

No. 40154-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

Drew Byron

Appellant.

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

The Honorable Judges Christine Pomeroy and Carol Murphy  
Cause No. 09-1-01253-2

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was probable cause of the seizure, detainment and arrest of Mr. Byron.
2. Whether Mr. Byron's Sixth and Fourteenth amendment right to effective assistance of counsel was violated.
3. Whether the information in the charging document was constitutionally sufficient.
4. Whether Mr. Byron's offender score was properly calculated at sentencing.
5. The 2008 amendments to the Sentencing Reform Act (SRA) are constitutional.

B. STATEMENT OF THE CASE.

On July 27, 2009, Heather Hilf-Barr was at home at 4535 68<sup>th</sup> Avenue Northeast, off of Puget Road, in Olympia, in Thurston County. Upon hearing a knock at the door, Ms. Hilf-Barr went to an upstairs window and observed a small gray car, and a man walking around the house. (RP 156-8) The man was observed entering the house through a side door and Ms. Hilf-Barr heard him move throughout the house. (12/14-6/09 RP 151-3). The man was dressed in a black long-sleeve shirt with his face covered by a bandanna and his head covered by a dark garment. (12/14-6/09 RP 162-3). During the burglary, Ms. Hilf-Barr heard a two-way radio

carried by the burglar warn that the police were on their way. (12/7-8/09 RP 154).

While driving to the scene, Deputy Cole saw a gray car drive past him, with one passenger inside. (12/7-8/09 RP 51). Deputy Cole arrived at Ms. Hilf-Barr's residence at 15:53 to discover the suspect had already fled. (12/7-8/09 RP 51-2). Because Deputy Cole had seen the gray car drive past him at the same time Ms. Hilf-Barr was reporting the burglary as still on-going inside the house, the police surmised the suspect must have fled on foot. (12/7-8/09 RP 51-2).

At the residence the police found several black bags placed near the front door, each filled with electronic equipment. (12/14-6/06 RP 39). At trial, Ms. Hilf-Barr testified that a mag light was missing after the burglary. (12/14-6/09 RP 163-4). When the police searched Mr. Byron incident to arrest, he was carrying a mini mag light and a two-way radio. (12/14-6/09 RP 100-102).

Backup arrived and commenced a search, starting from the residence, using a K9 dog. (12/7-8/09 RP 54). The suspect was tracked using backup officers and the K9 track, which was lost and then started a short distance from the home. (12/7-8/09 RP 24). In the course of the search, police found a black bag in a ditch near to

Ms. Hilf-Barr's residence, at the 5900 block of Puget Road. (12/14-7/09 RP 56-7). Inside this black bag police found a wallet containing Mr. Byron's identification, including a Department of Corrections card, indicating he was on community custody at the time he committed the burglary. (12/14-6/09 RP 8-9, 56-9).

Sergeant Dehan responded to alerts of the police chase, and eventually apprehended Mr. Byron in the 6200 block of Puget Road. (12/14-7/09 RP 137). Sergeant Dehan saw Mr. Byron emerge from the woods and walk towards him. (RP 13). Sergeant Dehan approached Mr. Byron with his weapon drawn and ordered Mr. Byron to get down on his stomach. (12/7-8/09 RP 14). Mr. Byron complied and Sergeant Dehan subsequently handcuffed him. *Id.* Deputy Cole advised him of his Miranda rights and Mr. Byron indicated he understood them. (CP 4). Mr. Byron made a few remarks about his earlier activities (jogging) and denied that a red bag found at Ms. Hilf-Barr's residence belonged to him. (CP 4).

Prior to trial, defense counsel brought a motion to suppress the evidence produced by the police frisk (Supplemental CP 8). At the CrR 3.6 suppression hearing, defense argued that police committed an unlawful search of Mr. Byron's person and then subsequently arrested him based on the probable cause raised by

the items recovered from the search (Supplemental CP 10). Deputy Cole testified that Mr. Byron was informed he was under arrest and was then searched incident to that arrest. (CP 4). Cole said that he advised the defendant of his Miranda rights “almost simultaneously.” (CP 4). In his testimony, Sgt. Dehan set forth the sequence of events as follows: detention, handcuffing, pat-down, conference between officers, arrest, search incident, and Miranda warnings. (CP 4). On this basis, the trial court found the detainment of Mr. Byron took place incident to arrest. (CP 5). The trial court found the search followed the “actual, formal” arrest by the deputies and thus the search occurred under the authority of law. (CP 5).

This motion was denied and the court found the search to have occurred incident to arrest, as articulated in the Findings of Fact (CP 3-5).

At trial the jury found Mr. Byron guilty of the crime of residential burglary. (12/14-6/09 RP 254). The jury also returned a special verdict form by which they found that Mr. Byron had committed the burglary while the victim (Ms. Hilf-Barr) was in the house, an aggravating factor. *Id.* This finding of an aggravating factor permitted the court to go above the standard range and impose an exceptional sentence. (12/23/09 RP 11).

At sentencing, defense counsel challenged the prosecutor's calculated offender score of ten. (12/23/09 RP 3-4, 5). The discrepancy was resolved by a recalculation, with a subsequent verbal agreement by both parties to a sentencing score of nine. (12/23/09 RP 10). Mr. Byron was on community custody at the time he committed the burglary. (12/23/09 RP 11). It is stipulated by *RCW 9.94A.525(19)* that "if the present conviction is for an offense committed while the offender was under community custody, add one point." *RCW 9.94A.525(19)*. The court issued an exceptional sentence of 116 months. (12/23/09 RP 24).

#### C. ARGUMENT.

##### 1. There was probable cause for the seizure, detention, and subsequent arrest of Mr. Byron.

Mr. Byron contends that statements admitted at trial were obtained in violation of his rights under the Fourth Amendment and Washington Const. Article 1, Section 7 because the police lacked probable cause to detain him. Mr. Byron argues that police action therefore constituted a seizure which lacked reasonable suspicion, was unconstitutional in scope and duration, and ended in an arrest which lacked probable cause.

It is the State's position that any legal issues raised by Mr. Byron's arrest were properly assessed by the lower court, which found no constitutional violation relating to Mr. Byron's arrest. (CP 5). The trier of fact was in the best position to review the evidence and the State therefore urges deference to the discretion of the trial court. A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The trial court did not abuse its discretion in this instance because there was sufficient evidence to support probable cause for the detainment, seizure, and subsequent arrest of Mr. Byron. The State responds to these allegations individually, while recognizing that the series of events happened in an extremely short period of time. (CP at 4).

1(a). There was reasonable suspicion to justify detainment and seizure of Mr. Byron by Sgt. Dehan

Mr. Byron first argues that Sgt. Dehan lacked reasonable suspicion to detain Mr. Byron and subsequently place him in handcuffs until reinforcements arrived. It is the State's contention that reasonable suspicion existed.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect individuals from unreasonable search and seizure by the government. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Under both state and federal constitutions, a seizure is reasonable when it is based upon probable cause. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). However, an investigative or Terry stop is an exception to the general rule that warrantless searches and seizures are presumed invalid. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). A Terry stop may be made to investigate whether a person was involved in or is wanted in connection with a completed felony. *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). To be lawful, the officer making the Terry stop must have a reasonable suspicion, grounded in specific and articulable facts. *Hensley*, 469 U.S. 229. The scope of an investigatory seizure is determined by considering: (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and (3) the length of time of the seizure. See *State v. Laskowski*, 88 Wn. App. 858, 950 P.2d 950 (1997), *review denied*, 135 Wn.2d 1002 (1998).

First, there was sufficient evidence in this case, given the circumstances, to support reasonable suspicion for detainment. There was nothing unreasonable concerning Sgt. Dehan's decision to detain and subsequently seize Mr. Byron. Sgt. Dehan had been called to the area in response to a residential burglary, with information that a man wearing dark clothing had fled on foot. (12/7-8/09 RP at 20). Sgt. Dehan was warned over the radio that a K9 unit had found a trail, and the scent trail led in his direction. (12/14-6/09 RP at 127). Sgt. Dehan then heard his fellow officers yelling at someone to stop running. (12/14-6/09 RP at 128). It was shortly after this that Sgt. Dehan observed Mr. Byron emerge from the same area. (12/7-8/09 RP at 32; 12/14-6/09 RP at 128). Mr. Byron was apprehended in dark clothing, approximately one mile from the crime scene and an hour and a half after the burglary. (12/14-6/09 RP at 12). Past reports of criminal activity will support a Terry stop when they are coupled with current suspicious behavior. *State v. Bray*, 143 Wn. App. 148, 177 P. 3d 154 (2008). Deputy Clark testified that he observed Mr. Byron at this time, running amongst the trees, in a "fast, low crouch type of run." (12/7-8/09 RP at 30).

Mr. Byron was the only person to emerge from the woods, and was wearing a dark-colored shirt and camouflage pants; both these items of clothing matched the description of the suspect the police were chasing based upon information Sgt. Dehan heard over the police radio. (12/07-8/09 RP 7). Sgt. Dehan also noticed a black stocking cap sticking out of his back pocket, which he found noticeable and suspicious. (12/14-6/09 RP 33). The reasonableness of an officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. *State v. Lee*, 147 Wn. App. 912, 199 P. 3d 445 (2008), review denied, 166 Wn.2d 1016 (2009). It is the State's position these circumstances provide a sufficient basis for reasonable suspicion.

1(b). Sgt. Dehan's actions were reasonable in scope and duration.

A Terry stop must last no longer than is necessary to verify or dispel the officer's suspicions, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). The reasonableness of police activity during the Terry stop must necessarily depend on the facts of each particular case. *Id.* At issue is whether Sgt. Dehan's use of

a drawn gun and handcuffs was reasonable in this particular case. The use of drawn guns is appropriate when police have a “reasonable apprehension” of fear. *State v. Hudson*, 56 Wn. App. 490, 784 P.2d 553 (1990). The man of reasonable caution is a man standing in the shoes of the officer. *Henry v. United States*, 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959).

The Appellant’s brief draws an analogy to the case of *State v. Williams*, 102 Wn.2d, in which the Washington Supreme Court took issue with the “scope and intensity of the intrusion.” In *Williams*, the suspect was starting to drive away from the burglarized house. Other than the proximity of the car to the house, and the car starting when the police car drove by, there was no clear indication of wrong-doing by Williams. “He made no furtive gestures or violent responses.” *Williams* 102 Wn.2d at 740. The officer in the case gave no warning to stop but immediately parked his patrol car to block Williams’ vehicle and ordered him to turn off the car, throw the keys out the window, and place his hands on the interior roof. *Williams* 102 Wn.2d at 735.

By contrast, in the present case, the police were engaged in a full-fledged police pursuit, involving back up and a K9. As Sgt. Dehan testified the police made clear verbal requests for Mr. Byron

to stop running as they chased him through the woods. (12/14-6/09 RP at 128). Police knew that the burglar had entered a dwelling in broad daylight, with an accomplice, and that he sought to elude the police. On this basis it was reasonable to consider the suspect bold and potentially dangerous, and willing to take risks with law enforcement. It was unknown whether he was armed. Upon arrest, the police discovered him to be in possession of an empty knife sheath, although this evidence was excluded as the result of a motion in limine. (12/14-6/09 RP 7).

The detainment and seizure of Mr. Byron was also reasonable in duration. This was not an instance of indefinite detainment. Not only was this detainment brief, but this brief length was foreseeable, as it occurred "incident to arrest." (CP 5). Sgt. Dehan told Mr. Byron to get on the ground and handcuffed him in order to retain control until additional police assistance arrived. The police were already in the area, as a result of the pursuit, thus their arrival was foreseeable and imminent. The length of time Sgt. Dehan waited for reinforcement was brief, compared to the 35-minute interval that appeared to "approach excessiveness" in *Williams*, 102 Wn.2d at 741. Deputy Cole testified that from the

time he heard Mr. Byron was in custody to the time he arrived on the scene was approximately four minutes. (12/7-8/09 RP at 55).

1(c). There was probable cause for arrest.

A police officer may make an arrest without a warrant for offenses committed outside his presence if he has reasonable grounds to believe: (1) that the offense committed is a felony and (2) that the person apprehended committed the felony. *Kellogg v. State*, 94 Wn.2d 851, 621 P.2d 133 (1980). Such an arrest is reasonable only if supported by probable cause. *State v. Bonds*, 98 Wn.2d 1, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983); *Dunaway v. New York*, 442 U.S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979). Probable cause exists for a warrantless arrest where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that a felony has been committed. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). In determining whether the officer's belief was reasonable, the court must consider all the facts within the officer's knowledge at the time of the arrest as well as the officer's special experience and expertise. *Id.*

Washington law recognizes that the arresting officer does not need knowledge of evidence to establish guilt beyond a

reasonable doubt. *State v. Bellows*, 72 Wn.2d 264, 432 P.2d 654 (1967). Rather, it is only the probability of criminal activity, and not a prima facie showing of it which governs the standard of probable cause. *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room is allowed for some mistakes on their part. *State v. Mannhalt*, 1 Wn. App. 598, 462 P.2d 970 (1969).

In this case the police were trailing a suspect in response to a burglary, using a K9 and additional officers. (12/7-8/09 RP at 23). These facts suggest every intention to arrest Mr. Byron upon catching up with him. Past reports of criminal activity will support a Terry stop when they are coupled with current suspicious behavior. *State v. Bray*, 143 Wn. App. 148, 177 P. 3d 154 (2008). Deputy Clark testified that he observed Mr. Byron at this time, running amongst the trees, in a “fast, low crouch type of run.” (12/7-8/09 RP at 30).

The State argued in opening statements that Mr. Byron was linked to the burglary because he was apprehended in dark clothing, approximately one mile from the crime scene and an hour and a half after the burglary. (12/14-6/09 RP at 12). When he was

apprehended, he was covered in bits of leaves and sweating profusely. (12/14-6/09 RP at 129). It is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered, along with other circumstances of the case, in determining guilt or innocence. *State v. Burton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The rationale of the principle is that flight can be a deliberate attempt to avoid arrest and prosecution. *State v. Gellerman*, 42 Wn.2d 742, 259 P.2d 371 (1953); *State v. Moser*, 37 Wn.2d 911, 226 P.2d 867 (1951); *State v. Wilson*, 26 Wn.2d 468, 174 P.2d 553 (1946); *State v. Lew*, 26 Wn.2d 394, 174 P.2d 291 (1946).

Given these facts, there was probable cause to conclude that Mr. Byron was evading the police and that he was connected to the recent burglary. As he was the only person to emerge from an area which police were actively securing using backup and K9 units, it was reasonable to conclude that Mr. Byron must be eluding the police. It was further reasonable to conclude, given the temporal and geographic proximity to the robbery, and based on Mr. Byron's dress and behavior, that this attempt to elude resulted from Mr. Byron's involvement with the nearby burglary. The circumstances of the police chase and the information known to

Sgt. Dehan by way of police dispatch was sufficient to constitute probable cause.

Finally, it is the State's position that any legal issues raised by Mr. Byron's arrest were properly assessed by the lower court, which found no constitutional violation relating to Mr. Byron's arrest. The trier of fact was in the best position to review the evidence and the State therefore urges deference to the discretion of the trier of fact.

2. There was no violation of Mr. Byron's Sixth and Fourteenth Amendment right to effective assistance of counsel.

On appeal, Mr. Byron challenges defense counsel's stipulation to statements made to police following his detainment but prior to his Miranda warning. Mr. Byron asserts this conduct rises to the level of ineffective assistance of counsel. The United States Supreme Court adopted a 2-prong test to determine whether a defendant has been denied effective assistance of counsel.

The defendant must show that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d

1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). The defendant must show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Prejudice occurs when but for the deficient performance, the outcome would have been different. *In Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). *Strickland*, 466 U.S. at 687.

A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Id.* at 689; *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). The Appellant's brief fails to meet both prongs of the *Strickland* test because there was no resulting prejudice in this case.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

*Strickland*, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the

adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. Mr. Byron argues on appeal that admission of Mr. Byron's statements to police were prejudicial because the explanation for his presence in the area was "unrealistic" and drew unwarranted attention from the jury, thus drawing the jury's attention away from the "lack of evidence put forward by the State." (Appellate Brief, 28). Mr. Byron exaggerates the importance of this testimony to the State's case and understates the breadth of the State's evidence.

The weight of the State's evidence dispels the possibility of prejudicial effect, because the State's case included a wide swath of evidence which proved guilt beyond a reasonable doubt. When Mr. Byron was apprehended, he was wearing a long-sleeved dark shirt and gloves, despite the hundred degree weather. (CP 4; 12/7-8/09 RP 16). Mr. Byron did not offer any reasonable alternative explanation for his shirt and gloves, nor was any alternative offered at trial. (12/14-6/09 RP 240). In addition, the search incident to arrest turned up the following items: a two-way radio, a mini-mag flashlight, and a gray stocking cap. (CP 4). Ms. Hilf-Barr, the victim, had reported hearing a two-way radio announce that "the cops are coming" in the course of the burglary. (CP 3). The multiple bags,

sitting by the door and filled with Ms. Hilf-Barr's electronic equipment, indicate an interrupted burglary. (12/14-6/06 RP 39). The link between Mr. Byron and the burglary at 4535 68<sup>th</sup> Avenue is substantiated by the black bag found at 5962 Puget Road, a short distance from Ms. Hilf-Barr's house, at 68<sup>th</sup> street. (RP 57, 92,). This bag contained Mr. Byron's identification and wallet. (RP 59). It can be reasonably be inferred that Mr. Byron intended to fill this bag with items from Ms. Hilf-Barr's house, as had been done with the other bags left at the residence.

The State submits the totality of this evidence is sufficient to prove guilt beyond a reasonable doubt and thus any error at trial was not prejudicial.

3. Any deficiency in the charging document was not sufficient to be a constitutional violation.

Mr. Byron challenges his charging documents for the first time, arguing it lacked both legal and factual validity, in violation of his constitutional right to notice under both the United States constitution and the Washington State constitution. U.S. Const. amend. V, VI, XIV; Wash. Const. art. I, § 3, 22. It is the State's position that the information contained in the charging document was constitutionally sufficient in both law and fact.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. *State v. Borrero*, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When the charging document is challenged after the verdict, the language is construed liberally in favor of validity. *Id.* at 360. In the cases arising since the adoption of the liberal construction test, we have noted the information must be read as a whole, in a commonsense manner, from the perspective of a person of common understanding rather than a legal expert. *State v. Valdobinos*, 122 Wn.2d 270, 286, 858 P.2d 199 (1993).

The purpose of the constitutional right to full disclosure of the charges is to allow the defendant to adequately prepare a defense. *Auburn v. Brooke*, 119 Wn.2d 623, 836 P.2d 212 (1992). Therefore, the "essential elements rule" requires that a charging document contain alleged facts to support every element of the offense, in addition to adequately identifying the crime charged and the requisite elements. *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989). An "essential element is one whose specification is

necessary to establish the very illegality of the behavior.” *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). The omitted details listed in Mr. Byron’s brief fail to meet this definition.

This rule was formulated into a 2-prong test in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). The test asks: (1) whether the necessary facts appear in any form, or by fair construction, in the charging document. If so, then (2) the defendant must show that he was nonetheless actually prejudiced by the inartful language which caused a lack of notice. *Id.*

The first prong of the test looks to the face of the charging document itself. *State v. Tandecki*, 153 Wn.2d 842, 849, 109 P.3d 398 (2005). Mr. Byron’s charging document alleged that:

Count I – Residential Burglary – RCW 9A.52.025(1) – Class B Felony: In that the defendant, Drew Lynn Byron, in the State of Washington, on or about the July 27, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a dwelling. And further, the current offense – a burglary – was committed when the victim of the burglary was present in the residence when the crime was committed. *RCW 9.94A.535(2)(u)*.

[CP 2]

The text of RCW 9A.52.025 reads:

- (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) Residential burglary is a class B felony. In establishing sentencing guidelines and disposition standards, the sentencing guidelines commission and the juvenile disposition standards commission shall consider residential burglary as a more serious offense than second degree burglary.

[RCW 9A.52.025]

The Amended Information clearly includes the two requisite elements of the charge of Residential Burglary (“unlawfully entered a dwelling” with “intent to commit a crime against person or property therein”) under RCW 9A.52.025. There was no constitutional infringement because there was no omission of an essential element of the State’s case against Mr. Byron. It is the State’s position that the qualifier “other than a vehicle” was descriptive rather than essential to this particular case because there was no vehicle being burgled. The charging document does not need to mirror the language of the statute. *Tandecki*, 153 Wn.2d at 846. It can be inferred from the facts of the case that this omitted information would have provided no additional knowledge to Mr. Byron concerning the charges against him, nor influenced his defense. Thus Mr. Byron was afforded adequate notice of the nature and cause of the charge against him, in accordance with the intended purpose of the constitutional protection.

The Appellate Brief also disputes the adequacy of the factual information provided by the charging documents. Mr. Byron contends that factual details such as the address of the burglary and the identity of the victim are details which support the legal elements of the crime. However, the Appellate Brief fails to provide any explanation as to how or why this information is relevant to determining the essential elements of residential burglary, nor provide any supporting case law. (Appellant's Brief, 31). While the address and name of the victim arguably provide greater detail, these details are not essential to fully understand the legal elements of the crime. By contrast, in *Leach* the omitted factual information was the age of the victim, and the statute distinguished between a misdemeanor count and a felony count of indecent exposure based on the age of the victim. In the present case, the legal elements the State had to prove were (1) unlawful entry and (2) intent to commit a crime. A long line of cases have held that it is sufficient to charge in the *language* of the statute if the statute defines the offense with certainty. *Brooke*, 119 Wn.2d 635 (citing *Kjorsvik*, 117 Wn.2d 99 n.4 and cases cited therein). It is the State's position that the document in question accurately depicted the offense of residential burglary and its elements.

The charging document is no place for nonessential details which can be adduced during discovery, in pretrial motions, or at trial. An accused is afforded significant opportunities to flesh out the State's charges if a concern arises before trial regarding their adequacy, as noted in *State v. McCarty*, 140 Wn.2d 420, 998 P.2d 296 (2000). CrR 2.1(c) allows the accused to seek a bill of particulars. CrR 4.7 affords the accused discovery regarding the State's case. Moreover, if the State's case is flawed as a matter of law, the accused may seek its dismissal. *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). In this case Mr. Byron made no such motion prior to or during trial. (CP; Supplemental CP).

4. At sentencing, Mr. Byron's offender score was properly calculated.

On appeal, Mr. Byron submits his offender score should be eight and that is was therefore miscalculated at sentencing. This is wrong; his offender score was correctly calculated at sentencing.

First, defense counsel explicitly agreed to an offender score of nine at sentencing. (12/23/09 RP 10). Acknowledgment of prior offenses and the court's calculation is recognized as a waiver of the right to challenge the score on appeal under RCW 9.94A.530(2).

Second, the offender score was correctly calculated. Mr. Byron's criminal history by itself would add up to an offender score of eight (rounded down from 8.5). However, because Mr. Byron was on community custody at the time of the burglary, this added an additional point to his score per RCW 9.94A.525(19). This statute requires that "if the present conviction is for an offense committed while the offender was under community custody, add one point." RCW 9.94A.525(19). This additional point is clearly noted on the offender score sheet. (Supplemental CP 30). This brings Mr. Byron's total score to 9.5, which would be rounded down to nine. (Supplemental CP 30). Therefore, Mr. Byron's offender score was accurately calculated by the sentencing court.

5. The 2008 amendments to the SRA are constitutional.

The State carries a recognized evidentiary obligation with regard to proof of a defendant's personal criminal history. *State v. Ford*, 137 Wn. 2d 472, 973 P.2d 452 (1999). Requirements regarding acceptable documentation and acknowledgment of the State's evidence by the offender at sentencing have been codified by RCW 9.94.500 and RCW 9.94A.530, the 2008 amendments to the Sentencing Reform Act. Mr. Byron asserts these amendments violate two constitutional rights: the Fifth amendment privilege

against self-incrimination and the Fourteenth amendment right to due process. It is the State's position these amendments are constitutional.

First, Mr. Byron claims his right to due process was violated by the 2008 amendments to the Sentencing Reform Act. His argument places inappropriate reliance on *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999), citing it for support that RCW 9.94.500 and RCW 9.94A.530 unconstitutionally shift the burden of proof to the offender. (Appellate brief 35).

However, in *Ford*, the issue was whether the State's "bare assertion" that the defendant's out-of-state convictions would be classified as felonies in Washington, combined with the defendant's failure to specifically object to that assertion, was sufficient under the SRA to authorize the sentence imposed. *Ford*, 137 Wn.2d at 476, 482. Relying on SRA procedural requirements for analyzing comparability, the court held that it was not sufficient. *Ford*, 137 Wn.2d at 482. In response, on June 12, 2008, the Legislature amended *RCW 9.94A.500(1)* to allow a prosecutor to prove a defendant's criminal history by submitting a "criminal history summary," which "shall be prima facie evidence of the existence and validity of the convictions listed therein." *RCW 9.94A.500(1)*.

And *RCW 9.94A.530(2)* was amended to allow a sentencing court to rely on this summary if not objected to by the defendant, just as the court is allowed to rely on information contained in a pre-sentence report. *RCW 9.94A.530(2)*. Mr. Byron's sentencing proceedings took place on Feb. 3, 2010.

Mr. Byron argues that *Ford* stands for the principle that requiring an offender to object when the State presents the summary of criminal history unconstitutionally shifts the burden of proof. Importantly, however, the court in *Ford* based its holding on the validity of the *SRA*'s requirements rather than on constitutional protections of due process, suggesting that when the State's evidence is consistent with *SRA* requirements, it is sufficient to prove criminal history at sentencing. However, Mr. Byron cites no additional case law to support his argument.

In *Ford*, the Court recognized that placing a minimal obligation to object upon the offender "preserves the purpose of the *SRA* to impose fair sentences based on provable facts, yet provides the proper disincentive to criminal defendants who might otherwise purposefully fail to raise potential defects at sentencing . . ." *Ford*, 137 Wn. at 486. This concern is reflected in *RCW 9.94A.530(2)*,

namely that without an obligation upon the defendant to object to an incorrect criminal history, a perverse incentive would arise for the offender to remain silent, in order to raise a miscalculated score on appeal. *Ford* at 486. And although the Court discussed the minimal requirements of due process at sentencing, it emphasized that its conclusion should not be construed to place a heavier burden on the State than was required by the SRA. *Ford*, 137 Wn.2d at 482. This suggests that the holding in *Ford* was thus based on the intent and procedures of the SRA rather than the principle of due process.

Second, Mr. Bryon argues that RCW 9.94A.530 violates the constitutional privilege against self-incrimination because it allows a lack of objection to be considered acknowledgment of the State's evidence. This argument was rejected by this very Court in *State v. Blunt*, 118 Wn. App. 1, 71 P.3d 657 (2003). Mr. Blunt cited *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999), arguing it prohibited a sentencing judge from drawing an adverse inference from a defendant's failure to deny prior convictions.

In *Mitchell*, the defendant's failure to "come forward" to contradict the government's evidence and to "explain [her] side"

was a reason cited by the sentencing court in support for the State's sentencing request. *Mitchell*, 526 U.S. at 319. On appeal, the United States Supreme Court held that a defendant maintains the right against self-incrimination during a sentencing hearing and that no adverse inferences can be drawn from a defendant's silence "with regard to factual determinations respecting the circumstances and details of the crime," such as the quantity of drugs involved in the crime. *Mitchell*, 526 U.S. at 321, 328. However, this Court noted in *Blunt* that *Mitchell* allows a court to consider whether an offender offered "no evidence to challenge the accuracy of" the State's evidence, once the State has met its burden of proof: "To hold that *Mitchell* dictates otherwise would be to allow the defendant's muteness effectively to rebut the government's evidence." *Blunt*, 118 Wn. App at 662 , quoting *United States v. Romero-Rendon*, 220 F.3d 1159, 1163, n.4 (9th Cir. 2000). Thus, this Court already distinguished between "drawing an adverse inference from a refusal to testify at sentencing (unconstitutional as per *Mitchell*) from the instance where a defendant puts forward no evidence, allowing the State's evidence to be "clear and convincing proof." *Id.* Applying this distinction, the Court found the lower court did not improperly infringe on Blunt's right to remain silent by noting Blunt's

failure to challenge the State's evidence. *Blunt*, 118 Wn. App. at 662-3. This Court also explicitly noted that a statute allowing the court to infer such acknowledgment does not infringe on a sentencing defendant's right to remain silent, specifically referencing *RCW 9.94A.370(2) (2000) recodified as 9.94A.530(2) (LAWS OF 2001, ch. 10, § 6)*. *Blunt*, 118 Wn. at 662. Rather, this statute was interpreted to allow unchallenged, minimally reliable evidence of prior convictions to preponderate toward proof of a prior conviction. *Id.*

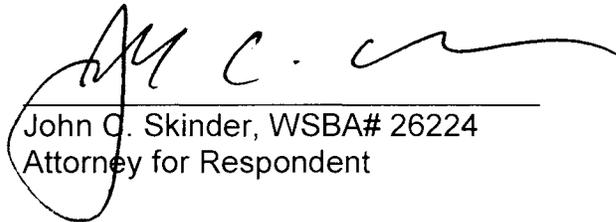
The State's criminal history summary was prima facie evidence of the defendants' prior convictions. RCW 9.94A.500(1). Defense counsel objected at sentencing to the first offender score offered by the State (12/23/09 RP 3). The State thus recalculated the score, and both parties explicitly agreed upon the final score of nine (12/23/09 RP at 10). The State maintains the calculation and the imposed sentence to be correct.

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D. CONCLUSION.

For the above reasons, the State respectfully requests this Court to dismiss Mr. Byron's appeal and affirm his conviction and sentence.

Respectfully submitted this 17<sup>th</sup> day of JUNE, 2010.



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

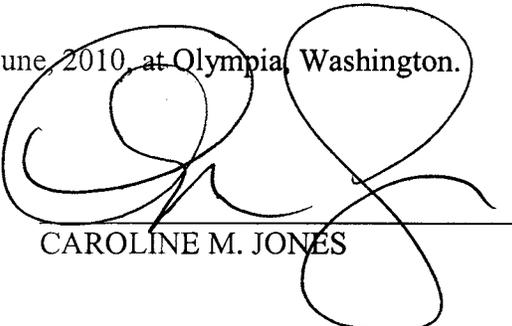
- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: JODI R. BACKLUND  
MANEK R. MISTRY  
203 4<sup>TH</sup> AVE E, STE 404  
OLYMPIA, WA 98501-1189

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JENNY

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

Dated this 17 day of June, 2010, at Olympia, Washington.

  
CAROLINE M. JONES