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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN CASTRO, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. RESPONDENT'S ISSUES PRESENTED

1. Is a prior deadly weapon finding a sentencing issue for the trial court to decide, rather than a fact issue for the jury to decide, before it can be used to “double” a defendant’s current firearm enhancement under RCW 9.94A.533(d)?

2. Can the defendant raise an issue regarding whether the State met its burden to establish his criminal history at the resentencing if the defendant did not appeal the determination of his criminal history from the original sentencing or did not object at the resentencing? If this Court remands for a third sentencing, what is the proper procedure on remand?

3. Did the trial court improperly calculate the defendant’s offender score on remand as a “9 plus,” if, in fact, the defendant’s offender score for the second-degree murder and first-degree unlawful possession of a firearm was well above a “9 plus” offender score?

4. Did this Court vacate the defendant’s underlying 2008 conspiracy to deliver a controlled substance conviction or only the deadly weapon enhancement finding attached to it?

5. Was the trial court required to, sua sponte, identify and exercise its discretion to determine whether any of the defendant’s prior crimes constituted the same criminal conduct where the defense did not ask the court to exercise its discretion?

6. Should this Court consider the defendant's LFO argument under RAP 2.5(a)(3), if it was not raised in the trial court?

7. If this Court considers the defendant's LFO argument, was the trial court's imposition at the resentencing of a repayment amount of \$10.00 a month, as opposed to the \$5.00 a month previously ordered at the original sentencing court, "clearly erroneous?"

8. Has the defendant established any error by the inclusion of superfluous language "persistent offender" contained in the footer of the judgment and sentence?

II. STATEMENT OF THE CASE

Procedural history.

The defendant was charged and convicted by a jury of second-degree murder, felony riot,¹ and first-degree unlawful possession of a firearm, CP 1-2, 108-12. The jury found the defendant was armed with a firearm during the commission of the second-degree murder and felony riot. CP 113-15. The defendant filed a direct appeal. This Court affirmed the convictions but remanded to the superior court for resentencing in an unpublished opinion. *State v. Castro*, 195 Wn. App. 1056 (2016), *as*

¹ In 2013, the legislature amended RCW 9A.84.010. "Felony riot" has been re-designated as "criminal mischief," replacing the term "riot." Laws of 2013, ch. 20, § 1; RCW 9A.84.010. The amendment did not change any elements of the crime.

amended on denial of reconsideration (Jan. 24, 2017) (unpublished). On direct appeal, the defendant argued, in part, that the trial court erroneously classified one of his prior offenses, conspiracy to deliver a controlled substance with a deadly weapon enhancement, as a most serious offense. *Id.* This Court agreed and found the prior conspiracy to deliver a controlled substance with a deadly weapon enhancement was an invalid enhancement because a deadly weapon enhancement cannot apply to an unranked felony; conspiracy to deliver a controlled substance is such an unranked felony. *Id.* Therefore, this Court found that there was no deadly weapon verdict to support elevating the conviction to a most serious offense. *Id.*

The defendant was resentenced by the Honorable Julie McKay in the superior court. This appeal timely followed.

III. ARGUMENT

A. THE DEFENDANT WAS NOT ENTITLED TO HAVE A JURY FIND HIS PRIOR WEAPON ENHANCEMENT BEYOND A REASONABLE DOUBT BEFORE THE SENTENCING COURT COULD USE IT TO ENHANCE HIS CURRENT OFFENSE OF SECOND-DEGREE MURDER WITH A FINDING HE COMMITTED THE MURDER WHILE ARMED WITH A FIREARM.

The defendant argues for the first time on appeal that a jury did not make a finding that he had a previous deadly weapon enhancement, which he claims was necessary for the sentencing court to “double” his incarceration time on his current firearm enhancement.

The defendant was charged with several felonies including second-degree murder. CP 10-11. The second-degree murder alleged a firearm enhancement. CP 10. The jury returned a special verdict finding the defendant was armed with a firearm during the commission of the second-degree murder. CP 91. At sentencing, the trial court imposed a 120-month firearm enhancement, as opposed to 60-month weapon enhancement, for the second-degree murder under Count I. CP 91, 93, 94. The enhancement was doubled because the defendant had a previous deadly weapon or firearm finding.

RCW 9.94A.533(3) governs sentencing enhancements for the use of firearms in the commission of a crime. The statute requires enhancements of five years (60 months) for the use of a firearm in a class A felony, RCW 9.94A.533(3)(a). Under RCW 9.94A.533(3), firearm enhancements are mandatory, must be served in total confinement, and run consecutively to all other sentencing provisions. Second-degree murder is a class A offense, with a statutory maximum of life in prison. RCW 9A.32.050(2); RCW 9A.20.021(a). Furthermore, under RCW 9.94A.533 (d), a sentencing court is required to double a current firearm enhancement if there has been a previous finding that the defendant was armed with a deadly weapon or

firearm during the commission of a qualifying felony under RCW 9.94A.533 (a), (b), or (c) of that statute. That statute states:

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

RCW 9.94A.533(d).

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The “statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

However, a finding that the defendant was previously sentenced for a felony with a deadly weapon or firearm enhancement need not be proven to a jury. In *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the United States Supreme Court

held that prior convictions are sentence enhancements rather than elements of a crime, and therefore need not be proved beyond a reasonable doubt to a jury. Our high court has likewise held that neither the United States Constitution nor the Washington Constitution requires a jury, rather than a judge, to find the existence of prior convictions beyond a reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 143, 156, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, (2004). Specifically, the *Smith* court held “[in] *Almendarez-Torres* ... the United States Supreme Court expressly held that prior convictions need not be proved to a jury. Because the Court has not specifically held otherwise since then, we hold that the federal constitution does not require that prior convictions be proved to a jury beyond a reasonable doubt.” *Id.* at 143.

The defendant’s reliance on *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), is misplaced. In *Alleyne*, the Court held that any fact that increases the mandatory minimum penalty for a crime is an “element” that must be submitted to the jury. *Alleyne*, 570 U.S. at 103. The *Alleyne* decision was squarely addressed by our Supreme Court in *State v. Witherspoon*, 180 Wn.2d 875, 891, 329 P.3d 888 (2014). In that case, the defendant argued that *Alleyne* required prior convictions be proved to a jury beyond a reasonable doubt before they could be used to enhance a sentence. Our Supreme Court found this argument unsupported. After reviewing the

relevant case authority, the Court held that the use of prior convictions as a basis for sentencing is constitutionally permissible provided either the State proves their existence to a judge by a preponderance of the evidence, or a defendant affirmatively acknowledges their existence. *Id.* at 891-92.² See also *State v. Thieffault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (*Apprendi* does not require prior convictions used to establish Persistent Offender Accountability Act status be proved to a jury); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001) *cert. denied*, 535 U.S. 996 (2002) (recognizing that United States Supreme Court decisions holding that recidivist factors need not be pled and proved beyond a reasonable doubt are still good law). Moreover, *Blakely* did not overrule *Almendarez-Torres*. Rather, in reiterating the *Apprendi* rule, *Blakely* specifically excluded its application to prior convictions from its constitutionally based jury trial requirement in *Apprendi*, noting that the jury must determine any fact,

² The *Witherspoon* court reiterated that: “We have repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes.” See *State v. McKague*, 172 Wn.2d 802, 803 n. 1, 262 P.3d 1225 (2011) (collecting cases); see also *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) (“In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt”); *Smith*, 150 Wn.2d at 139 (prior convictions do not need to be proved to a jury beyond a reasonable doubt for the purposes of sentencing under the POAA).

“other than the fact of a prior conviction,” that increases a sentence over the statutory maximum. *Blakely*, 542 U.S. at 313.

Likewise, in *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006), the Supreme Court considered whether an increase in the offender score for crimes committed while on community supervision must be submitted to the jury. The defendant argued that *Apprendi*'s prior conviction exception did not include facts that were merely “related” to a prior conviction.

Rejecting this claim, the Supreme Court explained:

[T]he prior conviction exception encompasses a determination of the defendant's probation status because probation is a direct derivative of the defendant's prior criminal conviction or convictions and the determination involves nothing more than a review of the defendant's status as a repeat offender. In this regard, the community placement conclusion does not implicate the core concern of *Apprendi* and *Blakely*—that is the determination does not involve in any way a finding relating to the present offense conduct for which the State is seeking to impose criminal punishment and/or elements of the charged crime or crimes. To give effect to the prior conviction exception, Washington'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” such as the defendant's community status.

Jones, 159 Wn.2d at 241. Under *Jones*, Washington courts may determine “as a matter of law” facts “intimately related to the prior conviction.” *State v. Brinkley*, 192 Wn. App. 456, 460-61, 369 P.3d 157, *review denied*, 185 Wn.2d 1042, 377 P.3d 759 (2016).

Most recently, in *State v. Simms*, 171 Wn.2d 244, 246, 250 P.3d 107, (2011), the State charged Simms with first-degree robbery, two counts of second-degree assault and first-degree unlawful possession of a firearm. The robbery and assault counts included a prior 2000 firearm enhancement. Because the defendant had a prior firearm enhancement, the trial court doubled the firearm enhancements as required by RCW 9.94A.533(3)(d). *Id.* at 246. In affirming the defendant’s convictions, the Supreme Court held that the defendant’s prior 2000 assault conviction was not a fact supporting an element of the current offenses “because application of RCW 9.94A.533 does not result in a sentence beyond the maximum authorized statutory sentence.” *Id.* at 250-251. Ultimately, the Supreme Court found that the prior firearm enhancement was not an “essential element” of the crimes charged. *Id.* at 253. As the court stated: “Given Simms’ prior sentence for assault in the second-degree with a firearm enhancement in 2000, the court was *required* under RCW 9.94A.533(d) to double the firearm enhancements for Simms’ 2006 robbery and assault convictions.” *Id.* at 253 (emphasis in the original). Although the defendant boldly asserts the Supreme Court’s reasoning in *Simms* is “dubious,” it remains valid authority for this Court’s consideration.

Here, to determine whether the defendant had a prior conviction with a weapon enhancement finding “involves nothing more than a review

of the defendant's status as a repeat offender." *Jones*, 159 Wn.2d at 241. The sentencing court is entitled to consider "facts intimately related to the prior convictions" such as the dates of conviction, offense dates and the underlying offense. *Id.* These facts, including a finding of a weapon or firearm enhancement related to the conviction, all of which appear on the face of the prior judgments and sentences, are "intimately related to" the fact of the prior conviction itself. Defendant's argument that a prior finding that the defendant was armed with a deadly weapon or firearm must be proved to a jury beyond a reasonable doubt has no merit. The trial court did not err in "doubling" the firearm enhancement.

B. NO COPY OF THE DEFENDANT'S PRIOR CONVICTIONS WAS PRESENTED TO THE TRIAL COURT AT RESENTENCING. HOWEVER, A HEARING WAS PREVIOUSLY CONDUCTED AT THE DEFENDANT'S ORIGINAL SENTENCING, IN CONJUNCTION WITH THE DEFENDANT SIGNING AN ACKNOWLEDGEMENT OF HIS CRIMINAL HISTORY. AT THE RESENTENCING, THE DEFENSE ACKNOWLEDGED RECEIPT OF THE PRIOR CONVICTIONS, HAD NO OBJECTION TO THEIR USE, AND AGREED TO HAVE THE STATE FILE COPIES OF THE DEFENDANT'S PRIOR CONVICTIONS AFTER THE RESENTENCING. IF ERROR, IT WAS INVITED. MOREOVER, IT IS NOT AN ISSUE FROM WHICH THE DEFENDANT CAN APPEAL FROM.

The defendant next asserts the State did not present adequate proof his prior convictions at his resentencing.

At the time of the original sentencing in 2013, the Honorable Kathleen O'Connor conducted a hearing regarding the defendant's criminal history. RP (5/23/13) 2-23. The State presented certified copies of the defendant's prior judgments and sentences along with the testimony of a forensic fingerprint examiner. The fingerprint examiner testified that the fingerprints located on the defendant's prior judgments and sentences were that of the defendant. *Id.* At the original sentencing, the parties handed forward an "Understanding of Defendant's Criminal History," which contained the defendant's signature. CP 116-17.³ Under § 1.5 of the "Understanding of Defendant's Criminal History," dated May 23, 2013, that section states, in pertinent part:

Defendant affirmatively agrees that the State has proven, by a preponderance of the evidence, defendant's prior convictions and stipulates, without objection, by his/her signature below, unless a specific objection is otherwise stated in writing within this document...

CP 117.

Moreover, under § 1.4 of the 2013 document "Understanding of Defendant's Criminal History," there is a notation by the defense that it objected to the 2008 conspiracy to deliver a controlled substance conviction being included in the defendant's criminal history and that the two 2002

³ A supplemental designation is being filed contemporaneously with this brief.

delivery of a controlled substance convictions were the same course of conduct. CP 116.

On direct appeal from the original sentencing and convictions, the defendant did not assign error to the lower court's determination of his criminal history, other than challenging the 2008 conspiracy to deliver a controlled substance conviction, which was addressed by this Court, nor did he challenge his offender score calculation.

At sentencing on remand, defense counsel stated the following:

[DEFENSE ATTORNEY] KATO: Judge O'Connor did have those certified copies of the judgments and sentences in front of her. Usually they're filed in the court file. They weren't. But they were put away as exhibits. And on the appeal, they were found in the evidence vault, for lack of a better term. And I knew what was before the court, I have copies of them, so I had no objection to having those certified copies of the judgments and sentences that weren't filed, be filed, because they were supposed to be before the court. They just fell off the face of the earth. And I took over after appointed counsel, and they had no idea that there were no certified copies in the record, either. So we found out afterwards and the record's been fixed.

THE COURT: So does this still need to be fixed? Are they in the court file? Or do I need to address the motion of the state to have those removed from the exhibit? Because I do have them admitted as exhibits here at sentencing. The clerk printed the log based upon the motion so I could see what the judge had. Whether those need to be removed from the exhibit, copied and placed into the court file. Because obviously I have them as an exhibit, I can't undo that. But I can certainly take copies of those exhibits and place them in the court file.

[DEFENSE ATTORNEY] KATO: Most likely to be safe, knowing the obsessive compulsive tac of the Court of Appeals, you better have them in there again. It's a resentencing, it's a sentencing anew, and so let's have a record for it because whatever happens today, it's not going to be done today.

THE COURT: Certainly. All right. Thank you. Mr. Garvin, you have those. I can either have the clerk pull them from evidence, recopied and placed into the file. Or if you have new certified copies, I can take those as well.

[DEPUTY PROSECUTOR] GARVIN: I don't know that I have them with me. I didn't bring -- I have boxes and boxes of material on this case. I didn't bring those. But I can track them down and get them to counsel for review and supplement them within a day or two, your Honor.

THE COURT: All right. Supplement the record with those certified copies, as long as defense counsel has the opportunity to review what is being placed into the file.

[DEFENSE ATTORNEY] KATO: Your Honor, I reviewed those. They are what they are.

THE COURT: I want to make sure you review what Mr. Garvin gives you.

[DEFENSE ATTORNEY] KATO: I hope it's the same thing.

RP 11-13.

Here, the certified copies of the defendant's prior convictions are not in the superior court file. Although defense counsel acknowledged he had certified copies of the defendant's prior convictions, there was no statement on the defendant's understanding of criminal history signed by

the defendant at the resentencing nor did the defendant affirmatively acknowledge his prior convictions on the record at the time of the resentencing.⁴

1. Invited error.

The doctrine of invited error prohibits a party from setting up error in the trial court and then complaining of it on appeal. *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003); *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Young*, 48 Wn. App. 406, 414-15, 739 P.2d 1170 (1987). The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

Here, the defendant does not complain that the trial court imposed an illegal sentence,⁵ such as where the court exceeded its statutory authority, or miscalculated his offender score. *See State v. Phelps*, 113 Wn. App. 347, 354, 57 P.3d 624 (2002). He simply argues for the first time on appeal that

⁴ With no apparent reason, that admonition was not followed up on by the deputy prosecutor. The defense attorney had no objection to the court's directive to file the certified judgments and sentences after the resentencing.

⁵ The invited error doctrine does not preclude review of an illegally imposed sentence, "even if [the] defendant agree[d] to the sentence." *In re Pers. Restraint of Green*, 170 Wn. App. 328, 332, 283 P.3d 606 (2012); *State v. Wallin*, 125 Wn. App. 648, 661-62, 105 P.3d 1037 (2005) ("[i]nvited error reasoning has been rejected by the Supreme Court on the ground that a defendant cannot empower a sentencing court to exceed its statutory authorization").

the State failed to meet its burden to establish his criminal history. However, his sentencing counsel took affirmative action, by which counsel knowingly and voluntarily acknowledged receipt of the defendant's prior convictions at the time of the resentencing, that Judge O'Connor had a copy of defendant's prior convictions at the original sentencing and counsel acknowledged he knew what was before Judge O'Connor at the original sentencing, he was familiar with the contents of the prior judgments and sentences, and he had no objection to the certified judgments and sentences being filed after the resentencing of the defendant. RP 11-12.

Furthermore, as the record reflects on resentencing, defense counsel had no objection to the criminal history calculation or the inclusion of his prior offenses in his criminal history. Ultimately, at the time of the resentencing, the superior court judge stated:

Obviously[,] the offender score for all of those is a 9 plus. I don't believe that is disputed by either your attorneys nor the state under these circumstances, with the seriousness levels and the offenders -- or excuse me, the class of these felonies that the court is dealing with here today.

RP 23-24.

The defense knowingly, voluntarily, and affirmatively set up the error, if any, and should be precluded from raising it on appeal.

2. The defendant is barred from arguing the State did not meet its burden to establish criminal history at the resentencing because he did not appeal the trial court’s determination of his criminal history at the original sentencing, and agreed with the trial court’s determination of his criminal history at the resentencing on remand.

A defendant may challenge a sentencing error for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

In that regard, it is the State’s obligation, not the defendant, “to assure that the record before the sentencing court supports the criminal history determination.” *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009), *disapproved on other grounds*, *State v. Jones*, 182 Wn.2d 1, 7 n. 3, 338 P.3d 278 (2014). In that regard, “[t]he best method of proving a prior conviction is by the production of a certified copy of the judgment, but ‘other comparable documents of record or transcripts of prior proceedings’ are admissible to establish criminal history.” *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 568, 243 P.3d 540 (2010). The State’s burden of proving the conviction is a preponderance of the evidence, and that burden is “not overly difficult to meet” and evidence that bears some “minimum indicia of reliability” will suffice. *Id.* at 569.⁶

⁶ An unsupported statement of prior criminal history is insufficient to satisfy the State’s burden of proof. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The State is relieved of this burden if the defendant affirmatively acknowledges his or her prior criminal history. *Id.* However, the defendant’s mere failure to object is insufficient. *Id.* “[T]he State must provide evidence of a defendant’s criminal history ... unless the defendant affirmatively acknowledges the criminal

However, the defendant now attempts to raise an issue regarding his criminal history which could have been raised on the first appeal, and which may not be raised in a second appeal. *See* RAP 2.5(c)(1); *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009) (“a case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count[s], and where the trial court exercises no discretion on remand as to the remaining final counts.”) *Id.* at 37; *State v. Parmelee*, 172 Wn. App. 899, 292 P.3d 799, 801, *review denied*, 177 Wn.2d 1027, 309 P.3d 504 (2013). As stated in *State v. Sauve*, 100 Wn.2d 84, 87, 666 P.2d 894 (1983), “[T]he general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal.” Our appellate courts have been committed to the rule that questions decided on appeal, or questions that might have been determined had they been raised, will not be considered on a subsequent appeal of the same case. *See Davis v. Davis*, 16 Wn.2d 607, 609, 134 P.2d 467 (1943); *accord, State v. Bauers*, 25 Wn.2d 825, 830,

history on the record.” *Mendoza*, 165 Wn.2d at 930. “[T]he court may rely on the defendant’s stipulation or acknowledgement of prior convictions to calculate the offender score.” *State v. James*, 138 Wn. App. 628, 643, 158 P.3d 102 (2007). Moreover, the State cannot rely on the defendant’s silence to meet its burden. *State v. Jones*, 182 Wn.2d 1, 10, 338 P.3d 278 (2014).

172 P.2d 279 (1946); *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970); *State v. Bradfield*, 29 Wn. App. 679, 630 P.2d 494 (1981).

In that regard, where one portion of a sentence is found to be erroneous, that erroneous portion does not undermine the otherwise valid part of the sentence. *State v. Rowland*, 160 Wn. App. 316, 328, 249 P.3d 635, *affirmed*, 174 Wn.2d 150, 272 P.3d 242 (2012). And, an appellate may remand for resentencing due to an erroneous offender score but leave otherwise valid sentences intact. *Rowland*, 160 Wn. App. at 328; *see Kilgore*, 167 Wn.2d at 37 (“[T]he finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced’ is unaffected by the reversal of one or more counts.” (quoting *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980))).

In *Kilgore*, our Supreme Court considered whether the defendant’s case had become final after the appellate court had reversed two of his convictions and affirmed the other five and the State declined to retry on remand. 167 Wn.2d at 34-35. On remand after direct appeal, the trial court merely corrected the judgment and sentence to reflect the reversed counts. *Id.* at 34. The Supreme Court noted that whether the judgment in *Kilgore*’s case was final depended on whether the trial court on remand had exercised independent judgment; there can be no reviewable issue if the trial court does not exercise independent judgment on remand. *Id.* at 41. The court held

that by “simply correcting the original judgment and sentence, no appealable issues remained.” *Id.* The Supreme Court concluded that, because the trial court on remand chose not to exercise its discretion, Kilgore’s case remained final, and the trial court did not abuse its discretion when it declined to invalidate Kilgore’s exceptional sentence. *Id.* at 44.

Similarly, in *Rowland*, the court granted the defendant’s personal restraint petition challenging his offender score and remanded for resentencing. 160 Wn. App. at 320. “[T]he resentencing court reconsidered only the erroneous offender score, while declining to exercise its discretion to consider the exceptional sentence.” *Id.* at 328. Thus, this court concluded that “while the finality of Rowland’s standard range sentence was disturbed by our remand for resentencing following his successful PRP, his exceptional sentence was not.” *Id.* at 329.

Here, after direct appeal, this Court remanded the case to the superior court for resentencing because the conspiracy to deliver a controlled substance contained an invalid enhancement. The defendant had previously, fully acknowledged and agreed to his criminal history, other than the several written notations by him,⁷ at the time of the first sentencing

⁷ The defendant asserted that the conspiracy to deliver a controlled substance conviction was invalid and the defendant “believe[d]” that his 2004 delivery of a controlled substance convictions were the same course of conduct. CP 116.

in 2013, as documented in the “Understanding of Defendant’s Criminal History,” as discussed above. CP 116-17. Furthermore, he did not appeal the determination of his criminal history from the original sentencing. The trial court was not asked to again determine the defendant’s offender score at the resentencing.

Furthermore, this Court remanded for resentencing because the trial court included a non-strike offense in a persistent offender calculation when initially sentencing the defendant. The defendant’s untimely challenge to the State’s inclusion of his prior felony convictions into his criminal history, for the first time after resentencing, which the defendant acknowledged at his initial sentencing, does not derive from an appealable issue of an independent judgment by the trial court and it is not properly before this Court.

3. If the Court finds the State did not meet its burden to establish the defendant’s criminal history at the resentencing, remand is appropriate to allow the State to present the defendant’s prior convictions to the sentencing court.

Where the State fails to meet its burden, the proper remedy is to remand for resentencing to allow the State to present evidence of the defendant’s prior convictions. RCW 9.94A.530(2); *see also Mendoza*, 165 Wn.2d at 930; *Jones*, 182 Wn.2d at 6-11.

C. THE TRIAL COURT DID NOT IMPROPERLY CALCULATE THE DEFENDANT’S OFFENDER SCORE AS A “9 PLUS.”

Standard of review.

An appellate court reviews a sentencing court’s calculation of an offender score de novo. *State v. Moern*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010). Calculation of an offender score requires the sentencing court to identify all prior convictions, eliminate those convictions that wash out, and count the remaining prior convictions. *State v. Sandholm*, 184 Wn.2d 726, 739, 364 P.3d 87 (2015).

To calculate the offender score, the court relies on its determination of the defendant’s criminal history, which the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, defines as “the list of a defendant’s prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.” RCW 9.94A.030(11). Prior convictions result in offender score “points” as outlined in RCW 9.94A.525.

Contrary to the defendant’s unsupported argument that the trial court “estimated” the defendant’s criminal history, *the trial court made a finding that the defendant’s offender score was a “9 plus.”* RP 23-24; CP 93 (§ 2.3 of the judgment and sentence). The court also included the defendant’s criminal history, although not acknowledged by the defendant, in § 2.2 of the judgment and sentence. CP 92-93. The defendant had three

prior violent offenses, five nonviolent offenses, and four juvenile convictions. In addition, the defendant had three current convictions.

Because the prior second-degree robbery and second-degree assault convictions are violent offenses, each conviction counts as two points in the defendant's offender score, totaling six points for the second-degree murder, *See* RCW 9.94A.030(55)(viii)(xi); RCW 9.94A.525(8), and those offenses count as one point for the remaining nonviolent offense, first-degree unlawful possession of a firearm. RCW 9.94A.525(7). The prior juvenile nonviolent offenses count one-half point each. RCW 9.94A.525(8).

Under RCW 9.94A.525(1):

A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

RCW 9.94A.525(1) references RCW 9.94A.589, under which "other current offenses" are treated as prior convictions for purposes of calculating the offender score and generally run concurrently with each other rather than consecutively. RCW 9.94A.589(1)(a).

Accordingly, the offender score for the current second-degree murder is "15" without inclusion of the 2008 delivery of a controlled substance conviction, or "16" with inclusion that conviction. The current

riot conviction was unranked with a standard range of 0-12 months, a sentence unaffected by the offender score. RCW 9.94A.505(2)(b). Finally, the offender score for the current first-degree unlawful possession of a firearm conviction would be “12” without inclusion of the 2008 delivery of a controlled substance conviction, or “13” with its inclusion. Accordingly, the trial court’s finding that the defendant’s offender score was a “9 plus” was properly calculated for the second-degree murder and first-degree unlawful possession of a firearm convictions. The trial court did not err.

D. THIS COURT DID NOT VACATE THE DEFENDANT’S PRIOR 2008 DELIVERY OF A CONTROLLED SUBSTANCE CONVICTION, BUT RATHER HELD THAT IT WAS AN UNRANKED FELONY, AND COULD NOT QUALIFY AS A “MOST SERIOUS OFFENSE” UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT.

The defendant next alleges that his prior 2008 conviction for conspiracy to deliver a controlled substance was vacated by this Court during his direct appeal, and cannot be used to calculate his offender score on remand. This claim has no merit.

On direct appeal, this Court held that a conviction for conspiracy to deliver a controlled substance is an unranked felony and a weapon enhancement cannot apply to an unranked felony. *Castro*, 195 Wn. App. 1056; *see also State v. Soto*, 177 Wn. App. 706, 716, 309 P.3d 596 (2013), *as amended* (Jan. 14, 2014). Therefore, this Court did

not invalidate the underlying felony conviction for conspiracy to deliver a controlled substance, but rather invalidated the firearm enhancement because there was no basis for the enhancement in law.

“Invalid on its face” is a term of art that, like many terms of art, obscures, rather than illuminates its meaning. Generally speaking, a judgment and sentence is not valid on its face if it demonstrates that the trial court did not have the power or the statutory authority to impose the judgment or sentence. “Invalid on its face” does not mean that the trial judge committed some legal error. A trial court does not lose its authority because it commits a legal error, and most legal errors must be addressed on direct review or in a timely personal restraint petition or not at all.

In re Pers. Restraint of Scott, 173 Wn.2d 911, 916, 271 P.3d 218 (2012)
(internal citations omitted).

Ultimately, this Court found the conspiracy to deliver a controlled substance *with a deadly finding* was invalid on its face for purposes of the Persistent Offender Accountability Act because a weapon enhancement cannot attach to an inchoate crime. This Court did not vacate the underlying felony conviction and it remains a valid conviction for inclusion in the defendant’s criminal history and resultant offender score. Conspiracy to deliver a controlled substance remains a viable, unranked felony. RCW 69.50.407; *State v. Hebert*, 67 Wn. App. 836, 837, 841 P.2d 54 (1992). This Court should instruct the trial court to strike the deadly weapon

enhancement from the judgment and sentence for defendant's conspiracy to deliver a controlled substance conviction.

E. A TRIAL COURT IS NOT REQUIRED TO *SUA SPONTE* IDENTIFY AND EXERCISE ITS DISCRETION TO DETERMINE WHETHER PRIOR CRIMES INVOLVED THE SAME CRIMINAL CONDUCT. THE DEFENDANT HAS WAIVED HIS CLAIM THAT SEVERAL PRIOR CRIMES CONSTITUTED THE SAME CRIMINAL CONDUCT BECAUSE HE DID NOT ASK THE TRIAL COURT TO EXERCISE ITS DISCRETION.

The defendant further argues the trial court committed error by not determining, *sua sponte*, whether any of the defendant's prior convictions constituted the "same criminal conduct."

A trial court determines an offender's standard sentence range by calculating an offender score based on the number of current and prior convictions. RCW 9.94A.525; RCW 9.94A.589(1)(a); *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). If the court finds that some or all of the current offenses encompass the same criminal conduct, those current offenses shall be counted as one crime. RCW 9.94A.589(1)(a); *Graciano*, 176 Wn.2d at 536. Offenses must be treated as the same criminal conduct when they are committed at the same time and place, require the same intent, and involve the same victim. *Id.* at 536. RCW 9.94A.589(1)(a) is construed narrowly, and, if the defendant fails to prove any of its elements, the crimes are not the same criminal conduct. 176 Wn.2d at 540.

In addition, a criminal defendant has the burden of proving that current offenses constitute the same criminal conduct. *Graciano*, 176 Wn.2d at 539-40. Because the finding that two crimes constitute the same criminal conduct favors the defendant by lowering his presumed offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.* at 539.

The scheme - and the burden - could not be more straightforward: each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the trial court, and like other circumstances in which the movant invokes the discretion of the trial court, the defendant bears the burden of production and persuasion.

Id. at 540 (emphasis in original).

In *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000), *review denied*, 141 Wn.2d 1030 (2000), the defendant argued for the first time on appeal that the two crimes to which he had pleaded guilty constituted the same criminal conduct. *Id.* at 517-18. He argued that the trial court should have *sua sponte* found his two crimes to be the same criminal conduct. *Id.* at 521. Division One rejected that attempt, noting the same criminal conduct determination is, in part, a factual determination by the trial court and also is, in part, a matter of judicial discretion. *Id.* at 523-24. An appellate court cannot know how the trial court might have exercised its discretion in

deciding the factual inquiries involved in determining a same criminal conduct inquiry or if the trial court would have exercised its discretion favorably to the defendant. *Id.* A trial court's failure to *sua sponte* determine whether current offenses constitute the same criminal conduct is not a challenge reviewable for the first time on appeal. As the court stated:

Because this is not the legislature's directive, the trial court's failure to conduct such a review *sua sponte* cannot result in a sentence that is illegal. The trial court thus should not be required, without invitation, to identify the presence or absence of the issue and rule thereon.

Id. at 525.

Ultimately, the *Nitsch* court held that the defendant's "failure to identify a factual dispute for the court's resolution and ... failure to request an exercise of the court's discretion" waived the challenge to his offender score. *Id.* at 520; *see also In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494, 158 P.3d 588, 590 (2007) (noting that because the same criminal conduct inquiry involves both factual determinations and the exercise of discretion, if a defendant fails to bring this to the court's attention, he or she waives the challenge to the offender score).

Here, the defendant did not argue any of his convictions constituted the same criminal conduct at the time of his resentencing. On appeal, the defendant fails to identify from the record, what convictions, if any, constitute the same criminal conduct. Rather, he bases his argument on

conjecture and speculation that several, unidentified prior crimes may constitute the same criminal conduct. Accordingly, he has waived any objection to the trial court's determination of his offender score based upon an assertion that several, unidentified prior convictions "may qualify as the same criminal conduct." Br. of App. at 21.

F. THIS COURT SHOULD NOT CONSIDER THE DEFENDANT'S LFO ARGUMENT UNDER RAP 2.5(A)(3), AS IT WAS NOT RAISED IN THE TRIAL COURT. FURTHERMORE, IF THE COURT EXERCISES ITS DISCRETION, THE DEFENDANT FAILS TO ESTABLISH THE TRIAL COURT'S DETERMINATION THAT HE PAY \$10 A MONTH TOWARD HIS LFOS IS CLEARLY ERRONEOUS.

Standard of review.

Appellate courts review a decision on whether to impose LFOs for abuse of discretion. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court's factual determination concerning a defendant's resources and ability to pay is reviewed under the "clearly erroneous" standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011); *Baldwin*, 63 Wn. App. at 312. A "clearly erroneous test" was set forth by the United States Supreme Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948): "A finding is clearly erroneous when although

there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

Legal financial obligations (LFOs) decisions unchallenged in the trial court cannot be raised initially on appeal due to RAP 2.5(a)(3). In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), our high court held that an LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity, and that an appellate court “must make its own decision to accept discretionary review.” *Id.* at 830, 835. Nevertheless, the *Blazina* court exercised its discretion to consider unpreserved LFO arguments in light of the “[n]ational and local cries for reform of broken LFO systems.” *Id.* at 835.

Under Blazina, the Court noted that trial judges have a statutory obligation to consider RCW 10.01.160(3) at sentencing and make an individualized determination of the defendant’s ability to pay *discretionary* LFOs. *Id.* at 837.

Mandatory LFOs are not subject to trial courts’ discretion. *State v. Mathers*, 193 Wn. App. 913, 918-21, 376 P.3d 1163 (2016). Mandatory LFOs include: (1) the \$500 Victim Assessment Fee required by RCW 7.68.035(1)(a); (2) the \$100 DNA Collection Fee required by RCW 43.43.7541; and (3) the \$200 Criminal Filing Fee required by

RCW 36.18.020(2)(h). *See also State v. Clark*, 191 Wn. App. 369, 373, 362 P.3d 309 (2015) (Victim Penalty Assessment Fee, DNA Collection Fee, and Criminal Filing Fee); *State v. Lundy*, 176 Wn. App. 96, 102-04, 308 P.3d 755 (2013) (Victim Penalty Assessment Fee, DNA Collection Fee, and Criminal Filing Fee).

Regarding the monthly payments, the legislature has directed sentencing courts to set a sum that an offender is required to pay towards satisfying LFOs, and to do so on the judgment and sentence or a subsequent order to pay. RCW 9.94A.760. The legislature has authorized the sentencing court to order that the LFOs can be paid in installments or with a specific period of time. Furthermore, with exceptions, the legislature has directed that a portion of incoming funds received by an inmate during incarceration be applied to his or her LFOs. RCW 72.09.480(2), and that it is appropriate that a portion of an inmate's wages be applied to his or her LFOs, RCW 72.09.111.

At the time of sentencing, the defense attorney advised the court that there was no need to inquire of the defendant's ability to pay the costs because they were mandatory. RP 30-31. The court stated it would only order the \$500 victim assessment as previously ordered at the time of the original sentencing. RP 30. However, the court did order the defendant to

pay \$10.00 per month and set a commencement date for the payments to begin. RP 28.

The defendant offers no authority that the trial court at the resentencing was bound by the prior sentencing court's determination regarding the monthly payments toward his legal financial obligation. Moreover, the defendant did not offer any evidence of his financial status at the time of the resentencing, other than his lawyer's broad assertion at sentencing that he had been in the penitentiary for the last four years and "there's not a heck of a lot of ability to make a payment." RP 29. The defendant's appeal assumes poverty, but he offers nothing from the record to support that assertion. It is unknown whether he is employed by prison industries or whether he has alternative means of paying the \$10.00 per month, as ordered by the court.

This Court should exercise its discretion and not consider the defendant's claim. If this Court does exercise its discretion, the defendant has not established the trial court's determination is clearly erroneous that the defendant pay \$10 a month toward his legal financial obligations, as opposed to the previously ordered \$5.00. There was no error.

G. THE DEFENDANT CANNOT ESTABLISH ANY HARM BY INCLUSION SUPERFLUOUS LANGUAGE IN THE FOOTER.

The defendant fails to identify any authority that he was harmed or impacted by the superfluous language contained in the footer on each page of the judgment and sentence which has the following language: “Felony Judgment and Sentence (FJS)(Persistent Offender).” This claim has no merit.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgments and sentences.

Respectfully submitted this 10 day of August, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN CASTRO,

Respondent.

NO. 35575-6-III

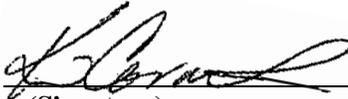
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on August 10, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Richard Lechich
wapofficemail@washapp.org

8/10/2018
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

August 10, 2018 - 2:49 PM

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