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

1. Whether defendant fails to meet his burden to show that the prosecutor's closing analogy constituted flagrant and ill-intentioned argument which was so prejudicial that no curative instruction could have neutralized it.
2. Whether defendant is barred from raising an objection to a special verdict jury instruction on appeal when he did not preserve his objection in the trial court.
3. Whether the special finding of "sexual motivation" was properly charged and applied in this 2005 case when it comports with the law in effect at that time and the parties did not apply the current version of the statute retroactively.
4. Whether there was sufficient evidence to support the jury's guilty verdicts on the counts of robbery and burglary.
5. Whether defendant waived any objection to the calculation of his offender score when he stipulated to his score at the time of sentencing.

B. STATEMENT OF THE CASE.

1. Procedure

On September 11, 2008, the Pierce County Prosecutor's Office filed cause number 08-1-04240-7 charging appellant Robert Charles Mayo, hereinafter "defendant," with rape in the first degree (count 1) and felony harassment (count 2), which occurred on November 1, 2005. CP 1-2. The information was subsequently amended to add burglary in the first

degree as count 3, and robbery in the first degree as count 4. CP 3-5. The burglary charge, count 3, alleged that the crime was committed with “sexual motivation” pursuant to RCW 9.94A.030 and RCW 9.94A.835. CP 3-5. This case was assigned to the Honorable Kitty-Ann vanDoorninck for trial on March 4th, 2010. 1 RP 7CP 56-58.

After closing arguments, Judge vanDoorninck completed a set of jury instructions. 4 RP 387. She solicited exceptions to the instructions from both parties. Neither party lodged any objections. 4 RP 387.

Closing arguments were heard on March 15, 2010. 5 RP 391. During closing, the prosecutor used a puzzle analogy to argue the concept of “beyond a reasonable doubt.” 5 RP 419. Defense did not object to this analogy. 5 RP 419.

On March 15, 2010, the jury returned verdicts of guilty on the counts of rape in the first degree, felony harassment, burglary in the first degree with a special finding of sexual motivation, and robbery in the second degree. CP 99-104. Defendant was sentenced on April 23, 2010. CP 109-125. He signed a stipulation that he had three prior juvenile convictions which gave him an offender score of 4.5. CP 105-108. The

parties agreed that his offender score was 10 on the counts of rape and burglary, 9 on the count of robbery, and 5 on the felony harassment.¹ 6 RP 432-433, CP 150-153. Judge vanDoorninck sentenced defendant to 318 months on rape in the first degree, 22 months on felony harassment, 116 months on burglary in the first degree with sexual motivation, and 84 months on robbery in the second degree. 6 RP 446, CP 109-125. Defendant was ordered to be on community custody from the date of sentencing for the rest of his life on the rape and burglary, and for 18 months on the robbery. 6 RP 446, CP 109-125.

Defendant timely filed his notice of appeal. CP 130-147.

2. Facts

Victim A.C. testified that she spent the night of October 31, 2005, at a Budget Hotel in Tacoma, Washington. 4 RP 310. At approximately 8:45 a.m. on November 1st, she was sitting on the bed with her cell phone on a bed side table when she heard some rustling at her door. 4 RP 313-314. Defendant, who A.C. had never seen before, pushed into the room, making a comment about calling some females. 4 RP 315-316. When A.C. tried to edge past him to the door, defendant slammed the door

¹ The parties stipulated that defendant's offender scores were: 11 points on the rape, 6 points on the harassment, 11 points on the burglary and 10 points on the robbery. The trial found that the rape and harassment counts merged, so each score was reduced by one point. 6 RP 445.

closed and pushed A.C. down onto the bed. 4 RP 315. Defendant told A.C. that if she did not do what he told her, he would kill her. 4 RP 315. She was afraid that he would kill her if she didn't listen to him. 4 RP 315.

A.C. testified that defendant told her to undress and he took off his clothes. 4 RP 315. Defendant then raped A.C. repeatedly for about an hour. 4 RP 315-316. As he raped her, defendant grabbed her around the neck, bit her on the neck, and forcefully threw her around. 4 RP 318. After the attack, A.C. had bite marks on her neck. 4 RP 333.

After approximately an hour, A.C. told defendant that she had a truck outside with money and keys in it. She indicated that he could take the truck if he wanted. 4 RP 318. In fact, A.C. did not have a truck, but was using this ruse to get defendant to leave her hotel room. 4 RP 319. Defendant then ordered A.C. to come with him as he went to look for her truck. 4 RP 319. He took A.C.'s cell phone as he left the hotel room to go look for her truck. 4 RP 321. A.C. decided not to object to him taking her phone out of fear that he may hurt her or carry through his previous threat to kill her. 4 RP 321-322, 346-349. She did not give him permission to take her cell phone. 4 RP 321-322, 331.

When A.C. left the hotel room with defendant, she saw another guest outside. 4 RP 322-323. A.C. ran to that guest who gave her shelter in her room. 4 RP 322-323. During trial, A.C. identified defendant as the man who raped her and took her cell phone. 4 RP 329-330.

A.C. testified that after her escape she was taken to Tacoma General Hospital where she was seen by a sexual assault nurse. 4 RP 324. A.C. described distinctive tattoos she had seen on defendant's body. 4 RP 325-326. A.C. identified photos which depicted her leaving the hotel room with defendant. Exhibits 6, 7, 8, 10 and 14. 4 RP 327-329.

Chris Westby testified that he is a detective for the Lakewood Police Department special assault unit. 3 RP 76-77. He was dispatched to Tacoma General Hospital where he contacted and interviewed A.C. 3 RP 78-79. After A.C. had sexual assault exam he took possession of the rape kit which had been completed. 3 RP 92. The kit was later sent to the Washington State Patrol to search for a potential DNA profile from the rapist. 3 RP 93.

On November 2, 2005, Detective Westby obtained a series of photos taken by the hotel security system on the date of this incident. 3 RP 83-85, 88. The photos showed defendant as he came out of a hotel room with A.C. as well as of him fleeing the scene. 3 RP 87-88.

Martina White testified that she stayed at the Budget Inn in Lakewood, Washington for a couple of days. 1 RP 32. On the morning of November 1, 2005, she was outside on the porch when she saw defendant and A.C. leave a nearby room. 1 RP 33. When A.C. rushed over to her and told her that the male had just raped her, Ms. White took her into her own room. 1 RP 33-34, 38. 1 RP 38. She never saw the male again. 1 RP 38. Ms. White identified a series of exhibits show the exterior of the

Budget Inn as defendant left to look for A.C.'s truck. Exhibit number 14 shows defendant fleeing after A.C. found refuge in Ms. White's room. 4 RP 329. Ms. White identified defendant in court as the male who had been outside A.C.'s room with her on that morning. 1 RP 45.

Norbert Wade is a property and evidence supervisor with the Lakewood Police Department. 3 RP 116. He was dispatched to the Budget Inn in Lakewood on November 1, 2005, to process the scene of this rape. 3 RP 116-117. As he collected evidence in A.C.'s room, Mr. Wade saw a cell phone charger plugged into the wall, but did not locate a cell phone. 3 RP 121.

Jeremy Sanderson testified that he is a forensic scientist who works in the DNA section of the Washington State Patrol crime lab in Tacoma. 4 RP 246. In July of 2007, he examined a rape kit completed during the assault examination of A.C. 4 RP 254. Through the use of DNA analysis, the unknown sample of DNA taken in the assault exam and preserved in the rape kit was identified as having been consistent with the defendant's DNA profile. 4 RP 255. Mr. Sanderson testified that he issued a report to the police which explained that a possible match had been made to defendant's DNA, and requested a reference sample from defendant for

confirmation purposes. 4 RP 255. When defendant's reference sample was tested, it matched the DNA on the swabs collected during A.C.'s sexual assault exam. 4 RP 256.

Defendant testified that he was with friends on the evening of October 31 and November 1st, and denied that he had raped A.C. 4 RP 362-367, 369.

C. ARGUMENT.

1. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER AND DEFENDANT'S RIGHT TO A FAIR TRIAL WAS PRESERVED.

The State is generally afforded wide latitude in making arguments to the jury. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P. 2d 1273 (2009). A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *Id.* *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996).

Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)).

An appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhalawal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P. 2d 1239 (1997) citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P. 2d 1105 (1995).

Defense raised no objections to the prosecutor's closing remarks during trial. Therefore, defendant has waived any objection to the prosecutor's analogy unless he shows that it was so flagrant and ill-intentioned that no curative instruction could have eliminated any resulting prejudice. *Stenson, supra*.

Defendant argues that “[r]eversal is required because the prosecutor committed flagrant and ill-intentioned misconduct...” Brief of Appellant, page 13. This misstates the standard defendant must meet in order to appeal an argument which was not objected to below. The standard actually has three prongs, each of which must be met in order to prevail on a claim of misconduct.

The first prong of the three prongs that defendant must show is that the prosecutor’s remark was “flagrant.” “Flagrant” is defined in *Webster’s Third International Dictionary 875 (2002)* as “conspicuously or outstandingly bad.” The argument to which defendant objects was a puzzle analogy the prosecutor used to help define the concept of “beyond a reasonable doubt” for the jurors. The prosecutor argued:

Think of reasonable doubt like a puzzle. A puzzle that you get at Christmas or for your birthday. As you get this puzzle, one family member tells you, hey, it’s a puzzle of Portland. Another family member says, no, it’s a puzzle of Tacoma and another family member says, no, it’s a puzzle of Seattle. As you slowly fill in those puzzle pieces, you say, well, I think it’s Tacoma, I guess it could be Portland, maybe it’s Seattle, but let’s continue putting the pieces together. So you see Mount Rainier and you think to yourself, well, it’s definitely not Portland. Still, I think it’s probably Tacoma, maybe Seattle. So you put in a little more, and you see part of the Tacoma Dome. It’s at that point that you have an abiding belief that you’re putting together a puzzle of Tacoma, there’s no doubt in your mind that you’re putting together a puzzle of Tacoma, even though you’re still missing some of those pieces. And that’s reasonable doubt, Ladies and Gentlemen.

It’s the State’s burden. The State has met that burden, and we’re to indicate here that the State has

embraced that burden on each and every element for each and every count.

5 RP 419-420. This analogy is consistent with jury instruction number 2, which was both read by the court to the jury before the closing arguments, and provided to them for their deliberation. The last paragraph of instruction 2 states:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence of lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 60-98, instruction number 2.

This puzzle analogy is not a mischaracterization of the law. It encourages the jury to fully and fairly consider all of the evidence before it. It discusses the concept of how strong a belief has to be before it is abiding. Right after the prosecutor discussed the puzzle analogy, she reiterated that the State has the burden of proving each element of each crime. 5 RP 420. This analogy does not trivialize the State's burden of proof.

Defendant argues *State v. Johnson*, No. ____ Wn. App. ____, 243 P. 3d 936 (2010), 39418-9-II Wash. Nov. 24, 2010, controls this case. He implies that the *Johnson* prosecutor used the puzzle analogy and for this

reason alone, the Court of Appeals reversed Johnson's conviction.

Defendant's logic is that this case, which also used the puzzle analogy should be reversed as well. However, the *Johnson* case differs in two significant ways.

The puzzle analogy used by the prosecutor in *Johnson* had significantly different wording. The *Johnson* prosecutor argued that you may be convinced beyond a reasonable doubt that the puzzle shows a scene of Tacoma after completing *only half of the puzzle*. *Id* at 939, *emphasis added*. In reviewing *Johnson*, the court stated that the puzzle analogy trivialized the State's burden and focused on the degree of certainty a juror would need in order to act. *Id*. To the extent that the *Johnson* prosecutor quantified the evidence the State needed to meet the burden of proof, an implication that half of a puzzle is sufficient trivializes the State's burden.

The prosecutor here did not suggest any quantity of evidence which was needed before a jury might form an abiding belief in the truth of the charges. The prosecutor in this case discussed putting the puzzle together *until* you have an abiding belief that you are looking at a scene of Tacoma. She talked about the fact that you could have an abiding belief in the topic of the puzzle *even though you may still be missing some of the pieces*. She then told the jurors that *if they had put together so much of the*

puzzle that they had no doubt in their minds, then they were convinced beyond a reasonable doubt. 5 RP 419-420. This argument does not quantify the State’s burden of proof, but instead lets the jury decide when they are convinced beyond a reasonable doubt that every element of every crime has been met. This analogy only lets them know that they do not have to be convinced *beyond any doubt*. They may be convinced even if every piece of information has not been accounted for by the prosecutor.

For instance, defendant argues that he cannot be convicted of robbery because the State did not prove what ultimately happened to the cell phone he took. The puzzle argument tells the jury that they may be convinced of guilt even if some pieces of information are still missing. The prosecutor then reiterated the State’s burden: “the State has embraced that burden on each and every element for each and every count.” 5 RP 420. The phrasing here did not trivialize or undermine the defendant’s due process rights.

The second distinction regarding *Johnson* is that the prosecutor in that case made multiple improper arguments. *Id* at 940. The second argument in *Johnson* was that the jury had to have an articulable reason to acquit. Further, the *Johnson* prosecutor argued that if the jury could not “fill in the blank” with a reason to acquit, then it had to convict. *Id* at 940, citing *State v. Anderson*, 153 Wn. App. 417, 220 P. 3d 1273 (2009). The

Johnson court found that these arguments subverted the presumption of innocence by implying that the jury had a duty to convict, and that the defendant bore the burden of supplying a reason for the jury not to convict. *Id* at 940.

Finally, the *Johnson* prosecutor discussed “reasonable doubt” in the context of everyday decision making. The *Johnson* court referred to its decision in *Anderson* where it found that such “everyday decision” arguments “trivialized and ultimately failed to convey the gravity of the State’s burden,” and implied that the jury should convict unless it found a reason not to.² *Id.* The prosecutor in this case made only one analogy which was used in the *Johnson* case. Based on the distinct difference that this prosecutor did not quantify the burden of proof and did not use the other two arguments which the *Johnson* court found so offensive, her argument differed significantly. She neither trivialized the State’s burden of proof, nor implied that defendant bore any burden. The prosecutor’s argument in this case is not “flagrant.”

² The prosecutor in *Anderson* did not use the puzzle analogy, but instead discussed common daily decisions, and focused on the jury’s degree of certainty which would lead it to *act or to refrain from acting*. *Id.* at 432.

Defense argues that an argument is “ill-intentioned” where a court has previously recognized it as improper in a published opinion. However, given the above definition of “conspicuously bad,” the presentation of an argument when on notice that it is improper could be categorized as “flagrant.” Regardless of how defendant’s argument is categorized, no court had previously held that the puzzle analogy was improper argument. In this circumstance, this prosecutor was not on notice that the puzzle analogy was considered improper argument. Defense cites *Johnson* to show ill-intent by this prosecutor, but this case was tried in March of 2010, more than nine months before *Johnson* was decided on November 24, 2010.

Defense also cites *State v. Anderson*, as a case in which the prosecutor trivialized the State’s burden of proof. However, the puzzle analogy was not used in *Anderson*, so that gave the prosecutor no notice that the puzzle analogy might be considered suspect. *Johnson, supra*. By defendant’s own test, the prosecutor did not have ill-intent in this case. Defendant has failed to show that this prosecutor’s argument was ill-intentioned.

The second prong defendant must show is that the prosecutor’s closing remark was “ill-intentioned.” An ill-intentioned argument would be one which is intended to persuade the jury to apply a wrong standard. As noted above, the prosecutor in this case informed the jury that it was

the prosecutor's burden to prove beyond a reasonable doubt each and every element for each and every crime. 5 RP 419-420. These statements accurately represent the prosecutor's burden. Defendant has not shown that the prosecutor attempted to mislead the jury about who bore the burden, or that it was less than "a reasonable doubt."

The third prong defendant must also meet has two parts. Initially defendant must show that the remark evinced an enduring and resulting prejudice which could not be neutralized by an instruction to the jury. Defendant did not object to the prosecutor's puzzle analogy during trial. Nor did he seek a mistrial. The absence of an objection or a motion for mistrial at the time of the argument strongly suggests to a court that the argument in question did not appear critically prejudicial to an appellant in the context of the trial. *State v. Swan*, 114 Wn. 2d 613, 661, 790 P.2d 610 (1990). "Moreover, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or appeal." *Id.*

When considering whether the prosecutor's closing argument resulted in an enduring and resulting prejudice, the court should also consider the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. The evidence in this case was overwhelming. The State produced two eye-witnesses who testified to defendant's identity, the victim described

unique tattoos and the jury saw photos of defendant with those tattoos, the DNA evidence identified defendant as the rapist, there were videos of defendant at the scene, and defendant's alibi was not credible. With such an abundance of incriminating evidence, a prosecutor's argument would have to be very remarkable to evoke an enduring and resulting prejudice.

An example of incurable prejudice is found in *State v. Clafin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), in which a prosecutor read a poem about rape victims in his closing argument. This poem, meant to show what rape victims "probably felt," was long, referred to matters outside of the record and contained vivid and highly inflammatory imagery describing rape's emotional effect. *Id.* The Court of Appeals held that the reading of the poem was so prejudicial that no curative instruction could have neutralized the harm. *Id.*

The prosecutor's analogy in this case was not startling, it did not inflame the passions and prejudices of the jury, and it did not persuade them to disregard the State's burden of proof. It was a fair extrapolation of the language used in instruction number 2, a standard WPIC commonly given by trial courts this state. CP 60-98, instruction 2. The prosecutor in this case made no remark which resulted in an enduring prejudice.

To complete the third prong, it must be deemed that the remark was so prejudicial that it could not have been neutralized by an admonition to the jury. The prosecutor's argument could easily have been cured by a

reminder from the court that the State bears the burden of proving each element of each crime beyond a reasonable doubt. In fact, the prosecutor did instruct the jury to that effect as she made the analogy. 5 RP 420. The jury instructions which had already been read to the jury made this point, and their presence in the jury room would serve to emphasize the State's burden. CP 60-98.

In consideration of the overwhelming evidence in this case, the absence of a quantitative value having been used in the burden of proof analogy, the fact that the prosecutor immediately told the jury that it bore the burden of proof as to each element of each crime, and the fact that no other improper closing remarks were made in this case, any prejudicial effect which may have accrued would have been slight.

There was no prejudice in this case which could not have been neutralized by an admonition to the jury. In order for defendant to prevail on an argument that the prosecutor's remarks were flagrant, ill-intentioned and could not have been cured, he must show that all three of these prongs are met. In this case, none of the prongs has been met. Defendant's right to a fair trial is intact in this case.

2. APPELLANT IS BARRED FROM OBJECTING TO THE SPECIAL FINDING JURY INSTRUCTION ON APPEAL WHEN NO OBJECTION WAS LODGED IN THE TRIAL COURT.

A trial court shall afford counsel an opportunity to object to the giving of any instruction or the refusal to give a requested instruction. CrR 6.15(c). The party objecting shall state the reason for the objection, specifying the number, paragraph and particular part of the instruction to be given or refused. *Id.* The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), *citing*, *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967).

Included in the court's instruction in the case below was the following:

You will also be furnished with a special verdict for the crime of burglary in the first degree. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must be unanimously satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to this question, you must answer "no."

CP 60-98, instruction number 34. As required by CrR 6.15, the judge in this case asked both parties whether they had any exceptions to the jury instructions. 4 RP 387. Defense responded that there was no objection. 4 RP 387.

RAP 2.5(a) allows that a party may raise the following claimed errors for the first time on appeal:

- (1) lack of trial court jurisdiction,
- (2) failure to establish facts upon which relief can be granted, and
- (3) manifest error affecting a constitutional right.

Since defendant did not object to jury instruction 34 below, he may appeal this instruction only if there is an error of constitutional magnitude.³

The Washington Supreme Court addressed the question of whether the issue of unanimity on a special finding verdict was an issue of constitutional magnitude in *State v. Bashaw*, 169, Wn.2d 133, 234 P. 3d 195 (2010). The *Bashaw* Court indicated in footnote 7 that the issue of jury unanimity

“...is not compelled by constitutional protections against double jeopardy...but rather by the common law precedent of this court, as articulated in *Goldberg*.”

Bashaw, *supra* at 146. Although the opinion does not expressly state the issue was not of constitutional magnitude, it must be presumed that

³ The issues outlined in RAP 2.5(a)(2) and (3) are not applicable in this case.

Bashaw objected to the jury instruction at trial, thereby preserving this issue for appellate review.

That is not the posture of this case, as no objection was lodged in the trial court. Because the issue of unanimity in a special verdict finding is not an issue of constitutional magnitude, it may not be raised on appeal unless defendant preserved it by objecting in the trial court. Defendant's failure to object to the jury instruction below precludes him from challenging the instruction for the first time before this Court.

3. THE JURY'S FINDING OF "SEXUAL MOTIVATION" ON THE BURGLARY CHARGE IS PROPER AS IT COMPORTS WITH THE LAW IN EFFECT AT THE TIME THE OF CRIME AND WAS NOT USED TO ENHANCE DEFENDANT'S SENTENCE.

Count three of the information in this case charged defendant with the crime of burglary in the first degree and alleged that it was committed with sexual motivation.

COUNT III

That ROBERT CHALRES MAYO, in the State of Washington, on or about the 1st day of November 2005, did unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building, located at 9915 S. Tacoma Way, and in entering or while in such building or in immediate flight therefrom, the defendant...did intentionally assault A.C., a person therein, contrary to RCW 9.94A.52.020(1)(b), with sexual motivation as defined in RCW 9.94A.030 and invoking the provisions of 9.94A.835, and adding additional time to the presumptive sentence as

provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.⁴

CP 3-5. Defendant was convicted of burglary in the first degree with a finding of sexual motivation on this charge. CP 101-102.

During 2005, burglary was codified as a crime pursuant to RCW 9A.52.020. The 2005 Revised Code of Washington (RCW) contained a definition of sexual motivation: "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW 9.94A.030(42).

During 2005, RCW 9.94A.835 provided special procedures for alleging that a crime was committed with sexual motivation. The 2005 version of RCW 9.94A.835 read:

- (1) The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case other than sex offenses... when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact-finder.

⁴ The second amended information filed on April 14, 2009, did not change count 3.

- (2) In a criminal case wherein there has been a special allegation that the state shall prove beyond a reasonable doubt that the accused committed the crime with sexual motivation. The...jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation.

CP 3-5. The allegation of sexual motivation and the special procedure for alleging sexual motivation were both properly charged in count three.

The information also alleges that it is “adding additional time to the presumptive sentence as provided in RCW 9.94A.533.” CP 3-5. However, in 2005, RCW 9.94A.533 only covered felony crimes where the offender or an accomplice was armed with a firearm. It was not amended to add time to the presumptive sentence for a finding of sexual motivation until 2006.

In fact, the sentence of this case was not adjusted due to the sexual motivation finding. Had defendant been convicted of the same four counts in 2005, his offender score would have been 10 and the burglary sentence would have been 87 to 116 months. No additional time would have been added to the sentence in 2005 since RCW 9.94A.533 made adjustments to standard sentences only for firearm enhancements.

In this case, both parties agreed that the burglary predated the 2006 amendment of RCW 9.94A.533 which provided for additional punishment for a finding of “sexual motivation.” 6 RP 432. Defendant was sentenced on April 23, 2010, to the high end of that same range, 87 to 116 months, on the burglary count, and no additional time was added for the special finding. CP 109-125. The sexual motivation finding did not enhance his sentence.

Defendant’s argument that the sexual motivation finding could not apply to his crime is incorrect. The repercussions of a finding of “sexual motivation” in 2005 were that it may serve as the basis for an exceptional sentence upward, and that the offender was required to register as a sex offender. RCW 9.94A.533. Here, the court did not impose an exceptional sentence upward. While defendant was required to register as a sex offender, this requirement also flowed from his conviction of rape. Thus, defendant suffered no additional penalty from the finding of sexual motivation.

The finding of sexual motivation could properly be applied to defendant’s crime. The sentence entered in this case is in conformity with 2005 law. Defendant’s request that the sexual motivation finding in this case be reversed should be denied.

4. THE PROSECUTOR PROVED ALL ELEMENTS OF ROBBERY AND BURGLARY BEYOND A REASONABLE DOUBT WITHOUT THE NECESSITY OF SHOWING THE WHEREABOUTS OF VICTIM'S CELL PHONE AFTER DEFENDANT TOOK IT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *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 the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to 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. 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)).

In this case, the court instructed the jury on the following elements of robbery:

- (1) that on or about the 1st day of November, 2005, the defendant unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use of threatened use of immediate force, violence or fear of injury to the person;
- (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance in the taking;
- (5) That in the commission of these acts or in immediate flight therefrom the defendant inflicted bodily injury; and
- (6) That any of the acts occurred in the State of Washington.

CP 60-98, instruction number 26.

A.C. testified that she had a cell phone with her at the hotel when defendant entered and raped her. 4 RP 313-316. A.C. testified that defendant took the phone with him as he left the hotel room. 4 RP 321, 346. Mr. Wade, the evidence supervisor, processed the hotel room after

this rape occurred and saw a cell phone charger plugged into the wall of the room. He never found the phone. 3 RP 121. The jury could have reasonably drawn the inference that defendant took A.C.'s cell phone in her presence. These facts establish the first element of robbery.

Intent to commit theft, the second element of robbery, can be inferred from the fact that defendant took A.C.'s cell phone, put it into his pocket and left the hotel room to look for her truck. 4 RP 346. Unlike the situation with the truck, A.C. did not ever offer to let defendant have the cell phone, and he never asked. Ms. White testified that exhibit 14 showed defendant fleeing the hotel area after she took A.C. into her room. The cell phone was never recovered. A reasonable person could easily infer that defendant took the cell phone with the intent to steal it.

The third element of robbery, that defendant took the cell phone against A.C.'s will, was established by the fact that he had threatened to kill her if she did not comply with his demands. 4 RP 321-322, 346-349. A.C. did not give defendant permission to take her cell phone. 4 RP 331. A.C. explained to the jury that she did not object to the taking for fear that he might hurt her in some way or could continue his previous attack on her. 4 RP 321-322. The jury could reasonably conclude that A.C. risked additional injury if she resisted or fought to recover her cell phone. The third element of robbery was clearly shown.

The jury could also have found that the cell phone was obtained and retained through force or fear. A.C. testified that she did not confront defendant when he took her cell phone because she reasoned that she was “still alive, if that is what he wanted, then take it.” 4 RP 321. She testified that she did not try to do anything but let him take her cell phone because she was afraid for her life. 4 RP 347. As noted above, defendant had previously pushed her down, raped her, grabbed her neck, bitten her and thrown her around. She was afraid that his attack would resume. The fourth element of robbery was met.

The fifth element of robbery is that the defendant inflicted bodily injury on A.C. during the commission of these acts or in immediate flight. Certainly the jury could reasonably have inferred that A.C.’s testimony about the bodily injury she received during this attack fulfilled the fifth element of robbery. Finally, based on A.C.’s testimony about where she was when she checked into this hotel, one could reasonably infer the sixth element, that these events occurred in Tacoma, Washington was uncontested. 4 RP 333-334.

Based upon all of this evidence any jury could reasonably infer that defendant committed robbery when he injured A.C. and took the phone against her will by fear or threat. The State met its burden of proving every element of robbery beyond a reasonable doubt.

Viewing all of the evidence as true, and drawing all reasonable inferences in the light most favorable to the State, and most strongly against the defendant, any reasonable jury could find that the State produced evidence to support each element of robbery in the second degree. The verdict of the trier of fact should be upheld.

Defendant also argues that the burglary charge could not be proven absent evidence that he stole A.C.'s cell phone. The elements of burglary as charged in this case are:

- (1) That on or about the 1st day of November, 2005, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and
- (4) That the acts occurred in the State of Washington.

CP 160-198, number 21. Again, A.C. testified to the first element, that this burglary occurred on November 1, 2005.

The evidence which supports the second element, that defendant entered or remained with intent to commit a crime, is based on A.C.'s testimony that as soon as defendant entered the room, he pushed her onto the bed and ordered her to undress. He then raped her for an hour. A reasonable inference is that defendant entered or remained in the hotel room with intent to assault her.

The third element is that, while in the building, defendant assaulted A.C. Abundant evidence was presented to support the jury's finding that A.C. was raped and bitten by defendant before he left her room. Since an assault against a person was clearly established, it was not necessary that the State also prove that he commit a crime against property. Any reasonable jury could conclude, based on this evidence that the third element of burglary was proven. Again, that the burglary was committed in Washington was clearly established by A.C.'s testimony regarding the events of the night before, October 31, 2010.

Again, after viewing all of the evidence as true, and drawing all reasonable inferences in the light most favorable to the State and most strongly against the defendant, any reasonable jury could find that the State produced evidence to support each element of burglary in the first degree. The verdict of the trier of fact should be upheld.

5. DEFENDANT WAIVED HIS RIGHT TO OBJECT TO HIS OFFENDER SCORE WHEN HE SIGNED A STIPULATION ACKNOWLEDGING THE PRIOR AND CURRENT OFFENSES AND THE SCORES ASSIGNED TO EACH.

A sentencing court may rely on a defendant's acknowledgement of the classification of his prior offenses. *State v. Ford*, 137 Wn.2d 472, 483, 973 P.2d 452 (1999). Alleged errors as to stipulated facts or offender

score calculations are not subject to direct appeal. *State v. Huff*, 119 Wn. App. 367, 371, 80 P.3d 633 (2003) (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)).

At sentencing on April 23, 2010, defendant expressly stipulated to his offender score for each of his past and current charges. CP 150-153. He acknowledged the stipulation in open court on April 23, 2010, the date he was sentenced. 6 RP 432. He signed the stipulation before it was filed with the court. CP 150-153. Defendant never indicated that there was any question about his offender score. He now alleges that the court erred in calculating his offender score. However, by his previous stipulation to his offender score he waived any right to challenge the trial court's offender score calculation on appeal.

The stipulation defendant signed indicates that he has a juvenile robbery conviction from King County for which he was sentenced on March 27, 2002. CP 150-153. When calculated as a prior offense for rape, a serious violent sex offense, the juvenile robbery has a multiplier of two points. RCW 9.94A.525(9) and (17). Defendant has a second juvenile robbery conviction for which he was sentenced on November 11, 2001. CP 150-153. This also gives him a multiplier of two points. Finally, a juvenile conviction for assault in the third degree, sentenced on July 21, 2001, gives defendant another half point. CP 150-153, RCW 9.94A.525(8). The juvenile multipliers of 4.5 points are rounded down for a total juvenile offender score of 4 points. CP 150-153. RCW 9.94A.525.

Defendant was convicted in this case of rape in the first degree, felony harassment, burglary in the first degree, and robbery in the second degree, a total of four counts. Using the rape as the highest offense, his multiplier for the burglary, a violent offense, is two points. RCW 9.94A.525(9) and (17). These two points added to the four as a juvenile, two points for the burglary which is a violent offense, and one point each for the harassment and robbery convictions result in a total offender score of 10 on the rape charge. RCW 9.94A.525(9) and (17).

When defendant scores his points, he simply adds one point for each offense, regardless of the seriousness or violence of the underlying offense. His calculation of the offender score is grossly undervalued and incorrect. The offender scores used by the court in this case are correct. This case does not need to be remanded for re-sentencing.

D. CONCLUSION.

For the foregoing reasons the State asks this Court to affirm the convictions entered below.

DATED: February 7, 2011.

MARK LINDQUIST
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STATE OF WASHINGTON

BY _____
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI 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.

2.10.11 
Date Signature