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), required modification of Washington's factual comparability analysis. The United States Supreme Court had held in Apprendi that, with the exception of the mere 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 proved beyond a reasonable doubt." 530 U.S. at 490. Lavery thus clarified that a sentencing court could consider only those facts that had been "admitted or stipulated to, []or proved to the finder of fact beyond a reasonable doubt" in determining whether an out-of-state conviction was comparable.

154 Wn.2d at 258; see also State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

Here, Russell was convicted in California of one count of Burglary in the First Degree and two counts of Burglary in the Second Degree. CP 141-42, 153-55, 158-62. The California Penal Code defines burglary in pertinent part as follows:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, . . . floating home, . . . railroad car, locked or sealed cargo container, . . . trailer coach, . . . any house car, . . . inhabited camper, . . . vehicle . . . when the doors are locked, aircraft . . . or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (West).

Any burglary of an inhabited dwelling house, vessel designed for habitation, floating home, trailer coach, or inhabited portion of any building in California is defined as first-degree burglary. Cal. Penal Code § 460(a) (West). All other burglaries are second-degree burglary. Cal. Penal Code § 460(b) (West).

Russell is correct that the crime of burglary is broader in California than in Washington, in that California does not require that the entry into the dwelling or building be unlawful. The two crimes therefore are not comparable under the legal prong. See State v. Thomas, 135 Wn. App. 474, 483, 144 P.3d 1178 (2006).

Under the factual prong of Washington's comparability analysis, however, Russell's crimes are comparable to burglary in Washington. Russell was charged with and specifically pleaded to *unlawfully* entering a dwelling and two commercial structures, with the intent to commit larceny.[10] CP 141-42, 154. The first crime was factually comparable to Residential Burglary in Washington, which arises when a person enters or remains unlawfully in a dwelling, other than a vehicle, with the intent to commit a crime against a person or property therein.[11] RCW 9A.52.025(1). The second two crimes were factually comparable to second-degree burglary in Washington, which arises when a person enters or remains unlawfully in a building, other than a vehicle or dwelling, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). The trial court properly calculated Russell's offender score.

Russell contends that the United States Supreme Court's recent decision in Descamps v. United States, __ U.S. __, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), precludes sentencing courts from making this type of factual inquiry into the comparability of an out-of-state conviction. Br. of

[10] "Larceny" in California means "theft." Cal. Penal Code § 490a (West). "Theft" is defined in Section 484. See Cal. Penal Code § 484 (West).

[11] While first-degree burglary in California can occur when a person enters any inhabited dwelling house, vessel designed for habitation, floating home, trailer coach, or inhabited portion of any building, Cal. Penal Code § 460(a) (West), Russell pleaded guilty specifically to entering a dwelling. CP 154. Thus, there is no risk that he actually entered a vehicle, which arguably would not be factually comparable in Washington.

App't at 15-19. Descamps held that federal sentencing courts cannot delve into the facts underlying a conviction to determine comparability for purposes of applying the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), unless the out-of-state conviction is for an alternative means crime—and then only for the limited purpose of determining which alternative mean the defendant was convicted of violating. 133 S. Ct. at 2281-82, 2285. The Court reached this decision under the text and history of the ACCA, to avoid Sixth Amendment concerns,[12] and to avert the "practical difficulties" of factual inquiry. Id. at 2287.

Russell's reliance on Descamps is unavailing. His argument has already expressly been rejected by the Washington Supreme Court. In State v. Olsen, 180 Wn.2d 468, 474, 325 P.3d 187, cert. denied, 135 S. Ct. 287 (2014), the court held that Washington's factual comparability test survives Descamps. 180 Wn.2d at 474. Because Washington has already imposed strict limitations on judicial fact-finding at the time of sentencing—i.e., the sentencing court may only consider those facts "that were clearly charged and then clearly proved beyond a reasonable doubt to a jury or admitted by the defendant"—the Sixth Amendment concerns

[12] The Court opined that factual inquiry under the ACCA "would (at the least) raise serious Sixth Amendment concerns[,]" but did not hold that inquiry into the facts underlying a conviction is *per se* barred by the Sixth Amendment. 133 S. Ct. at 2288 (parenthetical in original).

raised by Descamps simply are not implicated when sentencing defendants under the SRA. 180 Wn.2d at 476.

Here, because the California information charged Russell with *unlawfully* entering a dwelling and two commercial structures, and he admitted in his plea statement to entering them unlawfully, the sentencing court properly considered these facts in finding that his California burglary convictions were comparable to burglary convictions in Washington.[13] The trial court properly included these convictions in Russell's offender score. His sentence should be affirmed.

Finally, should this Court agree that the trial court miscalculated Russell's offender score, the State should have an opportunity on remand to submit new evidence in support of Russell's prior convictions. RCW 9.94A.530(2); State v. Jones, 182 Wn.2d 1, 11, 338 P.3d 278 (2014). The trial court may also reconsider whether Russell's prior California

[13] Russell insists that "the fact that [he] admitted in California to allegations that would constitute a felony in Washington does not matter" because "such facts would have been irrelevant to whether Mr. Russell committed a crime in that state[.]" Br. of App't at 17 (citing, *inter alia*, Descamps, 133 S. Ct. at 2281-82). Some language in Descamps arguably supports Russell's position; for example, the Court noted there that "whether [Descamps] ever admitted to breaking and entering is irrelevant." 133 S. Ct. at 2286. But the defendant in Descamps had merely failed to object to the prosecutor's superfluous representation, at the time of his California plea hearing, that his crime involved breaking and entering. Id. at 2282. The instant case is distinguishable because, as the Washington Supreme Court has held, Descamps does not apply to facts that have been *actually charged and admitted to*. Olsen, 180 Wn.2d at 474, 476-77. The Olsen court's reading of Descamps is binding here. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court).

conviction for Receiving Stolen Property—based on the possession of a stolen firearm—is comparable to a felony offense in Washington.[14]

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Russell's conviction and sentence.

DATED this 24th day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JACOB R. BROWN, WSBA #44052
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

[14] The State argued below that Russell's offender score should include an additional point based on a prior conviction in California for Receiving Stolen Property, in which he pleaded to "willfully and unlawfully receiv[ing] property to wit: credit cards [and] handgun[,] knowing said property to be stolen." CP 132, 135, 138-39, 142, 154; 5RP 5. The State argued that this offense was factually comparable to Possessing a Stolen Firearm under RCW 9A.56.310 and 9A.56.140. CP 132, 135, 138-39; 5RP 5. The trial court found that this offense was not comparable. 5RP 10-11. However, the trial court could reconsider this issue on remand with or without additional evidence. See RCW 9.94A.530(2).

INDEX TO APPENDICES

Appendix A

California Information

31/33

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA
POST OFFICE BOX 808
SANTA ANA, CALIFORNIA 92702
TELEPHONE: (714) 834-3600

Filed this 19th day of February, 2002

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

FEB 15 2002

ALAN SLATER, Clerk of the Court
BY M. VALDEZ

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, VS. CLAYTON HARRISON RUSSELL 33 4/3/78 SETH KENNETH CHELINI - 32 1/22/82 AKA SETH KENNETH CHELIN SETH CHELINI Defendant(s)	CASE NO. 01NF1416 REFILED (01NM03133) INFORMATION

THE DISTRICT ATTORNEY OF ORANGE COUNTY hereby accuses the aforenamed defendant(s) of violating the law at and within the County of Orange as follows:

COUNT 1: On or about March 5, 2001, CLAYTON HARRISON RUSSELL and SETH KENNETH CHELINI, in violation of Section 459-460(a) of the Penal Code (BURGLARY FIRST DEGREE - INHABITED DWELLING), a FELONY, did willfully and unlawfully enter an inhabited dwelling house, and trailer coach and inhabited portion of a building inhabited by ED THAETE with the intent to commit LARCENY.

It is further alleged that the above offense is a serious Felony within the meaning of Penal Code Section 1192.7(c)(18), and encompassed within the meaning(s) of Penal Code Sections 460(a), 461.1 and 462(a).

COUNT 2: On or about March 5, 2001, CLAYTON HARRISON RUSSELL and SETH KENNETH CHELINI, in violation of Section 487(d) of the Penal Code (GRAND THEFT FIREARM), a FELONY, did willfully and unlawfully steal, take, carry, and carry away the firearm of ED THAETE.

It is further alleged that the above offense is a serious Felony within the meaning of Penal Code Section 1192.7(c)(26).

COUNT 3: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 459-460(b) of the Penal Code (BURGLARY SECOND DEGREE - COMMERCIAL STRUCTURE), a FELONY, did willfully and unlawfully enter a IDENTITY SKATE SHOP located at 7884 LA PALMA AVE, BUENA PARK under the dominion and control of IDENTITY SKATE SHOP with the intent to commit LARCENY.

COUNT 4: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 496(a) of the Penal Code (RECEIVING STOLEN PROPERTY), a FELONY, did willfully and unlawfully buy, receive, conceal, sell, withhold and aid in concealing, selling and withholding property, to wit: CREDIT CARDS & HANDGUN, which had been stolen and obtained by extortion, knowing that said property had been stolen and obtained by extortion.

COUNT 5: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 459-460(b) of the Penal Code (BURGLARY SECOND DEGREE - COMMERCIAL STRUCTURE), a FELONY, did willfully and unlawfully enter a ROBINSON'S MAY located at 300 BREA MALL WAY, BREA under the dominion and control of ROBINSON'S MAY with the intent to commit LARCENY.

COUNT 6: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 459-460(b) of the Penal Code (BURGLARY SECOND DEGREE - COMMERCIAL STRUCTURE), a FELONY, did willfully and unlawfully enter a NORDSTROM'S located at 600 LOS CERRITOS CENTER, CERRITOS under the dominion and control of NORDSTROM'S with the intent to commit LARCENY.

COUNT 7: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 484g(a) of the Penal Code (USE OF ACCESS CARD WITHOUT CONSENT), a MISDEMEANOR, did willfully and unlawfully, with intent to defraud, use for the purpose of obtaining money, goods, services and anything else of value an access card and access card account information altered, obtained and retained in violation of section 484e and 484f and an access card which he/she knew was forged, expired and revoked.

COUNT 8: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 484g(a) of the Penal Code (USE OF ACCESS CARD WITHOUT CONSENT), a MISDEMEANOR, did willfully and unlawfully, with intent to defraud, use for the purpose of obtaining money, goods, services and anything else of value an access card and access card account information altered, obtained and retained in violation of section 484e and 484f and an access card which he/she knew was forged, expired and revoked.

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COUNT 9: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 484e(c) of the Penal Code (UNLAWFUL ACQUISITION OF AN ACCESS CARD BELONGING TO ANOTHER), a MISDEMEANOR, did willfully and unlawfully acquire an access card from another without the cardholder's, EDWARD THAETE, and issuer's CAPITAL ONE, consent and with knowledge that an access card had been acquired from another without said cardholder's and issuer's consent, with the intent to use it, sell and transfer it to a person other than the issuer and the cardholder.

COUNT 10: On or about March 5, 2001, CLAYTON HARRISON RUSSELL, in violation of Section 484g(a) of the Penal Code (USE OF ACCESS CARD WITHOUT CONSENT), a MISDEMEANOR, did willfully and unlawfully, with intent to defraud, use for the purpose of obtaining money, goods, services and anything else of value an access card and access card account information altered, obtained and retained in violation of section 484e and 484f and an access card which he/she knew was forged, expired and revoked.

PRIOR(s)

It is further alleged that defendant, SETH KENNETH CHELINI, has previously suffered the following conviction or juvenile adjudication of a serious or violent felony within the meaning of Penal Code Sections 667(d) and (e)(1) and 1170.12(b) and (c)(1):

Said defendant, SETH KENNETH CHELINI, was previously convicted of a violent/serious felony offense, a violation of Section 245(A)(1) of the PENAL Code, in the Superior Court, County of ORANGE, State of California (Case Number 00J17049I), on and about 16th day of August, 2000.

It is further alleged that the defendant(s), SETH KENNETH CHELINI, was previously convicted of a serious felony in violation of Section 245(A)(1) of the PENAL Code in the JUVIE Court, County of ORANGE, State of California (Case Number J17049), on and about 16th day of August, 2000, within the meaning of Penal Code Sections 667(a)(1) and 1192.7(c).

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Contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State Of California.

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code Section 1054.3.

DATED: 2-14-2

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

BY: Dennis D Bauer
DEPUTY DISTRICT ATTORNEY

01F05759

Appendix B

California Guilty Plea and Sentence

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
AND FOR THE COUNTY OF ORANGE

OINF1414 PEOPLE VS. Clayton Russell

GUILTY PLEA IN THE SUPERIOR COURT

1. My true full name is Clayton Harrison Russell. I am represented by Robert J. Hickey who is my attorney.

2. I understand that I am pleading guilty and admitting the following offenses, prior convictions and special punishment allegations, carrying possible penalties as follows:

CT.	Charge	Sentence Range in Years (Circle if a particular sentence has been agreed on)	Enhancements	yrs	Term for Priors	yrs	Total Penalty Years
5	459-460	16-2-3					8 month

Maximum Total Punishment 1 year 8 months 8yr

2a. ☐ I understand that I am ineligible for probation and will serve a state prison sentence for count(s) _____ of the information to which I am pleading guilty.

2b. ☐ I understand for persons sentenced to state prison the following terms of parole apply after expiration of the prison term.

- ☐ Determinate sentence: 3 years parole plus 1 year maximum confinement on revocation. An additional year of confinement can be imposed for my misconduct during the year of my revocation confinement. P.C. 3057
- ☐ Life sentence non-murder case: 5 years parole plus 1 year maximum confinement on each revocation. (Maximum total revocation confinement is 2 years.)
- ☐ Life sentence murder conviction:
  1st degree murder: 7 years to life parole.
  2nd degree murder: 5 years to life parole.

2c. ☐ I understand that it is absolutely necessary all plea agreements, promises of particular sentences or sentence recommendations by completely disclosed to the court on this form.

3. ☐ I understand that I have the right to be represented by an attorney at all stages of the proceedings until the case is terminated and that if I cannot afford an attorney, one will be appointed free of charge.

4. ☐ I understand that I have a right to a speedy and public trial by jury. I hereby waive and give up this right.

5. ☐ I understand that I have the right to be confronted by the witnesses against me and to cross examine them myself or through an attorney. I hereby waive and give up these rights.

6. ☐ I understand that I have the right to testify on my own behalf but that I cannot be compelled to be a witness against myself, and may remain silent if I so choose. I hereby waive and give up these rights.

7. ☐ I understand that I have the right to call witnesses to testify in my behalf and to invoke the compulsory process of the court to subpoena those witnesses. I hereby waive and give up these rights.

8. ☐ I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

9. ☐ I understand that I will be required to register as a sex offender pursuant to Section 290 of the Penal Code.

10. ☐ I understand that I will be required to provide blood/saliva samples as required under Section 290.2 of the Penal Code.

11. ☐ I understand that I will be required to register as a narcotic offender pursuant to Section 11590 of the Health and Safety Code.

12. ☐ I understand that I have the right to appeal the Superior Court's denial of my Penal Code Section 1538.5 motion (suppression of evidence motion) in this case. I hereby waive and give up this right.

13. ☐ I understand that I have the right to receive credit for all time I have spend in custody prior to my sentencing in this case (both work time and good time). I hereby waive and give up this right.

JNF1416 CLAYTON RUSSELL

14. I understand that under the Fourth and Fourteenth Amendments to the United States Constitution, I have a right to be free from unreasonable searches and seizures. I hereby waive and give up this right, and further agree for the period during which I am on probation, to submit my person and property, including any residence, premises, container or vehicle under my control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant, and with or without reasonable cause, or reasonable suspicion.

15. I understand that I have the right to reject probation and I hereby waive and give up that right and accept probation on all the terms and conditions contained in Page 3 of this form.

16. My lawyer has told me that if I plead guilty to the felony charge(s), enhancement(s), and prior conviction(s) as listed on page 1 of this form, the Court will require me to pay restitution to the victim as determined (G.C. § 13967(c) and/ or a restitution fine of between $200 and $10,000 [G.C. § 13967(a)] and will: (circle one)

(a) Sentence me to state prison for the term prescribed by law, which term is _____ years in the penitentiary. I waive and give up my right to make application for probation and request immediate sentence.

(b) Consider my application for probation before sentence is pronounced. I understand the court may send me to state prison for a maximum of _____ years.

(c) Grant me probation under the conditions set forth in page 3 (attached) that I have signed and initialed. I understand that if I violate my probation the court may send me to the penitentiary for a maximum of 7 YEARS 8 months _____ years on this case.

(d) Commit me to CYA ☐ Commit me pursuant to 1203.03 PC ☐ Institute CRC proceedings ☐

(e) Other _____

17. I certify all other cases pending against me in the County and their proposed disposition are as follows:
NONE PER D

18. I understand that a plea of guilty to this offense may also constitute an admission that I violated a former grant of probation and may result in additional penalties being imposed.

19. I have discussed the charge(s), the facts and the possible defenses with my attorney.

20. I offer my plea of "Guilty" freely and voluntarily and with full understanding of all the matters set forth in the pleading and in this form. No one has made any threats, used any force against myself, family or loved ones, or made any promises to me except as set out in this form, in order to convince me to plead guilty.

21. I offer to the court the following facts as the basis for my plea of guilty to a felony:
ON OR ABOUT 3-5-01 WHILE IN ORANGE COUNTY, I WILLFULLY AND UNLAWFULLY ENTERED AN INHABITED DWELLING WITH THE INTENT TO COMMIT LARCENY. FURTHER ON 3-5-01 WHILE IN ORANGE COUNTY I WILLFULLY AND UNLAWFULLY ENTERED 2 & 3 SEPERATE COMMERCIAL STRUCTURES, IDENTITY SKATE SHOP, ROBINSON'S MAY, [illegible] WITH THE INTENT TO COMMIT LARCENY. FURTHER ON 3-5-01 WHILE IN ORANGE COUNTY, I WILLFULLY AND UNLAWFULLY RECEIVED PROPERTY TO WIT: CREDIT CARDS, HANDGUN KNOWING SAID PROPERTY TO BE STOLEN

22. I understand each and every one of the rights outlined above and I hereby waive and give up each of them in order to enter my plea to the above charge(s). I am entering a plea of guilty because I am in fact guilty and for no other reason. I declare under penalty of perjury that I have read, understood, and personally initialed each item above and discussed them with my attorney, and everything on this form is true and correct. The signing and filing of this form is CONCLUSIVE EVIDENCE I have plead guilty to the enumerated charges herein.

EXECUTED at FULLERTON, California.

DATED 5-29-02 SIGNED Clayton Russell
Defendant

23. DEFENDANT'S ATTORNEY ONLY – I am attorney of record and I have explained each of the above rights to the defendant, and having explored the facts with him/her and studied his/her possible defenses to the charge(s), I concur in his/her decision to waive the above rights and to enter a plea of guilty. I further stipulate this document may be received by the court as evidence of defendant's intelligent waiver of these rights and that it shall be filed by the clerk as a permanent record of that waiver. No promises of a particular sentence or sentence recommendation have be made by myself or to my knowledge by the prosecuting attorney or the court which have not been fully disclosed in this form.

DATED 5-29-02 SIGNED _____
Attorney

24. FOR THE PEOPLE: Date _____ DEPUTY DISTRICT ATTORNEY _____
(After reading, initialing and signing, give to courtroom clerk)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

C- 01NF1416 PEOPLE vs. CLAYTON HARRISON RUSSELL

PROBATION/SENTENCING (SUPERIOR COURT)

1. ☒ State Prison for _____ yrs. _____ mos. Execution suspended. Placed on probation for _____ years.
2. ☒ Imposition of sentence suspended. Placed on probation for 3 years.
3. ☒ Sentenced to the County jail for _____. Execution suspended. Placed on probation for _____ years

TERMS AND CONDITIONS OF PROBATION

4. ☐ Supervised OR ☒ Probation Department relieved of supervision.
5. ☐ Spend 1 YEAR in County jail. Credit 334 days actual time served and 160 days good/work time. 3 total
Stay granted until _____. 21
6. ☒ Pay fine of: _____ (up to $10,000 for most felonies. PC 672)
_____ (up to $20,000 for selected drug offenses. H&S 11372)
_____ (up to $50,000 for selected serious drug offenses H&S 11352.5)
plus penalty assessment.
6a. ☐ Pay restitution fine of 7000. (Minimum of $200 to maximum of $10,000 on all felonies. GC 13967(a).)
7. ☐ Make full restitution in amounts and manner as determined by the court in count(s) 1, 3, 4, 5 to ED Thacker
8. ☐ Reimburse the ANAHEIM Police Department as determined by the court. and Anaheim police department
9. ☒ Register pursuant to Section 11590 of the Health and Safety Code.
10. ☒ Register pursuant to Section 290 of the Penal Code.
11. ☒ Not be in the presence of minor children under the age of 18 unless accompanied by responsible adult(s) over 21 years of age and approved by probation officer.
12. ☒ Use no unauthorized drugs, narcotics or controlled substances and submit to drug or narcotic testing program as directed by probation or police officer.
13. ☐ Submit your person and property, including any residence, premises, container or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant, and with or without reasonable cause, or reasonable suspicion.
14. ☐ Cooperate with probation officer in plan for (psychological or psychiatric) (alcohol and/or drug) treatment.
15. ☒ Have no blank checks in possession, not write any portion of any checks, not have checking account nor use or possess credit cards or open credit accounts unless approved by probation.
16. ☐ Seek training, schooling or employment and maintain residence and associates as approved by probation.
17. ☐ Not own, use or possess any type of dangerous or deadly weapon.
18. ☐ Obey all laws, orders, rules and regulations of the Probation Department, Court and jail.
19. ☐ Violate no law.
20. ☒ All of the below apply unless lined out
a. Not drive a motor vehicle with a measurable amount of alcohol in the blood.
b. Submit to a chemical test of my blood on demand of any peace or probation officer.
c. Not be present in any establishment where the primary items for sale are alcoholic beverages.
d. Not consume any alcoholic beverages.
e. Not drive a motor vehicle without a valid California driver's license on my person.
21. ☒ Not in any manner, directly or indirectly, initiate contact with nor communicate with _____
22. ☐ Other conditions: CRUZ WAIVER PROBATION SENTENCE ONLY IF DEFENDANT PERMITS FOR SENTENCING
23. ☐ Pay cost of probation in the amount of $_____ per month as directed by Probation Officer, to begin_____.
24. ☒ Pay lab analysis fee of $50.00 (mandatory) for each specified drug offense conviction (H&S 11372.5).
25. ☐ I understand that the Court ultimately determines the conditions of probation and I have the right to request the Court to modify or strike any condition imposed by the Probation Department that I feel is unreasonable.

I have read and agree to all the conditions of probation I have initialed above.

DATED: 5/28/02 _____ Defendant

F026-413.8 (R9/93) White–File Copy; Yellow–Plaintiff; Pink–Defendant

Appendix C

California Clerk's Minutes

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

MINUTES

Case : 01NF1416 F A
Name : Russell, Clayton Harrison

Date of Action	Seq Nbr	Code	Text
05/26/02	[redacted]	HEARD	[redacted]
	2	OFJUD	Officiating Judge: Richard W. Stanford Jr, Judge
	3	OFJA	Clerk: G. Gonzales
	4	OFBAL	Bailiff: C. V. Moreno
	5	OFREP	Court Reporter: Roxanne Drake
	6	TRSTR	**This case came on regularly for trial.**
	7	TRTXT	The Court and Counsel conferred in chambers, off the record at 9:45 a.m.
	8	APDDA	People represented by Tracy Rinauro, Deputy District Attorney, present.
	9	APDWCR	Defendant present in Court with counsel Robert J. Hickey, Retained Attorney.
	10	FILED	People's Motion in Limine filed.
	11	PLWTH	**Defendant's motion to WITHDRAW NOT GUILTY PLEA to count(s) 1, 3, 4, 5 granted.**
	12	ADLCR	Defendant advised of legal and constitutional rights.
	13	ADMAX	Defendant advised of maximum possible sentence.
	14	ADCSQ	Defendant advised of consequences of violating probation and parole.
	15	PLGCT	**To the Original Information defendant pleads GUILTY as to count(s) 1, 3, 4, 5.**
	16	FIWWR	Defendant's written waiver of legal and constitutional rights on GUILTY plea received and ordered filed.
	17	FIFNS	Financial Statement of Assets filed.
	18	PLCJN	Counsel joins in waivers and plea.
	19	PLFWR	Court finds defendant intelligently and voluntarily waives legal and constitutional rights to jury trial, confront and examine witnesses, and to remain silent.
	20	PLFBA	Court finds factual basis and accepts plea.
	21	WVAFS	Defendant waives arraignment for sentencing.
	22	PLRIS	Defendant requests immediate sentencing.
	23	WVTIM	Defendant waives statutory time for Sentencing.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

MINUTES

Case : 01NF1416 F A
Name : Russell, Clayton Harrison

Date of Action	Seq Nbr	Code	Text
05/28/02	24	CLSET	**Sentencing set on 06/20/2002 at 09:00 AM in Department N10.**
	25	DFOTR	Defendant ordered to appear.
	26	TEXT	People state for the record the reason the disposition
	27	MOTBY	Motion by People to dismiss remaining counts taken under submission
	28	BLPBS	Present bail deemed sufficient and continued.
	29	CNOTEA	check to see if prior have been deleted, Motion to dismiss remaining counts under submission.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

MINUTES

Case : 01NF1416 F A

Name : Russell, Clayton Harrison

Date of Action	Seq Nbr	Code	Text
[redacted]			
	2	OFJUD	Officiating Judge: Gregg L. Prickett, Judge
	3	OFJA	Clerk: R. Peace
	4	OFBAL	Bailiff: D. W. Drake
	5	OFREP	Court Reporter: Roxanne Drake
	6	APDDA	People represented by Tracy Rinauro, Deputy District Attorney, present.
	7	APDWC	Defendant present in Court with counsel Robert J. Hickey, Retained Attorney.
	8	WVAFS	Defendant waives arraignment for sentencing.
	9	WVTIM	Defendant waives statutory time for Sentencing.
	10	PBDAP	Defendant applies for probation.
	11	WVPBR	Probation report waived.
	12	PRISS	No legal cause why judgment should not be pronounced and defendant having Pled Guilty to count(s) 1, 3, 4, 5, Imposition of sentence is suspended and defendant is placed on 3 Years FORMAL PROBATION on the following terms and conditions:
	13	PRJAL	**Serve 1 Years Orange County Jail as to count(s) 1, 3, 4, 5.**
	14	CODJP	**Court denies Probation Work Furlough, Probation Home Detention, County Parole, Sheriff Work Release, Supervised Electronic Confinement, Honor Farm, Theo Lacy Facility, or Community Work Program.**
	15	JLCTS	**Credit for time served: 21 actual, 10 conduct, totaling 31 days.**
	16	PRSRF	Pay $200.00 Restitution Fine pursuant to Penal Code 1202.4 or Penal Code 1202.4(b).
	17	PRRES	Pay restitution in the amount as determined and directed by Probation Officer as to count(s) 1, 3, 4, 5.
	18	PRTXT	Victim name: Ed Thaete
	19	PRTXT	Reimburse Anaheim Police Department as determined by probation department

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE

MINUTES

Case : 01NF1416 F A

Name : Russell, Clayton Harrison

Date of Action	Seq Nbr	Code	Text
06/20/02	20	PRSAS	Submit your person and property including any residence, premises, container, or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant, and with or without reasonable cause or reasonable suspicion.
	21	PRPSY	Cooperate with Probation Officer in any plan for psychiatric, psychological, alcohol and/or drug treatment, or counseling.
	22	PRTSE	Seek training, schooling, or employment and maintain residence as approved by Probation Department.
	23	PRASA	Do not associate with anyone disapproved of by your Probation Officer.
	24	PRNWP	Do not own, use, or possess any type of dangerous or deadly weapon.
	25	ADTXT	Defendant advised by the Court that a felony conviction makes it unlawful for the defendant to possess a firearm for life in California and 10 years anywhere in the U.S. under Federal Law
	26	ADTXT	Defendant advised by the Court that he has the right to a hearing re restitution amount
	27	PROBY	Obey all laws, orders, rules, and regulations of the Court, Jail, and Probation.
	28	PRVNL	Violate no law.
	29	PRPCD	Pay the costs of probation based on the ability to pay as directed by the Probation Officer.
	30	PRATC	Defendant accepts terms and conditions of probation.
	31	PRFEP	All fees payable through the Probation Department. (Entered NUNC_PRO_TUNC on 10/10/08)
	32	PRTXT	All terms and conditions to be directed and monitored through the Probation Department
	33	PBRPT	Defendant to report to Probation Officer within 72 hours of release.
	34	DFREM	Defendant remanded to the custody of the Sheriff.
	35	NTJAL	**Commitment Order issued.**
	36	BLBEX	Court orders bail bond exonerated.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

MINUTES

Case : 01NF1416 F A

Name : Russell, Clayton Harrison

Date of Action	Seq Nbr	Code	Text
06/20/02	37	CDCDM	Count(s) 2, 6, 7, 8, 9, 10 DISMISSED - Motion of People.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the Brief of Respondent, in State v. Clayton Harrison Russell, Cause No. 72428-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of July, 2015.

Name:
Done in Seattle, Washington