

62526-8

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NO. 62526-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN A JONES III,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the defendant entitled to a self defense instruction when he did not request that instruction and it was not supported by the evidence or his theory of the case?

2. Did defense counsel provide ineffective assistance when he did not propose a self defense instruction when that instruction did not support the defense theory of the case?

3. Was there sufficient evidence presented to the court to establish the defendant had been convicted of murder and two counts of attempted murder in California? If not should the State be permitted to introduce additional evidence of those convictions at a re-sentencing hearing?

4. Should the case be remanded to the trial court for the judge to compare the California convictions to Washington's comparable offenses on the record?

5. Was the trial court's exceptional sentence supported by the record?

6. Was the exceptional sentence clearly excessive?

7. Was the order prohibiting the defendant from having contact with his son related to the crime for which the defendant was convicted?

II. STATEMENT OF THE CASE

Jennifer Phillips and the defendant, John A. Jones had a brief romantic relationship between December 2005 and January 2006. Ms. Phillips became pregnant by the defendant during this relationship. Although she told the defendant that she was pregnant with his child in May they did not begin seeing each other again until October when their child was born. They re-started their romantic relationship in December 2006. 1 RP 28-30.

The defendant has a son by a previous relationship who was 5 years old at the time the defendant and Ms. Phillips got back together in December. By February 2007 the defendant and his son moved in with Ms. Phillips and their son. 1 RP 31.

About one month after the defendant moved in with Ms. Phillips the two began to argue. The arguments led to the defendant physically assaulting Ms. Phillips. In March the defendant hit Ms. Phillips on the head. In April the defendant hit Ms. Phillips on the head, and then threw a glass at her. The glass cut her finger and thumb, requiring stitches. Ms. Phillips told emergency room personnel that she accidentally injured herself because she was afraid police would be called and the defendant would be upset. 1 RP 33-38.

Ms. Phillips was concerned that the police not be called because the defendant had repeatedly told her not to call the police. He told her that if she did call the police that he would kill her. Ms. Phillips believed the defendant because on one occasion when they were arguing the defendant had pinned Ms. Phillips on the floor and covered her mouth and nose so that she could not breathe, while he again made the threat to kill her. Ms. Phillips thought the defendant was capable of killing her because he had previously told her that he had been convicted of committing a murder in California. 1 RP 40-41.

By May Ms. Phillips determined to break up with the defendant. The decision was precipitated by an assault on her by the defendant which caused her to have difficulty breathing for two weeks. 1 RP 43-46.

Despite their troubles Ms. Phillips and the defendant shared a bedroom. On June 5 in the early morning hours Ms. Phillips was asleep in her bed when the defendant came home from an evening of drinking at a bar. The defendant threw all of the pillows off of the bed. He then told Ms. Phillips to get out of his face. Ms. Phillips could tell the defendant was angry so she got up and went into the living room. The defendant followed Ms. Phillips. He yelled at her

for leaving their son alone in their bedroom. The defendant hit Ms. Phillips in the head, grabbed her by the hair and threw her down, causing her to hit her head on the coffee table. 1 RP 51, 53-54.

The defendant then ordered Ms. Phillips to take off her clothes and sit on the sofa. Ms. Phillips was afraid of the defendant so she did as she was told. The defendant told Ms. Phillips that he had burnt his ex-girlfriend with a hot knife in her bottom, and that he intended to do the same to Ms. Phillips. Ms. Phillips begged the defendant not to do so. The defendant went into the kitchen. When he came out he was holding a knife that was on fire with a towel wrapped around the handle. When the defendant walked over to her Ms. Phillips grabbed him by the wrist to try and keep him from burning her. She managed to twist the knife so that it burned her left wrist. The blade fell to the carpet. The defendant picked it up with the towel and threw it into a pile of clothes in the hallway. 1 RP 56-60.

Their son began to cry. The defendant ordered Ms. Phillips into the bedroom. Ms. Phillips went into the bedroom and picked up her son to try and console him. The defendant came into the bedroom and began to yell at Ms. Phillips. He accused her of lying and stealing from him. He then demanded to know how many

times his son had told her that he loved her. When Ms. Phillips replied "a few" the defendant punched Ms. Phillips in the face. As a result of the blow her nose was broken and it began to bleed profusely. The defendant had previously injured his knuckles a few weeks before when he punched a mirror. The blow to Ms. Phillips face reopened the wounds to his knuckles as well. 1 RP 61-63; 2 RP 70-84.

Ms. Phillips went to the bathroom to try to stop the bleeding. At the defendant's request Ms. Phillips brought him something to clean his wounds as well. The defendant told Ms. Phillips that she was not going to work that day. The defendant then directed Ms. Phillips to give him a back rub. While she did so the defendant fell asleep. Ms. Phillips then gathered up her son and joined the defendant's other son in the living room where he was watching television. 1 RP 62-64, 78, 84.

Ms. Phillips stayed in the living room with the boys quietly watching television for about five hours. Although their phones had been previously broken during arguments, Ms. Phillips managed to put her cell phone back together sufficiently so that she could text message her work, informing them that she would not be in that day. About 4 hours later at 12:15 p.m. Ms. Phillips co-worker

texted back, telling Ms. Phillips to call their supervisor, or that the co-worker would call 911. Ms. Phillips did not respond. About 1 p.m. the defendant woke up, yelled at Ms. Phillips, and then told her to go take care of the children. He then went back to sleep. Ms. Phillips sent a text message to her sister about 1:15 p.m. because she wanted help leaving. Ms. Phillips told her sister what happened and asked her sister to come and get her. About 15 minutes later Ms. Phillips sent another text message, asking her sister to bring the police. 1 RP 78-82, 84-86; 2 RP 66-68.

Julie Cushman, Ms. Phillips sister, was working in Bellevue at the time she received her sister's message. When she got her sister's second message on the way to Ms. Phillips apartment, Ms. Cushman called the police. Ms. Cushman got to Ms. Phillips apartment first and waited for police to arrive. When police arrived Ms. Phillips came out of the apartment crying uncontrollably, stating "he's going to kill me." 2 RP 68-71, 89, 92, 95.

The defendant was charged in a second amended information with a total of eight counts, including various degrees of assault and harassment. 1 CP 85-87. At trial the defendant testified that he had not struck Ms. Phillips or thrown a glass at her in April. He denied ever assaulting her before or after that. He also

denied ever threatening to kill her or burn her with a hot knife. He planned on moving out on June 5. When he got home around 2 a.m. they talked for about two hours about their son. He then went into the living room to lie down on the sofa. Ms. Phillips followed him out there and put their child in a swing. The defendant went back into the bedroom. Ms. Phillips followed a few minutes later, and they began to argue. The defendant stated when his back was turned away from her Ms. Phillips hit him in the head. He reacted by raising his arm to get her off of him, hitting her. He did not intend to hit her. The defendant stated there were no apparent injuries on Ms. Phillips, and her nose was not bleeding. 2 RP 123-128, 131, 133-137, 142-143.

The jury acquitted the defendant of counts I-IV and VI-VIII. It convicted the defendant of Count V, Assault 2nd. 1 CP 11. The Jury returned a special verdict that the crime occurred within the sight or sound of the victim or the defendant's minor child or children under the age of 18 years. 1 CP 7, 8, 33, 2 CP ____ (sub 65.2).

III. ARGUMENT

A. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL ON THE BASIS THAT THE JURY WAS NOT INSTRUCTED ON SELF DEFENSE.

1. The Court Had No Duty To Instruct The Jury On Self Defense When The Defendant Did Not Request That Instruction. The Instruction Was Not Supported By The Evidence Or The Defense Theory Of The Case.

The defendant argues that he is entitled to a new trial because the court did not instruct the jury on self defense and there was evidence in the record to support the defense. The defendant concedes that he did not request a self defense instruction. A court has no duty to instruct the jury on a theory of defense when the defendant does not request instruction on that theory. State v. Graeber, 46 Wn.2d 602, 607, 283 P.2d 974 (1955), cert. denied, 350 U.S. 938, 76 S.Ct. 310, 100 L.Ed. 819 (1956), and 351 U.S. 9707, 76 S.Ct. 1036, 100 L.Ed. 1488 (1956), State v. Lathrop, 112 Wash. 560, 562, 192 P. 950 (1920). Therefore the court committed no error when it did not instruct the jury on self defense.

The court did not err for another reason as well; neither the evidence nor the defendant's theory of his case supported giving a self defense instruction. A party is entitled to have the jury instructed on his theory of the case if there is evidence to support that theory. State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174

(2000). A defendant is entitled to a self defense instruction if there is some evidence demonstrating self defense. Id. at 549. A person's use of force toward another person is not unlawful if it is used by a person who is about to be injured in preventing or attempting to prevent an offense against his person if the force used is not more than necessary. RCW 9A.16.020(3).

Here the defendant denied striking the blow that broke Ms. Phillips' nose. Thus his theory of the case was not that he acted in self defense, but that he did not commit a second degree assault upon her.

The defendant did not produce any evidence that he acted in self defense. He testified that Ms. Phillips struck him in the head. He did not testify that he believed that he was in imminent danger of death or serious bodily injury. Rather he testified that due to their relative size Ms. Phillips could in no way overpower him. The defendant testified that he acted accidentally, not intentionally. 2 RP 134-135. "When a defendant claims a victim's injuries were the result of accident rather than caused by the defendant's acts, the defendant cannot claim self defense. This is because a defendant is not entitled to have a jury instruction unless there is sufficient evidence to support a theory or defense." State v. Dyson, 90 Wn.

App. 433, 439, 952 P.2d 1097 (1997). The defendant failed to produce sufficient evidence to support a self defense instruction not only because he testified he did not act intentionally. The evidence was also not sufficient because the defendant denied that he caused Ms. Phillips injuries when he hit her in an attempt to get her away from him.

2. Counsel Did Not Provide Ineffective Assistance Of Counsel Because He Did Not Propose A Self Defense Instruction.

As an alternative basis for a new trial the defendant asserts his counsel was ineffective for failing to propose a self defense instruction. A defendant asserting ineffective assistance of counsel as a basis for a new trial must show (1) that counsel's performance was deficient, i.e. that it fell below an objective standard of reasonableness and (2) that he was prejudiced by counsel's deficient performance. A defendant is prejudiced when counsel's errors are so serious that the defendant has been deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). All of the circumstances are considered when deciding whether counsel's performance falls below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Courts employ a strong

presumption that counsel rendered effective representation. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). If counsel's conduct constitutes legitimate trial strategy or tactics it cannot be the basis for an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

As discussed, there was no evidence supporting a self defense instruction at trial. Failure to assert self defense when the defendant denies committing the crime does not constitute deficient performance. State v. Johnson, 113 Wn. App. 482, 493, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1010, 69 P.3d 874 (2003).

The evidence presented to the jury consisted of two irreconcilable versions of events. Ms. Phillips testified the defendant hit her without provocation, resulting in a broken nose. The defendant testified he hit Ms. Phillips as he was laying down facing away from her to try and get her off of him when she hit him, but that blow did not break her nose. Given that evidence the defense attorney made a tactical decision to argue that Ms. Phillips was not credible, the defendant was credible and that, pursuant to his testimony, the defendant did not commit the crime. Counsel summed up his strategy stating:

The broken nose, if you believe that's happened, that's assault 2. A fractured bone is always substantial bodily harm. I'm not going to argue. The argument on that is he did not do it.

3 RP 89.

Because counsel made a strategic decision to rely on denial rather than self defense, counsel's failure to propose a self defense instruction cannot form the basis of a claim of ineffective assistance of counsel.

B. THE DEFENDANT'S PRIOR CRIMINAL HISTORY WAS BEFORE THE COURT. THE EXCEPTIONAL SENTENCE WAS BASED ON A PROPER GROUND. THE LENGTH OF THE SENTENCE WAS NOT CLEARLY EXCESSIVE.

At sentencing the State produced documentation showing the defendant had been convicted of one count of murder and two counts of attempted murder in California. Based on that documentation and the defendant's admission to Ms. Phillips that he had been convicted of murder, the trial judge determined that the defendant's offender score was "at least 6." Based on the jury's finding the assault occurred within sight or sound of the defendant or victim's minor child or children under the age of 18 the court imposed an exceptional sentence of 120 months. ___ CP ___ (sub 65.2); 9-22-08 RP 13-15.

The defendant challenges his sentence on two grounds. First he argues that the court improperly included the murder and two attempted murder convictions in its calculation of his offender score because the court failed to conduct a comparability analysis between California and Washington's murder statutes. Second, the defendant asserts that the trial court relied on improper factors when it imposed an exceptional sentence, and the sentence was clearly excessive.

1. Evidence Of The Defendant's Prior California Convictions Was Before The Trial Court. The Case Should Be Remanded For The Trial Court To Conduct A Comparability Analysis On The Record. The State Should Be Permitted To Introduce Any Additional Evidence Necessary To Enable The Trial Court To Conduct That Analysis.

The sentencing court must first correctly determine the defendant's standard range before it can impose an exceptional sentence. State v. Parker, 132 Wn.2d 182, 188, 937 P.2d 565 (1997). The standard range is based in part of the defendant's offender score that is calculated using the defendant's prior and current criminal history. RCW 9.94A.525. Out of state convictions must be classified according to the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3).

When comparing the elements of a foreign conviction to a

comparable Washington offense the court may look to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant, or some comparable judicial record of that information. Shepard v. U.S., 544 U.S. 13, 26125 S.Ct. 1254, 1263, 161 L.Ed.2d 205 (2005), State v. Moncrief, 137 Wn. App. 729, 154 P.3d 314 (2007), State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). In Washington the Courts have also looked at the judgment and sentence to determine whether the offense was comparable. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

At sentencing the parties and the trial judge discussed the documents that the State supplied the court to support the conclusion that the defendant had at least three prior convictions from California. Due to an oversight those documents were not filed with the court at the time of sentencing. By separate motion the State has sought to supplement the record with documents that the parties agree, and that the trial court found were before the court at the time of sentencing.

The court had two documents from which the court could determine that the California murder and attempted murder convictions were comparable to Washington offenses. The Court

had the Abstract of Judgment which certified the defendant had pled guilty to Murder in violation of section 187 of the California Penal Code, and two counts of Attempted murder (counts 2 and 4) in violation of sections 187/664 of the California Penal Code. The Court also has the transcript of the plea colloquy in which the defendant pled guilty to those charges.

While the abstract of judgment is not specifically a judgment and sentence, it is a comparable judicial record of that information. In California, the judgment of the Court is its oral pronouncement. The abstract is the summary of that pronouncement. People v. Prater, 71 Cal. App. 3d 695, 139 Cal. Rptr. 566 (1977). The abstract states everything that the judgment and sentence would state, including the name of the defendant, the crimes for which he was found guilty, and the sentence. The plea colloquy falls squarely within the documentation the Court held a trial court may consider when determining whether the foreign conviction is comparable.

The trial court was required to conduct an analysis to determine if the California convictions were comparable to murder and attempted murder under Washington law. RCW 9.94A.525(3). The court included those convictions in the defendant's offender

score without conducting in the necessary analysis. The case should be returned to the trial court for it to do so.

The defendant argues that the case should be remanded for re-sentencing but that the State should be precluded from introducing any additional evidence of the defendant's convictions. He relies on State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002). This Court should reject that argument.

Since Ford and Lopez were decided the Legislature has amended RCW 9.94A.530 to permit introduction of additional evidence supporting the defendant's criminal history after remand from an appeal or collateral attack. This change was specifically made to address the Court's decisions in Ford and Lopez, "in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing." Laws of 2008 ch. 231, §1.

Even before this legislative amendment, under the facts in this case the remedy would not have been to score the defendant without consideration of the California convictions. Where documentation supporting the prior out of state convictions was before the court, and the trial court simply failed to conduct an analysis on the record, the Court has remanded the case to the trial

court to conduct the comparability analysis. State v. Labarbera, 128 Wn. App. 343, 350, 115 P.3d 1038 (2005). Because there was documentation supporting the California convictions before the court the remedy is remand for the trial court to conduct the analysis that it failed to do.

2. The Trial Court's Determination That An Exceptional Sentence Was Warranted Was Supported By The Record. The Trial Court Did Not Abuse Its Discretion When It Set The Term Of The Exceptional Sentence.

The trial court may impose an exceptional sentence outside the standard range if it determines, considering the purposes of the Sentencing Reform Act, that there are substantial and compelling reasons justifying that sentence. RCW 9.94A.535. To reverse a sentence outside the standard range the reviewing court must find either (1) that the reasons supplied by the sentencing court are not supported by the record before the trial judge, or that those reasons do not justify an exceptional sentence, or (2) that the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(2),(4).

The defendant contends that the trial court relied on reasons that do not justify an exceptional sentence. He also argues the sentence was clearly excessive. The trial court did not err.

The jury found the offense involved domestic violence and that the offense occurred within sight or sound of the victim's or the offender's minor children under the age of 18. 1 CP 41, 2 CP ____ (sub 65.2). These are aggravating circumstances which justify an exceptional sentence above the standard range. RCW 9.94A.535(h)(ii). The trial judge relied on this finding in his oral ruling to impose the exceptional sentence. 9-22-08 RP 13.

The defendant takes issue with the court's additional comments referencing the defendant's misdemeanor history for inflicting corporal injury on a spouse. He argues the court improperly used this prior offense to justify the exceptional sentence. Those comments related to the reason for the length of the sentence, not the sentence itself. The court was clear that it relied on the jury finding that the offense was a domestic violence offense occurring within sight or sound of his or the victim's children to impose an exceptional sentence, and not prior criminal history. 9-22-08 RP 13-15. The Court's failure to enter written findings and conclusions as required by RCW 9.94A.535 should be remedied upon remand.

The court's reference to the defendant's prior history and his pattern of behavior explained the court's reasons for setting the

length of the defendant's sentence. A trial court may consider factors in setting the length of an exceptional sentence even when those factors could not be considered when determining whether an exceptional sentence is justified. State v. Ross, 71 Wn. App. 556, 568, 861 P.2d 473 (1993), review denied, 123 Wn.2d 1019, 865 P.2d 636 (1994), State v. McCune, 74 Wn. App. 395, 873 P.2d 565, 125 Wn.2d 1006, 886 P.2d 1134 (1994). Even though the court could not consider the defendant's future dangerousness when deciding whether there were substantial and compelling reasons for an exceptional sentence, it was entirely proper to consider the defendant's past criminal history, and the likelihood of recurrence in setting the length of the defendant's sentence. Ross, 71 Wn. App. at 568.

Like Ross, the trial judge here relied on the defendant's past history to set the term of his sentence. The prosecutor stated the defendant had a misdemeanor conviction for corporal injury on a spouse. 9-22-08 RP 2. That was supported by Ms. Phillip's testimony when she described the defendant ordering her to disrobe and then informing her that he was going to burn her with a hot knife. Ms. Phillips testified that the defendant told her that evening that he had similarly burnt his former girlfriend's "asshole"

with a hot knife. This threat caused Ms. Phillips to fear the defendant would do the same to her. 9-15-08 RP 57.

The trial court reflected on the prosecutor's representation coupled with Ms. Phillip's testimony regarding the knife incident and other assaults the defendant committed upon her. The court justifiably concluded that the evidence showed "the defendant's abusive behavior continued as a pattern of behavior during his relationship with Ms. Phillips. I think for those reasons he is a danger to anyone who may be in a close relationship for him. For that reason I will impose the high end, the maximum 120 months in prison." 9-22-08 RP 15. The court's reasoning is similar to the court's reasoning in Ross. The trial court did not err when it took into consideration the defendant's past history in setting the term of the exceptional sentence.

The defendant also argues the sentence imposed was "clearly excessive." That term is not defined by statute. The Court has held that term means action which is clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken. State v. Ritchie, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995), quoting, State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986).

Alternatively, a sentence which “shocks the conscience of the reviewing court” is clearly excessive. Ross, 71 Wn. App. at 571.

The defendant relies on cases which consider how much longer the sentence imposed was in relation to the standard range for the offense given the offender score. That analysis does not complete an inquiry into whether the sentence is clearly excessive.

The Court rejected a doubling rule that would limit the terms of an exceptional sentence to twice the standard range in Oxborrow. The Court noted application of the rule to the facts in that case would result in a sentence that was “grossly inappropriate” considering the facts of the case. Id. at 531.

The defendant cites two cases in which the Court found the sentence was clearly excessive. State v. Elsberry, 69 Wn. App. 793, 850 P.2d 590 (1993) overruled, State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995), and State v. Delarosa-Flores, 59 Wn. App. 514, 799 P.2d 736 (1990), review denied, 116 Wn.2d 1010, 805 P.2d 814 (1991). In both cases the defendant had no prior criminal history. In Elsberry the Court cited factors which the trial court ignored, finding those factors diminished the severity of the aggravating factors used by the trial court to impose the sentence.

In Delarosa-Flores the Court rejected three of the five grounds the trial court relied upon to impose an exceptional sentence.

In other cases in which the Court found the length of the sentence was not clearly excessive additional circumstances were present justifying the sentence imposed. In Souther the defendant was convicted of vehicular homicide under the DUI prong. He had a long history of DUI and other alcohol and driving offenses. This Court found the 20 year exceptional sentence was not clearly excessive. State v. Souther, 100 Wn. App. 701, 721, 998 P.2d 350, 142 Wn.2d 1006, 34 P.3d 1232 (2000). Similarly, in McCune the Court found a 367 month sentence was not clearly excessive when the defendant committed a similar offense in the past. “It was reasonable for the court to consider Mr. McCune’s pattern of conduct in determining what light of exceptional sentence was appropriate.” McCune, 74 Wn. App. at 399.

The trial court correctly considered the defendant’s pattern of domestic abuse when it imposed a 120 month sentence. Given the defendant’s prior history of violence toward multiple persons, and his use of that history to threaten and intimidate Ms. Phillips in this case in order to perpetrate his offense, the sentence imposed was not clearly excessive.

C. THE ORDER PROHIBITING THE DEFENDANT FROM CONTACT WITH HIS SON CONFLICTS WITH EXISTING AUTHORITY.

At sentencing the court entered a no contact order prohibiting the defendant from contact with Ms. Phillips and the defendant's and Ms. Phillips son. The court reasoned that the child was present when the defendant assaulted Ms. Phillips and thus remained at risk. 9-22-08 RP 16. The defendant objected to the no contact order in favor of his son. 9-22-08 RP 19. The defendant contends the trial court's order violated his fundamental right to parent.

The court may order crime related prohibitions including ordering no contact with a specified class of persons. In a criminal case the fundamental right to parent may be restricted by a condition of the defendant's sentence if the condition is reasonably necessary to prevent harm to the children. State v. Sanford, 128 Wn. App. 280, 288, 115 P.3d 368 (2005). Courts have found that a no contact order imposed as part of a criminal judgment and sentence was not proper when the defendant's offense was against the mother of his children, even where the child was a witness to the domestic violence. State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001), Sanford, supra.

The State concedes that under the facts of this case these authorities control. The defendant and Ms. Phillip's son was not a victim of the offense. The Court ordered that the defendant have no contact with Ms. Phillips. There is nothing in the record that indicates the no contact order in favor of Ms. Phillips would be insufficient to satisfy the court's intent to protect the child from the harm of witnessing domestic violence between his parents. The order should be struck.

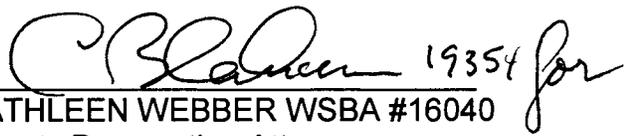
IV. CONCLUSION

For the forgoing reasons the State requests that the Court affirm the defendant's conviction. The State asks the Court to remand the case to the trial court in order for the court to analyze whether the defendant's murder and attempted murder convictions are comparable to Washington offenses on the record. Consistent with legislative amendments the State asks the Court to find that the State may supplement the record on remand. The trial court should be given the discretion to impose an exceptional sentence. If the trial court re-imposes and exceptional sentence it should

enter written findings of fact and conclusions of law supporting that sentence.

Respectfully submitted on September 18, 2009.

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