IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES L. GRIFFIN, Appellant.	No. 38705-1-II 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 _____ day of April, 2010.

_____
Houghton, P.J.

We concur:

_____
Bridgewater, J.

_____

Quinn-Brintnall, J.

No. 38705-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES L. GRIFFIN, Appellant.	No. 38705-1-II UNPUBLISHED OPINION

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.[1]

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.

[1] 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.

> [STATE]: Did you do that personally?
> [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.

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.[2]

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.[3]

---

[2] 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.

[3] 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).

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.