Supreme Court No. 99311-4
(COA No. 80056-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FAISAL GULED ADAN,

Appellant.

PETITION FOR REVIEW

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A. INTRODUCTION

By the time Faisal Adan was only 15 years old, he was a survivor of extreme physical abuse, and a mental health professional diagnosed him with Post-Traumatic Stress Disorder. By the time he was only 21 years old, Mr. Adan was shot at three separate times. In the first two shootings, the bullets physically injured Mr. Adan. The third time this happened, the bullets hit his car.

A week after the third shooting, Mr. Adan saw a man on the bus whom he believed was armed and ready to hurt him. Rather than become the victim of a fourth shooting, Mr. Adan pulled out a gun and shot the man. Mr. Adan believed he was acting in self-defense.

A court may grant a defendant a mitigated sentence if he presents evidence of a failed claim of self-defense. This does not require the defendant to demonstrate the victim was an actual aggressor. Yet the court refused to grant Mr. Adan a mitigated sentence because it mistakenly believed Mr. Adan had to establish this fact.

Moreover, a court must meaningfully consider a defendant's youth when it evaluates a request for a mitigated sentence. While Mr. Adan presented significant evidence about how his youth influenced his crimes, the court failed to meaningfully consider this evidence.

This Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Faisal Adan asks this Court to review a decision affirming the sentencing court's denial of his request for a mitigated sentence. The Court of Appeals issued this opinion on November 9, 2020, and Mr. Adan has attached a copy of this opinion to this petition.

C. ISSUES PRESENTED FOR REVIEW

It is error for a court to refuse to grant a mitigated sentence based on a misunderstanding of the law.

(a) Mr. Adan requested a mitigated sentence in part based on a theory of failed self-defense. However, the court refused to grant a mitigated sentence on this basis because it believed he needed to establish the victim was the actual aggressor and in actual danger when he committed his crime. The court misunderstood the law, as neither the Court of Appeals nor this Court has ever held that a court can only grant a defendant a mitigated sentence based on a theory of failed self-defense if the defendant establishes the victim was the aggressor. Nevertheless, the Court of Appeals affirmed. Should this Court accept review? RAP 13.4(b)(1), (2), (4).

(b) This Court has also held a sentencing court must meaningfully consider a defendant's youth when a defendant requests a mitigated sentence. Mr. Adan also requested a mitigated sentence in part due to his

youth, as he was only 21 years old when he committed the offense. In support of this, he presented abundant expert evidence demonstrating his youth contributed to his actions. However, the sentencing court refused to grant a mitigated sentence on this basis, opining no evidence existed that Mr. Adan's youth contributed to his offense. Should this Court accept review? RAP 13.4(b)(1), (2), (4).

D. STATEMENT OF THE CASE

In 2010, when Faisal Guled Adan was just 14 years old, someone shot him in the leg. CP 132, 140, 145-46, 500; RP 55, 86. Out of fear, Mr. Adan refused to tell his mother who shot him. RP 131. After this happened, Mr. Adan felt afraid, and he had frequent nightmares and intrusive thoughts. CP 10, 106. Mr. Adan did not return to school after the shooting. CP 106. During that same year, Mr. Adan began to have run-ins with the law. CP 100-01. His father became upset at his behavior, and he grabbed him around his neck and punched him. CP 100. This was not the first time Mr. Adan's father physically abused him. CP 100. Mr. Adan did not feel safe at home, and he felt depressed. CP 100. In 2011, a mental health professional diagnosed Mr. Adan with Post-Traumatic Stress Disorder (PTSD). CP 100-01. Individuals with PTSD are hypervigilant and have a heightened sense of alertness. RP 52-53.

Shortly after receiving this diagnosis, Mr. Adan's mother, Suad Duale, sent Mr. Adan to her native Somalia to attend a private Islamic school because she believed Mr. Adan was associating with "bad friends." RP 87, 97, 131-32; CP 120. But instead of this school educating or helping Mr. Adan, the faculty of the school starved, beat, and tortured Mr. Adan for nearly a year. CP 120; RP 131-32. Individuals at the school made an example out of Mr. Adan because he was American, and guards at the school would repeatedly tie him up and beat him in front of others. CP 124. The school starved him so badly he lost 50 pounds within a year. CP 123-24. When another woman from Seattle visited the school, she reported Mr. Adan's withering condition to his mother, who promptly removed him from the school. CP 124; RP 132.

When Mr. Adan returned, his family noticed a difference in his behavior, as he was more irritable and erratic. RP 87; CP 124. Mr. Adan's behavior worsened upon his return. RP 58-59. While Mr. Adan began taking drugs before he was tortured at the school, his drug use increased after returning home. CP 124, 174-75. Mr. Adan committed several crimes after returning to the United States. *See* CP 894.

In February of 2016, at the age of 21, Mr. Adan associated with a man named "Egypt,"[1] who would supply Mr. Adan with cocaine in exchange for favors. CP 122. At Egypt's behest and so Mr. Adan could obtain his drug of choice at the time (cocaine), Mr. Adan attempted to rob a man of his cash and drugs. CP 122. However, the dealer shot Mr. Adan in the stomach. CP 122. Mr. Adan spent two months recovering from this gunshot. CP 106, 122. Mr. Adan's mother reported that he stopped sleeping, and he would cry and shout, "I'm gonna get killed. I'm gonna get killed." RP 133.

Beginning in roughly August or September of 2016, Mr. Adan began to use methamphetamine. CP 255. In the weeks that followed, Mr. Adan became increasingly paranoid. CP 94, 106, 129, 131-32. Mr. Adan bought a gun two weeks before November 29, 2016. CP 102. The week before November 29, 2016, some unknown individual shot at Mr. Adan's car. CP 130.

On November 29, 2016, Mr. Adan got on the bus and saw Ahmed Sheikah, a man he recognized because he had previously been in jail with him. CP 85. Mr. Adan felt suspicious when he saw him on the bus because he knew Mr. Sheikah drove a car and because of "the way he was acting."

[1] This person's true name is unknown.

CP 85, 87, 90, 92. Mr. Sheikah asked Mr. Adan to get off at the stop near the Sam's Club, Mr. Adan refused, Mr. Sheikah spoke on the phone with some unknown person, and when Mr. Sheikah got off the phone, he told Mr. Adan, "we're gonna see what's gonna happen." CP 85, 87, 90, 92. Mr. Adan felt threatened by this comment, and he also believed Mr. Sheikah had a gun on his hip. CP 92. Mr. Adan shot Mr. Sheikah. CP 85. On his way out of the bus, Mr. Adan pointed a gun at the bus driver. CP 4. The police arrested Mr. Adan shortly afterwards, and Mr. Adan admitted to shooting Mr. Sheikah because he felt threatened. CP 88.

Mr. Adan pleaded guilty to one count of murder in the second degree, one count of assault in the second degree, and one count of unlawful possession of a firearm in the first degree. CP 22. At sentencing, Mr. Adan requested a mitigated sentence of 20 years largely based on his youth at the time of the offense and based on a theory of failed self-defense. CP 34-35.

The court refused to grant a mitigated sentence because it believed Mr. Adan needed to demonstrate that Mr. Sheikah was an actual aggressor to the shooting, and because it believed no evidence existed that youth had anything to do with Mr. Adan's crimes. RP 152. Indeed, the court said,

> Defense alternatively or additionally asked me to consider or enter an **exceptional sentence because of failed self-defense**…. However, **the statute requires the Court to find to a -- to a**

> **significant degree the victim was the initiator, willing participant, aggressor, or provoker of the incident. In mitigation, the Court has to look at this from the perspective of what the victim did, not what Mr. Adan believed he did.**

RP 151-52 (emphases added).

The court instead imposed a sentence of 353 months. CP 891.

The Court of Appeals affirmed, opining Mr. Adan actually based his argument on his paranoid delusions rather than on self-defense. Op. at 1, 6-7. The Court of Appeals also rejected Mr. Adan's arguments about his youth at the time of the offense, concluding this argument was "grounded in his contention that the court did not believe and credit his versions of the various disputed facts." Op. at 9.

E. ARGUMENT

> **This Court should accept review because the court's rejection of Mr. Adan's request for a mitigated sentence rested on a grievous misunderstanding of the law.**

RCW 9.94A.535(1) provides a non-exhaustive list of mitigating circumstances a court may consider to impose an exceptional sentence below the standard range. This list of mitigating circumstances reflects the legislature's desire to allow variations in sentencing where factors exist which make a particular defendant's conduct less blameworthy than other defendants who committed the same offense. *See State v. Pascal*, 108

Wn.2d 125, 136-37, 736 P.2d 1065 (1987) (*referencing* David Boerner, *Sentencing in Washington* § 9.12(c)).

a. To grant a defendant a mitigated sentenced based on a claim of a failed self-defense, it is unnecessary for the defendant to prove the victim was the initial aggressor.

In granting a mitigated sentence, a court can consider a claim of failed self-defense. Mr. Adan submitted extensive evidence detailing his belief that on the date of the crime, he believed Mr. Sheikah would harm him, and so Mr. Adan shot Mr. Sheikah first to prevent Mr. Sheikah from hurting him. However, the court believed it had no discretion to grant a mitigated sentence based on a failed self-defense. The court reached that conclusion due to its mistaken belief that it could only grant the sentence if Mr. Adan produced evidence that Mr. Sheikah actually provoked or was the actual aggressor prior to the shooting.

But to establish even a complete claim of self-defense, a defendant need produce only evidence he was in *apparent* danger, not *actual* danger. It also appears the court conflated two sportions of the mitigated sentence statute and thereby failed to recognize that each factor delineated by the statute contains different requirements for a court to impose an exceptional sentence. Consequently, the court erred in denying Mr. Adan's request for a mitigated sentence based in part on its belief that Mr. Adan could not

assert failed self-defense without first demonstrating Mr. Sheikah actually provoked the shooting.

A court can grant a mitigated sentence if the defendant "committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected [the defendant's] conduct." RCW 9.94A.535(1)(c). This allows defendants to request a mitigated sentence if their conduct satisfied some, but not all, of the criteria for establishing a defense, like self-defense or entrapment. *See Pascal*, 125 Wn.2d at 136-37; *Jeannotte*, 133 Wn.2d at 855.

To establish a complete claim of self-defense, the defendant must initially present only some evidence which tends to prove the defendant acted in self-defense. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). This is a low threshold; moreover, once the defendant establishes presents some evidence, the State must disprove self-defense beyond a reasonable doubt. *Id.*; *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). "Evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, *knowing all the defendant knows and seeing all the defendant sees.*" *Janes*, 121 Wn.2d at 238 (emphasis added).

Thus, a trier of fact's evaluation of a claim of self-defense contains both objective and subjective elements. *Walden*, 131 Wn.2d at 474. The

subjective element requires the trier of fact to put themselves in the defendant's shoes at the time of the crime and consider the defendant's actions in light of the facts and circumstances known to the defendant, even those predating the offense. *Janes*, 121 Wn.2d at 238. The subjective element also allows the trier of fact to consider the defendant's self-defense claim by evaluating whether the defendant perceived *apparent*, not actual, danger from the decedent. *See State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000).

The defendant need only perceive apparent imminent danger, and imminent danger does not require an actual physical assault. *Janes*, 121 Wn.2d at 241. An apparent threat, "or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out." *Id*.

The objective element of self-defense requires the trier of fact to incorporate the subjective element and ask what a reasonably prudent person who was similarly situated to the defendant would have done. *Janes*, 121 Wn.2d at 238. The law excuses a defendant's use of deadly force if the defendant reasonably believed he was threatened with death or great personal injury. *Walden*, 131 Wn.2d at 474.

Mr. Adan requested a mitigated sentence based in part on failed self-defense, as he subjectively believed during the offense that he was

acting in self-defense when he shot Mr. Sheikah. CP 32, 36-39, 56, 714-15; RP 94, 115, 126. In support of this assertion, Mr. Adan presented expert evaluations from a psychiatrist (Dr. Mark McClung) and a forensic psychologist (Julie Armijo). CP 82, 115. He also presented letters and testimony from family members and from Dr. McClung. CP 879-885; RP 47-85, 128-135.

Both the mitigation report and the psychiatric report consist of a review of extensive collateral materials which lent support to Mr. Adan's assertion that the court should have granted a mitigated sentence based on a theory of failed self-defense. CP 82, 115. The reports note Mr. Adan was shot twice: once when he was 14 and once again in February of 2016, and the second shooting required Mr. Adan to spend two months in recovery. CP 106, 122. After he was shot the first time, Mr. Adan experienced frequent upsetting dreams and intrusive thoughts about the shooting. CP 100-01, 106. A mental health specialist diagnosed Mr. Adan with PTSD in 2011, when Mr. Adan was 16 years old. CP 37, 78, 101, 125, 236. PTSD results in individuals having a heightened sense of alertness, and individuals with this condition are hypervigilant. RP 52-53.

After someone shot Mr. Adan the second time (in 2016, the same year as Mr. Adan's charged crimes), Mr. Adan's mother, Suad Duale, noted Mr. Adan became "jumpy" and hypervigilant. CP 106. He told his

mother, “they are coming to kill me, and I don’t want my family to be hurt.” CP 106. Mr. Adan stopped sleeping, and he would cry and shout, “I’m gonna get killed. I’m gonna get killed.” RP 133. Dr. McClung concluded Mr. Adan experienced PTSD symptoms after the second shooting. CP 110.

Three months before Mr. Sheikah was shot by Mr. Adan, Mr. Adan became even more paranoid due to his use of methamphetamine and development of methamphetamine-induced psychosis. CP 94, 106, 129, 131-32. Individuals who experience methamphetamine-induced psychosis develop paranoid delusions accompanied by hallucinations and hearing voices. RP 63. Mr. Adan’s uncle and other family members also reported that Mr. Adan would stay at their home and tell him he felt unsafe and that someone was trying to kill him. RP 128-30.

A week before Mr. Sheikah was shot by Mr. Adan, Mr. Adan’s fears came to fruition, as he was shot at (but not injured) while he was driving. CP 130. This was the third shooting Mr. Adan experienced during his life.

Among the collateral materials Dr. McClung reviewed was the statement Mr. Adan made to police on the date of the incident. CP 84-87. During the statement, Mr. Adan told the police that for the “past couple [of] months people [have] been following him,” that people were trying to

set him up and kill him, and that he felt threatened. CP 84-85. When Mr. Adan saw Mr. Sheikah on the bus, Mr. Adan recognized him from previously being in jail with him. CP 85. Mr. Adan claimed he saw Mr. Sheikah following him for the two weeks preceding the incident. CP 87-88, 91. Mr. Adan also believed gang members were following him. CP 88-89.

Mr. Adan felt suspicious when he saw Mr. Sheikah on the bus on the date of the incident:. CP 85. He said he shot Mr. Sheikah because of "the way he was acting;" he later elaborated that Mr. Sheikah asked him to get off at the stop near the Sam's Club, and Mr. Adan refused. Mr. Sheikah spoke on the phone with some unknown person, and when Mr. Sheikah got off the phone, he told Mr. Adan "we're gonna see what's gonna happen." CP 85, 87, 90, 92. Mr. Adan felt threatened by this comment, and he believed Mr. Sheikah had a gun on his hip. CP 92. CP 92. Deciding he was no longer "gonna be the victim," Mr. Adan shot Mr. Sheikah. CP 85.

Dr. McClung concluded that Mr. Adan's methamphetamine-induced psychosis caused him to misinterpret reality on the date of this incident, and he also concluded, "[Mr. Adan's] paranoid perception of the immediate situation could have made him believe he needed to act in self-defense." CP 108. Dr. McClung also noted that at the time of the incident,

Mr. Adan had "ongoing fears for his safety. These were due to several factors: realistic threats or fears of reprisal; fear related to his paranoid delusions, and PTSD-related symptoms intensifying vigilance and over-reacting to perceived threats." CP 110-111. Ms. Armijo also concluded that Mr. Adan's "paranoia appears to be rooted in realistic fears and in his substance abuse and mental disorder." CP 131.

All of this evidence readily demonstrated that Mr. Adan established he *subjectively* believed Mr. Sheikah would kill or severely injure him, and so to prevent Mr. Sheikah from doing so, Mr. Adan shot him first. While this evidence may not have conclusively established to any trier of fact that "a reasonably prudent person," given all Mr. Adan experienced, would have shot Mr. Sheikah, that is unnecessary to established a failed defense. *See Janes*, 121 Wn.2d at 238.

The court also believed Mr. Adan's claim of self-defense pertained to RCW 9.94A.535(1)(a), but the court was wrong. The legislature has separately permitted a defendant to request a mitigated sentence if, "to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker to the incident." RCW 9.94A.535(1)(a). 9.94A.535(1)(a) applies where the victim provoked or initiated the crime; moreover, it does not require the victim to have used physical force to provoke the incident. *See State v. Whitfield*, 99 Wn. App. 331, 994 P.2d

222 (1999) (upholding defendant's mitigated sentence based on RCW 9.94A.535(1)(a) where victim repeatedly verbally antagonized the defendant). This factor also applies where the victim fueled or assisted the defendant in committing the crime. *See State v. Hinds*, 85 Wn. App. 474, 936 P.2d 1135 (1997).

While sometimes, defendants asserting a claim of failed self-defense under RCW 9.94A.535(1)(c) *separately* request a mitigated sentence under RCW 9.94A.535(1)(a) because the victim was *also* an aggressor or provoker, proof of one is unnecessary to prove the other. *See, e.g.*, *Pascal*, 108 Wn.2d at 136; *Janes*, 121 Wn.2d at 231-32; *State v. Anders*, No. 32114-2-III, 2016 WL 1078862, *2 (Wash. Ct. App. Mar. 17, 2016).[2]

At no point did Mr. Adan seek a mitigated sentence based on any assertion that Mr. Sheikah actually initiated, participated-in, or provoked the shooting. CP 56.[3] Instead, Mr. Adan sought an exceptional sentence based in part on a theory of failed self-defense. However, the State argued in its briefing that Mr. Adan's self-defense assertion fell under the purview

[2] GR 14.1.

[3] While defense counsel discussed the ruling in *Whitfield* under the portion of its motion discussing failed self-defense, it appears to have used this case for the broad principle that a defendant's actions need not be proportional to the victim's actions in order for the court to impose an exceptional sentence. CP 57-58.

of RCW 9.94A.535(1)(a). CP 297-98. The court relied on this assertion because it concluded, "the statute requires the court to find to a significant degree the victim was the initiator, willing participant, aggressor, or provoker of the incident." RP 152.

The court was plainly wrong in this respect, and it was also wrong in concluding Mr. Adan needed to establish that he was in actual, not just apparent danger. However, the Court of Appeals seemingly concluded this error was acceptable because (1) trial counsel's sentencing memorandum made some references to RCW 9.94A.535(1)(a) and cases relating to that statute: and (2) because it believed Mr. Adan's presentation of his "delusional misperceptions, were not, in substance, a failed self-defense mitigating factor but rather a variation of the 'failed mental state' mitigating factor under RCW 9.94A.535(1)(e). Op. at 4-6.

The Court of Appeals erred at arriving at these conclusions. While Mr. Adan made several arguments supporting his request for a mitigated sentence, he distinctly argued one of the bases for the request was failed self-defense. RP 83, 93-94; CP 32. Counsel even discussed the subjective and objective test that applies to these claims. RP 93. Counsel elaborated that Dr. McClung's report demonstrated that Mr. Adan's PTSD symptoms likely caused him to misconstrue Mr. Sheikah's actions. RP 115, 126. And the sentencing court plainly understood Mr. Adan's argument, as it stated,

"Mr. Adan alternatively or additionally asked me to consider or enter an **exceptional sentence because of failed self-defense**…." RP 151-52. The Court's conclusion to the contrary is in error.

Additionally, the court concluded, "the [mitigated sentence] statute and scores of cases make it clear…the voluntary ingestion of drugs and alcohol may not be considered a mitigating factor." RP 150. To the extent the court believed it was precluded from even considering Mr. Adan's request for a mitigated sentence based on his drug use, the court was wrong.

RCW 9.94A.535(1)(e) precludes courts from imposing a mitigated sentence if the defendant's voluntary drug or alcohol use impaired his ability to appreciate the wrongfulness of his conduct. *See State v. Schloredt*, 97 Wn. App. 789, 801-02, 987 P.2d 647 (1999); *State v. Hutsell*, 120 Wn.2d 913, 922, 845 P.2d 1325 (1993).

In *State v. Gaines*, 122 Wn.2d 502, 559 P.2d 36 (1993), this Court concluded that a person's drug use or addiction to drugs cannot, on its own, justify a mitigated sentence. *Id.* at 512. However, this Court never concluded that a person's use of, or addiction to, controlled substances categorically precluded him from requesting a mitigated sentence. This is evinced by the fact that this Court merely remanded for resentencing so that the court could assess whether the defendant's minor role in the

crime, standing alone, warranted an exceptional sentence. *Id.*; *see also Janes*, 121 Wn.2d at 226, 231-32 (court granting defendant a mitigated sentence despite the fact that defendant used drugs and alcohol before killing victim).

To the extent that the court believed it was impossible for it to grant a mitigated sentence because Mr. Adan consumed drugs before the crime, the court was wrong.

It is necessary for this Court to accept review because sentencing courts and appellate courts continue to misconstrue when and how courts can grant a mitigated sentence. Mr. Adan presented overwhelming evidence of a failed self-defense, yet the sentencing court erroneously believed Mr. Adan needed to prove something that was completely unnecessary. This is a question of substantial public importance.

b. <u>The sentencing court failed to meaningfully consider Mr. Adan's youth at the time of his offense</u>.

This Court has consistently held that courts must meaningfully consider a defendant's youth at the time of his offense, and it must meaningfully consider mitigation evidence. *See State v. Delbosque*, 195 Wn.2d 106, 118-19, 456 P.3d 806 (2020); *State v. O'Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015); *State v. Gilbert*, 193 Wn.2d 169, 175, 438 P.3d 133 (2019).

The sentencing court concluded, "there's no evidence whatsoever to suggest that [Mr. Adan's crime] was an impulsive act caused by youthfulness, but rather it was due to Mr. Adan's drug ingestion." RP 150 (emphasis added). However, the record established that Mr. Adan's youth also contributed to his crimes. Mr. Adan was only 21 years old when he committed these offenses. CP 126. Dr. McClung explained that young adults ranging from ages 18 to 21 have underdeveloped areas of the brain related to self-control. CP 110.

When 21-year-olds, like Mr. Adan, "feel threatened, they may be more impulsive, and they [are] more likely to take risks than older adults." CP 110. Dr. McClung also concluded that one of factor relating to Mr. Adan's crime was his "risk of overreacting to perceived threats." CP 111. Ms. Armijo explained Mr. Adan's self-control was likely even more underdeveloped than the average 21-year-old due to the extensive trauma he experienced as a child. CP 126.

Thus, Mr. Adan's actions of (1) feeling compelled to buy a gun just two weeks before the incident and carry a gun with him on a bus; (2) believing he needed to shoot Mr. Sheikah to thwart an imminent attack; and (3) brandishing the gun at the bus driver to secure his exit from the bus are demonstrative of Mr. Adan's overreaction to perceived threats, which can be partially attributed to his youth. CP 83, 102. While a

confluence of factors may have related to Mr. Adan's overreaction, there was evidence Mr. Adan's youth and underdeveloped brain was among these factors. Accordingly, the court erred in opining there was "no evidence whatsoever" that Mr. Adan's youth played a role in his crimes, and the Court of Appeals erred in dismissing Mr. Adan's argument.

This Court should accept review. RAP 13.4(b)(1),(2), (4).

F. CONCLUSION

For the reasons stated in this petition, Mr. Adan respectfully requests that this Court accept review.

DATED this 8th day of December, 2020.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. FAISAL GULED ADAN, Appellant.	)	No. 80056-6-I UNPUBLISHED OPINION

VERELLEN, J. — Faisal Adan challenges his standard range sentence, arguing that the trial court misunderstood his nonstatutory "failed self-defense" mitigating factor. But the substance of his argument was based upon his paranoid delusions, and the court adequately considered and reasonably exercised its discretion to reject his delusions as a mitigating factor.

The court did not abuse its discretion by imposing a standard range sentence.

Therefore, we affirm.

FACTS

One afternoon, Faisal Adan boarded a bus around rush hour. Adan recognized one of the passengers, Ahmed Sheikah, and they started talking. Minutes later, Adan stood up and shot Sheikah multiple times. Adan then pushed his way through to the

front of the bus, pointed his revolver at the bus driver, and ordered him to open the door. Adan fled.

Soon after, Renton police officers apprehended Adan. Adan confessed to shooting Sheikah. Adan explained he shot him because Sheikah asked Adan to get off of the bus, had a look in his eyes, reached toward his hip, spoke with someone on the phone, and then said, "We're gonna see what's gonna happen."[1] Adan also admitted to taking a "whole bunch" of methamphetamine and other controlled substances before the shooting.[2] Adan contends he believed that Sheikah was threatening his life.

Adan pleaded guilty to first degree murder, first degree unlawful possession of a firearm, and second degree assault. Based on these charges and Adan's criminal history, a standard range sentence was between 317 and 417 months. The State requested a sentence of 396 months. Adan requested an exceptional sentence below the standard range.

At sentencing, the court heard arguments from both parties and testimony from Dr. Mark McClung, the bus driver, and family members. It rejected Adan's request for an exceptional sentence and imposed a standard range sentence of 353 months.

Adan appeals.

[1] Clerk's Papers (CP) at 85.

[2] CP at 426.

ANALYSIS

Adan argues the court erred when it imposed his standard range sentence. Standard range sentences are not appealable under the Sentencing Reform Act (SRA).[3] But an appellant can challenge "the procedure by which a sentence within the standard range was imposed."[4] When an appellant has requested an exceptional sentence below the standard range, our "review is limited to [deciding whether] the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose" the requested sentence.[5] A trial court abuses its discretion when its discretion is based on untenable grounds or reasons.[6]

Adan contends "the court believed it had no discretion to grant a mitigated sentence on the basis of a failed self-defense claim and had a "mistaken belief that it could only grant the sentence if [Adan] produced evidence that [Sheikah] actually provoked or was the actual aggressor prior to the shooting."[7]

Under the SRA, RCW 9.94A.535(1) lists various mitigating factors a trial court can weigh when considering an exceptional sentence. Under RCW 9.94A.535(1)(a), a court can consider whether "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident," and under .535(1)(e) whether "[t]he

[3] RCW 9.94A.210(1).

[4] State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986).

[5] State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

[6] State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869, review denied, 195 Wn.2d 1025, 466 P.3d 772 (2020).

[7] Appellant's Br. at 9.

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." Notably, "'failed defenses' may constitute mitigating factors supporting an exceptional sentence below the standard range."[8]

Here, at sentencing, Dr. McClung testified Adan suffered from paranoid delusions and he "misperceived or misinterpreted the look in Mr. Sheikah's eye or the statement he had overheard."[9] Relying on Dr. McClung's testimony, Adan identified failed self-defense as a mitigating factor. But his articulation of failed self-defense and his use of authority to support his argument was unclear.

Adan's sentencing memorandum addressed failed self-defense and cited a variety of cases, including State v. Whitefield,[10] which directly address failed self-defense under RCW 9.94A.535(1)(a). Specifically, Adan focused on Dr. McClung's opinion that Adan's "mental disorder" could have caused him to misinterpret reality in a paranoid manner which may have contributed to his perception that he was in acute danger at the time of the shooting. Dr. McClung concluded that Adan's "paranoid perception of the immediate situation could have made him believe that he needed to act in self-defense."[11] The defense presented Adan's "paranoid perceptions" under a

[8] State v. Jeannotte, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997).

[9] Report of Proceedings (RP) (May 17, 2019) at 151.

[10] 99 Wn. App. 331, 337-38, 994 P.2d 222 (1999) (holding that to a significant degree the victim provoked the incident and that the persistence of the victim warranted an application of the mitigating factor under RCW 9.94A.535(1)(a)).

[11] CP at 60-61.

theory of failed self-defense, relying at least in part on authority tied to RCW 9.94A.535(1)(a).[12] But the defense also concluded the failed self-defense section of Adan's sentencing brief by asserting, "As Dr. McClung's opinion . . . seems sufficient to submit a diminished capacity defense . . . , it follows that his opinion certainly serves as the basis for an exceptional sentence downward."[13] The defense's sentencing memorandum conclusion mentions the "diminished capacity defense," but their argument still categorizes Adan's "paranoid perceptions" as a theory of failed self-defense, including references to RCW 9.94A.535(1)(a).

At sentencing, Adan's counsel confusingly argued, "[W]e are not relying on the statutory mitigating factor for [failed self-defense], that [instead] there is a body of case law that specifically cites to failed self-defense, even though that typically leads to . . . a conviction on a lesser charge by the jury than as a sentencing issue."[14] His counsel noted that the subjective portion of the self-defense test asks the fact finder to stand in the position of the defendant. Adan's counsel asserted that here, based on Dr. McClung's testimony, Adan "delusionally believed that he was acting in self-defense [which] is grounds for an imposition of an exceptional sentence [below the standard range]."[15]

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[12] In his sentencing memorandum, Adan also emphasized State v. Mitchell, 102 Wn. App. 21, 997 P.2d 373 (2000). In Mitchell, this court held that a trial court should have admitted expert testimony on whether the defendant may have been experiencing paranoid delusions at the time of the incident. Id. at 26-28.

[13] CP at 61.

[14] RP (May 15, 2019) at 93.

[15] Id. at 94.

The trial court evaluated Dr. McClung's testimony before rejecting Adan's failed self-defense theory. The court noted that no matter what Adan perceived, Sheikah's actual conduct was not sufficient to prove that Sheikah or the bus driver was the "initiator," "aggressor," or "provoker of the incident." The court also addressed Adan's mental state and his delusions, concluding that they did not support a mitigated sentence.

Adan contends the trial court misunderstood his failed self-defense mitigating factor and his counsel's oral argument that he was not relying on RCW 9.94A.535(1)(a). But it is understandable that the trial court addressed RCW 9.94A.535(1)(a) in light of the defense's written materials that included cases referring to the statutory failed self-defense mitigating factor. The court accurately recited that the mitigating factor under RCW 9.94A.535(1)(a) requires the court to find "to a significant degree the victim was the initiator, willing participant, aggressor, or provoker of the incident." And there was no indication that either Sheikah or the bus driver engaged in such conduct.

As presented to the sentencing court, Adan's delusional misperceptions were not, in substance, a failed self-defense mitigating factor but rather a variation on the "failed mental state" mitigating factor under RCW 9.94A.535(1)(e). Consistent with Dr. McClung's testimony, Adan linked his delusions and misperceptions to concepts of diminished capacity. The court expressly considered Adan's arguments that his "mental deficiencies significantly impaired his capacity . . . to conform . . . his conduct

to the requirements of the law."[16] What Adan labels as a nonstatutory failed self-defense factor was adequately considered by the sentencing court when it addressed Adan's mental state, including his delusions and diminished capacity. The court did not abuse its discretion when it considered and rejected that argument.

Adan contends in his opening brief that the trial court "conflated two different mitigating factors [in rejecting his failed self-defense theory] which are separate and distinct."[17] He argues that the court should have analyzed his failed self-defense theory under RCW 9.94A.535(1)(c) (duress, coercion, threat or compulsion insufficient to constitute a full defense) instead of RCW 9.94A.535(1)(a). But in both the written materials and at oral argument, Adan's counsel argued only two mitigating factors, namely, RCW 9.94A.535(1)(a) and RCW 9.94A.535(1)(e). As discussed, Adan's mitigating argument in substance focused upon his delusional mental state, implicating RCW 9.94A.535(1)(e). The court adequately considered and responded to the materials and arguments made by the defense.

Next, Adan contends that the trial court rendered its decision under the mistaken assumption that because Adan used controlled substances before committing his crimes, the trial court was precluded from granting him a mitigated sentence.

A court's consideration of drug use under RCW 9.94A.535(1)(e) is limited "to only those circumstances in which the use might have formed the basis for a defense,

[16] RP (May 17, 2019) at 152.

[17] Appellant's Br. at 17.

that is, to those circumstances when the defendant's intoxication at the time of the offense was induced by fraud or force."[18] "Drug addiction and its causal role in an addict's offense may not serve to justify a durational departure from a standard range sentence."[19]

Here, the trial court considered Adan's drug induced impairment relative to his "capacity to [appreciate] the wrongfulness of his conduct" as required by RCW 9.94A.535(1)(e).[20] The court weighed Dr. McClung's testimony that Adan was in a state of "substance abuse psychosis" when he committed his crimes against the fact that Dr. McClung never diagnosed Adan with posttraumatic stress disorder or antisocial personality disorder.[21] The court found that Adan's mental state when he committed the crime did not satisfy RCW 9.94A.535(1)(e) because "his ability to appreciate wrongful behavior was diminished but not substantially impaired as is required by the SRA."[22]

Adan contends that the court "believed it was impossible" to grant him a mitigated sentence because he consumed controlled substances.[23] But the court merely recognized that the "voluntary ingestion of drugs and alcohol may not be

[18] State v. Gaines, 122 Wn.2d 502, 515, 859 P.2d 36 (1993).

[19] Id. at 509.

[20] RP (May 17, 2019) at 151.

[21] Id.

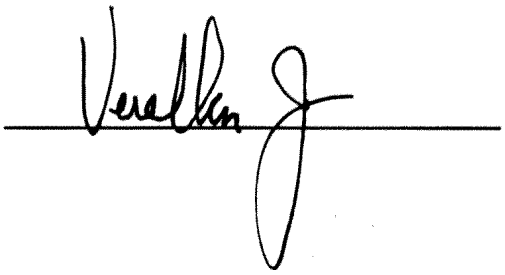
[22] Id.

[23] Appellant's Br. at 22.

considered a mitigating factor."[24] Although a failed mental state can be a basis for mitigation, the court rejected any showing of a true diminished capacity due to Adan's "voluntary ingestion of drugs."[25] And, as discussed, the court considered other mitigating circumstances after acknowledging Adan's voluntary drug consumption.

Finally, Adan argues that the court relied on various facts not supported by the record. But his arguments are all grounded in his contention that the court did not believe and credit his versions of the various disputed facts. Because the trial court is not required to accept the defense's version of disputed facts, Adan's argument fails.

Therefore, we affirm.



WE CONCUR:

[24] RP (May 17, 2019) at 150.

[25] Id. at 150-51.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80056-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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