IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent and Cross-Appellant, v. JAY BRIAN KASBAUM, Appellant and Cross-Respondent.	No. 40340-4-II UNPUBLISHED OPINION

Van Deren, J. — Jay Kasbaum appeals his bail jumping convictions, asserting that the trial court erred by excluding evidence in violation of his right to present a defense under article I, section 22 of our state constitution and the Sixth Amendment of the United States Constitution. Kasbaum also asserts that because the State successfully moved to exclude hospital admission documents, the prosecutor committed misconduct by questioning Kasbaum regarding the lack of evidence supporting his affirmative defense and by arguing to the jury that Kasbaum could not meet his burden to prove his affirmative defense that he was at the hospital when he was supposed to be at court. The State cross-appeals the trial court's imposition of a sentence under Washington's Drug Offender Sentencing Alternative (DOSA). We affirm both Kasbaum's convictions and the DOSA sentence.

FACTS

In March 2009, the State charged Kasbaum with one felony count of unlawful possession of a controlled substance with intent to deliver, two felony counts of unlawful possession of a controlled substance, and one misdemeanor count of unlawful possession of 40 grams or less of marijuana. The State filed an amended information charging Kasbaum with two counts of bail jumping after Kasbaum failed to appear in court on June 24, 2009, and September 21, 2009. After determining that police officers seized evidence in violation of Kasbaum's constitutional rights, the State withdrew its drug-possession charges and proceeded to jury trial on the two bail jumping counts.

Kasbaum's defense at trial was that he failed to appear in court on June 24 because his alarm clock did not go off due to a power outage and that he failed to appear in court on September 21 because he broke his knuckle and went to the hospital for treatment. On the second day of trial, Kasbaum sought to admit hospital admission documents to support his defense. The State objected to admission of the evidence, arguing that the documents were hearsay and that Kasbaum did not produce a witness that could authenticate the documents as business records. The State also argued that the documents were not relevant to Kasbaum's defense because they did not indicate the time that Kasbaum had sought medical treatment. The trial court excluded the documents, stating:

> Okay. Well, in this case, I'm looking at the omnibus order of September 16th, 2009. It indicates that all the discovery has been completed, and so I have a couple of concerns. One is the discovery hasn't been timely provided to the State, and the second concern is that I believe these documents are hearsay, and in addition, there isn't sufficient indicia of authenticity to admit these documents. The patient information section, it's not filled in. I mean, it doesn't indicate who these are or who they're for. It doesn't indicate — doesn't meet the diagnosis or

> treatment exception to the hearsay rule because none of them say anything about the diagnosis or treatment received, so Mr. Kasbaum can certainly testify that he was at the hospital or what diagnosis or treatment he received if he chooses to testify, but these documents aren't admissible to prove that.

Report of Proceedings (RP)[1] at 51.

After the State rested, Kasbaum moved for a brief recess to determine whether he could find a witness to authenticate the hospital admission documents. The trial court denied Kasbaum's motion based on his late production of these documents. Kasbaum asserted that the trial court could not rely on the September 16 omnibus order to deny his motion for a recess based on late discovery because the omnibus order was filed before the State added the second bail jumping charge. The State replied that it filed a second omnibus order on November 9. The trial court considered the November 9 omnibus order and denied Kasbaum's motion for a recess, stating:

> Okay. I'm looking at the November 9th omnibus order. On the November 9th omnibus order, it indicates that the defense is investigating defendant's hospital records, and that was November 9th. That's almost a month ago. Today is December 3rd, so I believe that the defense has had adequate time to research the defendant's hospital records.

RP at 94.

Kasbaum testified that he had been working on a car on the morning of September 21 when he broke the knuckle of his left hand and went to St. Clare Hospital in Lakewood, Washington, for treatment. He called his attorney's office from the hospital and was advised to come directly to the office. Kasbaum immediately left the hospital and went to his attorney's office without receiving any medical treatment. That same day, Kasbaum scheduled a hearing to

[1] Unless otherwise indicated, cites to the report of proceedings refer to the December 2 to December 3, 2009, trial record.

quash the warrant issued because he failed to appear.

The State's asked Kasbaum during its cross-examination:

> [State]: Okay. You indicated on September 21st, the morning of your court hearing, you were working on your car?
> [Kasbaum]: Right.
> [State]: You indicated that you injured your hand and you indicated you were showing the jury your left hand, right?
> [Kasbaum]: Right.
> [State]: It was your left hand? That's yes?
> [Kasbaum]: Yes.
> [State]: And you also indicated that you went to seek medical treatment on that day, correct?
> [Kasbaum]: Correct.
> [State]: Okay. Did you see a nurse or doctor?
> [Kasbaum]: I walked in and –
> [State]: A nurse or doctor.
> [Kasbaum]: It was – I believe it was a nurse at the front desk.
> [State]: All right. Is that person here today?
> [Kasbaum]: No, because you objected it.
> [State]: Is that person, yes or no, here today?
> [Kasbaum]: No.

RP at 111.

Kasbaum did not object to the State's cross-examination. At closing, the State addressed Kasbaum's affirmative defense:

> [T]he defense . . . ha[s] to give you evidence that shows [Kasbaum] needed to be hospitalized or he needed to receive treatment. Where's the evidence?
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> . . . .
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> [Kasbaum] says that he was seen by a nurse. Okay. Where's that person? Not here. He says that he broke his hand. All right. Didn't hear anything qualifying him as a medical expert that allows him to make that diagnosis. We saw no x-rays. We saw no medical records.
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> [Kasbaum] then tells you that even though he went to a hospital, he left immediately, but apparently still couldn't get here on time, and because he left immediately, he received no treatment. Very clearly, in order to be eligible for this defense, you have to be hospitalized or you have to receive treatment. By his own admissions when he took the stand, he told you that neither one of them w[as] true, that he didn't receive any treatment, and that he wasn't hospitalized. So this defense on it[]s face is not valid. Defense has no proof showing that he needed

treatment, that he received treatment, that he was hospitalized.

RP at 131-33.

In its rebuttal closing argument, the State also told the jury, "[A]s to the defense, the burden is on the defendant. Did he provide you with any medical information whatsoever? No. . . . [H]e provided you with no documentation or proof to show that he had any [injury]." RP at 138-39. Kasbaum did not object to these portions of the State's closing argument. The jury returned verdicts finding Kasbaum guilty of both bail jumping charges.

The State asked the trial court to sentence Kasbaum to the statutory maximum of 60 months. Kasbaum requested an exceptional sentence below the standard range or, in the alternative, a sentence under DOSA. At Kasbaum's sentencing hearing, the trial court reviewed a January 7, 2010, chemical dependency evaluation, which indicated Kasbaum had chemical dependency issues. The trial court also heard testimony from Kasbaum's former community corrections officer (CCO). The trial court sentenced Kasbaum to a DOSA sentence over the State's objection, stating:

> I think that there is — in this case, the underlying offenses are all four drug offenses, and while bail jumping isn't a drug offense, the underlying offenses that bring us here today involve substance abuse issues, and I don't know why you didn't choose to avail yourself or take advantage of treatment options that you may have had earlier, but my understanding from [Kasbaum's former CCO] is back in September [20]08, you did get one evaluation, which was inconclusive about whether treatment was recommended or not and whether you were chemically dependent or not. The more recent evaluation done on January 7th of this year indicates that there is some chemical dependency. So I believe that based on the purposes of the Sentencing Reform Act and that what is appropriate in this case for the Court to impose is what's called a DOSA sentence, and I'm going to impose a DOSA sentence in this case and give you an opportunity to deal with this drug issue, because with your offender score, I think you now understand that if you do anything, including obviously being late to court, you're looking at five years in prison.

RP (Jan. 14, 2010) at 21-22.

Kasbaum timely appeals his convictions. The State cross-appeals the trial court's imposition of a DOSA sentence.

ANALYSIS

I. Right To Present a Defense

Kasbaum first contends that the trial court violated his constitutional right to present a defense by excluding evidence relevant to his bail jumping defense. The State responds that the trial court properly excluded the evidence because the evidence was not relevant and was inadmissible hearsay. We hold that the hospital documents were relevant to Kasbaum's defense, but that the trial court did not violate Kasbaum's right to present a defense by excluding the evidence.

In general, we review a trial court's evidentiary ruling for an abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). But we review de novo a claim that a trial court's evidentiary ruling violated a defendant's constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

A. Relevancy

A defendant has a right to present evidence in defense of the crimes charged. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A defendant does not, however, have the right to present irrelevant evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

"'Relevant evidence'" is "evidence having any tendency 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. Under ER 402, "All relevant evidence is admissible,

except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

RCW 9A.76.170(2) provides an affirmative defense to the crime of bail jumping, which states:

> It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.010(4)[2] defines "'[u]ncontrollable circumstances'" in relevant part as "a medical condition that requires immediate hospitalization or treatment."

Kasbaum offered three hospital documents that he asserted were relevant to his affirmative defense to the September 21 bail jumping charge.[3] Those documents included a patient rights form, a conditions of admission/financial agreement form, and notice of privacy practices form. All three documents contained boilerplate language and did not contain any specific information related to Kasbaum. Kasbaum signed all three documents and indicated on the forms that he signed them on September 21, 2009. The documents also included an unknown person's signature.[4]

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[2] The legislature amended RCW 9A.76.010 in 2009 to remove gender-specific language. The effective date of the amendment was July 26, 2009, between the dates Kasbaum committed his two bail jumping offenses. Because the amendment did not make any substantive changes to RCW 9A.76.010, we refer to the current form of the statute. *See* former RCW 9A.76.010 (2001).

[3] Kasbaum does not assert that the excluded evidence was relevant to his June 24 bail jumping charge.

[4] All three forms appear to be signed by the same unknown person. The patient rights and notice

Contrary to the State's contention, the three hospital admission forms are relevant to Kasbaum's affirmative defense. The documents, which Kasbaum asserts he received and signed at the hospital on September 21, support Kasbaum's affirmative defense that he was unable to attend his court hearing do to a medical emergency requiring immediate hospitalization. Accordingly, the hospital documents meet the "very low" threshold of relevancy. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State's contention that the documents do not contain the time of day Kasbaum went to the hospital, do not contain personal information, and do not indicate anything about Kasbaum's condition or treatment concern the weight of the evidence, not its relevancy.

B. Hearsay

Kasbaum appears to concede that the hospital admission documents contain inadmissible hearsay, but nonetheless argues that the trial court violated his right to present a defense by excluding them.[5] We disagree.

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of privacy practices forms have an unknown signature on the "Witness" line. Exs. 19, 21. The conditions of admission/financial agreement form has the same signature on the "Signature of [Franciscan Health System] Employee" line and includes a handwritten date of September 21, 2009. Ex. 20 (capitalization omitted).

[5] At trial, the State objected to the admission of the hospital documents because Kasbaum could not produce a witness to authenticate the documents under the business records exception to the hearsay rule. RCW 5.45.020. The State thus assumed, and the trial court accepted, that the hospital documents contained inadmissible hearsay without any explanation of why Kasbaum was offering the documents as evidence, which could have obviated a hearsay objection. For purposes of this appeal we turn to Kasbaum's constitutional claim because Kasbaum did not assert at trial that the documents did not contain hearsay. RAP 2.5(a); *See also State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial."). Furthermore, Kasbaum assigns error to the trial court's evidentiary ruling only insofar as it violated his constitutional right to present a defense. We need not address the trial court's denial of Kasbaum's motion for a recess because he does not assign error to that ruling.

A defendant's Sixth Amendment right to present relevant evidence may be subject to reasonable restrictions. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998); *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct 1038, 35 L. Ed. 2d 297 (1973). And state governments "unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." *Scheffer*, 523 U.S. at 309.

In *Jones*, 168 Wn.2d 713, our Supreme Court held that the trial court's exclusion of evidence under Washington's rape shield statute, RCW 9A.44.020, violated the defendant's Sixth Amendment right to present a defense.[6] In holding that the trial court's evidentiary ruling violated the defendant's Sixth Amendment right to present a defense, our Supreme Court determined that courts are required to balance "'the defendant's need for the information sought'" with "[t]he State's interest in excluding prejudicial evidence." *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). In balancing these competing interests, courts must consider "'the integrity of the truthfinding process and [a] defendant's right to a fair trial.'" *Jones*, 168 Wn.2d at 720 (alteration in original) (quoting *Hudlow*, 99 Wn.2d at 14).

Although the longstanding rule against the admission of hearsay evidence "may not be applied mechanistically to defeat the ends of justice," that was not the case here. *Chambers*, 410 U.S. at 302. Kasbaum was permitted to testify about all the critical facts underlying his

[6] The *Jones* court determined that the defendant's Sixth Amendment rights were violated by the exclusion of evidence under the rape shield statute despite holding that the rape shield statute did not apply to the evidence at issue, contrary to the long-standing principle that "[a] reviewing court should not pass on constitutional issues unless absolutely necessary to the determination of the case." *State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981).

affirmative defense. And, contrary to Kasbaum's contention, the excluded hospital admission forms, although marginally relevant, were not highly probative of his affirmative defense because the documents did not indicate the date or time that they were issued to Kasbaum, apart from the date he wrote next to his signature line,[7] and did not provide any information related to Kasbaum's injury or his need for treatment at the hospital when he was due in court. Thus, even if the excluded hospital documents had been admitted, the jury still had to evaluate the credibility of Kasbaum's testimony to determine if he met the burden of proving his affirmative defense. Accordingly, we hold that the trial court's exclusion of evidence did not violate Kasbaum's right to present a defense to the September 21 bail jumping charge.

II. Prosecutorial Misconduct

Next, Kasbaum contends that the prosecutor committed misconduct by (1) questioning Kasbaum about his failure to produce evidence supporting his affirmative defense and (2) arguing in closing that Kasbaum failed to produce evidence supporting his affirmative defense. Kasbaum asserts that these actions constitute prosecutorial misconduct because the prosecutor's successful argument to exclude the hospital admission forms caused him to be unable to produce evidence supporting his affirmative defense. We disagree.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Because Kasbaum did not object to the prosecutor's allegedly improper conduct at trial, we must ascertain whether the prosecutor's

[7] Although one document contained a handwritten date next to an unknown person's signature, Kasbaum did not produce the person as a witness at trial.

misconduct was "so flagrant and ill-intentioned" that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). This standard of review requires Kasbaum to establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict" and (2) "no curative instruction would have obviated [the] prejudicial effect on the jury." *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

We review a prosecutor's allegedly improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor has '"wide latitude in making arguments to the jury'" and may '"draw reasonable inferences from the evidence.'" *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)).

In support of his prosecutorial misconduct claim, Kasbaum relies on *State v. Kassahun*, 78 Wn. App. 938, 900 P.2d 1109 (1995). In *Kassahun*, the State charged a gas station and convenience store owner with second degree murder after he shot and killed someone outside of his establishment. 78 Wn. App. at 939-41. The State successfully moved to preclude the defendant from discovering objective evidence of the victim's gang affiliation and activities, as well as that of some of the witnesses present when the victim was killed. *Kassahun*, 78 Wn. App. at 946, 952. The trial court modified its ruling in limine to allow Kassahun to present testimony regarding his own subjective belief that the victim was a gang member. *Kassahun*, 78 Wn. App. at 946. During closing argument, the State argued, over defense objection, that there was no evidence that "'lawless gangs [were] taking over and running the show in the parking lot'" of Kassahun's store. *Kassahun*, 78 Wn. App. at 946 (quoting *Kassahun* Report of Proceedings

(Nov. 23, 1993) at 1198).

Division One of this court determined that the prosecutor committed misconduct at closing, reasoning:

> Having prevailed by motion in limine in its effort to preclude Kassahun from discovering objective evidence of Walker's gang membership and gang activities and that of some of the witnesses who were in the parking lot at the time of the shooting, it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer objective evidence to support his belief that his business was being overrun by gangs.

Kassahun, 78 Wn. App. at 952. But because the *Kassahun* court reversed Kassahun's convictions on other grounds, it did not analyze whether the prosecutor's improper closing argument prejudiced Kassahun. 78 Wn. App. 952.

Kassahun is distinguishable for a number of reasons. First, here, the prosecutor did not specifically refer to the excluded documents in its cross-examination or during closing arguments. Instead, the prosecutor referred to Kasbaum's failure to support his affirmative defense with testimony from a medical professional or with medical documentation showing that he suffered an injury requiring hospitalization or treatment. The excluded hospital admission forms only show that Kasbaum went to the hospital and do not contain any information related to his injury or need for treatment. Thus, unlike in *Kassahun*, the prosecutor here was not faulting Kasbaum for failing to produce evidence that the prosecutor successfully moved to exclude. And the prosecutor could have made the same argument that the evidence did not support the defense theory even if the trial court admitted the hospital admission forms as evidence.

Second, unlike cases holding that a prosecutor commits misconduct by commenting "'on the lack of defense evidence [that] the defendant ha[d] no duty to present,'" here the prosecutor

was commenting on the lack of defense evidence supporting Kasbaum's affirmative defense. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009) (quoting *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990)). Finally, even assuming that the prosecutor's questioning and comments during closing argument were improper, Kasbaum cannot show that such misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" and is incurable by a jury instruction. *Stenson*, 132 Wn.2d at 719. Regardless of the prosecutor's questions and comments during closing, the jury was required to evaluate *Kasbaum*'s evidence, or lack thereof, to determine whether he met his burden of proving the affirmative defense by a preponderance of the evidence. Accordingly, Kasbaum was not prejudiced by the prosecutor's cross-examination or closing argument.

We affirm Kasbaum's convictions.

III. DOSA sentence

In its cross-appeal, the State asserts that the trial court abused its discretion in imposing a DOSA sentence. Specifically, the State asserts that sufficient evidence did not support the trial court finding that Kasbaum's chemical dependency contributed to his bail jumping offense. We disagree.

In general, because a DOSA sentence is an alternate form of a standard range sentence, it may not be appealed. RCW 9.94A.585(1); RAP 2.2(b)(6); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). "[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." *Williams*, 149 Wn.2d at 146-47. But the rule prohibiting appeals from standard range sentences "does not bar a party's right to challenge the underlying legal

conclusions and determinations by which a court comes to apply a particular sentencing provision." *Williams*, 149 Wn.2d at 147. Accordingly, we may review standard range sentences "for the correction of legal errors or abuses of discretion in the determination of what sentence applies." *Williams*, 149 Wn.2d at 147.

Here, the State asserts that the trial court abused its discretion in determining that Kasbaum was eligible for a DOSA sentence because there was no evidence supporting a finding that a chemical dependency contributed to his offense. The State relies on RCW 9.94A.607, which provides that a trial court may order an offender to participate in rehabilitative programs as a community custody condition upon a finding that a chemical dependency contributed to the offense. But RCW 9.94A.660[8], not RCW 9.94A.607, is the particular statute that provides the requisite conditions for a trial court to impose a DOSA sentence. RCW 9.94A.660 provides in relevant part:

> (1) An offender is eligible for the special drug offender sentencing alternative if:
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> (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4);
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> (b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug . . . or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug . . .;
>
> (c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense . . . ;
>
> (d) For a violation of the Uniform Controlled Substances Act . . . or a criminal solicitation to commit such a violation . . . the offense involved only a small quantity of the particular controlled substance as determined by the judge . . . ;

[8] In 2009, the legislature amended RCW 9.94A.660. The effective date of the amendment was August 1, 2009, between the dates that Kasbaum committed his bail jumping offenses. Because the 2009 amendment did not affect the issue on appeal, eligibility requirements for a DOSA sentence, we refer to the current form of the statute for clarity. *See* former RCW 9.94A.660 (2008).

> (e) The offender has not been found . . . to be subject to . . . deportation . . . ;
>
> (f) The end of the standard sentence range for the current offense is greater than one year; and
>
> (g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

RCW 9.94A.660 does not require a finding that chemical dependency contributed to the offense. Instead, RCW 9.94A.660(3) provides that a trial court may impose a DOSA sentence if the offender meets the statutory conditions and if the trial court finds that a DOSA sentence is appropriate. Because the State does not argue that Kasbaum failed to meet the conditions set forth in RCW 9.94A.660(1)(a) to (g) and the trial court did not abuse its considerable discretion in finding a DOSA sentence was appropriate in light of the evidence that Kasbaum has substance abuse issues, we affirm Kasbaum's sentence.

We affirm both Kasbaum's convictions and the trial court's imposition of a DOSA sentence.

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

We concur:

Van Deren, J.

Quinn-Brintnall, J.

Penoyar, J.