71628-0

71628-0

No. 71628-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DARYL LAMAR BERRY,

Appellant.

---

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

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# APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

In this prosecution for assault, the trial court permitted the State to present highly damaging evidence that Daryl Berry had assaulted his girlfriend in the past, despite the long-standing ban on the admission of propensity evidence. The court admitted the evidence for the purpose of assessing the complaining witness's credibility, yet her credibility was not at issue more than that of any other witness in the case. Moreover, the evidence was relevant to her credibility only through a theory of propensity—that is, only to show that because he assaulted her in the past, she must be telling the truth about the current allegations. Because the court misapplied ER 404(b) and admitted the evidence for improper reasons, the convictions must be reversed.

In addition, two points were erroneously added to the offender score, requiring reversal of the sentence and remand for resentencing.

## B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting prior bad act evidence.

2. The trial court erred in including a misdemeanor conviction from 2006 in the offender score.

3. The trial court erred in adding a point to the offender score based on a finding that Mr. Berry committed the current offense while on community custody.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of a defendant's prior bad acts is not admissible at trial if the only relevance of the evidence is to show the defendant's propensity to commit the crime. Such evidence may be admissible in a domestic violence case if it is relevant to assess the credibility of the complaining witness under a theory other than propensity. Here, the trial court admitted evidence of Mr. Berry's prior assaults on the complaining witness for the ostensible purpose of assisting the jury to assess her credibility. But the only logical relevance of the evidence was to show her allegations about the current incident must be true because he assaulted her in the past. Did the court abuse its discretion in admitting the evidence?

2. Generally, only prior *felony* convictions are included in the offender score. Under RCW 9.94A.525(21), if the present conviction is for a domestic violence offense, prior misdemeanor convictions may be included in the offender score if "domestic violence as defined in RCW 9.94A.030, was plead and proven *after August 1, 2011*." (emphasis

added). Did the court err in applying this provision where the prior alleged domestic violence misdemeanor conviction it included in the offender score was from 2006?

3. A point is added to the offender score if the State proves the defendant committed the current offense while on community custody. Did the court err in adding a point to the offender score on this basis where the State did not prove Mr. Berry committed the current offense while on community custody?

D. STATEMENT OF THE CASE

Daryl Berry and Jessica Stump were romantically involved for several years and had two children together. 12/10/13RP 52; 12/11/13RP 45-47. On March 22, 2013, a no-contact order was entered prohibiting Mr. Berry from contacting Ms. Stump or coming to her residence. 12/10/13RP 59; 12/11/13RP 59; Exhibit 3.

On May 2, 2013, Ms. Stump was living in an apartment in Burien with her three children. 12/10/13RP 52. Early that evening, a person walking by the apartment saw a woman on the balcony screaming for someone to call the police. Exhibit 13. The bystander called 911. Exhibit 13.

King County Sheriff Deputy Benjamin Miller responded to the call. 12/11/13RP 106. He found Mr. Berry and Ms. Stump standing in front of the apartment. 12/11/13RP 110. Mr. Berry was bleeding from his head and holding a cloth to his head. 12/11/13RP 111. Deputy Miller noticed marks on Ms. Stump's wrists and a lump behind her ear. 12/11/13RP 113. She told him Mr. Berry had punched her in the head and grabbed her wrist. 12/11/13RP 115, 118. She said he did not have permission to be in the home. 12/11/13RP 118. Ms. Stump did not seek medical attention for her apparent injuries. 12/11/13RP 62.

Mr. Berry was charged with one count of first degree burglary, domestic violence, based on assault, and one count of felony violation of a no-contact order, domestic violence, based on assault.[1] CP 7-8.

Prior to trial, the State moved to admit evidence of prior alleged incidents of violence between Mr. Berry and Ms. Stump under ER 404(b). 12/03/13RP 98-101. The trial court admitted the evidence over defense objection. 12/09/13RP 35-36, 44-45. The court instructed the

[1] The State also charged the aggravating circumstance that Mr. Berry committed the offenses shortly after being released from incarceration. CP 7-8. Although the jury found the existence of the aggravating circumstance, CP 71-72, the court did not impose an exceptional sentence. CP 81-83.

jury it could consider the prior bad act evidence for the purpose of assessing Ms. Stump's credibility:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior incidents of violence and may be considered by you only for the purpose of assessing the credibility of the alleged victim. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 41; see also 12/11/13RP 44 (court's oral limiting instruction).

As a result of the trial court's ruling, at trial the deputy prosecutor asked Ms. Stump whether Mr. Berry had hurt her in the past. 12/10/13RP 53. Over objection, Ms. Stump testified, "the burns, the scratches, the scars – all that stuff, it's long gone. But the things that have happened in my head and my heart I'm still trying to repair and just get passed [sic]." 12/10/13RP 53-54. The prosecutor then asked, "Has there been physical violence between yourself and Daryl?" 12/10/13RP 54. Again over objection, Ms. Stump responded, "Clearly there has. Yes." 12/10/13RP 54. The prosecutor then asked about an incident on a specific date, October 5, 2012. 12/10/13RP 55. Ms. Stump responded that on that date, Mr. Berry was driving on the highway with her and her three children in the car. 12/10/13RP 55-56. He was upset "about people scratching his cars or turning his idle up

and down." Id. She said, "he just snapped and reached across the vehicle and punched me in my face in front of my kids." Id. He continued to punch her while driving and talking on the telephone. Id. He then pulled the car over to the side of the highway and the two wrestled. Id. He "yanked" her shirt over her head and she ran along the side of the highway "with no shirt on, . . . screaming for help." Id. He also removed the children from the car and left them on the side of the road. Id. Her son was only ten days old at the time. Id. A no-contact order was entered as a result of this incident. 12/10/13RP 56.

Regarding the current allegations, Ms. Stump said she was in her apartment sleeping when Mr. Berry started banging on her door. 12/10/13RP 61. She said he did not have permission to be there. 12/10/13RP 63. When the knocking stopped after a while, Ms. Stump opened the door to see if he had gone. 12/10/13RP 62. Mr. Berry then pushed open the door, striking her in the face and causing her to fall backward. 12/10/13RP 63-64. He continued to strike her. 12/10/13RP 64. She grabbed a picture from the mantel and struck Mr. Berry on the head. 12/10/13RP 65-66. She then went to the balcony, opened the door, and screamed for someone to call the police. 12/10/13RP 65-67.

Mr. Berry testified he had lived in the apartment with Ms. Stump and the children for about four or five months. 12/12/13RP 41. He had a key and could come and go as he pleased. 12/12/13RP 41-43. That day, he had just gotten out of jail and had gone to the apartment to gather his belongings; he was not planning to stay. 12/12/13RP 45, 56. He did not think anyone was home because the couple's truck was not parked in its usual spot. 12/12/13RP 44. He did not bang on the door but opened it with his key. 12/12/13RP 45. He did not strike or push Ms. Stump, although she did strike him. 12/12/13RP 51-52, 56-57. He did not intend to violate the no-contact order. 12/12/13RP 61.

Mr. Berry also denied leaving his children on the side of the highway in October 2012 and said he would never do such a thing. 12/12/13RP 68.

Mr. Berry's uncle, Sidney Berry, also testified. 12/12/13RP 11-12. He had visited Mr. Berry, Ms. Stump, and their children at their apartment in Burien that spring. 12/12/13RP 13. He had no reason to think the family did not live there together and believed the apartment was Mr. Berry's home. 12/12/13RP 14-15.

The jury found Mr. Berry guilty as charged of first degree burglary and felony violation of a no-contact order. CP 65-66. The

jury also found, by special verdict, that Mr. Berry and Ms. Stump were "members of the same family or household prior to or at the time the crime was committed." CP 67-68.

E. ARGUMENT

**1. The trial court erred in admitting evidence of prior alleged assaults by Mr. Berry for the purpose of assessing Ms. Stump's credibility, where the only logical relevance of the evidence was to show that, because he assaulted her in the past, she must be telling the truth about the current alleged assault**

*a. Evidence of a defendant's prior bad acts is inadmissible at trial unless it is logically relevant to a material issue through a theory other than propensity*

Evidence of a defendant's other crimes, wrongs or acts is categorically excluded from trial if the only relevance of the evidence is "to prove the character of a person in order to show action in conformity therewith." ER 404(b).[2]

Other act evidence is admissible only if it is logically relevant to a material issue through a theory other than propensity. State v.

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[2] ER 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). Such evidence may be admissible to prove a material issue such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). But even if a proper purpose is identified, that is not a "magic password[] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its] name." Saltarelli, 98 Wn.2d at 364 (internal quotation marks and citation omitted). The "other purposes" listed in ER 404(b) for which other act evidence may be admitted are not exceptions to the categorical bar on propensity evidence. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012). Such evidence is not admissible for *any* purpose if the only relevance of the evidence is to show the defendant's character and action in conformity with that character. Id.

The ban on propensity evidence is based on the fundamental notion that a defendant may be tried only for the offense charged. State v. Sutherby, 165 Wn.2d 870, 886-87, 204 P.3d 916 (2009).

Before admitting other act evidence, the trial court must identify the purpose for admitting the evidence and determine whether the evidence is relevant and necessary for that purpose. State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995). Evidence is relevant

and necessary if it makes the existence of the identified fact more probable. Id. The fact must be of consequence to the determination of the action and the probative value of the evidence must outweigh its potential for prejudice. Saltarelli, 98 Wn.2d at 362.

Other act evidence is presumed inadmissible and the court must resolve any doubt as to whether to admit it in the defendant's favor. State v. Fuller, 169 Wn. App. 797, 829, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013). A trial court's interpretation of ER 404(b) is reviewed *de novo* as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets ER 404(b) correctly, the Court reviews the trial court's decision to admit misconduct evidence for an abuse of discretion. Id. A trial court abuses its discretion if it fails to abide by the rule's requirements. Id.

*b. Ms. Stump's credibility was not sufficiently material to justify the admission of evidence of Mr. Berry's prior bad acts*

Ms. Stump's credibility was not at issue any more than the credibility of any other witness in this case, or indeed any other witness in any other case. Therefore, her credibility was not sufficiently material to justify admitting evidence of Mr. Berry's prior bad acts.

Case law provides guidance for when "credibility" is a proper purpose for admitting evidence under ER 404(b). In State v. Magers, for instance, a witness had previously made statements accusing the defendant of assault. 164 Wn.2d 174, 179, 189 P.3d 126 (2008). Prior to trial, however, she recanted those statements. Id. The Washington Supreme Court held "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of the recanting victim." Id. at 186. Thus, the evidence was relevant to enable the jury to assess the victim's credibility where she had given "conflicting statements." Id.

In State v. Grant, the complaining witness's initial statements to police, made in her husband's presence, did not identify her husband as her assailant. 83 Wn. App. 98, 102, 920 P.2d 609 (1996). But once her husband was removed from the scene, she identified him as the person who assaulted her. Id. At trial, the State sought to admit evidence of prior assaults between the two, as well as the testimony of the woman's therapist to the effect "that the consequences of domestic violence often lead to seemingly inconsistent conduct on the part of the victim." Id. at 103, 109. The Court concluded the therapist's testimony was relevant and admissible under ER 404(b). Id.

In each case, the witness's credibility was in question not because her testimony contradicted the statements of other witnesses, but because the witness's statements contradicted themselves in a material way. In a normal case with conflicts between two witnesses, a jury can compare the testimonies of the witnesses with consideration of each person's demeanor, opportunity to observe events, and apparent bias. In such a case, the jury can use any of the tools at the disposal of every jury when faced with contradictory testimonies of witnesses. But where the conflict is internal to the witness's own statements, jurors are without those normal tools. In such a case, credibility is consequential in a unique way.

Here, there was no recantation or inconsistency in the witness's statements. Ms. Stump's statements to police were consistent with her testimony at trial. See 12/11/13RP 115, 118; 12/10/13RP 61-67. Her testimony simply did not raise the same credibility problem presented in Magers or Grant. Her credibility was not at issue more than that of any other witness. Yet, the trial court admitted evidence of Mr. Berry's prior bad acts "for the purpose of assessing" her credibility. CP 41.

If credibility in its broadest sense is enough to permit admission of another person's prior acts, there are few circumstances in which

that threshold would not be met. A witness's credibility is at stake in every trial. To permit "credibility" in its broadest sense to be a valid basis for admitting evidence of a criminal defendant's prior acts risks eviscerating ER 404(b), as there will be few if any instances in which credibility would not suffice as a purpose for admitting such evidence. If there is no specific, compelling reason to question the witness's credibility—such as where the witness has recanted or made substantially inconsistent statements—the credibility of the witness is not sufficiently material to justify opening the door to evidence of the defendant's prior bad acts.

In the absence of materially contradictory statements made by Ms. Stump, credibility was not sufficiently material to justify admitting evidence of Mr. Berry's prior bad acts.

*c. Evidence of Mr. Berry's prior bad acts was not logically relevant to Ms. Stump's credibility through a theory other than propensity*

Even if Ms. Stump's credibility was a material purpose for admitting the evidence of Mr. Berry's prior acts, those acts were not logically relevant to her credibility through a theory other than propensity. Logical relevance is demonstrated if the identified fact for which the evidence is admitted is "of consequence to the outcome of

the action" and tends to make the existence of the fact more or less probable. Saltarelli, 98 Wn.2d at 362-63. Again, the evidence must establish that fact by some logical theory other than propensity. Gresham, 173 Wn.2d at 420-21. The evidence at issue here did not meet this standard.

Assuming the assessment of Ms. Stump's credibility was a consequential purpose despite the absence of an internal contradiction in her statements, there is no showing of how the evidence of Mr. Berry's prior bad acts made her more or less credible except through a theory of propensity. That is, one can only conclude the prior acts were relevant by first concluding that because Mr. Berry assaulted her in the past, he must have done so on this occasion and therefore Ms. Stump is credible in making the present allegation. That is the only logical relevance of the evidence yet using the evidence for that purpose is plainly improper.

By contrast in Grant, the State sought to establish for the jury how the witness's denial and minimization fit within the context of domestic violence. 83 Wn. App. at 108. To explain the variance in the witness's testimony, the State did far more than merely offer evidence of prior acts. Instead, the State sought to do so by the use of an expert.

Id. In that way, the prior acts evidence was placed in context, allowing the State to argue credibly that the evidence was relevant to help explain why the witness would make inconsistent statements. As the Court explained, that combination of evidence allowed the jury "full knowledge of the dynamics" of a domestic violence relationship which the jury could use to evaluate the witness's credibility.

Here, the State did not attempt to provide the jury "full knowledge of the dynamics" of domestic violence. Indeed, no evidence was presented of those dynamics. Instead, there was just evidence of prior acts. The prior act evidence did not by itself explain either the dynamics of domestic violence or why a person's sworn testimony should be deemed credible. In Grant the State sought to prove the dynamics of domestic violence; here the State made no such effort.

Simply hearing other acts evidence in a vacuum does nothing to assist a jury to assess a witness's credibility or anything else beyond inviting jurors to view the evidence as propensity evidence.

In sum, the court erred in admitting the evidence.

*d. The erroneous admission of the evidence was not harmless*

The erroneous admission of evidence in violation of ER 404(b) requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Gresham, 173 Wn.2d at 433. The Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the prejudice caused by the inadmissible testimony was substantial. Ms. Stump described an unrelated alleged incident from the past that undoubtedly predisposed the jurors to believe Mr. Berry was capable of—and likely committed—the current offense. Ms. Stump said that one day several months earlier, Mr. Berry punched her in the face in front of her children while driving in the car, then pulled off her shirt and forced her to run along the side of the highway "with no shirt on, . . . screaming for help." 12/10/13RP 55-56. She said he also forced her children out of the car, including her son who was only 10 days old at the time. Id. These allegations are shocking and portray Mr. Berry as a violent, heartless individual. The fact that a no-contact order was supposedly entered as a result of the incident implies the

allegations were deemed to be true by a court of law and therefore should be believed by the jury. Yet the prior alleged incident was wholly unrelated to the current allegations and should not have been admitted under ER 404(b).

Ms. Stump also made vague allegations regarding other prior incidents of violence, further reinforcing the notion in the minds of the jurors that Mr. Berry was a serial batterer. She said there had been "physical violence" between her and Mr. Berry, which caused "the burns, the scratches, the scars." 12/10/13RP 53-54. Again, these allegations portrayed Mr. Berry as a violent person and unfairly predisposed the jury to believe he must have assaulted Ms. Stump on the present occasion because such behavior would be in conformity with his violent character.

In contrast to the substantial and unfair prejudice caused by the improperly admitted evidence, the untainted evidence was far from overwhelming. The State's admissible evidence consisted almost entirely of Ms. Stump's description of the episode. Yet her testimony was contradicted by Mr. Berry, who testified he had permission to be in the apartment, used his key to open the door, and did not strike or push Ms. Stump. The jury was far more likely to believe his version of

events had it not heard the improper evidence regarding his prior bad acts.

In sum, the improper admission of the evidence was not harmless and the convictions must be reversed.

### 2. The sentence is erroneous because two points were improperly added to the offender score

At sentencing, the trial court included one prior misdemeanor conviction for "harassment dv" in the offender score. CP 86, 100. The court also added a point based on the allegation that Mr. Berry committed the current offense while on community custody. 12/03/13RP 51.

The offender score is erroneous because the court was not authorized to add a point for the prior misdemeanor conviction, nor for the allegation that Mr. Berry committed the current offense while on community custody.

#### *a. The court was not authorized to add a point to the offender score based on the prior misdemeanor conviction for "harassment dv" because domestic violence was not "plead and proven after August 1, 2011"*

A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293

(1980). When a sentencing court acts without statutory authority in imposing a sentence, that error may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

In applying the sentencing statute, the Court's objective is to determine the Legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). "The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face," the Court "give[s] effect to that plain meaning." Id. (quotation marks and citation omitted). The interpretation and application of the statute is a question of law reviewed *de novo*. Id.

Generally, the sentencing statute authorizes only prior *felony* convictions be included in the offender score. See RCW 9.94A.525. But an exception exists for certain prior misdemeanor convictions if the "present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030[3] was plead and

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[3] RCW 9.94A.030 defines "domestic violence" as "ha[ving] the same meaning as defined in RCW 10.99.020 and 26.50.010." RCW 9.94A.030(20). Under RCW 10.99.020(5), "'Domestic violence' includes but is not limited to" a list of enumerated crimes "when committed by one family or household member against another." RCW 26.50.010(1) defines "domestic violence" as " (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW

proven." RCW 9.94A.525(21). If the current offense is a "felony domestic violence offense," the trial court is to "[c]ount one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, *where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011*." RCW 9.94A.525(21)(c) (emphasis added).

Here, the trial court erred in including Mr. Berry's prior misdemeanor conviction for "harassment dv" in the offender score because "domestic violence" was not "plead and proven" for that offense "after August 1, 2011." The State alleged the "harassment dv" offense occurred on June 29, 2006, well before the August 1, 2011, statutory threshold. See CP 100. Because "domestic violence" was not "plead and proven . . . after August, 1, 2011," the statute did not authorize the court to include that misdemeanor conviction in the offender score. The sentence must therefore be reversed and the case remanded for resentencing without inclusion of the misdemeanor conviction in the offender score.

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9A.46.110 of one family or household member by another family or household member."

*b. The court erred in adding a point based on the allegation that Mr. Berry committed the current offense while on community custody because the State did not prove the allegation*

RCW 9.94A.525(19) authorizes the sentencing court to add one point to the offender score if the State proves "the present conviction is for an offense committed while the offender was under community custody."[4]

Here, the State alleged Mr. Berry committed the current offense while he was on "community custody" and the court added one point to the offender score based on that allegation, over defense objection. 12/03/13RP 51-52; CP 81. But although the State presented the testimony of Mr. Berry's community corrections officer (CCO), that testimony did not establish that Mr. Berry committed the current offense while on community custody. Therefore, the point was added to the offender score in error.

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[4] "Community custody" is "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department." RCW 9.94A.030(5). "Community custody" also includes, for purposes of the offender score point, "community placement or postrelease supervision, as defined in chapter 9.94B RCW." RCW 9.94A.525(19).

Constitutional due process and the authorizing statute require the State to prove the facts necessary to support the offender score calculation by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); RCW 9.94A.530(2); U.S. Const. amend. XIV.

Here, the State did not meet its burden of proof. The State presented the testimony of Fred Johnson, Mr. Berry's CCO. 12/16/13RP 114-16. Officer Johnson testified he began supervising Mr. Berry in February 2013. 12/16/13RP 116. But he did not say whether he was Mr. Berry's first CCO—that is, whether Mr. Berry had already served a portion of his term of community custody before Officer Johnson began supervising him. He also did not say how long Mr. Berry was to be on community custody.

Officer Johnson testified Mr. Berry was taken into custody on April 23, 2013, then released on May 2, 2013. 12/16/13RP 116-117. The current incident allegedly occurred on that same date, May 2, 2013. CP 7-8.

Although the evidence shows the current incident occurred on the same date that Mr. Berry was released from jail, it does not show

whether Mr. Berry was still on community custody on that date. The State presented no evidence at all to show how long the term of community custody was, or when Mr. Berry was to finish serving it. The State presented no evidence to establish that Mr. Berry was actually on community custody at the time of the current offense. Therefore, the court erred in adding a point to the offender score based on the community custody allegation.

When the defense raises a specific objection at sentencing and the disputed issues have been fully litigated below, the State is held to the existing record and may not present additional evidence on remand if the sentence is reversed on appeal. State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002).[5] In this case, because the defense objected to the community custody point and the issue was fully litigated below,

[5] In 2008, the Legislature enacted a statute, RCW 9.94A.530(2), which purported to overrule the rule announced in Lopez. The statute provides: "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." See Laws 2008, ch. 231, § 4. But the rule announced in Lopez is rooted in principles of due process. See Lopez, 147 Wn.2d at 520-21 (citing Ford, 137 Wn.2d at 485-86). The Legislature cannot modify or impair a judicial interpretation of the constitution. State v. Hunley, 175 Wn.2d 901, 914, 287 P.3d 584 (2012). Moreover, once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court. State v. Gore, 101 Wn.2d 481, 487-88, 681 P.2d 227

the State may not have another opportunity to prove the community custody allegation on remand.

F. CONCLUSION

The court erred in admitting highly prejudicial evidence of prior bad acts by Mr. Berry, requiring reversal of the convictions and remand for a new trial. In addition, the offender score was miscalculated, requiring reversal of the sentence and remand for resentencing.

Respectfully submitted this 15th day of September, 2014.

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(1984). Because the Supreme Court has not overruled Lopez, it is binding on this Court.

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

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| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 71628-0-I |
| v. | ) | |
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| DARYL BERRY, | ) | |
| | ) | |
| Appellant. | ) | |

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