Nov 2 2020

Supreme Court No. 99091-3

V.

State of Washington, Malek Kalid Ptah
Court of Appeals No. 78978-3-1

Petition For Review. RAP 13.4(c)

WSR# PRO-SE
Malek Kalid Ptah #411148
Coyotee Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Table of Contents

A. Introduction.

I, Malek Kalid Ptah ask this Supreme Court to accept review of the Court of Appeals decision denying motion for reconsideration designated in Part B of this petition.

B. Court of Appeals Decision.

The Court of Appeals Denied my motion for reconsideration Filed August 18, 2020 at 2:30pm Division 1 State of Washington case #78978-3-1 Please view Appendix A1, A2 and A3 of Order Denying Motion For Reconsideration Filed 09/01/2020.

Also Attached is Motion for reconsideration with pages 1-9 with includes Exhibits 1-8 and ~~A and B~~ Attachment A and B.

Appendix A1-A3

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
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September 1, 2020

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(via email)

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Sloanej@nwattorney.net

CASE #: 78978-3-I
State of Washington, Respondent v. Malek Kalid Ptah, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

FILED
9/1/2020
Court of Appeals
Division I
State of Washington

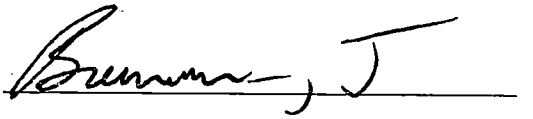
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. MALEK KALID PTAH, Appellant.	)	No. 78978-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Malek Kalid Ptah filed a motion for reconsideration of the opinion filed on June 29, 2020. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration of the opinion filed on June 29, 2020 is denied.

FOR THE COURT:



Judge

Fm: Malek Kalid Kah
Motion for Reconsideration.
Coyote Ridge Corrections Center
P.O Box 769
Connell, WA 99326

Case #: 78978-3-I

To: The Court of Appeals of the State of Washington.
Division 1
600 University Street
Seattle, WA 98101-4170

A. Introduction.

Dear Judges Dwyer, Bowman and Verellen.
This is a motion for reconsideration, RAP 12.4(b). On many points of laws, and facts which has been taken out of context. And some have been overlooked or misapprehended as it was comade. Your Honor, please bare with me thorughout my motion for reconsideration.

B. Assignment of reconsidered Error, In context.

- Abuse of Discretion ~ Standard of Review.
- Mental Illness ~ Chapter 71.05 RCW, Complete chapter.
- Prosecutorial Misconduct
- Ineffective Assistence of Counsel.

Standard of Review - Abuse of Discretion: a court abuses its discretion if the decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v Rodrick, 149 Wn 2d 647, 654, 71 P.3d 638 (2003) a decision is based on untenable grounds or untenable reasons if it rest on facts unsupported by the record or was reached by applying the wrong legal standard. Id. a courts exercise of discretion is unreasonable when it is premised on legal error. State v Ramirez, 191 Wn. 2d 732, 462 P. 3d 414 (2008) A court abuses its discretion when it fails to consider a mitigating factor on the mistaken belief that it is barred from such consideration. State v. O'Dell, 183 Wn 2d 680, 697, 358 P.3d 359, 367 (2015)

Statement of Fact in Argument By Mr. Bales, on page 1262 Sentencing August 24, 2018 (Volume VIII). Verbatim Report of Proceedings; The Court: Can you, before you go to that, clarify the running of the counts, whether the recommendation is concurrent or consecutive? Mr. Mason: Thank you for clarifying that. Mr. Bales: The counts would be concurrent with each other, but the enhancements are consecutive. So, for instance, the longest sentence that the State is requesting is 34 months, and then you have 36 months that has to be consecutive, and another 36 months that has to be consecutive. Mr. Mason: And I'm sorry, clarify that the State's recommending the top end of the range on the firearm concurrent, is that right? The Court: So what I'm hearing is that counts one through four, the standard range, run concurrently. And then added on the both count

one and count two, as to each is a 36-month mandatory, 36 months that gets added on. Mr. Bales: Correct. The Court: What I'm not clear about is whether these two enhancements run consecutive with one another. Mr. Bales: The two enhancements are consecutive with each other as well. And so basically enhancements have to go on to the end of the longest sentence. So a defendant will serve his standard range sentence first, and then the enhancements are at the end of that. So with regards to the State's recommendation, the longest sentence recommendation that we have is for 34 months, and that's on counts two and three. The 10 months, the 34 months, on each of those four counts, would run concurrent with each other, those would all be concurrent. But deadly weapon enhancements and firearm enhancements are consecutive to the standard range, and these consecutive to each other. The Court: And so your addition, again, for your recommendation -- which is obviously not going to necessarily the same as the defense, but what's your addition for total amount of time? Mr. Bales: My addition would be the 36 plus the 36 gives you 72 months of straight time with the enhancements. And that's served consecutively with the longest sentence that's requested, which is 34 month on count two and count three. The Court: Okay, thank you for explaining how you reached that 106. I definitely see that route now.

Supreme Argument, in addition with Graham Case

Argument Supported.

(The SRA operates to provide structure to sentencing, but does not eliminate discretionary decisions affecting

offende sentences. 9.94.010). In State v. Holcomb, 2018 Wash. App. LEXIS 1580, No. 49730-1-II, Holcomb was convicted of assault 1, and assault 2, with firearm enhancements attached to both, the enhancements were ordered to run consecutive of the underlying crimes. At sentencing the Court implies that it lack the discretion to order concurrent sentences for enhancements. The Court States, at LEXIS 944, in "State v. McFarland, 189 Wn.2d 47, 55, 399 P.3d 1106 (2017)" our Supreme Court held that when multiple firearm enhancements result in a presumptive sentence that is clearly excessive, the trial court may run the firearm enhancements concurrently as part of an exceptional, mitigated Sentence under RCW 9.94A.535(1)(g). And even in cases where the defendant did not request an exceptional, mitigated sentence, remand is appropriate when the record suggests at least the possibility that the Sentencing court would have considered imposing concurrent firearm-related sentences had it properly understood that it had the discretion to do so." McFarland, 189 Wn.2d at 59. In McFarland (LEXIS 825 at *917) the Washington Supreme Court finds: "When a trial court is called to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with applicable law. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (quotations added) While the defendant is entitled to challenge a sentence within the Standard range, this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision; every

defendant is entitled to have an exceptional sentence actually considered. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) A discretionary sentence within the standard range is reviewable in "circumstances where the Court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose exceptional sentences below the standard range. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)[3] A trial court errs when "it refuses categorically to impose an exceptional sentence below § 399 P.3d 1111[5] the standard range under any circumstances"[5] or when it operates under the mistaken belief that it did not have the discretion to impose a mitigating exceptional sentence for which a defendant may have been eligible.[5] Garcia-Martinez, 88 App. at 330; also re Pers. Restraint of Mulholland, 161 Wn. 2d at 333.

Prosecutoral Misconduct.

Evidence is "favorable" if it is impeaching or exculpatory, Comstock v. Humphries 786 F.3d 701, 708 (9th Cir 2015) (citing Strickler, 527 U.S. at 281-82). That evidence may have minimal value is not relevant to determination of wheather it is favorable. Comstock, 786 F.3d at 708 (concluding that the states courts finding that a statement impeachment value was "minimal" was contrary to Brady). "Brady information includes material... that bears on the credibility of a significant witness in case", United States v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1993) (quoting United States v. Strifler 851 F.2d 1197, 1201 (9th Cir. 1988)

The above passage is in Reference to with-held recorded Omnibus victom interviews of both Hoard and Seymour. As well as my telephone cellular recordings which would have shined light to the credibility of all. The jury would have heard first hand, Seymour never denied such claim of Hoard assaulting his daughter. Had they been aloud the jury would have been able to understand Seymour asked for my help removing all of Hoards property that he had left in her house. Instead of allowing all the phone call recordings as the state viewed all. As in Mr. Dan 4th respondent brief on page 9 very bottom. The State cherry picked phone calls. The State was able to find the actual audio recordings of only a few of these calls on the disc provided for Ex. 44. The State is relying on the verbatim report of proceedings and the defense briefing because the trial court largely relied

on the defense's offers of proof as well. (In addition to Prosecutor Misconduct: As in Kyles v. Whitley and Brady v Maryland, The prosecution failed to disclose Evidence in a Timely manner which was Exculpatory And pivitol to my ~~[redacted]~~ Innocence. It was all of the above following documents: Recorded Interview statements of "Victims" contradicting many statements that would have put light on there credability and my innocence, Brady v. Maryland, 56 U.S. 117; Kyles v. Whitley, 16 U.S. St. CT. 111. Among many other prosecutor misconduct violations, my Appeal Lawyer says reversal Due! Ineffective Assistance of Counsel.

• My counsel was Ineffective because he failed to Subpoena my Mental Health files, And get a mitigated sentence and downward departure. His deficient performance prejudiced me as stated in the Two Prong Approach of Strickland vs. Washington 117 Wash. 2d 206.
• Ex Trial Counsel Col. Mack B Tackett was deficient also because no proper protocal was followed under any of Mental illness sections such as RCW 71.05.010 Legislative intent, or neither of RCW 71.05.135 Mental health commissioners Appointment. or RCW 71.05.137 Mental health commissioners Authority. While, The first inquiry then becomes on of prejudice. Prejudice is established where "there is a reasonable possibility that, but for counsels unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. at 694 (emphasis added). A reasonable probability is a probability sufficent to undercline confidence in the outcome." Id. ; United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375,

87 L. Ed. 2d 481 (1985), ~~as amended~~ on remand 798 F. 2d 1297 (9th Cir. Wash. 1986) (same). See also, Woodford v. Visciotti, 537 U.S. 19, 22, 123 S. Ct. 357, 154 L. Ed 279 (2002).

Statement.

• Trial counsels' Mark B Tackett was also inadequate constitutionally prejudicial, when he abruptly asserted "self defense as an all or nothing approach which was very risky" days into trial. From my knowledge Col Mark B Tackett suggested we use defences: Diminished Capacity and Necessity. The only reasoning I took the stand at Trial was, Col. Tackett told me he would ask me questions such as "what took place in the house, leading you to believe your god daughter was molested? Where you the only one who had that impression? Who told you fullfill your god fatherly duties, ask her questions. Nor did Col. Tackett ever object to any of the Prosecutors ill-intentioned remarks and inferences which lead to my wrongful conviction, and excessively sentences. As Col. Tackett continued to move forward with his "Mandatory continuences", And steady ignoring my mental health illness. I soon tried to understand from different older friends I talk to ~~[illegible]~~ letting me know that lawyer is playing you. After I signed over power of attorney to Col. Mark B. Tackett #19519 in March 2017. I found it odd, so I contacted ACLU, Disability Rights Washington trying to get help. I found out in Washington Professional Practice, after convicted - it is unethical, unprofessional conduct for a lawyer to do. Everything soon became clear

as to why Counsel Col Tackett never took my case serious, and never seem to follow up. Turned out Col Tackitt had been project his micro aggression upon me, due to him being of Confederate bloodline in his family and obsession with the civil war; Keep in mind im from New Orleans LA, born in Baton Rouge, LA. & I know racist.

Court of Appeals please review the following Exhibits: 1, 2, 3, 4, 6, 7, and 8.

Also review Attachment A & B

Exhibit C is the Revocation of Power of Attorney.

Thus, I did not have an equal opportunity to ~~pass~~ present a defense.

Sincerely, Thank you for your time

Your Honor: Judge Dwyer, Judge Bowman and Judge Vecellen.

Malek Kal Aug. 17, 2020

Complete Chapter | RCW Dispositions

Chapter 71.05 RCW

MENTAL ILLNESS

Sections

Ex. 1

Ex.2

Ex 3

NOTES:

Rules of court: *Cf. Superior Court Mental Proceedings Rules (MPR).*

Reviser's note: The department of social and health services filed an emergency order, WSR 89-20-030, effective October 1, 1989, establishing rules for the recognition and certification of regional support networks. A final order was filed on January 24, 1990, effective January 25, 1990.

Council for children and families: Chapter 43.121 RCW.

Minors—Mental health services, commitment: Chapter 71.34 RCW.

Ex. 4

RCW 71.05.137

Mental health commissioners—Authority.

The judges of the superior court of the county by majority vote may authorize mental health commissioners, appointed pursuant to RCW 71.05.135, to perform any or all of the following duties:

(1) Receive all applications, petitions, and proceedings filed in the superior court for the purpose of disposing of them pursuant to this chapter or RCW 10.77.094;

(2) Investigate the facts upon which to base warrants, subpoenas, orders to directions in actions, or proceedings filed pursuant to this chapter or RCW 10.77.094;

(3) For the purpose of this chapter, exercise all powers and perform all the duties of a court commissioner appointed pursuant to RCW 2.24.010;

(4) Hold hearings in proceedings under this chapter or RCW 10.77.094 and make written reports of all proceedings under this chapter or RCW 10.77.094 which shall become a part of the record of superior court;

(5) Provide such supervision in connection with the exercise of its jurisdiction as may be ordered by the presiding judge; and

(6) Cause the orders and findings to be entered in the same manner as orders and findings are entered in cases in the superior court.

[2013 c 27 § 1; 1989 c 174 § 2.]

NOTES:

Severability—1989 c 174: See note following RCW 71.05.135.

Ex. 5

RCW 71.05.135

Mental health commissioners—Appointment.

In each county the superior court may appoint the following persons to assist the superior court in disposing of its business: PROVIDED, That such positions may not be created without prior consent of the county legislative authority:

(1) One or more attorneys to act as mental health commissioners; and

(2) Such investigators, stenographers, and clerks as the court shall find necessary to carry on the work of the mental health commissioners.

The appointments provided for in this section shall be made by a majority vote of the judges of the superior court of the county and may be in addition to all other appointments of commissioners and other judicial attaches otherwise authorized by law. Mental health commissioners and investigators shall serve at the pleasure of the judges appointing them and shall receive such compensation as the county legislative authority shall determine. The appointments may be full or part-time positions. A person appointed as a mental health commissioner may also be appointed to any other commissioner position authorized by law.

[1993 c 15 § 2; 1991 c 363 § 146; 1989 c 174 § 1.]

NOTES:

Effective date—1993 c 15: See note following RCW 26.12.050.

Purpose—Captions not law—1991 c 363: See notes following RCW 2.32.180.

Severability—1989 c 174: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1989 c 174 § 4.]

EXHIBIT C

Revocation of Power of Attorney

I, Malek Khalid Heru-Rah, hereby revoke the Durable Power of Attorney I gave to Col. Mark B. Tackitt, WSBA#19519 Cremenal Defense Attorney, of Law Offices of Col. Mark B. Tackitt P.O Box 46330 Seattle, Washington 98146.

Maleke K. H. Rah — 02/19/19
SIGNATURE — DATE

Notarization

State of Washington

County of Franklin

I certify that I know or have satisfactory evidence that HTHH, Malek, is the person who appeared before me, signed above, and acknowledged that the signing was done freely and voluntarily for the purposes mentioned in this instrument.

SUBSCRIBED and SWORN to before me on J. Brian 2/19/19.

Julie Brown
SIGNATURE OF Notary

Julie Brown CRT
PRINT NAME OF Notary

NOTARY PUBLIC for
the STATE OF WASHINGTON.

My commission expires
3/28/2020

JULIE BROWN
COMMISSION EXPIRES
NOTARY
PUBLIC
MARCH 28, 2020
STATE OF WASHINGTON

EXHIBIT C - Revocation of Power of Attorney.

ATTACHMENT A

From: "Tackitt (mobile)" <tackitt@zipcon.net>
Date: August 9, 2018 at 3:20:39 PM PDT
To: <david@demasonlaw.com>
Subject: The "Civil War stuff"

Dave,

You'll need to be more specific about what you seek. "Civil War stuff" covers a very wide range of possibilities. Considering my knowledge of the client and the status of his situation, I'm thinking your inquiry isn't of a positive nature.

I accepted many phone calls from him. I even accepted calls when I was on vacation. I do acknowledge having spoken to him while I was at Civil War sites in Georgia (Chickamauga) and Alabama (Ft. Blakeley). I have accepted calls from him while I was touring sites in Tennessee, Mississippi, Louisiana, Georgia and Alabama.

Did he tell you what I ordered at Battlefield Burgers in Ft. Oglethorpe, GA, last October? He caught me while I was waiting for an order. Or a Zaxby's while I was on the road in Alabama?

He did catch me at a local Civil War reenactment in July of last year. I was the acting adjutant for the blue side at that event in Chehalis. I don't do role playing. My primary duty at that event, and most events, is to teach CW drill. We wear wool clothing regardless of the weather.

I remember taking a timeout on a very hot day and turning on my phone to check for messages. He happened to call when my phone was on. I might have said something about wearing a dark blue, wool uniform on a sunny field. He had no problem with what I was doing. (The reason for his call was something to do with relaying messages between him and his girlfriend.)

I do not ever recall having any kind of debate with him about the war. What part of slavery is a good idea? I do remember one of the times where he yelled and threatened me from the holding cell in e1201 during a case setting. He did that more than once. This one in particular was post Charlotte.

Said I was a Confederate because attorney James Bible had told him such. Told him if he had any problems, he should address them to the court. Judge Lum gave him a ton of slack and allowed the client to address any concerns he had. He never brought up the Confederate remark nor anything to do with my "Civil War stuff."

He may also be confusing the type of ties I wear. Really. I wear Scottish and English clan tartans. He thought that meant, Klan, as in KKK. He seemed satisfied about my explaination that clan doesn't mean Klan. (I had never even thought of that before he mentioned it.) He never brought it up beyond that one time which was during an e1201 case setting.

If he's trying to label me as a racist, you might consider speaking with him about the Eritrean cab driver he didn't want on our jury.

- Tackitt
206/841-7566 cell

Yesterday, 2:02 PMDavid Mason; **ATTACHMENT B**

Dear Mr. Mason-

This email is in response to your inquiry seeking information on communications from your client Malek Kahlid involving his previously assigned attorney Mark Tackitt. As you know I am the Director of Assigned Counsel for the King County Department of Public Defense and handle calls involving client concerns on assigned counsel cases.

I received numerous phone calls from Mr. Ptah where he expressed concerns over the representation provided by Mr. Tackitt. These calls generally expressed concerns over what Mr. Ptah saw as a failure to adequately address important issues in his case, both legal and factual, and what he saw as unnecessary delays in preparing his case. As is my normal practice I shared his concerned with Mr. Tackitt so that any issues could be addressed between the attorney and client.

I hope this helps information helps with your representation. Please let know if I be of further assistance.

Sincerely,

Burns

R. "Burns" Petersen,

Director of Assigned Counsel

King County Department of Public Defense

Dexter Horton Building

710 Second Ave, Suite 200

Seattle, WA 98104

robert.petersen@kingcounty.gov

burns.petersen@kingcounty.gov

206-477-8966 (dir)

Assigned Counsel Website

RCW 71.05.180

Detention period for evaluation and treatment.

*** CHANGE IN 2020 *** (SEE 5720-S2.SL) ***

If the evaluation and treatment facility, secure withdrawal management and stabilization facility, or approved substance use disorder treatment program admits the person, it may detain him or her for evaluation and treatment for a period not to exceed seventy-two hours from the time of acceptance as set forth in RCW **71.05.170**. The computation of such seventy-two hour period shall exclude Saturdays, Sundays and holidays.

[2019 c 446 § 18; 2016 sp.s. c 29 § 219; 1997 c 112 § 12; 1979 ex.s. c 215 § 11; 1974 ex.s. c 145 § 11; 1973 1st ex.s. c 142 § 23.]

NOTES:

Effective dates—2016 sp.s. c 29: See note following RCW **71.05.760**.

Short title—Right of action—2016 sp.s. c 29: See notes following RCW **71.05.010**.

Table of Authorities

Washington Cases

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Federal Cases

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C. Issues Presented For Review

In Conclusion, Thank You all for taking my everthing into consideration; I Appreciate you taking the time reading my Presented Issues For Review. Blessings.

Malek Khalid Ash

KING COUNTY SUPERIOR COURT

State of Washington,	)	
Plaintiff,	)	
vs.	)	No. 16-1-06734-1 SEA
	)	COA No. 78978-3-I
Malek K. Ptah,	)	
Defendant.	)	

VERBATIM REPORT OF PROCEEDINGS (VOLUME VIII)

Sentencing August 24, 2018

APPEARANCES:

For the Plaintiff:
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Seattle, Washington 98104-2362

For the Defendant:
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REBECCA E. DONLEY, CCR 3184
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E-mail: Rdonley@caseydonley.com

I N D E X

(Proceedings of August 24, 2018 commenced at 1:06:44 a.m.)

THE COURT: Thank you, please be seated, and the parties in the matter involving State and Mr. Ptah may come forward.

MR. BALES: Thank you. Your Honor. Your Honor, this first matter this afternoon is the State of Washington vs. Ptah, Cause No 16-1-06734-1 Seattle. Brad Bales on behalf of the State of Washington. The defendant's in court, in custody, present with counsel, Mr. Mason. The original counsel of record was Mark Tackitt. He was the trial attorney.

THE COURT: Let me just indicate what I've reviewed for today's hearing. I have this scheduled for sentencing. I also have a motion for a new trial and to vacate the judgment pursuant to Criminal Rule 7.8. Counsel for the state, you've seen that?

MR. BALES: I did see that today, Your Honor.

THE COURT: All right. And attached -- or along with that, the Court also received a declaration of Mr. Ptah, and my copy is signed. And then I have attached to that -- sorry, I think I also have a declaration -- let me back up.

I've got the motion, and that is from Mr. Mason, counsel for Mr. Ptah. I then have Mr. Ptah's declaration signed under penalty of perjury. I have

attached to that what's described as Attachment A. I'll just hold that up, it's photographs. And then I also have a declaration of John Neryme (ph). I don't know if I'm pronouncing that right. And that is also signed under penalty of perjury. And I've reviewed those items. And then, in addition, I have the presentence statement of the prosecuting attorney, and that includes a number of documents from the court file, including the first amended information, and then the State's post-trial statement regarding the convictions and penalties. That's what the form is called that contains the counts that the Court is looking at for sentencing and the firearm allegation.

Then there's a scoring form, which indicates a standard range of four, and a range of 15 to 20 months. Then there's the deadly weapon enhancement document, and the standard range for theft of a firearm is 26 to 34 months. I have an Appendix B. And then finally, in that same packet, the State's recommendation for sentencing, and I also have a defense sentencing memorandum that was prepared by Mr. Mason along with some attachments. I think it's here part as his Attachment A to that. Is there anything I've missed?

MR. MASON: There should be just one thing. My declaration, which should follow my client's

declaration in the (inaudible) motion.

THE COURT: Okay, let me see. I started to say that I had that, and then I stopped because I wasn't finding it.

MR. MASON: And there is one other thing. But let's --

THE COURT: One thing at a time. Mr. Mason, I feel like I saw a declaration from you --

MR. MASON: In the email chain. I have one other --

THE COURT: -- and I'm not finding it now.

MR. MASON: I have one other copy. Counsel has it, my declaration. I can hand it back.

THE COURT: Yeah, please do, and I'll let you know whether I'm seeing it for the first time, or I've already seen it. I had a number of things on my desk this morning.

MR. MASON: Of course.

THE COURT: A lot of paper. Let's see.

MR. MASON: I have a copy of the email chains. I think they were attached.

THE COURT: So you submitted these by email?

MR. MASON: Yes. And Counsel has a copy, so.

THE COURT: I don't think I got a paper copy of this, so let me just take a moment.

MR. MASON: Of course.

THE COURT: All right. I have had a chance to read not only Mr Mason's declaration and find the attachment, which is -- purports to be an email from Mr. Tackitt to Mr. Mason entitled, "The Civil War Stuff." And an Attachment B, which maybe came from an email. It doesn't show the whole thing. It's, "Dear Mr. Mason," from Burns Peterson, Director of Assigned Counsel." So I'm ready to hear your arguments.

MR. MASON: Your Honor, there is one other document my client has confirmed for me he'd like the Court to see, that he provided me yesterday. It wasn't clear to me whether it was working notes of his (inaudible) determined this morning he wants this to be part of the record.

THE COURT: And Mr. Bales has just been given this?

MR. BALES: I just got that, yeah. This morning.

THE COURT: All right. This is obviously posing a problem to have so much reading to do at the very beginning of the --

MR. MASON: I understand.

THE COURT: -- trial, so I'm hoping it's not terribly extensive, but go ahead and hand it up, and I'll consider it as part of the materials.

MR. MASON: He'd like to make it part of the record.

MR. BALES: He mainly just addressed trial issues

throughout that document.

MR. MASON: Yes, for the most part I wanted (inaudible) documents.

THE COURT: Okay. It doesn't look too long. Let me just give it a moment. Okay, mine seems to end sort of abruptly. I just want to make sure it's supposed --

MR. MASON: I think it does.

THE COURT: -- to end with, "On the pretrial interview recording she stated this, according to Colonel Tackitt." That's what it ends with?

MR. MASON: Yes, it does.

THE COURT: All right. Thank you. I've had a chance to read everything, and I will now hear a brief argument.

MR. BALES: Yes, Your Honor. First of all, the defendant was convicted in count one, assault in the second degree; count two, theft of a firearm; count three theft of a firearm 'and count four, assault in the second degree. Count one and count four, the jury found the defendant was armed with a firearm at the time of the offense. The counts that were listed in, five and six were dismissed by the Court at the request of the State. We did not go forward with counts five and six, even though those show up on the information. So I just want to make sure the record is clear on

that.

THE COURT: Thank you. I recall that.

MR. BALES: The offender score for count one and count four is a four, seriousness level is a four. The standard range is 15 to 20 months on each count, and there's a 36-month enhancement on each of those counts. On counts two and three the offender score is a three, seriousness level six, with a range 26 to 34 months in confinement. Does Counsel agree with the offender score and range?

MR. MASON: Yes.

MR. BALES: The State's recommendation is for 20 months on count one, 34 months on count two, 34 months on count three, and 20 months on count four. Also, the mandatory 36 months enhancements on count one and count four. That would make the recommendation of the State 106 months total confinement, given the enhancements as well.

Also, the State is asking for an order of prohibiting contact with Quinton Hoard and Christina Seymour, the two victims in the case, restitution, if any, community custody. This is a violent offense, so the community custody range is 18 months, and as part of that community custody condition, the State would ask that the defendant be required to have a mental

health evaluation and follow all treatment recommendations that would include taking prescribed medications.

There's also the mandatory prohibition against possessing a firearm and loss of right to vote. That concludes the State's recommendations in the case. I'd only just briefly talk about the case, since this was a contested trial and Your Honor sat through that entire trial but --

THE COURT: Can you, before you go to that, clarify the running of the counts, whether the recommendation is concurrent or consecutive?

MR. MASON: Thank you for clarifying that.

MR. BALES: The counts would be concurrent with each other, but the enhancements are consecutive. So, for instance, the longest sentence that the State is requesting is 34 months, and then you have 36 months that has to be consecutive, and another 36 months that has to be consecutive.

MR. MASON: And I'm sorry, clarify that the State's recommending the top end of the range on the firearm concurrent, is that right?

THE COURT: So what I'm hearing is that counts one through four, the standard range, run concurrently. And then added on to both count one and count two, as

to each is a 36-month mandatory, by virtue of the jury's finding, 36 months that gets added on.

MR. BALES: Correct.

THE COURT: What I'm not clear about is whether those two enhancements run consecutive with one another.

MR. BALES: The two enhancements are consecutive with each other as well. And so basically enhancements have to go on to the end of the longest sentence. So a defendant will serve his standard range sentence first, and then the enhancements are at the end of that. So with regards to the State's recommendation, the longest sentence recommendation that we have is for 34 months, and that's on counts two and three. The 20 months, the 34 months, on each of those four counts, would run concurrent with each other, those would all be concurrent. But deadly weapon enhancements and firearm enhancements are consecutive to the standard range, and they're consecutive to each other.

THE COURT: And so your addition, again, for your recommendation -- which is obviously not going to necessarily the same as the defense, but what's your addition for total amount of time?

MR. BALES: My addition would be the 36 plus the 36 gives you 72 months of straight time with the

enhancements. And that's served consecutively with the longest sentence that's requested, which is 34 months on count two and count three.

THE COURT: Okay, thank you for explaining how you reached that 106. I definitely see that route now. And then you were going to shift to the argument with respect to the posttrial motions.

MR. BALES: Yes. First of all, I believe the State's recommendation on the high end is appropriate, given that this was a fairly significant and scary incident involving the two victims in this case, and the defendant had actually attempted to shoot and kill one of those victims. He pointed the gun at Mr. Hoard, said that he wanted to shoot and kill him, attempted to shoot and kill him, and actually took substantial steps in actually wanting to shoot and kill him.

Fortunately for Mr. Hoard, the Court recalls, that gun did not work. He didn't either get the magazine seated all the way in there -- and it wouldn't fire. And he attempted to remedy that and shoot Mr. Hoard, but luckily again for Mr. Hoard, that gun did not fire. The defendant told the detective in the case and the officer on the scene that he intended to shoot and kill Mr. Hoard. He even made some kind of comment about the piece-of-shit pistol that he had because it didn't fire

and do what he wanted it to do and said it was only a piece-of-crap .22. So he was adamant, and even told the officers to write that in their report, because that's what he had intended to do. So we were very close to having a homicide in this case if the defendant had been able to actually operate that pistol. But that goes to show what his intent is when he committed that assault in the second degree.

He also hit the other victim in the face, causing multiple lacerations to her face. She was extremely scared, called Mr. Hoard, and he was basically coming to the rescue, and the defendant then went outside and tried to shoot and kill him.

So this is a very egregious assault in the second degree. I always look at, you have a low end and you have a high end, I usually start in the middle. If there's mitigating factors, you go down, if there's aggravating factors you go up. But here, the factors in this case are all, I think, aggravating.

With regard to the request for new trial -- and I may have some comments after defense makes their full argument, but in what I've been able to read on the material that I was given, their primary focus for a new trial is, for instance, ineffective assistance of counsel, and then also the fact that Mr. Tackitt does

some reenactment with regard to Civil War events.

The defendant in this case, the defendant has been, at least from my observations and I hope the Court's observations, has been a very difficult client to deal with. And I believe Mr. Tackitt had done an exceptional job dealing with him prior to trial, in preparation of trial, at least from what I could see in the courtroom, and then also during trial.

And Mr. Mason -- even Mr. Mason in our last court hearing saw what happens with the defendant when he's interacting with counsel and we had much of that yelling and screaming on the record, even when he's dealing with Mr. Mason, who doesn't have these Civil War reenactments in his past. And so he treats his counsel very, very similarly.

The thing with Mr. Tackitt is, the issue would have to rise to the level where it prohibited Mr. Tackitt from adequately performing his services as counsel. And I think that, one, that's not demonstrated on the record. It wasn't present in court. He actually was able to interact with the defendant. They communicated multiple times. The defendant would become a little bit disruptive with witnesses, but Mr. Tackitt was able to communicate well with him, keep him relatively calm, and I actually was fairly surprised how calm the

defendant was during the trial, compared to how he had been during some of our pretrial hearings. But Mr. Tackitt was able to communicate with him, work with him during the trial, and then progress through the trial. So I do not believe any of these things that are raised by the defense rise to the level of interfering with Mr. Tackitt's ability to represent his client.

It also is not something that was raised or brought up as a significant issue by the defendant, either in pretrial hearings or during the trial itself. And in Mr. Tackitt's email that he submitted, one of the things was that he is -- during some of these reenactments, is a Confederate. But even in his own statement where he was -- the defendant had called him while he was on a reenactment, he wasn't -- he was representing the Union side during this hobby that he has with regard to reenactments. So there's no evidence before the Court that shows the fact that, he has a hobby of doing reenactments where he's on either the Union or the Confederate side, both, switching back and forth. This hobby no way interfered with his ability to represent his client. He fully represented him in the best way he could.

Also, that is present on the record, and the State's

position is, the appellate court is in as good a position to review that record for ineffective assistance of counsel claim as well as this court. But I think since Your Honor was present in court, observed how Mr. Tackitt interacted with his client and how he presented the case, you're in a much better position than the court of appeals. But Mr. Tackitt was able to represent his client.

I also do not believe that any of the other information that they submitted in the briefings and the affidavits rises to the level of granting a new trial. There were some comments about the defendant's telephone, and how he had recorded things that Your Honor may remember. We litigated all those recordings during pretrial motions that were -- that the defendant had recorded other individuals on the telephone. Those were all brought up during trial. There were potentially a couple that were not allowed to come in, and then Mr. Tackitt made tactical decisions on whether to submit some of those or not submit them, and those were all strategic decisions on his part.

But one of the complaints of the defendant is that all of these calls weren't in there because they were quote, "golden" on his case. But the State submits that they weren't golden on his case. A lot of them

showed motive and some of his delusions about what's going on. So the defendant is making issue with strategy decisions and also decisions that were made by the Court with regard to the admissibility of evidence, and I do not believe that he's provided any additional information that would make the Court have a different ruling than you did during the pretrial hearings. So those do not rise to the level of a new trial either.

With regard to the final topic where the defense requests an exceptional sentence down, the State believes that there is insufficient reason or basis to grant an exceptional sentence down. There has to be substantial and compelling reasons that justify a departure from the standard range. One of the primary things that Mr. Mason focuses on is a failed mental defense. In my dealings with counsel in this case this mental defense has always been brought on as a, quote, "defense," but in the State's position, the mental issues suffered by the defendant are more an aggravator than a defense.

The defendant has failed to see the seriousness of his actions. He's failed to have any remorse. He does not have an understanding of how dangerous he actually is to the victims and the people around him. He does not accept the fact that taking out the gun and

pointing it at someone and trying to kill them is somehow inappropriate. And even after his interactions with the police officers, he said, "I'd do it again." He said he would actually go out and complete the task. So the defendant's issues do not rise to the level of a mental defense for diminished capacity. That was clear during the trial because he still conformed the intent to commit the crime. There was massive amounts of goal-directed behavior that led up to the actual assault. So it did not even come close to meeting the diminished capacity requirement.

And again, the factors and issues that the defendant have are aggravating as opposed to mitigating in this case. So the State asks that the Court impose a standard range sentence on the defendant, that the Court follows the State's recommendation for the 20, 20, 34 and 34, with the 72 months of mandatory enhancements that run consecutive for a total of 106 months.

THE COURT: Thank you. Mr. Mason?

MR. MASON: Thank you, Your Honor. I'll combine it all --

THE COURT: Sure.

MR. MASON: -- how's that? I can't decide whether I'm at an advantage or disadvantage having come in at

the ninth inning and reviewing it. Different perspective. Everyone has a different relationship. What I can say is the minute I look at the facts of this case, whether they were in trial or even in discovery, was they don't read like a normal case. My client doesn't interact with the police like a, quote, normal defendant. My take, and you see it in the argument in my sentencing memorandum -- I'll start there and work backwards, is that I don't -- I'm confused by a number of things.

One, I don't see the State in this trial impeach any of the medical facts, and of the -- definitely of the medical history, definitely a medical documentation. What I see is a go-around and a go-around between goal-directed behavior, Dr. Cummings, and the other medical experts that work together, and what is how my client's brain works.

What I also see is something we see every day, and that -- even in our local hospital, that we work with incredibly regular cases, and (inaudible) trust Harborview Medical that takes him in for many weeks. You were here when Mr. Tackitt crossed the medical on that. And each time he goes in and is seen for a much more substantial time than he's reviewed by the expert who testified, is that he's given a psychotic arena of

Constitutional Provisions

(Amendments, Title)

1st, Religious and Political freedom

5th, Criminal actions - Provisions concerning Due Process of law and just compensation clauses.

6th, Rights of the accused

14th, Due process - Equal protection

15, Right of citizens to vote

Part 1.

Introduction to Chapter 1.

The Criminal Code.

§ 1:1 Overview. The Washington Criminal Code comprises RCWA Title 9A. The Code stretches through 32 statutory chapters.

§ 1:3 Mental states

§ 1:4 Mental states ~ Jury instructions

§ 1:9 Defenses: Two Kinds of Defenses.

Had the facts of my case not been over looked, Explain 13th Fw. as it was repeatedly being blocked by counsel Col Mack B Tackett from the courts. Explain briefly.

The Lesser offenses ~ "Legal" prong: § 1:10 or § 1:11.

"Factual" prong would have been applied to my case,

§ 1:12 Lesser offenses ~ Jury instruction: Note.

FACT.

• Displaying weapon ~ gross misdemeanor (No form)

Found: Washington Practice 13A, Criminal Law And Sentencing.

Chapter 9 Drive ~ by Shooting and Reckless Endangerment.

§9:2 Statutory definition ~ Reckless Endangerment

• A person is guilty of reckless endangerment[1] when he or she recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person. Reckless endangerment is a gross misdemeanor.[2]

§9:3 History of statutes

• The crime of reckless endangerment was created as part of the 1975 criminal code.[1] It has not been substantively amended.[2]

[Section 9:2]

[1] RCWA 9A.36.050(1).

[2] RCWA 9A.36.050(2).

[Section 9:3]

[1] 1975 Wash. Laws, 1st ex. sess., ch 260, §9A.36.050.

[2] Two amendments reflected the creation of drive ~ by ~ shooting as a separate crime. 1989 Wash. Legis. Serv. ch. 271, §116; 1997 Wash. Legis. Serv. ch. 338 §45.

§9:4 Table of significant dates.

• July 1, 1976 Effective date of 1975 criminal code.

• May 7, 1989 Crime of first degree reckless endangerment created as class C felony of seriousness level II.[1]

No. 2) Pertaining to Ineffective Assistance of Counsel; As Trial counsel's Col. Mack B Tackitt was deficient by failing to submit an application to Court as to recieve a Arbitration hearing, due to my Mental Health History. I have suffered prejudice as a result of deficient performance. Strickland v. Washington, 466 U.S. 688, 687-88, 104 S. C. 2052, 80 L. Ed. 2d 674 (1984). Counsels representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time representation first began in early January through February 2017. Col Mack B. Tackitt continued representing me, stating on a daily basis; "you paranoid and delusional, its Not your fault, you were just being in conformaty of your diagnoses.

FILED
6/29/2020
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. MALEK KALID PTAH, Appellant.	)	No. 78978-3-I UNPUBLISHED OPINION

BOWMAN, J. — Malek Kalid Ptah appeals his jury convictions of two counts of second degree assault with firearm enhancements and two counts of theft of a firearm. Ptah raises issues of prosecutorial misconduct, violation of his right to present a defense, ineffective assistance of counsel, and sentencing errors. We affirm Ptah's convictions but remand for the trial court to recalculate Ptah's offender score and determine whether he qualifies for waiver of the $100 DNA[1] fee.

FACTS

Ptah faced a jury trial for charges resulting from events that occurred at the apartment of his friend Christina Seymour. Ptah raised self-defense and diminished capacity defenses. Testimony at trial described the events as follows.

[1] Deoxyribonucleic acid.

Ptah had a "traumatic" childhood marked by instability and sexual abuse. As an adult, he experienced significant mental health issues, including two involuntary hospitalizations. Ptah had consistent diagnoses of paranoia, schizotypal personality disorder, and substance abuse. His health records also contained occasional diagnoses of psychosis, bipolar disorder, delusional disorder, and post-traumatic stress disorder.

Seymour was one of the few significant relationships in Ptah's life. The two were like siblings and were godparents to each other's children. Ptah had a very close relationship with the two-year-old daughter Seymour shared with her boyfriend Quinton Hoard.

On the evening of December 23, 2016, Ptah went to visit Seymour at her apartment. Ptah and Seymour talked and shared some wine. Ptah spent the night.

The next morning on December 24, Hoard returned to the apartment after work. Hoard, who had a concealed weapons permit, showed Ptah the guns he had stored in a large black bag in Seymour's closet. Hoard kept the ammunition in the bag but in a separate, locked ammunition box. None of the guns were loaded. Seymour testified that Hoard had two assault rifles and three pistols—a .45, a pink .22, and a Glock.

According to Hoard, he showed Ptah his pink Sig Sauer Mosquito .22 caliber semiautomatic pistol, his black 9 mm Glock 19 handgun, his black Springfield XD Tactical .45 caliber handgun, and his AK-47 tactical rifle. Hoard planned to pawn some of the weapons for Christmas presents. Ptah expressed

interest in the pink Sig Sauer .22, wanting Hoard to give him the gun for protection. Hoard refused, telling Ptah he would need a background check. Ptah was adamant about wanting the gun but Hoard continued to refuse. Hoard testified, "I kept telling him no, no, no, he just kept getting a little more angry, a little more frustrated each time."

According to Ptah, Hoard also showed him his Del-Ton Sport AR-15 rifle and agreed to sell him one of the assault rifles. Ptah also testified that Hoard demonstrated that the pink .22 caliber handgun did not work. Hoard pointed the weapon at the ground and pulled the trigger repeatedly but it failed to fire. Ptah claimed that he, Hoard, and Seymour discussed Ptah holding onto the .22 because Ptah knew somebody who could fix the weapon.

Later that morning, Hoard went to work, leaving Ptah to spend time with Seymour and her daughter. Ptah testified that Seymour's daughter made a statement he interpreted to mean that Hoard had molested her. Ptah believed that Seymour heard and understood her daughter's statement as well.

Seymour did not believe Hoard had molested their daughter, but Ptah continued with the accusations. Ptah began making plans to get Hoard out of the apartment. Ptah testified that he told Seymour they needed to call the police. Ptah insisted that Seymour and her daughter could not stay in the apartment with Hoard. Ptah also decided to remove the firearms from the apartment. He devised a plan to put the guns in the car, call the police, then wait in the parking lot for Hoard and the police. Ptah claimed he wanted to separate Hoard from the guns so that Hoard could not shoot everyone when they accused him of

molesting his daughter. According to Ptah, Hoard had claimed he would shoot Seymour and others in the past.

Ptah testified that he and Seymour talked about this plan for several hours. They were going to take the guns down to the curb, put them in the trunk of the car, and call the police. Ptah said he believed Seymour agreed to the plan. Ptah testified that he and Seymour gathered all the guns and bullets into a bag. Ptah attached the Sig Sauer .22 caliber handgun to his hip.

Ptah testified that when he tried to take the bag out of the apartment, Seymour "flipped the script on me" and would not let him leave with the guns. Ptah and Seymour fought over the bag of guns. She grabbed his arm and tried to hit him. He claimed Seymour said she was going to shoot him and tried to retrieve a gun. Ptah tried to bite her and hold her back but she hit him multiple times on the head. He eventually pistol-whipped her once.

Seymour's testimony differed. According to her, Ptah was extremely agitated and concerned about the weapons in the closet and his suspicion that Hoard molested her daughter. She "play[ed] along" and agreed with his theories, hoping he would tire of the topic. But she never agreed to help him take the weapons. When Ptah began taking the guns out of the closet, Seymour said he could not leave with Hoard's property. Ptah would not listen, and they argued. The argument turned into a physical altercation. Ptah told Seymour he would pistol-whip her if she did not let him take the weapons. Seymour did not believe Ptah would physically hurt her. But as they "tussl[ed]" over the bag of weapons and Seymour refused to let go, Ptah "pulled out a pistol and started hitting" her

about the head and face. Seymour recalled that he struck her more than five times. Her daughter was nearby, "[s]creaming and saying no." When a neighbor knocked on the door, Ptah stopped hitting Seymour and left with multiple bags and the guns.

Seymour was bleeding, with contusions and cuts on her face. She called Hoard, who thought she was "playing" and did not believe that Ptah had assaulted her. When Seymour made a video call, Hoard saw the blood and quickly returned to the apartment. Seymour called the police.

Ptah testified that he walked out of the apartment elevator with the bags to find Hoard with a weapon in his hand. Ptah then drew the .22 from his waist to try to scare Hoard. Ptah testified that he believed the .22 was not operable. He aimed the gun toward the sill of the door next to Hoard to scare him. Ptah pulled the trigger, knowing the gun would not fire.

Hoard testified that he was walking toward the apartment building doors when he saw Ptah and asked, " 'What's going on.' " Ptah had the bags and held the .22 caliber pistol in his hand. Ptah said, " 'I gotta do this' " and cocked the gun. Hoard drew his gun and backed up until he was hiding behind a car in the parking lot. Hoard called the police from his hiding spot.

Police arrived to find Hoard pointing his gun toward the apartment building. Hoard was compliant with police demands, saying he would drop his weapon when Ptah dropped his. At that point, the officer noticed Ptah with the bags and guns at his feet. Both men put down their guns at the officer's command.

The police officer approached Ptah and saw a garbage bag and several other bags at his feet. Two assault rifles protruded from the garbage bag. A backpack contained the pink .22 caliber pistol and an AR-15 magazine.

Ptah willingly spoke with the police. He told the officer that he and Seymour planned to confront Hoard with accusations of molestation and then have him arrested. However, when Ptah began collecting the guns, Seymour appeared to change her mind and tried to prevent Ptah from taking the weapons. Ptah claimed that Seymour had punched him several times in the jaw and he retaliated by hitting her twice with the .22. He then left the apartment with the bags and guns. When Hoard arrived, Ptah put the magazine in the pistol, pointed it at Hoard, and pulled the trigger three times. The gun " 'clicked' " rather than fired.

Detectives noted concerns about Ptah's mental health. He was "very excited" while talking to responding officers. Kirkland Police Detective Brian Frankeberger testified, "The chronological order of things was kind of skewed, and he would talk over himself and then come back and then talk about a different part of the incident and then come back." Ptah testified that he was "[e]xcited" and "happy" when the police arrived because he believed his plan to secure the guns and have the police arrest Hoard had succeeded. Ptah told a detective, " 'You're lucky the motherfucker isn't dead, add that to your report.' "

The State charged Ptah with two counts of second degree assault of Seymour and Hoard while armed with a firearm and two counts of theft of a

firearm—"a pistol" and "an AR15 rifle" belonging to Hoard.[2] After several days of testimony, the jury convicted Ptah as charged. The trial court imposed a concurrent sentence within the standard range, two consecutive 36-month firearm enhancements, and legal financial obligations. Ptah timely appeals.

ANALYSIS

Prosecutorial Misconduct

Ptah argues the prosecutor committed misconduct during closing argument. He contends that the prosecutor improperly appealed to the jury's passion and prejudice, misstated the law of self-defense, and argued law not contained in the jury instructions.

To prove prosecutorial misconduct, a defendant must establish that conduct was both improper and prejudicial in the context of the entirety of the case. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Where, as here, the defendant fails to object at trial, the error is waived absent misconduct so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). To demonstrate this level of misconduct, "the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[2] The State also charged Ptah with two counts of unlawful possession of a firearm in the second degree. The State asked and the court agreed to dismiss those counts at the beginning of the trial.

We review statements in a prosecutor's closing arguments in the context of the issues in the case, the total argument, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). A prosecutor has wide latitude to draw reasonable inferences from the evidence during closing argument. Boehning, 127 Wn. App. at 519. "However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant." Boehning, 127 Wn. App. at 519.

I. Uncharged Crimes

Ptah claims the prosecutor improperly appealed to the jury's passion and prejudice by suggesting that the State could have charged Ptah with more than just two counts of theft of a firearm. We disagree.

References to dismissed or uncharged crimes may prejudice a defendant by inviting a jury to determine guilt based on improper grounds. See Boehning, 127 Wn. App. at 522; State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976). For example, in Boehning, the prosecutor referred to three counts of rape during closing argument that had been dismissed at the close of evidence. Boehning, 127 Wn.2d at 517. The prosecutor's remarks were improper because dismissal of the charges was not evidence from which reasonable inferences and arguments about the charged crimes could be made. Boehning, 127 Wn. App. at 522. The purpose of the remarks was clearly to appeal to the passion and prejudice of the jury to infer guilt of the charged crimes. Boehning, 127 Wn. App. at 522. Similarly, in Torres, the State charged three codefendants with rape. Torres, 16 Wn. App. at 255. Two of the codefendants were also charged with

burglary. The prosecutor suggested during opening statement that the State could have charged the third codefendant with burglary as well. Torres, 16 Wn. App. at 256. This suggestion was not relevant to any issue at trial and improperly allowed the jury to infer the defendant's guilt on both charged and uncharged crimes.

This case differs from Boehning and Torres. The evidence in this case showed that Ptah took multiple firearms. But the State charged Ptah with theft of only two of the guns. To preserve jury unanimity, the prosecutor had to identify the two specific firearms the State intended to rely on as evidence of the thefts. See State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), abrogated on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); State v. Carson, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015). The prosecutor identified those firearms and argued, "[I]n this particular case, the State charged two of the firearms. We didn't charge theft of all four; we just picked two of the firearms." He explained, "Did the defendant take the other ones? Yes. But the State elected to move forward on two counts of theft instead of multiple counts of theft. So those are the two it's referring to."

The prosecutor's statements were made in the context of explaining the "to convict" instructions for the two theft of a firearm counts and focused the jury on the firearms that the State elected to pursue as evidence of those counts. The argument was relevant to an issue at trial and did not amount to an improper appeal to the passion and prejudice of the jury.

II. Law of Self-Defense

Ptah argues the prosecutor committed misconduct by misstating the law of self-defense as defined in the jury instructions. According to Ptah, the prosecutor erroneously suggested that the self-defense instruction should apply to Hoard rather than Ptah. We conclude that the prosecutor's analogy was a proper explanation of the law of self-defense.

To raise self-defense, the defendant must produce some evidence of reasonable apprehension of great bodily harm and imminent danger. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Once properly raised, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The trial court instructed the jury, in pertinent part:

> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, when the force is not more than is necessary.
>
> The use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

In closing argument, the prosecutor argued that the language of the instruction relating to defense of property would apply to Hoard if he had been charged, but does not apply to Ptah. He encouraged the jury to "[g]o through the self-defense instruction" and argued that "a good application of that self-defense instruction is applied to Mr. Hoard." He argued that Hoard's "property is being

stolen, so that self-defense instruction says he can use reasonable force to protect his property." The prosecutor later argued:

> You can't go and steal somebody's property and then claim self-defense when they are hanging on to [sic] the property that you're trying to steal. Can you imagine that? Go steal somebody's property and when they try to keep in from you, "Hey, I was just defending myself when I beat him up or shot him when I was stealing the property." It doesn't apply there.

The prosecutor also argued that the language of the instruction relating to lawful defense of person would apply to Hoard if he were charged, but does not apply to Ptah. The prosecutor told the jury that Ptah "has just beat up [Hoard's] girlfriend, is coming out with a firearm, points a firearm at him and tries to shoot him." He argued that the "self-defense instruction would say that Mr. Hoard could use reasonable force in order to defend himself in that situation." The prosecutor concluded by explaining, "[T]hat's how that instruction works. So if the State somehow tried Mr. Hoard for that offense . . . [,] you can see how it applies to Mr. Hoard. But that instruction does not apply in this case with regard to the defendant."

Ptah argues that "whether Hoard would hypothetically have been entitled to a self-defense instruction is irrelevant" because the charge of the jury is to "measure Ptah's conduct against the legal standard for when force is lawful." But the prosecutor's hypothetical was clearly an effort to do just that. The prosecutor contrasted Ptah's actions with Hoard's in an attempt to demonstrate that Ptah's conduct did not meet the legal standard of lawful force.

III. First Aggressor

Ptah also argues that the prosecutor committed misconduct by suggesting to the jury that Ptah could not raise self-defense because he was the first aggressor. Ptah contends that the prosecutor's argument was improper because the court did not provide the jury a first-aggressor instruction.

"Statements made during closing argument that pertain to the law must be confined to the law set forth in the instructions." State v. Souther, 100 Wn. App. 701, 714, 998 P.2d 350 (2000). A "first aggressor" instruction is appropriate "[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense." Riley, 137 Wn.2d at 909-10.

The prosecutor argued:

> [Hoard] was not the aggressor in this case. The defendant should be thankful that he's not shot, even though he tried to take the life of somebody else.
>
> So look through that self-defense instruction. First of all, it doesn't apply given the facts of this case because the defendant is the aggressor, and you can't be the aggressor and then use self-defense. It also doesn't apply because the force he used is totally unreasonable under the circumstances. But again, he struck [Seymour]. He tried to shoot Mr. Hoard. Self-defense does not apply. It would have applied to Mr. Hoard if he would have acted, but not to the defendant in this case.

Ptah mischaracterizes the prosecutor's argument. He did not argue that Ptah was the first aggressor—that Ptah provoked Hoard into assaulting him, creating the need for Ptah to act in self-defense. Rather, the prosecutor argued that Ptah was the only aggressor—that Ptah was not entitled to argue self-defense because he was not defending himself when he tried to shoot Hoard.

The State has the burden to prove the absence of self-defense. Kyllo, 166 Wn.2d at 862. The prosecutor's argument was not a misstatement of the law and was confined to the law as proscribed in the jury instructions.

Washington Privacy Act

Ptah contends the trial court erred in excluding recorded phone calls. We review a trial court's legal conclusions on a motion to suppress de novo. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011) (citing State v. Smith, 165 Wn.2d 511, 516, 199 P.3d 386 (2009)).

At trial, Ptah moved to admit the content of eight telephone calls he recorded from his cell phone. Seven of the calls involved Seymour. The eighth recording was a call between Ptah and Hoard. Ptah argued that the calls were admissible as impeachment evidence, as evidence of present sense impressions, and to show his then existing mental state.

The State moved to exclude the evidence pursuant to the Washington privacy act (WPA), chapter 9.73 RCW. The trial court excluded five of the calls with Seymour, concluding that she had not consented to the recordings. The court reserved ruling on two other recordings because it lacked sufficient information to determine whether Seymour consented. The court also reserved ruling on the call between Hoard and Ptah but later admitted the evidence.[3] Ptah did not renew his motion to admit the two recordings with Seymour. One of those calls consisted of a voicemail with Seymour's voice in the background.

[3] During Hoard's testimony, defense counsel offered the call between Hoard and Ptah, which the trial court admitted.

The other call contained Ptah rapping and reciting poetry and ends with Seymour saying someone threatened her, but she does not say who threatened her.

The WPA prohibits the recording of private communications without the consent of all parties. RCW 9.73.030(1). A recording violates the WPA if it captures "(1) a private communication transmitted by a device, which was (2) intercepted by use of (3) a device designed to record and/or transmit, (4) without the consent of all parties to the private communication." State v. Christensen, 153 Wn.2d 186, 191-92, 102 P.3d 789 (2004) (citing RCW 9.73.030(1)(a)). Any information obtained in violation of the WPA is inadmissible in criminal cases. RCW 9.73.050.

"A party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded." State v. Townsend, 147 Wn.2d 666, 675, 57 P.3d 255 (2002) (citing RCW 9.73.303(3)). Additionally, "a communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded." Townsend, 147 Wn.2d at 675.

Ptah claimed at trial and again on appeal that he announced to Seymour in an effective manner that he recorded all of their telephone calls. He points to one recording of a call with Seymour in which he complains about a conversation he had with his son's mother as evidence that Seymour consented. In that call, he told Seymour to " 'hear this conversation' " with his son's mother and then said, " 'You know my phone records everything.' " Seymour replied, " 'Ah, shit.' "

However, during a defense interview, Seymour explained that she thought Ptah's comment about recording calls on his phone referred to only his conversations with his son's mother. She was not aware that Ptah recorded her conversations with him as well.

Ptah fails to establish that Seymour consented to the recording of her conversations. Ptah's comment to Seymour in the context of a contentious conversation with his son's mother was not an "effective" announcement that he recorded all calls with Seymour. RCW 9.73.030(3); Townsend, 147 Wn.2d at 675. And the undisputed evidence shows that Seymour did not know that Ptah recorded their calls. Townsend, 147 Wn.2d at 675. Because Seymour did not consent to the recordings, they were inadmissible under RCW 9.73.050.

Right To Present a Defense

Ptah also raises a due process challenge to the exclusion of the recorded calls as an infringement of his right to present a defense. We review a constitutional issue de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). However, a defendant's right to present a defense is sometimes limited by the "procedural and evidentiary rules that control the presentation of evidence." State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996). In such cases, "the court must evaluate whether the interests served by the rule justify

the limitation. Restrictions imposed by such rules may not be arbitrary or disproportionate to the purposes they are designed to serve." Baird, 83 Wn. App. at 482.[4] This requires balancing the interests promoted by the evidentiary statute against those of the defendant in offering the evidence. Baird, 83 Wn. App. at 843. Evidentiary statutes cannot bar highly probative evidence essential to the defense. See Jones, 168 Wn.2d at 723-24.

In this case, the WPA controls the admission of the recorded calls. "Its purpose is straightforward: to preserve as private those communications intended to be private." Baird, 83 Wn. App. at 482-83. Washington has a long history of robust protection of private telephone communications. State v. Archie, 148 Wn. App. 198, 202, 199 P.3d 1005 (2009). We weigh this against Ptah's stated purpose for seeking admission of the recorded conversations—impeachment, present sense impression, and then existing mental state. In particular, Ptah argues the telephone calls were relevant to the jury in determining his state of mind as it pertained to his diminished capacity defense.

But Ptah had ample opportunity to present evidence of his state of mind without relying on the calls recorded in violation of the WPA. A mental health expert testified as to Ptah's state of mind and mental health. According to the expert, Ptah demonstrated schizotypal paranoid thinking, particularly when he concluded that Hoard was molesting Seymour's daughter. Ptah saw clues that only he understood and came to the conclusion of sexual abuse. This set into motion a series of choices that made sense only to Ptah. The expert described

[4] Citations omitted.

this as Ptah's "grandiose delusion" that he would "protect" Seymour and her daughter and save them from Hoard. This attempt to save Seymour and her daughter turned to "betrayal" when she refused to cooperate with the plan to remove the guns. The expert testified that the shock of this betrayal motivated Ptah to the confrontations with Seymour and Hoard. The expert opined, "[S]omeone with a full deck wouldn't act like this."

Ptah also testified in detail about his mental state at the time of the incident. Ptah detailed his difficult childhood and the sexual abuse he experienced, which made him hypervigilant. He described his worry that his son was being molested and his belief that Hoard was molesting Seymour's daughter. He expressed his concerns about Hoard having weapons and his fears for the safety of Seymour and her child. He talked about formulating the plan with Seymour and her change of heart. He described feeling "happy" when the police arrived because he thought the plan had succeeded. Police officers also described their observations of Ptah and mental health concerns.

Given this extensive testimony, the recorded calls had little additional probative value as to Ptah's mental state at the time of the incident. Exclusion of the calls did not prevent Ptah from presenting his diminished capacity defense.

Ineffective Assistance of Counsel

Ptah claims his trial counsel was ineffective for failing to object to the prosecutor's improper closing argument and for failing to renew Ptah's motion to admit recorded calls with Seymour. To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate that defense counsel's

representation fell below an objective standard of reasonableness and the deficient representation resulted in prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Kyllo, 166 Wn.2d at 863.

As discussed above, the prosecutor's closing argument was not an attempt to appeal to the passion and prejudice of the jury, did not misstate the law, and did not stray from the law as provided in the jury instructions. Accordingly, failure to object to the argument does not amount to deficient representation.

Neither was counsel's failure to renew Ptah's motion to admit recordings of his telephone calls deficient. The recordings had little probative value. Discussion during the motion in limine shows confusion about the content and significance of the calls. The State expressed concern that the conversations would confuse the jury. Given the minimal probative value, the likelihood of confusion, and the ample additional evidence of Ptah's mental state, counsel's failure to revisit the evidence does not amount to ineffective assistance.

Sentencing Issues

Ptah requested an exceptional sentence. He asked the court to "forego the firearm enhancements" and impose standard-range concurrent sentences for each count. He also asked the court to find that the two convictions for theft of a firearm constitute the same criminal conduct for the purpose of calculating his offender score. The trial court denied both of Ptah's requests and sentenced him

to concurrent standard-range sentences on each count and two consecutive 36-month firearm enhancements. The court waived all nonmandatory legal financial obligations and ordered Ptah to pay restitution, the $500 victim penalty assessment, and the $100 DNA collection fee. Ptah appeals.

We review a sentencing court's decision for abuse of discretion or misapplication of the law. State v. Delbosque, 195 Wn.2d 106, 116, 456 P.3d 806 (2020). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Delbosque, 195 Wn.2d at 116. A failure to exercise discretion is also an abuse of discretion. State v. Stearman, 187 Wn. App. 257, 270, 348 P.3d 394 (2015). Interpretation of a statutory provision is a question of law we review de novo. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

I. Firearm Enhancements

Ptah argues the trial court failed to recognize that it had discretion to "forego" imposing consecutive sentences for the firearm enhancements. In support of his contention that the trial court had discretion to impose concurrent sentences for the firearm enhancements, Ptah cites to In re Personal Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), and State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017). Both cases are inapposite.

Mulholland addressed the court's discretion in sentencing multiple serious violent offenses. Mulholland, 161 Wn.2d at 327. Under RCW 9.94A.589(1)(b),[5] multiple serious violent offenses are served consecutive to each other. In

[5] We note the legislature recently amended RCW 9.94A.589. LAWS OF 2020, ch. 276, § 1. The amendments do not affect the analysis throughout this opinion.

Mulholland, the court concluded that the explicit language of RCW 9.94A.535[6] gives trial courts discretion to impose concurrent sentences for serious violent offenses. Mulholland, 161 Wn.2d at 329-30.

In McFarland, the court considered whether the language in RCW 9.94A.535 also authorized discretion to depart from the requirement that courts impose consecutive sentences for multiple "firearm-related" offenses under RCW 9.94A.589(1)(c). McFarland, 189 Wn.2d at 52-53. It concluded that there was "no statutory basis to distinguish between the consecutive sentencing language in these two subsections." McFarland, 189 Wn.2d at 53.

Neither Mulholland nor McFarland addressed firearm enhancements. Firearm enhancements are added to a standard-range sentence and are governed by RCW 9.94A.533(3). The imposition of firearm enhancements is mandatory:

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e).

The explicit language of RCW 9.94A.533(3)(e) requires the imposition of firearm enhancements and mandates that they run consecutive to all other sentencing provisions and to each other. Unlike the consecutive sentence statute at issue in Mulholland and McFarland, RCW 9.94A.535 does not provide

[6] RCW 9.94A.535 provides the guidelines for imposing an exceptional sentence and states, in pertinent part, "A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section."

authority to depart from the mandates of the firearm enhancement statute. "[J]udicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement in light of the absolute language of [RCW 9.94A.533(3)(e)]." State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), overruled on other grounds by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).[7]

II. Same Criminal Conduct

In general, offender score calculations include all current and prior convictions. RCW 9.94A.589(1)(a); see State v. Roose, 90 Wn. App. 513, 515-16, 957 P.2d 232 (1998). However, multiple current offenses encompassing the same criminal conduct count as one crime. RCW 9.94A.589(1)(a); see State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000). RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." If one of these elements is missing, the sentencing court must count the offenses separately in the offender score. Haddock, 141 Wn.2d at 110.

Ptah argues that his two convictions for theft of a firearm constitute the same criminal conduct for the purpose of calculating his offender score. He contends that the trial court abused its discretion by failing to conduct a same-criminal-conduct analysis. The State concedes this error, but the parties

[7] In Houston-Sconiers, our Supreme Court concluded that the Eighth Amendment to the United States Constitution requires that courts sentencing juveniles must have discretion to consider the mitigating circumstances of youth and held that "[t]o the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled." Houston-Sconiers, 188 Wn.2d at 21, 9 (footnote omitted). Ptah makes no argument that he was a juvenile offender at the time of his sentencing.

disagree as to the proper remedy on appeal. Ptah contends that we should determine whether the crimes constitute the same criminal conduct and remand for recalculation of his offender score and resentencing. The State argues that we should remand for the trial court to conduct a same-criminal-conduct analysis. We agree with Ptah.

"Deciding whether crimes involve the same time, place, and victim often involves determinations of fact." State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). But "when the underlying facts are undisputed, the determination of same criminal conduct may be resolved as a matter of law." State v. Hatt, 11 Wn. App. 2d 113, 141, 452 P.3d 577 (2019), review denied, 195 Wn.2d 1011, 460 P.3d 176 (2020). Here, the facts are not in dispute. The record clearly establishes that Hoard was the victim of both thefts and that the thefts occurred simultaneously at Seymour's apartment. We conclude that the theft of firearm convictions constitute the same criminal conduct for the purpose of calculating Ptah's offender score. See Tresenrieter, 101 Wn. App. at 497. We remand to the trial court for recalculation of Ptah's offender score.

III. DNA Fee

Ptah claims that the trial court erroneously imposed a $100 DNA fee without consideration of whether his mental health conditions impact his ability to pay the fee. The State properly concedes error based on RCW 9.94A.777(1) and State v. Tedder, 194 Wn. App. 753, 756-57, 378 P.3d 246 (2016). We remand for the trial court to consider Ptah's ability to pay.

Statement of Additional Grounds

Ptah submitted a statement with several additional grounds for relief. We address these to the extent we can discern his legal arguments.

I. Mental Illness

Ptah argues he did not receive adequate accommodations for his mental illness. In particular, he claims his mental illness required the court to appoint a guardian ad litem (GAL) under RCW 4.08.060. However, RCW 4.08.060 pertains to only civil cases. Similarly, Ptah cites to King County Superior Court's mental proceeding rules allowing for GAL appointment in commitment hearings. See LMPR 1.7. These rules are also inapplicable in the criminal context.

Ptah also claims rights under chapter 10.77 RCW. Ptah's mental illness did not entitle him to the rights and procedures for the criminally insane as defined in that chapter.

II. Ineffective Assistance of Counsel

Ptah argues that his attorney was ineffective because he failed to convince the court to admit his recorded telephone calls. He claims his attorney "[led] me to believe" that the evidence was "Gold," creating the expectation that the recordings would be admitted. The trial court properly excluded the recorded phone calls pursuant to the WPA. Counsel's inability to admit the evidence was not deficient.

We affirm Ptah's convictions for two counts of theft of a firearm and two counts of assault in the second degree with firearm enhancements but remand

for the trial court to recalculate Ptah's offender score and determine whether he qualifies for waiver of the $100 DNA fee.

WE CONCUR:

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