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Supreme Court No. 102362-6
COA No. 83293-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LASHONNE DAVIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Lashonne Davis seeks review of the decision entered June 20, 2023. Appendix A. A motion to reconsider was denied on August 11, 2023. Appendix B.

B. COURT OF APPEALS DECISION

Lashonne Davis seeks review of the Court of Appeals decision in COA No. 83293-0-I.

C. ISSUES PRESENTED ON REVIEW

1. Did the trial court violate Ms. Davis's Sixth Amendment right to counsel by denying her motion without adequate inquiry?

2. Did the trial court err in denying Ms. Davis's second motion for new counsel?

3. Did the court violate the Sixth Amendment by imposing consecutive sentences absent a jury finding as required by Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and the Sixth Amendment?

4. Did the trial court erroneously miscalculate Ms. Davis's offender score, because a prior handwritten statement mentioning a prior offense, which the sentencing court never found, does not override the defendant's lawyer's subsequent challenge to the score at sentencing?

D. STATEMENT OF THE CASE

Lashonne Davis was charged with two counts of first - degree assault. CP 1-6, 9-10. The State alleged that on January 28, 2020, Ms. Davis was staying in the bedroom at the home of Mr. Melvin Donaldson, and when Donaldson returned to the home with Robin King, Ms. Davis allegedly stabbed them. CP 4. But Ms. Davis believed her life was in danger. 5/10/21RP at 659. The trial court instructed the jury on self-defense. CP 44-46. However, the jury found Ms. Davis guilty. CP 54-55.

The court found that the two offenses were "separate and distinct" under RCW 9.94A.589(1)(a). 10/29/21RP at 55-56; CP 94 (State's sentencing memorandum). The court thus ran the prison sentences for the two offenses

consecutively. 10/29/21RP at 600-02; CP 165. Ms. Davis appealed. CP 172. The Court of Appeals affirmed. Appendix A.

E. ARGUMENT

(1). Review is warranted where the Court of Appeals failed to apply the proper standard when a defendant seeks new counsel.

(a). Summary of why review by the Supreme Court is warranted.

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." Review is warranted where the Court of Appeals failed to apply the requirement that a trial court meaningfully and substantively inquire into a defendant's reasons for dissatisfaction with counsel, instead dismissing the request because Ms. Davis, a layperson, used the phrase "conflict of interest" but did not meet the court's legal conception of that term. The Court further failed to recognize that existing counsel's statements

affirmatively, vividly demonstrated that Ms. Davis must indeed have a new lawyer immediately.

Realizing that an unaided layperson may have little skill in arguing the law or in coping with an intricate procedural system, Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932), the Supreme Court has held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Review is warranted under RAP 13.4(b)(3).

(b). The entire dialogue during the pre-trial request for new counsel, to the extent that there was one, between the court and Ms. Davis, was wholly inadequate.

Ms. Davis was arraigned on February 11, 2020, and subsequently, she sought substitute counsel on August 24, 2020. 8/4/20RP at 5-7. Ms. Davis stated that a conflict of interest existed. 8/24/20RP at 4. Counsel admitted that Ms. Davis had been contacting the Department of Public Defense regarding the matter. 8/24/20RP at 5. Ms. Davis explained to

the court that counsel Jensen had answered her questions about the case untruthfully, had not explained the case to her clearly, and had not explained how she should understand court hearings and important pleadings and paperwork. 8/24/20RP at 5. Ms. Davis emphasized again that counsel had not been truthful with her about the case. 8/24/20RP at 5. The court issued a summary response after having failed to conduct a genuine examination into the request for substitution of counsel, and instead relied on the fact that counsel is a good lawyer to deny Ms. Davis's motion. 8/24/20RP at 5; CP 7 (order of denial).

The Court of Appeals failed to precisely set forth the brief, but telling record of Lashonne's Davis's request for a new lawyer, or appreciate the significance of what was said by both client and lawyer. When Ms. Davis sought substitute counsel on August 24, 2020, she informed the trial court that a conflict of interest existed, but the trial court appeared confused that Ms. Davis did not satisfy some legal conception of a conflict of interest, and placed weight against substitution based on

counsel's statements, instead of recognizing that those statements supported substitution.

> JUDGE OISHI: What, what is it that you want to tell me as far as your motion?
> MS. DAVIS: Okay, so as far as down with this case, Mr. Jensen, there's a conflict of interest between him and myself where -- JUDGE OISHI: Can you keep your voice up, please?
> MS. DAVIS: Okay.
> JUDGE OISHI: Yeah, you said there's a conflict of interest. I'm not sure what you mean.
> MS. DAVIS: Okay, so when asking him starting questions and things, it's things he has been untruthful to me about, you know. And like he has made statements to me saying that we are not going to mess this case up. Like, who is we? And he's talking to me like it's things that he's being said. He hasn't explained certain things to me clearly. Like dealing with court and paperwork and stuff like that. So I feel like I'm not being represented correctly. And need someone that's going to represent me rightfully and be truthful with me in regards to my case.
> JUDGE OISHI: Okay, thank you. Mr. Jensen, you don't have to, but do you have any type of response?
> MR. JENSEN: I guess I, I just don't understand the context of that. And Ms. Davis has been contacting DPD rather than me lately. And I wish I knew why.

8/24/20RP at 4-6. The trial court simply ruled, "Of course, with appointed counsel Ms. Davis does not have the right to an

attorney of her choosing. I haven't heard any type of sufficient basis to discharge Mr. Jensen. I'm also convinced he's going to do a good job on this case and he's more than competent counsel." 8/24/20RP at 5. The court declined to conduct a meaningful examination into the request for substitution of counsel, faulted Ms. Davis for not meeting the "conflict of interest" definition, and ignored her lawyer's admission that they were not communicating. 8/24/20RP at 5; see CP 7 (order of denial).

There was of course no issue of untimeliness. This was a month before the potential date of trial, although subsequent hearings were held, including in November, where the parties discussed Ms. Davis's absence based on a jail report that she was being held for necessary medical treatment. 11/16RP at 16-17. Ms. Davis's lawyer suggested that Ms. Davis might be "malingering;" this allegation was put to rest following the court's bailiff's communications with the jail, which indicated

Ms. Davis was indeed ill, initially thought to be COVID. 11/16/20RP at 18, 30.

The Court of Appeals ruled that the trial court's inquiry was adequate. To the contrary, Ms. Davis explained to the court that her attorney had repeatedly answered her questions about the case untruthfully, had not explained the case to her clearly, and had not explained how she should understand court hearings and important pleadings and paperwork. 8/24/20RP at 5. Ms. Davis emphasized that counsel had not been truthful with her about the case. 8/24/20RP at 5. Plainly, Ms. Davis, a layperson, was not attempting to show a conflict of interest that involved a violation of the Rules of Professional Conduct - a nuanced matter not easily explained even by those with law degrees. See State v. Dhaliwal, 150 Wn.2d 559, 570-71, 79 P.3d 432 (2003) (comparing actual conflicts of interest to a "theoretical division of loyalties.' "). Yet she was wrongly faulted by the court for failing to do so.

The Court of Appeals deemed the Lopez case to be different. Decision, at p. 7. In substance - when compared to the substantive inquiry required of the trial court - it is not different, and indeed Ms. Davis's complaints here, even *more* than Lopez's, demanded further inquiry. In State v. Lopez, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), the defendant told the court that he wanted " 'a different attorney because this one isn't helping me at all.' " State v. Lopez, at 764. The trial court responded, " 'I'm not going to appoint you another attorney.' " Lopez, at 764. Division Three determined that such a summary denial of a request to discharge counsel without inquiring into any of the reasons for the defendant's dissatisfaction with his attorney was an abuse of the court's discretion. Lopez, at 767.

The trial court here conducted no more of a substantive inquiry than the court in Lopez did, except to ask that Ms. Davis state something that met the definition of "conflict of interest" rather than recognizing that she, a lay defendant, was complaining of a complete breakdown in communication. And

trial counsel's remarks should have alerted the court that there was a complete breakdown in the relationship between Ms. Davis and her lawyer. Trial counsel stated, "I guess I, I just don't understand the context of that. And Ms. Davis has been contacting DPD rather than me lately. And I wish I knew why." 8/24/20RP at 4-6. This means that after months of representation Ms. Davis's lawyer claimed complete ignorance of the nature of her dissatisfaction with counsel, and a complete lack of communication between them. It was as if counsel was stating that Ms. Davis's complaints were all in her head, a dismissal that is oft-heard less by men, and more by women. See *Bryna Bogoch, Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, Law & Society Review, Vol. 31, No. 4 (1997), at p. 702 (noting, "It may be that lawyers share a similar bias [as doctors], and grant legitimacy to male clients' anger, while ignoring or undermining similar feelings by women.") (available at https://www.jstor.org/stable/3053984).

The trial court in this case did not make any genuine effort to lean in and truly listen to Lashonne Davis. In the case of Martel v. Clair, 565 U.S. 648, 132 S.Ct. 1276, 182 L.Ed.2d 135 (2012), in the context of Title 18 U.S.C. § 3599 which entitles indigent defendants to the appointment of counsel, the Supreme Court rejected the argument that substitution of an appointed lawyer is warranted only when the lawyer lacks the qualifications necessary for appointment, when he has a disabling conflict of interest, or even when - as one reasonably fears in this case Ms. Davis felt - he has completely abandoned the client; here, this situation demonstrated more than is required. See also Christeson v. Roper, 574 U.S. 373, 377, 135 S. Ct. 891, 893–94, 190 L. Ed. 2d 763 (2015).

These standards make clear that the Court of Appeals approved of an inadequate inquiry. At oral argument in the present case, the Court inquired of appellate counsel as to what the trial court should have inquired. Counsel's response was that the trial court should have stated and asked, "You say he's

being untruthful? That's very serious. Tell me how he's being untruthful." See https://www.courts.wa.gov/content/OralArgAudio/a01/20230413/1.%20State%20v.%20Davis%20%20%20832930.mp3 (beginning at time point 7:47). The claim by Ms. Davis - twice expressed - that her lawyer was being untruthful with her merited, indeed required, an inquiry of that nature, but it did not occur.

In affirming the court's inadequate inquiry, the Court of Appeals distinguished Adelzo-Gonzalez on its facts, but the case was cited for its rule. Decision, at pp. 6-7. Ms. Davis was locked in an irreconcilable conflict – mistrust, and a lack of communication and understanding on both her and counsel's part - to the degree that her upset forced her to demand a new lawyer. As a layperson she could not define the doctrinal requirements for "conflict of interest" - rather, it is the court which "must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern." United States

v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001). A court can "only ascertain the extent of a breakdown in communication by asking specific and targeted questions" about the defendant's dissatisfaction, distrust, and concern. Adelzo-Gonzalez, 268 F.3d at 777. This did not occur. Review is warranted in this case.

(c). Ms. Davis's subsequently expressed complaints required new counsel and also shed light on the trial court's failure to rule correctly pre-trial.

On July 27, 2021, Ms. Davis again sought new counsel, prior to sentencing. 7/27/21RP at 538; CP 57. Ms. Davis first argued to the trial court that her previous motion for new counsel was wrongly ignored by the 2020 court simply because that court believed her lawyer was competent. 7/27/21RP at 538. Demonstrating that error, Ms. Davis's own words made clear the extent of the conflict with counsel and the breakdown in communication that existed since the beginning of the case. Those remarks were extensive. 7/27/21RP at 537-43; see AOB, at pp. 21-26. Even more importantly, in assessing her

request fiord new counsel , a reviewing court looks to the whole record. As Ms. Davis noted, and as counsel himself stated, counsel agreed that there had been a breakdown in communications and that Ms. Davis should be appointed new counsel. 7/27/21RP at 543-44.

Ms. Davis, a layperson surrounded by a courtroom of lawyers including one (hers) who posited that she faked a medical problem to avoid coming to court, told the court that there was a conflict of interest, that her lawyer was not being truthful with her, and that her lawyer was not communicating with her about the case. Duly expanded upon, those serious complaints would present circumstances requiring substitution of counsel. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (good cause includes a conflict of interest, irreconcilable conflict, or a complete breakdown in communication). Instead, the trial court stated that Ms. Davis's attorney was somebody that it had dealt with on lots of cases, and had known before

ascending to the bench, and "he's really good." 7/27/21RP at 546.

But the focus of the trial court's inquiry should be on the nature and extent of the conflict between lawyer and client, not on whether counsel is generally competent. Adelzo-Gonzalez, 268 F.3d at 776-777. And the court's remarks about knowing counsel, as almost verging on an appearance of unfairness, only added to the error in denying new counsel. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); U.S. Const. amend XIV.

Remarkably, the court then stated that any breakdown was caused by Ms. Davis. 7/27/21RP at 547. The court stated, "problems with communication that are caused by the client are not" what courts deem a complete breakdown and communication. 7/27/21RP at 547. There was no basis to make this judgment. At every juncture, the court *per se* abused its discretion by failing to make an adequate inquiry into the attorney-client conflict complained of by Ms. Davis. United

States v. Lott, 310 F.3d 1231, 1249-50 (10th Cir. 2002); State v. Lopez, 79 Wn. App. at 767. As the Ninth Circuit has stated, minimal inquiries do not suffice. See United States v. Moore, 159 F.3d 1154, 1160-61 (9th Cir. 1998). Throughout the case, any inquiry was, at best, perfunctory. The trial court disregarded counsel's statements, which only affirmed a complete breakdown in communications. It should not be deemed anything close to adequate. Review should be granted.

2. As argued in the Opening Brief, Ms. Davis's right to a jury trial was violated where the court, rather than a jury, made the consequential finding that the offenses were "separate and distinct."

(a). Review is warranted.

Review of this issue is warranted RAP 13.4(b)(3) as it presents an important issue under the Sixth Amendment.

(b). The Sixth Amendment was violated and the consecutive sentences should be reversed.

Ms. Davis objected to imposition of consecutive sentences by the court, absent authority from findings made by a jury. CP 67; Opening Brief, at p. 34. In addition to

guaranteeing a lawyer, the Sixth Amendment also provides that "the accused shall enjoy the right to . . . trial, by an impartial jury". U.S. Const. amend. VI; Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In the case of State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2005), this Court concluded that Apprendi and Blakely did not intend to include facts underlying consecutive sentences as among those which must be found by a jury and proven beyond a reasonable doubt under the Sixth Amendment. State v. Cubias, 155 Wn.2d at 554-55. That precedent should not be followed, as it is incorrect and harmful. See State v. Berlin, 133 Wn.2d 541, 547, 947 P.2d 700 (1997). See Opening Brief, at pp. 34-41.

3. The trial court miscalculated Ms. Davis's offender score.

(a). Review is warranted.

Review is warranted under RAP 13.4(b)(1) and (2) where the Court of Appeals failed to follow decisions of this Court and

the Courts of Appeal in reviewing Ms. Davis's offender score. RAP 13.4(b)(1),(2).

(b). The State failed to prove that Ms. Davis's offender score for the scored offense of first degree assault should include her 2011 conviction for second degree manslaughter.

A court may only impose a sentence that is authorized by statute and rests on adequate proof justifying its length. State v. Hunley, 175 Wn.2d 901, 915, 287 P.3d 584 (2012); U.S. Const. amend. XIV. A sentence "based on an improperly calculated score lack[s] statutory authority" and "cannot stand." State v. Wilson, 170 Wn.2d 682, 688, 244 P.3d 950 (2010).

Importantly, as it was not done here, RCW 9.94A.500(1) requires the court to "specify the convictions it has found to exist," based on the evidence presented, and make this information "part of the record." The court must also find the prior convictions proven by a preponderance of evidence before it is authorized to impose a sentence based on that history. Id.

(c). <u>It was not proved in the present judgment that the defendant's 2003 conviction for a 2001 manslaughter in the second degree, a Class C offense for purposes of the present sentencing, should be included in Ms. Davis's offender score.</u>

Ms. Davis's 2003 conviction for a 2001 manslaughter in the second degree is a Class B conviction for sentencing purposes. Former RCW 9A.32.070(2). The offender score statute that governs when class B felony convictions may be included in a defendant's offender score provides for a 10 year washout period. RCW 9.94A.525(2)(b). The "wash out" statutes contains a "trigger" clause, which identifies the beginning of the ten-year period, and a "continuity/interruption" clause, which establishes the substantive requirements a person must satisfy during the period. <u>State v. Ervin,</u> 169 Wn.2d 815, 821, 239 P.3d 354 (2010).

The trial court never made a finding of the intervening misdemeanor that the Court of Appeals relies on. Ms. Davis's judgment contains no such findings by the trial court. <u>See</u> CP 163 (judgment and sentence, at p. 2, stating that "Criminal

history is attached in Appendix B"); CP 168 (judgment and sentence, at pp. 168 (Appendix H, listing manslaughter in King Cty 02-1-05827-9).

In rejecting Ms. Davis's arguments on appeal that the manslaughter offense washed out of her offender score, the Court of Appeals improperly affirmed a present judgment wherein the sentencing court made no finding of any crime subsequent to the manslaughter that prevented its wash out, where the wash out period for manslaughter is ten years. See Decision, at pp. 14-18; see Appellant's Reply Brief, at pp. 13-14 (arguing that the Respondent had conceded in its responsive briefing on appeal that the assault it now claimed interrupted the washout period is not set forth as a finding by the trial court in Ms. Davis's judgment and sentence.).

Below, defense counsel made clear in the defense presentence report that it was not agreeing to any offender score, and was not stipulating to the inclusion of the 2003 manslaughter or the 2015 third degree assault. CP 65 (noting

that Ms. Davis's offender score was yet to be properly determined); CP 67 (noting that defense was not stipulating to the State's claimed history - the manslaughter, and the third degree assault); 10/29/21RP at 556-57 (defense counsel arguing that, as Ms. Davis strongly contended, the manslaughter "should have washed beyond the ten year scope.").

These were among the issues specifically disputed at sentencing on October 29, 2021. In the sentencing briefing filed approximately seven weeks earlier, defense counsel had appended the lay client Ms. Davis's social history set forth by her in a handwritten document, written prior to sentencing, as amongst the support for his advocacy for an exceptional sentence downward under RCW 9.94A.535 based on ongoing harassment by victim Melvin Donaldson, a dysfunctional relationship between Ms. Davis and Mr. Donaldson, drug use, and a history of homelessness and joblessness that were a part of her severe dysfunction as shown by her social history which left her with significantly impaired capacity to conform to the

requirements of the law, and an offense that was a response to a continuing pattern of physical or sexual abuse by Mr. Donaldson. CP 69-72.

The Court of Appeals relied, to deem that the manslaughter did not wash out, on Ms. Davis's personal mention, found within that prior handwritten social history, that she had been "picked up" in 2005 on fourth degree assault (and misdemeanor harassment) and "did 60 days on 90 days." Decision, at p. 17.

But the sentencing court below had never made any such finding, nor did the sentencing court find, either orally or in writing, or by reliance on any filing, that there was any admission or acknowledgement of this 2005 crime or crimes at the present sentencing. Before a court can properly determine the authorized sentence under RCW 9.94A.525, it must "(1) identify all prior convictions; (2) eliminate those that wash out; and (3) 'count' the prior convictions that remain in order to arrive at an offender score." State v. Moeurn, 170 Wn.2d 169,

175, 240 P.3d 1158 (2010). And RCW 9.94A.500(1) requires the court to "specify the convictions it has found to exist," based on the evidence presented, and make this information "part of the record."

Importantly, Ms. Davis's handwritten document was not an acknowledgment allowing a finding of no wash out. Ms. Davis was represented by counsel, and his argument to the court at the October 29 sentencing hearing was that the manslaughter washed out under the 10 year period. 10/29/21RP at 556-57. The sentencing court stated that it disagreed on the argument of washout because of "ongoing criminal history," 10/29/21RP at 557-58, but, as noted, made no oral finding or entry whatsoever as to any given intervening crime. See Reply Brief, at at pp. 13-14.

Certainly, the sentencing court never deemed Ms. Davis to have acknowledged the 2005 crime(s) that the Court of Appeals relied on to affirm her sentence, which are mentioned in her "social history." This was no acknowledgment. This Court

stated that where a defendant "affirmatively acknowledges" a prior conviction, the State is relieved of its burden of proving the existence of the conviction. Decision, at *8 (citing State v. Royal, No. 83322-7-I, slip op. at 7 (Wash. Ct. App. May 22, 2023)).

The Court also stated that a "defendant's 'affirmative acknowledgement of the existence and comparability of out-of-state convictions will render further proof' of the conviction unnecessary." Decision, at *8 (quoting State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004)). But neither Royal nor Ross stand for the proposition that a defendant's social history filed in support of her hope for a downward departure based on her difficult life circumstances, supersedes her lawyer's argument at the sentencing hearing itself, seven weeks later, that expressly disputes inclusion of the manslaughter as part of the offender score, and did so on wash out grounds.

The State's burden under RCW 9.94A.530(2) to prove prior convictions is relieved only "if the defendant affirmatively

acknowledges the alleged criminal history." State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012). No such affirmative acknowledgment was made here. Ms. Davis wrote about her life, her relationship to the victims, and mitigating circumstances; defense counsel, as legal advocate, explicitly stated that, for purposes of his client's criminal history and offender score, the defense was disputing everything, including arguing that the manslaughter washed out. CP 65; CP 67; 10/29/21RP at 556-57.

Nor do these cases stand for the proposition that the Court of Appeals can affirm on the basis of independent review of the record at the appellate level, in search of mention of a prior crime that the sentencing court itself did not find or enter into the record as found to be a part of Ms. Davis's criminal history. Whether a prior crime exists is a question of fact that must be determined properly in the trial court. State v. Arndt, 179 Wn. App. 373, 378, 320 P.3d 104 (2014); In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010).

(d). Even if it were proper to for the Court of Appeals to resolve the wash out issue based on a statement by Ms. Davis in her social history, the Court's reliance on her statement establishes a ten year crime-free period in the community.

The sentencing court made no finding as to a misdemeanor or misdemeanors committed at any time. CP 162-170 (judgment and sentence). The Court of Appeals has rightly indicated it would be improper to rely on the State's unacknowledged assertions as to any alleged 2005 misdemeanors. Decision, at pp. 16-17 (citing Hunley, at 915). This necessarily includes the State's bare assertion that the misdemeanor offenses were sentenced on February 2, 2006. CP 190. This Court determined it could only rely on Ms. Davis's statement in her social history. Decision, at pp. 14-18. Ms. Davis disagrees that the Court can rely on that social history statement as an acknowledgment, for the reasons argued herein, because it does not constitute the same, and the lower court in any event made no such finding of the existence of any prior misdemeanors, much less those at issue.

But even if, solely for purposes of argument, it were proper for the Court of Appeals to rely on its own finding of 2005 crime(s) based on Ms. Davis's social history statement that she had been "picked up" in 2005 on fourth degree assault (and misdemeanor harassment) and "did 60 days on 90 days," see Decision, at p. 17, this information, as the only dates the Court of Appeals deemed proved, by acknowledgment, merely establishes that the prior crimes were committed *in the year 2005*. Thus the crimes could have been committed on the first day of 2005. This does not establish a date of subsequent release from confinement any later in time than a theoretical 61 days after the first day of the year 2005. Even a March 2 date - the 61st day of the year 2005, based on a date of commission of the crimes on January 1, 2005, followed by 60 days confinement - would result in a passage of 10 years, 7 months, and 2 days until the October 4, 2015 date of commission of the third degree assault for which Ms. Davis was convicted on May 31, 2017. See CP 101, 124; see RCW 9.94A.525(2)(b) (establishing

ten year wash out period for manslaughter. Ms. Davis was wrongly sentenced. Reversal and remand for resentencing is required. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 876, 50 P.3d 618 (2002).

F. CONCLUSION

Based on the foregoing, Ms. Davis asks that this Court accept review and reverse her judgment and sentence.

This pleading contains 4,713 words and is formatted in font Times New Roman size 14.

Respectfully submitted this 11th day of September, 2023.

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LASHONNE NICOLE DAVIS, Appellant.	No. 83293-0-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — A jury convicted Lashonne Davis of two counts of assault in the first degree for stabbing two people in the apartment in which she was temporarily residing. Davis now asserts that two judges improperly denied her separate motions to substitute appointed counsel, that the trial court violated the appearance of fairness doctrine by referencing a prior judges' case notes, and that the court miscalculated her offender score. Davis, in a statement of additional grounds, also claims ineffective assistance of counsel and violation of the double jeopardy clause. Davis has not established a basis for relief from her convictions. We affirm.

FACTS

The State charged Davis with two counts of assault in the first degree for stabbing her roommate and his friend. The State alleged domestic violence as to count

Citations and pincites are based on the Westlaw online version of the cited material.

one related to her roommate. Several months after being charged, Davis moved for substitution of counsel and explained to a King County Superior Court judge (first judge) that she was unhappy with her appointed counsel. Davis stated the two had a "conflict of interest," and she was not satisfied with her representation. Her counsel stated that he did not understand the context of her complaints. The court subsequently denied the motion, finding no sufficient basis to discharge appointed counsel.

The case proceeded to trial in May 2021. The jury found Davis guilty on both counts. The jury also issued special findings, finding that Davis was armed with a deadly weapon during the commission of both crimes and that she and one of the victims were members of the same family or household at the time of the stabbings.

In July 2021, approximately two months after the verdict but before sentencing, Davis again moved for a substitution of counsel, this time reading from prepared notes. The trial court (second judge) again denied her motion and the case proceeded to sentencing.

As part of the defense request for an exceptional downward sentence, Davis submitted a hand-written social history. As part of that history, Davis admitted to being "picked up" on "case #05-1-13394-1" in 2005 and pleaded guilty to assault in the fourth degree and misdemeanor harassment. At sentencing, the trial court accepted the State's calculated offender score based on Davis' prior convictions, which included manslaughter in the second degree and assault in the third degree pleaded as a domestic violence offense. The trial court also found that the two current convictions were "separate and distinct" for sentencing purposes. Davis was sentenced to 150 months' confinement on count one and 108 months' confinement on count two, to run

consecutively. The court also imposed a mandatory additional term of 24 months' confinement on each count to be served consecutively because the jury found a deadly weapon was used in the assaults.

Davis appeals.

DISCUSSION

Substitution of Counsel

Davis first challenges the trial court's denial of her motions for substitution of appointed counsel at two points during the proceedings. We address each in turn. Davis contends both judges who heard the motions failed to conduct an adequate inquiry.

When determining whether the trial court erred by refusing to appoint new counsel, we consider "the extent of the conflict, the adequacy of the inquiry, the timeliness of the motion, and the effect of the conflict on the representation actually provided." State v. Thompson, 169 Wn. App. 436, 458, 290 P.3d 996 (2012); see also In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (Stenson II). Upon examining these factors, we will grant relief only if the trial court abused its discretion. State v. Lindsey, 177 Wn. App. 233, 248, 311 P.3d 61 (2013) (citing State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018)). An abuse of discretion occurs if the trial court's decision is manifestly unreasonable or based on untenable grounds. Lindsey, 177 Wn. App. at 248-49 (citing State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)). "'A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the

wrong legal standard.'" State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

A criminal defendant "does not have an absolute, Sixth Amendment right to choose any particular advocate." State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) (Stenson I)). A defendant "must show good cause to warrant substitution of [appointed] counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." Id. at 200 (quoting Stenson I, 132 Wn.2d at 734).

Generally, a defendant's loss of confidence or trust in appointed counsel is not a sufficient reason to appoint new counsel. Id. Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent the presentation of an adequate defense. Stenson I, 132 Wn.2d at 734 (citing State v. Lopez, 79 Wn. App. 755, 766, 904 P.2d 1179 (1995)). Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution on the scheduled proceedings. Id. (citing State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987)).

The defendant need not show prejudice, but must demonstrate the alleged conflict caused some lapse in representation contrary to the defendant's interests, or that it likely affected particular aspects of counsel's advocacy on behalf of the defendant. State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (2008). As we recently held in State v. McCabe, No. 84635-3, slip op. at 6 (Wash. Ct. App. Jan. 30,

2023) (published in part), https://www.courts.wa.gov./opinions/pdf/846353.pdf, an attorney's failure to work with the defendant must be complete in order to establish that there has been a deprivation of counsel.

A trial court conducts an adequate inquiry into a conflict or breakdown in communication by allowing the defendant and counsel to express their concerns fully. State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007) (citing Varga, 151 Wn.2d at 200-01). "Formal inquiry is not always essential where the defendant otherwise states [her] reasons for dissatisfaction on the record." Id. at 271.

A. Pretrial Motion

Davis first moved the court for new counsel in August 2020, approximately eight months into her case and before trial commenced. Davis' counsel set the motion hearing at her request. The trial court asked Davis what she wanted to tell the court regarding her motion for substitution of counsel. Davis explained that she felt there was a "conflict of interest" between herself and her appointed counsel. The judge responded by saying, "you said there's a conflict of interest. I'm not sure what you mean." Davis stated that her appointed counsel had been "untruthful to me about, you know," without further elaboration, and that counsel told her that "we are not going to mess this case up." Davis also complained that her attorney had not explained "certain things" clearly, "like dealing with court and paperwork and stuff like that." Davis said she did not feel like she was being "represented correctly" and needed someone who was going to be truthful with her in regards to her case. Davis provided no further explanation.

After listening to her response, the trial court gave Davis' appointed counsel an opportunity to respond. Her attorney stated that he did not understand the context of

her concerns and explained that Davis had been contacting the Department of Public Defense office rather than contacting him "lately" and that he wish he knew why. The trial court denied Davis' motion, explaining that it had not "heard any type of sufficient basis" to substitute counsel. The trial court further stated that Davis' appointed counsel was "more than competent counsel" and was "convinced [counsel was] going to do a good job on this case."

"[A] conflict over strategy is not the same thing as a conflict of interest." Cross, 156 Wn.2d at 607; see also Stenson II, 142 Wn.2d at 722 ("Case law does not support the application of the concept of a conflict of interest to conflicts between an attorney and client over trial strategy."). A conflict of interest exists when a defense attorney owes duties to a person whose interests are adverse to those of the defendant. State v. Kitt, 9 Wn. App. 2d 235, 244, 442 P.3d 1280 (2019). Under RPC 1.7(a)(2), an actual conflict exists if there is a significant risk that the client's representation will be materially limited by the lawyer's responsibilities to a third person or the lawyer's personal interests. The alleged conflict must be more than a "mere theoretical division of loyalties." Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). In the context of a breakdown in communication, this means that the defendant must demonstrate a "complete collapse" in the relationship with counsel; "mere lack of accord" will not suffice. Cross, 156 Wn.2d at 606.

Davis relies on language stating that "in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001). However, that case is factually distinguishable. In Adelzo–Gonzalez, the defendant's

attorney opposed his client's motions and openly accused him of lying and being coached. The defendant claimed his attorney used profanity and threatened to "sink him for 105 years" so he would not be able to see his wife and children. Id. at 779. The Ninth Circuit reversed, explaining that "[d]espite such striking signs of a serious conflict, the district court made no meaningful attempt to probe more deeply into the nature of Adelzo–Gonzalez's relationship with the appointed counsel." Id. at 778.

Davis also cites Lopez, 79 Wn. App. at 767, as an example of an inadequate inquiry. The defendant in Lopez told the court that he wanted "a different attorney because this one isn't helping me at all." Lopez, 79 Wn. App. at 764. The trial court abused its discretion in Lopez because it summarily denied the request without any inquiry when it responded to the motion by saying, "I'm not going to appoint you another attorney." Id. at 764.

Unlike the court in Lopez, the trial court in the instant case specifically asked Davis what it is she wished to share with the court regarding her motion. After Davis said there was a "conflict of interest" without specificity, the court explained to Davis that the court was not sure what she meant and allowed her to elaborate further.

Davis does not identify anything in the record that demonstrates the trial court abused its discretion in denying her request for substitution of her appointed counsel. The trial court afforded Davis the opportunity to explain her dissatisfaction with her counsel and allowed counsel to respond to those complaints. The trial court considered those responses and explained its own evaluation of Davis' appointed counsel's ability to represent her before denying the motion.

The trial court did not abuse its discretion in denying Davis' pretrial motion for

substitution of counsel.[1]

B. Posttrial Motion

In July 2021, after trial but before sentencing, Davis again moved for substitution of counsel. Davis' counsel filed a written motion for substitution of appointed counsel at Davis' request. This time the motion was heard before a different judge, the same one who presided over trial. The trial court indicated that she read the briefing on the issue provided by both parties before asking Davis to explain the reasons for her request.

Davis read from a prepared statement again indicating a conflict of interest between herself and appointed counsel. Davis largely reiterated the concerns she stated at the first hearing and explained that she felt her counsel had lied to her, lacked professionalism, and failed to explain aspects of the proceedings to her. Davis stated that her counsel had failed to provide her with documents and transcripts of proceedings in the case, had not adequately explained the bail process, and had "harassed" her about incidents she felt were unrelated to the case at hand.

After hearing from Davis, the trial court asked her counsel if there was anything he wanted to add, to which he replied, that it was "well stated by Ms. Davis that there is a breakdown in communications. And I'm simply not doing her any favors by staying on as her lawyer." Neither Davis or her counsel expressed a complete breakdown in communications.

[1] In her brief, Davis also notes that in November 2020, approximately three months after her initial motion for substitution of appointed counsel was denied, her attorney speculated that the reason she had not appeared for a scheduled hearing was that Davis "might be malingering, but I'm saying that without much basis beyond the fact that this is the second time we've been set out to trial, and on the eve of trial she said she's too sick to come."

The trial court said it was mostly hearing the same arguments Davis made in her previous similar motion that was denied. The court explained that judges shared notes internally and she had reviewed the prior judge's notes from the August hearing. The court explained that Davis had not said anything that indicated counsel had done anything to intimidate her or that was "inept or incompetent or not an appropriate decision." The trial court stated,

> So you know, I have to tell you, I don't believe you've shown a conflict of interest. I don't believe you've shown a complete breakdown in communication. What you showed me is, you're not willing to work with your attorney; and that you don't trust your attorney, which is different. That's kind of self-generated by you. Okay? And it's your decision on how you approach your attorney.
>
> But I just do not see how you've shown me that things are so much at odds between the two of you that [counsel] is unable to present an adequate defense at sentencing, which is what's coming up next.

The trial court also commented positively on counsel's performance during trial and her observation of him since she has been on the bench. She also noted that having represented Davis at trial, her appointed counsel was the person who knew her case best and in the best position to represent her at sentencing. The trial court denied Davis' motion.

In this second instance of requesting substitution of counsel, Davis again fails to identify specific circumstances indicating that good cause existed to substitute counsel or that the relationship between herself and her appointed counsel would prevent the presentation of an adequate defense at sentencing. The trial court properly considered the statements of both Davis and her attorney on the matter and considered the court's own evaluation of the attorney's performance through trial and posttrial motions prior to sentencing before denying the motion.

The trial court did not abuse its discretion in denying Davis' post-trial motion for substitution of counsel.

Appearance of Fairness

Davis next contends that the trial court violated the appearance of fairness doctrine by "relying on ex parte communications between itself and the prior court" when it read a prior judge's case notes in considering Davis' second motion for substitution of counsel. Davis also challenges the trial court's reliance on its own prior interactions with Davis' appointed counsel as a violation of the same doctrine.

A criminal defendant has the right to be tried and sentenced by an impartial court. U.S. CONST. amends. VI, XIV § 1; WASH. CONST. art. 1, § 22. A judicial proceeding is valid under the appearance of fairness doctrine if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. State v. Soliz-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017) (citing State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010)). The law requires the judge to not just be impartial, but to *appear* impartial. Id. (citing Gamble, 168 Wn.2d at 187-88). The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts. Id. (citing Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)). The remedy, if the appearance of fairness doctrine was violated, would be a new trial with a new judge. State v. Hendrickson, 81 Wn. App. 397, 402, 914 P.2d 1194 (1996).

We first address the trial court's reading of the previously assigned judge's internal notes prior to ruling on Davis' substitution of counsel motion. A judge is

generally prohibited from initiating, permitting, or considering ex parte communications concerning a pending matter. CJC 2.9(A). The Washington State Supreme Court has defined an ex parte communication as a "'communication between counsel and the court when opposing counsel is not present.'" State v. Perala, 132 Wn. App. 98, 112, 130 P.3d 852 (2006) (internal quotation marks omitted) (quoting State v. Watson, 155 Wn.2d 574, 579, 122 P.3d 903 (2005)).

A judge sharing notes with another judge about the same case is not ex parte communication. The Code of Judicial Conduct permits a judge to consult with court officials or other judges "to aid the judge in carrying out the judge's adjudicative responsibilities" so long as "the judge makes reasonable efforts to avoid receiving factual information that is not part of the record." CJC 2.9(A)(3). Davis asserts that the instant case is analogous with State v. Romano, in which this court reversed a conviction based on the trial court's independent factual investigation prior to sentencing. 34 Wn. App. 567, 662 P.2d 406 (1983). However, in that case, the defendant was convicted of theft in the first degree and the issue before the court was the amount of restitution the judge should impose. Romano, 34 Wn. App. at 568. Rather than relying on the evidence and argument properly before the court, the sentencing judge contacted personal friends engaged in the jewelry business to obtain their assessments of the defendant's purported income from his work as a jewelry salesman. Id. Romano is inapposite. Here, the judge acted within the scope of proper judicial conduct by reviewing the previous judge's notes regarding a similar motion hearing held in open court in the same case. Davis cites to no authority supporting her argument that such actions are prohibited. "Where no authorities are cited in support of

a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Davis also argues that another violation of the appearance of fairness is the court's consideration of its own interactions with defense counsel. Davis argues, without citing any supporting authority, that the court relying on its prior working relationship with counsel appeared deeply unfair. Davis asserts in her Statement of Additional Grounds (SAG) the trial court described its relationship with defense counsel as "personal friends." Davis' recollection is inaccurate.

The trial court noted her observations of counsel during trial and believed he did a good job. The court also noted that it has known defense counsel since before the judge joined the bench, which was 20 years prior. With that context, the judge observed that counsel was really good, well prepared and effective and "about as good an attorney as you're likely to get." The trial court did not suggest it was personal friends with defense counsel. The comments, in context, suggests that the trial court had the opportunity over 20 years to professionally observe counsel's skills as an attorney. This was the court's own evaluation of counsel, which is a factor to consider in determining whether to grant or deny a motion for substitution of counsel. See Stenson I, 132 Wn.2d at 734 (citing Stark, 48 Wn. App. at 253). A reasonable observer who knows and understands all of the facts would not reasonably question the judge's impartiality in this context.

Davis has not established that the trial court violated the appearance of fairness

doctrine.

Separate and Distinct Offenses

Davis also asks this court to disregard the Washington Supreme Court's holding in State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005), and conclude that a jury, not a judge, should have determined if Davis' convictions were "separate and distinct" offenses for sentencing purposes. Davis argues the finding requires her sentences for each count be served consecutively, exposing her to a punishment greater than that authorized by the jury's guilty verdict. See Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

A trial court must impose consecutive sentences where a defendant is convicted of two or more "serious violent offenses" involving "separate and distinct criminal conduct." RCW 9.94A.589(1)(b). Assault in the first degree is a "serious violent offense." RCW 9.94A.030(46)(a)(v). To determine whether criminal conduct is separate and distinct, Washington courts rely on the definition of "same criminal conduct" under RCW 9.94A.589(1); Cubias, 155 Wn.2d at 552. Two or more crimes constitute the "same criminal conduct" if they (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). If two or more crimes do not meet the definition of "same criminal conduct," they are necessarily "separate and distinct." Cubias, 155 Wn.2d at 552.

Where offenses involve separate victims, the offenses are considered "separate and distinct [criminal] conduct." Id. at 552-53 (alteration in original) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 821, 100 P.3d 291 (2004)). Here, the trial court

found that the evidence "clearly established that there were two separate assaults here against two separate victims," ruling that the offenses were separate and distinct.

In Apprendi, the United States Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. It later clarified its decision in Blakely, holding that the "'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303.

In Cubias, the Washington State Supreme Court held that "the trial court's imposition of consecutive sentences under RCW 9.94A.589(1)(b) does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of the decisions of the United States Supreme Court in Apprendi and Blakely." Cubias, 155 Wn.2d at 556. This court is bound by the decisions of the Washington State Supreme Court. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) ("A decision by [the state supreme] court is binding on all lower courts in the state.").

The trial court did not err in finding that Davis' offenses were "separate and distinct."

Offender Score

Davis next challenges the calculation of her offender score. Davis contends that a prior conviction for manslaughter in the second degree should not have been counted in her offender score because it washed out her criminal history under RCW

9.94A.525(2)(b). Davis also argues that a prior assault in the third-degree conviction should have only counted as one point because domestic violence was not pled and proven.

"We review a sentencing court's calculation of an offender score de novo." State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The sentencing court follows the guidelines of the Sentencing Reform Act (SRA) to calculate an offender's score. See RCW 9.94A.525, .510. To determine a sentencing range under the SRA, a defendant is awarded "points" for each prior conviction under the parameters set out in RCW 9.94A.525. The offender score is calculated by "the sum of points accrued under [RCW 9.94A.525] rounded down to the nearest whole number" combined with the seriousness level of the offense, which together provide the standard sentencing range. RCW 9.94A.525; RCW 9.94A.510. In calculating an offender score, the sentencing court must (1) identify all prior convictions, (2) eliminate those that "wash out," and (3) count the prior convictions that remain. State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). The State must prove the existence of prior convictions by a preponderance of the evidence. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010). The State must introduce "evidence of some kind to support the alleged criminal history." State v. Payne, 117 Wn. App. 99, 105, 69 P.3d 889 (2003) (quoting State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). A sentence based on a miscalculated offender score "is a fundamental defect that results in a complete miscarriage of justice" requiring resentencing. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 876, 50 P.3d 618 (2002) (citing In re Pers. Restraint of Johnson, 131 Wn. 2d 558, 568-69, 933 P.2d 1019 (1997)).

A. Manslaughter

A prior conviction is not calculated in the offender score when a defendant has spent a sufficient period of time without committing any crimes resulting in conviction, in essence the offense "washes out." See RCW 9.94A.525(2). A prior conviction for a Class B felony washes out when a defendant has spent "[10] consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(b). The State has the burden of proving a defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500(1).

Davis pleaded guilty to one count of manslaughter in the second degree and was sentenced to 33 months' confinement in 2003.[2] Manslaughter in the second degree is a Class B felony. Former RCW 9A.32.070 (1997). Davis argues that the conviction should have washed out because the State did not present evidence that she committed another crime resulting in conviction in the 10 years following her release from confinement. Davis' prior felony criminal history listed the 2003 manslaughter conviction and a conviction in 2017 of assault in the third degree.

The State argues that Davis was convicted in 2006 of an assault in the fourth degree committed in 2005, preventing the manslaughter conviction from washing out. The State had submitted a 2017 plea agreement to assault in the third degree where she agreed to the criminal history attached by the prosecutor. That criminal history listed a 2005 offense under cause number "05-1-13394-1" for assault in the fourth degree without a disposition date. The State did submit its own sentencing

[2] The record provided does not contain the date on which Davis was released from confinement for this conviction.

memorandum that the prosecutor's understanding of Davis' criminal history included a 2006 conviction of assault in the fourth degree and harassment under cause number "05-1-13394-1." But a prosecutor's summary of a defendant's criminal history is insufficient to satisfy its burden to prove by a preponderance the existence of a criminal conviction. See State v. Hunley, 175 Wn.2d 901, 915, 287 P.3d 584 (2012).

However, Davis admitted to the sentencing court in her handwritten "social history" that in 2005 she was "picked up for case # 05-1-13394-1" and pleaded guilty to "Assault 4 and misdemeanor harassment" and "did 60 days on 90 days." This court has recently held that where a defendant "affirmatively acknowledges" a prior conviction in a filing submitted to the court, the State is relieved of its burden of proving the existence of the conviction. State v. Royal, No. 83322-7-I, slip op. at 7 (Wash. Ct. App. May 22, 2023), https://www.courts.wa.gov/opinions/pdf/833227.pdf. The Washington State Supreme Court has previously held similarly that a defendant's "affirmative acknowledgement of the existence and comparability of out-of-state convictions will render further proof" of the conviction unnecessary. State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004) (citing Ford, 137 Wn.2d at 483 n. 5)). In determining existence and comparability of out of state convictions, the State similarly "bears the burden to prove by a preponderance of the evidence." Id. at 230. Because the State bears the same burden to prove both the existence of an in-state conviction and out-of-state conviction, it follows that the sentencing court would be able to rely on a defendant's "affirmative acknowledgement" of the existence of an in-state conviction in the same way it would for an out-of-state conviction.

Because Davis affirmatively admitted to a criminal conviction that occurred within

10 years following her conviction for manslaughter in the second degree, the court correctly counted her manslaughter conviction in her offender score because it did not wash out.[3]

B. Assault in the Third Degree

Davis also challenges the calculation of a 2017 assault in the third degree conviction as a domestic violence offense. A defendant's offender score may be increased if the defendant has a prior felony "domestic violence offense" that was "pleaded and proven" using the definition of "domestic violence" in RCW 9.94A.030. RCW 9.94A.525(21)(b). The definition of domestic violence includes assault in the third degree committed against another family or household member. RCW 9.94A.030(20)(a); See RCW 10.99.020(4)(iii). A "family or household member" includes "persons who have a biological or legal parent-child relationship." RCW 10.99.020(7)(c).

Here, Davis asserts that the trial court erred in finding that the conviction was for a crime of domestic violence because the judgment and sentence form provided to the court did not have the box for "domestic violence as defined in RCW 10.99.020 was pled and proved" checked. However, the judgement and sentence stated that the court finds that the defendant was guilty of "assault in the Third Degree – Domestic Violence." Documents accompanying that form, provided to the trial court by the State, included a statement by Davis acknowledging "I did cause bodily harm to T.D., a human being,

[3] We need not address the State's unpersuasive alternative argument that because Davis' current conviction occurred in King County Superior Court, the trial court was permitted to take judicial notice of the previous King County conviction as its own record.

when I struck her with a thing likely to produce bodily harm – specifically a dumbbell. T.D. is my biological child."

The trial court found that, despite the failure to check a box on the judgment and sentence form, "the State has clearly established that the prior Assault in the Third Degree was a Domestic Violence" based on that court's findings and Davis' own admission. We hold that the State met its burden of proving by a preponderance that Davis' prior assault in the third degree was a pleaded and proven "domestic violence offense" under RCW 9.94A.030.

We next address claims Davis asserts in a SAG that have not already been addressed in her direct appeal.

Double Jeopardy

Davis also contends in her SAG that her two convictions in the instant case amount to double jeopardy because they were committed using the same weapon and committed at the same point in time.

Both the Fifth Amendment to the United States Constitution and article 1, § 9 of the Washington State Constitution prohibit double jeopardy. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Washington's double jeopardy clause offers the same protection as the federal constitution. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007).

When offenses harm different victims, the offenses are not factually the same for purposes of double jeopardy. State v. Baldwin, 150 Wn.2d 448, 457, 901 P.2d 354 (1995). Here, the offenses caused harm to two different victims, King and Donaldson, and were not factually the same for the purposes of double jeopardy. Davis' two

convictions of assault in the first degree did not violate the double jeopardy clause.

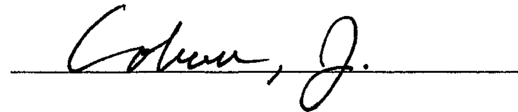
Ineffective Assistance of Counsel

Davis makes several assertions critical of her defense attorney that can be best summarized as an ineffective assistance of counsel claim.

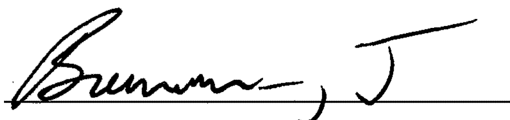
To show ineffective assistance of counsel, Davis must establish that her counsel's performance was both deficient and resulted in prejudice. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions, a strategic or tactical decision is not a basis for finding error. Strickland, 466 U.S. at 689-91.

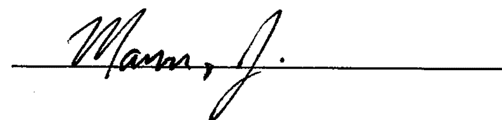
Davis' claims relate to information outside of the record precluding the panel's review. Among her claims, she asserts that her attorney failed to inform her of any plea bargain offered by the State; failed to inform her of the correct sentencing range; failed to request a mental health evaluation; never discussed discovery with her; and never visited her in jail. We cannot consider matters outside the record on a direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition.").

We affirm.



WE CONCUR:





FILED
8/11/2023
Court of Appeals
Division I
State of Washington

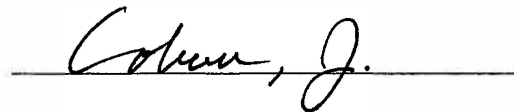
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. LASHONNE NICOLE DAVIS, Appellant.	No. 83293-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Lashonne Davis, having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



DECLARATION OF FILING AND MAILING OR DELIVERY

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. 83293-0-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:

☒ respondent Jennifer Joseph, DPA
[jennifer.joseph@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: September 11, 2023

WASHINGTON APPELLATE PROJECT

September 11, 2023 - 4:28 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83293-0
Appellate Court Case Title:	State of Washington, Respondent v. Lashonne Nicole Davis, Appellant

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