NO. 31137-6-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff,
Respondent,

Vs.

CORY LEE LANE,

Defendant,
Appellant.

RESPONDENT'S BRIEF

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I. ISSUE PRESENTED

1. A charging document challenged for the first time on appeal will be considered sufficient unless it omitted essential elements of the crime and prejudiced the defendant. The information alleged that Lane, who was required to register based on a prior conviction, knowingly failed to register as a sex offender under RCW 9A.44.130. Under this statute, there is only one punishable offense: knowingly failing to register as required. Did the charging document contain all essential elements of the crime where the information mirrored the language of the statute?

2. Jury instructions challenged on appeal are considered sufficient if the jury was informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. The "to convict" instruction used in Lane's trial contained the same language as the information. A definitional jury instruction was included defining the word "residence." Was

the jury instructed as to all essential elements of the charged crime?

3. Did the court miscalculate Lane's offender score and must this matter be remanded for the sentencing court to resolve the dispute in Lane's offender score?

II. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Cory Lee Lane, was charged by amended information with Failure to Register as a Sex Offender and Unlawful Possession of Firearm in the First Degree. CP 135-136. The State alleged that, during a time intervening between May 1, 2010 and June 16, 2011, Lane, having previously been convicted of Attempted Rape in the Second Degree, was required to register as a sex offender and knowingly failed to comply with the requirements of RCW 9A.44.130 (2006). CP 108-109. A jury found Lane guilty of Failure to Register as a Sex Offender and Unlawful Possession of a Firearm in the First Degree. CP 139-140; RP 659.

2. SUBSTANTIVE FACTS

Lane was previously convicted of Attempted Rape in the Second Degree and was therefore required to register as a sex offender. CP 108-109. In April of 2011, Pend Oreille County Deputies were alerted by local citizens that a sex offender, Cory Lane, was residing in Pend Oreille County. RP 315-317, 319, 383-384. A number of State's witnesses testified that they believed that Lane was residing at the home of Roxanne Perry on Driskill Road in Newport, Washington. RP 110-112, 115, 127, 137, 161, 177, 281-282. Lane failed to report this residence to the Pend Oreille County Sheriff's Office.

III. ARGUMENT

Lane contends that both the information and the "to convict" instruction were constitutionally deficient. Lane first argues that the information did not contain the essential elements of the crime of failure to register. Lane, however, fails to specify which essential element the State failed to charge. This argument fails because the information filed in the present case included all of the essential elements of the crime of failing to register as sex offender. Further, Lane cannot demonstrate that he was prejudiced by the wording of the information.

Lane also argues that the jury instructions did not properly inform the jury of the law, they were misleading and they deprived him of a fair and impartial jury. This argument fails as the jury was properly instructed as to the law.

A. The amended information contained the essential elements of the crime and Lane cannot show that he was prejudiced by the language contained in the information.

An information is constitutionally sufficient if it includes all of the essential elements of the crime, whether statutory or nonstatutory, even if it is vague as to some other matter significant to the defense. *State v. Moavenzadeh,* 135 Wn. 2d 359, 362, 956 P.2d 1097 (1998); *State v. Philips*, 98 Wn. App. 936, 939, 991 P.2d 1195 (2000). The purpose of the essential elements rule is to afford the defendant notice of the nature and cause of the allegations against him so that he may properly prepare a defense. *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

A challenge to the sufficiency of a charging document is of constitutional magnitude and may be raised for the first time on appeal. *Id.* However, where no challenge is raised in the trial court, the reviewing court liberally construes the charging document in favor of validity on appeal. *State v. Kjorsvik*, 117 Wn. 2d 93, 105, 812 P.2d 86 (1991). Courts apply a two-prong test to determine an information's sufficiency post verdict: (1) Do the necessary elements appear in any form, or can the

elements be found by fair construction, in the information, and if so, (2) can the defendant show that he was prejudiced by the inartful language that caused the lack of notice? *Kjorsvik*, 117 Wn. 2d at 105-106. Courts considering the first prong look at the face of the information only, but courts considering the second prong may look beyond the face of the information to determine if the defendant actually received notice of the charges that he had to defend against. *Id.* at 106. The information need not contain the exact words used in a statute or case law to be sufficient. *Id.* at 108-109. "Even missing elements may be implied if the language supports such a result." *State v. Hopper*, 118 Wn. 2d 151, 156, 822 P.2d 775 (1992). Courts read the information as a whole and are guided by common sense and practicality in construing the language. *Id.* An appellate court reviews challenges to the sufficiency of the charging document de novo as they involve questions of law. *State v. Williams*, 162 Wn.2d 177, 183-184, 170 P.3d 30 (2007).

A person commits the crime of failure to register as a sex offender if he or she "knowingly fails to comply with any of the requirements" of the sex offender statute. Former RCW 9A.44.130(11)(a)(2006).[1] The statute imposes one duty: to register with the sheriff. RCW 9A.44.130;

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[1] Former RCW 9A.44.130(11) was recodified as RCW 9A.44.132, effective June 10, 2010. LAWS of 2010, ch. 267 § 3.

State v. Peterson, 145 Wn. App. 672, 677, 186 P.3d 1179 (2008), aff'd, 168 Wn.2d 763, 230 P.3d 588 (2010). This section establishes the only punishable offense:

> A person who knowingly fails to register with the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense.

Former RCW 9A.44.130(11)(a)(2006)[2]; Peterson, 145 Wn. App. at 677-678. The statute then sets forth various registration requirements, including deadlines for registration based upon the sex offender's residential status and other circumstances. Former 9A.44.130(4)(a)(i)-(ix)(2006).

The appellate courts have previously addressed whether the various deadlines and procedures for registration set forth in the sex offender registration statute constitute essential elements of the offense of failure to register as a sex offender. State v. Bennett, 154 Wn. App. 202, 224 P.3d 849 (2010); State v. Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008), aff'd, 168 Wn.2d 763, 230 P.3d 588 (2010).

Here, the State alleged by amended information that during a specified period of time, Lane, in Pend Oreille County, Washington, was

[2] The current statute similarly provides that "a person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offender and knowingly fails to comply with any of the requirements of RCW 9A.44.130." RCW 9A.44.132(1).

required to register as a sex offender due to his prior conviction of Attempted Rape in the Second Degree and that Lane did "knowingly fail to comply with the requirements of RCW 9A.44.130." CP 108-109. Lane contends that the State failed to prove the essential elements of the crime of failure to register but did not specify which elements were not proven.

In *Peterson*, the defendant argued that the information charging him with failure to register as a sex offender was constitutionally inadequate because it did not allege the registration deadline with which he was required to comply. 145 Wn. App. at 676-78. The statute provides various deadlines for registration where an offender changes his or her address based up on the offender's residential status thereafter. *Peterson*, 145 Wn. App. at 676. As relevant there, it "required re-registration within 48 hours if the offender was homeless, 72 hours if the offender had a new fixed address, or 10 days if the offender had moved to an address outside the county. *Peterson*, 145 Wn. App. at 674. The State could not determine Peterson's whereabouts after he moved from his previous address; thus, the information charging Peterson with failure to register as a sex offender did not include the statutory deadline for registration. *Peterson*, 145 Wn. App. at 674-75.

The court of appeals rejected Peterson's contention that the various deadlines for registration based upon residential status constituted an essential element of the offense of failure to register as a sex offender. *Peterson*, 145 Wn. App. at 677-78. The court noted that the sex offender registration statute established only one punishable offense and that moreover, the statute imposed one duty: to register with the sheriff. *Peterson*, 145 Wn. App. at 677-678 (citing RCW 9A.44.130). Thus, the court concluded that the definition of and procedures for registration, set forth in the remaining subsections of the statute, merely articulate the definition of continuing compliance and they did not define the elements or create alternative means of committing the crime of failure to register. *Peterson*, 145 Wn. App. at 678.

The Washington Supreme Court affirmed the Court of Appeals decision in *Peterson*. *State v. Peterson*, 168 Wn. 2d 763, 230 P.3d 588 (2010). The supreme court noted that "this case requires us to consider what elements constitute the crime of failure to register as a sex offender." *Peterson*, 168 Wn. 2d at 765. The court determined that whether failure to register was an alternative means crime was a separate analysis from whether the deadlines for registration constituted essential elements of the offense. *Peterson*, 168 Wn. 2d at 774. The court held "that residential

status is not an element of the crime of failure to register." *Peterson*, 168 Wn.2d at 774.

Here, the amended information charging the appellant with failure to register as a sex offender alleged that he knowingly failed to comply with the requirements of the sex offender registration statute. CP 135-136. The State's theory of the case was that Lane failed to comply with the registration because he failed to notify the Pend Oreille County Sheriff of his residence within Pend Oreille County. RP 603-605, 630-631. As concluded in *Peterson*, the sex offender registration statute creates only one punishable offense: "failure to comply with any of the requirements" of that statute. Former RCW 9A.44.130(11)(a) (2006)[3]. All the essential elements of the crime of failure to register were alleged in the amended information filed with the court in the present case. The amended information was constitutionally adequate and provided notice to the appellant of the charge. The appellant did not challenge the validity of the information at the trial court level. The reviewing court should liberally construe the charging document in favor of validity where no challenge was raised in the trial court. *State v. Kjorsvik*, 117 Wn. 2d 93(1991).

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[3] The current statute similarly provides that "a person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offender and knowingly fails to comply with any of the requirements of RCW 9A.44.130." RCW 9A.44.132(1).

Additionally, the appellant fails to identify which essential element the State failed to allege in the information.

In determining the sufficiency of a charging document post-verdict an appellate court must address the second prong of the test by asking whether the defendant can show that he was prejudiced by the inartful language that caused the lack of notice." *Kjorsvik,* 117 Wn. 2d at 105. Looking beyond the information under which he was tried, as permitted by *Kjorsvik,* it is clear that Lane received notice of the charges that he had to defend against. The witnesses who testified on behalf of the defense along with Lane's counsel closing arguments focused entirely on the claim that Lane did not violate the registration requirement because he was properly registered and residing in Spokane County. RP 343, 345-347, 386-387,389, 391, 397, 429, 456, 610-616. It was the defense's theory that Lane did not violate his duty to register with Pend Oreille County because he did not live in the county. RP 610-616, 626. There was no claim that Lane was not aware of the relevant requirement or did not understand how to comply. Given the record, Lane cannot show that the information failed to apprise him of the nature of the charge against him or hindered his ability to prepare a defense.

On appeal, Lane does not contend that he was actually prejudiced by the information's alleged inadequacy. Rather, Lane asserts only that

the information omitted an essential element of the offense without specifying which element the State omitted. The information provided adequate notice to the appellant of the crime charged and thus the appellant was not prejudice by the language of the information.

B. The defendant is precluded from arguing on appeal that the trial court erred in giving jury instructions number 11 and 12 because the defendant did not object to these instructions below.

The appellant additionally appears to argue that the jury instructions given to the jury were constitutionally inadequate. Specifically, the appellant challenges jury instruction 11 and 12. The appellant contends that the instructions do not correctly state the law for the charging period alleged, therefore, the jury instructions do not properly inform the jury of the law, are misleading and deprived him of a fair and impartial trial. This claim is without merit because the Lane did not preserve the issue for appeal and because the jury instructions properly informed the jury of the law.

Jury instructions satisfy the fair trial requirement when, taken as a whole, they properly inform the jury of the law, are not misleading, and permit the parties to argue their theories of the case. If a trial court's decision about a jury instruction is based on a ruling of law, the appellate court reviews it de novo. *State v. Souther*, 100 Wn. App. 701, 708, 998

P.2d 350 (2000) (citing State v. Walker, 136 Wn. 2d 767, 772-773, 966 P.2d 883 (1998), *review denied*, 142 Wn.2d 1006 (2000)).

An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988); State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). Stated another way, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." Washington Rules of Appellate Procedure (RAP) 2.5(a); *See also,* State v. Munguia, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001). The appellant must show actual prejudice in order to establish that the error is "manifest." Munguia, 107 Wn. App. at 340 (*citing* State v. McFarland, 127 Wn.2d 322, 333-334, 899 P.2d 1251 (1995)). Furthermore, a party objecting to a jury instruction must "state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." CrR 6.15(c). The purpose of CrR 6.15(c) is to give the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Moreover, a jury instruction becomes the law of the case if there was no specific objection to it at trial. State v. Perez-Cervantes, 141 Wn.2d 468, 476 n. 1, 6 P.3d 1160 (2000).

The Defendant fails to show how the instructions constituted

manifest error affecting a constitutional right. In short, the Defendant waived any objection to instructions 11 and 12 by failing to object below. Because, as explained above, the residency requirement does not constitute an essential element of the offense of failure to register as a sex offender, this challenge similarly fails. The "to convict" instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence. *State v. DeRyke,* 149 Wn. 2d 906, 910, 73 P.3d 1000 (2003) (quoting *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). In reviewing the constitutional adequacy of a "to convict" instruction, the reviewing court may not supply a missing element by relying upon other jury instructions. *DeRyke*, 149 Wn. 2d at 910.

Here, the "to convict" instruction included the language of the information and provided the specific way in which Lane failed to register. *See*, Appellant's Brief, Appendix A& B. Instruction 15 provided the definition of residence which was relevant to the compliance provision applicable in this case. *See,* Appellant's Brief, Appendix C. Lane appears to contend that he was misinformed about the elements of the offense of failure to register and the jury was provided instructions that were a misstatement of law because the state alleged the wrong statute that was in effect.

Former RCW 9A.44.130(11) was recodified as RCW 9A.44.132, effective June 10, 2010. LAWS of 2010, ch. 267 § 3. The current failure to register statute similarly provides that "a person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offender and knowingly fails to comply with any of the requirements of RCW 9A.44.130." RCW 9A.44.132(1). The essential elements of the crime of failure to register did not change when the statute was recodified in 2010.

As explained above, the essential elements of the offense of failure to register as a sex offender are the knowing failure to comply with the registration requirements set forth in the statute. Thus, contrary to the appellant's contention, the "to convict" instruction is not constitutionally inadequate because it does not set forth the particular registration requirement with which the appellant failed to comply. Moreover, the jury was properly instructed regarding the definition of "residence." *See,* State v. Allen, 176 Wn. 2d 611, 626-627, 294 P.3d 679 (2012)(noting that, although the "true threat" concept was not an essential element of the offense, the jury was properly instructed regarding the definition of "true threat" in a separate instruction). The "to convict" instruction included the essential elements of the offense of failure to register as a sex offender, and thus, it was constitutionally adequate.

C. Any error in the "to convict" instruction was harmless.

Generally, all elements should be included in the "to convict" instruction. *See,* State v. Mills, 154 Wn. 2d 1, 109 P.3d 415 (2005). At the same time, the requirements of due process are met when the jury is informed of all of the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. State v. Scott, 110 Wn. 2d 682, 690, 757 P.2d 492 (1988). A jury is presumed to read the court's instructions as a whole, in light of all other instructions. State v. Hutchinson, 135 Wn. 2d 863, 885, 959 P.2d 1061 (1998).

Lane does not argue that the instructions as a whole fail to include all the elements of the crime. Lane appears to argue that all the elements were not included in the "to convict" instruction. Lane does not indicate what elements were missing. This is significant because the instructions did not prevent either party from arguing their theory of the case. *See,* Mills, 154 Wn. 2d at 7 ("jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law"). Lane's theory of the case was that he did not fail to comply because he was already registered in the county of his residence-

Spokane County and was not required to register with Pend Oreille County. RP 50, 345-347.

The jury instructions allowed Lane to argue his theory of the case. The definitional instruction on "residence" explained to the jury the meaning of the word. CP 110-127. Further, the jury was instructed that although the lawyers might only reference specific instructions in closing argument, during deliberations the jury must consider the instructions as whole. CP 110-127. In reading the instructions as a whole, it is clear that the jury was properly instructed as they informed the jury of the applicable law. Any error in the "to convict" language was harmless.

D. This matter should be remanded for the sentencing court to resolve the dispute in Lane's offender score.

A sentencing court's calculation of a defendant's offender score is a question of law that is reviewed de novo. *State v. McCraw*, 127 Wn. 2d 281, 289, 989 P.2d 838 (1995). "A sentencing court acts without statutory authority… when it imposes a sentence based on a miscalculated offender score," *In re Pers. Restraint of Johnson*, 131 Wn. 2d 558, 568, 933 P.2d 1019 (1997); accordingly, such an error can be raised for the first time on appeal. *State v. McCorkle,* 137 Wn. 2d 490, 495, 973 P.2d 461 (1999).

The appellant challenges his third degree assault conviction sentenced on January 17, 1992 and his conviction for attempt to elude sentenced on February 4, 1994, arguing pursuant to RCW 9.95A.525(1)(c) that these convictions "washed out" and should not be included in the calculation of his offender score as he remained crime free for five years[4]. The appellant contends that his convictions for attempt to elude and assault in the third degree-Class C felonies should have washed out because of the 5 years from February 4, 1994 to March 26, 1999-that he spent in the community without being convicted of another offense.

RCW 9.94A.525(2)(c), provides, that "except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction."

The trial court must conduct a sentencing hearing before imposing a sentence on a convicted defendant. RCW 9.94A.500(1); *State v. Hunley*, 175 Wn. 2d 901, 908, 287 P.3d 584 (2012). A defendant's

[4] The petitioner believes that the appellant erroneously cited the "wash out" statute as 9.95A.525(1)(c). The State cites to RCW 9.94A.525(2)(c) which states the law in regards to the Class C felony "wash out" provision.

offender score affects the sentencing range and is generally calculated by adding together the defendant's current offenses and the prior convictions. RCW 9.94A.589(1)(a); *Hunley,* 175 Wn. 2d at 908-909. In determining the proper offender score, the court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2); *Hunley,* 175 Wn. 2d at 909. The purpose of this limitation is "to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information." *Id.* at 909 (citing *State v. Herzog,* 112 Wn.2d 419, 431-32, 771 P.2d 739 (1989)); WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.")).

The legislature amended RCW 9.94A.500(1) in 2008 to provide that "[a] criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein." LAWS OF 2008, ch. 231, § 2. At the same time, RCW 9.94A.530(2) was also amended to add, "Acknowledgment includes … not objecting to criminal history presented at the time of sentencing." LAWS OF 2008, ch. 231, § 4; *see also*, *Hunley,* 175 Wn. 2d at 909.

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction. *Id.* at 482. While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." *Ford,* 137 Wn.2d at 480. Further, unless convicted pursuant to a plea agreement, the defendant has "no obligation to present the court with evidence of his criminal history." *State v. Hunley,* 175 Wn. 2d 901, 909-910 (citing *State v. Lopez,* 147 Wn.2d 515, 512, 55 P.3d 609 (2002)).

"The best evidence of a prior conviction is a certified copy of the judgment." *Ford,* 137 Wn. 2d at 480. "However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *Id.; see, e.g.*, *In re Pers. Restraint of Adolph,* 170 Wn.2d 556, 566, 570, 243 P.3d 540 (2010) (prior driving under the influence conviction proved by Department of Licensing driving record abstract and a defendant case history from the District and Municipal Court Information System (DISCIS); reasoning both are "official government records, based on information obtained directly from the courts, and can be created or modified only by government personnel

following procedures established by statute or court rule"); *State v. Vickers*, 148 Wn.2d 91, 120-21, 59 P.3d 58 (2002) (prior conviction proved by certified copy of docket sheet showing guilty plea); *State v. Winings*, 126 Wn. App. 75, 91-93, 107 P.3d 141 (2005) (prior out of state convictions adequately proved with copies of minute orders, defendant's guilty pleas, charging documents identifying prior crimes and their elements, and certified abstract of judgment, taken together); *State v. Payne*, 117 Wn. App. 99, 105-06, 69 P.3d 889 (2003) (prior conviction from Canada proved when State introduced evidence of the warrant, information, sentence, transcript of defendant's plea and submissions, and warrant of committal).

The Washington Supreme Court has vacated sentences on multiple occasions where the State failed to provide sufficient evidence of prior convictions. *See, State v. Mendoza*, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009); *Hunley*, 175 Wn.2d 901; *Ford*, 137 Wn.2d at 482. In the *Ford* case, the State orally summarized the defendant's prior out of state convictions and the trial court counted the convictions toward the defendant's offender score as comparable Washington offenses. *Ford*, 137 Wn.2d at 475-76. The supreme court reasoned that no evidence was introduced to support the out of state offenses or comparability to Washington offenses because "a prosecutor's assertions are neither fact

nor evidence, but merely argument." Id. at 483 n.3. Accordingly, the court held that the State failed to meet the preponderance standard and that the lack of evidence fell "below even the minimum requirements of due process." Id. at 481.

The State argued on appeal that no additional evidence was required because the defendant acknowledged the prior conviction by failing to object. Id. at 478. The court rejected that argument and declared that "[a]cknowledgment does not encompass bare assertions by the State unsupported by the evidence." Id. at 483. Accordingly, the defendant's mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgment. Id. at 482-83. The court further explained that there must be some affirmative acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations. Id. "To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant." Id. at 482.

The supreme court's holdings in Ford have been reaffirmed in subsequent opinions. *See,* Mendoza, 165 Wn.2d at 928-29; State v. Hunley, 175 Wn. 2d 901, 287 P.3d 584 (2012). In Mendoza, the sentencing court relied on a filed statement by the prosecuting attorney

that included a list asserting the defendant's criminal history. 165 Wn.2d at 917. The statement listed the sentencing court and date of the crime but did not include any other documentation to verify the convictions. *Id.* at 918. The defendant did not object to the criminal history at sentencing, nor did he affirmatively agree with the prosecutor's representations. *Id.* The court found that the State had to provide evidence of each defendant's criminal history, generally a certified copy of the judgment and sentence, unless such defendant affirmatively acknowledged the criminal history on the record. The court held that no evidence of defendants' criminal histories were provided and defendants did not affirmatively acknowledge their histories. Thus, the sentencing courts did not have any facts or information on which to find by a preponderance of the evidence that the criminal history was valid. The State was entitled to present evidence of defendants' criminal histories because there were no specific objections at the sentencing hearing. *Mendoza,* 165 Wn. 2d at 930.

In *State v. Hunley*, the defendant alleged prior convictions, like those in *Ford* and *Mendoza,* were established solely on the prosecutor's summary assertion of the offenses. The prosecutor did not present any evidence documenting the alleged convictions. There was no certified judgment and sentence or other comparable document of record, like a DISCIS criminal history summary. And Hunley never affirmatively

acknowledged the prosecutor's assertions regarding his criminal history. The supreme court held that the sentencing court violated the defendant's right to due process by basing the imposed sentence on prior convictions demonstrated only by the prosecutor's written summary and the defendant's failure to object. Additionally, the supreme court affirmed the court of appeals' remedy to remand for resentencing, requiring the State to prove Hunley's prior convictions unless affirmatively acknowledged. *See,* State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (erroneous calculation of offender score requires remand for resentencing unless the record clearly shows the trial court would have imposed the same sentence regardless of the error); *see also,* State v. Raines, 83 Wn. App. 312, 315, 922 P.2d 100 (1996) (resentencing appropriate even though defendant had served entire modified sentence because modifications could cause a future sentencing court to impose additional demanding conditions of community placement or sway a court to impose the high end of the standard range); Hunley, 175 Wn.2d at 915-916. RCW 9.94A.530(2), also provides that, "on remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

Similar to the facts in *Mendoza* and *Hunley,* the sentencing court in the instant case relied on a statement of the prosecuting attorney that included a list asserting the defendant's criminal history in the judgment and sentence. CP 141-151; RP 689. It would appear that the criminal history listed in the judgment and sentence contained errors. Essentially, there are two charges, burglary in the second degree and an assault in the third degree listed with the same date of crime, same date of sentence and same sentencing court. However, the burglary in the second degree is listed as a juvenile offense and the assault in the third degree is listed as an adult offense. Clearly, there is an error regarding whether these two crimes committed by the appellant were sentenced in juvenile court or adult court.

The prosecution did not present any evidence documenting the alleged convictions. Additionally, Lane did not affirmatively acknowledge the prosecutor's assertions regarding his criminal history nor object to the State's assertion of his criminal history. The State would concede that pursuant to the holdings in *Mendoza* and *Hunley,* the State did not meet its burden in proving the defendant's prior criminal history. Thus, the State respectfully requests that the matter be remanded to the sentencing court for the State to prove Lane's prior convictions and for the judgment and sentence to accurately reflect his offender score.

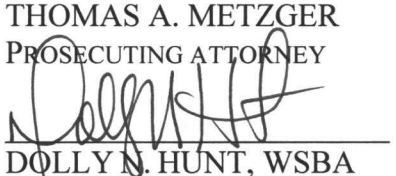
IV. CONCLUSION

The amended information in the present case contained the essential elements of the crime of failure to register as a sex offender. Additionally, Lane cannot show that he was prejudiced by the language contained in the information. The defendant is precluded from arguing on appeal that the trial court erred in giving jury instructions number 11 and 12 because the defendant did not object to these instructions below. Even if the instructions were in error, any error in the "to convict" instruction was harmless. The Court should uphold the verdict on the failure to register charge.

Lastly, the State concedes that it did not meet its burden in proving the defendant's prior criminal history. Thus, the State respectfully requests that the matter be remanded to the sentencing court for the State to prove the appellant's prior convictions and for the judgment and sentence to accurately reflect his offender score.

RESPECTFULLY SUBMITTED this 26th day of April, 2013.

THOMAS A. METZGER
PROSECUTING ATTORNEY



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Certificate of Mailing

I, do hereby certify and declare under penalty of perjury of the laws of the State of Washington that on this date I deposited in the United States Post Office in the City of Newport, Pend Oreille County, Washington a properly stamped and addressed envelope(s) directed to:

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Containing a true and correct copy of:

Respondent's Brief

April 26, 2013 Newport, WA
Date and Place

Tricia Shanholtzer