Supreme Court No. 91990-9
COA No. 71628-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DARYL LAMAR BERRY,

Petitioner.



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# PETITION FOR REVIEW

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### Cases

A. IDENTITY OF PETITIONER/DECISION BELOW

Daryl Lamar Berry requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Berry, No. 71628-0-I, filed June 15, 2015. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals erroneously conclude that the improper admission of prior bad act evidence was harmless?

2. Did the trial court err in permitting the State to amend the information to charge first degree burglary?

3. Did admission of the 911 recording of a call made by a bystander, where Mr. Berry had no opportunity to cross-examine the caller, violate his Sixth Amendment right to confrontation?

4. Did the trial court err in not dismissing the case when the complaining witness did not testify at the time set by the prosecution?

5. Was Mr. Berry denied his Sixth Amendment right to cross-examine the deputy?

6. Did the trial court err including that Mr. Berry was competent to stand trial?

7. Was Mr. Berry's constitutional right to be present violated?

8. Did Mr. Berry receive ineffective assistance of counsel due to his attorney's failure to investigate evidence regarding his mental health?

C. 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. 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 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.

Mr. Berry appealed, arguing that the trial court erred in admitting the prior bad act evidence, and that his offender score was miscalculated. The Court of Appeals agreed the trial court erred in admitting prior bad act evidence but held the error was harmless. The Court of Appeals also agreed the offender score was miscalculated and remanded for resentencing.[1] Mr. Berry raised additional issues in his *pro se* statement of additional grounds for review, which the Court of Appeals rejected.

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[1] The Court of Appeals' holdings regarding the offender score are not at issue in this petition.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

**1. This Court should grant review and hold the erroneous admission of inflammatory and highly prejudicial prior bad act 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. State v. Gresham, 173 Wn.2d 405, 433, 169 P.3d 207 (2012). 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 trial court erred in permitting the State to amend the information to charge Mr. Berry with first degree burglary

Mr. Berry had a constitutional right to timely notice of the charge. Const. art. I, § 22; State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991).

### 3. Admission of the 911 recording violated Mr. Berry's Sixth Amendment right to confront his accusers

A criminal defendant has a Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend VI; Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). That right was violated when the 911 call recording was admitted against Mr. Berry but the caller did not testify at trial.

### 4. Mr. Berry was denied his right to interview the complainant, and the trial court erred in not dismissing the case when the complainant did not testify at the time set by the prosecution

The trial court erred in denying defense counsel's motion to dismiss the charge when the complaining witness did not show up for trial on time.

### 5. Mr. Berry was denied his right to cross-examine the deputy

A criminal defendant has a Sixth Amendment right to meaningful cross-examination of the witnesses against him. U.S. Const. amend. VI; Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). That right was violated when evidence of police statements was admitted at trial.

### 6. Mr. Berry did not understand the proceedings or the nature of the charges against him

The Fourteenth Amendment prohibits the conviction of a person who is not competent to stand trial. U.S. Const. amend. XIV; In re Pers. Restraint of Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001). Mr. Berry's right to due process was violated because he did not understand the nature of the charge or the proceedings.

### 7. Mr. Berry's constitutional right to due process was violated because he was not present for part of the proceedings

A criminal defendant has a right to be present at any stage of the proceedings where his substantial rights might be affected. U.S. Const. amend. XIV; Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934); State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975). That right was violated when portions of the proceedings were conducted in Mr. Berry's absence.

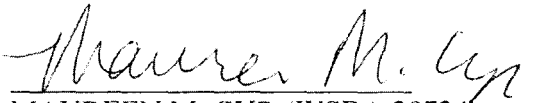
### 8. Mr. Berry received ineffective assistance of counsel because his attorney failed to investigate evidence regarding his mental health

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Mr. Berry received ineffective assistance of counsel because his attorney failed to investigate evidence of his mental health.

E. CONCLUSION

For the reasons given, this Court should grant review.

Respectfully submitted this 14th day of July, 2015.



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# APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, Respondent, v. DARYL LAMAR BERRY, Appellant. | ) | No. 71628-0-I |
| | ) | DIVISION ONE |
| | ) | UNPUBLISHED OPINION |
| | ) | FILED: June 15, 2015 |

TRICKEY, J. — Evidence of prior domestic violence committed by a defendant is not admissible to bolster a complainant's credibility when the complainant has not recanted or made inconsistent statements. Here, the complainant's credibility had not been called into question, and the State concedes that the trial court erred in admitting prior bad acts for credibility. However, the erroneous admission of ER 404(b) evidence is nonconstitutional error; and, where, as here, there was no probability that the outcome of the trial would have been different, the error was harmless. Accordingly, we affirm the conviction. But because the trial court miscalculated the defendant's offender score, we remand for resentencing.

FACTS

Daryl Berry and Jessica Stump were romantically involved for several years and had two children together. Stump testified that her relationship with Berry made her feel the happiest and the worst in her life. While testifying, she recounted an incident where Berry started punching her while driving her and the children. Berry pulled over to the side of the road, ripped her shirt off over her head, and pushed her out of the car. She was left on the side of the road with her children. As a result, she obtained a restraining order against Berry. Stump identified the no contact order admitted at trial as the order

she had obtained. After this March 22, 2013 order, she continued to be friendly because they had children together.

Stump had moved to the Burien address in November 2012. This was the residence Stump and her children were living in at the time the court issued the no contact order. Stump testified that Berry did not have a key to the apartment.

On May 2, 2013, Stump was at home when she heard Berry banging loudly on her door for over 45 minutes. When she thought he had finally gone, she prepared to leave the apartment. As she opened the door halfway, Berry struck her, knocking her back to the floor. A struggled ensued with Stump smashing a picture frame over Berry's head. She was able to open the balcony door and shout outside for help. A passerby dialed 911. Stump's 9-year-old daughter also called 911.

Deputy Sheriff Benjamin Miller responded to the 911 calls. The deputy separated Stump and Berry, who was bleeding from his head. The deputy first spoke with Berry who denied that Stump was the person who had hit him. Berry claimed that the women who had hit him in the head had run off. The deputy then spoke with Stump who was crying and upset. He observed marks on her wrists and a big lump behind one of her ears. Stump told the deputy that Barry had hit her and that she thought she was going to die. The deputy learned that Stump had a no contact order that Berry had received in open court on March 22, 2013. The deputy arrested Berry.

Berry testified that he had resided with Stump at the apartment. He denied knocking on Stump's door that day and claimed that he entered the apartment with his own key. Berry denied hitting Stump and claimed that she had no visible injuries when he left to speak with Deputy Miller. Berry also denied knowing that there was a no contact

order prohibiting him from contacting Stump. He denied that the signature on the no contact order was his, although on cross-examination he admitted that he had been in court on March 22, 2013, when the order was issued. Berry stated that it was an "Assault IV – wasn't even much a DV [(domestic violence)]."[1] Berry then testified that it was an incident in 2002 that provided a basis for a no contact order, not the one at issue here. Berry then stopped testifying.

A jury found Berry guilty as charged of 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. And in a bifurcated trial, the jury found the State had proved the aggravating circumstances that Berry had committed the offenses shortly after being released from incarceration.

The trial court sentenced Berry to the standard range for both offenses. Berry appeals.

ANALYSIS

Berry appeals, contending that the trial court erred in admitting evidence of prior assaults for the purpose of assessing Stump's credibility when her testimony was consistent with her complaint. Berry also contends that the trial court improperly added two points to his offender score in calculating his sentence.

I. ER 404(b)

Before trial, the trial court granted the State's ER 404(b) motion to admit evidence of Berry's prior acts for purposes of assessing Stump's credibility. 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

[1] 7 Report of Proceedings (RP) at 72.

> may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The trial court admitted the evidence to support the credibility of the witness. Under State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014), the State concedes that the trial court erred in admitting the evidence, but argues that any error was harmless.

Erroneous admission of evidence is reviewed for nonconstitutional harmless error. Gunderson, 181 Wn.2d at 926. Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence and did not affect the outcome of the trial. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Here, it is reasonably probable that the admission of the prior domestic violence did not materially affect the outcome of the trial. The jury heard from both Stump and Berry as well as the deputy who arrived shortly after the incident. The 911 recording played to the jury captured a frantic female, crying before the police arrived.

Deputy Miller's testimony at trial established that the account Stump gave at the scene was consistent with Stump's testimony at trial. Berry's testimony, on the other hand, was not corroborated. At the scene, he told the deputy it was someone other than Stump who had hit him in the head.

Berry's testimony, unlike Stump's, was replete with contradictions and evasions. Berry claimed he had a key to the apartment and that the police took it. He told the deputy that he knew about the no contact order, but testified that he was not aware of it. The no contact order contained Berry's signature, which was similar to that found on his driver's license. There was no evidence that he had a key.

Moreover, Berry's own testimony indicated that he assaulted Stump in 2002. Further, Berry admitted that he was in court, but that the judge only told him to stay away from Stump and did not tell him that he could not go to the residence. Given Berry's erratic testimony and Stump's testimony corroborated by the 911 calls and the deputy, there is no reasonable probability that the jury's verdict would have been different had the ER 404(b) evidence not been admitted. Additionally, because the court gave a limiting instruction on the erroneously admitted ER 404(b) evidence, the jury could only consider it to weigh Stump's credibility, which was supported by the deputy and the 911 calls. See State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) (jury presumed to follow the instructions).

II. Offender Score Calculation

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009), disapproved of on other grounds by State v. Jones, 182 Wn.2d 1, 338 P.3d 278 (2014). Where the State fails to meet its burden and the defendant fails to object, the proper remedy is to remand for resentencing to allow the State to present evidence of the defendant's prior convictions. Mendoza, 165 Wn.2d at 930; see also Jones, 182 Wn.2d at 6-11.

Berry argues that the court erred in assessing two points, one for the misdemeanor conviction for domestic violence harassment and one for the State's assertion that Berry committed the current offense while on community custody.

At sentencing, the State calculated Berry's standard range sentence based on an offender score of seven for domestic violence - burglary in the first degree. The offender

score included one point for each of Berry's three prior adult felony convictions: one point for a 2006 misdemeanor harassment domestic violence conviction; one point for Berry being on community custody at the time of the current offense; and two points for count two the "other current offenses" of domestic violence - felony violation of a no contact order, pursuant to RCW 9.94A.525(21)(a).[2]

The State concedes that the trial court erred in including a point for Berry's 2006 misdemeanor domestic violence conviction because the misdemeanor conviction occurred before August 2, 2011. RCW 9.94A.525(21)(a). We accept the State's concession that it was error to include the misdemeanor conviction.

Next, Berry argues that the State failed to sustain the burden of proof to establish that he was in fact on community custody. Under RCW 9.94A.525(19), if a present conviction is for an offense committed while the offender was under community custody, one point is added to the offender score.

At sentencing, Berry did not acknowledge that he was on community custody when he committed the offense. Neither did the State provide such evidence. A defendant waives his right to challenge the State's failure to prove sufficient facts at sentencing only if that defendant "affirmatively acknowledges" the necessary facts. Mendoza, 165 Wn.2d at 930. As our Supreme Court stressed there is a "need for an affirmative acknowledgement by the defendant of facts and information introduced for the purposes of sentencing." Mendoza, 165 Wn.2d at 928 (emphasis omitted).

The State agrees that Berry did not explicitly state that he was on community custody at the time of the offenses, but contends that his presentence report arguing for

[2] Clerk's Papers at 100.

an offender score of five was made on grounds other than those appealed and that argument necessarily included a point for community custody, effectively acknowledging that he was on community custody at the time of the offense. This was not an explicit acknowledgment under Mendoza. Thus, the State presented insufficient evidence to include the point for community custody. Accordingly, we remand for resentencing.

III. Statement of Additional Grounds

Berry raises a number of issues in a pro se statement of additional grounds for relief, none of which have merit.

First, Berry contends the trial court erred in permitting the State to amend the information charging him with first degree burglary rather than residential burglary. Under CrR 2.1(d), the court may permit the amendment of information any time before a verdict or so long as the defendant is not prejudiced. Berry's counsel in colloquy explained that her client was not happy to be charged with the amended information, however, the defense was not impacted by it. Thus, there was no error.

Berry next argues that the admission of the 911 recording, when the caller was not present to testify, violated his Sixth Amendment right to confront his accuser under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But under State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005), where circumstances, as here, indicate that the primary purpose of the 911 calls were to enable police assistance to meet an ongoing emergency, such statements are nontestimonial. Since the determination of whether or not such statements are testimonial is a factual question, we review their admission under an abuse of discretion standard. State v. Shafer, 156 Wn.2d

381, 395, 128 P.3d 87 (2006). Under the circumstances here, the trial court did not abuse its discretion.

Berry also contends that he was denied the right to interview the complainant in this case. However, although there was some difficulty in arranging time within which defense was afforded the opportunity to interview the complainant, it did in fact occur. Nor is there any merit to Berry's contention that the trial court erred in not dismissing the case because the complainant was unavailable to testify at the specific time set by the prosecution.

Berry next claims that he was not able to cross-examine the deputy. But his counsel specifically chose not to do so. Such a decision is a trial tactic and does not constitute grounds for a claim of ineffective assistance of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001).

Berry claims that he did not comprehend the proceedings; however, his objection rests primarily on the court's refusal to dismiss the case when the complainant witness was unable to show up at 9:00 a.m. This delay in the start of a witness testimony is insufficient to constitute grounds for a mistrial. A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion and will not be overturned unless its decision is manifestly unreasonable or based on untenable grounds. State v. Wade, __ Wn. App. __, 346 P.3d 838, 850-51 (2015). Here, Berry can show no prejudice and thus the trial court did not abuse its discretion.

Berry also claims that he did not understand the proceedings and the nature of the charges against him. The issue of Berry's incompetency first arose when the State sought to introduce a letter purportedly written by Berry and sent to Stump. The letter contained

information that was in the plea negotiations and the issue of his residence at the apartment. Berry became agitated and somewhat combatant with the court repeatedly requesting that Berry stop speaking and to sit down so that his counsel could be heard. Berry agreed to sit and let his attorney speak, but continued to be disruptive. The court ruled in Berry's favor but he refused to settle down so the court could recess. Once Berry was removed, the court recessed.

The next day before presenting its case, defense counsel moved for a mistrial based on Berry's incompetency. The trial court denied the motion. RCW 10.77.060(1)(a) requires a competency hearing whenever there is "reason to doubt" a defendant's competency. A trial court's decision on whether to order a competency examination is reviewed for an abuse of discretion. State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009). A trial court abuses its discretion when its decision is arbitrary or is based upon untenable grounds or made for untenable reasons. State v. McDonald, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). "The determination that an accused is competent to stand trial is within the discretion of the trial court, and will not be reversed on appeal absent manifest abuse of discretion." State v. Hanson, 20 Wn. App. 579, 582, 581 P.2d 589 (1978).

Here, Berry testified on his own behalf. His testimony on direct examination was coherent and demonstrated that he was aware of what had happened at the residence, although he disagreed with the State's version of events. On cross-examination, Berry began to exhibit the combative pose taken earlier. At the conclusion of his testimony, defense counsel again moved for a mistrial on the basis of Berry's inability to understand the proceedings since the State amended the charges to first degree burglary. The trial

court denied this motion. On the record before us, we cannot say that it was an abuse of discretion.

Berry also claims that he was denied due process because he was not present during certain parts of the proceedings. Before closing arguments were presented to the jury and while the court was undertaking administrative tasks outside the presence of the jury, Berry became combative and continued to speak over his attorney and the judge, demanding that he be given an opportunity to testify to the jury. Berry had already testified on his own behalf.

Berry demanded to be taken out of the courtroom. Defense counsel objected to Berry's absence again arguing he was incompetent. The court noted that Berry's intent was to disrupt the proceedings and that he had been repeatedly warned. In the end it was Berry himself who chose to absent himself from the proceedings.

The trial court then instructed the jury and the State gave its closing argument outside of Berry's presence. At the conclusion of the State's argument, the court recessed affording defense counsel an opportunity to confer with her client who still refused to come to court. Berry was afforded multiple opportunities to come to court but chose not to do so. When the jury rendered its verdict, Berry was still absent.

The right to be present at trial is not absolute and where a defendant's behavior has been persistently disruptive, a defendant in effect voluntarily waives the right to be present. State v. Chappel, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001). Here, Berry was repeatedly warned that his behavior would not be tolerated and that court would not continue while he was acting that way. The trial court's decision to continue the trial in

Berry's absence was constitutionally permissible. See Illinois v. Allen, 397 U.S. 337, 345-46, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

Finally, Berry relies on matters outside the record to make his claim that his attorney provided ineffective assistance for failing to investigate evidence regarding his mental health. As such, this claim cannot be considered on a direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (the court will not review matters outside of the trial record on direct appeal).

IV. Conclusion

Because the admission of the ER 404(b) evidence was harmless and Berry's claims in his statement of additional grounds have no merit, we affirm the convictions. But because the trial court miscalculated the offender score, we remand for resentencing.

Trickey, J

WE CONCUR:

Spearman, C.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. 71628-0-I**, 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 or residence address as listed on ACORDS:

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Date: July 14, 2015