S. Ct. No. 99945-7
COA No. 37383-5-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HOWARD LEE NORTON,

Petitioner.

PETITION FOR REVIEW

Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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A. IDENTITY OF PETITIONER

Howard Lee Norton asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Norton seeks review of the decision of the Court of Appeals, Division III, filed on June 3, 2021, affirming his convictions and sentence. A copy of the opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Was the evidence insufficient to support the convictions for second degree assault with a firearm enhancement when the State failed to disprove self-defense beyond a reasonable doubt?

2. Was the State's evidence insufficient to support beyond a reasonable doubt the convictions for malicious harassment with a firearm enhancement?

3. Did the court abuse its discretion by erroneously determining it had no discretion to run the firearm enhancements concurrently, rather than consecutively, thus resulting in all practicality a life sentence?

D. STATEMENT OF THE CASE

Mr. Norton was charged by amended information with two counts of second degree assault and two counts of malicious

harassment, all with firearm enhancements. (CP 95-97). The defense did not object to the amendment. (1/9/20 RP 2). Prior to trial, a CrR 3.5 hearing was held and the court determined certain statements by Mr. Norton would be admissible. (CP 178). The case proceeded to jury trial.

Ahnonymas Walker works for Winco in the produce department. (1/14/20 RP 141). He had been friends with Carmen Flemming for about 10 years and they socialized with each other. (*Id*.). On March 11, 2019, they decided to go to the Thirsty Dog in Spokane for cheap beer and free pool. (*Id*. at 142). They met up around 9 p.m. and arrived at the Thirsty Dog a half-hour later. (*Id*.). They sat at the bar and recognized some folks to their left, but no one to the right. (*Id*. at 143). Mr. Walker noticed a man to his right, Mr. Norton, with a cowboy hat and mustache. (*Id*. at 144). Mr. Walker did not know him before that night. (*Id*.). Mr. Norton went outside, walking out a young lady he had been talking to earlier. (*Id*. at 146).

Upon returning, Mr. Norton asked Mr. Walker what he did. (1/14/20 RP 145). When he said he worked at Winco in produce, Mr. Norton called him ignorant and a liar. (*Id*.). Mr. Walker said why ask if you do not believe it. He told him to just come to Winco

around 2 tomorrow where he would be working in produce. (*Id*.). Mr. Norton replied he was a lying sack of shit and ignorant. (*Id*.). Mr. Walker went to the bathroom and talked to Mr. Flemming thereafter. (*Id*. at 146).

Mr. Norton left again for a couple minutes and came back in. (1/14/20 RP 146). He had a smirk on his face. Mr. Walker told his friend Mr. Norton had a gun because of the way he was talking and his attitude told him to watch out. (*Id*.). Mr. Walker said to his friend that Mr. Norton might have thought he was a drug dealer. (*Id*.). When Mr. Flemming asked why Mr. Norton thought Mr. Walker was a drug dealer, it set him off again. (*Id*. at 148).

Mr. Norton said he was going to kill them. (1/14/20 RP 148). Mr. Walker stood up. Mr. Flemming started walking toward Mr. Norton, who was sitting down but then stood up. (*Id*. at 148-49). Mr. Walker was kind of scared and saw Mr. Norton reaching into his pocket. Mr. Flemming grabbed Mr. Norton's arms and they began struggling. (*Id*. at 149). Mr. Walker saw a gun come up in Mr. Norton's right hand and he ran out the door. (*Id*.). He thought Mr. Norton was going to shoot him and Mr. Flemming, who was tussling with him. (*Id*.). Mr. Flemming also ran out the door when he saw the gun come up. (*Id*. at 150). He ran outside after Mr.

Walker. (*Id*.). Mr. Norton came out the door and shot once. (*Id*.). But Mr. Walker did not see him directly when he fired. (*Id*. at 186). He was out before Mr. Norton even came through the door. (*Id*.). Mr. Walker and Mr. Flemming ran through an alleyway. (*Id*.).

Mr. Walker was afraid when the shot went off. (1/14/20 RP 151). The police came rather quickly. (*Id*.). Mr. Walker and Mr. Flemming talked to officers, after which the two went back into the bar and had drinks. (*Id*.).

After security video was played for the jury, Mr. Walker testified the bartender said something to Mr. Norton about the comments he made to him and Mr. Flemming. (1/14/20 RP 159). Mr. Walker again said Mr. Flemming and Mr. Norton were tussling when he saw Mr. Norton's arm come up and a gun. He took off running. (*Id*. at 161). Mr. Walker is 6 feet 4 inches tall and weighs about 220 pounds. (*Id*. at 173).

Mr. Flemming was friends with Mr. Walker. (1/14/20 RP at 185-86). On March 11, 2019, the two decided to shoot pool, have drinks, and hang out. (*Id*. at 196). They went to the Thirsty Dog, an establishment they had been to before, arriving around 9 or 9:15 p.m. (*Id*. at 197). Both men sat at the bar. (*Id*.).

Mr. Norton engaged with Mr. Walker and asked him what he

did for work. That was how the whole thing started. (1/14/20 RP 199). Mr. Norton called Mr. Walker a liar. (*Id*. at 199-200). After they talked, Mr. Norton left the bar and came back 15-20 minutes later. (*Id*. at 200). He sat in the same seat. (*Id*.). Mr. Walker and Mr. Norton had a back-and-forth with each calling the other an MF or F'er. (*Id*. at 243).

Mr. Flemming asked Mr. Norton what was wrong with him and called him a crackhead. (1/14/20 RP 201). Mr. Norton said they were so ignorant they had to cuss. (*Id*.). Mr. Flemming testified the bartender had words with Mr. Norton that he was going to kill them. (*Id*.). Taking it seriously, Mr. Flemming turned and asked him what he said. Mr. Norton told him the same thing. (*Id*.).

They stood up. (1/14/20 RP 202). Mr. Norton had a hand in his pocket like he had something there and it could have been a gun. Mr. Flemming reached and grabbed his wrist as Mr. Norton did have a gun in his pocket. Mr. Flemming was very scared. (*Id*.). He tried to tussle with Mr. Norton and that did not work out so he ran out of the bar. Mr. Norton came out behind him and fired a shot. (*Id*.). Mr. Norton was two steps out of the building when he fired. (*Id*. at 202-03). He screamed get the hell out and don't F'ing come back. (*Id*. at 203). Mr. Flemming testified the shot was not

aimed at him. (*Id*. at 223).

Afterwards, Mr. Flemming talked to the police. (*Id*.). He said he did not threaten Mr. Norton. He only touched Mr. Norton on the wrists. (*Id*. at 204). Mr. Flemming testified Mr. Norton called him the N-word and felt his actions were racially motivated. (*Id*. at 214-15). But Mr. Flemming did not tell the police he was called the N-word even when asked about his conversations with Mr. Norton. (*Id*. at 225-26).

Officer Benjamin Brown-Bieber responded to the Thirsty Dog on March 11, 2019, around 11:43 p.m. with Officer Carrie Christiansen. (1/14/20 RP 246). Having a description of the reported person, he contacted Mr. Norton. (*Id*.). Officer Christiansen interviewed him initially. (*Id*. at 247). Officer Brown-Bieber talked to Mr. Flemming, who was scared, excited, and very loud. (*Id*.).

Officers Christiansen and Corrigan Mohondro patted down Mr. Norton for weapons. (1/14/20 RP 248). A loaded pistol magazine was in his pocket. (*Id*.). They were 9 mm Makarov pistol rounds. (*Id*.). A shell casing was found in front of the bar's entrance; it was a 9 mm Makarov shell casing. (*Id*.).

Officer Brown-Bieber talked to Mr. Norton, who had been

drinking that day. (1/14/20 RP 250). He said a male was running away west on the south side of Liberty Ave. (*Id*.). Mr. Norton stood in front of the bar with a small 9 mm. (*Id*.). After firing it, he put the gun under the driver's seat of his car. (*Id*.). Officer Mohondro found the 9 mm there. (1/15/20 RP 327). Mr. Norton said he fired the shot to make a believer out of him. (*Id*. at 251). Officer Christiansen had talked to Mr. Norton earlier for 45 minutes to an hour. (*Id*. at 255).

Candace Guzman was the bartender at the Thirsty Dog. (1/14/20 RP 262). She was working on March 11, 2019. She knew Mr. Norton as a customer and a friend. (*Id*. at 263). He went to the bar every couple days. (*Id*.). That night, Mr. Norton was at his normal spot at the left side of the bar and had three whiskey and waters. (*Id*. at 264). Ms. Guzman testified he had interaction with two black males at the bar. (*Id*. at 264-65). Mr. Norton asked them where they worked and the two got offended by the way he asked the questions so they got heated up to where they were going after each other. It was a mutual tussle with verbal assaults back and forth. (*Id*. at 278-79). She told them to calm down. (*Id*. at 265). Ms. Guzman talked to Mr. Walker and Mr. Flemming separately from Mr. Norton. (*Id*.).

At the end, when it got out of control, Mr. Norton said I will kill you MF'ers. (1/14/20 RP 266). He grabbed what looked like a gun out of his pocket and Mr. Walker and Mr. Flemming went running outside. (*Id*. at 266-67). Ms. Guzman called 911. (*Id*. at 267). She did not recall Mr. Norton saying anything racist. (*Id*. at 269). But on the 911 call, she said Mr. Norton was being extremely racist. (*Id*.).

Amanda Kinkaid was at the Thirsty Dog the evening of March 11, 2019. (1/14/20 RP 285). She saw a tiff between Mr. Walker, Mr. Flemming, and Mr. Norton, but it calmed down. (*Id*. at 288). She did not see who initiated the interaction. (*Id*.). The second time was when she heard the N-word. (*Id*.). She heard a heated argument and they started standing up. Mr. Norton was rustling around in his pockets and one black guy went running out the door. The other guy stayed behind trying to fight him from taking his hands out of his pocket. (*Id*. at 288-89). He was not successful; Mr. Norton had a gun. (*Id*. at 289). The second guy ran out of the bar as well. (*Id*.). Ms. Kinkaid admitted, however, she did not honestly know what happened that night except for two arguments and one physical altercation. (*Id*. at 294-95). When she talked with Officer Brown-Bieber, she did not mention the N

word to him. (1/15/20 RP 348).

Ashley Rothrock was at the bar with Ms. Kinkaid that night. (1/14/20 RP 356). She saw two black guys getting frustrated and upset with Mr. Norton. (*Id*. at 308-09). Voices were getting louder and the two were telling Mr. Norton to stop. (*Id*.). Ms. Rothrock did not see anything in his hands. (*Id*.). When Mr. Walker and Mr. Flemming ran out of the bar with Mr. Norton following them, she saw a gun to his side. (*Id*.). She heard a gunshot right before all three went outside. (*Id*. at 309-10). Ms. Rothrock did not actually hear the conversation between the three people at the bar. (*Id*. at 311-12).

Bradley Hudson, a regular at the Thirsty Dog, was there on March 11, 2019. (1/15/20 RP 353-54). He did not hear any conversations between Mr. Walker, Mr. Flemming, and Mr. Norton. (*Id*. at 360). Ms. Guzman first brought his attention to them when she went by with her phone and said something under her breath. But nothing was going on so Mr. Hudson did not pay any more attention. (*Id*. at 360-61). The next time, Mr. Flemming stood up and said something to Mr. Norton. (*Id*. at 362). Mr. Flemming was aggressive and confrontational. (*Id*.). He stood up quickly and went toward Mr. Norton, who was just sitting there and then stood

up. (*Id*.). He took a step back and Mr. Flemming grabbed his arms. (*Id*. at 362-63). An altercation ensued, but Mr. Hudson did not see a gun at that time. (*Id*. at 363). He saw the gun later after Mr. Norton yanked his arms away from Mr. Flemming's grip. (*Id*.). Mr. Norton did not approach him first. (*Id*. at 366).

Mr. Hudson followed Mr. Norton out of the bar. (1/15/20 RP 368). Mr. Norton was only a couple of feet outside the second of two doors to the bar. (*Id*. at 370). He never went into the parking lot. (*Id*. at 371). Mr. Hudson did not see which direction Mr. Walker and Mr. Flemming ran. (*Id*. at 372). Mr. Norton stood at the front of the bar and fired a shot. (*Id*.). He did not shoot immediately after they went out the door. (*Id*. at 373). Mr. Norton shot the gun in the air and did not point it at anyone. (*Id*.). Mr. Hudson heard sirens and the police came very quickly. (*Id*. at 374). He told Mr. Norton to take the magazine out and put the gun in his car. (*Id*. at 379).

Mr. Norton testified he ordered dinner to go and sat at the bar. (1/15/20 RP 384-86). He had a long conversation with the bartender as there was hardly anyone in there. (*Id*. at 386). Mr. Norton saw Mr. Walker and Mr. Flemming come in between 8:30-8:45. (1/15/20 RP 388). Around 11, he decided to make some

conversation and asked what they did for a living. (*Id*. at 390). The conversation escalated to a verbal exchange after a while. (*Id*. at 391-92). When Mr. Walker said he worked at Winco, Mr. Norton asked if it was a good place to work. (*Id*. at 392). Mr. Flemming said it was none of his F'ing business and called him an F'ing old man or cowboy. (*Id*. at 393). Nothing was said for a short time. (*Id*.). Then every so often, Mr. Flemming called Mr. Norton a stupid old cowboy. Mr. Norton asked why he had to say that. (*Id*. at 393-394). Mr. Flemming called him an MF'ing moron or idiot and Mr. Norton replied it was plain to see who the moron was as Mr. Flemming could not say a full sentence without throwing in the F word three or four times. (*Id*. at 394). Mr. Walker was basically not involved. (*Id*. at 395). This pointed exchange between Mr. Norton and Mr. Flemming went on for about a half-hour. (*Id*.). It got louder and more serious only at the very end. (*Id*.).

Mr. Norton had his food to go in front of him. He went to his car to get his wallet and smoke a cigarette before coming back to pay for his food. (1/15/20 RP 395-96). He was thinking things had escalated to where Mr. Flemming told him he was going to F him up and take him out. (*Id*. at 396). He had been threatened like that several times. (*Id*. at 400). Mr. Norton thought things could go bad

if he went back in to pay for his food so he decided to get his pistol and stick it in his left pocket. (*Id*.). The gun was loaded. (*Id*. at 396-97). Mr. Norton went back in and, before he even sat down, Mr. Flemming was cussing him again. (*Id*. at 397). Mr. Norton did not call either him or Mr. Walker the N-word. (*Id*.). He was arrested and charged that night. (*Id*. at 398). Not until a week before trial did he face the racial criminal charges. (*Id*. at 398-99).

Mr. Norton did not recall Ms. Guzman talking to him or them during the verbal exchange and incident. (1/15/20 RP 406). He did not threaten to kill Mr. Walker or Mr. Flemming. (*Id*.). After he went back in, Mr. Norton saw Mr. Flemming get up and go around Mr. Walker, who was sitting between them. (1/15/20 RP 414). Mr. Norton said not to do it and got up as two big guys were coming for him. (*Id*. at 417). Mr. Walker moved to the left. (*Id*. at 418). Mr. Norton yelled loudly to get the hell out as he was very scared and figured he had had it. (*Id*.). His gun was in his pocket, but he did not pull it out. (*Id*.). He was not worrying about Mr. Walker, but rather Mr. Flemming who was coming after him. (*Id*. at 419). Mr. Norton was fumbling for his pistol and Mr. Flemming tried to grab him and get his arm out of his pocket. (*Id*. at 420). Mr. Norton thought Mr. Flemming was going to kill him. (*Id*.). He got his gun

out with his left hand and got it to his right hand. (*Id*.). The gun was not pointed at anybody. (*Id*.). He yelled at Mr. Walker and Mr. Flemming to get the hell out. (*Id*. at 421). Mr. Norton followed them out of the bar, about 5 or 6 feet behind. (*Id*.). He had been threatened by both men, but more so by Mr. Flemming. (*Id*.). If Mr. Flemming had not got off his stool, he would not have done so either. (*Id*.). Mr. Norton had simply come back in to pay his tab, pick up his food, and leave. (*Id*.).

Mr. Walker was the first one out of the door and Mr. Flemming followed with Mr. Norton following them. (1/15/20 RP 422). Mr. Hudson was behind Mr. Norton. (*Id*.). Mr. Walker and Mr. Flemming were long gone. (*Id*. at 423). Standing about five feet from the door and worried they were hiding, Mr. Norton fired a shot about 10 seconds after he came out. (*Id*. at 424). He could not recall if he shot into the air or the ground. (*Id*.). Mr. Norton did not point the gun at anyone. (*Id*. at 426). He did not go back inside the bar that night. (*Id*.).

Mr. Norton put the gun back in his car after Mr. Hudson gave him that advice. (1/15/20 RP 426-27). He could hear sirens so he stayed outside until the police contacted him. (*Id*. at 427). Mr. Norton was acting to protect himself that night because the two big

guys threatened to mess him up and take him out. (*Id*. at 428. He said there was nothing racial towards them. (*Id*. at 428, 440).

The defense rested. (*Id*. at 450). The case went to the jury, which found Mr. Norton guilty of two counts of second degree assault and two counts of malicious harassment, all with special firearm verdicts. (1/16/20 RP 550-552). At the sentencing hearing on January 31, 2020, Mr. Norton asked the court to run the firearm enhancements concurrently, not consecutively. (*Id*. at 570-72). The court stated it had no discretion to run the enhancements concurrently so they had to be consecutive. (*Id*. at 575-56). Mr. Norton was sentenced to 15 months on the second degree assault counts and 13 months on the malicious harassment counts, to run concurrently. (*Id*. at 577). The firearm enhancement was 36 months for each assault and 18 months for each malicious harassment for total enhancements of 108 months. (*Id*.). Total confinement was thus 123 months. (*Id*.; CP 190). The Court of Appeals affirmed his convictions and sentence in its June 3, 2021 unpublished opinion.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted because the Court of Appeals' decision (1) conflicts with other appellate decisions and (2) involves

an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1), (2), (4).

Mr. Norton acted in self-defense. The State must prove beyond a reasonable doubt every element of a charged crime. U.S. Const. amends. 5, 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Since a claim of self-defense negates the essential element of intent for second degree assault, the burden is on the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P2d 1069 (1984). The court gave a self-defense and aggressor instruction. (CP 86; CP 145).

For self-defense, the defendant must have subjectively feared he was in imminent danger of death or great bodily harm; this belief was objectively reasonable; the defendant exercised no greater force than was reasonably necessary; and the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). Evidence of self-defense must be viewed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The jury then is to stand in the shoes of the defendant, consider all the facts and

circumstances known to him, and determine what a reasonable person in the same situation would have done. *Id*.

It is undisputed that Mr. Norton, Mr. Walker, and Mr. Flemming engaged in a war of words with each other. (1/14/20 RP 145-46, 148, 199-200, 201, 243, 288-89, 308-09; 1/15/20 RP 391-97, 400). Mr. Flemming and Mr. Norton verbally threatened each other. (*Id*.). Mr. Flemming told him several times he would mess him up and take him out. (1/15/20 RP 396, 400). Mr. Norton thought things could go bad so he decided to get his pistol and stick it in his pocket. (*Id*. at 400). When Mr. Norton went back into the Thirsty Dog, Mr. Flemming got up, went around Mr. Walker, and went after him. (*Id*. at 414, 417, 419). Mr. Norton got up and tried to get his gun from his pocket, but Mr. Flemming grabbed his arms. (*Id*. at 420). The testimony of all three men corroborated these events. There was no credibility determination for the jury to make as these facts were uncontested.

Mr. Norton believed Mr. Flemming was going to kill him or do some serious harm. (1/15/20 RP at 420; CP 142). In these circumstances, there is no doubt Mr. Norton was not the aggressor provoking a belligerent response. (CP 146). Mr. Flemming went after him first and Mr. Norton acted in self-defense. He had no

duty to retreat. (CP 144).

Even viewed in a light most favorable to the State, its evidence fell far short of disproving beyond a reasonable doubt that Mr. Norton acted in self-defense. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The jury decides credibility, but it cannot find facts through guess, speculation, and conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). When, as here, the triggering events were essentially undisputed, the jury did not have to determine credibility. Thus, in order to find Mr. Norton did not act in self-defense beyond a reasonable doubt, the jury necessarily had to speculate, guess, and resort to conjecture to find facts supporting its determination the State had met its burden by the requisite quantum of proof. *Id*.

This was a mutual battle of words that escalated into something physical and serious when, after threatening to take him out, Mr. Flemming came after Mr. Norton. He reacted in self-defense and by necessary means when he saw Mr. Flemming coming for him as he thought he was going to be killed. (1/15/20 RP 420). Mr. Norton subjectively believed he was about to be killed and that belief was objectively reasonable as two big guys were coming for him, a 71-year-old man. *Callahan*, *supra*.

Because the State failed to disprove self-defense beyond a reasonable doubt, the second degree assault convictions with firearm enhancements should be reversed and dismissed. *Acosta*, *supra*. The Court of Appeals' opinion finding to the contrary and improperly giving deference to the jury when the relevant facts were not in dispute with no credibility determination to be made thus conflicts with *Green* and *Hutton*, warranting review under RAP 13.4(b)(1) and (2).

The State must prove all the elements of a crime beyond a reasonable doubt. *In re Winship*, *supra*. A defendant commits the crime of malicious harassment if he maliciously and intentionally threatens a specific person, placing him in reasonable fear of harm to his person, because of his perception of a victim's race. (CP 136). Here, neither Mr. Walker nor Mr. Flemming mentioned to the police or anyone else the night of the incident that Mr. Norton called them the N-word. (1/14/20 RP 159, 225-26). Mr. Walker did not testify he was called the N-word by Mr. Norton and he was the one who would know. (*Id*. at 145-73). Clearly, with respect to the malicious harassment count involving Mr. Walker, there was no evidence beyond a reasonable doubt, or any at all, to support the

charge. *Green*, 94 Wn.2d at 220-21. The malicious harassment conviction involving Mr. Walker cannot stand.

As for the malicious harassment charge involving Mr. Flemming, he testified at trial Mr. Norton called him the N-word, but he did not tell the police that even when asked about the conversations with him. (1/14/20 RP 225-26). Ms. Kinkaid testified she heard the N-word, but she did not mention the N-word to Officer Brown-Bieber when he talked with her. (1/15/20 RP 285, 348). Ms. Guzman testified she did not recall Mr. Norton saying anything racist, yet she said he was being extremely racist in the 911 call. (1/14/20 RP 269). The after-the-fact testimony and contradictory statements are hardly proof beyond a reasonable doubt. What occurred were verbal exchanges between Mr. Flemming and Mr. Norton consisting of name-calling and posturing until Mr. Flemming physically went after Mr. Norton. The altercation had nothing to do with race and everything to do with two men being macho. In these circumstances, even when viewed in a light most favorable to the State as it must be, the evidence did not prove beyond a reasonable doubt malicious harassment. The conviction involving Mr. Flemming should also be reversed and the charge dismissed. The Court of Appeals' opinion affirming the

malicious harassment convictions involving Mr. Walker and Mr. Flemming conflicts with *Green* and review is appropriate under RAP 13.4(b)(1).

Mr. Norton asked the court to run the firearm enhancements concurrently rather than consecutively. (1/31/20 RP 570-72) The The court declared it had no discretion to do so:

> They – the legislature has adopted the Sentencing Reform Act, which sets ranges for charges, and without some very significant and extreme facts to base modifying those ranges, the Court doesn't have any discretion.
>
> And specifically with regards to what is called weapons enhancements, which the jury did find that there was a weapon involved here, there is absolutely zero discretion to the Court. So the weapons enhancements, based upon the jury's finding, are required and they are required to run one after the other. Good time does not apply to those and I don't have any discretion to change any of that . . . (1/31/20 RP 575).

In *State v. McFarland*, 197 Wn.2d 47, 55, 399 P.3d (2017), however, the court held that, in a case in which standard range consecutive sentencing for multiple firearm-related convictions results in a presumptive sentence that is clearly excessive in light of the purpose of the SRA, a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences.

When a court is called on to make a discretionary decision, the court must meaningfully consider the request in accordance with applicable law. *McFarland*, 197 Wn.2d at 56. A trial court errs when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances" or when it operates under the "mistaken belief" that it did not the discretion to impose a mitigated exceptional sentence for which he may have been eligible. *Id*., citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

The question is whether this discretion to run firearm-related offenses concurrently and not consecutively applies as well to firearm enhancements. RCW 9.94A.533(3)(e). If so, the court here abused its discretion as discretion unexercised is discretion abused. *McFarland*, 197 Wn.2d at 56; *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999). As sought by the defense, there is a possibility the judge would have considered imposing concurrent firearm enhancements had it understood its discretion to do so. The court recognized consecutive firearm enhancements would basically result in a life sentence for Mr. Norton. (1/31/20 RP 571-72, 575-76). Although *McFarland* addressed firearm-related offenses, the same result should apply

to firearm enhancements. *See State v. Bonisisio*, 99 Wn. App. 783, 797, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999) (remanding for resentencing because the record indicated the trial court likely would have imposed a different sentence had it correctly interpreted a statute to allow concurrent firearm enhancements).

In *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017), the court held a sentencing judge had discretion to impose an exceptional sentence of concurrent firearm enhancements in juvenile cases. Justice Madsen, concurring in result only, noted that sentencing courts should have the discretion to depart from mandatory firearm enhancements and align such enhancements with the rest of the sentencing jurisprudence. *Id*. at 39. *McFarland* did so with firearm-related offenses and Mr. Norton's case provides this court with the opportunity to align firearm enhancements with the reasoning and result in *McFarland*.

The Court of Appeals' opinion relied on precedent and declined the opportunity to apply the *McFarland* reasoning to firearm enhancements. (Op. at 15, 16, 19-20). The court based its decision on the language of the legislature and precedent of *State v. Brown*, 139 Wn.2d 20, 938 P.2d 608 (1999), *overruled on other*

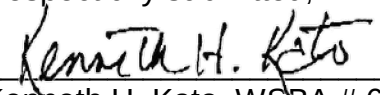
grounds by State v. Houston-Sconiers, *supra*. The issue, however, is ripe for decision by this Court because it involves an issue of substantial public interest that should be decided. Review is warranted under RAP 13.4(b)(4).

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Norton respectfully urges this Court to grant his petition for review.

DATED this 2nd day of July, 2021.

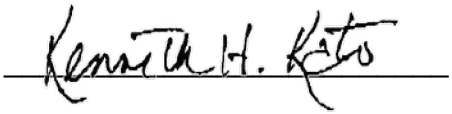
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on July 2, 2021, I served a copy of the petition for review by USPS on Howard L. Norton, # 421861, PO Box 2049, Airway Heights, WA 99001; and through the eFiling portal on Larry Steinmetz at his email address.



APPENDIX

FILED
JUNE 3, 2021
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. HOWARD LEE NORTON, Appellant.	)	No. 37383-5-III UNPUBLISHED OPINION

FEARING, J. — Howard Norton appeals his conviction and sentence for two counts of second degree assault and two counts of malicious harassment. Each conviction carried a firearm-related sentencing enhancement. We affirm the convictions and sentence.

FACTS

This prosecution arises from shots fired one evening at the Thirsty Dog tavern. The State alleges that Howard Norton fired the shots with racial malice. Since Norton challenges the sufficiency of evidence for his convictions, we take the facts in a light favorable to the State.

Howard Norton patronized the Thirsty Dog several times a week. The gregarious Norton enjoyed talking with other customers. On March 11, 2019, Norton drank

whiskey, not his usual drink, at the tavern. Bartender Candace Guzman estimated that Norton drank three whiskeys over six hours.

On March 11, 2019, Ahnonymas Walker and his friend, Carmen Flemming, both black men, entered the Thirsty Dog at 9:30 p.m. to play pool and consume beer. Walker and Flemming often socialize at the Thirsty Dog. While sitting at the bar, the duo saw an unfamiliar man and a woman to their right. The man, defendant Howard Norton, wore a cowboy hat. Norton did not know Walker or Flemming.

Howard Norton engaged Ahnonymas Walker in conversation. Norton asked Walker where the latter worked. Walker responded that he worked in WinCo's produce department. Norton replied that Walker was an ignorant, "effing" liar. Report of Proceedings (RP) (Jan. 14, 2020) at 145. Walker retorted that, if Norton did not believe his story, Norton should go to the produce apartment at 2 p.m. the following day, when he would be working. In reply, Norton called Walker ignorant and a "lying sack of shit." RP (Jan. 14, 2020) at 146. Walker and Norton exchanged further brickbats.

Carmen Flemming overheard the unorthodox conversation between his friend Ahnonymas Walker and Howard Norton. Flemming attributed Norton's behavior to alcohol consumption. After Walker called both men ignorant, Flemming entered the colloquy. Flemming called Norton a crackhead. The bartender, Candace Guzman, heard the heated exchange and told all three men to relax. According to Norton, Flemming thereafter lobbied insults such as "stupid, old cowboy." RP (Jan. 15, 2020) at 393.

Norton averred that Flemming threatened to "F me up." RP (Jan. 15, 2020) at 396. Norton told Flemming: "I said it's pretty plain to see who is the moron here, because you can't say a full sentence without throwing that F word in at least two or three times, you can't say one sentence." RP (Jan. 15, 2020) at 394.

Ahnonymas Walker retired to the gentlemen's room. Howard Norton left the bar. According to Norton, he left intending to procure his wallet from his car in order to pay for food he had ordered to go. Norton returned after fifteen minutes to his original seat with his food and bill awaiting him. He bore not only his wallet, but a gun. Walker noticed a smirk on Norton's face, and Walker told Carmen Flemming to studiously watch Norton because he believed Norton had retrieved a gun. Walker added that he suspected that Norton believed Walker to deal drugs.

Carmen Flemming inquired of Howard Norton if Norton deemed Ahnonymas Walker a drug dealer. Norton responded that Flemming was "an ignorant son-of-bitch and stupid." RP (Jan. 14, 2020) at 148. Norton asked Flemming if Walker told Flemming to ask him the question. Walker interrupted and told Norton that he had not directed Fleming to ask the question. Norton called Flemming the N word. Norton denies uttering the racial disgrace, but another bar patron, Amanda Kincaid, heard the slur. The bartender did not hear the racial insult.

Howard Norton told Ahnonymas Walker and Carmen Flemming that he intended to kill the pair. Norton denies issuing the threat, but the Thirsty Dog's bartender,

Candace Guzman, overheard Norton utter the menace. RP 266. Guzman heard Norton utter: "I will kill you mother fuckers." RP (Jan. 14, 2020) at 266. Flemming took the threat seriously.

Ahnonymas Walker stood and moved to the side. Carmen Flemming told Howard Norton that the latter should not issue death threats. Flemming walked toward Norton, and Norton stood from his bar stool. Flemming backed away, and Norton walked toward him. Norton reached into his pocket. Flemming grabbed Norton's wrist, felt a gun, and a struggle ensued. Walker watched. Walker saw a gun in Norton's right hand, and he ran to the exit door in fear of being shot. He glanced back, and he saw Flemming also darting toward the door.

Carmen Fleming and Ahnonymas Walker fled the Thirsty Dog Bar. RP 150. Howard Norton also exited the tavern and fired a shot into the air. RP 202-03, 373-74. Norton screamed, "'get the hell out of here and don't fucking come back.'" RP (Jan. 14, 2020) at 203.

During his trial testimony, Howard Norton portrayed the conduct of Carmen Flemming leading to the shooting as threatening and as justifying self-defense. When he went to his car to retrieve his wallet, he adjudged the need for a weapon to protect himself. On Norton's returning to the bar, Flemming leaned toward him and stated that he planned to "F me up and anybody else that, you know, that he wants to, he can do it to anybody he said." RP (Jan. 15, 2020) at 413. Norton told him not to try. According to

Norton, Flemming stood from his chair and walked around Ahnonymas Walker toward Norton. Norton believed that "there was two big guys coming after me." RP (Jan. 15, 2020) at 417.

According to Howard Norton's trial testimony, a fearful Norton told Flemming loudly "to get the hell out of here." RP (Jan 15, 2020) at 418. When Flemming turned toward him, Norton reached into his pocket for his gun. Flemming attempted to grab Norton's arm from his pocket. Norton removed the gun from his pocket with his left hand and transferred the weapon to his right hand so that Flemming could not intercept it. He then followed Flemming and Walker out of the bar. On exiting the bar, Norton did not see Walker or Flemming. Norton waited approximately ten seconds before firing his gun and, when he discharged the gun, he did so toward the ground or air, though he could not recall which. Norton insisted that he never pointed the gun at anyone. He acted to protect himself, and the incident was not racially-motivated.

Bartender Candace Guzman phoned 911 dispatch. She reported that an elderly man pulled a gun on two black men and added that the gunman acted "extremely racist" toward the two men. RP (Jan. 14, 2020) at 269. On the arrival of law enforcement, Howard Norton, Ahnonymas Walker, and Carmen Flemming returned to the bar. All three men cooperated with officers.

Spokane Police Officer Benjamin Brown-Bieber spoke with Howard Norton and Carmen Flemming. Flemming mentioned that Norton called him ignorant and a moron,

but Flemming did not comment that Norton employed the N word. Norton admitted he fired a shot outside of the bar. When asked why he fired a shot, Norton stated, "he [Norton] wanted to make a believer out of him [Carmen Flemming]." RP (Jan. 14, 2020) at 251. Norton admitted fault for the shooting and requested that law enforcement avoid blaming the bar. Officer Arthur Plunkett spoke to a frightened Ahnonymas Walker, who breathed heavily from scattering down an alley.

Officer Carrie Christiansen patted down Howard Norton and discovered a loaded pistol magazine in his pocket. The magazine contained nine by eighteen mm Makarov pistol rounds. Officers discovered a matching spent shell casing at the front entrance of the bar. Officers found a semi-automatic pistol in Howard Norton's car.

In conversing with Officer Carrier Christiansen, Howard Norton commented that Carmen Flemming threatened him and others. Norton remarked to Officer Christiansen, "'That's the prejudice thing, you know.'" RP (Jan. 15, 2020) at 429. Christiansen inquired as to what Norton meant when referring to "'the prejudice thing.'" Norton answered: "'He's a black guy you know that. '" RP (Jan 15, 2020) at 429. The officer asked Norton if he was prejudiced, and Norton responded: "'I ain't prejudiced. I don't mind sleeping with them. I just ain't going to go to school with them.'" RP (Jan. 15, 2020) at 429-30.

PROCEDURE

The State of Washington charged Howard Norton with two counts of second degree assault and two counts of malicious harassment, each with a firearm enhancement. The two discrete counts of second degree assault and malicious mischief arose because of the two discrete victims, Carmen Flemming and Ahnonymas Walker.

At trial, Carmen Flemming testified that Howard Norton called him the N word, and he deemed Norton's actions to be racially motivated. Defense counsel asked Flemming about his failure to report the racial slur to officers on the night of the shooting:

> Q. Why wouldn't you, at that scene when this happened, if he called you that name, why wouldn't you tell a trained police officer, who's trained to do interviews, that he used a racial slur toward you?
>
> A. I didn't bring it up because he wasn't there for no racial slur. He was there because the man pulled out a gun, had a gun, so I was talking to him about the incident.

RP (Jan. 14, 2020) at 225-226. Flemming did not think the language relevant at the time.

During trial, bartender Candace Guzman testified that she never heard Howard Norton employ the N word. She told the emergency dispatcher that Norton acted in a racist manner based on a comment by a customer. Patron Amanda Kincaid testified she remembered Norton utter the slur because of its piercing quality.

Howard Norton testified at trial in support of his defense of self-defense. On cross-examination, the State asked Howard Norton if he remembered telling Officer Christiansen, "'That's the prejudice thing, you know.'" RP (Jan. 15, 2020) at 429. The State inquired about additional statements made to Officer Christiansen, asking:

> And then Officer Christiansen says, "What's the prejudice thing?" In which you replied, "He's a black guy you know that." Do you remember that?
>
> A. I do.
>
> Q. And then she asked, "Are you prejudiced?" And you said, "I ain't prejudiced, I don't mind sleeping with them, I just ain't going to go to school with them." Do you remember that?
>
> A. I do.
>
> Q. You were just joking when you said that?
>
> A. It was followed up by the answer, that was just in jest, you know.

RP (Jan. 15, 2020) at 429-30. Howard Norton acknowledged shooting the gun to scare Carmen Flemming and Ahnonymas Walker.

The trial court instructed the jury on self-defense. The trial court also gave an first aggressor instruction which provided in part, that if the jury "find[s] beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense." Clerk's Papers at 145.

The jury convicted Howard Norton on all counts and returned special firearm verdicts. At the sentencing hearing on January 31, 2020, the sentencing court stated that it lacked any discretion with regard to the imposition of the sentences for the firearm

enhancements. The sentencing court sentenced Norton, who had no other countable criminal history, to the low end for each of his four offenses. Norton received 15 months on each count of second degree assault and 13 months on each malicious harassment count, to run concurrently, for an effective total of 15 months. The court imposed sentences for the firearm enhancements, including 36 months for each assault conviction and 18 months for each malicious harassment conviction, for a total of 108 months. The effective sentence for the convictions and firearm enhancements totaled 123 months with 18 months of community custody.

LAW AND ANALYSIS

On appeal, Howard Norton asserts three assignments of error. He challenges the sufficiency of evidence to convict him of the two counts of second degree assault. He challenges the sufficiency of evidence to convict him of two counts of malicious harassment. Finally, he claims the trial court erred when ruling that the court must run his firearm enhancement sentences consecutively.

Second Degree Assault

Howard Norton argues that he acted in self-defense and the State failed to disprove this defense beyond a reasonable doubt. Therefore, according to Norton, the jury could not find him guilty of either count of second degree assault. We disagree.

The State has the burden of proving every essential element of a charged crime beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007);

In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

An assault in self-defense constitutes a lawful act. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). RCW 9A.16.020(3) declares:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
> . . . .
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.010(1) defines "necessary" as meaning:

> that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.

Proof of self-defense negates the knowledge element of second degree assault. *State v. Acosta*, 101 Wn.2d at 616. Since proof of self-defense negates knowledge, due process requires that the State disprove self-defense in order to prove that the defendant acted unlawfully. *State v. Acosta*, 101 Wn.2d at 616. To raise the claim of self-defense,

the defendant must first offer credible evidence tending to prove self-defense. *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627 (1999). The State then bears the burden of disproving self-defense beyond a reasonable doubt. *State v. Graves*, 97 Wn. App. at 61-62. Evidence must show that (1) the accused subjectively feared he was in imminent danger of death or great bodily harm, (2) this belief was objectively reasonable, (3) the accused exercised no greater force than reasonably necessary, and (4) the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). The jury need not find an actual threat of imminent harm as long as the defendant reasonably perceived such a threat. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

Self-defense requires the jury to consider both objective and subjective considerations. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). 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. *State v. Janes*, 121 Wn.2d at 238. The jury must weigh the defendant's actions in light of all the facts and circumstances known to the defendant, even those substantially predating the killing. *State v. Janes*, 121 Wn.2d at 238. The inquiry is subjective to the extent the jury adjudges the facts by standing in the place of the defendant, but objective because the jury must decide whether a reasonably prudent person in such shoes would have acted as the defendant did. *State v. Janes*, 121 Wn.2d at 238.

The jury enjoys the province to weigh the evidence and determine the credibility of the witnesses and decide disputed questions of fact. *State v. Dietrich*, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969). This court does not review credibility determinations on appeal. *State v. Thomas*, 150 Wn.2d at 874.

Carmen Flemming, Ahnonymas Walker, and Howard Norton agreed that they engaged in a heated verbal exchange, including a medley of profanities. They disagree as to other details. The jury served the function of resolving the truthfulness of the varying testimony.

Carmen Flemming and Ahnonymas Walker both denied that they threatened Howard Norton. The jury could believe them. Flemming, Walker, and the bartender Candace Guzman testified that Norton declared an intent to kill Flemming and Walker. Even under Norton's version of the facts, he returned, with his gun, to a seat near Flemming and lingered to pay for his food. He did not inform the bartender of any threats to his person. A jury could conclude that Norton lacked any subjective fear for his safety.

Under Howard Norton's version of the facts, Carmen Flemming approached him first and he feared that Flemming would harm him. Norton averred that he feared that two large men were coming after him. Norton reached for his gun in self-defense. Even should the jury accept that Norton feared Flemming or Ahnonymas Walker, they could determine that he exercised greater force than reasonably necessary. Once Walker and

Flemming ran toward the bar entrance, Norton followed them with a gun pointed toward them. Any threat had ended. He chased them from the bar and then fired his gun. When the two gentlemen fled the bar, Norton lacked any need to shoot.

Malicious Harassment

Howard Norton argues that the State provided insufficient evidence to support the two convictions for malicious harassment because the State failed to prove that Norton threatened Carmen Flemming and Ahnonymas Walker because of their race. He argues that Walker never testified to the use of a racial slur directed toward him. Norton contends that the altercation arose from men being macho, not from racism. Testimony that Norton used a racial slur and that Norton told a law enforcement officer that African-Americans behave in a particular way deconstructs Norton's contention.

Former RCW 9A.36.080 (2010), in effect at the time of the alleged crime, provided in relevant part:

> (1) A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap:
> . . . .
> (c) Threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property. The fear must be a fear that a reasonable person would have under all the circumstances. For purposes of this section, a "reasonable person" is a reasonable person who is a member of the victim's race, color, religion, ancestry, national origin, gender, or sexual orientation, or who has the same mental, physical, or sensory handicap as the victim. Words alone do not constitute malicious harassment unless the

> context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

LAWS OF 2010, ch. 119, § 1. The law required the jury to find that Howard Norton specifically threatened Carmen Flemming and Ahnonymas Walker because of his perception of their race.

RCW 9A.36.080 penalizes acts that rise to the level of malicious and intentional threats against a person based on the victim's race or color. Words stated in a context that show they are a threat constitute malicious harassment provided the person has the apparent ability to follow through with the threat. *State v. Johnson*, 115 Wn. App. 890, 896, 64 P.3d 88 (2003). The trier of fact need not weigh the extent to which bias played a role in the commission of the crime. *State v. Johnson*, 115 Wn. App. at 896. A spontaneous decision to assault someone because of the victim's membership in the targeted group is still malicious harassment. *State v. Johnson*, 115 Wn. App. at 896.

Howard Norton threatened both Carmen Flemming and Ahnonymas Walker. Both are black men. Flemming testified that Howard Norton called him the N word. He believed that Norton's statements were racially-motivated. Customer Amanda Kincaid also testified that she heard the piercing word. Norton stated to Officer Carrie Christiansen, "'That's the prejudice thing, you know.'" RP (Jan. 15, 2020) at 429. When asked what he meant, Norton stated, "'He's a black guy you know that.'" RP

(Jan. 15, 2020) at 429. The officer asked if Norton was prejudiced and he responded, "'I ain't prejudiced. I don't mind sleeping with them. I just ain't going to go to school with them.'" RP (Jan. 15, 2020) at 429-30. This testimony abundantly supports partial motivation of race.

In support of his contention that race did not motivate him, Howard Norton contends that his alleged use of racist terms only became disclosed after the night of the incident. Some of the evidence confirms this contention. Some does not. Regardless, the jury could find the language was used.

Sentence

The sentencing court imposed a sentence that runs 123 months. 15 of those months arise from the four substantive convictions, which sentences the court ran concurrently. One hundred eighteen of those months derive from weapon enhancements for each of the four crimes, which sentences ran consecutive to the underlying sentences and to each other. The sentence enhancements almost subsume the underlying sentence.

Howard Norton argues that the sentencing court erred when it concluded that it lacked discretion to order that his firearm enhancements run concurrently with his sentences for his underlying crimes rather than consecutively. He argues that, pursuant to *State v. McFarland*, 189 Wn.2d 47, 55, 399 P.3d 1106 (2017), a sentencing court should have discretion to impose a sentence that includes concurrent firearm-related enhancements. Precedent compels a different conclusion.

"As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within the correct standard sentencing range established by the Sentencing Reform Act of 1981, chapter 9.94A RCW." *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Nevertheless, "this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." *State v. Williams*, 149 Wn.2d at 147. A court that fails to exercise its discretion has abused its discretion. *Bowcutt v. Delta North Star Corp*., 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

RCW 9.94A.533 provides:

> (1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.
>
> . . . .
>
> (3) The following additional times *shall* be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

> (a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;
>
> . . . .
>
> (e) *Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.*

(Emphasis added.) According to the Washington State Supreme Court, the plain language of the statute not only anticipates the imposition of multiple enhancements under a single offense but clearly insists that all firearm and deadly weapon enhancements are mandatory and must be served consecutively. *State v. DeSantiago*, 149 Wn.2d 402, 418, 68 P.3d 1065 (2003) (addressing the current statute's forerunner, RCW 9.94A.510). LAWS OF 2002, ch. 290 §§ 10, 11.

State v. Brown, 139 Wn.2d 20, 938 P.2d 608 (1999), *overruled on other grounds by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), forecloses Howard Norton's claim that imposition of firearm-related enhancements may be issued concurrently as opposed to consecutively. In that case, the State argued that the trial court erred in granting Natalie Brown's request for an exceptional sentence downward when it imposed a sentence below that outlined for a deadly weapon enhancement. Brown argued that, when presented with sufficient justification, the court can deviate from the sentencing range without limitation. Our high court disagreed:

> RCW 9.94A.310(4) [former relevant statute] begins by providing that deadly weapon enhancements 'shall be added to the presumptive sentence[.]' The more specific language within RCW 9.94A.310(4)(e) requires that '[n]otwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, [and] shall be served in total confinement.' This language clearly dictates a reading by the average informed lay voter that deadly weapon enhancements are mandatory and must be served.

State v. Brown, 139 Wn.2d at 28 (first alteration added). The state Supreme Court relied on this "absolute language" contained in former RCW 9.94A.310(4)(e) and stated that, if the sentencing provision "is to have any substance, it must mean that courts may not deviate from the term of confinement required by the deadly weapon enhancement." *State v. Brown*, 139 Wn.2d 29.

Howard Norton asks this court to extend the reasoning of *State v. McFarland*, 189 Wn.2d 47 (2017), in which our high court addressed sentences for firearm-related *convictions* imposed under RCW 9.94A.589(1)(c) "Consecutive or concurrent sentences." In *State v. McFarland*, Cecily Zorada McFarland contended that the sentencing court erred in concluding that it lacked discretion to impose an exceptional mitigated sentence and impose her firearm-related sentences concurrently rather than consecutively. Our high court agreed, holding that, "in a case in which standard range consecutive sentencing for multiple firearm-related convictions 'results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],' a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent

firearm-related sentences." *State v. McFarland*, 189 Wn.2d at 55 (quoting RCW 9.94A.535(1)(g)). In the opinion, the court recognized a distinction between sentencing for firearm-related enhancements and convictions, stating that the purpose behind the enactment of RCW 9.94A.589(1)(c) was to reverse the Supreme Court's decision in *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 955 P.2d 789 (1998), and "ensur[e] that firearm-related *enhancements* be served consecutively." *State v. McFarland*, 189 Wn.2d at 55. In *In re Post Sentencing Review of Charles*, 135 Wn.2d at 254, our high court had held that "multiple weapon enhancements do not necessarily run consecutively to each other."

Howard Norton also asks this court to extend the reasoning of the state Supreme Court's opinion in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). There, our high court considered the sentences of two juveniles, tried in adult court, whose sentences included firearm enhancements. The court overruled *State v. Brown* to the extent that it applied to bar a sentencing court from exercising its discretion with regard to juvenile sentences. *State v. Houston-Sconiers*, 188 Wn.2d at 21 n.5. Norton points to the opinion of Justice Madsen, who concurred in result only and insisted that the court erred in issuing its decision in *State v. Brown*, as it took away a court's discretion to fulfill the purpose of the Sentencing Reform Act.

We decline Howard Norton's request to follow *State v. McFarland* and *State v. Houston-Sconiers*. We must follow the language of the legislature and the

implementation of that language by the Supreme Court in *State v. Brown* even if we deem the lengthy sentence resulting from multiple sentencing enhancements unfair.

CONCLUSIONS

We affirm all four of Howard Norton's convictions and his sentence.

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

Fearing, J.

WE CONCUR:

Siddoway, A.C.J.

Lawrence-Berrey, J.

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