

**FILED**  
MAY 7 2010  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

84554-9

SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 38705-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES L. GRIFFIN,

Petitioner.

FILED  
COURT OF APPEALS  
DIVISION II  
10 MAY 13 AM 11:16  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David L. Edwards

FILED  
COURT OF APPEALS DIV. II  
STATE OF WASHINGTON  
2010 MAY 10 PM 4:04

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner James Griffin asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Griffin, COA No. 38705-1-II, filed December 30, 2009, and the order amending the opinion and denying the motion for reconsideration, filed April 10, 2010. The decision and order are attached as Appendices A and B.

C. ISSUE PRESENTED FOR REVIEW

1. Whether, under Apprendi v. New Jersey,<sup>1</sup> the state must prove to a jury beyond a reasonable doubt the aggravating factor that the individual committed the offense shortly after being released from confinement?

2. Whether the aggravator must be based on facts established beyond a reasonable doubt *in accordance with the rules of evidence*?

3. Whether the rules of evidence still apply when the right to a jury is waived?

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<sup>1</sup> Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

D. STATEMENT OF THE CASE

The court enhanced Griffin's sentence ten months beyond the standard range, based on its finding that Griffin committed the current offense shortly after release from incarceration. CP 12-22; RP 74, 84. At Griffin's bench trial,<sup>2</sup> the state called sergeant Travis Davis who works in the corrections division of the Grays Harbor County Sheriff's Office. RP 62. Davis testified that "as part of his duties" he checks records and "that sort of thing." RP 62. He explained there is a "Spillman" database that gives each inmate a "name number" and that someone had signed out Griffin's "name number" on August 19, 2008.<sup>3</sup> RP 63. Davis did not specify how entries are made in the database, whether entries are made "in the normal course of business," or whether entries are made at or near the time of the act, condition or event – as required for a business record. See RCW 5.45.020.

On appeal, Griffin argued the evidence was insufficient to support the sentencing enhancement because it was based solely on inadmissible hearsay, to which he had objected there was an inadequate foundation. Brief of Appellant (BOA) at 7-19.

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<sup>2</sup> Griffin waived his right to a jury trial. CP 8.

<sup>3</sup> Griffin was charged with committing residential burglary on October 2, 2008. CP 1-2.

Division Two of the Court of Appeals agreed the evidence supporting the aggravator “was hearsay and did not fall under the business records exception, . . . because the State failed to lay a proper foundation.” Appendix A at 4. The court nevertheless affirmed the enhancement, reasoning: “the rules of evidence do not prohibit the trial court’s admittance of hearsay for purposes of sentencing.” Appendix A at 4 citing ER 1101.<sup>4</sup>

In a motion for reconsideration, Griffin argued, under Apprendi v. New Jersey and Blakely v. Washington,<sup>5</sup> that due process required the trial court to find the aggravating factor based on facts established beyond a reasonable doubt *in accord with the rules of evidence*. Motion for Reconsideration (MR) at 2-8.

The court disagreed, characterizing the aggravator as “a finding of rapid recidivism,” to which Blakely did not apply:

Here, a determination of rapid recidivism does not involve fact finding related to Griffin’s current offense. It involves only findings of his prior conviction and the “intimately related” fact of his release from incarceration for that conviction. The trial court could make this determination from the judicial record flowing from his prior conviction. Thus, the rapid recidivism determination does not implicate Blakely.

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<sup>4</sup> Under ER 1101(c)(3), the rules of evidence “need not be applied” at sentencing.

<sup>5</sup> Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Appendix B at 4.

By finding Blakely inapplicable, the court avoided the need to decide whether application of relaxed evidentiary safeguards to prove a sentencing enhancement violates the Sixth or Fourteenth Amendments or state constitutional provisions, Const. art. 1, §§ 3, 21:

Because a rapid recidivism determination does not implicate Blakely, we may consider whether ER 1101 allowed the trial court to consider hearsay in making its sentencing decision determination.

Appendix B at 5, n.2.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

BECAUSE THIS CASE INVOLVES SIGNIFICANT QUESTIONS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS, THIS COURT SHOULD ACCEPT REVIEW.

This Court has held that Blakely does not apply to determinations of whether an offender was on community custody at the time of the offense. State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006). The Court of Appeals relied on Jones to find that Blakely neither applies to determinations of whether an offender was recently released from incarceration at the time of the offense. Appendix A at 3-4. Although the decision was unpublished, trial

courts will undoubtedly find it persuasive and rely on it in future cases. But whether the recently-released aggravator falls within the prior conviction exception to Blakely should not be resolved by an unpublished court of appeals decision. This Court should weigh in on this important constitutional question and issue of substantial public interest, as the lower court's decision further broadens the prior conviction exception.

Should this Court decide that the recently-released aggravator must be proven in accord with the constitutional guarantees afforded under Blakely, this case squarely presents the issue regarding the manner of proof required. Whether application of relaxed evidentiary standards to prove a sentencing enhancement violates due process under our state constitution is an issue of first impression in Washington and an important constitutional question that should be resolved by this Court. RAP 13.4(b)(3), (4).

As noted above, this Court held that constitutional considerations do not require probation status to be determined by a jury. In Jones, the sentencing court was therefore allowed to add one point to Jones' offender score for being on community placement at the time of the offense. Jones, 159 Wn.2d at 247.

At first blush, Jones might seem applicable here. Just as the court in Jones could determine a probationer's status as being on community custody, the court here could determine Griffin's release date. But upon closer inspection, the court here was not just determining a release date. Rather, the court was determining whether Griffin committed the current offense "*shortly after* being released from confinement." RCW 9.94A.535(3)(t) (emphasis added). Accordingly, the sentencing court was determining more than just Griffin's date of release from incarceration. The court was also determining whether that date qualified as *recent* in relation to the current offense. That determination is a judgment call.

Significantly, the Legislature envisioned that this type of factual finding is entitled to Blakely safeguards:

(3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

...

(t) The defendant committed the current offense shortly after being released from incarceration.

RCW 9.94A.535 (emphasis added).

RCW 9.94A.537 provides:

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

Emphasis added.

Griffin waived his right to a jury trial. However, he did not waive his right to proof beyond a reasonable doubt. According, assuming the court of appeals incorrectly concluded this sentencing enhancement does not implicate Blakely, this case squarely presents the question of whether proof beyond a reasonable doubt necessarily means constitutional evidentiary safeguards will apply. Several courts have so held. See e.g. United States v. Buckland, 289 F.3d 558, 568 (9<sup>th</sup> Cir. 2002) (drug quantity and type “must be charged in the indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt”); United States v. Croxford, 324 F. Supp. 2d 1230, 1241 (D. Utah, 2004) “Presumably, if sentence enhancing facts must now be charged and proven to a jury beyond a reasonable doubt, constitutional evidentiary safeguards will apply”); United States v. O’Daniel, 328

F. Supp. 2d 1168 (N.D. Okla, 2004) (“Simply stated, there can be no dilution of one’s rights under the Sixth Amendment when one fact finder is selected over another”); but cf. United States v. Fulks, 454 F.3d 410 (4<sup>th</sup> Cir. 2006) (relaxed evidentiary standards at capital sentencing proceedings do not violate due process).

Support for application of evidentiary safeguards can be found in this Court’s decision in State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984). Long before Apprendi and Blakely, this Court considered whether the rules of evidence applied in capital sentencing proceedings. In Bartholomew, this Court struck down as unconstitutional a statute that allowed jurors to consider “any relevant evidence in capital sentencing proceedings, *regardless of its admissibility under the rules of evidence*[.]” Bartholomew, 101 Wn.2d at 638-39 (emphasis in original). Noting federal jurisprudence was foggy on whether evidence of non-statutory aggravating factors was subject to the same liberal reception as evidence of mitigating factors, this Court resolved it could not wait for clarity and the state would be subject to a higher burden regarding aggravating facts:

Nevertheless, faced with a death penalty statute, provisions of which we find offensive under the Eighth Amendment, Fourteenth Amendment, and our state

constitution, we cannot wait for the Supreme Court to clarify this concept. It is our opinion that this “prejudice” concept<sup>6]</sup> subjects the prosecution to a more stringent standard than that of the defendant at the sentencing phase of a capital case. As we noted in our prior decision:

Conceivably, any aggravating information could be said to prejudice a defendant, but presumably the Court intended to restrict the concept to undue or unreasonable prejudice. At the very least, the Court’s recognition that a defendant may be prejudiced by the reception of information at his sentencing suggests that different criteria apply to aggravating factors than apply to mitigating factors.

[State v. Bartholomew], 98 Wn.2d [173, 195,] 654 P.2d 1170 [(1982)].

Bartholomew, 101 Wn.2d at 637-38.

This Court first noted that striking down the statute allowing consideration of all relevant evidence, regardless of admissibility, was consistent with federal decisions acknowledging the “prejudice” concept. Alternatively, however, it held that the Washington

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<sup>6</sup> In Gregg v. Georgia, the Supreme Court articulated the “prejudice concept” as:

We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

428 U.S. 153, 203-04, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (emphasis added).

Constitution provided broader due process protection than its federal counterpart. Bartholomew, 101 Wn.2d at 639. To that end, aggravating factors in Washington's capital sentencing proceedings must be proven subject to evidentiary safeguards. Bartholomew, 101 Wn.2d at 640-642.

The Court of Appeals decision condones the use of inadmissible hearsay as the sole support for an increased sentence. Had Griffin not waived his right to a jury trial, evidentiary safeguards would have protected him from such a fate. There should be no dilution of an individual's rights under the Sixth Amendment by choosing to be tried to the court as opposed to a jury. Because this case involves important constitutional questions that have far reaching consequences, this Court should accept review. RAP 13.4(b)(3), (4).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(3), (4).

Dated this 10<sup>th</sup> day of May, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

## **APPENDIX A**



[DAVIS]: Yes, I did.

[STATE]: Okay . . . and based on those records, what is his name number?

[DAVIS]: 41408.

[STATE]: What is a name number?

[DAVIS]: Its [sic] a unique number assigned by our inmate database, that [ ] Spillman is the inmate database that we use. Each individual that has that name record is given that name record that's unique to that one individual.

[STATE]: Are you familiar with the defendant sitting here?

[DAVIS]: Yes, I am.

[STATE]: Is that the same James Lamar Griffin that has the name number, 41408?

[DAVIS]: Yes, it is.

[STATE]: Has Mr. Griffin been in the jail previously?

[DAVIS]: Yes, he has.

[STATE]: On what date was he released the last time?

....  
[DAVIS]: His last release date was August 19th, 2008 at approximately 21 hundred hours.

Report of Proceedings (RP) at 62-63.

Griffin then objected to Davis's testimony, asking whether Davis testified as to his memory or some other source of information. The trial court overruled the objection, stating that Griffin could cross-examine Davis regarding the substance of his knowledge. Davis then testified that, according to the Spillman database, Griffin's last release date from jail was August 19, 2008. Griffin objected again, arguing that the record lacked authentication or certification. The trial court asked the State if it would like to lay a foundation, and the State proceeded as follows:

[STATE]: Did you look up previous commitments for name number 41408 in your system?

[DAVIS]: Yes, I did.

[STATE]: Were you able to locate a previous commitment for that name number?

[DAVIS]: Yes. And it was booking number 162490.

[STATE]: And when was the release date on that booking number?

[DAVIS]: August 19th, 2008.

No. 38705-1-II

RP at 64.

Griffin did not cross-examine Davis but reiterated his objection to the testimony, based on lack of personal knowledge and foundation. The trial court overruled the objection.

In its written findings of fact and conclusions of law finding Griffin guilty of residential burglary, the trial court determined that the Grays Harbor County Jail had released him on August 19, 2008. Because he committed the residential burglary on October 2, the trial court concluded that when he committed the crime, he “had recently been released from incarceration.” Clerk’s Papers at 14. The trial court further concluded that commission of a residential burglary recently after release from incarceration was an aggravating circumstance justifying a sentence above the standard range. Griffin’s standard sentencing range was 15 to 20 months of confinement. The court imposed an exceptional sentence of 30 months. He appeals his sentence.

#### ANALYSIS

Griffin contends that the trial court erred in admitting Davis’s testimony about his date of release from the Grays Harbor County Jail. Griffin asserts that it was inadmissible hearsay and, without that testimony, the evidence insufficiently supports the exceptional sentence.

We review the trial court’s findings of fact made in support of an exceptional sentence under the clearly erroneous standard. *State v. Branch*, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996). Under that standard, we will reverse only if substantial evidence does not support the findings. *Branch*, 129 Wn.2d at 646.

Whether to admit or refuse evidence is within the trial court’s discretion, and we will not reverse its decision absent a manifest abuse of discretion. *State v. Iverson*, 126 Wn. App. 329,

336, 108 P.3d 799 (2005). A trial court abuses its discretion when bases its decision on unreasonable or untenable grounds. *State v. Aguirre*, 73 Wn. App. 682, 686, 871 P.2d 616 (1994).

Hearsay is a statement made by someone other than the declarant, offered to prove the truth of the matter asserted. ER 801(c). Absent an exception, hearsay is not admissible. ER 802. In sentencing proceedings, however, ER 1101 dictates that the rules of hearsay do not apply.

The record here reflects that Davis's testimony was hearsay and did not fall under the business records exception, as the State argues, because the State failed to lay a proper foundation. *State v. Walker*, 16 Wn. App. 637, 640, 557 P.2d 1330 (1976). Regardless, the rules of evidence do not prohibit the trial court's admittance of hearsay for sentencing purposes. ER 1101. Here, the trial court relied on Davis's hearsay testimony solely for the purpose of determining whether substantial evidence supported an exceptional sentence. The trial court's admittance of and reliance on hearsay testimony for the purpose of sentencing was not error. Griffin's argument fails.<sup>2</sup>

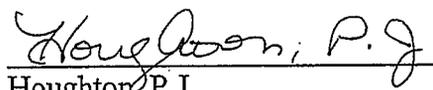
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<sup>2</sup> Griffin also argues that the State failed to offer the records Davis testified about and therefore failed to satisfy the best evidence rule. But he did not object to Davis's testimony on this ground at trial and so he failed to preserve the issue for appeal. RAP 2.5(a).

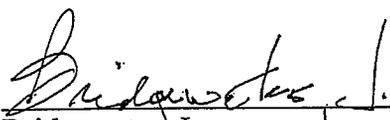
No. 38705-1-II

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record under RCW 2.06.040.

  
\_\_\_\_\_  
Houghton, P.J.

We concur:

  
\_\_\_\_\_  
Bridgewater, J.

  
\_\_\_\_\_  
Quinn-Brintnall, J.

## **APPENDIX B**

DL  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II

DIVISION II

10 APR 20 AM 11:06

STATE OF WASHINGTON,

No. 38705-1-II

STATE OF WASHINGTON

DEPUTY

Respondent,

RECEIVED

v.

APR 22 2010

JAMES L. GRIFFIN,

Nielsen, Broman & Koch, P.L.L.C.

Appellant.

ORDER  
AMENDING OPINION AND  
DENYING MOTION FOR  
RECONSIDERATION

Appellant James L. Griffin filed a motion reconsideration in the above-entitled matter.

After review of that motion and the response requested by the court from the respondent, State of Washington, the court hereby amends the opinion and otherwise denies the motion for reconsideration as follows:

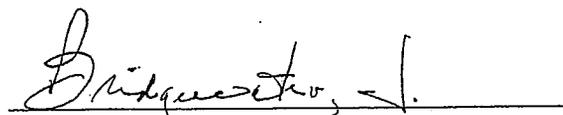
On page 3 of the opinion, a subtitle, "*Blakeley v. Washington*," and two paragraphs of discussion are inserted directly below the heading, "Analysis." On the new page 4, a subtitle is added, "Hearsay;" on the new page 5, a new footnote 2 is inserted. The remainder of the former opinion concludes as before.

IT IS SO ORDERED.

DATED this 20<sup>TH</sup> day of April, 2010.

  
Houghton, P.J.

We concur:

  
Bridgewater, J.

  
Quinn-Brintnall, J.

FILED  
COURT OF APPEALS  
DIVISION II

10 APR 20 AM 11:06

STATE OF WASHINGTON  
BY: \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

No. 38705-1-II

Respondent,

v.

JAMES L. GRIFFIN,

UNPUBLISHED OPINION

Appellant.

HOUGHTON, P.J. — James Griffin appeals his exceptional sentence for residential burglary, arguing that the trial court abused its discretion in admitting hearsay testimony during sentencing proceedings. We affirm.<sup>1</sup>

**FACTS**

After a bench trial, the court found Griffin guilty of committing a residential burglary on October 2, 2008. During the trial, the State elicited the following testimony from Sergeant Travis Davis of the Grays Harbor Sheriff's Department:

[STATE]: As part of your duties, do you check records, maintain records, any of that sort of thing?

[DAVIS]: Yes.

[STATE]: And you were asked to look up a record on James Lamar Griffin; did you do that?

[DAVIS]: Yes.

[STATE]: Did you do that personally?

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<sup>1</sup> A commissioner of this court initially considered Griffin's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

[DAVIS]: Yes, I did.

[STATE]: Okay . . . and based on those records, what is his name number?

[DAVIS]: 41408.

[STATE]: What is a name number?

[DAVIS]: Its [sic] a unique number assigned by our inmate database, that [ ] Spillman is the inmate database that we use. Each individual that has that name record is given that name record that's unique to that one individual.

[STATE]: Are you familiar with the defendant sitting here?

[DAVIS]: Yes, I am.

[STATE]: Is that the same James Lamar Griffin that has the name number, 41408?

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[STATE]: Has Mr. Griffin been in the jail previously?

[DAVIS]: Yes, he has.

[STATE]: On what date was he released the last time?

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[DAVIS]: His last release date was August 19th, 2008 at approximately 21 hundred hours.

Report of Proceedings (RP) at 62-63.

Griffin then objected to Davis's testimony, asking whether Davis testified as to his memory or some other source of information. The trial court overruled the objection, stating that Griffin could cross-examine Davis regarding the substance of his knowledge. Davis then testified that, according to the Spillman database, Griffin's last release date from jail was August 19, 2008. Griffin objected again, arguing that the record lacked authentication or certification. The trial court asked the State if it would like to lay a foundation, and the State proceeded as follows:

[STATE]: Did you look up previous commitments for name number 41408 in your system?

[DAVIS]: Yes, I did.

[STATE]: Were you able to locate a previous commitment for that name number?

[DAVIS]: Yes. And it was booking number 162490.

[STATE]: And when was the release date on that booking number?

[DAVIS]: August 19th, 2008.

RP at 64.

Griffin did not cross-examine Davis but reiterated his objection to the testimony, based on lack of personal knowledge and foundation. The trial court overruled the objection.

In its written findings of fact and conclusions of law finding Griffin guilty of residential burglary, the trial court determined that the Grays Harbor County Jail had released him on August 19, 2008. Because he committed the residential burglary on October 2, the trial court concluded that when he committed the crime, he “had recently been released from incarceration.” Clerk’s Papers at 14. The trial court further concluded that commission of a residential burglary recently after release from incarceration was an aggravating circumstance justifying a sentence above the standard range. Griffin’s standard sentencing range was 15 to 20 months of confinement. The court imposed an exceptional sentence of 30 months. He appeals his sentence.

## ANALYSIS

### *BLAKELY V. WASHINGTON*

Griffin first contends that under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), due process requires that trial courts must base a finding of a rapid recidivism aggravating circumstance on facts established beyond a reasonable doubt in accordance with the rules of evidence. We disagree.

In *State v. Jones*, 159 Wn.2d 231, 247-48, 149 P.3d 636 (2006), our Supreme Court held that a trial court’s determination of a defendant’s community placement status for sentencing purposes does not violate the principles established in *Blakely*. It observed that such determinations do not implicate the “core concern” of *Blakely* because they do not involve fact

finding related to the defendant's current offense. *Jones*, 159 Wn.2d at 241. Further, it stated that *Blakely*'s prior conviction exception allows sentencing courts to determine not only the fact of a prior conviction, but also facts "'intimately related to [the] prior conviction' such as the defendant's community custody status." *Jones*, 159 Wn.2d at 241 (quoting *United States v. Moore*, 401 F.3d 1220, 1225 (10th Cir. 2005)). Finally, it reasoned that determinations of community custody status fall within *Blakely*'s prior conviction exception because they involve inquiries limited to a review of the judicial record created by a prior conviction. *Jones*, 159 Wn.2d at 239.

Here, a determination of rapid recidivism does not involve a fact finding related to Griffin's current offense. It involves only findings of his prior conviction and the "intimately related" fact of his release from incarceration for that conviction. The trial court could make this determination from the judicial record flowing from his prior conviction. Thus, the rapid recidivism determination does not implicate *Blakely*. Griffin's argument fails.

#### HEARSAY

Griffin next contends that the trial court erred in admitting Davis's testimony about his date of release from the Grays Harbor County Jail. Griffin asserts that it was inadmissible hearsay and, without that testimony, the evidence insufficiently supports the exceptional sentence.

We review the trial court's findings of fact made in support of an exceptional sentence under the clearly erroneous standard. *State v. Branch*, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996). Under that standard, we will reverse only if substantial evidence does not support the findings. *Branch*, 129 Wn.2d at 646.

Whether to admit or refuse evidence is within the trial court's discretion, and we will not reverse its decision absent a manifest abuse of discretion. *State v. Iverson*, 126 Wn. App. 329, 336, 108 P.3d 799 (2005). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Aguirre*, 73 Wn. App. 682, 686, 871 P.2d 616 (1994).

Hearsay is a statement made by someone other than the declarant, offered to prove the truth of the matter asserted. ER 801(c). Absent an exception, hearsay is not admissible. ER 802. In sentencing proceedings, however, ER 1101 dictates that the rules of hearsay do not apply.<sup>2</sup>

The record here reflects that Davis's testimony was hearsay and did not fall under the business records exception, as the State argues, because the State failed to lay a proper foundation. *State v. Walker*, 16 Wn. App. 637, 640, 557 P.2d 1330 (1976). Regardless, the rules of evidence do not prohibit the trial court's admittance of hearsay for sentencing purposes. ER 1101. Here, the trial court relied on Davis's hearsay testimony solely for the purpose of determining whether substantial evidence supported an exceptional sentence. The trial court's admittance of and reliance on hearsay testimony for the purpose of sentencing was not error. Griffin's argument fails.<sup>3</sup>

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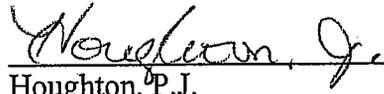
<sup>2</sup> Because a rapid recidivism determination does not implicate *Blakely*, we may consider whether ER 1101 allowed the trial court to consider hearsay in making its sentencing decision determination.

<sup>3</sup> Griffin also argues that the State failed to offer the records Davis testified about and therefore failed to satisfy the best evidence rule. But he did not object to Davis's testimony on this ground at trial and so he failed to preserve the issue for appeal. RAP 2.5(a).

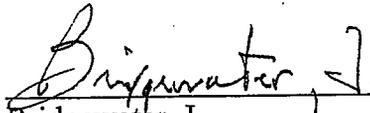
No. 38705-1-II

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record under RCW 2.06.040.

  
\_\_\_\_\_  
Houghton, P.J.

We concur:

  
\_\_\_\_\_  
Bridgewater, J.

  
\_\_\_\_\_  
Quinn-Brintnall, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	SUPREME COURT NO. _____
	)	COA NO. 38705-1-I
v.	)	
	)	
JAMES GRIFFIN,	)	
	)	
Petitioner.	)	

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10<sup>TH</sup> DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

KRAIG NEWMAN  
GRAYS HARBOR COUNTY PROSECUTING ATTORNEY  
102 W. BROADWAY AVENUE  
ROOM 102  
MONTESANO, WA 98563

JAMES GRIFFIN  
DOC NO. 318086  
WASHINGTON STATE REFORMATORY  
P.O. BOX 777  
MONROE, WA 98272

FILED  
 COURT OF APPEALS  
 DIVISION II  
 10 MAY 13 AM 11:16  
 STATE OF WASHINGTON  
 BY \_\_\_\_\_  
 DEPUTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 10<sup>TH</sup> DAY OF MAY, 2010.

x *Patrick Mayovsky*