Supreme Court No. _____
Court of Appeals No. 57532-9-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TESTER,

Petitioner.

PETITION FOR REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washapp.org

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Tester, the petitioner, asks this Court to grant review of Court of Appeals' decision terminating review. The Court of Appeals issued a partly published opinion on April 9, 2024.

In the published portion of the opinion, the Court held that a recent law requiring trial courts to no longer count most prior juvenile adjudications in sentencings did not apply to offenses committed before its effective date of July 23, 2023.

In the unpublished portion of the opinion, the Court held that the closure of Mr. Tester's trial in *September 2022* did not violate the constitutional right to a public trial because the Superior Court entered an administrative order *in July 2020* that ordered all trials closed due to perceived risks from COVID-19.

Mr. Tester's motion for reconsideration was denied on April 30, 2024.

The opinion and order denying reconsideration are attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Defendants have a constitutional right to a public trial. A closure of the court to the public must be justified based on an individualized analysis resulting in specific findings. Based on a stale order entered several months after the COVID-19 pandemic started, the trial court closed the courtroom during Mr. Tester's trial in September 2022, when the pandemic was at its end. Did the trial court unconstitutionally close Mr. Tester's trial to the public where it did not analyze whether the closure was justified based on an individualized circumstances and did not enter any specific findings?

2. A law in effect during Mr. Tester's appeal requires that courts not count most prior juvenile adjudications in an offender score calculation at sentencing. The legislature did so to remedy the injustice of automatically increasing a person's

punishment based on the person's actions as a child. Mr. Tester had several prior juvenile adjudications that were counted in his offender score and increased his punishment. Given the expression of intent, does this law apply to pre-enactment cases, specifically non-final cases on direct appeal?

C. STATEMENT OF THE CASE

A complete statement of the case is set out in Mr. Tester's opening brief. Br. of App. at 5-9.

In short, Mr. Tester, a man experiencing homelessness, was prosecuted for staying at what he believed to be abandoned property in the woods. CP 4-5, 53, 69; RP 194, 202.

At the trial for burglary and theft in September 2022, the trial court closed the courtroom to the public because this is how it had been operating during the pandemic, and streamed the trial on YouTube. RP 15, 17, 121. The trial court conducted no individualized analysis and made no findings to justify the closure. RP 15, 20-21.

Following convictions on the charged offense, and based largely on several decades-old juvenile adjudications, the trial court sentenced Mr. Tester to 45 months' of confinement. CP 52, 56-60.

In the unpublished portion of its decision, the Court of Appeals held there was no violation of Mr. Tester's constitutional right to a public trial. Slip op. at 12-13.

In the published portion of the opinion, the Court held the law instructing trial courts to not count most prior juvenile adjudications in offender score calculations at sentencing did not apply to pre-act offenses like Mr. Tester's and only applied to offenses committed on or after July 23, 2023, when the law went into effect.

Mr. Tester moved for reconsideration. Mr. Tester explained that the Court of Appeals had overlooked or misapprehended controlling precedent holding that a individualized assessment with findings is required before a

trial is closed. Less than a week later, the Court summarily denied the motion without calling for an answer from the State.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted to reaffirm that before a trial is closed to the public, the trial court must conduct an individualized analysis and make specific findings to justify the closure. The Court of Appeals' contrary holding departs from clear precedent and should be reversed.

a. Criminal defendants have a constitutional right to a public trial.

The state and federal constitutions mandate public trials. U.S. Const. amends. I, VI; Const. art. I, §§ 10, 22; *Waller v. Georgia*, 467 U.S. 39, 44-46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *State v. Whitlock*, 188 Wn.2d 511, 519-20, 396 P.3d 310 (2017). In criminal trials, this constitutional right is afforded to both the defendant and the public. *State v. Fort*, 190 Wn. App. 202, 219-24, 360 P.3d 820 (2015). Openness helps ensure the fairness and integrity of the proceedings. *Id.* at 222-23. "The presence of interested spectators may keep the accused's triers keenly alive to a sense of their responsibility

and to the importance of their functions." *Id.* at 221 (citing *Waller*, 467 U.S. at 46). In essence, "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court." *Id.*

Under the state constitution, a criminal proceeding cannot be closed unless the trial court conducts the requisite analysis and concludes that the closure is justified. *Whitlock*, 188 Wn.2d at 520-21. The analysis considers five criteria:

> 1. The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a serious and imminent threat to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

b. Without individualized analysis or justification, the trial court barred the public from attending Mr. Tester's trial, violating the constitutional right to a public trial.

Trial began on September 22, 2022. The trial court stated, "We are on the record and streaming." RP 15. The court recounted the courtroom was closed to the public: "We're still under a *Bone-Club* order, just for the record, so public will not be allowed in the courtroom, but we're streaming on YouTube." RP 15. When the prospective jurors entered the courtroom, the court told the jurors, "we have a *Bone-Club* order in effect, which means the courtroom is closed to the public," but explained that a camera in the courtroom was broadcasting on YouTube. RP 20-21.

The trial court's statement about a "*Bone-Club* order" was referring to an administrative order entered by the Cowlitz Superior Court on July 27, 2020, when the country was largely

closed due to the pandemic.[1] Based on the risk posed by COVID-19, the order purports to justify closing courtrooms to the public and streaming the proceedings live on YouTube instead. Concerning duration, the order promises that it "is in place for the scheduled proceedings and will be reconsidered daily as public health data, directives, and advice are issued."

This promise was not kept. Although the COVID-19 emergency was essentially at an end by the time Mr. Tester's trial began in late September 2022,[2] no on-the-record analysis

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[1] Admin. Ord., No. 2020-003-08, *In re Superior Court Courtroom Proceedings Held in a Virtual Courtroom* (Cowlitz County Super. Ct., Wash. July 27, 2020) (Admin. Ord., No. 2020-003-08) https://www.cowlitzsuperiorcourt.us/all-forms/318-administrative-order-no-2020-003-08/viewdocument/318 [https://perma.cc/5ACA-ZH4U]. This and other COVID-19 related orders from the Cowlitz County Superior Court are collected at https://www.cowlitzsuperiorcourt.us/covid-19

[2] Two weeks before Mr. Tester's trial began, the governor announced the upcoming rescission of all remaining COVID-19 emergency proclamations and state of emergency by October 31, 2022. *Inslee announces end to remaining COVID-19 emergency orders and state of emergency by October 31* (Sept. 8, 2022),

was conducted by the trial court before it barred the courtroom doors. Indeed, no analysis was conducted. Instead, the trial court relied on a stale order that was over two years old.

A defendant's public trial rights have been violated if (1) the proceeding implicates the public trial right; (2) the proceeding was closed; and (3) the closure was not justified. *Whitlock*, 188 Wn.2d at 520.

Here, the proceeding was the entirety of Mr. Tester's trial, including jury selection. This obviously implicates the public trial right. *See State v. Wise*, 176 Wn.2d 1, 12 n.4, 288 P.3d 1113 (2012) (well settled that public trial right applies to jury selection).

As for a closure, a closure occurs "when the courtroom is completely and purposefully closed to spectators so that no one

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https://governor.wa.gov/news/2022/inslee-announces-end-remaining-covid-19-emergency-orders-and-state-emergency-october-31. The news release touted that Washington had one of the lowest death rates for COVID-19 in the country and that most of the governor's emergency orders had already been lifted. *Id.*

may enter and no one may leave." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). As the stale order recounts, closing the courtroom doors was a closure even if the proceedings were streamed on the internet. App. 1-3.

Streaming video of a trial on the internet is not equivalent to the physical presence of people in the courtroom. The jury, judge, and counsel were unable to see any viewers of the trial. The "presence of interested spectators" is important to remind the participants of "the importance of their functions." *Waller*, 467 U.S. at 46.

And the public's view of the trial on the internet was also not equivalent to being in the courtroom. Viewing something on a screen is different than viewing it in person. *See State v. Sweidan*, 13 Wn. App. 2d 53, 67, 461 P.3d 378 (2020) ("Virtual presence created by a television screen falls short of physical presence."). Moreover, the view is limited to the perspective of the camera, which is different. The sound is also different. In fact, the transcript contains many notations of "no audible

response" or "indiscernible." RP 19, 26-30, 32-39, 63, 68-69, 73, 81, 83, 97, 101-03, 106, 128, 141, 144, 146-47, 174, 207, 210-11, 239-41, 265, 283, 288, 298. So a viewer online would likely experience the same difficulty in hearing what was said.

Consistent with this analysis, courts applying the federal standard have concluded that providing audio or video access to a proceeding over the internet results in a closure. The Ninth Circuit Court of Appeals held that streaming only audio was a total court closure. *United States v. Allen*, 34 F.4th 789, 797 (9th Cir. 2022). And other courts have recognized that even streaming both video and audio is at least a partial court closure. *People v. Roper*, No. 21CA0309, 2024 WL 271633, at *3-4 (Colo. App. Jan. 25, 2024); *People v. Bialas*, 535 P.3d 999, 1001 (Colo. App. 2023), *cert. granted*, No. 23SC520, 2024 WL 1144314 (Colo. Mar. 11, 2024); *United States v. Babichenko*, 508 F. Supp. 3d 774, 779 (D. Idaho 2020).

Consequently, even though the trial was streamed online, a court closure occurred under the state and federal constitutions.

Lastly, the closure was not justified. The trial court did not analyze the *Bone-Club* factors. "A closure unaccompanied by a *Bone–Club* analysis on the record will almost never be considered justified." *State v. Smith*, 181 Wn.2d 508, 520, 334 P.3d 1049 (2014). This is not one of the rare cases. Consequently, the lack of any *Bone-Club* analysis means the closure was not justified.[3] *Whitlock*, 188 Wn.2d at 520. Notwithstanding this straightforward analysis, the Court of Appeals rejected Mr. Tester's argument. The Court of Appeals reasoned there was no public trial violation because the blanket local administrative order closed all courtrooms. Slip op. at 13.

[3] Beyond the state constitutional right to a public trial, Mr. Tester's federal constitutional right to a public trial was also violated. Under a federal analysis, the streaming of the trial on video was, at the least, a nontrivial partial closure. Br. of App. at 20.

The Court reasoned that "the Cowlitz County Superior Court order had not been rescinded the time of trial" and that closure was consistent with Supreme Court's 2021 COVID-19 order encouraging courts to use remote proceedings "'whenever appropriate.'" Slip op. at 13 (quoting Fifth Revised & Extended Ord. Regarding Ct. Operations, No. 25700-B-658, at 3, In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency (Wash. Feb. 19, 2021) (Fifth Emergency Ord.)).[4]

The Court of Appeals overlooked that "the Supreme Court's opinions uniformly require *an individualized analysis* resulting *in specific findings* in order for court closures to satisfy article I, section 10." *In re Det. of D.F.F.*, 144 Wn. App. 214, 219-20, 183 P.3d 302 (2008) (emphasis added), *affirmed*, 172 Wn.2d 37, 256 P.3d 357 (2011). "[A]utomatic limitations

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4 https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf [https://perma.cc/F2PD-LEXX]

on the openness of court proceedings violate article I, section 10 because they are not based on *a case-specific inquiry*." *Id.* at 220 (emphasis added). Here, no case-specific inquiry happened in Mr. Tester's case.

That there was a blanket local order on closures in existence and an order from this Court encouraging courts to take steps to mitigate the risks posed from COVID-19 does not make the closure of Mr. Tester's trial constitutional. Both the Court of Appeals and this Court in *D.F.F.* declared unconstitutional a court-promulgated rule closing all mental health court proceedings to the public. *In re Det. of D.F.F.*, 172 Wn.2d 37, 41-42, 256 P.3d 357 (2011); *D.F.F.*, 144 Wn. App. at 217. That the court-rule was in existence and used to justify the closure in *D.F.F.* did not matter. This is because article I, section 10 requires *an individualized inquiry*. *D.F.F.*, 172 Wn.2d at 42; *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *D.F.F.*, 144 Wn. App. at 217-18.

The same flaw identified in *D.F.F.* is present in this case. The administrative order creates *an indefinite* closure without individualized case-specific consideration. Although the order states it would "be reconsidered daily" based on public health data, this was a false promise. There certainly was nothing showing reconsideration by the trial court in Mr. Tester's case. The court simply declared there was a standing *Bone-Club* order, "so public will not be allowed in the courtroom." RP 15. The reality of the waning COVID-19 pandemic and the return to normalcy in September 2022 was not considered.

This sort of indefinite and overbroad court-closure does not square with the public trial right. As the fifth *Bone-Club* factor states, a closure "order must be no broader in its application or duration than necessary to serve its purpose." 128 Wn.2d at 259. An indefinite order that closes all courtrooms based a hypothesized risk of COVID-19 spread, regardless of the circumstances or actual risk, is overbroad.

Here, if the trial court had done the case-specific analysis that article I, section 10 demands, it would have concluded that closure of Mr. Tester's trial was not warranted. Beyond the pandemic being essentially at an end in September 2022, it is unlikely members of the public would have packed the courtroom. Mr. Tester's case was not one of broad public interest and would have likely only attracted several family members and friends of Mr. Tester's. And the public could have been required to wear masks.

Mr. Tester did not have an opportunity to object to the administrative order in 2020 because *his case did not exist yet*. And the public did not have had an opportunity to object since the indefinite closure order was apparently done through a closed administrative procedure. This does not comport with the constitutional right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 179-80, 137 P.3d 825 (2006); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 806, 100 P.3d 291 (2004).

An individualized and case-specific *Bone-Club* analysis was required before the trial court closed Mr. Tester's trial.

c. Review should be granted because the Court of Appeals' decision departs from clear precedent. Review should also be granted because whether streaming a trial on the internet is a substitute for an open courtroom presents a significant constitutional question and issue of substantial public interest.

As Mr. Tester's analysis proves, the Court of Appeals' holding on the public trial issue departs from clear precedent holding that a court-closure must be justified based on an individualized analysis and specific findings. Due to the conflict with precedent, review is warranted. RAP 13.4(b)(1), (2).

As for whether streaming a trial on the internet is a substitute for an open-courtroom, a question the Court of Appeals did not address, this is a significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

It is also an issue of substantial public interest. RAP 13.4(b)(4). Remote proceedings and streaming of courtrooms

online is still a frequent occurrence. Whether this is *an adequate substitute* for the tried-and-true method of the courtroom being physically open for people is a question this Court should answer. The answer should be a resounding "no," but there appears to be disagreement among jurists on whether broadcasting a courtroom on the internet is a substitute for the public being able to actually attend a court proceeding in person.

2. Review should be granted to decide whether the law eliminating the use of most juvenile adjudications in offender score calculations applies to sentencing on pre-act offenses where the case is not final.

Under the Sentencing Reform Act, the offender score and offense seriousness level determines the standard range sentence. RCW 9.94A.510, 530(1). The offender score is the total sum of points accrued from prior convictions rounded down to the nearest whole number. RCW 9.94A.525.

Mr. Tester has several juvenile adjudications that were counted in his offender score. CP 56. This increased his

punishment by making his offender score a 7 rather than a 3. CP 52, 56-59; *see* RCW 9.94A.525; RCW 9A.52.025.

The legislature passed a law mandating that most prior juvenile felony adjudications do not count in the offender score. Laws of 2023, ch. 415, § 2.[5] The law took effect on July 23, 2023, while Mr. Tester's case was on direct appeal.

In the published portion of its opinion, the Court of Appeals held this law does not apply to pre-act offenses or to sentences that are pending on appeal.

Interpretation of a statute is a legal issue, reviewed de novo. *State v. Jenks*, 197 Wn.2d 708, 713, 487 P.3d 482 (2021).

In ruling that the law did not apply, the Court of Appeals relied on two statutes that generally require that sentences be determined based on the law in effect at the time of the offense. RCW 9.94A.345; RCW 10.01.040; slip op. at 3-5.

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5 https://leg.wa.gov/CodeReviser/documents/sessionlaw/2023pam2.pdf. The exceptions are for first and second degree murder along with class A felony sex offenses.

The Court of Appeals reasoned that the language of the statute did not evince intent to apply to pre-act cases, including non-final cases on direct appeal. Slip op. at 5-8.

A statute need *not* have express language for it to operate at later sentencings or even "retroactively." *Jenks*, 197 Wn.2d at 720; *State v. Ross*, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004); *State v. Rose*, 191 Wn. App. 858, 865-66, 365 P.3d 756 (2015); *Dorsey v. United States*, 567 U.S. 260, 274, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). Laws purporting to create any kind of drafting requirement on the legislature are ineffective because a legislature cannot bind a future legislature from exercising its power. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142, 1151-52 (2007); *United States v. Winstar Corp.*, 518 U.S. 839, 872-73, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996).

As the United States Supreme Court has recognized, whether a statute applies must be analyzed based on its language. *Dorsey*, 567 U.S. at 274-75, 132 S. Ct. 2321, 183 L.

Ed. 2d 250 (2012). "No magical passwords" or express intent are required to supersede or exempt a law from a prior law. *Id.* at 274 (cleaned up). The analysis is whether the legislature did so "by necessary implication." *Id.* Or, as this Court has put it, the law is exempt from the prior law when the legislature expresses "an intent in words that fairly convey that intention." *Jenks*, 197 Wn.2d at 720 (cleaned up). Thus, the legislature is *not* required to say, "This act shall apply to pending cases." *Rose*, 191 Wn. App. at 865-66.

Here, the plain language of the new law expresses an intent to apply to all sentencings after its effective date, including to pre-act offenses. The intent section of the law, expressing the purpose of the law, shows this:

> The legislature intends to:
>
> (1) *Give real effect* to the juvenile justice system's express goals of rehabilitation and reintegration;
>
> (2) *Bring Washington in line* with the majority of states, which do not consider prior juvenile offenses in sentencing range calculations for adults;

> (3) *Recognize the expansive body of scientific research on brain development*, which shows that adolescent's perception, judgment, and decision making differs significantly from that of adults;
>
> (4) *Facilitate the provision of due process* by granting the procedural protections of a criminal proceeding *in any adjudication* which may be used to determine the severity of a criminal sentence; and
>
> (5) *Recognize how grave disproportionality within the juvenile legal system* may subsequently impact sentencing ranges in adult court.

Laws of 2023, ch. 415, § 1 (emphases added).

This statement of intent uses strong words that convey the legislature's intent to have this law apply to all sentencings: "Give real effect," "Bring Washington in line," "Recognize the expansive body of scientific research on brain development," "Facilitate the provision of due process . . in any adjudication," and "Recognize [the] grave disproportionality within the juvenile legal system." *Id.*

This statement of intent shows it is fundamentally unfair and out-of-step to increase a person's punishment based on what that person did as a child. Consequently, the legislature's

intent was to end this harmful practice in all sentencings on or after July 23, 2023. *See Dorsey,* 567 U.S. at 273-281 (several considerations showed that Congress intended more lenient penalties to apply when sentencing offenders whose crimes preceded enactment of law, including avoiding sentencing disparities that the act was intended to remedy); *State v. Grant*, 89 Wn.2d 678, 684, 575 P.2d 210 (1978) (language that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages" expressed sufficient intent to apply to all cases); *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970) (amendment was not merely prospective given the language, "the provisions of this chapter shall *not ever* be applicable to any form of cannabis") (emphasis added); *Rose*, 191 Wn. App. at 869 (statement of intent saying that "the people intend to stop treating adult marijuana use as a crime" and "allow law enforcement resources to be focused on violent and property

crimes" expressed an intent to have law apply to pending cases).

Notwithstanding that Mr. Tester's argument centered on this statement of intent, the Court of Appeals *did not even acknowledge its existence*. Slip op. at 3-8. Rather than grasp the nettle, the opinion simply asserts: "[T]he legislature did not express an intent that the 2023 amendment would apply to pending prosecutions for offenses committed before its effective date." Slip op. at 5; *cf. State v. Troutman*, __ Wn. App. 2d. __ 546 P.3d 458, 462 (2024), petition for review filed May 3, 2024 (analyzing this statement of intent, but rejecting that it conveyed intent to apply law to pre-act offenses).

This *ipse dixit*—because I said so, does not withstand scrutiny. The statutes in *Dorsey*, *Zornes*, *Grant*, and *Rose* did not expressly state that the amendments in those cases would apply to pending cases for prosecutions for offenses committed before their effective dates. The implication from the Court of

Appeals is that an explicit statement is required, which is not the rule.

This Court's decision in *State v. Jenks*, 197 Wn.2d 708, 487 P.3d 482 (2021) is not to the contrary. The statute in *Jenks* concerned eliminating second degree robbery as a strike offense for purposes of Washington's "three strikes and you're out" life-sentence law. Unlike the law here, it did *not* have a statement of intent. *Compare* Laws of 2023, ch. 415, § 1 *with* Laws of 2019, ch. 187. Thus, the language of the statute did "not fairly convey intent to exclude the saving clause" statute. *Jenks*, 197 Wn.2d at 720.

The more relevant case from this Court is *Ross*. 152 Wn.2d 220. There, the legislature reduced the amount of points for prior drug convictions in offender scores by amending RCW 9.94A.525. The Court determined this change in the law did not apply to crimes committed before the effective date of the law. *Ross*, 152 Wn.2d at 239. The legislature expressed the intent that the statute would *not* apply "retroactively" by stating the

amendments "apply to crimes committed on or after July 1, 2002." *Id.* (quoting Laws of 2002, ch. 290, § 29).

In contrast to *Jenks* and *Ross*, the statement of intent here fairly conveys the message that it applies to any future sentencing (as opposed to just offenses committed after its effective date).[6] Otherwise the goals expressed in the statement of intent make little sense. And unlike in *Ross*, the legislature did *not* include a comparable statement that the law would only "apply to crimes committed on or after" a particular date. *Ross*, 152 Wn.2d at 239.

Jenks is also distinct because it did not consider whether the statute there was remedial. 197 Wn.2d at 726. A statute is remedial when it relates to practice, procedure, or remedies and

[6] This is not an issue of "retroactivity" on whether the law applies to people serving sentences where their cases are final. Rather it is an issue of *prospective* application. Does the law apply to all new sentencings going forward, including pre-act offenses? Or does it apply just to sentences for crimes committed on or after July 23, 2023, the effective date of the act?

does not affect a substantive or vested right." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007) (internal quotation omitted). "[R]emedial statutes are liberally construed in order to effectuate the remedial purpose for which the statute was enacted." *Grant*, 89 Wn.2d at 685. "[R]emedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment." *Pillatos*, 159 Wn.2d at 473.

Here, the statute "relate[s] only to procedures and does not affect a substantive or vested right." *Id.* The State does not have a substantive or vested right in having a person's juvenile adjudications count in their offender score. Thus, the statute applies to Mr. Tester's sentencing. Because Mr. Tester's case is not final and on appeal, he is entitled to relief. *State v. Jefferson*, 192 Wn.2d 225, 245-47, 429 P.3d 467 (2018); *see Troutman*, 546 P.3d at 463 ("Because Troutman's sentence is still on direct appeal, the amendment would apply prospectively *if* the saving clause did not apply.").

Review is warranted on this important issue. The mode of analysis by the Court of Appeals is in conflict with precedent. RAP 13.4(b)(1), (2). And this issue undoubtedly "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3). There are many (non-final) pre-act cases where courts have or will count juvenile adjudications, increasing the punishment imposed. No one should needlessly serve a sentence in excess of the law.

And this is happening notwithstanding the legislature's statement of intent saying this is unjust and "[r]ecogniz[ing] how grave disproportionality within the juvenile legal system may subsequently impact sentencing ranges in adult court." Laws of 2023, ch. 415, § 1. This disproportionately has affected people of color and indigenous persons the most. [7] This Court should grant review and decide this critical issue.

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[7] Crosscut, Luna Reyna, *WA may end mandatory sentencing points based on juvenile convictions* (Apr. 20, 2023), available at: https://crosscut.com/politics/2023/04/wa-may-end-mandatory-sentencing-points-based-juvenile-

E. CONCLUSION

Mr. Tester's petition for review presents important issues that this Court should decide. The Court should grant the petition for review on both issues.

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convictions (recounting data showing that "People of color are facing longer sentences because they were involved in the juvenile system as children" and that "Indigenous youth are 3 times more likely than white youth to enter the prison pipeline through referral into the juvenile justice system than to have criminal charges dropped."); *see also State v. Tesfasilasye*, 200 Wn.2d 345, 358, 518 P.3d 193 (2022) ("Our Black, Indigenous, and other People of Color communities are arrested, searched, and charged at significantly higher rates than White communities"); *State v. Waits*, 200 Wn.2d 507, 521, 520 P.3d 49 (2022) ("It goes without saying that the criminal legal system disproportionately affects the poor and people of color."); *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (taking "judicial notice of implicit and overt racial bias against black defendants in this state").

This document contains 4,826 words and complies with RAP 18.17.

Respectfully submitted this 23rd day of May, 2024.

Richard W. Lechich,
WSBA #43296
Washington Appellate Project,
#91052
Attorney for Petitioner

Appendix

Filed
Washington State
Court of Appeals
Division Two

April 30, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL JOHN TESTER, JR., Appellant.	No. 57532-9-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the court's April 9, 2024 opinion. Upon consideration, the court denies the motion. Accordingly, it is

ORDERED.

PANEL: Jj. Maxa, Che, Price

FOR THE COURT:

Maxa, J.

MAXA, P.J.

Filed
Washington State
Court of Appeals
Division Two

April 9, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL JOHN TESTER, JR., Appellant.	No.57532-9-II PART PUBLISHED OPINION

MAXA, P.J. – Michael Tester appeals his third degree theft and residential burglary convictions and his sentence.

When Tester was sentenced, his offender score included juvenile adjudications. At the time, former RCW 9.94A.525(1) (2021) contained no provision precluding prior juvenile adjudications from being counted when calculating an offender score. But in 2023, the legislature amended RCW 9.94A.525(1) by requiring that "adjudications of guilt pursuant to Title 13 RCW [Juvenile Courts and Juvenile Offenders] which are not murder in the first or second degree or class A felony sex offenses may not be included in the offender score." RCW 9.94A.525(1)(b). This amendment became effective on July 23, 2023. LAWS OF 2023, ch. 415, § 2.

Tester argues that we should remand for resentencing based on an offender score that does not include his previous juvenile adjudications because RCW 9.94A.525(1)(b) should be applied prospectively on appeal.

We hold that RCW 9.94A.345 and RCW 10.01.040 require that Tester be sentenced based on the law in effect when he committed his offenses, and RCW 9.94A.525(1)(b) does not

apply prospectively to Tester's offender score calculation. In the unpublished portion of this opinion, we address and reject Tester's other arguments except for the State's concession that the crime victim penalty assessment (VPA) must be stricken from the judgment and sentence.

Accordingly, we affirm Tester's convictions and sentence, but we remand for the trial court to strike the VPA from the judgment and sentence.

FACTS

A jury found Tester guilty of third degree theft and residential burglary based on an incident that occurred in May 2022. Sentencing occurred in October 2022.

At sentencing, the trial court determined Tester's offender score, which included six juvenile adjudications. The court sentenced Tester to 364 days of confinement with 364 days suspended for the third degree theft conviction and 45 months of confinement for the residential burglary conviction.

Tester appeals his convictions and sentence.

ANALYSIS

Tester argues that we should remand for resentencing based on an offender score that does not include his previous juvenile adjudications because RCW 9.94A.525(1)(b) should be applied prospectively on appeal. We disagree.

A. STANDARD OF REVIEW

We review questions of statutory interpretation and law de novo. *State v. Jenks*, 197 Wn.2d 708, 713, 487 P.3d 482 (2021). Statutes are construed based on their plain language. *Id.* at 714. If the plain language is unambiguous, the analysis ends and we apply the statute's plain

language. *Id.* " 'Language is unambiguous when it is not susceptible to two or more interpretations.' " *Id.* (quoting *State v. Delgado*, 148 Wn.2d 723, 726, 63 P.3d 792 (2003)).

B. AMENDMENT TO RCW 9.94A.525(1)

In 2022, when Tester was convicted and sentenced, former RCW 9.94A.525(1) contained no provision precluding prior juvenile convictions from being counted when calculating an offender score. The trial court sentenced Tester using an offender score that included his prior juvenile adjudications.

But in 2023, the legislature amended RCW 9.94A.525(1) by requiring that "adjudications of guilt pursuant to Title 13 RCW [Juvenile Courts and Juvenile Offenders] which are not murder in the first or second degree or class A felony sex offenses may not be included in the offender score." RCW 9.94A.525(1)(b). This amendment became effective on July 23, 2023. LAWS OF 2023, ch. 415, § 2.

C. LEGAL PRINCIPLES

Generally, both RCW 9.94A.345 and RCW 10.01.040 control the effect of amendments to penal statutes on sentencing. *Jenks*, 197 Wn.2d at 713. RCW 9.94A.345 states, "Except as otherwise provided in [the SRA[1]], any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.525(1)(b) is part of the SRA. The Supreme Court has stated that RCW 9.94A.345 commands trial courts to look to the law in effect at the time of the crime when imposing a sentence. *Jenks*, 197 Wn.2d at 716.

RCW 10.01.040, the general savings clause statute, states in part,

> Whenever any criminal or penal statute shall be amended or repealed, *all offenses committed or penalties or forfeitures incurred while it was in force shall be*

[1] Sentencing Reform Act of 1981, ch. 9.94A RCW.

> *punished or enforced as if it were in force*, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

(Emphasis added.) To avoid application of RCW 10.01.040, the legislature must express its intent " 'in words that fairly convey that intention.' " *Jenks*, 197 Wn.2d at 720 (quoting *State v. Ross*, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004)).

"Under these statutes . . . sentences imposed under the SRA are generally meted out in accordance with the law in effect at the time of the offense." *Jenks*, 197 Wn.2d at 714. This is because it is a legislative function, and not a judiciary function, to fix legal punishments for criminal offenses and to alter the sentencing process. *Id.* at 713.

In addition, statutes are presumed to apply prospectively rather than retroactively. *State v. Brake*, 15 Wn. App. 2d 740, 744, 476 P.3d 1094 (2020). However, under some circumstances a prospective statutory amendment may apply to a case pending on direct appeal even though the offense occurred before enactment of the statute. *See State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (holding that a statutory amendment pertaining to costs that are imposed on defendants following conviction applied prospectively to a case pending on direct review). An amendment applies to a pending appeal " 'if the precipitating event under the statute occurred after the date of enactment.' " *Jenks*, 197 Wn.2d at 722 (quoting *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 809, 272 P.3d 209 (2012)). We look to the subject matter that the statute regulates to determine the precipitating event for application of the statute. *Jenks*, 197 Wn.2d at 722.

In *Jenks*, the defendant was convicted of first degree robbery in 2017. *Id.* at 711. The trial court determined that he had three strike offenses and was a persistent offender under the

Persistent Offender Accountability Act (POAA) of the SRA, and sentenced him to life without parole. *Id.* One of his previous strike offenses was second degree robbery. *Id.* Two years after the defendant was sentenced as a persistent offender, and while his case was pending on direct appeal, the legislature enacted Engrossed Substitute Senate Bill (ESSB) 5288, which removed second degree robbery from the list of "most serious offenses" in RCW 9.94A.030(32). *Id.* Therefore, second degree robbery no longer counted as a strike under the POAA. *Id.*

The Supreme Court held that the change in law did not apply to the defendant's case because of RCW 9.94A.345 and RCW 10.01.040. *Id.* at 715. The court also held that the change in law did not apply prospectively to the case on direct appeal because "the triggering event for determining who qualifies as a persistent offender occurs when someone has been convicted of a most serious offense *and* was also, in the past, convicted of two other most serious offenses on separate occasions." *Id.* at 722. Therefore, the defendant's triggering event was his 2017 conviction for first degree robbery, which occurred before the enactment of ESSB 5288. *Id.* at 722-23.

D. APPLICATION OF AMENDMENT TO RCW 9.94A.525(1)

Here, former RCW 9.94A.525(1) – which did not preclude prior juvenile adjudications from being counted in an offender score – was in effect at the time of Tester's conviction. The legislature did not express an intent that the 2023 amendment would apply to pending prosecutions for offenses committed before its effective date. Therefore, both RCW 9.94A.345 and RCW 10.01.040 require that Tester be sentenced based on the former version of RCW 9.94A.525(1), rather than based on RCW 9.94A.525(1)(b).

However, Tester argues that even if RCW 9.94A.525(1)(b) only applies prospectively, it must be applied to his case because it still is pending on direct appeal. He contends that the

termination of his appeal is the applicable triggering event. He cites to *Ramirez*, 191 Wn.2d 732 and *State v. Jefferson*, 192 Wn.2d 255, 429 P.3d 467 (2018) to support his argument.

But Tester's case is similar to *Jenks*. RCW 9.94A.525(1) regulates which prior convictions count when calculating an offender score. The triggering event for determining a defendant's offender score is the defendant's sentencing for a conviction, at which the offender score is calculated. Therefore, the triggering event here was when Tester was sentenced for his 2022 convictions for third degree theft and residential burglary, which occurred before the enactment of RCW 9.94A.525(1)(b).

Neither *Ramirez* nor *Jefferson* compel a different result. In *Ramirez*, the Supreme Court addressed statutory amendments modifying the imposition of discretionary legal financial obligations (LFOs) that were enacted while the defendant's case was pending on direct appeal. 191 Wn.2d at 747. The court noted that it previously had "concluded that the 'precipitating event' for a statute 'concerning attorney fees and costs of litigation' was the termination of the defendant's case." *Id.* at 749 (quoting *State v. Blank*, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)). Therefore, the court held that the statutory amendments applied to the defendant's case because it was pending on direct appeal and was not yet final. *Ramirez*, 191 Wn.2d at 749.

However, the Supreme Court in *Jenks* expressly declined to expand *Ramirez* to all cases. *Jenks*, 197 Wn.2d at 723. The court stated that the statute in *Ramirez* "dealt with the narrow subject matter of 'costs imposed upon conviction,' " and was not analogous to the sentencing statute at issue. *Jenks*, 197 Wn.2d at 723 (quoting *Ramirez*, 191 Wn.2d at 749). Similarly here, the LFO statute at issue in *Ramirez* is not analogous to RCW 9.94A.525(1)(b).

In *Jefferson*, the Supreme Court considered whether GR 37, a court rule involving discriminatory use of peremptory strikes that was adopted after the defendant's trial, applied to

the defendant's case on direct appeal. *Id.* at 243. The court determined that the precipitating event in that case was voir dire, so GR 37 did not apply. *Id.* at 248.

In discussing the issue, the Supreme Court stated,

> We generally hold that when the new statute concerns a postjudgment matter like the sentence or revocation of release, . . . then the triggering event is not a "past event" but a future event. In such a case, the new statute or court rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred.

Id. at 247. But *Jefferson* did not involve amendments to a sentencing statute, and therefore this statement was dicta. And in making this statement, the court cited to *Blank*, 131 Wn.2d 230 and *In re Personal Restraint of Flint*, 174 Wn.2d 539, 277 P.3d 657 (2012), neither of which involved amendments to sentencing statutes. Finally, the court in *Jenks* did not reference this statement in analyzing the prospective application of statutory amendments. Therefore, we conclude that the statements regarding postjudgment matters in *Jefferson* do not apply here. *See State v. Molia*, 12 Wn. App. 2d 895, 902, 460 P.3d 1086 (2020) (concluding that the statement in *Jefferson* does not control when addressing a statutory amendment that affects sentencing).

Tester also argues that RCW 9.94A.525(1)(b) is a remedial statute, and "remedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). Remedial statutes generally involve procedural matters rather than substantive matters. *Id.* Tester claims that RCW 9.94A.525(1)(b) applies to his case on appeal because it involves a procedural change.

But "changes to criminal punishments are substantive, not procedural." *Jenks*, 197 Wn.2d at 721. Regardless, the remedial nature of an amendment is irrelevant when the statute is subject to RCW 10.01.040. *See State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000).

Therefore, we hold that RCW 9.94A.525(1)(b) does not apply to Tester's offender score calculation and sentencing for his 2022 conviction.

CONCLUSION

We affirm Tester's convictions and sentence, but we remand for the trial court to strike the VPA from the judgment and sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we hold that (1) Tester cannot establish that the trial court violated his public trial right by not allowing spectators in the courtroom; (2) sufficient evidence supported Tester's third degree theft conviction; (3) the State did not fail to prove Tester's criminal history at sentencing because Tester affirmatively acknowledged his criminal history and waived the State's burden of proof; and (4) as the State concedes, the $500 VPA must be stricken from the judgment and sentence.

ADDITIONAL FACTS

Background

In May 2022, a landowner checked his family cabin in Woodland and found Tester and his girlfriend inside the cabin. The landowner told them to leave and notified law enforcement.

As Tester and his girlfriend were leaving the cabin, an officer arrived and detained them. Tester eventually admitted that he took boat oars, totes, and rope from the property. The landowner confirmed that these items were from his property. The officer also located a battery belonging to the landowner in Tester's trailer.

The State charged Tester with third degree theft and residential burglary.

Trial Court Proceedings

Due to the significant risks of the COVID-19 pandemic, in July 2020 the Cowlitz County Superior Court filed an administrative order that analyzed the impact of COVID-19 on in person court proceedings. Admin. Ord., No. 2020-003-08, *In re Superior Court Courtroom Proceedings Held in a Virtual Courtroom* (Cowlitz County Super. Ct., Wash. July 27, 2020) (Admin. Ord., No. 2020-003-08), https://www.cowlitzsuperiorcourt.us/all-forms/318-administrative-order-no-2020-003-08/viewdocument/318 [https://perma.cc/5ACA-ZH4U]. The order considered the factors outlined in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) regarding closure of courtrooms. Admin. Ord., No. 2020-003-08, at 1-3. The order stated,

> The Court has weighed the importance of open proceedings against the present health risks and has determined that it is appropriate to defer to the guidance of the public health experts during this pandemic. The risk of further spread of COVID-19 outweighs the public's interest to be physically present in an open court at this time.

Admin. Ord., No. 2020-003-08, at 2-3.

However, the order expressly stated that all trial court hearings would be "live streamed on YouTube for the general public to observe" pursuant to *Bone-Club*. Admin. Ord., No. 2020-003-08, at 2. The order concluded, "This Order is narrowly tailored as to address present health risks. No less restrictive alternative is available that will sufficiently protect the health of all present." Admin. Ord., No. 2020-003-08, at 3. The order applied to all scheduled proceedings.[2] Admin. Ord., No. 2020-003-08, at 3.

[2] A February 2021 Supreme Court order stated that "applicable emergency orders may be deemed part of the record in affected cases for purposes of appeal without the need to file the orders in each case." Fifth Revised & Extended Ord. Regarding Ct. Operations, No. 25700-B-658, at 15, *In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency* (Wash. Feb. 19, 2021) (Fifth Emergency Ord.), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf [https://perma.cc/F2PD-LEXX].

Tester's trial took place in September 2022 in Cowlitz County Superior Court. At the beginning of trial, the trial court stated to the parties, "We are on the record and streaming. . . . We're still under a *Bone-Club* order, just for the record, so public will not be allowed in the courtroom, but we're streaming on YouTube." Rep. of Proc. (RP) at 15. The court later stated to the prospective jurors,

> I do want to also just state for the record that we have a *Bone-Club* order in effect, which means the courtroom is closed to the public. However, there's a camera in the middle of the aisle there that's taping everything from that little half wall this direction, and that's being broadcast over YouTube, which the general public can watch the proceedings in all of our courtrooms in that manner. So, that's still in place as part of some of our emergency orders. Because of that, I want you to be aware that everything that you respond to, any questions that you're asked is also going to be broadcast on YouTube.

RP at 20-21.

When court reconvened after voir dire, the trial court stated, "I have us streaming. Welcome back, everyone. We are back on the record and streaming." RP at 121.

Third Degree Theft Jury Instructions

The trial court gave to the jury four instructions regarding third degree theft. Instruction 21 contained the third degree theft statute: "A person commits the crime of theft in the third degree when he commits theft of property or services not exceeding $750 in value." Clerk's Papers (CP) at 35. Instruction 22 defined property: "Property means anything of value." CP at 36. And instruction 23 defined "wrongfully obtains": "Wrongfully obtains means to take wrongfully the property of another." CP at 37.

Instruction 24 was the to convict instruction for third degree theft:

> To convict the defendant of the crime of theft in the third degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 17, 2022, the defendant wrongfully obtained or exerted unauthorized control over property of another;

(2) That the defendant intended to deprive the other of the property; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 38.

Conviction and Sentencing

The jury found Tester guilty of both third degree theft and residential burglary. When scheduling a date for a sentencing hearing, Tester's counsel stated, "I think, all of his felony history is more than 15 years old. It didn't wash because of a couple of misdemeanors in the interim. . . . I think he still has four convictions from when he's a juvenile, on account of they simply didn't wash, Your Honor." RP at 306.

At the sentencing hearing, the State said, "[Tester] scores seven points based on his priors and the current offenses, that puts him at a range of 43 to 57 months in the Department of Corrections prison. The State is seeking 57 months." RP at 317. Tester responded that half his points "come from his juvenile record. . . . But for a couple of driving license suspended, [he] would have essentially zero points." RP at 318. Tester further stated, "*We don't contest the offender score*" and he "comes in here with a 43 to 57 month range . . . we think that 43 months of someone's life is more than sufficient for the loss of property in this case." RP at 319-20 (emphasis added).

The trial court found that Tester was indigent under RCW 10.101.010(3), but imposed a VPA of $500 as part of his sentence.

ANALYSIS

A. RIGHT TO A PUBLIC TRIAL

Tester argues that the trial court violated his constitutional right to a public trial when the court closed the courtroom to the public. We disagree.

1. Legal Principles

Criminal defendants have a right to a public trial under both the Sixth Amendment to the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. *State v. Whitlock*, 188 Wn.2d 511, 519, 396 P.3d 310 (2017). We review de novo the question of law whether a defendant's public trial right has been violated. *Id.* at 520.

We engage in a three-part inquiry to determine whether the public trial right has been violated: (1) whether the proceeding at issue implicated the public trial right, (2) if so, whether the proceeding was closed, and (3) if so, whether the closure was justified. *Id.* The burden is on the defendant regarding the first two questions and the burden is on the State regarding the third question. *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015).

To determine whether a closure was justified, courts must engage in a *Bone-Club* analysis. 128 Wn.2d at 258-59. Under *Bone-Club*, the trial court must perform a weighing test consisting of five criteria before closing the courtroom:

> "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.

> 5. The order must be no broader in its application or duration than necessary to serve its purpose."

Id. (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

2. Analysis

Here, we need not engage in the public trial right analysis because the Cowlitz County Superior Court's administrative order addressed the *Bone-Club* factors and concluded that closing the courtroom to spectators for all proceedings was appropriate. Admin. Ord., No. 2020-003-08, at 2.

Tester argues that closing the courtroom was not justified because the Cowlitz County Superior Court's *Bone-Club* order was over two years old at the time of his trial in September 2022 and the COVID-19 pandemic essentially was over by then. However, the Cowlitz County Superior Court order had not been rescinded at the time of trial. And in February 2021, the Supreme Court issued an order regarding the COVID-19 health emergency that stated that "courts should follow the most protective public health guidance applicable in their jurisdiction, and should continue using remote proceedings for public health and safety whenever appropriate." Fifth Emergency Ord., at 3. That order was not rescinded until October 31, 2022. Ord. re: Ct. Operations After October 31, 2022, No. 25700-B-697, *In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency* (Wash. Oct. 27, 2022), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Order%202570 0A697.pdf [https://perma.cc/HXR3-V2WG]. As a result, Tester cannot show that the standing *Bone-Club* order was stale.

We hold that Tester cannot establish that the trial court violated his public trial right.

B. SUFFICIENCY OF EVIDENCE – THIRD DEGREE THEFT CONVICTION

Tester argues that insufficient evidence supported the third degree theft conviction because the State failed to prove that the value of the stolen items did not exceed $750. We disagree.

1. Legal Principles

RCW 9A.56.050 states in part, "A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value." But the value of the alleged stolen object is not an essential element of third degree theft. *State v. Goss*, 186 Wn.2d 372, 380-81, 378 P.3d 154 (2016). It merely divides the lowest degree of theft from the next higher degree. *Id.* at 381.

A defendant may challenge the sufficiency of evidence supporting an element of a crime that was added under the law of the case doctrine. *State v. Anderson*, 198 Wn.2d 672, 685, 498 P.3d 903 (2021). The law of the case doctrine provides that jury instructions not objected to are treated as the properly applicable law. *Id.* at 678. Therefore, " 'the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction.' " *Id.* at 679 (quoting *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)).

The doctrine also may apply to a definitional instruction if it defines a matter that is relevant to an element listed in the to convict instruction. *Anderson*, 198 Wn.2d at 683-84. "But '[e]ach instruction must be evaluated in the context of the instructions as a whole.' " *State v. France*, 180 Wn.2d 809, 816, 329 P.3d 864 (2014) (quoting *State v. Benn*, 120 Wn.2d 631, 654–55, 845 P.2d 289 (1993)).

2. Analysis

Here, the instructions given were consistent with the third degree theft statute. The to-convict instruction required the jury to find that the State proved beyond a reasonable doubt the following three elements of third degree theft: "(1) That on or about May 17, 2022, the defendant wrongfully obtained or exerted unauthorized control over property of another; (2) That the defendant intended to deprive the other of the property; and (3) That this act occurred in the State of Washington." CP at 38.

Instruction 21 stated, "A person commits the crime of theft in the third degree when he commits theft of property or services not exceeding $750 in value." CP at 35. Tester argues that the "not exceeding $750 in value" language defined the term "property" in the to convict instruction and represented the law of the case. He claims that based on this instruction, the State had to prove that the items stolen did not exceed $750 in value. But evaluating the context of the instructions as a whole, property clearly was defined as "anything of value" in instruction 22. *see France*, 180 Wn.2d at 816.

Even if the "not exceeding $750 in value" language is considered definitional, the law of the case doctrine would only apply if the definitional instruction defined a matter that was relevant to an element of third degree theft listed in the to convict instruction. *See Anderson*, 198 Wn.2d at 683-84. And the value of the stolen property was not an essential element of third degree theft. *Goss*, 186 Wn.2d at 380-81.

Therefore, we hold that sufficient evidence supported Tester's third degree theft conviction.

C. PROOF OF CRIMINAL HISTORY

Tester argues that we should remand for resentencing because the State failed to prove by a preponderance of the evidence his criminal history and that his convictions did not wash out. The State argues that Tester waived the State's burden by affirmatively acknowledging his criminal history. We agree with the State.

1. Legal Principles

"In determining the proper offender score, the court may rely on information that is admitted, acknowledged, or proved in a trial or at sentencing." *State v. Cate*, 194 Wn.2d 909, 913-14, 453 P.3d 990 (2019). The State has the burden of proving the criminal history by a preponderance of the evidence. *Id.* at 912-13. A prosecutor's unsupported summary of criminal history does not satisfy the State's burden. *Id.* at 913.

In addition, a defendant's failure to object to the offender score calculation does not satisfy the State's burden. *Id.* The defendant must affirmatively acknowledge the criminal history to waive the State's burden. *Id.* " '[A] defendant does not "acknowledge" the State's position . . . absent an affirmative agreement beyond merely failing to object.' " *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 463-64, 28 P.3d 729 (2001) (quoting *State v. Ford*, 137 Wn.2d 472, 483, 973 P.2d 452 (1999)). And a defendant is not "deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation." *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009).

In addition, class B and C felony convictions other than sex offenses are not included in the offender score if the offender spent the necessary number of "consecutive years in the

community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(b)-(c).

We review de novo a trial court's calculation of an offender score. *State v. Griepsma*, 17 Wn. App. 2d 606, 619, 490 P.3d 239 (2021). However, we review for substantial evidence the existence of a prior conviction, which is a question of fact. *Id.*

2. Analysis

Here, the State calculated that Tester had an offender score of 7. Tester stated during sentencing, "We don't contest the offender score," and agreed that he came in with a 43 to 57 month standard range. RP at 319-20.

Tester went beyond merely failing to object and affirmatively acknowledged the offender score by stating that he did not contest the score. *See Connick*, 144 Wn.2d at 463-64. And he affirmatively stated that he had a 43 to 57 month range and recommended a sentence of 43 months, where the State recommended 57 months.

In addition, Tester affirmatively acknowledged that his previous felony convictions did not "wash because of a couple of misdemeanors in the interim" and that his four juvenile convictions "simply didn't wash." RP at 306.

Therefore, we hold that Tester affirmatively acknowledged his criminal history and waived the State's burden of proof.

D. CRIME VICTIM PENALTY ASSESSMENT

Tester argues, and the State concedes, that the $500 VPA should be stricken from his judgment and sentence. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16,

530 P.3d 1048 (2023). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.101.010(3). Although this amendment took effect after Tester's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16.

The trial court determined that Tester was indigent under RCW 10.101.010(3). Therefore, on remand the $500 VPA must be stricken from the judgment and sentence.

CONCLUSION

We affirm Tester's convictions and sentence, but we remand for the trial court to strike the VPA from the judgment and sentence.

MAXA, P.J.

We concur:

PRICE, J.

CHE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 57532-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Anthony Charles Carlow, DPA
[CarlowA@cowlitzwa.gov]
[appeals@co.cowlitz.wa.us]
Cowlitz County Prosecuting Attorney - Appellate Division

☒ petitioner

☐ Attorney for other party

TAYLOR HALVERSON, Legal Assistant
Washington Appellate Project

Date: May 23, 2024

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