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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying Mr. Nelson's motion to sever count three from counts one and two.
2. The prosecutor committed misconduct by commenting on Mr. Nelson's exercise of his Fifth Amendment right to silence .
3. The trial court violated Mr. Nelson's Sixth Amendment right to compel witnesses by allowing the witness's attorney to assert a blanket Fifth Amendment privilege on the witness's behalf.
4. The State presented insufficient evidence to prove the comparability of a prior Arizona conviction for inclusion in Mr. Nelson's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Severance of charges should be granted where the prejudice of joinder to the defendant outweighs concerns of judicial economy. Mr. Nelson moved to sever count three from counts one and two because, among other things, (1) he was captured on video cashing the checks at issue in counts one and two, but was not selected from a photographic montage with respect to count three; (2) he presented different defenses and would have testified as to counts one and two but not in a separate trial on count three; (3) in a joint trial the jury would likely infer guilt on count three from

the evidence of guilt on counts one and two, and the State acknowledged that most of the evidence would not be cross-admissible in separate trial. Did the trial court abuse its discretion in denying the motion to sever?

2. A prosecutor violates the defendant's Fifth Amendment rights by inviting the jury to infer guilt from the invocation of the right to silence. Although pre-arrest silence may be used to impeach a defendant's credibility after he testifies, it may not be used before the defendant testifies as substantive evidence of guilt. During opening statements, the prosecutor in this case said that Mr. Nelson "never did show up to make [a] statement with Officer Hogue." Did the State violate Mr. Nelson's Fifth Amendment right to silence?

3. Under the Sixth Amendment and article I, section 22, a defendant has a right to compel witness testimony. Although a witness may have a Fifth Amendment right to remain silent in the face of some questions, a witness does not have the absolute right to remain silent and a witness's attorney may not assert such a right on the witness's behalf. Here, Mr. Nelson sought to compel the attendance of Lorena Arisman to confirm that Mr. Nelson worked for Ms. Arisman in a furniture refurbishing business. The

trial court allowed Ms. Arisman's attorney to assert a blanket Fifth Amendment privilege on her behalf. Did the trial court violate Mr. Nelson's constitutional right to compel witness testimony?

4. Under the Sentencing Reform Act and the Fourteenth Amendment, the State bears the burden of proving the comparability of an out-of-state conviction by a preponderance of the evidence. Here, the State presented evidence that Mr. Nelson had an Arizona conviction for attempted sexual assault, but the Arizona attempt statute is broader than Washington's, and the State did not present evidence that Mr. Nelson admitted the facts necessary to find the conduct fell within Washington's statute or that those facts were proved to a jury beyond a reasonable doubt. Did the sentencing court err in including the Arizona conviction in Mr. Nelson's offender score?

C. STATEMENT OF THE CASE

Frank Nelson worked as a refurbisher and delivery driver for a furniture business owned by Lorena Arisman. 3 RP 58.¹ In January of 2011, Mr. Nelson and Ms. Arisman went to an ATM together and deposited two checks. One was a \$447.97 check

¹ Four of the volumes of reports of proceedings are labeled Volume I, Volume II, etc. They will be cited as 1 RP, 2 RP, 3 RP, and 4 RP. The other volumes will be cited by date.

from Shaun O’Kinsella, and the other was a \$2,000 check from Dianne McMillan. 2 RP 42-74. According to Mr. Nelson, Ms. Arisman had told him these checks were from customers. 3 RP 60-64. However, Mr. O’Kinsella and Ms. McMillan had not written the checks. 2 RP 11-19. The State charged Mr. Nelson with one count of identity theft and one count of forgery. CP 225.

In a separate incident, someone tried to cash a forged check at Money Tree using the identity “Frank Joseph Nelson”. 2 RP 19-37. Officer Ryan Hogue of the Everett Police Department called appellant Frank Nelson to investigate, and Mr. Nelson told Officer Hogue that he had lost his wallet at Safeway and someone must have stolen his identity. 2 RP 104-112; 3 RP 67. When the teller was shown a photographic montage that included appellant Frank Nelson’s picture, she said the perpetrator was not in the montage. 2 RP 31, 35.

The State charged Mr. Nelson with forgery for the Money Tree incident, and Mr. Nelson moved to sever this new count three from counts one and two. CP 191, 198-202; 11/3/12 RP 5-20; 11/4/11 RP 3-12. The court denied the motion; Mr. Nelson renewed the motion immediately before trial and it was denied again. CP 179-82; 1 RP 86-110.

As to counts one and two, the trial court permitted Mr. Nelson's attorney to argue that Ms. Arisman must have doctored the checks without Mr. Nelson's knowledge. The court allowed Mr. Nelson to elicit testimony from detectives about finding Ms. Arisman with check-washing tools. 2 RP 163-205; 3 RP 45-47. However, the court denied Mr. Nelson's motion to compel Ms. Arisman's testimony. Over Mr. Nelson's objection that Ms. Arisman should have to invoke the Fifth Amendment on a question-by-question basis, the court did not examine Ms. Arisman herself and allowed Ms. Arisman's attorney to invoke a blanket privilege on her behalf. 1 RP 2-3, 14-35, 63-65.

During opening statements, the prosecutor described Officer Hogue's investigation of count three. She said that after Mr. Hogue called Mr. Nelson and confronted him with the evidence against him, Mr. Nelson disclaimed responsibility on the telephone but "never did show up to make that statement with Officer Hogue." 1 RP 188. After trial, the jury convicted Mr. Nelson of all three counts as charged. CP 72-74. Mr. Nelson appeals. CP 2.

D. ARGUMENT

1. The trial court abused its discretion in denying Mr. Nelson's motion to sever count three from counts one and two.

This Court should reverse the trial court's ruling denying Mr. Nelson's motion to sever count three from counts one and two. Mr. Nelson demonstrated that the prejudice of joinder outweighed concerns of judicial economy because (1) the State conceded most evidence would not be cross-admissible; (2) Mr. Nelson's defenses were different and he planned to testify as to counts one and two but not count three; (3) the court failed to instruct the jury it could not consider evidence on one count to convict on another; and (4) the State's evidence on counts one and two – where Mr. Nelson was caught on video committing the crime – was much stronger than its evidence on count three, where the eyewitnesses stated the perpetrator was not in a photographic montage that included Mr. Nelson.

- a. A court should sever offenses where the prejudice of joinder to the defendant outweighs joinder's benefit to judicial economy.

Criminal Rule 4.4 provides that the trial court "shall grant a severance of offenses whenever ... severance will promote a fair determination of the defendant's guilt or innocence of each

offense.” CrR 4.4(b). Severance is appropriate where the prejudicial effects of joinder outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 722, 790 P.2d 154 (1990). “Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant’s guilt for another crime or to infer a general criminal disposition.” State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

In determining whether the potential for prejudice requires severance, courts consider four factors: (1) the strength of the State’s evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). This Court reviews the denial of a motion to sever for abuse of discretion. Id.

The trial court abused its discretion in denying the motion to sever because this case is like Sutherby and unlike Bythrow and Russell; that is, an evaluation of the above four factors demonstrates that the potential for prejudice required severance.

- b. The prejudice of joinder outweighed concerns for judicial economy because the State's evidence was weaker on count three, the defense was different on count three, the jury likely inferred guilt on count three from the evidence presented for counts one and two, and the State conceded the evidence would not be cross-admissible in separate trials.

As to the first factor, the State's evidence on counts one and two was much stronger than its evidence on count three.

Surveillance video captured Mr. Nelson depositing the checks at issue in counts one and two. In contrast, the witness who dealt with the suspect in count three did not select Mr. Nelson from a photographic montage. CP 200; 1 RP 87. Cf. Sutherby, 165 Wn.2d at 885 (evidence of child pornography stronger than evidence of child rape where child pornography was found on defendant's computer but child rape count depended on testimony of six-year-old).

The trial court stated that without reviewing all of the discovery, "it may be difficult to determine the relative strengths of the counts." CP 181. With no further analysis, the court simply concluded, "Although defense argues that Counts I and II are stronger, this does not appear to be a substantial factor favoring the Defendant." CP 181. This was error, because Mr. Nelson had

already explained that he was clearly identified in counts one and two and not identified in association with count three, and that there was a great risk of prejudice because the jury would likely infer guilt on count three from the evidence supporting count two. CP 200; 1 RP 92.

As to the second factor, Mr. Nelson's defense for count three was different from his defense on counts one and two. Cf. Sutherby, 165 Wn.2d at 885 (counsel ineffective for failing to move to sever where defense to child rape and molestation was different from defense to child pornography). As to count three, Mr. Nelson argued he did not deposit the check and that someone must have stolen his identification from the wallet he had recently lost at Safeway. CP 200. As to counts one and two, however, Mr. Nelson acknowledged cashing the checks but denied knowing they had been forged. CP 199. Mr. Nelson had to testify in his own defense as to counts one and two in order to explain why he was not guilty of the crimes despite having been captured on video cashing the checks. 1 RP 87. But he planned to exercise his right not to testify regarding count three, because the cashier who dealt with the suspect for several minutes said a montage containing Mr. Nelson's image did not include the perpetrator. CP 201. The trial court did

not even acknowledge this problem, stating only, “the court does not find the defenses in this case to be clashing with one another and would appear to be relatively clear to the jury.” CP 181.

In Russell, the Court upheld the denial of severance because there was merely “some suggestion” that the defendant would elect to testify as to one count but not another, and there was “no offer of proof as to which count the defendant might elect to testify about, no offer of proof as to what he might say, and no showing that he would be prejudiced by any decision he might make regarding his decision to testify on any count or counts and not on another.” Russell, 125 Wn.2d at 65. In contrast, Mr. Nelson did clearly indicate which counts he would and would not testify about, did make an offer of proof, and did explain the prejudice he would suffer as a result of the disparate defenses. CP 198-202; 11/3/11 RP 7-8; 1 RP 92. Thus, this factor also cuts in favor of severance.

As to the third factor, the trial court concluded, “it is assumed that the jury will follow the court’s instructions. As such, this element is also not in the Defendant’s favor.” CP 181. The trial court erred, because as in Sutherby, the court instructed the jury to decide each count separately but did not instruct it that the

evidence of one crime could not be used to decide guilt for a separate crime. Sutherby, 165 Wn.2d at 885-86; CP 85. Also as in Sutherby, the prosecutor urged the jury to use evidence from one count to support a conviction on the count that should have been severed. See id. Mr. Nelson told the detective and the jury that he could not have been the one who cashed the check in count three because he never uses his middle name on his checks. 3 RP 34-36, 69-71. Yet the prosecutor in closing argument pointed out to the jury that the check at issue in count one included the name “Joseph” and urged the jury to accordingly reject the defense on count three. 4 RP 9. Additionally, the prosecutor accused Mr. Nelson of tailoring his defenses to the evidence, and stated that given Mr. Nelson’s defense on count three, he probably would have denied he deposited the checks in counts one and two “if we didn’t have the footage.” 4 RP 13-14. The prosecutor also reminded the jury of Mr. Nelson’s prior convictions – convictions which would not have been admitted in a separate trial for count three, but which were admitted here under ER 609 because Mr. Nelson had to testify in his own defense on counts one and two. 4 RP 31. Thus, this factor also weighs in favor of severance.

Finally, the fourth factor also favors severance because the State agreed that most of the evidence supporting counts one and two would not be admissible in a separate trial on count three. CP 181; 11/3/11 RP 17-18; see ER 404(b); Sutherby, 165 Wn.2d at 886-87. The court acknowledged the concession and recognized that “cross-admissibility is the most important factor,” yet ruled that because there would be “some overlap” in testimony “this element is not in the Defendant’s favor.” CP 181-82; 11/4/11 RP 9-10. The court rested its ruling on Bythrow, CP 181, but that case is inapposite. There, the primary issue was whether the absence of cross-admissibility required severance per se. Bythrow, 114 Wn.2d at 720-21. Mr. Nelson did not and does not claim that there is a bright-line rule. However, because the State admitted that most of the evidence would not be cross-admissible, this factor, too, cuts in favor of severance. Sutherby, 165 Wn.2d at 886-87.

In sum, the trial court abused its discretion in denying the motion to sever because Mr. Nelson demonstrated under the relevant four-factor test that he was prejudiced by joinder. Furthermore, the prejudice outweighs concerns for judicial economy because the trials would be relatively short. Cf. Russell, 125 Wn.2d at 68 (prejudice from joinder did not outweigh concerns

for judicial economy where trial took 33 days and most evidence was cross-admissible). This Court should reverse and remand for separate trials.

2. The prosecutor violated Mr. Nelson's Fifth Amendment right not to incriminate himself by urging the jury to draw an adverse inference from his pre-arrest silence.

Every prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Thus, a prosecutor may not comment on a defendant's exercise of his constitutional rights. "[W]hen the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated." State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); U.S. Const. amend. V; Const. art. I, § 9.

Here, as in Burke, the prosecutor violated Mr. Nelson's rights under the Fifth Amendment and article I, § 9 by commenting on Mr. Nelson's pre-arrest silence. During opening statements, the prosecutor described Officer Hogue's investigation of count three. She said that after Mr. Hogue called Mr. Nelson and confronted him with the evidence against him, Mr. Nelson disclaimed responsibility

on the telephone but “never did show up to make that statement with Officer Hogue.” 1 RP 188. The trial court later granted Mr. Nelson’s motion to exclude this evidence from the trial, but the damage had already been done during opening statements. 2 RP 128-30.

The Burke court reversed under similar circumstances. In that case, an officer went to the defendant’s house to confront him with evidence that he had committed rape of a child. Burke, 163 Wn.2d at 207. The defendant answered a few questions but after his father intervened he decided not to talk anymore without consulting counsel. Id. He was charged with the crime, and at trial he testified he reasonably believed the victim was at least 16 years old. The State undermined that defense by implying the defendant would have told the police he believed the victim was of age if that were true. Id. at 208. The prosecutor made these implications before and after the defendant testified, including in opening statements. Id.

The Supreme Court held the State violated the defendant’s right to silence under the Fifth Amendment and article I, section 9. Id. at 222. This was so even though the defendant testified, because although evidence of silence may be used to impeach a

testifying defendant's credibility, the use of that evidence before the defendant testified was improper. Id. at 216, 218. Such "anticipatory impeachment" might be proper in some circumstances, but only where the appropriate foundation is laid and with the court's permission. Id. at 218 n.8. Otherwise, "[t]he cases that have permitted testimony about the defendant's silence have done so only for the limited purpose of impeachment after the defendant has taken the stand, and not as substantive evidence of guilt...." Id. at 218 (emphasis added).

Here, too, the prosecutor used Mr. Nelson's failure to talk to the police as substantive evidence of guilt before Mr. Nelson even testified. In so doing, the prosecutor violated Mr. Nelson's constitutional right to silence. Id.

Because the error was constitutional, the convictions must be reversed unless the State proves beyond a reasonable doubt its violation did not contribute to the verdict obtained. Id. at 222; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967). As in Burke, the State cannot meet that heavy burden here. As to count three, although the witnesses testified that Mr. Nelson had the same telephone number as the perpetrator, they did not choose Mr. Nelson from a photographic montage and Mr.

Nelson testified he lost his wallet and the actual perpetrator must have stolen it. 2 RP 25-26, 31; 3 RP 53, 67-70. As to counts one and two, Mr. Nelson testified that Lorena Arisman gave him the checks as payment for his work, and that he did not realize they were forged. 3 RP 58-64. Several detectives testified that Ms. Arisman was indeed suspected of multiple incidents of check-washing. 3 RP 121-51. Given this evidence, the State cannot prove beyond a reasonable doubt that its comment on Mr. Nelson's exercise of his right to silence did not affect the outcome. This Court should reverse and remand for new trials on all counts.

3. The trial court violated Mr. Nelson's Sixth Amendment right to compel witness testimony by allowing the witness's attorney to assert a blanket Fifth Amendment privilege on her behalf.

Mr. Nelson sought to compel the testimony of Lorena Arisman to show she paid him for his legitimate work refurbishing furniture. But Ms. Arisman did not testify because the court allowed Ms. Arisman's attorney to assert a blanket Fifth Amendment privilege on her behalf. This was error. Mr. Nelson had a right under the Sixth Amendment and article I, section 22 to compel Ms. Arisman's testimony. Although Ms. Arisman has a Fifth Amendment privilege not to incriminate herself, a claim of privilege

generally may be raised only against specific questions, and not as a blanket foreclosure of testimony. Furthermore, it must be raised by the witness herself, not the attorney. This Court should reverse.

- a. A defendant has a constitutional right to compel witness testimony; a witness does not have the absolute right to remain silent and a witness's attorney may not assert such a right on the witness's behalf.

The Sixth Amendment and article I, section 22 guarantee the right to compel the testimony of witnesses. U.S. Const. amend. VI; Const. art. I, § 22; Washington v. Texas, 388 U.S. 14, 18-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). Although a witness's Fifth Amendment privilege not to testify may conflict with a defendant's Sixth Amendment right to compel testimony, the Fifth Amendment privilege is not applicable unless the witness has "reasonable cause to apprehend danger from a direct answer." Levy, 156 Wn.2d at 731-32 (internal citations omitted). "The court must determine whether the privilege is applicable and a witness cannot establish the privilege merely by making a blanket declaration ... that he cannot testify for fear of self-incrimination." Id. at 732.

Even when the witness may assert the Fifth Amendment privilege as to some questions, "the scope may not extend to all

relevant questions.” Id. “In general, a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony.” State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). “A witness does not have the absolute right to remain silent when called to testify.” Id.

Furthermore, an attorney may not assert the privilege for a witness; the witness must personally invoke his or her Fifth Amendment rights and the court must inquire of the witness directly. Levy, 156 Wn.2d at 732. (“the trial court erred in not requiring that Martin personally assert her Fifth Amendment privilege”).

- b. The trial court violated Mr. Nelson’s Sixth Amendment rights by allowing Lorena Arisman’s attorney to assert a blanket Fifth Amendment privilege on her behalf.

Mr. Nelson sought to compel the testimony of Lorena Arisman to confirm his claim that he worked for her in a furniture business. CP 142; 1 RP 19-20. Mr. Nelson’s defense on counts one and two was that Ms. Arisman paid him by passing on checks from customers, which Mr. Nelson would cash and split among the workers on the job. CP 142; 1 RP 19-20. He did not know the checks were forged. 1 RP 63; 3 RP 60-64.

Ms. Arisman's attorney told the court he did not want her "to testify about anything." 1 RP 2. Mr. Nelson objected and reminded the court Ms. Arisman could not assert a blanket Fifth Amendment privilege and that much of what Mr. Nelson wanted to examine her about would not be self-incriminating. 1 RP 2, 14. But Ms. Arisman's attorney countered, "I've instructed my client that she is to take the Fifth Amendment to protect her right to remain silent and she's to assert that right if she's asked questions." 1 RP 15. Mr. Nelson's attorney responded:

I've indicated in my brief to the Court exactly the substance of the testimony that is not self-incriminating that I believe is relevant to our defense and our defense theory and my client has a right to compel that testimony. I don't believe that simply the fear of, well, she may open the door herself to incriminating statements [is] a reason that she should be prohibited from being compelled to testify as to relevant evidence that we have a right to present.

1 RP 17.

The court acknowledged that having Ms. Arisman confirm Mr. Nelson worked for her in a furniture refurbishing business "might not seem incriminating," but opined that her acknowledgment that she was involved with him at all could create an inference that "she was involved in the crime." 1 RP 21. The court allowed Ms. Arisman's attorney to assert a Fifth Amendment

privilege on her behalf. 1 RP 21, 25. The court never inquired of Ms. Arisman herself, and Ms. Arisman never asserted her own Fifth Amendment rights.

The trial court erred in two respects: (1) it allowed Ms. Arisman's attorney to invoke Ms. Arisman's Fifth Amendment rights instead of inquiring directly of Ms. Arisman; and (2) it allowed Ms. Arisman (through her attorney) to assert a blanket Fifth Amendment privilege rather than limiting the privilege to certain questions. In Levy, the Supreme Court held the trial court erred under similar circumstances. There, the witness "made a blanket declaration that she could not testify without fear of incriminating herself in her own separate trial, but she did not make the assertion to the trial judge; her attorney made it for her." Levy, 156 Wn.2d at 732. The Court concluded:

It is questionable that the court could adequately inquire into [the witness's] reasons for asserting the privilege without actually speaking to her because the court's mandate is to determine whether the assertion is legitimate. It is also possible that [the witness] could have answered some questions without incriminating herself. For these reasons, the trial court erred in not requiring that [the witness] personally assert her Fifth Amendment privilege.

Id.

In Lougin, the witness herself invoked the Fifth Amendment privilege, but the court ruled the trial court still committed error by allowing the witness to claim a blanket privilege. Lougin, 50 Wn. App. at 382. The Court endorsed the defendant's argument that "the proper procedure would have been to allow him to call [the witness] and question her. If at any point she claimed a privilege against answering a question, the trial court could rule on her claim as it related to the specific question asked." Id. The Court concluded, "the trial court erred in not requiring [the witness] to take the stand and then claim the privilege as to specific questions." Id. The same is true here.

The State may argue that Delgado controls because in that case Division Two endorsed a trial court ruling allowing a witness to assert the Fifth Amendment privilege as to an entire incident. State v. Delgado, 105 Wn. App. 839, 18 P.3d 1141 (2001). However, the Delgado court reiterated the general rule that "a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony." Id. at 845 (citing Lougin, 50 Wn. App. at 381). The court held that only in "narrow" circumstances may a witness invoke the Fifth Amendment for all relevant questions. Id. The narrow exception applied in that case because the witness was

facing charges for the same assault and therefore could refuse to speak regarding the incident. Id. But here, Ms. Arisman was not facing charges for the same incidents and Mr. Nelson merely wanted to question her regarding their general business relationship. Furthermore, in Delgado the court properly inquired directly of the witness, whereas here, the trial court erred in allowing the witness's attorney to invoke the privilege for her. Levy, 156 Wn.2d at 732.

In sum, the trial court violated Mr. Nelson's constitutional right to compel the testimony of a witness by allowing Ms. Arisman's attorney to assert a blanket Fifth Amendment privilege on her behalf.

c. The State cannot prove beyond a reasonable doubt the error did not contribute to the verdicts.

Because this error was constitutional, reversal is required unless the State proves beyond a reasonable doubt the error did not contribute to the verdicts. Chapman, 386 U.S. at 24; Levy, 156 Wn.2d at 731; Lougin, 50 Wn. App. at 382. The State cannot prove the error was harmless here. Although Mr. Nelson was permitted to examine detectives regarding Ms. Arisman having been apprehended with check-washing implements, no one confirmed

Mr. Nelson's testimony that he worked for Ms. Arisman in a real business. Had Ms. Arisman testified that she did run a furniture refurbishing business and did employ Mr. Nelson in that business, the jury may have believed that Mr. Nelson did not knowingly deposit forged checks. Without that testimony, the jury was left to assume Mr. Nelson knowingly associated with Ms. Arisman for criminal purposes, and that his claim of genuine employment was not credible. Because this also had an adverse impact on Mr. Nelson's credibility as to count three, all three convictions should be reversed and the case remanded for a new trial.

4. The sentencing court erred in calculating the offender score, requiring remand for resentencing.

The sentencing court included an incomparable out-of-state conviction in Mr. Nelson's offender score. The sentence should be vacated and the case remanded for resentencing.

a. The State bears the burden of proving a defendant's offender score by a preponderance of the evidence.

The Sentencing Reform Act ("SRA") creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505, .510, .520, .525; State v. Ford,

137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court's calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

“Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3). The State bears the burden of proving the existence and comparability of a defendant's out-of-state convictions. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002).

Washington courts apply a two-part test to determine whether the State has satisfied the burden as to comparability. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the elements of the out-of-state crime must be compared to the relevant Washington crime. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable, the defendant's out-of-state conviction is legally equivalent to a Washington conviction. Id. at 254.

But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant's underlying

conduct, as evidenced by the undisputed facts in the record, violates the comparable Washington statute. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606. Even if the State presents additional evidence of conduct beyond the judgment and sentence, “the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial.” Lavery, 154 Wn.2d at 255 (quoting Morley, 134 Wn.2d at 606).

- b. The State failed to prove Mr. Nelson’s 1988 Arizona conviction is comparable to a Washington crime because Arizona’s attempt statute is broader than Washington’s.

The State presented evidence that Mr. Nelson was convicted of “attempted sexual assault” in 1989 in Arizona. CP 34. The State also presented the relevant Arizona statutes. Under Arizona law, “sexual assault” means “intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.” CP 65 (citing ARS 13-1406) (emphasis added). “Knowingly” means “with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person’s conduct is of that

nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.” ARS 13-105.

The attempt statute provides:

- A. A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person:
 - 1. Intentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be; or
 - 2. Intentionally does or omits to do anything which, under the circumstances as such person believes them to be, is any step in a course of conduct planned to culminate in commission of an offense; or
 - 3. Engages in conduct intended to aid another to commit an offense, although the offense is not committed or attempted by the other person, provided his conduct would establish his complicity under chapter 3 if the offense were committed or attempted by the other person.
- B. It is no defense that it was impossible for the person to aid the other party’s commission of the offense, provided such person could have done so had the circumstances been as he believed them to be.

CP 66 (citing ARS 13-1001).

In contrast, Washington’s attempt statute provides, “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW

9A.28.020(1). “The mental state required for criminal attempt [in Washington] (specific intent) is the highest mental state requirement defined by statute.” State v. Johnson, 173 Wn.2d 895, 905, 270 P.3d 591 (2012). Washington rejected the Model Penal Code, which, like Arizona’s statute, requires only “the culpability otherwise required for commission of the crime.” Id. at 906 (citing MPC & CMTS § 5.01, at 295-96). The Model Penal Code “defines criminal attempt more broadly than does RCW 9A.28.020,” id. at 905, and our legislature “rejected this extension of culpability.” Id. at 906. Thus, Mr. Nelson’s conviction for attempted sexual assault in Arizona is not legally comparable to a Washington crime.

Where crimes are not legally comparable, it is very difficult for the State to prove factual comparability. As the Lavery Court explained:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. In Lavery, the Supreme Court held the State failed to prove by a preponderance of the evidence that the

defendant's federal robbery conviction was comparable to a Washington robbery conviction, because the State did not present evidence that the defendant had admitted or stipulated to the necessary facts, or that those facts had been proved to a jury. Id.

The same is true here. The State presented the indictment and judgment for the Arizona crime, showing that Mr. Nelson pled guilty, but neither document contains an admission to facts that would constitute attempt in Washington. Indeed, the indictment alleged not that Mr. Nelson "intended" the criminal result, as would be required in Washington, but that he "intentionally or knowingly" committed the crime. CP 46. Thus, even if the State had presented evidence that Mr. Nelson pleaded guilty to the crime "as charged," it would have failed to prove comparability. The Arizona conviction should not have been included in Mr. Nelson's offender score.

Other cases are instructive. In Thiefault, for example, the Supreme Court held the State failed to prove the comparability of a Montana robbery conviction by a preponderance of the evidence even though the State presented the judgment and sentence, an affidavit, and the motion for leave to file information which alleged conduct that would have constituted robbery in Washington. State

v. Thieffault, 160 Wn.2d 409, 415-17, 158 P.3d 580 (2007).

“[A]lthough the motion for leave to file information and the affidavit both described Thieffault’s conduct, neither of the documents contained facts that Thieffault admitted, stipulated to, or that were otherwise proved beyond a reasonable doubt.” Id. at 416 n.2.

In Thomas, this Court held the State failed to prove the comparability of two California burglary convictions by a preponderance of the evidence because California’s burglary statute does not require unlawful entry. State v. Thomas, 135 Wn. App. 474, 476-77, 144 P.3d 1178 (2006). The State presented certified copies of charging documents, a judgment on plea of guilty, minutes from a jury trial, and a transcript from the sentencing hearing. This Court held the State failed to prove factual comparability even though the State’s evidence showed that California had alleged unlawful entry in the charging documents and the defendant had pled guilty to the crime as charged in one count and had been found guilty beyond a reasonable doubt as charged in the other count. Id. at 483-85.

In Ortega, this Court held the State failed to prove that a Texas conviction for indecency with a child was comparable to a Washington conviction for first-degree child molestation. State v.

Ortega, 120 Wn. App. 165, 167, 84 P.3d 935 (2004). Washington's statute required proof that the child was under 12 years old, while Texas law required only proof that the child was under 17 years old. Id. at 172-73. The State presented a presentence report and letters from the Texas victim, her mother, and a county official all stating that the victim was 10 years old at the time of the crime, and also presented the indictment and judgment. Id. at 173-74. But this Court held the evidence was insufficient to prove the Texas victim was under 12 years old. Id. at 174. Because the relevant facts were not admitted or proved to a jury beyond a reasonable doubt, the Texas conviction was not comparable to a Washington conviction and could not count as a "strike" for sentencing purposes. Id. at 167.

As in Lavery, Thiefault, Thomas, and Ortega, the State in this case failed to prove the comparability of the foreign conviction because it did not present evidence that Mr. Nelson admitted to the necessary facts or that the facts were proved to a jury beyond a reasonable doubt. To the contrary, the State proved that the Arizona crime is broader and that Mr. Nelson was charged under the broader statutory language. Accordingly, the Arizona conviction

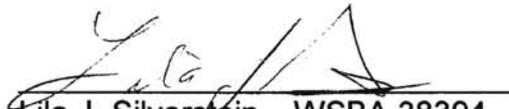
should not have been counted in the offender score. This Court should vacate the sentence and remand for resentencing.

E. CONCLUSION

For the reasons set forth above Mr. Nelson respectfully requests that this Court reverse his convictions and remand for new trials. In the alternative, the case should be remanded for resentencing.

DATED this 9th day of July, 2012.

Respectfully submitted,


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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)
)
 Respondent/Cross-appellant,)
)
)
)
 FRANK NELSON,)
)
)
 Appellant-Cross-respondent.)

NO. 68150-8-I

COURT OF APPEALS
STATE OF WASHINGTON
2012 JUL -9 PM 4:17

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JULY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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