IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERALD A. HAYTER JR., Appellant.	No. 40018-9-II UNPUBLISHED OPINION

Van Deren, J. — Jerald Hayter Jr. appeals his conviction for failing to register as a sex offender. He argues that (1) the evidence was insufficient because his guilty plea to the predicate offense, a 1989 second degree rape conviction, was involuntary; (2) he received ineffective assistance of counsel; (3) his jury trial waiver violated his rights under the Washington State Constitution; (4) the State was improperly relieved of its burden of proving his prior criminal history at sentencing; and (5) the trial court violated his right to remain silent at sentencing by asking him whether he agreed with the State's list of his prior offenses. We affirm.

FACTS

On March 14, 2009, George Kelley, an Aberdeen police officer, responded to a domestic violence call at an apartment on Simpson Avenue in Aberdeen. Hayter was sleeping on a mattress in the apartment's living room. Kelley spoke with Hayter. A few days later, Kelley, whose duties

included monitoring the registered sex offenders in Aberdeen, came across Hayter's signed February 26, 2009, registration form that registered him at the Union Gospel Mission (mission) at 405 East Heron in Aberdeen.

On March 19, Kelley and his sergeant went back to the apartment on Simpson Avenue and spoke to Hayter. Hayter told Kelley that "he was supposed to be living at the [m]ission" and "he had ten days to register a new address." Report of Proceedings (RP) (Nov. 5, 2009) at 40. Kelley had already spoken to Mark Bailey from the mission, who told Kelley that he had not seen Hayter "in quite some time." RP (Nov. 5, 2009) at 42. Kelley placed Hayter under arrest and another officer transported Hayter to the Aberdeen jail.

On March 20, the State charged Hayter with failing to register as a sex offender. The State alleged that on "March 18, 2009, having been convicted on or about June 9, 1989, of a sex offense that would be classified as [a] felony under the Law of Washington, to wit: Rape in the Second Degree in Grays Harbor County," Hayter failed to register as a sex offender under former RCW 9A.44.130 (2008). Clerk's Papers (CP) at 1.

On April 20, the trial court held a CrR 3.5 hearing and found that Kelley's March 19 discussion with Hayter was not a custodial interrogation and that Hayter's statements were admissible. The trial court accepted Hayter's waiver of the time for trial rights and granted Hayter's trial continuance request. Trial was set for August 4.

On July 21, the trial court granted Hayter's second trial continuance request. Trial was reset for September 15. On August 20, the State moved to continue the trial due to witness unavailability, Hayter agreed to the continuance, and the trial court granted the continuance. Also on August 20, Hayter, his attorney, and the trial judge signed a waiver of trial by jury. This

written waiver stated:

> I, [Hayter], am aware of the following matters concerning waiver of my right to a jury trial:
>
> 1. I am entitled to a trial by a jury [of] citizens who would determine my guilt or innocence. This right is protected by the Constitution and laws of the United States and the State of Washington.
> 2. In a jury trial, the State must convince all of the twelve citizens (the jurors) of my guilt beyond a reasonable doubt. In a trial by judge, the State must only convince the judge beyond a reasonable doubt.
>
> I understand these rights and waive (give up) my right to a jury trial and agree that my case can be tried by a judge without a jury.

CP at 26. Moreover, Hayter's attorney asserted, "I have reviewed the right to a jury of twelve with the Defendant. I believe the Defendant's waiver of a trial by jury and agreement to be tried by a judge is voluntarily, knowingly and intelligently made." CP at 26. The trial court conducted the following colloquy with Hayter:

> THE COURT: Mr. Hayter, I have been handed a document entitled waiver of trial by jury. It's dated today; is that your signature on this document?
> THE DEFENDANT: Yes, it is.
> THE COURT: Did you read it?
> THE DEFENDANT: Yes.
> THE COURT: Do you understand what it says?
> THE DEFENDANT: Yeah.
> THE COURT: Is it your intention as you stand here now, to waive your right to a trial by jury in this case?
> THE DEFENDANT: Yes, I am.
> THE COURT: Do you understand that you have a right under the constitution of the United States and the State of Washington to have your guilt or innocence determined by a jury of 12 citizens?
> THE DEFENDANT: Yes.
> THE COURT: And if you waive that right, your guilt will be determined by a judge sitting without a jury; do you understand that?
> THE DEFENDANT: Yes, sir.
> THE COURT: And at a jury trial, the prosecuting attorney must convince all 12 of the jurors of your guilt beyond a reasonable doubt. In a jury trial the [S]tate must—rather, if you waive your right to a jury then the State only needs to convince one person, the judge, of your guilt; do you understand that?
> THE DEFENDANT: Yes.
> THE COURT: And did you have an opportunity to discuss this issue of a

trial by jury or a trial without a jury with [your defense attorney]?
THE DEFENDANT: Yes, I have.
THE COURT: Did you have any questions that he didn't answer to your satisfaction?
THE DEFENDANT: No sir.
THE COURT: Do you have any questions you wish to ask me about this process?
THE DEFENDANT: No.
THE COURT: Okay. I am going to ask you one more time, just in case; do you now wish to have your guilt determined by a judge sitting without a jury?
THE DEFENDANT: Yes, sir.
THE COURT: And you wish to waive your right to a jury trial?
THE DEFENDANT: Yes, sir.

RP (Aug. 20, 2009) at 4-6.

On September 18, Hayter informed the trial court that he felt his attorney was not adequately representing him or doing enough to assert his diminished capacity defense. The trial court heard Hayter's grievances and determined that Hayter's attorney had met with him at least nine times at court and there were potentially additional meetings outside of the court room. Additionally, the trial court found that Hayter's attorney had filed "several different motions and documents with the court as th[e] case ha[d] progressed, indicating that he had contacted witnesses, made decisions regarding various defenses to pursue or not to pursue, ha[d] reviewed discovery provided to him by the State, . . . and filed his own omnibus response." RP (Sept. 18, 2009) at 13. The trial court stated that Hayter was "certainly being represented by experienced counsel who kn[ew] how to best use his time and the resources of the court." RP (Sept. 18, 2009) at 13. The trial court informed Hayter that "to be effectively represented by counsel, does not require that you agree with every decision that's made." RP (Sept. 18, 2009) at 13. Moreover, Hayter's attorney had already subpoenaed an expert witness to address Hayter's diminished capacity defense. The trial court denied Hayter's request for new counsel and granted

Hayter's continuance request.

Hayter's bench trial began on November 5. At trial, the following witnesses testified: (1) Bailey, the men's director at the mission; (2) Monty Glaser, an Aberdeen police officer; (3) Kelley; (4) Debbie Grandorff, a support specialist at the Grays Harbor County Sheriff's Office; (5) Scott Haga, a physician's assistant; (6) Julia Hayter, Hayter's sister; (7) Hayter; and (8) Brett Trowbridge, a licensed Washington psychologist, who testified as Hayter's expert witness. Kelley testified as described above.

Bailey testified about the requirements for those who wish to stay at the mission. He stated that "[i]f they need a place to stay, they just check in overnight, and then they're considered a guest of the [m]ission. They're allowed to stay as long as they need to as long as they're making an attempt to get on their feet." RP (Nov. 5, 2009) at 25. The mission also offers a one year program to guests and, if they are interested, they are given directions on how to get into the program but are not automatically admitted. Additionally, the mission informs all guests that once they leave the mission, "they automatically lose their bed for 30 days." RP (Nov. 5, 2009) at 27. Bailey testified that Hayter checked into the mission on February 16 and stayed there until March 1. Bailey further testified that Hayter had not returned to the mission after March 1.

Hayter presented a diminished capacity defense. Hayter testified that when he was released from jail on February 2 he intended to reside at the mission and begin their year long program. After being at the mission for a few weeks, Hayter left, purportedly to visit his sick grandson in Kent. But Hayter never made it to Kent and ended up staying with his sister in Pacific County. Hayter testified that he intended to return to the mission when he left his sister's house.

Haga testified that Hayter could have suffered potential side effects from the medications prescribed to treat his pain, anxiety, panic disorder, and agoraphobia in February and March; including impaired concentration and judgment, nausea, light-headedness, sleepiness, and dizziness. Trowbridge testified that Hayter was mildly mentally retarded, that his intelligence quotient (IQ) had been determined to be 70, and he read at the third grade level.

The State introduced (1) Hayter's judgment and sentence from his 1989 second degree rape conviction, (2) Hayter's signed registration notification stating that his conviction required him to register as a sex offender, and (3) Hayter's sex offender registration indicating that he registered at the mission on February 26,

The trial court found Hayter guilty of failing to register under former RCW 9A.44.130(11)(a). It was "not at all persuaded by the testimony of either Mr. Haga or Dr. Trowbridge that Mr. Hayter lacked the capacity to know what he was doing. He testified that he told Detective Kelley that he believed he had ten days to notify the sheriff's office of a change of address. He was mistaken about that, but he was also beyond the ten days." RP (Nov. 5, 2009) at 96. The trial court was "convinced [beyond a reasonable doubt] that Mr. Hayter was aware of his obligations to register and that he knowingly failed to do so." RP (Nov. 5, 2009) at 96. On November 19, the trial court entered the following findings of fact and conclusions of law in support of its guilty verdict:

FINDINGS OF FACT

1.

[Hayter] was convicted in Grays Harbor Superior Court cause number 89-1-42-6 of Rape in the Second Degree.

2.

On February 26, 2009, [Hayter] registered with the Grays Harbor Sheriff's Office, listing his address as 405 E Heron, Aberdeen, WA. This address is the . . . [m]ission.

3.

On February 2, 2009, [Hayter] signed a Duty to Register Form with the Grays Harbor's Sheriff's Office that detailed his responsibilities in regards to registering as a sex offender.

4.

[Hayter] began staying at the . . . [m]ission on February 16, 2009. The morning after [Hayter] checked in, Mark Bailey met with [Hayter] and explained that, if [Hayter] left the Mission without permission, he would be prohibited from staying at the [m]ission for at least 30 days.

5.

[Hayter] left the [m]ission on March 1, 200[9] and was gone overnight without permission. [Hayter] did not return to the [m]ission after that date.

6.

[Hayter] knew, or should have known, that the [m]ission was no longer his residence.

7.

[Hayter] spent the next 18 days living at various locations in the Aberdeen area.

8.

[Hayter] did not make a new registration with the Grays Harbor Sheriff's Office between March 1 and March 18, 2009.

Based upon the foregoing findings of fact, the court enters the following:

conclusions of law

1.

This court has jurisdiction over [Hayter] and subject matter.

2.

Based upon the evidence, this court determines, beyond a reasonable doubt, the following:

1. [Hayter] was convicted of a felony sex offense.
2. [Hayter] was required by law to register as a sex offender.
3. [Hayter], who had a fixed residence, failed to send a signed written notice of where [Hayter] plan[ned] to stay to the sheriff of the county where [Hayter] last registered within 48 hours, excluding weekends and holidays, of ceasing to have a fixed residence;
4. That all these acts occurred in Grays Harbor County, Washington.

CP at 4-6 (boldface omitted).

Hayter was sentenced on November 16, 2009. The State offered a list of Hayter's seven prior felonies and presented a certified copy of Hayter's 1989 second degree rape judgment and sentence. It did not provide copies of the other judgment and sentencing forms. The State asked

the trial court to have Hayter acknowledge his criminal history. Hayter's attorney stated that he had provided Hayter with a copy of his alleged criminal history but had not reviewed it with him. Hayter acknowledged that the State had correctly set forth his criminal history. The trial court sentenced Hayter to 57 months, the top of the standard range, citing the crime's seriousness and the fact that it was Hayter's fifth failure to register offense. Hayter appeals.

ANALYSIS

I. Error Raised for the First Time On Appeal

First, Hayter argues that his "failure to register conviction violated his Fourteenth Amendment[1] right to due process because the evidence was insufficient to prove the elements of the charged crime." Br. of Appellant at 9 (capitalization and boldface omitted). Hayter contends that his 1989 second degree rape conviction was constitutionally invalid because his guilty plea was not voluntary. Thus, Hayter argues, the State failed to establish the validity of the 1989 rape conviction and his failure to register conviction must be reversed and dismissed with prejudice.

Assuming that a challenge to the predicate conviction's constitutional validity applies in the failure to register context, we must first address whether Hayter may properly raise this issue for the first time on appeal. An appellant may raise a claim for the first time on appeal if it constitutes manifest constitutional error. RAP 2.5(a)(3).

This issue was resolved by our Supreme Court in *State v. Smith*, 104 Wn.2d 497, 707 P.2d 1306 (1985) and its decision is controlling. A challenge to the constitutional validity of a prior conviction used to establish the elements of a present offense is not a constitutional error that a defendant may raise for the first time on appeal. *Smith*, 104 Wn.2d at 500-01. In such

[1] U. S. Const.

challenges, the defendant must first place at issue the constitutionality of the prior guilty plea. *Smith*, 104 Wn.2d at 506. The defendant's initial burden is to offer "a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction," *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993), or to call attention to the issue of an invalid predicate conviction. *See State v. Swindell*, 93 Wn.2d 192, 197, 607 P.2d 852 (1980) ("once a defendant calls attention to the alleged unconstitutionality of a plea of guilty . . . the State must prove beyond a reasonable doubt, that the plea was made voluntarily"); *State v. Holsworth*, 93 Wn.2d 148, 159, 607 P.2d 845 (1980) ("defendant must first call attention to the inappropriateness of using a . . . plea[;] . . . once the defendant raises the issue, the State must bear the burden of [proof]").

In *Smith*, our Supreme Court reasoned that "[t]he nature of the challenge is to the State's proof, not to a violation of constitutional rights" because, "[i]f the State fails to meet [its] burden, it has not proved an essential element of the case: a constitutionally valid prior conviction." 104 Wn.2d at 506. Thus, if the defendant fails to challenge the constitutional validity of a predicate conviction before the trial court, then he "has not suffered a violation of his constitutional rights in the [present] proceeding; he only has missed an opportunity to enlarge the State's burden of proof." *Smith*, 104 Wn.2d at 506.

Here, Hayter did not object to the State's request to admit a certified copy of Hayter's 1989 second degree rape judgment and sentence. Moreover, Hayter did not argue at trial that his 1989 conviction was invalid due to the involuntariness of the 1989 guilty plea, or for any other reason. Thus, Hayter failed to place at issue the constitutional validity of his 1989 second degree rape conviction or to offer "a colorable, fact-specific argument supporting the claim of

constitutional error in the prior conviction." *Summers*, 120 Wn.2d at 812; *Smith*, 104 Wn.2d at 506 . We reject Hayter's attempt to recast his failure to challenge the predicate sex offense conviction below as a manifest constitutional error. Because Hayter has not alleged an error of constitutional magnitude, we do not consider it for the first time on appeal.

II. Ineffective Assistance of Counsel

Hayter next argues that he was denied effective assistance of counsel because (1) "defense counsel sought to exclude . . . Hayter's statements, but did not investigate . . . Hayter's case prior to the CrR 3.5 hearing, and thus failed to provide evidence bearing on the circumstances under which . . . Hayter's statements were made" and (2) "[d]efense counsel's dilatory conduct and lack of preparation" violated Hayter's speedy trial right. Br. of Appellant at 18, 21, 23. The State argues that Hayter has presented no evidence of defense counsel's inadequate preparation before the CrR 3.5 hearing and Hayter cannot demonstrate prejudice as a result of his attorney's alleged deficient performance. Finding Hayter received effective assistance of counsel, we also deny this claim.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, Hayter must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127

Wn.2d at 335. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

We strongly presume that counsel is effective and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 335–36. A failure to demonstrate either deficient performance or prejudice defeats an ineffective assistance of counsel claim. *See McFarland*, 127 Wn.2d at 334–35; s*ee also Strickland*, 466 U.S. at 700.

A. CrR 3.5 Suppression Hearing

First, Hayter argues that he received ineffective assistance of counsel because his attorney failed to investigate Hayter's case before the CrR 3.5 hearing. Hayter contends that his defense counsel should have argued that Hayter's statements be evaluated under a "totality-of-the-circumstances test," including Hayter's "anxiety, agoraphobia, and panic disorder, that he was heavily medicated at the time of the interrogation, [and] that he had an IQ of 70." Br. of Appellant at 19-20. The State argues that Hayter's ineffective assistance of counsel claim must fail because (1) there is no evidence in the record to support his assertion that his attorney did not investigate his case before the CrR 3.5 hearing, (2) Hayter has not demonstrated that he was prejudiced, and (3) Hayter's statements were noncustodial and, thus, *Miranda*[2] warnings were not required.

Hayter does not provide citation to the record to support his claim that defense counsel

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

failed to investigate his case prior to the CrR 3.5 hearing. We do not consider matters not in the record. RAP 10.3(a)(6), (b) (The parties' briefs should provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.").

At the conclusion of the CrR 3.5, the trial court found that the preliminary "criminal investigation did not trigger an obligation on [the officer's] part to advise . . . Hayter of his constitutional rights before . . . the interrogation became custodial." RP (Apr. 20, 2009) at 16. The trial court determined that Hayter's statements were noncustodial and, thus, admissible. Hayter does not challenge the trial court's finding that he was not in custody when he made the statement to Kelley. Hayter's only argument is essentially that defense counsel erred by not arguing Hayter's mental state and IQ during the suppression hearing.

We apply two tests to determine the voluntariness of statements, the due process test and the *Miranda* test. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). Here, because Hayter was not in custody for *Miranda* purposes when he made the statements to Kelley, we do not consider the *Miranda* voluntariness test. Under the due process test, a statement is voluntary and admissible if, in light of all the circumstances, the defendant exercised free will and was not coerced into making the statement. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); *State v. Saunders*, 120 Wn. App. 800, 809, 86 P.3d 232 (2004). In determining voluntariness, a trial court considers the "defendant's physical condition, age, mental abilities, physical experience, and police conduct." *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). A trial court should also consider "[a] defendant's mental disability and use of drugs at the time of a confession . . . , but those factors do not necessarily render a confession

involuntary." *Aten*, 130 Wn.2d at 664.

Here, the trial court was not persuaded by Haga or Trowbridge's trial testimony that "Hayter lacked the capacity to know what he was doing." RP (Nov. 5, 2009) at 96. The trial court was "convinced that . . . Hayter was aware of his obligations to register and that he knowingly failed to do so." RP (Nov. 5, 2009) at 96. And Hayter has not demonstrated any prejudice resulting from defense counsel's failure to argue that Hayter's mental state or low IQ made his statement to Kelley involuntary. Moreover, even if the trial court had suppressed Hayter's statements as involuntary, he has not persuaded us that the trial outcome would have differed. The State provided sufficient evidence to prove beyond a reasonable doubt that Hayter failed to register as a sex offender under former RCW 9A.44.130. Thus, Hayter has not demonstrated prejudice and his claim that counsel ineffectively represented him at the CrR 3.5 hearing fails.

B. Speedy Trial Rights

Next, Hayter argues that his attorney's "dilatory conduct denied . . . Hayter his right to a speedy trial." Br. of Appellant at 21. Hayter alleges that he "was forced to choose between his right to a speedy trial and his right to adequately prepared counsel." Br. of Appellant at 22. But Hayter fails to argue how his defense counsel's trial continuance requests prejudiced him.

On April 20, defense counsel moved for the first continuance to allow time to hire an investigator and subpoena witnesses. Hayter consented to the trial continuance. Hayter's defense counsel moved for a second continuance on July 21, citing difficulty contacting potential witnesses. The trial court again granted the continuance. Then, on August 20, the State moved for a trial continuance for good cause due to witness availability and defense counsel approved the

continuance. The trial court asked Hayter if he had any questions regarding the continuance, and he did not. On September 18, Hayter's defense counsel moved for the final trial continuance and authorization to hire an expert to assist with Hayter's diminished capacity defense. Hayter's counsel indicated that Hayter was willing to waive his speedy trial right because he wanted a mental evaluation to determine his capacity. The trial court granted the final continuance upon a good cause finding.

Hayter has failed to argue that he objected to the continuances or how the delay in his trial prejudiced him. A showing of prejudice requires "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. Hayter states only, "But where appointed counsel unreasonably delays resolution of the case, an accused person can languish in jail awaiting trial, as . . . Hayter was forced to do." Br. of Appellant at 23. There is no evidence that Hayter was prejudiced by his attorney's continuance requests. Furthermore, it is well established that a trial court may grant a continuance over a defendant's objection to allow counsel additional time to prepare for trial. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) ("Counsel was properly granted the right to waive trial in 60 days, over defendant's objection, to ensure effective representation and a fair trial."); *see also State v. Woods*, 143 Wn.2d 561, 580-81, 23 P.3d 1046 (2001).

Here, Hayter did not object to any of the trial continuances. The continuance requests provided Hayter's counsel with adequate time to hire an investigator, develop Hayter's diminished capacity defense, subpoena witnesses, and hire an expert. Although Hayter was in custody while he awaited trial, after he was convicted and sentenced to 57 months' confinement, he was given credit for his time served before trial. Because Hayter cannot demonstrate prejudice resulting

from his defense counsel's trial continuance requests, his ineffective assistance of counsel claim fails.

III. Jury Trial Waiver

Hayter also argues that for his jury trial waiver to be valid

> a reviewing court must find in the record proof that the defendant fully understood the right under the state constitution—including the right to participate in selecting jurors, the right to a fair and impartial jury, the right to a jury of twelve, the right to be presumed innocent by the jury unless proven guilty by a proof beyond a reasonable doubt, and the right to a unanimous verdict.

Br. of Appellant at 35. Hayter urges us to reconsider *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006) and apply a *Gunwall*[3] analysis to determine additional safeguards required for a valid jury trial right waiver under the Washington Constitution. In *Pierce*, we refused to apply a *Gunwall* analysis to the waiver of jury trial rights. Hayter asserts that, by refusing to apply *Gunwall*, we have failed to "articulate *any* test for determining the requisites of a valid [jury trial] waiver under the state constitution." Br. of Appellant at 35 n.11. Hayter is mistaken and we decline to reconsider *Pierce*.

We review de novo a jury trial waiver. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). In *Pierce*, we stated that, "Washington already has rules governing a defendant's waiver of the jury trial right. A defendant may waive the right as long as the defendant acts knowingly, intelligently, voluntarily, and free from improper influences." 134 Wn. App. at 771. A court considers several factors to determine if this standard is met, including: (1) whether the defendant was informed of his jury trial right; (2) the general facts and circumstances, including the defendant's experience; (3) whether there was a written waiver; and (4) an attorney's representation that his client's waiver is being made knowingly, intelligently, and

[3] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

voluntarily. *Pierce*, 134 Wn. App. at 771.

Pierce waived his right to a jury trial through a written waiver. *Pierce*, 134 Wn. App. at 767. After receiving the written waiver, the trial court advised Pierce that he had the right to have his case heard by an impartial jury of 12 people and that by waiving this right his case would be heard by only one person, a judge. *Pierce*, 134 Wn. App. at 767-68. Pierce stated that he understood and wanted to waive his right to a jury trial. *Pierce*, 134 Wn. App. at 767-68. Pierce's trial counsel told the court that Pierce was knowingly and voluntarily waiving his right to a jury trial. *Pierce*, 134 Wn. App. at 767.

We decided that, although the Washington State Constitution did provide a more expansive right to a jury trial than under *Gunwall*, it did not automatically follow that additional safeguards were required before this more expansive right could be waived. *Pierce*, 134 Wn. App. at 773. Based on all the information that Pierce had at the time he executed his waiver, we held that Pierce had enough information to make his jury trial waiver valid. *Pierce*, 134 Wn. App. at 773.

Here, as in *Pierce*, Hayter has not argued that his waiver was somehow not voluntarily, knowingly, and intelligently made. Hayter's written waiver of right to a jury trial, as required by CrR 6.1(a), is "strong evidence" that he validly waived his jury trial right. *Pierce*, 134 Wn. App. at 771. And while not required, the trial court conducted a colloquy with Hayter to determine that he understood the rights he was waiving. *See Pierce*, 134 Wn. App. at 772.

Hayter executed a written waiver after consulting with his attorney. The trial court informed Hayter that he had the right to a jury of 12 people who the State would have to convince of his guilt beyond a reasonable doubt. The trial court advised Hayter that by waiving

his jury trial right, his case would be heard by a judge. Hayter stated that he understood his jury trial right and wished to waive it. Hayter declined to ask the trial court any questions about his jury trial waiver. After a thorough colloquy, the trial court accepted Hayter's jury trial waiver. Based on the standards articulated and applied in *Pierce*, Hayter is incorrect in his assertion that no test exists to determine whether a defendant's waiver of the jury trial right is valid under the Washington Constitution. *Pierce* is controlling and we hold that Hayter knowingly, intelligently, and voluntarily waived his jury trial right. Thus, the trial court did not err in accepting the waiver.

IV. Sentencing

Finally, Hayter argues that the 2008 amendments to the Sentencing Reform Act of 1981, chapter 9.94A RCW, unconstitutionally relieved the State of its burden of proof and that the trial court violated his right to remain silent at his sentencing hearing. The State argues that (1) under RCW 9.94A.500(1) the trial court properly relied on the criminal history provided by the State that was acknowledged by Hayter and (2) Hayter's right to remain silent was not violated because he was assisted by counsel, responded freely to the trial court's questions, and his statements were voluntary.

A. State's Burden of Proving Hayter's Criminal History at Sentencing

> At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). "'The best evidence of a prior conviction is a certified copy of the judgment.'" *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting [*State v.*] *Ford*, 137 Wn.2d [472,] 480, 973 P.2d 452 [(1999)]). It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. *Ford*, 137 Wn.2d at 480. This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing "'some minimal indicium of reliability beyond mere allegation.'" *Ford*, 137 Wn.2d at 481 [(emphasis omitted)] (internal quotation marks omitted) (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)).

State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence." *Mendoza*, 165 Wn.2d at 920; *see also State v. Ross*, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004); *Ford*, 137 Wn.2d at 480.

In *Ross*, our Supreme Court

> reiterated [its] holding in *Ford* that once a defendant acknowledges the existence and comparability of prior convictions, no further proof is necessary. A defendant cannot challenge his sentence for the first time on appeal unless he shows that an error of fact or law exists within the four corners of the sentence. Since neither defendant [in *Ross*] could show such an obvious error in his sentence, it was not miscalculated, and any objection to the inclusion of acknowledged criminal history was waived.

Mendoza, 165 Wn.2d at 927-28 (internal citations omitted).

Here, Hayter affirmatively acknowledged that the State had correctly set forth his criminal history at his sentencing hearing.[4]

> [THE PROSECUTOR]: Your Honor, . . . I filed a statement of prosecutor listing what the State believes to be Mr. Hayter's criminal history, and ask that he is acknowledging that as his history.

[4] In *State v. Hunley*, we determined that the 2008 amendments, RCW 9.94A.500 and .530, to the Sentencing Reform Act of 1981, chapter 9.94A RCW, unconstitutionally relieved the State of its burden to prove a defendant's prior convictions at sentencing. No. 39676–9-II, 2011 WL 1856074 (Wash. Ct. App. June 2, 2011), *petition for review filed*, No. 86135-8 (Wash. June 14, 2011). *Hunley* states that "constitutional due process requires the State to meet its burden of proof at sentencing. The defendant's silence is not constitutionally sufficient to meet this burden." 2011 WL 1856074, at *4. *Hunley* rejects the legislature's attempt to overrule *Ford*, stating "the 2008 amendments to RCW 9.94A.500(1) and RCW 9.94A.530(2) cannot constitutionally convert a prosecutor's 'bare assertions' into evidence or shift the burden of proof by treating the defendant's silence as acknowledgement." *Hunley*, 2011 WL 1856074, at *4. "*Ford* and its progeny make clear that, unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by a preponderance of the evidence." *Hunley*, 2011 WL 1856074, at *4. But, unlike Hunley, who did not acknowledge his criminal history, Hayter explicitly acknowledged his criminal history to the trial court and, thus, the *Hunley* analysis is not controlling here.

> THE COURT: [Hayter's defense attorney], have you and your client reviewed the criminal history set forth on Page 2 of the statement of prosecuting attorney?
>
> [HAYTER'S DEFENSE ATTORNEY]: I did give a copy to Mr. Hayter. I did not review it, and he is shaking, yes, he thinks that is the number of points he has.
>
> THE COURT: Mr. Hayter, do you believe that this correctly sets forth your criminal history?
>
> [HAYTER]: Yes, sir.

RP (Nov. 16, 2009) at 2. Because Hayter affirmatively acknowledged that the State had correctly set forth his criminal history, we hold that the State met its burden of proving his criminal history by a preponderance of the evidence.

B. Right to Remain Silent

Hayter also contends that the trial court violated his "right to remain silent by forcing him to acknowledge criminal history." Br. of Appellant at 37. In support of this argument, Hayter cites *In re Detention of Post*, 145 Wn. App. 728, 187 P.3d 803 (2008), *aff'd*, 170 Wn.2d 302, 241 P.3d 1234 (2010). *Post* states that "[a] criminal defendant's right to remain silent continues through sentencing." *Post*, 145 Wn. App. at 758. We agree with Hayter that his right to remain silent existed at his sentencing. But here, the trial court merely inquired of Hayter's counsel whether he and Hayter had reviewed the prosecutor's statement and asked Hayter whether he agreed that it was correct. The trial court did not require that either his counsel or Hayter respond to its inquiries. Hayter has not provided any authority that supports his argument that a trial court inquiring about whether a defendant agrees with the prosecutor's statement of criminal history, in the presence of his defense attorney, violates the defendant's right to remain silent. Thus, without citation to further authority or to the record showing some coercion by the trial court, we hold that Hayter's claim fails. RAP 10.3(a)(6) (An appellant must offer "argument in

support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.").

Finding no error, we affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Johanson, J.