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No.
Court of Appeals 36299-6-II

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAURA MOUERN,

Appellant

09 APR -9 AM 11: 46
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

PETITION FOR REVIEW

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A: IDENTITY OF PETITIONER

Pursuant to RAP 13.4, petitioner, Laura Moeurn, asks this Court to grant review of the opinion of the Court of Appeals in State v. Moeurn, 36299-6-II.

B. OPINION BELOW

Mr. Moeurn appeals his conviction of second degree assault, with a deadly weapon enhancement. Mr. Moeurn argues the State failed to prove beyond a reasonable doubt that he committed the assault. Further, he contends that the deputy prosecutor's prejudicial misconduct in closing argument, fundamentally misstating the State's burden of proof, was intended to and did cause the jury to convict him in the absence of sufficient evidence. Finally, Mr. Moeurn contends the trial court miscalculated his offender score.

The Court of Appeals affirmed Mr. Moeurn's conviction. But in doing so the court failed to consider all the State's evidence in its evaluation of the sufficiency of the evidence. Further the court concluded that the prosecutor's repeated statements to the jury in closing argument not to worry about their doubts did not warrant reversal. Finally, although the State conceded error, the court

rejected Mr. Moeurn's argument that his lone prior offense had washed out. Pursuant to RCW 9.94.525(2).

C. ISSUES PRESENTED

1. Where the evidence in the light most favorable to the State establishes that an assault was committed but creates, and leaves unresolved, substantial doubt the Mr. Moeurn committed the assault, does Mr. Moeurn's conviction deprive him of due process?

2. Where a prosecutor engages in misconduct by misstating the law, the defendant is denied a fair trial. Did the deputy prosecutor's misstatement of the law of reasonable doubt and the State's burden of proof deny Mr. Moeurn a fair trial?

3. A court acts without authority when imposing a sentence based on an offense that washed out because the requisite period of time passed without further criminal convictions. In the case at bar, the court used a conviction for a 1995 Class C juvenile offense when more five years elapsed prior to the current offense without any additional criminal convictions. Did the court unlawfully sentence Mr. Moeurn based upon a washed out prior conviction?

D. STATEMENT OF THE CASE

On January 13, 2007, Laura Moeurn and several friends went to the Captain's Corner bar in Aberdeen to celebrate the

birthday of Julie Keov. RP 162-64. While they were enjoying their evening, one of their group, Kim Chum, became involved in a disagreement with another of the bar's patrons, Clayton Wenger. RP 106, 192, 213. After exchanging words, and perhaps shoves, Mr. Chum left the bar with Mr. Moeurn and the others in their group. Mr. Wegner, too, left the bar along with Steven Vetter and Cody Ross, who had agreed to drive Mr. Wenger home from the bar that night. RP 91, 107.

Mr. Ross described the person who had argued with Mr. Wenger inside the bar as an Asian male wearing a red shirt and red hat. RP 93. Mr. Moeurn is an Asian and was wearing a red shirt and black hat. RP 125-26 Kim Chum is also an Asian male and was wearing a red hat and red shirt RP 205, 218, 233. At least one other Asian male, Dara Phin, was with the group that evening.

The groups encountered one another again in the alley behind the bar and become involved in a fight. RP 91. According to Mr. Ross and Mr. Wenger, the individual with whom Mr. Wenger had argued inside struck Mr. Wenger in the back of the head with a board. RP 90, 95. RP 106-07. Crystal Barnett called police when the fight began, and subsequently identified Mr. Moeurn as the person who struck Mr. Wenger. RP 25. Several individuals who

had been with Mr. Moeurn and Mr. Chum that night testified Mr. Chum was the person who struck Mr. Wenger. RP 169, 197, 217-18.

The State charged Mr. Moeurn with second degree assault with a deadly weapon enhancement. CP 1-2. A jury convicted him as charged. CP 16.

E. ARGUMENT

1. THE COURT OF APPEALS'S MISAPPLICATION OF THE STANDARD OF REVIEW OF A CHALLENGE TO THE SUFFICIENCY OF THE STATE'S EVIDENCE PRESENTS A SUBSTANTIAL CONSTITUTIONAL ISSUES AND IS CONTRARY TO THIS COURT'S DECISIONS.

It is a familiar statement that in a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Additionally, the identity of a criminal defendant and his presence at the scene of a crime must be proven beyond a reasonable doubt. State v. Thomson, 70 Wn.App. 200, 211, 852 P.2d 1104 (1993), review denied, 123 Wn.2d 877 (1994). Evidence is sufficient only if, in the

light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Nothing in this standard allows a reviewing court to selectively rely on that evidence which supports the verdict while ignoring that portion of the State's evidence which establishes a reasonable doubt. Yet that is what the Court of Appeals's opinion does.

Mr. Wenger was unable to describe the person who hit him beyond saying he was wearing a red shirt, and that it was the same individual he had argued with inside the bar. RP 106-07. When shown a picture of Mr. Chum and asked if that was the person who hit him Mr. Wenger responded "I don't know." RP 109.

Mr. Vetter, who testified that although he was close enough to Mr. Wenger to hear the board "go by my ear" nonetheless, was unable to clearly see the face of the person who swung the board. RP 79-80. Mr. Vetter testified the person was wearing dark jeans and a sweatshirt with long red and white stripes. RP 80, 82. When police officers arrived at the scene, Mr. Vetter identified Mr. Moeurn as the person who assaulted Mr. Wenger. At trial, Mr. Vetter

explained “there was a couple of people that looked alike” an apparent reference to the number of Asian males present in the alley. RP 84. Mr. Vetter further explained, with a noticeable lack of conviction, that he identified Mr. Moeurn because

he was pretty well at that time – be about the same – that size and the color of the jeans, and he was – the clothing that he was wearing that matched him – the description that I gave the officer.

RP 84-85.

Mr. Ross testified the assailant wore a red hat and red shirt, RP 93, a description which matched Mr. Chum, not Mr. Moeurn. RP 205, 218, 233. Mr. Ross testified the person with whom Mr. Wenger had argued inside was the person who struck him with the board, again matching the testimony of other witnesses describing Mr. Chum’s activities that night.

In the weeks following the incident, he was shown a photographic montage containing a picture of Mr. Moeurn, Mr. Ross identified someone other than Mr. Moeurn. RP 146. During trial Mr. Ross was shown a photograph of Mr. Chum, Exhibit 11, and identified Mr. Chum as the person who struck Mr. Wegner, apparently oblivious to the fact that Exhibit 11 was not a picture of Mr. Moeurn. RP 96. Despite the fact that he had at least twice

identified someone else as the assailant, Mr. Ross maintained he was 95% certain that Mr. Moeurn was the person who hit Mr. Wenger. RP 93.

Thus, the only descriptive features Mr. Wenger, Mr. Vetter, and Mr. Ross provided were of an Asian male wearing red, with Mr. Ross adding that he wore a red hat as well.

Ms. Barnett testified that after striking Mr. Wenger the person carrying the board walked past her house, and stated he did not return. RP 49. Yet even Mr. Vetter and Mr. Ross testified Mr. Moeurn never left the scene. By contrast, there was evidence that Mr. Chum fled. RP 169. After police arrived, Ms. Barnett identified Mr. Moeurn as he sat in the back of a patrol car with an officer shining a flashlight on him. RP 25. Despite the suggestibility of such an identification procedure, Ms. Barnett allowed she was only 75% certain that Mr. Moeurn was the person who assaulted Mr. Wenger. RP 75

Every witness testified that the person who struck Mr. Wenger was the person with whom he had argued inside the bar. RP 90, 95, 106-07, 164, 169, 192, 197. Thus, the only dispute was who that person was.

In the light most favorable to the State, the State's evidence established an Asian male wearing a red shirt and red hat struck Clayton Wenger. In the light most favorable to the State, Mr. Moeurn was wearing a black hat that evening. In the light most favorable to the State, Mr. Moeurn was the assailant to a 75% degree of certainty to a neutral observer. In the light most favorable to the State, Mr. Moeurn was the assailant to a 95% degree of certainty to a biased observer who also identified someone else both during and before trial. Viewing the evidence in the light most favorable to the State a rational trier of fact could not find beyond a reasonable doubt Mr. Moeurn committed the assault. To conclude otherwise would require a degree of certainty that even the State's witnesses did not express.

Nonetheless, this court's opinion affirms the verdict concluding Mr. Mouern's argument is merely a credibility dispute which cannot be revisited on appeal. The court's opinion conflates credibility with certainty. Assuming, as one must, that the jury resolved all credibility disputes in the State's favor, that does not translate to a higher degree of certainty than the witnesses themselves expressed, the evidence is what it is. Assuming the jury believed every bit of the State's evidence, that does not permit

the jury, nor this court, to fill in the at least a 5% doubt as expressed by the State's best witness. Moreover, it does not permit this court to disregard the fact that that very same witness identified someone other than Mr. Mouern both pretrial and during his trial testimony, yet this court's opinion does not mention that evidence from the State's own witness.

In its best light, the State's evidence does not establish beyond a reasonable doubt that Mr. Moeurn committed the assault in this case.

The opinion of the Court of Appeals applies an overly-deferential standard to its review of the state's witness. The court was required to examine **all** the evidence in the light most favorable to the State, not merely that which supports the verdict. The fact that a reviewing court must assume the jury resolved credibility disputes in the State's favor does not mean the court can fill gaps in the certainty of the State's own witnesses. Only by applying an incorrect standard of review could the Court of Appeals affirm Mr. Mouern's conviction. That misapplication of the law is contrary to this Court's decisions and presents a substantial constitutional issue warranting review under RAP 13.4.

2. THE COURT OF APPEALS'S CONCLUSION
THAT THE PROSECUTOR DID NOT
MISSTATE THE LAW OR SHIFT THE
BURDEN OF PROOF IS A SUBSTANTIAL
CONSTITUTIONAL ISSUE WARRANTING
REVIEW

A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety

violated the defendant's due process rights to a fair trial.

Davenport, 100 Wn.2d at 762.

In closing argument, the deputy prosecutor, discussing Ms. Barnett's testimony, asked the jury "Did the defense attorney give you a reason to doubt?" RP 256-57. The deputy prosecutor told the jury not to become distracted by arguments concerning Ms. Barnett's self-confessed 75% level of certainty in her identification of Mr. Moeurn. The deputy prosecutor told the jury

An abiding belief is one you're going to take out of here. After all the testimony, after all the deliberations, most importantly, in the end you simply still just believe that he's guilty. That's an abiding belief.

RP 257-58. The deputy prosecutor continued:

You're probably wondering how you're going to work this out. This is a situation where you're given two stories and they're mutually exclusive. Both of them can't be true. The defendant or was it Kim? One of these guys hit him. Right now you know what's going on. You have your belief, but you probably have your doubt. And then you are asking yourself, Well does my doubt reach reasonable doubt. As I said before, you don't even have to worry about your doubt. Think of your duty. What do you believe? Don't ask yourself, am I reasonable? Just say, what do I believe? But also don't worry about this reasonable person thing, this little fiction that lawyers talk about. You are reasonable people. . . . The only thing that matter is what you believe. Just look into your heart and you know what you believe.

RP 262-63.

Whatever an abiding belief is, the concept of reasonable doubt requires it be more than simply a gut feeling as to guilt in the face of doubt. Proof beyond a reasonable doubt is not merely a “little fiction that lawyers talk about,” it is a constitutional mandate. “The presumption of innocence is the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The deputy prosecutor’s argument urged the jury to ignore this bedrock requirement.

The State’s argument urged the jury to eliminate the notion of doubt altogether from their deliberations; “you don’t even have to worry about your doubt.” The argument encouraged jurors to vote for conviction in the face of doubt, so long as they believed; “the only thing that matters is what you believe.” As if that was not bad enough, the deputy prosecutor told the jury its their duty to do so

Importantly the Court of Appeals does not rest its opinion upon the fact that the misstatements were not objected to. Instead, the Court of Appeals conclude that he deputy prosecutor did not misstate the law at all. Opinion at 10. That conclusion cannot be squared with Fifth Amendment’s plain requirement that the State alone bears the burden of proof.

Even assuming the court rested its decision on a conclusion that the statements were not flagrant and ill-intentioned, and thus do not warrant review absent objection, State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), that conclusion would be equally incorrect.

The deputy prosecutor's comments directly contrary to well-established Washington law. The deputy prosecutor's comments were not made in response to statements or provocations by defense counsel. Instead, they were made in the context of the deputy prosecutor's efforts to eliminate the substantial doubts created by the State's own evidence. The question of the identity was the critical question before the jury, and there was ample and quite reasonable doubt in the State's proof. Mr. Ross expressed 95% certainty in his identification of Mr. Moeurn, yet he had identified someone else in pretrial montage, and identified Mr. Chum as the assailant at trial. RP 93, 96. The fact that he identified Mr. Chum, pictured in Exhibit 11, as the assailant, under the belief that it was Mr. Moeurn, simply gave rise to more doubt. The deputy prosecutor's comments were an effort to coax the jury to a degree of certainty that Ms. Barnett was unable to express and none of the State's other witnesses maintained.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v Fleming, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). The deputy prosecutor's comments were intended to circumvent the substantial doubts standing in the way of a conviction.

The resulting prejudice of the State's misconduct was intended and did have a substantial impact on Mr. Moeurn's Fourteenth Amendment right to a fair trial. The only meaningful remedy for these violations is a new trial. Pursuant to RAP 13.4 this Court should accept review.

3. AS THE STATE CONCEDED BELOW, THE OPINION OF THE COURT OF APPEALS IS CONTRARY TO THE TO RCW 9.94A.525(2) AND SIGNIFICANT QUESTION OF PUBLIC IMPORT

Due process requires the State prove an individual's criminal history and offender score by a preponderance of the evidence.

State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999).

Where the State fails to offer sufficient evidence such that the record fails to support the criminal history and offender score

calculation, the defendant is denied the minimum protections of due process. Id. at 481.

RCW 9.94A.525 provides in relevant part:

(2). . . . Class B 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 ten consecutive years in the community without committing any crime that subsequently results in a conviction. 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. . . . This subsection applies to both adult and juvenile prior convictions.

. . . .
(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses

Despite the plain language of RCW 9.94A.525(2), the court's opinion concludes that even though Mr. Moeurn's 1995 conviction of attempted second degree assault is a Class C felony, the 5-year washout rule does not apply. Instead, the Court of Appeals concludes that because a completed second degree assault would

be a Class B felony, Mr. Moeurn's Class C felony is subject to a 10-year washout rule.

Mr. Moeurn argues, and the State agrees, these provisions operate sequentially in the order they are listed in the statute. Mr. Moeurn's 1995 attempted assault is a Class C felony.

The plain language of RCW 9.94A.525(2) required the court to exclude any Class C felony unless the State proved MR. Moeurn had not been crime free for more than 5 years. Nothing in RCW 9.94A.525(2) makes its provisions subject to the provisions of RCW 9.94.525(4). Moreover, nothing in RCW 9.94A.525(4) suggests the legislature intended its provisions to require courts to apply different wash-out rules, as opposed to scoring rules, for anticipatory offenses.

Instead if one reads RCW 9.94A.525 as a whole it is clear that the its provisions were intended to be applied sequentially in the order they appear. The statute begins with a description of "offender score." The first three subsections describe generally the universe of relevant prior convictions and other current conviction which can be included in an a offender score. RCW 9.94A.525(1) defines prior conviction and describes how other current offense are to be treated. RCW 9.94A.525(2) defines which prior offense

may be included. RCW 9.94A.525(3) describes which foreign convictions may be included, and also includes language regarding the how foreign convictions are a scored. From that point. The remaining subsections, beginning with RCW 9.94A.525(4), provide specific rules regarding the actual calculation of the offender score based upon the prior and current offenses which remain after application of the first three subsections.

Thus applied properly, the wash-out provisions of RCW 9.94A.525(2) are a threshold to application of the subsequent provisions of RCW 9.94A.525. Because Mr. Moeurn's prior Class C felony washed out, i.e., could not be included in his offender score, there is no offense to "score" pursuant to RCW 9.94A.525(4).

The Court of Appeals's opinion is contrary to the provisions of RCW 9.94A.525(2). This Court should accept review pursuant to RAP 13.4.

F. CONCLUSION

For the reasons above, this Court should accept review pursuant to RAP 13.4.

Respectfully submitted this 6th day of April, 2009.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II RECEIVED

MAR -9 2009

STATE OF WASHINGTON,
Respondent,
v.
LAURA BAKER MOEURN,
Appellant.

Washington Appellate Project

No. 36299-6-II

ORDER DENYING MOTION TO
RECONSIDER

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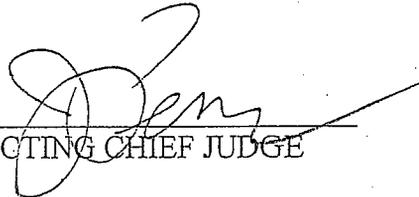
APPELLANT moves for reconsideration of the Court's decision terminating review, filed February 3, 2009. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Hunt, Quinn-Brintnall, Van Deren

DATED this 6th day of March, 2009.

FOR THE COURT:


ACTING CHIEF JUDGE

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RECEIVED

STATE OF WASHINGTON,

No. 36299-6-II

FEB -4 2009

Respondent,

Washington Appellate Project

v.

LAURA BAKER MOEURN,

UNPUBLISHED OPINION

Appellant.

HUNT, J. — Laura¹ Moeurn appeals his conviction and sentence for second degree assault with a deadly weapon enhancement. He argues that (1) the evidence was insufficient to prove he was the person who hit the victim; (2) prosecutorial misconduct in closing arguments deprived him of his right to a fair trial; and (3) the trial court miscalculated his offender score. We affirm.

FACTS

I. ASSAULT

On January 12, 2007, Laura Moeurn went to the Captain's Corner bar with several friends. Inside the bar, members of Moeurn's group and another patron, Clayton Wenger,

¹ Laura Moeurn is a male.

engaged in a confrontation when Moeurn began acting "like he wanted to fight."² Moeurn and his friends left the bar but did not immediately leave the area.

Shortly thereafter, Wenger and his friends exited the bar and began to fight with Moeurn's group outside in the alley. The fight broke up temporarily, but then resumed. At some point, Moeurn hit Wenger in the back of the head with a two-by-four piece of lumber. Crystal Barnett, who lives near Captain's Corner, observed the fight from her window and called the police.³

When the police arrived, one of Wenger's friends, Steven Vetter, approached a police officer and identified Moeurn as the person who had hit Wenger with the two-by-four. The officer placed Moeurn in the back of his car. Barnett came outside and made a statement to police in which she described the assailant as an Asian or Native American male "wearing a gray shirt with a red shirt over it and wearing a baseball hat." 1 Report of Proceedings (RP) at 9. After taking Barnett's statement, the officer took her over to the police car in which Moeurn was sitting; when the officer shined his flashlight on Moeurn, Barnett identified Moeurn as the person who had struck Wenger with the board. The officer then took Moeurn out of the police car and advised him that he was under arrest for assault.

² Cody Ross and Clayton Wenger both testified that a person wearing a red shirt started the confrontation in the bar and that this was the same person who had hit Wenger with the two-by-four.

³ The State played the 911 tape for the jury, but it is not part of the record on appeal.

When Moeurn was booked, jail personnel placed the clothing he was wearing in a locker. Police subsequently seized the clothing to use as evidence, including a grey sweatshirt, a red T-shirt, and a black hat.⁴

II. PROCEDURE

The State charged Moeurn with second degree assault, while armed with a deadly weapon.

A. State's Case in Chief

At trial, several witnesses testified, with varying degrees of certainty, that Moeurn was Wenger's assailant. Barnett testified that she was "75 percent" certain she had identified the correct person. She explained that she was somewhat uncertain because "[i]n the time that [she] did not see that person they could have changed clothes, there could have been somebody else that looked exactly like him. It was dark. There's always a possibility when they leave your sight." 1 RP at 51-52. Barnett further testified that she did not see anyone else wearing "a red T-shirt on top of a gray hoody,"⁵ other than the person she saw hit Wenger with the board. 1 RP at 47.

Vetter testified that (1) he was talking with Wenger when Wenger was hit by the two-by-four piece of lumber; (2) he (Vetter) saw the assailant well enough to get a look at the assailant's clothing, which was red; (3) he saw Wenger's assailant getting into a car as police officers were arriving; and (4) the police subsequently placed that same person, Wenger's assailant, in the patrol car.

⁴ The trial court admitted these articles into evidence.

⁵ Barnett explained that a "hoody" is a hooded sweatshirt.

Cody Ross, another friend of Wenger, testified that he recognized Moeurn as the person who had attacked Wenger with the two-by-four. When asked if he “positively recognize[d] Moeurn’s] face,” Ross replied, “Not a hundred. Probably maybe 95 percent.” 1 RP at 93. Ross also testified that (1) he had seen Moeurn sitting in the back of the patrol car the night of the incident; (2) he was certain the person in the patrol car was Wenger’s assailant; and (3) there was no one else in the bar or in the alley who had worn a red shirt other than the person who struck Wenger with the board.

B. Defense Case

Moeurn and several of his friends testified for the defense. Moeurn testified that Kim Chum, another Asian male with them that night, had been wearing a red shirt and had blood on his hand. Mary Meas, Moeurn’s girlfriend and the mother of his children, also testified that Chum had been wearing red; she had concluded that Chum had hit Wenger because Chum had been standing next to Wenger when Wenger was hit and Chum had blood on his hand after that. Three other witnesses, all friends of Moeurn, testified to essentially the same story.

C. Verdict and Sentencing

The jury found Moeurn guilty of second degree assault, while armed with a deadly weapon. Before sentencing, the prosecutor prepared a document titled “Statement of Prosecuting Attorney.” In that statement, the prosecutor asserted that Moeurn had been previously adjudicated to have committed second degree attempt to commit assault, as a juvenile in 1994, and of driving without a valid operator’s license, in February 1997. At the sentencing hearing, the State referred to this “Statement of Prosecuting Attorney” and requested that the court “ask the defendant at this time if he agrees to this criminal history or he would like better proof of it.”

2 RP at 297. Moeurn's attorney replied, "I have spoken with Mr. Moeurn, and he does admit that it is true that he has the violation—the conviction stated by the State, and I myself have seen a certified copy of that, so I know it to be so." 2 RP at 297.

Based on Moeurn's prior juvenile attempted second degree assault adjudication, the trial court calculated an offender score of two, which yielded a standard range sentence of 12 months and 1 day to 14 months. The court sentenced Moeurn to 24 months confinement, including the 12-month deadly weapon enhancement.

Moeurn appeals his conviction and sentence.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Moeurn first argues that the evidence was insufficient to support the jury's finding beyond a reasonable doubt that he was the person who assaulted Wenger.⁶ Moeurn theorizes that another Asian male, who had been wearing clothing similar to Moeurn's, had committed the crime but had fled before the police arrived. Moeurn also contends that because the "neutral observer," Crystal Barnett, had stated on the witness stand that she was only 75 percent sure that Moeurn was the assailant, the jury could not find him guilty beyond a reasonable doubt.

Moeurn's argument fails.

⁶ Moeurn does not argue that the evidence is insufficient to support any other elements of the crime of second degree assault with a deadly weapon. Rather, he asserts only that someone else committed the crime.

A. Standard of Review

The test for determining the sufficiency of the evidence is whether a rational person, after viewing the evidence in the light most favorable to the State, could have found each element of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008) (citing *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980)).

We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

B. Evidence Supporting Conviction

Crystal Barnett, Steven Vetter, and Cody Ross all testified that Moeurn was the person who hit Wenger in the back of the head with a two-by-four. Barnett and Ross both testified that no one else in the alley had been wearing clothing similar to the red shirt and grey sweatshirt that Moeurn was wearing.

Viewing the evidence in the light most favorable to the State and drawing all inferences in favor of the State, as we must, we hold that there is sufficient evidence to support the jury's

finding beyond a reasonable doubt that it was Moeurn who assaulted Wenger with the two-by-four.⁷

II. NO PROSECUTORIAL MISCONDUCT

Moeurn next argues that he is entitled to reversal of his conviction and a new trial because (1) in closing argument, the prosecutor misstated the law about the standard of proof, beyond a reasonable doubt; (2) these comments improperly shifted the burden of proof to him (Moeurn); and (3) although he did not object to the prosecutor's statements at trial, the comments were flagrant and ill-intentioned. We disagree.

A. Standard of Review

Generally, a defendant must object to an alleged error at trial when it can be corrected; otherwise, he fails to preserve the error for appeal. *State v. Classen*, 143 Wn. App. 45, 64, 176 P.3d 582 (citing *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975)), *review denied*, 164 Wn.2d 1016 (2008). "In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (internal quotation marks omitted) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004)). Where the defendant does not object at trial, he must prove that the prosecutor's comments were so flagrant and ill-intentioned that a curative instruction would have been ineffective to cure the resulting prejudice. *State v. Barajas*,

⁷ Because we defer to the jury on credibility determinations, the contrary testimonies of Moeurn and his friends—that Chum was also wearing red and had blood on him—do not alter this result. *Thomas*, 150 Wn.2d at 874-75. Nor does the fact that Barnett was only 75 percent sure of her identification of Moeurn require the jury to find reasonable doubt, especially in light of the other strong evidence identifying Moeurn as the assailant.

143 Wn. App. 24, 38, 177 P.3d 106 (2007), *review denied*, 164 Wn.2d 1022 (2008); *Classen*, 143 Wn. App. at 64.

In *Barajas*, the prosecutor misstated the State's burden of proof for premeditation, saying that "the State merely had to prove that Mr. Barajas acted with the level of deliberation of a hungry dog trying to protect its food." *Barajas*, 143 Wn. App. at 38. In *Classen*, the prosecutor allegedly misstated the law by saying during closing arguments that "manslaughter is an accident." *Classen*, 143 Wn. App. at 63. In *Barajas*, Division Three of our court held, and in *Classen*, we held that a prosecutor's misstatement of the law in closing argument does not warrant remand for a new trial where (1) the defendant failed to object, and (2) the trial court properly instructed the jury. *Barajas*, 143 Wn. App. at 38; *Classen*, 143 Wn. App. at 64-65. In holding that a new trial was not warranted in *Classen*, we noted that jurors are presumed to follow the court's instructions. *Classen*, 143 Wn. App. at 64 n.13 (citing *State v. Daniels*, 160 Wn.2d 256, 264, 156 P.3d 905 (2007)). Such is the case here.

B. Prosecutor's Comments Not Flagrant and Ill-Intentioned

Moeurn points to three separate statements during the prosecutor's closing argument that he believes constitute misconduct. None of these statements, however, meet the *Barajas* and *Classen* standard for a new trial: The prosecutor's statements were not so flagrant and ill-intentioned that a curative instruction would have been ineffective to cure the resulting prejudice.

The statements to which Moeurn objects for the first time on appeal are bolded in the following excerpts:

The first thing you've got to know is that everybody in this witness chair today deserves to be believed until they give themselves a reason to not be believed. If that—now, did that woman give you any reason yesterday to not be believed? In her cross-examination, they're telling—or her telling of the story,

did it ever seem to you that she was trying to modify her testimony to fit a story? Did it ever seem to you she wasn't genuinely trying to remember what was happening? **Did the defense attorney give you a reason to doubt?** There's some talk she might not be able to see it, about how would she be able to see anything? If she couldn't see, then she would just [be] making this up. Does that make any sense? But she did say, I saw the person who hit him, and he is the person in the gray hoody and the red shirt and the dark pants, and then for 15 seconds she lost sight of him. She went down and then she identified him.

2 RP at 256-57.

Now, she said 75 percent, and defense counsel might make—try to make some hay about this 75 percent. Remember, this isn't a math problem. We're talking about beyond a reasonable doubt. He'll talk about a civil standard, which is 51 percent, still a preponderance of the evidence. But beyond a reasonable doubt is a different standard. Now, in the jury instruction it states it different. This is in the last paragraph of the second instruction. It says that if you have been proven to have an abiding belief, you have been proven—this story has been proven beyond a reasonable doubt. So you don't need to worry about that. It's not a math problem. He's going to be saying 50 percent isn't good enough. Don't worry about 50 percent. What do you believe? Is it an abiding belief? **An abiding belief is one you're going to take out of here. After all the testimony, after all the deliberations, most importantly, in the end you simply still just believe that he's guilty, that's an abiding belief.**

2 RP at 257-58.

You're probably wondering how you're going to work this out. This is a situation where you're given two stories and they're mutually exclusive. Both of them can't be true. The defendant or was it Kim? One of these guys hit him. Right now you know what's going on. You have your belief, but you probably have your doubt. And then you're asking yourself, Well, does my doubt reach reasonable doubt? As I said before, you don't even have to worry about your doubt. Think about your duty. What do I believe? Don't ask yourself, am I reasonable? Just say, what do I believe? And you know, when you walk out of here, you have to know you did the right thing. When somebody asks you, So, what happened in there? Well, I voted guilty. I did the right thing. That's an abiding belief. But also don't worry about this reasonable person thing, this little fiction that lawyers talk about. You are reasonable people. That's why you were picked for jury duty. The only thing that matters is what you believe. Just look into your heart and you know what to believe.

2 RP at 262-63.

Moeurn argues that the prosecutor's closing comments warrant reversal because they were similar to those in *State v. Flemming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997), in which Division One of our court ordered a new trial. In *Flemming*, the prosecutor argued, "[F]or you to find the defendants . . . not guilty, . . . you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom." 83 Wn. App. at 213 (emphasis omitted). Division One cited *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991), for the principle that "it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *Flemming*, 83 Wn. App. at 213. The court held that the prosecutor's statement was "a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial" because the prosecutor made the statements two years after *Casteneda-Perez* had held such statements impermissible. *Flemming*, 83 Wn. App. at 214.

The prosecutor in *Flemming* also made statements that Division One held improperly shifted the burden of proof to the defendants. *Flemming*, 83 Wn. App. at 214. Among other statements, the prosecutor stated, "[I]t's true that the burden is on the State. *But you . . . would expect and hope that if the defendants are suggesting there is reasonable doubt, they would explain some fundamental evidence in this [matter].*" *Flemming*, 83 Wn. App. at 214 (alterations and emphasis in original).

The prosecutor's comments here, however, did not similarly shift the burden of proof; nor were they so "flagrant and ill-intentioned" that they could not have been cured by an instruction if Moeurn had timely objected and so requested. On the contrary, the prosecutor's

comments here more closely resemble those in *Barajas* and *Classen*, which did not warrant reversal and remand for a new trial.

C. Conclusion

Moeurn did not object to the prosecutor's closing arguments comments at trial; thus, he did not preserve the prosecutorial misconduct issue for appeal. And he does not meet the exception for reviewing this non-preserved alleged error because (1) the comments were not flagrant or ill-intentioned when taken in context of the entire trial; and (2) he fails to show that any claimed prejudice could not have been cured by an appropriate contemporaneous instruction, which he did not request.⁸

Accordingly, we hold that the prosecutor's remarks do not entitle Moeurn to a new trial.

III. OFFENDER SCORE

Last, Moeurn argues that (1) the trial court improperly calculated his offender score because it included a juvenile offense that had "washed out";⁹ and (2) the State failed to prove he had been convicted of any offense within the five years preceding his commission of the instant

⁸ Moeurn also argues that the prosecutor's closing remarks were improper because the Supreme Court disapproved of a jury instruction using the same "abiding belief language" in *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007). Contrary to Moeurn's argument, in *Bennett* the Supreme Court approved, not disapproved, similar "abiding belief" language; and (2) specifically instructed trial courts to use the "abiding belief" instruction, which contains language similar to that used by the prosecutor in this case during his closing remarks. *Bennett*, 161 Wn.2d at 318.

⁹ A defendant's offender score does not include a prior conviction if the defendant has subsequently spent more than five consecutive years (for a Class C felony) or 10 consecutive years (for a Class B felony) in the community without committing a crime that results in a conviction. RCW 9.94A.525(2).

crime. Rejecting the State's erroneous concession of error, we disagree with both Moeurn and the State.

A. Standard of Review

We review the sentencing court's calculation of the offender score de novo. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005), *review denied*, 158 Wn.2d 1008 (2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1882, 167 L. Ed. 2d 370 (2007). A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A defendant cannot waive a challenge to a miscalculated offender score where the alleged error is a legal error leading to an excessive sentence. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d.618 (2002). But "waiver can be found where the alleged error involves an agreement to facts, later disputed[.]" *Goodwin*, 146 Wn.2d at 874.

B. Offender Score Calculation

The sentencing court calculates a defendant's offender score according to RCW 9.94A.525. Under former RCW 9.94A.525(2) (2007),¹⁰ prior Class B felony convictions are not included in the offender score if the defendant has spent ten consecutive years in the community without committing a crime that subsequently results in a conviction. Generally, a prior Class C felony is not included if the offender has spent five consecutive years in the community without committing a crime that results in a conviction. Former RCW 9.94A.525(2)(2007).¹¹ *But see*

¹⁰ Currently codified as RCW 9.94A.525(2)(b).

¹¹ Currently codified as RCW 9.94A.525(2)(c).

RCW 9.94A.525(4), *infra*. These rules also apply to prior juvenile criminal adjudications. Former RCW 9.94A.525(2)(2007).¹²

Moeurn argues that (1) because his previous juvenile for attempted second degree assault adjudication was a Class C felony, he was required to spend only five years in the community, without committing another crime resulting in a conviction, in order for his juvenile crime to be excluded from calculation of his offender score for the instant offense; and (2) his 1994 attempted assault adjudication “washed out” because, after his February 1997 conviction for driving without a license, he was crime free until he committed the current offense in January 2007, more than five years later. Without supporting explanation, the State concedes that use of Moeurn’s prior juvenile adjudication was error. We disagree.

Moeurn is correct that under RCW 9A.28.020, attempt to commit a Class B felony is a Class C felony. But RCW 9.94A.525(4) requires “[s]cor[ing] prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) *the same as if they were convictions for completed offenses.*” (Emphasis added.) Thus, contrary to Moeurn’s assertions, because second degree assault is a Class B felony (RCW 9A.36.021), RCW 9.94A.525(4) requires that Moeurn’s prior attempted second degree assault adjudication count as a Class B felony for offender score purposes.

As we note above, former RCW 9.94A.525(2) establishes a ten-year wash-out period for Class B felonies, thus requiring Moeurn to have spent ten consecutive years in the community without another conviction before his prior attempted second degree assault adjudication could wash out and be excluded from his current offender score calculation. Because Moeurn

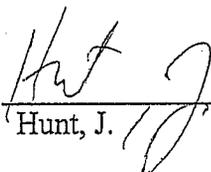
¹² Currently codified as RCW 9.94A.525(2)(f).

committed a new crime in February 1997, nine years and eleven months before committing the instant crime in January of 2007, his 1994 juvenile attempted assault adjudication did not “wash out.” Therefore, we reject the State’s concession of error on this point.

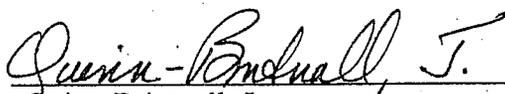
We hold that the trial court properly included Moeurn’s 1994 juvenile adjudication when it calculated Moeurn’s offender score and sentenced him for the instant 2007 second degree assault conviction.

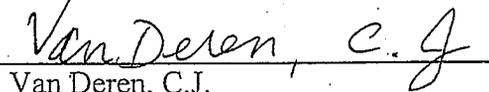
Affirmed.

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.


Hunt, J.

We concur:


Quinn-Brintnall, J.


Van Deren, C.J.

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DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 36299-6-II** (for transmittal to the Court of Appeals – Division Two) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent: Kraig Christian Newman - Grays Harbor County Prosecuting Attorney**, **appellant** and/or **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 6, 2009

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