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SUPREME COURT NO. 96447-5

NO. 76437-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDREW BUCHANAN,

Petitioner.

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

The Honorable David A. Svaren, Judge
The Honorable Michael Rickert, Judge
The Honorable Dave Needy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Andrew Buchanan, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Buchanan, ___ Wn. App. ___, ___ P.3d ___, 2018 WL 4440610 (No. 76437-3-I, filed September 17, 2018).[1]

B. ISSUES PRESENTED FOR REVIEW

1. The trial court rejected defense counsel's argument that exceptional concurrent sentences were appropriate for Buchanan's multiple firearm convictions in accordance with the multiple offense policy of RCW 9.94A.589. In sentencing Buchanan to consecutive sentences for his convictions for second degree unlawful possession of a firearm and theft of firearm, the trial court explained, "I note that the firearm offenses are required by law to run consecutive to each other and concurrent to all other charges." 1RP[2] 132. Should review be granted where the Court of Appeals decision concluding that Buchanan could not show prejudice from the trial court's failure to properly consider imposing concurrent sentences for Buchanan's convictions conflicts with precedent from this Court, involves a significant question of Constitutional law, and involves an issue of substantial public interest?

[1] A copy of the opinion is attached as an appendix.

[2] The index to the citations to the record is found in the Brief of Appellant (BOA) at 2, n. 1.

2. The trial court indicated it was imposing only mandatory legal financial obligations (LFOs) against Buchanan. But the trial court also imposed a $250 jury demand fee, an LFO which is not mandatory. Is review warranted under RAP 13.4(b)(1), (b)(2), (b)(3), and (b)(4), where Division One's opinion failed to reach the merits of Buchanan's argument, and in so doing conflicts with precedent from this Court, an opinion from Division Three, involves a significant question of Constitutional law, and involves an issue of substantial public interest?

3. On September 20, 2018 this Court issued a decision in State v. Ramirez, __ Wn.2d___, __ P.3d __, 2018 WL 4499761 (Sept. 20, 2018), which held that House Bill 1783 amendments to several facets of the state's legal financial obligation regime applied prospectively to cases not yet final on appeal, including striking the $200 criminal filing fee and $100 DNA fee. Ramirez, 2018 WL 4499761 at *7-8 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)). Buchanan, who case is not yet final on appeal, seeks review of the imposition of the $200 criminal filing fee and $100 DNA fee imposed against him under RAP 13.4(b)(1), (b)(3), and (b)(4).

C. STATEMENT OF THE CASE[3]

1. Trial Testimony.

Joseph Divita's storage shed's alarm system was activated but he found nothing amiss when he went to check on the property. 2RP 87. A few days later, Divita found the shed door ajar and closed it. 2RP 87. Neither Divita nor his wife found anything amiss inside the shed as late as September 24. 2RP 89, 144.

On September 26, Divita noticed a burning odor inside the shed. He saw broken glass and noticed that his safe had been opened. 2RP 90-91, 96-97, 147. The safe contained documents, cash, jewelry, and sets of silverware. 2RP 98-99, 148, 168-69, 601-05, 610. A pry bar was lying about four feet away from the safe that did not belong to Divita. 2RP 100, 167-68, 175. Divita also noticed the motion sensor lighting and internet connection to the shed had been tampered with. He also saw a ladder leaning against the side of the shed. 2RP 92-93, 177-78. Divita called 911. 2RP 91.

When Swinomish Detective, James Schwahn responded, he found no one inside the shed. 2RP 164, 166, 251. Schwahn noticed that a gap between two sliding doors allowed the doors to be pried open with a knife.

[3] Buchanan presented a more detailed statement of facts in the BOA, at pages 3-8, which he incorporates herein by reference.

2RP 173-74. Schwahn also found a cigar wrapper on the ground outside the shed. 2RP 179-80.

The shed alarm went off again on the morning of September 27. 2RP 103-05, 120. Divita saw that the video recording system and camera recording wires had been unplugged. He also saw that the ladder on the outside of the shed had been moved. 2RP 103-07, 120.

Schwahn again found no one inside the shed. 2RP 104, 181-83, 251. The lock to the room where Divita stored his guns and ammunition was broken. A shotgun and rifle were missing. 2RP 112-15, 146-47, 187.

Divita pulled video clips and pictures from cameras set up inside and outside the shed. 2RP 123, 193-96, 200-01. The video depicted a man carrying two long objects as he left the shed. 2RP 126, 141-42, 199, 305-06, 341; Ex. 15. The pictures showed a car leaving the property that Divita did not recognize. 2RP 117-18. The car did not have a license plate but Schwahn identified the car as a Mitsubishi Eclipse. 2RP 200-01. The pictures did not reveal how many people were inside the car or who was driving it. 2RP 340.

Schwahn discovered that Buchanan had recently purchased a red Mitsubishi Eclipse and a Ford Mustang. 2RP 204-06, 319, 355. Schwahn saw the cars parked at Buchanan's house. The Mitsubishi did not have a license plate. 2RP 215-20. Buchanan had been stopped by police driving

the Mitsubishi on September 26. The car contained a lot of property but none of it was suspected as being stolen. Police did not notice anything suspicious at the time of the stop. 2RP 135-38.

Schwahn learned that the Mitsubishi had been at a storage facility where Buchanan rented a storage unit. 2RP 222-27, 230-31, 237-39, 250-51. Police searched the storage unit and found paperwork in Divita's name, some silverware, and jewelry boxes. 2RP 463-68, 476-80. Buchanan was not at the storage unit. 2RP 473, 488-89.

Police also searched the Mitsubishi and house. Inside the house was woman's jewelry and silverware. 2RP 258-62, 287-92. Inside the Mitsubishi was a gold bracelet, fourteen silver place settings, and a set of keys with Divita's name on them. 2RP 258-62, 329-31, 483-90. Police also saw a propane tank and torch inside the Mitsubishi. 2RP 263, 292-93, 324, 330-31. Buchanan was not inside the car or the house at the time of the search. 2RP 265, 322, 473, 491.

Buchanan was arrested while driving the Ford Mustang. 2RP 265-68, 333. Inside the car was a cigar wrapper that matched the one outside Divita's shed, a laptop, and a pair of snips. 2RP 270-75.

Missing jewelry was recovered from several area shops. 2RP 496-509, 603, 622-23, 627, 630. Two women testified that they pawned some jewelry for Buchanan at the end of September 2016. 2RP 536-37, 542-47,

570-73. Neither woman suspected that the jewelry was stolen. 2RP 538-39, 558, 572, 595.

Keri Davis was dating Buchanan at the time of the alleged incidents. 2RP 379. In exchange for a favorable deal with the prosecuting attorney's office, Davis testified against Buchanan. 2RP 449-50, 454.

On September 27, Davis went with Buchanan to the Divita's storage shed. 2RP 387-88. Buchanan told her had taken about $7,000 from the property the night before and used it purchase the Mitsubishi and Ford. 2RP 388-89, 401. Davis covered her face and head and then used a ladder to climb into the shed through a window. 2RP 402-03. Davis unplugged all the recording equipment inside the shed. 2RP 404. She then opened the shed door and let Buchanan inside. 2RP 405. Buchanan grabbed two guns before the alarm went off. 2RP 405-06, 413.

Based on this evidence, the State charged Buchanan with one count each of first degree burglary, second degree burglary, first degree theft, first degree trafficking in stolen property, and two counts each of second degree unlawful possession of a firearm and theft of firearm. CP 201-04; 1RP 55, 96.

2. Sentencing.

A jury found Buchanan guilty as charged. CP 205-12. Defense counsel requested a low end standard range sentence. However, citing

RCW 9.94A.535(1)(g), defense counsel also noted that the trial court could impose an exceptional sentence below the standard range if it found mitigating circumstances. CP 146-47. As defense explained, "I don't think it would be unreasonable for the Court to consider a departure to go below that [standard range] even more." 1RP 129.

The sentencing court rejected Buchanan's request for a low end standard range sentenced, explaining that returning to the same property several times warranted a midrange sentence. In apparently rejecting Buchanan's request for a mitigated sentence however, the trial court explained only that, "I note that the firearm offenses are required by law to run consecutive to each other and concurrent to all other charges." 1RP 132.

Pursuant to RCW 9.94A.589(1)(c), the court imposed consecutive standard range sentences of 42 months for each theft of a firearm conviction and 20 months for each second degree unlawful possession conviction, for a total of 124 months imprisonment. The trial court ran the sentences on Buchanan's remaining convictions concurrent to the 124 months.

3. Court of Appeals Opinion.

Buchanan appealed, raising several issues, including an argument that the trial court erred by failing to properly consider its discretion to

impose concurrent sentences for Buchanan's firearm convictions. The Court of Appeals rejected Buchanan's argument, noting that even though "it is unclear whether the court understood that it could impose an exceptional mitigated sentence," Buchanan could not show prejudice because the court rejected Buchanan's request for a law-end standard range sentence. Appendix at 12.

The Court of Appeals also declined to reach the merits of Buchanan's argument that the trial court erred by imposing a non-mandatory $250 jury demand fee. Appendix at 16-17. Buchanan now asks this Court to accept review and reverse the Court of Appeals.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW OF THE TRIAL COURT'S FAILURE TO PROPERLY CONSIDER ITS DISCRETION TO IMPOSE CONCURRENT SENTENCES FOR THE FIREARM CONVICTIONS IS APPROPRIATE UNDER RAP 13.4(b)(1), (b)(3), and (b)(4).

Washington's firearms and dangerous weapons statute provides in relevant part that "[n]otwithstanding any other law," if an offender is convicted of either unlawful possession of a firearm in the first or second degree, or for the felony crime of theft of a firearm, or both, "then the offender shall serve consecutive sentences for each of the felony crimes of conviction." RCW 9.41.040(6). The multiple offense subsection of the Sentencing Reform Act (SRA) provides in relevant part that if an offender

is convicted under RCW 9.41.040, "[t]he offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed." RCW 9.94A.589(1)(c). State v. McFarland, 189 Wn.2d 47, 52-53, 399 P.3d 1106 (2017).

Notwithstanding the language of RCW 9.41.040(6) and RCW 9.94A.589(1)(c) however, "a sentencing court had discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm related sentences." McFarland, 189 Wn.2d at 55 (citing RCW 9.94A.535(1)(g)). Statutory grounds for a mitigated sentence were supported by the record in this case, including the operation of the multiple offense policy, so that remand for resentencing is appropriate where the trial court suggested that it had no discretion to impose concurrent sentences because "the firearm offenses are required by law to run consecutive to each other and concurrent to all other charges." 1RP 132.

A court may impose an exceptional sentence downward under RCW 9.94A.535, if it finds there are substantial and compelling reasons justifying an exceptional sentence. McFarland, 189 Wn.2d at 52-53, 55. RCW 9.94A.535(1) provides an illustrative list of nonexclusive reasons for mitigated sentences. For example, a court may impose a mitigated sentence if it finds "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in

light of the purposes of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g); State v. Graham, 181 Wn.2d 878, 882-85, 337 P.3d 319 (2014) (exceptional, concurrent sentences permitted pursuant to the multiple offense policy after defendant was convicted of shooting an AK-47 at six police officers); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 325-30, 166 P.3d 677 (2007) (same, as to defendant who shot at a home while six people were inside eating dinner); State v. Solis-Diaz, 194 Wn. App. 129, 133-37, 376 P.3d 458 (2016) (remanded for resentencing where trial court did not consider exceptional sentence downward due to its mistaken belief that the mitigating factor of the multiple offense policy did not apply to the defendant's drive-by shooting, serious violent offenses), aff'd on other grounds by, 187 Wn.2d 535, 387 P.3d 703 (2017).

"A trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range." State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995). The factor must "be sufficiently substantial and compelling to distinguish the crime in question from others in the same category." Id. Once a sentencing court identifies a mitigating factor, it should then consider the purposes of the SRA and, finally, determine if the sentence to be imposed is clearly too lenient. Alexander, 125 Wn.2d at 725, 730, 731.

The record here supported an exceptional, mitigated sentence. Buchanan's presumptive standard range sentence was 106 to 140 months in prison, because the multiple unlawful possession and theft of firearm offenses all stacked upon one another with consecutive sentences. CP 143-47, 213-27. The purposes of the SRA include just and proportional punishment to the seriousness of offense and to the punishment imposed on others committing similar offenses. As defense counsel properly noted, Buchanan's punishment did not seem just or proportional when compared to someone who had caused the death of someone. 1RP 128-30. Buchanan's culpability did not change significantly between the various firearm offenses. No one was physically harmed during any of the charged incidents. Buchanan's case is a prime candidate for the multiple offense policy, given that Buchanan's sentence was as clearly excessive in light of the purposes of the SRA.

A sentencing court's failure to consider an exceptional sentence downward, even where not specifically requested by the defense, may still be amenable to review, particularly where the trial court's statements on the record suggest an error has been made. McFarland, 189 Wn.2d at 56-59. Here, the sentencing court rejected Buchanan's request for a low end standard range sentenced, explaining that returning to the same property several times warranted a midrange sentence. In apparently rejecting

Buchanan's request for a mitigated sentence however, the trial court explained only that, "I note that the firearm offenses are required by law to run consecutive to each other and concurrent to all other charges." 1RP 132.

The trial court's statement that the firearm sentences were "required by law to run consecutive to each other[,]" suggests it failed to recognize its discretion to sentence Buchanan to concurrent sentences on the firearm convictions. In rejecting, Buchanan's argument however, the Court of Appeals reasoned that "because it is unclear whether the court understood that it could impose an exceptional mitigated sentence, we decide whether the record makes clear that the court would have imposed the same sentence had it known that an exceptional mitigated sentence was available." Appendix at 12. The Court of Appeals then concluded that because the trial court rejected Buchanan's request for a low-end standard range sentence in favor of a mid-range standard sentence, Buchanan could not demonstrate prejudice. Id.

The Court of Appeals' conclusion conflicts with this Court's opinion in McFarland. McFarland was convicted as an accomplice of first degree burglary, 10 counts of theft of a firearm, and three counts of second degree unlawful possession of a firearm. McFarland, 189 Wn.2d at 50. McFarland and her boyfriend stole firearms, ammunition, checkbooks,

alcohol, and electronics from a home while on of the home owners was sleeping. Id.

At sentencing, defense counsel agreed with the State as to running the various firearm-related sentences consecutively, but requested sentences at the bottom of the standard range. Defense counsel expressed concern about the overall sentence length, noting the disproportionate sentences for firearm thefts. McFarland, 189 Wn.2d at 50-51. The trial judge responded, "237 months is—just a little shy of 20 years, which is what people typically get for murder in the second degree," and defense counsel commented, "I think that's a fairly apt analogy." Id. at 51. Nonetheless, defense counsel did not request, and the sentencing court did not consider, imposing an exceptional sentence downward by running the firearm-related sentences concurrently. The court said, "I don't have—apparently [I] don't have much discretion, here. Given the fact that these charges are going to be stacked one on top of another, I don't think—I don't think [the] high end is called for, here." Id. The court accepted defense counsel's recommendation to impose sentences at the bottom of the standard range for each of the firearm-related convictions and entered a total sentence of 237 months (19 years and 9 months). Id.

On appeal, this Court concluded that a trial court has discretion to impose concurrent sentences under RCW 9.94A.535, notwithstanding the

language of RCW 9.41.040(6) and RCW 9.94A.589(1)(c). Id. at 53-55. The Court held that McFarland was entitled to resentencing because the sentencing court erroneously believed it could not impose concurrent sentences, and the record demonstrated it might have done so had it recognized its discretion under RCW 9.94A.535. Id. at

Like McFarland, here the trial court's comments that the firearm sentences were "required by law to run consecutive to each other[,]" suggests it failed to recognize its discretion to sentence Buchanan to concurrent sentences on the firearm convictions. And while the trial court rejected Buchanan's request for a low end standard range sentence, it also rejected the State's request for a sentence at the high end of the standard range. 1RP 132. As in McFarland, this fact "suggests at least the possibility that the sentencing court would have considered imposing concurrent firearm-related sentences had it properly understood its discretion to do so." 189 Wn.2d at 59. Review is appropriate under RAP 13.4(b)(1), (b)(3), and (b)(4).

2. REVIEW OF THE TRIAL COURT'S IMPOSITION OF A $250 JURY DEMAND FEE IS APPROPRIATE UNDER RAP 13.4(b)(1), (b)(2), (b)(3), and (b)(4).

The trial court indicated it was imposing only mandatory legal financial obligations (LFOs) against Buchanan. 1RP 135. Accordingly, the court ordered Buchanan to pay three mandatory LFOs: $500 victim

assessment, $200 criminal filing fee, and a $100 DNA database fee. CP 164-65; State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). But the trial court also imposed a $250 jury demand fee, a LFO which is not mandatory. The court has the discretion not to impose a jury demand fee. Lundy, 176 Wn. App. at 107 (jury demand fee is discretionary); RCW 36.18.016(3)(b) (court *may* require a defendant to pay jury demand fee) (emphasis added); Compare State v. Clark, 195 Wn. App. 868, 872, 381 P.3d 198 (2016) (noting it was unclear whether jury demand fee was mandatory or discretionary), reversed in part by, 187 Wn.2d 1009, 388 P.3d 487 (2017).

Defense counsel addressed Buchanan's ability to pay legal LFOs at sentencing. Counsel explained that Buchanan had worked in the past, but that he was injured on the job within the last year and had a pending legal claim as a result. 1RP 129. As defense counsel noted,

> He's [Buchanan] been unable to work. Certainly his ability moving forward to pay fines and restitution is going to be extremely limited. I'm not sure physically about his ability to return work yet alone *[sic]* with his incarceration and everything else. So I would ask the Court to waive any fines and fees, costs, which the Court is able to do.

1RP 129.

Buchanan confirmed that he had been injured on the job and would "do the best I can[,]" to pay any ordered restitution and court costs. 1RP

131. The court imposed only mandatory LFOs explaining, "I am ordering the requested legal financial obligations requested by the State as of the mandatory legal financial obligations." 1RP 134.

A trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). The exercise of sound discretion presupposes the trial court has a correct understanding of the applicable law, including its sentencing authority. McGill, 112 Wn. App. at 100. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority." Id. at 102. The court erroneously believed that it had no choice but to impose the discretionary jury demand fee. The law, however, authorized the court to exercise its discretion on whether to impose that LFO. The failure to exercise sentencing discretion is an abuse of discretion. See Mulholland, 161 Wn.2d at 332-34 (trial court mistakenly believed it was without discretion to impose concurrent sentences for separate serious violent offenses); State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005) (failing to exercise discretion on whether to grant exceptional sentence downward).

The Court of Appeals acknowledged that Buchanan objected to imposition of any non-mandatory LFOs at the sentencing hearing. Appendix

at 17. Nonetheless, the Court declined to reach the merits of Buchanan's argument regarding the imposition of the jury demand fee because Buchanan did not separately "object after the trial court imposed the fees." Id. The Court of Appeals cited no authority in support of its position that a separate objection is required once the fees are imposed.

Even assuming Buchanan's objection to the imposition of non-mandatory LFOs was not sufficient to preserve the issue for appellate review, the issue is important and warrants review. Indeed, in State v. Ramirez, this Court recently discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, WL 4499761 at *3, 6-8.

HB 1783 "amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c)." Ramirez, at *6 (citing LAWS of 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (2018) ("The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)."). Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public

assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

HB 1783 amends RCW 10.46.190 which now states that "the court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." Under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants.

Because imposition of a $250 jury demand fee against Buchanan conflicts with this Court's recent decision in Ramirez, and conflicts with authority from Division Two, review is appropriate under RAP 13.4(b)(1), (b)(2), (b)(3), and (b)(4).

3. REVIEW OF THE TRIAL COURT'S IMPOSITION OF A $200 CRIMINAL FILING FEE AND $100 DNA FEE IS APPROPRIATE UNDER RAP 13.4(b)(2), (b)(3), and (b)(4).

HB 1783 also amends RCW 36.18.020(2)(h), which now states the $200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. This amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who

are indigent at the time of sentencing. Ramirez, at *8. In Ramirez, this Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Buchanan is indigent under RCW 10.101.010(3). CP 194-95. Because HB 1783 applies prospectively to his case, the sentencing court similarly lacked authority to impose the $200 filing fee.

The $100 DNA fee also must be stricken. HB 1783 amends RCW 43.43.7541 to read, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*" Laws of 2018, ch. 269, § 18 (emphasis added). HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, at *6.

RCW 43.43.754(1)(a) requires collection of a biological sample for purposes of DNA identification analysis from every adult or juvenile convicted of a felony or certain other crimes. Buchanan has previous felony convictions. CP 160. He would necessarily have had his DNA sample collected pursuant to RCW 43.43.754(1)(a).

Because Buchanan's DNA sample was previously collected, the DNA fee in the present case is no longer mandatory under RCW

43.43.7541. The fee is discretionary. And, under the current version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. The sentencing court lacked authority to impose the $100 DNA fee.

Because imposition of a $200 filing fee and $100 DNA fee against Buchanan conflicts with this Court's recent decision in Ramirez, review is appropriate under RAP 13.4(b)(1), (b)(3), and (b)(4).

E. CONCLUSION

Because Buchanan satisfies the criteria under RAP 13.4 (b)(1), (b)(2), (b)(3), and (b)(4), this Court should grant review and reverse the Court of Appeals.

DATED this 16th day of October, 2018.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANDREW DENVER S BUCHANAN, Appellant.	)	NO. 76437-3-I DIVISION ONE UNPUBLISHED OPINION FILED: September 17, 2018

FILED
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STATE OF WASHINGTON
2018 SEP 17 AM 10: 21

LEACH, J. — Andrew Buchanan appeals his multiple convictions and his sentence. He claims that the admission of opinion evidence violated his constitutional right to an impartial jury, that he received ineffective assistance of counsel, and that the trial court made several errors when sentencing him. Because each of his claims lacks merit, we affirm.

FACTS

Joseph and Cindy Divita own a storage shed that they use to store family property. In mid-September 2016, the shed's alarm was activated. A few days later, Divita[1] found the door ajar but determined that nothing was missing. On September 26, Divita found that someone had broken into the shed and the safe inside. Someone had stolen a number of items, including jewelry from the safe.

[1] "Divita" refers to Joseph Divita.

The shed alarm went off again on September 27, and Divita found that his shotgun and rifle were missing.

Images from a video camera inside the shed showed a woman and a man. Divita testified that the images showed the man carrying two of Divita's firearms as he left the shed. Images from a camera located outside of the shed showed a vehicle that Swinomish Detective James Schwahn identified as one that Buchanan had recently purchased. Police obtained search warrants for the vehicle, Buchanan's storage unit, and the house where Buchanan was living. Police found items from Divita's shed at all three locations, including pieces of the stolen jewelry. Police also recovered some of the stolen jewelry from a number of jewelry vendors.

The State charged Buchanan with first degree burglary, second degree burglary, first degree theft, first degree trafficking in stolen property, and two counts each of second degree unlawful possession of a firearm and theft of a firearm. A jury found him guilty as charged. He appeals.

ANALYSIS

Right to an Impartial Jury

Buchanan challenges the admission of Schwahn's opinion testimony that the man in the surveillance video was carrying firearms; Buchanan claims this testimony infringed upon his right to an impartial jury under the Sixth Amendment

to the United States Constitution and article 1, section 22 of the Washington Constitution.[2] We disagree.

A. Manifest Constitutional Error

As a preliminary matter, the State contends that this court should not review this claim because Buchanan did not raise the issue below. An appellate court may refuse to review any claim of error that a party did not raise in the trial court unless one of three exceptions applies.[3]

First, Buchanan claims that his trial counsel did raise the issue below. His counsel moved in limine to preclude any testimony "that narrates or provides any opinion, speculation, or personal interpretation about the content of any photograph or video evidence for which the witness was not personally present to observe at the time of occurrence and for which the witness lacks direct personal knowledge." Buchanan contends that because the party who loses a motion in limine generally has a standing objection,[4] his counsel preserved the issue for appeal without objecting. But the record provided to this court does not include the trial court's rulings on these motions in limine. So we decline to review his claim on this basis.

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[2] The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Article 1, section 22 of the Washington Constitution states, "[T]he accused shall have the right to . . . a speedy public trial by an impartial jury."

[3] RAP 2.5(a).

[4] State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

Second, Buchanan asserts that admission of Schwahn's testimony qualifies as manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3). An error is manifest if it caused actual prejudice.[5] This means the defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial.[6] But this court first decides whether the alleged error implicates a constitutional right. To determine if an error is of constitutional magnitude, a reviewing court assumes the alleged error occurred and then assesses if that error actually violated the defendant's constitutional rights.[7]

Buchanan contends that Schwahn's identification testimony infringed on his constitutional right to an impartial jury because Schwahn provided an improper opinion about his guilt. Opinion testimony about a criminal defendant's guilt violates the defendant's right to a trial by an impartial jury.[8] Buchanan likens his case to State v. Farr-Lenzini[9] and State v. Montgomery.[10]

The State charged Farr-Lenzini with attempting to elude police or, in the alternative, the lesser included crime of reckless driving.[11] The State asked the

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[5] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).
[6] Kirkman, 159 Wn.2d at 935.
[7] State v. Kalebaugh, 179 Wn. App. 414, 420-21, 318 P.3d 288 (2014), aff'd, 183 Wn.2d 578, 355 P.3d 253 (2015).
[8] State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).
[9] 93 Wn. App. 453, 970 P.2d 313 (1999).
[10] 163 Wn.2d 577, 183 P.3d 267 (2008).
[11] Farr-Lenzini, 93 Wn. App. at 458.

pursuing police officer to give his opinion "as to what the defendant's driving pattern exhibited."[12] The officer responded that the driver "was attempting to get away from me and knew I was back there and refusing to stop."[13] Division Two of this court held that the officer's testimony about Farr-Lenzini's state of mind violated her right to a jury trial because it constituted an opinion about the intent element of the offenses.[14]

In Montgomery, the State charged the defendant with intent to manufacture methamphetamine.[15] One detective testified that he believed Montgomery was purchasing items with the requisite intent and another testified that the items "were purchased for manufacturing."[16] Our Supreme Court held that this testimony about Montgomery's state of mind amounted to improper opinions on guilt.[17]

Here, Schwahn testified that in the surveillance video played for the jury, the man pictured was carrying firearms:

> Q. Now, let's go—move on to the—oh. So first of all, before I leave the videos, did you make any observations on the video relating to the firearms?

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[12] Farr-Lenzini, 93 Wn. App. at 458.
[13] Farr-Lenzini, 93 Wn. App. at 458.
[14] Farr-Lenzini, 93 Wn. App. at 463-64.
[15] Montgomery, 163 Wn.2d at 583.
[16] Montgomery, 163 Wn.2d at 588.
[17] Montgomery, 163 Wn.2d at 594-95.

> A. So the video where the alarm is set off, at that point prior to the alarm being set off you see a male walking across the video camera. And where he's heading is he's heading towards that door which was, like we said, was on the bottom there. So the south side of the building, he's walking towards the open door and you can see clearly in his hands that he's got two long objects that is, in my opinion, it's clear that—it looks to be rifles.
>
> One of them is in a camo-style—kind of looked like a cloth case. That's the one that's in his right hand. The one that's in his left hand does not—doesn't appear to be in a case, or if it is in a case, it's a much more form-fitting case that's in his left hand, a little harder to see because it's black and kind of blends in with the shadows.

Buchanan asserts that similar to Farr-Lenzini and Montgomery, Schwahn opined on Buchanan's guilt with respect to the first degree burglary, theft of firearms, and unlawful possession of firearms counts, by testifying that in his "opinion," it was "clear" that the surveillance video showed the man pictured carrying firearms. As Buchanan acknowledged at oral argument, his view about the admissibility of opinion testimony in a criminal case would make nearly all opinion testimony inadmissible. But the fact that an opinion supports a finding of guilt does not make the opinion improper.[18]

Unlike the witnesses in Farr-Lenzini and Montgomery, Schwahn did not testify about Buchanan's intent. Schwahn expressed no opinion about whether Buchanan committed a crime or about the identity of the man in the video. He opined about possession, which supported a finding of guilt only for the firearm-

[18] State v. Collins, 152 Wn. App. 429, 436, 216 P.3d 463 (2009).

related offenses with which the State charged Buchanan. Thus, the challenged testimony did not violate Buchanan's right to an impartial jury. Buchanan does not show manifest constitutional error.

B. Ineffective Assistance of Counsel

Alternatively, Buchanan claims that he received ineffective assistance of counsel because his trial counsel did not object to Schwahn's alleged improper testimony on guilt. Claims of ineffective assistance present mixed questions of law and fact, which we review de novo.[19]

To prove ineffective assistance, the defendant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense to the extent that it denied the defendant a fair trial.[20] If the defendant carries this burden, this court must reverse.[21] To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness.[22] Appellate courts examine trial counsel's performance with great deference, and the defendant must overcome the presumption that the challenged action "'might be considered sound trial

[19] Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[20] Strickland, 466 U.S. at 687.
[21] State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).
[22] Strickland, 466 U.S. at 687-88.

strategy.'"[23] Generally, the decision of when or whether to object is trial strategy.[24]

Buchanan contends that defense counsel's failure to object to Schwahn's challenged testimony constitutes deficient performance. He asserts that because Schwahn's testimony directly related to a disputed issue of fact, his counsel's failure to object was not trial strategy. But counsel's performance is not deficient because counsel did not object to admissible testimony.[25] ER 701 provides that a lay witness may give opinion testimony if it is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony or the determination of a fact in issue. The rule allows witnesses to testify about observations as well as inferences and opinions, including opinions about the speed of a car, the value of property, and identification of a person, when such testimony will be helpful to the jury.[26]

As discussed above, Schwahn expressed his opinion that the man pictured in the video was holding firearms. This is permissible lay witness opinion testimony that is helpful to the jury in determining whether Buchanan committed first degree burglary, theft of firearms, and unlawful possession of

[23] Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).
[24] State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).
[25] State v. Alvarado, 89 Wn. App. 543, 553, 949 P.2d 831 (1998).
[26] Ashley v. Hall, 138 Wn.2d 151, 155-56, 978 P.2d 1055 (1999).

firearms. Buchanan's counsel did not perform deficiently by failing to object to Schwahn's admissible testimony. Because Buchanan does not show deficient performance, we reject his ineffective assistance of counsel claim.

Statutory Grounds for an Exceptional Mitigated Sentence

Next, Buchanan claims that he should be resentenced because the trial court declined to run his firearm-related sentences concurrently as an exceptional mitigated sentence only because it incorrectly believed it could not do so. We disagree.

The standard range sentence for multiple firearm-related convictions is consecutive sentences.[27] A sentencing court has discretion to impose an exceptional mitigated sentence in the form of concurrent sentences for multiple firearm-related convictions when consecutive sentences would result in a "presumptive sentence that is clearly excessive in light of the purpose of the [Sentencing Reform Act of 1981 (SRA)]."[28] Among other objectives, the SRA[29]

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[27] RCW 9.94A.589(1)(c) states, "If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, [t]he offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection 1(c), and for each firearm unlawfully possessed."

[28] RCW 9.94A.535(1)(g).

[29] Ch. 9.94A RCW.

seeks to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history."[30]

A sentencing court must find that there are "substantial and compelling reasons justifying an exceptional sentence."[31] "A discretionary sentence within the standard range is reviewable in 'circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.'"[32] A trial court relies on an impermissible basis 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.'"[33] An appellate court must remand for resentencing when it is not confident that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option.[34]

Buchanan relies on State v. McFarland[35] to support remand in this case. In McFarland, our Supreme Court held that "[r]emand for resentencing [was]

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[30] RCW 9.94A.010(1); State v. McFarland, 189 Wn.2d 47, 52, 399 P.3d 1106 (2017).

[31] RCW 9.94A.535.

[32] McFarland, 189 Wn.2d at 56 (internal quotation marks omitted) (quoting State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)).

[33] McFarland, 189 Wn.2d at 56 (alteration in original) (quoting In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)).

[34] Mulholland, 161 Wn.2d at 334; see also McGill, 112 Wn. App. at 99.

[35] 189 Wn.2d 47, 399 P.3d 1106 (2017).

warranted" because the sentencing court did not understand its discretion to impose concurrent sentences for McFarland's firearm-related offenses.[36] The court explained that although the sentencing court imposed a sentence at the bottom of the standard range, it "indicated some discomfort with [its] apparent lack of discretion and even commented that McFarland's standard range sentence was equivalent to that imposed for second degree murder."[37]

Here, Buchanan claims that the sentencing court mistakenly believed that statutory constraints prevented it from considering an exceptional mitigated sentence. At sentencing, Buchanan's trial counsel asked that the court consider an exceptional mitigated sentence below the standard range and, if the court decided against a mitigated sentence, that it impose a low-end sentence. Buchanan's counsel stated that the range for Buchanan's firearm-related offenses was higher than many other criminal offenses involving homicide or manslaughter. His counsel asserted that this range was disproportionate to the seriousness of these offenses and thus excessive in light of the purpose of the SRA to punish offenses proportionate to the seriousness of the offense.

When sentencing Buchanan, the court noted that "the firearm offenses are required by law to run consecutive to each other and concurrent to all other charges." As discussed above, this is, in fact, what RCW 9.94A.589(1)(c)

[36] McFarland, 189 Wn.2d at 58-59.
[37] McFarland, 189 Wn.2d at 51, 58-59.

requires. But because it is unclear whether the court understood that it could impose an exceptional mitigated sentence, we decide whether the record makes clear that the court would have imposed the same sentence had it known that an exceptional mitigated sentence was available. The court explained why it chose to impose a midrange sentence of 124 months rather than a low-end sentence of 106 months:

> I am going to tell you why I am sentencing you in the manner that I am sentencing you. It's been argued by the Prosecutor that I should go to the high end of the range in sentencing you. It's been argued by your attorney I should go to the low end of the range, possibly even exceptionally in sentencing you.
>
> It seems to me that in returning to the same location to further victimize the Divitas that shows a certain degree of callous indifference to their rights and the impact that invading their property, their lives, their memories; that that callous indifference to their rights argues that I should be sentencing you right in the midrange of these particular crimes.

Unlike the sentencing court in McFarland, here, the court decided against imposing a low-end standard range sentence and imposed a midrange sentence. The court explained that Buchanan's "callous indifference" to the Divitas' rights warranted a longer sentence. Because the court rejected Buchanan's request for a low-end standard range sentence due to his attitude, Buchanan does not show prejudice, and his claim fails.

Ineffective Assistance of Counsel

Buchanan makes another ineffective assistance of counsel claim based on his trial counsel's failure to argue that several of his convictions constituted the same criminal conduct under the SRA. We disagree.

As discussed above, ineffective assistance of counsel requires that the defendant show (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense to the extent that it denied the defendant a fair trial.[38] Defense counsel's failure to argue same criminal conduct when the argument is relevant can constitute ineffective assistance.[39]

RCW 9.94A.589(1)(a) states, "Except as provided in (b), (c), or (d) of this subsection," when a trial court sentences a defendant for two or more current offenses, it determines the sentence range for each current offense by treating all current convictions as if they were prior convictions so as to include a defendant's current offenses in his offender score. But if the court finds that some or all of a defendant's current offenses constitute the "same criminal conduct,"[40] it must count those offenses as one crime when calculating the defendant's offender score.[41]

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[38] Strickland, 466 U.S. at 687.

[39] State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004).

[40] "'Same criminal conduct' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

[41] RCW 9.94A.589(1)(a).

The exception clause in RCW 9.94A.589(1)(a) makes the same-criminal-conduct analysis described in 1(a) inapplicable to subsections (b), (c), or (d). RCW 9.94A.589(1)(c) provides an exception for firearm-related offenses:

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions.

Thus, when a defendant like Buchanan is convicted of unlawful possession of a firearm in the second degree and theft of a firearm, the sentencing court does not perform the same-criminal-conduct analysis under RCW 9.94A.589(1)(a). Instead, it does not score the defendant's current convictions for those firearm-related offenses when calculating his offender score specifically for those same offenses.

First, Buchanan claims that his trial counsel performed deficiently because his counsel failed to argue that his two convictions for unlawful possession of a firearm in the second degree and his two convictions for theft of a firearm constituted the same criminal conduct. To support this claim, he relies on State v. Murphy.[42] There, Division Two of this court concluded that burglary, unlawful possession of a firearm, and theft of a firearm all constituted the same criminal

[42] 98 Wn. App. 42, 50-51, 988 P.2d 1018 (1999).

conduct. But, in Murphy, the court examined a former version of the statute that the legislature amended, in relevant part, in 1999 to include an exception that was substantively identical to the current version of RCW 9.94A.589(1)(c) cited above.[43]

Here, Buchanan's two convictions for unlawful possession of a firearm in the second degree and theft of a firearm qualify under RCW 9.94A.589(1)(c). This provision requires only that the sentencing court not count those convictions toward Buchanan's offender scores for his firearm-related convictions. If the sentencing court had considered whether any of Buchanan's offenses qualified as the same criminal conduct under RCW 9.94A.589(1)(a), it would not have considered these four convictions in its determination. Thus, Buchanan's counsel's performance did not fall below an objective standard of reasonableness because his counsel did not argue at sentencing that the court should apply an inapplicable statutory provision.

Second, Buchanan claims that his trial counsel provided ineffective assistance because his counsel did not assert that his conviction for first degree burglary was the same criminal conduct as his convictions for unlawful possession of a firearm and theft of a firearm. But the burglary antimerger statute states, "Every person who, in the commission of a burglary shall commit

[43] Murphy, 98 Wn. App. at 50-51 (examining former RCW 9.94A.400(1)(a) (1996)).

any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."[44] In State v. Lessley,[45] this court affirmed the trial court's determination that the defendant's convictions for kidnaping and burglary did not qualify as the same criminal conduct. We reasoned that the antimerger statute provides the sentencing judge with the discretion to exempt burglary from the same-criminal-conduct analysis.

Buchanan contends that his trial counsel performed deficiently because his counsel failed to tell the trial court about the discretion it had. But Buchanan provides no authority to support the proposition that it is counsel's responsibility to inform the trial court of its discretion to apply the antimerger statute or that counsel performs deficiently when he does not do so. When a party does not support its assertions with authority, a reviewing court assumes that it has found none.[46] Buchanan does not meet his burden of proving ineffective assistance.

Jury Demand Fee

Last, Buchanan claims that the trial court erred in imposing the $250 jury demand fee because it did so based on the incorrect belief that it was a mandatory fee rather than a discretionary fee. Buchanan did not challenge the

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[44] RCW 9A.52.050.
[45] 59 Wn. App. 461, 463, 467, 798 P.2d 302 (1990).
[46] State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

imposition of the jury demand fee at his sentencing hearing.[47] In State v. Blazina,[48] our Supreme Court held that RAP 2.5(a) grants appellate courts discretion whether to review a defendant's challenge to his legal financial obligations that he raises for the first time on appeal. We exercise our discretion and decline to review this challenge.

CONCLUSION

Buchanan does not show that Schwahn provided improper opinion testimony on guilt, meet his burden on either of his ineffective assistance of counsel claims, or show prejudice on the exceptional mitigated sentence issue. We affirm.

Leach, J.

WE CONCUR:

Dwyer, J.

Appelwick, C.J.

[47] Although Buchanan's counsel asked "the Court to waive any fines and fees, costs, which the Court is able to do," he did not object after the trial court imposed the fees.

[48] 182 Wn.2d 827, 832-35, 344 P.3d 680 (2015).

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

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