Supreme Court No. 1041071
Court of Appeals No. 397653-III

THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON
Cross-Petitioner,

v.

KEVIN WADE ZIMMERMAN
Cross-Petitioner.

STATE'S PETITION FOR REVIEW & ANSWER TO PETITION

WILL M. FERGUSON
WSBA 40978
SPECIAL DEPUTY PROSECUTING ATTORNEY
STEVENS COUNTY
215 S. OAK STREET, ROOM 114
COLVILLE, WA 99114

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I. IDENTITY OF PETITIONER

Respondent State of Washington, by and through the Stevens County Prosecuting Attorney, requests review of portions of the Published Opinion of the Washington Court of Appeals, Division III, designated in Part III of this Petition.

II. STATEMENT OF THE CASE

Mr. Kevin Wade Zimmerman (hereinafter "Mr. Zimmerman") was convicted of four Major Violations of the Uniform Controlled Substances Act (hereinafter "UCSA") by a Stevens County jury. Clerk's Papers (hereinafter "CP") 151-57.

Mr. Zimmerman was charged with Violation of the Uniform Controlled Substances Act- Delivery of Heroin, Violation of the Uniform Controlled Substances Act- Delivery of Fentanyl, Violation of the Uniform Controlled Substances Act- Possession with Intent to Deliver Methamphetamine, and Violation of the Uniform Controlled Substances Act- Possession with Intent to Deliver Methamphetamine. CP 88-90. Each count

contained notice to Mr. Zimmerman that he was alleged to have committed an aggravator:

> And further do allege the crime was a major violation of the Uniform controlled substances act, so identified by consideration of the following: The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so, under the authority of RCW 9.94A.535(3)(e)(i).

CP 88-90.

The jury convicted Mr. Zimmerman on May 12, 2023. Report of Proceedings (hereinafter "RP") 582-84; CP 150-57. The jury found the aggravators that Mr. Zimmerman committed each crime as one of at least three separate transactions. CP 151, 153, 155, 157.

Prior to sentencing, the State submitted its Sentencing Memorandum, requesting an offender score that accounted for Mr. Zimmerman's seven prior felony convictions from the state of Oregon. CP 158-226, 231-47. The State identified each of the seven prior felony convictions, provided legal analysis, the charging information, the judgment and sentence, and the

Oregon statute in effect at the time that Mr. Zimmerman committed each felony. CP 161-63, 169-226. Mr. Zimmerman submitted his own sentencing memorandum, challenging neither inclusion of his Oregon felony convictions, nor the aggravators found by the jury. CP 227-30.

At sentencing, Mr. Zimmerman challenged only one of the Oregon felony convictions for delivery of a controlled substance. RP 596: 6-10. The Superior Court took a recess of approximately ten minutes to allow the State to retrieve the certified copies. RP 598-99. Upon resumption of the hearing, even though Mr. Zimmerman denied signing the judgment in a 2017 conviction for delivery of a controlled substance, the Superior Court found that the State had met its burden of proof in the only challenged prior Oregon felony conviction. RP 600: 6-24.

The Superior Court imposed an exceptional sentence on Mr. Zimmerman, due to the major violations aggravators. RP 605: 1-12; 609-10; CP 250.

III. DECISION OF THE COURT OF APPEALS

On March 28, 2025, Division III of the Court of Appeals, in a published opinion, reversed the jury's finding of the aggravators and the Superior Court's imposition of an exceptional sentence. The Court of Appeals then addressed legal and factual comparability of Mr. Zimmerman's foreign convictions, finding that four of the challenged five were factually comparable. Division III declared that the Robbery in the Third Degree was not factually comparable. Opinion at page 20. See Appendix A.

The State moved for reconsideration on the issues of the aggravator, Mr. Zimmerman's stipulations as to legal comparability, and the factual comparability of Mr. Zimmerman's Oregon conviction for Robbery in the Third Degree. Mr. Zimmerman did not seek reconsideration and instead filed his Petition for Review on April 28, 2025. The Court of Appeals denied the State's Motion for Reconsideration on April 29, 2025. See Appendix B.

IV. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review under WA RAP 13.4(b)(3) because Division III's fundamentally flawed analysis of foreign convictions is a significant question under the fifth and sixth amendments to the United States Constitution?

2. Should this Court accept review under WA RAP 13.4(b)(4) when Division III's Opinion broadly applies to sentencing of felony convictions in Washington, thereby impacting a significant portion of felons?

3. Should this Court accept review under WA RAP 13.4(b)(4) of Division III's Opinion regarding major violations of the Uniform Controlled Substances Act?

4. Should this Court deny Mr. Zimmerman's request for review under WA RAP 13.4 because Division III's Opinion on legal comparability was ultimately correct and because Division III's Opinion on factual comparability, except for the Oregon Robbery in the Third Degree conviction, was correct?

V. ARGUMENT

1. Division III's Opinion presents a significant question of law under the United States Constitution.

Division III's comparability analysis presents a significant question of law under the sixth amendment to the United States

Constitution. See WA RAP 13.4(b)(3). Division III's Opinion creates confusion in every setting in which a defendant stipulates to legal and/or factual comparability of foreign convictions.

Utilizing prior convictions to impose a lengthier prison term is a matter of Constitutional concern; primarily the 5th and 6th amendments to the United States Constitution. See Apprendi v. New Jersey, 530 U.S. 466, 466-67, 120 S.Ct. 2348 (2000); Descamps v. U.S., 570 U.S. 254, 133 S.Ct. 2276 (2013); State v. Olsen, 180 Wash.2d 468, 470, 325 P.3d 187 (2018). To be sure, a state may utilize prior convictions, but there are observed standards and procedures. Division III's Opinion takes those standards and procedures and muddies the water with uncertainty.

Division III noted Mr. Zimmerman's stipulation on legal comparability:

> During sentencing, Mr. Zimmerman's counsel alluded to the legal comparability of his Oregon convictions, stating:

> I reviewed the documents that were provided by the State. I reviewed the statutes in question. They appear to be synonymous with the Washington statutes. So, we could do a full comparability analysis here. But, based on my understanding of the law and my understanding of the case law, the comparability analysis will probably be met.
>
> RP at 594….On appeal, Mr. Zimmerman asserts that because defense counsel's statements fall short of any affirmative stipulation and that the sentencing court also conducted its own independent legal comparability analysis, we should review the sentencing court's analysis.

Opinion at page 7. Division III never answered the question of whether defense counsel's statement was an affirmative stipulation.

Instead, Division III launched into the two-step analysis. By doing so, Division III seems to say that if a sentencing court engages in any form of independent analysis, the defendant's stipulations may not be considered.

Second, Division III, at best, created a new rule and, at worst, created uncertainty that if a superior court conducts its own analysis, it may not, in any part, rely upon any assertion or agreement of the convicted person. Doing so then presents the superior court with a choice. Either it conducts its own analysis which can then be reviewed and questioned for completeness and correctness and rely not at all on the agreement of the convicted person or entirely refuse to analyze the foreign convictions and rely solely on the stipulations of the defendant.

The approach taken by Division III is flawed *ab initio*. Division III's approach leaves the question as to whether a sentencing court can rely exclusively on the defendant's stipulations or, if it does not, whether the sentencing court may rely in part on those stipulations to fill in the gaps. The approach taken by Division III invites confusion. Without a solid, easily understood approach, smaller issues become even more difficult to predict.

A bright-line rule is required to prevent further confusion.

2. <u>Division III's Opinion has a significant impact on sentencing of felony convictions throughout Washington.</u>

This Court should grant review of Division III's reversal of the aggravators and of the factual comparability of Mr. Zimmerman's Oregon conviction for Robbery in the Third Degree under WA RAP 13.4(b)(4). Division III's Opinion impacts felony sentencing and the application of the Sentencing Reform Act, in two ways.

First, Division III's Opinion impacts all felony VUCSA cases in which an aggravator is charged and found by a jury. Division III erroneously interpreted RCW 9.9A.535(3)(e)(i) and applied the incorrect standard to review when a jury makes a finding of one or more aggravators.

Division III misapprehended the standard of review for aggravators. Division III applied the following standard: "[w]e review de novo whether the record supports the reasons supplied by the sentencing court for sufficiency of the evidence and whether those reasons justify a sentence outside the standard

range." Opinion at page 21 (citing State v. Griffin, 173 Wn.2d 467, 474, 268 P.3d 924 (2012)).

However, State v. Griffin does not supply the full and appropriate standard of review. Griffin was the result of a bench trial, not a jury trial. State v. Griffin, 173 Wash.2d at 470.

This Court's full expression of the appropriate standard is found in State v. Ferguson. "Review of a court's imposition of an exceptional sentence is governed by RCW 9.94A.210(4). An appellate court determines the appropriateness of an exceptional sentence by answering three questions under RCW 9.94A.210(4): (1) whether the reasons given by the sentencing judge are supported by evidence in the record, under the clearly erroneous standard of review; (2) whether the reasons justify a departure from the standard range, under *de novo* review, as a matter of law; or (3) whether the sentence is clearly too excessive or too lenient, under the abuse of discretion standard of review." State v. Ferguson, 142 Wash.2d 631, 646, 15 P.3d 1271 (2001).

The standard from Ferguson is the full and appropriate standard that Division III should have applied to the Superior Court's application of the aggravators.

Second, Division III's Opinion impacts any convicted person who has foreign felony convictions. This Court should accept review of Division III's holding on factual comparability of Mr. Zimmerman's Oregon Robbery in the Third Degree conviction. The State demonstrated that Mr. Zimmerman's Oregon Robbery was factually comparable.

When a defendant is unwilling to stipulate to comparability, the State need only prove factual comparability by a preponderance of the evidence. State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007); see also Opinion at page 13. The State met that burden by supplying two documents: the Oregon Judgment and the Oregon charging Information.

Regarding factual comparability of the Oregon Robbery, Division III concluded:

The fifth Oregon conviction is third degree robbery

> committed on June 14, 2013. Mr. Zimmerman pleaded guilty. The information stated that Mr. Zimmerman "did unlawfully and in the course of attempting to commit theft, use or threaten the immediate use of physical force on employee(s) of Walmart, with the intent of preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking." CP at 206. **The Oregon information, however, fails to state or address whether Mr. Zimmerman was in the presence of any Walmart employees**. Although that fact seems very likely, even where "mathematical deduction or speculation" could support factual comparability, facts not demonstrated in the indictment or information do not serve to establish factual comparability. *Crawford*, 150 Wn. App. at 797-98.

Opinion at page 19 (emphasis added). The conclusion runs counter to a plain, common sense reading of the Oregon charging Information and Judgment.

The State of Oregon charged Mr. Zimmerman with one count of Robbery in the Third Degree and one count of Theft in the Third Degree. CP 206. As part of the guilty plea, the State of Oregon dismissed the Theft in the Third Degree charge. CP 204. Mr. Zimmerman was not charged with attempted theft from

Walmart; he was charged with accomplished theft from Walmart.

More importantly, Division III concluded that the Information failed to state or address whether Mr. Zimmerman was in the presence of any Walmart employees. However, Oregon's allegation was: "…[Mr. Zimmerman did] use or threaten the immediate use of physical force on employee(s) of Walmart…." CP 206. Mr. Zimmerman was alleged to have—and plead guilty to—threatening employees of Walmart, while engaged in theft. CP 206, 203. That conclusion requires no "mathematical deduction or speculation" because **the presence of a Walmart employee is asserted in the Information**.

The application of the aggravators and the factual comparability analysis portions of Division III's Opinion have broad implications for felony sentencing in Washington. This Court should accept review under WA RAP 13.4(b)(4).

3. Mr. Zimmerman's Petition should be denied.

Mr. Zimmerman is correct about one thing: the Court of Appeals' Published Opinion sows confusion. Petition for Review at page 12. But Mr. Zimmerman's Petition should be denied because the methodology used by Division III on factual comparability was correct.

Division III was correct in utilizing the charging information in foreign convictions as the basis for factual comparability in cases where a defendant pleads guilty. Except as argued *supra*, Division III's analysis on factual comparability was correct. Mr. Zimmerman asserts that the sentencing court may not rely on the Oregon charging documents as a source of supporting facts. Petition for Review, pages 7-8. Mr. Zimmerman is incorrect.

Despite what Mr. Zimmerman contends, there is no bright-line rule that says a sentencing court may never rely upon a foreign charging document as a basis for factual analysis when the offender pled guilty to that foreign charge. Mr. Zimmerman

wrongly contends that Division III erred by finding supporting facts for comparability in the Oregon documents presented by the State at sentencing. Mr. Zimmerman claims that the sentencing court engaged in the type of fact finding prohibited by Apprendi. Petition for Review at page 11.

Mr. Zimmerman turns to State v. Olsen, arguing that this Court's interpretation of Apprendi forecloses the use of the Oregon documents, despite Mr. Zimmerman's guilty plea in those foreign cases. Petition for Review at page 9.

State v. Olsen merely squared Lavery, Apprendi, and Descamps: "This federal framework is consistent with the *Lavery* framework, which limits our consideration of facts that might have supported a prior conviction to only those facts that were clearly charged and then clearly proved beyond a reasonable doubt to a jury **or admitted by the defendant**." State v. Olsen, 180 Wash.2d 468, 476, 325 P.3d 187 (2014) (emphasis added). "We, therefore, move on to the factual prong [if the legal prong is not satisfied], under which we determine whether the

defendant's conduct would have violated the comparable Washington statute. We may consider only facts that were admitted, stipulated to, or proved beyond a reasonable doubt." Id. at 478 (internal citations omitted).

Mr. Zimmerman pled guilty to several offenses in Oregon. By doing so, he admitted the facts alleged by the State of Oregon. For example, Mr. Zimmerman claims he "did **not** admit" to the charging language in his Oregon burglary conviction. Petition for Review at page 5 (emphasis in original). But Mr. Zimmerman **did** admit the charging language by pleading "no contest".

Mr. Zimmerman further claims that Division III's factual comparability analysis flies in the face of the following published decisions of other Divisions of the Court of Appeals: State v. Davis, State v. Thomas, State v. Ortega, and State v. Bunting. Petition for Review at pages 7-8; but see also In re Pers. Restraint Petition of Crawford, 150 Wash.App. 787, 797–98, 209 P.3d 507 (Div. II, 2009) (looking to the indictment and information for

factual support when a defendant pled guilty to a felony in Kentucky). Mr. Zimmerman is incorrect.

State v. Davis and State v. Thomas do not prohibit reference to the charging document of the foreign offense, so long as the sentencing court stays within the bounds of facts relating to the elements of the crime. See State v. Davis, 3 Wash.App.2d 763, 782, 418 P.3d 199 (Div. I, 2018); State v. Thomas, 135 Wash.App. 474, 487, 144 P.3d 1178 (Div. I, 2006).

Next, State v. Ortega did not prohibit review of charging information to establish the underlying facts of a foreign conviction. Where the State failed in Ortega was in utilizing the defendant's Texas conviction for an exceptional sentence when the jury in the Texas case did not find that Mr. Ortega victimized a 10-year-old. State v. Ortega, 120 Wash.App. 165, 174, 84 P.3d 935 (Div. III, 2004), review granted in part, cause remanded, 154 Wash.2d 1031, 119 P.3d 852 (2005). "When the jury is not charged with the duty to determine that certain facts exist beyond a reasonable doubt, those facts cannot be used to increase the

penalty for the related crime beyond the statutory maximum." Id. at 172 (citing Apprendi, 530 U.S. at 490). "Following the same reasoning, we conclude underlying facts that were not found by the trier of fact beyond a reasonable doubt may not be used to increase the penalty of a subsequent conviction beyond the statutory maximum." Id. Ortega therefore stands for the principle that if a case is tried, the only established facts are those found by the jury.

Finally, in State v. Bunting, the defendant pled guilty to an indictment for armed robbery. Division I of the Court of Appeals found that the only proper source for factual comparability was the indictment:

> Because Bunting pleaded guilty to armed robbery, the only acts he conceded were the elements of the crime stated in the indictment. The facts contained in the "Official Statement of Facts" and the complaint were not proved in a trial; therefore, we cannot consider them. Only the indictment is relevant here. The indictment does not allege intent to deprive as an element; nor does it clearly indicate that this element was proved or conceded by Bunting's guilty plea.

State v. Bunting, 115 Wash.App. 135, 142, 61 P.3d 375 (Div. I, 2003).

Mr. Zimmerman claims that the Published Opinion is in direct conflict with other opinions of the Court of Appeals but, when given more than a cursory glance, those cases are not in conflict.

VI. CONCLUSION

This Court should grant the State's Petition and deny Mr. Zimmerman's Petition.

I certify that the number of words in this Document, excluding this Certificate and other portions of this Document exempt from the word count, according to Microsoft Word, is 2,949 and is therefore within the word count permitted by WA RAP 18.17.

RESPECTFULLY SUBMITTED 28th day of May, 2025.

_____

Will Ferguson, WSBA 40978
Special Deputy Prosecuting Attorney
Office of the Stevens County Prosecuting Attorney
Attorney for Cross-Petitioner

CERTIFICATE OF SERVICE

I certify that on the 28th day of May, 2025, I caused a copy of the foregoing document to be served via e-mail upon uploading the same to the Washington Courts web portal, to the following Parties or their attorney(s):

Andrea Burkhart
Two Arrows, PLLC
Attorney for Petitioner/Appellant Zimmerman
Andrea@2arrows.net

Will Ferguson, 40978

APPENDIX A

FILED
MARCH 28, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. KEVIN WADE ZIMMERMAN, Appellant.	)))))))))	No. 39765-3-III PUBLISHED OPINION

HAZEL, J.P.T.[†] — A jury found Kevin Zimmerman guilty of two counts of delivering a controlled substance and two counts of possession with intent to deliver. Each count included findings for the aggravating factor that the current offense involved "at least three separate transactions in which controlled substances were sold" and each of those four counts referred to a single transaction. Clerk's Papers (CP) at 151, 153, 155, 157. Mr. Zimmerman's criminal history included five Oregon felony convictions that the sentencing court counted toward the offender score calculation.

On appeal, Mr. Zimmerman argues (1) his five Oregon convictions are not comparable to Washington statutes and should not have been included in his offender score, (2) substantial evidence does not support the aggravating circumstance of a major

[†] Tony Hazel, an active judge of a court of general jurisdiction, is serving as a judge pro tempore of this court pursuant to RCW 2.06.150(1).

violation of the Uniform Controlled Substances Act (UCSA), chapter 69.50 RCW, and (3) his legal financial obligations should be struck. For the most part, we disagree that Mr. Zimmerman's Oregon convictions are not comparable to Washington statutes but remand because substantial evidence fails to support the aggravating circumstance of a major violation of the UCSA. Mr. Zimmerman raises several other issues for review in a statement of additional grounds for review. We find none persuasive. We remand for a full resentencing consistent with this opinion and to strike the VPA and DNA collection fees.

FACTS

Mr. Zimmerman was found guilty by a jury of two counts of delivering a controlled substance and two counts of possession with intent to deliver, including four findings from the jury that each count was "one of at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." CP at 151, 153, 155, 157. Each count individually referred to a single transaction. The State maintained that each separate surrounding count within the information served to establish the "three separate transactions" for each count despite the aggravator statute's express reference to "[t]he current offense" involving multiple (at least three) controlled substance transactions based on RCW 9.94A.535(3)(e)(i).

Mr. Zimmerman's trial was continued repeatedly. Some of these continuances were with his consent. Some were because Mr. Zimmerman failed to appear. A number were granted so that defense counsel could locate and interview witnesses, among other discovery issues. One of the continuances was granted because of Mr. Zimmerman's counsel's illness.

At sentencing, the trial court determined that Mr. Zimmerman's offender score should include criminal history from five Oregon felonies, including two first degree theft convictions, one second degree burglary conviction, one aggravated first degree theft conviction, and one third degree robbery conviction. Mr. Zimmerman's counsel stated the following during sentencing concerning the foreign convictions and when specifically addressing the topic of legal comparability:

> I reviewed the documents that were provided by the State. I reviewed the statutes in question. They appear to be synonymous with the Washington statutes. So, we could do a full comparability analysis here. But, based on my understanding of the law and my understanding of the case law, the comparability analysis will probably be met.

2 Rep. of Proc. (May 30, 2023) (RP) at 594. There is no indication from the record that the sentencing court relied on defense counsel's comments. Instead, the sentencing court conducted its own legal comparability analysis, ultimately finding that "Washington's statutes and Oregon's statutes . . . pretty much, if not almost identically, mirror each other." *Id*. at 595-96.

The sentencing court also found that Mr. Zimmerman was indigent by checking the box contained within the judgment and sentence. It nevertheless imposed a $500 victim penalty assessment (VPA) and a $100 DNA collection fee.

ANALYSIS

Prior convictions

A defendant's prior convictions may be used to determine their offender score. *State v. Arndt*, 179 Wn. App. 373, 377, 320 P.3d 104 (2014). Comparable out-of-state or foreign felony convictions should also be included in calculating the score. RCW 9.94A.525(3). We review de novo the trial court's offender score calculation. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

When deciding whether a foreign or out-of-state conviction should be included in an offender score, the sentencing court must undertake a potentially two-part comparability analysis. Whenever performing a comparability analysis for out-of-state or foreign convictions, the sentencing court first compares the elements of the crimes to determine if they are legally comparable and thus includable. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The appropriate analytical exercise to ascertain legal comparability requires a sentencing court to directly compare the foreign statutory criminal elements applicable at the time of the foreign offense with the most similarly titled or potentially comparable Washington felony criminal elements in effect

at the time of the offense. *See id*. If the elements are the same or substantially similar, then the out-of-state or foreign crime and the Washington crime are deemed legally comparable, and the sentencing court should, therefore, include that out-of-state conviction in the defendant's offender score calculation without any further comparability analysis necessary. *See id.*

However, where a Washington offense is narrower or otherwise contains elements not found in the out-of-state offense, the two statutes are not substantially similar, and thus, the foreign crime is not legally comparable as a matter of law. *See id*. Whenever legal comparability is not established, additional analysis will then be required to determine whether the out-of-state crime is factually comparable. *See In re Pers. Restraint of Crawford*, 150 Wn. App. 787, 797, 209 P.3d 507 (2009). Thus, to include any out-of-state or foreign convictions toward a defendant's offender score, a comparability analysis will potentially involve a two-step analytical process (i.e., STEP ONE: determine legal comparability; STEP TWO: only if needed, determine factual comparability).

If legal comparability falls short, the sentencing court must then look at the underlying criminal conduct tied to the conviction by a careful examination of the foreign conviction record as laid out in the indictment or information to determine whether that same conduct (if deemed established) would have violated any Washington felony

criminal statute in effect at the time of the offense. *Id*. When comparing the defendant's conduct, the court must examine the Washington statute in effect when the foreign crime was committed to determine comparability, as this ensures that the comparison is accurate and relevant to the legal standards applicable at the time of the offense. *Lavery*, 154 Wn.2d at 255 (citing *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998)). In short, the analytical exercise employed to ascertain factual comparability requires a comparison of the defendant's conduct to any comparable Washington criminal statute. Special attention is necessary to ensure that the foreign record sufficiently and lawfully establishes the conduct. If such conduct is established by the foreign record and that same conduct would also violate a Washington felony criminal statute, the foreign conviction shall be countable toward a defendant's offender score. *Id*.

Alternatively, if a defendant affirmatively stipulates that an out-of-state conviction is legally comparable, that conviction is appropriately included in the offender score without requiring a sentencing court to analyze further. *In re Pers. Restraint of Canha*, 189 Wn.2d 359, 366, 402 P.3d 266 (2017). However, a defendant, either orally or in writing, must affirmatively acknowledge both the existence of the foreign conviction(s) and make an affirmative concession that legal comparability is met, established, or otherwise agreed to by the defense. In the absence of such an affirmative stipulation, the sentencing court must then undertake the potential two-step comparability analysis to

assess whether any out-of-state conviction(s) will be included in the offender score; failure of a defendant to object to inclusion of a conviction is not enough. *State v. Ross*, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004); *State v. Zamudio*, 192 Wn. App. 503, 508, 368 P.3d 222 (2016). Moreover, defense statements that fall short of an affirmative stipulation require the sentencing court to perform the potential two-step comparability analysis. *See Zamudio*, 192 Wn. App. at 507-09.

During sentencing, Mr. Zimmerman's counsel alluded to the legal comparability of his Oregon convictions, stating:

> I reviewed the documents that were provided by the State. I reviewed the statutes in question. They appear to be synonymous with the Washington statutes. So, we could do a full comparability analysis here. But, based on my understanding of the law and my understanding of the case law, the comparability analysis will probably be met.

RP at 594. Whenever a sentence is based on an incorrect offender score, such error is considered a fundamental defect that inherently results in a miscarriage of justice, warranting resentencing based on the correct offender score. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). On appeal, Mr. Zimmerman asserts that because defense counsel's statements fall short of any affirmative stipulation and that the sentencing court also conducted its own independent legal comparability analysis, we should review the sentencing court's analysis.

Legal comparability (STEP ONE of comparability analysis)

The sentencing court found through its own analysis that Oregon's first degree theft statute was legally comparable to Washington's second degree theft statute and that Oregon's aggravated first degree theft statute was also legally comparable to Washington's first degree theft statute. Oregon's first degree theft statute, OR. REV. STAT. § 164.055, and aggravated first degree theft statute, OR. REV. STAT. § 164.057, both turn on committing "theft" as described in OR. REV. STAT. § 164.015. Washington's first and second degree theft statutes are similarly predicated on a person committing "theft," described in RCW 9A.56.020. RCW 9A.56.030 (first degree theft); RCW 9A.56.040 (second degree theft).

One way to commit theft in Oregon is via theft of lost or mislaid property. OR. REV. STAT. § 164.015(2). This version of theft requires that a person "knows *or has good reason to know*" that property was lost or mislaid to commit theft. OR. REV. STAT. § 164.065 (emphasis added). In Washington, however, theft of lost or mislaid property only occurs when "the actor *knows* [the property] to have been lost or mislaid." RCW 9A.56.010(2) (emphasis added). Oregon's theft by receiving statute, OR. REV. STAT. § 164.095(1), similarly applies when one "receives, retains, conceals or disposes of property of another knowing *or having good reason to know* that the property was the subject of theft." (Emphasis added.) Washington, meanwhile, requires one to

"*know*[ ] that [stolen property] has been stolen." RCW 9A.56.140(1) (emphasis added). The broader mental state requirements under the Oregon statute(s) for both crimes show that one can commit theft, and thus first degree and aggravated first degree theft, in Oregon in ways that would not be completed crimes under Washington's statutory counterparts. Because of differing crime elements, the Oregon theft statutes are not legally comparable to Washington's felony theft statutes. *Cf. Lavery*, 154 Wn.2d at 255-56 (holding that a federal bank robbery statute was not legally comparable to Washington's second degree robbery statute because the federal statute had a broader intent requirement). Because legal comparability is lacking, an additional factual comparability analysis will be required to determine if these two Oregon convictions for first degree and aggravated first degree theft will be includable toward the offender score.

The sentencing court found that Oregon's second degree burglary statute was legally comparable to Washington's second degree burglary statute. Oregon allows a conviction for second degree burglary if the person "enters or remains unlawfully in a building with intent to commit a crime therein." OR. REV. STAT. § 164.215(1). For the purposes of burglary in Oregon, the statute's inclusion of the word "building" also expressly encompasses "any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein." OR. REV. STAT. § 164.205(1).

On the other hand, Washington finds a person guilty of second degree burglary only "if, with intent to commit a crime *against a person or property therein*, he or she enters or remains unlawfully in a building *other than a vehicle or a dwelling*." RCW 9A.52.030(1) (emphasis added). Washington's definition of second degree burglary is thus narrower concerning the intent (mens rea) and provides more restrictive structural criteria for the term "building." By similar logic, Oregon's statute is broader than Washington's by including more varied structural criteria for the term "building" and additional intent criteria not applicable to Washington. The statutes are, therefore, not legally comparable as there could be ways to violate or complete Oregon's crime without necessarily completing the comparable crime in Washington. Moreover, the two statutes have different elements and are not legally comparable. Additional analysis for factual comparability will be necessary to determine if the second degree burglary conviction from Oregon will appropriately count toward the offender score.

The sentencing court found that Oregon's third degree robbery statute was legally comparable to Washington's second degree robbery statute. A person commits third degree robbery in Oregon if

> in the course of committing or attempting to commit theft or unauthorized use of a vehicle . . . the person uses or threatens the immediate use of physical force upon another person with the intent of:
>
> (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

> (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

OR. REV. STAT. § 164.395(1). Meanwhile, Washington defines second degree robbery as "commit[ting] robbery." RCW 9A.56.210(1). In Washington,

> [a] person commits robbery when he or she unlawfully takes personal property from the person of another or in her or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone.

RCW 9A.56.190.

Washington's and Oregon's statutes are different in three ways: (1) Washington requires taking personal property from someone's person or presence, (2) the Oregon statute allows for conviction when force is used to compel someone to aid in the taking, whereas Washington's definition does not include such language, and (3) Oregon allows for conviction if the theft was merely attempted, which Washington does not.

Thus, Oregon's third degree robbery and Washington's second degree robbery statutes are not legally comparable, as the elements differ. None of Mr. Zimmerman's five Oregon convictions are legally comparable and therefore additional analysis to ascertain factual comparability is required.

Factual comparability (STEP TWO if needed: use when legal comparability is in doubt)

For purposes of factual comparability analysis, the court may only consider "facts that were admitted, stipulated to, or proved" beyond a reasonable doubt. *Canha*, 189 Wn.2d at 367. Thus, the sentencing court may consider facts conceded by the defendant in a prior guilty plea. *Arndt*, 179 Wn. App. at 381. A guilty plea, however, only concedes those facts that relate to the *essential and material elements* of the crime as stated in the indictment. *State v. Bunting*, 115 Wn. App. 135, 142, 61 P.3d 375 (2003). Therefore, the appropriate analytical tool employed when undertaking a factual comparability analysis is to determine whether a defendant's conduct, underlying a foreign conviction, has been sufficiently established by the foreign record and, only if lawfully established, whether such conduct would violate any comparable felony criminal statute in effect in Washington at that time of the offense. *Lavery*, 154 Wn.2d at 255.

> "[W]hile it may be necessary to look into the record of a foreign conviction to determine its [factual] comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial."

Id. (quoting *Morley*, 134 Wn.2d at 606). "Where the foreign statute is broader than Washington's, that [factual comparability] examination may not be possible because

there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense." *Id.* at 257.

Additionally, to include a foreign conviction in a defendant's offender score calculation, the existence of any conviction and its comparability to a Washington felony must be proved by the State by a preponderance of the evidence or on a more likely than not basis. *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007).

The first Oregon conviction was for first degree theft committed on June 6, 2012. Mr. Zimmerman pleaded guilty. The Oregon information stated that Mr. Zimmerman "did unlawfully and knowingly commit theft of jewelry and various personal property . . . of a total value of $1,000 or greater." CP at 173. In this case, despite the different intent requirements preventing legal comparability between the Oregon and Washington felony theft statutes, examination of the foreign charging language corresponding with a subsequent guilty plea, establishes that Mr. Zimmerman would have *knowingly* committed the second degree theft under Washington's felony theft statute, as both Washington's specific intent requirement and all other essential elements under Washington's second degree theft statute are satisfied by Oregon's precise charging language. In both Washington and Oregon, the effect of a guilty plea admits the essential and material elements of the crime. *Blain v. Cain*, 327 Or. App. 584, 590, 536 P.3d 623 (2023), *review denied*, 32 Or. 22, 543 P.3d 1238 (2024); *see also Bunting*, 115 Wn. App.

at 142. Although the Oregon charging information does not specify how Mr. Zimmerman committed theft, it nevertheless provides sufficient factual context to establish the defendant's intent, conduct, and all other essential elements of the Washington felony crime of second degree theft.

If a foreign charging document (indictment or information) alleges facts or circumstances that go beyond the essential elements of the foreign criminal statute, such facts are not deemed to be established via a guilty plea for purposes of conducting a factual comparability analysis. However, when this court examines only the essential elements of Oregon's criminal first degree theft elements, as mirrored by the Oregon charging information, the conduct matches and corresponds precisely to the elements of second degree theft in Washington and therefore factual comparability is readily established by a preponderance of the evidence standard. Therefore, the above foreign conviction for first degree theft should be included in the defendant's offender score calculation.

The second Oregon conviction is a different first degree theft conviction charged with a different victim also committed on June 6, 2012. Mr. Zimmerman similarly pleaded guilty. The Oregon information stated that Mr. Zimmerman "did unlawfully and knowingly commit theft of jewelry and various personal property, of a total value of $10,000 or more." CP at 185. Analysis of Oregon's charging language, when compared

to only the essential elements of both the Oregon and Washington statutes, similarly resolves the intent issue between the statutes and specifically establishes the factual comparability to Washington's second degree theft statute(s). RCW 9A.56.040. First, Oregon's charging language does not exceed the material and essential elements of the Oregon first degree theft statute. In addition, when examining the conduct established only by the essential elements of the foreign crime flowing from a guilty plea, all essential elements of Washington's second degree theft statute are precisely satisfied. Accordingly, this conviction for first degree theft from Oregon should be included or otherwise count toward the offender score.

The third Oregon conviction is second degree burglary committed on June 6, 2012. Mr. Zimmerman pleaded no-contest to this charge. A plea of no-contest under Oregon law may only serve as an admission that the prosecution had sufficient evidence to convict and does not necessarily serve to establish the underlying facts of conviction in all subsequent proceedings. *State v. Jackson*, 319 Or. App. 789, 791, 511 P.3d 82 (2022). However, even a plea of no-contest under both the laws of Washington and Oregon satisfies the definition of "conviction." *See generally id*.; RCW 9.94A.030(9); RCW 9.94A.525(3); OR. REV. STAT. § 135.345; *State v. Roberts*, 255 Or. App. 132, 136, 296 P.3d 603 (2013). Moreover, nothing under either Oregon or

Washington law prohibits the use of no-contest or similar type guilty pleas (i.e., *Alford*,[1] nolo contendere, or *Barr*[2] style pleas) from inclusion in criminal history for a subsequent sentencing hearing. *See Roberts*, 255 Or. App. at 136; *see also State v. Heath*, 168 Wn. App. 894, 899-901, 279 P.3d 458 (2012). Therefore, a plea of no-contest does not generally impact or affect comparability analysis within the narrow context of criminal history scoring.

The relevant Oregon charging information stated that Mr. Zimmerman "did unlawfully and knowingly enter a dwelling . . . with the intent to commit the crime of theft therein." CP at 191. Oregon's second degree burglary would not be factually comparable to second degree burglary in Washington, which requires that the person "enters or remains unlawfully in a building *other than a vehicle or a dwelling*." RCW 9A.52.030(1) (emphasis added). It would, however, be factually comparable to the Washington felony of residential burglary because "[a] person is guilty [in Washington] of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). The Oregon charging information related to this count, and as established by a no-contest plea, sufficiently establishes that Mr. Zimmerman's conduct

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 267, 684 P.2d 712 (1984).

corresponded precisely to Washington's residential burglary elements because he did "knowingly enter a dwelling . . . with the intent to commit the crime of theft therein." CP at 191. Thus, Oregon's second degree burglary conviction is factually equivalent to residential burglary in Washington. This conviction should, therefore, count toward Mr. Zimmerman's offender score.

It is important to note that a no-contest plea or similar style of guilty plea usually does not serve to establish the factual or circumstantial context surrounding the conviction in any other evidentiary proceeding outside of this narrow context of includability for purposes of offender score criminal history calculations. For example, ER 803(22) establishes that a judgment from a previous conviction is not a recognized exception to hearsay if *it flows from a plea of nolo contendere*. However, as previously indicated, because Oregon's sentencing statute expressly defines the term "conviction(s)" to include pleas of no-contest and Washington case law similarly establishes that either a no-contest or *Alford*-style guilty plea should be included in offender score calculations, such a narrow purpose is consistent with the legislative intentions and directives of both states. RCW 9.94A.030(9); RCW 9.94A.525(3); OR. Rev. Stat. § 135.345. To rule otherwise would go against the Washington Legislature's express desire for out-of-state comparable convictions to be considered under Washington's Sentencing Reform Act of 1981, chapter 9.94A RCW. *See* RCW 9.94A.525(3); *see also*

Heath, 168 Wn. App. at 899-901. Constitutional due process is nevertheless preserved within the narrow context of offender score criminal history because any plea of no-contest or similar *Alford*-style plea would necessarily include procedural requirements and safeguards that ensure any defendant would be advised of the essential elements of the offense pleaded to and a court finding that a factual basis exists to accept such a plea. These procedural safeguards are in place at the time of any plea, regardless of the style of a guilty plea. *See State v. Osborne*, 35 Wn. App. 751, 757, 669 P.2d 905 (1983), *aff'd*, 102 Wn.2d 87, 684 P.2d 683 (1984); *Henderson v. Morgan*, 426 U.S. 637, 647, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). Therefore, pleas of nolo contendere, *Alford*-style pleas, or similarly styled guilty pleas do not usually affect or implicate the legal or factual comparability analysis unless the foreign jurisdiction of origin prohibits those styles of convictions from inclusion in criminal history. Oregon has no such prohibition, so Mr. Zimmerman's no-contest guilty plea should be included within his offender score calculation after applying the same factual comparability analysis.

The fourth Oregon conviction is aggravated first degree theft committed on June 6, 2012, but with a different victim. Mr. Zimmerman pleaded guilty to the charge. The information stated that Mr. Zimmerman "did unlawfully and knowingly commit theft of jewelry, of a total value of $10,000 or more." CP at 199. The foreign record similarly resolves the Oregon and Washington intent discrepancy issue because Mr. Zimmerman

pleaded guilty to "knowingly" committing theft. Additionally, the $10,000 total value is higher than the threshold value of $5,000 contained in Washington's first degree theft statute. RCW 9A.56.030(1)(a). Mr. Zimmerman's aggravated first degree theft conviction is factually comparable to first degree theft in Washington and such factual comparability is established via the essential elements of the Oregon crime, which are deemed admitted flowing from the effect of a guilty plea. Since the conduct established by the guilty plea would violate Washington's first degree theft elements if such conduct had been perpetrated in Washington, the conviction is appropriately included within Mr. Zimmerman's offender score.

The fifth Oregon conviction is third degree robbery committed on June 14, 2013. Mr. Zimmerman pleaded guilty. The information stated that Mr. Zimmerman "did unlawfully and in the course of attempting to commit theft, use or threaten the immediate use of physical force on employee(s) of Walmart, with the intent of preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking." CP at 206. The Oregon information, however, fails to state or address whether Mr. Zimmerman was in the presence of any Walmart employees. Although that fact seems very likely, even where "mathematical deduction or speculation" could support factual comparability, facts not demonstrated in the indictment or information do not serve to establish factual comparability. *Crawford*, 150 Wn. App. at 797-98.

Therefore, the foreign record does not establish the factual comparability of the Oregon third degree robbery conviction because an essential criminal element necessary for Washington's robbery statute is missing.

We conclude that all of Mr. Zimmerman's Oregon convictions except for his robbery conviction are factually comparable. Therefore, four of Mr. Zimmerman's Oregon convictions should count toward his offender score but the robbery conviction should not.

Aggravated sentence

Mr. Zimmerman asserts that the trial court erred in its reasons for imposing an aggravated sentence. The trial court identified three reasons to impose an exceptional sentence: the multiple drug transaction aggravator under RCW 9.94A.535(3)(e)(i) (relating to major violations of the Uniform Controlled Substances Act), the "overwhelming evidence presented at trial," and the recency of Mr. Zimmerman's previous convictions. CP at 285.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "'A justification for the rule is that it tends to bring sentences into conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection [before] the [sentencing] court.'"

Ross, 152 Wn.2d at 229 (quoting *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)). Reversing an exceptional sentence requires us to find "[e]ither that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense." RCW 9.94A.585(4)(a). We review de novo whether the record supports the reasons supplied by the sentencing court for sufficiency of the evidence and whether those reasons justify a sentence outside the standard range. *State v. Griffin*, 173 Wn.2d 467, 474, 268 P.3d 924 (2012).

We recently decided the same issue posed by the multiple drug transaction aggravator in *State v. Haas*, 33 Wn. App. 2d 344, 561 P.3d 299 (2024). In *Haas*, we held that multiple drug transactions must be charged in the same count for the multiple transaction aggravator to apply. *Id.*at 349-50. Mr. Zimmerman's drug transactions were charged in separate counts. Under our recent holding in *Haas*, the prosecutor erred by charging the aggravator for each separate count and by relying solely on the separately charged surrounding counts to establish the multiple controlled substances transactions. Accordingly, the sentencing court understandably erred in relying on the multiple transaction aggravator for purposes of imposing an exceptional sentence.

Similarly, "overwhelming evidence presented at trial" is not an enumerated statutory factor supporting an exceptional sentence, as the quantity or quality of evidence

does not serve the purpose of the exceptional sentence statute. "Exceptional sentences are intended to impose additional punishment where the particular offense at issue causes more damage than that contemplated by the statute defining the offense." *State v. Davis*, 182 Wn.2d 222, 229, 340 P.3d 820 (2014). The amount or quality of evidence supporting a conviction is an entirely independent inquiry from the severity of the underlying crime. Accordingly, the amount or quality of evidence may not be factors used or considered to justify the imposition of an exceptional sentence. *Id.*

Rapid recidivism may be used to support an exceptional sentence. RCW 9.94A.535(3)(t). What constitutes rapid recidivism depends on the circumstances of each case. *See State v. Combs*, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010) (holding that, although six months might be a short period of time for the rapid recidivism aggravator in some circumstances, it was not a short period of time in the context of an eluding offense after a prison sentence for drug possession). The record does not make it clear when Mr. Zimmerman was last released from incarceration nor did the jury ever find that the rapid recidivism aggravator applied to Mr. Zimmerman's trial or sentence. Any fact considered by a sentencing court for purposes of increasing the penalty beyond the statutory maximum must be proved beyond a reasonable doubt as specifically found by a jury and as codified by RCW 9.94A.535. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The record

thus does not support imposing an exceptional sentence because of rapid recidivism due to the lack of a jury finding.

The trial court erred in aggravating Mr. Zimmerman's sentence on the three grounds described above.

Legal financial obligations

The trial court imposed a VPA and a DNA collection fee on Mr. Zimmerman. The legislature subsequently amended the relevant statutes to prevent those fees from applying to indigent defendants. LAWS OF 2023, ch. 449, §§ 1, 4. Both changes apply prospectively. *Id*. These changes also apply to cases pending on direct review. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

Although the State encourages us to remand this issue to the superior court to make a factual inquiry into Mr. Zimmerman's indigency, we do not believe it is necessary here. The record contains sufficient evidence of Mr. Zimmerman's indigency. We see no reason to disturb the trial court's finding on the issue.

This case is remanded to strike Mr. Zimmerman's VPA and DNA collection fee.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

Add'l Ground 1: Speedy trial rights

Mr. Zimmerman claims that under the Fourteenth Amendment to the United States Constitution his due process rights were violated because at "no time did I sign my rights

away for a fast and speedy trial." Add'l Ground 1. Mr. Zimmerman also alleges that his attorney moved for continuances in his case over Mr. Zimmerman's multiple objections.

A defendant who is not detained in jail shall be brought to trial within 90 days unless a continuance is granted, and a jailed defendant shall be brought to trial in 60 days unless a continuance is granted. CrR 3.3(b). Whether to grant the continuance of a trial rests within a court's sound discretion, and we will not disturb it on appeal unless the court "fail[s] to exercise its discretion or manifestly abuse[s] its discretion." *State v. Miles*, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970). Granting defense counsel's request for a continuance over the defendant's objection is not necessarily an abuse of discretion. *State v. Saunders*, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009). "Even when the defendant objects, the granting of a continuance to allow counsel to adequately prepare and ensure effective representation does not constitute an abuse of discretion." *State v. Ollivier*, 161 Wn. App. 307, 313, 254 P.3d 883 (2011), *aff'd*, 178 Wn.2d 813, 312 P.3d 1 (2013).

Mr. Zimmerman's trial was initially continued repeatedly with his consent and because of his multiple failures to appear at hearings. It was then continued repeatedly for reasons that were clearly intended to allow counsel to adequately prepare and ensure effective representation for Mr. Zimmerman, such as locating and interviewing late-revealed alibi witnesses, interviewing a confidential informant involved in the case, and

Mr. Zimmerman's counsel's illness. At no point did the trial court go past the speedy trial deadlines imposed by each continuance. Although his trial was significantly delayed, those delays were caused by Mr. Zimmerman's conduct, granted with his consent, or given for his benefit. When reviewing the various reasons provided for the continuances and when analyzing the continuance record as a whole, at no point did any of these continuances violate Mr. Zimmerman's constitutional speedy trial right nor did any of those continuances exceed the rule-based deadlines prescribed by CrR 3.3. Mr. Zimmerman was neither materially nor substantially prejudiced by any of the continuances granted by the trial court. We find no error.

Add'l Ground 2: Ineffective assistance of counsel

Mr. Zimmerman claims he received ineffective assistance of counsel because his attorney "abandon[ed] me, refused to file motions, did not interview witnesses, did not tell me that my rebuttal witnesses for Jacob Level would not be there until [the] day of trial, [and] never went over my trial." Add'l Ground 2. We cannot review a claim raised in the statement of additional grounds if it is too vague to properly inform us of the claimed error. *State v. Hand*, 199 Wn. App. 887, 901, 401 P.3d 367 (2017), *aff'd*, 192 Wn.2d 289, 429 P.3d 502 (2018). Mr. Zimmerman does not specify which (1) motions his attorney refused to file, (2) witnesses his attorney did not interview, or (3) rebuttal witnesses that were not available. It is also unclear what Mr. Zimmerman precisely

means by his attorney "never went over [my] trial." Add'l Ground 2. These claims of error(s) are thus too vague to review.

Mr. Zimmerman also mentions telling his attorney that "Destiny's statement in trial [was] different from discovery" and that he has a "notarized letter from the person who really sold the drugs to Destiny." *Id.* It is unclear what error Mr. Zimmerman attaches to this statement to his attorney, but the record also contains no indication that Destiny changed her testimony at trial. We address the notarized letter in the next SAG.

Add'l Ground 3: Sufficiency of the evidence

Mr. Zimmerman claims that there was insufficient evidence to convict him beyond a reasonable doubt because his "DVR, and phone and [a] notarized letter prove my innocence." Add'l Ground 3. These materials appear to be outside the record on review. This court cannot consider new evidence on direct appeal. *State v. Irwin*, 191 Wn. App. 644, 660, 364 P.3d 830 (2015). If Mr. Zimmerman has facts or evidence outside the record to support this claim, his recourse is to file a personal restraint petition. *Id*. (citing RAP 16.4). The evidentiary record reviewed from trial otherwise supports the jury's convictions on all four counts and when applying sufficiency of the evidence analysis with all reasonable inferences reviewed in the light most favorable to the State.
A reasonable jury could have found Mr. Zimmerman guilty on all four counts based on the evidence admitted in trial.

Add'l Ground 4: Wrongful conviction

Mr. Zimmerman claims that he was wrongfully convicted. Besides the bare assertion of his innocence, he does not develop this claim further. This claim is also too vague for us to review. *Hand* 199 Wn. App. at 901.

None of Mr. Zimmerman's additional claims for review affect this court's decision. Accordingly, we deny providing any relief based on Mr. Zimmerman's claims of error.

CONCLUSION

We remand to the trial court for a full resentencing consistent with this opinion. The $500 VPA and $100 DNA collection fee shall be struck at resentencing.

Hazel, J.P.T.

WE CONCUR:

Lawrence-Berrey, C.J.

Fearing, J.

APPENDIX B

FILED
APRIL 29, 2025
In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. KEVIN WADE ZIMMERMAN, Appellant.	)	No. 39765-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered the respondent's motion for reconsideration of this court's March 28, 2025, opinion; and the record and file herein.

IT IS ORDERED that the respondent's motion for reconsideration is denied.

PANEL: Judges Hazel, Lawrence-Berrey and Fearing

FOR THE COURT:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

May 28, 2025 - 4:04 PM

Transmittal Information

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