

No. 43362-1-II

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

STATE OF WASHINGTON, RESPONDENT

V.

SHERRY HAVENS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay

No. 11-1-00295-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>State’s Counterstatement of Issues Pertaining to Assignment of Error</u> | 1 |
| B. <u>Facts of Case</u> | 2 |
| C. <u>Argument</u> | 3 |
| 1) The Wal-Mart store in Shelton, Washington provided written notice to the defendant, Sherry Havens, informing her that she was not allowed to enter the store. In violation of the notice, Havens entered the store with the intent to shoplift merchandise. Havens was caught with merchandise as she was leaving the store after bypassing the last point of payment. The State charged Havens with burglary in the second degree, alleging that Havens entered the Wal-Mart unlawfully and with the intent to commit theft. <i>Because Havens was charged with burglary, rather than trespass, was the State required to prove that Havens knowingly entered the Wal-Mart, or was the State only required to prove that Havens entered the Wal-Mart with the intent to commit a crime?</i> | 3 |
| 2) When Havens was sentenced by the court following her conviction of burglary in the second degree in the instant case, her attorney, the prosecutor, and the court calculated her offender score as three. The calculation was based upon a finding that Havens had a prior conviction for burglary, which, with a multiplier of one point, accounted for two of the three points. The third point arose from a more than five year old class C conviction for possession of a controlled substance. Although the conviction was more than five years old, it had not washed because Havens had intervening misdemeanor convictions that prevented the felony conviction from washing under RCW 9.94A.525(2)(c). However, no citation to the record | |

was located where dates of the misdemeanor convictions were clearly expressed. *Should Havens be resentenced so that the record will be clear as to the reason why her felony conviction did not wash?*.....10

3) Havens asserts on appeal that her trial attorney was ineffective because he did not present a defense of diminished capacity which would have required the jury to believe that, due to a head injury, Havens did not remember that she was banned from Wal-Mart. However, Havens' claim is premised upon assertions of fact that are not contained in the record on appeal. *Should Havens' claims that are not supported by the record be considered in a direct appeal, and does the record show that trial counsel's performance was based upon legitimate trial tactics and, therefore, that counsel was not ineffective?*.....18

D. Conclusion20

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

City of Bremerton v. Widell, 146 Wn.2d 561, 51 P.3d 733 (2002).....7

In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).....20

State v. Bellerouche, 129 Wn. App. 912, 120 P.3d 971 (2005).....8

State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988).....8

State v. Finley, 97 Wn. App. 129, 982 P.2d 681 (1999).....7

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).....15, 17

State v. Green, 157 Wn. App. 833, 239 P.3d 1130 (2010).....8

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).....19, 20

State v. Grimes, 92 Wn. App. 973, 966 P.2d 394 (1998).....7, 8, 10

State v. Hunley, ___ Wn.2d ___, 287 P.3d 584
(No. 86135-8, Nov. 1, 2012).....14, 15, 16, 17

State v. Kutch, 90 Wn. App. 244, 951 P.2d 1139 (1998).....8

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....19, 20

State v. R.H., 86 Wn. App. 807, 939 P.2d 217 (1997).....8

State v. Soto, 45 Wn. App. 839, 727 P.2d 999 (1987).....9

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
80 L.Ed. 2d 674 (1984).....18

Statutes

RCW 9.94A.525(2)(c).....1, 10, 14, 15, 18
RCW 9A.52.010(5).....8, 10
RCW 9A.52.030.....4, 6, 7, 8, 9, 10
RCW 9A.52.070.....6, 7, 9
RCW 9A.52.080.....6, 7
RCW 9A.52.090.....6, 7, 9

A. State's Counterstatement of Issues Pertaining to Assignment of Error

- 1) The Wal-Mart store in Shelton, Washington provided written notice to the defendant, Sherry Havens, informing her that she was not allowed to enter the store. In violation of the notice, Havens entered the store with the intent to shoplift merchandise. Havens was caught with merchandise as she was leaving the store after bypassing the last point of payment. The State charged Havens with burglary in the second degree, alleging that Havens entered the Wal-Mart unlawfully and with the intent to commit theft. *Because Havens was charged with burglary, rather than trespass, was the State required to prove that Havens knowingly entered the Wal-Mart, or was the State only required to prove that Havens entered the Wal-Mart with the intent to commit a crime?*

- 2) When Havens was sentenced by the court following her conviction of burglary in the second degree in the instant case, her attorney, the prosecutor, and the court calculated her offender score as three. The calculation was based upon a finding that Havens had a prior conviction for burglary, which, with a multiplier of one point, accounted for two of the three points. The third point arose from a more than five year old class C conviction for possession of a controlled substance. Although the conviction was more than five years old, it had not washed because Havens had intervening misdemeanor convictions that prevented the felony conviction from washing under RCW 9.94A.525(2)(c). However, no citation to the record was located where dates of the misdemeanor convictions were clearly expressed. *Should Havens be resentenced so that the record will be clear as to the reason why her felony conviction did not wash?*

- 3) Havens asserts on appeal that her trial attorney was ineffective because he did not present a defense of diminished capacity which would have required the jury to believe that, due to a head injury, Havens did not remember that she was banned from Wal-Mart. However, Havens' claim is premised upon assertions of fact that

are not contained in the record on appeal. *Should Havens' claims that are not supported by the record be considered in a direct appeal, and does the record show that trial counsel's performance was based upon legitimate trial tactics and, therefore, that counsel was not ineffective?*

B. Facts of Case

On August 7, 2009, Sherry Havens was served with a trespass notice that prohibited her from entering the Wal-Mart store in Shelton, Washington. CP 21; RP 50.

On August 18, 2011, security personnel saw Havens in the electronics section of the of the Shelton Wal-Mart. RP 24-25. Asset protection associate Anthony McNeal's attention was drawn to Havens because Havens was shopping while carrying an empty, plastic, Wal-Mart bag. RP 25. McNeal began to watch Havens' movements in the store. RP 26.

McNeal watched as Havens took a variety of items, including a "Tinkerbell tote bag," and placed them into a shopping cart. RP 26-27. Havens moved to the housewares department, where she took several items from her shopping cart and put them into the tote bag. RP 27. Havens then moved to the infants department, where she took the items out of the tote bag and put them, together with the now empty tote bag,

into the plastic Wal-Mart bag that she had been carrying. RP 28. In addition to the items that she had placed into the Wal-Mart bag, Havens also had three bottles of soap and bleach in her basket. RP 27-28.

Havens pushed her basket to the front of the store toward the cash registers, but she bypassed the registers and pushed her basket past the last point of sale to the exit doors, where she was stopped by security within feet of the exit doors as the doors opened in response to her approach. RP 28, 31-35.

After considering the evidence, the jury returned a guilty verdict to the charged offense of burglary in the second degree. RP 351.

C. Argument

- 1) The Wal-Mart store in Shelton, Washington provided written notice to the defendant, Sherry Havens, informing her that she was not allowed to enter the store. In violation of the notice, Havens entered the store with the intent to shoplift merchandise. Havens was caught with merchandise as she was leaving the store after bypassing the last point of payment. The State charged Havens with burglary in the second degree, alleging that Havens entered the Wal-Mart unlawfully and with the intent to commit theft. *Because Havens was charged with burglary, rather than trespass, was the State required to prove that Havens knowingly entered the Wal-Mart, or was the State only required to prove that Havens entered the Wal-Mart with the intent to commit a crime?*

For the first time on appeal, Havens argues that on the facts of the instant case the jury's verdict finding her guilty of burglary in the second degree in violation of RCW 9A.52.030(1) should be reversed because the jury was not instructed in regard to the knowledge element of the offense of criminal trespass. Appellant's Opening Brief, pp. 9-11; CP 17; RP 122.

The charge and conviction in the instant case arose out of the fact that Havens was caught shoplifting at the Shelton Wal-Mart on August 18, 2011. CP 17; RP 24-49. At trial, Havens stipulated to the jury that on August 7, 2009, she had been issued a trespass notice and that she was prohibited from lawfully entering the premises of the Shelton Wal-Mart. RP 50; CP 21.

Outside the presence of the jury, the parties discussed at trial whether the State would elicit testimony about the reason why Havens had been trespassed from Wal-Mart. RP 1-2. When the prosecutor stated that an element of the charged offense of burglary required proof that Havens' entry into Wal-Mart was unlawful -- and that it was necessary to prove that she had been trespassed from Wal-Mart but that the reason for the trespass notice was irrelevant -- Havens' attorney responded: "That would be sufficient, Your Honor. That we would stipulate that Ms. Havens had been trespassed -- given a trespass notice from Wal-Mart and therefore it

was unlawful for her to enter.” RP 2. The prosecutor, seeking clarification, said: “And that she was aware of the order.” RP 3. Havens’ attorney affirmed: “And she was aware of the order.” RP 3.

When the parties discussed the wording of the stipulation, Havens’ attorney stated: “We would stipulate that she has been served with a trespass notice and that she signed for it, and therefore, her entry into Wal-Mart was unlawful.” RP 11-12. The prosecutor expressed concern “that apparently there was [an] allegation that Ms. Havens has suffered some kind of head injury where... she doesn’t remember the fact that she has been trespassed from Wal-Mart. And that sounds suspiciously close to the State as diminished capacity....” RP 12. Havens’ attorney responded, “Well, we’re stipulating that she was there unlawfully.” RP 12. Because there was no medical evidence to support the defense, the prosecutor asked for a ruling from the court disallowing Havens from raising a diminished capacity defense by alleging that she had forgotten that she was trespassed from Wal-Mart. RP 13. Havens’ attorney responded:

Your Honor, I have no intention of going into Ms. Havens’ head injury or the fact that she doesn’t remember being trespassed. We’re stipulating -- we are stipulating that she was trespassed and that therefore her entry into Wal-Mart was unlawful.... Our defense is not diminished capacity. Our defense is that she did not commit the crime of shoplifting. She didn’t do it. That’s our defense.

RP 13.

RCW 9A.52.030(1) states that “[a] person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.” In the instant case, Havens’ entry into the Wal-Mart was unlawful because prior to her entry she had been trespassed from the premises. RP 50; CP 21.

Even though she stipulated at trial that her entry into Wal-Mart was unlawful, Havens now argues on appeal and cites RCW 9A.52.090 for the assertion that “[b]y statute, a person may not be convicted of burglary if’ their entry is to a building that is open to the public and that, therefore, it was the State’s burden at trial to “disprove the applicability of RCW 9A.52.090.” Appellant’s Opening Brief, at p. 9. However, the statute and case authority cited by Havens on this point pertain only to the offense of trespass and not to the offense of burglary.

RCW 9A.52.090 states that “[i]n any prosecution under RCW 9A.52.070 and 9A.52.080, it is a defense that ... [t]he premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises” But Havens was not prosecuted under RCW 9A.52.070 or .080 (trespassing in

the first or second degree). Instead, she was prosecuted under RCW 9A.52.030, burglary in the second degree. CP 17.

For the purposes of analysis and comparison, it is noted here that proof of the offense of trespass in the first degree requires proof that the act of entering or remaining unlawfully in a building is done “knowingly.” RCW 9A.52.070.¹ Thus, when the offense of trespass is alleged, the State does bear the burden of proving beyond a reasonable doubt that the defendant’s entry into the property was done “knowingly.” *State v. Finley*, 97 Wn. App. 129, 135, 982 P.2d 681 (1999). And, in regard to the offense of trespass, the State bears the burden of disproving the statutory defense defined by RCW 9A.52.090(2). *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733, 738 (2002).

But unlike the offense of trespass, the offense of burglary in the second degree does not require that the defendant’s entry into a building was done knowingly; instead, the only required mental element is proof that the defendant had the “intent” to commit a crime against persons or property therein when she entered the building. RCW 9A.52.030; *State v. Grimes*, 92 Wn. App. 973, 966 P.2d 394 (1998). The statutory language

¹ The lesser offense of trespass in the second degree has the same the mental element of knowledge. RCW 9A.52.080.

of RCW 9A.52.030 requires that the State must prove that the defendant entered or remained unlawfully in the building, but it does not follow that the State is required to prove the statutory elements of trespass, or to disprove the statutory defenses, as a prerequisite to proof of the crime of burglary. See, e.g., *State v. Grimes*, 92 Wn. App. 973, 966 P.2d 394 (1998); *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988); *State v. Kutch*, 90 Wn. App. 244, 951 P.2d 1139 (1998).

“A person ‘enters or remains unlawfully’ in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.” RCW 9A.52.010(5). In the instant case, Havens’ entry into Wal-Mart was unlawful because she had been trespassed from the premises, and that prohibition was in effect when she was caught shoplifting in the instant case. RP 24-35, 50. A private business, such as Wal-Mart, may lawfully exclude any person from its business so long as its purpose is not discriminatory. *State v. Bellerouche*, 129 Wn. App. 912, 915-916, 120 P.3d 971 (2005); *State v. Kutch*, 90 Wn. App. 244, 951 P.2d 1139 (1998).²

² At page 10 of Appellant’s Opening Brief, Havens cites *State v. Green*, 157 Wn. App. 833, 485-46, 239 P.3d 1130 (2010), and *State v. R.H.*, 86 Wn. App. 807, 812-13, 939 P.2d 217 (1997), to support her contention that “the prosecution bears the burden of proving the lawfulness and scope of any exclusion before criminal liability can attach.” But these cases, however, were concerned with the crime of criminal trespass rather than

The crime of criminal trespass in the first degree is a lesser included offense of burglary in the second degree. *State v. Soto*, 45 Wn. App. 839, 727 P.2d 999 (1987). The *Soto* court explained that burglary in the second degree requires the mental state of “intent” while criminal trespass requires the mental state of “knowledge.” *Id.* at 841. The *Soto* court reasoned that proof of intent necessarily provides proof of knowledge. *Id.* Thus, the court held that proof of burglary in the second degree necessarily includes proof of criminal trespass in the first degree. *Id.* But the intent element of burglary is related to intent to commit a crime, while the knowledge element of trespass is related to “knowingly” entering the building. RCW 9A.52.030; RCW 9A.52.070.

Initially, it would appear that because the mental elements of the offenses of burglary and trespass -- intent to commit a crime in the one,

the crime of burglary. *R.H.* held that in regard to the crime of trespass, the statutory defenses to trespass created by RCW 9A.52.090 are not affirmative defenses, but instead negate an element of the crime of trespass, and therefore the State is required to prove the absence of those defenses beyond a reasonable doubt. Contrary to Havens’ assertion, the State asserts that *R.H.* does not hold that the State must prove that an exclusion is lawful; instead, the State asserts that *R.H.* requires the State to prove that defendant’s entry is unlawful. The State asserts that *Green* is distinguishable because the building at issue in *Green* was a public school to which the defendant had a statutory right to enter; thus, on the facts of that case in order to prove that defendant’s entry into the school was unlawful, it was necessary for the State to prove that the school’s exclusion of the defendant from the premises was lawful. In the instant case, these facts do not exist, and in any event, the stipulated trespass notice in the instant case did adequately prove the scope and lawfulness of the exclusion.

State’s Response Brief
Case No. 43362-1-II

Mason County Prosecutor
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360-427-9670 ext. 417

and knowingly entering a building in the other -- refer to separate and distinguishable acts, proof of one does not necessarily lead to proof of the other. However, if one enters a building with the intent to commit a crime therein, then presumably in all such cases entry into the building would be done knowingly, as one cannot *unknowingly* enter a building with the intent to commit a crime.

Additionally, Havens' reliance upon case authority and statutory language that applies to the mental element of trespass is misplaced when applied to the offense of burglary, because burglary, as defined by RCW 9A.52.030 and .010(5), does not require proof that she knew that her entry into the building was unlawful. *State v. Grimes*, 92 Wn. App. 973, 966 P.2d 394 (1998).

- 2) When Havens was sentenced by the court following her conviction of burglary in the second degree in the instant case, her attorney, the prosecutor, and the court calculated her offender score as three. The calculation was based upon a finding that Havens had a prior conviction for burglary, which, with a multiplier of one point, accounted for two of the three points. The third point arose from a more than five year old class C conviction for possession of a controlled substance. Although the conviction was more than five years old, it had not washed because Havens had intervening misdemeanor convictions that prevented the felony conviction from washing under RCW 9.94A.525(2)(c). However, no citation to the record was located where dates of the misdemeanor convictions were clearly expressed. *Should Havens be resentenced so that the record will be clear as to the reason why her felony*

conviction did not wash?

After the jury convicted Havens of burglary in the second degree, the court proceeded to sentencing. RP 122, 125. At the sentencing hearing, the prosecutor alleged as follows in regard to Havens' criminal history:

She does have three prior felony convictions, all out of Mason County: Burglary in the second degree, date of crime 11/20/2004, date of sentence March 14th of 2005; unlawful possession of a controlled substance, date of crime was May 23rd, 2005, date of sentence was July 18th, 2005; and another unlawful possession of a controlled substance, the same date of crime and date of sentence. Both of these prior convictions, I believe, are same criminal conduct. She possessed two separate drugs on the same occasion, and so I'm going to ask the Court that she has an offender score of two based upon the - actually, three. Yes, an offender score of three because the burglary in the second degree is a multiplier and counts as two points.

If Ms. Havens has a dispute about the offender score we can certainly pull the other court files and the Court can take notice of those - the prior convictions. Given a - with an offender score of three, Your Honor, there is a standard range of nine to twelve months and a maximum term of ten years, \$20,000.00.

The State's going to be requesting that the Court impose the maximum of - the top of the standard range of twelve months in this case. Ms. Havens has - I think, deserves this sentence for a couple of different reasons. One is, I'll point out for the Court that her previous burglary in the second degree back in 2005 was also a Wal-Mart burglary. So, she simply is - she's a repeat offender doing the same thing again and again.

State's Response Brief
Case No. 43362-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

She has a fairly extensive history of misdemeanor convictions going back to 2003. They involve shoplifting out of Shelton Municipal Court, theft in the third degree out of Shelton Municipal Court, theft in the third degree out of Shelton Municipal Court, driving while license suspended in the third degree out of Mason County District Court and, well, several driving - I won't go through all of those, but several driving in license third degrees out of Mason County District Court and Shelton Municipal Court, plus there is another theft conviction that she recently had in June of 2011 out of Thurston County District Court.

So, Ms. Havens has been a repeat customer of the criminal justice system and she is - and given the fact that she's had very similar convictions in the near past, the State believes that in itself would justify a sentence at the top of the standard range. In addition, Your Honor, I'll note for the Court that Ms. Havens did fail to appear for sentencing and she was arrested on the warrant and brought before the Court, so I think that also points toward a top-range sentence.

RP 125-127.

After hearing the prosecutor's allegations and sentencing recommendation, the trial court judge asked for clarification in regard to the "multiplier for the burglary in the second degree, prior conviction in 2004." RP 128. In response, Havens' attorney said, "Your Honor, we don't contest the accuracy of the State's recitation of the history." RP 128.

After offering Havens' the opportunity to speak, the court then delivered its ruling and imposed a sentence. RP 128-131. While delivering the ruling, the trial judge commented as follows:

Ms. Havens, with the repeat nature of this offense, having been convicted in 2004 with essentially the same offense, burglary in the second degree by entering Wal-Mart after you have been told not to and then committing a crime inside by shoplifting or stealing something, then repeating it at this point, with a list of four other either shoplifting or theft in the third convictions. The Court is concerned that it stop now, that you realize that if it's not yours you can't take it.

RP 129.

Havens' current crime of conviction occurred on August 18, 2011, RP 24-25, 99, 122; CP 5. When determining Havens' offender score for sentencing purposes, the court included a July 18, 2005, conviction for possession of a controlled substance (a class C felony). CP 6. Thus, the trial court judge calculated two points (one point plus a one-point multiplier) for a prior burglary conviction, plus one point for the 2005 controlled substance conviction, for a total of three points. CP 6-7.

Although it is self-evident that more than five years elapsed between the July 18, 2005, conviction and the current offense, no citation to the record was located where there was identification of any intervening conviction that occurred within five years of the 2005 offense so as to

prevent the 2005 conviction from washing under the provisions of RCW 9.94A.525(2)(c). The prosecutor alleged that Havens had “a fairly extensive history of misdemeanor convictions going back to 2003” and that she “had very similar convictions in the near past.” RP 126-127. When imposing sentence, the trial court acknowledged that Havens had “a list of four other either shoplifting or theft in the third convictions,” but the trial court did not specify the dates of any of these convictions. RP 129.

Although the verbatim report is silent as to the date of any of these convictions, neither was any citation to the record located where Havens objected to the calculation of her offender score. Furthermore, notwithstanding the failure of the verbatim report and the judgment and sentence to identify the intervening convictions that prevented Havens’ 2005 conviction from washing, the conviction should not wash because between July 18, 2005 (when Havens was sentenced on the controlled substance charge) and the five-year anniversary of that date, Havens accumulated ten misdemeanor convictions. CP 6; CP Sub #1, p.3 (JIS printout of Defendant’s Criminal History (DCH) -- designated by Supplemental Designation of Record).

“It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence.” *State v.*

State’s Response Brief
Case No. 43362-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Hunley, ___ Wn.2d ___, 287 P.3d 584, 589 (No. 86135-8, Nov. 1, 2012), citing *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). In the instant case, the State made assertions about Havens' misdemeanor history but did not specify the dates of those convictions and did not present any corroborating evidence of those convictions. "Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction." *Id.*

In the instant case, however, even though the State did not offer proof of Havens' misdemeanor convictions and did not offer detail about the dates of those convictions, the fact of the convictions, the applicable dates, and the calculated offender score of three, were each based upon more than the mere assertions of the prosecutor. Havens acknowledged "the accuracy of the State's recitation of the [criminal] history." RP 128. The acknowledged recitation included the prosecutor's assertion that Havens had an offender score of three and that she had "an extensive history of misdemeanor convictions," RP 126. Additionally, although the verbatim report is silent on the point, a search of the clerk's papers shows that the sentencing judge had a copy of Havens' criminal history that showed an accumulation of ten misdemeanor convictions that interrupted the wash period of RCW 9.94A.525(2)(c). CP Sub #1, p.3 (JIS printout of

Defendant's Criminal History (DCH) -- designated by Supplemental Designation of Record).

The mere fact that Havens did not object to the calculation of her offender score is insufficient to relieve the State of its burden of proof in regard to her offender score, but an affirmative acknowledgement of the offender score may relieve the State of this burden. *Hunley* at 590 (¶18). Here, even though Havens' acknowledgment was to the "history" recited by the prosecutor, which did not include the dates of conviction, the history included the calculation of an offender score of three.

Still more, *Hunley* supports the proposition that where a criminal defendant has not denied or objected to the calculation of her offender score, a criminal history summary from the Judicial Information System may suffice as proof of the criminal history. *Id.* at 589-590 (¶ 16). There is no citation to verbatim report where the trial court judge expressly relied upon Havens' DCH, but the context of the judge's comments indicate that she was aware of Havens' criminal history, and a search of the record shows that the record did in fact include a copy of Havens' DCH. RP 129; CP Sub #1, p.3 (JIS printout of Defendant's Criminal History (DCH) -- designated by Supplemental Designation of Record).

The State urges that record of the instant case validates the trial court's calculation of Havens' offender score of three. However, the State concedes that the correct and better practice is for the record to clearly state the defendant's criminal history and the evidence upon which the defendant's offender score is determined. The following language quoted by *Hunley* is instructive on this point:

Our concept of the dignity of individuals and our respect for the law itself suffer when inadequate attention is given to a decision critically affecting the public interest, the interests of victims, and the interests of the persons being sentenced. Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions."

Id. at 592 (¶23), quoting *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d 452 (1999) (quoting ABA *Standards* std. 18-5.17, at 206).

The *Hunley* court remanded for resentencing because in that case there was neither an affirmative acknowledgement of the offender score nor additional evidence to prove the offender score. *Hunley* at 590, 591 (¶¶18, 21, 25). In the instant case, however, Havens affirmatively acknowledged her offender score of three, and the trial court record includes a copy of Havens' DCH which shows that due to intervening misdemeanor convictions during the five-year period after Havens'

controlled substance conviction, that conviction did not wash under the provisions of RCW 9.94A.525(2)(c).

- 3) Havens asserts on appeal that her trial attorney was ineffective because he did not present a defense of diminished capacity which would have required the jury to believe that due to a head injury Havens did not remember that she was banned from Wal-Mart. However, Havens' claim is premised upon assertions of fact that are not contained in the record on appeal. *Should Havens' claims that are not supported by the record be considered in a direct appeal, and does the record show that trial counsel's performance was based upon legitimate trial tactics and, therefore, that counsel was not ineffective?*

Havens' argument on appeal that she received ineffective assistance of counsel at trial is premised upon her assertions that she had a head injury, that the head injury prevented her from remembering that she had been trespassed from Wal-Mart, and that her attorney did not investigate her claimed defense of a head injury or that her caused her to forget that she was trespassed from Wal-Mart.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984);
State v. Grier, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

When a claim of ineffective assistance of counsel is brought on direct appeal, the reviewing court will not consider matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In the instant case, the record on appeal does not support Havens' assertions that her purported head injury and its effects on her inability to remember were real or legitimate, and the record does not support her assertion that her attorney did not investigate her claim or that he did not consult with an expert. No citations to the record were located where trial counsel did consult an expert or where it can be shown that the claims were investigated, but counsel would have been under no duty to report these actions had they occurred, and it is Havens' burden to provide a record on appeal. *Id.*

Additionally, the record on appeal supports a finding that trial counsel legitimately pursued a tactical decision not to pursue a diminished capacity defense. RP 13. If, due to confidential communications, experience, or consultation with others, counsel viewed Havens' diminished capacity defense as weak, or if counsel knew the claim to be uncorroborated or unsupported by fact, then it would have been

State's Response Brief
Case No. 43362-1-II

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360-427-9670 ext. 417

particularly imprudent to have pursued the defense. Presenting a frivolous defense would have damaged Havens' credibility to the jury. The imprudence of pursuing such a defense would have been all the more detrimental to Havens given that she was also asserting that she was not shoplifting in Wal-Mart. RP 13. For Havens to frivolously assert to the jury that she had forgotten that she was trespassed from Wal-Mart would have diminished her believability in regard to her second assertion, that she was not shoplifting when she attempted to leave the store with merchandise without paying.

Trial counsel is not ineffective for forgoing frivolous defenses while strengthening more credible defenses. The "court approaches an ineffective assistance of counsel argument with a strong presumption that counsel's representation was effective." *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004), citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate trial tactics are not deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

D. Conclusion

For the reasons argued above, the State asks that the court sustain Havens' conviction in the instant case. The State also requests that the

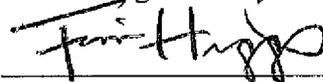
State's Response Brief
Case No. 43362-1-II

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court sustain Havens' sentence, because the record shows that the sentence would not change if Haven were resentenced. Or in the alternative, because the record does not clearly express the reasons for Havens' offender score of three, the State asks that the court remand the case for resentencing and allow the parties to present evidence or stipulations to clearly indicate the reasons for the offender score.

DATED: December 31, 2012.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

January 18, 2013 - 1:09 PM

Transmittal Letter

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Case Name: State v. Sherry Havens

Court of Appeals Case Number: 43362-1

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Comments:

The attached Brief of Respondent is now being resubmitted because I erroneously omitted page 2 of the Table of Contents from the original submission.

Sender Name: Tim J Higgs - Email: timh@co.mason.wa.us

A copy of this document has been emailed to the following addresses:
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