FILED
Court of Appeals
Division II
State of Washington
7/30/2019 4:03 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
8/1/2019
BY SUSAN L. CARLSON
CLERK

97500-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 51000-6-II

State of Washington,

Respondent,

v.

Kennith C. Bowens,

Appellant

PETITION FOR REVIEW

Harry Williams IV, WSBA #41020
Law Office of Harry Williams
707 East Harrison
Seattle, Washington 98102
harry@harrywilliamslaw.com
206.451.7195

Attorney for Petitioner

Table of Contents

Table of Authorities iii

Introduction 1

Identity of Petitioner 2

Citation to Court of Appeals Decision 2

Issues Presented for Review 2

Statement of the case... 3

Video calls from the jail 3

Sentencing 5

Grounds for Review...

Argument 6

A. Standard of review 7

B. Whether a person was a "willing participant"
is a factor that can justify an exceptional sentence 7

C. The court of appeals erred when it affirmed the trial court,
although the trial court found it could not consider the
"willing participant" factor in determining whether to
impose an exceptional sentence.. 8

D. The court of appeals erred in construing an ambiguous
record against Bowens... 12

E. Bowens is indigent and should not be assessed any fees
or costs 13

Conclusion 13

Certificate of Service 14

Appendix (after certificate of service)

Table of Authorities

Table of Cases

State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008)................ 1, 10

State v. Bunker, 169 Wn.2d, 238 P.3d 487 (2010) 1, 9

State v. Grayson, 154 Wn .2d 333, 111 P.3d 1183 (2005) 7

State v. Grewe, 117 Wn.2d 211, 813 P.3d 1238 (1991) ....

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)................

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) 7, 10

State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) 12-13

Statutes

RCW 9.94A.535 .... *passim*

RCW 10.00.020 3

RCW 26.50.110 3

RAP 15.. 13

Introduction

Bowens sought an exceptional downward sentence because his wife, the mother of his child, went to extraordinary lengths to accept his calls from jail—setting up false accounts, registering to receive calls from other inmate's accounts, and changing her phone number to avoid detection. Bowens wanted to argue that these extraordinary actions made her a willing participant in the crime. The trial court found that it lacked discretion to grant an exceptional sentence because Bowen's girlfriend was not "the aggressor" and her efforts to avoid detection and get in contact with Bowens were the same as "answering the phone." The court of appeals affirmed.

This Court should grant review because the court of appeals' decision conflicts with *State v. Bunker*, 169 Wn. App. 407, 183 P.3d 1086 (2008), affirmed regarding other issues, 169 Wn.2d 571, 238 P.3d 487 (2010).

One of the factors that a trial court may use to justify an exceptional downward sentence is if to "a significant degree, the victim was [a] . . . willing participant." RCW 9.94A.535(1)(a). The trial court may exercise its discretion to consider this mitigating factor in imposing a sentence for violation of a no-contact order. *Bunker*, 144 Wn. App. at 421. In *Bunker*, the court of appeals rejected the State's argument that, because consent is not a defense to the crime of violating a no-contact order, the trial court is prohibited from considering the victim's willing participation in the crime when sentencing the defendant. *Id*.

The court of appeals below distinguished *Bunker* because the trial court here did not specifically state it would have imposed an exceptional sentence. Appendix at 8. In distinguishing *Bunker*, the court of appeals construed the record against Bowens, and the State conceded that the record "not a paragon of clarity." State resp. in the court of appeals at 12.

A plain reading of the trail transcript shows that the trial court found it lacked discretion to impose an exceptional sentence based the victim's willing participation. That conflicts with *Bunker*, and this Court should grant review and reverse the court of appeals.

Identity of Petitioner

Kennith Cornell Bowens, appellant below, ask this Court to accept review of the Court of Appeal's decision terminating review.

Citation to the court of appeals decision

The unpublished court of appeals decision was filed on July 16, 2019. The decision is attached as an appendix to this Petition.

Issues presented for review

1. Did the court of appeals decision, which affirmed a trial court's determination that it lacked discretion to consider willing participation in the violation of a no-contact order, conflict with *State v. Bunker*?

2. Did the court of appeals improperly construe an ambiguous record in favor of the State?

Statement of the case

A jury found Kennith Bowens guilty of five counts count of violating a domestic violence court order (RCW 26.50.110(5)) and one count of tampering with a witness, domestic violence (RCW 10.99.020/9A. 72.120(1)(b)). CP 139. On September 15, 2017, he was sentenced to a 60-month sentence on the charges for violating a no-contact order, and a concurrent 51-month sentence on the tampering charge. CP 142.

The court of appeals affirmed the sentence on July 16, 2019, in an unpublished opinion. Appendix.

Video calls from the jail

The underlying charges were based on four video calls and one traditional phone call, all made from the jail. Video from the video calls was presented at trial.

Video calls require that the person outside the jail be registered with the jail video call service. RP 125, 141. For the "the video chats—the person on the outside or inside can schedule it—but they both have to be present." RP 197. The parties have to "schedule it in advance so each party knows what time . . . to be there." RP 197. The person on the outside of the jail has to accept an invitation and call in at the agreed time. RP 198.

If the person on the outside does not want to accept a call, they can choose not to show up or even cancel the appointment. RP 201.

When deputies would block her number, Bowens' wife would get another number so that she could receive calls from Bowens. RP 125; RP 195. She acquired "multiple phone numbers through texting apps." RP 196; RP 202. She even used a fake name, Jim Bass, to hide her identity from the jail. RP 194. Bowens sometimes used other people's accounts as well, so his wife had to arrange to accept calls from those other accounts. RP 63; RP 67.

While the audio of the calls is not completely transcribed, the dialog that is transcribed is consensual, with discussion of, among other things, Bowens' wife's pregnancy with Bowens' child. RP 160-162.

Bowens was in jail for violating an earlier civil no contact order, although that case was dismissed and the no contact order dissolved. RP 92. If that previous order—which had been entered against the wishes of Bowens' wife—had been dissolved earlier, Bowens would not have been jail and any contact with his wife would have been permissible. Perhaps recognizing the lack of violence and acceding to Bowens' wife's request for continued contact, the trial court here refused the state's request for a post-conviction no-contact order between Bowens and his wife. RP 395-96. The trial court also rejected the state's request for anger management classes and participation in the Domestic Violence Perpetrator Program. RP 394.

Sentencing

At sentencing, the alleged victim, Bowens' wife, testified against placement of a no-contact order, stating that "I am in no way afraid of Kennith and I have no need for a No Contact Order. However I am afraid of the impact of not being able to have contact for—contact for his guidance, support and emotional well-being as a partner and father. Without it we all suffer beginning with our unborn daughter." RP 386. She also told the Court that she "never wanted [a] No Contact Order to begin with." RP 387. The court decided not to enter a post-conviction no-contact order. RP 395-96.

Bowens' counsel requested an exceptional sentence. RP 387. Counsel based the request on two factors from RCW 9.94A.535(1): (a) "To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident;" and (g) that the "operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RP 387-88. This appeal focuses on the willing participation question.

The trial court said it needed to employ a "two-part test" to determine whether an exceptional sentence could apply. RP 391. The trial court stated that "Most of the—most of the exceptional downwards—the case law on it—most of the exceptional downwards was where the victim was an aggressor in the case." RP 392.

Defense counsel then reiterated that Bowens was arguing on the basis of his wife being a "willing participant." RP 392. Counsel emphasized that "in order to set up these calls both parties have to arrange for it and—and then it has to be approved." RP 392.

The trial court noted that it could "not base an exceptional sentence on factors necessarily considered by the legislature in establishing a standard range." RP 393. The court then concluded that "We clearly don't have that here. I—we can't even get past the first one." RP 393. The trial court thus found that it could not consider the willing participant factor in evaluating whether to impose an exceptional sentence.

Argument

Kennith C. Bowens was prosecuted for violating a pretrial no-contact order. To have the contact, Bowens' wife had to go through an elaborate process of applying to receive video calls, scheduling times for video calls, and then accepting the calls. To facilitate contact, Bowens' wife frequently changed her number and used a fake identity so that the Clark County jail could not block the calls. Bowens tried to hide his identity by using other inmates' accounts, and Bowens' wife registered to receive calls from those accounts. Bowens' wife made many appointments, through many numbers and many hidden identities. It is hard to conceive of what further efforts his wife would have had to make to show she was a willing participant.

The issue here is whether the court of appeals misread the law and construed the record against Bowens when it affirmed the sentence.

A. Standard of review

"Whether a particular factor can justify an exceptional sentence is a question of law," which the court of appeals reviews "de novo." *State v. O'Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015).

B. Whether a person was a "willing participant" is a factor that can justify an exceptional sentence

A trial court abuses its discretion when it categorically refuses to exercise its discretion to impose an exceptional sentence below the standard range " 'under any circumstances.' " *State v. Grayson*, 154 Wn .2d 333, 342, 111 P.3d 1183 (2005) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342. Thus, the "failure to consider an exceptional sentence is reversible error." *Id.*

One of the possible factors that a trial court may use to justify an exceptional downward sentence is if to "a significant degree, the victim was [a] . . . willing participant." RCW 9.94A.535(1)(a). The trial court may

exercise its discretion to consider this mitigating factor in imposing a sentence for violation of a no-contact order. *Bunker*, 144 Wn. App. at 421.

C. **The court of appeals erred when it affirmed the trial court, although the trial court found it could not consider the "willing participant" factor in determining whether to impose an exceptional sentence**

The trial court here stated that willing participation was "necessarily considered by the legislature is establishing a standard range [sentence]." RP 393. The trial court then conflated "willing participation" with being "first aggressor": "most of the exceptional downwards—the case law on it—most of the exceptional downwards was where the victim was an aggressor in the case. And that's kind of what they key on." RP 392. The trial court **never** said it was considering an exceptional sentence, **never** said anything resembling, "she was a willing participant, but it was not enough to justify an exception downward sentence." Instead, the trial court insisted that "we clearly don't have that here" after noting that an exceptional sentence had to be based on a factor not considered by the legislature. RP 393.

Despite this, the court of appeals found that "the trial court was aware that willing victim participation was a statutory mitigating factor" and thus held that "the trial court did not abuse its discretion when it declined to impose an exceptional sentence." Appendix 2. What the trial court actually did was simply set out the statutory framework and then say

that “we clearly don’t have that here.” RP 393. The “that,” on any reasonable reading, is a factor not already considered by the legislature.

A plain reading of “that” is that “that’ refers to the statement before it—which is a statement repeating the requirement that an exceptional sentence must be based on a factor not considered by the legislature.

Here is the transcript:

> The trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing a standard range.
>
> We clearly don’t have that here. I – we can’t even get past the first one.

RP 393.

The “last antecedent rule []states that qualifying or modifying words and phrases refer to the last antecedent.” State v. Bunker, 169 Wn. 2d 571, 578, 238 P.3d 487, 491 (2010). The last antecedent here is “factors necessarily considered by the legislature.” Under *Bunker* and rules of grammar, the trial court’s “that” referred to the statutory factors, and the decision finding no such factor was present was an error of law, and error affirmed by the court of appeals, creating a conflict with *Bunker*.

The court of appeals found that the trial court considered an exceptional sentence based on its next statement, that the victim “answered the phone” and this was not “sufficiently substantial and compelling” because it did not “distinguish this crime from others in the same category.” Appendix 8, citing RP 393-94. Whether a mitigating

factor is sufficient to distinguish the crime, however, is different from whether the court could consider willing participation.

What the trial court actually said was "her answering the phone is really all we've got as mitigating factors . . ." RP 394. The court then said "I can't get there either." RP 394. Under a plain language analysis, the "either" means that the trial court did not believe that is could consider willing participation in deciding whether to impose an exceptional sentence. Since the willing participation here would have been Bowen's wife's "answering the phone," the lack of reference to her actions in analyzing the first factor shows that the trial court made a **legal** determination that willing participation could not be considered, not a **factual** determination that her actions were insufficient.

Finally, the trial court's next statement was "under the law the appellate review would send it right back for re-sentencing" also favors Bowens. RP 394. Again, that necessarily means that the trial court believed it was making a **legal** determination that it could not consider an exceptional sentence based on willing participation because on appeal it is a "question of law" whether "a particular factor can justify an exceptional sentence . . ." *O'Dell*, 183 Wn.2d at 688. Failing to consider willing participation as factor justifying an exception sentence is reversible error. *Bunker*, 144 Wn. App. at 421-22. The trial court erred when it conflated the willing participation and aggressor factors, and the court of appeals' opinion here creates a conflict with *Bunker*—unless the second, "independent" reason the court of appeals considered was sufficient.

The trial court stated that "her answering the phone is really all we've got as mitigating factors." RP 394. This statement was made after a finding that "clearly" there were no factors present that had not already been considered by the legislature. RP 393-94.

The trial court did not consider whether Bowens' wife's acts—setting up appointments to talk, using a fake identity and multiple numbers to get around restrictions on contact, registering to receive calls from other inmates' accounts to help Bowens evade detection—demonstrated that she was a willing participant or whether these extraordinary acts distinguished this case from others in the same category. RP 393-94.

The court of appeals found that this failure was just a question of the "weight the trial court put on certain facts." Appendix at 9. Instead, the trial court's determination was "clearly erroneous" because it was not supported by substantial evidence. *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

The substantial evidence that was presented could have supported an exceptional sentence—if the trial court believed it had the discretion to impose such a sentence. The crime of violating a no-contact order is completed regardless of whether the victim consents to the contact. CP 112 (jury instruction 18, "It is not a defense to the charge of violation of a court order that a person protected by the order invited or consented to the contact"). Whether the victim picked up the phone or not does not matter—what matters here is the victim's significant actions to encourage further contact, making her a willing participant.

The finding that "answering the phone" was the only evidence was clearly erroneous, and follows from the failure to apply the correct legal standard. It is, of course, common that a protected party simply answers the phone although the caller is the prohibited from making contact, and that is a violation of law. But the record here showed so much more. Bowens' wife:

- Set up appointments to talk;
- Set those appointments up using a fake identity;
- She used multiple numbers to get around restrictions on contact;
- And she registered to receive calls from other inmates' accounts to help Bowens evade detection.

RP 63, 67, 125, 194, 195, 196, 202. She had to work hard and use deception to keep in contact with Bowens.

The court's failure to consider this evidence stems from its incorrect legal analysis: because it failed to understand that the willing participant doctrine could justify a downward departure, it failed to seriously consider the evidence in support of that factor. That was error requiring resentencing.

The court of appeals erred in construing an ambiguous record against Bowens

At best, the record is ambiguous. When an appellate court cannot determine from the record the sentencing court's reasoning, the case must be remanded for a new sentencing. *State v. Parker*, 132 Wn.2d 182, 189,

937 P.2d 575, 579 (1997)(holding that remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway). As the State conceded below, the trial court's statements were not a "paragon of clarity." State resp. in the court of appeals at 12. The court of appeals failed to follow the rule requiring remand where a record is ambiguous, and this represents a second, separate reason for granting the petition.

Bowens is indigent and should not be assessed any fees or costs

The trial court found Bowens indigent. CP 157-58. He is currently incarcerated and is the presumption of continued indigency applies to him. RAP 15.2(f).

Conclusion

The Court should grant the Petition.

Respectfully submitted on July 30, 2019

s/ Harry Williams IV
Harry Williams IV
WSBA #41020
Law Office of Harry Williams
707 East Harrison
Seattle, Washington 98102
harry@harrywilliamslaw.com
206.451.7195
Attorney for Kennith Bowens

Certificate of Service

On July 30, 2019, I served all parties by electronic service, and served a paper copy by U.S. mail to

Kennith C. Bowens #307603
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-2049

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated July 30, 2019 in Seattle, Washington.

s/Harry Williams IV, WSBA #41020

Appendix

Court of Appeals Decision

Filed
Washington State
Court of Appeals
Division Two

July 16, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNITH CORNELL BOWENS, Appellant.	No. 51000-6-II UNPUBLISHED OPINION

GLASGOW, J. — Kennith C. Bowens was prohibited from having contact with Kindra Marcus, his wife, based on a domestic violence no contact order. In violation of the order, Bowens made contact with Marcus several times through the Clark County Jail's video and traditional jail call systems while he was in jail on an unrelated charge. Bowens was convicted of five counts of violation of a domestic violence no contact order and one count of witness tampering. He appeals his standard range sentences.

Bowens argues that the trial court abused its discretion in declining to grant an exceptional sentence downward because, he says, the trial court mistakenly believed that willing victim participation in the phone calls could not be a mitigating factor. He also contends that he received ineffective assistance of counsel at sentencing because his counsel failed to cite to a recent case that would have notified the sentencing court of its discretion to impose an exceptional sentence downward.

We conclude the trial court was aware that willing victim participation was a statutory mitigating factor and hold that the trial court did not abuse its discretion when it declined to impose an exceptional sentence. We also hold that because defense counsel at sentencing cited to the proper statutory authority, counsel's representation was not deficient and Bowens's claim of ineffective assistance fails. We affirm Bowens's standard range sentences.

FACTS

I. BACKGROUND FACTS

During the relevant time period, the Clark County Jail used the Telmate system for phone communications and video visits with people outside the jail, similar to FaceTime video or Skype. When an inmate was booked, the jail staff registered them through the Telmate system and gave them a personal identification number. In order to make a video call, the inmate or the person on the outside could schedule an appointment in advance and the other person had to accept the invitation. In addition to the video call system, inmates in the Clark County Jail could also make traditional phone calls.

Bowens made several video calls to Marcus during his time in the jail. When deputies blocked her number, Marcus would get another number with a different name on the account so that she could receive calls from Bowens. In addition, Bowens made a call from another inmate's account to a phone number listed to someone named "Jim Bass." Verbatim Report of Proceedings (VRP) at 194. However, the person on the other end of the call was Marcus.

Based on Bowens's calls to Marcus while he was in the Clark County Jail, the State charged Bowens with five counts of Felony Domestic Violence Court Order Violation and one count of Tampering with a Witness (Domestic Violence).

II. TRIAL AND SENTENCING

At trial, the State presented evidence about the jail's communications systems and Bowens's repeated contacts with Marcus. Recordings of the video calls and traditional phone calls were played for the jury. During one call, in a conversation about his upcoming trial, Bowens told Marcus that she needed to "make [her]self scarce and not be there so they probably trying to get you—you need still not be there." VRP at 185. He also said that "it jams them up to where they have no choice but to dismiss—do you understand what I'm saying? That's why I'm getting on you." VRP at 186. Bowens asked Marcus: "[W]hat are you going to say [to the prosecutor]?" and Marcus replied: "Well I love you." VRP at 172. Based on this evidence, the jury found Bowens guilty on all charges.

At sentencing, the prosecutor explained that the standard range sentence for each count of violation of the no contact order was 60 months, while the standard range for the one count of witness tampering was 51 to 60 months.

The prosecutor argued that there were several uncharged attempts to contact Marcus where the call went unanswered. And even after Bowens was charged for the video calls, he continued to contact Marcus through other inmates' phone accounts. Again, even after these additional calls were added to the charges, Bowens continued to call Marcus. The prosecutor also noted Bowens's lengthy criminal history that included convictions involving domestic violence in 1994, 1995, 1996, 1998, 1999, 2002, 2005, 2007, 2008, and 2010, in addition to other crimes.

A victim's advocate read a statement from Marcus asking for "the least invasive" sentence for Bowens, in part because Marcus was pregnant with his daughter. VRP at 386-87.

She said that she loved Bowens and wanted him to be a part of her children's lives because he was a supportive father. Finally, the advocate conveyed that Marcus felt the no contact order was "pushed on" her to avoid Child Protective Services' involvement. VRP at 387.

Bowens requested an exceptional sentence downward based on Marcus's willing participation under RCW 9.94A.535(1)(a). He argued that because "you have to have two people participating in [the calls] . . . [s]he's obviously a . . . willing participant in . . . these violations of No Contact Orders." VRP at 388. "The second . . . was the Tampering and the other were . . . phone calls on different numbers and obviously she had to . . . make an effort to . . . have this . . . contact occur . . . under different phone numbers." VRP at 388.[1]

The following exchange then occurred:

> [Trial Court]: We've got to employ [a] kind of two part test to determine whether or not an exceptional sentence either downward or upward. And certainly we can't go upward because sixty months is at the top end of the . . . range. I mean it's the very top. We can't go beyond that.
>
> Now the question is do I have enough to support an appellate review to go down? And I . . . apologize—unless I'm missing something—but I'm just not—other than just personal to him—he's the one that made the calls from the jail. It's not like she was . . . an aggressor . . . in that respect.
>
> [Defense Counsel]: Well—no—a willing participant I think—accepted—

[1] While Bowens's request for an exceptional sentence downward focused on Marcus's willing participation in the calls, he did not limit his request only to the five counts of felony violation of a court order, nor did his assignments of error limit his argument on appeal only to those convictions.

> [Trial Court]: Most of the . . . exceptional downwards—the case law on it—most of the exceptional downwards was where the victim was an aggressor in the case. And that's kind of what they key on.
>
> [Defense Counsel]: [R]ight. And that's one of the factors—and what I'm focusing on is willing participant and . . . my point in that Your Honor is that in order to set up these calls both parties have to arrange for it and . . . then it has to be approved.

VRP at 391-92.

The trial court later explained its decision to decline to impose the exceptional sentence:

> Okay. So here's the law, okay? Here's the law as I understand it. In—in doing this analysis of an exceptional down or up I've got to consider two factors. The first factor:
>
> "*The trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing a standard range*."
>
> We clearly don't have that here. I—we can't even get past the first one.

VRP at 393-94 (quoting *State v. Law*, 154 Wn.2d 85, 95, 110 P.3d 717 (2005)). But the trial court did not stop there. The judge went on to explain:

> The second one is the mitigating factors of her answering the phone is really all we've got as mitigating factors – she answers the phone so:
>
> "*The mitigating factor must be sufficiently substantial and compelling to distinguish this crime from others in the same category*."
>
> *And I can't get there either*. So under the law the appellate review would send it right back for re-sentencing. So your request for an exceptional sentence downwards is denied.

VRP 393-94 (second emphasis added) (quoting *Law*, 154 Wn.2d at 95).

The trial court imposed the standard range sentence of 60 months for each conviction for violation of the no contact order and 51 months for the conviction for witness tampering, all to be served concurrently. Bowens appeals his standard range sentences.

ANALYSIS

I. Decision Not to Impose an Exceptional Sentence

Bowens first argues that the trial court erred as a matter of law by declining to consider his request for an exceptional sentence downward based on the victim's willing participation. He contends the trial court decided that it could not consider the willing participant factor in determining whether to impose an exceptional sentence. We disagree.

A. Exceptional Sentences Departing Downward from the Standard Range

A trial court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). One potential mitigating factor is, "[t]o a significant degree, the victim was an initiator, *willing participant*, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a) (emphasis added).

A decision to impose a standard range sentence is generally not reviewable. RCW 9.94A.585(1). When a defendant has requested an exceptional sentence below the standard range, this court's "review is limited to circumstances where the [trial] court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). We review a sentencing court's decision to deny an exceptional sentence for abuse of discretion. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002); *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015), *review denied*, 189 Wn.2d 1007 (2017).

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis added). A trial court "refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." *Garcia-Martinez*, 88 Wn. App. at 330. "A trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand." *State v. Bunker*, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008).

Conversely, where a trial court has considered the facts and the law, and has determined that there is no basis for an exceptional sentence, then the court has exercised its discretion. *Garcia-Martinez*, 88 Wn. App. at 330-31. In other words, where a trial court has determined that there is no basis for sentencing outside of the standard range and it therefore states that it could not impose a downward departure, that is an appropriate exercise of sentencing discretion. *Id.*

B. The Trial Court Properly Considered the Victim's Willing Participation

Bowens relies on *Bunker* to contend that the sentencing court would have imposed an exceptional downward sentence had it known that the victim's willing participation constituted a mitigating factor. He argues that the trial court erred as a matter of law when it reasoned that the potential for willing victim participation was "necessarily considered by the legislature in establishing a standard range." VRP at 393. Bowens also asserts that the trial court erred when it conflated willing participation with whether the victim was a first aggressor.

The trial court acted within its discretion when it considered and rejected Bowens's request for an exceptional sentence based on the victim's willing participation. *Bunker* is distinct from this case because in *Bunker*, the trial court expressed a willingness to impose an exceptional sentence absent what it perceived as a legal bar to doing so. *Bunker*, 144 Wn. App. at 411. Here, the trial court did not express such a willingness.

The trial court first concluded that Bowens could not overcome the prohibition on imposing an exceptional sentence based on factors necessarily considered by the legislature in establishing the standard range. The court then stated:

> [T]he mitigating factors of—her answering the phone is really all we've got as mitigating factors—she answers the phone so:
>
> *"The mitigating factor must be sufficiently substantial and compelling to distinguish this crime from others in the same category."*
>
> *And I can't get there either.*

VRP at 393-94 (second emphasis added) (quoting *Law*, 154 Wn.2d at 95). The trial court's conclusion that it could not "get there either," indicates that this was an independent reason for denying the exceptional sentence. The trial court considered the fact that Marcus "answer[ed] the phone," but it did not find that fact "sufficiently substantial and compelling" to justify an exceptional sentence downward. VRP at 393-94.

Regardless of whether the trial court stated that there was a legal bar to an exceptional downward departure, it went on to determine whether substantial and compelling mitigating factors, including Marcus's participation, distinguished this crime from others in the same

category. Thus, the trial court did not "'refuse[] categorically'" to consider an exceptional sentence below the standard range under any circumstances. *Grayson*, 154 Wn.2d at 342 (quoting *Garcia-Martinez*, 88 Wn. App. at 330). An articulation of a valid reason for rejecting the exceptional sentence is acceptable. *See id.* (noting that the trial court did not articulate other reasons for denying the requested sentence). Here, the trial court properly exercised its discretion when it declined to impose an exceptional sentence based on the facts before it.

Bowens also argues that the trial court failed to consider whether Marcus's acts of setting up appointments to talk, using a fake identity and varying phone numbers, and registering to receive calls from other inmates's accounts demonstrated that she was a willing participant. He contends that the trial court erred when it declined to impose an exceptional sentence in these circumstances. But Bowens simply disagrees with the weight the trial court gave to certain facts. We do not reverse a standard range sentence except "where the [trial] court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *Garcia-Martinez*, 88 Wn. App. at 330. We hold that the trial court did not abuse its discretion here.

II. Ineffective Assistance of Counsel

Bowens next argues that "[t]rial counsel was ineffective for failing to cite the proper authority that gives the . . . court power to impose an exceptional sentence based on the willing participant doctrine." Br. of Appellant at 2, 10. We hold that Bowens's argument fails because trial counsel cited to the proper statutory authority that put the trial court on notice of its

discretion to impose an exceptional sentence based on the victim's willing participation.

A. Burden to Show Ineffective Assistance

In order to establish ineffective assistance of counsel, Bowens must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To show prejudice, a defendant must show that there is a probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

There is a strong presumption of effective assistance, and the defendant bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Failure to cite to controlling case law can constitute deficient performance. *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 266, 15 P.3d 719 (2001).

B. Counsel's Performance Was Not Deficient

Bowens argues that trial counsel's failure to cite to *Bunker* as "on-point, recent authority" was ineffective assistance. Reply Br. of Appellant at 6. We disagree. Trial counsel was not deficient because he advised the trial court of the correct statutory authority supporting the request for an exceptional sentence and corrected the court when it conflated the concept of a victim-aggressor with willing victim participation. While it is true that failure to cite to

controlling case law can constitute ineffective assistance of counsel, the record shows that Bowens's trial counsel properly cited to RCW 9.94A.535(1)(a), which gave the trial court notice of its authority to impose an exceptional sentence downward based on the victim's willing participation. *See Hernandez-Hernandez*, 104 Wn. App. at 266.

Moreover, Bowens cannot show that he was prejudiced because the trial court made no statements on the record that indicated any openness toward an exceptional sentence. *See State v. McFarland*, 189 Wn.2d 47, 58, 399 P.3d 1106 (2017). Instead, the trial court was aware that willing participation was a mitigating factor, but simply determined that Marcus's participation in the form of "answering the phone" was not "sufficiently substantial and compelling" for an exceptional sentence downward. VRP at 393-94.

Therefore, trial counsel's performance was not deficient, nor was it prejudicial. We hold that Bowens's ineffective assistance of counsel claim fails and we affirm the standard range sentence.

III. APPELLATE COSTS

Bowens requests that this court not impose appellate costs against him because he is indigent. The State explained that it will not seek appellate costs. Therefore, we accept the State's representation and decline to impose appellate costs against Bowens.

CONCLUSION

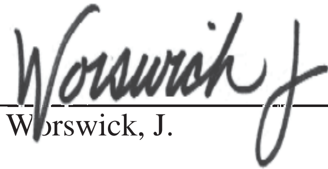
For the foregoing reasons, we affirm Bowens's standard range sentences.

A majority of the panel having determined that this opinion will not be printed in the

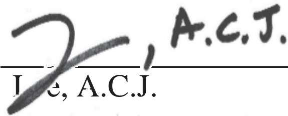
Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:



Worswick, J.



Lee, A.C.J.

LAW OFFICE OF HARRY WILLIAMS LLC

July 30, 2019 - 4:03 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51000-6
Appellate Court Case Title:	State of Washington, Respondent v. Kennith C. Bowens, Appellant
Superior Court Case Number:	17-1-00989-0

The following documents have been uploaded:

- 510006_Petition_for_Review_20190730160244D2506605_0705.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Bowens Petition for Review Cover.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- aaron.bartlett@clark.wa.gov

Comments:

Please ignore the prior, incorrect filing

Sender Name: Harry Williams - Email: harry@harrywilliamslaw.com
Address:
707 E HARRISON ST
SEATTLE, WA, 98102-5410
Phone: 206-451-7195

Note: The Filing Id is 20190730160244D2506605