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Supreme Court No. _______
COA No. 40309-2-II

Case #: 1045212

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WALTER S. AMSDEN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Walter Amsden asks this Court to accept review of a Court of Appeals opinion that affirmed his conviction but reversed for resentencing. The Court of Appeals issued its opinion on August 5, 2025. Mr. Amsden has attached the opinion to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. When a statute elevates a base crime to a greater crime if a person has certain prior criminal convictions, courts should bifurcate the jury instructions so that the prior criminal convictions may be found in a special verdict form. The jury can only examine the special verdict form if it first convicts the person of the base crime. This procedure is consistent with due process and provides defendants with greater constitutional protection, as the existence of a person's prior criminal convictions may prejudice the defendant.

While a decision from this Court says it is permissible, but not necessary, to comply with this procedure, the decision recognizes this is a fairer practice. And a recent United States Supreme Court opinion supports this reasoning.

Mr. Amsden asked the court to bifurcate his to-convict instruction so that the requirement for proof of his prior convictions was contained in a separate special instruction. The trial court refused, and the Court of Appeals affirmed. The opinion implies that, based on this Court's precedent, it is never reversible error for a court to refuse to bifurcate a jury instruction. This Court should accept review and clarify when it is reversible error for a court to refuse to bifurcate a jury instruction. RAP 13.4(b)(1), (3), (4).

2. If evidence is minimally relevant yet highly prejudicial, courts must exclude it. Domestic violence crimes are particularly stigmatizing. Because one of the elements of Mr. Amsden's offense required the State to prove that he previously violated two no-contact orders, Mr. Amsden entered

an *Old Chief*[1] stipulation as to these convictions so the jury would not learn the specifics of the convictions. These specifics included the fact that these no-contact orders were designated as “domestic violence” no-contact orders.

Mr. Amsden also asked the court to redact any mention of domestic violence and his domestic violence conviction history from the no-contact order at issue in this case. The trial court refused. The Court of Appeals found this error was not prejudicial for untenable reasons, including that Mr. Amsden admitted to the underlying offense but exercised an affirmative defense. This reasoning misunderstands the applicable standard of review and overlooks how this prejudicial evidence affected his affirmative defense. This Court should accept review. RAP 13.4(b)(1)-(4).

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[1] An *Old Chief* stipulation allows a defendant to concede to the element of his prior conviction in order to prevent the State from producing details of the conviction before the jury. *Old Chief v. United States*, 519 U.S. 172, 190-92 (1997).

3. The United States Supreme Court's recent decision in *Erlinger v. United States*[2] makes plain that judges can increase a person's sentence, absent a jury finding, in only one particular circumstance: when the increased sentence is due to a prior conviction. However, in this circumstance, the court is limited to determining only the existence of the prior crime and the prior crime's elements. Any other facts that exceed this inquiry must be presented to the jury and proven beyond a reasonable doubt.

As with any fact that increases punishment, the failure to prove such a fact with the required burden of proof requires a court to dismiss with prejudice.

Here, the State never submitted critical facts, with proof beyond a reasonable doubt, to the jury to increase Mr. Amsden's sentence. While the Court of Appeals correctly found that the State did not prove Mr. Amsden's prior criminal history

[2] 602 U.S. 821, 834 (2024).

at sentencing, the Court of Appeals held remand was appropriate for the State to once again try and prove Mr. Amsden’s criminal history. In doing so, the Court of Appeals held *Erlinger* did not bind the State at resentencing. The Court of Appeals’ failure to implement binding United States Supreme Court precedent warrants this Court’s review. RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

In November of 2023, Walter Amsden was homeless. RP 144-146. Mr. Amsden had no friends or family to stay with. RP 144. He needed identification in order to stay at a homeless shelter, but he did not have any. RP 144, 169.

In the middle of the night in Spokane, temperatures fell below freezing. RP 102, 144. Mr. Amsden slept in a van to protect himself from the weather. RP 144-146, 170. The van was registered in his ex-partner’s name, Shawna Peterson, and parked across the street from her residence. CP 1-2; RP 95, 126. Ms. Peterson intended to give Mr. Amsden the van and even

stored clothes and blankets for him in the vehicle. RP 147, 185, 187.

A security guard working at Ms. Peterson's apartment building saw Mr. Amsden and called the police to report his presence. CP 1; RP 89. The security guard was aware that Ms. Peterson had a no-contact order with Mr. Amsden. CP 1; RP 95; Ex. P-1.

When the police arrived and arrested Mr. Amsden, he was inside the van and covered under blankets. CP 1-2; RP 128, 144.

The State charged Mr. Amsden with a violation of a no-contact order (domestic violence) for being within a prohibited distance from Ms. Peterson's residence. CP 2-3; RCW 7.105.450(1). Because Mr. Amsden has at least two prior convictions for violating a domestic violence protection order, his current charge was elevated to a felony. CP 2-3; RCW 7.105.450(1), (5).

To prevent the jury from learning of the specifics of his prior convictions for violating a no-contact order, Mr. Amsden and the State stipulated to his prior convictions for violating a no-contact order. CP 18, RP 141.

Mr. Amsden also filed several pretrial motions related to his prior convictions for violating a no-contact order. Mr. Amsden asked the court to bifurcate the jury instructions regarding his prior convictions for violating a no-contact order. CP 19-21. He also asked the court to redact any reference to the term "domestic violence" from all exhibits. CP 28. The court denied Mr. Amsden's motion to bifurcate the jury instructions and denied his redaction request. RP 10-11,19-20.

At trial, Mr. Amsden agreed he violated the no-contact order. RP 144, 169-70. However, he argued the law excused this because he was only trying to avoid freezing to death when he violated the order. RP 145, 167-170. Accordingly, he lodged a necessity defense. RP 167-170.

Nevertheless, the jury found Mr. Amsden guilty of violating the no-contact order. CP 130; RP 174.

Relying on the State's summary of Mr. Amsden's criminal history and over his personal objection, the court sentenced Mr. Amsden to a 60 month sentence based on an offender score of nine. Op. at 7.

D. ARGUMENT

1. This Court should accept review and clarify that, when requested, a court generally errs when it refuses to bifurcate a jury instruction that requires the jury to find the defendant was convicted of prior offenses.

Individuals have the right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). "To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *State v. Weaver*, 198 Wn.2d 459, 465-66, 496 P.3d 1183 (2021).

Relatedly, jury instructions must also guard against the danger of unfair prejudice to the defendant. *State v. Oster*, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002). A jury instruction that reminds the jury that the defendant previously committed a crime poses a significant danger of unfairly prejudicing the defendant. *See id.* This is because such information is generally irrelevant and "may lead the jury to believe the defendant has the propensity to commit crimes." *Id.*; *see also* ER 404(b). It may therefore encroach upon the defendant's right for the jury to presume he is innocent. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976).

Consequently, while normally, all of the elements of a crime must appear in a to-convict instruction, this is neither required nor appropriate in certain circumstances. *See State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). In a case where the defendant's criminal history is an element the State must prove beyond a reasonable doubt, the defendant "is afforded greater constitutional protection by adopting a

bifurcated instruction which guards against unfair prejudice and guarantees that the State meets its burden." *Oster*, 147 Wn.2d at 147-48.

Accordingly, "where the legislature has established a statutory framework which defines a base crime which is elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form." *State v. Mills*, 154 Wn.2d 1, 10, 109 P.3d 415 (2005).

A recent United States Supreme Court case, *Erlinger v. United States*, fortifies the propriety of bifurcating jury instructions. "By sequencing and separating the jury's determinations regarding past crimes, a court decreases the likelihood that a jury will be overpersuaded by the defendant's prior criminal conduct." *Erlinger*, 602 U.S. at 848 (citation modified).

This Court generally reviews bifurcation decisions for an abuse of discretion. *State v. Roswell*, 165 Wn.2d 186, 192, 196

P.3d 705, 707 (2008). A trial court's decision will be reversed under this standard when its decision is "manifestly unreasonable or based upon untenable grounds or reasons," such as relying on "unsupported facts" or an "erroneous view of the law." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115, 118–19 (2006).

Here, the State charged Mr. Amsden with one count of felony violation of a no-contact order. CP 3. To elevate this crime to a felony offense, the State needed to prove that Mr. Amsden had two prior convictions for violating a no-contact order. RCW 7.105.450(5); CP 65.

Mr. Amsden requested that the court bifurcate the jury instructions as to his prior conviction, reasoning this Court approved of this method in *Oster*. RP 10.

The State objected to Mr. Amsden's request to bifurcate the instructions. RP 10. The State claimed bifurcation was not "necessary" since the parties agreed to stipulate to the prior convictions under *Old Chief*. *Id.*

The court rejected Mr. Amsden's proposed instruction on numerous grounds. First, the court claimed bifurcation was unnecessary because the "*Oster* case said it was fine" to include prior convictions in to-convict instructions and the court "does not have to bifurcate [the instruction]." *Id.* Second, the court claimed the *Old Chief* stipulation would "take away" some of the prejudice from the jury learning of Mr. Amsden's prior convictions. *Id.* Third, the court rejected the instruction because "the jury should hear the actual elements of the crime." RP 11. The Court of Appeals approved of this reasoning. Op. at 9.

Both the trial court and the Court of Appeals were wrong. Both courts fundamentally misunderstood *Oster's* reasoning and holding. *Oster* acknowledged that, generally, all elements must appear in a to-convict instruction. *Oster*, 147 Wn.2d at 143. However, it held that in circumstances like Mr. Amsden's, it was often better to bifurcate the instructions. *See id.* at 147-48. Not only is it better practice, but it also aligns with a defendant's right to due process. *Mills*, 154 Wn.2d at 7. Indeed,

it is the "fairest" practice. *See Erlinger*, 602 U.S. at 847. It is neither ideal nor necessary to include prior convictions in a to-convict instruction.

Both courts also erred because they believed the *Old Chief* stipulation would mitigate the prejudice Mr. Amsden would experience from the jury learning of his prior conviction in a single instruction. But this reasoning erroneously conflates the protection afforded by a stipulation and an instructional bifurcation.

A stipulation removes prejudice because it prevents the jury from hearing the details of a previous offense, *State v. Case*, 187 Wn.2d 85, 87, 384 P.3d 1140, 1141 (2016), as amended (Jan. 19, 2017). On the other hand, instructional bifurcation constrains the prejudicial effect that may result from the court reminding the jury of the defendant's prior offenses. *Oster*, 147 Wn.2d at 147–48. Though both procedures are designed to prevent a jury from basing their decision on a defendant's past acts, the two methods mitigate different

sources of prejudice. Both courts erred when they conflated the two.

Additionally, contrary to the court's reasoning, Mr. Amsden's request for bifurcated instructions would not have prevented the jury from hearing the elements of the charged offense. Rather, he moved to contain the requirement for proof of his prior convictions in a separate special instruction. The jury would have been provided with the additional instruction regarding his prior convictions if it found him guilty of the underlying misdemeanor offense. The court erroneously confused this request with an attempt to remove the element from the jury's consideration.

In sum, the Court of Appeals opinion relies on faulty reasoning. It also suggests that because *Oster* said, in circumstances like Mr. Amsden's, it was permissible to include all elements in a to-convict instruction, it is never error to refuse a defendant's request to bifurcate jury instructions. This Court should accept review.

2. This Court should accept review because the opinion of the Court of Appeals overlooks precedent regarding the prejudicial and inflammatory nature of domestic violence evidence.

In reviewing a trial court's evidentiary decision, courts first "determine what evidentiary rules apply and then determine whether the trial judge acted within the discretion accorded by those rules." *State v. Gunderson*, 181 Wn.2d 916, 921-22, 337 P.3d 1090, 1093 (2014).

Subject to numerous limitations, ER 402 instructs trial courts to admit only relevant evidence. Evidence is relevant only if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

However, courts must exclude even relevant evidence under ER 403 if the danger of unfair prejudice substantially outweighs its probative value. *Kappelman,* 167 Wn.2d at 9. A danger of unfair prejudice exists when evidence "is likely to

stimulate an emotional response than a rational decision." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583, 586 (2010).

When weighing the probative value of the evidence against its prejudicial effect, courts must be careful and methodical. *See Gunderson*, 181 Wn.2d at 925. This is especially true for domestic violence cases, where the danger of unfair prejudice is particularly high. *See id.*

Before trial, Mr. Amsden stipulated to his two prior convictions to preclude the State from introducing details of his prior offenses. CP 18, 45. Mr. Amsden also filed a motion to redact any reference to "domestic violence" from all exhibits. CP 28. He argued that the phrase was "irrelevant and highly prejudicial" under ER 401, 402, and 403. Furthermore, reference to the term "domestic violence" "serves no purpose other than to appeal to the passion and prejudice of the jurors." *Id.* Mr. Amsden also asked the court to redact all of paragraph 6 in the no-contact order, which stated a court found Mr. Amsden

was "charged with, arrested for, or convicted of an offense of domestic violence under Chapter 10.99. RCW." RP 16-18, 21; Ex. P-1, pgs. 1-2; Ex. D-104, pgs. 1-2 For similar reasons, Mr. Amsden also filed a separate motion to prohibit any reference to domestic violence during the trial. CP 28.

The State objected, arguing the redaction could "confuse the jury." RP 16, 18. In response, Mr. Amsden reiterated that the term "domestic violence" is highly prejudicial and carries a lot of stigma. RP 18. He again asked the court to exclude reference to "domestic violence" because it would unfairly prejudice him. *Id.*

When the court issued its ruling denying Mr. Amsden's motion to redact, it also discussed Mr. Amsden's separate, but related, motion to exclude all references to domestic violence during the trial. RP 18-20. The court appeared to have conflated the two motions as it issued the ruling. *See* RP 18-20. The court denied Mr. Amsden's motion to redact the no-contact order because it reasoned that the court needed to explore the issue of

domestic violence during voir dire in order to remove biased jurors. At trial, the court admitted the no-contact order without the requested redactions. RP 21, 125; Ex. P-1.

As a threshold matter, the Court of Appeals wrongly concluded the trial court's ruling on the challenged exhibit was "tentative." Op. at 11. It was not. At the end of the court's ruling, the court specifically remarked on Mr. Amsden's proposed exhibit with the requested redactions. RP 20. It then stated:

> So I can mark yours as a proposed defendant's exhibit and then **note that it's rejected.**

RP 20 (emphasis added).

The court's statement that it rejected Mr. Amsden's proposed redacted no-contact order shows its ruling on the motion to redact was final. The Court of Appeals' conclusion to the contrary is untenable.

However, the Court of Appeals turned to the merits of the argument and held this evidence was not more prejudicial than

probative. Op. at 12-13. The court reasoned that because (1) the topic of domestic violence was discussed in voir dire; and (2) Mr. Amsden admitted to the underlying offense, but lodged a necessity defense, the evidence was not prejudicial. Op. at 13.

This reasoning is plainly wrong. Mr. Amsden's current charge carried a "domestic violence" label, so it made sense to explore this topic during voir dire. CP 131. Discussing the topic of domestic violence during voir dire did not admit or prove that Mr. Amsden committed domestic violence in the past. However, by not redacting the exhibit, the court let the jury conclusively learn Mr. Amsden committed prior crimes that were labeled "domestic violence" offenses. This was, of course, prejudicial. *See State v. Taylor*, 193 Wn.2d 691, 702, 444 P.3d 1194 (2019).

Exposing the jury to this evidence critically undermined the purpose of Mr. Amsden's *Old Chief* stipulation. It thereby increased the probability of the jury convicting Mr. Amsden on improper grounds, such as generalizing his past prior conviction

for domestic violence as evidence of his propensity to commit the crime at issue. *See Old Chief*, 519 U.S. at 180-81.

The Court of Appeals' analysis also ignores how this evidence affected Mr. Amsden's necessity defense. To establish the necessity defense, Mr. Amsden had to prove, by a preponderance of the evidence, the following elements: (1) he reasonably believed the commission of the crime was necessary to avoid or minimize harm, (2) the harm sought to be avoided was greater than the one from breaking the law, (3) the harm was not brought about by himself, and (4) no reasonable alternative existed. CP 77; *State v. Spokane Cnty. Dist. Court*, 198 Wn.2d 1, 12, 491 P.3d 119 (2021). If the jury were to find Mr. Amsden established this defense, they would have to acquit him of the charged crime. CP 77. Ultimately, the jury found Mr. Amsden guilty of the felony charge, and so the defense failed. RP 174.

The erroneous admission of the unredacted no-contact order materially diminished from Mr. Amsden's defense.

Highly prejudicial evidence can fundamentally undermine a person's affirmative defense, as it allows the jury to infer that, because a person has prior convictions, the crime at issue was just another instance of the defendant committing crimes. *State v. Stockton* 91 Wn. App. 35, 41-42, 955 P.2d 805, 809 (1998).

That is exactly what happened here: the improperly admitted evidence allowed the jury to infer that because Mr. Amsden had prior "domestic violence" offenses, he must have violated the no-contact order in order to harm or harass Ms. Peterson. This evidence critically undercut his necessity defense.

This Court should accept review.

3. This Court should accept review because the Court of Appeals' opinion ignores recent United States Supreme Court precedent. This precedent fundamentally alters how the State must prove certain facts that increase punishment pursuant to the Sentencing Reform Act.

The United States Supreme Court's opinion in *Erlinger v. United States* is an important opinion that fundamentally

changes how the State must prove certain facts, under the SRA, that increase punishment. This Court should accept review to ensure Washington's sentencing practices comply with *Erlinger* and the Fifth, Sixth, and Fourteenth Amendments.

The rights to due process and a jury trial require the State to prove to a jury, with proof beyond a reasonable doubt, every fact essential to punishment, regardless of whether the fact is labeled an element or a sentencing factor. *Hurst v. Florida*, 577 U.S. 92, 97-98 (2016); U.S. Const. amends. V, VI, XIV.

This is so because "[*Apprendi v. New Jersey*] concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime.'" *Alleyne*, 570 U.S. at 111 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In accordance with *Apprendi*, in *Blakely v. Washington*, the United States Supreme Court concluded that any fact used to impose a sentence above the standard range under the SRA

also falls within this category of elements. 542 U.S. 296, 303-04 (2004).

One “narrow” exception to *Apprendi* and *Blakely’s* requirements exist. A court may on its own find the “fact” of a prior conviction absent proof beyond a reasonable doubt. *Almadarez-Torres v. United States*, 523 U.S. 224, 246-47, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

This Court has understood this exception to broadly encompass any fact associated with a prior conviction. *See, e.g., State v. Jones*, 159 Wn.2d 231, 241, 149 P.3d 636 (2006) (permitting a judge to find the defendant was on community custody at the time of the offense to increase his offender score); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 79 (2001) (allowing a judge to find that a defendant’s prior convictions are “most serious offenses” that require a sentence of life without parole); *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (permitting a judge to conduct a “factual

comparability analysis" to determine whether his foreign conviction was comparable to a Washington offense).

Erlinger, however, holds that "the fact of a prior conviction" exception is an extremely narrow and jealously guarded exception. It therefore fundamentally contradicts this Court's precedent that allows the judge, not a jury, to find "facts" related to a prior offense absent proof beyond a reasonable doubt.

In *Erlinger*, the government charged the defendant with unlawfully possessing a firearm. 602 U.S. at 825. The government charged him under the Armed Career Criminal Act (ACCA), which subjected him to a more severe punishment. *Id*. A person qualifies for a more severe sentence under the ACCA if the person has three prior "violent felonies" or "serious drug offenses" that were committed on different occasions. *Id*.

While the defendant pleaded guilty to unlawfully possessing a firearm, he strenuously maintained he did not qualify as an offender under the ACCA because the government

relied upon a string of offenses that happened within a few days. *Id*. at 827. Consequently, he argued the offenses did not occur on different occasions but rather constituted a single criminal episode. *Id*.

In turn, the court examined a range of facts, including whether the defendant's past offenses were "committed close in time, whether they were committed near to or far from one another, and whether the offenses were similar or intertwined in purpose and character." *Id*. at 828. (citation modified). After examining these facts, the court concluded the defendant's crimes occurred on different occasions, which triggered a higher standard range under the ACCA. *Id*. at 827.

At the United States Supreme Court, the defendant argued that this sort of fact-finding went beyond the mere finding the fact of a prior conviction and triggered the Fifth and Sixth Amendment's requirements. *Id*. at 828.

The United States Supreme Court agreed. First, the court noted that the right to a jury trial required "the government to

include in its criminal charges all the facts and circumstances which constitute the offense." *Id*. at 831. (internal quotations omitted). It also highlighted the government must "prove its charges to a unanimous jury [with] proof beyond a reasonable doubt[.]" *Id*. at 834. And in response to State sentencing schemes that parse out the elements of the underlying offense from other matters that may increase punishment, the United States Supreme Court had consistently held that **any** fact that increases a person's punishment must be proved to a jury with proof beyond a reasonable doubt. *Id*. at 834-36.

The court noted the ACCA subjected the defendant to a higher punishment, and a court's finding that prior offenses were committed on different occasions constituted a "fact-laden task." *Id*. at 834. It required the court to exercise its judgment and find, for example, whether the crimes at issue "occurred close in time" and if the offenses were "similar or intertwined in purpose." *Id*.

The court concluded there was "no doubt what the constitution requires in these circumstances: virtually any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be resolved by a unanimous jury beyond a reasonable doubt[.]" *Id*. "Judges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance of the evidence standard[.]" *Id*. at 835.

The United States Supreme Court's recent opinion in *Erlinger v. U.S.* makes clear that whether (a) a prior conviction may be included in the offender score because it does not "wash-out;" (b) a prior conviction constitutes a domestic violence offense; and (c) a prior foreign conviction is factually comparable to a Washington offense and can be scored must be proved to a jury with proof beyond a reasonable doubt. *See State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010) (discussing when a prior conviction "washes-out" and cannot be included in the offender score); *State v. Hodgins*, 190 Wn. App. 437, 360

P.3d 850 (2015) (explaining when a prior conviction can be scored as a prior domestic violence offense); *Lavery*, 154 Wn.2d 249 (discussing factual comparability analysis).

Determining whether an offense "washes out" goes beyond the mere fact of a "prior conviction" because it is a fact-laden task. First, the court must determine there was a conviction and for what. That falls within the narrow fact-of-conviction exception, and a court is free to make this determination. But then the court must determine when in relationship to the present offense the defendant committed the past conviction. That mirrors the separate-occurrence finding at issue in *Erlinger*. That is a fact reserved for the jury, and the State must prove this fact to a jury with proof beyond a reasonable doubt.

A number of additional factual determinations are baked into this temporal determination, and these determinations reinforce the need for the State to prove this to a jury with proof beyond a reasonable doubt. A court must determine if a person

received a sentence of confinement for a prior offense. Next, the court must determine when they were released from confinement. Then, the court would need to determine the date the defendant committed the later offense, not the date of conviction. All of that is well beyond determining the fact and elements of a prior offense. *See* RCW 9.94A.525(2).

Additionally, because a domestic violence designation is not itself an element of the crime, the State must prove the existence of a prior domestic violence offense to a jury with proof beyond a reasonable doubt. *State v. Abdi-Issa*, 199 Wn.2d 163, 169–70, 504 P.3d 223, 227 (2022) (citing *State v. Goodman*, 108 Wn. App. 355, 359, 30 P.3d 516 (2001); *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000)).

Furthermore, deciding whether a foreign offense is factually comparable to a Washington offense goes beyond the "fact of a prior conviction" exception because it is a fact-laden task. This Court has stated a court can examine "whether **the conduct** underlying the foreign offense would have violated the

comparable Washington statute." *Thiefault*, 160 Wn.2d at 415 (emphasis added); *accord State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998).

Under *Erlinger*, this test for "factual comparability" is impermissible and unconstitutional. *Erlinger* states a judge can only consult sentencing documents to "ascertain the jurisdiction in which they occurred and the date on which they happened." 602 U.S. at 840. But courts have no authority to "go any further." *Id.* To the extent Washington caselaw suggests otherwise, *Erlinger* overrules it.

Here, absent a jury finding these facts with proof beyond a reasonable doubt, the court independently found that Mr. Amsden's (1) prior offenses did not wash; (b) prior convictions constituted domestic violence offenses; and (c) prior foreign convictions were comparable to a Washington offense when it increased Mr. Amsden's offender score and sentence. *See* CP 85, 94, 102, 116, 132; Op. Br. at 46-47. However, the State never proved this, and so on remand, his sentence must be

dismissed with prejudice. *Burks v. United States*, 437 U.S. 1, 11 (1978).

The Court of Appeals agreed resentencing was required, but it held the State was free at resentencing to present evidence to prove Mr. Amsden's offender score. Op. at 15. It did so because it believed *Erlinger* only applied "to the federal government's pursuit of a sentence enhancement under the [ACCA]." Op. at 15.

This position is untenable, and other courts throughout the country have properly rejected it. *See, e.g, People v. Wiley,* 570 P.3d 436, 439 (Cal. 2025); *Commonwealth v. Shifflett*, 335 A.3d 1158, 1175 (Pa. 2025); *State v. Carlton*, 328 A.3d 944, 953 (N.J. Super. Ct. App. Div. 2024); *Jackson v. State*, 410 So. 3d 4, 10-11 (Fla. Dist. Ct. App. 2025).

This Court should do the same and accept review.

E. CONCLUSION

For the reasons stated in this petition, Mr. Amsden respectfully requests that this Court accept review.

This petition uses Times New Roman Font, contains 4,965 words, and complies with RAP 18.17.

DATED this 29th day of August, 2025.

Respectfully submitted,

/s Sara S. Taboada

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CASE # 403092
State of Washington v. Walter Scott Amsden
SPOKANE COUNTY SUPERIOR COURT No. 2310303132

Counsel:

Enclosed please find a copy of the opinion filed by the court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:btb
Attachment

c: **E-mail** Honorable Annette S. Plese

c: **E-mail** Walter Scott Amsden, DOC #386353 (Airway Heights Corrections Center)

FILED
AUGUST 5, 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,	)	No. 40309-2-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
WALTER SCOTT AMSDEN,	)	
	)	
Appellant.	)	

MURPHY, J. — Walter Amsden was convicted of felony violation of a domestic violence no-contact order. At trial, Amsden stipulated to two prior convictions for violation of a protection order, and did not contest his violation of the order that resulted in the current charged offense. Amsden instead relied on a defense of necessity.

On appeal, Amsden claims: (1) he was denied due process when the trial court refused to bifurcate a jury instruction on whether the State had proved two prior protection order violations, (2) he was prejudiced when the trial court refused to redact the term "domestic violence" from the State's no-contact order exhibit and otherwise prohibit its use of the term during trial, and (3) insufficient evidence was presented to prove his criminal history for purposes of calculating the offender score.

We disagree with the first two assignments of error but, as the State concedes, remand is necessary for resentencing to address the offender score issue.

We affirm Amsden's conviction but reverse his sentence and remand for resentencing.

FACTS

Amsden was charged with violation of a domestic violence no-contact order after he was found sleeping in the protected party's vehicle, which was within the restricted area identified in the no-contact order. The State alleged Amsden had two prior convictions for violating a protection order and charged Amsden with a felony.

Prior to trial, the parties entered into an *Old Chief*[1] stipulation relative to Amsden's prior convictions.

Also prior to trial, Amsden moved to bifurcate the evidence and jury instructions pertaining to his prior convictions utilizing the procedure as provided in *State v. Oster*, 147 Wn.2d 141, 52 P.3d 23 (2002). The trial court denied Mr. Amsden's bifurcation motion:

> THE COURT: Actually, the to convict instruction includes that he has to have two priors to meet the felony, and that *Oster* case said it was fine. The Judge decided to do it, but that it is part of the elements. So that[] the Court does not have to bifurcate it. The *Old Chief* stipulation takes away some of that prejudice, but there are many kinds of charges such as failing to register as a sex offender, felony possession of a firearm that include elements.

---

[1] *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

> So the Supreme Court has held that you don't have to separate it. In fact, the jury should hear the actual elements of the crime. So I'm going to deny it for bifurcation at this point.

Rep. of Proc. (RP) (Mar. 11, 2024) at 10-11.

Prior to the commencement of trial, the State announced its intent to introduce into evidence, as an exhibit, the domestic violence no-contact order Amsden was charged with violating. Amsden proposed the same no-contact order as an exhibit but with all references to domestic violence redacted, including the entirety of paragraph 6 of the order, which read: "Based upon the record, both written and oral, the Court finds that the defendant has been charged with, arrested for, or convicted of an offense of domestic violence under Chapter 10.99 RCW. Ex. P-1 at 2 (boldface omitted). Amsden also moved in limine to exclude during trial "any reference to any acts of domestic violence" between Amsden and the protected party, redact "any reference to 'domestic violence' from all exhibits", and "[p]rohibit the use of the term 'domestic violence' during trial." CP at 27-28.

The State opposed Amsden's motions in limine, and expressed concern that the redaction of the entirety of paragraph 6 of the no-contact order exhibit or prohibiting reference to domestic violence during trial could confuse the jury. The State also expressed that, while it did not plan to bring up the history of domestic violence or

have an expert testify about domestic violence or details of Amsden's relationship with the protected party other than they are intimate partners, it did have some questions for the venire about whether any of its members had a history with domestic violence.

With regard to the motions to exclude, redact, and prohibit any reference to domestic violence, the court observed:

> THE COURT: . . . This [is] a DV [domestic violence] charge. I'm planning on asking the jury as far as domestic violence because there's a lot of jurors usually that have experience with domestic violence that might not be appropriate for this kind of a trial.
>
> So I was planning on doing that because a no contact order, this isn't just your simple no contact order. It is a domestic violence no contact order. So the jury they're going to find out that they were intimate partners or dated. That's going to be part of it.
>
> So what's the purpose of not including domestic violence?

RP (Mar. 11, 2024) at 18. In response, Amsden argued that "just the term domestic violence is highly prejudicial because it impassions people." RP (Mar. 11, 2024) at 18. The court ultimately ruled:

> THE COURT: Well, one, the charge is domestic violence for a violation of a no contact order. The Court usually as part of that when I talk about a violation of a no contact order, talk about domestic violence, I try to explain that domestic violence means that there's a relationship between the alleged victim and the defendant whether it be intimate partners, household members, depending on that. That's more of a tag based on the relationship between the parties. Then I do ask the jurors if they have had any experience with protection orders, domestic violence and then go through them one by one, and you do get some very strong feelings.

> So we just did a domestic violence trial, and I think we struck three [prospective jurors] for cause that one lady's currently in the domestic violence court. So I really think it's something that the Court needs to flush out to get a fair trial.
>
> [DEFENSE COUNSEL]: Understood.
>
> THE COURT: So at this point, the Court's going to deny the motion to redact anything involving the term domestic violence. If you have a better way you want me to explain it, but I will explain it's a tag just to show the relationship between the alleged victim and the defendant. As I said, I just ask about that and if anybody's been involved with that.

RP (Mar. 11, 2024) at 19-20.

During jury selection, the court explained to prospective jurors that the alleged crime was a violation of a no-contact order, which was "categorized as a domestic violence, and . . . domestic violence just means that the parties, the alleged victim, the defendant, there's a relationship between them either as intimate partners, brother/sister, mother/father, those kind of [relationships]. So that's what the domestic tag is." RP (Mar. 11, 2024) at 49. Multiple prospective jurors expressed experience or knowledge of domestic violence as a result of questioning from the trial court, the prosecutor, and defense counsel. Several jurors expressed doubts that they could remain impartial and were excused for cause.

At the close of the State's case-in-chief, the *Old Chief* stipulation was read to the jury by the trial court:

> The parties have agreed that certain facts are true. You must accept as true the following facts: That the person before the Court who has been identified in the charging document as the defendant, Walter Amsden, date of birth 4/27 of '75, prior to November 18th, 2023, has at least two prior convictions for violating the provisions of a court order in Superior Court under case numbers 23-1-01835-32 and 16-1-02417-4. The stipulation is to be considered evidence only of the prior convictions.

RP (Mar. 11, 2024) at 141; *see also* Clerk's Papers (CP) at 65.

Amsden testified that he was sleeping in the van because all of his possessions were in the van, he had nowhere else to sleep, and he was afraid of freezing to death.

Several of the court's jury instructions are relevant to issues on appeal. First, the jury was instructed on what the State's burden was in order to prove Amsden was guilty of felony violation of a no-contact order:

> To convict the defendant of the crime of felony violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 18, 2023, there existed a no-contact order applicable to the defendant;
> (2) That the defendant knew of the existence of this order;
> (3) That on or about said date, the defendant knowingly violated a provision of this order;
> (4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
> (5) That the defendant's acts occurred in the State of Washington.

CP at 74.

The court also instructed the jury on the definition of "intimate partners" and "dating relationship." CP at 80. Finally, the jurors were instructed, if they found Amsden guilty, on a how to use the special verdict form included in the instructions that addressed whether or not Amsden and the protected person where "intimate partners." CP at 81, 83.

The jury found Amsden guilty of violating the no-contact order and that Amsden and the protected person were intimate partners.

The State's sentencing brief included an overview of Amsden's criminal history, as well as appended copies of the judgments from some, but not all, of the alleged previous convictions. Amsden objected and refused to sign off on the understanding of his criminal history on the belief that some of his previous convictions had washed out. RP (Mar. 21, 2024) at 178-81; CP at 128-29.

After holding a sentencing hearing, the court imposed a prison-based drug offender sentencing alternative of 30 months' incarceration and 30 months' community custody based on a calculated offender score of 9+.

Amsden now appeals.

ANALYSIS

Bifurcation

Amsden argues the trial court erred by denying his motion to bifurcate jury instructions. We generally review bifurcation decisions for an abuse of discretion. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or for untenable reasons." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take."'" (quoting *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). It is an abuse of discretion for a trial court to base its ruling on an erroneous view of the law. *Id*.

While a bifurcated trial is constitutionally permissible, and sometimes necessary, it is not favored in Washington. *Roswell*, 165 Wn.2d at 197; *State v. Kelley*, 64 Wn. App. 755, 762, 828 P.2d 1106 (1992). When an element of the crime charged includes the existence of a prior conviction, the court may, but is not required to, bifurcate the instructions and the trial. *Oster*, 147 Wn.2d at 147-48. In *Roswell*, the Washington

Supreme Court held that the trial court's decision to deny a motion to bifurcate was not an abuse of discretion. 165 Wn.2d at 198. "If a prior conviction is an element of the crime charged, evidence of its existence will never be irrelevant. One can always argue that evidence that tends to prove any element of a crime will have some prejudicial impact on the defendant." *Id*.

Here, the trial court's decision to deny bifurcation was based on tenable reasons. Amsden's prior convictions for violation of a protection order were an element of the crime charged. As noted by the trial court, the *Old Chief* stipulation removed some of the potential prejudice from disclosure of Amsden's prior criminal convictions to the jury, with the stipulation allowing Amsden to concede to the fact of prior convictions and preventing the State from introducing details about those offenses. The purpose of such a stipulation is to reduce the danger of unfair prejudice from the evidence of a prior conviction. *See State v. Taylor*, 193 Wn.2d 691, 697-98, 444 P.3d 1194 (2019). The *Old Chief* stipulation here served to mitigate disclosure of the prior convictions against potential prejudice.

More specific to the facts of this case, Amsden's trial strategy included stipulating to his prior offenses and not denying that the violation of the current no-contact order occurred, instead arguing that his actions were necessary to avoid or minimize a harm—

in this instance hypothermia or freezing to death. With Amsden's agreement that he violated the current no-contact order, the jury was tasked with deciding whether Amsden's necessity defense legally excused his actions. The trial court did not abuse its discretion in declining Amsden's motion to bifurcate.

Motion to exclude/redact "domestic violence"

Amsden assigns error to the trial court's denial of his motions to (1) exclude any reference to prior acts of domestic violence between Amsden and the protected party, (2) redact any reference to "domestic violence" from all exhibits, and (3) prohibit use of the term "domestic violence" during trial. A trial court's decision on admissibility of evidence will not be disturbed absent an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when it admits evidence that is more prejudicial than probative. *Salas v. Hi-Tech Erectors,* 168 Wn.2d 664, 671-73, 230 P.3d 583 (2010).

The State is entitled to admit into evidence at trial the no-contact order that the defendant is charged with violating. *Taylor*, 193 Wn.2d at 703. A trial court may redact any portion of the no-contact order that poses a risk of unfair prejudice. *Id.* at 702.

Amsden argues evidence that he was previously convicted of a "domestic violence" offense was minimally relevant and highly prejudicial, and the trial court erred

when it allowed the jury to learn about past domestic violence related crimes through the exhibit admitted at trial without redaction and prohibition on use of the term "domestic violence" during trial proceedings. We disagree for three reasons. First, Amsden waived any objection by failing to follow up with objections during trial. Second, he fails to show that the prejudicial effect of using the term outweighed its relevance. And finally, Amsden fails to show prejudice.

In the pretrial hearing on this issue, after considering Amsden's motions to (1) exclude any reference to prior acts of domestic violence between Amsden and the protected party, (2) redact any reference to "domestic violence" from all exhibits, and (3) prohibit use of the term "domestic violence" during trial, the trial court ruled:

> So *at this point*, the Court's going to deny the motion to redact anything involving the term domestic violence. If you have a better way you want me to explain it, but I will explain it's a tag just to show the relationship between the alleged victim and the defendant.

RP (Mar. 11, 2024) at 20 (emphasis added).

"'[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling' when the evidence is submitted at trial." *Powell*, 126 Wn.2d at 257 (alteration in original) (quoting *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)). The trial court in its pretrial ruling invited defense counsel to offer a better way for the court

to explain the term "domestic violence" to the jury, but we can find nothing in the record to indicate defense counsel took the court up on that offer or otherwise renewed its objection to the State's no-contact order exhibit when the trial court admitted it into evidence.

Even if we were to find that the trial court committed error, Amsden fails to demonstrate that the relevance of using the term "domestic violence" was outweighed by its prejudicial effect. Amsden does not deny that the term was relevant. *See* ER 401.

ER 403 provides that, even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evidence is unfairly prejudicial when it is more likely to create an emotional response from a jury instead of a rational decision. *State v. Scherf*, 192 Wn.2d 350, 388, 429 P.3d 776 (2018). The trial court has wide discretion when balancing the probative value of evidence against the potential prejudicial effect under ER 403. *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996). When weighing the probative value of evidence against its prejudicial effect, courts must be careful and methodical. *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). This is especially true for domestic violence cases, where the danger

of unfair prejudice is particularly high. *See id*. For nonconstitutional evidentiary error, the defendant bears the burden to demonstrate prejudice. *State v. Barry*, 183 Wn.2d 297, 303-04, 352 P.3d 161 (2015).

Amsden argues evidence that he was previously convicted of a domestic violence related offense was minimally relevant and highly prejudicial, and the court erred when it allowed the jury to associate that phrase with him. The trial court accurately stated that the relationship of intimate partners was part of the crime charged. That relationship was an element of the State's burden of proof. Jurors' experience with no-contact orders and domestic violence were discussed by the trial court, the prosecution, and the defense during jury selection. In this case, Amsden stipulated to prior offenses, agreed to the commission of the underlying offense, and was relying on the defense of necessity for acquittal. Given this situation, there was no abuse of discretion in the trial court's ruling.

Finally, any error in admitting evidence with the term "domestic violence" not redacted or excluded was harmless. Amsden conceded that he violated the no-contact order under the theory that he had no reasonable alternative available to him to avoid the harm of hypothermia or freezing to death. Amsden has not shown that the evidence was so inflammatory as to undermine his necessity defense. We do not find any error, but if there was error, the error was harmless.

Amsden's criminal history

Amsden challenges his sentence, arguing the offender score calculation was incorrect because the State failed to prove the existence of all his prior convictions. The State concedes that it did not prove the existence of all prior convictions. We accept the State's concession, reverse Amsden's sentence, and remand for resentencing.

A sentencing court's calculation of an offender score is reviewed de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Remand for resentencing is required if the offender score has been miscalculated unless it is clear from the record that the trial court would impose the same sentence. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Unless a defendant pleads guilty, he is not obligated to present evidence of his criminal history. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *Id.* at 909-10; *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010). Absent an affirmative acknowledgement or stipulation by the defendant of their criminal history, it is the State's obligation "to assure that the record before the sentencing court supports the criminal history determination." *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *State v. James*, 138 Wn. App. 628,

643, 158 P.3d 102 (2007). A defendant's silence or a reliance on presumptions about the prior convictions does not meet the State's burden. *State v. Jones*, 182 Wn.2d 1, 10, 338 P.3d 278 (2014).

The State argues it may provide proof of Amsden's criminal history on remand for resentencing, notwithstanding what occurred or what was presented at the earlier sentencing hearing. Amsden claims that the introduction of additional evidence would violate *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024), in which the United States Supreme Court held that a judge "may 'do no more, consistent with the Sixth Amendment [to the United States Constitution], than determine what crime, with what elements, the defendant was convicted of.'" 602 U.S. at 838 (quoting *Mathis v. United States*, 579 U.S. 500, 511-12, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016)). Both *Erlinger* and *Mathis* involved the federal government's pursuit of a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), and are not applicable to the facts, charge, sentence, or remand and resentence at issue in this case. We agree with the State on this issue. If the State fails to meet its burden to prove a defendant's criminal history during sentencing, "due process does not prohibit the State from presenting additional evidence in order to meets its burden" on remand. *Jones*, 182 Wn.2d at 10; *see also* RCW 9.94A.525(22). "On remand for resentencing

following appeal . . . , the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including history not previously presented." RCW 9.94A.530(2).

Statement of additional grounds for review

Amsden raises two additional issues in a pro se statement of additional grounds for review.

First, Amsden claims the prosecution offered perjured evidence and did not present all of the discovery based on the protected person's representations at the sentencing hearing that she had given Amsden the van, that she had the key, that the battery was dead, and that a different officer than the one presented at trial arrested Amsden. Even if true, Amsden has not shown how this prejudiced him at trial or at sentencing. If Amsden has evidence outside the current record that could support this claim, his remedy is to raise a challenge in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

Second, Amsden argues the presiding judge was changed right before trial without his knowledge or approval. While he cites generally to the superior court criminal rules, Amsden does not cite to any specific rule requiring his approval for a change in judicial officer, nor does he claim any prejudice by the change. This argument likewise fails.

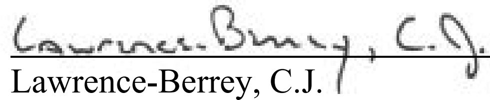
CONCLUSION

We affirm Mr. Amsden's conviction, but reverse his sentence and remand for resentencing.

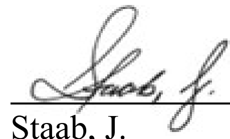
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Murphy, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Staab, J.

WASHINGTON APPELLATE PROJECT

August 29, 2025 - 4:10 PM

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