

Supreme Court No. ____
(COA No. 75114-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PALWINDER SINGH,

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

Palwinder Singh, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Singh seeks review of the Court of Appeals decision dated September 18, 2017, a copy of which is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

A unanimous jury must find the prosecution proved each essential element of a crime before a conviction may be entered. Residential burglary requires proof of either the alternative acts of unlawfully entering a home with the intent to commit a crime or unlawfully remaining with this intent. Here, the State asked the jury to convict based on either alternative, but agreed no one knows if Mr. Singh entered to commit a crime and he only remained because his family blocked him as he tried to flee. Is there insufficient evidence of the essential elements of residential burglary, and alternatively, was Mr. Singh denied his right to a unanimous jury verdict when the jury was not instructed that it must unanimously agree on the underlying act?

D. STATEMENT OF THE CASE

Despite the concerns of his wife, parents, and sister, Palwinder Singh was unable to escape his drug addiction. 3RP 320.¹ Mr. Singh had immigrated with his family to the United States from India as a teenager but continued to live within a close community of Sikh relatives. 3RP 324; 4RP 372. He stopped adhering to his family's religious tenets by using drugs and alcohol and cutting his hair and beard, which distressed his family. 3RP 320; 4RP 373-74, 377.

In April 2015, Mr. Singh's wife, Jaspal Kaur, was living with Mr. Singh's parents. 3RP 280. For reasons unexplained at trial, a no-contact order barred Mr. Singh from coming within 1000 feet of his wife's residence. 2RP 192.

On April 27, 2015, Jaspal² called the police, reporting that Mr. Singh knocked on the back door of the family home, came inside crying and asking to see his children, "patted" his daughter in a "loving" way,

¹ The verbatim report of proceedings consists of six consecutively paginated volumes.

² Because several witnesses have the same last name, they are referred to by their first name for purpose of clarity, no disrespect is intended.

and fled when Jaspal said she would call the police. 3RP 289-90. The police responded but did not find Mr. Singh. 2RP 177, 196.³

On April 30, 2015, Jaspal again called the police, alleging Mr. Singh came to the family home. 3RP 296-97. He knocked on the back door and asked for help, saying his car broke down. *Id.* He did not enter the house and left when Jaspal said she would call the police. 3RP 297, 299. Responding officers found Mr. Singh at his aunt and uncle's nearby home. 2RP 182-84.

On July 1, 2015, Mr. Singh entered the family home through the open back door. 3RP 303. Once inside, he said "nasty" words to his wife, "grabbed" her hair, kicked her with his legs, and hit her with a bangle on his wrist. 3RP 303-04. Mr. Singh's sister Lakwinder Kaur heard the noise and intervened. 3RP 305, 325. His sister said, "I'm calling the police," and Mr. Singh "started running away," so she "grabbed him." 3RP 326. Lakwinder told him, "I'm not going to let you go." 3RP 327.

Unable to escape his sister's grip, Mr. Singh bit her hand. 3RP 327. He stopped biting her hand after his family hit and kicked him, and

³ Mr. Singh was charged with felony violation of a no-contact order for this alleged entry into the home but was not convicted. CP 8, 107.

then he ran away, allegedly pushing his mother as he fled. 3RP 330, 334.

As pertinent to this petition, the State charged Mr. Singh with residential burglary, third degree assault against his sister, and fourth degree assault against his mother, for the July 1, 2015 incident. CP 8-10. The jury acquitted him of fourth degree assault but convicted him of residential burglary and third degree assault predicated on negligently harming his sister's hand. CP 108-11.

The facts are further set forth in the Court of Appeals opinion, pages 1-3 and within the relevant argument sections of Appellant's Opening Brief and Appellant's Reply Brief. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT

Mr. Singh was denied his right to a unanimous jury verdict on the alternative acts underlying the State's allegation of residential burglary

1. *The State bears the burden of proving the essential elements to a unanimous jury.*

Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Byrd*, 125

Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 5, 14; Const. art. I, §§ 3, 21, 22. For evidence to be legally sufficient, a “modicum of evidence” on an essential element is “simply inadequate.” *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). “[I]t could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Id.*

Rational inferences from the evidence “must be reasonable and ‘cannot be based on speculation.’” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

The right to a unanimous jury verdict demands the jury verdict reflect a unanimous finding of the act or acts underlying the charged offense. *See Apprendi v. New Jersey*, 530 U.S. 466, 498, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (Scalia, J., concurring) (charges must be proved “beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens”); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (“longstanding tenet” of criminal law jurisprudence is “the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve

of his equals and neighbours.” (quoting 4 W. Blackstone, Commentaries on the Laws of England, 343 (1769)).

In Washington, the state constitutional right to a trial by jury “provides greater protection for jury trials than the federal constitution.” *State v. Williams-Walker*, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22.

These greater protections include the express constitutional requirement of jury unanimity, dictating that the jurors must unanimously agree upon the act that constitutes the charged offense. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); Const. art. I, § 3. To ensure jury unanimity, either the prosecution must elect the act on which it relies or the court must instruct the jury to unanimously agree that at least one particular act constituting the charged crime has been proved beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411; *see also State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). “By requiring a unanimous verdict on one criminal act, we protect a criminal defendant’s right to a unanimous verdict based on an act proved beyond a reasonable doubt.” *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); *see also State v. Parra*, 96 Wn.App. 95, 102, 977 P.2d 1272 (1999) (“we must presume that the State’s

inexplicable failure to request a unanimity instruction was reversible error unless no rational juror could have had a reasonable doubt as to either act establishing the crime”).

For example, in *Coleman* there was neither an election nor unanimity instruction even though the complaining witness testified about different acts that could constitute the charged offense of child molestation. 159 Wn.2d at 512. Although there was evidence of multiple acts, the complainant had not consistently alleged one of these occurred. *Id.* at 514. The prosecution claimed it elected to rely on a certain act by focusing on it, but the Court found no clear election occurred. *Id.* Based on the potential that the jurors did not unanimously agree as to the particular act underlying the conviction, the Supreme Court held, “Reversal is required because this was a multiple acts case, prejudice is presumed, and there is a risk of a lack of unanimity on all the elements” absent a unanimity instruction. *Id.* at 515.

Similarly, the residential burglary allegations rested on alternative acts, without an unambiguous election and absent an instruction explaining the necessity of juror unanimity.

2. *The prosecution alleged two alternative acts underlying residential burglary, implied there was limited evidence, and did not seek a unanimous jury verdict.*

“There are two distinct physical acts that amount to residential burglary.” *State v. Sony*, 184 Wn.App. 496, 500, 337 P.3d 397 (2014), *rev. denied*, 182 Wn.2d 1019 (2015). One is “unlawfully entering a building with intent to commit a crime” inside; the second is “unlawfully remaining in a building with intent to commit a crime” inside. *Id.*

Here, the prosecution’s closing argument implied there was no clear evidence of an unlawful entry by Mr. Singh with the intent to commit a crime, saying to the jurors regarding the residential burglary allegation: “No one knows why he entered the house in the first place.” 4RP 422. The prosecution argued Mr. Singh may have gone to the home “to berate his wife,” or may be “because he wanted help? Who knows?” *Id.* Through this argument, the prosecution implicitly agreed Mr. Singh’s reasons for entering were too inconclusive to support a burglary conviction. *Id.* Instead, it focused on the contention that while Mr. Singh was inside, “he intended to commit a crime” because “he assaulted his family members.” *Id.*

The Court of Appeals contended the State did not need to prove Mr. Singh's motive and therefore his intent was not dispositive. Slip op. at 7. But the prosecution needed to prove Mr. Singh intended to commit a crime for burglary and did not base the residential burglary allegation on Mr. Singh's interaction with his wife, Jaspal Kaur. The likely reason for the prosecution's focus on the interaction with Mr. Singh's sister was to avoid same criminal conduct or double jeopardy overlap between count three, violating the no contact order protecting Jaspal by entering the protected place, and count four, residential burglary. CP 9; 4RP 422.

The prosecution did not ask for a unanimity instruction. The jury was directed to consider both alternatives in the to-convict instruction and it was never told it must unanimously agree that alternative acts were proven beyond a reasonable doubt. CP 88 (Instruction 15).

The Court of Appeals treated the offenses as part of a course of conduct, but this simply dilutes the prosecution's burden of proving the act underlying the burglary when separate acts are the basis of the case. While Mr. Singh was not supposed to be inside Jaspal's residence, he did not willfully remain in his parent's home with the intent to commit a crime inside. Once his family saw Mr. Singh was inside the home,

they told him they would call the police and he began to flee. His sister tried to prevent Mr. Singh from leaving. She “grabbed him” and said, “I’m not going to let you go.” 3RP 327. It was only then, after his sister blocked him from leaving and because he was not able to escape her grip as she held him, that he bit her hand and resisted until he was able to push his way free and leave. *Id.*

Mr. Singh intended to leave when confronted but was prevented from doing so. Due to his interaction with his sister, the State separately charged Mr. Singh with third degree assault, defined as acting in a criminally negligent fashion, and as a result of this negligence, he caused his sister bodily harm. CP 9, 85. The fight between Mr. Singh and his sister was not alleged to be an intentional criminal assault. CP 85 (Instruction 12, to convict of third degree assault, State must prove Mr. Singh “acted with criminal negligence”). If Mr. Singh remained in the home because he was prevented from fleeing as he had in the past, and acted negligently while inside, the State did not prove he unlawfully remained with the intent to commit a crime as required for residential burglary.

In sum, the State did not offer overwhelming evidence of the essential alternative acts necessary to prove residential burglary. The

prosecution conceded that the evidence did not show why he entered, and it was most likely he entered his parent's home either to see his children or because he needed help as he had a few weeks earlier. 3RP 289; 4RP 422. Although he argued with his wife inside, the prosecution focused the burglary on his conduct with his family and not his disruptive conduct with his wife. 3RP 303-04; 4RP 422. His interaction with his sister started because he was trying to flee and his sister grabbed him to hold him for the police. 3RP 326. He reacted hostilely but negligently, not intending to cause harm even if that was the by-product of the tussle. CP 85-86.

The State's failure to seek and the court's failure to give a unanimity instruction deprived Mr. Singh of his right to a unanimous jury verdict on every element of the charged offense. Even if these alternatives could be enough to constitute the offense charged, there is no assurance that the jury unanimously agreed on the particular underlying act.

The jury's verdict does not demonstrate it unanimously agreed the State had proven a specific act underlying the charge of residential burglary.

3. *The Court should grant review due to the lack of unanimity for the alternative acts and means involved under Court of Appeals case law.*

Failing to insure the jury's verdict is based on its unanimous agreement that a certain act was proven beyond a reasonable doubt is presumptively prejudicial. *Coleman*, 159 Wn.2d at 515; *Petrich*, 101 Wn.2d at 573. The prosecution bears the burden of proving the error is not harmless beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 515.

Some jurors could have focused on the entry but others on the circumstances under which Mr. Singh remained in the home. Because each of these considerations have separate purposes and the evidence did not clearly demonstrate the necessary intent to commit a crime inside, the State cannot prove this error is harmless beyond a reasonable doubt. Thus, reversal is required and this Court should grant review.

F. CONCLUSION

Mr. Singh respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 18th day of October 2017.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 75114-0-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
PALWINDER SINGH,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>September 18, 2017</u>
)	

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COX, J. – Palwinder Singh appeals his convictions for residential burglary, two counts of felony violation of a court order, and third degree assault. Contrary to Singh’s assertions, the jury did not have to be unanimous as to the means by which he committed residential burglary. But the sentencing court failed to identify, and the State failed to prove, the criminal history supporting Singh’s sentence. We therefore affirm Singh’s convictions but reverse his sentence and remand for resentencing consistent with this opinion.

Based on allegations that Singh repeatedly violated a no-contact order and assaulted his estranged wife and several family members, the State charged him with third-degree assault of his sister, fourth-degree assault of his mother, third-degree malicious mischief, residential burglary, and three counts of felony violation of a court order.

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At trial, Singh's wife, Jaspal Kaur, testified that Singh struggled with drug and alcohol abuse for years and resisted his family's efforts to help him. The couple eventually separated, and in 2014 Kaur obtained a no-contact order against Singh. The order prohibited him from coming within 1,000 feet of Kaur and her home. Singh repeatedly violated the order, resulting in several misdemeanor convictions.

Kaur testified that in late April 2015, Singh twice appeared at her home, but ran away when she called police. In July 2015, he entered Kaur's house through the back door. He was angry, intoxicated, and calling Kaur "dirty names." He grabbed her by her hair, kicked her, and threw her onto a sofa. He slapped her and struck her in the head with her bangle. Singh's sister and parents, who lived with Kaur, tried to intervene, but Singh told his sister "Get out of my way. You know, it's between me and my wife." When Singh's sister told him she was calling the police, he started to leave. She tried to stop him by grabbing his shirt, but he bit her hand until she kicked him in the groin. As he left, Singh pushed his mother to the ground and stepped on her chest.

Singh testified at trial and denied being at Kaur's home in late April or July 2015. He also denied assaulting Kaur or his sister and mother. He admitted knowing that the no-contact order prohibited him from communicating with Kaur or going to her house.

The jury found Singh guilty of residential burglary, third-degree assault of his sister, and two felony violations of a court order for the July 2015 incident and

one of the April 2015 incidents. The jury acquitted him on the charge of assaulting his mother and deadlocked on one count of felony violation of a court order. The court dismissed the latter count and the malicious mischief charge.

Prior to sentencing, the State calculated Singh's offender scores on the assault, felony violations of a court order, and burglary counts as 14, 14, and 15, respectively. The defense calculated the scores as 11, 11, and 13. At sentencing, the State conceded defense counsel's offender scores were correct.

The court imposed a DOSA sentence consistent with the parties' recommendations. The judgment and sentence mirrored the offender scores and sentencing ranges provided by the defense.

Singh Appeals.

UNANIMITY

Criminal defendants in Washington are entitled to a unanimous jury.¹ If the State presents evidence of *multiple acts* that could each form the basis of a charged count, either the State must tell the jury which act it is relying on, or the court must instruct the jury to unanimously agree on the criminal act.² No election or instruction is required, however, if the multiple acts are part of a continuing course of conduct.³ The right to a unanimous verdict may also apply

¹ State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

² State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), *overruled on other grounds by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.2d 981 (2002).

³ State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

to *alternative means* of committing a crime.⁴ While there is no “categorical right” to unanimity in alternative means cases,⁵ “there are particular situations when express unanimity is required, specifically when at least one means lacks sufficient evidentiary support.”⁶ If, however, there is sufficient evidence to support each means, there is no right to express unanimity.⁷

Relying in part on our decision in State v. Sony,⁸ Singh contends the State presented the jury with evidence of *multiple acts* of residential burglary — *i.e.*, unlawful entering and unlawful remaining with intent to commit a crime – and that the State’s failure to make an election or provide a unanimity instruction violated his right to a unanimous verdict. Although the State agrees with Singh that multiple acts analysis applies in this case, it acknowledges our statement in Sony that unlawful entering and unlawful remaining are “alternative means” of committing residential burglary.⁹ Curiously, while arguing that this statement in Sony is dicta, the State fails to acknowledge Sony’s reliance on our earlier holding to the same effect in State v. Gonzales.¹⁰ In any event, the State argues

⁴ State v. Woodlyn, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017).

⁵ Id.

⁶ Id.

⁷ Id.

⁸ 184 Wn. App. 496, 337 P.3d 397 (2014).

⁹ Id. at 500.

¹⁰ 133 Wn. App. 236, 243, 148 P.3d 1046 (2006) (“There are two alternative means to commit burglary: unlawfully entering a building with intent to commit a crime, or unlawfully remaining in a building with intent to commit a crime.”).

alternatively that the present case is distinguishable from any case applying alternative means analysis to residential burglary and that a multiple acts analysis must be applied. We need not resolve whether alternative means or multiple acts analysis applies in this case because there was no violation of Singh's right to a unanimous verdict in either case.

Alternative Means

If unlawful entry with intent to commit a crime against a person or property and unlawful remaining with the same intent were alternative means of committing residential burglary under the facts in this case, Singh had no right to a unanimous verdict if both means were supported by sufficient evidence.¹¹ Evidence is sufficient if, after viewing it in a light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt the elements of the crime proven.¹² A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn from that evidence.¹³ Circumstantial evidence and direct evidence carry equal weight.¹⁴ We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence.¹⁵

¹¹ Woodlyn, 188 Wn.2d at 164.

¹² State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

¹³ Id.

¹⁴ State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

¹⁵ State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict Singh of *both* means of committing residential burglary, the State had to prove beyond a reasonable doubt that, with intent to commit a crime against a person or property, he entered *and* remained unlawfully in the residence without authorization.¹⁶ The State presented evidence that Singh entered and remained in Kaur's residence in violation of a no-contact order that prohibited him from coming within 1,000 feet of that residence. The evidence also supported inferences that Singh unlawfully entered and remained *with the intent* to violate a no-contact order. In addition, the evidence supported an inference that he remained with the intent to commit an assault against Kaur. When viewed in a light most favorable to the State, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt the elements of the alternative means.¹⁷

Multiple Acts

Where a jury is presented with multiple acts supporting the same offense, jury unanimity is required unless the acts are part of a continuing course of conduct.¹⁸ In determining whether acts formed a continuing course of conduct, "we evaluate the facts in a commonsense manner, considering (1) the time

¹⁶ State v. Spencer, 128 Wn. App. 132, 136-43, 114 P.3d 1222 (2005).

¹⁷ Id. (finding both means of committing residential burglary supported by sufficient evidence where defendant entered and remained in violation of no-contact order and did so with intent to violate the no-contact order). See also State v. Stinton, 121 Wn. App. 569, 576, 89 P.3d 717 (2004) ("Given the requirement that we broadly interpret the 'intent to commit a crime therein' element of residential burglary, we hold that a violation of a protection order provision can serve as a predicate crime for residential burglary.").

¹⁸ Handran, 113 Wn.2d at 17.

separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose.”¹⁹ Here, Singh unlawfully entered Kaur’s residence. He immediately and angrily started calling her names, grabbed her by the hair, and repeatedly assaulted her. When his sister tried to intervene, he bit her hand for two minutes, continued to grab Kaur’s hair, and said “it’s between me and my wife.” We agree with the State’s assertion that Singh’s unlawful “entering and remaining occurred at the same time and place and [were] intended to secure the same objective; to have prohibited contact with the same victim, [Kaur].” Viewed in a commonsense manner, the unlawful entering and unlawful remaining were part of a continuing course of conduct and unanimity was not required.²⁰

Singh’s claims that the State “conceded there was no substantial evidence that [he] unlawfully entered with the intent to commit a crime” and “elected to base the burglary on his conduct with his family and not his . . . conduct with his wife” are not supported by the record. Furthermore, as the prosecutor correctly pointed out to the jury, the State did not “have to prove what

¹⁹ State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518, 523-24 (2010).

²⁰ See Spencer, 128 Wn. App. at 136-39; State v. Brown, 159 Wn. App. at 12-15 (continuing course of conduct exception applied to multiple violations of no-contact order where time separating the violations was short, and the violations involved the same victim, locations, and ultimate purpose – *i.e.*, to contact and confront the victim).

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Mr. Singh's motive was about entering the house."²¹

OFFENDER SCORE

Singh next contends that, contrary to RCW 9.94A.500(1) and RCW 9.94A.525(21), the court did not list the criminal history on which the court relied and the record includes no proof that any prior offenses were crimes of domestic violence. He further contends the State failed to provide the sentencing court with evidence of the prior convictions. He concludes his sentence "should be vacated and a new sentencing hearing held at which he receives the correct offender score, as proved by the State and found by the court."

The State counters that Singh affirmatively acknowledged his criminal history when he proposed offender scores for the various counts, and thereby relieved the State of its obligation to prove his criminal history. The State concedes that the court erred in failing to specify the prior convictions it found to exist and that remand for amendment of the judgment and sentence is necessary. We agree with Singh.

It is the State's burden to prove prior convictions at sentencing by a preponderance of the evidence.²² The State is relieved of that burden *only* if the defendant "affirmatively acknowledges" the "facts and information" the State

²¹ RP 414; State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985) (the State is not required to prove a specific crime the defendant intended to commit in order to prove burglary).

²² State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012).

introduces regarding criminal history.²³ Acknowledgment of the *offender score* is not an affirmative acknowledgment of *the facts and information* regarding criminal history.²⁴ Furthermore, RCW 9.94A.500(1) requires the sentencing court to specify the convictions it found to exist and used in calculating the offender score, and RCW 9.94A.525(21) authorizes the court to count two points for certain offenses “where domestic violence as defined in RCW 9.94A.030 was pleaded and proven.”

Although Singh acknowledged his offender score, he never affirmatively acknowledged his criminal history. The State was therefore not relieved of its burden to prove Singh’s criminal history. It is undisputed that the State failed to present *evidence* of Singh’s criminal history at sentencing. It is also undisputed that the sentencing court failed to identify the criminal history it relied on as required by RCW 9.94A.500(1), and that the evidence at sentencing did not demonstrate that domestic violence was pleaded and proven in any of the prior convictions.

²³ State v. Mendoza, 165 Wn.2d 913, 929, 205 P.3d 113 (2009), *disapproved of on other grounds by State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

²⁴ State v. Ramirez, 190 Wn. App. 731, 734, 359 P.3d 929 (2015) (acknowledgment of offender score does not relieve State of its burden to prove criminal history because it does not acknowledge facts and information underlying the score); *cf.* State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010) (“A defendant’s affirmative acknowledgment of his offender score does not relieve the State of its burden of proving the comparability of out-of-state offenses.”).

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We reverse Singh's sentence and remand for resentencing consistent with this opinion. Because the State "does not intend to seek appellate costs," we need not reach Singh's argument that he lacks the ability to pay them.

COX, J.

WE CONCUR:

Speerman, J.

Schubert, 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. 75114-0-1**, 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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petitioner

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Date: October 18, 2017

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