Supreme Court No. 96057-7
Court of Appeals No. 351131

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MATHEW PHILLIPS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kevin Mathew Phillips, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 35113-1-III pursuant to RAP 13.3 and RAP 13.4(b)(3) and (4) issued on May 29, 2018. The opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Due process requires the State to prove the defendant's prior convictions at sentencing by a preponderance of the evidence. Does a defendant's signature on the State's offer letter, which was dated six months prior to sentencing, was not signed by defense counsel, and stated that it was subject to change, constitute a binding affirmative acknowledgement of a defendant's criminal history necessarily satisfying the State's burden to prove a defendant's prior convictions for calculating his offender score at sentencing?

2. Does RCW 9.94A.535(2)(c), which allows the court to impose an exceptional sentence where the defendant has committed multiple current offenses and the defendant's high offender score results in *some* of the current offenses going unpunished, require that there be more than one offense that would go unpunished before the court can impose an exceptional sentence under the statute?

C. STATEMENT OF THE CASE

a. Mr. Phillips is ordered to serve an 18-month exceptional sentence for violating a no contact order that was entered against the wishes of the protected party.

Kevin Phillips entered a guilty plea to one count of felony violation of a no contact order for calling his girlfriend, Kelsey Kirkpatric, from the jail. CP 5-15. Ms. Kirkpatric spoke at Mr. Phillips's hearing. RP 24. She explained that she and Mr. Phillips had been together for years, but once when they briefly broke up, there was an incident in which he hit her car windows. RP 24. This incident resulted in a domestic violence protection order that was imposed "automatically," even though she "didn't request it" and "didn't want to." RP 24.

Ms. Kirkpatric was particularly upset the no-contact order carried the label of "domestic violence," because Mr. Phillips never once put a hand on her and she never thought he would. RP 26. She tried to get the no-contact order dropped three different times, but her request was denied each time. RP 25. She didn't think prosecuting him for the violation was fair because she never wanted the no-contact order in the first place. RP 25. She was pregnant with his child when he made

the call from the jail, which is why they both felt compelled to have communication. RP 20, 25.

In addition to being sentenced on this offense, Mr. Phillips was sentenced on two unrelated offenses during the same sentencing hearing: assault in the second degree, domestic violence, an offense for which which he claimed self-defense against his father but was convicted at trial, and possession of a controlled substance, to which he pleaded guilty. RP 2, 10, 35; CP 45.

b. The State failed to produce sufficient evidence to correctly calculate Mr. Phillips's offender score; the Court of Appeals found that Mr. Phillips relieved the State of its burden of proof by signing an offer letter containing his prior convictions that he signed six months prior to sentencing.

The parties disagreed about Mr. Phillips's offender score at sentencing. The defense asserted that Mr. Phillips had an offender score of eight (8) before he was sentenced on these three offenses. CP 40. The State asserted that his score was a nine (9). RP 5.

The trial court first sentenced Mr. Phillips to what it characterized as a "mid-range" sentence of 96 months for the assault in the second degree conviction based on his offender score of nine (9). RP 33; CP 50. The court then sentenced Mr. Phillips on his plea to possession of a controlled substance. RP 35. He received the maximum

sentence of 24 months, which the court ran concurrent to the 96 months already imposed. RP 36.

The court then sentenced Mr. Phillips on his plea to one count of violation of a protection order. RP 36-37. The court imposed a 60-month sentence. CP 20; RP 55. The court ordered 18 months of this sentence to run consecutive to the 96 months imposed for his assault in the second degree conviction, and the remainder concurrently. CP 20-24; 29; RP 55.

On appeal, Mr. Phillips asserted that the State failed to prove his offender score by a preponderance of the evidence. The Court of Appeals found the State met its burden of proof, citing to the "Amended Offer Letter" from the State, which was dated six months prior to Mr. Phillips entering his guilty plea. CP 16. This "Amended Offer Letter" stated it was subject to change, and was signed by Mr. Phillips, not his counsel. CP 16. The Court of Appeals ruled that this outdated summary that bore no other indicia of reliability was "sufficient affirmative acknowledgement" to relieve the State from producing further proof. Slip Opinion at 7.

c. Mr. Phillips's actual offender score remains a guess.

The State's failure to prove Mr. Phillips's offender score by sufficient proof created the problem that Mr. Phillips's actual offender remains disputed. Rather than rule the State failed to meets its burden of proof in establishing Mr. Phillips's prior convictions by a preponderance of the evidence, the Court of Appeals engaged in guesswork about the source of the disputed offender score by surmising the confusion derives from "scrivener's errors" and a mistaken "cut and past[e]" into the judgment and sentence. Slip Op. at 8, 9.

d. The court imposed an exceptional 18-month sentence based on one, not some, offenses that would go unpunished absent an exceptional sentence.

Mr. Phillips also argued that the court was not authorized to impose an exceptional sentence based on the free crimes aggravator when he had one, and not "some" offenses that would go unpunished absent the court imposing an exceptional sentence. RCW 9.94A.535(2)(c). The Court of Appeals relied on a competing dictionary definition of "some" to find that RCW 9.94A.535(2)(c) applies where a defendant's high offender score would allow one crime to go unpunished, failing to consider RCW 9.94's usage of "one or

more," rather than "some" when the Legislature intends to include one and not more than one. Slip op. at 12.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to determine the due process requirements that must be met before a court finds a defendant affirmatively acknowledges his criminal history at sentencing.

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). The State's failure to prove the defendant's prior convictions for sentencing violates due process. *Hunley*, 175 Wn.2d at 915. Bare assertions, unsupported by evidence, do not satisfy the State's burden. *Id.* at 910. The best evidence of a prior conviction is a certified copy of the judgment. A certified copy of a judgment and sentence is the best evidence of a prior conviction. *State v. Rivers*, 130 Wn. App. 689, 701, 128 P.3d 608 (2005).

In *Hunley*, the State presented only a written summary of its understanding of the defendant's criminal history. *Hunley*, 175 Wn.2d at 905. It failed to present "a certified judgment and sentence or other comparable document of record, like a DISCIS criminal history summary." *Id.* at 913. A mere written summary absent any record to

support it does not satisfy the preponderance standard and falls "below even the minimum requirements of due process." *Id.* at 914.

The documentation of Mr. Phillips's criminal history was even more deficient than in *Hunley*. There is no record of a certified judgment and sentence from any of his prior convictions or any other documentation of his criminal history provided by the State. And like Mr. Hunley, Mr. Phillips never affirmatively acknowledged the prosecutor's assertions regarding his criminal history at sentencing. *Id.*

The State and defense disagreed about Mr. Phillips's base offender score. CP 40; RP 5. On appeal, Mr. Phillips asserted he did not affirmatively acknowledge "the facts and information alleged at sentencing" that would have relieved the State of its evidentiary obligations. *Hunley*, 175 Wn.2d at 912. The Court of Appeals disagreed, giving great weight to the "Amended Offer Letter" relied on by the State at sentencing to establish Mr. Phillips's offender score, finding this was evidence that Mr. Phillips affirmatively acknowledged his criminal history. Slip Op. at 8-9; CP 16.

This "amended offer letter" was not signed by Mr. Phillips's attorney. RP 16. Mr. Phillips's signature acknowledges the prior offenses are "true and accurate," but it is not the same list incorporated

into the Judgment and Sentence, because it does not indicate any findings of domestic violence as does the list in the court's judgment and sentence. CP 20. Further, it is dated from September 20, 2016, nearly six months before the sentencing hearing held on March 1, 2017. CP 16. There is no stipulation as to the offender score. CP 16. The letter states that the "criminal history is subject to change." RP 16.

The Court of Appeals ruling shifts the State's burden of proof onto Mr. Phillips: "while Mr. Phillips's trial lawyer calculated his client's offender score differently, he never contested the accuracy of the criminal history signed by Mr. Phillips." Slip op. at 8-9.

The State's failure to provide documentation of Mr. Phillips's prior convictions made accurate calculation of his offender score impossible because of the discrepancies in the "Amended Offer Letter" and the information contained in the judgement and sentence. "A sentencing court acts without statutory authority...when it imposes a sentence based on a miscalculated offender score." *In re Goodwin,* 146 Wn.2d 861, 868, 50 P.3d 618 (2002) (citing *In re Pers. Restraint of Johnson,* 131 Wn.2d 558, 568, 933 P.2d 1019 (1997)).

For sentencing on the offense of violation of a protection order, Mr. Phillips's prior offender score would be calculated according to

RCW 9.94A.525(21), because this conviction for a felony domestic violence offense contained a finding that domestic violence was "pleaded and proven." CP 18-19. Under this provision, "prior" felony domestic violence offenses that are "pleaded and proven" count as two points. *Id.* One of the prior offenses listed in the Judgment in Sentence, felony harassment, contains an asterisk indicating "domestic violence was pled and proved." CP 20. This would count as two points under RCW 9.94A.525(21)(a). But the prior felony DV VNCO conviction contains no such finding that domestic violence was "pleaded and proven." RCW 9.94A.525(21)(a); CP 20. Thus, there is an insufficient basis for determining whether this prior felony DV VNCO felony offense, which does not contain the asterisk with the court's finding, counts as a "domestic violence offense" for Mr. Phillips's sentencing under RCW 9.94A.525(21)(a).

Were domestic violence not pleaded and proven for this offense, the felony DV VNCO offense would be scored as only one point under RCW 9.94A.525(7). Likewise, the gross misdemeanor offense of DV VNCO appears to have been included in his offender score, but it does not have an asterisk indicating that domestic violence was "pleaded and proven" as required to count as one point under RCW

9.94A.525(21)(d). Absent the finding that domestic violence was "pleaded and proven," this misdemeanor offense should not have been included in his offender score. Finally, there is no documentation provided by the State by which to assess whether there was sufficient evidence to find that domestic violence was "pleaded and proven" for the felony harassment charge. CP 20.

And absent the underlying judgment and sentences for Mr. Phillips's prior convictions, it was impossible for the court to fulfill its obligation under RCW 9.94A.525(5)(a)(i), which requires the sentencing court to determine whether prior convictions qualify as the "same criminal conduct:" "the current sentencing court shall determine with respect to other prior adult offenses…whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a)"(emphasis added). [1] This deficiency in the documentation of Mr. Phillips's criminal history is certainly pertinent here, where his criminal history includes convictions for felony harassment and DV-VNCO, which share the same date of sentence and same date of crime, thus raising the

[1] "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

question the court was required to resolve, as to whether these offenses would qualify as "same criminal conduct" under RCW 9.94A.589(1)(a). CP 20.

"A sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *Goodwin*, 146 Wn.2d. at 867-868. Because evidence of Mr. Phillips's prior convictions would change how his offender score should have been calculated when he was sentenced for violation of a protection order, his correct offender score was not determined. A correct offender score was especially crucial here, where a lower base offender score could have meant that the "free crimes" aggravator might not even have applied to him.

The Court of Appeals engages in tortured guesswork to avoid the due process problem of Mr. Phillips being sentenced without the State establishing his criminal history by sufficient proof. The Court of Appeals surmises there was a"scrivener's error" in preparing the criminal history in the judgment and sentence. Slip op. at 8. The Court guesses further that, "it appears likely that" the criminal history in the offer letter was "cut and pasted" into the felony judgment and sentence

"without realizing" that the disputed asterisk mean something different in the two tables. Slip op. at 8-9.

A defendant's due process right to be sentenced based on the correct offender score and the State's burden to prove this are of great constitutional importance. This Court should grant review to determine whether the requirements of due process are met when the State relies on an outdated, unsubstantiated document that is not signed by defense counsel to constitute affirmative acknowledgement of a criminal history. Review is especially warranted where this so-called affirmative acknowledgment leaves an open question about the defendant's actual offender score.

2. This Court should grant review to provide guidance in interpreting whether the "free crimes" aggravator applies when only one offense would go unpunished absent imposition of an exceptional sentence under RCW 9.94A.535(2)(c).

Under the Sentencing Reform Act, when a person is sentenced on two or more offenses at the same time, the sentences on each count must be served concurrently. RCW 9.94A.589(1)(a). Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a).

The Legislature gives courts discretion to impose an exceptional sentence in the case of the "free crimes" aggravator, which is triggered when the defendant's high offender score combines with multiple current offenses that results in "some of the current offenses going unpunished." RCW 9.94A.535(2)(c); *State v. France*, 176 Wn. App. 463, 469, 470, 308 P.3d 812 (2013).

a. The plain language of the statute provides that the "free crimes" aggravator applies only when "some of," or more than one, current offenses would otherwise go unpunished.

Courts have a duty to ascertain the legislature's intent in construing the "free crimes aggravator." *France,* 176 Wn. App. at 470 (citing *Lake v. Woodcreek Homeowner Ass'n,* 169 Wn.2d 516, 526, 243, P.3d 1283 (2010)). Statutory interpretation begins with the statute's plain meaning. *France,* 176 Wn. App. at 471. Where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In an unambiguous statute, a word is given its plain and obvious meaning. *Id.* at 10 (citing *Addleman v. Bd. of Prison Terms & Paroles,* 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)). If a statute's meaning is unambiguous, the inquiry ends. *France*, 176 Wn. App. at 470. A court

determines a statute's plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme as a whole. *State v. Engel,* 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

The "free crimes" aggravator applies when "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c)(emphasis added). Here, the plain meaning of the statute states that it applies only in cases where some of the current offenses would go unpunished absent the exceptional sentence.

"Some" is an ordinary word, and this court can thus look to its dictionary definition. *Alvarado,* 164 Wn.2d at562. ("When a term has a well-accepted, ordinary meaning, we may consult a dictionary to ascertain the term's meaning."). The word "some" when followed by "of," functions as a quantifier.[2] As a quantifier it means, "a few of them but not all of them."[3] "A few" is used to indicate a small number of

[2] COLLINS ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com/us/dictionary/english/some_1 (last accessed 9/15/2017)
[3] COLLINS ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com/us/dictionary/english/some_1 (last accessed 9/15/2017) (description of some as quantifier).

people or things.[4] A small group of things is necessarily more than one thing. The Court of Appeals relied on a competing dictionary definition of "some," to include "one," rather than looking to the legislature's use of the term throughout the chapter. Slip Op. at 12.

Analysis of the use of quantifiers in the Sentencing Reform Act shows the Legislature used the quantifier "some of," differently than "one or more." *State v. Mathers*, 193 Wn. App. 913, 919, 376 P.3d 1163 (2016) ("where the legislature uses different language within a provision, a different intent is indicated."). For example, the legislature describes "one or more crimes" in RCW 9.94A.730, "one or more of the facts" in RCW 9.94A.537, and "one or more violent acts" in RCW 9.94A.562. By contrast, like in RCW 9.94A.535(2)(c), "some of" is used to describe a plurality in RCW 9.94A.589: "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime."(emphasis added).

A plain reading of the statute then necessarily leads to the conclusion that RCW 9.94A.535(2)(c) does not apply when only one

[4] COLLINS ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com/us/dictionary/english/few (last accessed 9/15/2017) (definition of "a few.")

crime would go unpunished, because the Legislature did not employ the quantifier "one or more." Because the plain language of the statutory provision is unambiguous, the court's inquiry should end here. *State v. Gonzalez,* 168 Wn.2d 256, 263, 226 P.3d 131 (2010). And because courts are required to "assume that the Legislature meant exactly what it said and apply the statute as written," RCW 9.94A.535(2)(c) may only apply in instances where more than one crime would go unpunished. *State v. Roggenkamp,* 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (citing *In re Recall of Pearsall–Stipek,* 141 Wn.2d 756, 767, 10 P.3d 1034 (2000)).

b. <u>The trial court imposed an exceptional sentence based on only one crime that would go unpunished under RCW 9.94A.535(2)(c).</u>

The trial court erred in finding that the RCW 9.94A.535(2)(c) applied to Mr. Phillips, where only one offense, and not "some of" his current offenses would have gone unpunished as required by statute.

As argued in section above, there was insufficient evidence upon which to accurately determine Mr. Phillips's offender score. However, Mr. Phillips was sentenced on the offense of violation of a protection order based on the State's assertion that his offender score was 11. CP 20; RP 43. This was two (2) points above the sentencing

grid's standard range. *France*, 176 Wn. App. at 468 ("Where a defendant has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range").

The State's contention that he had an offender score of eleven (11) when sentenced on the offense of felony violation of a protection order supports the Defense's position that he started with an offender score of eight (8) prior to being sentenced on the three offenses, because this is the only possible way to arrive at an offender score of eleven (11). When he was sentenced on the offense of felony of a protection order, his offender score would have been calculated under RCW 9.94A.525(21), because domestic violence was pleaded and proven for this offense. CP 19. This means he would have received one (1) point for the offense of possession of a controlled substance under RCW 9.94A.525(7) and two (2) points for the offense of assault in the second degree, domestic violence. RCW 9.94A.525(21)(a). He was accordingly sentenced on the offense of assault in the second degree with an offender score of nine (9). CP 45. This one offense was scored with two (2) points. When Mr. Phillips was sentenced for the offense of violation of a protection order, this was the only offense that was

sentenced in excess of the sentencing grid's maximum offender score of nine (9). CP 19. The trial court thus imposed this exceptional sentence where he had only one offense—the felony violation of a protection order—that would go unpunished if the court had not imposed an exceptional sentence. CP 20; RP 55. A plain reading of this statute did not permit its application because Mr. Phillips's offender score resulted in only one offense, and not "some of" his current offenses to go unpunished as required by statute. Nevertheless, the Court of Appeals ruled that it would be an "arbitrary distinction" to allow one crime to go unpunished, and not two. Slip Op. at 13.

The correct interpretation of the statute that allows a trial court to impose an exceptional sentence is certainly a matter of substantial public concern that warrants review by this Court, as it will affect any person who is sentenced to additional prison time for having one additional crime that would go unpunished under RCW 9.94A.535(2)(c). RAP 13.4(b)(4).

E. CONCLUSION

This Court should grant review to determine whether a defendant's right to due process is violated when the State is relieved of its burden of proof to establish a defendant's offender score based on

the defendant signing an offer letter six months prior to sentencing that is not signed by defense counsel, and reflects different information about the criminal history than is contained in judgment and sentence relied by the trial court for sentencing. This Court should also grant review to provide guidance to lower courts in the correct application of RCW 9.94A.535(2)(c).

Respectfully submitted this the 27th day of June 2018.

s/ Kate L. Benward

_____

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

STATE OF WASHINGTON,	)	
	)	No. 35113-1-III
Respondent,	)	
	)	
v.	)	
	)	
KEVIN MATHEW PHILLIPS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Kevin Phillips appeals the exceptional partially-consecutive sentence imposed for his conviction on plea of guilty to felony violation of a domestic violence protection order. He argues that the State failed to prove his criminal history and that the exceptional sentence was not authorized by statute. We reject Mr. Phillips's argument that his signed agreement to his criminal history was not a sufficient acknowledgment and hold that RCW 9.94A.535(2)(c) applies where a defendant's high offender score would allow a single crime to go unpunished. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On February 15, 2017, the Benton County Superior Court held a sentencing hearing on three criminal matters involving Kevin Phillips. The first matter addressed by the court was Mr. Phillips's conviction following a jury trial for the second degree assault of his father, a domestic violence offense. The second was Mr. Phillips's plea of guilty to possession of a controlled substance. The third and final matter was this one, in which Mr. Phillips entered a plea of guilty to violation of a no contact order.

Among material presented to the court in connection with the sentencings and included in our record on appeal is a document with the heading, "AMENDED OFFER LETTER," dated September 20, 2016. Clerk's Papers (CP) at 16. It included the following table, captioned "PRIOR OFFENSE(S) (DATE) – DISPOSITION":

	CRIME	DATE OF SENTENCE	SENTENCING COURT (*County and State*)	DATE OF CRIME	A or J Adult, Juvenile	TYPE OF CRIME
1	UPCS - pending	PENDING	Benton County, WA	March 27, 2016	A	NV
2	Assault 2 - pending	PENDING	Benton County, WA	July 13, 2016	A	V
3	Assault 3rd	September 5, 2012	Benton County, WA	June 21, 2012	A	NV
4	Escape 2nd	September 5, 2012	Benton County, WA	June 20, 2012	A	NV
5	Possession of a Stolen Vehicle	June 14, 2012	Benton County, WA	April 24, 2012	A	NV
6	Felony Harassment*	March 7, 2013	King County, WA	April 21, 2012	A	NV
7	DV VNCO	March 7, 2013	King County, WA	April 21, 2012	A	NV
8	DV VNCO	November 9, 2011	King County, WA	October 20, 2011	A	NV

***Confirmed on CC at time of offense**

Id. It was stamped "DEFENSE COPY" and was signed by Mr. Phillips.

A signed criminal history was mentioned first during the first sentencing. The court allowed the prosecutor to approach, and we infer that she provided the court with sentencing materials, copies of which she had also provided to Shelley Ajax, who represented Mr. Phillips in the first two sentencings, but not the third.[1] The following statements were made:

> THE COURT: . . . Miss Ajax, just let me know when you've had the opportunity to review that, and provide that to Mr. Phillips.
> MS. LONG: Does your Honor have a *signed copy of the criminal history* as well as the appeal rights form?
> THE COURT: I have in this file, the trial file. I don't believe I have one. *There is one in the other file, the order violation file, Mr. Swanberg's.*

Report of Proceedings (RP)[2] at 4 (emphasis added).

During the second sentencing, the following reference was made to a signed criminal history:

> MS. LONG: Your Honor has the *signed criminal history* on that one as well?
> THE COURT: Yes, for I believe both of the pleas we have signed criminal history.

RP at 36 (emphasis added).

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[1] In the first two matters, the State was represented by Julie Long and Mr. Phillips was represented by Shelley Ajax. In the third matter, the State was represented by Diana Ruff and Mr. Phillips was represented by Samuel Swanberg.

[2] All references to the report of proceedings are to the report of proceedings taking place on March 1, 2017.

During the sentencing in this matter, prosecutor Diana Ruff pointed to matters reflected in Mr. Phillips's criminal history several times. Her amended offer letter with its signed criminal history appears in the trial court record as an attachment to Mr. Phillips's statement on plea of guilty. The plea statement refers to the attachment:

> The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete.

CP at 6. No criminal history other than the history included in the amended offer letter is attached to the plea statement.

In arguing for the State's recommended sentence, Ms. Ruff pointed out that the eight crimes identified in Mr. Phillips's criminal history resulted in an offender score of 11 in this case, "and that's obviously because domestic violence cases are scored differently than others, and he was also on community custody at the time [the offense in the case assigned to me] was committed." RP at 37. With an offender score of 9-plus, the minimum and maximums of the standard range were both 60 months. Because Mr. Phillips had been convicted to a total period of confinement of 96 months for the two convictions sentenced earlier in the hearing, Ms. Ruff asked for an exceptional sentence, relying on the "free crimes" aggravator, RCW 9.94A.535(2)(c). She asked that the full 60 months, or at least some of it, run consecutive to Mr. Phillips's other current sentences.

For his part, Mr. Phillips asked for an exceptional mitigated sentence under RCW 9.94A.535(1)(a), on the basis that the party protected by the no contact order that was violated—his former girlfriend, who was pregnant with his child—was to a significant degree a willing participant. The sentencing court had already heard from her in the first sentencing, when she affirmed that she had opposed entry of the no contact order imposed in connection with a prior conviction of Mr. Phillips and had sought, unsuccessfully, to have it lifted.

The sentencing court found substantial and compelling reasons for an exceptional aggravated sentence and ordered that 18 months of Mr. Phillips's 60 month sentence for the crime charged in this case be served consecutive to the sentences for his other current offenses. The court emphasized what it characterized as Mr. Phillips's "consistent history of violating [court orders] whenever . . . you think that what you want is more important than following the rules." RP at 54.

Mr. Phillips appeals.

ANALYSIS

Mr. Phillips makes two assignments of error. He argues first that the sentencing court violated his due process rights by sentencing him to an exceptional sentence based on an offender score the State failed to prove. Second, he argues that we should construe the "free crimes" aggravator to apply only when more than one current offense would otherwise go unpunished.

By affirmatively acknowledging his criminal history, Mr. Phillips waived the factual error he asserts for the first time on appeal

A defendant's offender score, together with the seriousness level of his current offense, dictates the standard sentence range used in determining his sentence. RCW 9.94A.530(1). To calculate the offender score, the court relies on its determination of the defendant's criminal history, which the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, defines as "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11). Prior convictions result in offender score "points" as outlined in RCW 9.94A.525. When, as here, the current offense is a felony domestic violence offense, each adult prior felony conviction involving domestic violence that was "pleaded and proven after August 1, 2011," counts as two points and certain prior misdemeanors where domestic violence was pleaded and proven count as one point. RCW 9.94A.525(21). To arrive at an offender score of 11, the State necessarily attributed two points, as domestic violence offenses, to Mr. Phillips's current second degree assault conviction and to his March 2013 conviction for felony violation of a no contact order.

The State bears the burden of proving a defendant's prior convictions at sentencing by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). The State's burden is "'not overly difficult to meet' and may be satisfied by evidence that bears some 'minimum indicia of reliability.'" *In re Pers.*

Restraint of Adolph, 170 Wn.2d 556, 569, 243 P.3d 540 (2010) (quoting *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999)). If there is an affirmative acknowledgment by the defendant of facts and information introduced for the purposes of sentencing, no further proof from the State is necessary. *State v. Mendoza*, 165 Wn.2d 913, 927-28, 205 P.3d 113 (2009).

Mr. Phillips contends that his signed criminal history contained in the amended offer letter is an insufficient affirmative acknowledgment of his criminal history because it is dated September 20, 2016, almost six months before his sentencing date; it is not signed by his lawyer; it does not bear the court's "filed" stamp; and it states that it is subject to change.

None of these asserted shortcomings prevents Mr. Phillips's signature, which attests to the truth and accuracy of his criminal history in the amended offer letter, from being a sufficient affirmative acknowledgement. It is unsurprising that the amended offer letter bears no "filed" stamp, since it serves as the 12th and 13th page attachment to Mr. Phillips's statement on plea of guilty. Mr. Phillips cites no authority that an acknowledgement is insufficient unless signed by a defendant's trial lawyer or that it must be executed at any particular time. While the prosecutor's amended offer letter stated that the criminal history was subject to change, there is nothing to suggest that it ever did change. While Mr. Phillips's trial lawyer calculated his client's offender score

differently, he never contested the accuracy of the criminal history signed by Mr. Phillips. Given Mr. Phillips's affirmative acknowledgment, his sufficiency challenge fails.

His argument that the calculation of the offender score was in error because some of his prior convictions were double counted without a showing that domestic violence was pleaded and proven was not preserved. RAP 2.5(a); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (waiver may be found where a defendant stipulates to incorrect facts). While not required to reach the issue, we point out that review of the record strongly suggests that this challenge is premised on a scrivener's error made in preparing the criminal history in the judgment and sentence in this case.

Among standard Washington court forms is one entitled "Additional Current Offenses and Current Convictions Listed Under Different Cause Numbers Used in Calculating the Offender Score." Form WPF CR 84.0400 A2.1 (Rev. 7/2011).[3] It includes a table for use when convictions imposed in different cases are sentenced at the same time, as happened here, and reads, in substance:

> 2.1b The defendant has the following additional current convictions listed under different cause numbers used in calculating the offender score:

[3] http://www.courts.wa.gov/forms/?fa=forms.static&staticID=14 #CertofRestoreofOpp.

Crime		*Cause Number*	*Court (county & state)*	*DV* Yes*

*** DV:Domestic Violence was pled and proved.**

Form WPF CR 84.0400 A2.1 (some emphasis added) (some boldface omitted). This appears to be the table imported into Mr. Phillips's judgments and sentences in this case and in case no. 16-1-00740-0, the second degree assault conviction that was sentenced earlier the same day.

The felony judgment and sentence in the second degree assault case, no. 16-1-00740-0, discloses that domestic violence was alleged and proved in that case. *See* CP at 46. The criminal history in that judgment and sentence also indicates, by asterisks, that domestic violence had been pleaded and proven when Mr. Phillips was sentenced for felony violation of a no contact order in March 2013 and when he was sentenced for violation of a no contact order, a gross misdemeanor, in November 2011. *See* CP at 48. There is no indication that domestic violence was pleaded and proven when he was sentenced for felony harassment in March 2013. *See id.*

In the judgment and sentence in this case, however, the sole asterisk appears misplaced. Although an asterisk is supposed to signify that domestic violence was pleaded and proven, an asterisk appears next to only Mr. Phillips's March 2013 felony harassment conviction. This is identical to the placement of the single asterisk in the

signed criminal history included in the September 2016 amended offer letter to Mr. Phillips reproduced above; there, however, one can see that the asterisk signified that Mr. Phillips was serving community custody ("Confirmed on CC") at the time of his offense. CP at 16. It appears likely that the criminal history table from the amended offer letter was "cut and pasted" into Mr. Phillips's felony judgment and sentence without realizing that an asterisk signified something different in the two tables. We doubt that domestic violence offenses were double counted in error.

A single offense that will go unpunished because of multiple current offenses is sufficient for application of the free crimes aggravator

Mr. Phillips's second assigned error is that his exceptional sentence was not authorized by statute. Generally, sentences for multiple current offenses, other than serious violent offenses, run concurrently. RCW 9.94A.589(1)(a)-(b). Consecutive sentences for multiple current offenses are thus exceptional. *State v. Newlun*, 142 Wn. App. 730, 735 n.3, 176 P.3d 529 (2008). They may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a).

Mr. Phillips argues that properly construed, RCW 9.94A.535(2)(c), the statutory aggravator on which the sentencing court relied, applies only when, as a result of a defendant's high offender score, more than one current offense will go unpunished. In his case, only one crime would have gone unpunished.

A sentence outside the standard sentence range for an offense is subject to appeal. RCW 9.94A.585(2). To reverse such a sentence, we must find "(a) [e]ither that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4). Where the challenge is to the trial court's authority to impose an exceptional sentence for the reasons it identifies, our review is de novo. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) (citing *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005)).

RCW 9.94A.535(2)(c) provides that the trial court may impose an aggravated exceptional sentence where "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." The possibility of an offense going unpunished arises because a standard range sentence reaches its maximum at an offender score of "9 or more." RCW 9.94A.510. As a result, where a defendant has multiple current offenses that result in an offender score greater than 9, further increases in the offender score do not increase the standard sentence range. *France*, 176 Wn. App. at 468.

Focusing on the statute's reference to "*some of* the current offenses going unpunished" and citing a dictionary's definitions, Mr. Phillips asserts that as a quantifier, "some of" means "a few of them" and "'a few' is used to indicate a small number of

people or things." Br. of Appellant at 13-14. From this, he argues that "*some* of the current offenses" in RCW 9.94A.535(2)(c) cannot mean "*one* of the current offenses." Because the State's argument at his sentencing hearing was that only the one crime charged in this case would go unpunished by a standard range sentence, Mr. Phillips argues that the free crimes aggravator could not apply.

We can accept the definitions cited by Mr. Phillips and still conclude that "a small number of . . . things" can be one thing. And among definitions for "some" provided by another dictionary are "**2 :** being *one*, a part, or an unspecified number of something (such as a class, group, species, collection, or range of possibilities) named or contextually implied," and "**4 :** being *one of*, one kind of, or an undetermined proportion of **:** being always at least one but often a few and sometimes all of." MERRIAM-WEBSTER UNABRIDGED DICTIONARY 2171 (1993) (some emphasis added). When we think about quantities that do not qualify as "some," we think of "all" and "none." By contrast, "one" plainly qualifies as "some."

In *France*, this court construed the free crimes aggravator, pointing out that our primary duty is to ascertain and carry out the legislature's intent and that we begin with plain meaning. 176 Wn. App. at 469. "[A] statute is not ambiguous merely because different interpretations are conceivable." *Id.* at 470.

Given the commonly understood meaning of "some," RCW 9.94A.535(2)(c) applies where a defendant's high offender score would allow one crime to go unpunished.

And were we to resort to canons of statutory construction, a canon that applies here is that we will not infer a legislative intent to make arbitrary distinctions. *Guinness v. State*, 40 Wn.2d 677, 693-94, 246 P.2d 433 (1952) (Donworth, J., dissenting). It would be an arbitrary distinction for the legislature to allow one crime to go unpunished, but not two.

Mr. Phillips's sentence is affirmed.

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

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 35113-1-III
	)	
KEVIN PHILLIPS,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JUNE, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] KEVIN PHILLIPS 816521 OLYMPIC CORRECTIONS CENTER 11235 HOH MAINLINE FORKS, WA 98331	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JUNE, 2018.

X_____

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