

NO. 44445-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY THOMAS,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Jeffrey Thomas relies primarily on the arguments in his Opening Brief. However, Mr. Thomas provides the following response to the State's argument on the unsupported offender score.

**Mr. Thomas's objection at sentencing put the court on notice that the State was required to prove his prior offenses; the State's failure to do so precludes it from presenting new evidence on remand.**

If the Court affirms Mr. Thomas's conviction, the matter should be remanded for resentencing based on the State's evidence from the initial hearing. *See* Op. Br. at 17-20. The State alleged Mr. Thomas had multiple prior offenses, and presented certified copies of pleadings relating to several of them. RP 426; Sentencing Exhibit 1. However, the State presented no evidence of the most recent alleged offenses—a 2006 King County offense and a 2009 Pierce County offense. *See id.* Mr. Thomas made clear at sentencing that he would not agree to the State's proposed offender score and was holding the State to its burden. RP 428. The State did not present any additional evidence or argument in the face of Mr. Thomas's opposition. RP 426-30. In sentencing Mr. Thomas, the court included these unsupported convictions. RP 430; CP 75.

The sentence is erroneous because the evidence does not support the offender score calculation. First, the two wholly unsupported convictions should not have been included because the State failed to meet its burden to prove their existence. *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012). On remand, the State cannot present new evidence because it was on notice of Mr. Thomas's objection to the offender score during the initial hearing. *Id.* at 906 & nn.1, 2. Second, without the 2006 and 2009 convictions, the remaining prior offenses wash out. Absent the 2006 or 2009 conviction, the State failed to prove that Mr. Thomas committed an offense within five years of release from confinement on the remaining class C felonies or within 10 years on the 1993 class B felony. *Compare* RCW 9.94A.525(2)(b) and (c) *with* CP 84.

In response, the State argues Mr. Thomas's objection below was not specific enough to put it on notice of its duty to prove the prior convictions. *Resp. Br.* at 16-18. The State's argument is based on an erroneous view of the specificity required. A defendant's objection at sentencing need only put "the sentencing court on notice that the State must present evidence." *State v. Bergstrom*, 162 Wn.2d 87, 93-94, 169 P.3d 816 (2007). Mr. Thomas plainly did so here. Defense counsel

avowed, “in reference to Mr. Thomas’s alleged offender score, . . . I would not be stipulating to his offender score in any case . . . . I do think it’s up to the Court and the State to determine his offender score.”

RP 428. The court and the State were on notice that the State had to present evidence to satisfy its burden. The State was not only on notice, but it in fact presented evidence. Sentencing Exhibit 1; RP 426.

The prosecutor stated,

I’ve handed forward to the Court and had marked as an exhibit the certified copies of Mr. Thomas’s judgment and sentences, or judgments and sentence. Well, the documents are there. And we believe that establishes that we’ve met our burden to prove that he has an offender score of nine plus, and again, we are ready to proceed at this time.

RP 426. The prosecutor submitted documents supporting many of the prior offenses alleged to comprise Mr. Thomas’s offender score. For unknown reasons that cannot be attributed to the specificity of Mr. Thomas’s objection to the offender score, the State simply failed to include any evidence supporting the two most recent alleged prior offenses. The State was on notice of its obligation to prove the offender score, it simply failed to do so.

In this regard, *State v. Lopez* is on point. 147 Wn.2d 515, 55 P.3d 609 (2002). In *Lopez*, the State asked the court to sentence the

defendant as a persistent offender. *Id.* at 518. The defendant objecting, stating the State had to prove the prior offenses. *Id.* The State responded that it could do so, but did not have the evidence with it that day. *Id.* The court did not wait for the State to collect the evidence; it merely sentenced the defendant as a persistent offender that same day. *Id.* On appeal, the courts found the evidence insufficient to support the sentence and remanded for resentencing without an opportunity for the State to present new evidence. *Id.* at 518-19, 523.

The *Lopez* court emphasized the sufficiency of the defendant's objection. As here, the court summarized that "[e]ven now the state complains Lopez's objection was not specific because he did not contest the existence of any of the convictions alleged in the prosecution's proposed judgment or their characterization either as felonies or as violent offenses for the purposes of the POAA." 147 Wn.2d at 521. But as the court recognized, this is not the defendant's obligation. *Id.* Mr. Lopez's objection was sufficient:

Lopez objected to the court's imposition of a life sentence absent proof of a prior offense by a preponderance of the evidence. His objection was sufficient to notify the sentencing court of its obligation to demand evidence of the prior convictions alleged by the state. Thus, the Court of Appeals correctly remanded for sentencing on the existing record.

*Id.* It would send the wrong message to allow the State a second opportunity to prove its allegations, just as it sends the wrong message to uphold procedurally defective sentencing hearings. *Id.* at 523.

Like *Lopez*, Mr. Thomas put the court on notice that the State had the obligation to prove, and the court had the obligation to find, Mr. Thomas's offender score by a preponderance of the evidence. The State had the opportunity to present its evidence. It did so for several prior convictions. But it failed to present any evidence on the 2006 or 2009 alleged prior offenses. The State should be held to this record on remand. *See Lopez*, 147 Wn.2d at 521, 523.

## B. CONCLUSION

For the reasons set forth here and in Mr. Thomas's Opening brief, his conviction should be reversed and remanded for a new trial. First, the public was excluded from the exercise of peremptory strikes without any analysis of the right to an open courtroom. Also, the court admitted highly prejudicial evidence that had little probative value in the form of Mr. Thomas's statement that he was "Jesus Christ."

However, if the conviction is not reversed the Court should remand to correct the offender score and sentence, based on the evidence initially presented, and strike the discretionary costs imposed.

DATED this 23rd day of April, 2014.

Respectfully submitted,



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# WASHINGTON APPELLATE PROJECT

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