NO. 96992-2

COA No. 50414-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

KEITH ROBERSON

Petitioner

ON APPEAL FROM THE SUPERIOR COURT FOR CLALLUM COUNTY
The Honorable Christopher Melly
Superior Court No. 16-1-00058-3

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Keith Roberson, appellant below, asks this court to accept review of the Court of Appeals decision terminating review designated in part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals opinion in cause number 50414-6-II which affirmed his conviction and sentence. The decision was filed March 5, 2019. A copy of the decision is in the Appendix at pages A-1 through A-14.

III. ISSUES PRESENTED FOR REVIEW

A. Where the record contains evidence that a defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law was significantly impaired as the result both of mental illness and the voluntary use of a controlled substances, may a trial court grant an exceptional sentence downward pursuant to RCW 9.94A.535 (1) (e)?

B. Does mental illness justify a mitigating sentence in the same way that youth does under the Eighth Amendment and Const. Art. I. §14?

IV. STATEMENT OF THE CASE

A. Procedural History

Keith Roberson was charged by an information filed February 22, 2016 with assault in the first degree, RCW 9A.36.011 (a), (Count I) and assault in the second degree, RCW 9A.36.021(c), (Count II). The state

alleged he was armed with a firearm on both counts, pursuant to RCW 9.94A.825. CP 159.

The case proceeded to trial on January 9, 2017 before the Honorable Christopher Melly and a jury. [1] The jury returned a verdict of not guilty of assault in the first degree on Count I, but convicted Mr. Robertson of the lesser offense of assault in the second degree on this count. CP 60, 62. The jury convicted Mr. Roberson on Count II as charged. CP 58. The jury returned special verdicts of "yes" on the firearm enhancements on both counts. CP 57, 59. At the sentencing hearing held on June 7, 2017, the court sentenced Mr. Roberson to 84 months in custody. Seventy–two months of this sentence represented the two firearm enhancements, which ran consecutively to each other. RP 655; CP 7 *et. seq*. Mr. Roberson filed a timely notice of appeal. CP 6.

B. Trial Testimony

Sherrie Elkhart lived on Barr Road in Clallum County, RP 252. Her closest neighbor was Louie Ricklick. RP 253. The Elkharts had an alarm system that went off on the night of the incident. She and her husband went outside to look and thought they saw Israel Lundstrom and Jennifer Cox. RP 255. Cox and Lundstrom were panicked about

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[1] The VRP is numbered consecutively, and is in one volume.
Trial proceedings began Jan. 9, 2017 and starts at page 102 of the transcript.
The sentencing hearing, held June 7, 2017, begins at page 631.
A supplemental VRP has the in–court playback of three exhibits (911 Calls) and the deposition of Mike Walters, which was played for the jury. This will be referred to as RP Supp. ___.

something, but she could not tell what about. Lundstrom and Cox left and headed back to the van they were living in. RP 256, 270-71.

Elkhart had been calling the police on Cox and Lundstrom to drive them off the street. RP 257. There had been constant suspicious traffic at Cox's trailer. Ms. Elkhart suspected there was drug activity going on there. RP 268. She did not see Israel and Cox again that night. RP 258.

Ms. Elkhart went back to sleep but was awakened by a gunshot. She called their neighbor, Louie Ricklick. He told them to call 911, because there was someone at his back door. RP 259. Ms. Elkhart's husband then called 911. RP 259.

The Elkharts heard someone "wailing" for help, but she did not recognize the voice. RP 260. Ms. Elkhart never saw Mr. Roberson that night. RP 261. The court admitted without objection the tapes of her 911 call and that of her husband, Michael Elkhart. RP 262. It took a long time for the police to come but during the wait, she kept hearing someone screaming for help. RP 263. The cries for help were constant. RP 266. The screaming for help did not stop until the police arrived. RP 272.

Michael Elkhart and his wife were getting ready to go to bed when they heard their sensor go off. He went outside to look. He saw Israel Lundstrom and a woman, Jennifer Cox. Lundstrom rented a house down the road. RP 274-275.

When he talked with Lundstrom, Lundstrom was talking excitedly, at "about 100 MPH." RP 290. Lundstrom and Cox hung out at Cox's

mother's. There was a lot of short–term traffic there. Elkhart could tell it was drug trafficking. RP 292.

The police were called and came to the end of the road where there was a van parked by his neighbor's gate. RP 277. The van was towed away, and he and his wife went to bed. RP 278.

They were awakened by the noise of a gate by his neighbor's, and then a gunshot. It was the gate by Louie Ricklick's property. RP 278.

Mr. Elkhart went out his front door and called 911. He heard a voice calling for help. RP 279. He went in the direction of Ricklick's house because there had been a burglary there two years earlier. He had his phone and a small flashlight, but no firearm. RP 279. He heard the sound of the voice was coming from another neighbor's house, Mike Walters' house, beyond Louis Ricklick's house. RP 280. The voice that was yelling for help was a male voice. RP 294. The calling for help went on for a long time. RP 296.

Elkhart did not see anything amiss at Ricklick's place. RP 295. But he did see someone dressed in black in Mike Walters' carport. This man was at Walter's back door. Walters was also at his back door. RP 281. Walters was yelling , "get out of here, get out of here." RP 281, 298.

Michael Elkhart did not say anything to the man in black. RP 282. He was about 40-50 feet from the carport. RP 283. He did not come as close as 15 feet. RP 524. The man in black pointed his gun and fired at him. RP 283. The man who fired was firing at Elkhart's flashlight. The

man who shot did not say anything threatening to him before he fired. RP 297. There was no second shot fired at him. RP 299.

After the shot, Elkhart took cover behind the fence. RP 285. The next day he showed the police where he had been standing. RP 284.They found a hole in the fence. RP 289. The bullet had come within 8-10 feet of him, based on the hole in the fence. RP 297.

Mr. Elkhart had never met Keith Roberson. He had no quarrel with him. RP 290. He did not know what was going on in the carport between Walters and Roberson. He did not hear Roberson threatening Walters. Instead, Roberson was yelling for help, "call 911." RP 298.

Deputy Paul Federline was called to South Barr Road due to a disturbance. RP 236. He found a van parked at the very end of the road, near at gate where it dead–ends. RP 236. When he checked the van, it was unoccupied. RP 239.

He went in to the woods to look for the van's owner. He knew who the owner was, and told him to come out of the woods. He did not hear anyone or see anyone in the woods. RP 241. He waited and no one came out. Since the van was blocking the road and the gate , he impounded it and it was towed. RP 241.

He spoke with a man named Israel Lundstrom, who gave him an evasive and convoluted story about Mr. Roberson fleeing in his van. RP 243. He did not speak with Ms. Cox, who was hiding in the trailer on the property where the call had come from. RP 244, 245.

During the 911 call between Michael Walters and the dispatcher, Walters told the dispatcher a black man was on his carport, who told him he was being chased through the woods. The man on the carport, Mr. Roberson, looked like he was really scared. RP Supp. 25-26. He was crying and sobbing and did not sound stable. RP Supp. 28-29. The man outside wanted them to call 911. He was crying the whole time he was at the back door. RP 439.

Roberson asked to speak with the dispatcher, who tried to talk with him. RP Supp. 35-36; 45. Roberson kept asking for help. RP Supp. 40, 46. The dispatcher told him he would have to give up the gun when the police arrived. RP Supp. 46. Roberson reiterated to Walters that he wanted the police there because people were chasing him. RP Supp. 55. He kept asking when the police would arrive. RP Supp. 55, 56, 57.

When Deputy Edgington arrived, Mr. Roberson asked to see him. RP Supp. 59-60. He said he would put his gun down when he could see Edgington. RP Supp. 60-61. Roberson kept asking why somebody would want to hurt him. RP Supp. 61. The dispatcher later told Walters that Roberson was known to the police and had mental problems. RP Supp. 66.

Mike Walters testified about the events of the 911 call by deposition, Ex. 23. His residence in February of 2016 was a double–wide mobile home on South Barr Road. RP Supp. 78. He heard a pounding on the door, and thought it might be one of his granddaughter's friends. No one was at the front door, and then he saw the backdoor open and Mr.

Roberson was there. RP Supp. 80. Roberson told him he needed to call the police because Roberson needed help. RP Supp. 81-82, 104. Walters went to get his cell phone to call 911 and then went back out the door where Roberson was. RP Supp. 83. Roberson told him that people were chasing him through the woods. RP Supp. 83, 104. Several minutes into the call, he realized Roberson was armed. RP Supp. 84. Roberson was mostly pointing the gun in the direction of his neighbor's, Mr. Ricklick, but also pointed the gun at Walters. RP Supp. 84-85. Walters asked him not to point the gun at him. RP Supp. 85. Over the course of their interaction, Roberson pointed the gun at him several times. RP Supp. 86.

Roberson started to get more agitated, and fired a shot in the direction of the neighbor's house. The gun was not pointed into the air, nor directly into the ground. RP Supp. 87. Walters told him to stop shooting. RP Supp. 88. That was about the time the neighbor, Mike Elkhart, came by with a flashlight. RP Supp. 89. Both Roberson and Walters told Elkhart to go away. RP Supp. 90. Several minutes later Roberson fired again in the direction of Louie's (Ricklick) house. RP Supp. 91, 105. He did not fire at Mr. Walters. RP Supp. 111.

Walters did not flee inside his mobile home because he could not move very fast due to ailments, and also thought Roberson could just fire through the door if he did. RP Supp. 92.

Roberson was pacing back and forth, and screaming for help over and over again. RP Supp. 93.[2] About 40 minutes into the incident, Roberson said that he did not want to die, but he did not want to go out alone. RP Supp. 93. That statement frightened Walters. RP Supp. 94.

The dispatcher connected Walters with Ralph Edgington, one of the deputies who was on the way. Walters told him to come in with his lights on so that Mr. Roberson would know they were the police. RP Supp. 96.

It took about an hour from the beginning of the incident before the police arrived. RP Supp. 98. When the deputies arrived, Roberson put his gun down on a dryer that was in the carport. As he did so, Walters went inside his house and locked the door. RP Supp. 97. A few minutes later, he was told that Mr. Roberson had been "contained." RP Supp. 98.

Walters had never met or crossed paths with Roberson before. RP Supp. 101. Roberson did not ask for money or property. He just wanted Walters to summon the police. RP Supp. 107. Roberson got progressively more agitated as the time wore on while they were awaiting the arrival of the police. RP Supp. 108. Roberson grew more and more afraid, and Walters tried to calm him down. RP Supp. 108. Once Roberson recognized Ralph Edgington, he started to calm down. RP Supp. 110, 113.

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[2] The transcriber notes that yelling in the background and dog barking were going on more or less continuously during this phone call. RP Supp, generally.

Ralph Edgington was one of several officers who responded to a prowler with a gun call. After meeting off scene with other officers, they made a tactical plan. Since Edgington knew Mr. Roberson, he tried to talk with him. RP 333-335.

When he first saw Roberson, he had a gun in his hand and was looking around frantically and crying out. RP 335. He was not pointing the gun at the officer. RP 335. Edgington shone his flashlight on himself so that Roberson could see who he was. RP 336. Roberson eventually put his gun down on a laundry machine that was in the carport. RP 337-38. Edgington tried to reassure him that the police were not going to hurt him, because Roberson thought someone was after him. RP 339. The police ended up taking Roberson to the hospital ER. RP 340.

Mark Millet was another of the deputies who responded to the prowler call. RP 344. Deputy Edgerton was the lead person, and was trying to calm Mr. Roberson down. Millet also illuminated himself with his flashlight so that Roberson would see they were in fact police officers. RP 346, 350. Mr. Roberson did not point his gun at the police. RP 350. Edgerton succeeded in getting Mr. Roberson to put his gun down, and Millet was able to pick it up. RP 347.

At the time of trial, Keith Roberson was 56 years old and an unemployed landscaper. RP 468. His wife had recently passed away. RP 468. He became homeless and used methamphetamine. RP 469. He had been doing well until his wife died. RP 496.

On the night of the incident, he had used methamphetamine. RP 470. He went to Barr Road with Jennifer Cox to do the methamphetamine. A car pulled up behind his, Cox jumped out, taking all the methamphetamine, and a man with brass knuckles and a dagger attached came up to his van. RP 474-475.

Mr. Roberson fled down the road in his van until he came to a dead end, left his van and fled into a wooded area, where he hid. He fled because he thought the man with the brass knuckles was going to kill him. RP 477. He saw a "searching flashlight" while he was in the woods. RP 480. He ran to a house and knocked but no one answered, so he went to a second house, which turned out to be Michael Walters' house. He asked them to call 911 for him because he was being chased through the woods. RP 481. He was very afraid. RP 481. Walters got his phone to call the police and then stood in the doorway. RP 481-82. He did not point the gun at Walters or intend to assault him. RP 482. He did not threaten him or intend to shoot him. RP 482. He just wanted help because he was very afraid. He did fire a "warning shot." RP 483. He wanted someone to hear the shot so that they would call the police for him. RP 484. He did not intend to hurt Michael Elkhart, and had never met him. RP 484.

Mr. Roberson had been in the Army National Guard and had handgun training with a .44 caliber, which was a larger gun that the one he had on the night of the incident. RP 484. He was not trying to hit anyone

when he fired the shot. RP 485. He was a good enough shot that if he had intended to hit anyone, he would have. RP 491.

His van had been towed when he fled to the woods, so he began to mistrust the police. RP 486. That was why he asked them to show themselves to him. RP 487. He finally recognized Deputy Edgerton. RP 488. He laid down his gun, and cooperated with the arrest process. RP 489. He had not heard Deputy Federline calling to him when he was in the woods about towing his van. RP 498.

He remembered Mr. Walters asking him to put his gun away, but he did not do that. RP 500. He also remembered Walters asking him not to point the gun at him. RP 500. He was not pointing the gun at Walters, but he was yelling at him for help. RP 500. Over objection, the prosecutor asked him several times to speculate whether Walters was "just making that up for 911". RP 500-501. He denied shooting at Mr. Elkhart. RP 504. He thought the person with the flashlight was possibly the same person who had been searching in the woods with the flashlight. RP 507. No one came to attack him while he was in the carport. RP 509. He remembered Mr. Walters saying, "please don't shoot." RP 509. He was not able to communicate with the dispatcher even when the phone was given to him. RP 511-12, 521. He did not fire at Mr. Elkhart when he fired a "warning shot" at the fence. RP 514.

C. Sentencing Hearing

Mr. Roberson requested a downward exceptional sentence based on RCW 9.94A.535 (1)(e).[3] He provided a psychological assessment prepared by Dr. Ken Muscatel which concluded as follows:

> I have concluded that Mr. Roberson did likely have symptoms of a significant mental disturbance at the time of the incident, and those factors likely affected his behavior, thinking, judgment and emotional responses at that time. Thus it is appropriate for the court to consider these as mitigating factors in determining the sentence. These opinions are offered on a more probable than not basis.

CP 34, *et seq.* RP 637-640. Defense counsel asked for the two firearm enhancements to be run concurrently. He noted that the recent case of *State v. Houston–Sconiers*, *infra*, had loosened the strait–jacket on trial courts regarding exceptional sentences and firearm enhancements, at least where juveniles were concerned. He analogized Mr. Roberson's mental illness to the undeveloped cognitive ability of juveniles which was recognized by the *Houston–Sconiers* court as the foundation of its holding. RP 642-644.

The trial court concluded that although the statutory mitigating circumstance set out in RCW 9.94A.535 (1)(e) might apply, to the extent that Mr. Roberson's behavior was attributable to the use of drugs, rather

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[3] RCW 9.94A.535 provides in pertinent part as follows:
(1) Mitigating Circumstances - Court to Consider
The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.
...
(e)The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded

than the underlying mental illness documented in Dr. Muscatel's report, it did not. RP 653-654. The court imposed a sentence at the low end of the standard range, including the two firearm enhancements, of 84 months. RP 665.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Whether a court can grant an exceptional sentence downward pursuant to RCW 9.94A.535 (1)(e) where there is both evidence of mental illness and voluntary use of a controlled substance is an issue of public importance on which the court should grant review pursuant to RAP 13.4 (b)(4).

The trial court presided over a trial that was replete with evidence supporting the conclusion that Mr. Roberson's ability to conform his behavior to the dictates of the law, and his capacity to understand the wrongfulness of his conduct was significantly impaired as a result of mental illness.

Other parts of the record besides the incident itself also supported the conclusion that Mr. Roberson was suffering from mental illness. The police took him to the hospital on the night of his arrest for that very reason. RP 56-57. The 911 dispatcher also alluded to the fact that the police had knowledge that Mr. Roberson had mental health issues, during his conversation with Mr. Walters. RP Supp. 66.

At the time of sentencing, Mr. Roberson had been examined by Dr. Kenneth Muscatel, whose report to the court concluded that MR. Roberson's conduct demonstrated "symptoms of a significant mental

disturbance at the time of the incident, and those factors likely affected his behavior, thinking, judgment and emotional responses at that time." CP 34 *et seq.*

The record also would also support the conclusion that Mr. Roberson's behavior on the night of the offenses was affected by his consumption of methamphetamine, a drug known for causing bizarre, irrational and psychotic behavior.[4]

The trial court acknowledged the existence of RCW 9.94A.535 (1)(e)'s mitigating factor for mental illness. The court also noted that voluntary use of drugs or alcohol was excluded from consideration under this factor. RP 653-54. The court opined that Mr. Roberson's bizarre behavior on the night of the incident was "largely attributable" to his consumption of methamphetamine, and "to the extent that you were not completely there due to drug use, the legislature took that into consideration...." RP 653. The trial court thus concluded that even where there was evidence of mental illness which clearly affected Mr. Roberson's behavior, if drug use *also* contributed, an exceptional sentence was categorically excluded. Where a trial court erroneously believes an exceptional sentence cannot be granted, it abuses its discretion. *State v. Grayson,* 154 Wn. 2d 333, 342, 111 P.3d 1183 (2005).

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[4] Methamphetamine Psychosis: Epidemiology and Management Suzette Glasner-Edwards, Ph.D. and Larissa J. Mooney, M.D., https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5027896/

This court should take review to determine whether the mitigating factor in RCW 9.94A.535 (1)(e) only applies to cases where mental illness was the *sole or predominant* factor underlying a defendant's ability to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, and where drug use was not involved in the offense behavior at all.

The panel decision below cites to *State v. Allert*, 117 Wn. 2d 156, 167, 815 P.2d 752 (1991) for the proposition that use of RCW 9.94A.535 (1)(e) is "permissible only if the record establishes that the defendant's impairment existed independently of any voluntary use of drugs or alcohol." Slip Op at 12. This is a misreading of *Allert*.

Allert, a former police officer, was charged with two counts of robbery. He asked for an exceptional sentence downward pursuant to RCW 9.94A.535(1)(e). The trial court found that at the time of the commission of the offenses, he was suffering from three recognized mental health disorders: alcoholism, depression, and severe compulsive personality. The trial court also found that because of the "separate and combined effects" of each mental disorder, the defendant's capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law was significantly impaired.

The Court of Appeals affirmed the exceptional sentence. The Supreme Court accepted review and reversed.

The 5-4 majority noted that there was support in the record for the trial court's finding that the *combined* effects of each mental disorder affected the defendant's ability to appreciate the wrongfulness of his conduct. But the court also concluded that since alcoholism could not be used as a basis for the exceptional sentence, and since the record did not clearly state that Allert would have been impaired at the time of the offenses *absent* alcohol abuse, the sentence could not be upheld because the factual foundation for the sentence was insufficient.

The statute says that the voluntary use of drugs or alcohol is excluded from consideration as a mitigating factor. The statute does not say that a mental illness which co-exists with the use of a drug which can cause psychotic behavior is insufficient to support an exceptional sentence.

The *Allert* decision does not support a reading of the statute that a mental illness which co-exists with the use of a psychosis causing drug is insufficient as a matter of law to support a mitigated sentence. It merely says that the record in the case did not support the finding that the two other mental illnesses Allert had other than alcoholism by themselves caused the defendant's inability to conform his behavior to the requirements of the law.

Mental illness and the use of drugs will often co-exist, and it may be difficult if not impossible for mental health professionals to parse out which facets of a person's illness affected their behavior the most on a

given occasion. This court should accept review under RAP 13.4 (b)(4) to clarify the scope of RCW 9.94A.535 (1)(e). This will give important guidance to trial courts, lawyers and mental health professionals. The court should hold that if the record contains evidence of a mental illness which affects a person's ability to conform his behavior to the law, that is a mitigating factor a court can consider, notwithstanding the fact that the person's behavior was also affected by a drug which contributed to the bizarre behavior.

B. Whether mental illness is analogous to youth in terms of culpability and should allow courts to grant a sentence below the guideline range is an issue of public importance. The court should grant review of this issue pursuant to RAP 13.4 (b)(3) and (b)(4).

In *State v. Houston–Sconiers*, 188 Wn. 2d 1, 391 P.3d 409 (2017), this court began its opinion thusly: '[C]hildren are different." The court went on to hold that the Eighth Amendment to the United States Constitution allowed a sentencing court to consider the mitigating circumstances of youth, despite sentencing statutes that appear to forbid such consideration, including sentence enhancement statutes for firearm enhancements.

To paraphrase *Houston–Sconiers* in the present context, "the mentally ill are different." This is not a revolutionary idea. Our substantive and procedural criminal laws recognize that those who are mentally ill are different, and must be treated differently.

A person who is insane has a complete defense to criminal liability and must be treated differently if the defense is established. RCW 9A.12.010 and 10.77.110. A person who is mentally ill to the extent he or she is not competent may not even be tried for an offense. RCW 10.77.050. Short of insanity or incompetency, a person may be found not guilty of an offense if due to a mental illness he or she lacks the mental capacity to commit the offense. *State v. Gough*, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989). The entire chapter of 10.77, part of Title 10, Criminal Procedure, deals with persons charged with crime who are mentally ill.

The *Houston-Sconiers* court noted the development of Eighth Amendment protections for children who are charged with crimes, even those charged in adult court with crimes committed while they are juveniles. Youth are viewed differently than adults under the law for a number of reasons, but their different mental capacity is among the most important. *Houston–Sconiers* at 188 Wn. 2d at 19, FN 4.

Mentally ill adults are similar to youth in that their ability to conform their conduct to the dictates of the law is different and often impaired. For the same reasons that the *Houston–Sconiers* court said that trial court's hands are not tied at sentencing when youths are involved, and trial courts can depart from otherwise applicable guideline ranges and/ or sentencing enhancements, *Houston–Sconiers* , 188 Wn. 2d at 9, the same

must be true, under the Eighth Amendment and Const. Art. I §14, for the mentally ill.

The trial court here obviously felt constrained by the limitations of RCW 9.94A.535 (1)(e), and also declined to run the firearm enhancements in this case concurrently due to RCW 9.94A.533, which requires by its terms that they run consecutively. Applying the reasoning and holding of *Houston–Sconiers* to mentally ill adult defendants would allow a trial court its proper discretion to craft a sentence that is appropriate despite the constraints of these statutes.

This court should grant review pursuant to RAP 13. 4 (b)(3) and (b)(4) and hold under the Eight Amendment and Const. Art. I §14 and hold that sentencing courts have total discretion in sentencing mentally ill adult defendants to depart downward from an otherwise binding guideline range or firearm enhancement.

VI. CONCLUSION

This record in this case established without any doubt that Mr. Roberson was suffering from mental illness at the time of the incident which led to his convictions for assault. The trial court did not grant an exceptional sentence because it felt that Mr. Roberson's behavior was partly or primarily the result of methamphetamine use on the night of question. The court clearly felt that the statute only permitted a downward departure if *only* mental illness were involved.

The ability of a trial court to consider a downward departure from the standard range and from any otherwise applicable sentence enhancements where mental illness and drug use interact is a question of public importance which this court should clarify and settle. Review should be granted under RAP 13.4 (b)(4).

The trial court ignored defense counsel's invitation to apply the reasoning of this court's *Houston–Sconiers* decision to mentally ill defendants who are adults. This court should grant review to determine whether under the Eighth Amendment and Art. I §14 trial courts retain full discretion to grant downward departures from the sentencing guidelines and enhancements when crafting a sentence for an adult with mental illness. Review should be granted under RAP 13. 4 (b)(3).

Dated this 25th day of MARCH, 2019

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Filed
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Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KEITH ROBERSON, Appellant.	No. 50414-6-II UNPUBLISHED OPINION

WORSWICK, J. — Keith Roberson appeals his convictions of two counts of second degree assault. He argues that (1) the prosecutor committed misconduct by arguing that Roberson created the need for self-defense, and by asking him to speculate about the motives of another witness; (2) that insufficient evidence supports the second count of second degree assault; and (3) that the trial court erred by not imposing an exceptional downward sentence. Finding no error, we affirm.

FACTS

Around 3:00 a.m., Roberson and a woman were using methamphetamine in Roberson's van. The woman took the drugs and paraphernalia and then jumped out of the van as a car pulled in behind the van. A man exited the car, and approached the van lunging at Roberson with "brass knuckles with a fixed dagger on the end." Verbatim Transcript (VT) at 474. Roberson quickly drove away, stopping near a wooded area. He then grabbed his gun, exited his van, and ran into the wooded area. He continued running, and eventually encountered Michael Walters's

house. He knocked on, and then opened, Walters's door. Roberson was agitated and upset, screaming for help, and for someone to call 911.

Walters called 911. Walters reported to the dispatcher that Roberson told him that Roberson was being chased and appeared scared. Walters also told the 911 dispatcher that Roberson had a pistol, and had fired it "kind of at the ground." VT (Excerpt Trial Day 1) at 32. While on the phone with 911, Walters asked Roberson not to shoot.

Michael Elkhart, Walters's neighbor, heard screaming. He called 911, and ran outside with a flashlight. Elkhart approached Walters's yard, still holding a flashlight. Elkhart was approximately 40 to 50 feet away from Walters, and saw Roberson and Walters talking at Walters's door. Roberson began aiming the gun toward Elkhart, and Walters told Elkhart to leave. Roberson shot in Elkhart's direction, hitting a fence. Roberson then aimed his gun at Walters, and Walters asked Roberson not to point it at him and to put away the gun. Roberson was crying and told Walters, "I don't want to die, but I'm not going to go out alone." VT (Excerpt Trial Day 1) at 93.

At various times, Roberson tried to speak with the 911 dispatcher. Roberson did not believe that a 911 dispatcher was on the phone.

Clallam County sheriffs arrived and arrested Roberson. The State charged Roberson with first degree assault of Elkhart, with intent to inflict great bodily harm, while armed with a firearm, and second degree assault of Michael Walters, with a deadly weapon, while armed with a firearm. At trial, Roberson, Walters, Elkhart, and a Clallam County Sheriff's Deputy testified consistently with the above facts. Walters also testified that despite his request, Roberson

continued to aim the gun at him. Additionally, Walters's and Elkhart's 911 calls were admitted. The transcribed 911 calls show that Roberson was crying and yelling throughout the call.

Roberson testified that he used methamphetamine, and was using methamphetamine on the night of the incident. He explained that he was "making a lot of noise" and "screaming and hollering because [he] wanted somebody to find out where [he] was," and that he twice "fired a warning shot." VT at 483. He testified that he was not trying to hurt Elkhart or Walters, but wanted someone to call the police for him. He also acknowledged that even though he heard Walters ask him to put the gun away, he did not.

The following exchange occurred during the State's cross-examination of Roberson:

Q. Okay, you said you remember everything?

A. Yes, ma'am, I do.

Q. Do you remember him saying to you please put that away?

A. Yes.

Q. Okay. And that was the gun he was telling you to please put away?

A. Yes.

Q. And you didn't put it away?

A. No.

Q. Um, do you remember him saying don't shoot?

A. Yes.

Q. In fact, he said don't shoot more than once; right?

A. Yes.

Q. Okay. Do you remember him saying don't point it at me?

A. I heard him say that.

Q. Okay, and he said that more than once; right?

A. Yes, he did.

Q. And you were pointing the gun at him?

A. No, I wasn't.

Q. So, he was just—you weren't pointing the gun at him, and he was just saying don't point it at me for—

A. Absolutely, because he was on the phone with dispatch. But the reason why he was saying don't point the gun at me, don't point the gun at me, I'm just looking at him hollering for help.

Q. So he was just making that up?

A. He was—that's all, don't point the gun at me, don't point the gun—I wasn't—I had no reason—I had no—this man's saving my life. I had no reason to point the gun at him, I didn't want anything from him but help. I just wanted him to help me.

Q. So he was just making that up for 911?

A. Yes—

MR. ANDERSON: Objection as to the motives of the witness.

THE COURT: Overruled.

THE WITNESS: I never pointed the gun at him.

VT at 499-501.

The jury was instructed on first degree assault, and the lesser included crime of second degree assault. The jury was also instructed on self-defense to assault.[1] During closing argument, the prosecutor argued:

> So, my argument is how can someone argue self-defense when they create the situation. When he essentially through his own behavior, brings someone into the area of danger, and when they come, he shoots at them. And then says well, I was defending myself—

VT at 577. Roberson objected to the prosecutor's comment on the grounds that the prosecutor's comment was an improper first-aggressor argument. The State agreed that the argument that Roberson "created the risk" was improper. VT at 580. The trial court then instructed the jury to disregard the prosecutor's argument that Roberson created the risk.

The jury found Roberson guilty of two counts of second degree assault while armed with a firearm.

Dr. Kenneth Muscatel performed a psychological evaluation for sentencing purposes. He found that "it is likely that methamphetamine played a very significant role in the incident," as well as "mental health impairment." Clerk's Papers (CP) at 45. He also determined that in addition to methamphetamine use, Roberson "likely ha[d] symptoms of a significant mental disturbance at the time of the incident, and those factors likely affected his behavior, thinking, judgment, and emotional responses at that time." CP at 45. "It is likely his impaired mental status, reflecting both pre-existing mental health impairment and chronic features of impaired

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[1] The trial court's instruction reflected the language provided in 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 17.02 (3d ed. 2008)("Lawful Force—Defense of Self, Others, Property").

mental health, as well as his use of methamphetamine at the time, were the likely participants of this rather bizarre incident." CP at 45.

Roberson asked the trial court to consider evidence of mental illness as grounds for an exceptional downward sentence under RCW 9.94A.535(1)(e). He also requested that the court impose the firearm enhancements to run concurrently under *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). The trial court considered Dr. Muscatel's report, but declined imposing an exceptional sentence, finding that the mitigating factors in RCW 9.94A.535 were inapplicable. The court also found that to the extent that Roberson was "not capable of appreciating the wrongfulness of [his] behavior that night, that was largely attributable to the fact that [he] . . . had voluntarily consumed the methamphetamine." VT at 653-54. The trial court imposed the firearm enhancements to run consecutively. Roberson appeals.

ANALYSIS

A. PROSECUTORIAL MISCONDUCT

1. *Legal Principles*

To establish prosecutorial misconduct, a defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant establishes that the prosecutor's conduct was improper, we then determine whether he was prejudiced. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where an objection was made, a defendant must "show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Emery*, 174 Wn.2d at 760. Where a trial court issues a curative instruction, we presume the jury

follows the court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

In reviewing a prosecutor's comments during closing argument, we look to the context of the total argument, the issues presented in the case, the evidence addressed in the argument, and the jury instructions. *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). A prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury during closing argument. *Thorgerson*, 172 Wn.2d at 448.

2. *Closing Argument*

Roberson argues that the prosecutor committed misconduct by arguing that Roberson had "no right to assert self-defense." Br. of App. at 15. Specifically, Roberson assigns error to the prosecutor's argument that Roberson created the dangerous situation, and then claimed self-defense. We hold that although the comment was improper, the trial court's instruction cured any possible prejudice.

Roberson cites *State v. Davenport*, to support his argument, but that case is distinguishable. 100 Wn.2d 757, 675 P.2d 1213 (1984). In *Davenport*, although the defendant was not charged as an accomplice and the jury was not instructed on accomplice liability, the prosecutor argued that he was guilty as an accomplice. *Davenport*, 100 Wn.2d at 759-60. The defendant objected to the argument, but the trial court overruled the objection. *Davenport*, 100 Wn.2d at 759. Further, during deliberations, the jury asked the court for "a definition of 'accomplice' in terms of participation in the crime." *Davenport*, 100 Wn.2d at 759. The Supreme Court held that the prosecutor's argument was improper, and the record demonstrated

that the jury considered the improper arguments, and may have been prejudiced by it. *Davenport*, 100 Wn.2d at 763, 765.

Here, Roberson's objection was sustained and the trial court instructed the jury to disregard the prosecutor's argument. Roberson baldly asserts that even though the court issued a curative instruction, there is a reasonable probability that the prosecutor's comment affected the jury's verdict.[2] But where a trial court issues a curative instruction, we presume the jury follows the court's instructions. *Anderson*, 153 Wn. App. at 428. Accordingly, Roberson's argument fails.

3. *Cross-Examination*

Roberson claims that the prosecutor committed misconduct during cross-examination of Roberson when she asked Roberson if Walters was "making this up for 911." Br. of App. at 17. Specifically, Roberson argues that the prosecutor improperly asked Roberson to opine on whether a witness was being honest. We disagree.

It is improper for a prosecutor to ask a witness whether another witness is lying. *State v. Ramos*, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011). Some factors we consider in determining whether a prosecutor's misconduct likely affected the verdict, are "whether the prosecutor was able to provoke the defense witness to say that the State's witness must be lying, whether the State's witness's testimony was believable and/or corroborated, and whether the

[2] Roberson does not challenge the trial court's curative instruction or otherwise explain his contention that the court's curative instruction was ineffective.

defense witness's testimony was believable and/or corroborated." *State v. Padilla*, 69 Wn. App. 295, 301, 846 P.2d 564 (1993).

The prosecutor did not provoke Roberson to testify that another witness must be lying. Because the prosecutor did not ask Roberson if another witness's testimony was a lie, the authority that Roberson relies upon is distinguishable. The prosecutor asked Roberson about a prior occurrence with Walters. Moreover, even assuming that the prosecutor's question was improper, Roberson has not demonstrated a substantial likelihood that the misconduct affected the verdict. Walters's 911 call was admitted and played for the jury, and was consistent with Walters's testimony. Walters testified that Roberson aimed the gun at him after he asked Roberson to put away the gun. And Walters testified that Roberson fired the gun after Walters asked him not to. Given the overwhelming evidence supporting Walters's testimony, Roberson has not demonstrated a substantial likelihood that the improper conduct affected the verdict.

B. SUFFICIENCY OF THE EVIDENCE

Roberson argues that his conviction of second degree assault of Walters (count 2) is not supported by sufficient evidence. Specifically, he contends that there is insufficient evidence of Roberson's specific intent to create apprehension and fear of bodily injury. We disagree.

Due process requires the State to prove every element of the charged crimes beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). We review sufficiency of evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182

(2014). In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Homan*, 181 Wn.2d at 106. We consider circumstantial evidence as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *Goodman*, 150 Wn.2d at 781. We also "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

RCW 9A.36.021(1)(c) provides that "[a] person is guilty of assault in the second degree if he or she . . . [a]ssaults another with a deadly weapon." The statute does not define "assault," thus, courts must resort to the common law definition. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Washington recognizes three common law definitions of assault: "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *Elmi*, 166 Wn.2d at 215. The trial court defined assault in its instruction to the jury:

> An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 75.

Roberson and the State agree that second degree assault of Walters in count 2 was based on the intentional creation of apprehension. Roberson contends that there was insufficient evidence that Roberson intended to create apprehension of bodily injury. He argues that because he did not intend to make Walters fearful, and because he did not verbally threaten Walters or use his gun to demand entry into Walters's home, there was no evidence of intent to create apprehension.

But the record shows that Roberson was frantic and crying for help, and that he pointed his gun at Walters, despite Walters's request not to point it at him. Further, the record shows that despite Walters asking Roberson not to shoot the gun, Roberson shot it twice. And we take all evidence in the light most favorable to the State. A rational jury could have inferred that Roberson screaming and pointing the gun at Walters after Walters asked him not to, coupled with Roberson firing two "warning shots," constituted an intent to create apprehension and fear in Walters. Moreover, Roberson testified that he was not trying to hurt Elkhart or Walters, but wanted someone to call the police for him, from which a rational jury could infer Roberson was using fear of the gun to force them to call 911. Accordingly, we hold that that a rational jury could have inferred the necessary intent from the evidence presented at trial.

C. SENTENCING

Roberson argues that the trial court erred by not imposing an exceptional sentence downward. Specifically, he claims that the trial court did not exercise its discretion because it believed that it did not have discretion to impose an exceptional sentence where the record

indicated both that Roberson suffered from mental illness and was under the influence of methamphetamines. Roberson also claims that the trial court did not consider whether an adult's mental illness was a mitigating factor under *State v. Houston-Sconiers*. We hold that the trial court did not abuse its discretion when it refused to impose an exceptional sentence.

A standard range sentence is generally not appealable. RCW 9.94A.585; *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). However, where, as here, a defendant has requested an exceptional sentence below the standard range, we can review the denial if the trial court either refused to exercise its discretion, or relied on an impermissible basis for refusing to impose an exceptional sentence. *Osman*, 157 Wn.2d at 482; *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

RCW 9.94A.535(l)(e) authorizes an exceptional sentence below the standard range if a preponderance of evidence shows that

> [t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

Imposition of an exceptional sentence under RCW 9.94A.535(1)(e) is permissible only if the record establishes that the defendant's impairment existed independent of any voluntary use of drugs or alcohol. *See State v. Allert*, 117 Wn.2d 156, 167, 815 P.2d 752 (1991). Roberson claims the sentencing court erroneously believed that any voluntary use of drugs precluded imposition of a mitigated exceptional sentence. But the record fails to support this claim.

The trial court considered Dr. Muscatel's report. Dr. Muscatel's report stated:

> [I]t is likely that methamphetamine played a very significant role in the incident. . . . It is likely that methamphetamine exacerbated [Roberson's impaired mental health.]. . . .
>
> It is likely his impaired mental status, reflecting both pre-existing mental health impairment and chronic features of impaired mental health, as well as his use of methamphetamine at the time, were the likely participants of this rather bizarre incident."

CP at 45. Dr. Muscatel's report did not establish that the effect of Roberson's mental impairment could be separated from the effects of his voluntary drug use.

The trial court found that to the extent that Roberson was "not capable of appreciating the wrongfulness of [his] behavior that night, that was largely attributable to the fact that [he] . . . had voluntarily consumed the methamphetamine." VT at 653-54. The trial court considered the impaired-capacity mitigating factor, but found it inapplicable based on the evidence presented. The trial court neither refused to consider an exceptional sentence, nor relied on an impermissible basis for declining to impose an exceptional sentence. Thus, the trial court properly exercised its discretion and its decision declining to impose an exceptional sentence is not reviewable.

Roberson also argues that the trial court should have considered his mental illness as a basis for imposing an exceptional downward sentence under *State v. Houston-Sconiers*, 188 Wn.2d 1. But *Houston-Sconiers* addresses the trial court's discretion in sentencing a juvenile, and is inapplicable here. 188 Wn.2d at 23, 34. Roberson was not a juvenile, and has not provided argument or authority demonstrating that the trial court erred by not granting an exceptional sentence based on *Houston-Sconiers*. Accordingly, his claim fails.

We affirm.

No. 50414-6-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Melnick, J.

Sutton, J.

March 26, 2019 - 9:49 AM

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