Supreme Court No. 97438-1
(COA No. 77488-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEX ARNOLD CHAVEZ,

Appellant.

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 COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(3)-RAP 13.4(b)(4), Alex Arnold Chavez, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals' decision affirming his conviction. A copy of the Court of Appeals' opinion, issued on June 17, 2019, is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. A prosecutor commits misconduct when she urges a jury to decide a case based on evidence outside the record. The central issue in dispute at Mr. Chavez's trial was whether he knowingly violated a no-contact order. The prosecutor repeatedly told the jury that Mr. Chavez explicitly admitted he was in the vicinity of the protected party because he wanted to give his daughter an item and because he wanted to check on his daughter's welfare. But the State never presented any evidence that Mr. Chavez made such statements. Should this Court accept review because the Court of Appeals' affirms Mr. Chavez's conviction despite the prosecutor's mentioning of facts never admitted into evidence? RAP 13.4(b)(3); RAP 13.4(b)(4).

2. It is flagrant misconduct for a prosecutor to shift the burden to the defendant. Again, the central issue in contention at Mr. Chavez's trial was whether he knowingly violated the no-contact order. At trial, the

prosecutor emphasized that Mr. Chavez produced no evidence that he did not knowingly violate the no-contact order. Should this Court accept review because the Court of Appeals affirmed Mr. Chavez's conviction despite the prosecutor's improper shifting of the burden? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Alex Chavez was sitting on a bench in an alcove with a blanket around him in Capitol Hill when Officer David Moore approached him and stated, "Alejandro,[1] good morning, Officer Moore with Seattle Police Department. Our contacts are recorded." RP 642, 651-52. At the time of Officer Moore's encounter with Mr. Chavez, Mr. Chavez was homeless. RP 552. Officer Moore asked to see Mr. Chavez's hands; Mr. Chavez responded, "what did I do?" RP 653. Officer Moore once again asked to see Mr. Chavez's hands and Mr. Chavez asked, "is this a ruse or what?" RP 653. Officer Moore informed Mr. Chavez this was not a ruse and that he was under arrest for violating a no-contact order. RP 653. Officer Moore proceeded to search Mr. Chavez incident to arrest. Mr. Chavez asked what kind of order he violated and what specific condition he violated. RP 654-55. Officer Moore told Mr. Chavez he would have to speak to the city of Redmond about that. RP 655.

[1] Mr. Chavez also goes by the name "Alejandro." RP 717.

The City of Redmond previously issued a no-contact order prohibiting Mr. Chavez from contacting Amy Krajci, and Ms. Krajci happened to live in Capitol Hill. Ex. 15, pg. 1; RP 754. Ms. Krajci called the police after she spotted Mr. Chavez in her neighborhood. RP 558, 564, 566.

As Officer Moore searched Mr. Chavez incident to arrest, Officer Moore pulled out an item that Mr. Chavez said he wanted to give to his daughter. RP 751. Later, Mr. Chavez told Officer Moore he was concerned about his daughter's welfare. RP 573.

The State charged Mr. Chavez with domestic violence felony violation of a no-contact order, as he was previously twice convicted of violating no-contact orders. CP 1, 335. The case proceeded to trial. At trial, the prosecutor repeatedly told the jury that Mr. Chavez explicitly stated he was in the vicinity of Ms. Krajci in order to give his daughter an items and also because he was concerned about his daughter. RP 549, 778, 780, 786. But the State never presented any evidence indicating Mr. Chavez made such statements.

A jury convicted Mr. Chavez of violating the no-contact order, and the Court of Appeals affirmed Mr. Chavez's conviction. CP 328.

D. ARGUMENT

This Court should accept review because the Court of Appeals' opinion affirms Mr. Chavez's conviction despite the repeated instances of prosecutorial misconduct that occurred during his trial.

a. Defendants possess the right to a fair trial, and prosecutorial misconduct can deprive defendants of this right.

The Sixth and the Fourteenth Amendments to the United States Constitution and article I, section 22 of our State Constitution secure a defendant's right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecutor may deprive a defendant of this right if she engages in misconduct. 175 Wn.2d at 703.

While a prosecutor has wide latitude to persuade the jury it may make inferences based on the evidence the State presented, it is misconduct for a prosecutor to urge the jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn. App. 533, 553, 283 P.3d 1158 (2012); *accord State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). This is because it is fundamental principle in our criminal justice system that a jury convict a defendant *only* with the evidence presented at trial. *See State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d

1169 (2007), *referencing State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). Because the jury knows the prosecutor is an officer of the State, it is particularly grievous for a prosecutor to mislead the jury regarding a critical fact in a case. *See State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015) (noting it is particularly egregious for a prosecutor misstate the law of the case).

It is also misconduct for a prosecutor to shift its burden to the defendant. *In re Wilson*, 169 Wn. App. 379, 394-95, 279 P.3d 990 (2012). A defendant has no duty to present evidence; rather, the State bears the burden of proving every element of its case beyond a reasonable doubt. *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). As such, prosecutorial arguments shifting the burden to the defendant "subvert the presumption of innocence and turn the proof beyond a reasonable doubt standard on its head." *Wilson*, 169 Wn. App. at 394.

When a defendant asserts the State engaged in prosecutorial misconduct, the defendant must show the prosecutor's conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. This Court assesses the prejudice to the defendant in the context of the entire record, the issues in the case, the instructions to the jury, and the circumstances at trial. *Id.*; *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Misconduct requires reversal if a substantial likelihood exists it affected the jury verdict. *Id.* When a defendant does not object to the misconduct at trial, prejudice can still be established if the misconduct was so flagrant and ill-intentioned that a jury instruction would not have cured it. *Id.* The focus on this inquiry is not on the flagrant or ill-intentioned nature of the remarks but rather on whether the resulting prejudice could have been cured. *Pierce*, 169 Wn. App. at 552.

b. The State presented as fact evidence critical to an element of Mr. Chavez's alleged crime, but it actually never presented this evidence at trial.

The prosecutor engaged in misconduct when she introduced "facts" never admitted into evidence during opening and closing argument. The unadmitted "facts" the prosecutor presented to the jury prejudiced Mr. Chavez because they essentially confirmed he knowingly violated the no-contact order, which was a hotly contested matter during Mr. Chavez's trial. Therefore, these unadmitted "facts" were central to the jury's verdict finding Mr. Chavez guilty of this crime.

To convict Mr. Chavez of felony violation of a no-contact order, the State had to prove each of the following elements beyond a reasonable doubt: (1) a no-contact order existed on February 2, 2017, applicable to Mr. Chavez; (2) Mr. Chavez knew of the existence of the order; (3) on February 2, 2017, Mr. Chavez *knowingly* violated the no-contact order; (4)

this act occurred in Washington; and (5) Mr. Chavez was previously twice convicted of violating a court order. RCW 26.50.110(5); CP 320. A person knowingly violates a no-contact order if he is aware he is violating a no-contact order. CP 321; *State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002).

During opening statements, counsel for Mr. Chavez argued, "what's important in this trial, ladies and gentlemen, is what Mr. Chavez knew...what [Mr. Chavez] knew is the center of this case." RP 554.

At trial, Officer Moore testified regarding the circumstances of Mr. Chavez's arrest. After learning about Mr. Chavez's appearance, confirming that Mr. Chavez had a no-contact order restraining him from contacting Ms. Krajci, and locating Mr. Chavez, Officer Moore arrested him. RP 566-69. Mr. Chavez asked Officer Moore what order he was violating, and he also asked what kind of order he violated and the conditions. RP 656. Officer Moore responded that Mr. Chavez would "have to talk to the City of Redmond about that." RP 656. Officer Moore asked Mr. Chavez if he knew he had a no-contact order, and Mr. Chavez stated he was not aware he was violating the order. RP 657.

Once Officer Moore handcuffed Mr. Chavez, Officer Moore walked Mr. Chavez to the front of a police car and searched him. RP 570-71. From one of Mr. Chavez's coat pockets, Officer Moore retrieved an

Electronic Benefit Transfer (EBT) card. RP 571. Officer Moore testified Mr. Chavez said he wanted to give the EBT card to his daughter and also said he wanted to give the card to Ms. Krajci. RP 571. Mr. Chavez told Officer Moore he was concerned for his daughter and wanted to know if she was okay. RP 573. Officer Moore also claimed Mr. Chavez "kind of" gestured towards the location of "the residence" when he said he wanted to give the EBT card to his daughter. RP 571.

During the search, Officer Moore also discovered a note in Mr. Chavez's pocket. RP 658. The note contained writings regarding Mr. Chavez's salary, his bank account, and apparent directions to a bank (the note mentions Wells Fargo and BOA, the common acronym from Bank of America) that happened to be located in Capitol Hill, in the vicinity where Ms. Krajci resides. RP 553, 660-62. The note neither mentions Ms. Krajci's name nor her address. Trial Ex. 6.

At no point during the trial did the State produce evidence that Mr. Chavez explicitly stated he was near Ms. Krajci's residence specifically because he wanted to give his daughter an EBT card or because he was concerned about his daughter. Nevertheless, the State repeatedly stated Mr. Chavez himself actually specified that his purpose for being near Ms. Krajci's residence was to give his daughter the EBT card and because he

was concerned about her well-being. During opening statements, the prosecutor stated,

> Mr. Chavez is put in custody, is read his Miranda warnings, and *he tells the officers that he is there because he's concerned about his daughter*. He wants to give his daughter an EBT card. Pretty straightforward case.

RP 549 (emphasis added).

Again, during closing arguments, the prosecutor stated,

> [Officer Moore and Mr. Chavez] are talking about how there's this no-contact order and what [Mr. Chavez] can do in order to see his daughter. He's concerned. The officer is suggesting ways in which he cannot violate the order but still see his daughter. *He's very clear. This is why he's here.* It's not complete happenstance that he's on this corner and his daughter happens to be inside. A*nd he has an EBT card in his pocket that he just happens to tell officers, I'm here to give this to my daughter.*

RP 779 (emphasis added).

And yet again, the prosecutor later stated,

> So Officer Moore says, well, *the Defendant talked to me about being there to give his daughter an EBT card.*

RP 786 (emphasis added).

The prosecutor grievously misstated the testimony produced at trial regarding a critical element of the case. Without the prosecutor misstating these facts, the jury would have been free to deduce that upon Mr. Chavez learning he violated a court-order issued in Redmond, he knew this order applied to Ms. Krajci; thus, he figured Ms. Krajci was nearby and

therefore his daughter was nearby too. As such, the jury would have been free to assume that Mr. Chavez may have figured that since his daughter was close, Officer Moore could drop the EBT card off with his daughter. Instead, the prosecutor's misstatements left the jury with no choice but to convict Mr. Chavez of this crime.

c. The prosecutor engaged in improper burden-shifting during closing argument that compounded the prejudice Mr. Chavez experienced due to the prosecutor's misstatement of the facts.

Moreover, the prosecutor's improper burden shifting during closing argument compounded the prejudice Mr. Chavez experienced due to the prosecutor's misstatement of the facts. "It is flagrant misconduct to shift the burden to the defendant." *Miles*, 139 Wn. App. at 890 (referencing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)). During closing argument, the prosecutor stated,

> Officer Moore also testified that, when he pulled up on the scene, he saw the suspect who was the defendant crossing the street, less than 500 feet from Ms. Krajci's apartment complex. *So we know that the defendant knowingly violated the order. There is absolutely no evidence to the contrary, and in fact, all the evidence shows that he knew she was there. He wanted to give her his EBT card.*[2]

RP 780 (emphasis added).

[2] This last sentence—"he wanted to give her his EBT card"—also constitutes a separate improper incident of misconduct: arguing facts outside the record. The impropriety of this argument is fully discussed in part b (the preceding section).

Mr. Chavez objected because the prosecutor's comments impermissibly shifted the burden to him, but the court overruled, asserting the prosecutor's statements merely constituted "argument." RP 780.

Later, the prosecutor stated,

> The State is asking you and will continue to ask you to draw reasonable inferences from the evidence *or lack thereof.*

RP 796 (emphasis added).

This improper burden-shifting further prejudiced Mr. Chavez for two important reasons. First, a trial court's overruling of a specific objection "lends an aura of legitimacy to what was otherwise an improper argument." *Allen*, 182 Wn.2d at 378 (quoting *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). Thus, the court's response to the prosecutor's argument essentially endorsed the State's invitation to assess the lack of evidence Mr. Chavez produced regarding whether he knowingly violated the court-order. But a defendant has no duty to present evidence; instead, the State bears the entire burden of proving its case beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 215. In violation of the law, the jury received the court's blessing to consider the lack of evidence Mr. Chavez produced to rebut the State's claims that he knowingly violated the no-contact order.

Second, the prosecutor's burden-shifting statements were central to the "knowing" element of Mr. Chavez's alleged offense. The State already prejudiced Mr. Chavez regarding this element when it stated, as fact, that Mr. Chavez explicitly stated he was in the vicinity of Ms. Krajci's home because he wanted to give his daughter an EBT card/check up on his daughter's well-being. The prosecutor's misstatement of the burden while discussing the "knowing" element of Mr. Chavez's alleged offense further compromised Mr. Chavez's chances of an acquittal.

d. The prosecutor's misconduct substantially prejudiced Mr. Chavez because it resolved a central disputed element in the State's favor; thus, it is highly certain the misconduct affected the verdict and this Court should reverse.

"Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant has been prejudiced." *State v. Pete*, 152 Wn.2d 546, 555, n.4, 98 P.3d 803 (2004). To assess whether the prosecutorial misconduct prejudiced the defendant, this Court does not assess whether sufficient evidence exists to convict the defendant; instead, this Court assesses whether the misconduct encouraged the jury to base its verdict on the prosecutor's improper arguments rather than the properly admitted evidence. *Glasmann*, 175 Wn.2d 710-11.

The prosecutor's misconduct substantially prejudiced Mr. Chavez because it resolved the centrally disputed element in this case—whether Mr. Chavez knowingly violated the no-contact order—in the State's favor. *See Glasmann*, 175 Wn.2d at 708 (reversing a conviction due to prosecutorial misconduct because the misconduct addressed a critical element of the defendant's charge); *accord Allen*, 182 Wn.2d at 375 (reversing a conviction due to prosecutorial misconduct because the misconduct misstated an element that was critically important to the defendant's case); *see also Miles*, 139 Wn. App. at 888 (reversing a conviction due to prosecutorial misconduct because the extraneous facts the prosecutor inappropriately introduced during trial went to the heart of the defendant's defense).

While Mr. Chavez did not object to the prosecutor's misstatement of the facts, the prosecutor's submission of evidence never admitted at trial and its misstatement of the burden of proof warrants reversal because this misconduct undoubtedly influenced the jury's verdict. It encouraged the jury to find Mr. Chavez guilty of this crime based on statements he never made and evidence he did not present but had no duty to produce.

Mr. Chavez's right to a fair trial must be granted in full. *Glasmann*, 175 Wn.2d at 712. Accordingly, this Court should accept review. RAP 13.4(b)(3); RAP 13.4(b)(4).

E. CONCLUSION

Based on the foregoing, Mr. Chavez respectfully requests that this Court accept review.

DATED this 16th day of July, 2019.

Respectfully submitted,

/s Sara S. Taboada
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALEX ARNOLD CHAVEZ, Appellant.	No. 77488-3-I DIVISION ONE UNPUBLISHED OPINION FILED: June 17, 2019

CHUN, J. — A jury convicted Alex Chavez of domestic violence felony violation of a no-contact order. On appeal, Chavez raises claims of prosecutorial misconduct. Because none of the prosecutor's statements amount to error, we affirm the conviction. However, the incorrectly calculated offender score and improperly imposed DNA fee require remand for resentencing.

I.
BACKGROUND

In October 2015, the King County District Court issued a post-conviction replacement no-contact order restraining Chavez from contacting his former girlfriend, the mother of his child. The order prohibited Chavez from knowingly entering, remaining, or coming within 500 feet of Amy Krajci's residence, school, workplace, or vehicle. The order has a duration of five years.

One morning in February 2017, Krajci called the police to report that she saw Chavez outside her apartment in violation of the no-contact order. The police responded and located Chavez about 100 feet from Krajci's building.

Seattle Police Officer David Moore contacted Chavez and placed him under arrest for violating the no-contact order. Because of Chavez's extensive history of convictions for violating court orders, the State charged him with domestic violence felony violation of a court order.

During the trial, Officer Moore testified about his encounter with Chavez. RP 570-82, 643-64. Officer Moore stated that Chavez cooperated, but initially questioned if the arrest was a "ruse." When Officer Moore asked Chavez if he was aware that he had a no-contact order, Chavez responded, "I wasn't aware that I was violating it."

Officer Moore searched Chavez incident to arrest. Among the items in Chavez's pockets, Officer Moore found an Electronic Benefits Transfer (EBT) card.[1] Chavez told Officer Moore he wanted to give the card to his daughter. Along with this statement, Chavez turned back towards the residence and motioned with his head. Officer Moore further testified that Chavez expressed concern that he had not seen or heard from his daughter and wanted information about her. Officer Moore spoke with Chavez about possible ways to find information about his daughter without violating the court order.

After further testimony, a jury convicted Chavez of domestic violence felony violation of a court order. The trial court calculated an offender score of 19, with a standard range sentence of 72 to 96 months. Instead of a standard

[1] For those with food assistance benefits, an EBT card acts as a debit card to purchase food items at stores. Https://www.dshs.wa.gov/esa/community-services-offices/ebt-and-eft-make-getting-benefits-easier.

range sentence, the trial court sentenced Chavez to a 30 month prison-based drug offender sentencing alternative. The court also ordered Chavez to pay the $100 DNA collection fee.

Chavez appeals.

II.
ANALYSIS

A. Prosecutorial Misconduct

To prevail on a claim of prosecutorial misconduct, the defendant must prove that the prosecutor's comments were improper and prejudicial. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2008). "The burden to establish prejudice requires the defendant to prove that 'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2007) (alteration in original)).

Chavez raises two claims of prosecutorial misconduct based on statements made during the opening and closing arguments of the State's case. He contends the prosecutor argued facts not in evidence and improperly shifted the evidentiary burden. We conclude that neither claim amounts to prosecutorial misconduct.

1. Facts Not in Evidence

Chavez argues the prosecutor stated in opening and closing arguments that Chavez clearly told police that he was concerned about his daughter and wanted to give her the EBT card. According to Chavez, the State failed to

produce evidence that Chavez explicitly made statements to that effect. We disagree.

The State has wide latitude to argue inferences from the evidence but, "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

The State made several statements about Chavez's desire to give the EBT card to his daughter. In opening statements, the prosecutor told the jury that Chavez, "tells the officers that he is there because he's concerned about his daughter. He wants to give his daughter an EBT card." The prosecutor repeats this claim in closing arguments: "He's very clear. This is why he's here. It's not complete happenstance that he's on this corner and his daughter happens to be inside. And he has an EBT card in his pocket that he just happens to tell the officers, I'm here to give this to my daughter." And finally, the prosecutor summarized Officer Moore's testimony as, "the Defendant talked to me about being there to give his daughter an EBT card."

Chavez claims the prosecutor's statements "grievously misstated the testimony." But the prosecutor did not misstate the evidence. Instead, the prosecutor referenced the testimony from Officer Moore. Officer Moore testified that Chavez expressed concern about his daughter during their conversations. RP 573. Officer Moore also stated that upon the search incident to arrest, Chavez had an EBT card in his pocket, said he wanted to give the card to his

daughter, and motioned toward Krajci's residence with his head. The prosecutor's comments constitute logical inferences from this testimony and were not improper.

2. Burden Shifting

Chavez also argues the prosecutor improperly shifted the evidentiary burden during closing arguments. The State claims the prosecutor permissibly commented on the lack of evidence to support other theories of the case. We agree with the State.

The State bears the burden of proving all elements of its case beyond a reasonable doubt. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). "[I]t is flagrant misconduct to shift the burden of proof to the defendant." State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). A prosecutor may commit misconduct by telling the jury to find a defendant guilty based on the failure to present evidence to support the defense's theory. State v. Sells, 166 Wn. App. 918, 930, 271 P.3d 952 (2012). "However, '[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.'" Sells, 166 Wn. App. at 930 (quoting State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009)). A prosecutor is entitled to "point out improbabilities or a lack of evidentiary support for the defense's theory of the case." State v. Killingsworth, 166 Wn. App. 283, 291-92, 269 P.3d 1064 (2012).

Here, the prosecutor made exactly this observation to the jury. The prosecutor stated, "So we know that the defendant knowingly violated the order. There is absolutely no evidence to the contrary and, in fact, all the evidence shows that he knew she was there. He wanted to give her his EBT card." The prosecutor also made a subsequent comment that, "the State is asking you and will continue to ask you to draw reasonable inferences from the evidence or lack thereof."

The prosecutor's statements do not imply that the defense was required to produce evidence and failed to do so. See Killingsworth, 166 Wn. App. at 291-92. Instead, the statements merely point to the strength of the State's evidence and the lack of evidentiary support for any other theory. As such, these statements do not shift the burden of proof to the defendant and do not constitute improper statements.

Because the prosecutor's statements were not improper, Chavez cannot prevail on a claim of prosecutorial misconduct. We affirm his conviction and turn to the sentencing issues.

B. Offender Score Miscalculation

Chavez claims the trial court miscalculated his offender score by improperly doubling his prior domestic violence convictions. The State concedes this error. We agree and remand for recalculation and resentencing based on the corrected score.

In order to determine the appropriate sentence, the trial court must calculate a defendant's offender score by adding together the current offenses and prior convictions. State v. Hunley, 175 Wn.2d 901, 908-09, 287 P.3d 584 (2012); RCW 9.94A.525. The State bears the burden of proving prior convictions by a preponderance of evidence. Hunley, 175 Wn.2d at 909-10. An appellate court reviews the calculation of offender scores de novo. State v. Shelley, 3 Wn. App.2d 196, 199, 414 P.3d 1153 (2018).

When calculating the offender score, each prior adult felony conviction generally counts as one point, while juvenile felony convictions counts as a half point. RCW 9.94A.525(7). However, if a defendant's present conviction is a domestic violence offense, the court must double each prior felony conviction—both adult and juvenile—where domestic violence was pleaded and proven after August 1, 2011. RCW 9.94A.525(21)(a),(c).[2]

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[2] (21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after August 1, 2011, for any of the following offenses: A felony violation of a no-contact or protection order RCW 26.50.110, felony Harassment (RCW 9A.46.020(2)(b)), felony Stalking (RCW 9A.46.110(5)(b)), Burglary 1 (RCW 9A.52.020), Kidnapping 1 (RCW 9A.40.020), Kidnapping 2 (RCW 9A.40.030), Unlawful Imprisonment (RCW 9A.40.040), Robbery 1 (RCW 9A.56.200), Robbery 2 (RCW 9A.56.210), Assault 1 (RCW 9A.36.011), Assault 2 (RCW 9A.36.021), Assault 3 (RCW 9A.36.031), Arson 1 (RCW 9A.48.020), or Arson 2 (RCW 9A.48.030);

. . .

(c) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(d) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was pleaded and proven after August 1, 2011.

RCW 9.94A.525(21)(a),(c),(d).

Chavez has a lengthy record of felony domestic violence related convictions, with four juvenile and five adult convictions. When calculating his offender score, the trial court doubled these nine convictions to arrive at an offender score of 19. But RCW 9.94A.525(21) does not apply because the nine convictions were pleaded and proven before August 1, 2011. Therefore, the trial court erred in its calculation of Chavez's offender score.

By imposing a sentence based on an incorrect offender score, the trial court acted without statutory authority. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). The defendant is entitled to reversal and remand for resentencing on the erroneous portion of the sentence. Goodwin, 146 Wn.2d at 869-70. On remand, both Chavez and the State "have the opportunity to present any evidence relevant to ensure the accuracy of the criminal history." State v. Jones, 182 Wn.2d 1, 10-11, 338 P.3d 278 (2014).

C. DNA Fee

Both parties request remand for the trial court to strike the $100 DNA fee because the State previously collected Chavez's DNA due to prior convictions. A legislative amendment effective June 7, 2018, eliminated the mandatory $100 DNA collection fee where "the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541. This amendment applies prospectively to Chavez due to his pending direct appeal at the time of the amendment's enactment. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714

(2018). As a result, we agree with the parties' request and remand for the trial court to strike the DNA fee from the judgment and sentence.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Chun, J.

WE CONCUR:

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. 77488-3-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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