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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARCUS MCCLAIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 16-1-04553-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the extraordinary remedy of dismissal with prejudice is unavailable where the defendant was convicted after jury trial and he cannot show that his right to a fair trial was prejudiced by a 70 day delay in obtaining a competency evaluation?
2. Whether defendant has failed to show prosecutorial misconduct in rebuttal when the prosecutor's argument was a proper response to defense counsel's closing argument and defendant cannot show the unchallenged argument caused prejudice?
3. Whether defendant has failed to show ineffective assistance of counsel where defense counsel can show neither deficient performance nor prejudice that could not have been neutralized by a curative instruction if a timely objection had been made?
4. Whether this court should remand to correct defendant's offender score where the State did not plead and prove domestic violence after August 2011 for defendant's 2005 violation of a protection order – domestic violence conviction, but did plead and prove domestic violence for defendant's 2012 unlawful imprisonment conviction and his two Lakewood Municipal Court Violation of Court Order convictions?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On November 16, 2016 the Pierce County Prosecutor's Office charged Marcus McClain, hereinafter defendant, with one count of felony domestic violence court order violation for having contact with his

mother, Annette McClain, on July 20, 2016, in violation of a court order prohibiting him from such contact. CP 3.

On November 29, 2016, a competency evaluation was ordered by the court. CP 4-8. The Forensic Psychological Evaluation was completed by December 12, 2016, and an order finding defendant competent was entered on December 14, 2016. CP 9-18, 19-20. Later, on May 5, 2017, after reviewing a report from Dr. Newsome, the court found that defendant was not competent. *See* 6/21/17 RP 3. On May 9, 2017, the court ordered competency restoration treatment at Western State Hospital (WSH). CP 29-33. The order required defendant to be transported within 7 days for competency restoration. CP 31, No. 6.

At a hearing on June 21, 2017, defendant argued that WSH and the Department of Social and Health Services (DSHS) should be held in contempt for the delay in providing defendant restorative treatment and that his case should be dismissed. 6/21/17 RP 3-4; CP 31, No. 6; CP 34-57. The court denied defendant's motion to dismiss; but held WSH and DSHS in contempt and found defendant was a member of the *Trueblood class*.¹ 6/21/17 RP 6; CP (contempt order).

¹ *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, 822 F.3d 1037 (9th Cir. 2016).

Defendant was admitted to WSH on July 18, 2017, for competency restoration. CP 65. In his August 30, 2017, Forensic Evaluation, Dr. Rob Saari opined that defendant had the capacity to understand the nature of the proceedings against him and to assist in his defense. CP 70. On September 6, 2017, an order finding defendant competent was entered. CP 82-83.

On December 5, 2017, the defendant's case was assigned out for trial. CP 357. The State filed an amended information adding count II, a charge of domestic violence court order violation, for assaulting Annette McClain in violation of an existing court order prohibiting defendant from contacting her. 12/5/17 RP 4-5; CP 87-88. Defendant's attorney requested another competency evaluation. 12/5/17 RP 29; CP 89-95. On December 13, 2017, the forensic psychological evaluation found defendant competent to proceed to trial. CP 96-104. On December 13, 2017, the court entered an order finding defendant competent. CP 105-06.

A CrR 3.5 motion was held on January 10, 2018. 1/10/18 RP 60-97. The court found defendant's custodial statements to Detective Hoisington were made voluntarily and were admissible at trial. 1/10/18 RP 97. After trial, a jury convicted defendant on count I, court order violation on January 16, 2018. CP 128. The jury was unable to reach a verdict on count II. 1/16/18 RP 393-94, 401; CP 130.

At sentencing the State argued that the defendant had an offender score of ten based upon a combination of prior felony and misdemeanor convictions that dated from 2005 through 2016. 1/26/18 RP 407-10. The State produced certified copies of defendant's prior convictions to prove his offender score. 1/26/18 RP 407-10; CP 162-283, 360-79. The State calculated defendant's offender score as follows:

Crime	Date of Sentence	Sentencing Court	Adult or Juvenile	Felony or Misdemeanor	Number of Points
Att Theft 1	1/19/05	Pierce County Superior Court	A	Felony	1
DV – VPO	8/25/05	Pierce County Superior Court	A	Felony	2
Custodial Assault	3/26/10	Pierce County Superior Court	A	Felony	1
Unlawful Imprisonment	8/30/12	Pierce County Superior Court	A	Felony	2
Assault 3	8/30/12	Pierce County Superior Court	A	Felony	1
DV-VPO	7/16/14	Lakewood	A	Misdemeanor	1
DV-VPO	7/16/14	Lakewood	A	Misdemeanor	1
DV- Assault 4	7/8/15	Tacoma	A	Misdemeanor	1

1/26/18 RP 408-10; CP 133-35, 162-283.

The State argued that defendant's five prior felonies counted as seven points because the 2005 felony DV-VPO and the 2012 unlawful imprisonment – DV counted as two points each. 1/26/18 RP 408-09; CP 173-94, 226-65, 361-79 . Three of defendant's misdemeanor convictions counted as three points because his 2014 convictions for DV-VPO (2 counts) and his 2015 DV – assault 4 conviction were repetitive domestic violence offenses and counted as one point each. 1/26/18 RP 409; CP 266-83. After reviewing the documentation submitted by the State, the court found defendant's offender score was ten. 1/26/18 RP 411-12. After the court ruled, defense counsel confirmed that defendant's offender score was ten. 1/26/18 RP 412. With a ten offender score, defendant's standard range was 60 months – 60 months. 1/26/18 RP 410.

Thank you, Your Honor. I would inform the Court Mr. McClain is 47 years old. As the Court just reviewed his history, he is at a score of ten. Not only because of all his felonies – he has ten felonies. He has limited felonies, but a couple of them count as multipliers. And, additionally, the domestic violence cases, his misdemeanor history, also counts toward his points, which leads him to a score of ten.

1/26/18 RP 412. The State argued for a standard range sentence of 60 months and defense argued for an exceptional down to 24 months with 12 months of community custody. 1/26/18 RP 410, 412-20. The court

sentenced defendant to an exceptional sentence of 48 months in the Department of Corrections with 12 months of community custody. 1/26/18 RP 424; CP 139-51. The court signed an order of indigency. CP 158-59. This timely appeal followed. CP 154.

2. FACTS

On July 20, 2016, defendant went to his mother's apartment in violation of Tacoma Municipal Court Order D00047292 prohibiting him from having contact with her. 1/10/18 RP 160-62, ; CP 1-2, 358-59. During his visit with his mother, Annette McClain, they argued and struggled over a flashlight. 1/10/18 RP 160, 170; 1/11/18 RP 282-84, 301; During the struggle, Annette was struck in the head with the flashlight, causing an injury. 1/10/18 RP 160, 170; 1/11/18 RP 282-84, 286, 301. Defendant left his mother's apartment and was arrested on an unrelated matter the following day. 1/11/18 RP 291.

On July 22, 2016, defendant's sister, Juliet McClain², went to their mother's apartment to check on her because she had not heard from her mother in several days. 1/10/18 RP 150-52, 168. When Juliet entered the apartment, she called out to her mother, but did not receive a response, 1/10/18 RP 155. Juliet went into her mother's bedroom where she found

² Because Annette McClain and Juliet McClain share the same last name, I will refer to them by their first names for purposes of clarity.

Annette in her bed, deceased. *Id.* Juliet noticed what appeared to be injuries on her mother including a wound on Annette's head and blood on her ear. 1/10/18 RP 156-57. Annette did not have the injuries when Juliet had last seen her mother about four days before. 1/10/18 RP 158-59. Juliet and the apartment manager, Pheanny Neang, contacted police. 1/10/18 RP 156, 178.

Officer Jennifer Terhaar was the first officer to arrive on the scene on July 22, 2016. 1/11/18 RP 206, 217, 220. Officer Terhaar observed Annette lying in her bed with a wound on her forehead and an injury to her neck. 1/11/18 RP 207, 209, 210. Juliet told Officer Terhaar that there was a no-contact order prohibiting her brother, the defendant, from contacting their mother, Annette. 1/11/18 RP 212. Officer Terhaar confirmed that there was a valid no contact order between defendant and Annette. 1/11/18 RP 212-13

During the course of the police investigation into Annette's death, Ms. Neang reviewed the apartment's surveillance video. 1/10/18 RP 179-80, 186. Ms. Neang located surveillance footage of defendant exiting and entering Annette's apartment building in the early morning hours on July 20, 2016. 1/10/18 RP 181, 183, 191, 194, 195. Ms. Neang recognized defendant from prior contacts with him at the apartment complex. 1/10/18

RP 177. Ms. Neang provided copies of the surveillance footage to the police. 1/10/18 RP 181.

Detective Hoisington interviewed defendant on August 16, 2016, while he was being held in the Pierce County Jail on other matters. 1/11/18 242-43, 250. After being advised of his *Miranda*³ rights, defendant told Detective Hoisington that he had visited his mother on July 20, 2018. 1/11/18 RP 247, 249, 251, 252, 255. Defendant said he and his mother had gotten into an argument that eventually escalated into a struggle over a flashlight. 1/11/18 RP 247, 252, 253. Defendant's mother was struck in the forehead with the flashlight during the struggle. 1/11/18 RP 248.

C. ARGUMENT.

1. THE EXTRAORDINARY REMEDY OF DISMISSAL WITH PREJUDICE IS INAPPROPRIATE WHERE DEFENDANT CANNOT SHOW THAT HIS RIGHT TO A FAIR TRIAL WAS PREJUDICED BY THE DELAY IN OBTAINING DEFENDANT'S COMPETENCY EVALUATION.

No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues. RCW 10.77.050. A person is incompetent when he lacks the capacity to

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect. RCW 10.77.010(15). If, during the pendency of a criminal case, the defendant's competency is in doubt, the trial court shall order a competency evaluation. *See* RCW 10.77.060(1)(a). If the court finds based upon the evaluation that the defendant is incompetent, then the court shall order the proceedings stayed and may order the defendant committed to a designated treatment facility for competency restoration. *See* RCW 10.77.060(1)(a)(b). If the court finds that competency has been restored, the court will lift the previously entered stay and the criminal proceedings resume. *See* RCW 10.77.060(1)(c).

In *State v. Hand*, 192 Wn.2d 289, 291, 429 P.3d 502 (2018), Anthony Hand was charged with unlawful possession of a controlled substance for methamphetamine that was found in his waistband when he was arrested. On December 24, 2014, the court ordered a competency evaluation for Hand. *Hand*, 192 Wn.2d at 292. Hand was evaluated and, based upon that evaluation, the court found Hand was not competent. *Id.* The court ordered a 45 day commitment to WSH for competency restoration within 15 days. *Id.*

Hand was not transferred to WSH for restoration for more than two months because WSH had a backlog of referrals. *Id.* at 292-93. While

Hand waited to be transferred for competency restoration, he made numerous motions to dismiss his case for a substantive due process violation; he also made a motion to show cause why WSH should not be held in contempt for failing to comply with the court's order to transfer Hand for competency restoration by January 7, 2015. *Hand*, at 292.

The court denied defendant's motions to dismiss, but did hold WSH in contempt for failing to abide by the court's December 24, 2014, order to transfer Hand to WSH for restoration. *Id.* at 292-93. On March 10, 2015, 76 days after the court's December 24th competency restoration order, WSH admitted Hand for restoration. *Id.* at 293. On April 29, 2015, the trial court found Hand competent to stand trial. *Id.* After a bench trial on stipulated facts, defendant was found guilty and he appealed the court's denial of his motion to dismiss on substantive due process grounds. *Id.* On appeal, this Court found that Hand's substantive due process rights were violated when he was detained for 76 days before WSH admitted him for treatment. *Id.* However, the court found that dismissal with prejudice was not the appropriate remedy under CrR 8.3(b) because Hand could not show that the delay prejudiced his right to a fair trial. *Hand* at 293 citing *State v. Hand*, 199 Wn. App 887, 890, 401 P.3d 367 (2017). Hand petitioned for review and the Supreme Court affirmed. *Id.* at 302.

In the present case, on May 5, 2017, the court found that defendant was not competent. *See* 6/21/17 RP 3. On May 9, 2017, the court ordered competency restoration treatment at WSH. CP 29-33. The court's order required defendant to be transported within 7 days for competency restoration. CP 31, No. 6. Defendant was not transported to WSH until July 18, 2017. *See* CP 65.

In a hearing prior to defendant's transport to WSH, defendant argued that WSH should be held in contempt and his case should be dismissed because defendant had not been transported for competency restoration. 6/21/17 RP 3-4; CP 31, No. 6; 34-57, 285-86. The court denied defendant's motion to dismiss; but held WSH in contempt and found defendant was a member of the *Trueblood* class. 6/21/17 RP 6; CP 355-56.

Defendant was admitted to WSH on July 18, 2017, for competency restoration. CP 65. In his August 31, 2017, Forensic Evaluation, Dr. Rob Saari opined that defendant had the capacity to understand the nature of the proceedings against him and to assist in his defense. CP 70. On September 6, 2017, the court entered an order finding defendant competent. CP 82-83.

Seventy days elapsed between the order calling for treatment and the commencement of restoration services. CP 29-33, 65. The State

agrees with defendant that this delay was unduly long under *Trueblood v. Washington State Dep't of Social & Health Services.*, 822 F.3d 1037 (9th Cir. 2016) and *State v. Hand*, 192 Wn.2d 289, 301-02. However, the delay in this case was less than the delay in *Hand*, where seventy-six days elapsed between the order of commitment and the commencement of restorative services. *Hand*, at 291. Like *Hand*, the delay in this case was a due process violation, but dismissal with prejudice is unwarranted. *Id.* at 302.

Defendant argues that this Court should provide him with the same relief as was provided in *State v Kidder*, 197 Wn.App. 292, 389 P.3d 664 (2016). Brief of Appellant at 13. Defendant's argument fails because his case is distinguishable from *Kidder*, where the trial court dismissed the case with prejudice *before* competency restoration; whereas here, defendant's competency was restored and his case proceeded to jury trial.

In *Kidder*, Darla Kidder was charged with arson in the first degree on July 22, 2014. *Kidder*, at 295. After a competency evaluation, the court found Kidder was not competent to stand trial and ordered her committed for 90 days for competency restoration at WSH pursuant to former RCW 10.77.084 and .086. *Kidder*, at 299-300. Kidder was not admitted to WSH for restoration treatment until January, 2015. *Id.* at 308. Between September 24th and January 6th, Kidder's attorney made numerous

attempts to compel WSH to comply with the Court's order for competency restoration treatment. *See Id.* at 299-308. The court twice found the State in contempt for failing to comply with the Court's orders to transport Kidder to WSH for competency treatment. *Id.* at 304-05. After 104 days, Kidder was transported to WSH. *Id.* at 309. Prior to her transport, Kidder filed a motion to dismiss the case arguing that she had a "statutory and constitutional right to receive competency restoration treatment and the unreasonable delay in providing treatment violated due process." *Id.* at 306. The court dismissed Kidder's charges without prejudice because it found that the Kidder was incompetent and unlikely to become competent within a reasonable period of time. *Id.* at 310. On appeal, the Court of Appeals affirmed, holding that Kidder's due process rights were violated when the State failed to provide restorative treatment within a reasonable time. *Id.* at 317.

Unlike *Kidder*, here defendant's competency was restored and his case proceeded to trial where he was convicted of felony violation of a court order. Defendant's request for the same remedy as *Kidder*, pretrial dismissal without prejudice, is not appropriate. As argued above, like *Hand*, where defendant's due process rights were violated by the delay in competency restoration treatment, but he cannot show how his trial rights were prejudiced by that delay, dismissal is not appropriate.

2. THE PROSECUTOR'S REBUTTAL WAS A PROPER RESPONSE TO DEFENSE COUNSEL'S CLOSING ARGUMENT; ALTERNATIVELY, IF ERROR, ANY PREJUDICE COULD HAVE BEEN NEUTRALIZED BY A CURATIVE INSTRUCTION HAD A TIMELY OBJECTION BEEN MADE.

To prove prosecutorial misconduct, a defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citing *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)).

The defendant has the burden of establishing that the alleged error is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the error does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288,

53 P.3d 974 (2002). Juries are presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wn.2d at 86. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.* at 87.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727. An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a

case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993). However, a prosecutor may also argue credibility of witnesses. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness).

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the [error] resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *Thorgerson*, 172 Wn.2d at 455).

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); see also *State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). “Accordingly,

reviewing courts focus less on whether the prosecutor's [error] was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction." *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

In this case, defendant claims the State committed misconduct during its rebuttal argument by telling the jury to ignore defendant's testimony that defendant "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." Brief of Appellant at 15-16. Defendant argues that the prosecutor's argument relieved the State of its burden to prove that Defendant knowingly violated the protection order. *Id.* at 16-17. Defendant's prosecutorial misconduct claim fails because the defense mischaracterizes the prosecutor's rebuttal, which was a proper response to defense counsel's closing and the evidence presented at trial.

Alternatively, in the unlikely event that this Court find's the prosecutor's remarks are improper, defendant cannot meet the high burden of showing the remark was both flagrant and ill-intentioned because a curative instruction could have neutralized any prejudicial effect and there is no evidence the result of the trial was adversely impacted by the prosecutor's arguments.

- a. The Prosecutor's rebuttal argument addressed evidence defense adduced during trial and was a proper response to defense counsel's closing arguments.

Throughout the trial and in his closing arguments, defense counsel focused the jury's attention on the absence of any evidence showing that the victim, Annette McClain, *wanted* the no contact order defendant was charged with violating. 1/11/18 RP 219-20, 254-55, 345-46, 350. During trial, defense counsel asked both Officer Terhaar and Detective Hoisington whether they knew if Ms. McClain wanted the order. 1/11/18 RP 219-20, 254-55. Both testified that they had no knowledge of whether Ms. McClain wanted the no contact order or not. *Id.* at 220, 254-55. On cross examination of Juliet McClain, defense counsel asked: "Did your mother ever tell you that she had actually taken the no-contact order off against Mr. McClain?" 1/10/18 RP 171. Juliet testified that her mother had not told her that. 1/10/18 RP 171. And, when defendant testified, defense counsel elicited testimony from him that his mother did not want the order and that they had gone to court together to have the order "taken off." 1/11/18 RP 269, 293. In his closing argument, defense counsel argued that Officer Terhaar could not testify whether Annette McClain "wanted this no contact order or that she had actually taken the steps to recall it." 1/11/18 RP 346. Later in his closing, defense counsel argued that

Detective Hoisington never spoke to Ms. McClain so “he had no idea what her state of mind was, whether she wanted the no-contact order, what she told Mr. McClain, whether the no -contact [order] had been recalled, we don’t know.” 1/11/18 RP 350.

To address the testimony defense counsel elicited during trial and to respond to defense counsel’s closing argument, the Prosecutor properly argued in his rebuttal that the State does not have to prove that the victim wanted the no contact order. The Prosecutor argued the following:

Counsel said several times we don’t know, we didn’t hear from Annette. And that’s true, we absolutely would have liked to have Annette testify. For obvious reasons, she’s not here to testify. But whether she wanted this order or not, that’s not relevant to the proceedings. Is that an element that the State has to prove is whether the victim, the one protected, requests or wants this order? This order was issued by Judge Ladenburg in Tacoma Municipal Court to protect her from him. They still have contact, obviously. The order was violated. So it didn’t really work as it was designed to work, but ***whether or not she wanted that order is not an element the State has to prove. In fact, the jury instructions we talked about indicate that 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 [sic] it’s not a defense in this case whether or not she wanted this order or not.***

1/11/18 RP 367 (emphasis added).

In *State v Boisselle*, 3 Wn. App.2d 266, 270, 415 P.3d 621 (2018), Michael Boisselle was charged with murder in the second degree for the

death of Brandon Zomalt. Boisselle claimed self-defense and evidence was presented at trial that Zomalt was violent and addicted to both alcohol and methamphetamine. *Boisselle*, 3 Wn. App.2d 266, 270. On the day of the shooting, Boisselle told Zomalt to leave his residence, but Zomalt refused. *Id.* at 271. Boisselle and Zomalt argued; Zomalt pulled out a gun and pointed it at Boisselle. *Id.* Boisselle retreated to his bedroom while Zomalt sat on the living room couch with the gun placed on the arm of the couch. *Id.* Boisselle testified that when he took the gun from the arm of the couch, Zomalt stood and started coming in Boisselle's direction so Boisselle fired the gun at Zomalt several times. *Id.* at 271-72. The State produced evidence that Boisselle was shot multiple times, including three shots that showed contact wounds to Zomalt's head. *Id.* at 292.

In his closing argument, defense counsel argued that Boisselle shot Zomalt in self-defense after Zomalt stood up from the couch and began to chase after Boisselle. *Id.* at 292-93.

[Boisselle] grabbed the gun off the arm of the love seat. He ran, trying to get away, he was going to go up the stairs. At that moment when he takes the gun, Mr. Zomalt gets up out of that couch...So he gets up off this love seat, starts coming after Mr. Boisselle. Mr. Boisselle turns and fires the gun.

Id. at 292.

In rebuttal, the prosecutor made the following argument:

So now let's talk about the actual law of self-defense, Instruction No. 26 says, necessary means under the circumstances as they reasonably appear to the actor, no reasonably effective alternative appeared to exist and the amount of force used was reasonable to effect the purpose. You can respond in kind.

Mr. Boisselle said I was going to get beat up. So he can beat him back up or fight back. And you know what? If a fistfight ensues and Mr. Zomalt is winning and inflicting a severe beating or death on Michael Boisselle, then he can fire shots. There is no preemptive strike in self-defense.

Boisselle, at 295. Later in rebuttal, the prosecutor argued that “[y]ou can’t over defend. You don’t get to put three in the brain because you’re angry that the guy came at you. You can’t...” *Id.*

On appeal, Boisselle argued that the prosecutor’s argument that “there is no preemptive strike in self-defense” and “you can’t over defend” were misstatements of the law because he only needed to show reasonable apprehension of great bodily harm and imminent danger to himself or another; a showing of actual danger was not required. *Id.* The Court of Appeals rejected Boisselle’s argument because, when looked at in light of the entire argument the prosecutor’s rebuttal was not a misstatement of the law. *Id.* Instead it was a response to defense counsel’s argument that the amount of force Boisselle used was reasonable. *Id.*

In the present case, like *Boisselle*, the State's response to defense closing argument was a proper statement of the law in light of the entire argument. The State's rebuttal argument was clearly intended to address any improper inference created by defendant's repeated references that Annette may not have wanted the no contact order. The prosecutor's rebuttal clarified that (1) the State did not need to prove that Annette wanted the protection order to prove its case, and (2) it was not a defense to the charges that Annette did not want the protection order. 1/11/18 RP 367. The prosecutor's rebuttal also referred the jurors to their instructions, which outlined the elements the State had to prove and instructed the jury that it is not a defense that the victim wanted the contact. *Id. See* CP 117-18, 122. In this case, like in *Boisselle*, the prosecutor's rebuttal was not only an accurate statement of the law as outlined in the court's instructions, but a reasonable response to defense counsel's closing argument and the evidence adduced at trial.

b. The State's closing arguments did not shift the burden of proving knowledge to the defendant.

In both his initial and rebuttal closings, the prosecutor's arguments correctly stated the elements that the State had to prove beyond a reasonable doubt for the jury to return verdicts of 'guilty'. At no point in his argument did the prosecutor shift the burden the defendant to prove the

absence of knowledge. Defendant's arguments to the contrary are without merit.

In the State's initial argument, the prosecutor reviewed the elements of the crimes charged and the evidence adduced at trial to prove each element, argued that the victim's consent to contact was not a defense to a violation of a court order, and addressed defendant's anticipated argument that defendant believed the order had been recalled.

1/11/18 R 316- 34.

The State's closing argument clearly outlined the State's burden to prove that the defendant both knew of the no contact order and that he knowingly violated the order.

PROSECUTOR: Now, did he know about the existence of his order? We have to prove that. It wouldn't be fair if there's this no-contact order that he has no knowledge of, and then he violates it, and then he gets in trouble for that. That wouldn't seem right. How do we know that he knew about the order? Well, he knew about it because he signed it.

11/11/18 RP 318.

PROSECUTOR: The next thing we have to prove is that on that same date, July 20th, that he knowingly violated that order. Well, how do we know that he violated the order? Well, several things. We know because of the surveillance [video] that he was at the victim's place of residence on that day... We also know from his admissions that he was there...

1/11/18 RP 319.

The prosecutor's argument further explained the importance of the requirement that the State prove defendant knowingly violated the no-contact order. "...[I]t wouldn't be fair if he runs into his mom buying a pack of cigarettes and they're both in this store buying something and he didn't know that she was in there and we charged him with violating the order..." 1/11/18 RP 320. The prosecutor properly argued that the defendant's intentional act of going to his mother's residence to see her was a knowing violation of the no-contact order." 1/11/18 RP 320.

In addition to arguing how the State had met its burden to prove that the defendant knowingly violated the no-contact order, the State argued that the evidence did not support defendant's theory of the case – that defendant believed the order had been recalled. 1/11/18 RP 330. In so doing, the prosecutor reminded the jury that the State has the burden of proving each element beyond a reasonable doubt. 1/11/18 RP 331.

PROSECUTOR: [Defendant] indicates that this order is recalled. That he was in Judge Ladenburg's court and his mom asked that the order be rescinded or taken away and judge did something; yet, there's no paperwork of that. There's no evidence of that. And the other thing, he remembers his mom living at another spot when they went into Judge Ladenburg's court. He's got a lot of orders. He has a lot of, kind of, things going on, and perhaps he was just confused about which time this was or what exactly happened there, but there's no evidence of that.

The defense doesn't have to put on a case in a criminal matter, as you heard. The burden's on the State. The State has the burden of proving each of those

elements beyond a reasonable doubt. The defendant doesn't have to do anything. They could have sat there the whole time and played cards or did something else. And it's my burden to prove what happened in this case.

They chose to put on a case. They chose to put the defendant on the stand, and they chose to present evidence. When you do – when they do, you get to evaluate that evidence just as you would the evidence that the State put on...

1/11/18 RP 331 (emphasis added).

PROSECUTOR: When you look at the defendant's testimony, you need to ask yourself: Was he credible? Did what he said make sense? Do you think that that order was really recalled? If it was, why isn't there any documentation about that? He doesn't have to put on a case, but once he does, you get to evaluate his case. Well, where's the documentation? There is none, and that's why there's no evidence of that.

1/11/18 RP 332.

This court should find that the prosecutor's remarks in rebuttal were proper. When viewed in the context of the whole argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury it is clear that the prosecutor did not shift the burden of proof to defendant. In the unlikely event this court finds the prosecutor's rebuttal argument was improper, defendant fails to demonstrate that a curative instruction could not have cured any resulting prejudice. Defendant neither objected to these arguments during trial nor requested a curative instruction. 1/11/18 RP 360-70. Defendant cannot

show prejudice, where the trial court's jury instructions clearly instructed the jury: (1) that the State has the burden of proving each element of each crime beyond a reasonable doubt; (2) that the jury must consider all evidence the court admitted in determining whether a proposition has been proved; (3) that violation of a court order requires the State to prove both that the defendant knew the existence of the order and that he knowingly violated a provision of the order; (4) as to the definition of knowledge; and (5) that consent is not a defense to violation of a court order. CP 109-11, 112, 116, 117, 119, 122. The court's instructions cured any potential juror confusion, and jurors are presumed to follow their instructions. *Stein*, 144 Wn.2d at 247. Defendant fails to establish prosecutorial misconduct.

3. WAS DEFENSE COUNSEL INEFFECTIVE WHERE HE MADE A STRATEGIC DECISION TO NOT OBJECT TO THE STATE'S PROPER REBUTTAL ARGUMENTS AND DEFENDANT CANNOT SHOW THE OBJECTION WOULD HAVE BEEN SUSTAINED HAD IT BEEN MADE?

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred.

Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986). A claim of ineffective assistance of counsel is reviewed *de novo*.

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case,

viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel

are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

When and whether to object is a “classic example of trial tactics.” *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 62, *review denied*, 113 Wn.2d 1002 (1989). Where a defendant bases his ineffective assistance of counsel claim on trial counsel’s failure to object, the defendant must show that the objection would have likely succeeded.” *State v. Gerdts*, 136 Wn.App. 720, 727, 150 P.2d 627 (2007).

Defendant relies upon *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980) to support his argument that trial counsel’s failure to preserve error constitutes ineffective assistance of counsel and justifies appellate review of the error. *See* Brief of Appellant at 24. However, defendant’s reliance on *Ermert* is misplaced. In *Ermert*, the defendant was charged with welfare fraud for not disclosing money she had saved from her public assistance. The ‘to convict’ instruction offered by the State misstated the law and Ermert’s trial counsel was deficient when she failed to object to the instruction. *Ermert*, at 849-50. This error was prejudicial because had the jury instruction correctly stated the law, there would have been insufficient evidence to support a conviction. *Ermert*, at 851.

Here, unlike *Ermert*, there was no instructional error. Additionally, the prosecutor’s argument was clearly tailored to ensure the jury

understood that a victim's consent to contact was not a defense to a court order violation. The challenged section of the prosecutor's rebuttal argument was crafted to focus the jury on the elements the State actually had to prove and to ensure that the jury did not misuse the evidence defendant presented regarding whether or not defendant's mother wanted the protection order.

PROSECUTOR: Counsel said several times we don't know, we didn't hear from Annette. And that's true, we absolutely would have liked to have Annette testify. For obvious reasons, she's not here to testify. ***But whether she wanted this order or not, that's not relevant to the proceedings. Is that an element that the State has to prove is whether the victim, the one protected, requests or wants this order?*** This order was issued by Judge Ladenburg in Tacoma Municipal Court to protect her from him. They still have contact, obviously. The order was violated. So it didn't really work as it was designed to work, ***but whether or not she wanted that order is not an element the State has to prove. In fact, the jury instructions we talked about indicate that 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.***

1/11/18 RP 367 (emphasis added). Defendant cannot show deficient performance when his attorney chose not to object to the State's proper argument.

Additionally, the defendant cannot show he was prejudiced by his attorney's failure to object. Without citation to authority, defendant argues that the prejudice prong of the *Strickland* test is satisfied if defendant's prosecutorial misconduct claim is not reviewed: "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." See Brief of Appellant, at 24-25. However, the standard for prejudice under *Strickland* is whether the result of the *trial* would have been different, not whether the result of the *appeal* would differ. See *State v. Thomas*, 109 Wn.2d at 226 (emphasis added). Defendant's argument that he is prejudiced should this court decline to review his prosecutorial misconduct claim fails because he can't show the result of the trial would have been different had his attorney objected to the State's proper argument or that a curative instruction could not have neutralized any prejudice.

Defendant's ineffective assistance of counsel argument fails because defendant can show neither deficient performance by trial counsel nor prejudice.

4. THE TRIAL COURT PROPERLY FOUND THAT THE STATE “PLEADED AND PROVED” DOMESTIC VIOLENCE UNDER RCW 26.50 AND 10.99 FOR DEFENDANT’S UNLAWFUL IMPRISONMENT AND HIS TWO MISDEMEANOR VIOLATIONS OF COURT ORDER CONVICTIONS; BUT THIS COURT SHOULD REMAND TO CORRECT DEFENDANT’S OFFENDER SCORE BECAUSE DEFENDANT’S 2005 VIOLATION OF PROTECTION ORDER WAS NOT PLEADED AND PROVED BEFORE AUGUST 2011.

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the standard range sentence is established by the current offense seriousness score and the defendant’s offender score. RCW 9.94A.530(1); *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).⁴ The defendant’s offender score is based on the defendant’s criminal history, including prior convictions. RCW 9.94A.525; *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004).

Generally, if the present conviction is for a nonviolent felony offense, prior adult felonies are scored as one point. RCW 9.94A.525(7). However, when an offender’s present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030⁵ was pleaded and proven, RCW 9.94A.525(21) requires some prior adult

⁴ *Ford* superseded by statute on other grounds, Laws of 2008, ch. 231, § 4, as recognized in *State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

⁵ “Domestic violence” has the same meaning as defined in RCW 10.99.020 and 26.50.010. RCW 9.94A.030(2).

convictions to be counted as 2 points and repetitive domestic violence offenses to be counted as 1 point. See RCW 9.94A.525(21)(a) and (d)⁶.

A conviction is counted the same whether it is a result of a jury verdict or a plea. An *Alford* plea is treated the same for purposes of calculating an offender score as a traditional plea. See *State v. Tinajero*, 2013 WL 2995925 (June 13, 2013)⁷. In an *Alford* plea, the defendant concedes there are sufficient facts for a court to find him guilty and pleads guilty to take advantage of the prosecutor's plea offer. *State v. D.T.M.*, 78 Wn. App. 216, 220, 896 P.2d 108 (1995). To accept an *Alford* plea, the court must find an independent factual basis for the guilty plea. *State v. D.T.M.*, 78 Wn. App. 216, 220.

“[W]ashington’s sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts intimately related to the prior conviction” *State v. Jones*, 159 Wn.2d

⁶ RCW 9.94A.525(21)(a) and (d) states in the relevant part: If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

- (a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after August 1, 2011, for any of the following offenses: A felony violation of a no-contact or protection order RCW 26.50.110...Unlawful imprisonment (RCW 9A.40.040)...
- (d) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was pleaded and proven after August 1, 2011.

⁷ GR.1 allows for citations to unpublished opinions filed on or after March 1, 2013, for persuasive value only as the court deems appropriate.

231, 241, 149 P.3d 636 (2006); *see also State v. Giles*, 132 Wn. App. 738, 743, 132 P.3d 1151 (2006). The use of prior convictions as a basis for sentence is constitutionally permissible if the State proves their existence by a preponderance of the evidence. *See State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999) (*citing* RCW 9.94A.110 recodified as RCW 9.94A.500). “The State must introduce evidence of some kind to support the alleged criminal history” *Ford*, 137 Wn.2d at 481. “The best evidence of a prior conviction is a certified copy of the judgment.” *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

The sentencing court’s calculation of a defendant’s offender score is reviewed de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). “[T]he remedy for a miscalculated offender score is resentencing using [the] correct offender score.” *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (*citing Ford*, 137 Wn.2d at 479-480.); *see also State v. Hunley*, 161 Wn. App. 919, 929-930, 253 P.3d 448 (2011) (*citing Mendoza*, 165 Wn.2d at 930).

In the present case, the State proved each of defendant’s prior convictions by a preponderance of the evidence when it presented certified copies of the defendant’s judgment and sentences to the trial court at sentencing. 1/26/18 RP 408-12; CP 162-283. On appeal, defendant concedes that the State proved all eight convictions, however, defendant

challenges the sentencing court's scoring of four of these convictions under RCW 9.94A.525(21)(a) and (d). Brief of Appellant at 27-29.

First, the defendant challenges the trial court's application of RCW 9.94A.525(21)(a) to his 2005 conviction for felony violation of a protection order – domestic violence (VPO-DV) and to his 2012 conviction for unlawful imprisonment, domestic violence⁸, asserting that neither was pled or proved after August 1, 2011, as required by RCW 9.94A.525(21)(a). The State agrees the 2005 VPO-DV conviction was neither pled nor proved after August 1, 2011, and should have been counted as one point at defendant's sentencing. However, defendant's argument that the State failed to plead and prove defendant's 2012 unlawful imprisonment – domestic violence conviction is without merit.

In the present case, the State proved at sentencing that defendant had been convicted of count II, unlawful imprisonment – domestic violence, and count III, assault in the third degree, under Pierce County cause number 11-1-05076-1. The State provided the sentencing court with certified copies of all three informations filed in cause number 11-1-05076-1; the declaration of probable cause; the statement of defendant on plea of guilty; and the judgment and sentence. 1/26/18 RP 408-09; CP

⁸ The 2012 unlawful imprisonment – domestic violence conviction is from Pierce County cause number 11-1-05076-1. CP 361-73.

226-65. Unlawful imprisonment – domestic violence is charged as count II in all three informations. CP 241-51. The charging documents all contain identical language:

Count II: And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MARCUS KEITH MCCLAIN of the crime of UNLAWFUL IMPRISONMENT, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan and/or so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That MARCUS KEITH MCCLAIN, in the State of Washington on or about the 17th day of December, 2011, did unlawfully, feloniously, and knowingly restrain another person, to-wit: Annette McClain, contrary to RCW 9A.40.040, *a domestic violence incident as defined in RCW 10.99.020*, and against the peace and dignity of the State of Washington.

CP 241-51 (emphasis added). These informations are supported by the declaration of probable cause which alleges defendant committed the crime of “Unlawful Imprisonment (DV related) against Annette McClain (his 73 year old mother)...” CP 252-54. In section 4(b) of his statement of defendant on plea of guilty, defendant acknowledges that he is charged with “Unlawful Imprisonment DV and Assault 3 as set out in the Amended Information dated 8/29/12...” CP 255. In section 7 of his statement of defendant on plea of guilty, defendant states: “ I plead guilty

to count(s) 2 and 3 as charged in the Amended Information dated 8/29/12...”. CP 262. The court found a factual basis for defendant’s plea and found him guilty as charged. CP 264. The State proved by a preponderance of the evidence that it pleaded domestic violence as defined in RCW 9.94A.030 by providing certified copies of the informations for defendant’s unlawful imprisonment – domestic violence conviction; the State proved by a preponderance of the evidence that it proved the unlawful imprisonment – domestic violence was “domestic violence” as defined in RCW 9.94A.030 by providing the sentencing court with certified copies of defendant’s statement of defendant on plea of guilty and judgment and sentence for that conviction.

The judgment and sentence in cause number 11-1-05076-1 contains a scrivener’s error in section 2.1 that erroneously identifies count I as the count for which the State has pleaded and proved domestic violence instead of count II. CP 229. Defendant did not plead guilty to count I; he pled guilty to counts II and III. CP 228, 241-43, 262. Defendant argues that because of this scrivener’s error the State has failed to prove by a preponderance of the evidence that defendant’s conviction for unlawful imprisonment – domestic violence was an offense for which domestic violence was “pleaded and proved.” Brief of Appellant at 27-28. A single scrivener’s error on the judgment and sentence cannot defeat the

evidence that the State charged defendant with unlawful imprisonment – domestic violence as defined in RCW 10.99.020 in three different informations, the defendant pled guilty to unlawful imprisonment – “DV” as charged in the August 29, 2012 amended information, and the court found him guilty and sentenced him on unlawful imprisonment – domestic violence. CP 226-243, 252-65.

In re the Pers. Restraint Petition of Mayer, 128 Wn. App. 694, 698, 117 P.3d 353 (2005), Jeremy Mayer pled guilty by way of an *Alford* plea to second degree murder. The amended information to which he pled guilty contained an incorrect statutory reference to first degree murder, which was also carried over into the judgment and sentence. *Mayer*, 128 Wn. App. 694, 698-99. In his personal restraint petition, Mayer claimed that his plea to second degree murder was involuntary because the statute listed in his plea documents was incorrect. *Id.* at 700. This Court stated that it was clear from the documents that the error was merely a scrivener’s error. *Id.* at 700. Mayer was entitled to the correction of that error, but his plea was valid. *Id.* at 701-02.

Like *Mayer*, it is clear that defendant’s 2012 judgment and sentence contains a scrivener’s error. Defendant was charged in count II with unlawful imprisonment -domestic violence; he pled to unlawful imprisonment – domestic violence as charged in the second amended

information; and the court found a factual basis to support his plea to unlawful imprisonment – domestic violence. CP 226-243, 252-65. The State has proved by a preponderance of the evidence that it “pleaded and proved” domestic violence for defendant’s conviction for unlawful imprisonment – domestic violence. The court properly counted this conviction as two points when calculating defendant’s offender score pursuant to RCW 9.94A.525(21)(a).

Defendant also asserts that the court improperly counted his two Lakewood Municipal Court convictions for Violation of a Court Order as one point each when calculating his offender score. Brief of Appellant at 28. Defendant’s argument fails because defendant’s two Lakewood Municipal Court convictions for Violation of a Court Order were repetitive domestic violence offenses under RCW 9.94A.525(21)(d)⁹. See 1/226/18 RP 411-12, 424.

The Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, determines the sentencing range for most criminal offenses and takes into account the presence and nature of prior convictions. See RCW

⁹ RCW 9.94A.525(21)(a) and (d) states in the relevant part: If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

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

9.94A.525. A sentencing court calculates the “offender score” for a conviction for a felony domestic violence offense by including one point for “a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven.” RCW 9.94A.525(21)(c). A repetitive domestic violence offense is defined by RCW 9.94A.030(42) and states in the relevant part:

Repetitive domestic violence offense means any:

(a)(ii) Domestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense;

(iii) Domestic violence violation of a no-contact order under chapter RCW 26.09, 26.10 ***26.26, or 26.50 RCW that is not a felony offense;

In the present case, the State produced certified copies of defendant’s judgment and sentence, complaint, and statement of defendant on plea of guilty for his 2014 convictions for two counts of Violation of a Court Order – Domestic Violence out of Lakewood Municipal Court case number 14L0645. CP 266-71. The complaint charged that on or about June 18, 2014, defendant violated domestic violence court orders under RCW 26.50.110(1) by having contact with two different family or household member contrary to RCW 10.99.020. CP 268-70. Each count in the complaint is entitled “Violation of Court Order (Domestic Violence)

– RCW 26.50.110(1). See CP 268-69. Defendant’s statement of defendant on plea of guilty on case number 14L0645 states that he is pleading guilty to the 2 counts of Violation of Court Order “[a]s set out in the charging document. CP 266-67; see also CP 268-70. As noted previously, the charging document specifically reference both RCW 26.50.110(1) and 10.99. Finally, defendant’s judgement and sentence for case number 14L0645 includes a finding that “For the crime(s) charged in count(s) 5&6¹⁰, domestic violence was pled and proved.” CP 271. The State met its burden to prove by a preponderance of the evidence that defendant’s 2014 domestic violence court order violation convictions under case number 14L0645 were repetitive domestic violence offenses and the court properly counted them as one point each in defendant’s offender score.

Defendant also argues that because defendant pled guilty to the two Lakewood misdemeanors by entering an *Alford* plea in which he did not admit the underlying facts of his crimes, that the State has not “proven” domestic violence for purposes of RCW 9.94A.525(21)(d). See Brief of Appellant at 28-29. This argument also fails because, as argued

¹⁰ The judgment and sentence lists 3 different case numbers on it: (1) 14L514, a count of assault in the 4th degree DV on line 1 that was dismissed; (2) 14L611, a count of assault in the 4th degree DV on line 3 that was dismissed; and (3) 14L645, two counts of NCO Viol DV on lines 5 & 6 with a guilty finding. CP 271.

above, the judgment and sentence for the Lakewood misdemeanors has a specific finding that domestic violence was pled and proved. CP 271. Even if that were not the case, the trial court found a factual basis for his plea when he accepted defendant's *Alford* plea. CP 267. Just above the Judge's signature on defendant's statement of defendant on plea of guilty are the court's findings: "I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. *Id.* Defendant understands the charges and the consequences of the plea. ***There is a factual basis for the plea. The defendant is guilty as charged.***" (emphasis added). *Id.* Because defendant was convicted as charged, and the charging documents contained the required references to RCW 10.99 and/or RCW 26.50, the State proved that domestic violence had been both pled and proved under RCW 9.94A.525(21)(a).

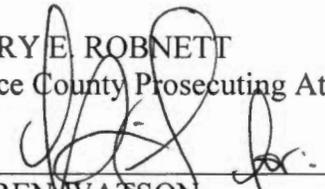
Because the court erroneously included defendant's 2005 Domestic Violence Court Order Violation as two points instead of one, defendant's offender score should be a nine instead of a ten. This Court should remand to correct defendant's offender score.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court affirm defendant's conviction and remand for the trial court to correct his offender score.

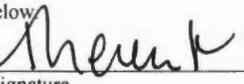
DATED: May 20, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


KAREN WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.20.19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 20, 2019 - 3:08 PM

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