Supreme Court No. 91718-3
(CoA 44258-2-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARTIN IVIE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Martin Ivie, petitioner here and appellant below, asks this Court to grant review of the Court of Appeals opinion affirming his convictions for first degree assault, third degree assault and attempting to elude a police vehicle dated April 21, 2015, pursuant to RAP 13.3(a)(1) and RAP 13.4(b). The Court of Appeals reversed Mr. Ivie's conviction of second-degree theft. Slip. Op. 1. It as ruled that the State failed to prove Mr. Ivie's prior convictions and remanded for a new trial to allow the State to present evidence of such convictions. Slip. Op. 2. A copy of the decision is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. A criminal defendant's constitutional right to due process is violated when a conviction is based upon insufficient evidence. In this case the State failed to present sufficient evidence that Mr. Ivie had the requisite intent to assault either Deputy Reed or Sergeant Adams. Is the Court of Appeals ruling that there was sufficient evidence of intent in conflict with other rulings and the due process clause of both the United States and Washington constitutions requiring all convictions be carried by the State upholding its burden of proof?

2. A defendant's statement may only be used at trial if it was given voluntarily. When questioned by detectives. Mr. Ivie had just undergone surgery and was still under the influence of narcotic pain medications. Mr. Ivie's statement was not a product of rational intellect and free will. Is the Court of Appeals ruling that Mr. Ivie's statement was properly admitted in conflict with other rulings and the due process clause of both the Untied States and Washington constitutions that protect against a criminal defendant's right to self incrimination?

3. A defendant has the right to a fair trial and this right includes an impartial jury. Actions of an individual juror that rise to the level of jury misconduct may deny the defendant a fair trial in violation of Article I, section 22 and the Sixth Amendment. During deliberations the jury foreperson intimidated and bullied other jurors and failed to pass juror inquiries on to the court. Was the Court of Appeals incorrect in affirming the trial court's denial of Mr. Ivie's motion for a new trial based on jury misconduct?

C. STATEMENT OF THE CASE

This Court for several reasons should review Mr. Ivie convictions and affirmation of those on direct appeal. The right to due process and a conviction based on the State's fulfillment of its burden

to prove all essential elements of a crime beyond a reasonable doubt is fundamental and soundly protected by both the United States and Washington Constitution. U.S. Const. Amend. XIV; Wash. Const. Article I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The Court of Appeals opinion that the State met its burden to prove beyond a reasonable doubt all elements of the crime charged is in conflict with the decision of this Court in *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1970). RAP 13.4(b)(1).

The right to a trial by an impartial and indifferently chosen jury is a fundamental right and any issue regarding it presents a significant question of law under both the United States and Washington Constitutions fundamental. U.S. Const. Amend. XIV; Wash. Const. Article I, § 3; *In re Winship*, 397 U.S. 358 at 364. The fact that Mr. Ivie's fundamental right to due process was violated makes his case ripe for review. RAP 13.4(b)(3). The violation of due process is always of substantial public interest and Mr. Ivie's case is no different. RAP 13.4(b)(4). It is for all of the above reasons that Mr. Ivie seeks review from this Court.

D. STATEMENT OF THE FACTS

Mr. Ivie was convicted of one count of theft in the second degree, one count of attempting to elude, one count of assault in the third degree, and two counts of assault in the first degree. CP 38-47. The incident leading to his arrest arose from an alleged timber theft. 6/27/12RP 57, 63, 72. The location was remote and between 15 and 60 minutes from Shelton, the nearest town. 6/27/12RP 76. On February 9, 2012, Deputy Reed received a report of a downed maple tree in the area of Dow Mountain Road. He suspected iliegal harvesting of maple wood. 06/27/12RP 68. The terrain in the area is extremely rugged and the road is often only wide enough for one vehicle. 06/27/12RP 86. Deputy Reed decided to "stake out" the area. It was dark enough out and that he used night vision goggles. 06/27/12RP 69, 73; 07/03/12RP 586.

A few minutes after 8 p.m. a small pick-up truck pulled up and a subject, later identified as Mr. Ivie, exited the vehicle. He removed a box and a chainsaw from the back of the truck. 06/27/12RP 75, 77. 07/03/12RP 578. Deputy Reed watched Mr. Ivie for approximately 25 minutes but did not see him use the chainsaw, cut down the maple or remove any wood from the area. 6/27/12RP 76, 119, 123, 125. Deputy

Reed testified, however, that when confronted, Mr. Ivie appeared agitated and failed to heed the deputy's instructions. 6/27/12RP 81-82.

Deputy Reed requested that dispatch send another officer to assist him. 06/27/12RP 76. Deputy Reed then revealed himself, pulled his gun and told Mr. Ivie to get on the ground. *Id* at 82. Mr. Ivie refused and stated that he would like to go home first to drop off his dog and his truck to avoid either being impounded. 06/27/12RP 82; 06/29/12RP 485-86; 07/03/12 585. There was also testimony that the dog received care for a wound following the incident. 06/29/12RP 485-86.

Mr. Ivie ultimately got back into his vehicle and drove off.[1] 6/27/12RP 83. According to Deputy Reed he was in the middle of the road shining a flashlight straight ahead when Mr. Ivie, with his high beams illuminated, drove directly toward him, forcing him to jump out of the way of the truck. 06/27/12RP 90-93. As Mr. Ivie made his way down the hill, Deputy Reed chased after the truck. 06/27/12RP 86. Deputy Reed reported to Sergeant Adams, the responding officer that Mr. Ivie was in his truck and headed toward him. *Id.*

[1] Mr. Ivie testified at trial that he simply wanted to take his dog home, as he feared he would be taken to the pound if Mr. Ivie were indeed arrested. 7/3/12RP 585.

Mr. Ivie testified he had not seen Deputy Reed in the middle of the road and was not purposefully headed back in Reed's direction. 07/03/12RP 587, 617, 620. Mr. Ivie's never saw Reed close to his truck. 07/03/12RP 593. Mr. Ivie was driving in four-wheel low at approximately 20 miles per hour. 07/03/12RP 587-88. Mr. Ivie reiterated that he had no intention to assault Deputy Reed, nor did he intend to inflict great bodily harm upon him. 07/03/12RP 593.

Sergeant Adams drove into the area with his lights on but his siren off. 06/28/12RP 278. He had some difficulty finding Deputy Reed's location. 06/28/12RP 279-81. Deputy Reed told Sergeant Adams over the radio that Mr. Ivie was headed in his direction. Sergeant Adams parked his patrol car and got out of the vehicle with his rifle and placed a bullet in the chamber. 06/28/12RP 288, 293.

Sergeant Adams later got back into his patrol car and followed Mr. Ivie's truck passing Deputy Reed who was standing on the side of the road. 06/28/12RP 296-97, 350. Adams feared he would lose the vehicle. 06/28/12RP 301. When the truck stopped Sergeant Adams parked about twenty feet behind it and got out of his patrol car with his rifle. 06/28/12RP 307.

Sergeant Adams approached the car with his rifle and light pointed at the driver's side window while issuing orders to get out of the vehicle and on the ground. He was working himself up an embankment and when the truck began moving towards him. 06/28/12RP 312. Sergeant Adams then fired a total of eight shots through the driver's window, of which at least four hit Mr. Ivie and one hit his dog Shane. 6/29/12RP 485-86; 06/28/12RP 317. The truck straightened out and went down the embankment and into the trees. 06/28/12RP 318.

Mr. Ivie testified that he thought the patrol car might have been chasing another suspect. 07/03/12RP 90. When he arrived near the embankment, Mr. Ivie saw a vehicle and was unsure if it was a police car. Moments before being shot multiple times, Mr. Ivie's dog barked and alerted him to a figure on the driver's side of his truck. 07/03/12RP 592-93. Mr. Ivie never saw Sergeant Adams in front of his truck, and he did not intend to assault him. 07/03/12RP 593-94.

Mr. Ivie was taken first to Mason General County Hospital and then transferred to Tacoma General Hospital, where he underwent surgery for the bullet wounds. 7/3/12RP 644. Detective Simper and

Sergeant Breen took his statement while Mr. Ivie was still in the hospital on the morning of February 10, 2012. 6/29/12RP 502.

Mr. Ivie objected to admission of his statement contending it was involuntary. 4/2/12RP 2. During a pretrial hearing, Detective Simper testified he knew Mr. Ivie had been shot, was in the hospital, and had recently undergone surgery prior to conducting the interview. 6/29/12RP 502. When Simper advised Mr. Ivie of his *Miranda* rights, Mr. Ivie invoked his right to his attorney but later Mr. Ivie called for the detectives to return to the room to speak with him. 6/29/12RP 505-07; 7/2/12RP 529. They proceeded to interrogate Mr. Ivie, recording his statement. *Id.*

Neither officer inquired as to how long Mr. Ivie had been out of surgery nor what medications he was being given but both officers believed that Mr. Ivie was not intoxicated. 6/29/12RP 511, 514-15; 7/2/12RP 533-534, 542. Breen did note that at the beginning of the interview Mr. Ivie had his eyes closed and they had to ask him to open them. 7/2/12RP 557.

Mr. Ivie testified that he only vaguely remembered speaking with the detectives. 7/2/12RP 543. He was unclear as to how many times exactly he had been shot and had no memory of being transferred

from Mason County General Hospital to Tacoma General. 7/2/12RP 543-544. After listening to the taped interview, Mr. Ivie believed he sounded as if he was under the influence of narcotics. *Id.* He testified to being dosed with morphine and Oxycontin. 7/2/12RP 552. He remembered the detectives telling him they were there to investigate a wrongful shooting. The majority of his statement was "cloudy" and he was "pretty drugged up" and had a concussion. 7/2/12RP 546. Mr. Ivie never received physical therapy while at Tacoma General but prior to giving his statement he was up and walking, in part to prevent pneumonia. *Id.* The court noted that Mr. Ivie was slurring at the beginning of the taped interview. The court ruled that Mr. Ivie's statement was voluntary and available for impeachment purposes. 7/2/12RP 567-69. The court did not file written findings of fact.

The jury convicted Mr. Ivie on all counts. CP 38-47. This included. *Id.* at 792. Four days later, Juror 4, Marjorie Steinke contacted Mr. Ivie's trial counsel and advised him that foreperson of the jury refused to send out questions to the court during deliberations, that she had serious concerns about the law and this left her without enough

information to reach a proper verdict.[2] CP36-37. Mr. Ivie filed Motion for a New Trial on July 12, 2012.[3] *Id.* Ms. Steinke submitted a declaration stating she "did not believe Mr. Ivie committed the First Degree Assault against Deputies Reed and Adams." *Id.* She continued:

> The foreperson was very pushy. She made comments during deliberation to the effect of "after all, he is a thief and a liar" and she made up her mind that Mr. Ivie was guilty early on in deliberation. She did not want to submit questions to the bailiff to be answered by the court and left so many questions unanswered.... Even though I had questions about that rule, I knew that the lead juror would not ask them.

Id.

Mr. Ivie argued that the foreperson's actions were misconduct and that they removed the mechanism for the jurors to make inquiries of the court. 11/9/2012RP 810-11. The foreperson's conduct caused confusion, which impacted the verdict and prejudiced Mr. Ivie. *Id.* 811. The court ruled that this behavior did not rise to the level of jury misconduct and inhered in the verdict. *Id.* at 821-23.

Mr. Ivie convictions for first degree assault, third degree assault and eluding a police vehicle were affirmed by an opinion issued by the

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[2] Mr. Ivie requested a new attorney following the conclusion of trial, but prior to the hearing on his motion for a new trial and sentencing original defense counsel James Foley was allowed to withdraw. The court appointed Charles Lane in his absence. CP34; 8/3/2012RP 797-803.

Court of Appeals on April 21, 2015. The Court overturned his conviction for second-degree theft under the theory that a lack of proper jury instruction and State election of a specific act violated Mr. Ivie's right to a unanimous jury. The State conceded and the Court agreed that there was a lack of proof of prior convictions in determining Mr. Ivie's offender score and the case was remanded for resentencing. Slip. Op. 1-2.

E. ARGUMENT

1. The Court of Appeal's ruling in Mr. Ivie's case is in conflict with this Court's rulings and those of the Court of Appeals that a conviction must be supported by sufficient evidence.

The Court of Appeals' affirmation of the State's failure at trial to present sufficient evidence to prove every essential element of a crime charged beyond a reasonable doubt is in conflict with well established Washington State case law. *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); *State v. Green*, 94 Wn.2d 216 at 220-21.

Assault is a specific intent crime and requires proof of the specific intent to cause assault. *State v. Elmi*, 166 Wn.2d 209, 215, 207

[1] Mr. Ivie filed a subsequent Motion for a New Trial on October 12, 2012

P.2d 438 (2009). The term "assault" encompasses the concept of a knowing, willful, or purposeful act, rather than an unknowing act. *State v. Hopper*, 118 Wn.2d 151, 158, 822 P.2d 775 (1992); *State v. Esters*, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996); *State v. Allen*, 67 Wn. App. 824, 826, 840 P.2d 905 (1992).

Mr. Ivie was convicted of two counts of assault in the first-degree and one count of assault in the third-degree. CP 38-47. RCW 9A.36.011(1)(a):

> A person is guilty of assault in the first degree, if with ***intent*** to inflict great bodily harm: Assaults another with a firearm or any deadly weapon or by any force means likely to produce great bodily harm or death[.]

State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). In this case the State proved neither the intention to strike or to specific intent to injure.

The State failed to prove that Mr. Ivie intentionally assaulted Deputy Reed or Sergeant Adams. Mr. Ivie's clear intention was to go home and to secure his truck and his dog before being detained. 06/27/12RP 82; 06/29/12RP 485-86; 07/03/12RP 585. Although this behavior amounts to evading it does not provide the requisite intent to prove assault in the first-degree.

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following Mr. Lane's appointment. CP 31-33.

Intent may not be inferred from equivocal evidence as it "relieves the State of its burden to prove all the elements." *State v. Vasquez*, __ P.3d __, WL 3864265, ¶ 13 (July 25, 2013). The incident took place on a remote dirt road on an extremely dark night in February. 06/27/12RP 73, 86; 07/03/12RP 586. Dark enough that Deputy Reed used night vision goggles while "staking out" the area. 06/27/12RP 69, 73. Mr. Ivie did not see Deputy Reed anywhere close to his vehicle after leaving the scene. 07/03/12RP 587, 593, 617, 620. Without the ability to even see Deputy Reed due to the dark conditions, it is evident that Mr. Ivie did not attempt to aim his truck at the officer. In fact, Mr. Ivie testified he did not intend to assault or inflict great bodily harm on Deputy Reed. 07/03/12RP 593.

The State also failed to show sufficient evidence that Mr. Ivie intended to assault Sergeant Adams. Mr. Ivie did not see Sergeant Adams by his truck. 07/03/12RP 592-93. Similarly, Mr. Ivie was unable to see Sergeant Adams and only became aware of the officer's presence outside of his patrol car moments before he was shot in the head and back. *Id.* The fact the bullets were fired from the driver's side of Mr. Ivie's truck and not from directly in front of it, demonstrates that Sergeant Adams was not in danger of being struck by Mr. Ivie.

07/03/12RP 592-93. Mr. Ivie repeatedly testified that he wanted to take his dog home and did not intend to strike or injure either officer. 06/27/12RP 82; 06/29/12RP 485-86; 07/03/12RP 585.

2. The right to due process is a fundamental right and any issue regarding it presents a significant question of law under both the United States and Washington Constitutions.

a. A conviction based on insufficient evidence is clearly a significant question of law.

A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. Amend. XIV; Wash. Const. art. I § 3; *In re Winship*, 397 U.S. 358 at 364. As discussed above Mr. Ivie's convictions for first degree assault rest on insufficient evidence of intent violating his due process rights.

b. The due process clauses in both the United States and Washington Constitutions protect against compelled evidence.

The use of an involuntary statement in a criminal trial for any purpose is a denial of due process of law. *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1968); U.S. Const. amends., V,

XIV; Wash. Const. art. I, §§ 3, 9.[4] This fundamental protection stems from a "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Blackburn v. Alabama*, 361 U.S. 199, 206-07, 80 S. Ct. 274, 4 L.Ed.2d 242 (1960). The coercion used by a state agency need not be physical as, "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Jackson v. Denno*, 378 U.S. 368 at 389. Numerous cases have demonstrated that government compulsion can be mental well as physical.[5]

The detectives questioned Mr. Ivie after he had undergone surgery for law enforcement inflicted gunshot wounds. He was under the influence of narcotics. 7/2/12RP 552. Therefore his statement to Detective Simper and Sergeant Breen was not a "product of rational

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[4] "...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." *U.S. Const. amend., V.* "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..." *U.S. Const. amend., XIV.* "No person shall be deprived of life, liberty, or property, without due process of law." *Const. art. I § 3.* "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." *Const. art. I § 9.*

[5] *See Gallegos v. Colorado*, 370 U.S. 49, 82 S. Ct. 1209, 8 L.Ed.2d 325 (1962); *Culombe v. Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L.Ed.2d 1037 (1961); *Spano v. New York*, 360 U.S. 315, 79 S. Ct. 1202.

intellect and a free will." *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L Ed. 2d 770 (1963) *quoting Blackburn v. Alabama*, 361 U.S. 199 at 208. It was involuntary and should not have been admitted for any purpose. The Supreme Court stated that "it is hard to imagine a situation less conducive to the exercise of a 'rational intellect and free will'" than that of someone who has been "seriously wounded just a few hours" prior to being questioned by police. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). Much like the petitioner in *Mincey*, Mr. Ivie was questioned in the hospital, after being shot at least four times on a remote, mountainous dirt road. 6/27/12RP 76. Mr. Ivie had no memory of being transported to Mason County General Hospital or subsequently being transferred to Tacoma General. 7/3/12RP 644. Following surgery for gunshot wounds, two officers questioned Mr. Ivie regarding the incident surrounding his arrest. 6/29/12RP 502.

The voluntariness of a statement is determined under a totality of the circumstances analysis and should include factors such as "defendant's physical condition, age, mental abilities, experiences and police conduct." *State v. Rupe*, 101 Wn.2d 664, 679, 692, 683 P.2d 571

(1984). Although not definitive, a defendant's drug use should also be considered. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). In applying these factors to Mr. Ivie's statement it is clear that the trial court was erroneous in finding it voluntary.

Mr. Ivie was in poor physical condition following surgery. 7/2/12RP 546. Mr. Ivie was not confined to a bed but hospital staff dictated any mobilization on his part in attempts to prevent pneumonia. *Id.* Mr. Ivie had been prescribed opiate painkillers, including morphine and felt like he was in a dream state, 7/2/12RP 552. The officers testified that Mr. Ivie did not appear to be under the influence of drugs but neither were medical professionals fully equipped to comment on Mr. Ivie's physical condition. 6/29/12RP 511; 7/2/12RP 533.

Mr. Ivie was questioned by two officers while in the hospital, under the influence of narcotics, very close in time to having undergone surgery and he remembers very little of the statement he provided. Like in *Mincey*, the situation as a whole demonstrates the involuntariness of Mr. Ivie's statement to police, which would require it be excluded at trial. The use of an involuntary statement is always unconstitutional. *Jackson v. Denno*, 378 U.S. 368. Mr. Ivie was impeached with a statement he barely remembers making and this

resulted in severe prejudice against him. 7/2/12RP 543; 567-69. Mr. Ivie's statement to police following surgery and under the influence of pain medication was not voluntary and therefore his convictions were unconstitutional and the Court of Appeals was erroneous in its ruling.

3. Any conviction based on insufficient evidence, the improper admission of a criminal defendant's involuntary statement, and tainted by jury misconduct is a violation of due process and is always of substantial interest public interest.

a. It is of substantial public interest when a conviction stands on insufficient evidence.

As discussed above, the State bears the burden of presenting sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. A conviction based on the failure to carry this burden violates a criminal defendant's fundamental right to due process. *In re Winship*, 397 U.S. 358 at 364; U.S. Const. Amend. XIV; Const. art. I § 3; *City of Seattle v. Slack*, 113 Wn.2d 850 at 859. The right to due process is the backbone of the criminal justice system and any violation of that right is of substantial public interest. At trial the State failed to prove that Mr. Ivie had the prerequisite intent to injure with officer. The Court of Appeal's affirmation of his convictions based on insufficient evidence chips away at our fundamental rights.

Any attack on the right to due process should be of great interest to us all.

b. The use of Mr. Ivie's statement given following a surgery to save him from police inflicted gunshot wounds against him is of substantial public interest.

As discussed in depth above Mr. Ivie sustained injuries inflicted by the police. Eight shots were fired and four hit Mr. Ivie. He required surgery because of these gunshots. 06/28/12RP 317. He was questioned following this surgery and has little memory of it. 7/2/12RP 543. Regardless of who shot Mr. Ivie the police questioning him following a serious surgery, while on paid medication which caused him to be unable to make a voluntary statement was a violation of his right against self-incrimination. The admission of his statement was improper. The Court of Appeal's affirmation of his convictions based on the improper admission of an involuntary statement is the type of decision that chips away at the backbone of our criminal justice system and should be reviewed as a substantial public interest.

c. Any violation of the right to an impartially chosen and fair jury is of substantial public interest.

As recognized by the Court of Appeals, Mr. Ivie's right to a unanimous jury was violated and when he was convicted of theft in the

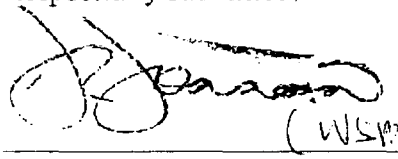
second degree without a proper instruction to the jury. The Court of Appeals, however, erred when they failed to provide Mr. Ivie a new trial based on juror misconduct. A criminal defendant's right to an impartial chosen and fair jury free of the taint of misconduct is a fundamental right and therefore of substantial public interest.

F. CONCLUSION

Petitioner Martin Ivie respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 21st day of May 2015.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARTIN IVIE, Appellant.	No. 44258-2-II UNPUBLISHED OPINION

BJORGEN, J. — Martin Ivie appeals from his convictions and sentence, following a jury trial, for first degree assault, third degree assault, second degree theft, and attempting to elude a police vehicle. The events giving rise to the charges arose out of a wood theft and the ensuing chase and apprehension.

Ivie contends that (1) insufficient evidence supports his convictions for first degree assault, (2) the trial court erroneously admitted, for impeachment purposes, statements Ivie made to police while recovering from his wounds in the hospital, (3) the trial court failed to make sufficient findings and conclusions following a hearing on the voluntariness of Ivie's statements to police in the hospital, (4) the trial court failed to instruct the jury that it must unanimously agree as to which conduct constituted the charged theft, (5) the trial court erred in denying his motion for a new trial based on juror misconduct, and (6) the State failed to prove Ivie's prior convictions by a preponderance of the evidence for purposes of calculating his offender score. Ivie also submitted a statement of additional grounds for review (SAG) under RAP 10.10.

We conclude that sufficient evidence supports the assault convictions, that Ivie's statements at the hospital were properly admitted, that the trial court did not properly

instruct the jury on unanimity concerning the theft charge, that the trial court properly denied Ivie's motion for a new trial, and that the State failed to prove Ivie's prior convictions for calculation of his offender score. We also deny Ivie's SAG claims. Consequently, we reverse Ivie's conviction of second degree theft and affirm his other convictions. We also remand for a new hearing on Ivie's offender score, at which the State may offer new evidence to prove the existence of the prior convictions.

FACTS

On the evening of February 9, 2012, Mason County Sheriff's Deputy William Reed staked out a freshly cut maple tree from which he suspected someone had been stealing wood. The State's expert, Don van Orman, estimated the total retail value of all the wood from the tree at roughly $4,400. Most of the tree had already been removed[1] when Reed arrived, however, and van Orman appraised the wholesale value of the remaining wood, were it cut into three-inch by nine-inch by two-foot "billets" for use in making musical instruments, at $600. Verbatim Report of Proceedings (VRP) at 161-162, 166-168, 172-174.

The night was wet, foggy, and extremely dark: Reed described the conditions as "heavy fog mist [sic]" with "zero illumination." VRP at 73. Witnesses described the roads in the area as steep, winding, and primitive. At only eight to ten feet wide, the roads are too narrow in most places for cars to pass other vehicles or turn around.

Shortly after 8:00 p.m., a pickup truck arrived at the site and Reed, clad all in black,[2] observed an individual emerge from the truck and begin removing bark from one of the large

[1] As discussed below, Ivie admitted at trial that he had taken wood from the site a few days before these events.

[2] Reed testified that his black jumpsuit-style uniform had markings identifying him as a deputy, but that he wore an unmarked black jacket over the uniform.

maple rounds remaining on the ground. After watching the suspect work for about 25 minutes and upon seeing Mason County Sheriff's Deputy Travis Adams arriving in a patrol car, Reed stepped out from behind the tree limbs to get a clearer view of the suspect. Reed immediately recognized the suspect as Ivie, a local resident and woodcutter. Reed ordered Ivie to drop his tools and get on the ground. Ivie threw down his hatchet, but refused to get on the ground. After a tense conversation, Ivie threw his chainsaw in the truck bed and, disregarding Reed's orders, drove away.

Reed pursued on foot, thinking that Adams's approaching vehicle would block Ivie's escape. Before Ivie reached Adams's location, however, Ivie turned his truck around in the entrance to a driveway and proceeded back the way he had come, accelerating in Reed's direction.

Reed continued to advance, pointing his flashlight toward Ivie's oncoming truck and radioing Adams that Ivie had turned around and was coming toward him. Although the narrow roadway afforded only two feet of space on either side of the vehicle, Ivie did not stop as he approached Reed. When the truck came within about five yards, Reed had to jump out of the way to avoid it. Ivie continued down the road, and Adams's marked patrol car, with emergency lights flashing, passed Reed and pursued Ivie.

After a short pursuit, Ivie stopped his truck. As Adams's car slowed, he saw the truck's reverse lights come on, and the truck backed up, hitting the front of the patrol car. Ivie then turned and proceeded up a steep side road. Adams followed Ivie up the side road until it ended at a 90 degree left turn leading to a cleared, flat patch of ground with a trailer on it. Ivie stopped the truck on the landing, and Adams stopped about 20 feet behind him.

Fearing an "ambush situation," Adams got out of his car with his assault rifle, moved to the rear of his car, and began backing down the steep roadway about 30 feet behind his car. VRP at 306-07. At that point Adams stood at the bottom of a fern-covered embankment leading up to the trailer site, well below the level of the trailer and Ivie's truck.

Like Reed, Adams wore a "black jumpsuit" uniform with reflective markings only on the back. VRP at 270. His assault rifle had a flashlight attached to the barrel, which would remain on only as long as he touched a pad on the side of the weapon. Adams believed he had the flashlight on and pointed at the truck as he issued commands to Ivie, who remained in his truck, but Adams was not sure that the light remained on the entire time.

Heedless of Adams's commands, Ivie made a sharp left turn onto the level patch of ground, then turned so that his truck faced toward the top of the embankment that separated the trailer site from the road, pointing just behind Adams's car. While Ivie made the turn, Adams moved to within five feet behind his patrol car, then turned to climb up the embankment to the landing. The embankment at that point was high enough that Adams could not see over it until he stepped up onto the slope. Adams stood on the embankment, raised his rifle up, shone the flashlight at the truck, and continued to shout commands. As Adams stood on the embankment, he could see the driver's door of Ivie's truck and Ivie behind the wheel. Adams testified that he then shone his light on the truck and ordered Ivie to get out and to get on the ground. Adams stated that he believed he had the flashlight on the whole time, but "can't say that it didn't blink on and off." VRP at 313. At that point, Adams testified Ivie's head "turned, looked right at me and hit the gas and turned in my direction." VRP at 312. Ivie completed the turn and accelerated directly at Adams.

The truck then veered slightly to the right, away from the patrol car and in the direction of the road up which Ivie and Adams had come. As Adams moved sideways along the embankment, he held his assault rifle up as high up as he could, attempting to get the barrel on the same level as Ivie, and fired four rounds. The truck straightened out and went off the embankment. As the truck passed him, Adams fired four additional rounds into the driver's side door area. The truck proceeded down the embankment, crossing the road behind Adams's car and crashing into trees and bushes at the bottom of the embankment on the other side of the road.

Through his police radio, Adams notified dispatch that he had fired shots and believed Ivie had been hit. When Adams reached the truck, he found Ivie still in the driver's seat and seriously wounded. Adams returned to his car, notified dispatch of his coordinates, got his medical kit, and returned to the truck to provide first aid.

Approximately 16 hours after the shooting, two detectives attempted to interview Ivie at Tacoma General Hospital where he was recovering from surgery for multiple gunshot wounds. After a detective read him the *Miranda*[3] advisements, Ivie asked for an attorney, and the detectives shut off the recorder and began to leave. Ivie then called to them to come back to his room, saying that he wanted to speak with them. The detectives started the recorder and again read Ivie the *Miranda* advisements. Ivie agreed to speak with the officers and answered their questions for about 30 minutes.

Although Ivie's eyes were closed throughout the interview and his speech was "somewhat slurred" during the first portion of it, the detectives described Ivie as "alert." VRP at 513, 533, 568. In the detectives' opinion, he was not so under the influence of drugs as to be unable to understand the questions or give responsive answers.

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

PROCEDURAL HISTORY

The State charged Ivie with (1) two counts of first degree assault, based on the incidents in which he drove his truck towards Reed and, later, Adams, (2) two counts of second degree assault based on the same conduct, (3) one count of third degree assault, based on the incident in which he backed his truck up into Adams's patrol car, (4) one count of attempting to elude a pursuing police vehicle, and (5) one count of second degree theft, based on Ivie's activities at the felled maple tree on or about February 9. Ivie pled not guilty and proceeded to trial.

Prior to Ivie's testimony and over his objection, the trial court held a hearing outside the presence of the jury and ruled that Ivie had answered the detectives' questions at the hospital voluntarily. The court entered no findings or conclusions in support of this ruling.

At trial the State presented the testimony of Reed and Adams, who described the events as set forth above. The lead investigator testified to the State's crime scene forensic analysis conducted using computer-based crime scene reconstruction technology. Although the testifying investigator did not actually operate the equipment or take the measurements, Ivie did not object to the admission of the images.

Ivie presented evidence disputing certain facts described above,[4] including giving testimony on his own behalf. Although he denied cutting down the maple, Ivie admitted that he had taken some blocks of wood from the site a few days previously, which he sold for $348. He explained that, at the time of the events at issue, he thought a friend of his owned the property and believed he had the friend's permission to be on the property.

[4] Ivie denied seeing either officer directly in front of his vehicle during the incidents in which he allegedly committed first degree assault against them, and testified that Adams's patrol car hit the back of his truck after Ivie had already finished backing up and put the truck into drive.

The prosecutor repeatedly impeached Ivie's testimony using the hospital interview on cross-examination, pointing out various inconsistencies between his answers in the hospital and his trial testimony. The court instructed the jury on third degree theft as a lesser degree of second degree theft. The court did not instruct the jury that it must unanimously agree which act constituted the charged theft. The jury returned guilty verdicts on all counts as charged.

Prior to sentencing, Ivie moved for a new trial under CrR 7.5 based on juror misconduct and submitted an affidavit from one of the jurors in support of the motion. The juror stated that she did not believe Ivie committed first degree assault against either Reed or Adams, but that "[t]he foreperson was very pushy" and "did not want to submit questions" to the court. Clerk's Papers (CP) at 28. The juror stated that "even though no one said anything I felt pressure from the other jurors as they just wanted me to change my vote so they could all leave," and that she changed her vote based on an erroneous explanation of the law from another juror, CP at 28-29.

The court denied the motion and entered convictions on all the verdicts, except those for the alternative second degree assault charges, which the court vacated. The court calculated Ivie's offender score as five, based on the current convictions and a 2005 conviction for second degree malicious mischief, a class C felony, which had not washed out due to subsequent misdemeanor convictions. The State presented no evidence of the prior convictions at the sentencing hearing, but Ivie did not challenge the State's representation of his criminal history.

Because the two first degree assault convictions qualified as serious violent felonies under RCW 9.94A.589(1)(b), the court imposed consecutive sentences totaling 222 months' confinement. The court imposed lesser sentences on the other charges, to be served concurrently.

Ivie timely appeals.

ANALYSIS

Because Ivie's challenge to the sufficiency of the evidence, if successful, would require dismissal with prejudice of the two first degree assault charges, our analysis begins there. Concluding that sufficient evidence supported each of these convictions, we then turn to Ivie's other challenges to his convictions and sentence.

1. SUFFICIENCY OF THE EVIDENCE OF INTENT TO INFLICT GREAT BODILY HARM

Ivie contends that the State presented insufficient evidence for a reasonable juror to find beyond a reasonable doubt that he assaulted Reed or Adams with intent to cause great bodily harm, an element of first degree assault. We find the evidence sufficient, under applicable standards, to support each assault conviction.

In evaluating the sufficiency of the evidence, we review the evidence in the light most favorable to the State. *State v. Ehrhardt*, 167 Wn. App. 934, 943, 276 P.3d 332 (2012) (citing *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010)). We ask "'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant who claims that insufficient evidence supports his conviction "admits the truth of the State's evidence and all reasonable inferences therefrom." *Ehrhardt*, 167 Wn. App. at 943 (citing *Drum*, 168 Wn.2d at 35). Inferences drawn from circumstantial evidence "must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). In applying these rules, a reviewing court must "defer to the fact finder on issues of witness credibility." *Drum*, 168 Wn.2d at 35.

The statute defining first degree assault requires the State to prove that the accused committed the acts constituting assault "with intent to inflict great bodily harm." RCW 9A.36.011(1). The trial court instructed the jury accordingly.

The first act for which Ivie was convicted of first degree assault was his driving at Reed. As summarized above, evidence was submitted that after Reed confronted him, Ivie drove away, contrary to Reed's orders. Reed then followed him on foot until Ivie turned around and accelerated back toward Reed. As Ivie approached, Reed shone his flashlight at the oncoming truck. With only two feet of space on either side of Ivie's vehicle, Reed had to jump out of the way to avoid being hit with about five yards to spare. Although contrary inferences may also logically be drawn, a rational fact finder could have found beyond a reasonable doubt from this evidence that Ivie intended to inflict great bodily harm on Reed.

Ivie's other conviction of first degree assault rests on his driving toward Adams. Evidence was submitted, also summarized above, that Ivie looked right at Adams from the level area on top of the embankment and then accelerated directly at him. As Adams moved to his right out of the path of the truck, the truck veered slightly to its right away from the patrol car and in line with the direction of the road heading back down. From this evidence, a rational fact finder could have concluded that the truck's veer away from Adams showed that Ivie did not intend to strike Adams, but rather was intent on getting away. From the same evidence, though, especially Adams's testimony that Ivie looked at him and accelerated directly toward the officer, a rational fact finder could also have concluded that Ivie did intend to inflict great bodily harm on Adams.

Our Supreme Court has cautioned, however, that

> [w]hen intent is an element of the crime, "intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate

> such an intent as a matter of logical probability." *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991). Though intent is typically proved through circumstantial evidence, "[i]ntent may not be inferred from evidence that is 'patently equivocal'." [*Woods*, 63 Wn. App.] at 592 (quoting *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985); *State v. Couch*, 44 Wn. App. 26, 32, 720 P.2d 1387 (1986)).

Vasquez, 178 Wn.2d at 8.

In *Vasquez* the court held that the defendant's possession of forged identification cards, together with his statement to a security guard that the cards were his and evidence that Vasquez held a job, was insufficient to support a conviction requiring proof of intent to injure or defraud. 178 Wn.2d at 18. More directly on point, we have held that evidence that the defendant's accomplice fired shots into a house, hitting a child, insufficient to sustain a conviction for first degree assault even though the trial court found it "likely apparent [to the defendant] that the house was occupied" because people inside were visible through a window. *State v. Ferreira*, 69 Wn. App. 465, 469-70, 850 P.2d 541 (1993) (emphasis omitted) (internal quotation marks omitted).

Here, however, evidence was presented that Ivie saw both Reed and Adams and accelerated directly toward them at separate times. Ivie's knowledge of the presence of those specific officers and his driving directly at them is much less equivocal evidence of intent than the evidence in either *Vasquez* or *Ferreira*. Even though the truck's veering slightly away from Adams may have shown intent to avoid the officer, Adams's testimony is clear that Ivie saw Adams and accelerated directly toward him. Under the standards set out above, the evidence was sufficient to support the two convictions of first degree assault.

II. THE TRIAL COURT'S ADMISSION OF STATEMENTS IVIE MADE TO POLICE IN THE HOSPITAL

Ivie contends that the admission of the statements he made in the hospital violated his right to due process because he made them involuntarily. Ivie bases this claim on the facts that

he had recently undergone surgery and was under the influence of pain medication. Ivie further contends that the trial court's failure to enter the findings and conclusions mandated by CrR 3.5(c) after ruling the statements voluntary independently merits reversal.

Any use of the defendant's involuntary statement against him in a criminal trial denies him due process of law, regardless of the other evidence against him. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). The inquiry into voluntariness is necessarily fact-specific. *Gallegos v. Colorado*, 370 U.S. 49, 52, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962). In that inquiry, the court considers whether, under the totality of the circumstances, including the suspect's powers of resistance and the pressure brought to bear by the interrogators, the "'defendant's will was overborne.'" *Dickerson v. United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). A suspect's mental disability and the influence of drugs bear on the analysis, but do not necessarily make the statements involuntary. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

Ivie relies on *Mincey*, which held that statements taken from the defendant in a hospital bed shortly after a police officer shot him were not the product of free and rational choice and were consequently involuntary. *Mincey*, 437 U.S. at 401-02. The facts in *Mincey*, however, differ markedly from those here. Many of Mincey's answers were incoherent, and the interrogator "relentlessly" continued questioning him even though Mincey repeatedly asked to terminate the interview, invoked the right to counsel, and lost consciousness. *Mincey*, 437 U.S. at 398-401. Further, the treating physician testified that Mincey was "depressed almost to the point of coma." *Mincey*, 437 U.S. at 398 (quotation marks omitted).

Here, the evidence showed that the police honored Ivie's initial invocation of the right to counsel, that they continued the interrogation only at Ivie's request, and that Ivie gave largely coherent and responsive answers to their questions. Ivie presented no expert medical testimony concerning his condition at the time or the effects of any drugs he had taken.

More specifically, the trial court found in its oral ruling that (1) police obtained permission from hospital staff before questioning Ivie, (2) Ivie was well enough to walk at the time, (3) Ivie generally gave coherent, responsive answers to their questions, without significant pauses, (4) when police asked open ended questions, Ivie gave detailed answers and added his own thoughts, (5) Ivie admitted that he had memories of the interrogation independently of the recording, and (6) no evidence showed that police sought to coerce Ivie or overbear his will. The court also noted that Ivie presented no evidence of the exact nature, timing, or duration of the surgery or of the severity of his wounds, other than his own testimony that he had been repeatedly shot, suffered a concussion, and was under the influence of morphine and OxyContin.

CrR 3.5 requires a trial court to hold a hearing on the admissibility of any statements of the accused that will be offered into evidence and to make written findings and conclusions associated with its decision. The record here contains no written findings or conclusions concerning the admissibility of Ivie's statements in the hospital. The failure to enter findings and conclusions, however, is harmless error "as long as oral findings are sufficient to allow appellate review."[5] *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). Here, the trial court made oral findings of fact and conclusions of law sufficiently detailed to allow for appellate

[5] Our Supreme Court recently held that the absence of written findings supporting an exceptional sentence is not harmless even when the sentencing court's oral ruling makes the basis clear. *State v. Friedlund*, ___ Wn.2d ___, ___, 341 P.3d 280, 283 (2015). We do not read the rule articulated there to apply in this context, however.

review. Therefore, the absence of findings and conclusions is not reason to reverse Ivie's convictions.

We review challenges to findings and conclusions entered after a CrR 3.5 hearing for whether substantial evidence in the record supports the findings and whether the conclusions follow from those findings. *State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Because Ivie does not specifically challenge them, we must treat the trial court's oral findings as verities. *See Broadaway*, 133 Wn.2d at 130-31. As described above, those findings and the other evidence noted support the conclusion that Ivie made the hospital statements voluntarily. Therefore, the trial court did not err in admitting those statements.

III. Lack of Instruction on Unanimity As to Which Act Constituted the Charged Theft

Ivie contends that his conviction of second degree theft violated his right to a unanimous verdict because (1) the jury heard evidence of two separate acts, several days apart, each of which could have constituted theft, (2) the court did not instruct the jury that it must unanimously agree which incident constituted the charged crime, and (3) the State did not specifically inform the jury which act it relied on to prove the charge.[6] We agree.

To convict a defendant of a particular charge, a jury must unanimously agree that the defendant committed the act alleged in the information. WASH. CONST., art. I, § 21; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). "Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must

[6] Ivie further contends that the State failed to present sufficient evidence that he committed theft on the date identified in the information because no evidence established that he actually possessed the wood. This argument has no merit because the theft statute, RCW 9.9A.56.020, does not require actual possession to commit the crime: it is enough that the accused exercised unauthorized control of the property at issue, which Reed's testimony established.

ensure that the jury reaches a unanimous verdict on one particular incident." *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In order to comport with this unanimity requirement, either (1) the State must inform the jury which act constituted the crime, or (2) the trial court must instruct the jurors to convict only if they unanimously agree on the specific act constituting the crime. *Kitchen*, 110 Wn.2d at 409.

If the evidence indicates a "'continuing course of conduct,'" however, no such election or jury instruction is required. *Handran*, 113 Wn.2d at 17 (quoting *Petrich*, 101 Wn.2d at 571). "A continuing course of conduct requires an ongoing enterprise with a single objective." *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). In the context of multiple acts potentially constituting theft, we have held that

> a unanimity instruction is not required where (1) a defendant is charged with a single count of theft based on a common scheme or plan, (2) the evidence indicates multiple incidents of theft from the same victim, (3) the multiple transactions are aggregated for charging purposes, (4) the jury is instructed on the law of aggregation, and (5) the to-convict instruction for the theft charge requires the jury to find that the multiple incidents are part of "a common scheme or plan, a continuing course of conduct, and a continuing criminal impulse."

State v. Garman, 100 Wn. App. 307, 317, 984 P.2d 453 (1999).

Here, the State charged Ivie with a single count of theft. The charging document and to-convict instructions specified that the conduct constituting theft occurred "on or about" February 9, 2012. CP at 74-75, 87. The jury heard evidence that Ivie (1) took wood from the felled maple tree several days prior to February 9, and (2) exercised unauthorized control over the wood on February 9. The trial court did not give a unanimity instruction. The trial court did instruct the jury that

> [w]henever any series of transactions that constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the amount of value.

CP at 62. Although this requires the jury to aggregate the value when a common scheme or plan is present, it does not require the jury to find that the multiple incidents are part of a common scheme or plan or a continuing course of conduct in order to convict. Therefore, under *Garman*, 100 Wn. App. at 317, the common strands in Ivie's activities on February 9 and several days earlier did not remove the unanimity requirement imposed by *Kitchen*, 110 Wn.2d at 409.

In the absence of a unanimity instruction or continuing course of conduct, the State must inform the jury which act constituted the crime. *Kitchen*, 110 Wn.2d at 409. The "on or about February 9" statements in the information and to-convict instruction do not accomplish this, because this time span arguably included both of the potential underlying acts. Further, the opening statements were not transcribed, and the State's closing argument did not inform the jury which act it relied on for the theft. To the contrary, the State's closing argument blended the two events together in discussing theft. In the first segment of its closing, the State discussed van Orman's valuation of all the wood taken from the tree, without differentiating between the two events. The State then referred in closing to "what Mr. Ivie was doing on the mountain on February 9" and mentioned Ivie's taking of the $348 worth of wood, which was from the prior incident. In the same discussion, the State also stated:

> Don't forget the fact that what he's talking about had to have occurred before the -- before the evening of the 9th when he went back out there to take more wood, to take more value.

VRP at 777. The State did not inform the jury of which act it relied on for the theft charge.

Under the authority above, the theft conviction violated Ivie's right to a unanimous verdict. Constitutional error requires us to presume prejudice, and to overcome this presumption the State must prove the error harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). With conflicting testimony as to whether the value of the wood

exceeded the $750 threshold required for second degree theft, RCW 9.9A.56.040, the State has not met that burden. The remedy for this error is generally reversal and remand. *See Kitchen*, 110 Wn.2d at 412.

Under *In re Personal Restraint of Heidari*, 174 Wn.2d 288, 293-95, 274 P.3d 366 (2012) and *State v. Green*, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980), where the lack of a unanimity instruction renders the evidence insufficient to support a conviction, the appellate court may remand for resentencing on an included offense if, and only if, (1) the trial court instructed the jury on the included offense, and (2) the jury necessarily found each element of the included offense in returning a guilty verdict on the greater offense. Although the State never charged Ivie with third degree theft, the court did instruct the jury on that crime as an included offense of second degree theft.

The jury did not, however, necessarily find each element of third degree theft with respect to both incidents. Some jurors may simply not have credited Ivie's arguably self-serving admission, and voted to convict only on the basis of his conduct on the night February 9. Alternatively, some jurors may have harbored doubt as to whether Ivie reasonably believed he had permission to take wood on the prior occasion, but no doubt as to the latter. We therefore reverse the second degree theft conviction, but do not remand for resentencing on third degree theft.

IV. JURY MISCONDUCT

Ivie contends that the trial court erred in denying his motion for a new trial based on juror misconduct. Ivie bases this claim on the jury foreperson's perceived reluctance to submit questions to the court despite one juror's uncertainty about the law and belief that Ivie was not guilty of first degree assault.

We review a trial court's ruling on allegations of juror misconduct for abuse of discretion. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003). "A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

In addressing a claim of juror misconduct, a court may not consider matters in a post-verdict juror affidavit that "inhere in the verdict." *Breckenridge*, 150 Wn.2d at 204. Matters inhere in the verdict if "the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him," or "can[not] be rebutted by other testimony without probing a juror's mental processes." *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). Examples include allegations

> that one or more jurors misunderstood the judge's instruction;
> or were influenced by an illegal paper or by an improper remark of a fellow juror;
> or assented because of weariness or illness or importunities;
> . . .
> or had omitted to consider important evidence or issues;
> or had miscalculated accounts by errors of fact or of law;
> or had by any other motive or belief been led to their decision.

Gardner, 60 Wn.2d at 841-42 (quoting 8 WIGMORE, EVIDENCE § 2349, at 681-82 (McNaughton rev. ed. 1961)) (quotation marks omitted) (footnotes omitted) (emphasis omitted).

All the allegations in the juror's declaration fall under one or more of these categories. The only arguable question involves the jury foreperson's reluctance to submit questions to the court. The juror, however, did not allege that the jury foreperson actually refused to submit any questions. She merely alleged that she "knew that the lead juror would not ask them, since [the foreperson] all but refused to ask the one question we did finally get her to submit." CP at 28-

29. This is a matter of the juror's belief that the jury foreperson would not submit additional questions and thus inheres in the verdict.

The matters alleged in the juror's declaration inhere in the verdict. The trial court did not err in denying Ivie's motion for a new trial.

V. FAILURE TO PROVE PRIOR CONVICTIONS BY A PREPONDERANCE AT SENTENCING

Ivie contends also that we must remand his case for resentencing because the State failed to offer any evidence of the prior convictions used to calculate his offender score. The State concedes the error, and we accept the State's concession.

"The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence." *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). Here, the State provided no evidence of the prior convictions in the trial court, thus failing to meet this burden.

In *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014), our Supreme Court upheld an amendment to RCW 9.94A.530(2) that states:

> On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

Therefore, we remand for a new hearing, at which either party may offer evidence, including new evidence, regarding the existence of the prior convictions.

VI. IVIE'S SAG

In order to obtain appellate review of an issue raised in a SAG, a defendant must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). We do not consider matters not in the record, and the appellant bears the burden of providing a record adequate for

review of the issues raised; if the appellant fails to meet this burden, the trial court's decision must stand. RAP 9.2; *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

The following claims raised in Ivie's SAG are either too vague and conclusory to merit review or depend on matter outside the record: (1) the prosecutor committed various acts of misconduct, including manufacturing or tampering with evidence and withholding exculpatory evidence, (2) certain events that allegedly occurred during the jury's visit to the scene of the events at issue violated Ivie's right to an impartial jury, (3) Ivie did not timely receive disclosure of the evidence used against him and never received full disclosure, (4) police deprived Ivie of due process by failing to gather exculpatory evidence, and (5) Ivie is unlawfully imprisoned. Under the standards above, we do not consider these claims.

Three other claims raised in the SAG either have been waived or have no merit. First, Ivie contends that the State violated his right to confront the witnesses against him by presenting exhibits generated using computer-based crime scene reconstruction technology without any testimony from the users regarding the accuracy or reliability of the technology. To preserve such a claim for review, the defendant must timely raise the issue in the trial court. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) ("The defendant *always* has the burden of raising his Confrontation Clause objection."). Ivie did not do so, and he has waived this challenge.

Second, Ivie contends that the State violated his right to due process by failing to properly preserve evidence. The record discloses that, although it was raining, police did not gather evidence from the scene until the following day. It certainly is possible that the rain obliterated marks on the ground that would have established Adams's or Reed's location relative to Ivie's truck. However, absent an affirmative showing that the evidence had exculpatory value,

the State's failure to preserve "'potentially useful'" evidence does not violate a criminal defendant's right to due process of law, unless the police acted in bad faith. *State v. Straka*, 116 Wn.2d 859, 884, 810 P.2d 888 (1991) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). Ivie makes no showing of bad faith. Therefore, his argument fails.

Third, Ivie contends that the court improperly dismissed a juror and excused an alternate juror. The record discloses that the court dismissed a juror during trial whose appendix ruptured. After closing arguments, the trial court excused the remaining alternate. These procedures comply with the relevant law, RCW 2.36.100, .110 and CrR 6.5, and Ivie's failure to timely object waived the issue in any event. *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995).

Finally, Ivie contends that his trial attorney made various errors or omissions that deprived him of the effective assistance of counsel. Many of these depend on matters outside the record, such as Ivie's claims that his attorney (1) met with him very briefly on only four occasions, (2) failed to obtain and present exculpatory evidence, (3) failed to provide him with copies of trial materials in advance, and (4) secretly worked with the prosecutor to ensure convictions. Others plainly have no merit, such as Ivie's claims that his attorney failed to coach defense witnesses to give more favorable testimony. The record is sufficient, though, to review Ivie's claim that his trial attorney provided ineffective assistance with respect to the hearing on the admissibility of Ivie's statements in the hospital.

We review claims of ineffective assistance of counsel de novo as they present mixed questions of law and fact. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A defendant who raises an ineffective assistance claim "bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109. Although "[t]here is a strong presumption that defense counsel's conduct is not deficient," that presumption is rebutted if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To establish prejudice, the defendant must demonstrate a reasonable probability of a different outcome absent counsel's deficient performance. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The record discloses several occasions before and during trial when the court and counsel discussed whether a hearing would be needed on the admissibility of Ivie's statements at the hospital. In these exchanges defense counsel expressed his need for testimony from the medical professionals who treated Ivie to competently challenge the voluntariness of Ivie's statements. These same exchanges also disclose some uncertainty as to whether and when such a hearing would be held. On Friday June 29, 2012, the trial court made clear, over defense counsel's objection that he needed additional time to arrange medical witnesses, that it would likely proceed with the hearing the following Tuesday whether or not the defense obtained those witnesses. The court held the hearing that Tuesday, and the defense did not present testimony from the medical professionals who treated Ivie or any expert testimony concerning Ivie's injuries or the nature and effects of whatever surgical procedure or medications had been employed.

After the State extensively impeached Ivie with his statements in the hospital, defense counsel sought to rehabilitate Ivie by describing the circumstances under which Ivie made them. Defense counsel did not object to the trial court's failure to instruct the jury to consider the weight and credibility of Ivie's statements in the hospital in view of the surrounding circumstances, as required by CrR 3.5(d),[7] and did not propose such an instruction.

Turning first to the failure to obtain medical testimony for the CrR 3.5 hearing, the record, summarized above, shows that defense counsel consistently told the court that he would need such testimony at the hearing. The hearing, however, was not scheduled until well into the presentation of testimony at trial. It is not reasonable to expect defense counsel to have somehow scheduled needed experts to be ready to appear on two working days' notice, which is what the trial court required. It also appears that the court's short deadline followed in part from its mistaken impression that the record did not reflect that defense counsel had stated repeatedly that he would need such testimony. Defense counsel's performance with regard to the medical testimony did not fall below an objective standard of reasonableness.

Turning next to counsel's failure to request the instruction required by CrR 3.5, Ivie fails to demonstrate a reasonable probability that the outcome would have been

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[7] The language of the rule is mandatory:

> If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; . . . and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

CrR 3.5(d). Thus, the trial court plainly erred in omitting the instruction. Ivie cannot directly raise the issue on appeal, however, because defense counsel did not timely object or propose such an instruction. *See State v. Taplin*, 66 Wn.2d 687, 691, 404 P.2d 469 (1965) (interpreting the same language in former *Rule of Pleading, Practice, and Procedure*, 101.20W(d)(4).

different if the jury had been instructed that it may give Ivie's statements the weight and credibility they see fit in view of the circumstances. *Kyllo*, 166 Wn.2d at 862. With that, Ivie fails to demonstrate the prejudice needed to sustain his claim of ineffective assistance of counsel. *A.N.J.*, 168 Wn.2d at 109.

CONCLUSION

We reverse Ivie's second degree theft conviction and affirm his remaining convictions. We also remand for a new hearing on Ivie's offender score, at which the State may offer new evidence to prove the existence of the prior convictions.

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 in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.
BJORGEN, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Melnick, J.
MELNICK, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44258-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Timothy Whitehead [timw@co.mason.wa.us]
Mason County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 21, 2015

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