Supreme Court No. 99364-5
(COA No. 80127-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CAMERON ELLIS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Cameron Ellis, petitioner here and appellant below, asks this Court to accept review of the decision by the Court of Appeals terminating review, as amended on reconsideration and dated November 23, 2020, a copy of which is attached. RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. When the prosecution violates the bedrock constitutional guarantee that an accused person must be confronted by the witnesses against him, it must prove beyond a reasonable doubt the error did not affect the verdict. In violation of Mr. Ellis' right to confrontation, a police officer repeated the complainant's post-incident allegations to the jury as a substitute for her testimony. The Court of Appeals deemed the error harmless by noting there was some other evidence about the incident. It never acknowledged this other evidence came from a single witness who disavowed her original statements and testified at trial that she did not see any crime occur. Did the Court of Appeals misunderstand and disregard the controlling constitutional test for assessing a violation of the Confrontation Clause, which requires

reversal when there is conflicting testimony on the material evidence that was admitted in violation of the right to confrontation?

2. Should this Court grant review of the Court of Appeals' incorrect application of the harmless error test for a Confrontation Clause violation when the Court of Appeals' confusion stems from this Court's failure to adhere to the test mandated by the United States Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)?

3. The erroneous admission of hearsay evidence requires reversal when there is a risk of prejudice and it is likely the jury placed some value on the improperly admitted evidence. The trial court improperly admitted hearsay from a detective to establish a key fact showing Ms. Spellman was the person Mr. Ellis spoke to on the phone in violation of a no-contact order. The Court of Appeals deemed the error harmless based on ambiguous testimony from a defense witness. Where a detective repeated inadmissible hearsay, and it is well established that jurors will trust testimony from a police detective, did the Court of Appeal disregard the requirement that the court must reverse where there is a risk of prejudice from improperly admitted testimony and the jury may have relied on this testimony?

4. If flawed jury instructions permit the jury to use the same act as the basis of two convictions for the same crime, the appellate court must reverse one of the convictions as a double jeopardy violation unless the jurors unambiguously relied on separate acts as the basis of both convictions. The jury convicted Mr. Ellis of two identical charges of felony violation of a no-contact order on the same day. The record contains no evidence the jurors based their verdicts on unanimous agreement of separate acts. Did the Court of Appeals impermissibly forgive a double jeopardy violation and dilute the rigorous standard of review required by this Court's precedent?

C. STATEMENT OF THE CASE

Brandi Spellman used to date Cameron Ellis, according to Ms. Spellman's friend Terri Drake. RP 363.[1] A court order entered in 2017 prohibited contact between Ms. Spellman and Mr. Ellis. Ex. 2.

In March 2018, Ms. Drake called 911 and reported that a man was hitting a woman and took her purse. RP 372. While Ms. Drake was on the phone with 911, she said the incident ended and the man left. RP 374.

[1] The verbatim report of proceedings consists of four consecutively paginated volumes of proceedings.

Officer Matthew Chapman was dispatched to respond to this 911 call. RP 331-32. According to Officer Chapman, Ms. Spellman told him Mr. Ellis grabbed her purse when she was kicking him to get him away from her car. CP 164; RP 336-39. She said Mr. Ellis punched her several times before she drove away with Ms. Drake. CP 165. Officer Chapman agreed that Ms. Spellman had her purse with her when he spoke to her, but thought she did not have her wallet. RP 338.

Ms. Spellman did not testify at Mr. Ellis' trial. Officer Chapman recounted Ms. Spellman's statements to him about the incident to the jury. RP 331-39.

Ms. Drake testified and denied seeing Mr. Ellis hit or steal from Ms. Spellman. RP 366-67. She said she could not identify the man she saw speaking to Ms. Spellman, although when speaking to police in March she had described Mr. Ellis as punching Ms. Spellman. RP 366-67, 384.

Mr. Ellis was charged with second degree robbery and felony violation of a no-contact order, which was elevated to a felony based on the alternative means of committing an assault or having two prior convictions for violation of a no-contact order. CP 121-22.

In April and May 2018, Mr. Ellis was in the King County jail. RP 433. The jail recorded phone calls to the phone number 206-437-8249. RP 488. Three of these phone calls were from Mr. Ellis' booking account and a fourth was from another person's account. RP 434-35, 439, 448-49, 454. None of the speakers' names were mentioned during the calls. RP 437-38 442-44, 455-58, 461-64. Detective Wheeler read from police reports written by another officer that listed this phone number as the number Ms. Spellman told the police was her number. RP 488-90. The detective said multiple police reports listed this number as belonging to Ms. Spellman. RP 490-91. The prosecution charged Mr. Ellis with four counts of felony violation of a no-contact order based on telephone calls made from the jail. CP 121-24.

Without Ms. Spellman's trial testimony, the defense objected to the prosecution's use of Ms. Spellman's statements to the police as a violation of his right to confront his accuser. RP 69-70, 312, 336, 390, 556-58. The court overruled these objections. RP 70; *see* RP 296, 558.

In its closing argument to the jury, the prosecution argued Ms. Spellman was "speaking volumes" by not coming to court to testify. RP 609. It told the jury that Ms. Spellman's failure to testify in person was her way of "crying out for help." RP 609.

The Court of Appeals ruled that the prosecution's reliance on Officer Chapman's testimony repeating of Ms. Spellman's post-incident statements to the jury violated the Confrontation Clause. Slip op. at 12-13.[2] But it ruled the constitutional error was harmless because Ms. Drake had testified about the incident, without mentioning that Ms. Drake insisted at trial that she did not see Mr. Ellis take anything or use force against Ms. Spellman. Slip op. at 13.

The Court of Appeals also ruled the prosecution improperly relied on hearsay testimony to establish Ms. Spellman's phone number, which was critical evidence in proving Mr. Ellis spoke to Ms. Spellman on the phone in violation of a no-contact order. Slip op. at 14. But it ruled this error was harmless because a defense investigator testified that this phone number was the number she had for Ms. Spellman, even though the investigator never said she confirmed this number belonged to her or used this number to contact her. Slip op. at 16.

The Court of Appeals also agreed there was a potential double jeopardy violation because two counts of felony violation of a no-contact order involved phone calls made on the same day. Slip op. at

[2] The Court of Appeals also reversed another felony no-contact order conviction pertaining to alleged contact in January 2018 due to a Confrontation

17. The jury received identical instructions for these two charges and the court never instructed them to rest their convictions on separate acts. *Id*. The Court of Appeals deemed this error harmless because there was some evidence of separate phone calls. Slip op. at 18.

The Court of Appeals denied Mr. Ellis' motion to reconsider its original opinion issued on July 20, 2020, but amended the original opinion in part on reconsideration.

The facts are further explained in Appellant's Opening Brief, in the relevant factual and argument sections, and are incorporated herein.

D. ARGUMENT

1. The Court of Appeals applied the wrong test to assess the harmfulness of a confrontation clause violation where there is conflicting evidence about what happened during the incident

a. Unlike a sufficiency of the evidence review, a Confrontation Clause violation is not harmless beyond a reasonable doubt when there is conflicting evidence about what happened from the only eyewitness.

When the prosecution relies on testimonial out-of-court statements from an accuser who does not testify, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S.

Clause violation. That conviction is not at issue in this petition.

18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); U.S. Const. amend. VI; Const. art. I, § 22.

Confrontation clause violations are not assessed by merely weighing the testimony offered at trial, because the error stems from the defendant's inability to challenge the out-of-court accusations by confronting the accuser. In this context, the constitutional error requires the court to examine the importance of cross-examination and the significance of the unconfronted allegations. *State v. Wilcoxon*, 185 Wn.2d 324, 335-36, 373 P.3d 224 (2016), citing *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

As the United States Supreme Court has explained, in the context of a Confrontation Clause error, the reviewing court must examine certain factors, including: (1) the "importance of the witness's testimony" in the prosecution's case; (2) whether the out-of-court statements were cumulative; and (3) the presence conflicting testimony on material points, as well as the overall strength of the prosecution's case. *Van Arsdall,* 475 U.S. at 684.

"The correct inquiry" must "assum[e] that the damaging potential of cross-examination were fully realized." *Id*. It also must acknowledge there was conflicting evidence about central elements of

the charges: that Ms. Spellman's purse was stolen and she was assaulted. It must weigh the crucial nature of Ms. Drake's testimony, as she was the only witness with firsthand knowledge, and yet she gave entirely inconsistent testimony about whether Mr. Ellis committed the charged crimes.

The Court of Appeals did not apply the controlling constitutional test in the context of a Confrontation Clause violation. Instead, it recited one version of the evidence provided by Ms. Drake, ignored her in-court testimony that disavowed and cast doubt on that out-of-court evidence, and ended its inquiry there.

b. The Court of Appeals misapplied the harmless error test for a Confrontation Clause violation.

The Court of Appeals articulated the constitutional harmless error test as asking whether it believes beyond a reasonable doubt "the jury would have reached the same result in the absence of the error." Slip op. at 11, citing *State v. Fisher*, 185 Wn.2d 836, 847, 374 P.3d 1185 (2016). It also explained the test as based on its consideration of whether the "untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.*

Then the Court of Appeals ruled "we conclude the jury would have reached the same result without the error." Slip op. at 13. It cited Ms. Drake's 911 call alleging Mr. Ellis took Ms. Spellman's purse, and her post-incident statement to police that alleged Mr. Ellis grabbed Ms. Spellman to stop her from leaving, pulled on her purse, and punched her before walking away with the purse. Id.

But the Court of Appeals did not even mention the conflicting evidence about Ms. Drake's allegations and absence of any other corroborating evidence. Ms. Drake testified in court, before the jury, under oath, and gave a different description of what she saw.

While Ms. Drake's 911 call and her statement to the police said, "he's got her purse" or he "walked away with her purse," in court and under oath, Ms. Drake said Ms. Spellman's purse "was with us on the floor" and she did not see Mr. Ellis take her property. RP 374, 384-85. Officer Chapman confirmed that Ms. Spellman had her purse with her when he interviewed her. RP 337.

There was also conflicting evidence about whether Mr. Ellis was present during this incident at all. Ms. Drake testified that she was unable to see the person Ms. Spellman was interacting with and she did

not know if it was Mr. Ellis. RP 366. She did not see the person hit Ms. Spellman. RP 367. But Ms. Drake said otherwise to the police. RP 384.

Officer Chapman's impermissible testimony repeating Ms. Spellman's accusations were far more damning and likely affected the jury. In this improperly admitted statement, she gave details about an argument with Mr. Ellis, being kicked and punched, and having her purse and wallet grabbed by Mr. Ellis. RP 336-37.

There was also conflicting evidence about any assault occurring. As the basis of a no-contact order conviction, the jury was instructed on statutory alternative allegation of an assault occurring during the violation of a no-contact order. CP 21-22, 86. In court, Ms. Drake denied seeing an assault and Officer Chapman said no injuries were visible. RP 338, 367. There is conflicting and contrary evidence about an assault, which was a material part of the improperly admitted, unconfronted allegations.

The Court of Appeals disregarded the central question on which a Confrontation Clause violation hinges. The appellate court must examine the damaging potential of cross-examination had it occurred, must weigh the importance of the improperly admitted evidence in case, and must assess the existence of conflicting testimony on the material

issues before the jury. *Van Arsdall*, 475 U.S. at 684; *Wilcoxon*, 185 Wn.2d 335-36. The harmless error analysis conducted by the Court of Appeals is inadequate and disregards the essential role of the appellate court in reviewing a constitutional error. Slip op. at 13.

The appellate court may not ignore the likelihood the jury relied on Officer Chapman's rendition of his post-incident interview with the complaining witness. It may not assume the jury credited Ms. Drake's statements to the police and 911, and disregarded Ms. Drake's trial testimony that contradicted and disavowed her ability to see what was going on or know whether Mr. Ellis was being there. Slip op. at 13; RP 366-67, 370, 385.

When the prosecution bears the burden of proving a confrontation clause violation harmless, the reviewing court may not simply credit some of the testimony and decide the error is harmless. These out of court allegations were the key material issue in this case. Had Mr. Ellis been able to confront and cross-examine his accuser, the jury may not have believed her initial allegations were true, particularly when she claimed her purse was taken but her purse was visible at the scene later. The prosecution has not proved this error is harmless beyond a reasonable doubt and both convictions stemming from this

March 18th incident that relied on these out-of-court allegations must be reversed.

c. This Court should take review because this Court's precedent mislead the Court of Appeals to dilute the threshold for finding of Confrontation Clause error harmless.

The Court of Appeals relied on language used by this Court in *Fisher* to explain the harmless error test it must apply. Slip op. at 11, 13. *Fisher* is misleading, because it directs the court to look at the "untainted evidence" without also requiring the court to look at the possibility cross-examination would have been damaging, and without requiring the court to weigh conflicting evidence and assess whether the unconfronted allegations spoke directly to the key issues before the jury. *See Fisher*, 185 Wn.2d at 847.

Fisher does not contain the core framework of a Confrontation Clause violation. *See Van Arsdall*, 475 U.S. at 684. It does not focus the appellate court on the existence of inconsistent testimony and the likelihood the jury used the improperly admitted evidence in deciding to credit the prosecution's case. *Id*. Substantial public interest favors review because this Court's precedent mislead the Court of Appeals in

how to apply the constitutional harmless error test mandated by a Confrontation Clause violation.

2. The Court of Appeals misconstrued the harmful effect of improperly admitted hearsay evidence from a lead detective on a material fact.

When evidence is erroneously admitted, it undermines the verdict when there is "a risk of prejudice" and the court cannot "know what value the jury placed upon the improperly admitted evidence." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

In the context of an evidentiary error, the harmless error test requires a showing of minor significance for the error to be harmless. *See State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004), quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

It is also well-established that testimony from police officers carry an "aura of reliability." *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). Jurors are likely to consider an officer's testimony trustworthy and this testimony is "especially likely to influence a jury." *City of Seattle v. Levesque*, 12 Wn. App. 2d 687, 711, 460 P.3d 205, *rev. denied*, 195 Wn.2d 1031 (2020).

The Court of Appeals disregarded this harmless error test and refused to believe the jury relied on testimony from a detective that was admitted over defense objection.

Mr. Ellis was convicted of four counts of felony violation of a no-contact order based on phone calls allegedly made from the jail by Mr. Ellis to Ms. Spellman. The only evidence the prosecution presented in its case-in-chief that Ms. Spellman was the person Mr. Ellis called came from a detective's hearsay testimony that this phone number belonged to Ms. Spellman, which the detective repeated several times and mentioned this number was contained in multiple police reports as belonging to Ms. Spellman. RP 488, 490-91.

This testimony was critical because the people on the phone never identified themselves and no one verified through phone records or other firsthand knowledge that this was Ms. Spellman's phone number. RP 600.

The Court of Appeals correctly ruled the detective's testimony that this phone number belonged to Ms. Spellman was improperly admitted hearsay because the detective was simply reading from police reports and had no knowledge of her number. Slip op. at 14-15. But it held this key evidence did not affect the trial, relying solely on a

defense investigator's testimony on cross-examination that this was the telephone number she had "on file" for Ms. Spellman. Slip op. at 16.

The Court of Appeals misapplied the controlling harmless error test. It disregarded the established principle that jurors are likely to credit and trust a detective's testimony. *See Montgomery*, 163 Wn.2d at 595; *Levesque*, 12 Wn. App. 2d at 711. It treated the evidence from the investigator in the light most favorable to the prosecution and mischaracterized what she said. Investigator Verla Viera never used this phone number to communicate with Ms. Spellman. RP 515-16. She had no idea if it was Ms. Spellman's number; it was simply a number for Ms. Spellman in her file. *Id*.

It is abundantly clear the jury relied on the detective's testimony that these calls were made to Ms. Spellman's phone number. After the court overruled the defense objection to the detective's hearsay, the detective repeated that multiple police reports listed this same phone number as Ms. Spellman's number, emphasizing this hearsay and giving it the imprimatur of the police. RP 488, 490-91. The only other evidence connecting the phone number to Ms. Spellman came from a defense investigator who had never checked to see whether this was a number Ms. Spellman used. RP 515-16.

The harmless error test the Court of Appeals used was essentially a sufficiency review, taking the evidence the light most favorable to the prosecution and deciding whether any juror could have convicted him. But this is the wrong test. The Court of Appeals did not, as it must, assume there was "a risk of prejudice" from the detective's testimony or acknowledge it cannot "know what value the jury placed upon the improperly admitted evidence." *Salas*, 168 Wn.2d at 673; *Thomas*, 99 Wn.2d at 105. It did not admit the significance of this testimony as both an important fact and coming from a source the jury was likely to trust. *Thomas*, 150 Wn.2d at 871.

It is contrary to this Court's precedent to deem the key evidence from a detective had no impact on the jury when it was admitted over objection, repeated for the jury by the detective, and the only other witness who even mentioned this phone number had no idea if it was a number Ms. Spellman used. The hearsay the detective testified about is not of minor significance. *See Thomas*, 150 Wn.2d at 871. The convictions resting on this phone number should be reversed after an accurate application of the controlling test governing the erroneous reliance on hearsay. This Court should grant review.

3. The Court of Appeals refused to find two overlapping charges violated double jeopardy by misapplying the controlling test.

The constitutional protection against double jeopardy prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011); U.S. Const. amend. V; Const. art I, § 9.

This prohibition is strictly and rigorously protected by our courts. *Mutch*, 171 Wn.2d at 664. When charges are identical, involving the same offense, same complaining witness, and same time period, courts must pay special attention to ensure no double jeopardy violation occurs. *Id*.

To prevent overlapping charges from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes each charged offense. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991).

In the absence of proper jury instructions, reversal is required unless it was "manifestly apparent" that the conviction for each count was based on a separate act. *Mutch*, 171 Wn.2d at 664. Review is

"rigorous" and it will be "a rare circumstance" where the appellate court should affirm despite deficient jury instructions. *Id*. at 664-665.

The Court of Appeals agreed the jury received "flawed" instructions that did not require it to find separate and distinct acts to convict Mr. Ellis of counts 4 and 5, which involved the same offense committed on the same date. Slip op. at 17.

Despite finding a presumptively prejudicial double jeopardy violation, the Court of Appeals deferentially ruled the jury understood these identical counts involved separate and distinct conduct because the prosecution presented evidence of four phone calls. Slip op. at 18.

This Court's precedent holds that presenting the jury with identical to-convict instructions is harmless only in the rarest of circumstances, where the separate nature of the charges was emphasized as well uncontested throughout the case. *Mutch*, 171 Wn.2d at 664-665. Here, the prosecution treated the calls as all part of a joint effort to contact Ms. Spellman, hoping that the jurors would rely on them in their totality to conclude Ms. Spellman was the person Mr. Ellis was speaking to, and never emphasizing the separate and distinct nature of the offenses.

This Court should grant review because the Court of Appeals decision is contrary to this Court's ruling in *Mutch* and permits the prosecution to obtain verdicts that violate double jeopardy.

E. CONCLUSION

Based on the foregoing, Petitioner Cameron Ellis respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 23rd day of December 2020.

Respectfully submitted,

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APPENDIX A

FILED
11/23/2020
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. CAMERON J. ELLIS, Appellant.	No. 80127-9-I ORDER DENYING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

Cameron J. Ellis filed a motion for reconsideration of the opinion filed on July 20, 2020. Respondent State of Washington filed an answer to the motion. The panel has determined that the motion for reconsideration should be denied but the opinion filed on July 20, 2020 withdrawn and a substitute opinion filed. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied and the opinion filed on July 20, 2020 shall be withdrawn and a substitute opinion shall be filed.

Bruman, J.

Mann, C.J.

Leach, J.

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

THE STATE OF WASHINGTON, Respondent, v. CAMERON J. ELLIS, Appellant.	No. 80127-9-I UNPUBLISHED OPINION

BOWMAN, J. — Cameron J. Ellis appeals his jury convictions for six counts of felony violation of a no-contact order and one count of robbery in the second degree. He asserts the underlying no-contact order is constitutionally invalid, the court violated his right to confrontation by admitting the victim's out-of-court statements, the State relied on inadmissible hearsay to identify the victim's phone number, and two of his convictions violate double jeopardy. He also claims and the State concedes that remand is necessary to recalculate his offender score and to strike a scrivener's error in the judgment and sentence. We conclude that Ellis is barred from collaterally challenging the validity of the underlying no-contact order, that the impermissible hearsay establishing the victim's telephone number was harmless error, and that Ellis' convictions do not violate double jeopardy. But the victim's out-of-court statements were testimonial

and violate the confrontation clause. We reverse one of Ellis' convictions and remand for further proceedings consistent with this opinion.

FACTS

On October 18, 2017, following a conviction for fourth degree domestic violence assault, the Tukwila Municipal Court (TMC) issued a five-year domestic violence no-contact order prohibiting Ellis from having any contact with B.S. "directly" or "indirectly" or being within 500 feet of her. Ellis signed and acknowledged receipt of a copy of the TMC no-contact order. Yet Ellis continued to contact B.S. By January 8, 2018, Ellis had two municipal court convictions for misdemeanor violation of the TMC no-contact order.

On January 28, 2018, a bystander called 911 from a Denny's restaurant and reported that "[a] lady" just came in "freaking out," saying she "needs a police officer here at Denny's." The "lady," later identified as B.S., declined to talk to the 911 operator. But during the 911 call, B.S. can be heard in the background stating, "Somebody hit me . . . [a]nd he took my car," a black Nissan Sentra. B.S. also confirmed that "a boyfriend" hit her but she did not identify herself or disclose the boyfriend's name.

Within five minutes of the 911 call, King County Sheriff Deputy Matthew Chapman arrived at the Denny's. Once on scene, Deputy Chapman saw "Mr. Smith" exiting a black Nissan Sentra in the Denny's parking lot. He talked to Smith for "a minute or two." Smith said he "found the vehicle in the road against the median" and saw "a female run in the Denny's." Smith then "moved" the

Nissan "back to the parking lot" for her. Deputy Chapman confirmed Smith's identity and "released him from the area."[1]

Deputy Chapman saw a "visibly distraught" and "kind of frantic" B.S. come out of Denny's. Deputy Chapman spoke to B.S. for 5 to 10 minutes. B.S. confirmed ownership of the Nissan while "speaking very quickly, very upset." B.S. told Deputy Chapman that

> she had gotten in her — just unlocked her vehicle, got in her vehicle to leave the parking lot. At that point, she realized that Mr. Ellis was in the vehicle with her. She said she then told him that he couldn't be there because they had a protection order which prohibited them from contacting each other. She said at that point, he then punched her in the right side of the face. And then she jumped out of the vehicle while it was still moving, which is how it ended up in the median.

B.S. gave a detailed description of Ellis. Other deputies who responded to the 911 call conducted "an area check" but none of them found Ellis. Deputies photographed the Nissan and the injuries to B.S.'s right eye, which included redness, swelling, and a "contusion" above her eyebrow "consistent with being punched in the face."

On March 17, 2018, Terri Drake called 911 and reported that "[t]his guy is beating on this girl in the parking lot at Crystal Manor Apartments." Drake said, "His name is Cameron Ellis" and identified B.S. as the victim. Drake told the 911 operator that Ellis beat up B.S. "until she jumped in my car" and that B.S.'s car "is unattended right now. And the door is open." Drake said, "[H]e's got [B.S.'s] purse" and, "I think he's walking behind us now." Drake reported that Ellis had "a no-contact . . . too."

[1] Neither Smith nor the 911 caller testified at trial.

Deputy Chapman responded to the 911 call and arrived at the apartment complex within six minutes. Upon his arrival, a "visibly distraught" and "very elevated" B.S. waved down Deputy Chapman. B.S. told the deputy she drove to the apartments to meet her friend Drake and saw Ellis in the parking lot when she got out of her car. Ellis tried to call B.S. over to him. Instead, B.S. backed away and got inside Drake's vehicle. Ellis opened Drake's car door and B.S. kicked at Ellis "to fend him off." Ellis then tried grabbing B.S.'s purse and began punching her in the face, head, and upper body area. At that point, B.S. released the purse and Ellis walked away. As Drake drove away "from the situation," B.S. saw Ellis take the wallet out of her purse and throw the purse into her Nissan. B.S. gave Deputy Chapman a description of Ellis but deputies did not find him.

The State charged Ellis with two counts of domestic violence felony violation of the TMC no-contact order and one count of second degree robbery of B.S.'s purse. Ellis remained in custody awaiting trial.

While in custody, the jail recorded four telephone calls from Ellis to B.S.'s cell phone number 206-437-XXXX.[2] Ellis made the first call on April 9, 2018 at 12:35 p.m. from his jail booking account (BA) number. He made the second call from his BA number on April 9, 2018 at 12:52 p.m. Ellis made the third call on April 11, 2018 at 8:55 p.m. from his jail housing unit but from a BA number belonging to "Clarence Darden." And he made the last call on May 14, 2018 at 9:03 a.m. from his BA number. Neither Ellis nor B.S. identified themselves in any of the calls. After listening to the jail calls, the State amended the information to

[2] We redact the last four digits of phone numbers throughout this opinion to protect the victim's privacy.

charge Ellis with four additional counts of domestic violence felony violation of the 2017 TMC no-contact order.

During pretrial motions, the court denied Ellis' motion to exclude the TMC no-contact order. The court also overruled Ellis' hearsay objection to the State eliciting testimony from Deputy Chapman about B.S.'s March 17, 2018 statements to him and reserved ruling on her January 28, 2018 statements to the deputy.

At trial, B.S. did not testify. Ellis renewed his objections to the State's use of B.S.'s statements to Deputy Chapman but the court overruled them. King County jail captain Michael Allen confirmed Ellis' BA number and testified about the four recorded jail calls to 206-437-XXXX. The State also played each jail call for the jury and provided a transcript as a listening aid. Over Ellis' hearsay objections, King County Sheriff Detective Benjamin Wheeler read from a report that listed B.S.'s "cell phone number" as 206-437-XXXX.

Defense private investigator Verla Viera testified to meeting B.S. in person and B.S. stating that Ellis had not assaulted her or taken her purse. On cross-examination, Viera said the phone number in her file for B.S. was 206-437-XXXX. Ellis did not testify at trial.

In closing, the State used a Microsoft PowerPoint slide show to show the jury the dates and times of all four jail calls Ellis made to B.S.'s cell phone number. The jury convicted Ellis of the charged offenses but did not find there was a domestic relationship between B.S. and Ellis. The court imposed a

concurrent standard-range sentence of 60 months' confinement. Ellis timely appeals.

ANALYSIS

Validity of TMC No-Contact Order

The State charged Ellis with six felony violations of the TMC no-contact order that issued following his conviction for fourth degree assault. Ellis argues that his underlying assault conviction is constitutionally invalid so the TMC no-contact order is also invalid. The State argues Ellis is collaterally barred from challenging the validity of the TMC no-contact order. We agree with the State.

Before trial, Ellis moved to exclude the TMC no-contact order, arguing that it stemmed from an invalid assault conviction. Ellis claimed the conviction was invalid because he pleaded guilty without counsel and without evidence of a valid waiver of counsel.[3] In support of his argument, Ellis relied on the TMC docket that only noted (1) counsel initially represented Ellis, (2) Ellis then elected to proceed pro se, (3) the matter was set aside for Ellis to "speak with the prosecutor," (4) a "[w]aiver of right to counsel [was] approved and signed" by the court, and (5) the plea of guilty was "filed and accepted." The trial court denied Ellis' motion.

[3] A valid waiver of counsel requires a showing in the record that the defendant understands the nature and classification of the charge, the maximum penalty of a conviction, and the existence of binding technical rules that govern presentation of a defense. State v. Howard, 1 Wn. App. 2d 420, 426-27, 405 P.3d 1039 (2017).

The collateral-bar rule "prohibits a party from challenging the validity of a court order in a proceeding for violation of that order."[4] City of Seattle v. May, 171 Wn.2d 847, 852, 256 P.3d 1161 (2011) (citing State v. Noah, 103 Wn. App. 29, 46, 9 P.3d 858 (2000)). Exceptions exist for void or inapplicable orders. May, 171 Wn.2d at 852, 854-55. An order is void if the issuing court lacks jurisdiction over the parties or the subject matter or if the court lacks the inherent power to enter the order. Bresolin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975).

Ellis does not allege that the court lacked jurisdiction or the inherent power to issue the TMC no-contact order. Nor does he argue that the order does not apply to him. Instead, he argues that the no-contact order was invalid because the underlying conviction was constitutionally infirm. The collateral-bar rule prohibits his challenge.

Right to Confrontation

Ellis claims the trial court's admission of B.S.'s statements to Deputy Chapman violated his right to confrontation. The State contends the court properly admitted B.S.'s statements because they were nontestimonial. We review a confrontation clause challenge de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

[4] This rule "recognize[s] that flaws which do not go to the heart of the judicial power are insufficient to justify the flaunting of an otherwise lawful order." Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n, 85 Wn.2d 278, 284, 534 P.2d 561 (1975). And that a party's remedy for an erroneous order or decision is to appeal it, not to disregard it contemptuously. Deskins v. Waldt, 81 Wn.2d 1, 5, 499 P.2d 206 (1972) (citing Dike v. Dike, 75 Wn.2d 1, 8, 448 P.2d 490 (1968)).

The Sixth Amendment to the United States Constitution provides that criminal defendants shall have the right to confront the witnesses against them. Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The confrontation clause bars admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford, 541 U.S. at 68. The State bears the burden of establishing that statements are nontestimonial. Koslowski, 166 Wn.2d at 417 n.3.

In determining whether a statement is testimonial, courts look to its primary purpose:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

In Koslowski, the Washington Supreme Court focused on four factors discussed in Davis to help determine whether the primary purpose of a law enforcement interrogation "is to enable police assistance to meet an ongoing emergency or instead to establish or prove past events":

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help?

> A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19[5] (quoting Davis, 547 U.S. at 827).

The court also recognized that "a conversation could contain both testimonial and nontestimonial statements," which may begin with inquiries to address an emergency and later "become testimonial once the emergency appears to have ended or the information necessary to meet the emergency has been obtained." Koslowski, 166 Wn.2d at 419 (citing Davis, 547 U.S. at 828). And with domestic disputes, officers will often "need to determine with whom they are dealing in order 'to assess the situation, the threat to their own safety, and possible danger to the potential victim.' " Koslowski, 166 Wn.2d at 421[6] (quoting Davis, 547 U.S. at 832).

Ellis argues that B.S.'s January and March 2018 statements to Deputy Chapman were testimonial because the statements were "about the completed incidents."[7] We address each statement in turn.

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[5] Footnote omitted.

[6] Internal quotation marks omitted.

[7] The trial court admitted the 911 calls for the January and March 2018 incidents. Ellis concedes that "[t]hese calls are not testimonial under the confrontation clause."

I. January 2018 Statements

The record shows that B.S.'s January 28, 2018 statements to Deputy Chapman were testimonial because the primary purpose of the interrogation was not to aid an ongoing emergency.

Deputy Chapman testified that he spoke with B.S. for approximately 10 minutes while he was at the scene. The questioning focused on eliciting from B.S. the details of what happened. Deputy Chapman testified B.S. told him that she "unlocked her vehicle" and "realized that Mr. Ellis was in the vehicle with her." According to Deputy Chapman, B.S. told Ellis that "he couldn't be there" because of the no-contact order. Then Ellis punched her and she "jumped out of the vehicle while it was still moving." Deputy Chapman testified, "[F]rom there, she ran into the Denny's" and a bystander called 911. B.S. gave Deputy Chapman a detailed description of Ellis, including what he was wearing, and denied needing medical attention. Deputy Chapman testified that B.S. did not provide "any sort of written statement" and that he did not "ever try to follow up with her."

A reasonable listener would not believe that the primary purpose of Deputy Chapman's questioning was to meet an ongoing emergency. B.S. had recovered her car and the scene was secure. Although deputies did not locate Ellis in the area, there was no evidence to suggest that he posed "a threat of harm, thereby contributing to an ongoing emergency." State v. Ohlson, 162 Wn.2d 1, 15, 168 P.3d 1273 (2007). There was no indication that he possessed a weapon or tried to return to the scene. And Deputy Chapman testified that B.S.

"did not want any medical attention," and that she was "insisting that she had to go pick up her child and that she had to leave right away because she had to pick them up."

Neither were B.S.'s statements primarily the type necessary to resolve an ongoing emergency. Rather, they were responses to Deputy Chapman's questioning about what happened and whether she needed medical attention. These questions, when viewed objectively, primarily elicited statements that described events that happened in the past and were potentially relevant to a subsequent prosecution.

Finally, although B.S.'s conversation occurred in the informal setting of a Denny's parking lot, the environment was secure with the deputies present. We conclude that B.S.'s January 28 statements were testimonial and that admitting the statements through Deputy Chapman violated Ellis' Sixth Amendment right to confront witnesses.

Constitutional error is presumed prejudicial. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). However, confrontation clause violations are subject to a harmless error analysis. State v. Fisher, 185 Wn.2d 836, 847, 374 P.3d 1185 (2016). A constitutional error is harmless if the appellate court is "persuaded beyond a reasonable doubt that the jury would have reached the same result in absence of the error." Fisher, 185 Wn.2d at 847. In determining whether constitutional error is harmless, we consider "whether the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Fisher, 185 Wn.2d at 847.

Here, the untainted evidence does not persuade us beyond a reasonable doubt that a jury would find Ellis guilty of the January 28 felony violation of the TMC no-contact order. Deputy Chapman was the sole witness in support of the allegation. And although the court admitted the 911 call containing the bystander's statements, the caller does not provide the identity of either Ellis or B.S., nor does the substance of the call amount to overwhelming evidence that Ellis committed felony violation of a no-contact order. For these reasons, we conclude the confrontation clause error was not harmless and reverse the conviction as charged in count 1.

II. March 2018 Statements

Ellis next argues that B.S.'s statements to Deputy Chapman on March 17, 2018 were testimonial for the same reasons as her January 28 statements—there was no ongoing emergency and B.S. told the deputy about "completed incidents."

On March 17, Deputy Chapman arrived at the apartment complex within six minutes of Drake's call to 911. B.S. "flagged" down the deputy and seemed "distraught" and "very elevated." B.S. then told Deputy Chapman what happened. She explained that Ellis "punched her multiple times" in the face and upper body area and "took" her purse "as he walked away." On these facts, a reasonable listener would interpret B.S.'s statements as an attempt to report a past event rather than aid in an ongoing emergency. Again, Ellis had left the area and there is no indication that he posed an ongoing threat to B.S. or to the public at large. And while Deputy Chapman's interrogation took place in an

informal setting, the setting was again formal enough that B.S. could deliberately recount the events in response to questioning in a secure environment. Based on the record before us, we conclude that B.S.'s March 17, 2018 statements are testimonial and that their admission at trial violated the confrontation clause.

But we conclude the jury would have reached the same result without the error. Fisher, 185 Wn.2d at 847. Here, the overwhelming untainted evidence supports the jury finding Ellis guilty of robbery in the second degree and felony violation of the TMC no-contact order on March 17, 2018. The court admitted as evidence a certified copy of the TMC no-contact order as well as the 911 call Drake made requesting help just after the incident. The 911 call established that "Cameron Ellis" was "beating" a woman "in the parking lot at Crystal Manor Apartments," that he took her purse, and that the woman's name is "[B.S.]."[8] Drake testified at trial and read to the jury the written statement she gave Deputy Chapman on March 22, 2018:

> "[B.S.] . . . is a friend of mine. And I've known Cameron Ellis as her previous boyfriend. On 3/17/18, about 4:45 p.m., I was arriving to pick up [B.S.] at the Crystal Manor Apartments . . . . I saw [B.S.] and [Ellis] standing [n]ear her car. . . .
>
> "When I stopped, [B.S.] tried to leave [Ellis] and get into my car. [Ellis] then started grabbing and pulling on [B.S.] to stop her from leaving. He then started pulling on her purse and punching her repeatedly. She finally let go, and [Ellis] walked away with the purse.

Given this evidence, we conclude beyond a reasonable doubt that any confrontation clause error related to B.S.'s March 2018 statements was harmless.

[8] Drake provided B.S.'s full first and last name.

Hearsay Evidence

Ellis next argues that Detective Wheeler's testimony about B.S.'s phone numbers was inadmissible hearsay. We agree.

We review evidentiary rulings for abuse of discretion. State v. Dobbs, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). A trial court abuses its discretion when a decision is manifestly unreasonable or based on untenable grounds or reasons. Dobbs, 180 Wn.2d at 10. "Hearsay" is a statement "other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted." ER 801(c). Unless an exception applies, hearsay is inadmissible. ER 802; State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007).

At trial, Detective Wheeler testified as follows:

> Q And do you recall the numbers that you called to try and attempt to reach [B.S.]?
> A Not the specific numbers, but one was provided as a home number and the other as either cell phone or work number.
> Q Okay. And are those — is that information that would be contained in your report or other officers' reports or — I mean, can you tell us the —
> A It would be in the reporting officer's report and quite possibly in my own as well.
> Q Okay. So do you remember — did you ever speak with [Detective] Chapman, the reporting officer in this case?
> A I spoke with him many times. I don't remember if we talked about this.
> Q Okay. But so — but when you're investigating a case, you would go back and review what he had written down, his notes, his report even as part of this investigation; is that correct?
> A Yes.
> Q All right. I am going to show you what has been marked State's Exhibit 17 and 18. Do those look familiar?
> A These are two reports covering two different incidents, both written by [Detective] Chapman.
> Q All right. And this is part of the case that you investigated against Mr. Ellis; is that correct?
> A I believe the second one was, the one from March.

> Q Okay. The second one was in March. So as part of that case — or, well, does looking at that report help refresh your recollection about the numbers called or that you attempted to use to call [B.S.]?
> A Yes. They're listed right here in the report.
> Q All right. And what are the numbers that you tried to call?
> [DEFENSE COUNSEL]: Objection; hearsay.
> THE COURT: I'm going to overrule the objection.
> [DETECTIVE WHEELER]: 253-735-[XXXX] was given as her home address and the cell phone number 206-437-[XXXX].[9]

A party may use a writing to "refresh" the memory of a witness. ER 612. But police reports are a subjective summary of the officer's investigation and are generally not admissible. In re Det. of Coe, 175 Wn.2d 482, 505, 286 P.3d 29 (2012) (citing State v. Hines, 87 Wn. App. 98, 101-02, 941 P.2d 9 (1997)). Moreover, the victim and witness statements that make up the reports are "an additional level of hearsay," and when "multiple levels of hearsay are involved, each level must meet an exception." Coe, 175 Wn.2d at 505 (citing ER 805).

Here, Detective Wheeler could properly refer to Deputy Chapman's report as a writing to refresh his memory as to the specific numbers that he dialed when trying to reach B.S. But he also testified that Deputy Chapman's report indicated each number "was given" as B.S.'s home and cell phone numbers. The detective's testimony identifying the phone numbers as belonging to B.S. is hearsay and the trial court erred by admitting it.

The erroneous admission of hearsay is harmless error unless within reasonable probability, the improper evidence affected the outcome of the trial. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Following Detective

[9] Emphasis added.

Wheeler's testimony, the State cross-examined defense investigator Viera about her contact and communication with B.S. Viera testified without objection that 206-437-XXXX was "the only phone number" she had on file for B.S. We conclude the outcome at trial would not have been different in the absence of Detective Wheeler's inadmissible hearsay testimony.

Double Jeopardy

Ellis claims that two of his convictions for felony violation of the TMC no-contact order as charged in counts 4 and 5 violate double jeopardy. We disagree.

The Fifth Amendment to the United States Constitution and article 1, section 9 of the Washington Constitution protect a defendant from multiple punishments for the same offense. State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). "A 'defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.' " State v. Peña Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (quoting State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). A defendant may raise a double jeopardy claim for the first time on appeal, and we review the claim de novo. Mutch, 171 Wn.2d at 661.

When a person is charged with multiple counts of the same offense, "each count must be based on a separate and distinct criminal act." Mutch, 171 Wn.2d at 662. Ellis argues that "the record contains no guarantee" that the jurors unanimously agreed that he committed separate and distinct violations of the TMC no-contact order on April 9, 2018. The State alleged in counts 4 and 5 that

Ellis called B.S. from jail on April 9, but the trial court did not instruct the jury that each count must stem from separate criminal acts. And the court's to-convict instructions for both counts were identical:

> To convict the defendant of the crime of felony violation of a court order as charged in Count IV [and V], each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about April 9, 2018, there existed a no-contact order applicable to the defendant;
>
> (2) That the defendant knew of the existence of this order;
>
> (3) That on or about said date, the defendant knowingly violated a provision of this order;
>
> (4) That at the time of the violation, the defendant had twice been previously convicted for violating the provisions of a court order; and
>
> (5) That the defendant's act occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (2), (3), (4) and (5), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count IV [and V].
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty as to Count IV [and V].

We agree with Ellis that the court's instructions were flawed. But flawed instructions create only the potential for a double jeopardy violation. Mutch, 171 Wn.2d at 663. Double jeopardy is not violated when review of the entire record, evidence, arguments, and instructions show that it is " 'manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act." Mutch, 171 Wn.2d at 664[10] (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

[10] Alteration in original.

Here, the State charged Ellis with six distinct counts of violating the TMC no-contact order and the court gave the jury six separate to-convict instructions. Throughout the trial, the State made clear that the two April 9 counts stemmed from separate acts. During its case-in-chief, the State played both April 9 jail calls for the jury and provided transcripts as listening aids. The State marked those transcripts for illustrative purposes as exhibits 29 and 31. Exhibit 29 is identified as "TRANSCRIPT OF JAIL CALL #1 ON 04/09/2018 @ 12:35 TO (206)[ ]437-[XXXX]." Exhibit 31 is identified as "TRANSCRIPT OF JAIL CALL #2 ON 04/09/2018 @ 12:52 TO (206) 437-[XXXX]." And in closing, the State used a PowerPoint presentation to illustrate and explain that "the jail phone calls that we talked about, jail calls number 1, 2, 10, and 126 that . . . are starred there on the screen, those were all calls made to [B.S.]."[11]

Based on the entire record, we conclude it was manifestly apparent to the jury that the two charges for felony violation of a no-contact order on April 9 as alleged in counts 4 and 5 were not based on a single offense. The convictions do not violate the double jeopardy clause.

Domestic Violence Designation

Ellis claims we should amend his judgment and sentence to remove the erroneous "domestic violence" designations listed on all of his felony violation convictions.[12] The State does not oppose this request.

[11] The calls "starred" in the State's PowerPoint presentation show that Ellis made jail call number 1 on "04-09-2018" at "12:35:02," jail call number 2 on "04-09-2018" at "12:52:53," jail call number 10 on "04-11-2018" at "20:55:47," and jail call number 126 on "05-14-2018" at "9:03:48."

[12] An offense may be designated as a crime of "domestic violence" if the defendant and victim are members of the same family or household. RCW 10.99.020(5).

The court's special verdict forms asked the jury to determine whether Ellis and B.S. were "members of the same family or household prior to or at the time" Ellis committed each felony violation offense. The jury found Ellis guilty of the felony violation charges but wrote "not used" on the special verdict forms and left them blank. Because the jury did not find Ellis' offenses were crimes of domestic violence, we conclude inclusion of this designation in his judgment and sentence was a scrivener's error.

The remedy for scrivener's errors in a judgment and sentence is to remand to the trial court for correction. State v. Coombes, 191 Wn. App. 241, 255, 361 P.3d 270 (2015). Thus, we remand with directions to strike the domestic violence designations from Ellis' judgment and sentence.

Criminal History and Offender Score

Ellis argues that he is entitled to a new sentencing hearing because he did not agree to the State's summary of his criminal history and the State failed to prove his offender score. The State admits it did not prove Ellis' criminal history and "concedes that this case should be remanded for resentencing." We accept the State's concession.

"In calculating [an] offender score, the State must prove the [defendant's] criminal history by a preponderance of the evidence." State v. Cate, 194 Wn.2d 909, 912-13, 453 P.3d 990 (2019) (citing State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012)). Neither a "prosecutor's unsupported summary of criminal history" nor a defendant's failure to "object to the offender score calculation" satisfy the State's burden. Cate, 194 Wn.2d at 913. There "must be

some affirmative acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations." Hunley, 175 Wn.2d at 912 (citing State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999)). We remand to the trial court for a new sentencing hearing where the State must prove Ellis' criminal history by a preponderance of the evidence.

In sum, we affirm the jury's verdict but reverse the conviction for felony violation of a court order as charged in count 1, and remand for a new sentencing hearing to strike the domestic violence designations in the judgment and sentence and for the State to prove Ellis' criminal history.

Brennan, J.

WE CONCUR:

Mann, C.J.

Leach, 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. 80127-9-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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