IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARTIN IVIE, Appellant.	No. 44258-2-II UNPUBLISHED OPINION

BJORGEN, J. — Martin Ivie appeals from his convictions and sentence, following a jury trial, for first degree assault, third degree assault, second degree theft, and attempting to elude a police vehicle. The events giving rise to the charges arose out of a wood theft and the ensuing chase and apprehension.

Ivie contends that (1) insufficient evidence supports his convictions for first degree assault, (2) the trial court erroneously admitted, for impeachment purposes, statements Ivie made to police while recovering from his wounds in the hospital, (3) the trial court failed to make sufficient findings and conclusions following a hearing on the voluntariness of Ivie's statements to police in the hospital, (4) the trial court failed to instruct the jury that it must unanimously agree as to which conduct constituted the charged theft, (5) the trial court erred in denying his motion for a new trial based on juror misconduct, and (6) the State failed to prove Ivie's prior convictions by a preponderance of the evidence for purposes of calculating his offender score. Ivie also submitted a statement of additional grounds for review (SAG) under RAP 10.10.

We conclude that sufficient evidence supports the assault convictions, that Ivie's statements at the hospital were properly admitted, that the trial court did not properly

instruct the jury on unanimity concerning the theft charge, that the trial court properly denied Ivie's motion for a new trial, and that the State failed to prove Ivie's prior convictions for calculation of his offender score. We also deny Ivie's SAG claims. Consequently, we reverse Ivie's conviction of second degree theft and affirm his other convictions. We also remand for a new hearing on Ivie's offender score, at which the State may offer new evidence to prove the existence of the prior convictions.

FACTS

On the evening of February 9, 2012, Mason County Sheriff's Deputy William Reed staked out a freshly cut maple tree from which he suspected someone had been stealing wood. The State's expert, Don van Orman, estimated the total retail value of all the wood from the tree at roughly $4,400. Most of the tree had already been removed[1] when Reed arrived, however, and van Orman appraised the wholesale value of the remaining wood, were it cut into three-inch by nine-inch by two-foot "billets" for use in making musical instruments, at $600. Verbatim Report of Proceedings (VRP) at 161-162, 166-168, 172-174.

The night was wet, foggy, and extremely dark: Reed described the conditions as "heavy fog mist [sic]" with "zero illumination." VRP at 73. Witnesses described the roads in the area as steep, winding, and primitive. At only eight to ten feet wide, the roads are too narrow in most places for cars to pass other vehicles or turn around.

Shortly after 8:00 p.m., a pickup truck arrived at the site and Reed, clad all in black,[2] observed an individual emerge from the truck and begin removing bark from one of the large

[1] As discussed below, Ivie admitted at trial that he had taken wood from the site a few days before these events.

[2] Reed testified that his black jumpsuit-style uniform had markings identifying him as a deputy, but that he wore an unmarked black jacket over the uniform.

maple rounds remaining on the ground. After watching the suspect work for about 25 minutes and upon seeing Mason County Sheriff's Deputy Travis Adams arriving in a patrol car, Reed stepped out from behind the tree limbs to get a clearer view of the suspect. Reed immediately recognized the suspect as Ivie, a local resident and woodcutter. Reed ordered Ivie to drop his tools and get on the ground. Ivie threw down his hatchet, but refused to get on the ground. After a tense conversation, Ivie threw his chainsaw in the truck bed and, disregarding Reed's orders, drove away.

Reed pursued on foot, thinking that Adams's approaching vehicle would block Ivie's escape. Before Ivie reached Adams's location, however, Ivie turned his truck around in the entrance to a driveway and proceeded back the way he had come, accelerating in Reed's direction.

Reed continued to advance, pointing his flashlight toward Ivie's oncoming truck and radioing Adams that Ivie had turned around and was coming toward him. Although the narrow roadway afforded only two feet of space on either side of the vehicle, Ivie did not stop as he approached Reed. When the truck came within about five yards, Reed had to jump out of the way to avoid it. Ivie continued down the road, and Adams's marked patrol car, with emergency lights flashing, passed Reed and pursued Ivie.

After a short pursuit, Ivie stopped his truck. As Adams's car slowed, he saw the truck's reverse lights come on, and the truck backed up, hitting the front of the patrol car. Ivie then turned and proceeded up a steep side road. Adams followed Ivie up the side road until it ended at a 90 degree left turn leading to a cleared, flat patch of ground with a trailer on it. Ivie stopped the truck on the landing, and Adams stopped about 20 feet behind him.

Fearing an "ambush situation," Adams got out of his car with his assault rifle, moved to the rear of his car, and began backing down the steep roadway about 30 feet behind his car. VRP at 306-07. At that point Adams stood at the bottom of a fern-covered embankment leading up to the trailer site, well below the level of the trailer and Ivie's truck.

Like Reed, Adams wore a "black jumpsuit" uniform with reflective markings only on the back. VRP at 270. His assault rifle had a flashlight attached to the barrel, which would remain on only as long as he touched a pad on the side of the weapon. Adams believed he had the flashlight on and pointed at the truck as he issued commands to Ivie, who remained in his truck, but Adams was not sure that the light remained on the entire time.

Heedless of Adams's commands, Ivie made a sharp left turn onto the level patch of ground, then turned so that his truck faced toward the top of the embankment that separated the trailer site from the road, pointing just behind Adams's car. While Ivie made the turn, Adams moved to within five feet behind his patrol car, then turned to climb up the embankment to the landing. The embankment at that point was high enough that Adams could not see over it until he stepped up onto the slope. Adams stood on the embankment, raised his rifle up, shone the flashlight at the truck, and continued to shout commands. As Adams stood on the embankment, he could see the driver's door of Ivie's truck and Ivie behind the wheel. Adams testified that he then shone his light on the truck and ordered Ivie to get out and to get on the ground. Adams stated that he believed he had the flashlight on the whole time, but "can't say that it didn't blink on and off." VRP at 313. At that point, Adams testified Ivie's head "turned, looked right at me and hit the gas and turned in my direction." VRP at 312. Ivie completed the turn and accelerated directly at Adams.

The truck then veered slightly to the right, away from the patrol car and in the direction of the road up which Ivie and Adams had come. As Adams moved sideways along the embankment, he held his assault rifle up as high up as he could, attempting to get the barrel on the same level as Ivie, and fired four rounds. The truck straightened out and went off the embankment. As the truck passed him, Adams fired four additional rounds into the driver's side door area. The truck proceeded down the embankment, crossing the road behind Adams's car and crashing into trees and bushes at the bottom of the embankment on the other side of the road.

Through his police radio, Adams notified dispatch that he had fired shots and believed Ivie had been hit. When Adams reached the truck, he found Ivie still in the driver's seat and seriously wounded. Adams returned to his car, notified dispatch of his coordinates, got his medical kit, and returned to the truck to provide first aid.

Approximately 16 hours after the shooting, two detectives attempted to interview Ivie at Tacoma General Hospital where he was recovering from surgery for multiple gunshot wounds. After a detective read him the *Miranda*[3] advisements, Ivie asked for an attorney, and the detectives shut off the recorder and began to leave. Ivie then called to them to come back to his room, saying that he wanted to speak with them. The detectives started the recorder and again read Ivie the *Miranda* advisements. Ivie agreed to speak with the officers and answered their questions for about 30 minutes.

Although Ivie's eyes were closed throughout the interview and his speech was "somewhat slurred" during the first portion of it, the detectives described Ivie as "alert." VRP at 513, 533, 568. In the detectives' opinion, he was not so under the influence of drugs as to be unable to understand the questions or give responsive answers.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

PROCEDURAL HISTORY

The State charged Ivie with (1) two counts of first degree assault, based on the incidents in which he drove his truck towards Reed and, later, Adams, (2) two counts of second degree assault based on the same conduct, (3) one count of third degree assault, based on the incident in which he backed his truck up into Adams's patrol car, (4) one count of attempting to elude a pursuing police vehicle, and (5) one count of second degree theft, based on Ivie's activities at the felled maple tree on or about February 9. Ivie pled not guilty and proceeded to trial.

Prior to Ivie's testimony and over his objection, the trial court held a hearing outside the presence of the jury and ruled that Ivie had answered the detectives' questions at the hospital voluntarily. The court entered no findings or conclusions in support of this ruling.

At trial the State presented the testimony of Reed and Adams, who described the events as set forth above. The lead investigator testified to the State's crime scene forensic analysis conducted using computer-based crime scene reconstruction technology. Although the testifying investigator did not actually operate the equipment or take the measurements, Ivie did not object to the admission of the images.

Ivie presented evidence disputing certain facts described above,[4] including giving testimony on his own behalf. Although he denied cutting down the maple, Ivie admitted that he had taken some blocks of wood from the site a few days previously, which he sold for $348. He explained that, at the time of the events at issue, he thought a friend of his owned the property and believed he had the friend's permission to be on the property.

[4] Ivie denied seeing either officer directly in front of his vehicle during the incidents in which he allegedly committed first degree assault against them, and testified that Adams's patrol car hit the back of his truck after Ivie had already finished backing up and put the truck into drive.

The prosecutor repeatedly impeached Ivie's testimony using the hospital interview on cross-examination, pointing out various inconsistencies between his answers in the hospital and his trial testimony. The court instructed the jury on third degree theft as a lesser degree of second degree theft. The court did not instruct the jury that it must unanimously agree which act constituted the charged theft. The jury returned guilty verdicts on all counts as charged.

Prior to sentencing, Ivie moved for a new trial under CrR 7.5 based on juror misconduct and submitted an affidavit from one of the jurors in support of the motion. The juror stated that she did not believe Ivie committed first degree assault against either Reed or Adams, but that "[t]he foreperson was very pushy" and "did not want to submit questions" to the court. Clerk's Papers (CP) at 28. The juror stated that "even though no one said anything I felt pressure from the other jurors as they just wanted me to change my vote so they could all leave," and that she changed her vote based on an erroneous explanation of the law from another juror, CP at 28-29.

The court denied the motion and entered convictions on all the verdicts, except those for the alternative second degree assault charges, which the court vacated. The court calculated Ivie's offender score as five, based on the current convictions and a 2005 conviction for second degree malicious mischief, a class C felony, which had not washed out due to subsequent misdemeanor convictions. The State presented no evidence of the prior convictions at the sentencing hearing, but Ivie did not challenge the State's representation of his criminal history.

Because the two first degree assault convictions qualified as serious violent felonies under RCW 9.94A.589(1)(b), the court imposed consecutive sentences totaling 222 months' confinement. The court imposed lesser sentences on the other charges, to be served concurrently.

Ivie timely appeals.

ANALYSIS

Because Ivie's challenge to the sufficiency of the evidence, if successful, would require dismissal with prejudice of the two first degree assault charges, our analysis begins there. Concluding that sufficient evidence supported each of these convictions, we then turn to Ivie's other challenges to his convictions and sentence.

I. SUFFICIENCY OF THE EVIDENCE OF INTENT TO INFLICT GREAT BODILY HARM

Ivie contends that the State presented insufficient evidence for a reasonable juror to find beyond a reasonable doubt that he assaulted Reed or Adams with intent to cause great bodily harm, an element of first degree assault. We find the evidence sufficient, under applicable standards, to support each assault conviction.

In evaluating the sufficiency of the evidence, we review the evidence in the light most favorable to the State. *State v. Ehrhardt*, 167 Wn. App. 934, 943, 276 P.3d 332 (2012) (citing *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010)). We ask "'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant who claims that insufficient evidence supports his conviction "admits the truth of the State's evidence and all reasonable inferences therefrom." *Ehrhardt*, 167 Wn. App. at 943 (citing *Drum*, 168 Wn.2d at 35). Inferences drawn from circumstantial evidence "must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). In applying these rules, a reviewing court must "defer to the fact finder on issues of witness credibility." *Drum*, 168 Wn.2d at 35.

The statute defining first degree assault requires the State to prove that the accused committed the acts constituting assault "with intent to inflict great bodily harm." RCW 9A.36.011(1). The trial court instructed the jury accordingly.

The first act for which Ivie was convicted of first degree assault was his driving at Reed. As summarized above, evidence was submitted that after Reed confronted him, Ivie drove away, contrary to Reed's orders. Reed then followed him on foot until Ivie turned around and accelerated back toward Reed. As Ivie approached, Reed shone his flashlight at the oncoming truck. With only two feet of space on either side of Ivie's vehicle, Reed had to jump out of the way to avoid being hit with about five yards to spare. Although contrary inferences may also logically be drawn, a rational fact finder could have found beyond a reasonable doubt from this evidence that Ivie intended to inflict great bodily harm on Reed.

Ivie's other conviction of first degree assault rests on his driving toward Adams. Evidence was submitted, also summarized above, that Ivie looked right at Adams from the level area on top of the embankment and then accelerated directly at him. As Adams moved to his right out of the path of the truck, the truck veered slightly to its right away from the patrol car and in line with the direction of the road heading back down. From this evidence, a rational fact finder could have concluded that the truck's veer away from Adams showed that Ivie did not intend to strike Adams, but rather was intent on getting away. From the same evidence, though, especially Adams's testimony that Ivie looked at him and accelerated directly toward the officer, a rational fact finder could also have concluded that Ivie did intend to inflict great bodily harm on Adams.

Our Supreme Court has cautioned, however, that

> [w]hen intent is an element of the crime, "intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate

> such an intent as a matter of logical probability." *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991). Though intent is typically proved through circumstantial evidence, "[i]ntent may not be inferred from evidence that is 'patently equivocal'." [*Woods*, 63 Wn. App.] at 592 (quoting *State v. Bergeron*, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985); *State v. Couch*, 44 Wn. App. 26, 32, 720 P.2d 1387 (1986)).

Vasquez, 178 Wn.2d at 8.

In *Vasquez* the court held that the defendant's possession of forged identification cards, together with his statement to a security guard that the cards were his and evidence that Vasquez held a job, was insufficient to support a conviction requiring proof of intent to injure or defraud. 178 Wn.2d at 18. More directly on point, we have held that evidence that the defendant's accomplice fired shots into a house, hitting a child, insufficient to sustain a conviction for first degree assault even though the trial court found it "likely apparent [to the defendant] that the house was occupied" because people inside were visible through a window. *State v. Ferreira*, 69 Wn. App. 465, 469-70, 850 P.2d 541 (1993) (emphasis omitted) (internal quotation marks omitted).

Here, however, evidence was presented that Ivie saw both Reed and Adams and accelerated directly toward them at separate times. Ivie's knowledge of the presence of those specific officers and his driving directly at them is much less equivocal evidence of intent than the evidence in either *Vasquez* or *Ferreira*. Even though the truck's veering slightly away from Adams may have shown intent to avoid the officer, Adams's testimony is clear that Ivie saw Adams and accelerated directly toward him. Under the standards set out above, the evidence was sufficient to support the two convictions of first degree assault.

II. THE TRIAL COURT'S ADMISSION OF STATEMENTS IVIE MADE TO POLICE IN THE HOSPITAL

Ivie contends that the admission of the statements he made in the hospital violated his right to due process because he made them involuntarily. Ivie bases this claim on the facts that

he had recently undergone surgery and was under the influence of pain medication. Ivie further contends that the trial court's failure to enter the findings and conclusions mandated by CrR 3.5(c) after ruling the statements voluntary independently merits reversal.

Any use of the defendant's involuntary statement against him in a criminal trial denies him due process of law, regardless of the other evidence against him. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). The inquiry into voluntariness is necessarily fact-specific. *Gallegos v. Colorado*, 370 U.S. 49, 52, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962). In that inquiry, the court considers whether, under the totality of the circumstances, including the suspect's powers of resistance and the pressure brought to bear by the interrogators, the "'defendant's will was overborne.'" *Dickerson v. United States*, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). A suspect's mental disability and the influence of drugs bear on the analysis, but do not necessarily make the statements involuntary. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

Ivie relies on *Mincey*, which held that statements taken from the defendant in a hospital bed shortly after a police officer shot him were not the product of free and rational choice and were consequently involuntary. *Mincey*, 437 U.S. at 401-02. The facts in *Mincey*, however, differ markedly from those here. Many of Mincey's answers were incoherent, and the interrogator "relentlessly" continued questioning him even though Mincey repeatedly asked to terminate the interview, invoked the right to counsel, and lost consciousness. *Mincey*, 437 U.S. at 398-401. Further, the treating physician testified that Mincey was "depressed almost to the point of coma." *Mincey*, 437 U.S. at 398 (quotation marks omitted).

Here, the evidence showed that the police honored Ivie's initial invocation of the right to counsel, that they continued the interrogation only at Ivie's request, and that Ivie gave largely coherent and responsive answers to their questions. Ivie presented no expert medical testimony concerning his condition at the time or the effects of any drugs he had taken.

More specifically, the trial court found in its oral ruling that (1) police obtained permission from hospital staff before questioning Ivie, (2) Ivie was well enough to walk at the time, (3) Ivie generally gave coherent, responsive answers to their questions, without significant pauses, (4) when police asked open ended questions, Ivie gave detailed answers and added his own thoughts, (5) Ivie admitted that he had memories of the interrogation independently of the recording, and (6) no evidence showed that police sought to coerce Ivie or overbear his will. The court also noted that Ivie presented no evidence of the exact nature, timing, or duration of the surgery or of the severity of his wounds, other than his own testimony that he had been repeatedly shot, suffered a concussion, and was under the influence of morphine and OxyContin.

CrR 3.5 requires a trial court to hold a hearing on the admissibility of any statements of the accused that will be offered into evidence and to make written findings and conclusions associated with its decision. The record here contains no written findings or conclusions concerning the admissibility of Ivie's statements in the hospital. The failure to enter findings and conclusions, however, is harmless error "as long as oral findings are sufficient to allow appellate review."[5] *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). Here, the trial court made oral findings of fact and conclusions of law sufficiently detailed to allow for appellate

[5] Our Supreme Court recently held that the absence of written findings supporting an exceptional sentence is not harmless even when the sentencing court's oral ruling makes the basis clear. *State v. Friedlund*, ___ Wn.2d ___, ___, 341 P.3d 280, 283 (2015). We do not read the rule articulated there to apply in this context, however.

review. Therefore, the absence of findings and conclusions is not reason to reverse Ivie's convictions.

We review challenges to findings and conclusions entered after a CrR 3.5 hearing for whether substantial evidence in the record supports the findings and whether the conclusions follow from those findings. *State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Because Ivie does not specifically challenge them, we must treat the trial court's oral findings as verities. *See Broadaway*, 133 Wn.2d at 130-31. As described above, those findings and the other evidence noted support the conclusion that Ivie made the hospital statements voluntarily. Therefore, the trial court did not err in admitting those statements.

III. Lack of Instruction on Unanimity As to Which Act Constituted the Charged Theft

Ivie contends that his conviction of second degree theft violated his right to a unanimous verdict because (1) the jury heard evidence of two separate acts, several days apart, each of which could have constituted theft, (2) the court did not instruct the jury that it must unanimously agree which incident constituted the charged crime, and (3) the State did not specifically inform the jury which act it relied on to prove the charge.[6] We agree.

To convict a defendant of a particular charge, a jury must unanimously agree that the defendant committed the act alleged in the information. WASH. CONST., art. I, § 21; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). "Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must

[6] Ivie further contends that the State failed to present sufficient evidence that he committed theft on the date identified in the information because no evidence established that he actually possessed the wood. This argument has no merit because the theft statute, RCW 9.9A.56.020, does not require actual possession to commit the crime: it is enough that the accused exercised unauthorized control of the property at issue, which Reed's testimony established.

ensure that the jury reaches a unanimous verdict on one particular incident." *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In order to comport with this unanimity requirement, either (1) the State must inform the jury which act constituted the crime, or (2) the trial court must instruct the jurors to convict only if they unanimously agree on the specific act constituting the crime. *Kitchen*, 110 Wn.2d at 409.

If the evidence indicates a "'continuing course of conduct,'" however, no such election or jury instruction is required. *Handran*, 113 Wn.2d at 17 (quoting *Petrich*, 101 Wn.2d at 571). "A continuing course of conduct requires an ongoing enterprise with a single objective." *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). In the context of multiple acts potentially constituting theft, we have held that

> a unanimity instruction is not required where (1) a defendant is charged with a single count of theft based on a common scheme or plan, (2) the evidence indicates multiple incidents of theft from the same victim, (3) the multiple transactions are aggregated for charging purposes, (4) the jury is instructed on the law of aggregation, and (5) the to-convict instruction for the theft charge requires the jury to find that the multiple incidents are part of "a common scheme or plan, a continuing course of conduct, and a continuing criminal impulse."

State v. Garman, 100 Wn. App. 307, 317, 984 P.2d 453 (1999).

Here, the State charged Ivie with a single count of theft. The charging document and to-convict instructions specified that the conduct constituting theft occurred "on or about" February 9, 2012. CP at 74-75, 87. The jury heard evidence that Ivie (1) took wood from the felled maple tree several days prior to February 9, and (2) exercised unauthorized control over the wood on February 9. The trial court did not give a unanimity instruction. The trial court did instruct the jury that

> [w]henever any series of transactions that constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the amount of value.

CP at 62. Although this requires the jury to aggregate the value when a common scheme or plan is present, it does not require the jury to find that the multiple incidents are part of a common scheme or plan or a continuing course of conduct in order to convict. Therefore, under *Garman*, 100 Wn. App. at 317, the common strands in Ivie's activities on February 9 and several days earlier did not remove the unanimity requirement imposed by *Kitchen*, 110 Wn.2d at 409.

In the absence of a unanimity instruction or continuing course of conduct, the State must inform the jury which act constituted the crime. *Kitchen*, 110 Wn.2d at 409. The "on or about February 9" statements in the information and to-convict instruction do not accomplish this, because this time span arguably included both of the potential underlying acts. Further, the opening statements were not transcribed, and the State's closing argument did not inform the jury which act it relied on for the theft. To the contrary, the State's closing argument blended the two events together in discussing theft. In the first segment of its closing, the State discussed van Orman's valuation of all the wood taken from the tree, without differentiating between the two events. The State then referred in closing to "what Mr. Ivie was doing on the mountain on February 9" and mentioned Ivie's taking of the $348 worth of wood, which was from the prior incident. In the same discussion, the State also stated:

> Don't forget the fact that what he's talking about had to have occurred before the -- before the evening of the 9th when he went back out there to take more wood, to take more value.

VRP at 777. The State did not inform the jury of which act it relied on for the theft charge.

Under the authority above, the theft conviction violated Ivie's right to a unanimous verdict. Constitutional error requires us to presume prejudice, and to overcome this presumption the State must prove the error harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). With conflicting testimony as to whether the value of the wood

exceeded the $750 threshold required for second degree theft, RCW 9.9A.56.040, the State has not met that burden. The remedy for this error is generally reversal and remand. *See Kitchen*, 110 Wn.2d at 412.

Under *In re Personal Restraint of Heidari*, 174 Wn.2d 288, 293-95, 274 P.3d 366 (2012) and *State v. Green*, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980), where the lack of a unanimity instruction renders the evidence insufficient to support a conviction, the appellate court may remand for resentencing on an included offense if, and only if, (1) the trial court instructed the jury on the included offense, and (2) the jury necessarily found each element of the included offense in returning a guilty verdict on the greater offense. Although the State never charged Ivie with third degree theft, the court did instruct the jury on that crime as an included offense of second degree theft.

The jury did not, however, necessarily find each element of third degree theft with respect to both incidents. Some jurors may simply not have credited Ivie's arguably self-serving admission, and voted to convict only on the basis of his conduct on the night February 9. Alternatively, some jurors may have harbored doubt as to whether Ivie reasonably believed he had permission to take wood on the prior occasion, but no doubt as to the latter. We therefore reverse the second degree theft conviction, but do not remand for resentencing on third degree theft.

IV. JURY MISCONDUCT

Ivie contends that the trial court erred in denying his motion for a new trial based on juror misconduct. Ivie bases this claim on the jury foreperson's perceived reluctance to submit questions to the court despite one juror's uncertainty about the law and belief that Ivie was not guilty of first degree assault.

We review a trial court's ruling on allegations of juror misconduct for abuse of discretion. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003). "A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

In addressing a claim of juror misconduct, a court may not consider matters in a post-verdict juror affidavit that "inhere in the verdict." *Breckenridge*, 150 Wn.2d at 204. Matters inhere in the verdict if "the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him," or "can[not] be rebutted by other testimony without probing a juror's mental processes." *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). Examples include allegations

> that one or more jurors misunderstood the judge's instruction;
> or were influenced by an illegal paper or by an improper remark of a fellow juror;
> or assented because of weariness or illness or importunities;
> . . .
> or had omitted to consider important evidence or issues;
> or had miscalculated accounts by errors of fact or of law;
> or had by any other motive or belief been led to their decision.

Gardner, 60 Wn.2d at 841-42 (quoting 8 WIGMORE, EVIDENCE § 2349, at 681-82 (McNaughton rev. ed. 1961)) (quotation marks omitted) (footnotes omitted) (emphasis omitted).

All the allegations in the juror's declaration fall under one or more of these categories. The only arguable question involves the jury foreperson's reluctance to submit questions to the court. The juror, however, did not allege that the jury foreperson actually refused to submit any questions. She merely alleged that she "knew that the lead juror would not ask them, since [the foreperson] all but refused to ask the one question we did finally get her to submit." CP at 28-

29. This is a matter of the juror's belief that the jury foreperson would not submit additional questions and thus inheres in the verdict.

The matters alleged in the juror's declaration inhere in the verdict. The trial court did not err in denying Ivie's motion for a new trial.

V. FAILURE TO PROVE PRIOR CONVICTIONS BY A PREPONDERANCE AT SENTENCING

Ivie contends also that we must remand his case for resentencing because the State failed to offer any evidence of the prior convictions used to calculate his offender score. The State concedes the error, and we accept the State's concession.

"The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence." *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). Here, the State provided no evidence of the prior convictions in the trial court, thus failing to meet this burden.

In *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014), our Supreme Court upheld an amendment to RCW 9.94A.530(2) that states:

> On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

Therefore, we remand for a new hearing, at which either party may offer evidence, including new evidence, regarding the existence of the prior convictions.

VI. IVIE'S SAG

In order to obtain appellate review of an issue raised in a SAG, a defendant must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). We do not consider matters not in the record, and the appellant bears the burden of providing a record adequate for

review of the issues raised; if the appellant fails to meet this burden, the trial court's decision must stand. RAP 9.2; *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

The following claims raised in Ivie's SAG are either too vague and conclusory to merit review or depend on matter outside the record: (1) the prosecutor committed various acts of misconduct, including manufacturing or tampering with evidence and withholding exculpatory evidence, (2) certain events that allegedly occurred during the jury's visit to the scene of the events at issue violated Ivie's right to an impartial jury, (3) Ivie did not timely receive disclosure of the evidence used against him and never received full disclosure, (4) police deprived Ivie of due process by failing to gather exculpatory evidence, and (5) Ivie is unlawfully imprisoned. Under the standards above, we do not consider these claims.

Three other claims raised in the SAG either have been waived or have no merit. First, Ivie contends that the State violated his right to confront the witnesses against him by presenting exhibits generated using computer-based crime scene reconstruction technology without any testimony from the users regarding the accuracy or reliability of the technology. To preserve such a claim for review, the defendant must timely raise the issue in the trial court. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) ("The defendant *always* has the burden of raising his Confrontation Clause objection."). Ivie did not do so, and he has waived this challenge.

Second, Ivie contends that the State violated his right to due process by failing to properly preserve evidence. The record discloses that, although it was raining, police did not gather evidence from the scene until the following day. It certainly is possible that the rain obliterated marks on the ground that would have established Adams's or Reed's location relative to Ivie's truck. However, absent an affirmative showing that the evidence had exculpatory value,

the State's failure to preserve "'potentially useful'" evidence does not violate a criminal defendant's right to due process of law, unless the police acted in bad faith. *State v. Straka*, 116 Wn.2d 859, 884, 810 P.2d 888 (1991) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). Ivie makes no showing of bad faith. Therefore, his argument fails.

Third, Ivie contends that the court improperly dismissed a juror and excused an alternate juror. The record discloses that the court dismissed a juror during trial whose appendix ruptured. After closing arguments, the trial court excused the remaining alternate. These procedures comply with the relevant law, RCW 2.36.100, .110 and CrR 6.5, and Ivie's failure to timely object waived the issue in any event. *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995).

Finally, Ivie contends that his trial attorney made various errors or omissions that deprived him of the effective assistance of counsel. Many of these depend on matters outside the record, such as Ivie's claims that his attorney (1) met with him very briefly on only four occasions, (2) failed to obtain and present exculpatory evidence, (3) failed to provide him with copies of trial materials in advance, and (4) secretly worked with the prosecutor to ensure convictions. Others plainly have no merit, such as Ivie's claims that his attorney failed to coach defense witnesses to give more favorable testimony. The record is sufficient, though, to review Ivie's claim that his trial attorney provided ineffective assistance with respect to the hearing on the admissibility of Ivie's statements in the hospital.

We review claims of ineffective assistance of counsel de novo as they present mixed questions of law and fact. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A defendant who raises an ineffective assistance claim "bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109. Although "[t]here is a strong presumption that defense counsel's conduct is not deficient," that presumption is rebutted if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To establish prejudice, the defendant must demonstrate a reasonable probability of a different outcome absent counsel's deficient performance. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The record discloses several occasions before and during trial when the court and counsel discussed whether a hearing would be needed on the admissibility of Ivie's statements at the hospital. In these exchanges defense counsel expressed his need for testimony from the medical professionals who treated Ivie to competently challenge the voluntariness of Ivie's statements. These same exchanges also disclose some uncertainty as to whether and when such a hearing would be held. On Friday June 29, 2012, the trial court made clear, over defense counsel's objection that he needed additional time to arrange medical witnesses, that it would likely proceed with the hearing the following Tuesday whether or not the defense obtained those witnesses. The court held the hearing that Tuesday, and the defense did not present testimony from the medical professionals who treated Ivie or any expert testimony concerning Ivie's injuries or the nature and effects of whatever surgical procedure or medications had been employed.

After the State extensively impeached Ivie with his statements in the hospital, defense counsel sought to rehabilitate Ivie by describing the circumstances under which Ivie made them. Defense counsel did not object to the trial court's failure to instruct the jury to consider the weight and credibility of Ivie's statements in the hospital in view of the surrounding circumstances, as required by CrR 3.5(d),[7] and did not propose such an instruction.

Turning first to the failure to obtain medical testimony for the CrR 3.5 hearing, the record, summarized above, shows that defense counsel consistently told the court that he would need such testimony at the hearing. The hearing, however, was not scheduled until well into the presentation of testimony at trial. It is not reasonable to expect defense counsel to have somehow scheduled needed experts to be ready to appear on two working days' notice, which is what the trial court required. It also appears that the court's short deadline followed in part from its mistaken impression that the record did not reflect that defense counsel had stated repeatedly that he would need such testimony. Defense counsel's performance with regard to the medical testimony did not fall below an objective standard of reasonableness.

Turning next to counsel's failure to request the instruction required by CrR 3.5, Ivie fails to demonstrate a reasonable probability that the outcome would have been

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[7] The language of the rule is mandatory:

> If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; . . . and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

CrR 3.5(d). Thus, the trial court plainly erred in omitting the instruction. Ivie cannot directly raise the issue on appeal, however, because defense counsel did not timely object or propose such an instruction. *See State v. Taplin*, 66 Wn.2d 687, 691, 404 P.2d 469 (1965) (interpreting the same language in former *Rule of Pleading, Practice, and Procedure*, 101.20W(d)(4).

different if the jury had been instructed that it may give Ivie's statements the weight and credibility they see fit in view of the circumstances. *Kyllo*, 166 Wn.2d at 862. With that, Ivie fails to demonstrate the prejudice needed to sustain his claim of ineffective assistance of counsel. *A.N.J.*, 168 Wn.2d at 109.

CONCLUSION

We reverse Ivie's second degree theft conviction and affirm his remaining convictions. We also remand for a new hearing on Ivie's offender score, at which the State may offer new evidence to prove the existence of the prior convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.
BJORGEN, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Melnick, J.
MELNICK, J.