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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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CLERK OF SUPREME COURT
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID M. HENDERSON,

Appellant.

No.: 35316-4-II
PETITION FOR REVIEW

A. IDENTITY OF PETITIONER.

The State of Washington, by and through Gerald R. Fuller, Chief Criminal Deputy, Grays Harbor County Prosecuting Attorney, asks this court to accept review of the Court of Appeals decision terminating review as designated in Part B, below. A copy of the opinion is attached.

B. COURT OF APPEALS DECISION.

The State of Washington seeks review of the unpublished opinion of the Court of Appeals filed July 25, 2007 which affirms the conviction of the defendant, but remands the matter for re-sentencing. The matter was remanded for re-sentencing without any direction concerning whether or not the State of Washington was to be allowed to prove the criminal history of the defendant at re-sentencing.

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4 The State asks that the decision of the Court of Appeals be reversed and the sentence of
5 the Superior Court be reinstated. The State asks that this court find that the trial court, based
6 upon the evidence before it at sentencing, properly determined the defendant's offender score.

7 In the alternative, the State asks that this court at least direct that the State be allowed to
8 prove the defendant's prior convictions upon remand for re-sentencing as has been ordered by the
9 Court of Appeals in similar matters, See State v. Frank C. Mendoza, No. 34698-2-II decided July
10 17, 2007.

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12 **C. ISSUES PRESENTED FOR REVIEW.**

13 **1. Did the trial court properly determine the defendant's offender score based on**
14 **the information presented by the State of Washington in its Statement of Prosecuting**
15 **Attorney which was admitted at sentencing hearing without objection?**

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17 **D. STATEMENT OF THE CASE.**

18 Following jury trial, the defendant was convicted of Trafficking in Stolen Property in the
19 First Degree. A sentencing hearing was held. The State filed a Statement of Prosecuting
20 Attorney in which it listed the defendant's prior Grays Harbor County Superior Court
21 convictions. Each conviction, as listed in the Statement of Prosecuting Attorney, referenced the
22 nature of the offense and the Superior Court Cause number. Also, at sentencing, specific
23 reference was made to the Statement of Prosecuting Attorney and to the existence of the prior
24 convictions. (RP 80-81). No objection was made to the existence of these convictions.

25 Counsel for the defendant accepted the criminal history as presented to the trial court and
26 recommended a standard range sentence. (RP 81). The trial court accepted the representations
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4 of the State and the defendant's acknowledgment of his prior criminal history and imposed a
5 sentence within the standard range.

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7 **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.**

8 **The decision of the Court of Appeals presents a significant issue of law and an issue**
9 **of substantial public interest that should be determined by the Supreme Court.**

10 RCW 9.94A.530 provides as follows:

11 (2) In determining any sentence other than a sentence above the
12 standard range, the trial court may rely on no more information
13 than is admitted by the plea agreement, or admitted, acknowledged,
14 or proved in a trial or at the time of sentencing, or proven pursuant
15 to RCW 9.94A.537. Acknowledgment includes not objecting to
16 information stated in the presentence reports. Where the defendant
17 disputes material facts, the court must either not consider the fact
18 or grant an evidentiary hearing on the point. The facts shall be
19 deemed proved at the hearing by a preponderance of the evidence,
20 except as otherwise specified in RCW 9.94A.537.

21 The State of Washington presented its Statement of Prosecuting Attorney. This is a
22 presentence report provided to the court at sentencing. The report set forth the State's
23 understanding of the defendant's criminal history. Each felony offense was listed by reference to
24 the Superior Court cause number. There was no objection made. Accordingly, the convictions
25 are deemed proven. To preserve a challenge for review, the defendant is required to object to the
26 criminal history. RCW 9.94A.530(2). State v. Handley, 115 Wn.2d 275, 283-84, 796 P.2d 1266
27 (1990).

28 The Court of Appeals opinion attempts to assert that there is lack of proof of the
29 existence of the prior convictions. This case is not about conviction from a foreign country.
30 State v. Herzog, 112 Wn.2d 419, 771 P.2d 739 (1989). Neither is this about a conviction from
31 another state where there may be an issue whether there are comparable elements. State v. Ford,

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4 137 Wn.2d 472, 973 P.2d 452 (1999). These are all convictions that occurred in the State of
5 Washington, in the same court where the defendant is now being sentenced. These are all
6 convictions that will show by a simple check online through the
7 Judicial Information System set up by the Administrator of the Courts. These are all convictions
8 that were acknowledged by the defendant.

9 The Court of Appeals has artificially limited the meaning of “presentence report” to a
10 report prepared by the Department of Corrections. CrR 7.1(d) contemplates that there may be a
11 Department of Corrections report as well as reports from “...any interested person, as designated
12 by RCW 9.94A.500 [to] submit reports separate from that furnished by [DOC]. RCW 9.94A.500
13 specifically provides:

14 The court shall consider the risk assessment report and presentence
15 reports, if any, including any victim impact statement and criminal
16 history, and allow arguments from the prosecutor, the defense
17 counsel, the offender, the victim, the survivor of the victim, or a
18 representative of the victim or survivor, and an investigative law
19 enforcement officer as to sentence to be imposed.

20 The statute does not limit presentence reports to a report prepared by the Department of
21 Corrections. There is nothing that requires that the criminal history be prepared by the
22 Department of Corrections only. It is has been the practice in Grays Harbor County that the
23 prosecuting attorney prepares a Statement of Prosecuting Attorney that lists the defendant’s
24 criminal history for the court. RCW 9.94A.500, on its face, allows consideration of
25 “...presentence reports, if any, including any victim impact statement and criminal history...” The
26 State submitted a presentence report which contained the defendant’s criminal history. No
27 objection was made.

There is no requirement that the sentencing court hold an evidentiary hearing when there
is no objection made to factual statements contained in a presentence report. State v. Garza, 123

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4 Wn.2d 885, 889-890. The court in Garza also noted that the CrR 7.1(c) requires defense counsel
5 and prosecuting attorney to notify opposing counsel and the court, at least three days prior to
6 sentencing, of any part of a presentence report that will be controverted. No such notice was
7 given here. Garza, 123 Wn.2d at page 890. In fact, the defendant reviewed the criminal history
8 and made no objection. (RP 6, 04/17/06).

9 This defendant has not been deprived of any right. The Statement of Prosecuting
10 Attorney is given to the defendant prior to sentencing. He has the opportunity to review the list
11 of prior convictions. Upon notice that he objects, there will be a contested hearing. The
12 defendant certainly has the right to stipulate to his prior criminal history as he did here. There is
13 no need to unduly burden the process by requiring that certified documents of all convictions be
14 produced at every sentencing hearing.

15 The State is aware of the recent decision of the Court of Appeals, Division II in State v.
16 Frank C. Mendoza, No. 34698-2-II decided July 17, 2007. The State has filed a Petition for
17 Review in that matter which raises the very same sentencing issue. The court in Henderson made
18 its decision without any reference to Mendoza and simply ordered that the matter be remanded
19 for re-sentencing.

20 The State filed a Motion for Reconsideration in this matter asking that the Court of
21 Appeals at least amend the opinion to direct that the State be allowed to prove the defendant's
22 prior convictions at re-sentencing. The Motion for Reconsideration was denied. The court in
23 Mendoza, while holding that the defendant's prior criminal history had not properly been proven
24 at the original sentencing, held that upon remand that the State could produce certified copies of
25 documents and prove the defendant's prior criminal history. Mendoza, at page 19. The court
26 specifically held that the State was not limited to the record existing at the time of the original
27 sentencing. The court in this matter, made no reference to Mendoza. Despite a request for

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4 reconsideration, the court specifically refused to amend the opinion to address whether the State
5 could prove the fact of the prior convictions at a new sentencing hearing.

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7 **F. CONCLUSION.**

8 For reasons set forth, the State asks that review be accepted and that the decision of the
9 Court of Appeals be reversed.

10 In the alternative, the States asks that this court remand the matter to the Court of
11 Appeals, Division II, with direction that they amend the opinion in this matter so that the State
12 may be allowed to prove the defendant's prior convictions upon re-sentencing.

13 Dated this 27 day of August, 2007.

14 Respectfully Submitted,

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16 By: *Gerald R Fuller*
17 GERALD R. FULLER
18 Attorney for Petitioner
19 WSBA #5143

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GRF/jfa



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

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Grays Harbor County
Prosecuting Attorney's Office

July 25, 2007

Jodi R. Backlund
Backlund & Mistry
203 4th Ave E Ste 404
Olympia, WA, 98501-1189

Gerald R. Fuller
Grays Harbor Co Pros Ofc
102 W Broadway Ave Rm 102
Montesano, WA, 98563-3621

Manek R. Mistry
Backlund & Mistry
203 4th Ave E Ste 404
Olympia, WA, 98501-1189

David M. Henderson
PO Box 182
Moclips WA 98562

CASE #: 35316-4-II
State of Washington, Respondent v. David M. Henderson, Appellant

Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:cjb
Enclosure

cc: Judge David Foscue
Indeterminate Sentence Review Board

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID M. HENDERSON,

Appellant.

No. 35316-4-II

UNPUBLISHED OPINION

PENOYAR, J. — A jury convicted David Henderson of first degree trafficking in stolen property. He appeals, arguing that the trial court improperly instructed the jury and erred in including two prior convictions in his criminal history. A commissioner of this court referred his appeal to a panel of judges. Concluding that the instructional error is harmless, but agreeing that the trial court erred in including the prior convictions in his criminal history, we affirm his conviction but remand for resentencing.

FACTS

On July 5, 2005, Rocky Johnson discovered that a side door to his fifth-wheel trailer was open. A set of racing wheels, an aluminum oil pan, fuel pump extensions and a small stereo were missing. He called Butcher's Scrap Metal to alert it that someone had stolen these items. That afternoon, Henderson sold a set of racing wheels to Butcher's Scrap. Ronald Butcher called

Johnson and described the wheels. Johnson came to Butcher's Scrap the next day and identified the wheels as those taken from his trailer.

The police arrested Henderson. After they advised him of his constitutional rights, he told them that he had been given the wheels as collateral for a loan. When the borrowers did not return for the wheels, he sold them to Butcher's Scrap. He said that he did not know they were stolen. After some questioning, he changed his story and said that his girlfriend's son, Ben Martinez, had brought him the wheels. He said Martinez had brought him stolen items in the past to sell for him.

The State charged Henderson with first degree trafficking in stolen property. Johnson, Butcher and the detectives testified as described above. Henderson testified that Martinez told him that the racing wheels were not stolen.

The trial court instructed the jury on both first degree trafficking and second degree trafficking, with the pertinent instructions quoted below:

INSTRUCTION 4.

To convict the defendant, David M. Henderson, of the crime of Trafficking in Stolen Property in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 5, 2005, the defendant trafficked in stolen property.
- (2) That the defendant acted knowingly.
- (3) The acts occurred in Grays Harbor County.

.....

INSTRUCTION 7.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Trafficking in Stolen Property in the First Degree necessarily includes the lesser crime of Trafficking in Stolen Property in the Second Degree.

A person commits the crime of Trafficking in Stolen Property in the First Degree when he recklessly traffics in stolen property.

.....
INSTRUCTION 8.

To convict the defendant, David M. Henderson, of the crime of Trafficking in Stolen Property in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 5, 2005, the defendant trafficked in stolen property.
- (2) That the defendant acted recklessly.
- (3) The acts occurred in Grays Harbor County.

Clerk's Papers (CP) at 16-17 (emphasis added).

The jury convicted Henderson of first degree trafficking in stolen property. At sentencing, the State introduced a statement of prosecuting attorney, which stated that Henderson had two prior convictions. It did not introduce copies of the judgment and sentences. Henderson did not acknowledge or stipulate to the prior convictions. The trial court included both convictions in calculating Henderson's offender score as 2. The court then sentenced Henderson to the bottom of his standard sentence range, which was 12 to 14 months. He appeals.

ANALYSIS

First, Henderson argues that the trial court erred in giving the emphasized sentence in Instruction 7. That sentence should have read: "A person commits the crime of Trafficking in Stolen Property in the Second Degree when he recklessly traffics in stolen property." The State agrees that the sentence was incorrect but contends that it was a harmless typographical error.

An instructional error is harmless only if it "is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997) (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)) (interior

quotations and emphases omitted). The error in Instruction 7 is trivial. Instructions 4 and 8, the to-convict instructions for first degree trafficking and for second degree trafficking, were correct. The misstatement of "First Degree" rather than "Second Degree" in the erroneous sentence of Instruction 7 did not prejudice Henderson's substantial rights. Nor did it affect the final outcome of the case. Therefore, the error is harmless.

Second, Henderson argues that the State failed to prove his prior convictions, so the trial court erred in including them in his criminal history. In calculating an offender's criminal history, the court can rely only on information that is "admitted, acknowledged, or proved . . . at the time of sentencing." RCW 9.94A.530(2). "Acknowledgement includes not objecting to information stated in the presentence reports." *Id.* Henderson notes that he did not admit to his prior convictions, that there was no presentence report to which he could have objected, and that the State did not prove his prior convictions. Thus, he contends that the court erred in including them in his criminal history.

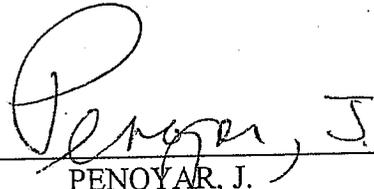
The State responds that Henderson did not challenge his prior convictions at sentencing and so cannot challenge them on appeal. *State v. Garza*, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994); *State v. Handley*, 115 Wn.2d 275, 283-84, 796 P.2d 1266 (1990). Sentencing errors can be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). *Garza* and *Handley* do not support the State's position because they both involve failures to object to presentence reports.

For a trial court to include prior convictions in an offender's criminal history, one of three events must occur: (1) the State proves the prior convictions with competent evidence; (2) the offender admits to the prior convictions; or (3) the offender acknowledges the prior convictions

by failing to object to their inclusion in a presentence report. None of these events occurred during Henderson's sentencing. Therefore, the court erred in including the two prior convictions in his offender score.

We affirm Henderson's conviction but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.



PENOVAR, J.

I concur:



HOUGHTON, C.J.

QUINN-BRINTNALL, J. (concurring in part and dissenting in part) — I concur with the majority that the typographical error in the instruction did not prejudice David M. Henderson and, thus, we should affirm the jury’s verdict of guilt. But I disagree with the majority’s holding regarding the sentencing issue.

I believe the majority mischaracterizes the prosecuting attorney’s criminal history statement as something other than a presentence report. The criminal history is a presentence report and, as such, Henderson was required to object to it before sentencing to preserve this challenge for review. *State v. Garza*, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994); *State v. Handley*, 115 Wn.2d 275, 283-84, 796 P.2d 1266 (1990).

Here, the State presented a report titled “Statement of Prosecuting Attorney” which read in relevant part:

COMES NOW H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, Washington, by and through his deputy, Gerald R[.] Fuller, and submits the following report for consideration at the sentencing of the defendant in the above-entitled cause.

....

PRIOR RECORD

CRIME	DATE OF SENTENCING	SENTENCING COURT (County and State)	DATE OF CRIME	A (Adult) or J (Juvenile)	TYPE OF CRIME
VUCSA-Poss of Controlled Substance		GHC 04-1-434-1			
PSP 2		GHC 04-1-434-1			

Clerk’s Papers at 20. Henderson did not object to this accounting of his prior record and, in my opinion, he therefore acknowledged this criminal history under RCW 9.94A.530(2).

CrR 7.1(a) grants a trial court authority to order “a risk assessment or presentence investigation and report be prepared by the Department of Corrections [DOC], when authorized

by law.” And CrR 7.1(d) contemplates other reports, allowing “[a]ny interested person, as designated in RCW 9.94A.500 [to] submit a report separate from that furnished by the [DOC].”

Former RCW 9.94A.500 (2000), in turn, grants authority for several reports: (1) a risk assessment report completed by DOC; (2) a chemical dependency screening report prepared by DOC; (3) a “presentence report” for defendants convicted of a felony sexual offense prepared by DOC; (4) a “presentence report” for mentally ill defendants prepared by DOC; and (5) a victim impact statement. The statute goes on to say:

The court shall consider the risk assessment report *and presentence reports, if any, including any victim impact statement and criminal history*, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

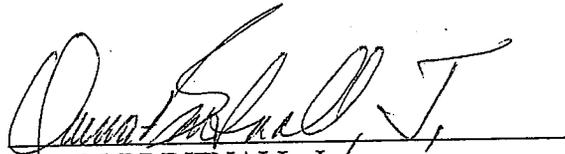
Former RCW 9.94A.500(1) (emphasis added).

The language emphasized above means that the term “presentence report” has a wider definition than that used by the majority and may include portions of a victim impact statement, a document that is not prepared by DOC. Crucially, the term clearly includes criminal history. No law requires that a defendant’s criminal history be prepared by the DOC.¹ Indeed, presentence reports of criminal history are typically prepared by the prosecutor or defense attorney and the DOC is only called upon to author such reports, causing much delay, in more serious cases or special circumstances such as the presence of mental illness or a felony sexual offense.

¹ If, conversely, DOC does prepare a presentence report, it should include criminal history. See CrR 7.1(b).

Without analysis, the majority here holds that an offender acknowledges prior convictions only if he fails to object to a presentencing report that is prepared by the DOC, rather than an attorney. I disagree.

Further, even given the majority's interpretation of presentence reports, I disagree with the remedy. The Grays Harbor County trial court could have taken judicial notice that Grays Harbor County courts had twice convicted Henderson for felonies within the previous two years. ER 201(b). I would affirm on all grounds.


QUINN-BRINTNALL, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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DIVISION II

STATE OF WASHINGTON,
Respondent,
v.
DAVID M. HENDERSON,
Appellant.

No. 35316-4-II

ORDER DENYING MOTION TO
RECONSIDER

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RESPONDENT moves for reconsideration of the court's decision terminating review, filed July 30, 2007. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Houghton, Quinn-Brintnall, Penoyar

DATED this 21st day of August, 2007.

FOR THE COURT:

E. Houghton
CHIEF JUDGE

Jodi R. Backlund
Backlund & Mistry
203 4th Ave E Ste 404
Olympia, WA, 98501-1189

Gerald R. Fuller
Grays Harbor Co Pros Ofc
102 W Broadway Ave Rm 102
Montesano, WA, 98563-3621

Manek R. Mistry
Backlund & Mistry
203 4th Ave E Ste 404
Olympia, WA, 98501-1189