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COA NO. 51097-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC V. TRENT,

Appellant.

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

The Honorable Douglas Goelz, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE ALL THE ESSENTIAL ELEMENTS OF THE BURGLARY OFFENSE.

The charging document in this case informs the accused that an element is optional rather than essential. The State fails to grasp the distinction. The burglary conviction must be reversed because the charging document is constitutionally defective in failing to include all essential elements of the crime of burglary.

"In a criminal prosecution, the accused has a constitutional right to be informed of the charge the accused is to meet at trial." State v. Holcomb, 200 Wn. App. 54, 61, 401 P.3d 412 (2017) (citing State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987)). "For that reason, the charging document must include all essential elements of a crime in order to apprise the accused of the charges and facilitate the preparation of a defense." Holcomb, 200 Wn. App. at 61 (citing State v. Pineda-Pineda, 154 Wn. App. 653, 670, 226 P.3d 164 (2010) (citing State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995))).

"An 'essential element is one whose specification is *necessary* to establish the very illegality of the behavior' charged." State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (emphasis added) (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). Stated another

way, essential elements are "those facts that *must be proved* beyond a reasonable doubt to convict a defendant of the charged crime." Zillyette, 178 Wn.2d at 158 (emphasis added) (quoting State v. Powell, 167 Wn.2d 672, 683, 223 P.3d 493 (2009)).

To convict Trent of burglary, the State needed to prove he "enter[ed] or remain[ed] unlawfully in a building" "with intent to commit a crime against a person or property therein." RCW 9A.52.020(1). In omitting the statutory language "with intent to commit a crime against a person or property therein," the charging document failed to put Trent on notice that the State needed to prove he entered or remained in the building with intent to commit a crime. It's not enough that criminal intent exists at some other point in time. Under the plain language of the statute, the intent to commit a crime must exist in entering or remaining in the building. See State v. Allen, 127 Wn. App. 125, 137, 110 P.3d 849 (2005) ("Unlawful presence and criminal intent must coincide for a burglary to occur."). Otherwise, the State cannot convict. The defect in the information is that it presents this intent as an option rather than a necessity.

The State argues a fair reading of the information informed Trent that he was accused of "entering or remaining unlawfully" and "intentionally assaulted a person therein." Brief of Respondent (BOR) at 8.

The State accurately quotes these isolated phrases but does not grapple with the charging language as a whole. "The information must be read 'as a whole and in a commonsense manner.'" Zillyette, 178 Wn.2d at 162 (quoting State v. Kjorsvik, 117 Wn.2d 93, 110-11, 812 P.2d 86 (1991)).

The information alleges Trent "did enter or remain unlawfully in a building." CP 47. So far, so good. But then the information goes off the rails. It omits the statutory element "with intent to commit a crime against a person or property therein." RCW 9A.52.020(1). It then alleges "in entering *or* while in the building *or* immediate flight therefrom, did intentionally assault any person therein." CP 47 (emphasis added). Under a commonsense reading, the disjunctive "or" conveys that the State need not prove the criminal intent existed in entering or remaining unlawfully to obtain a conviction, but rather that the accused can be found guilty if the State only proves immediate flight from the building with criminal intent, i.e., intent to assault. That is not the law. A person is not guilty of burglary if the intent to commit a crime existed only in immediate flight from the building. Stated another way, a person is not guilty of burglary if he intentionally assaulted someone while in immediate flight from a building without having such intent in entering or remaining in the building.

Entering or remaining unlawfully in the building with criminal intent is an essential element because its "specification is necessary to establish the very illegality of the behavior' charged." Zillyette, 178 Wn.2d at 158. A liberal reading of the information does not convey that entering or remaining unlawfully in the building with criminal intent is necessary to establish the crime of burglary. At best, the information conveys that the State may prove intent existed at that time, but it need not prove such intent to obtain a conviction. The information is therefore constitutionally defective in failing to allege an essential element of the crime.

The State says a bill of particulars can correct a vague charging document and Trent waived a vagueness challenge in not requesting one. BOR at 9. This argument misses the mark because a vagueness challenge is different from a constitutional sufficiency challenge to a charging document. City of Bothell v. Kaiser, 152 Wn. App. 466, 474, 217 P.3d 339 (2009) (citing State v. Leach, 113 Wn.2d 679, 686-87, 782 P.2d 552 (1989)). "A constitutionally defective information omits essential elements; a vague information states the elements but is vague about some other significant matter." Kaiser, 152 Wn. App. at 474 (citing Leach, 113 Wn.2d at 686-87). "A defendant may not challenge a constitutionally *sufficient* charging document for 'vagueness' on appeal if he or she did not

request a bill of particulars at trial." State v. Sullivan, 196 Wn. App. 314, 327, 382 P.3d 736 (2016). Trent, however, does not challenge the information on grounds of vagueness. He challenges the constitutionally sufficiency of the charge because it omits an essential element of the crime for which he was prosecuted at trial. A vagueness challenge to a constitutionally sufficient information may be waived by failure to request a bill of particulars, but challenge to the constitutional sufficiency of the information may be raised at any time. State v. Nonog, 169 Wn.2d 220, 225 n.2, 237 P.3d 250 (2010). Trent did not receive the notice mandated by due process. Trent was not required to request a bill of particulars to preserve his challenge to the constitutionally defective charging document. Kaiser, 152 Wn. App. at 474; Sullivan, 196 Wn. App. at 327.

The State says reversal is not required because Trent cannot establish prejudice. BOR at 9. The State misstates the law. When the first prong of the Kjorsvik test is unmet, then prejudice is presumed and reversal is required. A defendant need only establish prejudice when the first prong of the Kjorsvik test is satisfied but the information is otherwise vague or inartful. Kjorsvik, 117 Wn.2d at 105-06; State v. Kilonia-Garramone, 166 Wn. App. 16, 24, 267 P.3d 426 (2011), review denied, 174 Wn.2d 1014, 281 P.3d 687 (2012); State v. Phillips, 98 Wn. App. 936,

940, 991 P.2d 1195 (2000). The State misreads these cases in arguing otherwise. BOR at 7-8.

Trent doesn't need to establish prejudice to prevail. The reviewing court "look[s] at prejudice only if the necessary elements of the crime are first found through liberal construction in the language of the charging document. If, as is the case here, the necessary elements are neither explicitly stated nor fairly implied, reversal follows without any inquiry into the prejudice to the defendant." State v. McCarty, 140 Wn.2d 420, 428, 998 P.2d 296 (2000). This Court must presume prejudice and reverse the conviction if the information omits an essential element. State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010); see also Zillyette, 178 Wn.2d at 163 ("Because the State cannot satisfy the first prong of the Kjorsvik liberal construction test, we presume prejudice and reverse without deciding whether Zillyette was prejudiced."). Such is the case here. The burglary conviction must be reversed because a liberal reading of the charging document does not convey that the State needed to prove Trent entered or remaining inside the building with intent to commit a crime therein.

2. **THE EXCEPTIONAL SENTENCE MUST BE REVERSED BECAUSE THE AGGRAVATING CIRCUMSTANCE RELIED ON BY THE COURT IS UNSUPPORTED BY THE RECORD OR, ALTERNATIVELY, VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL.**
 - a. **Because no prior convictions wash out of the offender score, the court lacked statutory authority to impose an exceptional sentence on the ground that prior criminal history omitted from the offender score results in a sentence that is clearly too lenient.**

The State claims the trial court had statutory authority to impose an exceptional sentence under RCW 9.94A.535(2)(d) because Trent has an offender score of 9+ and his prior convictions would otherwise go unpunished. The State misconstrues the statute.

RCW 9.94A.535(2)(d) provides "The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient." "Criminal history" means a defendant's prior convictions and juvenile adjudications. RCW 9.94A.030(11).

In construing a statute, each word in a statute must be given meaning. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Nothing is considered superfluous. Id. The State equates

"unpunished" with "omitted." BOR at 10. The State's interpretation reads "pursuant to RCW 9.94A.525" right out of RCW 9.94A.535(2)(d).

There are only four provisions in RCW 9.94A.525 that address when convictions "shall not be included in the offender score." RCW 9.94A.525(2)(b), (c), (d), (f). These are the washout provisions addressing class B felonies, class C felonies, serious traffic convictions, and repetitive domestic violence offenses. *Id.* All other provisions in RCW 9.94A.525 describe when a conviction is *included* in the offender score. From this, it is clear that when the legislature stated "prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525," it meant criminal history which was omitted from the offender score because it washed out. There is no plausible alternative interpretation because the washout provisions of RCW 9.94A.525 are the only provisions in that statute that provide for criminal history to be omitted from the offender score.

The history of the aggravator at issue illuminates the emptiness of the State's contrary argument. The aggravator was first codified in 2005, when the legislature amended RCW 9.94A.535 in response to Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Laws of 2005, Ch. 68 § 3; State v. Newlun, 142 Wn. App. 730, 739, 176 P.3d 529, review denied, 165 Wn.2d 1007, 198 P.3d 513 (2008).

In rewriting RCW 9.94A.535, the legislature intended "to create a new criminal procedure for imposing greater punishment than the standard range or conditions and *to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances.*" Laws of 2005, ch. 68, § 1 (emphasis added).

From this statement, it is clear the legislature did not intend to invent any new aggravators but rather intended to rely on the aggravators that were already present in the statute or common law. The aggravator found at RCW 9.94A.535(2)(d) was not codified until the 2005 amendments. If, as argued by the State, the aggravator found at RCW 9.94A.535(2)(d) means an offender is subject to an exceptional sentence if he has *one* current conviction and an offender score greater than 9 points, then this aggravator must have existed in the common law prior to the 2005 amendment. We look in vain for any such aggravator. The State has cited no case showing such an aggravator existed as a matter of common law. See City of Seattle v. Muldrew, 69 Wn.2d 877, 877, 420 P.2d 702 (1966) ("Where no authorities are cited in support of a proposition, the

court is not required to search for authorities, but may assume that counsel, after diligent efforts, has found none.").

What we do find in the pre-2005 common law is an aggravator based on washed-out convictions. State v. Dunivan, 57 Wn. App. 332, 335-37, 788 P.2d 576 (1990). This common law aggravator is now codified at RCW 9.94A.535(2)(d). This conclusion is compelled by the statement of legislative intent that the 2005 amendments were meant to codify existing aggravating factors without expanding or restricting them. Laws of 2005, ch. 68, § 1.

The State's interpretation treats RCW 9.94A.535(2)(d) as a watered-down version of the separate "free crime" aggravator codified at RCW 9.94A.535(2)(c). This interpretation is unprecedented and doesn't make sense. For the free crime aggravator to apply, there must be more than one current conviction. See RCW 9.94A.535(2)(c) ("The defendant has committed *multiple current offenses* and the defendant's high offender score results in some of the current offenses going unpunished."). This has always been the law. See State v. Stephens, 116 Wn.2d 238, 243, 803 P.2d 319 (1991) ("an offender with such a score-*i.e.*, one who is already at the upper limit of the sentencing grid-should receive a greater punishment *if he commits more than one current crime.*"); State v. Smith, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993) (free crime aggravator was "automatically

satisfied whenever 'the defendant's high offender score is combined with multiple current offenses so that a standard sentence would result in 'free' crimes - crimes for which there is no additional penalty'').

What the State seeks to do is create a new aggravator that allows for an exceptional sentence where there is only a single current offense and an offender score of 9+. This interpretation of RCW 9.94A.535(2)(d) renders RCW 9.94A.535(2)(c) superfluous. If a single current conviction with a 9+ offender score qualifies as an aggravating circumstance, then there would be no use for an aggravating circumstance that requires two or more current convictions and an offender score of 9+. Courts must avoid constructions that "yield unlikely, absurd or strained consequences." State v. Barbee, 187 Wn.2d 375, 389, 386 P.3d 729 (2017) (quoting Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)).

The sentencing grid used in calculating the standard range sentence for an offense tops out at "9 or more." RCW 9.94A.510. If RCW 9.94A.535(2)(d) stated "criminal history which was omitted from the offender score calculation pursuant to RCW RCW 9.94A.510," then the State's argument might hold water. But that's not what the statute states. The statutory provision relied on by the trial court requires prior criminal history be "omitted from the offender score calculation pursuant to RCW 9.94A.525." RCW 9.94A.535(2)(d). Courts must follow the plain

language of the statute. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The State says "this aggravator rests, in addition to the misdemeanor assault offenses, on Trent's stipulated criminal history." BOR at 10. Trent has no misdemeanor history "omitted from the offender score calculation pursuant to RCW 9.94A.525." RCW 9.94A.535(2)(d). The only misdemeanor offenses that can be included in the offender score pursuant to RCW 9.94A.525 are certain traffic offenses and repetitive domestic violence offenses. RCW 9.94A.525(2)(e),¹ (21)(d).² Trent does not have prior convictions for any such misdemeanor. He has misdemeanor assault offenses in his history. Those offenses could never be included from his offender score pursuant to RCW 9.94A.525. It follows that they cannot be omitted from his offender score pursuant to RCW 9.94A.525. A conviction can't be omitted when it was never includable in the first place. As argued, the aggravator at issue here — RCW 9.94A.535(2)(d) — applies when prior convictions have washed out from criminal history and are therefore omitted from the offender score

¹ RCW 9.94A.525(2)(e) refers to traffic offenses defined by RCW 46.61.5055(14), which include misdemeanor-level crimes.

² RCW 9.94A.525(21)(d) refers to repetitive domestic violence offenses defined by RCW 9.94A.030, which includes misdemeanor-level offenses. See RCW 9.94A.030(42) (defining "repetitive domestic violence offense").

calculation. Trent has no prior convictions, felony or misdemeanor, that have washed out. The exceptional sentence imposed on Trent is therefore without statutory basis.

There is a separate aggravator that takes into account unscored misdemeanors without regard to their being "omitted from the offender score calculation pursuant to RCW 9.94A.525." This aggravator is found at RCW 9.94A.535(2)(b), which provides "The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." The trial court did not find this aggravator. CP 77, 93; RP 238.

Because the aggravators are listed separately, it is obvious the "unscored" misdemeanor aggravator in RCW 9.94A.535(2)(b) is different than the "omitted from the offender score" aggravator in (2)(d). Further, "the legislature is deemed to intend a different meaning when it uses different terms." Roggenkamp, 153 Wn.2d at 625. An offense can be "unscored," as in RCW 9.94A.535(2)(b). But that does not mean it was "omitted from the offender score calculation pursuant to RCW 9.94A.525," as in RCW 9.94A.535(2)(d). They mean different things.

The State's contrary argument rests on a flawed premise. The State believes that when an offender score is greater than 9 points, every

conviction that adds points to the offender score past the 9-point threshold is omitted from the offender score. This is incorrect. Just because an offender score exceeds 9 points does not mean convictions that add points above 9 are omitted from the offender score under RCW 9.94A.525. They are not omitted. They are included in the offender score, which is why we see cases where the offender score is calculated above 9 points. See State v. Alvarado, 164 Wn.2d 556, 563, 192 P.3d 345 (2008) ("Alvarado due to his current offenses and past criminal history had a calculated offender score of 21"). Trent had a single current conviction with an offender score of 21.³ All of his prior convictions counted in the offender score, which is how the total of 21 points is reached. The sentencing grid tops out at 9 points, RCW 9.94A.510, but the offender score itself is not capped under RCW 9.94A.525. The offender score is limitless. Someone can have an offender score calculated over 9 points precisely because the criminal history is included in the offender score rather than omitted from it.

Case law makes this point clear. The Supreme Court, in holding the "free crime" aggravator was applicable based on crimes that cause an offender score to be greater than 9 points, recognized that "the crimes were counted in calculating the offender score," but had no effect on the

³ The trial court vacated the assault conviction to avoid double jeopardy, leaving the burglary as the sole current conviction. CP 80.

sentence because the score was already "9 or more." Stephens, 116 Wn.2d at 244. According to the Supreme Court, then, whether a crime goes unpunished is a different question from whether a crime is included in the offender score.

In ruling on the aggravators, the court candidly stated "I have no idea if I got any of that right. But I worked hard at it. I'll tell you that." RP 238. There is no dispute the court did its best. Despite its efforts, the court misinterpreted controlling law. Trent has no prior convictions that wash out from his offender score. Trent therefore has no criminal history "which was omitted from the offender score calculation pursuant to RCW 9.94A.525." RCW 9.94A.535(2)(d). The exceptional sentence is therefore unauthorized by statute and must be reversed.

b. Alternatively, counsel was ineffective in agreeing to an erroneous interpretation of the statutory provision that the trial court relied on to impose an exceptional sentence.

The State claims the opening brief does not cite to that part of the record where defense counsel agreed with the trial court's erroneous interpretation of the statute. The State thus declines to address Trent's alternative ineffective assistance argument. BOR at 16.

Two points are made in reply. First, the State is wrong. Page 16 of the opening brief cites page 228 of the transcript where defense counsel

agreed with the court. The citation is made in conjunction with explaining why counsel's agreement did not waive the sentencing error for appeal. It is immaterial that the citation is not repeated on page 18 of the brief, where the ineffective assistance argument based on waiver begins. There is no requirement for redundant citations in the rules of appellate procedure. There is no confusion here.

That being said, none of this matters because the ineffective assistance claim is triggered only if counsel's agreement waived the error for appeal. The State does not argue waiver. And for good reason. As argued in the opening brief, defense counsel cannot waive legal error and cannot agree to a sentence in excess of statutory authority. State v. Wilson, 170 Wn.2d 682, 688-91, 689, 244 P.3d 950 (2010); State v. Gronnert, 122 Wn. App. 214, 224-25, 93 P.3d 200 (2004). There is therefore no need to reach the ineffective assistance claim.

c. The exceptional sentence is invalid because the trial court violated Trent's Sixth Amendment right to a jury trial in imposing it.

Under the Sixth Amendment, any fact that increases the penalty for a crime beyond the prescribed statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 542 U.S. at 301. The State argues Trent's Blakely claim is "moot" because he waived his right to a jury trial. BOR

at 11. The State's briefing on this subject is deficient. The State does not recognize waiver of the right to a jury trial on the charged offense is different than waiver of the right to a jury trial on an aggravating circumstance. Case law establishes the distinction. State v. Cham, 165 Wn. App. 438, 448, 267 P.3d 528 (2011); State v. Trebilcock, 184 Wn. App. 619, 632, 341 P.3d 1004 (2014), review denied, 183 Wn.2d 1001, 349 P.3d 857 (2015). In the opening brief, Trent distinguished his case from those where waiver of a jury for the aggravating circumstance was found. The State presents no counter-argument in this respect.

Shifting gears, the State says "application of this aggravating factor does not require a factual finding. Rather, it can be based solely on the defendant [sic] criminal history and the current offenses." BOR at 16. It cites State v. Clarke, 156 Wn.2d 880, 895-96, 134 P.3d 188 (2006) in support of this proposition. Clarke is inapposite and does not stand for what the State thinks it does. In Clarke, the Supreme Court upheld imposition of an "exceptional minimum sentence" based on two aggravating factors: unscored misdemeanors and free crimes. Clarke, 156 Wn.2d at 883-84. The Court held "Blakely does not apply to an

exceptional minimum sentence imposed under RCW 9.94A.712 that does not exceed the maximum sentence imposed."⁴ Id. at 884.

Clarke does not apply to Trent's case for three reasons. First, Clarke did not involve the aggravating circumstance in Trent's case. Second, Clarke involved an exceptional minimum sentence, not an exceptional sentence above the standard range that was imposed in Trent's case. Exceptional sentences above the standard range are subject to Blakely fact-finding requirements.⁵ In re Pers. Restraint of Beito, 167 Wn.2d 497, 503, 220 P.3d 489 (2009). Third, Clarke expressly refrained from deciding whether the fact-finding performed by the trial court violated the Sixth Amendment. Id. at 894 ("Because we hold that Blakely does not apply to Clarke's exceptional minimum sentence, we need not reach the issue of whether the specific fact-finding performed by the sentencing court violated the Sixth Amendment in this case."). Cases that

⁴ RCW 9.94A.712 governs indeterminate sentences for sex offenders.

⁵ Clarke's holding that Blakely does not apply to exceptional minimum sentences is no longer good law in light of Alleyne v. United States, 570 U.S. 99, 102, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), which held any factual finding required to trigger a mandatory minimum sentence constitutes an element of the crime and therefore must be submitted to a jury under the Sixth Amendment. See also State v. Dyson, 189 Wn. App. 215, 224, 360 P.3d 25 (2015), review denied, 184 Wn.2d 1038, 379 P.3d 957 (2016) (recognizing the holding of Alleyne); State v. Goss, 186 Wn.2d 372, 378 n.1, 378 P.3d 154 (2016) (acknowledging Alleyne while stating "this case does not give us an opportunity to explore whether Clarke remains good law.").

do not specifically decide an issue are not precedent on the issue. In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

Other courts, however, have expressly held that aggravators requiring a "clearly too lenient" finding are subject to Blakely. See State v. Saltz, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007) (the "clearly too lenient" finding required by the unscored misdemeanor aggravator is subject to the right to a jury trial under Blakely). Without citation to contrary authority, the State says Saltz was wrongly decided, but Saltz follows Supreme Court precedent on the matter. "It is well established that the 'clearly too lenient' factor cannot support an exceptional sentence when found by the judge." State v. Flores, 164 Wn.2d 1, 20, 186 P.3d 1038 (2008). The Supreme Court "has outlined specific factual findings a court must show to support a too lenient conclusion – it is not merely a legal conclusion, nor does it entail solely the existence of prior convictions. Blakely did not authorize such additional judicial fact finding." State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

The State writes "Appellant also claims Trent's criminal history was not stipulated. [citing Brief of Appellant at 20, 24] This is inaccurate." BOR at 11. The State's accusation is mistaken.

Page 18 of the opening brief states "the State stressed, and the parties stipulated, that none of the convictions washed out. RP 227, CP 71." Page 20 of the opening brief states "Everyone agreed none of the prior convictions washed out." The State, in its brief, likewise acknowledges none of the criminal history washed out. BOR at 13.

The State's real problem is with page 24 of Trent's appellate brief, which states "Trent did not stipulate to the fact that the presumptive sentence was too lenient." This is accurate. Trent stipulated to his criminal history and offender score, but he did not stipulate that his criminal history rendered his presumptive sentence clearly too lenient. In opposing the exceptional sentence, defense counsel argued the presumptive sentence wasn't clearly too lenient. CP 65; RP 228. The fact that a sentence is clearly too lenient is different from the fact of criminal history. Saltz, 137 Wn. App. at 583 ("Even though Mr. Saltz stipulated to the facts of his criminal history, he did not stipulate to the fact that the presumptive sentence was too lenient.").

3. THE DISCRETIONARY LEGAL FINANCIAL OBLIGATION MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO MAKE THE REQUISITE INQUIRY INTO ABILITY TO PAY OR DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IT.

The State argues the trial court knew Trent as a "talented artist" and therefore he likely had the future ability to pay. BOR at 17. Yet it concedes the court made no individualized determination of Trent's ability to pay. BOR at 16. Before imposing discretionary LFOs, the record must reflect that the trial court must made an individualized inquiry into ability to pay. State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). The trial court committed error under Blazina.

The State asks this Court not to review the claim because there was no objection below. BOR at 17. In keeping with other cases where this Court has reviewed unpreserved challenges to legal financial obligations, Trent requests that this Court exercise its sound discretion on the matter and reverse the improperly imposed fee for appointed counsel.

The State does not address Trent's alternative ineffective assistance claim. It therefore appears to concede the claim. See State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point."); In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to

concede it."). In any event, "[a] claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

B. CONCLUSION

For the reasons stated above and in the opening brief, Trent requests (1) reversal of the burglary conviction; (2) reversal of the exceptional sentence and discretionary LFO; and (3) remand for resentencing within the standard range and inquiry into his ability to pay the discretionary LFO.

DATED this 26th day of April 2018

Respectfully Submitted,

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