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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury where Balaski produced sufficient evidence that her possession was unwitting.
2. The trial court erred in calculating Balaski's offender score when it included her two alleged prior criminal convictions in determining her offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in not taking Balaski's case from the jury for sufficiency of the evidence when the State established that the bag she constructively possessed contained methamphetamine?
2. Did the trial court err in calculating Balaski's offender score by including her two prior criminal convictions when: (a) both convictions were from Mason County superior court; and (b) she did not object to their inclusion at sentencing?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."

The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Balaski's recitation of the procedural history and facts.

3. Summary of Argument

The trial court did not err by not taking Balaski's case from the jury for sufficiency of the evidence because the State established that she constructively possessed the bag containing methamphetamine. Its decision to let the jury decide the factual question of whether or not she unwittingly possessed the methamphetamine was correct, as it is the province of the jury to decide such matters.

The trial court also did not err in calculating Balaski's offender score by including her two prior felony convictions because: (a) both convictions were from Mason County superior court; and (b) she did not object to their inclusion at sentencing. By failing to object, she waived her right to appeal this issue. The record shows that the State cited to Balaski's specific convictions and the dates on which she was sentenced in Mason County on these prior cases and proceeded with sentencing. There is nothing in the record that even remotely suggests that the State's calculation of Balaski's offender score was incorrect. By making the record it did, the State satisfied its burden and proved by a preponderance of the evidence that Balaski had two prior felony convictions.

Should this Court disagree with the State, then it should look to the first prong of the three-part test enunciated in Bergstrom. The Court should then rule that because the State produced at least some evidence of

Balaski's prior convictions at sentencing, that her case should be remanded back to the trial court with the instruction that the State be allowed to introduce new evidence of her prior convictions. The decision of the trial court is complete, correct, and should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN NOT TAKING BALASKI'S CASE FROM THE JURY FOR SUFFICIENCY OF THE EVIDENCE BECAUSE THE STATE ESTABLISHED THAT THE BAG SHE CONSTRUCTIVELY POSSESSED CONTAINED METHAMPHETAMINE.

The trial court did not err in not taking Balaski's case from the jury for sufficiency of the evidence because the State established that the bag she constructively possessed contained methamphetamine.

The role of the jury is to be held "inviolable" under Washington's constitution. State v. Montgomery, 183 P.3d 267, 273 (WA S.Ct., May 15, 2008); see U.S. Const. Amend. VII; WA Const. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. State v. Montgomery, 183 P.3d at 273. To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts. State v. Montgomery, 183 P.3d at 273. In virtually every jury trial, the jury itself is instructed that "[i]t is your duty to determine which facts have been proved in this case from the evidence

produced in court.” State v. Montgomery, 183 P.3d at 273, Washington Practice: Washington Pattern Jury Instructions: Criminal 1.02, at 9 (2d ed. 1994)(WPIC).

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); see State v. Whipple, 183 P.3d 1105, 1107 (Div.2, May 20, 2008). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Ware, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002). A claim of insufficiency admits the truth of the State’s evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201.

Direct evidence is not required to uphold a jury’s verdict; circumstantial evidence can be sufficient. State v. O’Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533

(1992). Possession of property may be either actual or constructive.

Actual possession means that the goods are in the personal custody of the person charged with possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); see State v. Partin, 88 Wash.2d 899, 905, 567 P.2d 1136 (1977). Constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over them. Callahan, 77 Wn.2d at 29. Whether a person has dominion and control is determined by considering the totality of the situation. Partin, 88 Wash.2d at 906.

In Balaski's case, she "took full responsibility" for a plastic bag that Detective Noyes said, "looked like [it] had methamphetamine in it" on or around July 11, 2007. RP 27: 14-19; 16: 22-24. The white residue in the bag tested positive for methamphetamine. RP 32: 1-2. Balaski agreed on cross-examination that she found the bag about a day before [she] was contacted by the police. RP 42: 15-17. She also agreed that she "knew" the bag "was drug paraphernalia that users use," and recognized it "as a baggie that is common to hold methamphetamine." RP 42: 24-25; 43: 1-4. Balaski explained that although she intended to throw the bag away, she did not because her dog gets into the garbage. RP 43: 5-8. On direct examination, Balaski testified that she took the bag and set it up on the refrigerator in her trailer. RP 39: 19-20. According to Balaski, she

recognized the bag “to be drug paraphernalia that drug users do use and I don’t like kids to get it...” RP 39: 23-24.

Under Callahan, constructive possession was established because Balaski admitted that she picked-up the bag she knew to be drug paraphernalia outside her trailer and then brought it inside and placed it on her refrigerator. This firmly establishes her dominion and control over that bag. Although Balaski testified that it didn’t look like there was anything in the bag, a white residue inside of it tested positive for methamphetamine. RP 39: 25; 40:1.

Despite Balaski’s concerns about children possibly have access to this bag and/or her dog, it was for the jury, and not the trial court, to decide whether or not the State had met its burden of proof. The commonsense reason why Balaski did not want the bag to be accessible to her pet and/or children was that she felt it contained drugs. Viewed in the light most favorable to the State, the evidence in Balaski’s case permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. Had the trial court taken this case away from the jury, it would have infringed upon its ultimate power to weigh the evidence and determine the facts as the Supreme Court reasoned in Montgomery. Because the trial court made the correct decision and sent this case to the jury, no error occurred.

2. THE TRIAL COURT DID NOT ERR IN CALCULATING BALASKI'S OFFENDER SCORE WHEN IT INCLUDED HER TWO PRIOR FELONY CONVICTIONS BECAUSE:
 - (a) BOTH CONVICTIONS WERE FROM MASON COUNTY SUPERIOR COURT; AND
 - (b) SHE DID NOT OBJECT TO THEIR INCLUSION AT SENTENCING THEREBY WAIVING HER RIGHT TO APPEAL THIS ISSUE.

The trial court did not err in calculating Balaski's offender score when it included her two prior criminal convictions because: (a) both convictions were from Mason County superior court; and (b) she did not object to their inclusion at sentencing, thereby waiving her right to appeal this issue.

We review a sentencing court's calculation of an offender score de novo. State v. Bergstrom, 162 Wash.2d 87, 92, 169 P.3d 816 (2007); see State v. Tili, 148 Wash.2d 350, 358, 60 P.3d 1192 (2003); State v. Booker, 143 Wash.App. 138, 141, 176 P.3d 620 (Div.1, February 11, 2008). The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. Bergstrom, 162 Wash.2d at 93; see State v. Thompson, 181 P.3d 858, 861 (Div. 2, April 8, 2008).

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 Wash.2d at 93. Where the sentencing court's offender score determination is challenged on appeal for insufficient evidence of

prior convictions, the case law provides three approaches to analyze the issue, assuming the defendant has pleaded not guilty.

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to “specifically object” before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence. Bergstrom, 162 Wash.2d at 93. Second, if the defense does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant’s prior convictions, then the State may not present new evidence at resentencing. After the defense specifically objects, putting the sentencing court on notice that the State must present evidence, the State is held to the initial record on remand. Bergstrom, 162 Wash.2d at 93-94.

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State’s depiction of the defendant’s criminal history, then the defendant waives the right to challenge the criminal history after the sentence is imposed. Bergstrom, 162 Wash.2d at 94. More specifically, a defendant waives the right to argue on appeal that his crimes constitute the same criminal conduct after the defense agrees in the defendant’s own presence

memorandum that the criminal history, as reported, is correct. State v. Nitsch, 100 Wash.App. 512, 997 P.2d 1000 (2000).

Sentencing courts can rely on defense acknowledgement of prior convictions without further proof. Bergstrom, 162 Wash.2d at 94; see Former RCW 9.94A.530(2). Acknowledgement includes not objecting to information included in presentence reports. Bergstrom, 162 Wash.2d at 94; see Former RCW 9.94A.530(2).

In Balaski's case, neither she nor her attorney objected to the State's recitation of her criminal history and/or the calculation of her offender score. The State did not merely assert that she had two felony convictions, but made the following record:

The defendant has a prior conviction for unlawful possession of a controlled substance, methamphetamine, out of this court, sentenced on June 15th of '05; a prior conviction out of this court for attempting to elude a pursuing police vehicle, sentenced on October 2nd of 2003. She also was on community custody at the time of this offense, which, as the [trial court] will recall, was the basis for the contact in the first place, for a calculation of offender score at three. RP 84: 13-20.

To have required the State to prove Balaski's two prior convictions with additional documentation and/or testimony when she committed both of them in Mason County would have been both cumulative and in opposition to judicial economy.

Had the State had tried to introduce out of county or state criminal history in calculating her offender score, then more proof certainly would have been required. As the record shows, however, the State cited to specific, in-county, conviction history; history that neither Balaski or her attorney ever challenged. There is also nothing in the record that even remotely suggests that the State's calculation of Balaski's offender score was incorrect. Balaski therefore waived her right at the trial court level to challenge her offender score on appeal.

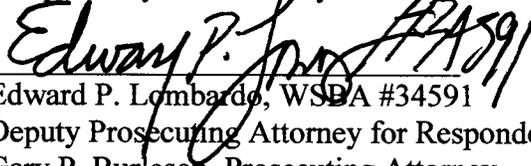
Should the Court disagree with the State's analysis, it should remand with the instruction that the State be allowed to present new evidence regarding Balaski's criminal history.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 26TH day of JUNE, 2008

Respectfully submitted by:


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Deputy Prosecuting Attorney for Respondent
Gary P. Bureson, Prosecuting Attorney
Mason County, WA

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DIVISION II

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

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 MARY L. BALASKI,)
)
 Appellant,)
 _____)

No. 37097-2-II
DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

I, EDWARD P. LOMBARDO, declare and state as follows:

On THURSDAY, JUNE 26, 2008, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 26TH day of JUNE, 2008, at Shelton, Washington.

[Signature]
Edward P. Lombardo, WSBA #34591

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