

NO. 35962-6

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN CONTRERAS REBOLLAR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 06-1-01643-4

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STATE OF WASHINGTON
BY _____
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COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's untimely motion for a mistrial when he could not show a trial irregularity that prejudiced him and the trial court gave a limiting instruction?
2. Did the state adduce sufficient evidence to prove the absence of self-defense?
3. Should this Court remand this case for resentencing to allow the state to offer evidence of defendant's prior criminal record and community custody status when defendant did not specifically object when the State alleged those facts to the sentencing judge?

B. STATEMENT OF THE CASE.

1. Procedure

On April 13, 2006, the State filed an information charging Adrian Contreras-Rebollar, hereinafter "defendant," with two counts of first degree assault with firearm enhancements, and one count of second degree unlawful possession of a firearm. CP 1-2. On November 30, 2006, Attorney Jay Berneburg filed a notice of association in this case. CP 18. On January 17, 2007, the parties appeared before the Honorable Ronald

Culpepper for trial. RP 3¹. On January 17, 2007, defendant pled guilty to one count of second degree unlawful possession of a firearm. CP 19-22. On January 19, 2007, the State filed a motion and affidavit to grant immunity to Ahria James Kelley. CP 23. The trial court granted the State's motion to grant immunity on the same date. CP 24-26.

On January 25, 2007, defendant filed a motion for a mistrial based upon Ms. Hernandez' testimony that defense counsel Berneburg met with her a couple of days before trial and told her that the victims' vehicle's headlights were out. CP 29-54. The court denied defendant's motion for a mistrial. RP 673. On February 1, 2007, the jury returned verdicts of guilty on both counts of first degree assault and returned special verdicts indicating defendant had been armed with a firearm when he committed those crimes. CP 108, 110, 112-113; RP 1048.

On February 16, 2007, the Court sentenced defendant to a total of 380 months: 1) 150 months on first degree assault, plus 60 months flat time on the firearm enhancement; 2) 110 months on first degree assault, plus 60 months flat time on the firearm enhancement; 3) 20 months on second degree unlawful possession of a firearm. CP 116-128; SRP 20-21.

¹ The verbatim report of proceedings shall be referred to as follows:

- 1) The eight consecutively paginated volumes that shall be referred to as "RP."
- 2) The sentencing report of proceedings shall be referred to as "SRP."
- 3) All others shall be referred to as "DATE RP."

The first degree assault sentences run consecutive to each other. CP 116-128; SRP 20. Additionally, the court ordered 24 to 48 months community custody on the two first degree assault convictions, and imposed standard costs and fines. CP 116-128; SRP 20. Defendant refused to sign any documents at his sentencing, including his judgment and sentence and stipulation to prior criminal history. CP 114-115, 116-128; SRP 22-25.

Defendant filed a timely notice of appeal on February 16, 2007. CP 129.

2. Facts

On April 12, 2008, defendant shot Nicholas Solis and Ahria Kelley as they were driving to Yessica Rosas' house. RP 492, 500. Neither Solis² nor Kelley saw defendant's car before he shot at them. RP 416, 500. Solis was shot several times and, as a result of this incident, is paralyzed from the chest down. RP 392, 393. Kelley was also shot by defendant in this incident. RP 504.

Regina Hernandez testified that she met defendant through Solis on April 11th. RP 252. She was with defendant from the evening of the 11th and into the following day. RP 235, 243. Throughout the evening of April 11th, Hernandez and defendant went to various locations where they drank alcohol and used methamphetamine. RP 233, 238, 242, 496, 266,

² In the verbatim report of proceedings, Solis is often referred to by his moniker, "Smiley."

268. At around five or six in the evening, Hernandez and defendant went to an alley behind Wolfie's house to get a car for Solis. RP 252, 253, 254, 256. She and defendant dropped Solis off in the alley and Solis got into a light colored car. RP 256-57. Hernandez testified up until this point defendant and Solis were getting along. RP 255.

After dropping Solis off, Hernandez and defendant drove away, but were later flagged down by Solis and Kelley, who was a passenger in Solis' vehicle. RP 257-58. Defendant and Solis argued about a sack of dope and a palm pilot. RP 258-59. All four of them went to Hilltop where defendant and Adrian again got into an argument. RP 259. Defendant returned to his car and said "This mother fucker is getting on my nerves; I'm going to do him in." RP 261. Hernandez saw defendant get his gun from the back of his vehicle and place it by the driver's seat. RP 261, 262, 303, 306. Defendant and Solis say they'll see each other later; defendant and Hernandez drive away. RP 266.

Defendant and Hernandez returned to Wolfie's alley where Hernandez again saw Solis. RP 268. She approached Solis, but saw he had a gun and his bandana up around his face. RP 268, 270, 272, 310, 314. Solis told her to get out of the way because he did not want to hurt her. RP 268. Solis pointed his gun at defendant and defendant shot at Solis. RP 269, 270, 274, 275. Solis' gun did not fire. RP 269, 314-15. Hernandez

got into defendant's car and she drove defendant to Yessica Rosas' house.
RP 269, 276, 558.

While Yessica Rosas and Hernandez were talking in Yessica's room, defendant went outside to his car. RP 282, 283, 284. When he came back inside, he was wearing dark clothes, sunglasses, and carrying his gun. RP 569-70. Yessica Rosas testified that when defendant came back inside he appeared nervous and looked like he was wearing a disguise. RP 574, 586. Yessica's father, Jose Rosas, heard people talking in Yessica's room and told defendant and Regina to leave the house because it was very late. RP 536. Mr. Rosas testified that he watched defendant and Hernandez get into their car and drive away. RP 537-38, 539. Before returning to bed, Mr. Rosas stopped to talk with Yessica for a minute. RP 539, 540. Mr. Rosas then returned to bed. RP 540. Ten to fifteen minutes later, Mr. Rosas was awakened by the sound of gunshots. RP 540. Mr. Rosas testified that he heard around five shots in rapid succession. RP 540-41.

When defendant and Hernandez left Yessica Rosas' house, Hernandez sat in the front passenger seat and defendant was in the driver's seat. RP 230-31, 286. Hernandez heard defendant say "There those mother fuckers are," and then defendant started shooting. RP 289, 316. All the shots were coming from defendant's vehicle; none were coming

from anywhere else. RP 289-90. When it was over, defendant said “I just dumped on those fools.” RP 290, 301. Hernandez testified that defendant did not appear afraid. RP 290. Instead, he appeared brave, calm, and cool. RP 290. Hernandez did not see Solis’ car approach because she was looking down at CDs. RP 289, 299, 300, 316. Hernandez testified that she looked up after defendant started shooting and all she saw was the back of Solis’ vehicle’s taillights. RP 316.

After midnight on April 12th, Ahria Kelley and Nick Solis were driving to Yessica Rosas’s house when defendant shot them. RP 492, 500. Kelley testified he did not see a gun, but did see the flash when the gun was fired. RP 500. Kelley said he knew they were getting fired at and said “Duck.” RP 501. After he saw the flash and said ‘Duck’ Kelley felt a bullet come through and hit his bone. RP 503, 504. The shot came out of defendant’s driver’s side window. RP 501. Kelley said the defendant’s car was parked at the side of the road with no lights on when defendant started firing at him and Solis. RP 501. Kelley testified that Solis was not armed when defendant shot them. RP 502. A rifle was found inside the Solis’ vehicle. RP 192. It appeared to be resting between the driver’s and passenger’s seats with the barrel end pointing toward the dash and the butt of the rifle resting against the back seat. RP 192. It appeared like Solis’ arm was resting on the rifle barrel. RP 192.

Kelley testified that after defendant shot them, Solis' car crashed into a mailbox and stopped. RP 504, 506. Kelley waited until defendant's car left the scene before he tried to get Solis out of his car. RP 509. He was unable to get Solis out of the car. RP 509. Solis tried to talk, but he made a sound like "haw." RP 508. Solis then said he couldn't move his legs. RP 509. Kelley went to Yessica's house to get help. RP 511.

Solis testified that he has little memory of the day defendant shot him. RP 394. He recalled driving to Yessica's house, but didn't know that defendant would be there. RP 415. Solis did not see defendant's car, but remembered seeing sparks at the time of the shooting. RP 416. Solis said he was not trying to shoot defendant when defendant shot him. RP 422. As a result of being shot by defendant, Solis is paralyzed from his chest down. RP 393.

Kim Say-Ye testified that when she came home on April 12th after midnight and saw a vehicle parked on the grass in front of her neighbor's house. RP 103. The headlights to the vehicle were on. RP 103. Shortly thereafter, police arrived on the scene. Inside the vehicle was Solis, who had been shot and appeared to have a bullet in his left arm pit. RP 127.

Defendant admitted that he had shot Solis, but testified he did not know Kelley was in the car with Solis. RP 874, 875.

After the shooting, defendant and Hernandez went to a motel and had sex. RP 287, 289, 290-91, 292. The following morning, the police contacted defendant and Hernandez as they were exiting their hotel room. RP 293, 701-02. Defendant was carrying his gun in his coat when he exited the hotel room, but when he became aware the police were there, defendant returned to the room. RP 293-94, 702. When he exited his hotel room, defendant no longer had his gun. RP 703. The police found defendant's gun in the hotel room wrapped in a coat. RP 692.

As defendant and Hernandez drove away from Yessica Rosas' house, he testified that he saw Solis' car approaching. RP 871-72. Defendant testified that he saw Solis' headlights go out, which he believed was an indication that Solis' intended a drive by shooting. RP 872. Defendant testified that he saw the barrel of Solis' gun rise and thought that Solis was going to shoot him. RP 873, 875. Defendant testified that Hernandez grabbed his arm and begged him to do something. RP 872. Defendant testified that he grabbed his gun, ducked down and fired toward Solis' vehicle. RP 875-76.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S UNTIMELY MOTION FOR A MISTRIAL BECAUSE THE IRREGULARITY, IF ANY, WAS NOT SERIOUS AND THE COURT GAVE A LIMITING INSTRUCTION.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion and will only be overturned when there is a "substantial likelihood" that the error prompting the motion affected the jury's verdict. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10, *cert denied* 501 U.S. 1237, 111 S. Ct. 2867, 115 L.Ed.2d 1033 (1991). A trial court abuses its discretion "when no reasonable judge would have reached the same conclusion." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989). Trial courts "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert denied*, 479 U.S. 995 (1986). The trial court is best suited to assess the prejudice of a statement. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

Courts look at (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction

to disregard the remark. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). When the above criteria are applied to the facts of this case, it is clear that there is not a substantial likelihood that Hernandez' testimony affected the outcome of the trial.

In *State v. Greiff*, 141 Wn.2d 910, 913, 10 P.3d 390 (2000), Greiff was convicted of second degree rape after his first trial resulted in a hung jury. On appeal, Greiff alleged that the trial court abused its discretion when it denied Greiff's motion for a mistrial which was based upon the State's failure to advise Greiff that a key officer's testimony would be different in the second trial than it was in the first. *Greiff*, 141 Wn.2d 910, 917. In his attorney's opening statement, he told the jury that Officer Marlow would testify that Officer Marlow repeatedly asked the victim if she had been sexually assaulted, and the victim repeatedly denied that she had been. *Id.* at 916-17. However, when Officer Marlow testified, he denied he had asked the victim if she had been sexually assaulted. *Id.* at 917. When confronted with his prior testimony, Officer Marlow explained that his testimony was different because, at the prior proceeding, he had confused Greiff's case with another. *Id.* at 917-18. The prosecutor became aware of Officer Marlow's anticipated change in testimony the day before the second trial started. *Id.* at 919.

In Greiff's motion for a mistrial, he argued that his attorney's credibility had been "undoubtedly damaged" because he had promised the jury he would elicit certain testimony from Officer Marlow and failed to

deliver on that promise. *Id.* at 921. The trial court found that there was not a substantial likelihood that the State's discovery violation affected the outcome of the trial and denied his motion. *Id.* at 921. In affirming the lower court's decision, the appellate court noted that if the defense was prejudiced by the trial irregularity, the trial court took appropriate curative steps (admitting the transcript of Officer Marlow's testimony from the prior trial and instructing the jury to consider it in evaluating Officer Marlow's credibility) to minimize any negative impact the opening statement would have had on Greiff's trial counsel's credibility. *Id.* at 922.

In the present case, the defendant does not allege that any of the three criteria used in *Escalona* to determine if the trial court abused its discretion are met. Instead, the defendant merely asserts that Hernandez' testimony challenged the credibility and ethics of defendant's trial counsel, and therefore the court abused its discretion when it denied defendant's motion for a mistrial. Brief of Appellant at 15. Defendant's arguments fail because Hernandez' testimony did not prejudice defendant and, assuming there was some prejudice, the trial court properly allowed Berneburg to testify in rebuttal to mitigate that prejudice. RP 813-29.

At trial, Hernandez, who was in the car with defendant when defendant shot Solis and Kelley, testified as follows on the morning of Tuesday, January 23, 2007:

PROSECUTOR: And you see a car coming?

HERNANDEZ: Coming.

PROSECUTOR: Then what happens?

HERNANDEZ: The headlights were out, but the other side of the lights were on. You understand.

PROSECUTOR: Well, you tell me.

HERNANDEZ: Like these are the main lights. They're off, but the outside are on, like the single lights, and I wasn't giving the car too much attention because I'm looking at the CD's, but all I remember is Adrian saying, "There those mother fuckers are," and I heard gunshots. And then I just looked back out the window, and the car brakes were on, and the car slowed down. I seen no heads or nothing, but to be honest, I thought it was somebody like an older person. I didn't know who it was.

RP 289.

During a recess, the prosecutor read to Hernandez the statement she gave to police the day after the shooting. RP 298. After the recess, Hernandez testified as follows.

PROSECUTOR: One thing I want to bring up first is the issue of whether you saw headlights on the approaching vehicle as you described. Did you actually see them?

HERNANDEZ: I didn't see the vehicle until I looked back at the brake lights.

PROSECUTOR: Why did you say earlier that you actually saw the side lights?

HERNANDEZ: I wasn't --

PROSECUTOR: The defense attorney?

HERNANDEZ: Yes, he told me that when he came to visit?

PROSECUTOR: When did he visit you?

HERNANDEZ: The day before yesterday.

PROSECUTOR: He didn't tell you to say that, did he?

HERNANDEZ: No.

PROSECUTOR: Did he tell you --

HERNANDEZ: That the lights were off.

PROSECUTOR: And my question then is: What is the truth, what he told you --

HERNANDEZ: The truth is what I said in the statement. I didn't see the car coming; I only seen the brake lights.

RP 299-300.

Defense counsel made no objection. On cross examination, the following exchange took place between Mr. Schoenberger and Hernandez:

DEFENSE ATTY: We met last Sunday didn't we?

HERNANDEZ: Mm-hmm.

DEFENSE ATTY: And Mr. Berneburg and I came and talked with you, didn't we?

HERNANDEZ: Yes sir.

DEFENSE ATTY: And we didn't tell you the headlights were off, did we? We said were the headlights on or off; isn't that right?

HERNANDEZ: Mr. Berneburg told me that the lights were off and to say that when I got to court.

DEFENSE ATTY: Didn't you respond that when the lights are off they do that when they're doing a drive-by shooting?

HERNANDEZ: Yes I did say that. You asked me what does the term mean?

DEFENSE ATTY: What does what term mean?

HERNANDEZ: When they drive with their lights off and I answered your question.

DEFENSE ATTY: But it's your testimony that Mr. Berneburg told you to say that the lights were off?

HERNANDEZ: Yes, sir.

DEFENSE ATTY: Didn't Mr. Berneburg and I make a big point of telling you that it's important that you just tell the truth and we'll deal with that?

HERNANDEZ: Mm-hmm.

DEFENSE ATTY: And we did tell you that, didn't we?

HERNANDEZ: Yes, sir to tell the truth.

DEFENSE ATTY: Several times?

HERNANDEZ: Yes.

DEFENSE ATTY: So you told us as you told the officers that you were looking through CD's and you didn't see the car until there was a shooting?

HERNANDEZ: That's the truth.

DEFENSE ATTY: So yet you're telling the jury today that Mr. Berneburg told you to say –

HERNANDEZ: That the headlights were off, yes, sir.

DEFENSE ATTY: And you're pretty sure that he told you to say that?

HERNANDEZ: Yes.

RP 304-06.

After cross-examining Hernandez, defendant made no objection to her testimony nor did he move for a mistrial. In fact, it wasn't until two days later, after nine more State's witnesses testified, that defendant made a motion for a mistrial based upon Hernandez' testimony. RP 300-673. On Thursday, January 25th, defendant moved for a mistrial because he wanted to call both his attorneys to the stand to testify: Mr. Berneburg to rebut Ms. Hernandez' testimony, and Mr. Schoenberger to endorse Mr. Berneburg's rebuttal testimony. RP 674. Defendant's motion for a mistrial was untimely because defendant failed to make a specific, timely objection to Hernandez' testimony. *See Spinelli v. Econ. Stations, Inc.*, 71 Wn.2d 503, 508, 429 P.2d 240 (1967)(an objection must be specific and timely to offer the trial court the opportunity to correct the error). The court denied the motion for a mistrial, but allowed Berneburg to testify in rebuttal). RP 682.

Here, using the three criteria outlined in *Escalona*, defendant must show that he was so prejudiced by Hernandez' testimony that nothing short of a new trial could ensure that he would be treated fairly. See *State v. Johnson*, 125 Wn. App. 443, 460, 105 P.3d 85 (2005). This defendant cannot do.

First, defendant has not shown that there was a trial irregularity that prejudiced his case with the jury. Unlike *Thompson*, which defendant relies upon in his brief, the State in the present case did not elicit testimony from a witness that had been excluded in a motion *in limine*. *State v. Thompson*, 90 Wn. App. 41, 44-45, 950 P.2d 977 (1998). Nor, as was the case in *Greiff*, did the State violate discovery rules by failing to discover a witness' testimony had changed. In fact, neither the prosecutor's questions, nor Hernandez' testimony, were objectionable.

Instead of a trial irregularity that prejudiced defendant, Hernandez' testimony raised issues with her own credibility and highlighted contradictions within her testimony. For example, on direct Hernandez testified that defense counsel did not tell her Solis' headlights were out. RP 300. However, on cross examination, she said defense counsel did tell her Solis' headlights were out. RP 305-306. While defendant claims Hernandez' testimony placed his trial counsel's credibility and ethics in question, this issue was addressed in cross examination, redirect,

Berneburg's rebuttal testimony, and by the limiting instruction the court gave prior to Berneburg's testimony and in the court's instructions to the jury. Jury Instruction No. 4; RP 298-305, 313, 810, 813-829.

Here, like *Greiff*, defendant cannot show there is a substantial likelihood that Hernandez' testimony prejudiced him to such a degree that nothing short of a new trial would insure that defendant would be tried fairly. When Hernandez' testimony is viewed against the background of all the evidence presented at trial, it is clear that defendant received a fair trial. *State v. Weber*, 99 Wn.2d 158, 164-165, 659 P.2d 1102 (1983); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Defendant admitted he shot Kelley and Silos, but argued he did this in self defense. The State's evidence was strong, and any prejudice to defendant from Hernandez' testimony was *de minimus*.

Defendant also asserts that he was denied his right to effective assistance of counsel because, once Berneburg was listed as a witness for the defense, he was excluded from the courtroom. However, defendant was represented by Mr. Schoenberger at all times during the trial. The court only excluded Mr. Berneburg from the courtroom once he was added to the witness list by defendant. RP 684. At the beginning of the trial, all witnesses had been excluded from the courtroom. RP 683.

The court properly denied defendant's untimely motion for a mistrial and defendant was at all times represented by counsel.

2. THE STATE PROVED THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

An individual may legally use force to prevent injury as long as the force is "not more than is necessary." RCW 9A.16.020(3). To use force, one must reasonably believe injury is imminent, but actual danger is not necessary. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). If a defendant produces some evidence of self-defense, then the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 493-94, 656 P.2d 1064 (1983). The absence of self-defense becomes an element of the charged offense that the State must prove beyond a reasonable doubt. *McCullum*, 98 Wn.2d 484, 488; *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988).

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851

P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it.

State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, including the absence of self-defense, the decision of the trier of fact should be upheld.

In the present case, the State adduced overwhelming evidence that the defendant did not act in self-defense. Regina Hernandez testified that she met defendant through Solis³ on April 11th. RP 252. She was with defendant from the evening of the 11th and into the following day. RP 235, 243. Throughout the evening of April 11th, Hernandez and defendant went to various locations where they drank alcohol and used methamphetamine. RP 233, 238, 242, 496, 266, 268. At around five or six in the evening, Hernandez and defendant went to an alley behind Wolfie's house to get a car for Solis. RP 252, 253, 254, 256. She and defendant dropped Solis off in the alley and Solis got into a light colored car. RP 256-57. Hernandez testified that up until this point, defendant and Solis were getting along. RP 255.

³ In the verbatim report of proceedings Solis is often referred to by his moniker, "Smiley."

After dropping Solis off Hernandez and defendant drove away, but were later flagged down by Solis and Kelley, who was a passenger in Solis' vehicle. RP 257-58. Defendant and Solis argued about a sack of dope and a palm pilot. RP 258-59. All four of them went to Hilltop where defendant and Solis again got into an argument. RP 259. Defendant returned to his car and said "This mother fucker is getting on my nerves; I'm going to do him in." RP 261. Hernandez saw defendant get his gun from the back of his vehicle and place it by the driver's seat. RP 261, 262, 303, 306. Defendant and Solis say they'll see each other later; defendant and Hernandez drive away. RP 266.

Defendant and Hernandez returned to Wolfie's alley where Hernandez again saw Solis. RP 268. She approached Solis, but saw he had a gun and his bandana up around his face. RP 268, 270, 272, 310, 314. Solis told her to get out of the way because he did not want to hurt her. RP 268. Solis pointed his gun at defendant and defendant shot at Solis. RP 269, 270, 274, 275. Solis' gun did not fire. RP 269, 314-15. Hernandez got into defendant's car and she drove defendant to Yessica Rosas's house. RP 269, 276, 558.

While Yessica Rosas and Hernandez were talking in Yessica's room, defendant went outside to his car. RP 282, 283, 284. When he came

back inside, he was wearing dark clothes, sunglasses, and carrying his gun. RP 569-70. Yessica Rosas testified that when defendant came back inside he appeared nervous and looked like he was wearing a disguise. RP 574, 586. Yessica's father, Jose Rosas, heard people talking in Yessica's room and told defendant and Regina leave the house because it was very late. RP 536. Mr. Rosas testified that he watched defendant and Hernandez get into their car and drive away. RP 537-38, 539. Before returning to bed, Mr. Rosas stopped to talk with Yessica for a minute. RP 539, 540. Mr. Rosas then returned to bed. RP 540. Ten to fifteen minutes later, Mr. Rosas was awakened by the sound of gunshots. RP 540. Mr. Rosas testified that he heard around five shots in rapid succession. RP 540-41.

When defendant and Hernandez left Yessica Rosas's house, Hernandez sat in the front passenger seat and defendant was in the driver's seat. RP 230-31, 286. Hernandez heard defendant say, "There those mother fuckers are," and then defendant started shooting. RP 289, 316. All the shots were coming from defendant's vehicle; none were coming from anywhere else. RP 289-90. When it was over, defendant said "I just dumped on those fools." RP 290, 301. Hernandez testified that defendant did not appear afraid. RP 290. Instead, he appeared brave, calm, and cool. RP 290. Hernandez did not see Solis' car approach because she was

looking down at CDs. RP 289, 299, 300, 316. Hernandez testified that she looked up after defendant started shooting and all she saw was the back of Silos' vehicle's taillights. RP 316.

After midnight on April 12th, Ahria Kelley and Nick Solis were driving to Yessica Rosas's house when defendant shot them. RP 492, 500. Kelley testified he did not see a gun, but did see the flash when the gun was fired. RP 500. Kelley said he knew they were getting fired at and said "Duck." RP 501. After he saw the flash and said 'Duck' Kelley felt a bullet come through and hit his bone. RP 503, 504. The shot came out of defendant's driver's side window. RP 501. Kelley said the defendant's car was parked at the side of the road with no lights on when defendant started firing at him and Solis. RP 501. Kelley testified that Solis was not armed when defendant shot them. RP 502.

Kelley testified that after defendant shot them, Solis' car crashed into a mailbox and stopped. RP 504, 506. Kelley waited until defendant's car left the scene before he tried to get Solis out of the car. RP 509. He was unable to get Solis out of the car. RP 509. Solis tried to talk, but he made sound like "haw." RP 508. Solis then said he couldn't move his legs. RP 509. Kelley went to Yessica's house to get help. RP 511.

Solis testified that he has little memory of the day defendant shot him. RP 394. He recalled driving to Yessica's house, but didn't know

that defendant would be there. RP 415. Solis did not see defendant's car, but remembered seeing sparks at the time of the shooting. RP 416. Solis said he was not trying to shoot defendant when defendant shot him. RP 422. As a result of being shot by defendant, Solis is paralyzed from his chest down. RP 393.

Defendant admitted that he had shot Solis, but testified he did not know Kelley was in the car with Solis. RP 874, 875.

After the shooting, defendant and Hernandez went to a motel and had sex. RP 287, 289, 290-91, 292. The following morning, the police contacted defendant and Hernandez as they were exiting their hotel room. RP 293, 701-02. Defendant was carrying his gun in his coat when he exited the hotel room, but when he became aware the police were there, defendant returned to the room. RP 293-94, 702. When he exited his hotel room, defendant no longer had his gun. RP 703. The police found defendant's gun in the hotel room wrapped in a coat. RP 692.

When the evidence is viewed in the light most favorable to the State, there was sufficient evidence that a jury could find the absence of self-defense beyond a reasonable doubt. Defendant's sufficiency of the evidence claim is without merit and must fail.

3. THIS COURT SHOULD REMAND THIS CASE FOR RESENTENCING TO ALLOW THE STATE TO OFFER EVIDENCE OF DEFENDANT'S PRIOR CRIMINAL RECORD AND COMMUNITY CUSTODY STATUS BECAUSE DEFENDANT DID NOT SPECIFICALLY OBJECT WHEN THE STATE ALLEGED THOSE FACTS TO THE SENTENCING JUDGE.

A convicted defendant's standard range sentence is determined by first calculating the defendant's offender score and then determining the offense seriousness score. RCW 9.94A.530(1). The sentencing court then uses a grid on which offender scores appear above each column, and offense seriousness scores appear before each row (this sentencing grid appears at RCW 9.94A.510). *See* RCW 9.94A.530(1). A convicted defendant's standard range sentence is the range that appears at the intersection of the column and row representing that defendant's offender score and offense seriousness score. RCW 9.94A.530(1). Appellate courts review a trial court's calculation of an offender score de novo. *State v. Fonotaga*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

- a. Defendant's failure to specifically object to evidence of his criminal record allows the State to offer evidence of his record on remand.

The sentencing court considers a defendant's criminal history in determining his offender score. RCW 9.94A.525. "'Criminal history' means the list of a defendant's prior convictions and juvenile

adjudications, whether in this state, in federal court, or elsewhere.” RCW 9.94A.030(14). The court generally counts offender score points as follows: “If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.” RCW 9.94A.525(8).

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 92-93, 169 P.3d 816 (2007). The best evidence to establish a defendant's prior conviction is the production of a certified copy of the prior judgment and sentence. *Bergstrom*, 162 Wn.2d at 93. When the State alleges the existence of prior convictions and the defense fails to “specifically object” to the existence of the prior convictions before the sentence is imposed, the proper remedy is to remand the case for resentencing. *Bergstrom*, 162 Wn.2d at 93. At that resentencing, the State is permitted to introduce new evidence to prove the allegations it made at the first sentencing hearing. *Bergstrom*, 162 Wn.2d at 93.

This Court should remand this case for resentencing so that the State can produce evidence of defendant's prior convictions. The State here alleged that defendant had one prior juvenile conviction for unlawful

possession of a controlled substance with intent to deliver, one adult conviction for third degree assault, and one adult conviction for second degree unlawful possession of a firearm. RP(Sentencing) 6; CP 114-128. Defendant did not specifically object to these allegations; he merely refused to sign, among other documents, the Stipulation on Prior Record and Offender Score. CP 114-115. The State's allegations went unchallenged because defense counsel signed the Stipulation on Prior Record and Offender Score. CP 114-115. Because the State alleged three prior convictions and defendant failed to specifically object to them, this Court should remand this case for resentencing so that the State can present evidence of those convictions. *See Bergstrom*, 162 at 93.

- b. Defendant's failure to specifically object to evidence of his criminal record allows the State to offer evidence of his record on remand.

A sentencing court must add one point to a defendant's offender score if the defendant committed his crime while on community custody. RCW 9.94A.525(19). Community custody is a subset of community placement, so 9.94A.525(19) requires the sentencing court to add one point to a defendant's offender score if the defendant committed the

current offense while on community placement. *State v. Crandall*, 117 Wn. App. 448, 451, 71 P.3d 701 (2003).

This Court should also remand for resentencing and to allow the State to present evidence that defendant was on community custody when he committed the crimes in the instant case. As with the defendant's prior criminal record, defendant did not object when the State alleged he was on community custody when he committed his crimes. RP (Sentencing) 6-9. Defendant merely refused to sign, among other documents, the Judgment and Sentence. CP 116-128. The State's allegation went unchallenged, however, because defense counsel signed the Judgment and Sentence. CP 116-128. Because the State alleged that defendant was on community custody when he committed his crimes, and defendant failed to specifically object to that allegation, this Court should remand this case for resentencing so that the State can present evidence that defendant was on community custody. See *Bergstrom*, 162 at 93.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that this court affirm defendant's convictions. The State asks this court to vacate defendant's sentence and remand this case for a new sentencing hearing where the State has the opportunity to present evidence of defendant's prior criminal history and community custody status.

DATED: July 28, 2008.

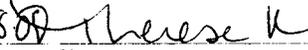
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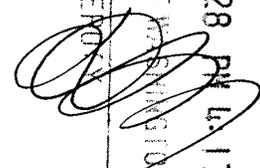


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WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-1.MI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.28.08 
Date Signature

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