

NO. 47422-1-II; 47869-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS AVALOS
Appellant.

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

The Honorable Christopher Melley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Avalos was denied his due process right to effective assistance of counsel by the trial court limiting counsel's closing argument to 30 minutes.
2. The trial court erred for offender score calculation purposes by refusing to consider whether Avalos prior offenses were same criminal conduct under RCW 9.94A.525.
3. The prosecutor committed reversible misconduct by declaring to the jury in closing that Mr. Avalos' testimony was one hundred percent not true.
4. The trial court erred by considering Avalos prior convictions as separate with conducting an independent analysis at sentencing.

Issues

1. Was Avalos denied his due process right to effective assistance of counsel by the trial court limiting counsel's closing argument to 30 minutes?
2. Did the trial court err for offender score calculation purposes by refusing to consider whether Avalos prior offenses were same criminal conduct under RCW 9.94A.525?
3. Did the prosecutor commit reversible misconduct by declaring to the jury in closing that Mr. Avalos' testimony was one hundred percent not true?
4. Did the trial court err by considering Avalos prior convictions as separate with conducting an independent analysis at

sentencing?

B. STATEMENT OF THE CASE

Carlos Avalos was 19 years old when he was charged with assault in the first degree with a deadly weapon enhancement against a corrections officer in Clallam Bay Corrections Center. CP 439. Avalos was convicted of the lesser offense of assault in the second degree without the weapons enhancement. CP 107, 354-59.

Avalos first encountered corrections officer Eric Huether while in custody at Clallam Bay, when Huether selected Avalos out of a group of inmates for a random body search. RP 473-75. The other inmates informed Avalos that Huether was disrespectful. RP 467. Avalos, afraid that the other inmates would perceive him to be a coward and a target, decided that he needed to somehow mark Huether to protect himself from becoming a target for the other inmates. RP 476-77.

Avalos, who is small at 5'4", admitted that he found a small piece of metal in a game of Risk and tried to sharpen it to protect himself against other inmates. RP 479-80. For a month Avalos carried the metal object secreted in a school folder as he attended GED classes. RP 480-83. On the date of the incident, Huether was working on the education floor as a substitute guard. RP 208. On his way to the restroom, Avalos observed Huether sitting at a computer in an office next to Avalos' classroom. RP 484-86.

While Huether was sitting at the computer, Avalos walked in to the office and repeatedly jabbed Huether in the back where he saw "skin". RP

488. Avalos was not trying to kill Huether; he just wanted to inflict minor injuries so the other inmates would know that Avalos was not a victim. RP 488. Huether and Avalos wrestled their way out of the room where other officers interceded and took control of Avalos with restraints and pepper spray. RP 151-55, 196, 489-493.

Huether needed a few sutures to 4 small wounds and made a full recovery from his “superficial” injuries. RP 276, 278 288, 290, 343. Emergency Room Doctor Tordini stated that he “sutured about four wounds. Most of them were small in length, so none of them required a large number of sutures.” RP 278.

(i) Prosecutor Comments During Closing Argument.

During closing argument the prosecutor argued that

A lot of detail that actually having it come at the end of everything you’d already heard makes quite a bit of sense, except for one thing, one thing that he kept repeating. One thing that he kept repeating that is absolute nonsense, that is absolutely 100 percent not true and you know what that thing was? I bet you can guess what that thing was, I didn’t intend to kill, I only intended to inflict minor injuries.

RP 564. The trial court sustained defense counsel’s objection and provided a curative instruction. RP 565.

(ii) Limitation on Closing

During defense counsel’s closing argument, the trial court informed counsel that he only had a few minutes to complete his closing argument. RP 594, 602. Defense counsel informed the court that he needed more time to complete his closing argument. Id. The court

disregarded and limited defense closing to 30 minutes, and provided more time for the state to complete its closing arguments. RP 594, 602.

The trial court denied counsel's motion for a mistrial based on his inability to adequately represent Avalos with the limitation on closing argument. RP 610. The court's oral ruling is as follows:

I can appreciate that you want more time and there's a lot to go over but, you know, the jury's been sitting here all day. The courthouse is closed. The clerk's here longer than she should be and I realize your client has interests independent of all that stuff, but 30 minutes to present your argument to the jury. I think you did a nice job with it. I'm not going to declare a mistrial.

RP 611.

(iii) Offender Score Calculation

Defense counsel calculated Avalos' offender score at 7, the prosecutor calculated Avalos offender score at 8 and the trial court calculated Avalos offender score at 8. IRP 2-22.1 Defense counsel argued that this sentencing court was required to determine if Avalos prior 2004 burglary and robbery should be counted as the same criminal conduct for sentencing under RCW 9.94A.525. The 2004 judgment and sentence did not include confinement, the box for "same criminal conduct" was not checked and community supervision was separate for each charge. (See Appendix A attached hereto and incorporated herein by reference). CP 144.

¹ IRP refers to the sentencing proceedings. RP refers to the trial proceedings.

The trial court disagreed. IRP 2-22. The trial court believed that the prior sentencing court's imposition of a deferred sentence without any time in custody coupled with a failure to check the "same criminal conduct" under RCW 9.94A.589(1)(a) relieved the current trial court from making an independent determination of same criminal conduct for offender scoring purposes. IRP 13-15.

All right, well with all due respect, Mr. Stalker, I disagree with your interpretation of the statute, 9.94A.525.5A (i), says, "Prior offenses *which were found* to encompass the same criminal conduct should be counted as one offense," and then it goes on a little bit and then the next sentence, "The current sentencing court shall determine with respect to other prior adult offense," so I think the statute draws a distinction between those which were previously determined to have been same course of conduct or not same course of conduct and those which the Court independently has to deal with regard to the other offenses and I think in 2004 the trial court found that the burglary and the theft were not the same course of conduct. There's not a box for the court to check with regard to that the way the form was set out, but the fact that the court did not fill in anything, I think the necessary reasonable corollary to that is they were not the same course of conduct. So, I think for counting purposes we're looking an offender score of 8 versus 7 and I think that interpretation supported by the case that you cited, *State vs. Williams*, 181.Wn.2nd.795, the Supreme Court there says, significantly I think, "The record does not establish that the sentencing court reached any conclusion as to whether a same criminal conduct finding was made in 2004." So, that court was looking back to what the court had done a decade previously in terms of determining whether there was a same course of conduct and I think the phraseology of the statute talking about prior offenses which were found and the current sentencing court having to deal with other prior offenses clearly I think in the legislatures mind jury [sic] distinction between those that had previously been determined by a court and those which have yet to be determined and with regard to the 2000[sic] burglary and theft offenses the

trial court determined that they were not the same course of conduct, so I think for counting purposes I think we're looking at an 8 versus 7.

IRP 13-15. The trial court imposed a sentence based on an offender score of 8. CP 107.

This timely appeal follows. CP 14.

C. ARGUMENTS

1. THE TRIAL COURT ERRED WHEN IT LIMITED DEFENSE COUNSEL'S CLOSING ARGUMENT.

The Sixth Amendment right to counsel is broadly interpreted. It "ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary fact finding process." *Herring v. New York*, 422 U.S. 853, 857, 862, 45 L.Ed. 2d 593, 95 S. Ct. 2550 (1975).

There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.

Herring, 422 U.S. at 857.

While closing argument is not evidence, it is extremely important. "For the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *State v. Fateley*, 18 Wn. App. 99, 108, 566 P.2d 959 (1977) (citing *Herring*, 422 U.S. at 857-58).

When a trial court abuses its discretion in the context of limiting the duration and/or scope of a criminal defense counsel's closing argument,

it denies the defendant his Sixth Amendment right to effective assistance of counsel. *Herring*, 422 U.S. at 857-62.

The Court in *Herring* described the limited circumstances under which a trial court may limit the duration or scope of a closing argument.

[The trial judge] may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion.

Id. at 862. None of these circumstances apply Avalos 'case.

While the trial court has discretion to limit the duration and scope of a closing argument, this discretion is not unlimited. *State v. Willis*, 37 Wn.2d 274, 280, 223 P.2d 453 (1950); *State v. Cecotti*, 31 Wn. App. 179, 183, 639 P.2d 243 (trial court can abuse its discretion by limiting the time or scope of closing argument), *review denied*, 97 Wn.2d 1020 (1982). Discretion is abused where it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State v. Alexander*, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995); *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996).

In assessing whether a trial court has abused its discretion in limiting the duration of closing argument, reviewing courts have looked at the length of the trial, the number of witnesses, and the complexity of the legal issues involved. *State v. Jack*, 63 Wn.2d 632, 638-39, 388 P.2d 566 (1964); *Willis*, 37 Wn.2d at 280); *Cecotti*, 31 Wn. App. at 183.

In *Willis*, the Court held that the trial court's time limitation on

defense closing argument was reversible error because the limitation was based on the judge's desire to close the court room at a certain time, rather than on the length of the trial the number of witnesses or the complexity of the legal issues. Additionally, counsel had not been previously informed that his time for closing would be limited to 30 minutes. *Willis*, 37 Wn.2d 280-81.

Here, the trial lasted five days. There were 85 exhibits introduced. The jury received 22 separate jury instructions. There were 10 witnesses including Avalos. Avalos was charged with assault in the first degree with a sentencing enhancement, and the state asked for an exceptional sentence under the aggravator, "egregious lack of remorse". CP 361, 387, 391, 439. VRP 1-525. All of these factors contributed to a complex trial with complex legal issues for the jury to understand and consider.

Closing argument was counsel's opportunity to respond to the arguments of the prosecutor, highlight particular jury instructions, and present the law and facts to the jury in the light most favorable to Avalos. Avalos' trial counsel informed the trial court that he needed more time to summarize Avalos' case for the jury, and the trial court had not previously informed counsel that he was going to limit closing argument to 30 minutes. RP 611. Even the prosecutor agreed that he was given more time for closing than the defense. RP 610.

Quite similar to *Willis*, the trial court, denied counsel's request because the court wanted to his work day to end. RP 611.

I can appreciate that you want more time and there's a lot to go over but, you know, the jury's been sitting here all day. The courthouse is closed. The clerk's here longer than she should be and I realize your client has interests independent of all that stuff, but 30 minutes to present your argument to the jury. I think you did a nice job with it. I'm not going to declare a mistrial.

RP 611.

Here, counsel informed the court that he had to cut short his argument and did not have enough time to go over all of the facts and issues he felt necessary. RP610. The trial court did not limit closing based on the *Willis* factors. RP 611. Rather, trial court abused its discretion by limiting defense counsel to 30 minutes because it wanted to end the court day rather than considering the *Willis* factors. RP 610-11. The trial court's abuse of discretion rises to constitutional error because it deprived Avalos of right to effective assistance of counsel. *Willis*, 37 Wn.2d 280-81.

Harmless Error Analysis

Avalos was denied his Sixth Amendment Constitutional right to counsel during closing argument which requires reversal unless it is harmless beyond a reasonable doubt. *Herring*, 422 U.S. at 857-62. It cannot be said that the arbitrarily imposed time limit on closing argument was harmless beyond a reasonable doubt because Avalos counsel did not have time to cover everything with the jury that he intended to cover in this factually intensive trial. Had Avalos' counsel been given additional time for closing argument, there is a reasonable possibility the outcome of the trial would have been different. Therefore, the error was not harmless beyond a reasonable doubt and this Court should reverse Avalos' conviction and

remand for a new trial. *Herring*, 422 U.S. at 865.

2. TRIAL COURT ERRED IN
CALCULATING OFFENDER SCORE.

In 2004 Avalos pleaded guilty to burglary in the second degree and theft in the second degree, committed on the same date and against the same victim. He was also sentenced on the same date for both crimes. CP 144. The trial court did not impose any time in detention; the trial court did not check the box noted “same criminal conduct”, but the court imposed separate community custody terms. CP 144. There was no evidence presented that the prior court engaged in a same criminal court analysis. *Id.*

A sentencing court exceeds its authority under the Sentencing Reform Act when it imposes a sentence based upon a miscalculated offender score. *In re Personal Restraint Petition of Johnson*, 131 Wn2d 558, 568, 933 P.2d 1019 (1997). This Court reviews an offender score calculation de novo but reviews a “determination of what constitutes the same criminal conduct [for] abuse of discretion or misapplication of the law.” *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) (alteration in original) (quoting *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999)).

A trial court abuses its discretion if its decision “(1) adopts a view that no reasonable person would take and is thus ‘manifestly unreasonable,’ (2) rests on facts unsupported in the record and is thus based on ‘untenable grounds,’ or (3) was reached by applying the wrong

legal standard and is thus made ‘for untenable reasons.’ ” *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (quoting *State v. Rorich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

When an offender has multiple prior convictions committed after July 1, 1986, the SRA counts all convictions separately, except:

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. **The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a),** and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations:

(Emphasis added) RCW 9.94A.525(5)(a).

RCW 13.40.180 provides that juvenile convictions are presumed to be served consecutively. *Id.*

(1) Where a disposition in a single disposition order is imposed on a youth for two or more offenses, the terms shall run consecutively, subject to the following limitations:

(a) Where the offenses were committed through a single act or omission, omission, or through an act or omission which in itself constituted one of the offenses and also was an element of the other, the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense;

Id. Avalos prior burglary and theft were served consecutively. CP 144; RCW 13.40.180.

Under RCW 9.94A.525, for calculating Avalos' offender score, the current sentencing court was required to decide if the prior crimes fit within the definition of same criminal conduct under RCW 9.94A.589(1)(a). *State v. Johnson*, 180 Wn.App. 92, 104, 320 P.3d 197 (2014). "Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." *State v. Graciano*, 176 Wn.2d 531, 536, 540, 295 P.3d 219 (2013) (quoting, RCW 9.94A.589(1)(a). The defense bears the burden of establishing same criminal conduct under RCW 9.94A.589(1)(a). *Graciano*, 176 Wn.2d at 539.

If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must independently evaluate whether those prior convictions encompass the same criminal conduct and, if they do, must count them as one offense. RCW 9.94A.525(5)(a)(i); *see also State v.*

Tongren, 147 Wn.App. 556, 563, 196 P.3d 742 (2008) (sentencing court must apply same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct), *abrogated on other grounds by Graciano*, 176 Wn.531. The defendant bears the burden of proving that his prior offenses constitute the same criminal conduct. *Graciano*, 176 Wn. at 539.

RCW 9.94A.525(1)(a) is silent regarding the treatment of prior juvenile offenses that were not served consecutively, but RCW 13.30.180 presumes juvenile offenses are to be served consecutively. RCW 9.94A.525(1)(a). Accordingly, applying the rule of lenity, this Court should require the current sentencing court to make an independent determination of same criminal conduct for calculating Avalos' prior 2004 convictions. *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1096 (2015).

“The burglary antimerger statute by its plain terms does not apply to RCW 9.94A.525, it applies to the present *punishment and prosecution* of offenses. “ *State v. Williams*, 181 Wn.2d 795, 800, 336 P.3d 1152 (2014). When calculating a defendant's offender score based on prior crimes involving burglary, the legislative framework supports limiting the burglary antimerger statute to current offenses because the antimerger statute was enacted to address double jeopardy concerns, not offender score computations. *Williams*, 181 Wn.2d at 800.

In *Williams*, the record did not establish whether the prior sentencing court determined whether or not Williams prior burglary

offense was counted as same criminal conduct with his robbery conviction. *Williams*, 181 Wn.2d at 797. Rather the sentencing court erroneously determined that the sentence merged for offender score purposes under the burglary anti-merger statute. *Id.* The Supreme Court reversed holding “that the burglary anti-merger statute does not obviate the need for a sentencing court to examine whether prior convictions constitute the same criminal conduct under 9.94A.525(a)(i).” *Id.*

Here as in *Williams*, the sentencing court did not conduct a same similar conduct analysis, instead it determined that the anti-merger statute required the court to count the priors separately. Additionally, similar to *Williams*, here Avalos’ prior burglary sentence did not indicate whether or not the trial court engaged in a same criminal conduct analysis, likely because the trial court did not impose a custodial sentence. CP 144. In any event, under *Williams*, the current sentencing court was required to engage in a same similar conduct analysis of the 2004 crimes. *Id.*

Review of the exhibits indicates that the 2004 crimes of burglary in the second degree and theft in the second degree were committed against the same person, at the same time and sentencing was on the same date of both crimes. CP 144. Accordingly, Avalos 2004 crimes of burglary in the second degree and theft in the second degree meet the definition of same criminal conduct under RCW 9.94A.589. This Court should remand for the sentencing court to reduce Avalos offender score to 7 and to recalculate his sentence.

3. THE PROSECUTOR COMMITTED

REVERSIBLE MISCONDUCT BY
ARGUING TO THE JURY THAT
AVALOS' TESTIMONY WAS "ONE
HUNDRED PERCENT NOT TRUE".

The prosecutor argued that Avalos was a liar and that he was guilty. RP 564. The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington State Constitution. *In re Glassman*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

Prosecutorial misconduct deprives a defendant of his constitutional right to a fair trial by using the prestige of his office to argue in closing that the defendant is a guilty liar. *In re Glassman*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011); *State v. Reed*, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); *State v. Brown*, 130 Wn.App. 767, 771, 124 P.2d 124 (2005).

A "[fair trial]" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.' " *Monday*, 171 Wn.2d at 677 (alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *Reed*, 102 Wn.2d at 145-47).

In order to prevail on a claim of prosecutorial misconduct, a defendant must establish in the context of the record and all of the circumstances of the trial, that the prosecutor's conduct was both improper and prejudicial. *Glassman*,

175 Wn.2d at 678. To show prejudice the defendant must show a substantial likelihood that the misconduct affected the jury verdict. *Id.*

Even when defense counsel's objection is sustained and the trial court gives a curative instruction, reversal is required if the prosecutor's remarks were so flagrant and ill-intentioned that they produced an enduring prejudice which could not have been neutralized by a corrective instruction to the jury. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). In determining whether a comment is flagrant and ill-intentioned the court will examine whether prior cases specifically denounced such conduct. *Brown*, 130 Wn.2d at 771 (*citing State v. Fleming*, 83 Wn.App. 209, 213-14, 921 P.2d 1076 (1996)).

Courts recognize the reality that jurors are not always able to follow certain instructions. *Bruton v. United States*, 391 U.S., 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (jury unlikely to follow an instruction to ignore a codefendant's confession); *State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) ("[t]he bell once rung cannot be unring"), *review denied*, 118 Wn.2d 1013 (1992)).

A prosecutor may argue inferences from the evidence but may not "use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case." *Glassman*, 175 Wn.2d at 678 (quoting the commentary on *American Bar Association Standards for Criminal Justice* std. 3-5.8). *Accord, Monday*, 171 Wn.2d at 677; *State v. Brett*, 126 Wn.2d 136, 179, 892 P.2d 29 (1995). A prosecutor cannot call a defendant a liar unless there

is evidence to support that claim. *Brown*, 130 Wn.2d at 771 (citing, *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558 (1969), *reversed on other grounds by, Adams v. Washington*, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971)).

In *Brown*, the Court reversed on prosecutorial misconduct grounds even though the defense did not object to the prosecutor arguing that Brown was a liar and that guilty was the “right verdict”. *Brown*, 130 Wn.App. at 771. “Given the ample case law condemning such conduct, we find the prosecutor’s comments “flagrant and ill-intentioned.” And we cannot say the error is harmless”. *Id.*

In *Reed*, the court held improper a prosecutor’s comments that the defendant was a liar, that the defendant was “clearly [guilty of] a murder two,” and that the jury should not believe defense witnesses because they were from out of town and drove fancy cars. *Reed*, 102 Wn.2d at 145-47. The court reversed because there was a substantial likelihood the comments affected the jury. *Reed*, 102 Wn.2d at 147-48.

In this case, the prosecutor committed flagrant and ill-intentioned misconduct in closing argument when he argued “[o]ne thing that he kept repeating that is absolute nonsense, that is absolutely 100 percent not true and you know what that thing was? I bet you can guess what that thing was, I didn’t intend to kill, I only intended to inflict minor injuries.” RP 564. The prosecutor knowingly and improperly used the prestige of his office to sway the jury by expressing his personal opinion that Avalos was a liar and guilty. *Id.* This argument denied Avalos his constitutional right to a fair trial. *Brown*, 130 Wn.App. at 771.

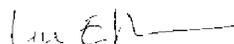
Reversal is required even under the non-constitutional standard of review because the misconduct was so flagrant and ill-intentioned that an objection and

curative instruction to the jury would not have neutralized the enduring prejudice. Once the concept, 'Avalos is a guilty liar' was argued to the jury by the prosecutor it could not have been cured by an instruction from the court. *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Powell*, 62 Wn. App. at 919.

D. CONCLUSION

DATED this 22nd day of October 2015.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the AAG Office Joshua Choate and John Hillman Atty General's Office CRJAppellate@ATG.WA.GOV and Carlos Avalos DOC# 359594 IMU North H6 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362 true copy of the document to which this certificate is affixed, on October, 22, 2015. Service was made electronically.



Signature

APPENDIX A

RANGE OF DISPOSITION:

- 4.2 Count 1 & 3 : Disposition shall be within the standard range
- 4.3 Count _____ Disposition within the standard range for this offense would effectuate a manifest injustice.
- 4.4 Count _____ : Disposition shall be within the Special Sex Offender Dispositional Alternative.
- 4.5 Count _____ : Chemical Dependency Disposition Alternative (RCW 13.40.165):
 Respondent is committed to the Department of Social and Health Services, Juvenile Rehabilitation Administration for a total of _____ weeks.
 Days of Confinement _____ Community Service Work _____
 Disposition is suspended. If the offender violates any condition of the disposition or the court finds that the respondent is failing to make satisfactory progress in treatment, the court may revoke the suspension and order execution of the disposition.

4.6 COMMUNITY SUPERVISION

Count 1	4 MONTHS	Supervision beginning: <u>011205</u>	Supervision ending: <u>051205</u>
Count 3	4 MONTHS	Supervision beginning: <u>051205</u>	Supervision ending: <u>091205</u>

4.7 COMMUNITY RESTITUTION (SERVICE) WORK:

Count 1	15 HOURS	With _____ hours credited for _____ days served.
Count 3	15 HOURS	With _____ hours credited for _____ days served.

4.8 CONFINEMENT:

Count 1	0 DAYS	With credit for 0 days served.
Count 3	0 DAYS	With credit for 0 days served.

Yes No Temporary releases from confinement for school, work, medical appointments, etc. are authorized at the discretion of the Juvenile Department.

Yes No Youth shall be screened to participate in the Juvenile Department's Day Reporting Program. The juvenile may serve the detention time imposed in the Day Reporting Program at the discretion of the Juvenile Department, provided he or she meets the requirements of the program and the Juvenile Department approves of it. One day of confinement will be equal to two (2) Day Reporting Sessions. The juvenile shall be given credit for _____ days already served in detention, for a total of _____ days remaining to be served. If the juvenile does not attend Day Reporting as assigned, a violation will be filed with the Court and the juvenile may face additional confinement.

Yes No Youth shall be screened to participate in the Juvenile Department's Electronic Monitoring Program. The juvenile may serve the detention time imposed in the Electronic Monitoring Program at the discretion of the Juvenile Department, provided he or she meets the requirements of the program and the Juvenile Department approves of it. One day of confinement will be equal to one (1) day of electronic monitoring. The juvenile shall be given credit for _____ days already served in detention, for a total of _____ days remaining to be served.

DATE: Agency: DC# 01-15-24 AGE 10

PREVIOUS OFFENSES

Offense	Standard Range	Actual Sentence	Category	Note
Consistently Supervised	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.

CURRENT OFFENSE

Offense	Standard Range	Actual Sentence	Category	Note
Consistently Supervised	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.

CURRENT OFFENSE

Offense	Standard Range	Actual Sentence	Category	Note
Consistently Supervised	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.

CURRENT OFFENSE

Offense	Standard Range	Actual Sentence	Category	Note
Consistently Supervised	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.

PREVIOUS OFFENSES

Offense	Standard Range	Actual Sentence	Category	Note
Consistently Supervised	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.
0-12 months (6-60)	0-12 mos (6-60)	0-12 mos (6-60)	Commitment	U.S.C.

Additional notes, good misdemeanors, misdemeanors & violations point 6, 7, 8, 9, 10, 11, 12, 13.

Total Points:

APPENDIX B



Exhibit #2

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

PO BOX 44288 OLYMPIA WA 98504-4288
<http://www.lrdparty.lni.wa.gov>

June 10, 2015

CLALLAM COUNTY PROSECUTOR'S OFFICE
ATTN: VICTIM/WITNESS ASSISTANT
223 E 4TH AVENUE
PORT ANGELES, WA 98362

Claim number: AS80954
Injured Worker: ERIC S. HUETHER
Date of Injury: 02/03/2014
Employer: DEPT OF CORRECTIONS

RE: RESTITUTION REQUEST

Defendant: CARLOS AVALOS
Date of Loss: 02/03/2014
Cause No: 14-1-00125-7

Dear Prosecutor:

This is to inform you that your claim for restitution of wages, benefits and other lost wages, benefits and expenses, has been filed with the Department of Labor and Industries. The Department of Labor and Industries assigned the claim number AS80954 to your claim.

We are seeking reimbursement for all claim expenses. Please check with us prior to incurring any expenses to ensure all your claim expenses are included in the system.

Send a copy of the restitution order and any other correspondence to:
THIRD PARTY SECTION, FORMER 44288, PO BOX 44288, OLYMPIA WA 98504-4288

Alternatively, you may mail to:
CASHIER, PO BOX 44288, OLYMPIA WA 98504-4288

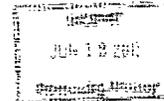
Be sure to include the L & I claim number on all checks and correspondence.

Thank you for your cooperation.

Sincerely,

Daniel Zamboni
Third Party Adjudicator
Phone: 360-902-5105
Fax: 360-902-5156

IPTY-SS11
Enclosure



ELLNER LAW OFFICE

October 22, 2015 - 7:55 PM

Transmittal Letter

Document Uploaded: 5-474221-Appellant's Brief.pdf

Case Name: State v. Avalos

Court of Appeals Case Number: 47422-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

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

CRJAppellate@ATG.WA.GOV