# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>NINA N. BRETTHAUER,<br><br>Appellant. | No. 41065-6-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Johanson, J. — Nina Bretthauer appeals her sentence for second degree assault while armed with a deadly weapon, arguing that at sentencing, the State failed to present sufficient evidence to prove her criminal history. Finding any error harmless, we affirm.[1]

After a bench trial, the trial court found Bretthauer guilty of second degree assault while armed with a deadly weapon. Before sentencing, the State filed a Statement of Prosecuting Attorney stating that Bretthauer had four prior class C felony convictions in 2000, 2001, 2001 and 2003. The State did not submit any other evidence of Bretthauer's criminal history. But because all four of her felony convictions had washed out of her offender score under RCW 9.94A.525(2)(c), the parties and the court agreed that her offender score was zero. The court

[1] A commissioner of this court initially considered Bretthauer's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

sentenced her within the standard range for a defendant with an offender score of zero.

A sentence within the standard range generally is not appealable. RCW 9.94A.210(1). But an appellant may challenge the procedure used by the court to impose a standard range sentence. *State v. Ammons*, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

Bretthauer argues that the State failed to present sufficient evidence to prove her criminal history. She contends that the 2008 amendments to RCW 9.94A.500(1), which directed that "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein,"[2] and to RCW 9.94A.530(2), which removed the State's burden of presenting evidence of a defendant's criminal history when the defendant "acknowledged" her criminal history by "not objecting to information stated in the presentence reports" and "not objecting to criminal history presented at the time of sentencing,"[3] unconstitutionally shifted the burden of proving criminal history away from the State. *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999).

In *State v. Hunley*, 161 Wn. App. 919, 928-32, 253 P.3d 448 (2011), we held that the 2008 amendments unconstitutionally shifted the burden of proving the defendant's criminal history. But, assuming we adhere to *Hunley*,[4] any error is harmless because none of Bretthauer's prior convictions were included in her offender score. The failure of proof did not prejudice

[2] Laws of 2008, ch. 231, § 2.

[3] Laws of 2008, ch. 231, § 4.

[4] Our Supreme Court has granted a petition for review.

Bretthauer.

We affirm Bretthauer's judgment and sentence.

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

Johanson, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.