

FILED  
Court of Appeals  
Division II  
State of Washington  
8/27/2018 4:21 PM

NO. 51817-1-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

MARCUS MCCLAIN,

Appellant.

---

---

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

The Honorable Edmund Murphy, Judge

---

---

BRIEF OF APPELLANT

---

---

JENNIFER J. SWEIGERT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Pre-trial Competency Proceedings</u> .....	3
3. <u>Substantive Facts</u> .....	4
C. <u>ARGUMENT</u> .....	7
1. DISMISSAL WAS REQUIRED WHEN THE STATE VIOLATED MCCLAIN’S SUBSTANTIVE DUE PROCESS RIGHTS BY DETAINING HIM FOR 70 DAYS IN JAIL AWAITING COMPETENCY RESTORATION TREATMENT. ....	7
a. <u>The 70-day delay in admitting McClain for competency restoration treatment violated substantive due process</u> .....	7
b. <u>McClain’s conviction should be reversed, and the case dismissed</u> .....	10
2. BY TELLING THE JURY TO IGNORE THE MOTHER’S DESIRE TO LIFT THE ORDER AND THE STEPS SHE TOOK TO DO SO, THE PROSECUTOR RELIEVED THE STATE OF ITS BURDEN TO PROVE WHETHER MCCLAIN KNEW THE ORDER WAS IN EFFECT. ....	15
a. <u>The prosecutor improperly relieved the State of its burden of proof</u> . ....	16

**TABLE OF CONTENTS (CONT'D)**

	Page
b. <u>The prosecutor's improper arguments relieving the State of its burden of proof prejudiced the outcome of trial and were also so flagrant and ill-intentioned that no instruction could have cured them.</u> .....	19
c. <u>To the extent the prosecutorial misconduct was not preserved for appellate review, defense counsel was ineffective.</u> .....	23
3. REMAND IS REQUIRED TO CORRECT MCCLAIN'S OFFENDER SCORE. ....	25
D. <u>CONCLUSION</u> .....	31

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Det. Of Morgan</u> 180 Wn.2d 312, 330 P.3d 774 (2014).....	7
<u>In re Pers. Restraint of Carle</u> 93 Wn.2d 31, 604 P.2d 1293 (1980).....	30
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	16, 17, 19, 22
<u>In re Pers. Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002).....	30, 31
<u>In re Pers. Restraint of Yung-Cheng Tsai</u> 183 Wn.2d 91, 351 P.3d 188 (2015).....	24
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	30
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	30
<u>State v. Carter</u> 127 Wn. App. 713, 112 P.3d 561 (2005).....	21
<u>State v. Casteneda Perez</u> 61 Wn. App. 354, 810 P.2d 74 (1991).....	22
<u>State v. Crawford</u> 164 Wn. App. 617, 267 P.3d 365 (2011).....	29
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	24, 25
<u>State v. Estes</u> 188 Wn.2d 450, 395 P.3d 1045 (2017).....	23, 24

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Fleming</u> 83 Wn. App. 209, 921 P.2d 1075 (1996).....	22
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	16, 22
<u>State v. Hand</u> 199 Wn. App. 887, 401 P.3d 367 rev. granted, 189 Wn.2d 1024 (2017).....	14
<u>State v. Hernandez</u> 185 Wn. App. 680, 342 P.3d 820 (2015).....	25
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	17
<u>State v. Kidder</u> 197 Wn. App. 292, 389 P.3d 664 (2016).....	12, 13
<u>State v. King</u> 162 Wn. App. 234, 253 P.3d 120 (2011).....	25
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	24
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	16, 20, 22
<u>State v. McFarland</u> 127 Wn.2d 332, 899 P.2d 1251 (1995).....	23
<u>State v. Michael</u> 160 Wn. App. 522, 247 P.3d 842 (2011).....	21
<u>State v. Pinson</u> 183 Wn. App. 411, 333 P.3d 528 (2014).....	20
<u>State v. Roche</u> 75 Wn. App. 500, 878 P.2d 497 (1994).....	30

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Ross</u> 152 Wn.2d 220, 95 P.3d 1225 (2004).....	26, 31
<u>State v. Thierry</u> 190 Wn. App. 680, 360 P.3d 940 (2015) <u>rev. denied</u> , 185 Wn.2d 1015 (2016) .....	20
<u>State v. Thomas</u> 150 Wn.2d 666, 80 P.3d 168 (2003).....	25
<u>State v. Tili</u> 148 Wn.2d 350, 60 P.3d 1192 (2003).....	25
<u>State v. Vassar</u> 188 Wn. App. 251, 352 P.3d 856 (2015).....	16
<u>State v. W.R.</u> 181 Wn.2d 757, 336 P.3d 1134 (2014).....	16
<u>State v. Wilson</u> 170 Wn.2d 682, 244 P.3d 950 (2010).....	29

**FEDERAL CASES**

<u>Advocacy Center for Elderly &amp; Disabled v. Louisiana Dep't of Health &amp; Hospitals</u> , 731 F. Supp. 2d 603 (E.D. La. 2010).....	8, 9, 10, 14
<u>Drope v. Missouri</u> 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).....	13
<u>Jackson v. Indiana</u> 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).....	10
<u>North Carolina v. Alford</u> 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	28
<u>Oregon Advocacy Center v. Mink</u> 322 F.3d 1101 (9th Cir. 2003) .....	7, 8, 9, 10, 12

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	23, 24
<u>Trueblood v. Wash. State Dep't of Social &amp; Health Servs.</u> 822 F.3d 1037 (9th Cir. 2016) .....	7, 8, 10, 12, 15
<u>Youngberg v. Romeo</u> 457 U.S. 307, 321-22, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) .....	13

**RULES, STATUTES, AND OTHER AUTHORITIES**

CtR 8.3 .....	3
RCW 9.94A.030 .....	26
RCW 9.94A.510 .....	25, 31
RCW 9.94A.525 .....	26, 27, 29
RCW 10.77.050 .....	13, 14
RCW 10.77.068 .....	10, 11
RCW 10.77.084 .....	12
RCW 26.50.110 .....	17
Sentencing Reform Act.....	29, 30
U.S. Const. amend. XIV .....	10
Const. art. 1, § 3 .....	10

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion to dismiss when he was detained in jail for 70 days awaiting competency restoration in violation of his substantive due process rights.

2. Prosecutorial misconduct during closing argument denied appellant a fair trial.

3. Defense counsel was constitutionally ineffective in failing to object to prosecutorial misconduct in closing argument.

4. The court erred in calculating appellant's offender score.

Issues Pertaining to Assignments of Error

1. Under substantive due process, incompetent criminal defendants have a right to timely treatment. When appellant was detained in jail awaiting competency restoration for 70 days, did the court err in denying his motion to dismiss the charges for violation of his substantive due process rights.

2. Prosecutors may not, in closing argument, seek to undermine the burden of proof beyond a reasonable doubt. Here, the prosecutor argued the jury had to "disregard" defense counsel's argument about facts that raised a reasonable doubt as to whether appellant knew the no-contact order was still in effect. Did this improper argument cause

incurable prejudice depriving appellant of a fair trial? Alternatively, was counsel constitutionally ineffective in failing to object?

3. When both the current and the prior offense involve domestic violence, the Sentencing Reform Act mandates that prior felonies count two points and prior misdemeanors count one point in the offender score, so long as domestic violence was pleaded and proved after August 1, 2011. Did the court err in calculating appellant's offender score by adding two points for a felony that was sentenced in 2005, two points for a 2012 felony without evidence that domestic violence was pleaded and proved, and two points for 2014 misdemeanors without evidence that domestic violence was pleaded and proved?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Marcus McClain with two counts of violating a court order. CP 87-88. Count I alleged the violation was a felony because McClain had, on two previous occasions, been convicted of violating such court orders. CP 87. Count two alleged a felony on the grounds that the conduct violating the order amounted to an assault. CP 87-88.

The jury found McClain guilty on count one and could not reach a verdict on count two. CP 128, 130. The jury also answered, "yes" to a

special verdict asking whether McClain and the protected party were members of the same family or household. CP 129.

Based on an offender score of 10, the court calculated McClain's standard range as 60 months, the statutory maximum for a class C felony. CP 143. The court imposed an exceptional sentence below the standard range, 48 months, in order to also impose 12 months of community custody, during which McClain would be required to obtain a mental health evaluation and abide by any treatment recommendations. CP 143, 145-47. Notice of appeal was timely filed. CP 154.

## 2. Pre-trial Competency Proceedings

On May 9, 2017, the court found McClain incompetent to stand trial and ordered transport to Western State Hospital for 45 days of competency restoration services. CP 29. The court ordered transport to occur within seven days. CP 31. Approximately a month later, on June 13, 2017, McClain moved for the charges to be dismissed on the grounds that the delay violated CrR 8.3(b) and substantive due process. CP 34-57. He also requested contempt sanctions. Id. At a hearing on June 21, 2017, the court denied the motion to dismiss and found that sanctions were already being imposed under federal class action litigation on this issue. IRP<sup>1</sup> 6. McClain was not admitted to Western State Hospital for competency restoration until July 18,

---

<sup>1</sup> There are nine volumes of Verbatim Report of Proceedings, referenced as follows: IRP – June 21, Sept. 6, Dec. 13, 2017; 2RP – Dec. 5, 2017, Jan. 9, 10, 11, 16, 26, 2018.

2017. CP 65. He was detained in jail awaiting competency restoration for 70 days. On August 30, 2017, a new evaluation found him competent. CP 60, 70.

3. Substantive Facts

In July 2016, McClain's mother died. 2RP 149-50. He was incarcerated at the time and did not learn of her death right away. 2RP 305. When last he saw his mother, the two had argued about his relationship with his significant other, of whom his mother did not approve. 2RP 267.

Until that point, their difficult relationship had been improving. 2RP 274. The previous year, a court order was entered prohibiting McClain from contacting her. 2RP 268. Exhibit 1 was a no-contact order, apparently signed by McClain, on its face valid for five years beginning in 2015 when it was filed. 2RP 292-94. He admitted previously violating orders restricting contact four times, three of which involved former girlfriends. 2RP 297-98.

McClain testified he and his mother had gone to court to have the order lifted, and his mother told him it was done. 2RP 269-70. He began to visit her and put in time helping her. 2RP 274. The mother's apartment manager testified that McClain visited occasionally, and his mother usually went downstairs to the main entrance to let him in. 2RP 190.

The evening of July 20, 2016, McClain's mother called, asking him to come over and buy him some cigarettes. 2RP 267. He arrived in the

evening, and she gave him her key fob to open the outside door to the building so she would not have to come downstairs to let him in when he returned. 2RP 274.

Surveillance video from showed him leaving the building with her key fob at 1:23 a.m. and returning at 1:30 a.m. 2RP 180-81, 194. One of the entrances is covered by only one, rather than two security cameras, but McClain did not use it. The entrance he used was fully covered by interior and exterior cameras. 2RP 190. The apartment manager agreed that a person trying to avoid detection by the security cameras would not have used the entrance that McClain used. 2RP 190. Although McClain was walking quickly, he was not running past the cameras or attempting to hide his face in any way. 2RP 191.

He estimated he was gone approximately 30 minutes after visiting two different stores to find the brand of cigarettes his mother preferred. 2RP 280-81. When he returned, they resumed a previous argument about McClain's relationship with his significant other. 2RP 282. When he turned to leave, she hit him in the head with a heavy flashlight. 2RP 271, 282. He tried to take it from her, and, in the struggle, the flashlight flew back and hit her in the forehead. 2RP 271, 284. McClain stayed with her until the bleeding stopped, repeatedly asking her if she wanted medical attention, but she refused. 2RP 284-86.

He left later that night and went to a friend's. 2RP 288. The next morning, he was in a car accident and went from the hospital to jail. 2RP 291. In jail, he was unable to call to check up on his mother. 2RP 303-04.

Two days later, McClain's sister checked on their mother and found her lying dead in her bed. 2RP 154-55. The medical examiner reported the mother, who was 78 and suffered from multiple ailments, had passed away of natural causes, specifically ischemic heart disease with hypertension and diabetes as contributing factors. 2RP 149-50, 166, 171, 218, 249.

McClain's sister did not believe this report and was suspicious of her brother. 2RP 159-60, 171, 257. The apartment manager reported that, a couple days before she was found dead, McClain's mother had been frantic about having lost her keys. 2RP 178-79. McClain's sister said she visited their mother regularly, every couple of days, and the mother had not told her that the no-contact order had been lifted. 2RP 171.

When police questioned McClain about the incident, he waived his rights to silence and to counsel. 2RP 252. He freely admitted being in his mother's apartment, arguing with her, and that he was involved in the accidental flashlight injury. 2RP 252-54. Police did not recall asking if he was aware that the no-contact order was still in effect. 2RP 254-55. He denied intentionally violating the order or striking his mother. 2RP 276.

C. ARGUMENT

1. DISMISSAL WAS REQUIRED WHEN THE STATE VIOLATED MCCLAIN'S SUBSTANTIVE DUE PROCESS RIGHTS BY DETAINING HIM FOR 70 DAYS IN JAIL AWAITING COMPETENCY RESTORATION TREATMENT.

An incompetent pretrial detainee cannot be jailed indefinitely simply because there is no room for him in the state hospital. Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1120 (9th Cir. 2003). Incompetent detainees have distinct liberty interests in freedom from incarceration and in restorative treatment. Id. at 1121. The state has no legitimate interest in keeping incompetent defendants "locked up in county jails for weeks or months" following an incompetency determination. Trueblood v. Wash. State Dep't of Social & Health Servs., 822 F.3d 1037, 1044 (9th Cir. 2016). The delay in admitting McClain for competency restoration treatment violated his substantive due process rights. His conviction should be reversed, and the case dismissed.

- a. The 70-day delay in admitting McClain for competency restoration treatment violated substantive due process.

Substantive due process prohibits the government from interfering with a fundamental right unless the infringement is narrowly tailored to serve a compelling state interest. In re Det. Of Morgan, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). An incompetent criminal defendant has a liberty interest in

receiving timely competency restoration treatment. Trueblood 822 F.3d at 1042-43. Here, the state had two interests: to restore McClain's competency, and to resume criminal proceedings. See Mink, 322 F.3d at 1122. There was no legitimate state interest in continuing to confine McClain without treatment. Id.

In Mink, the court also considered the cases of pretrial detainees who had been deemed incompetent to stand trial. 322 F.3d at 1119. The court held that waiting "in jail for weeks or months violates ... due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals." Id. at 1122. Mink stands for the proposition that persons detained for treatment may not constitutionally be detained while awaiting treatment. 322 F.3d at 1121-22. Because the jails were not capable of providing the treatment that was the purpose of the detention, the court found a violation of due process. Id. at 1122. The court determined the state had no legitimate interest that could outweigh the patients' liberty interests in both restorative treatment and freedom from incarceration. Id. at 1121.

The federal district court came to a similar conclusion in Advocacy Center for Elderly & Disabled v. Louisiana Dep't of Health & Hospitals, 731 F. Supp. 2d 603, 621 (E.D. La. 2010). There, potentially incompetent persons awaiting trial were detained in jail because the mental health facility

was full. Id. Although a limited treatment program was provided, the court concluded the detention did not bear a reasonable relationship to its purpose of determining or restoring competency. Id.

“The Incompetent Detainees remain in jail because [the state mental health facility] is full, not because there is any suggestion that remaining in jail might restore their competency.” Id. The court concluded the decision to keep the detainees in jail was an economic one, which could not outweigh the detainees’ liberty interests. Id. at 623. “A state’s constitutional duties toward those involuntarily confined in its facilities does not wax and wane based on the state budget.” Id. at 626. Under Mink and Advocacy Center, persons who are not competent to stand trial may not be detained without treatment designed improve their mental condition. Mink, 322 F.3d at 1121; Advocacy Center, 731 F. Supp. 2d at 621.

In 2014, the Federal District Court for the Western District of Washington, looking at Washington State laws and practices, found “the state has consistently and over a long period of time violated the constitutional rights of the mentally ill - this must stop. The Court finds that the defendant’s failure to provide timely competency evaluation and restoration to Plaintiffs and class members has caused them to languish in city and county jail for prolonged periods of time, and that this failure violates their right to substantive due process under the Fourteenth

Amendment.” Trueblood v. Washington State Dep't of Soc. & Health Servs., 73 F. Supp. 3d 1311, 1317-18 (W.D. Wash. 2014).<sup>2</sup>

McClain was akin to the pre-trial detainees in Mink, Advocacy Center, and Trueblood. He had been found not competent to stand trial and was being held for purposes of mental health treatment to restore him to competency. CP 29. His 70-day detention without treatment detention far exceeded the 14-day statutory deadline. RCW 10.77.068. It also violated his fundamental right to freedom from confinement because the purpose of the confinement (restoring him to mental competency) bore no relation to the nature of that confinement (incarceration in the county jail).

- b. McClain's conviction should be reversed, and the case dismissed.

Dismissal should be the remedy for this violation of McClain's substantive due process rights because the violations will otherwise continue unremedied. There must be a remedy when the nature and duration of confinement bear no reasonable relation to the purpose. Jackson v. Indiana, 406 U.S. 715, 733, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972); Const. art. 1, § 3; U.S. Const. amend. XIV. In Jackson, an incompetent criminal defendant

---

<sup>2</sup> Subsequently, the Ninth Circuit vacated the district court injunction, finding the seven-day deadline went beyond what due process required. Trueblood, 822 F.3d at 1046. The case was remanded to modify the injunction and evaluate whether the new statutory deadline of 14 days satisfied due process. Id. On remand, the injunction was modified to require admission for a competency evaluation within 14 days. Trueblood, Not Reported in F.Supp.3d 2016 WL 4268933 (W. Dist. WA, August 15, 2016). The State did not challenge the portion of the injunction requiring transport for competency restoration treatment within seven days. Trueblood, 822 F.3d at 1040.

was held for three and a half years. Id. at 738-39. The Court held the detention unconstitutional because there was no reasonable relationship between the terms of his confinement and its purpose. Id. The Court held that not only must the means and purpose be related, but the defendant also must receive treatment benefit in return for his loss of liberty. Id. at 738. The court declined to “prescribe arbitrary time limits.” Id. However, the court held that a person held for competency restoration treatment “cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.” Id. Furthermore, if restoration of competency is not foreseeable, “then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.” Id.

The Washington State legislature has set a performance target of seven days or less and a maximum time limit of fourteen days for an offer of admission to a state hospital to a defendant in pretrial custody. RCW 10.77.068(1)(a)(ii)(A)(B). The statute provides numerous defenses to allegations of failure to perform in the timely manner, which include showing that the reason for exceeding the time limits was outside the department’s control: “An unusual spike in the receipt of evaluation referrals or in the number of defendants requiring restoration services has occurred,

causing temporary delays until the unexpected excess demand for competency services can be resolved.”

But the statute is insufficient to protect and remedy due process violations because lack of funds, staff, facilities, or resources does not justify failing to protect the constitutionally guaranteed substantive due process rights of incompetent criminal defendants. Trueblood, 73 F. Supp.3d at 1314 (quoting Mink, 322 F.3d at 1121). Additionally, imposition of financial sanctions by the courts has not spurred the legislature or DSHS to remedy the violation of substantive due process rights of incompetent criminal defendants.

Under RCW 10.77.084(1)(c), the trial court is authorized to dismiss the criminal proceedings without prejudice if competency has not been restored within the statutory time limits of a 45 or 90-day treatment period. Division I of the Court of Appeals affirmed a trial court order dismissing the criminal charge without prejudice, after Western State Hospital repeatedly ignored court orders to admit the defendant for 90 days of restoration services. State v. Kidder, 197 Wn. App. 292, 389 P.3d 664 (2016).

By contrast, in this case, the trial court denied the motion to dismiss. 1RP 6. Thus, McClain remained in jail long past the seven days ordered by the court (and set as a performance target by the law), long past the 14 days

set as a maximum time limit by the law, and long past the 45 days allotted for the entirety of the competency restoration treatment.

McClain asks this Court to provide the same relief ordered by the trial court in Kidder. The serious relief of dismissal matches the state's failure to provide competency restoration services in a reasonable time because incompetent persons are being unconstitutionally punished.

Incompetent persons awaiting criminal trial are more akin to those subjected to involuntary civil commitment. Although they have been charged with a criminal offense, they remain protected by the presumption of innocence. Moreover, once they have been found incompetent, the State has no ability to prosecute them for any criminal offense while such incompetency continues. RCW 10.77.050; Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Constitutionally, they may not be punished: "Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg v. Romeo, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

Dismissal is the appropriate remedy because McClain's unlawful detention amounted to unconstitutional punishment. Indefinite detention in county jails awaiting competency restoration treatment amounts to unconstitutional punishment. "That incompetent detainees might have the

hope that they will at some unidentifiable point in the future be transferred from jail to a mental health facility in compliance with court order does not mean that their continued, lengthy imprisonment is non-punitive.” Advocacy Center, 731 F. Supp. 2d at 623-24.

The Washington Supreme Court is currently considering the remedy for the egregious and ongoing due process violations that occur when competency evaluations are delayed. State v. Hand, 199 Wn. App. 887, 401 P.3d 367, rev. granted, 189 Wn.2d 1024 (2017). In that case, Division Two of this court held that Hand’s substantive due process rights were violated by a 61-day delay in transport to Western State Hospital for competency restoration services. Id. at 895. However, that Court held dismissal was not the remedy. Id. On June 26, 2018, the Washington Supreme Court heard oral argument on this issue.

Like Hand, McClain was found incompetent to stand trial. CP 29. As of May 9, 2016, the State could not proceed with criminal charges against him. RCW 10.77.050 (“No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.”). Therefore, the only purpose for his detention was mental health treatment to see if his competency could be restored. The court ordered that he be transported from the jail to Western State Hospital for that treatment

within seven days. CP 31. Instead, McClain languished in jail for more than two months. CP 65.

The district court has already noted that, “Defendants [DSHS] have demonstrated a consistent pattern of intentionally disregarding court orders...and have established a de facto policy of ignoring court orders which conflict with their internal policies.” Trueblood, 101 F.Supp.3d at 1024. This has continued in McClain’s case. McClain respectfully asks this Court to consider the harm done to mentally ill, incompetent criminal defendants as they wait in jail for mental health treatment, in violation of their constitutional substantive due process rights, and dismiss his case with prejudice.

2. BY TELLING THE JURY TO IGNORE THE MOTHER’S DESIRE TO LIFT THE ORDER AND THE STEPS SHE TOOK TO DO SO, THE PROSECUTOR RELIEVED THE STATE OF ITS BURDEN TO PROVE WHETHER MCCLAIN KNEW THE ORDER WAS IN EFFECT.

The only disputed issue at trial was whether McClain knew the no-contact order was still in effect. 2RP 343, 347, 355-56 (defense closing argument not disputing that McClain was there). He testified he believed the order had been rescinded because his mother did not want it and he had gone with her to see a judge about lifting it. 2RP 269-70. This testimony, if believed, supported at least a reasonable doubt as to whether he knew the order was still in effect. Rather than confront this evidence, the prosecutor

told the jury to ignore it completely as irrelevant. 2RP 367. He told the jury, “You need to disregard counsel’s arguments to that effect.” RP 367. By telling the jury to disregard facts showing a reason to doubt, this argument relieved the State of its burden to prove McClain’s knowledge beyond a reasonable doubt.

a. The prosecutor improperly relieved the State of its burden of proof.

“Arguments by the prosecution that shift or misstate the State’s burden to prove the defendant’s guilt beyond a reasonable doubt constitute misconduct.” State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (citing State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014)). “Due process requires the prosecution prove every necessary element of the charged crime beyond a reasonable doubt.” State v. Vassar, 188 Wn. App. 251, 260, 352 P.3d 856 (2015) (citing In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012)). “Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct.” Glasmann, 175 Wn.2d at 713. If the prosecutor misstates the basis on which a jury can acquit, it “insidiously shifts the requirement that the State prove the defendant’s guilt beyond a reasonable doubt.” Id.

Knowledge of the existence of the no-contact order and knowingly violating its provisions are both elements of the offense of violating a court order. RCW 26.50.110. The jury instructions appropriately required the jury to find that McClain not only knew of the existence of the order, but also that he knowingly violated its provisions. CP 117. Therefore, the State was required to prove that knowledge beyond a reasonable doubt. Glasmann, 175 Wn.2d at 713; State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

The evidence presented at trial on the question of McClain's knowledge was conflicting. He testified he believed the order had been lifted because he and his mother had gone to see a judge about it. 2RP 269-70. He testified he had seen, but did not possess, documentation lifting the order. 2RP 296. The surveillance photographs presented at trial showed that he did not try to avoid cameras or hide his face when entering his mother's building. 2RP 190-91. His mother also did not try to hide the fact that he was there. 2RP 190. According to the apartment manager, McClain's mother would frequently, around the same time as the charged events, go down to the front door to let McClain in. 2RP 190. In its attempt to prove knowledge, the State argued only that McClain knew of the order because he signed it in open court and knowingly violated it because his presence at her apartment was not an accident. 2RP 318-21.

In closing argument, McClain argued the State had not presented any evidence that his mother wanted the no-contact order or refuting his testimony that she had taken steps to have it rescinded. 2RP 345-46. These arguments were directly relevant to the only disputed issue, McClain's knowledge. Even if her attempts were unsuccessful, her desire to lift the no-contact order and her taking steps in that direction would make it more likely that McClain, in fact, believed it had been lifted and therefore did not know the order was in effect.

Yet the State responded by arguing the jury should disregard this argument entirely as irrelevant. The prosecutor argued, "whether or not she even invites him over, wants the contact, that's not a defense. You don't get to reference that. So you need to disregard counsel's arguments to that effect, is that it's not a defense in this case whether or not she wanted this order or not." 2RP 367. While it is true that the mother's desire does not affect the validity of the order and her consent is not a defense, the defense was not disputing either of those questions. The only disputed issue was his knowledge, and the mother's desire to have the order lifted, along with steps she took to achieve that, are directly relevant and raise a reasonable doubt about his knowledge. The prosecutor essentially told the jury it could ignore valid reasons to doubt an essential element of the offense, thereby relieving the State of the burden of proof beyond a reasonable doubt. Because this

occurred during rebuttal, defense counsel had no opportunity to further clarify the significance of this evidence.

The prosecutor's rebuttal argument was improper. He asserted the jury could simply "disregard" relevant argument and facts pertinent to the only disputed element of the offense. 2RP 367. Yet, if the jury believed these facts, they amount to reason to doubt McClain's knowledge. If the jury found such a reason to doubt, it was required to acquit. Because the State bore the burden of proof of knowledge, any fact casting doubt on that knowledge was reasonable doubt and was a defense to the charge. The State's assertion that the jury could simply disregard this evidence relieved the State of its burden to prove knowledge beyond a reasonable doubt. This was flagrant and ill-intentioned misconduct that requires reversal of McClain's conviction.

- b. The prosecutor's improper arguments relieving the State of its burden of proof prejudiced the outcome of trial and were also so flagrant and ill-intentioned that no instruction could have cured them.

The prosecutor's misconduct relieved the State of its burden to prove knowledge and requires reversal of McClain's conviction. Prosecutorial misconduct during closing argument has the potential to violate the accused person's right to a fair trial. Glasmann, 175 Wn.2d 703-04. A prosecutor is a quasi-judicial officer with an independent duty to ensure that accused

persons receive a fair trial. State v. Thierry, 190 Wn. App. 680, 689, 360 P.3d 940 (2015), rev. denied, 185 Wn.2d 1015 (2016).

Reversible error results when the prosecutor makes improper arguments that are substantially likely to have affected the outcome of the trial. Id. Even when there was no objection, prosecutorial misconduct requires reversal when it is so flagrant and ill-intentioned as to cause prejudice to the defendant that cannot be cured by instructing the jury. State v. Pinson, 183 Wn. App. 411, 416, 333 P.3d 528 (2014). The prosecutor's conduct must be viewed in light of the total argument, the evidence, and the jury instructions. Thierry, 190 Wn. App. at 689.

The prosecutor's claim that the jury could simply ignore significant facts undermining its claim that McClain knew the order was in effect occurred in rebuttal, where defense counsel could not reinforce the relevance and significance of the facts. Comments made in a prosecutor's rebuttal argument are more likely to cause prejudice and increase the prejudicial effect of such arguments. Lindsay, 180 Wn.2d at 443. Moreover, these facts went directly to the only disputed element of the charged offense – McClain's knowledge. Thus, the prosecutorial misconduct went to the heart of this case. It therefore had a substantial likelihood of affecting the verdict.

Relieving the State of its burden of proving knowledge has properly been called prejudicial in other contexts. In State v. Carter, 127 Wn. App.

713, 716, 112 P.3d 561 (2005), Division Three considered an ineffective assistance of counsel claim based on defense counsel's proposal of an unwitting possession claim in an unlawful possession of a firearm case. The instruction indicated Carter had the burden of proving he possessed the firearm unwittingly. Id. This instruction relieved the State of its burden of proving Carter's knowledge, contrary to the applicable statute and case law that affirmatively placed the burden on the State. Id. at 717. This was prejudicial because "the jury was obviously misled" by the burden-shifting instruction. Id. at 718. See also State v. Michael, 160 Wn. App. 522, 527, 247 P.3d 842 (2011) ("By taking on the obligation to prove unwitting possession, a defense attorney would essentially relieve the State of its obligation to prove knowing possession beyond a reasonable doubt by undertaking the burden of proving the contrary by a preponderance of the evidence.").

Carter and Michael recognize the obvious prejudice in relieving the State of its burden of proving the essential element of knowledge. The prosecutor's improper argument, that the jury should disregard facts and argument showing reasons to doubt McClain's knowledge, caused the same prejudice.

Prosecutorial arguments that misconstrue or seek to alleviate the State's burden of proof constitute flagrant and ill-intentioned misconduct.

Glasmann, 175 Wn.2d at 713. Numerous cases forbid burden-shifting arguments. E.g., Lindsay, 180 Wn.2d at 434; Gregory, 158 Wn.2d at 859-60; State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1075 (1996); State v. Casteneda Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). Where “case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct,” the prosecutor’s misconduct qualifies as flagrant and ill intentioned. Glasmann, 175 Wn.2d at 707.

The misconduct here, which went to the sole disputed issue at trial, could not have been cured by an instruction. The misconduct was designed to relieve the State of its burden of proving an element of the offense. No instruction could have cured the prejudice because the argument appears valid in light of the jury instruction that consent was not a defense and the instruction defining knowledge, “It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of the crime,” both of which were given to the jury. CP 119, 122. While it is true that knowledge that particular conduct is criminal is not necessary to support a criminal charge, it does not follow that the State need not prove knowledge when it is an element of the crime. The State nonetheless made it seem so by arguing the jury should simply “disregard” evidence showing reason to doubt McClain’s knowledge. No instruction could have prevented the prejudice caused by the flagrant and ill-intentioned

argument that relieved the State of its burden of proof. Accordingly, McClain asks this court to reverse his conviction.

- c. To the extent the prosecutorial misconduct was not preserved for appellate review, defense counsel was ineffective.

If this court finds the prejudice from this misconduct could have been cured by objection and instruction, then this Court should, nevertheless, reverse McClain's conviction because the absence of such objection and curative instruction resulted from the ineffective assistance of counsel.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Washington has adopted Strickland v. Washington's two-pronged test for evaluating whether a defendant had constitutionally sufficient representation. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)[.]" Estes, 188 Wn.2d at 457. "Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" Id. at 458 (quoting State v. McFarland, 127 Wn.2d 332, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have

been different.” Id. (quoting State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A reasonable probability is lower than a preponderance standard; “it is a probability sufficient to undermine confidence in the outcome.” Id.

Defense counsel has a duty to research and know the relevant legal standards. Estes, 188 Wn.2d at 460; In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 188 (2015); State v. Kyлло, 166 Wn.2d 856, 868, 215 P.3d 177 (2009). Counsel’s failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). No reasonable strategy or tactic explains not objecting to prosecutorial arguments that relieved the State’s burden to prove knowledge. There was no reasonable tactic in failing to object to improper argument that went to the central burden of proof on the only disputed element of the charged offense.

The failure to object, if it results in refusal to consider McClain’s claim of prosecutorial misconduct, is prejudicial because it would undermine confidence in the outcome of this case. Depriving McClain of an opportunity to obtain appellate review of the misconduct in this case makes Strickland’s prejudice prong self-fulfilling. Were this court to decline to consider the prosecutorial misconduct claim, there is a reasonable probability that the outcome of this appeal and thus the State’s prosecution of McClain would

differ. To the extent that the prosecutorial misconduct claim is not preserved, McClain asks this court to consider it anyway because the reason it was not preserved was ineffective assistance of counsel. See Ermert, 94 Wn.2d at 848 (counsel's deficient failure to preserve error justifies examining error on its merits).

3. REMAND IS REQUIRED TO CORRECT MCCLAIN'S OFFENDER SCORE.

Regardless of whether his conviction is reversed, remand is required to correct McClain's offender score and sentence. McClain's sentence is the result of a misapplication of the scoring provisions related to domestic violence offenses. When the law is correctly applied, McClain's offender score is 6, not 10.

The Sentencing Reform Act defines the standard sentence range based on the individual's offender score and the seriousness level of the offense. State v. Thomas, 150 Wn.2d 666, 670-71, 80 P.3d 168 (2003); RCW 9.94A.510. "The offender score is calculated by counting the prior and current felony convictions in accordance with the rules for each offense." State v. King, 162 Wn. App. 234, 238, 253 P.3d 120 (2011). Appellate review of offender score calculations is de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); State v. Hernandez, 185 Wn. App. 680, 684, 342 P.3d 820 (2015). The State bears the burden of proving the existence of

the prior convictions by a preponderance of the evidence. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

Under RCW 9.94A.525(21)(a), prior felony convictions count as two points, rather than one, in the offender score if the prior conviction was for felony violation of a no-contact or protection order and “domestic violence as defined in RCW 9.94A.030 was pleaded and proved after August 1, 2011.” Additionally, prior misdemeanors, which would otherwise not be included in the offender score, count for one point if the misdemeanor is “a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was pleaded and proven after August 1, 2011.” RCW 9.94A.525(21)(d). The trial court erroneously invoked these provisions to score two of McClain’s prior felonies as two points each and to include two misdemeanors in his offender score.

The State presented certified copies of court records pertaining to McClain’s criminal history at sentencing. CP 162-283.<sup>3</sup> Those records show five prior felonies: a 2005 conviction for attempted first degree theft, a 2005 conviction for violation of a protection order, a 2010 conviction for custodial assault, a 2012 conviction for unlawful imprisonment, and a 2012 conviction for third degree assault. CP 142-43, 163-265. Without the domestic violence

---

<sup>3</sup> A supplemental designation of clerk’s papers was filed on August 23, 2018. Counsel has anticipated the citation assuming the clerk will number them sequentially after the previously designated clerk’s papers.

scoring provisions of RCW 9.94A.525(21), each of these prior felonies would count as one point. RCW 9.94A.525(7).

However, the prosecutor and the trial court scored the 2005 protection order violation as two points. 2RP 408, 411-12. This was error under the plain language of the law. This was a 2005 conviction. CP 173. The judgment and sentence contains a checked box stating that the offense “involve(s) domestic violence.” CP 173. But there is no indication that the statutory definition of domestic violence was pleaded or proved after 2011. The documentation indicates, on the contrary, that a judge determined domestic violence was involved in 2005. Id. That is insufficient to invoke the doubling provision of RCW 9.94A.525(21)(a). This offense should properly count as one, not two, points in McClain’s offender score.

The prosecutor and court also scored McClain’s 2012 conviction for unlawful imprisonment as two points. 2RP 409, 411-12. This was also incorrect. The judgment and sentence states that domestic violence was pleaded and proved as to count I. CP 229. But the unlawful imprisonment charge was count II. CP 228, 241, 245, 249. McClain was not sentenced on count I, which is nowhere mentioned in the judgment and sentence. CP 228-37. McClain pleaded guilty only to counts two and three. CP 262. Nowhere in his statement does he admit that either offense involved domestic violence. CP 255-64. The State did not demonstrate that the unlawful

imprisonment conviction was one for which domestic violence was pleaded and proved. It should also, therefore, count as one, rather than two, points in McClain's offender score.

The calculation also included two misdemeanor convictions for violations of court orders in Lakewood Municipal Court in 2014. 2RP 409, 411-12; CP 266-72. These were also wrongly included in McClain's offender score. The judgment and sentence only lists the offenses as "DV" without specifying whether domestic violence, under any definition, was pleaded or proved. CP 271. The plea statement does not mention the phrase "domestic violence" let alone the statutory definition under RCW. 9.94A.030. CP 266-67.

Additionally, McClain pleaded guilty under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). According to the Alford plea, McClain did not admit guilt, but simply admitted the State had enough evidence that it would likely win at trial. CP 267. His Alford plea admitted that the facts could have been proved, not that they were. CP 267. The purpose of an Alford plea is to permit a defendant to waive trial due to the risk of conviction without having to admit actual guilt. Alford, 400 U.S. at 33. Indeed, a defendant may enter such a plea "even if he [or she] is unwilling or unable to admit his [or her] participation in the acts constituting the crime." Id. at 37. Thus, by entering an Alford plea, McClain did not

acknowledge he committed a violation of the court order or that the crime was one of domestic violence. Because this plea did not admit any facts, it did not prove them for purposes of invoking the domestic violence scoring provisions of the Sentencing Reform Act.

Although domestic violence allegation was pleaded in the information, that is insufficient. The definition of domestic violence must also be proven. RCW 9.94A.525(21)(d). Neither the judgment nor the guilty plea indicates it was proven for these offenses. This is insufficient to invoke the scoring provisions of RCW 9.94A.525(21). These two misdemeanors should result in zero, rather than two, points in McClain's offender score.

Defense counsel's apparent acquiescence in the offender score does not amount to invited error. After the prosecutor presented its scoring analysis, the court declared, "I do find that based upon that presentation, that he does have an offender score of ten." 2RP 412. Counsel's acknowledgements after that time are simply a reference to McClain's score as it had already been determined by the court, not an admission that that score was correct. 2RP 412.

Moreover, legal errors in calculation of the offender score cannot be waived. State v. Crawford, 164 Wn. App. 617, 624, 267 P.3d 365 (2011). In general, a defendant cannot waive a challenge to a miscalculated offender score. State v. Wilson, 170 Wn.2d 682, 688, 244 P.3d 950 (2010) (citing In

re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002)). A defendant can waive a challenge to an offender score only where the challenge is based on a factual issue within the trial court's discretion. Wilson, 170 Wn.2d at 689. "Waiver does not apply where the alleged sentencing error is a legal error." Crawford, 164 Wn. App. at 624.

The issue in this case is a legal one, namely, the application of the specific domestic violence scoring provisions of the SRA to McClain's prior convictions. The question is not a factual one regarding the existence of the prior offenses. It is a legal one regarding whether the statutory prerequisites for triggering these scoring provisions have been met.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). "It is axiomatic that a sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score." State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994).

When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). "[T]he remedy for a miscalculated offender score

is resentencing using the correct offender score.” Ross, 152 Wn.2d at 228; see also Goodwin, 146 Wn.2d at 868. With the correct offender score of six, McClain’s standard range would be 41 to 54 months, rather than 60 months. RCW 9.94A.510. McClain asks this Court to remand for resentencing under a correct determination of his offender score.

D. CONCLUSION

For the foregoing reasons, McClain requests this Court reverse his convictions or, alternatively, remand for resentencing based on the correct offender score.

DATED this 27<sup>th</sup> day of August, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**August 27, 2018 - 4:21 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51817-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Marcus McClain, Appellant  
**Superior Court Case Number:** 16-1-04553-9

**The following documents have been uploaded:**

- 518171\_Briefs\_20180827161936D2657629\_1481.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BOA 51817-1-II.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@co.pierce.wa.us

**Comments:**

copy mailed to: Marcus McClain 779264 Washington Corrections Center P.O. Box 900 Shelton, WA 98584

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Jennifer J Sweigert - Email: SweigertJ@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20180827161936D2657629**