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Court of Appeals
Division III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 37311-8-III

STATE OF WASHINGTON, Respondent,

v.

BRYAN LEE WING, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....7

 A. The State failed to prove the \$750 damage threshold to elevate Wing’s malicious mischief conviction to a felony when it presented only evidence of replacement value and no evidence of diminution in value7

 B. The sentencing court erred in calculating Wing’s offender score when the record does not support its conclusion that five prior theft convictions arising from the use of a single victim’s stolen credit cards on the same day were not the same criminal conduct because the stores were also victims10

 C. The sentencing court’s comments that the inconvenience of trial and the absence of a defense demonstrated a failure to take responsibility that warranted a harsh prison sentence improperly penalized Wing for exercising his constitutional right to a trial14

VI. CONCLUSION.....20

CERTIFICATE OF SERVICE21

AUTHORITIES CITED

Federal Cases

Bordenkircher v. Hayes, 443 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604, 610 (1978).....15

U.S. v. Hutchings, 757 F.2d 11 (2d Cir. 1985).....20

U.S. v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).....14

U.S. v. Marzette, 485 F.2d 207 (8th Cir. 1973).....15

U.S. v. Medina-Cervantes, 690 F.2d 715 (9th Cir. 1982).....19

U.S. v. Stockwell, 472 F.2d 1186 (9th Cir. 1973).....19

Washington State Cases

In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).....10

In re Rowland, 149 Wn. App. 496, 204 P.3d 953 (2009).....10

State v. Adame, 56 Wn. App. 803, 785 P.2d 1144 (1990).....12

State v. Clark, 13 Wn. App. 782, 537 P.2d 820 (1975).....8

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987).....11

State v. Ehrhardt, 167 Wn. App. 934, 276 P.3d 332 (2012).....8

State v. Fateley, 18 Wn. App. 99, 566 P.2d 959 (1977).....8

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).....10

State v. Gilbert, 79 Wn. App. 383, 902 P.2d 182 (1995).....9

State v. Longshore, 141 Wn.2d 414, 5 P.3d 1256 (2000).....8

State v. Melrose, 2 Wn. App. 824, 470 P.2d 552 (1970).....8

State v. Price, 103 Wn. App. 845, 14 P.3d 841 (2000).....12

State v. Ratliff, 46 Wn. App. 325, 730 P.2d 716 (1986).....9

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....7, 8

State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003).....10, 11

<i>State v. Vike</i> , 66 Wn. App. 631, 834 P.2d 48 (1992).....	11
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	12
<i>State v. Walden</i> , 69 Wn. App. 183, 847 P.2d 956 (1993).....	11
<i>State v. Young</i> , 97 Wn. App. 235, 984 P.2d 1050 (1999).....	12

Other State Cases

<i>Commonwealth v. Bethea</i> , 474 Pa. 571, 379 A.2d 102 (1977).....	16, 17, 19
<i>In re Lewallen</i> , 23 Cal.3d 274, 152 Cal. Rptr. 528, 590 P.2d 383 (1979).....	17
<i>Johnson v. State</i> , 274 Md. 536, 336 A.2d 113 (1975).....	18, 19
<i>State v. Baldwin</i> , 192 Mont. 521, 629 P.2d 222 (1981).....	19
<i>State v. Fitzgibbon</i> , 114 Or. App. 581, 836 P.2d 154 (1992).....	19, 20
<i>State v. Hass</i> , 268 N.W.2d 456 (N.D. 1978).....	19
<i>State v. Kellis</i> , 148 Id. 812, 229 P.3d 1174 (Id. Ct. App. 2010).....	15
<i>State v. Knaak</i> , 396 N.W.2d 684 (Minn. 1986).....	17, 18, 20

Statutes

RCW 9.94A.525(5)(a)(i).....	11
RCW 9.94A.530.....	11
RCW 9.94A.589(1)(a).....	11
RCW 9A.48.010(1)(b).....	8
RCW 9A.48.080.....	7
RCW 9A.48.090.....	7

I. INTRODUCTION

A jury convicted Bryan Wing of second degree burglary, second degree malicious mischief, and third degree theft arising from the theft of a compound-miter saw from a home construction site. Because the State failed to prove the market value of the damaged door and instead obtained a felony conviction based upon the replacement value for a new door, the evidence was insufficient to establish the felony charge and the conviction should be reduced to misdemeanor malicious mischief. Second, the sentencing court erred in calculating Wing's offender score when it found that eight prior theft convictions were not the same criminal conduct based on a factual determination that the crimes had different victims that is not supported by the record. Lastly, the sentencing court's comments raise an inference that it improperly penalized Wing for exercising his constitutional right to a jury trial. Remand and resentencing are required.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Insufficient evidence supports the conviction for second degree malicious mischief.

ASSIGNMENT OF ERROR NO. 2: The sentencing court erred in calculating Wing's offender score.

ASSIGNMETN OF ERROR NO. 3: The trial court's comments at sentencing improperly suggest that the court penalized Wing for exercising his constitutional right to a jury trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the State's evidence of the replacement cost of the door was sufficient evidence of the amount of damage to the door, when the State did not demonstrate the damaged door had no value.

ISSUE NO. 2: Whether the record of facts admitted or proven to the sentencing court support its determination that Wing's eight convictions for theft occurring on a single day in 2015 were not the same criminal conduct because they were perpetrated against different victims.

ISSUE NO. 3: Whether the sentencing court's statements about the expense and inconvenience of a jury trial, its perception that Wing had no defense to the allegations, and its view that his apology to the victim was not sincere because he had proceeded to trial rather than admitting guilt, raise an inference that the court impermissibly penalized Wing for exercising his constitutional right to a jury trial.

IV. STATEMENT OF THE CASE

Mindy Halme visited the site of the home she and her husband were building and found that the door had been broken in. RP 9-10. On further inspection, she saw that the door was scratched did not close and the jamb was broken. RP 11. Inside, she discovered that a new DeWalt compound-miter saw was missing from its stand. RP 11-12, 40. On the floor near the saw was a debit card bearing the name Bryan Wing. RP 11-12.

Police responded and found a footprint bearing a distinctive tread pattern on the front door and in the dust near the saw stand. RP 24, 31-32. The tread marks did not match the shoes of any of the workers at the house at the time. RP 33. The responding officer knew Wing through a shared family relationship. RP 30-31.

The officer obtained a search warrant for Wing's vehicle and home and went to the property to execute it. RP 33-34. As he drove up he saw a car he recognized to belong to Wing, so he stopped it and contacted Wing in the driver's seat. RP 34-35. In the trunk, he found a DeWalt compound miter saw matching Halme's description. RP 40. He also compared Wing's shoes to the prints he found at the scene and determined that they matched. RP 37-39.

The State charged Wing with second degree burglary, second degree malicious mischief, and third degree theft and the case proceeded to trial. CP 1, 61. To support the element of physical damage in an amount exceeding \$750 required for the malicious mischief conviction, the State relied on testimony from Halme. CP 43, RP 113, 124. Halme testified that they had been able to repair the door so that it functioned but it was scratched up, so they planned to replace it. RP 12. She had tried to remove the scratches but had been unable to. RP 14. The State introduced into evidence an invoice showing she had paid \$1,057.33 for the door just a few weeks earlier. RP 10, 13-14. However, the State produced no evidence of the diminution in value of the door, the cost to repair it, or whether any money could have been recovered by selling the door in the salvage market.

The jury convicted Wing as charged. CP 57-59; RP 127. At sentencing, the State presented copies of several prior judgment and sentences to support its calculation of Wing's offender score as 17. Ex. 1; RP 137. Wing disagreed, arguing that his prior convictions for theft from Spokane County in 2015 were the same criminal conduct. Ex. 1 at 43; RP 133-34. According to the parties, the charges originated from the theft of a single wallet and subsequent use of three access devices at various stores

the same day. RP 133-34, 136-37. Wing consequently argued that his offender score was 10. RP 143.

Wing also exercised his right to allocate, taking the opportunity to apologize to Halme. RP 147-54. He noted that he had been denied a continuance to review the trial strategy with his attorney and also acknowledged his drug addiction and mental health problems, as well as the impact those had on his loved ones. *Id.*

The sentencing court accepted the State's calculation of Wing's score as 17, concluding that five of the theft convictions were not the same criminal conduct because:

I understand from -- reports given to me that these are different places, different times -- maybe the same day but they're different victims. So, as I see it, (inaudible) victim - person -- card, but really the victim's going to be the -- the store operator who's going to be out, 'cause the person using the credit card won't be responsible for that. So, may we -- Those are -- those are 2 separate -- separate events. They are five. I think that's -- how you have to read it.

CP 63; RP 155-56. No reports describing the facts of the case were retained in the record and nothing in the judgment and sentence for the crime supports a finding of multiple victims. CP 76; Ex. 1 at 52-53 (no additional victims identified for restitution or no-contact purposes).

The court then found that Wing's high offender score warranted an exceptional sentence and imposed consecutive sentences totaling 97 months. CP 63-65, 75. Rejecting Wing's request for a drug offender sentence alternative, the court stated:

And frankly, if a person wants a -- DOSA, think they'd have asked for a stipulated facts trial. He could have pled and requested it. But to say he never denied guilt, I'm going to say that's not true, because he pled not guilty at -- at arraignment, he pled -- he had a not guilty plea until the jury found him guilty. So we had to spend thousands of dollars for this individual, who said he'd never (inaudible) - - never denied it, but in fact he admitted it on the phone, he admitted it where he indicated to the officer that, yes, the only item in the trunk was the item in the search warrant -- which wasn't brought up in trial, but -- that was -- that was also a statement made. So, we -- we did go through a lot of trouble when you could have gone around it and -- and sought the issue.

RP 157. After repeating its comment about expending time and trouble on the case, the court explained its sentencing decision by saying:

I hope -- sincere about the (inaudible), but, you know, he may be -- sincere about the apology, -- we had a trial. She had to testify. So I question that. I don't -- I don't think there's much sincerity in saying he didn't do it when -- when there's no evidence to suggest you didn't do it, and poor Ms. Iverson, you had -- you had no -- you had no defense, frankly. You had -- (inaudible) the trial, but a continuance would have given you no -- no additional information because his statements, and his -- The fact is he had the item the same day that the item was taken, and he had it on him, and -- the search warrant was proper, we had prior hearings. All these things we knew before going into court. So, -- continuance wouldn't have given nothing more

than just -- delay the inconvenience, additional efforts of the witnesses to testify. So, -- I think that's -- appropriate.

RP 159, 160.

Wing now appeals and has been found indigent for that purpose.

CP 79, 81.

V. ARGUMENT

A. The State failed to prove the \$750 damage threshold to elevate Wing's malicious mischief conviction to a felony when it presented only evidence of replacement value and no evidence of diminution in value.

To convict Wing of the felony crime of malicious mischief in the second degree, the State was required to prove that he caused physical damage in an amount exceeding \$750. CP 43; RCW 9A.48.080. If the State fails to prove the requisite damage, the defendant is guilty only of the gross misdemeanor crime of malicious mischief in the third degree. RCW 9A.48.090.

Wing challenges the sufficiency of the State's evidence of this essential element. In a challenge to the sufficiency of evidence, the reviewing court considers "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and against the defendant. *Id.* However, a mere scintilla of evidence is insufficient; rather, the evidence must be of a quantum necessary to establish circumstances from which the jury could reasonably infer the fact proven. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977).

Washington statutorily defines “damages” as meaning, in addition to its ordinary meaning “any charring, scorching, burning, or breaking, or agricultural or industrial sabotage, and shall include any diminution in the value of any property as a consequence of an act” RCW 9A.48.010(1)(b). “Value” is not specifically defined as to malicious mischief but has been interpreted in the context of theft to mean market value, consisting of the price a well-informed buyer would pay a well-informed seller in a voluntary transaction. *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000). A jury may draw reasonable inferences from changes in the condition of the property that affect its value. *State v. Melrose*, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). However, the State may not rely upon replacement value to prove market value unless it first proves that the item has no market value. *State v. Ehrhardt*, 167 Wn. App. 934, 944-45, 276 P.3d 332 (2012); *State v. Clark*, 13 Wn. App. 782, 788, 537 P.2d 820 (1975). Alternatively, the State may present evidence of the cost to

repair a damaged item to establish the damage amount in a malicious mischief case. *State v. Gilbert*, 79 Wn. App. 383, 385, 902 P.2d 182 (1995); *State v. Ratliff*, 46 Wn. App. 325, 328-29, 730 P.2d 716 (1986), *review denied*, 108 Wn.2d 1002 (1987).

Here, the State's evidence did not meet either of these standards. It presented only evidence of the price Halme had paid for the door in its new condition, together with her testimony that she had been unable to repair the scratches in it and intended to replace it. RP 10, 12, 13-14. This evidence did not establish that the door could not be professionally repaired or what the cost would be to do so. The evidence also did not establish that there was no market value for the door as a salvage item, from which the jury could determine the diminution in value between the new door and the damaged door. Without first establishing either that the door was irreparable or that there was no market value for the door in its damaged condition, the State may not use replacement value to prove the amount of damage exceeded the \$750 felony threshold.

Because the evidence failed to establish that the amount of damage to the door exceeded \$750, the felony conviction should be reversed.

Because the evidence was sufficient to show damage in some amount, the

case should be remanded to enter judgment on the lesser degree offense of malicious mischief in the third degree.

B. The sentencing court erred in calculating Wing's offender score when the record does not support its conclusion that five prior theft convictions arising from the use of a single victim's stolen credit cards on the same day were not the same criminal conduct because the stores were also victims.

Offender score error may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). When a court imposes a sentence based on an improperly calculated offender score, it acts without statutory authority. *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Even when an exceptional sentence is imposed, incorrectly calculating an offender score is prejudicial error because the sentencing court must have the correct standard range in mind before deciding whether to depart from it and what departure the circumstances warrant. *See In re Rowland*, 149 Wn. App. 496, 508, 204 P.3d 953 (2009).

The Court of Appeals reviews the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). In determining whether the offender score is supported by the record, the

reviewing court considers that “the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530.

When multiple offenses are part of the same criminal conduct, they are counted as one offense and scored accordingly. RCW 9.94A.525(5)(a)(i); 9.94A.589(1)(a); *Tili*, 139 Wn.2d at 124-25. A trial court’s ruling as to whether offenses constitute the same criminal conduct is reviewed for abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993).

To constitute the same criminal conduct, the crimes must involve (1) the same objective criminal intent, considering whether one crime furthered another; (2) the same time and place; and (3) the same victim. RCW 9.94A.589(1)(a); *State v. Vike*, 66 Wn. App. 631, 633, 834 P.2d 48 (1992), *reversed on other grounds*, 125 Wn.2d 407, 885 P.2d 824 (1994). This standard may be met when the defendant commits multiple crimes against the same victim that further the commission of the other crimes. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

Additionally, separate incidents may occur at the same time for purposes of the test “when they occur as part of a continuous transaction or in a

single, uninterrupted criminal episode over a short period of time. *State v. Young*, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999). They are not required to occur simultaneously to comprise the same criminal conduct. *State v. Price*, 103 Wn. App. 845, 856, 14 P.3d 841 (2000), *review denied*, 143 Wn.2d 1014 (2001) (*citing State v. Porter*, 133 Wn.2d 177, 183, 185-86, 942 P.2d 974 (1997)).

With respect to the intent requirement, the standard evaluates whether the crimes served the same, or separate, criminal purposes. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013), *review denied*, 182 Wn.2d 1022 (2015); *see also State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (observing there is “one overall criminal purpose” in multiple counts of delivering different controlled substances). The concern is not “the particular mens rea element of the particular crime, but rather is the offender’s objective purpose in committing the crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). The court considers, objectively, the extent to which the criminal intent changed from one crime to the next. *Dunaway*, 109 Wn.2d at 215. In considering this factor, courts may evaluate whether one crime furthered the other. *Vike*, 125 Wn.2d at 411.

At sentencing, the parties agreed that Wing's 2015 Spokane County conviction for eight counts of second degree theft on July 18, 2014 arose from his theft of a single wallet from a single victim and his subsequent use of three credit cards it contained to purchase items from various stores the same day. Ex. 1 at 43-44; RP 133-34, 136-37. The court questioned whether the stores were defrauded by the conduct, but Wing's attorney responded that he had not been convicted of that. RP 135-36. The State agreed that three of the counts for theft of the access devices from the wallet were the same criminal conduct, but disputed the remaining five convictions. RP 136-37.

Based on the facts that were stipulated and proven, Wing met his burden to establish that the eight counts of theft constituted the same criminal conduct. They arose from the theft of property from a single victim and the theft of the access devices furthered the purchases that constituted the additional theft crimes. All of the crimes were committed the same day during the same criminal episode, with the intent of acquiring property that did not belong to Wing. Accordingly, the eight counts of theft should have been counted as a single point in calculating his offender score.

The sentencing court concluded the offenses were not the same criminal conduct because the store operators were additional victims. RP 155-56. This finding is not supported by any fact pleaded or proven at sentencing. The felony judgment and sentence that was admitted as a sentencing exhibit does not identify any other victim of the crimes or provide for restitution to any store. Ex. 1 at 52, 53. Consequently, the sentencing court's speculation that various stores were separate, additional victims of the theft crimes is not supported by the record.

Accordingly, the sentencing court erred by imposing an exceptional sentence on the basis of a miscalculated offender score. Because the eight 2015 theft charges should have counted as a single point, Wing's offender score should have been significantly lower when the court considered what term to impose. Consequently, resentencing should be required.

C. The sentencing court's comments that the inconvenience of trial and the absence of a defense demonstrated a failure to take responsibility that warranted a harsh prison sentence improperly penalized Wing for exercising his constitutional right to a trial.

It is unconstitutional to use enhanced sentencing to punish or penalize a defendant who exercises his constitutional rights. *U.S. v.*

Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (holding that discouraging exercise of Fifth or Sixth Amendment rights by penalizing through enhanced sentencing the exercise of those rights is unconstitutional). *See also State v. Kellis*, 148 Id. 812, 229 P.3d 1174, 1176 (Id. Ct. App. 2010) (it is improper for a court to penalize a defendant merely because he or she exercises the right to put the government to its proof at trial). Whether a defendant exercises his constitutional right to trial by jury to determine guilt or innocence must have no bearing on the sentence. *U.S. v. Marzette*, 485 F.2d 207 (8th Cir. 1973); *Bordenkircher v. Hayes*, 443 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604, 610 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”).

Here, the trial court’s comments clearly reflect that Wing’s decision to proceed to trial influenced its decision about an appropriate penalty. It made multiple comments about the time, trouble, and expense of trial, the necessity of the witnesses appearing to testify, and the absence (in the court’s view) of any valid defense to the allegations. RP 157-58, 159-60. Discussing a potential drug offender sentence alternative, the court opined that Wing could have requested a stipulated facts trial rather than requiring the court to “spend thousands of dollars” and “go through a lot of trouble” to try the case to the jury. RP 157. It then stated, “DOSA

is not something that is going to happen after a jury trial.” RP 158.

Responding to Wing’s allocution and his apology to Halme, the court pointed to his exercise of his right to a jury trial to question his sincerity, saying:

I hope -- sincere about the (inaudible), but, you know, he may be -- sincere about the apology, -- we had a trial. She had to testify. So I question that. I don’t -- I don’t think there’s much sincerity in saying he didn’t do it when -- when there’s no evidence to suggest you didn’t do it, and poor Ms. Iverson, you had -- you had no -- you had no defense, frankly. You had -- (inaudible) the trial, but a continuance would have given you no -- no additional information because his statements, and his -- The fact is he had the item the same day that the item was taken, and he had it on him, and -- the search warrant was proper, we had prior hearings. All these things we knew before going into court. So, -- continuance wouldn’t have given nothing more than just -- delay the inconvenience, additional efforts of the witnesses to testify.

RP 160. The comments squarely reflect the sentencing court’s judgment that Wing was unjustified in holding the State to its burden, and its view of what was an appropriate penalty was inappropriately influenced by these considerations.

Multiple cases from other jurisdictions addressing similar comments by sentencing judges on the choice to stand trial rather than to plead guilty have required remand for resentencing. In *Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102, 106 (1977), the judge made statements

to the effect that: “had you pled guilty, it might have shown me the right side of your attitude about this, but you pled not guilty, fought it all the way, and the jury found you guilty, and I’m going to sentence you at this time.” The Pennsylvania Supreme Court invalidated the sentence because the remarks created the inference that the trial court impermissibly considered Bethea’s decision to stand trial. 379 A.2d at 105–07. In *In re Lewallen*, 23 Cal.3d 274, 152 Cal. Rptr. 528, 590 P.2d 383, 384 (1979), the defendant refused the prosecutor’s plea offers and proceeded to trial where he was acquitted of all but one charge. The court comment commented, “[A]s far as I’m concerned, if a defendant wants a jury trial and he’s convicted, he’s not going to be penalized with that, but on the other hand he’s not going to have the consideration he would have had if there was a plea.” *Lewallen*, 590 P.2d at 385. Rejecting the state’s argument that the remark was ambiguous, the *Lewallen* Court found the only rational interpretation was that the trial judge based the sentence in part on the fact that *Lewallen* declined the plea bargain and demanded a trial by jury, and vacated the sentence. *Lewallen*, 590 P.2d at 387-88. And in *State v. Knaak*, 396 N.W.2d 684 (Minn. 1986), the Minnesota Supreme Court remanded for resentencing based on the following remark by the sentencing judge: “[The sentence] may be a little bit more harsh than if you had entered a plea of guilty to start with but I don’t know as

that's true in as much as I am sentencing in accordance with the standard first-time penalty." *Knaak*, 396 N.W.2d at 689 (brackets in original). *See also Johnson v. State*, 274 Md. 536, 336 A.2d 113, 117–18 (1975) (vacated sentence based on trial judge's remark: "If you had come in here with a plea of guilty ... you would probably have gotten a modest sentence").

Similarly here, the sentencing court's comments naturally raise the inference that the judge would not consider alternative sentencing or the potential mitigating influences of Wing's addiction because he chose a jury trial. By making its comments, the judge informed Wing, the attorneys, and the courtroom audience that a defendant who is sincere about pursuing a treatment-based disposition will plead guilty or stipulate to facts for trial, rather than incurring the expense and inconvenience of a jury trial. Such information threatens to chill the exercise of the right to trial by not only Wing, but by all of those present who learned that the judge would not look kindly upon them at sentencing if their choice of a jury trial did not produce a favorable outcome.

On appeal, the reviewing court does not have to find that the trial court actually punished the defendant for standing trial; rather, the inference and the chilling effect alone are sufficient to invalidate the

sentence. *U.S. v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (sentencing court commented on the cost of jury trial); *U.S. v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973) (“[C]ourts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.”); *State v. Baldwin*, 192 Mont. 521, 629 P.2d 222, 225–26 (1981) (observing that disparity in sentence offered for guilty plea and imposed after trial, when coupled with indication that sentence is punishment for choosing trial, remand or reduction of sentence required); *State v. Hass*, 268 N.W.2d 456, 463–65 (N.D. 1978) (sentencing court rejected alternative sentence based on defendant’s failure to make “a complete admission of his implicity in the offense” and throw himself “on the mercy of the court.”); *Bethea*, 379 A.2d at 106 (sentencing court commented that failing to plead guilty and fighting the case all the way through trial failed to demonstrate correct attitude); *State v. Fitzgibbon*, 114 Or. App. 581, 836 P.2d 154, 157 (1992) (sentencing court commented on difference between “someone who comes to trial and is contrite or asking for lenience from the Court,” and someone who “wants to take the stand and put the blame on someone else and try to wiggle out of it.”).

Any doubt as to the sentencing judge’s consideration of the choice to proceed to trial should be resolved in favor of the defendant. *Johnson v.*

State, 274 Md. 536, 336 A.2d 113, 117 (1975). Resentencing is warranted in the absence of an unequivocal statement on the part of the sentencing judge that the defendant's decision to go to trial was not considered. *U.S. v. Hutchings*, 757 F.2d 11, 13–14 (2nd Cir.), *cert. denied*, 472 U.S. 1031 (1985); *Knaak*, 396 N.W.2d at 689; *Fitzgibbon*, 836 P.2d at 157.

Here, the sentencing court's comments plainly raised the inference that it improperly considered the cost and inconvenience of trial and Wing's refusal to plead guilty in evaluating how harsh a sentence was appropriate. The record fails to unequivocally demonstrate that these considerations did not affect the sentence. Resentencing is required.

VI. CONCLUSION

For the foregoing reasons, Wing respectfully requests that the court REVERSE the conviction for second degree malicious mischief and REMAND the case for entry of judgment on the lesser degree offense of third degree malicious mischief and resentencing.

RESPECTFULLY SUBMITTED this 15 day of June, 2020.

TWO ARROWS, PLLC



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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant’s Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 15 day of June, 2020 in Kennewick, Washington.


Andrea Burkhart

BURKHART & BURKHART, PLLC

June 15, 2020 - 10:09 AM

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