No. 69076-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VLADIMIR MISHKOV,

Appellant.

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

BRIEF OF APPELLANT

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2. The trial court deprived Mr. Mishkov of a fair trial contrary to the Fourteenth Amendment Due Process Clause by admitting evidence of Mr. Mishkov's prior convictions.

3. The trial court erred and deprived Mr. Mishkov of Due Process in its calculation of his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Generally a court may only admit relevant evidence. Under ER 404, evidence of prior acts is not admissible to prove propensity and is only admissible if relevant to some other material purpose. Where a defendant offers to stipulate to a prior offense for purposes of establishing an element, the court must accept that stipulation. Here, Mr. Mishkov offered to stipulate to a his prior convictions of indecent exposure. The court refused the stipulation and instead permitted the State to offer extensive evidence of the circumstances of those prior convictions. Did the court deny Mr. Mishkov a fair trial?

2. Evidence of prior acts is inadmissible to show action in conformity therewith, and may be introduced only for another purpose

where (1) it is relevant and necessary to prove an essential ingredient of the crime charged and (2) its probative value outweighs its potential for prejudice. Did the trial court abuse its discretion by admitting extensive evidence of the circumstances of Mr. Mishkov's prior convictions?

3. The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant a fair trial. The admission of unfairly prejudicial evidence of prior crimes may deprive a defendant of a fair trial. Did the court's erroneous admission of Mr. Mishkov's prior convictions deprive him a fair trial and due process?

4. Due process requires the State prove the existence of prior convictions before a court may rely on them to calculate a person's offender score. Here, the State did not provide any evidence to establish three Pennsylvania juvenile adjudications. Did the court deny Mr. Mishkov due process when it included those offenses in its offender score calculation?

C. STATEMENT OF THE CASE

Chelsea Connolly is a barista at Sweet Cheeks a bikini-espresso stand in SeaTac. 6/12/12 RP 12-13. Ms. Connolly saw Mr. Mishkov "wandering" about the surrounding parking lot for about 45 minutes.

Id. at 17. While she was serving a customer, she noticed Mr. Mishkov sitting against a light pole with his erect penis exposed. *Id.* 18-19. Ms. Connolly pointed to Mr. Mishkov and asked her customer, Jesse Maltos, to confirm what Mr. Mishkov was doing. *Id.* at 29. Mr. Maltos turned to see Mr. Mishkov masturbating, and called police. *Id.* at 30-31.

When King County Sherriff Deputy Tim Gillette arrived, Mr. Mishkov was still sitting against the light pole with his back to the deputy. 6/11/12 P 122. Mr. Mishkov's hands were in front of him, and the deputy could see his arm moving. *Id.*

Mr. Mishkov was charged with a single count of indecent exposure, with the added allegation of sexual motivation. CP 89.

A jury convicted Mr. Mishkov as charged. CP 124-26.

D. ARGUMENT

1. The trial court deprived Mr. Mishkov of a fair trial by admitting evidence of his prior crimes.

a. Mr. Mishkov objected to the admission of evidence of his prior convictions.

Indecent exposure is a felony if the person has previously been convicted of the offense. RCW 9A.88.010(2)(c).

Prior to trial, Mr. Mishkov offered to stipulate to the existence of a prior offense for purposes of establishing the penalty for indecent

exposure. 6/4/11 RP 61. However, he objected to the State's efforts to introduce the facts surrounding his prior offenses. CP 40-47. Specifically, he contended that under ER 403 the prejudice flowing from the evidence greatly outweighed its probative value rendering it inadmissible under ER 404. 6/4/12 RP 65-66, 81, 114.

The State contended the evidence of the prior convictions was relevant to prove Mr. Mishkov's knowledge, his common scheme or plan, and sexually motivation. 6/4/12 RP 65-66, 109

The trial court permitted the State to offer evidence of the facts of that led to the prior convictions. The court reasoned the evidence was relevant to prove Mr. Mishkov's common scheme or plan, intent, knowledge, and also to prove his offense was sexually motivated. 6/5/12 RP 52, 57-58. The court recognized its ruling effectively denied Mr. Mishkov's request to stipulate to the prior offenses. 6/5/12 P 84.

b. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The "forbidden inference" of propensity to act in conformity with prior acts "is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person's guilt or innocence." *Wade*, 98 Wn. App. at 336.

When the State offers evidence of prior acts, the court must "closely scrutinize" the evidence to determine if (1) it is relevant and necessary to prove an essential ingredient of the crime charged and (2) its probative value outweighs its potential for prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The evidence is admissible only if it is offered for a proper purpose and passes this two-part test. *Id.*

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. Otherwise "motive" and "intent" could be used as "magic passwords whose mere incantation will open wide the

courtroom doors to whatever evidence may be offered in their names." *Saltarelli*, 98 Wn.2d at 364 (quoting *United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974)). Evidence that is admitted for a proper purpose may not be used at trial for an improper purpose. *State v. Fisher*, 165 Wn.2d 727, 744-49, 202 P.3d 937 (2009) (trial court properly admitted evidence of prior acts to explain delay in reporting, but prosecutor improperly used it to show action in conformity therewith, requiring reversal).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that would be substantially more prejudicial than probative. *Id.* at 745. Evidence of prior acts should be excluded if "its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). "[C]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009). In doubtful cases, "the scale should be

tipped in favor of the defendant and exclusion of the evidence." *Smith*, 106 Wn.2d at 776.

c. The court improperly admitted evidence of Mr. Mishkov's prior offenses.

i. The court improperly refused Mr. Mishkov's offer to stipulate.

Because of the prejudice which flows from evidence of a prior conviction a defendant may stipulate to the fact that he has a prior conviction in order to prevent the State from introducing evidence concerning details of the prior conviction to the jury. *State v. Roswell*, 165 Wn.2d 186, 195, 196 P.3d 705 (2008) (citing *Old Chief v. United States,* 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)). When a defendant offers such a stipulation *Old Chief* requires "the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction." *Roswell*, 165 Wn.2d at 195; *Old Chief*, 519 Wn.2d at 191 n. 10.

Mr. Mishkov offered to stipulate to his prior convictions. Yet the court refused to permit him to do so. 6/5/12 RP 84. Pursuant to *Roswell* the trial court was required to accept that stipulation and prevent the jury from hearing the facts surrounding the prior convictions. Instead the court specifically ruled the State was free to

introduce the evidence of the prior offenses. That ruling is contrary to *Roswell* and *Old Chief.*

ii. The evidence was not admissible for any proper purpose under ER 403 and ER 404(b)

Beyond its failure to accept Mr. Mishkov's stipulation to the fact of his prior convictions, the identified purposes for admitting the evidence under ER 404(b) provided an improper basis for admission.

The State's first theory of admissibility, to prove sexual motivation, was patently absurd. RCW 9.94A030(47) provides "'[s]exual motivation' means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." Masturbation is by definition sexually motivated, as it is:

> erotic stimulation especially of one's own genital organs commonly resulting in orgasm and achieved by manual or other bodily contact exclusive of sexual intercourse, by instrumental manipulation, occasionally by sexual fantasies, or by various combinations of these agencies

http://www.merriam-webster.com/dictionary/masturbation. If a jury cannot find Mr. Mishkov's masturbation was sexually motivated, the fact that he did it previously is wholly irrelevant. Even if it were marginally relevant, such limited probative value is vastly outweighed by the inherent prejudice of the evidence of the prior acts.

The second theory of admissibility, to prove a common scheme or plan, was equally lacking in legal support. "The existence of a common scheme or plan . . . is relevant only to the extent that it shows the charged crime happened." *State v. Foxhoven*, 161 Wn.2d 168, 179, 163 P.3d 786 (2007). Thus, *Foxhoven* concluded that because in that case there was no dispute that the acts occurred the trial court abused its discretion in admitting the evidence as proof of a common scheme. *Id.* Similarly, here, there it was not disputed that Mr. Mishkov masturbated in full view of two others. His common scheme or plan to do so was irrelevant.

Finally, the State contended the evidence of the previous incidents was relevant to show knowledge and intent. Again, there was no claim that Mr. Mishkov was inadvertently or accidentally masturbating in public in open view of others.

The evidence was not necessary or relevant to any of the identified bases of admission. Instead the true basis of its admission was made clear in the State's opening statement, wherein the deputy prosecutor said

> The reason why we're here today is because the defendant exposed himself in public; not only exposed himself , but actively masturbated in front of at least three different people. He did so knowing exactly what he was doing, and besides the obvious reasons, we know that because he has done it before.

6/11/12 RP (Opening Statements) 6. As *Roswell* and *Old Chief* recognized, it is because the inherent prejudice of such evidence threatens to overshadow its limited relevance that the right to stipulate exists. *Roswell*, 165 Wn.2d at 195; *Old Chief*, 519 U.S. at 191. Here, the prejudice outweighed the limited or nonexistent relevance of the evidence.

d. *This Court should reverse Mr. Mishkov's conviction.*

The erroneous admission of evidence requires reversal unless within reasonable probabilities, the outcome of the trial would not have been different absent the error. *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991); *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). Here, the outcome of trial would likely have been different absent the error.

Rather than have read to them a simple stipulation acknowledging Mr. Mishkov's prior conviction of indecent exposure, the jury heard detailed testimony regarding those offenses. Indeed, the better part of a day of trial was spent graphically recounting those incidents to the jury. 6/12/12 RP 53-109. The jury was then expressly instructed it could use that evidence for a number of irrelevant purposes. CP 112

The court's error very likely affected the verdict.

2. The trial court miscalculated Mr. Mishkov's offender score.

a. The prosecution must prove a person's criminal history before the court may calculate the accurate criminal history at sentencing.

The calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which starts with a list of his prior convictions. *See* RCW 9.94A.030(11); RCW 9.94A.525.

> The legislature intended the rules for calculating offender scores [in RCW 9.94A.525] to be applied in the order in which they appear. In that regard, subsection (1) defines a "prior conviction," and subsection (2) explains how to sift through the prior convictions in order to eliminate those that wash out. Subsections (7) through (18) then provide specific rules regarding the actual calculation of offender scores, instructing courts to "count" the prior offenses by assigning different numerical values to the prior offenses.

State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

Due process requires the State bear the burden of proving an individual's criminal history and offender score by reliable evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); *State v.*

Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); U.S. Const. amend. XIV; Const. art. I, § 3. "It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Proof of criminal history may not rest upon mere allegation to satisfy the fundamental requirements of due process. *Id.*; RCW 9.94A.500.

Hunley and *Mendoza* involved "nearly identical" facts. 175 Wn.2d at 913. In both cases, the sentencing court relied on a statement the prosecutor presented the court with a list asserting the defendant's criminal history. *Id.* The list included the name of the crime and its date "but did not include any other documentation to verify the convictions." *Id.* Neither defendant objected. *Id.*

The *Mendoza* Court ruled that the prosecution's list of criminal history did not constitute the necessary "presentence report" prepared by the Department of Corrections, and the defendant's failure to object did not constitute an acknowledgement of criminal history. 165 Wn.2d at 925. In *Hunley*, the defendant's criminal history was "established solely on the prosecution's summary assertion of the offenses." 175

Wn.2d at 913. "And Hunley never affirmatively acknowledged the prosecution's assertions regarding his criminal history." *Id.*

Hunley rejected an attempt by the Legislature to overrule *Mendoza* and provide that a prosecutor's assertion of a defendant's criminal history established the pertinent history unless the defendant expressly objected. *Id.* at 914 (citing RCW 9.94A.500(1); RCW 9.94A.530(2)). *Hunley* explained that the prosecution's burden of proof at sentencing "was rooted in principles of due process" and cannot be overruled by the Legislature. *Id.* It is unconstitutional to shift the burden of proof at sentencing to the defendant. *Id.* Consequently, "[o]ur constitution does not allow us to relieve the State of its failure" to establish a person's prior convictions "through certified copies of the judgments and sentences or other comparable documents. *Id.* at 915. An "unsupported criminal history summary from the prosecutor" does not establish a defendant's criminal history. *Id.* at 917.

Unless the defendant affirmatively agrees to the criminal history and standard range calculation offered by the prosecution, "the defendant's failure to object to the State's assertion of out-of-state criminal history did not waive the issue on appeal." *Mendoza*, 165 Wn.2d at 926 (citing *Ford*, 137 Wn.2d at 483-85). Even when a

defendant pleads guilty, "a defendant cannot agree to a sentence in excess of the authority provided by statute." *Id.* at 927 (citing *In re Personal Restraint of Goodwin,* 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002)). "Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation." *Mendoza*, 165 Wn.2d at 928. The State must offer evidence to establish its asserted criminal history. *Id.* at 928-29. "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (quoting *Goodwin,* 146 Wn.2d at 867–68).

b. The State did not prove the existence of Mr. Mishkov's out-of-state juvenile offenses.

The trial court included three Pennsylvania juvenile adjudications in its calculation of Mr. Mishkov's offender score. CP 147, 153.

Mr. Mishkov did not affirmatively agree with the State calculation of his offender score. Mr. Mishkov did acknowledge his standard range was 12 to 24 months. CP 138. However, because this is an unranked felony, Mr. Mishkov's standard range remains the same

regardless of his offender score. The range on the unranked felony is 0 to 12 months regardless of the offender score. RCW 9.94A.505(b); 9.94A.515. In addition, the sexual motivation finding requires a 12 month enhancement. RCW9.94A.533(8)(a)(iii). Acknowledging the standard range in this case was not an implicit acknowledgment of the score.

The State alleged Mr. Mishkov had three Pennsylvania burglary adjudications as a juvenile. Supp. CP __, Sub No.112. The State did not offer any documents to support that allegation. Indeed, the State's sentencing report under "disposition" states "sent unknown." *Id.* While criminal judgments from various jurisdictions undoubtedly take many forms, one of their key uniting features is that they actually state the sentence imposed. The State's ignorance of the sentences imposed is a fairly strong indicator that the State did not have copies of the prior judgments.

The State failed to prove Mr. Mishkov's criminal history.

c. <u>This Court should remand for resentencing</u>.

The Supreme Court has said:

> This court has long held "'the existence of an erroneous sentence requires resentencing.'" This principle also applies to a sentence imposed under the SRA in which an incorrect offender score is used to calculate the standard

> sentence range. The sentencing court should be afforded an opportunity to determine the appropriate sentence based upon accurate information used as a basis for calculating an offender score and in determining the correct sentence range under the SRA.

In re the Personal Restraint of Call, 144 Wn.2d 315, 333, 28 P.3d 709 (2001) (footnotes omitted). In the context of exceptional sentences, where the offender score has been miscalculated, "*[State v. Parker,* 132 Wn.2d 182, 190, 937 P.2d 575 (1997)] requires the record to show *clearly* that the trial court would have imposed the same exceptional sentence if it had used the correct offender score." *State v. Jennings*, 106 Wn. App. 532, 544, 24 P.3d 430 (2001).

Here, because it is an unranked felony, Mr. Mishkov's total standard range with the enhancement remains the same, 12 to 24 months, regardless of his offender score. RCW 9.94A.505(b); RCW 9.94A.515; RCW9.94A.533(8)(a)(iii). The court imposed the high-end of the standard range - 24 months. CP 150. It stands to reason that with such a broad range a court might sentence a person with a score of 4 differently than a person with a score of 5. In that way, this case mirrors *Call* where the sentence imposed based on the incorrect offender score still fell within the range for the correct score. 144 Wn.2d at 333. Nonetheless, the Supreme Court recognized that there

was nothing in the record suggesting the trial court would have imposed the same sentence based upon a proper calculation of the score. The trial court here did not make clear that it would have imposed the same sentence regardless of the score. As in *Call*, this case must be remanded to permit the trial court to enter an appropriate sentence "based upon accurate information" 144 Wn.2d at 333.

Further, inclusion of unproved criminal history on Mr. Mishkov's judgment creates the real danger that future courts may rely on its in future cases. Thus, on resentencing those priors should not be included unless the state can prove their existence.

E. CONCLUSION

For the reasons above this Court must reverse Mr. Mishkov's conviction and sentence.

Respectfully submitted this 2nd day of August, 2013.

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

STATE OF WASHINGTON, Respondent, v. VLADIMIR MISHKOV, Appellant.	)	NO. 69076-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF AUGUST, 2013.

X_____

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