

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 5

ARGUMENT 12

I. The trial court improperly commented on the evidence in violation of Wash. Const. Article IV, Section 16..... 12

A. Standard of Review..... 12

B. The trial judge improperly commented on the facts of the case by admitting the court’s initial finding of probable cause and its findings that Mr. Lundy had received proper notice and failed to appear for court as scheduled..... 13

II. Mr. Lundy’s Bail Jumping convictions were obtained in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Sections 21 and 22 of the Washington Constitution..... 14

A. Standard of Review..... 14

B. Impermissible opinion testimony on an accused person’s guilt violates the constitutional right to a jury trial.

C.	McIntosh’s testimony included a “nearly explicit” or “almost explicit” opinion that she believed Mr. Lundy was guilty of Bail Jumping.	15
D.	The violation of Mr. Lundy’s constitutional right to a jury trial was not harmless beyond a reasonable doubt. ...	17
III.	Mr. Lundy’s UIBC convictions violated his Fourteenth Amendment right to due process because the state introduced propensity evidence as substantive proof of guilt, and the court failed to give a limiting instruction.	17
A.	Standard of Review	17
B.	A conviction may not rest on propensity evidence... ..	18
C.	Mr. Lundy’s UIBC convictions were based in part on propensity evidence, which the trial court admitted without a limiting instruction.	19
IV.	Mr. Lundy’s Bail Jumping conviction in Count IV violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements beyond a reasonable doubt.	21
A.	Standard of Review	21
B.	Conviction for Bail Jumping requires proof that the accused person failed to appear at the time specified in the notice.....	21
V.	The trial court violated Mr. Lundy’s Fourteenth Amendment right to due process by refusing to instruct the jury on the “uncontrollable circumstances” affirmative defense to Bail Jumping.	24
A.	Standard of Review.....	24
B.	An accused person has a due process right to present a defense.	25

C.	Mr. Lundy presented sufficient evidence to require the court to instruct the jury on the “uncontrollable circumstances” affirmative defense to Bail Jumping.....	26
VI.	Mr. Lundy was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.	28
A.	Standard of Review.....	28
B.	The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.....	28
C.	Defense counsel was ineffective for failing to object to inadmissible evidence and for failing to request limiting instructions.....	30
D.	Defense counsel should have proposed proper instructions on the “uncontrollable circumstances” affirmative defense.....	36
VII.	Mr. Lundy’s Bail Jumping convictions violated his Fourteenth Amendment right to due process because the court’s “to convict” instructions relieved the state of its burden to prove the essential elements of each charge.	39
A.	Standard of Review.....	39
B.	A trial court must instruct the jury on every element of the charged crime.....	39
C.	Instruction No. 20 relieved the prosecution of its obligation to prove that Mr. Lundy was released “with knowledge of the requirement of a subsequent personal appearance.”	40
D.	The court’s instructions relieved the prosecution of its obligation to prove that Mr. Lundy failed to appear “as required.”	41
E.	The errors were prejudicial and require reversal.	41

VIII.	The trial court violated the Supreme Court’s order approving WPIC 4.01 as the exclusive means to instruct the jury on the burden of proof and the reasonable doubt standard.	42
IX.	The trial judge failed to properly determine Mr. Lundy’s offender score.	44
X.	The trial court erred by imposing an exceptional sentence.	47
	A. The trial court violated Mr. Lundy’s right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22 by imposing an exceptional sentence without a jury determination of aggravating factors.	47
	B. The trial court’s Findings of Fact do not support the imposition of an exceptional sentence.	48
CONCLUSION		50

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	48
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	15
<i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)	19
<i>Garceau v. Woodford</i> , 275 F.3d 769 (9th Cir. 2001), <i>reversed on other grounds at</i> 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). 19, 21	
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	30
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....	26
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	22
<i>McKinney v. Rees</i> , 993 F.2d 1378 (9 th Cir. 1993).....	19, 33
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....	23, 25
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	30
<i>United States v. Salemo</i> , 61 F.3d 214 (3 rd Cir. 1995)	30
<i>Washington v. Recuenco</i> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	49

WASHINGTON STATE CASES

City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000)..... 18, 43

In re Breedlove, 138 Wn.2d 298, 979 P.2d 417 (1999)..... 51

In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) 47

In re Detention of Martin, 163 Wn.2d 501, 182 P.3d 951 (2008) 12

In re Detention of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010) 35

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 27

In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)..... 47, 48

In re Hubert, 138 Wn. App. 924, 158 P.3d 1282 (2007)..... 29

State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008) 52

State v. Asaeli, 150 Wn.App. 543, 208 P.3d 1136 (2009) 31

State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995)..... 41

State v. Ball, 97 Wn.App. 534, 987 P.2d 632 (1999)..... 20

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997)..... 12

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007)..... 44, 45, 46

State v. Berg, 147 Wn.App. 923, 198 P.3d 529 (2008) 40

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987)..... 15

State v. Bryant, 89 Wn.App. 857, 950 P.2d 1004 (1998), *review denied*,
137 Wn.2d 1017, 978 P.2d 1100 (1999)..... 21

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 23, 44

State v. Carter, 127 Wn. App. 713, 112 P.3d 561 (2005)..... 38

State v. Carver, 122 Wn.App. 300, 93 P.3d 947 (2004) 20

State v. Coleman, 155 Wn.App. 951, 231 P.3d 212 (2010)..... 21, 22

<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 892 (2006)	19
<i>State v. Contreras</i> , 92 Wn. App. 307, 966 P.2d 915 (1998)	13
<i>State v. Depaz</i> , 165 Wn.2d 842, 204 P.3d 217 (2009)	23
<i>State v. Elliott</i> , 121 Wn.App. 404, 88 P.3d 435 (2004)	24
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009)	19
<i>State v. Farr-Lenzini</i> , 93 Wn.App. 453, 970 P.2d 313 (1999)	16
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	38
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008)	49, 50
<i>State v. Fredrick</i> , 123 Wn.App. 347, 97 P.3d 47 (2004)	20
<i>State v. Ginn</i> , 128 Wn.App. 872, 117 P.3d 1155 (2005)	24
<i>State v. Harris</i> , 122 Wn.App. 547, 90 P.3d 1133 (2004)	40
<i>State v. Harvill</i> , ___ Wn.2d ___, ___ P.3d ___ (2010)	23, 24, 27, 39
<i>State v. Hayward</i> , 152 Wn.App. 632, 217 P.3d 354 (2009)	40
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	29
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006)	27
<i>State v. Hudson</i> , 150 Wn.App. 646, 208 P.3d 1236 (2009)	23
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005)	50, 52
<i>State v. Jackman</i> , 125 Wn. App. 552, 104 P.3d 686 (2004)	14
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978)	37
<i>State v. Khlee</i> , 106 Wn.App. 21, 22 P.3d 1264 (2001)	42
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	15, 17
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009)	12, 42, 43

<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	40
<i>State v. Liden</i> , 118 Wn. App. 734, 77 P.3d 668 (2003)	20
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004)	41
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	12
<i>State v. Monson</i> , 113 Wash.2d 833, 784 P.2d 485 (1989)	35
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008)	15, 16, 36
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995)	31
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006)	29
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	49
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	28, 29, 37
<i>State v. Russell</i> , 154 Wn.App. 775, 225 P.3d 478 (2010)	33, 36
<i>State v. Saunders</i> , 91 Wn.App. 575, 958 P.2d 364 (1998)	30, 33
<i>State v. Simon</i> , 120 Wn.2d 196, 840 P.2d 172 (1992)	42
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997)	41, 43
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003)	37, 39, 40
<i>State v. Toth</i> , 152 Wn.App. 610, 217 P.3d 377 (2009)	18, 22, 43, 44
<i>State v. Trickler</i> , 106 Wn.App. 727, 25 P.3d 445 (2001)	31
<i>State v. Walsh</i> , 143 Wn.2d 1, 17 P.3d 591 (2001)	13
<i>State v. Woods</i> , 138 Wn. App. 191, 156 P.3d 309 (2007)	38
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999)	13

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	1, 3, 4, 14, 15, 17, 27, 49
-----------------------------	-----------------------------

U.S. Const. Amend. XIV	1, 3, 14, 15, 17, 18, 19, 23, 27, 33, 40, 41, 42, 43
Wash. Const. Article I, Section 21	1, 4, 14, 17, 49
Wash. Const. Article I, Section 22	4, 14, 28, 49
Wash. Const. Article IV, Section 16	1, 2, 12, 13, 35

WASHINGTON STATE STATUTES

RCW 9.94A.030	47
RCW 9.94A.500	46
RCW 9.94A.525	47, 48
RCW 9.94A.535	51
RCW 9A.76.170	16, 20, 25, 27, 38, 42

OTHER AUTHORITIES

CrR 6.15	39
ER 401	30, 34, 35
ER 402	30, 32, 34, 35
ER 403	30, 32, 35
ER 404	30, 32, 33
ER 802	35
RAP 2.5	12, 16, 17, 18, 40, 42, 43

ASSIGNMENTS OF ERROR

1. The trial judge improperly commented on the evidence in violation of Wash. Const. Article IV, Section 16.
2. Mr. Lundy's convictions were obtained in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 21 of the Washington Constitution.
3. Kelley McIntosh invaded the province of the jury by expressing her opinion on Mr. Lundy's guilt.
4. Mr. Lundy's UIBC convictions infringed his Fourteenth Amendment right to due process because they were based in part on propensity evidence.
5. The trial court erred by failing to instruct the jury that it could only consider Mr. Lundy's numerous "bad checks" as evidence of knowledge.
6. Mr. Lundy's Bail Jumping conviction in Count IV infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
7. The trial court erred by refusing to allow Mr. Lundy to present his "uncontrollable circumstances" affirmative defense to Bail Jumping.
8. The trial court violated Mr. Lundy's constitutional right to due process.
9. The trial court violated Mr. Lundy's constitutional right to present a defense.
10. Mr. Lundy was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel was ineffective for failing to object to inadmissible evidence.
12. Defense counsel was ineffective for failing to request instructions limiting the jury's consideration of certain evidence.
13. Defense counsel was ineffective for failing to timely propose proper instructions on the "uncontrollable circumstances" defense.

14. Mr. Lundy's Bail Jumping convictions infringed his Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of the charged crimes.

15. The court's instructions relieved the state of its burden to prove that Mr. Lundy failed to appear "as required."

16. The trial court erred by using a nonstandard instruction to outline the burden of proof and to define the reasonable doubt standard.

17. The trial court failed to properly determine Mr. Lundy's offender score.

18. The sentencing court erroneously included in the offender score offenses that had "washed out."

19. The trial court erred by sentencing Mr. Lundy with an offender score above nine.

20. The trial court erred by imposing an exceptional sentence.

21. The trial court violated Mr. Lundy's state and federal constitutional right to have the jury determine every fact which increases the penalty for a crime.

22. The trial court's factual findings do not support an exceptional sentence.

23. The trial court erred by entering Finding of Fact No. 2.2 (Judgment and Sentence).

24. The trial court erred by entering Finding of Fact No. 2.3 (Judgment and Sentence)

25. The trial court erred by entering Finding of Fact No. 2.4 (Judgment and Sentence).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court may not comment on the evidence at trial. In this case, the court admitted evidence that it had previously found probable

cause for the initial charge, and that it had found that Mr. Lundy received proper notice and failed to appear in court as scheduled. Did the trial court comment on the evidence in violation of Wash. Const. Article IV, Section 16?

2. A “nearly explicit” or “almost explicit” opinion on an accused person’s guilt violates the accused person’s constitutional right to a jury trial. Here, Kelley McIntosh opined that Mr. Lundy missed court without a bona fide excuse. Did this opinion testimony invade the province of the jury and violate Mr. Lundy’s constitutional right to a jury trial?

3. A trial court must instruct jurors not to consider evidence introduced for “other purposes” under ER 404(b) as substantive evidence of guilt. In this case, the trial judge failed to give a limiting instruction, and the jury was instead required to consider all the evidence when determining Mr. Lundy’s guilt. Were Mr. Lundy’s UIBC convictions based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process?

4. Bail Jumping requires proof that the accused person failed to appear in court as required. The state did not introduce evidence that Mr. Lundy failed to appear in court as required on July 1, 2009. Did Mr. Lundy’s conviction in Count IV violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

5. A trial court’s instructions must inform the jury of the state’s burden to prove every essential element of the charged crime. Here, the court’s instructions relieved the state of its burden to prove the essential elements of Bail Jumping. Did the trial court’s instructions relieve the state of its burden to prove the elements of Bail Jumping, in violation of Mr. Lundy’s Fourteenth Amendment right to due process?

6. To determine whether evidence is sufficient to support an affirmative defense, a trial court must evaluate the evidence most strongly in favor of the accused person. Mr. Lundy presented

sufficient evidence to raise an affirmative defense to the charge of Bail Jumping. Did the trial judge violate Mr. Lundy's Fourteenth Amendment right to due process by refusing his request to have the jury instructed on the "uncontrollable circumstances" defense to Bail Jumping?

7. An accused person has a constitutional right to the effective assistance of counsel. Mr. Lundy's attorney failed to object to inadmissible testimony, and failed to request limiting instructions prohibiting the jury from using such evidence as substantive evidence of guilt. Was Mr. Lundy denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

8. Class C felonies are excluded from the offender score if the defendant spent five years in the community without committing additional offenses. The trial court's criminal history finding included a five-year period with no criminal convictions. Should the sentencing court have excluded Mr. Lundy's prior Class C felony convictions from his offender score because they washed out?

9. A sentencing court must enter written findings to support imposition of an exceptional sentence. In this case, the sentencing court's written findings do not support the exceptional sentence. Must the exceptional sentence be vacated and the case remanded for resentencing?

10. An accused person has a right to have the jury determine every fact which increases the penalty for a crime. In this case, the court imposed an exceptional sentence based on its own findings that the standard range was clearly too lenient and did not adequately punish Mr. Lundy for his crimes. Did imposition of the exceptional sentence violate Mr. Lundy's right to a jury trial and to due process under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While in the Thurston County jail's work release program, John Lundy got a job at Red Robin, and then got a better job at Ace Industrial. RP (1/26/10) 287-290. After he received his first few paychecks, he set up a checking account. RP (1/26/10) 288-291. Because he lived at the jail, he used the jail address for his account; that address was printed on his checks. RP (1/25/10) 65. He arranged for his checks from Ace Industrial to be direct-deposited with Bank of America. RP (1/26/10) 292-294.

After his release from jail, Mr. Lundy negotiated with Leonard Gay to purchase a truck. RP (1/25/10) 56-63. They both signed a written agreement. RP (1/25/10) 62, 79-80; Exhibit 2, Supp. CP. Mr. Lundy made an initial payment of \$240 by check. He showed his identification to Mr. Gay, and planned to make further weekly payments until the value of \$2550 was paid off. RP (1/25/10) 63, 82. Mr. Lundy provided his phone number to Mr. Gay, although he later realized that he had given one incorrect digit.¹ RP (1/25/10) 68, 89.

Mr. Lundy also used his checking account to make two purchases at Rochester Lumber, and two additional purchases at Rochester NAPA Auto Parts. RP (1/25/10) 108-117, 120-129. He and a friend later returned

¹ He wrote "5" but the correct number was "6." RP (1/25/10) 68, 89.

one item to Rochester Lumber for a check refund, and another item to Rochester NAPA for a cash refund. RP (1/25/10) 115-117, 122-125; RP (1/26/10) 164, 167, 240-242.

Bank of America did not honor any of these checks. RP (1/25/10) 66, 108, 121; RP (1/26/10) 168. After trying to reach Mr. Lundy, Gay reported his truck stolen. RP (1/25/10) 67-72. A few days later, Mr. Lundy was stopped in the truck and arrested. RP (1/25/10) 94-96. Mr. Lundy expressed surprise that the truck was reported as stolen, and told the arresting officer he had a contract to purchase the truck. RP (1/25/10) 101, 105.

The state charged Mr. Lundy with Possession of a Stolen Motor Vehicle and two counts of Unlawful Issuance of Bank Checks, all occurring in March of 2009. CP 2-3. By the time of trial, the state had added three counts of Bail Jumping, including allegations that Mr. Lundy had missed court on July 1, 2009 (Count IV) and October 19, 2009 (Count VI).² CP 3.

To support the bad check allegations, the state presented the testimony of Paul Lemmon, a fraud investigator from the Bank of America. RP (1/26/10) 175-189. He testified that Mr. Lundy's account

² Mr. Lundy was acquitted of Count V, which alleged that he'd missed court on September 23, 2009. CP 3; RP (1/27/09) 413-415.

had been closed by the bank in June because it had been overdrawn for over 120 days. RP (1/26/10) 179. He said that net deposits totaled \$421.31, but that more than 40 checks were written, totaling over \$3800. RP (1/26/10) 177-178, 180. He told the jury that Mr. Lundy had accrued 14 non-sufficient funds fees. RP (1/26/10) 180-181. The prosecution introduced into evidence a document Mr. Lemmon prepared indicating all activities on the account, including every check written and every fee charged. RP (1/26/10) 182-186; Exhibit 40, Supp. CP. Defense counsel did not object to any of this testimony, nor did he request a limiting instruction. RP (1/26/10) 175-189.

Mr. Lundy presented evidence that he had set up automatic deposits for his paychecks and that he was not aware until months later that his checks had not been deposited. RP (1/26/10) 292-294, 301, 306-307. He did not receive any notices or statements from the bank, because he hadn't changed his address after being released from jail. RP (1/26/10) 308. He acknowledged that he had always been careless when it came to keeping track of his money, and told the jury that his wife was in charge of balancing the checkbook. RP (1/26/10) 264, 292-293, 301, 304, 315-317. Mr. Lundy also presented the testimony of his wife and a friend, to support his contentions that he was sincerely attempting to pay for the

truck and other items and that he was not the kind of person who regularly balances a checking account. RP (1/26/10) 250-284.

To support the Bail Jumping charges, the state presented the testimony of Superior Court employee Kelly McIntosh. RP (1/26/10) 192-239. She reviewed for the jury 27 documents admitted by the court. Exhibit 9 was an unredacted copy of Clerk's Minutes from Mr. Lundy's initial appearance. The minutes indicated (among other things) that Mr. Lundy was indigent, and that the court had "found probable cause for initial arrest and detention." Exhibit 9, Supp. CP. The packet of exhibits also included three different unredacted Bench Warrant Orders, each of which set forth the court's findings in support of the warrant: "the court now finding that after proper notice the Defendant has failed to appear as scheduled for [the] hearing". Exhibits 15, 27, 35, Supp. CP. After explaining the documentary evidence to the jury, McIntosh testified that Mr. Lundy did not "offer any bona fide explanation for not being present." RP (1/26/10) 227. Defense counsel did not object to any of this evidence, or request instructions limiting the jury's consideration of it.

Exhibit 13 ("Order and Notice Setting Trial Date or Other Hearings") directed Mr. Lundy to be in court on July 1, 2009 at 9:00 am for a status hearing. Exhibit 13, Supp. CP. Exhibit 14, the clerk's minutes for that hearing, were dated "Wednesday July 1, 2009 Criminal Calendar

8:30 am.” The minutes indicated that the case was called and that Mr. Lundy did not respond. Exhibit 14, Supp. CP. No exhibits or testimony established that the case was recalled at 9 am, the time specified on the order.

Mr. Lundy testified that he had obtained a bail bond on the charge, and that the bail bond company had never forfeit the money. He told the jury that he and his wife kept in close contact with the bondsman, and that he came to court to quash his warrants as soon as he realized that he had missed court. RP (1/26/10) 264-267, 294-298, 314. Mr. Lundy’s wife testified that Mr. Lundy missed court on one occasion because he was in jail at the Chehalis Tribal jail, and that he missed court on another occasion because he was in court at the Chehalis Tribal Court (which only held court one day per month). RP (1/26/10) 265-266.

The court gave a nonstandard instruction outlining the reasonable doubt standard and the burden of proof:

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by evidence beyond a reasonable doubt.

Each crime charged by the State includes one or more elements which are explained in a subsequent instruction. The State has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt

as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction No. 9, Supp. CP.

The court also gave the jury one “to convict” instruction for each Bail Jumping charge. Instructions Nos. 20-22, Supp. CP. After the instructions were read to the jury, the bailiff notified the court that jurors had a question: only Instruction No. 20 required the jury to find that the defendant “knowingly failed to appear before a court.” RP (1/26/10) 349-350. The judge corrected Instructions Nos. 21 and 22, and re-read them to the jurors when they returned to court the next day. RP (1/27/10) 359-362. Even after this correction, Instruction No. 20 required the jury to find “[t]hat the defendant had been released by court order or admitted to bail *with the requirement* of a subsequent personal appearance before that court,” while Instructions Nos. 21 and 22 required proof “[t]hat the defendant had been released by court order or admitted to bail *with knowledge of the requirement* of a subsequent personal appearance before that court.” Instructions Nos. 20-22, Supp. CP (emphasis added)

Before the jury was re-instructed on the morning of January 27, defense counsel requested an instruction regarding the “uncontrollable circumstances” defense to Bail Jumping. The court declined to give the instruction. RP (1/27/10) 355-358. Defense counsel apparently did not

propose any specific written instructions relating to the affirmative defense.

Mr. Lundy was acquitted of Count IV (Bail Jumping on September 23), and convicted of all the remaining charges. CP 4, 7. The trial court found that Mr. Lundy had 9 prior adult felony convictions and three prior juvenile felony convictions. CP 5-6. According to the court's findings, Mr. Lundy spent a period of nearly ten years without committing any crime that resulted in subsequent conviction. The court did not find that he was in custody during this period. CP 5-6. Despite this, the court included in the offender score all of Mr. Lundy's prior Class C felonies. RP (2/4/10) 3-23, CP 5-6. Defense counsel did not object to the offender score calculation. RP (2/4/10) 4.

The court found that Mr. Lundy's "unscored history results in a presumptive sentence that is to [sic] light and results in some offenses not being adequately punished." CP 6. The court sentenced Mr. Lundy to a 70-month exceptional sentence on Count I (Possession of a Stolen Motor Vehicle); on the other charges, the judge imposed standard range sentences concurrent with the sentence on Count I. CP 6-9. Mr. Lundy timely appealed. CP 15.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). A comment on the evidence “invades a fundamental right” and thus may be challenged for the first time on review as a manifest error. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009); *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Review is required when the appellant identifies a constitutional error and shows how, “in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).³

³ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those

- B. The trial judge improperly commented on the facts of the case by admitting the court's initial finding of probable cause and its findings that Mr. Lundy had received proper notice and failed to appear for court as scheduled.

Under Article IV, Section 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. Article IV, Section 16. In this case, the trial judge improperly commented on the facts by admitting evidence that the court had "found probable cause for initial arrest and detention," that Mr. Lundy received "proper notice," and that he'd "failed to appear as scheduled for [his court hearings.]" Exhibits 9, 15, 27, 35, Supp. CP.

A comment of this sort is "structural error [which] infects the entire trial process," and is not subject to harmless error analysis. *State v. Jackman*, 125 Wn. App. 552, 560, 104 P.3d 686 (2004). Accordingly, Mr. Lundy's convictions must be reversed and the case remanded for a new trial. *Id.*

claims have no chance of succeeding on the merits." *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

II. MR. LUNDY’S BAIL JUMPING CONVICTIONS WERE OBTAINED IN VIOLATION OF HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 21 AND 22 OF THE WASHINGTON CONSTITUTION.

A. Standard of Review

Whether or not opinion testimony impermissibly infringes an accused person’s right to a jury trial is an issue of constitutional dimension; such issues are reviewed de novo. *Martin, at 506.*

B. Impermissible opinion testimony on an accused person’s guilt violates the constitutional right to a jury trial.

A criminal defendant has a constitutional right to a jury trial.

Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21.

Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person’s guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159

Wn.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it is a “nearly explicit” or “almost explicit” statement by the witness that the witness believes the accused is guilty. *Kirkman*, at 937. Nor may a witness offer an opinion on the accused person’s state of mind. *State v. Montgomery*, 163 Wn.2d 577, 589-595, 183 P.3d 267 (2008); *see also State v. Farr-Lenzini*, 93 Wn.App. 453, 970 P.2d 313 (1999).

The erroneous admission of such testimony can create a manifest error affecting a constitutional right, requiring reversal even if raised for the first time on review. *Montgomery*, at 596 n. 9 (“[I]f there were evidence that these improper opinions influenced the jury's verdict, we would not hesitate to find actual prejudice and manifest constitutional error regardless of the failure to object or the likelihood that an objection would have been sustained.”); RAP 2.5 (a)(3).

C. McIntosh’s testimony included a “nearly explicit” or “almost explicit” opinion that she believed Mr. Lundy was guilty of Bail Jumping.

To convict Mr. Lundy of Bail Jumping, the prosecutor was required to prove that he had been charged with a crime, that he had been “released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state...” and that he “fail[ed] to appear... as required.” RCW 9A.76.170.

The prosecutor relied on Kelley McIntosh's opinion testimony to prove these elements.

McIntosh introduced herself as an employee of Thurston County Superior Court, established her credentials as an "expert" on court procedure, and explained what each document meant and how it related to Mr. Lundy's charge. RP (1/26/10) 192, 195- 224. After explaining the documentary evidence to the jury, McIntosh testified that Mr. Lundy did not "offer any bona fide explanation for not being present." RP (1/26/10) 227.

This was a "nearly explicit" or "almost explicit" opinion that McIntosh believed Mr. Lundy was guilty of Bail Jumping. *Kirkman*, at 937. The fact that the opinion came from a person employed by the court likely made it all the more persuasive. Her testimony violated Mr. Lundy's constitutional right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 21 of the Washington Constitution. *Id.* The admission of the testimony is a manifest error affecting Mr. Lundy's constitutional right to a jury trial, and thus can be raised for the first time on review. RAP 2.5(a)(3).

D. The violation of Mr. Lundy's constitutional right to a jury trial was not harmless beyond a reasonable doubt.

The errors here are presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). The errors were not trivial, formal, or merely academic; they prejudiced Mr. Lundy and likely affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). A reasonable juror could have entertained a reasonable doubt about whether or not the prosecution had established the elements of Bail Jumping. Because the error was not harmless beyond a reasonable doubt, Mr. Lundy's convictions must be reversed and the case remanded for a new trial. *Id.*

III. MR. LUNDY'S UIBC CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE STATE INTRODUCED PROPENSITY EVIDENCE AS SUBSTANTIVE PROOF OF GUILT, AND THE COURT FAILED TO GIVE A LIMITING INSTRUCTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Martin*, at 506.

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime can violate due process under the Fourteenth Amendment.⁴ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778.

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

For example, courts, reasoning that jurors may convict an accused because the accused is a “bad person,” have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior “bad acts,” may overlook weaknesses in the prosecution’s case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury’s attention away from the determination of guilt for the crime charged.

⁴ The U.S. Supreme Court has expressly reserved ruling on a very similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Natali & Stigall, “*Are You Going to Arraign His Whole Life?*”: *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

When evidence of an accused person’s “bad acts” are introduced for a limited purpose, the court must give a limiting instruction to ensure that the jury considers the evidence only for its proper purpose. *State v. Russell*, 154 Wn.App. 775, 225 P.3d 478 (2010) (where evidence is admitted under ER 404(b), a limiting instruction must be given). The burden rests with the court to give the instruction, whether requested or not. *Id.*, at 483. In the absence of an instruction, the jury is likely to use the prior “bad acts” as propensity evidence; this is especially true when jurors are required to consider “all of the evidence” relating to a proposition, “in order to decide whether [that] proposition has been proved...” Instruction No. 1, Court’s Instructions to the Jury, Supp. CP. *See also Russell*, at 483-484.

C. Mr. Lundy’s UIBC convictions were based in part on propensity evidence, which the trial court admitted without a limiting instruction.

In this case, the state introduced testimony that Mr. Lundy had written numerous bad checks (in addition to the checks that were the subject of Counts I-III). RP (1/26/10) 175-186; Exhibit 40, Supp. CP.

The evidence was (presumably) introduced to establish that Mr. Lundy acted with knowledge that he lacked sufficient funds to cover the checks (and that the truck he possessed had not been paid for).

The trial court did not limit the jury's consideration of this evidence. Court's Instructions to the Jury, Supp. CP. This was error. *Russell, supra*. The problem was compounded by Instruction No. 1, which included the following language: "In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition." Instruction No. 1, Court's Instructions to the Jury, Supp. CP. Furthermore, the error was particularly egregious, given that the prior "bad acts" were for the same crime under consideration by the jury in this case. *See, e.g., State v. Newton*, 109 Wn.2d 69, 76-77, 743 P.2d 254 (1987) (A trial judge "must be particularly conscious of the potential for prejudice where, as in this case, the prior conviction was for an offense identical to that with which the defendant is charged.")

Evidence that Mr. Lundy wrote numerous bad checks in addition to those for which charges were filed—when combined with the language of Instruction No. 1—resulted in a conviction based on propensity evidence. *Garceau, supra*. This violated Mr. Lundy's Fourteenth

Amendment right to due process. *Id.* Accordingly, his UIBC convictions must be reversed and the case remanded for a new trial. *Id.*

IV. MR. LUNDY'S BAIL JUMPING CONVICTION IN COUNT IV VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS BEYOND A REASONABLE DOUBT.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Martin*, at 506. A conviction based on insufficient evidence raises a manifest error affecting a constitutional right, which may be argued for the first time on review. RAP 2.5(a)(3). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

B. Conviction for Bail Jumping requires proof that the accused person failed to appear at the time specified in the notice.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state,

any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

Under RCW 9A.76.170(1), “Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state... who fails to appear... as required is guilty of bail jumping.” Bail Jumping is a class C felony if the person’s original charge is a class B or C felony. RCW 9A.76.170(3).

Bail Jumping requires proof “that the defendant has been given notice of the required court dates.” *State v. Fredrick*, 123 Wn.App. 347, 353, 97 P.3d 47 (2004). *See also State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (2004) (“[W]e expressly hold that the State must prove only that Carver was given notice of his court date”); *State v. Liden*, 118 Wn. App. 734, 740, 77 P.3d 668 (2003) (“Taking the evidence and all reasonable inferences in the State's favor, we fail to see how the State proved that Liden knew the exact date on when to appear for his trial”); *State v. Ball*, 97 Wn.App. 534, 536, 987 P.2d 632 (1999) (“This means

that the State ‘must prove beyond a reasonable doubt that [the defendant] knew, or was aware that he was required to appear at the [scheduled] hearing ...’”) (quoting *State v. Bryant*, 89 Wn.App. 857, 870, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017, 978 P.2d 1100 (1999)) (alterations in original).

This case is controlled by *State v. Coleman*, 155 Wn.App. 951, 231 P.3d 212 (2010). In *Coleman*, the defendant signed an order directing him to appear in court at 9:00 a.m. on a particular day. A court clerk’s minute entry dated for that day at 8:30 a.m. stated that the case was “[s]tricken, defendant on bench warrant status,” and a clerk testified that the entry meant that the defendant did not appear at the 8:30 hearing. The court found this evidence insufficient to establish the defendant’s guilt beyond a reasonable doubt, even when taken in a light most favorable to the state. *Id.*, at 963-964.

Here, as in *Coleman*, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Lundy failed to appear in court as required. To prove notice, the state presented an order signed by Mr. Lundy requiring him to appear for a “[s]tatus hearing at 9:00 a.m. on 1 July ’09.” Exhibit 13, Supp. CP. To prove his failure to appear, the state presented a minute entry dated July 1, 2009 at 8:30 a.m., indicating that “[t]he Court called for the defendant in open court, with no response.”

Exhibit 14, Supp. CP. There is no indication that the court waited until 9:00 a.m. (the time of the notice) to see if Mr. Lundy appeared as required.

As in *Coleman*, this evidence, even when taken in a light most favorable to the state, is insufficient to convince a jury beyond a reasonable doubt that Mr. Lundy failed to appear “as required.” Because the evidence was insufficient, Mr. Lundy’s conviction for Bail Jumping in Count IV must be reversed and the charge dismissed with prejudice.

Smalis, supra.

V. THE TRIAL COURT VIOLATED MR. LUNDY’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY REFUSING TO INSTRUCT THE JURY ON THE “UNCONTROLLABLE CIRCUMSTANCES” AFFIRMATIVE DEFENSE TO BAIL JUMPING.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Martin*, at 506. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *Toth*, at 615. To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and

that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

A trial court's refusal to instruct on an affirmative defense is reviewed for an abuse of discretion, if based on a lack of evidentiary support. *State v. Harvill*, ___ Wn.2d ___, ___, ___ P.3d ___ (2010). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

B. An accused person has a due process right to present a defense.

Under the Fourteenth Amendment to the United States Constitution, a state may not "deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV. The due process clause guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Denial of this right requires reversal unless it can be established beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn.App. 404, 410, 88 P.3d 435 (2004).

An accused person is entitled to have the jury instructed on his or her theory of the case if there is evidence to support that theory; failure to so instruct is reversible error. *Harvill*, at _____. In evaluating whether the evidence is sufficient to support an affirmative defense, trial court must interpret the evidence most strongly in favor of the defendant. *State v. Ginn*, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005).

- C. Mr. Lundy presented sufficient evidence to require the court to instruct the jury on the “uncontrollable circumstances” affirmative defense to Bail Jumping.

It is an affirmative defense to a Bail Jumping prosecution “that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.” RCW 9A.76.170 (2). In this case, the court should have granted Mr. Lundy’s request for instructions on the “uncontrollable circumstances” affirmative defense.⁵

⁵ Defense counsel waited to make the request until just before closing arguments, and apparently did not propose an instruction in writing. RP (1/27/10) 354-358. The court denied the request on its merits. RP (1/27/10) 356-358. If the issue is not adequately preserved for review, Mr. Lundy was denied the effective assistance of counsel, as argued elsewhere in this brief.

Taking the evidence in a light most favorable to Mr. Lundy, the evidence suggested that uncontrollable circumstances beyond his control prevented him from attending court, and that he appeared as soon as those circumstances ceased to exist. Kelley McIntosh relayed Mr. Lundy's explanation for his nonappearance: that he'd had other conflicting court dates.⁶ RP (1/26/10) 227, 237. She also confirmed that he'd voluntarily appeared for "walk-in" calendars to quash his warrants and reset court dates. RP (1/26/10) 231-232, 235-236.

Josephine Lundy testified that Mr. Lundy always turned himself in on the first "available turn-in date," each time he missed court.⁷ RP (1/26/10) 264. She also testified that he missed court on one occasion because he was in custody at the Chehalis Tribal jail, and that it took some time before he was bailed out.⁸ RP (1/26/10) 265. She confirmed that he'd also missed court because of conflicting court dates, and described a

⁶ He also told her that he had so many hearings scheduled that that he'd confused a court date in one county with a scheduled date in Thurston County. RP (1/26/10) 227.

⁷ Mr. Lundy confirmed that he'd turned himself in each time he missed a court date. RP (1/26/10) 294, 296, 314.

⁸ She testified that she believed he was arrested during "the middle of September, right about the 12th," and that he stayed in jail "*at least* four or five days." RP (1/26/10) 265 (emphasis added). Interpreting this evidence most strongly in favor of Mr. Lundy, it is possible that he was in custody at the Chehalis Tribal jail on September 23rd, when he missed court as alleged in Count V. Although he was acquitted of Count V, the evidence provided additional support for the requested instruction. CP 7.

morning appearance in tribal court that went longer than expected, preventing Mr. Lundy from reaching the superior court by the time of his one o'clock hearing in Thurston County.⁹ RP (1/26/10) 266.

Interpreting this evidence most strongly in Mr. Lundy's favor, the evidence was sufficient to raise the affirmative defense set forth in RCW 9A.76.170(2). The trial judge's refusal to do so requires reversal. *Harvill, supra*.

VI. MR. LUNDY WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

⁹ She testified that tribal court occurred only once per month, and this conflict occurred “right around the 18th or 19th.” RP (1/26/10) 266. Presumably, the events she described occurred on October 19th, the missed court date charged in Count VI. CP 3.

Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial

strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel was ineffective for failing to object to inadmissible evidence and for failing to request limiting instructions.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Under ER 404(b), “[e]vidence of other... 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.” Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”” *State v. Asaeli*, 150 Wn.App. 543, 576, 208 P.3d 1136 (2009) (quoting *State v. Pirtle*, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.¹⁰ *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wn.App. 727, 733, 25 P.3d 445 (2001).

¹⁰ However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

1. Defense counsel should have objected to evidence establishing that Mr. Lundy wrote numerous bad checks and was charged overdraft and NSF fees.

Defense counsel did not object when the prosecutor introduced evidence that Mr. Lundy had written a large number of bad checks, and that Bank of America had repeatedly charged him NSF and overdraft fees. RP (1/26/10) 175-186; Exhibit 40, Supp. CP. This failure to object and request a limiting instruction deprived Mr. Lundy of the effective assistance of counsel.

There was no strategic reason favoring the introduction of this material as substantive evidence. The evidence suggested that Mr. Lundy had a propensity to write bad checks, and permitted the jury to convict based on that basis. The use of propensity evidence to establish guilt violates ER 404(b); it may also violate the Fourteenth Amendment's due process clause. U.S. Const. Amend. XIV; *Garceau, supra*; *McKinney, supra*.

Defense counsel should have objected under ER 402, ER 403, and ER 404(b), and proper objections on these grounds would likely have been sustained. The evidence was irrelevant, highly prejudicial, and consisted primarily of propensity evidence forbidden under ER 404(b) and the Fourteenth Amendment. Although some of this evidence may have been admissible for "other purposes" under ER 404(b), a proper objection

would have required the trial judge to balance the evidence on the record and to give an appropriate limiting instruction. *Russell, supra*. Counsel's failure to object constituted deficient performance. *Saunders, supra*.

Had proper objections been made, the outcome of trial would have differed. With some of the evidence excluded and the jury's consideration of the remainder limited to proper purposes, at least some jurors would have voted to acquit Mr. Lundy. Accordingly, Mr. Lundy's convictions must be reversed and the case remanded for a new trial. *Id.*

2. Defense counsel should have sought to exclude irrelevant and prejudicial material, including inadmissible hearsay, contained in the state's documentary evidence.

When the prosecution offered Exhibits 10-35, defense counsel did not object to or seek redaction of inadmissible and prejudicial material contained in each document. This denied Mr. Lundy the effective assistance of counsel.

First, defense counsel should have sought to exclude any reference to Mr. Lundy's indigency. Exhibits 9, 12, Supp. CP. Mr. Lundy's indigent status was wholly irrelevant under ER 401, and thus should have been excluded under ER 402. Some jurors may have been prejudiced against poor people, or believed that the poor should not be entitled to appointed counsel, and thus might have viewed Mr. Lundy with disfavor upon learning that he was indigent.

Second, defense counsel should have objected and sought to exclude any reference to the court's issuance of no-contact orders, the amount of bail, or the conditions of release unrelated to Mr. Lundy's duty to appear in court. Exhibits 9, 10, 16, 17, 28, 29, Supp. CP. Jurors may have viewed the amount of bail, the no-contact orders, and the additional conditions of release as evidence of the judge's opinion of Mr. Lundy, the threat he posed to the community and the victim, and the risk that might fail to appear in court. The evidence was irrelevant under ER 401, and should have been excluded under ER 402 and 403.

Third, defense counsel should have objected and sought to exclude the court's initial finding of probable cause and its findings that Mr. Lundy received proper notice and failed to appear for court as scheduled. Exhibits 9, 15, 27, 35, Supp. CP. These findings likely carried great weight with the jury, and suggested that Mr. Lundy was guilty of the original charge and the Bail Jumping charges. They were irrelevant under ER 401 and inadmissible under ER 402 and ER 403; they were also improper judicial comments admitted in violation of Wash. Const. Article IV, Section 16. Furthermore, the court's findings were inadmissible hearsay and should have been excluded under ER 802:

Although the judge's findings of fact were contained in a certified public document, the document is not included under the public records exception to the hearsay rule. In order to qualify for the

exception, the proffered document “ ‘must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion.’ ”

In re Detention of Pouncy, 168 Wn.2d 382, 393, 229 P.3d 678 (2010)

(quoting *State v. Monson*, 113 Wash.2d 833, 839, 784 P.2d 485 (1989))

(internal citation omitted).

Finally, even if the evidence was admissible for a limited purpose, defense counsel should have sought instructions prohibiting the jury from considering it as substantive evidence of Mr. Lundy’s guilt. A proper objection would have required the trial judge to balance the evidence on the record and to give appropriate limiting instructions. *Russell, supra*.

The admission of this testimony as substantive evidence, without limitation, served no legitimate strategy. Instead, by failing to object and request a limiting instruction, defense counsel permitted the jury to use the evidence for any purpose. Proper objections would have been sustained, or resulted in limitations on the jury’s use of the evidence, and would have altered the outcome of the trial. Accordingly, Mr. Lundy’s convictions must be reversed and the case remanded for a new trial. *Id.*

3. Defense counsel should have objected to inadmissible opinion testimony offered through Kelley McIntosh.

Defense counsel failed to object when McIntosh provided inadmissible opinion testimony on Mr. Lundy’s guilt. RP (1/26/10) 192-

227; *Montgomery*. No legitimate strategy explains defense counsel's failure to object; the opinion testimony bolstered the state's case, and provided strong and unequivocal testimony that Mr. Lundy was guilty. An objection to the evidence would likely have been sustained (as outlined above). Accordingly, the failure to object constituted deficient performance. Furthermore, the result of the trial would have been different had the testimony been excluded.

Without the improper opinion testimony, a reasonable jury could have decided that the prosecution did not prove beyond a reasonable doubt that Mr. Lundy was guilty of Bail Jumping. Accordingly, if the improper admission of the opinion testimony cannot be reviewed as a manifest error affecting Mr. Lundy's constitutional right to a jury trial, his convictions must be reversed for ineffective assistance. *Reichenbach, supra*. The case must be remanded to the superior court for a new trial, with instructions to exclude inadmissible opinion testimony. *Id.*

D. Defense counsel should have proposed proper instructions on the "uncontrollable circumstances" affirmative defense.

To be reasonably competent, defense counsel must be familiar with the relevant legal standards and instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). An

attorney's failure to propose proper instructions on an applicable defense constitutes ineffective assistance. *See, e.g., Tilton, supra; State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007), *State v. Carter*, 127 Wn. App. 713, 112 P.3d 561 (2005).

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person's own testimony. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

Fernandez-Medina, at 460-461.

In this case, the defense strategy was (in part) to raise the affirmative defense set forth in RCW 9A.76.170(2). Defense counsel asked the court to instruct the jury on the defense, but failed to make the request in a timely fashion, and apparently did not propose written instructions as required by court rule. *See* CrR 6.15. If the court's failure

to instruct the jury on Mr. Lundy's "uncontrollable circumstances" defense is not preserved for review, then defense counsel was ineffective.

First, counsel should have familiarized himself with the applicable law (including CrR 6.15's requirements regarding proposed instructions).

Tilton, supra.

Second, Mr. Lundy was entitled to instructions on the affirmative defense, as discussed above. *Harvill, supra.* Had counsel proposed proper instructions in a timely fashion, the trial court would have been obligated to instruct the jury on the defense, and the issue would unquestionably be preserved for appellate review.

Third, there is a reasonable possibility that the outcome of the proceeding would have differed had the jury been properly instructed on the defense. Mr. Lundy provided substantial evidence that he met the requirements for the defense, as outlined in the preceding section. Given this evidence and proper instructions, a reasonable juror could have voted to acquit Mr. Lundy of Bail Jumping in Counts IV and VI.

Counsel's failure to propose proper instructions on the "uncontrollable circumstances" defense, and his failure to propose such instructions in writing and in a timely manner deprived Mr. Lundy of the effective assistance of counsel. *Tilton, supra.* Accordingly, the Bail

Jumping convictions must be reversed and the case remanded for a new trial. *Id.*

VII. MR. LUNDY’S BAIL JUMPING CONVICTIONS VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S “TO CONVICT” INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF EACH CHARGE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Martin*, at 506. A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3). Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. A trial court must instruct the jury on every element of the charged crime.

A trial court’s failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A “to convict” instruction must contain all the elements of the crime, because it serves as

a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004).

The jury has the right to regard the “to convict” instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

- C. Instruction No. 20 relieved the prosecution of its obligation to prove that Mr. Lundy was released “with knowledge of the requirement of a subsequent personal appearance.”

Bail Jumping requires proof that the accused person was “released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state...” RCW 9A.76.170. Proof of this element is different from proof that the accused person “knowingly failed to appear.” *See, e.g., State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992) (discussing knowledge element in promoting prostitution charge); *State v. Khlee*, 106 Wn.App. 21, 25, 22 P.3d 1264 (2001) (discussing knowledge element in possession of a stolen firearm charge).

Here, the court’s “to convict” instruction omitted an essential element: it failed to require proof that Mr. Lundy was released “with knowledge of the requirement of a subsequent personal appearance...” Instruction No. 20, Supp. CP. The omission relieved the prosecution of its

burden to prove the essential elements on Count IV, and created a manifest error affecting Mr. Lundy's Fourteenth Amendment right to due process. RAP 2.5(a)(3). *Kirwin, supra*.

D. The court's instructions relieved the prosecution of its obligation to prove that Mr. Lundy failed to appear "as required."

Bail Jumping requires proof that the accused person failed to appear "as required." RCW 9A.76.170 (1). Here, the court's "to convict" instructions omitted this element. Instead, the instructions allowed conviction upon proof that Mr. Lundy failed to "appear." Instructions Nos. 20-22, Court's Instructions to the Jury, Supp. CP. Because the "to convict" instruction omitted the state's burden to prove that Mr. Lundy failed to appear "as required," the prosecution was relieved of its burden to prove the essential elements. *Smith, supra*. This created a manifest error affecting Mr. Lundy's Fourteenth Amendment right to due process, and thus can be argued for the first time on appeal, pursuant to RAP 2.5(a)(3). *Kirwin, supra*.

E. The errors were prejudicial and require reversal.

Failure to instruct on an essential element requires reversal. *Smith, supra*. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *Toth, at 615*. To overcome the presumption, the state must establish beyond a

reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke*, 222.

The errors here are presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. Furthermore, because the jury may have relied on its reading of Instruction No. 20 to decide both Count IV and Count VI, the bail jumping convictions for both counts are infected by the omission of the knowledge requirement in that Instruction No. 20.

Mr. Lundy's Bail Jumping convictions must be reversed and the case remanded for a new trial. *Id.*

VIII. THE TRIAL COURT VIOLATED THE SUPREME COURT'S ORDER APPROVING WPIC 4.01 AS THE EXCLUSIVE MEANS TO INSTRUCT THE JURY ON THE BURDEN OF PROOF AND THE REASONABLE DOUBT STANDARD.

The Washington Supreme Court has exercised its "inherent supervisory authority to instruct Washington trial courts to use *only* the approved pattern instruction WPIC 4.01 to instruct juries that the government has the burden of proving every element of the crime beyond

a reasonable doubt.” *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007) (emphasis added).

In this case, the trial judge used a different instruction than that authorized by the Supreme Court.¹¹ Instruction No. 9, Court’s Instructions to the Jury, Supp. CP. In particular, Instruction No. 9 omitted the first two sentences of WPIC 4.01, which reads:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged.

WPIC 4.01. In addition, Instruction No. 9 included a sentence not contained in WPIC 4.01: “Each crime charged by the State includes one or more elements which are explained in a subsequent instruction.”

Instruction No. 9, Supp. CP.

When it required trial courts to use WPIC 4.01, the Supreme Court noted that “the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction.” *Bennett*, at 317-318. Furthermore, “every effort to improve or enhance the standard approved instruction necessarily... shifts, perhaps ever so slightly, the emphasis of the instruction.” *Bennett*, at 317.

¹¹ The Prosecuting Attorney proposed WPIC 4.01; however, the trial judge apparently substituted his own instruction. *See* Plaintiff’s Proposed Instructions, Supp. CP.

The nonstandard instruction used by the trial court in this case is not the “simple, accepted, and uniform instruction” adopted by the Supreme Court; instead, by omitting the two sentences quoted above (and inserting an additional sentence), Instruction No. 9 accomplishes the “ever so slight[]” shift warned of in *Bennett*. The instruction redirects the jury’s focus away from the defendant’s plea of not guilty and away from the fact that *every* element is at issue.

The Supreme Court’s directive in *Bennett* is meaningless unless it is enforced through reversal of convictions—such as Mr. Lundy’s convictions—obtained through disobedience of that directive. Absent such enforcement, a trial judge who flaunts the *Bennett* rule runs no greater risk of reversal than s/he would in the absence of the *Bennett* decision. Accordingly, reversal is required not merely because of any prejudice to Mr. Lundy, but rather because a failure to reverse encourages disrespect for the authority of the Supreme Court.

Mr. Lundy’s conviction must be vacated and the case remanded for a new trial. *Bennett, supra*.

IX. THE TRIAL JUDGE FAILED TO PROPERLY DETERMINE MR. LUNDY’S OFFENDER SCORE.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify

the convictions it has found to exist.” RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(11).

Under RCW 9.94A.525, the sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Prior offenses that are Class C felonies “wash out” of the offender score after the offender has spent five years in the community “without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c).

An offender “cannot agree to a sentence in excess of that which is statutorily authorized.” *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). In particular, an offender “cannot waive a challenge to a miscalculated offender score.” *In re Goodwin*, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002).

In this case, the sentencing court found that Mr. Lundy’s criminal history included six adult and three juvenile Class C felonies entered prior to the end of 1997. CP 5-6. A gap of approximately ten years intervened

between his last conviction in 1997 and his next offense, committed in 2007. CP 5. The court did not find that Mr. Lundy was confined during the period from 1997-2007. CP 5-6.

Under these circumstances, all of the Class C felonies washed out under RCW 9.94A.525(2)(c). Accordingly, on each charge the trial court should have sentenced Mr. Lundy with an offender score that included only his three prior Class B felonies, his 2008 conviction, and his three other current felony convictions. CP 5; RCW 9.94A.525. This is so despite defense counsel's statement that he did not disagree with the prosecutor's calculation of the offender score, since an offender cannot waive a challenge to a miscalculated score. *Goodwin, supra*.

The trial court's criminal history finding supports an offender score of seven for each charge. CP 5-6; RCW 9.94A.525. Accordingly, Mr. Lundy's sentence must be vacated, and the case remanded for resentencing with an offender score of seven.

X. THE TRIAL COURT ERRED BY IMPOSING AN EXCEPTIONAL SENTENCE.

- A. The trial court violated Mr. Lundy's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22 by imposing an exceptional sentence without a jury determination of aggravating factors.

The Sixth Amendment guarantees an accused person the right to a trial by jury. U.S. Const. Amend. VI. Any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. Article I, Section 21).¹² Whether or not a presumptive sentence is "clearly too lenient" is a fact that must be determined by a jury. *State v. Flores*, 164 Wn.2d 1, 20, 186 P.3d 1038 (2008). Accordingly, RCW 9.94A.535(2)(b) may only be invoked as an aggravating factor when the accused person stipulates that the presumptive punishment is "clearly too lenient," or waives a jury determination to allow a judge to decide that factor. *State v. Hughes*, 154 Wn.2d 118, 134, 110 P.3d 192 (2005) (abrogated on other grounds by

¹² By contrast, harmless error analysis *does* apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

In this case, the trial judge imposed an exceptional sentence based on a finding “per RCW 9.94A.535(2)(b) & (c) defendants [sic] unscored history results in presumptive sentence that is to [sic] light and results in some offenses not being adequately punished.” CP 6. Although the court did not use the precise language of the statute, it is clear that the judge intended to find the presumptive sentence clearly too lenient under RCW 9.94A.535(2)(b).

In the absence of a jury determination on this factor, the exceptional sentence violates Mr. Lundy’s right to a jury trial under the state and federal constitutions. *Flores, supra*. The sentence must be vacated, and the case remanded to the trial court for sentencing within the standard range.

B. The trial court’s Findings of Fact do not support the imposition of an exceptional sentence.

Whenever a sentencing court imposes an exceptional sentence, it must set forth findings justifying the sentence. RCW 9.94A.535(1). *See, e.g., In re Breedlove*, 138 Wn.2d 298, 310, 979 P.2d 417 (1999) (sentencing court is not excused from entering findings in support of exceptional sentence, even where parties stipulate to the sentence).

In this case, the trial court imposed an exceptional sentence under RCW 9.94A.535(2)(b) and (c). The former subsection permits an exceptional sentence whenever “prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient...” RCW 9.94A.535(2)(b). The court did not find that Mr. Lundy had any prior unscored misdemeanor or foreign criminal history. CP 5-6. Accordingly, the court’s findings do not support an exceptional sentence under RCW 9.94A.535(2)(b).

RCW 9.94A.535(2)(c) permits imposition of an exceptional sentence if the offender “committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” This factor is sometimes referred to as the “free crimes” aggravator, because a person with multiple current offenses receives no additional punishment once s/he reaches an offender score of nine. *See, e.g., State v. Alvarado*, 164 Wn.2d 556, 192 P.3d 345 (2008)

The sentencing court did not make findings necessary to sustain an exceptional sentence under this subsection. Instead, the court found that Mr. Lundy’s “unscored history results in presumptive sentence that is to [sic] light and results in some offenses not being *adequately* punished.” CP 6 (emphasis added). The court did not reference Mr. Lundy’s current offenses; furthermore, the finding that Mr. Lundy was not “adequately

punished” is equivalent to a finding that his punishment was “clearly too lenient,” a standard that the Supreme Court found unconstitutional when applied to the “free crimes” aggravating factor. *Compare Hughes, supra, with Alvarado, supra.* Accordingly, the sentencing court’s findings do not support imposition of an exceptional sentence.

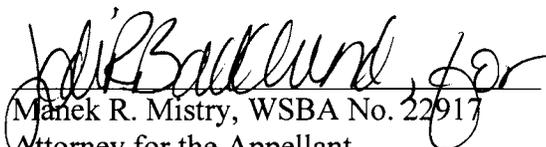
Mr. Lundy’s sentence must be vacated and the case remanded for sentencing within the standard range. *Hughes, supra.*

CONCLUSION

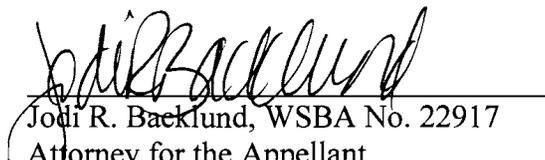
For the foregoing reasons, Mr. Lundy’s convictions must be reversed. Count IV must be dismissed with prejudice; the remaining counts must be remanded for a new trial. In the alternative, the sentence must be vacated, and the case must be remanded for resentencing with an offender score of seven.

Respectfully submitted on August 7, 2010.

BACKLUND AND MISTRY



Manek R. Mistry, WSBA No. 22917
Attorney for the Appellant



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

