

NO. 71723-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN RONQUILLO,

Appellant.

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COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS, JUDGE

**BRIEF OF RESPONDENT**

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A. ISSUES

1. A mandatory sentence of life without parole for an offender who was under the age of 18 when he committed the crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. Ronquillo received consecutive sentences for three serious violent crimes (including one murder) that he committed when he was 16 years old, for a total of 615.75 months. Given earned release time, he could be released at age 59. The court considered Ronquillo's request for a mitigated exceptional sentence at his resentencing, but determined that he did not meet the relevant standard. The Legislature passed a statute earlier this year that creates a presumption of release after 20 years for juveniles who committed their crimes before the age of 18. Given all of this, has Ronquillo failed to show that he was sentenced to mandatory life without parole in violation of either the Eighth Amendment or article I, section 14 of the Washington Constitution?

2. The multiple offense policy mitigating factor contained in RCW 9.94A.535(1)(g) may be applied where a defendant received consecutive sentences for multiple serious violent crimes under RCW 9.94A.589(1)(b). When *imposing* an exceptional sentence under the SRA, a sentencing judge must look to the act's

purposes as expressed in RCW 9.94A.010. In *rejecting* Ronquillo's request for a mitigated exceptional sentence, the sentencing court applied a standard that encompassed most, if not all, of the purposes of the SRA. Ronquillo's attorney urged the court to apply this standard. Did the trial court properly exercise its discretion in denying the request for an exceptional sentence? Was any error as to the applicable legal standard invited?

B. STATEMENT OF THE CASE

In March of 1994, when Brian Ronquillo was 16 years old, he participated in a gang-related drive-by shooting in front of Ballard High School in Seattle. CP 336, 485. Ronquillo fired at least six shots from the front passenger seat of a car, hitting innocent bystander Melissa Fernandes in the head and fatally wounding her. CP 337. For his actions that day, Ronquillo was convicted of one count of first degree murder (Melissa Fernandes), two counts of attempted first degree murder (Ryan Lam and Tam Nguyen, who were standing next to Fernandes), and one count of second degree assault while armed with a firearm (Brent Mason, who was hit by a bullet fragment). The trial court imposed a low-end, standard range sentence of 621 months of confinement. CP 360-61, 367.

The convictions were affirmed on appeal. CP 336-51. In 2013, Ronquillo won resentencing to correct a minor error in scoring. CP 2-5. The resentencing hearing was held on March 21, 2014. RP<sup>1</sup> 1.

At the resentencing hearing, the State asked the court to reimpose the same sentence – 621 months. RP 7; CP 283-304. Ronquillo took the opportunity to request an exceptional sentence below the standard range, and suggested that a sentence of 320 months would be appropriate. CP 6-40, 472-78.

At the hearing, Ronquillo presented the testimony of Dr. Terry Lee, a child and adolescent psychiatrist, to talk about adolescent brain development and its relationship to juvenile culpability. RP 16. Dr. Lee told the court that, due to incomplete development of the frontal lobe in adolescents, they are prone to impulsive behavior and acting on emotions. RP 17-19. Lee talked about the “complications from things like family and social disruptions or trauma abuse, that can also affect brain functioning and brain development.” RP 19. He cited studies that show that it is not until “around 25 or so” that “a brain starts functioning like adult brains.” RP 20. He cited the drop in risk perception in

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<sup>1</sup> The verbatim report of proceedings of the resentencing hearing held on March 21, 2014 will be referred to in this brief as “RP.”

adolescents, their susceptibility to peer pressure, their tendency toward “sensation-seeking,” and their difficulties with problem-solving. RP 20-21. Dr. Lee concluded that adolescents are “less able to foresee the probable consequences of their behavior, or consider alternate behaviors, and they are less culpable.” RP 21.

Ronquillo's attorney made several arguments in favor of a mitigated exceptional sentence. She relied on the multiple offense policy to argue that a sentence within the standard range was clearly excessive. RP 23-26, 29-30. She cited Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005); Graham v. Florida, 560 U.S.48, 130 S. Ct. 2011, 176 L. Ed.2d 825 (2010); and Miller v. Alabama, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012), noting that the Supreme Court in those cases had questioned the constitutionality of the sentences imposed on the juvenile defendants. RP 26-27. When pressed by the sentencing court, however, counsel acknowledged that Graham and Miller addressed *mandatory life without parole* sentences imposed on juveniles. RP 27.

The court rejected Ronquillo's request for an exceptional sentence. Relying on the Court of Appeals' opinion in State v. Graham, 178 Wn. App. 580, 314 P.3d 1148 (2013), *rev'd*,

\_\_\_ Wn.2d \_\_\_, 337 P.3d 319 (2014), the court found that the multiple offense policy did not apply to convictions for serious violent offenses. RP 61. The court also ruled in the alternative, however, finding that even if the multiple offense mitigator *did* apply here, the standard had not been met. RP 62.

The court further found that Ronquillo's age at the time of his crimes could not alone justify a sentence below the standard range; the court did, however, factor in Ronquillo's age and immaturity in determining his sentence *within* the standard range. RP 62-64. The court concluded that the United States Supreme Court cases on which counsel relied did not limit sentencing here because Ronquillo was not facing life without parole. RP 63. Finally, the court concluded that it could not consider Ronquillo's post-conviction behavior in prison in determining his sentence for these crimes. RP 65.

Taking into account the adjustment in scoring that had necessitated the resentencing, the court again sentenced Ronquillo at the bottom of the standard range, for a total of 615.75 months. RP 65-66; CP 481, 483.

C. ARGUMENT

1. RONQUILLO'S STANDARD RANGE SENTENCE IS NOT UNCONSTITUTIONAL.

Ronquillo argues that his standard range sentence of 615.75 months for crimes he committed at age 16 should be viewed as a sentence of mandatory life without parole, and thus as a violation of the prohibitions on cruel and unusual punishment contained in the state and federal constitutions. This argument is too far a stretch. With earned release time, Ronquillo could be eligible for release at age 59. Moreover, his is not a single lengthy term imposed for a single crime, but cumulative sentences for four crimes against four different persons, including first degree murder.

Recent developments in the law also rebut Ronquillo's claim that he was sentenced to mandatory life without parole. The Washington Supreme Court has now held that the multiple offense policy mitigator applies to consecutive sentences for serious violent offenses, and the trial court considered and rejected an exceptional sentence on this basis at Ronquillo's resentencing. In addition, the Legislature earlier this year enacted a new law that creates a *presumption* of release after 20 years for defendants convicted of crimes committed before the age of 18 and sentenced to lengthy

terms of imprisonment. Given applicable law, Ronquillo's sentence cannot be equated with mandatory life without parole.

a. Ronquillo Did Not Receive A Sentence Of Life Without Possibility Of Parole.

First of all, Ronquillo's sentence does not fall within the ambit of the rule announced in Miller v. Alabama, *supra*. The Court in Miller held that a mandatory sentence of *life without parole* for one who was under the age of 18 at the time of the crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. 132 S. Ct. at 2460. Ronquillo's sentence of 615.75 months is lengthy, but it is not life without parole. Ronquillo's attorney acknowledged as much at his resentencing, agreeing with the court that Ronquillo would be released "once he completes his time." RP 28.

Moreover, in arguing that his sentence is in effect a sentence of life without possibility of release (AOB<sup>2</sup> at 25), Ronquillo ignores the potential for early release. Under RCW 9.94A.728(1)(a), he may earn up to 15% of his sentence as earned release time. Under this statute, Ronquillo's sentence could potentially be reduced by 92.36 months, which would bring it down to approximately 523

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<sup>2</sup> Appellant's Opening Brief.

months, or 43 years. Given that he has been serving his sentence since the age of 16, Ronquillo could potentially be released at age 59. This is hardly the equivalent of life without parole.

Ronquillo also raises a claim under article I, section 14 of the Washington Constitution. His argument is contained in one paragraph, and includes no analysis of the four factors generally considered in addressing claims of cruel punishment (nature of the offense, legislative purpose behind the statute, punishment defendant would have received in other jurisdictions, and punishment meted out for similar offenses in the same jurisdiction). In re Personal Restraint of Haynes, 100 Wn. App. 366, 375-76, 996 P.2d 637 (2000). His argument is thus insufficient to support this claim. See id. at 376.

In any event, this argument is premised on Ronquillo's claim that he is serving a mandatory life without parole sentence. For the reasons argued throughout this section, this characterization of his sentence is inaccurate.

b. The Eighth Amendment Is Not Implicated By Separate Sentences For Separate Crimes.

The fact that Ronquillo is not serving a single lengthy sentence for a single conviction (as were the juvenile defendants in

Miller), but four separate sentences for four separate convictions for crimes against four different victims, cannot be overlooked when considering whether the sum total of the sentences violates the Eighth Amendment. The Eighth Amendment applies to each individual sentence, not to the cumulative result of consecutive sentences for separate crimes. See Lockyer v. Andrade, 538 U.S. 63, 74 n.1, 123 S. Ct. 1166, 155 L. Ed.2d 144 (2003) (rejecting, in context of federal habeas review, dissent's argument that two consecutive sentences of 25 years to life for two separate crimes were equivalent, for Eighth Amendment purposes, to a single sentence of life without parole for 37-year-old defendant); Pearson v. Ramos, 237 F.3d 881, 886 (7<sup>th</sup> Cir. 2001) (sentences are treated separately, not cumulatively, for Eighth Amendment purposes); United States v. Aiello, 864 F.2d 257, 265 (2<sup>nd</sup> Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); People v. Gay, 960 N.E.2d 1272, 1279 (Ill. App. 2011) ("The eighth amendment allows the State to punish a criminal for each crime he commits, regardless of the number of convictions or the duration of sentences he has already accrued.").

This rule has been applied specifically to claims that consecutive terms imposed upon a defendant for crimes committed as a juvenile violate the Eighth Amendment. See State v. Kasic, 228 Ariz. 228, 265 P.3d 410 (2011) (finding that cumulative sentence of 139.75 years for juvenile non-homicide offender, based on consecutive term-of-years sentences for multiple crimes with multiple victims, did not violate Eighth Amendment); Walle v. State, 99 So.3d 967 (Fla. Dist. Ct. App. 2012) (consecutive sentences of 65 years for 18 offenses, consecutive to 27-year sentence in separate case, did not violate Eighth Amendment when imposed on juvenile non-homicide offender); Bunch v. Smith, 685 F.3d 546 (6<sup>th</sup> Cir. 2012) (denying habeas relief under Eighth Amendment to juvenile non-homicide offender who received separate consecutive sentences for separate crimes against the same victim totaling 89 years).

While Ronquillo's consecutive sentences for his multiple serious violent offenses amount to a lengthy term of years, he was not sentenced to life without possibility of parole, the only sentence that Miller specifically prohibits. Under the analysis set out above, these sentences do not violate the Eighth Amendment.

c. Ronquillo's Sentence Is Not Mandatory.

There is an additional reason why Ronquillo's sentence does not run afoul of Miller. Unlike a mandatory sentence of life without possibility of release, Ronquillo's standard range sentence of 615.75 months may be mitigated through imposition of an exceptional sentence. Pursuant to the Washington Supreme Court's decision in State v. Graham, \_\_\_ Wn.2d \_\_\_, 337 P.3d 319 (2014), a sentencing court has discretion to impose an exceptional sentence below the standard range even in the case of consecutive sentences for multiple serious violent crimes, if the court finds that the cumulative sentence is clearly excessive in light of the purposes of the SRA.<sup>3</sup> The trial court exercised this discretion in Ronquillo's case, declining to impose a mitigated exceptional sentence because, in the court's estimation, the standard was not met here. *See* § C.2, *infra*.

d. The Legislature Has Remedied The Problem Identified In Miller.

Finally, Ronquillo's sentence is not among those prohibited by Miller because the Washington Legislature earlier this year enacted statutes addressing (and arguably going beyond) the

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<sup>3</sup> Sentencing Reform Act of 1981.

problem identified in Miller. Under these statutes (the “Miller fix”), any defendant who stands convicted of one or more crimes committed prior to his 18<sup>th</sup> birthday may petition the Indeterminate Sentence Review Board for early release after serving 20 years of total confinement. RCW 9.94A.730(1).

The relevant statute contains a *presumption* of release: “The board *shall* order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released.”<sup>4</sup> RCW 9.94A.730(3) (*italics added*). Thus, Washington’s sentencing scheme for juvenile offenders contains a realistic possibility of release after twenty years, and accordingly does not violate the Miller prohibition on mandatory life without parole sentences for such offenders.

The Legislature has placed certain restrictions on this relief, including disqualifying those who have been convicted of a crime committed *subsequent* to the person’s 18<sup>th</sup> birthday.

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<sup>4</sup> Because the statute contains a presumption of release after 20 years, Ronquillo’s argument that parole is an act of “grace” is inapposite, as is his reliance on People v. Gutierrez, 58 Cal. 4<sup>th</sup> 1354, 324 P.3d 245 (2014). AOB at 23-24, 27.

RCW 9.94A.730(1). Ronquillo may be disqualified from relief under this section, as he was convicted of custodial assault for actions that may have taken place after his 18<sup>th</sup> birthday. See State v. Ronquillo, 2000 WL 557902 (Wash. App. Div. 3, March 21, 2000).

If Ronquillo is in fact unable to take advantage of the new statute, it is solely through his own actions in committing another crime after he became an adult. The Legislature had every right to make the policy judgment to limit relief under the new statute in the way that it did. See State v. Fain, 94 Wn.2d 387, 390-91, 617 P.2d 720 (1980) (courts have “long deferred to the legislative judgment that repeat offenders may face an enhanced penalty because of their recidivism”).

Legislative decision-making, in general and specifically in this case, involves collaborative efforts to balance competing interests. See CP 46 (House Bill Report, 2SSB 5064). This Court should not second-guess this process, or violate the separation of powers doctrine by intruding on the province of the Legislature where that body has enacted a statute that comports with

constitutional constraints and requirements.<sup>5</sup> See State ex rel. Heavey v. Murphy, 138 Wn.2d 800, 815, 982 P.2d 611 (1999) (Talmadge, J., concurring) (“In the absence of an unconstitutional act, under our constitutional system of separation of powers, we must defer to the Legislature’s policy judgment, even in the circumstances where we think the policy judgment is unwise.”); Seattle v. Montana, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996) (“If the regulation tends to promote public safety, health, morals or welfare, then its wisdom or necessity is a matter left exclusively to the legislative body.”); State v. Campbell, 103 Wn.2d 1, 34-35, 691 P.2d 929 (1984) (absent constitutional prohibition, courts are bound to uphold legislative acts as the best expression of community standards). Given the new “Miller fix” law, Ronquillo’s sentence is not unconstitutional.

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<sup>5</sup> Because the Legislature has acted in a way that takes a juvenile’s age into account in sentencing where a lengthy term of years is involved, this Court should decline Ronquillo’s invitation to “re-examine” State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005), wherein the Washington Supreme Court held that the SRA does not permit an exceptional sentence below the standard range based on factors personal to the defendant, and unrelated to the crime or to the defendant’s culpability or past criminal record. AOB at 15-16.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE.

Ronquillo asserts on appeal that the legal standard for applying the multiple offense policy mitigating factor contained in RCW 9.94A.535(1)(g) is whether the presumptive sentence is clearly excessive in light of the purposes of the SRA, as expressed in RCW 9.94A.010. After Ronquillo's recent resentencing, the Washington Supreme Court confirmed that this is in fact the correct standard. State v. Graham, \_\_\_ Wn.2d \_\_\_, 337 P.3d 319 (2014). Even without this guidance, however, the sentencing court here evaluated Ronquillo's request for an exceptional sentence under the proper standard. While the sentencing court did not expressly mention the seven purposes of the SRA that are contained in RCW 9.94A.010, the standard that the court used (whether the incremental effect of the subsequent offenses was nonexistent, trivial or trifling) encompasses the majority (and arguably all) of these purposes. The court thus applied the correct legal standard in rejecting the request for an exceptional sentence.

Even if the trial court applied an incorrect legal standard in denying Ronquillo's request for an exceptional sentence below the standard range, the court did so because counsel urged that

standard, and in fact expressly told the court that the “nonexistent, trivial or trifling” standard was the *only* applicable standard. Thus, any error in this regard was invited.

a. The Trial Court Properly Rejected The Requested Exceptional Sentence.

The law extant at the time of Ronquillo's resentencing led the trial court to conclude that the multiple offense policy mitigating factor set out in RCW 9.94A.535(1)(g) did not apply to consecutive serious violent offenses imposed under RCW 9.94A.589(1)(b). RP 61; State v. Graham, 178 Wn. App. 580, 314 P.3d 1148 (2013), *rev'd*, \_\_\_ Wn.2d \_\_\_, 337 P.3d 319 (2014). Subsequently, the Washington Supreme Court held that this mitigator *does* apply to such sentences. Graham, 337 P.3d at 323.

However, in an abundance of caution, knowing that the Court of Appeals' decision in Graham was under review by the Washington Supreme Court, the sentencing court ruled in the alternative, assuming that the mitigator *did* apply to Ronquillo's sentence. RP 23-24, 62. In rejecting Ronquillo's request for an exceptional sentence on this basis, the sentencing court focused on whether the difference between the effect of the first criminal act (the murder of Melissa Fernandes) and the cumulative effects of

the subsequent criminal acts (the attempted murders of Ryan Lam and Tam Nguyen, and the second degree assault on Brent Mason), was nonexistent, trivial or trifling. RP 62.

The supreme court in Graham addressed the relevant legal standard:

Finally, Graham asks us to clarify the factual finding a sentencing judge must make to invoke the multiple offense policy mitigating factor of .535(1)(g). We decline to do so because we think the statute is also clear on that point. It directs the judge to consider if the presumptive sentence "is clearly excessive in light of the purpose of this chapter, *as expressed in RCW 9.94A.010.*" RCW 9.94A.535(1)(g) (emphasis added). RCW 9.94A.010 lists seven policy goals the legislature intends the SRA to advance:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Sentencing judges should examine each of these policies *when imposing an exceptional sentence* under .535(1)(g).

Graham, 337 P.3d at 323 (final italics added).

The legal standard cited by the sentencing court in considering Ronquillo's request for a mitigated exceptional sentence pursuant to the multiple offense policy – whether the difference between the effects of the original offense and the cumulative effects of the subsequent offenses is “nonexistent, trivial or trifling” -- comes from a line of Court of Appeals cases. See State v. Sanchez, 69 Wn. App. 255, 260-61, 848 P.2d 208, *rev. denied*, 122 Wn.2d 1007 (1993); State v. Hortman, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994), *rev. denied*, 126 Wn.2d 1025 (1995); State v. Kinneman, 120 Wn. App. 327, 342-43, 84 P.3d 882 (2003), *rev. denied*, 152 Wn.2d 1022 (2004); State v. McKee, 141 Wn. App. 22, 33, 167 P.3d 575 (2007), *rev. denied*, 163 Wn.2d 1049 (2008).

Notably, despite reliance on the “nonexistent, trivial or trifling” standard in these lower courts, the supreme court in Graham did not explicitly repudiate this standard. The Graham court likely left the standard in place because it is firmly rooted in

the purposes of the SRA. The court in Hortman elaborated on this connection:

Whether a given presumptive sentence is clearly excessive in light of the purposes of the SRA is not a subjective determination dependent upon the individual sentencing philosophy of a given judge. Rather, it is an objective inquiry based on the Legislature's own stated purposes for the act. See RCW 9.94A.010 (setting forth the purposes of the SRA). *Sanchez* holds that a presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling. We fully agree. The purposes of the SRA include ensuring punishments that are proportionate to the seriousness of the offense and the offender's criminal history, promoting respect for the law by providing punishment which is just, encouraging commensurate punishments for offenders who commit similar offenses, protecting the public, offering the offender an opportunity for self-improvement and making frugal use of the State's resources. RCW 9.94A.010.

*None of these purposes is served by the multiple offense policy when the difference between the effects of the first act and the cumulative effects of the subsequent acts is de minimis.*

Hortman, 76 Wn. App. at 463-64 (italics added).

The court in Hortman correctly tied the "nonexistent, trivial or trifling" standard to the purposes of the SRA. Accounting for additional significant harm caused by multiple serious violent offenses ensures that the punishment is "proportionate to the

seriousness of the offense.” RCW 9.94A.010(1). Punishing the offender for this additional harm also “[p]romote[s] respect for the law by providing punishment which is just.” RCW 9.94A.010(2). Including the additional harm in the calculus results in a sentence that is generally “commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010(3). Punishing an offender for the additional harm that he has caused to others also “[p]rotect[s] the public” by lengthening the term of incarceration. RCW 9.94A.010(4). Keeping the offender in prison for a lengthy period of time for serious violent crimes that caused additional significant harm offers the offender “an opportunity to improve himself” by taking advantage of the structure and programs that prison provides. RCW 9.94A.010(5). Keeping those who have caused more harm, and are thus arguably more dangerous, confined for a term commensurate with that harm makes “frugal use of the state’s and local governments’ resources.” RCW 9.94A.010(6). Finally, a lengthier term for the offender who has caused significant additional harm through multiple serious violent offenses reduces the “risk of reoffending.” RCW 9.94A.010(7).

Even if the “incremental additional harm” standard does not encompass *every* purpose of the SRA, it was nevertheless a valid

approach in this case. The court in Graham required sentencing courts to “examine each of these policies when *imposing* an exceptional sentence under .535(1)(g).” Graham, 337 P.3d at 323 (italics added). This makes sense, because when *imposing* an exceptional sentence, a court is going *outside* the standard range prescribed by the SRA, and must make certain that such a sentence does not violate the SRA’s purposes.

Here, by contrast, the sentencing court imposed a sentence *within* the standard range. The court was within its discretion to reject a sentence that *departed* from that range if, in the court’s estimation, such a sentence would frustrate *any* of the purposes of the SRA. The trial court properly rejected an exceptional sentence in Ronquillo’s case.

b. Ronquillo Invited Any Error.

The basic premise of the invited error doctrine is that a party may not set up an error at trial and then complain of that very error on appeal. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009); City of Seattle v. Patu, 147 Wn.2d 717, 58 P.3d 273 (2002). The doctrine was designed in part to prevent a party from misleading the trial court and receiving a windfall by doing so. Momah, 167 Wn.2d at 153. The invited error doctrine has been

applied even in cases where the error resulted from neither negligence nor bad faith. Patu, 147 Wn.2d at 720 (citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)). In determining whether the invited error doctrine applies, courts have considered whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. Momah, 167 Wn.2d at 154.

Here, Ronquillo both affirmatively assented to the alleged error he now raises on appeal and, more importantly, he materially contributed to it. Following the presentation of the defense expert witness, Dr. Lee, defense counsel told the court that she wanted to “get back to the State v. Graham case.” RP 23. Counsel informed the court that Graham was currently pending before the Washington Supreme Court. RP 23-24. The following exchange ensued:

**Counsel:** There’s actually two issues that they’ve petitioned for review on. One is the interpretation of [RCW 9.94A.535(1)(g)]. And one is also what the appropriate legal standard is. *The Court of Appeals have [sic] generally agreed the mitigating factor will apply if the incremental harm created by the additional offenses is nonexistent, trivialing [sic], or trifling.*

**Court:** Right. *I was going to ask if that’s the only test, or I mean –*

**Counsel:** *Well, yeah.* At Graham's resentencing the trial court focused on that line of cases, but misconstrued them as showing – requiring a showing that the additional current charges themselves were nonexistent, trivialing [sic], or trifling.

*When the correct focus should be on whether the incremental harm which flows from those additional charges is – I don't know if trivial is quite the right word or not, but if the focus is on the harm and not the actual charge.*

**Court:** Well, but if we – even if – but if trivialing [sic] or trifling, whatever the three words were that the Court used under the multiple offense policy –

**Counsel:** Uh-huh.

**Court:** -- if we have essentially four victims in this case –

**Counsel:** Yes, we do.

**Court:** -- *then wouldn't I have to look at what was the incremental impact on each one of these victims separately?* And –

**Counsel:** *I believe so. Yeah.*

RP 24-25 (italics added).

Defense counsel soon returned to this argument, again explicitly adhering to the “nonexistent, trivial or trifling” standard:

*“[J]ust getting back to the legal standard on the multiple offense policy. And Mr. Ronquillo's case is very much like Graham. We're not contending that the serious crimes of attempted murder are trivialing [sic] in any way. What he's arguing is that the*

*minimal incremental harm that flowed from each shot is more trivial.*

RP 29 (italics added).

Counsel's argument led the State to respond under that standard:

The harm that the defendant did in this particular case is immeasurable. Certainly not trivial, certainly not trifling. Any one of those multiple bullets that the defendant fired from his gun could have taken a life.

RP 34.

Not surprisingly, the court, in its alternative ruling considering Ronquillo's request for an exceptional sentence under the multiple offense policy, applied this same standard. Examining whether "the difference between the effects of the first criminal act and the cumulative effects of subsequent criminal acts is nonexistent, trivial, or trifling," the court concluded that it was not. RP 62.

In sum, the record is clear that defense counsel was the first to mention the "nonexistent, trivial or trifling" standard at the resentencing hearing. Significantly, when the court asked counsel whether that was the *only* test, counsel responded in the affirmative. Where, as here, counsel explicitly and repeatedly asked the court to apply a particular legal standard in evaluating the request for an exceptional sentence, argued only that standard, and

affirmatively told the court that that was the *only* applicable standard, counsel cannot then fault the court for using that standard in deciding whether to impose an exceptional sentence. Any error in this regard was invited.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 2<sup>nd</sup> day of January, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, **Stacy Kinzer**, containing a copy of the **Brief of Respondent**, in **STATE V. BRIAN RONQUILLO**, Cause No. **71723-5-I**, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame  
Name  
Done in Seattle, Washington

1/2/15  
Date