IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DREW LYNN BYRON, Appellant.	No. 40154-1-II UNPUBLISHED OPINION

Penoyar, C.J. — Drew Byron appeals his residential burglary conviction, arguing in relevant part that (1) police lacked probable cause to arrest him; (2) his counsel provided ineffective assistance by stipulating to the admission of custodial statements; (3) the information was legally and factually insufficient; (4) the trial court erroneously calculated his offender score; and (5) certain 2008 amendments to the Sentencing Reform Act of 1981 (SRA) violate the Fifth Amendment's privilege against self-incrimination and the Fourteenth Amendment's due process clause. We affirm Byron's conviction and sentence.

FACTS

On the afternoon of July 27, 2009, the temperature exceeded one hundred degrees Fahrenheit. Heather Hilf-Barr was sitting in her living room when she heard a "quiet knock" at her front door followed by two doorbell rings. Report of Proceedings (RP) (Dec. 15, 2009) at 147. She went upstairs to investigate. Through an upstairs window, Hilf-Barr observed an unfamiliar gray car in her driveway. Feeling that "something was wrong," she called 911. RP (Dec. 15, 2009) at 149.

After dialing 911, Hilf-Barr saw a man "dressed all in black" walking toward her house.

RP (Dec. 15, 2009) at 150. The man wore a "black bandanna with . . . white bandanna patterns" over his face, and carried a black and red duffel bag. RP (Dec. 15, 2009) at 150. The man's head was covered. The 911 operator dispatched police to the scene at 3:41 p.m.

The man entered the house through an unlocked side door. Hilf-Barr hid in the upstairs bathroom and conversed quietly with the 911 operator. Hilf-Barr could hear the intruder's footsteps and "a lot of banging and loud thumps" from downstairs. RP (Dec. 15, 2009) at 152. Then, she heard a voice say, "[T]he cops are coming" over a two-way radio. RP (Dec. 15, 2009) at 154. After another minute of "thumping and banging," the house fell silent. RP (Dec. 15, 2009) at 154.

Thurston County Deputy Sheriff Thomas Cole responded to the scene. Hilf-Barr told Cole that the suspect wore "dark clothing," including a "bandan[n]a, a gray stocking cap . . . [and] a long-sleeved shirt." RP (Dec. 8, 2009) at 53. Cole and other officers recovered several bags, including the intruder's black and red duffel bag, from the downstairs area of Hilf-Barr's house. These bags contained Hilf-Barr's personal property. Cole placed the black and red duffel bag in his patrol car.

A K-9 officer responded to Hilf-Barr's house with a tracking dog. Several other officers, including Deputy Alan Clark, established a perimeter unit in the vicinity to contain any suspects that the dog was able to track. The dog did not pick up a scent at the house.

Meanwhile, Sergeant Jeff Dehan had received a dispatch about the burglary and was driving toward Hilf-Barr's house. According to Dehan, the dispatcher described the suspect as "wearing a dark-colored shirt and . . . camo pants[] . . . and . . . something covering his head." RP (Dec. 7, 2009) at 7. Before Dehan arrived at the house, however, dispatch received a call at

about 4:20 or 4:25 p.m. from a nearby resident reporting "a suspicious male" in the resident's backyard. RP (Dec. 7, 2009) at 24. The tracking dog picked up a scent from that location and followed it in a southeasterly direction with respect to the burglary scene.

At some point, Clark observed an individual in dark clothing running in an easterly direction across the road in "a low crouch, a fast, low crouch type of a run." RP (Dec. 7, 2009) at 30. Based on the direction of the dog's track and "different sightings by deputies during the track," Dehan positioned himself at a perimeter location about one mile southeast of the burglary scene. RP (Dec. 7, 2009) at 11.

While Dehan was positioned at that location, he heard the K-9 officer and another officer yell at someone to stop. Shortly afterwards, at about 5:15 or 5:20 p.m., Dehan saw Byron emerge from the woods. Byron was wearing gloves and "a long-sleeved dark sweatshirt . . . [and] long camouflage shorts." RP (Dec. 7, 2009) at 16. He was "sweating profusely," he was covered with "debris," including leaves and branches, and he had a "stocking hat" hanging out of his pocket. RP (Dec. 7, 2009) at 16, 18.

Dehan drew his gun, ordered Byron to lie on his stomach, and handcuffed him. Dehan patted Byron down for weapons but felt none. At that time, Dehan did not take anything from Byron's person.

At 5:27 p.m., Cole learned that Dehan had detained a suspect and he proceeded to Dehan's location. Byron was sitting, with his hands cuffed behind his back, in the shade of a patrol vehicle. Cole and Dehan exchanged the information that each had gleaned during the investigation. They concluded that probable cause existed for Byron's arrest.

Before advising Byron that he was under arrest, Cole asked Byron what he was doing in

the area. Byron responded that he was "out running, like jogging." RP (Dec. 8, 2009) at 58. Cole then told Byron that he was under arrest. Dehan subsequently searched Byron's person, including his pockets, and found "a small flashlight, a two-way radio, the stocking hat" and "other items." RP (Dec. 7, 2009) at 18-19. At some point during or immediately after Dehan's search, Cole read *Miranda*[1] warnings to Byron. After Cole read Byron the *Miranda* warnings, Cole asked Byron whether he had lost anything. Byron told Cole that he had lost an item while out running.

The officers led Byron to Cole's patrol car. The black and red duffel bag that Cole had recovered from the crime scene was in the backseat. Cole, referring to this duffel bag, asked Byron what he wanted the officers to do with "his red bag." RP (Dec. 8, 2009) at 61. Byron paused several seconds and then responded, "That's not my bag." RP (Dec. 8, 2009) at 61.

The State charged Byron with residential burglary.[2] Before trial, the trial court entered an omnibus order signed by the parties. The order reads in relevant part:

- CUSTODIAL STATEMENTS BY DEFENDANT
    - Defendant's statements may be admitted into evidence without hearing by stipulation of the parties.
    - Defendant's statements will be offered in rebuttal only.
    - No custodial statements will be offered in the plaintiff's case-in-chief or rebuttal.
    - A CrR 3.5 hearing is required and is scheduled as indicated below.

Clerk's Papers (CP) at 32.

Byron also moved to suppress the evidence that Dehan seized during the search incident

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

[2] RCW 9A.52.025(1).

to his arrest. In his motion, Byron argued that Cole's incident report[3] suggested that Dehan's search took place *before* his arrest and, therefore, could not be justified as a valid search incident to arrest. After a suppression hearing, the trial court entered a finding stating that Cole had testified at the suppression hearing that his report "was mistaken as to the sequence of events." CP at 4. Thus, the trial court found that Cole had testified that "[Byron] was told he was under arrest and then was searched (by Sergeant DeHan) incident to that arrest." CP at 4. The trial court also concluded that Dehan and Cole had probable cause to arrest Byron.

At trial, the State showed Hilf-Barr a black or navy blue bandanna that police discovered in Byron's pockets during the search incident to arrest. She testified that she was "very certain" that it was the same bandanna that the intruder was wearing when he approached her house. RP (Dec. 15, 2009) at 162. She testified that the knit hat that Dehan recovered from Byron's pockets "could have been" the same hat that the intruder wore. RP (Dec. 14, 2009) at 163. She also testified that she owned a mini-flashlight, which was similar to the one that Dehan found in Byron's pockets, and which had been missing since the burglary.

Cole testified about Byron's statement that he was "out running" and his statement denying ownership of the black and red bag. RP (Dec. 15, 2009) at 96. Another police officer testified that he discovered a large black bag in a roadside ditch in the vicinity of the burglary. Byron's wallet, which contained several pieces of Byron's identification, was inside a fanny pack in the large black bag.

The jury convicted Byron as charged. Additionally, the jury entered a special verdict that

[3] Cole's report states, "A search of [Byron] by Sgt. DeHan revealed a 2-way radio in a pants pocket as well as (sic) mini mag flashlight and (sic) gray stocking cap. I told [Byron] he was under arrest for Residential Burglary. I read [Byron] his Miranda Rights." CP at 4.

Byron committed the crime while the burglary victim was present, an aggravating factor that can support a sentence above the standard range. Former RCW 9.94A.535(3)(u) (Laws of 2008, ch. 276, § 303).[4]

At the sentencing hearing, Byron agreed to an offender score of 9. Based on this score, the trial court calculated a standard range of 63 to 84 months and imposed an exceptional sentence of 116 months. Byron appeals his conviction and sentence.

ANALYSIS

I. Probable Cause for Byron's Arrest

Byron argues that his warrantless arrest violated the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution because officers lacked probable cause to arrest him. Specifically, Byron notes that (1) he did not match the description of the intruder that Hilf-Barr provided to Cole, (2) police stopped him more than 90 minutes after the 911 call and nearly one mile from the burglary scene, and (3) the tracking dog did not pick up Byron's scent from the burglary scene but, rather, from the house of a nearby resident who reported "a suspicious male" in her backyard. RP (Dec. 7, 2009) at 24. Accordingly, Byron argues that the trial court should have suppressed both his statements to Cole[5] as well as the evidence that police seized during the search incident to arrest. This argument fails.

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[4] Unless otherwise noted, we cite to statutes in effect on July 27, 2009, the date of Byron's crime.

[5] Byron characterizes his counsel's stipulation in the omnibus order as a waiver of "a Fifth Amendment/Sixth Amendment/*Miranda* hearing under CrR 3.5." Appellant's Br. at 17 n.7. Therefore, he argues that the stipulation should not be read "as a stipulation to admissibility in the face of violations of the Fourth Amendment and Article I, Section 7." Appellant's Br. at 17 n.7. We accept Byron's characterization for the sake of argument.

A. Standard of Review

Once a trial court determines the facts, we determine de novo whether those facts constitute probable cause. *In re Det. of Petersen*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002).

B. Probable Cause

The state constitution mandates that "[n]o person shall be disturbed in his private affairs . . . without authority of law." Wash. Const. art. I, § 7. Under the state constitution, a lawful custodial arrest is a constitutional prerequisite to a search incident to arrest. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). The lawfulness of an arrest stands on the determination of whether probable cause supports the arrest. *Moore*, 161 Wn.2d at 885; *accord* RCW 10.31.100 ("A police officer having probable cause to believe that a person has committed . . . a felony shall have the authority to arrest the person without a warrant."). "Probable cause exists when the arresting officer has 'knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed' at the time of the arrest." *Moore*, 161 Wn.2d at 885 (quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)).

As a preliminary matter, although Byron assigns error to several findings of fact, nowhere in his brief does he explain his objection to these findings, such as by asserting a claim that substantial evidence does not support the challenged findings. We do not consider assignments of error that are unsupported by argument. *See* RAP 10.3(a)(6). In any case, Byron does not appear to take issue with the trial court's finding of facts but, rather, the trial court's determination that these facts gave Dehan probable cause to arrest him.

The trial court properly concluded that officers had probable cause to arrest Byron for residential burglary. We conclude, based on Dehan's CrR 3.6 testimony, that probable cause

existed at the moment Byron emerged from the woods. First, Dehan encountered Byron at a perimeter location southeast of the crime scene, where he had positioned himself based on information from the tracking dog and "different sightings by deputies" that the suspect was traveling in a southeasterly direction. RP (Dec. 7, 2009) at 11. Second, Byron substantially matched the description of the burglary suspect that Dehan had received from dispatch. According to Dehan's testimony, dispatch told him that the suspect was "wearing a dark-colored shirt and . . . camo pants[] . . . and . . . something covering his head." RP (Dec. 7, 2009) at 7. Byron emerged from the woods wearing a dark-colored sweatshirt and camouflage shorts, and he had a "stocking hat" hanging out of his pocket. RP (Dec. 7, 2009) at 18. Third, Byron emerged from the woods immediately after Dehan heard the K-9 officer and another officer yelling at someone to stop. Taken together, these facts, in addition to Byron's odd appearance—he was "sweating profusely," covered with leaves and branches, and wearing gloves even though the temperature exceeded 100 degrees—would lead a reasonable officer to conclude that Byron was the burglary suspect. RP (Dec. 7, 2009) at 16.

Byron's arguments to the contrary are unconvincing. Although he correctly points out that Hilf-Barr provided Cole with a somewhat different description of the suspect, the probable cause determination turns on what the arresting officer, not others, knew at the time of the arrest. *See Moore*, 161 Wn.2d at 885. Furthermore, the timing and location of Byron's apprehension, while relevant, do not alone determine whether probable cause existed, especially considering the officers' clear testimony at the CrR 3.6 hearing that they were actively tracking a suspect in a southeasterly direction. Nor does the fact that the tracking dog picked up the scent from a nearby resident's home, rather than Hilf-Barr's, undermine the probable cause determination. This

resident saw an unknown man in his or her backyard after the burglary; thus, the dog's track based on a scent from the resident's house was highly relevant in assessing the existence of probable cause.

Because Dehan had probable cause to arrest Byron, the warrantless arrest did not violate article I, section 7 of the state constitution. Consequently, the trial court properly denied Byron's motion to suppress the fruits of the search incident to arrest. Furthermore, Byron's statements to Cole were not inadmissible as the fruits of an illegal seizure. Finally, because probable cause supported the arrest, we do not need to consider Byron's extensive arguments that Dehan effectuated an investigative stop of Byron in a manner that that violated article I, section 7 and the Fourth Amendment.

II. Ineffective Assistance of Counsel

Byron next argues that his counsel provided ineffective assistance by stipulating to the admission at trial of (1) his pre-*Miranda* statement that he was "out running," (2) his post-*Miranda* statement that he had lost an item while running, and (3) his post-*Miranda* statement that the black and red duffel bag in Cole's patrol car did not belong to him. RP (Dec. 15, 2009) at 96. We disagree.

A. Standard of Review

The federal and state constitutions guarantee the effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel was effective by demonstrating that (1) counsel's performance was

deficient by an objective standard of reasonableness, and (2) that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687-89. Counsel's performance is not deficient when undertaken for legitimate reasons of trial strategy or tactics. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Prejudice occurs when there is a reasonable probability that the outcome of the proceeding would have differed but for the deficient performance. *Strickland*, 466 U.S. at 694. "Reasonable probability" means a probability sufficient to undermine confidence in the trial's outcome after considering the totality of evidence before the jury. *Strickland*, 466 U.S. at 694-95.

B. Byron's Pre-*Miranda* Admission

A police officer must give *Miranda* warnings when a suspect is taken into custody and interrogated. *State v. Daniels*, 160 Wn.2d 256, 266, 156 P.3d 905 (2007). Any statement that a police officer obtains in violation of *Miranda* may not be used in the State's case in chief. *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990).

A suspect is in "custody" for *Miranda* purposes when the suspect's freedom of action has been curtailed to a degree associated with formal arrest. *Daniels*, 160 Wn.2d at 266 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). Interrogation includes express questioning or any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)).

Here, Cole obtained Byron's statement that he was "out running" while Byron was sitting on the ground, handcuffed, after Dehan had seized him several minutes earlier at gunpoint. RP

(Dec. 15, 2009) at 96. Thus, Byron's freedom of action was sufficiently curtailed that he was in custody for *Miranda* purposes. Moreover, Byron's statement that he was "out running" resulted from Cole's express question about what Byron was doing in the area. RP (Dec. 15, 2009) at 96. This question was reasonably likely to elicit an incriminating response from Byron, the burglary's primary suspect, because it involved whether Byron had an alibi or explanation for his presence in the area. Accordingly, because Byron made the "out running" statement in response to Cole's custodial interrogation and before Cole gave him *Miranda* warnings, the statement was inadmissible in the State's case-in-chief. RP (Dec. 15, 2009) at 96.

Nevertheless, Byron's counsel stipulated to the admission of this statement which, as Byron's appellate counsel observes, was "patently ridiculous in light of his clothing, the hot weather, the distance to his own neighborhood, and Deputy Clark's observation (that Mr. Byron had been running in a crouch)." Appellant's Br. at 24. We agree that Byron's counsel performed deficiently by stipulating to the admission of this statement.

Byron, however, cannot demonstrate a reasonable probability that the trial's outcome would have differed had the trial court suppressed this statement. As explained in the preceding section, Dehan encountered Byron in the area where the police and tracking dog were searching for the suspect. The victim identified the bandanna taken from Byron's pocket as the same bandanna she observed the burglar wearing. She also testified that two other items taken from Byron's pocket—the knit hat and the mini-flashlight—resembled, respectively, the hat that the burglar wore and an item that had been missing from her house since the burglary. The burglar had used a two-way radio, and police found a two-way radio in Byron's pocket. Police found Byron's wallet and identification in an abandoned bag near the crime scene. Given this strong

circumstantial evidence, Byron cannot demonstrate prejudice.

C. Byron's Post-*Miranda* Admissions

We conclude that defense counsel did not perform deficiently by stipulating to the admission of Byron's post-*Miranda* statement that the black and red duffel bag in Cole's patrol car did not belong to him. Because Byron's defense was a general denial, counsel's decision to stipulate to this statement could have been tactical given that the statement was consistent with his client's assertion that he did not commit the crime.[6] *See, e.g.*, *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (stating that performance is not deficient if "the actions of counsel complained of go to the theory of the case") (quoting *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)). Additionally, for the reasons explained in the preceding subsection, Byron cannot demonstrate prejudice from counsel's stipulation to his post-*Miranda* statement that he lost an item while running.

III. Sufficiency of the Information

Byron asks us to reverse his conviction and dismiss the residential burglary charge without prejudice because the information was both legally and factually insufficient. This argument fails.

A. Standard of Review

The State must include all essential elements of a crime in the information "in order to afford notice to an accused of the nature and cause of the accusation against him." *State v.*

[6] Byron makes a factual mistake when he observes in his brief that police later discovered Byron's identification in the black and red bag in Cole's patrol car, "ma[king] it clear to the jury that [Byron] lied to the police." Appellant's Br. at 24. That is incorrect. Police discovered Byron's identification in the large black bag in a roadside ditch in the neighborhood where the burglary occurred, not in the black and red bag that Cole recovered from the victim's house and placed in his patrol car.

Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. Const. amend. VI, Wash. Const. art I, § 22; *see also* CrR 2.1(a)(1). When the defendant challenges the information's sufficiency for the first time on appeal, we construe the document liberally in favor of validity. *State v. Brown*, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). In doing so, we inquire (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information and, if so, (2) whether the defendant nonetheless was actually prejudiced by the unartful language used. *Brown*, 169 Wn.2d at 197-98. When the information wholly omits an element, the remedy is to reverse the conviction and dismiss the charge without prejudice. *Brown*, 169 Wn.2d at 198.

The primary goal of the first prong of this test, the essential elements rule, is "to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." *Kjorsvik*, 117 Wn.2d at 101. Our goal is "to ensure those accused by the State of crimes have a meaningful opportunity to defend against the accusation." *State v. Tandecki*, 153 Wn.2d 842, 847, 109 P.3d 398 (2005). Accordingly, "defendants are entitled to be fully informed of the nature of the accusations against them *so that they can prepare an adequate defense.*" *Kjorsvik*, 117 Wn.2d at 101.

B. Legal Sufficiency

Byron argues that the information was legally deficient because it omitted an essential element of the charged crime. The residential burglary statute reads, in relevant part: "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling *other than a vehicle*." RCW 9A.52.025(1) (emphasis added). The first amended information reads, in relevant part:

> **COUNT I – RESIDENTIAL BURGLARY, RCW 9A.52.025(1) – CLASS B FELONY:**

> In that the defendant, DREW LYNN BYRON, in the State of Washington, on or about July 27, 2009, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a dwelling.

CP at 2. Byron argues that the State's failure to include the statutory phrase "other than a vehicle" in the information rendered the information constitutionally deficient. Appellant's Br. at 30-31.

Here, a fair construction of the information supports the conclusion that the State provided Byron with notice of the essential elements of residential burglary. Specifically, the State notified Byron of its allegations that he (1) entered or remained unlawfully within a dwelling, (2) with intent to commit a crime against a person or property therein. Although the statutory phrase "other than a vehicle" distinguishes the crime of residential burglary from the crime of vehicle prowling,[7] it is not an essential element of residential burglary that must be included in the information. Additionally, because the information fully informed Byron of the nature of the accusation against him, his challenge fails.

C. Factual Sufficiency

Byron also argues that the information was factually deficient because it "did not allege a single specific fact supporting the legal elements of either the charged crime or the aggravating factor." Appellant's Br. at 31. Byron notes, for example, that the information did not include the victim's address or name.

Byron's argument relies entirely on our Supreme Court's statement in *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) that the essential elements rule "requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately

[7] *See* RCW 9A.52.095, .100.

identifying the crime charged." But as our Supreme Court recently explained, the purpose of this requirement is "to charge in language that will 'apprise an accused person with reasonable certainty of the nature of the accusation.'" *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (quoting *Leach*, 113 Wn.2d at 686). As discussed above, the information adequately apprised Byron of the charges against him.

In *State v. Noltie*, 116 Wn.2d 831, 843, 809 P.2d 190 (1991), our Supreme Court discussed a challenge similar to Byron's:

> The defendant next argues that the information was defective for lack of specificity because it did not state the "when, where or how" of the charged crime. Washington courts have repeatedly distinguished informations which are constitutionally deficient and those which are merely vague. If an information states each statutory element of a crime but is vague as to some other matter significant to the defense, a bill of particulars can correct the defect. In that event, a defendant is not entitled to challenge the information on appeal if he or she has failed to timely request a bill of particulars.

(Footnotes omitted). Here, the information is merely vague as to certain factual details. Because Byron failed to timely request a bill of particulars, we reject his argument.

IV. Offender Score

Byron argues that the trial court erroneously sentenced him with an offender score of 9 rather than an offender score of 8. The parties agree that the prior criminal convictions listed on Byron's judgment and sentence, standing alone, result in an offender score of 8, not 9.

As the basis for the additional point, the State argues that Byron was on community custody at the time of the current offense.[8] Byron does not argue that he was not on community custody when he committed the current offense; rather, he asks us to remand for resentencing because the trial court did not check a box in the criminal history section of his judgment and sentence, which reads, "The defendant committed a current offense while on community placement (adds one point to score)." CP at 8.

[8] "If the present conviction is for an offense committed while the offender was under community custody, add one point." Former RCW 9.94A.525(19) (Laws of 2008, ch. 231, § 3).

We conclude that the State met its burden to demonstrate by a preponderance of the evidence that Byron was on community custody at the time of the current offense. Byron's judgment and sentence shows that he was sentenced for first degree burglary, a class A felony,[9] in November 2004 after having previously been convicted of several juvenile and adult felonies. After his release from confinement for the first degree burglary conviction, Byron committed another felony—attempting to elude a police vehicle[10]—in June 2008. These prior convictions, coupled with Byron's repeated, explicit agreement[11] to an offender score of 9, make it quite unlikely that Byron was not on community custody at the time of the present offense. Accordingly, we decline to remand for resentencing.[12]

We affirm Byron's conviction and sentence.

[9] RCW 9A.52.020(2).

[10] RCW 46.61.024(1).

[11] Byron agreed in writing that his offender score was 9 when he signed the judgment and sentence, which listed an offender score of 9 in the "sentencing data" section. Additionally, at the sentencing hearing, he agreed orally to an offender score of 9.

[12] We also decline to consider Byron's arguments that the legislature's 2008 amendments to two subsections of the SRA, RCW 9.94A.500(1) and RCW 9.94.530(2), resulted in an "unconstitutional shifting of the burden of proof" to Byron at his sentencing hearing. Appellant's Br. at 35 (quoting *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). Because we do not rely on Byron's lack of objection to the offender score sheet attached to the prosecutor's statement of criminal history as the evidentiary basis for determining that the State met its burden to prove that Byron was on community custody at the time of the present offense, we do not need to reach these constitutional arguments.

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.

Penoyar, C.J.

We concur:

Hunt, J.

Johanson, J.