SUPREME COURT NO. _____

NO. 73217-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAWN SULLIVAN,

Petitioner.

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

The Honorable Carol A. Schapira, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Dawn Marie Sullivan, the appellant below, seeks review of the Court of Appeals decision in State v. Sullivan, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 5938013 (Oct. 10, 2016), following the denial of her motion for reconsideration on November 2, 2016.

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court commit constitutional error by refusing to give a proposed self-defense instruction that correctly stated that the amount of force reasonably necessary may vary with the number of assailants faced by the person claiming lawful use of force, particularly where the self-defense instructions given inconsistently stated it was lawful to use force against only "*the person* of another"?

2. Although the State waived its opportunity to file a cost bill because it failed to respond to Sullivan's appellate cost arguments in the opening brief, the Court of Appeals nonetheless refused to deny appellate costs based on Sullivan's age and length of sentencing, declining consider her homelessness, mental health issues, or financial circumstances. Does the Court of Appeals decision conflict with its decision in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016), and otherwise violate Sullivan's substantive due process rights?

C. STATEMENT OF THE CASE

The State charged Sullivan with second degree assault with a deadly weapon for assaulting Christopher Bohannon on October 29, 2012 with a knife. CP 1. Although the State later added charges, it agreed to either dismiss or sever the additional charges. CP 9-11, 13; RP 10. Thus, the trial proceeded solely on the alleged second degree assault on Bohannon.

Sullivan testified she, Bohannon, and Robert Cessill[1] were in Bohannon's apartment when Bohannon exploded over Sullivan calling him selfish for refusing to share his medical marijuana. RP 411-12. Sullivan wished to leave and attempted to rouse Cessill, who had fallen asleep on Bohannon's couch. RP 413. Suddenly, Bohannon pounced on Sullivan and they began rolling around on the floor. RP 413-14. At some point, Cessill became involved; Sullivan testified she was scared by two men attacking her. RP 414-15. Sullivan wriggled away, ran to the kitchen, and grabbed a knife to protect herself. RP 416, 427. Bohannon grabbed the knife away within seconds and threw Sullivan out of the apartment; Sullivan stated she did not know Bohannon had been cut. RP 416, 428.

Bohannon testified he awoke when Sullivan brought Cessill over to his apartment and the three began to hang out. RP 131. Bohannon stated that when he refused to let Sullivan smoke his marijuana, she became

[1] Cessill was a man Sullivan met on the street and brought back to Bohannon's apartment. RP 406-08.

enraged, pulled Cessill off the couch, and threatened to punch Cessill if he did not leave the apartment with her. RP 133-34. Bohannon intervened, prompting Sullivan to run to the kitchen. RP 135-36. Bohannon stated Sullivan punched him in the face, he threw her twice to the ground, and then Sullivan grabbed and swung a knife cutting his arm. RP 136-37, 137, 142-43, 217-18.

Cessill testified he woke up on Bohannon's couch to Sullivan standing over him and threatening to punch him in the face. RP 348, 356. He stated Sullivan went to the kitchen, came out with the knife, and cut Bohannon with it a couple times. RP 358, 366.

As part of the self-defense instructions, defense counsel, based on State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000), proposed the instruction,

> two or more people are more likely to inflict injury than only one such person, the amount of force that is necessary to prevent the infliction of injury, and thus is not unlawful, may vary with the number of persons the defendant reasonably believes are about to commit or assist in an offense against a person.

CP 75; RP 485-86. The trial court refused to give this instruction. RP 486.

The jury found Sullivan guilty of second degree assault and returned a special verdict that Sullivan was armed with a deadly weapon when she committed the second degree assault. CP 22-23; RP 592-95.

The trial court imposed an exceptional sentence downward of zero months, finding that "the victim was an initiator, willing participant, aggressor, or provoker of the incident" under RCW 9.94A.535(1)(a). CP 98, 112-14; RP 619. The trial court imposed a 12-month sentence for the deadly weapon enhancement to be served in King County Community Center for Alternative Programs (CCAP) against the deadly weapon enhancement and credited Sullivan's time served in CCAP against the 12 months imposed. CP 98; RP 620, 623.

Sullivan appealed. CP 103. Among other things, Sullivan argued the trial court erred in refusing to give her proposed multiple assailant instruction. Br. of Appellant at 24-31. Sullivan asserted that, without the multiple assailant instruction, the lawful use force instructions were not manifestly clear because they permitted lawful force against only "*the person* of another." She claimed it was not made manifestly clear to jurors that they could consider the reasonableness of Sullivan's use of force against two attackers rather than against Bohannon alone given that Bohannon was the only "person of another" she cut with a knife. She argued this lack of clarity necessitated her multiple assailant instruction.

In her opening brief, Sullivan also made several arguments against the imposition of appellate costs. Br. of Appellant at 36-45.

The Court of Appeals rejected Sullivan's instructional argument, concluding, without analysis, that "Sullivan had the opportunity to present her self-defense argument unimpeded by any inconsistent jury instructions. Instead, the trial court's instructions made the applicable self-defense standard 'manifestly apparent' to the jury." Sullivan, slip op. at 13-14.

The Court of Appeals also refused to exercise any discretion on the issue of appellate costs, relying only on Sullivan's age and length of sentence. Id. at 19. The Court of Appeals refused to reconsider its decision in light of several of the additional facts Sullivan identified in her motion for reconsideration. The State filed a cost bill seeking to assess $5,075.65 against Sullivan in appellate costs.[2] Appendix B.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE DENIAL OF SULLIVAN'S PROPOSED MULTIPLE ASSAILANT INSTRUCTION DEPRIVED HER OF A HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND THE COURT OF APPEALS DECISION AFFIRMING THE DENIAL CONFLICTS WITH THIS COURT'S AND THE COURT OF APPEALS' PRECEDENT

Sullivan proposed a multiple assailant instruction that read, in part, "the amount of force that is necessary to prevent the infliction of injury . . . may vary with the number of persons the defendant reasonably believes are

[2] The State also appealed Sullivan's sentence. CP 122. The Court of Appeals agreed with the State's sentencing arguments, vacating Sullivan's CCAP sentence and the credit for CCAP time the trial court extended, remanding for resentencing. Sullivan, slip op. at 20-23.

about to commit or assist in an offense against a person." CP 75; RP 486. Because this statement is a correct statement of the law and because this instruction was necessary for Sullivan to fully argue her theory that greater force was reasonably necessary to repel both of her attackers, the trial court's refusal to give the instruction was constitutional error necessitating review under RAP 13.4(b)(3).

Self-defense instructions "read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'" State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (internal quotation marks omitted) (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (quoting State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980))), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). "Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." Irons, 101 Wn. App. at 549. "'Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.'" Id. (quoting State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)).

Defense counsel proposed a multiple assailant instruction based on the Irons case, which stated, "the amount of force that is necessary to prevent the infliction of injury, and thus is not unlawful, may vary with the number

of persons the defendant reasonably believes are about to commit or assist in an offense against a person." CP 75. Defense counsel explained that "it's obviously the state of the law such that the amount of force necessary is going to vary depending on how many people are being characterized as an aggressor" and that an Irons instruction would add "information to the jury as far as the fact that what's [reasonably] necessary is going to vary depending on how many aggressors there are." RP 485-86

Defense counsel was correct that a person may use a correspondingly greater amount of force to repel the attacks of multiple assailants. In Irons, the Court of Appeals reached this conclusion where "Irons was surrounded by four men, three of whom intended to assist the fourth in confronting Irons, and that one of these men—not the victim—threatened Irons with a beer bottle." Irons, 101 Wn. App. at 552. The court agreed with Irons that the jury instructions "inadequately conveyed the law of self-defense to the jury under the facts of his case because they 'did not make it manifestly clear to the jury that it could consider the fact that Irons was faced with multiple assailants.'" Id. (quoting briefing).

The Irons court "recognize[d] that the self-defense instructions . . . properly instructed the jury to take 'into consideration all the facts and circumstances as they appeared to [the defendant], at the time of and prior to the incident." Id. (third alteration in original) (quoting clerk's papers). The

court also noted the jury was correctly instructed that Irons "was entitled to defend himself if he believed 'in good faith and on reasonable grounds that he [was] in actual danger of great bodily harm[.]'" Id. (alterations in original) (quoting clerk's papers). Nonetheless,

> the problem arises after considering the additional language requiring that "the defendant reasonably believed that *the victim* intended to . . . inflict death or great personal injury; and . . . the defendant reasonably believed that there was imminent danger of *such harm* being accomplished[.]" The additional language requires the jury to consider only the actions and intentions of *the victim* in assessing Irons's reasonable belief. In a case involving multiple assailants, this language can easily be read to modify the portion of the charge that instructs the jury to consider *all facts and circumstances* as they appeared to the defendant. When read together in a case involving multiple assailants who were acting in concert with the victim, these jury instructions become internally inconsistent and, therefore, ambiguous.

Id. at 552-53 (alterations and emphases in original) (quoting clerk's papers).[3]

The denial of Sullivan's multiple assailant instruction caused a similar ambiguity here. Sullivan's theory was that two men, Bohannon and Cissell, attacked her, which in turn reasonably necessitated her greater use of force. RP 414-15, 444-45, 485-86. But the use-of-force instruction stated,

> The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.

[3] The Irons court also persuasively relied on several consistent out-of-state cases to bolster its conclusion. 101 Wn. App. at 553-55.

CP 41 (emphasis added). In contrast to Irons, this instruction did not potentially limit Sullivan's use of force to "the victim." But it nonetheless indicated that Sullivan, if she reasonably believed she was about to be injured, could lawfully use force upon only "the person of another." This instruction was inadequate because the jury could reasonably read "upon the person of another" as a requirement to consider the reasonableness of Sullivan's use of force in light of only Bohannon's actions—*the person* against whom she used force by cutting him with a knife. As in Irons, when the self-defense instructions are read together, they "become internally inconsistent and, therefore ambiguous." Irons, 101 Wn. App. at 553. Thus, as in Irons, it was not made manifestly clear to jurors that they could consider the reasonableness of Sullivan's use of force against two attackers rather than against Bohannon alone given that the Bohannon was the only "person of another" against whom Sullivan ultimately used any force. Because the instructions on lawful use of force did not make manifestly clear that Sullivan was lawfully permitted to use an increased amount of force because two persons, rather than one person, attacked her, the trial court erred in denying her multiple assailant instruction.

The Court of Appeals failed to address Sullivan's argument regarding the inconsistency created by the instruction's limitation to Sullivan's use of force against "the person of another." Instead, the Court of

Appeals concluded, without analysis, that "Sullivan did not have to contend with any inconsistency" and that she "had the opportunity to present her self-defense argument unimpeded by any inconsistent jury instructions." Sullivan, slip op. at 13-14.

The Court of Appeals' unanalyzed supposition is inconsistent with Irons, which stated, "Although the instruction allowed Irons to argue his theory of the case, it left him with the burden of overcoming the inconsistency between the instruction as written and his theory that he reasonably believed he was in imminent danger of death or great personal injury from multiple assailants . . . ." 101 Wn. App. at 559. "The defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is." State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984); see also CP 27 (instructing jury to disregard an attorney's "remarks, statement, or argument that is not supported by . . . the law in my instructions"). Sullivan and Cessill both testified that Cessill assisted Bohannon in a physical altercation with Sullivan. RP 348, 414-15, 445-46. But the inconsistency in the use-of-force instruction potentially precluded jurors from considering Cessill's actions in determining whether Sullivan's use of force was reasonable. The Court of Appeals' contrary conclusion conflicts with Irons and the related decisions of this court, warranting review under RAP 13.4(b)(1) and (2).

Finally, the denial of Sullivan's multiple assailant instruction was constitutional error given that it lessened the State's burden to disprove Sullivan acted in self-defense. See O'Hara, 167 Wn.2d at 103 (citing examples of manifest constitutional errors in jury instructions to include shifting or lessening the State's burden of proof). Because it was not made manifestly clear to the jury that Sullivan's reasonable use of force was not limited to the person of Bohannon, neither was it manifestly clear that Sullivan was reasonably permitted to use a correspondingly greater amount of force to repel *both* Bohannon *and* Cessill. This lowered the State's burden of disproving the reasonableness of Sullivan's use of force. This constitutional infirmity makes review appropriate under RAP 13.4(b)(3).

2. THE COURT OF APPEALS' REFUSAL TO ADDRESS SULLIVAN'S APPELLATE COSTS ARGUMENT CONFLICTS WITH ITS SINCLAIR DECISION MANY RESPECTS AND RESULTS IN CONSTITUTIONAL ERROR

a. The decision under review significantly conflicts with *Sinclair* and with this court's recent *Wakefield* decision

Despite the procedure outlined by Division One in Sinclair, Division One declined to address Sullivan's request in the opening brief that appellate costs be denied. See Sinclair, 192 Wn. App. at 389-90 ("We conclude that it is appropriate to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an

appellant's brief."). Several inconsistencies between the instant opinion and Sinclair warrant review. RAP 13.4(b)(2).

The Sinclair court held that if the issue of appellate costs is raised in the opening brief, then "[t]he State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill." Sinclair, 193 Wn. App. at 391 (emphasis added). Here, despite Sullivan having argued appellate costs in the opening brief, Br. of Appellant at 36-45, the State did not respond, even though it filed its brief after Sinclair was issued. Had Division One followed Sinclair in this case, it would have correctly concluded that the State waived its opportunity to seek appellate costs. Instead, the Court of Appeals converted itself into the State's advocate, advancing the arguments that the State chose not to make. This conflicts with the procedure outlined in Sinclair. RAP 13.4(b)(2).

One reason the Court of Appeals gave for declining to decide appellate costs was that "Sullivan's age and length of sentence distinguish her from Sinclair." Sullivan, slip op. at 19. While age and length of sentence might be relevant to the issue of appellate costs, these factors are not dispositive and should not serve as a litmus test for an appellate cost award. The Sinclair court directed counsel in future cases to be "helpful to the appellate court's exercise of its discretion by developing fact-specific arguments from information that is available in the existing record." 192

Wn. App. at 392. The Court of Appeals decision is inconsistent with the Sinclair approach by considering only two factors and ignoring several others. RAP 13.4(b)(2).

Had the Court of Appeals followed Sinclair, it would have recognized several reasons beyond Sullivan's age and sentence length that militate against imposing appellate costs.

First, Sullivan spent a significant time in Bohannon's apartment because she needed to use his phone, computer, and fax machine to complete her application for Section 8 housing. RP 400-02, 433-34. Section 8 housing is a means-tested, needs-based housing voucher program available for low income earners. See, e.g., www.seattlehousnig.org/housing/vouchers. This court recently concluded that courts should not disregard "eligibility for needs-based, means-tested assistance when evaluating ability to pay LFOs." City of Richland v. Wakefield, ___ Wn.2d ___, 380 P.3d 459, 464 (2016). "Instead, courts should regard such eligibility as strong evidence of indigency." Id. The Court of Appeals refusal to consider Sullivan's applications for needs-based, means-tested programming places its decision not only at odds with Sinclair but also with Wakefield. RAP 13.4(b)(1)–(2).

Second, Sullivan testified she suffers from a serious anxiety disorder for which she has sought numerous years of treatment. RP 400. The

superior court imposed the alternative sentence it did to ensure Sullivan could "remain connected with her mental health services." RP 612. Although in the context of LFOs imposed by trial courts, the legislature has expressed a preference not to impose LFOs on those with mental health conditions. RCW 9.94A.777. This provides persuasive authority that no court should be imposing more than $5,000 in discretionary LFOs on those with mental illnesses. See Appendix B (cost bill seeking $5,075.65). In Wakefield, this court suggested courts should be wary of imposing LFOs on those with mental disabilities. 380 P.3d at 466. The Court of Appeals' failure to address these record-based arguments conflicts with Sinclair and Wakefield, necessitating review. RAP 13.4(b)(1)–(2).

Third, the record and proceedings in the Court of Appeals establish that Sullivan is homeless. Sullivan was served with a copy of the opening brief at her mental health provider because she had arranged to pick up mail there due to homelessness. Appendix C (declaration of service). This arrangement had fallen through by the time the reply brief was filed—Sullivan's lack of an address resulted in her not being served with the reply brief. Appendix D (electronic filing sheet stated, "We do not have a valid address for appellant and, despite good faith efforts, have not been able to obtain one. We are unable to serve appellant with a copy of the reply brief"). When this court issued its decision, it provided a copy to Sullivan directly at

the women's shelter were Sullivan has occasionally stayed due to her homelessness. The decision at issue thus conflicts with Sinclair by allowing nearly $5,100 plus ever accumulating interest to be imposed on a homeless, mentally ill woman who qualifies for state assistance programs. This conflict warrants review under RAP 13.4(b)(1).

Fourth, the Court of Appeals declined to decide the issue of appellate costs by citing the supposed availability of a future remissions process. Sullivan, slip op. at 19. This directly affronts the Sinclair decision, which stated, "The future availability of a remission hearing in a trial court cannot displace this court's obligation to exercise discretion when properly requested to do so." 192 Wn. App. at 388. This alone warrants review under RAP 13.4(b)(2). And, in any event, indigent persons like Sullivan do not have the benefit of counsel at remission proceedings. Without counsel, indigent persons might not know to move for remission in times of hardship and would likely struggle to make coherent records supporting a manifest hardship determination. Moreover, no Washington authority addresses what "manifest hardship" under RCW 10.73.160(4) even means. See Wakefield, 380 P.3d at 464 (acknowledging "manifest hardship" has no definition). Because lawyers would necessarily have to litigate the meaning of "manifest hardship," the remissions process in the eyes of a pro se litigant affords an illusory remedy at best. Not only does the Court of Appeals decision

conflict with Sinclair, but it also defies common sense on the important issue of remission that should be decided by this court. Review is thus appropriate under RAP 13.4(b)(2) and (4).

b. The imposition of appellate costs violates substantive due process

The Court of Appeals did not address Sullivan's substantive due process claim at all. This conflicts with the decisions of this court and the Court of Appeals, and precluded a decision on a significant constitutional issue. Review is therefore warranted under RAP 13.4(b)(1)–(3).

When the nature of a claim on appeal is clear, the issue is "argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced," then "there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); accord State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998) ("[T]his court will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced and this court has not been overly inconvenienced."). Here, Sullivan briefed her substantive due process challenge to appellate costs, which included ample citation to authority and argument. See Br. of Appellant at 41-44. The State had an opportunity to

respond. The Court of Appeals' failure to address this issue conflicts with Olson and Grimes, necessitating review under RAP 13.4(b)(1)–(2).

As for Sullivan's substantive due process challenge, deprivations of life, liberty, or property must be substantively reasonable, meaning such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Wash. State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). The rational basis test—requiring the provisions in question to be rationally related to a legitimate state interest—where a fundamental liberty interest is not at stake, as is the case here. Id.

There can be no dispute that funding the Office of Public Defense is a legitimate state interest. But attempting to fund it on the backs of indigent persons when their public defenders lose their appeals, without first ascertaining their ability to pay, does not rationally serve this interest. Indeed, "the state cannot collect money from defendants who cannot pay." State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 380 (2015). It is not rational for appellate courts to impose appellate costs on indigent litigants without even inquiring into whether they have the ability or likely future ability to pay them.

The discretionless imposition of appellate costs also undermines the state's interest in deterring crime, given that imposing LFOs without an ability-to-pay determination inhibits reentry into society and "increase[s] the

chances of recidivism." Id. at 836-37. And the State's interest in enhancing offender accountability through LFOs is thwarted when a person cannot pay. To foster accountability, a sentencing condition must be achievable. If not, the condition actually undermines efforts to hold a defendant accountable.

A recent dissent by Chief Judge Bjorgen aptly identifies the substantive due process problem with imposing LFOs without an ability-to-pay determination:

> Without the individualized determination required by Blazina for discretionary LFOs, mandatory LFOs will be imposed in many instances on those who have no hope of ever paying them. In those instances, the levy of mandatory LFOs has no relation to its purpose. In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

State v. Seward, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 6441387, at *4 (Nov. 1, 2016) (Bjorgen, C.J., dissenting). Although Judge Bjorgen was discussing mandatory LFOs, his persuasive reasoning applies with equal force to the imposition of appellate costs without inquiring into ability-to-pay. His dissent also illustrates that there is a split in the Court of Appeals

on whether substantive due process bars the imposition of LFOs without ability-to-pay determination, which warrants review under RAP 13.4(b)(2).

Given that Sullivan's substantive due process challenge presents a significant constitutional question, given that there is a conflict in the Court of Appeals on the substantive due process issue, and given that Sullivan's appellate cost claims impact the entire statewide system of indigent appeals—an issue of substantial public interest that should be determined by this court—review is warranted under RAP 13.4(b)(2)–(4).

E. CONCLUSION

Because she meets all RAP 13.4(b) review criteria, Sullivan asks that this petition for review be granted.

DATED this 2d day of December, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 73217-0-I
	)	
Respondent,	)	(Consolidated with
	)	No. 73216-1-I)
v.	)	
	)	PUBLISHED OPINION
DAWN MARIE SULLIVAN,	)	
	)	
Appellant.	)	FILED: October 10, 2016
	)	

LEACH, J. — Dawn Sullivan appeals her conviction for second degree assault. She challenges the trial court's refusal to excuse a juror who may have known the complaining witness and its decisions to give a first aggressor jury instruction and not to give a multiple assailants instruction. And she claims prosecutorial misconduct in closing argument to which she did not object. We reject each of these arguments. The record shows that the juror's possible acquaintance with a witness did not affect the juror's ability to be fair and impartial. The evidence at trial justified a first aggressor instruction. The trial court's self-defense instructions allowed Sullivan to argue her defense theory, and her multiple assailant instruction would have been cumulative. Finally, the prosecutor's remark in closing reflected a reasonable inference from Sullivan's testimony. Accordingly, we affirm Sullivan's conviction.

The State appeals Sullivan's sentence. It claims that the trial court had no authority to sentence her to a community program instead of confinement or to award credit for participation in that program toward her sentence. Because the Sentencing Reform Act of 1981[1] and the Supreme Court's decision in State v. Medina[2] prohibit the sentence the trial court imposed, we remand for resentencing.

FACTS

Dawn Sullivan cut Christopher Bohannon on the arm with a kitchen knife during a quarrel in Bohannon's apartment. She had been staying there, off and on, for about a month while she looked for a new place to live. The night of the assault, Sullivan and Bohannon drank together at the apartment. After midnight, Sullivan left and walked to a nearby area of bars in downtown Seattle. She met Robert Cessill, a stranger, who was in town during a long layover and waiting at a bus stop. She invited Cessill back to Bohannon's apartment. The three talked, and Cessill and Bohannon drank, until Cessill fell asleep on the couch.

Sullivan asked to smoke some of Bohannon's medical marijuana. After he refused, the two began to argue. Sullivan, Bohannon, and Cessill later gave different accounts of what followed.

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[1] Ch. 9.94A RCW.
[2] 180 Wn.2d 282, 324 P.3d 682 (2014).

According to Sullivan, Bohannon became furious and told her to leave. She tried to rouse Cessill because "it would be rude" to bring over a guest and then leave him there. Bohannon told her to let Cessill sleep. As she was shaking Cessill's foot, Bohannon "pounced" on her, and the two rolled on the floor. She did not see Cessill get off the couch, but she suddenly felt both men on top of her on the floor. She was afraid because "people were putting their hands on [her] body and holding [her] against [her] will for no reason." She "wiggled out, jumped over the couch," ran to the kitchen, and grabbed a knife from a magnetic strip. She felt she needed to defend herself, and the knife was closer than the door. Bohannon grabbed her, and he and Cessill took the knife from her within seconds. Bohannon then threw her out of the apartment. She did not know she had cut him during the scuffle.

According to Bohannon, Sullivan was angry and announced she was leaving. She pulled Cessill off the couch and told him, "[Y]ou're coming with me or I'm going to punch you in the face." Bohannon intervened, telling her not to punch anyone and that he wanted her to leave. As he led her toward the door, Sullivan "ran across [him] the wrong way into the kitchen area." He followed her, and she punched him in the nose multiple times. To this point, he had not touched Sullivan except on the arms. He grabbed her wrists and pulled her to

her hands and knees, then put his hand on her back, trying to calm her down. She stayed on the floor for 30 seconds to 2 minutes. Then she "twirled around and got up and grabbed [Bohannon's] kitchen knife, [his] big one." Bohannon grabbed at it, cutting his hand. Then Sullivan swung it down, cutting his wrist. Bohannon again grabbed her wrists and pulled her down to all fours. She was still holding the knife. At that point, Cessill got off the couch, grabbed Sullivan, and pulled her backward onto the couch. Bohannon took the knife away. He went to the kitchen, gathered up the other knives from the magnetic strip, took them to his bedroom, and threw them onto the floor on the far side of his bed. He saw that Cessill had made Sullivan pass out.

Similarly, Cessill testified that he woke up as Sullivan was standing over him and saying, "I'm going to punch you in the face." Cessill opened his eyes, and Sullivan told him he needed to leave immediately. Bohannon told Sullivan to leave Cessill alone and that she needed to leave. She became more upset. Bohannon and Sullivan argued very briefly, and then Sullivan went to the kitchen. As Bohannon followed her, Sullivan came out with a knife. She backed Bohannon against a wall and repeatedly slashed down with the knife, cutting his arm.[3] Cessill got up, grabbed Sullivan, and put her in a martial arts chokehold,

[3] Cessill testified Sullivan never punched Bohannon but also indicated he could not see them when they were in the kitchen.

causing her to pass out and drop the knife. Bohannon took the knives from the kitchen and hid them. After a short time, Sullivan woke up and left.

The State charged Sullivan with second degree assault with a deadly weapon.[4] During Bohannon's testimony, a juror told the court he might know Bohannon through mutual acquaintances. The court denied Sullivan's request to excuse the juror for cause.

At the end of the trial, the court instructed the jury on self-defense. Over Sullivan's objection, the court gave a first aggressor instruction informing the jury that self-defense was not available if it found that Sullivan provoked the fight. Also over Sullivan's objection, the trial court declined to give an instruction stating that the amount of force necessary to defend one's self "may vary with the number of persons the defendant reasonably believes are" threatening violence.

During closing arguments, the prosecutor asserted that Sullivan had attempted to garner the jury's sympathy by suggesting she had been "fearful of some sort of sexual assault." Sullivan did not object.

The jury convicted Sullivan of second degree assault and found she was armed with a deadly weapon.[5] The trial court imposed an exceptional sentence

[4] RCW 9A.36.021(1)(c).
[5] RCW 9A.36.021(1)(c); RCW 9.94A.825.

of no jail time for the assault.[6] It also allowed Sullivan to serve the mandatory 12-month deadly weapon enhancement[7] in the King County Community Center for Alternative Programs Enhanced (CCAP). Sullivan and the State both appealed the judgment and sentence. This court consolidated the appeals.

ANALYSIS

Juror 9

First, Sullivan contends that the trial court denied her right to an impartial jury by not excusing a juror who may have known Bohannon. During a break in Bohannon's testimony, juror 9 told the trial court that he was "reasonably confident" he had met Bohannon and believed they might have mutual friends. He said he did not think they had ever had a conversation. He said they might be friends on social media but could not recall having any exchanges on social media either. He confirmed his uncertainty about actually knowing Bohannon. The judge asked juror 9 whether anything about this possible connection would make him concerned that it would be "awkward if [juror 9] didn't believe [Bohannon]." The prosecutor asked if juror 9 could remember any interaction with Bohannon and if their possible connection "would have any

[6] The court based the exceptional sentence on RCW 9.94A.535(1)(a), which allows for mitigating circumstances where "the victim was an initiator, willing participant, aggressor, or provoker of the incident."

[7] RCW 9.94A.533(4)(b).

impact . . . whatever on you just watching him and assessing his credibility and his testimony as if it was anyone else." The juror answered "no" to each question.

The United States and Washington Constitutions guarantee a defendant the right to an impartial jury.[8] A party may challenge a juror for cause.[9] A judge must excuse "any juror, who in the opinion of the judge, has manifested unfitness as a juror," including "by reason of bias."[10] When a party challenges a juror for actual bias, even if the juror appears to have "formed or expressed an opinion upon what he or she may have heard or read," to excuse the juror "the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."[11] "[T]he trial court is in the best position to determine a juror's ability to be fair and impartial."[12] This court reviews that decision for abuse of discretion.[13]

Here, the trial court did not violate Sullivan's right to an impartial jury by declining to excuse juror 9. While juror 9 believed he might have mutual friends

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[8] U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

[9] CrR 6.4(c).

[10] RCW 2.36.110; CrR 6.4(c).

[11] RCW 4.44.190; see RCW 4.44.170(2) ("Actual bias" means "a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.").

[12] State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

[13] State v. Jorden, 103 Wn. App. 221, 226, 11 P.3d 866 (2000).

with Bohannon, he did not think they had ever had a conversation. He stated that nothing about their possible connection would make him reluctant to disbelieve Bohannon and that that connection would have no impact on his assessment of Bohannon's credibility.

Even if juror 9 was confident that he recognized and had met Bohannon and thought they shared mutual friends, those facts alone would not require the court to excuse him. Nothing in the record indicates that the juror's potential acquaintance with Bohannon affected his opinion of Bohannon's credibility. Even if he had formed such an opinion, the trial court would need to be satisfied, from all the circumstances, that juror 9 could not disregard his opinion and decide the issue impartially.[14] The trial court was in the best position to make this judgment. The record affirmatively supports its decision that juror 9 could decide the case impartially. Thus, the trial court did not abuse its discretion in declining to excuse the juror.

First Aggressor Jury Instruction

Next, Sullivan contends that the trial court erred in giving the jury a first aggressor instruction. The court instructed the jury on self-defense and, over Sullivan's objection, instructed the jury, "[I]f you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct

[14] See RCW 4.44.190.

provoked or commenced the fight, then self-defense is not available as a defense."

When the record includes credible evidence from which a reasonable juror could find that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate.[15] Whether the State produced sufficient evidence to justify an aggressor instruction presents a question of law we review de novo.[16] We view the evidence in the light most favorable to the party requesting the instruction—here, the State.[17]

"[A]n aggressor or one who provokes an altercation" cannot successfully invoke the right of self-defense.[18] Although not favored, an aggressor instruction is proper "'where (1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the fight, or (3) the evidence shows that the defendant made the first move by drawing a weapon.'"[19] The provoking act must be intentional conduct reasonably likely to provoke a belligerent response.[20] It

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[15] State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999); Manzanares v. Playhouse Corp., 25 Wn. App. 905, 910, 611 P.2d 797 (1980).

[16] State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008).

[17] State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

[18] Riley, 137 Wn.2d at 909.

[19] State v. Stark, 158 Wn. App. 952, 959, 244 P.3d 433 (2010) (quoting Anderson, 144 Wn. App. at 89); Riley, 137 Wn.2d at 909-10.

[20] State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989).

cannot be words alone.[21] And it cannot be the charged assault.[22] But contrary to Sullivan's assertions, the provoking act can be part of a "single course of conduct" that leads to the assault.[23]

Sullivan contends that the trial court's first aggressor instruction here was both incorrect and unsupported by the evidence. We disagree.

The instruction correctly stated the law. In State v. Wingate,[24] the Supreme Court approved an instruction with nearly identical wording to the instruction here. Moreover, the instruction here is more specific and thus more favorable to the defendant than the one in Wingate. It required the jury find an "intentional violent act" rather than just an "intentional act."[25] Sullivan relies on State v. Arthur.[26] But the instructions here and in Wingate are distinguishable from those in Arthur. In Arthur, this court found an instruction that referred to a defendant's "unlawful act" to be overly vague, allowing the jury to speculate

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[21] Riley, 137 Wn.2d at 912-13.

[22] State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

[23] Rather, "[i]t has long been established that the provoking act must also be related to the eventual assault as to which self-defense is claimed." Wasson, 54 Wn. App. at 159. Sullivan cites decisions regarding double jeopardy and unanimity instructions—both issues that are inapplicable here. See State v. Villanueva-Gonzalez, 180 Wn.2d 975, 985, 329 P.3d 78 (2014); State v. Rodriguez, 187 Wn. App. 922, 937, 352 P.3d 200, review denied, 184 Wn.2d 1011 (2015).

[24] 155 Wn.2d 817, 821, 122 P.3d 908 (2005).

[25] Wingate, 155 Wn.2d at 821.

[26] 42 Wn. App. 120, 708 P.2d 1230 (1985).

about which act may have been unlawful. The court reasoned that an "unlawful act" could encompass an accidental collision with the victim's car. This court held that a trial court must direct an aggressor instruction toward intentional acts that the jury could reasonably assume would provoke a belligerent response.[27] The trial courts did precisely that here and in Wingate.

The evidence also supports the trial court's decision to give the first aggressor instruction. The evidence meets at least two of the three justifications for offering the instruction.[28] First, Bohannon and Cessill's testimony conflicts with Sullivan's about whether Sullivan's conduct provoked the fight. Both men testified that Sullivan attempted to pull Cessill off the couch and threatened to punch him, and Bohannon testified that Sullivan punched him in the face before he or Cessill used force against her. While "words alone" cannot defeat a self-defense claim, Sullivan combined her words with physical acts. Second, from the same testimony, the jury could reasonably determine that Sullivan provoked the fight. We therefore reject Sullivan's challenge to the aggressor instruction.

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[27] Arthur, 42 Wn. App. at 124-25.

[28] See Stark, 158 Wn. App. at 959. As to the third justification, Sullivan admits she was the first person to draw a weapon. But none of the witnesses suggested that Sullivan was "ma[king] the first move" in doing so, as she and Bohannon were already tussling in all three accounts.

Multiple Assailants Instruction

Sullivan also contends that the trial court should have given this instruction that she proposed:

> As it is within the realm of common experience that two or more people are more likely to inflict injury than only one such person, the amount of force that is necessary to prevent the infliction of injury, and thus is not unlawful, may vary with the number of persons the defendant reasonably believes are about to commit or assist in an offense against a person.

We review de novo a trial court's refusal to give an instruction based on a ruling on the law.[29] Self-defense "instructions, read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'"[30] Each side is entitled to have the jury instructed on its theory of the case when some evidence supports that theory.[31] Failure to instruct on a defense theory when evidence supports it is prejudicial error.[32]

In State v. Irons,[33] this court held that the trial court's self-defense instruction failed to "'make it manifestly clear to the jury that it could consider the fact that Irons was faced with multiple assailants.'" Four people had surrounded

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[29] State v. Walker, 136 Wn.2d. 767, 772, 966 P.2d 883 (1998).

[30] State v. Irons, 101 Wn. App. 544, 550, 4 P.3d 174 (2000) (internal quotation marks omitted) (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

[31] Riley, 137 Wn.2d at 908 n.1.

[32] State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

[33] 101 Wn. App. 544, 552, 4 P.3d 174 (2000).

Irons. He had reason to fear all four, but he proceeded to injure only one.[34] Even so, the trial court instructed the jury that for Irons to succeed on a self-defense claim, the jury had to find that Irons "'reasonably believed that the victim intended to . . . inflict death or great personal injury; and . . . that there was imminent danger of such harm being accomplished.'"[35] This court found the instruction allowed Irons to argue his theory of the case. But its inconsistency with Irons's theory prejudiced his ability to present his "theory that he reasonably believed he was in imminent danger of death or great personal injury from multiple assailants—not just" the victim.[36]

Sullivan did not have to contend with any inconsistency. The trial court instructed the jury that force is lawful when a person "reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary." Nothing in this or other instructions limits the defendant's justification to a reasonable fear of one person or eventual victims, as in Irons. Unlike Irons, Sullivan had the opportunity to present her self-defense argument unimpeded by any inconsistent

[34] Irons, 101 Wn. App. at 558-59.
[35] Irons, 101 Wn. App. at 552 (alteration in original).
[36] Irons, 101 Wn. App. at 559.

jury instructions. Instead, the trial court's instructions made the applicable self-defense standard "manifestly apparent" to the jury.[37]

Sullivan contends that failure to give the instruction prejudiced her because she was entitled to argue her theory and sufficient evidence supported the instruction.[38]

This court evaluates each jury instruction "in the context of the instructions as a whole."[39] "It is not error to refuse to give a cumulative instruction or one collateral to or repetitious of instructions already given."[40]

Sullivan's theory was self-defense, and the trial court instructed the jury on that theory. Her testimony supports her theory that she was justified in defending herself against both Bohannon and Cessill. But here a multiple assailant instruction would have been cumulative of the trial court's other instructions. As discussed above, the jury instructions adequately conveyed that Sullivan could fear multiple assailants, including people she was not charged with injuring.

Because the trial court's self-defense instructions were sufficient and allowed Sullivan to argue her theory of the case and because the proposed

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[37] Irons, 101 Wn. App. at 550.
[38] See Williams, 132 Wn.2d at 259.
[39] State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993).
[40] Benn, 120 Wn.2d at 655.

multiple assailant instruction was cumulative, we reject Sullivan's challenge to the trial court's refusal to give that instruction.

Closing Arguments

Next, Sullivan contends that the prosecutor appealed to jurors' passions and prejudices in asserting that Sullivan had implied she feared being sexually assaulted.

When claiming prosecutorial misconduct, the defendant has the burden of proving that the prosecutor's conduct was both improper and prejudicial.[41] In closing arguments, attorneys have "'latitude to argue the facts in evidence and reasonable inferences.'"[42] They may not, however, "urg[e] the jury to decide a case based on evidence outside the record."[43] And they may not make "[m]ere appeals to the jury's passion or prejudice."[44]

If a prosecutor's statements are improper, then this court determines whether those statements prejudiced the defendant.[45] When, as here, the defendant did not object at trial, the defendant waived any error unless the misconduct was "so flagrant and ill intentioned that an instruction could not have

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[41] State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).
[42] State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (quoting State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)).
[43] State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).
[44] State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006).
[45] Emery, 174 Wn.2d at 760.

cured the resulting prejudice."[46] "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'"[47] In short, this court asks, "[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'"[48]

Here, in describing the fight, Sullivan testified,

> A. . . . . We were rolling around on the floor and next thing I know I have a second boy on top of me. I—I don't know—I did not see, I don't know why, I don't know how. But then I had two boys on top of me.
>
> . . . .
>
> A. I was terrified.
>
> Q. And what were you terrified they might do to you?
>
> A. I just knew that I was getting hurt. That's—that's all. And I was scared and people were putting their hands on my body and holding me against my will for no reason.

At other points in her testimony, Sullivan again referred to having "two boys" "on top of me," and she spoke about her fears during the fight: "I was

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[46] Emery, 174 Wn.2d at 760-61. This court focuses more on whether an instruction could have cured the prejudice than whether the comments were flagrant and ill intentioned. Emery, 174 Wn.2d at 762.

[47] Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[48] Emery, 174 Wn.2d at 762 (alteration in original) (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

really scared. If I'm already getting beat up by two boys what's going to come next, you know?"

Earlier in Sullivan's testimony, her counsel asked whether she and Bohannon had a romantic relationship. Sullivan testified,

> A. I woke up cuddled with him on the couch once, half dressed, and I wasn't sure what happened because we were pretty drunk the night before. And he's the one who informed that we had—had sex. And I just kind of pretended it never happened and let it go. He's—I'm not in any way, shape, or form romantically interested in him.
>
> . . . .
>
> Q. And you—you had just mentioned that time when you did have—you were told you had a sexual—
>
> A. I wasn't happy about it.
>
> Q. Did you have—did you ever have a sexual encounter with him any time besides that time?
>
> A. No. No.
>
> Q. And how long before this incident that we're—we've all been talking about did that happen?
>
> A. Maybe two weeks before this incident.

In closing, the prosecutor suggested that Sullivan had testified she was "fearful of some sort of sexual assault" and argued that she had testified to the two men "grabbing her body" because "she wants to have the strongest emotional reaction," since "any kind of sexual assault is heinous."

We conclude that the prosecutor's argument reasonably characterized Sullivan's testimony. In recounting the fight, Sullivan repeatedly mentioned her fear at having "two boys" "on top of me," "putting their hands on my body." She and her counsel both raised the question of where the situation would lead. This account, combined with Sullivan's prior testimony that she regretted having sex with Bohannon and would not have consented to it if she had been sober, make it reasonable for the prosecutor to argue that she had implied she feared being sexually assaulted. The prosecutor did not rely on facts outside the record or appeal to the jury's passion or prejudice in suggesting that Sullivan wanted the jury to "have the strongest emotional reaction."[49] Rather, that argument fell within the prosecutor's wide latitude to draw reasonable inferences from the evidence. Because the argument was not improper, we do not need to decide whether an instruction could have cured any prejudice that resulted.

[49] The prosecutor's remarks are also less prejudicial on their face than remarks Washington courts have found improper. See State v. Miles, 73 Wn.2d 67, 69-70, 436 P.2d 198 (1968) (improper and prejudicial to admit hearsay evidence alleging a plan by defendants to perpetrate a robbery like the one with which they were charged); State v. Belgarde, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (improper and prejudicial to describe American Indian defendant as a leader of a "'deadly group of madmen'" and "'butchers, that killed indiscriminately'"); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984) (improper and prejudicial to read "vivid and highly inflammatory" poem by anonymous rape victim to jury during closing argument).

Appellate Costs

Finally, Sullivan asks this court to deny appellate costs should the State prevail.

"The commissioner or clerk 'will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review.'"[50] This court has discretion to consider the issue of appellate costs when a party raises the issue in its brief.[51]

In State v. Sinclair,[52] this court used its discretion to deny appellate costs to the State where the defendant remained indigent and this court saw "no realistic possibility," given that the defendant was 66 years old and received a 280 month prison sentence, that he would be able to pay appellate costs.

We decline to decide appellate costs at this stage. Sullivan's age and length of sentence distinguish her from Sinclair. If the commissioner or court clerk approves a cost bill from the State, RCW 10.73.160(4) allows the sentencing court to remit costs if payment would "impose manifest hardship" on Sullivan or her family.[53]

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[50] State v. Sinclair, 192 Wn. App. 380, 385-86, 367 P.3d 612 (quoting RAP 14.2), review denied, 185 Wn.2d 1034 (2016).

[51] Sinclair, 192 Wn. App. at 388-90.

[52] 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

[53] State v. Nolan, 98 Wn. App. 75, 79, 988 P.2d 473 (1999).

CCAP Sentence for Deadly Weapon Enhancement

The State contends, in a cross appeal, that the trial court did not have the authority to sentence Sullivan to no time in confinement for the mandatory one-year deadly weapon enhancement. The trial court instead sentenced her to one year in King County's CCAP.

Second degree assault is a class B felony and a violent offense.[54] Class B felonies committed after 1995 with a deadly weapon other than a firearm carry a mandatory one-year enhancement.[55] When this enhancement applies, courts must impose it "even if facts permit a departure from the standard range for the underlying offense."[56] "Notwithstanding any other provision of law," the enhancement must "be served in total confinement."[57] With exceptions not applicable here, "'[t]otal confinement' means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day."[58]

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[54] RCW 9A.36.021(2)(a); RCW 9.94A.030(55)(a)(viii). Amendments to RCW 9.94A.030, effective August 1, 2009, changed the numbering but not the relevant content of the definitions.

[55] RCW 9.94A.533(4)(b).

[56] State v. Graham, 181 Wn.2d 878, 884, 337 P.3d 319 (2014) (interpreting RCW 9.94A.533).

[57] RCW 9.94A.533(4)(e).

[58] RCW 9.94A.030(52).

RCW 9.94A.680 allows for alternative sentencing for offenders with sentences of one year or shorter. The only alternative that applies to violent offenders allows that "[o]ne day of partial confinement may be substituted for one day of total confinement."[59]

Here, the trial court imposed the mandatory one-year sentence for the deadly weapon enhancement. That sentence must be served in total confinement.[60] Since RCW 9.94A.680(1) allows a sentencing court to substitute partial confinement for total confinement, the trial court could sentence Sullivan to one year of CCAP only if CCAP qualifies as "partial confinement."

As Sullivan concedes, the Supreme Court already decided, in State v. Medina,[61] that CCAP is not "partial confinement." Sullivan asks this court to examine the statutory scheme to decide if the difference between her circumstances and the defendant's in Medina justifies a departure from that binding opinion. She suggests no distinctions, though, and we see none. Medina prohibited the trial court from allowing Sullivan to satisfy the deadly weapon enhancement with CCAP participation.

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[59] RCW 9.94A.680(1).

[60] See RCW 9.94A.533(4)(e).

[61] Medina, 180 Wn.2d at 289 ("[W]e do not think that participation in the educational, counseling, and service-oriented programs entailed in CCAP meets the statutory definition of 'confinement.'").

Credit for Time Served in CCAP

The State also contends that the trial court could not credit Sullivan for time she already served in CCAP toward the one-year deadly weapon sentence.

An offender sentenced to confinement has both a constitutional and a statutory right to receive credit for time the offender served before sentencing.[62] "[A] defendant's ineligibility for a particular type of partial confinement postconviction is not relevant to the question of whether that defendant must be credited for pretrial time served in that same type of partial confinement."[63]

RCW 9.94A.680(3) allows the court to credit the offender for time served before sentencing "in an available county supervised community option." As noted above, that provision applies only to "offenders convicted of nonviolent and nonsex offenses."[64] The Supreme Court confirmed, in Medina, that the statute does not permit the community option for violent offenders.[65] The trial court thus exceeded its authority in crediting Sullivan for time served in CCAP toward her one-year sentence for a violent offense.

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[62] State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992); RCW 9.94A.505(6).

[63] Medina, 180 Wn.2d at 288 (citing Speaks, 119 Wn.2d at 208).

[64] RCW 9.94A.680(3).

[65] Medina, 180 Wn.2d at 290 (applying canon of expressio unius est exclusio alterius). As the Supreme Court determined that the 2009 amendments adding 9.94A.680(3) did not apply retroactively to Medina's crime, that portion of the opinion is dicta. Nonetheless, we follow the Supreme Court's guidance.

Sullivan does not contest the State's statutory arguments. She challenges, instead, the injustice, as a matter of policy, of sentencing her to confinement because CCAP would better benefit her, her health, and the community. She further notes the inherent inconsistency of sentencing her to 12 months for the deadly weapon enhancement while imposing 0 months for the underlying crime due to Bohannon's partial culpability.

Whatever the trial court may have thought about the wisdom behind imposing a mandatory year of confinement for any crime committed with a deadly weapon, Washington courts have "consistently held that the fixing of legal punishments for criminal offenses is a legislative function."[66] The legislature's enactments prohibited the trial court from sentencing Sullivan to CCAP or awarding her credit for time already spent in CCAP. We therefore vacate those provisions and remand the case to the trial court for resentencing consistent with this opinion.

[66] State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986).

CONCLUSION

We affirm Sullivan's conviction and remand for resentencing.

Leach, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

APPENDIX B

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, vs. DAWN MARIE SULLIVAN, Appellant.	)	No. 73217-0-I COST BILL

The State of Washington asks that the following costs be awarded pursuant to RCW 10.73.160 and RAP 14.3. They are expenses actually incurred which were reasonably necessary for review.

Items 1, 2a, 3a and 6a are expenses incurred by the Washington Office of Public Defense, Indigent Defense Fund. An award of costs as to those items should be paid to the Washington Office of Public Defense. Costs pursuant to all other items should be paid to the King County Prosecutor's Office.

1.	Recoupment of fees for court appointed counsel	$	2917.00
2.	Preparation of original and one copy of report of proceedings		
	a. Appellant	$	1961.95
	b. Respondent	$	0.00
3.	Copies of clerk's papers		
	a. Appellant	$	58.00
	b. Respondent	$	0.00
4.	Transmittal of record on review	$	0.00
5.	Expenses incurred in superseding the decision of the trial court	$	n/a
6.	Charges of appellate court clerk for reproduction of briefs, petitions and motions		
	a. Appellant	$	14.11
	b. Respondent	$	10.59
7.	Preparing original respondent's brief(s)	$	114.00
8.	Filing fee	$	
	Total	$	**5075.65**
	Total to be paid to Washington Office of Public Defense:	$	4951.06
	Total to be paid to King County Prosecutor's Office:	$	124.59

The Appellant should be ordered to pay the above costs.

Dated this 17th day of October, 2016.

DANIEL T. SATTERBERG
Prosecuting Attorney

Donna L. Wise, WSBA # 13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the Cost Bill, in State v. Dawn Marie Sullivan, Cause No. 73217-0, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of October, 2016.

Name:
Done in Seattle, Washington

APPENDIX C

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

STATE OF WASHINGTON/DSHS	)	
Respondent,	)	
v.	)	COA NO. 73217-0-I
DAWN SULLIVAN,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF OCTOBER, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAWN SULLIVAN
C/O SEATTLE MENTAL HEALTH
1600 E. OLIVE STREET
SEATTLE, WA 98122

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF OCTOBER, 2015.

X Patrick Mayovsky

APPENDIX D

NIELSEN, BROMAN & KOCH, PLLC

April 07, 2016 - 1:49 PM

Transmittal Letter

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Court of Appeals Case Number: 73217-0

Party Respresented:
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Trial Court County: ____ - Superior Court # ____

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- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
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- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
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- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
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Comments:

We do not have a valid address for appellant and, despite good faith efforts, have not been able to obtain one. We are unable to serve appellant with a copy of the reply brief.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

paoappellateunitmail@kingcounty.gov
Donna.Wise@kingcounty.gov
Jim.Whisman@kingcounty.gov

NIELSEN, BROMAN & KOCH P.L.L.C.

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Filing Petition for Review

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Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

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