SUPREME COURT NO. 100814-7

NO. 37584-6-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LARRY WINTERS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable David Estudillo & John Antosz, Judges

PETITION FOR REVIEW

JARED B. STEED
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Larry Winters, appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Winters, No. 37584-6-III, (filed March 10, 2022) (Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate under RAP 13.4(b)(2), (b)(3), and (b)(4), where the trial court erred as a matter of law by concluding that Winters's emotional abuse was insufficient to warrant an exceptional mitigated sentence, and the Court of Appeals' conclusory opinion affirming the trial court, conflicts with other Court of Appeals precedent?

2. Is review appropriate under RAP 13.4(b)(1), (b)(3), and (b)(4) to determine the extent to which the non-exclusive factors of RCW 9.94A.535(1), and this Court's prior case law concerning age as a mitigating factor, allows for a defendant's

advanced age to be considered for purposes of imposing an exceptional mitigated sentence?

C. STATEMENT OF THE CASE

Winters is a now 72-year-old[1] man with no prior criminal history, and multiple serious and expensive medical conditions. 1RP[2] 30; 2RP 171, 186; CP 215. These include avoidant personality disorder, anxiety, depression, asthma, hypertension, a hernia, and ongoing remission treatments for colon cancer. 2RP 61, 112, 127-28, 132-33, 186-88; Ex. 1. Winters's cancer treatments, including surgery, and the financial strain of those medical payments took a heavy toll on him. 1RP 29-30.

Winters married Miranda[3] Winters around the fall of 2017 after three years of dating. 2RP 171, 174. Both lived entirely on social security benefits. 2RP 173. Given their

---

[1] Winters was 69-years-old at the time of the alleged incident. CP 215; 2RP 171.

[2] The index to the citations to the record is found in the Brief of Appellant (BOA) at 3, n.2.

[3] To avoid confusion Miranda Winters will be referred to by her first name only. No disrespect is intended.

already extremely limited income, coupled with Winters's expensive medical treatments, the couple's financial situation was constantly deteriorating. 1RP 30; 2RP 186.

Almost immediately after marriage, Miranda would frequently verbally abuse Winters "for no apparent reason." 2RP 99-100, 104-05, 114-16. During one incident, Miranda publicly berated Winters's inability to consummate the marriage because of his health issues. 2RP 112-13. Winters always reacted very passively to the verbal abuse. 2RP 100, 105, 115. On another occasion, Miranda purposefully bent the windshield wipers on Winters's truck when he failed to answer a telephone call from her. 2RP 100-01, 176-77.

In April 2018, Winters and Miranda moved from Seattle to Moses Lake to find more affordable housing. 2RP 172-73. Still, it took every portion of their social security checks to cover their mortgage payments. 2RP 186. To supplement their income, Winters sold items from the house on eBay. 2RP 183.

Once in Moses Lake, Miranda began limiting Winters's telephone contact with his friends back in Seattle. 2RP 105. During one phone call, Winters told a friend that Miranda had physically assaulted him. That friend encouraged Winters to call police and attend marriage counseling. 2RP 116-18. Winters still loved Miranda however and could not explain why he had not ended the relationship. 2RP 174, 198.

By 2019 Winters and Miranda were consuming alcohol daily. Miranda would often become belligerent toward Winters and start arguments with him for no reason. 2RP 174, 180-81, 184, 194, 203. Winters would sometimes try to talk to Miranda during these incidents, but as he explained, "you can't argue with someone who doesn't want to talk things out." 2RP 175. Miranda would often demean Winters by telling him that he paled in sexual comparison to her ex-boyfriend. 2RP 179. Miranda would also threaten to have her ex-boyfriend come and beat-up Winters. 2RP 177-80.

On March 23, 2019, Winters and Miranda drank heavily. 2RP 184. Miranda also smoked marijuana. 2RP 185. Miranda again began discussing her ex-boyfriend. 2RP 203. Winters believed that Miranda was threatening to leave him and end the marriage permanently. 2RP 192-96. In fact, Miranda had previously left around Winters about ten times during their marriage. 2RP 196. As Winters explained, this thought was devastating to him because his first two wives had left him and created lasting personal abandonment issues. 2RP 201.

Drunk, frustrated, and fearful, Winters grabbed a handgun with the intention of killing himself. 2RP 182, 205. Instead, however, the gun went off and Miranda was shot in the hand while she was on the telephone with 911. CP 3-7, 8-18. Winters acknowledged calling Miranda a "piece of shit" during the 911 call. 2RP 202-03. Before this incident, Winters had never physically assaulted Miranda. 1RP 29, 31; 2RP 100, 115, 203. Winters was devastated about the incident and attempted to kill himself in jail after his arrest. 2RP 182.

Based on this incident, Winters was charged with first degree assault with a deadly weapon. CP 1-2. Winters personally recalled very little about the incident. 1RP 14. He entered an Alford[4] plea to the charge, however. CP 8-18; 1RP 7-16.

Sentencing was continued so Winters could obtain a psychological report and defense counsel could complete necessary briefing related to Winters' request for an exceptional downward mitigated sentence. See 1RP 7, 21, 39-40, 43, 47, 78, 115; CP 30-188, 198-202, 203-214.

Winters remained in jail pending sentencing. 2RP 205. During that time, he voluntarily provided Miranda with a power of attorney and passwords for financial institutions so that she could continue to pay bills. 2RP 197-98, 205.

Psychologist Gregory Wilson completed a psychological evaluation of Winters in April 2019. Ex. 1; 2RP 121-22. Dr.

---

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

Wilson diagnosed Winters with several conditions, including substance use disorder, avoidant personality disorder with dependent personality disorder, major depressive disorder, and generalized anxiety disorder. Ex.1 at 7, 9; 2RP 127-28, 133. As Dr. Wilson explained, subjection to emotional abuse could be just as devastating as actual physical abuse to someone such as Winters who suffers from avoidant personality disorder. 2RP 130-31. Winters's dependent personality disorder also meant that "he's so needy for an individual, that even if he perceives being mistreated, he's willing to go back again and again, because being with someone is better than being with no one." 2RP 132-33.

As Dr. Wilson explained, Winters also suffered from low-self-esteem, "self-punitive and disparaging tendencies" and "extreme hopelessness." 2RP 133. Based on these conditions, his feelings of hopelessness, and his excessive alcohol use, Winters was "unable to manage or modulate his behavior

effectively" on the night of the incident. 2RP 134. Winters "lost all hope and he was devastated." 2RP 131.

Dr. Wilson opined that Winters needed treatment services for each of the diagnosis. Winters could be treated simultaneously for his anxiety and major depressive disorders. 2RP 128. Dr. Wilson recommended a group home setting – rather than prison – where Winters could obtain substance abuse services, acquire interpersonal skills, and learn to avoid being too passive. 2RP 124-33. Dr. Wilson assured the court that any concerns about Winters's danger to society could be "easily managed" with the recommended treatment and removing other certain variables such as alcohol use, and fears about abandonment. 2RP 129.

Based in part on Dr. Wilson's report, defense counsel requested an exceptional mitigated downward sentence. Counsel's request for the mitigated sentence was based on the three specific enumerated factors under RCW 9.94A.535(1)(b), (c), and (j). Specifically, those factors pertained to Winters

making a good faithed effort to compensate Miranda by providing the power of attorney and financial passwords; that given the verbal and emotional he suffered, coupled with his underlying mental disorders, Winters committed the crime under duress, coercion, threat, or compulsion; and that the current offense involved domestic violence and was committed in response to a continuing pattern of coercion, control, or abuse by Miranda. 1RP 37-38, 43, 60-61, 81-82, 84, 106, 118; 2RP 26-27, 79-84, 88, 234, 237-38, 242-43; CP 30-188, 189-97, 198-202, 203-214.

Although noting that Winters's case did not necessarily fit perfectly within those mitigating subsections, counsel also argued that the RCW 9.94A.535(1) factors were "illustrative only" and "not intended to be exclusive reasons for exceptional sentences." 2RP 81-88, 211-12, 238-40, 242-43; CP 31, 189-97, 199-202, 204-05, 211-14. As counsel explained, while any physical abuse by Miranda toward Winters was minimal, the emotional abuse suffered by Winters was every bit as harmful

given his mental health disorders, and therefore relevant under the (j) factor. 2RP 88, 234, 237, 242.

Counsel requested that either the base sentence and deadly weapon be run concurrently to each other, or that Winters be given credit for time already served on the base sentence and serve only prison time for the deadly weapon enhancement. 2RP 243-45. Counsel noted that given his age and health conditions, a standard range sentence would effectively amount to a lifetime sentence for Winters. CP 203.

The prosecutor opposed an exceptional mitigated sentence, recommending instead that Winters be given a standard midrange sentence, plus a consecutive 60-month deadly weapon enhancement. 1RP 22-23, 26; 2RP 50-51, 258-59; CP 260-71. Characterizing the sentencing hearing as a "victim shaming," the prosecutor maintained that Dr. Wilson's report was inaccurate, and that at the time of the incident Miranda was trying to leave the house, not "antagonizing" Winters. 2RP 53-55, 145-47, 151-52, 154, 248-49, 252-53. The

prosecutor noted that the police report alleged that Winters had unsuccessfully tried to fire the gun two additional times. 1RP 23-25; 2RP 54-55.

The prosecutor also argued that Winters's lack of criminal history was already contemplated by the sentencing guidelines, and that the mitigating factor of duress was not applicable because Winters had intentionally placed himself in the situation and there was no evidence of any coercion or threats by Miranda which induced Winters to act. 1RP 22-23, 26; 2RP 253-55.

Miranda initially requested leniency for Winters, explaining to the court that his cancer and financial issues weighed heavily on him. 1RP 29-30. Miranda explained that the incident was "just so out of character" for Winters and that he had never previously displayed "any form of physical abuse or vicious nature towards anybody." 1RP 29-31.

After Dr. Wilson's report alleged that she had subjected Winters to emotional and verbal abuse however, Miranda

disclosed prior alleged incidents of violence by Winters, and objected to the trial court imposing a sentence below the standard range. 2RP 57-59, 62-64. Still, Miranda requested that the trial court not impose a no contact order between her and Winters because there was still information that she needed to gather from him. 2RP 63-65.

The trial court declined to impose an exceptional mitigated sentence. 2RP 297-99. The trial court explained that it did not believe any of the specific factors listed in RCW 9.94A.535(1) and relied on by Winters were sufficiently satisfied. 2RP 266, 278, 292-93, 296-97.

The court reasoned that Winters's lack of criminal history was already contemplated by the legislature in setting the standard range sentences, and therefore was not standing alone a sufficient basis for a mitigating sentence. 2RP 278. Similarly, the court reasoned that Winters's providing of financial information to Miranda was not a sufficient basis standing alone for a mitigated sentence. 2RP 292.

As to the emotional and verbal abuse suffered by Winters, the court reasoned that it was not that different from what it typically saw between spouses during a divorce proceeding. 2RP 296-97. The court also noted that the emotional abuse at issue did not rise to the level of a battered-spouse defense. 2RP 292-97. As the court explained, it was an "incorrect statement of law" to say that domestic violence necessarily included emotional abuse. 2RP 283. While acknowledging that Miranda and Winters's relationship was unhealthy, the trial court concluded it was not a substantial and compelling reason for a mitigated sentence. 2RP 297. The court noted that Winters had voluntarily consumed alcohol prior to the incident. 2RP 296.

The trial court did reference Winters's age and medical conditions, but concluded these factors did not provide authority for an exceptional mitigated sentence:

> You know, there is something here that I can't consider, and I kind of wish I could in some cases, and this might be one, is you take a look at a

> person's age and their medical condition, I think the legislature should look at this. But I can't make them do that. I mean do the people really want someone in Mr. Winters' medical condition at his age in the prison system for ten years and helping take care of him, is that really what we want to do too?
>
> I've often thought that there should be some consideration, just like there is for very young people, we're seeing that more and more with youth, special considerations that, you know, certain people might get at a certain age with their limitations on mobility and the like, that they might be less likely. But that's not a door that's open to me.

2RP 297-98.

Based on an offender score of zero, Winters was given a low-end standard range sentence of 93 months in prison. The court also imposed a consecutive 60-month firearm enhancement, for a total prison term of 153 months. CP 215-33; 2RP 298-99. The court imposed 36 months of community custody. CP 220; 2RP 299.

Winters argued on appeal that the sentencing court abused its discretion by failing to appreciate that an exceptional mitigated sentence could be imposed based upon Winters's age,

medical conditions, and pattern of emotional and verbal domestic violence. BOA at 15-30. The Court of Appeals properly recognized that "public policy would seem to support an alternative to incarceration for an individual, such as Mr. Winters, who is aged and in need of significant medical care." Op. at 5. Still, the Court of Appeals concluded that the trial court appropriately recognized it lacked discretion to depart based on Winters's age and health issues. The Court of Appeals reasoned that the trial court properly concluded Winters had not shown an exceptional level of emotional abuse compared to other cases and that there was no evidence Winters's age impacted the crime. Op. at 4-5.

Winters now seeks this Court's review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review is warranted where the trial court erred as a matter of law in concluding that Winters's emotional abuse was insufficient to warrant an exceptional mitigated sentence.

A trial court may impose a sentence outside the standard range "if it finds, considering the purpose of [chapter 9.94A RCW], that there a substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The legislature intended this exceptional sentence provision "to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." In re Postsentence Petition of Smith, 139 Wn. App. 600, 603, 61 P.3d 483 (2007).

RCW 9.94A.535(1) permits a trial court impose an exceptional sentence below the standard range "if it finds that mitigating circumstances are established by a preponderance of the evidence." The statute provides an illustrative list of

mitigating factors that "are not intended to be exclusive reasons for the exceptional sentences." RCW 9.94A.535(1); See also State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997) (noting that statutory mitigating factors are only illustrative, and a court may use non-statutory mitigating factors in setting a more lenient sentence so long as the asserted non-statutory factors are sufficiently substantial), abrogated by State v. O'Dell, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

In determining whether a factor legally supports departure from the standard sentencing range the court employs a two part test: (1) a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; (2) the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. State v. Law, 154 Wn.2d 85, 93, 95, 110 P.3d 717 (2005).

Sentencing courts have "considerable discretion under the SRA" but "are still required to act within its strictures and principles of due process of law." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing State v. Mail, 121 Wn.2d 707,712, 854 P.2d 1042 (1993)). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Grayson, 154 Wn.2d at 342 (citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

"A trial court errs ... when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (alterations in original) (quoting In re Pers. Restraint Pet. Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)). Such an error is a "fundamental defect resulting in a complete miscarriage of justice" and warrants remand for

resentencing. Mulholland, 161 Wn.2d at 333; see also McFarland, 189 Wn.2d at 58-59; Grayson, 154 Wn.2d at 342 (failure to recognize and exercise discretion is reversible error).

RCW 9.94A.535(1)(j) authorizes imposition of a mitigated sentence, if it is "established by a preponderance of the evidence" that "the current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse." "Domestic violence" includes first degree assault, "when committed either by (a) one family or household member against another family or household member, or (b) one intimate partner against another intimate partner." RCW 10.99.020(4). Thus, the mitigating factor exists where "the current offense involved domestic violence and the defendant acted in response to a pattern of abuse by the victim." State v. Van Noy, 3 Wn. App. 2d 494, 501-02, 416 P.3d 751 (2018) (citing RCW 9.94A.535(1)(j)).

Winters testified that he had been subjected to a prolonged pattern of emotional and psychological abuse by Miranda, including demeaning name-calling, statements about ending the marriage, and threats to have her ex-boyfriend assault him. 2RP 174, 177-82, 192-96, 202-03. Given Winters's avoidant personality disorder, these forms of emotional abuse were just as devastating as physical abuse. 2RP 130-31. And it was precisely because of his avoidant personality disorder and Miranda's repeated emotional abuse, that Winters acted in the manner he did on the night of the incident. 2RP 134. As Dr. Wilson opined, "[T]hat's what I believe happened here. He lost all hope and he was devastated." 2RP 131.

But the trial court reasoned Winters's subjection to "unkind words" by his wife was not a substantial and compelling reason to impose an exceptional sentence because, "I am concerned it would open the door to a lot of people in bad relationships just taking it up to the next level." 2RP 296-97. The court repeatedly noted that the abuse suffered by Winters

was emotional rather than physical and therefore did not rise to the level of "battered-spouse syndrome." 2RP 289-90, 294, 296. As the court explained, a court flier describing domestic violence to include "emotional abuse and the like" was "an incorrect statement of the law. It might be in a broader sense of the word domestic violence, but not as defined in the statute." 2RP 282-83. The court surmised the language used by Miranda to Winters was "disturbing" and "wrong" but "not illegal." 2RP 282.

Despite the trial court's clearly articulated reasoning, the Court of Appeals concluded Winters's request for an exceptional mitigated sentence had properly been denied because "the [trial] court's decision was based on the fact that Mr. Winters had not shown an exceptional level of emotional abuse when compared to other cases that come before the court." Op. at 4. The Court of Appeals conclusory reasoning misapprehends the record and ignores prior precedent.

Contrary to the trial court's reasoning, domestic violence consists of a wide variety of physical, sexual, psychological, economic, and emotional acts that are committed with the goal of harming someone. As defined by RCW 10.99.020(4), "domestic violence" does not require that the act committed by one household member against another be physical in nature. RCW 10.99.020 (4)(xviii) proceeds to parenthetically cite 12 statutes that authorize and state the requirements for restraining orders, no contact orders, and orders of protection under chapters 10.99, 26.09, 26.10, 26.26, 26.44, 26.50, 26.52, and 74.34 RCW. Thus, to meet the definition of domestic violence in RCW 10.99.020(4)(xviii), a defendant only must violate a no contact or protection order that restrains or enjoins him or her from entering or coming within a particular distance of a location. Actual physical violence is not required.

"Domestic violence" is further defined by RCW 9.94A.030(20) which provides, "'Domestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010." The

definition of domestic violence in RCW 26.50.010, however, is very different from RCW 10.99.020. RCW 26.50.010(3) defines domestic violence as:

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one intimate partner by another intimate partner; or (b) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

This definition of domestic violence requires actual physical violence or fear of physical violence, sexual assault, or stalking. Thus, where a defendant does not physically harm or injure, or inflict fear of harm or injury, does not sexually assault, and does not stalk a family or household member, the defendant has not committed domestic violence under RCW 26.50.010(3).

But RCW 9.94A.535(1)(j) cites only to the definition of "domestic violence" contained in RCW 10.99.020, not those definitions contained in RCW 9.94A.030(20) and RCW

26.50.010(3). Such a distinction is significant in the sentencing context.

In State v. Ross, the trial court declined to count four of Ross's prior misdemeanor no-contact order violation convictions towards his offender score, because the convictions did not satisfy the definition of domestic violence in both RCW 10.99.020 *and* RCW 26.50.010. 188 Wn. App. 768, 770-71, 355 P.3d 306 (2015). In reversing Ross's sentence, Division One explained that despite the "and" in RCW 9.94A.030, there was "little doubt" that the legislature "intended domestic violence to include the conduct described in *either* RCW 10.99.020 *or* RCW 26.50.010." Ross, 188 Wn. App. at 773 (citing State v. McDonald, 183 Wn. App. 272, 333 P.3d 451 (2014), State v. Kozey, 183 Wn. App. 692, 334 P.3d 1170 (2014)) (emphasis added). In other words, Division One concluded that satisfying both definitions of "domestic violence" is not required for sentencing purposes.

Although here, the Court of Appeals failed to address Ross, this distinction is further supported by case law. For example, in State v. Goodman, Division Two determined that an arson which destroyed the complaining witnesses' home and killed her dog, but did not physically harm her, still satisfied the definition of "domestic violence" because it was intended to cause her emotional harm. 108 Wn. App. 355, 361, 30 P.3d 516 (2001), rev. denied, 145 Wn.2d 1036, 43 P.3d 20 (2002). As the court explained, a domestic violence victim was broader than the definition of one whose property is destroyed. Id. at 361, n.1. Rather, under RCW 9.94A.030, the complaining witness was a domestic violence victim because she "sustained emotional, psychological, physical, or financial injury[.]" Id. at 361.

Contrary to the Court of Appeals reasoning here, notably, the trial court did not merely conclude the evidence did not establish that Winters was not subjected to verbal, emotional, and psychological abuse. 2RP 279-80, 291, 293-94. Rather, the

court concluded as a matter of law, examining the relevant statutes and case law, this factor could not establish the basis for an exceptional sentence because Winters did not also suffer actual physical injury or violence. See e.g., 2RP 291 ("[T]he major thrust of this [battered] syndrome, if you look at these cases, is, by and large, you know, the word "battered," you can say emotional, but what it's being applied to is primarily physical abuse."); 2RP 296 ("But we don't have, you know, one thing that's raised by the courts, which is a failed battered-spouse defense, you know, or at least at that level where we have a spouse being battered or abused physically. In my mind, this fact pattern does not rise to that level."); 2RP 297 ("I find there's unkind words that were said by both sides to each other. This was not a healthy relationship [...] I don't think it raises to the level of a substantial and compelling reason to do this. I am concerned it would open the door to a lot of people in bad relationships just taking it up to the next level. So I myself

don't believe it's a substantial and compelling reason to order an exceptional sentence.")

Review is appropriate under RAP 13.4(b)(2), (b)(3), and (b)(4), because the trial court erred as a matter of and the Court of Appeals' affirming opinion conflicts with other Court of Appeals precedent.

2. Review is warranted to determine the extent to which the non-exclusive factors of RCW 9.94A.535(1), and this Court's prior case law, allows for a defendant's advanced age to be considered for purposes of imposing an exceptional mitigated sentence

The trial court also reasoned it lacked discretion to impose an exceptional sentence for a second reason. As the court explained, Winters's age and medical conditions were persuasive mitigating factors, but concluded considering those factors were "not a door that's open to me." 2RP 98. As the court explained:

> You know, there is something here that I can't consider, and I kind of wish I could in some cases, and this might be one, is you take a look at a person's age and their medical condition[.] [...] I

> mean do the people really want someone in Mr. Winters' medical condition at his age in the prison system for ten years and helping take care of him, is that really what we want to do too?

2RP 297-98.

As RCW 9.94A.535(1) makes clear however, the illustrative list of mitigating factors "are not intended to be exclusive reasons for the exceptional sentences." Rather, the Sentencing Reform Act (SRA) requires the trial court to exercise its sentencing discretion in light of the unique facts of each case. State v. Fisher, 108 Wn.2d 419, 431, 739 P.2d 683 (1987). "[T]he purpose of the [SRA] is to retain the sentencing court's discretionary ability to tailor punishment to individual situations." Id.

Here, Winters is a now 72-year-old man with multiple serious and expensive medical conditions. 2RP 61, 112, 127-28, 132-33, 186-88. If, as the trial court reasoned, it cannot consider Winters' age and health conditions, then it is

prevented from achieving its sentencing discretion considering the unique facts of each case.

To be sure, age is relevant to the exceptional sentence determination. Until recently, this Court reasoned that the "the age of the defendant does not relate to the crime or the previous record of the defendant." Ha'mim, 132 Wn.2d at 847. Thus, the "personal factor" of the defendant's age was not a compelling reason to impose an exceptional sentence. Id. As the Court of Appeals has properly recognized however, State v. O'Dell has "significantly revised the interpretation of Ha'mim[.]" State v. Ronquillo, 190 Wn. App. 765, 780, 361 P.3d 779 (2015).

O'Dell held that while the legislature has determined that all defendants 18 or over "in general" are equally culpable for equivalent crimes, the legislature could not have considered "particular vulnerabilities – for example, impulsivity, poor judgment, and susceptibility to outside influences – of specific individuals." 183 Wn.2d at 691. In O'Dell, these observations

were applied to an adult defendant who was slightly over the age of 18 when his crime was committed. Id. at 683.

While O'Dell stands for the proposition that youthfulness, in particular, may properly be considered as a mitigating circumstance, "it would be disingenuous to suggest that O'Dell merely clarified Ha'mim's holding or applied settled law to new facts." In re Pers. Restraint of Light-Roth, 200 Wn. App. 149, 160, 401 P.3d 459 (2017), rev'd, 191 Wn.2d 328, 422 P.3d 444 (2018). After all, O'Dell was asked the "same question [the Supreme] court considered in" Ha'mim but reached the opposite conclusion. Light-Roth, 183 Wn.2d at 689.

Given the non-exclusive factors of RCW 9.94A.535(1), the changing law concerning a defendant's age, and the trial court's own expressed desire to consider Winters' advanced age and serious medical conditions, this Court should accept review and find the sentencing court erred in concluding Winters's age could not provide a basis for an exceptional sentence.

E. CONCLUSION

Winters respectfully asks this Court to grant review, reverse the Court of Appeals, and remand his case for resentencing.

I certify that this document contains 4,828 words, excluding those portions exempt under RAP 18.17.

DATED this 7th day of April, 2022.

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC

JARED B. STEED,
WSBA No. 40635
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

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

STATE OF WASHINGTON,	)	No. 37584-6-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
LARRY LYNN WINTERS,	)	
	)	
Appellant.	)	

PENNELL, J. — Larry Lynn Winters appeals his sentence for first degree assault, arguing the trial court failed to recognize its discretion to award an exceptional sentence downward and committed legal error in imposing legal financial obligations (LFOs). We disagree with Mr. Winters's former argument, but grant him relief as to the LFOs.

FACTS

Mr. Winters entered an *Alford*[1] plea to assaulting his wife with a deadly weapon. The allegation was that Mr. Winters pointed a gun at his wife's face after a verbal dispute. When his wife grabbed the gun to move it away, Mr. Winters fired the gun and shot his wife through the thumb. Mr. Winters then unsuccessfully attempted to shoot his

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

wife in the face before she escaped their home. Mr. Winters had consumed a large amount of alcohol prior to the shooting and claimed to have very little memory of the incident.

Mr. Winters sought an exceptional sentence downward based on a combination of mitigating circumstances including his age, poor health, lack of criminal history, voluntary victim compensation, and own experience as a victim of domestic violence. In summary, Mr. Winters was 69 years old at the time of his offense conduct and suffering from rectal cancer. Mr. Winters also carried several mental health diagnoses, which he said were exacerbated by alcohol and emotional abuse from his wife. According to a psychologist who testified at the sentencing hearing, the emotional abuse allegedly inflicted on Mr. Winters by his wife had the same potential for devastation as would physical abuse. The psychologist recommended Mr. Winters receive a therapeutic sentence in lieu of prison.

The trial court declined to impose a sentence below the standard range, explaining that a downward departure must be based on circumstances "sufficiently substantial and compelling to distinguish this crime in question from others." Report of Proceeding (RP) (May 14, 2020) at 295. According to the court, the disharmony between Mr. Winters and his wife did "not reach that standard." *Id.* at 296. The court noted that the conflict

between Mr. Winters and his wife was similar to what is commonly presented in divorce cases.

In discussing its sentencing decision, the trial court expressed sympathy toward Mr. Winters's age and health. However, the court explained these factors were beyond its consideration:

> You know, there is something here that I can't consider, and I kind of wish I could in some cases, and this might be one, is you take a look at a person's age and their medical condition, I think the legislature should look at this. But I can't make them do that. I mean do the people really want someone in Mr. Winters'[s] medical condition at his age in the prison system for ten years and helping take care of him, is that really what we want to do too?
>
> I've often thought that there should be some consideration, just like there is for very young people, we're seeing that more and more with youth, special considerations that, you know, certain people might get at a certain age with their limitations on mobility and the like, that they might be less likely. But that's not a door that's open to me.

Id. at 297-98.

Based on an offender score of zero, Mr. Winters's standard sentencing range was 93 to 123 months, followed by a 60-month sentencing enhancement. The court imposed a low-end sentence followed by three years' community custody. The court also ordered mandatory LFOs including a $500 crime victim penalty assessment and a $100 DNA (deoxyribonucleic acid) collection fee.

Mr. Winters timely appeals his sentence.

ANALYSIS

Mitigated exceptional sentence

Appeals of standard range sentences are generally prohibited. RCW 9.94A.585(1). When a defendant challenges the denial of an exceptional sentence downward, appellate review turns on proof of legal error, such as a categorical refusal to exercise discretion or the mistaken belief of a lack of discretion to impose a nonguideline sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017); *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

We discern no legal error in the trial court's denial of Mr. Winters's departure request. Contrary to Mr. Winters's assertions on appeal, the court did not rule that it was prohibited from departing because the abuse alleged by Mr. Winters was emotional rather than physical. Instead, the court's decision was based on the fact that Mr. Winters had not shown an exceptional level of emotional abuse when compared to other cases that come before the court. This was an appropriate basis for denying the departure. *See State v. Law*, 154 Wn.2d 85, 97-98, 110 P.3d 717 (2005).

The trial court's lament that it lacked discretion to depart downward based on Mr. Winters's age was not legal error. We agree with Mr. Winters that age can sometimes be a mitigating factor at sentencing. *See State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359

(2015). But to justify a below-guideline sentence, the defendant's age must have some bearing on their offense conduct. *Id.* at 689. Here, there was no evidence Mr. Winters's age impacted his crime. Thus, there was no basis to depart.

As pointed out by the trial court at sentencing, public policy would seem to support an alternative to incarceration for an individual, such as Mr. Winters, who is aged and in need of significant medical care. Indeed, this policy plays a role in the State's compassionate release program. RCW 9.94A.728(1)(d). But this type of policy concern is not relevant to the question of a mitigated sentencing decision under the Sentencing Reform Act of 1981, chapter 9.94A RCW. *Law*, 154 Wn.2d at 101. The trial court appropriately recognized it lacked discretion to depart based on Mr. Winters's age and health issues.

LFOs

Mr. Winters makes two objections to the LFOs assessed in his judgment and sentence. First, he complains the trial court erroneously imposed discretionary community custody supervision fees. Second, he argues his mandatory LFOs cannot be satisfied through attaching his social security benefits. The State essentially concedes the substance of both arguments.

A trial court's authority to impose community custody supervision fees is set by RCW 9.94A.703(2)(d). This statute provides that "[u]nless waived by the court, as part of a term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections]." Given that supervision fees are waivable, they are discretionary. However, they are not a "'cost'" under RCW 10.01.160(3) that "'shall not'" be imposed against an indigent defendant. *See State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020).

Here, the trial court's sentencing disposition reflected an intent to waive all discretionary LFOs based on Mr. Winters's indigence. The imposition of supervision fees appears to have been inadvertent. The language imposing the fees is contained in a lengthy paragraph of the prewritten judgment and sentence form. As the parties agree, the supervision fees should be struck on remand.

Mr. Winters also contends the trial court erred by failing to specify his mandatory LFOs (the $500 crime victim penalty assessment and $100 DNA fee) cannot be satisfied from his social security benefits. The State concedes it cannot collect social security benefits for payment of LFOs. *See* 42 U.S.C. § 407(a). Nevertheless, it argues remand is unnecessary because the law on this point is clear and the State has not attempted to collect LFOs from Mr. Winters's benefits.

We have no reason to disagree with the State's claim that it has not attempted to collect LFOs from Mr. Winters's social security benefits. Nevertheless, because this matter is being remanded for correction of the judgment and sentence as to supervision fees, we direct that the trial court also specify in the judgment and sentence that payment of LFOs cannot be enforced against social security funds per 42 U.S.C. § 407(a).

CONCLUSION

Mr. Winters's sentence is affirmed. We remand to strike community custody supervision fees and to clarify that the mandatory LFOs (the $500 crime victim penalty assessment and $100 DNA collection fee) may not be satisfied from Mr. Winters's social security benefits.

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

Pennell, J.

WE CONCUR:

Siddoway, C.J.

Staab, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

April 07, 2022 - 3:05 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37584-6
Appellate Court Case Title:	State of Washington v. Larry Lynn Winters
Superior Court Case Number:	19-1-00181-2

The following documents have been uploaded:

- 375846_Petition_for_Review_20220407150248D3601007_9887.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 37584-6-III.pdf

A copy of the uploaded files will be sent to:

- kjmccrae@grantcountywa.gov
- kwmathews@grantcountywa.gov

Comments:

Copy mailed to Larry Winters, 419922 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email:)

Address:
2200 Sixth Ave. STE 1250
Seattle, WA, 98121
Phone: (206) 623-2373

Note: The Filing Id is 20220407150248D3601007