

65546-9  
65546-9  
NO. 65546-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER TERRY,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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**A. ISSUES PRESENTED**

1. To prevail on an ineffective assistance of counsel claim, an appellant must show deficient performance and resulting prejudice. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. Trial counsel did not request a limiting instruction regarding the use of a witness's prior inconsistent statements. Such an instruction would have highlighted that witness's credibility problems and would have undercut his potentially exculpatory testimony. Does counsel's failure to request a limiting instruction reflect a legitimate trial strategy? If not, has Terry failed to demonstrate prejudice?

2. The Confrontation Clause guarantees defendants the right to be confronted with the witnesses against them. This right does not prohibit the use of all out-of-court statements, but applies only to testimonial *hearsay*. The testimony at issue was not offered to prove the truth of the matter asserted. Does the Confrontation Clause permit admission of this nonhearsay evidence?

3. An alleged error may not be raised for the first time on appeal unless it constitutes manifest constitutional error. Evidentiary rulings do not implicate constitutional rights. At trial,

Terry objected to specific evidence under ER 403. For the first time on appeal, Terry challenges that same evidence under ER 404(b). Has Terry waived his ER 404(b) challenge?

4. Under ER 404(b), evidence of prior crimes, wrongs, or other acts may not be introduced to prove character. Terry challenges testimony that a car, which he had driven, had been reported missing. Does ER 404(b) apply when the evidence challenged is not a crime, wrong, or other act? If so, was the evidence legitimately admitted when it was offered to corroborate the victim's testimony?

5. To obtain reversal pursuant to the "cumulative error" doctrine, Terry must establish the presence of multiple trial errors *and* must show that the accumulated prejudice affected the verdict. Where errors have little or no effect on the trial's outcome, the doctrine is inapplicable. Terry has failed to establish either the existence of multiple errors or that any error affected the verdict. Is the cumulative error doctrine inapplicable?

6. The inclusion of prior juvenile adjudications in an offender score violates neither the right to a jury trial nor due process. Did the court properly include Terry's juvenile felony adjudications in calculating his offender score?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Christopher Terry was charged by amended information with robbery in the first degree. CP 5. Trial occurred in April 2010. The jury found Terry guilty as charged. CP 35. The court imposed a standard range sentence. CP 140-48.

2. SUBSTANTIVE FACTS.

Tameisha Hutton and her children live with Hutton's fiancé, Raesean Walton, in Seattle. RP 72.<sup>1</sup> At around 10:00 a.m. on October 4, 2009, Hutton saw two men in an unfamiliar car pull into her driveway. RP 80-82. Hutton recognized the driver as Walton's friend, Terry, but did not know the passenger. RP 82. Although Terry frequently visited Walton to play video games, it was unusual for him to arrive so early in the morning. RP 84. Nonetheless, when Terry knocked on her front door, Hutton let him and his companion into the house. RP 85.

Terry immediately asked, "Where's Rae at?" RP 86. Hutton explained that Walton was still asleep, but offered to wake him. Id.

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<sup>1</sup> The verbatim report of proceedings consists of five consecutively numbered volumes. In order to be consistent with the Brief of the Appellant, they will be referred to as "RP," followed by the page number.

Without saying anything else, Terry charged past Hutton, toward the bedroom. Id. Hutton followed and saw Terry pull out a gun and point it at Walton, who was still sleeping. RP 89-90. Holding the gun about five feet away from Walton's head, Terry shouted, "Nigger, I ought to kill you. Where's the safe at?" Id.

Walton woke as Terry repeated his demands. RP 90. Walton went to the living room, where Terry's companion was waiting. RP 98. Terry and Hutton followed. Id. Once Walton retrieved his keys, the unknown man attempted to wrestle them away. RP 99. Terry continued to point his gun at Walton. RP 101.

At the same time, Hutton called 911. RP 100. She heard Walton, who was still wrestling with the unknown man, shout, "Okay, I'm going to open the safe." Id. While continuing to aim his gun at Walton, Terry followed him into the bedroom. RP 101. A few minutes later, Terry and his companion hurried out of the house. RP 105-06.

Hutton told the 911 dispatcher that Terry had left in a maroon, four-door sedan, with a license plate beginning with 090. RP 108-09. Hutton had never seen Terry in that car. RP 151. After Terry left, Hutton determined that he had taken \$155 from the safe. RP 110.

When the police arrived, Hutton was the only cooperative witness. RP 227-28. She identified Terry by name and described the get-away car. RP 231-32. A few days later, Hutton identified Terry in a photo montage. RP 127, 166.

On October 6, 2009, Tukwila Police Sergeant Richard Mitchell stopped Terry as he was driving a maroon Toyota Corolla, license plate number 090-SEP. RP 210-12. Terry was not the registered owner. RP 215.

**C. ARGUMENT**

1. TERRY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

At trial, the State impeached Walton using prior inconsistent statements. Terry argues that counsel's failure to request a limiting instruction resulted in ineffective assistance of counsel. Terry's claim is meritless. Given the fact that Walton denied that Terry had robbed him, it was a legitimate tactical decision to avoid highlighting Walton's credibility problems. Moreover, Terry cannot show that he was prejudiced by counsel's failure to request a limiting instruction.

a. Relevant Facts.

Walton testified on behalf of the State. He said that he woke up to two unfamiliar men standing over his bed. RP 171-72. According to Walton, one of the men aggressively balled up his fist and demanded that he open the safe and hand over any money. RP 173-74. Walton complied with his demands. Id. Walton testified that neither robber had a gun. RP 176. He also denied that Terry was involved in the robbery. RP 184. He described the robbers as two tall, light-skinned African American men, and emphasized that Walton did not match that description. RP 196, 200.

The State questioned Walton about several prior inconsistent statements regarding his relationship with Terry and the details of the robbery. See generally RP 188-99. Walton denied telling Seattle Police Officer Kevin Nelson that he “didn’t know why Terry would target him.” RP 195. He also denied telling Detective Frank Clark that Terry had robbed him at gunpoint. RP 197.

Nelson, who was one of the first officers to respond to the robbery, testified that Walton refused to give a written statement.

RP 233. However, Walton said that he had known Terry for 10 years, and that he did not know why Terry had targeted him. Id.

Clark, the primary detective assigned to the case, testified about a follow-up phone conversation, in which Walton said that Terry had robbed him at gunpoint. RP 251-52.

Terry did not request an instruction limiting the use of Walton's prior inconsistent statements. RP 280-87; CP 12-15.

b. Counsel Employed Legitimate Trial Strategy.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his attorney's conduct fell below an objective standard of reasonableness, and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing

counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. Because an ineffective-assistance claim can function as a way to escape rules of waiver and raise issues not presented at trial, the Strickland standard must be scrupulously applied. Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S. Ct. 770, 788, \_\_\_ L. Ed. 2d. \_\_\_ (2011).

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. There is a "wide range" of reasonable performance, and a recognition that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Courts generally presume that counsel decided not to request a limiting instruction so as to avoid reemphasizing damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Such a presumption is appropriate in this case.

Terry argues that any “hypothetical strategy” would have been objectively unreasonable. However, Terry ignores the fact that Walton offered testimony that was favorable to his case. In fact, Walton was the only witness who testified that Terry was *not* one of the robbers. RP 184. Walton’s description of the robbers did *not* match Terry’s appearance. RP 199. Walton also testified that there was no gun involved in the robbery and that Terry had never seen the safe before. RP 176. It was important for Terry to maintain Walton’s credibility.

In fact, trial counsel recognized that Walton was an important witness for the defense. Walton was listed as a potential defense witness in Terry’s trial brief. CP 7. Moreover, when discussing potential ER 609 evidence, trial counsel agreed that Walton’s prior convictions were inadmissible and further explained, “Given that Mr. Walton is indicating it was somebody other than my client, I highly doubt I will be impeaching him.” RP 51-52.

Terry argues that a limiting instruction would have precluded the prosecutor from urging the jury to use the prior statements as proof of guilt. This argument depends on the benefit of hindsight. An attorney should not be faulted for a reasonable miscalculation or lack of foresight. Richter, 131 S. Ct. at 791. Here the trial attorney simply adhered to her chosen strategy. Regardless of whether trial counsel could have foreseen the prosecutor's argument, it was still reasonable to avoid impugning Walton's credibility.

c. Terry Has Not Demonstrated Prejudice.

Even if trial counsel was deficient, Terry cannot show that he was prejudiced. To prevail, Terry must show that "but for counsel's errors, the result of the trial would have been different."

Hendrickson, 129 Wn.2d at 78.

Terry contends that the prosecutor made Walton's prior statements the "linchpin of her case," and that the prosecutor's use of the statements "fatally compromised" Terry's case. Terry greatly overstates the emphasis that the State placed on Walton's prior statements. The State's closing focused almost entirely on Hutton's testimony. The prosecutor began her closing argument by saying that Hutton "stepped up to the plate when her boyfriend,

Raesean Walton, couldn't. She did what she had to do [testify against Terry] when he was too busy being a wimp." RP 288. In fact, the prosecutor argued that Hutton was the proof beyond a reasonable doubt. RP 196. Even defense counsel noted that the State was "placing all of their eggs in the basket of Tameisha Hutton's testimony." RP 305. Walton's prior statements were hardly the linchpin of the State's closing argument.

In analyzing any potential prejudice, Terry also fails to acknowledge the detrimental effect that a limiting instruction would have had on his own case. Walton was the only witness to testify that Terry was not involved in the robbery. Terry used Walton's testimony to support his argument that there was reasonable doubt. RP 308-09. Moreover, Walton's testimony that the robber did not have a gun provided the basis for the court to instruct the jury on robbery in the second degree. CP 33-34.

A limiting instruction would have drawn attention to the fact that Walton had given inconsistent statements. Any benefit achieved by limiting the State's argument would have been outweighed by the effect of undercutting the credibility of Walton's defense-friendly testimony.

2. KELLY'S TESTIMONY WAS NOT HEARSAY AND WAS NOT TESTIMONIAL.

Terry next argues that Seattle Police Officer Ben Kelly's testimony that he took a report about a missing vehicle violated Terry's Sixth Amendment right to confrontation. Terry's claim should be rejected. Kelly's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Because the testimony was not hearsay, it does not implicate Terry's right to confrontation.

a. Relevant Facts.

At around 1:00 a.m., on October 4, 2009, Kelly took a report of a missing, maroon Toyota Corolla. RP 263-64. The missing vehicle's license plate number was 090-SEP. Id. Christopher Terry was neither the reporting party nor the registered owner of the vehicle. RP 266.

Several hours later, Hutton reported that Terry had fled the robbery in a maroon sedan, with a partial license plate number of 090. RP 108-09. On October 6, 2009, Terry was arrested driving the car that was the subject of Kelly's report. RP 212.

The State offered Kelly's testimony to show that the Corolla was not Terry's car. RP 44. The State intended to corroborate Hutton's testimony that she had seen Terry fleeing in that vehicle and that she had never seen the vehicle before. Id. Terry objected based on hearsay, "right to confrontation," and "more prejudicial than probative." RP 48. The court allowed Kelly to testify about taking the report, but restricted Kelly's testimony, so as to eliminate any details surrounding the car's disappearance.<sup>2</sup> RP 62-65.

b. The Confrontation Clause Does Not Apply To Kelly's Testimony Because It Was Not Offered To Prove The Truth Of The Matter Asserted.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the court reviewed the history and purpose of this clause, determining that the "principal evil" at which the clause was directed was the civil-law system's use of ex parte examinations and

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<sup>2</sup> Although the record contains minimal details about Kelly's investigation, it appears that the car may have been stolen during a carjacking. RP 43. Contrary to Terry's assignment of error, which suggests that Kelly testified that the car was stolen, the jury never heard these details. Kelly was only permitted to testify that he had taken a missing vehicle report. RP 62-65.

ex parte affidavits as substitutes for live witnesses in criminal cases. Id. at 51. This practice denies the defendant a chance to test his accuser's assertions "in the crucible of cross-examination" in accord with the common-law tradition. Id. at 60.

The court in Crawford specifically retained the rule of Tennessee v. Street, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985), that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 59 n.9. Washington courts have also recognized that the Confrontation Clause is not implicated when out-of-court statements are not introduced to prove the truth of the matter asserted. In re Personal Restraint of Theders, 130 Wn. App. 422, 433, 123 P.3d 489 (2005).

Here, Kelly testified that he had taken a report about a missing car and that Terry was neither the registered owner nor the reporting party. RP 262-66. This testimony was not hearsay because it was not offered to prove that the car was missing. See ER 801(c). Rather, the testimony was offered to corroborate Hutton's testimony that she had never seen Terry in that car. Because Hutton's testimony conflicted with Walton's, the jury had to make a credibility determination. Hutton's credibility was reinforced

by the fact that her description of the getaway vehicle matched the car in which Terry was arrested two days later. It was especially compelling that, in light of Kelly's testimony and the vehicle registration, Hutton could not have fabricated that detail. Because Kelly's testimony was not offered to prove that the car was missing, the Confrontation Clause is not implicated. Crawford, 541 U.S. at 59 n.9.

Moreover, the Confrontation Clause is limited to "witnesses against the accused," or those who "bear testimony." Id. at 51. Thus, the Confrontation Clause gives defendants the right to confront those who make "testimonial" statements against them and it bars admission of adverse "testimonial" hearsay. Id. at 53-54.

The witness who spoke to Kelly was simply reporting a missing vehicle, and was not "bearing witness" against Terry in the robbery allegations. See Crawford, 541 U.S. at 51. Because Kelly's testimony does not go to prove any material fact in dispute, Crawford is not implicated. State v. Athan, 160 Wn.2d 354, 386-87, 158 P.3d 27 (2007) ("The testimony, in context, does not go to prove any material fact in dispute. Under these circumstances, Crawford is not implicated."); see also Commonwealth v. Sylvia,

456 Mass. 182, 188 n.15, 921 N.E.2d 968 (2010) (Because the Commonwealth was not required to prove motive, whether the substance found on the murder victim was crack cocaine was not a matter that played a role in the Commonwealth's case. The Confrontation Clause therefore was not implicated.).

Nonetheless, even if this Court were to conclude that the unidentified witness made a testimonial statement by reporting that his car was missing, reversal is still not required. Rather, the record plainly demonstrates that any error is harmless beyond a reasonable doubt.

When statements have been admitted at trial in violation of the Confrontation Clause, any resulting conviction should be affirmed if the error is harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Smith, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002). An error is harmless beyond a reasonable doubt if the untainted evidence overwhelmingly proves the defendant's guilt. Smith, 148 Wn.2d at 139. Put another way, such error is harmless if there is "no reasonable probability that the outcome of the trial would have been different had the error not

occurred." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

Here, the State had ample evidence to prove that Terry was guilty of robbery in the first degree. Hutton testified that Terry, whom she had known for at least a year, entered her house, held her fiancé at gunpoint, and stole \$155. Hutton provided a description of the getaway vehicle that matched the vehicle Terry was arrested in two days later. The vehicle was not registered to Terry.<sup>3</sup> Hutton identified Terry in a photo montage, and subsequently identified him in court. Given all of this evidence, there is no reason to believe that the outcome of the trial would have been different without Kelly's testimony. See Powell, 126 Wn.2d at 267.

3. TERRY DID NOT PRESERVE HIS OBJECTION UNDER ER 404(b).

Terry also argues that the missing car evidence should have been excluded under ER 404(b). However, at trial, Terry did not

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<sup>3</sup> At trial, Terry's only objection to the certified copy of the vehicle registration was based on CrR 4.7. RP 204.

object based on ER 404(b). He has therefore waived any objection.<sup>4</sup>

Under RAP 2.5(a)(3), appellate courts may consider an issue raised for the first time on appeal only when it involves a "manifest error affecting a constitutional right." To raise an issue not previously preserved, an appellant must show that (1) the error is manifest, and (2) the error is truly of constitutional dimensions. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Terry must first identify a constitutional error and then must show how the asserted error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). An error is "manifest" where it had "practical and identifiable consequences in the trial of the case." State v. Kirkpatrick, 160 Wn.2d 873, 880, 161 P.3d 990 (2007). Only after the court determines that the claim does in fact raise a manifest constitutional error does it move on to a harmless error analysis. McFarland, 127 Wn.2d at 333.

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<sup>4</sup> At the conclusion of his ER 404(b) argument, Terry contends that the trial court also erred in admitting evidence that he was not the legal owner of the car. Terry did not assign error to this evidence, and did not preserve the objection at trial. Consequently, this Court should not consider this argument. See RAP 2.5; RAP 10.3.

An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Error may not be predicated upon a ruling that admits evidence unless a timely objection is made, stating the *specific ground* of the objection. ER 103(a). Courts will only consider appellate challenges to evidentiary issues if the evidentiary rule was argued at trial. See State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321, 328 (2009).

In addition to his objection based on hearsay and the right to confrontation, Terry objected to Kelly's testimony based on the fact that it was "more prejudicial than probative." RP 48. This objection simply invokes ER 403.<sup>5</sup> Terry never cited ER 404(b) during motions in limine. While Terry's trial brief does include a section entitled "Motion To Exclude Evidence Of Other Crimes, Wrongs Or Bad Acts Pursuant To 404(b) and ER 403," the section references several pieces of evidence. CP 6-11. It is not clear from the written argument which evidence might be covered by ER 404(b). Id.

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<sup>5</sup> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

Terry did not preserve his argument by lodging a specific objection at trial. See ER 103(a); State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). Because the allegedly erroneous admission of ER 404(b) evidence is not of constitutional magnitude, Terry cannot raise the objection for the first time on appeal. Everybodytalksabout, 145 Wn.2d at 468-69.

4. KELLY'S TESTIMONY WAS NOT PROHIBITED UNDER ER 404(b).

Even if Terry had properly objected at trial, ER 404(b) does not apply here because Kelly did not testify about a prior crime, wrong, or act. ER 404(b) prohibits the use of "other crimes, wrongs, or acts...to prove the character of a person in order to show action in conformity therewith." Kelly simply testified that the car had been reported missing. He did not testify about any prior act on Terry's part. Even if the jury might speculate about Terry's involvement in the missing vehicle, this testimony did not come within the purview of ER 404(b). State v. Brown, 132 Wn.2d 529, 578-79, 940 P.2d 546 (1997).

Finally, if Kelly's testimony did fall under ER 404(b), it was properly admitted. Evidence of a defendant's prior crimes or

misconduct is admissible if it is relevant to a material issue at trial other than the defendant's propensity for criminal behavior, and if its probative value is not substantially outweighed by the potential for unfair prejudice. ER 404(b); ER 403; State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999).

Here, Kelly's testimony was not offered to prove Terry's character. Rather, it was offered to corroborate Hutton's testimony that, prior to the robbery, she had never seen Terry in that car.

5. CUMULATIVE ERROR DID NOT DENY TERRY A FAIR TRIAL.

Terry also argues that, if none of the alleged errors he has claimed warrants reversal of his conviction on its own, the conviction should nevertheless be reversed based on the combined effect of these errors. This argument fails.

The cumulative error doctrine only applies where several trial errors occurred which, standing alone, may not be sufficient to justify reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)), review denied, 151 Wn.2d 1031 (2004). It is axiomatic, however,

that to seek reversal pursuant to the “accumulated error” doctrine, the defendant must establish the presence of multiple trial errors *and* must show that the accumulated prejudice affected the verdict. Where errors have little or no effect on the outcome of trial, the doctrine is inapplicable. Greiff, 141 Wn.2d at 929. Here, as explained above, Terry has failed to satisfy this burden.

6. THE TRIAL COURT PROPERLY INCLUDED TERRY'S PRIOR FELONY JUVENILE CONVICTIONS IN HIS OFFENDER SCORE.

Finally, Terry argues that the trial court improperly included his juvenile felony convictions in the calculation of his offender score. The trial court determined that Terry's offender score was 10, based on four adult convictions and 12 juvenile convictions. CP 140-48. Terry asserts that the inclusion of the juvenile convictions violated his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process. However, this argument is foreclosed by State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006).

In Weber, the Washington Supreme Court rejected the argument that Terry now makes. The Court held that:

[I]n the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions, and in light of the aforementioned strong state indicators, we hold that juvenile adjudications are convictions for the purposes of Apprendi's prior conviction exception. Therefore, we affirm the Court of Appeals determination that Weber's due process and jury trial rights are not violated by including Weber's juvenile adjudication in his offender score.

Weber, 159 Wn.2d at 264-65. Weber is binding authority, and was decided on precisely the same grounds Terry argues here.<sup>6</sup>

Terry's argument must therefore be rejected. The trial court properly calculated Terry's offender score as 10 and imposed a sentence within the standard range. Accordingly, the sentence must be affirmed.

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<sup>6</sup> Terry appears to recognize this fact, as his brief explicitly indicates that he is seeking to "exhaust his state remedies." Br. App. at 26.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Terry's conviction and sentence.

DATED this 24 day of February, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Bridgette E Maryman  
BRIDGETTE E. MARYMAN, WSBA #38720  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002