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Court of Appeals
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

KENNITH CORNELL BOWENS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00989-0

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly considered and rejected Bowens' request for an exceptional sentence, which was based on the victim's willing participation in the violations of the no-contact order.**
- II. **Trial counsel was not ineffective since he advised the trial court of the statutory authority supporting his request for an exceptional sentence.**
- III. **The trial court properly sentenced Bowens and even if error occurred at the sentencing hearing resentencing is not required because there is not a reasonable probability that the trial court would have imposed an exceptional sentence below the standard range.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kenneth C. Bowens was charged by third amended information with five counts of violating a domestic violence no-contact order and one count of tampering with a witness for contact with Kindra Marcus between April 11, 2017 and June 22, 2017. CP 84-87. Each count included the special allegation of domestic violence. CP 84-97. The case proceeded to a jury trial before the Honorable Daniel Stahnke on August 22, 2017 and concluded on August 23, 2017 with the jury's verdict convicting Bowens as charged. RP 1-375; CP 117-123. The trial court sentenced

Bowens to a standard range sentence of 60 months confinement. RP 393-94; CP 139-149, 153-54. Bowens filed a timely notice of appeal. CP 159.

B. STATEMENT OF FACTS

Bowens was in jail during the time period giving rise to the charges for which he was convicted. RP 89-91, 128-29. At the same time, by virtue of a domestic violence no-contact order, he was prohibited from having contact with Kindra Marcus, his wife who was pregnant with their child. RP 91-93, 133-37, 234-41. Despite the existence of the no-contact order, Bowens continued to have contact with Ms. Marcus by utilizing the Clark County Jail's video call system as well as its traditional jail call system. RP 143-93, 248-54. In fact, Bowens' five no-contact order convictions were based on four video calls and one traditional jail call. RP 143-93, 248-54. Bowens also tampered with Ms. Marcus during one of the calls by advocating that she not appear at trial to testify against him in the hopes that her absence would lead to the dismissal of his criminal charges. RP 151-57, 169-193.

In order to successfully complete a video call both the inmate and the citizen outside of the jail must setup a telmate account, one of the two must schedule the date and time in advance for the video call, and then both must "show up" as scheduled. RP 131-32, 141-44, 197-99, 201-02.

Bowens and Ms. Marcus each setup a telmate account under their own name¹ and scheduled and completed four video calls. RP 158-168. Thus, for the purpose of having contact with Bowens, Ms. Marcus setup her own telmate account and, as scheduled, “answered the phone” by using a computer with a webcam. RP 144-46, 197-99, 201-02. The content of the video calls,² while at times sexual in nature, is consensual and related to their lives. RP 158-168.

The traditional jail calls, however, are far less congenial and gave rise to the tampering charge. RP 151-57, 169-193. Moreover, Bowens is using another inmate’s account to place the calls and is placing them to a phone number listed to a “Jim Bass” even though Ms. Marcus is the person on the other end of the line. RP 152-57,194-95. On one of these calls Bowens says to Ms. Marcus:

right now you have to look at what you’re doing right now with you – he’s trying to build stuff – when he’s trying to get stuff off of you – from your own mouth so they can have something to convict me on. If you say the wrong thing. Do you understand?

¹ The State’s offer of proof on the jail call system is cited by Bowens twice for certain propositions regarding Ms. Marcus’s efforts to have contact with Bowens. Br. of App. at 3-4; RP 114-126 (offer of proof). The offer of proof also shows that Ms. Marcus registered an account under her own name and that it was this account that she used for the video calls at issue. RP 125.

² As Bowens notes, the audio of the relevant video calls is not completely transcribed. Br. of App. at 4.

RP 178. She responds: “Yes. I understand.” RP 178. Bowens gets more specific telling Ms. Marcus that she needs to “make [her]self scarce and not be there so they probably trying to get you – you need still not be there.” RP 185. He continues: “I’m not trying to be mean – I’m really not – it’s just this is very important to me that I can cover all bases . . . to where it – it jams them up to where they have no choice to dismiss – do you understand what I’m saying? That’s why I’m getting on you.” RP 185-86.

At sentencing the State emphasized Bowens’ criminal history, which included 15 prior convictions for domestic violence offenses and 9 convictions for violating no-contact orders of which 5 were pleaded and proven as domestic violence offenses. RP 385; CP 150-52. Ms. Marcus, on the other hand, had her victim advocate read a statement in which she asked for “the least . . . punishment” for Bowens because he was a “loving, supportive husband and father” and because she wanted them to “remain a . . . family and have a healthy baby.” RP 386-87.

Bowens’ trial attorney argued for an exceptional sentence downwards pursuant to RCW 9.94A.535(1)(a), which is a statutory mitigating factor available when “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RP

387-88.³ Bowens' trial attorney focused his sentencing argument on the fact that Ms. Marcus was a willing participant in the violations of the no-contact order. RP 387-89. Bowens himself commented that "like [Ms. Marcus] said we want to be together." To which the trial court responded "[b]ut that's something I can't really consider. . . . [A]s much as I would love to consider the fact that she's pregnant and you're expecting a child I can't really consider those personal factors. . . ." RP 391.

At this point, the trial court and Bowens' trial attorney engaged in the following back and forth regarding the propriety of an exceptional sentence:

[COURT]: Now the question is do I have enough to support an appellate review to go down? And I – I apologize – unless I'm missing something – but I'm just not – other than just personal to him – he's the one that made the calls from the jail. It's not like she was of – of – an aggressor in –in that respect.

[DEFENSE]: Well – no – a willing participant I think – accepted –

[COURT]: Most of the – most of the exceptional downwards – the case law on it – most of the exceptional downwards was where the victim was an aggressor in the case. And that's kind of what they key on.

[DEFENSE]: - right. And that's one of the factors – and what I'm focusing on is willing participant and – and my – my point in that Your Honor is that in order to set up these

³ Bowens also argued for an exceptional sentence pursuant to subsection (g) of the same statute claiming his sentence was clearly excessive due to the multiple offense policy, but he does not raise any issues related to that potential mitigating factor on appeal. Br. of App. at 5.

calls both parties have to arrange for it and – and then it has to be approved.

RP 392. The trial court concluded:

Okay. So here's the law, okay? Here's the law as I understand it. In – in doing this analysis of an exceptional down or up I've got to consider two factors. The first factor:

The trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing a standard range.

We clearly don't have that here. I – we can't even get past the first one. The second one is the mitigating factors of – her answering the phone is really all we've got as mitigating factors – she answers the phone so:

The mitigating factor must be sufficiently substantial and compelling to distinguish this crime from others in the same category.

And I can't get there either. So under the law the appellate review would send it right back for re-sentencing. So your request for an exceptional sentence downwards is denied.

RP 393-394. The trial court then imposed the 60 month sentence.

ARGUMENT

I. The trial court properly considered and rejected Bowens' request for an exceptional sentence, which was based on the victim's willing participation in the violations of the no-contact order.

Review of a standard range sentence where the defendant requested an exceptional sentence below the standard range is “limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. Garcia-Martinez*, 88

Wn.App. 322, 944 P.2d 1104 (1997); *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017). In other words, a trial court “errs when ‘it refuses categorically to impose an exceptional sentence below the standard range under any circumstances’ or when it operates under the ‘mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.’” *McFarland*, 189 Wn.2d at 56 (quoting *Garcia-Martinez*, 88 Wn.App. at 330). On the other hand, a trial court “that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion. . . .” *Garcia-Martinez*, 88 Wn.App. at 330. That is, a trial court properly exercises its discretion in declining to impose an exceptional sentence when it “has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually *or* legally insupportable and imposed a standard range sentence.” *Id.* (emphasis added).

When a trial court errs by failing to exercise its discretion upon a request for an exceptional sentence the remedy of a remand for resentencing is only required when there was “a possibility the [trial] court would have imposed a mitigated sentence had it recognized its discretion to do so.” *McFarland*, 189 Wn.2d. at 58 (internal quotation omitted). In order to determine whether there was a possibility of a trial court imposing

a mitigated sentence, reviewing courts should examine whether the trial court made “statements on the record which indicated some openness toward an exceptional sentence.” *Id.* (citing cases) (internal quotation omitted).

An exceptional sentence below the standard range is appropriate when the mitigating factors considered by the trial court are not those “factors necessarily considered by the Legislature in establishing the standard sentence range” and when the mitigating factors are “sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” *State v. Law*, 154 Wn.2d 85, 110 P.3d 717 (2005) (citations omitted). Thus, for example, family considerations are not valid mitigating factors since these factors relate to the *defendant* and not the *crime*. *Id.* at 97-98, 102 (citing cases). In contrast, the “willing participant” mitigating factor can justify an exceptional sentence if to “a significant degree, the victim was a[] . . . willing participant” in the committed crime. RCW 9.94A.535(1)(a). Accordingly, a trial court can impose an exceptional sentence when a victim is a “willing participant” in a defendant’s violation of a no-contact order.; *State v. Bunker*, 144 Wn.App. 407, 183 P.3d 1086 (2008) *aff’d on other grounds*, 169 Wn.2d 571 (2010). Just because the factor may be present under the facts of a case, however,

does not mean the trial court is required to impose an exceptional sentence below the standard range. *Bunker*, 144 Wn.App. at 422.

State v. Bunker and, *State v. Hecker* and *State v. Ames*, two unpublished cases from this Court,⁴ are instructive. 144 Wn.App. 407; 192 Wn.App. 1036, 2016 WL 562748; 190 Wn.App. 1044, 2015 WL 6506635. In *Bunker*, the defendant was convicted of violating a no-contact order premised on the presence of the protected party (victim) in his truck. 144 Wn.App. at 410-11. In response to the defendant's request for an exceptional sentence based on the "willing participant" mitigating factor the trial court stated "unfortunately, under the statute and the case law I don't think I have the discretion to impose an exceptional sentence downward. If I did have that discretion, I would probably do it." *Id.* at 411. Because the trial court erroneously believed that it did not have the discretion to impose an exceptional sentence and indicated a willingness to impose an exceptional sentence if it could, the *Bunker* court reversed the trial court for an abuse of discretion and remanded for resentencing. *Id.* at 421-22.

In *Hecker*, there was a factual basis to argue the "willing participant" mitigating factor justified an exceptional sentence, but the

⁴ "[U]npublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate." GR 14.1. *Bowens* cites these cases as well.

defense attorney in arguing for an exceptional sentence focused solely on the unfairness of the sentence. 2016 WL 562748 at 1. Additionally, the defense attorney failed to inform the trial court of the statutory authority or case law that would have allowed for an exceptional sentence based on the “willing participant” mitigating factor. *Id.* This Court found that defense counsel’s performance was deficient since there “were clear statutory grounds and supporting case law that could have justified the trial court’s imposition of an exceptional sentence downward.” *Id.* at 3.

Moreover, due to this performance the trial court “was unaware that a victim’s willing participation may be statutory grounds for an exceptional downward sentence under RCW 9.94A.535.” *Id.* at 4. Furthermore, this Court concluded that the defendant was prejudiced and a resentencing was necessary because there “is a reasonable probability the sentencing court would have imposed an exceptional downward sentence had it known” it could have based on the “willing participant” mitigating factor. *Id.* As a result, the defendant’s sentence was reversed. *Id.*

In *Ames*, defense counsel sought an exceptional sentence for the defendant based on the fact that the victim “was a voluntary and willing participant in violating the no-contact order.” 2015 WL 6506635 at 1. At first, the trial court refused to impose an exceptional sentence because it did not believe that the victim’s “consensual contact with [the defendant]

made her a ‘willing participant’ under RCW 9.94A.535(1)(a).” *Id.* at 3. Defense counsel, however, corrected the trial court and in citing *Bunker, supra*, explained “that it would not be an abuse of discretion for the trial court to impose an exceptional downward sentence under the willing participant exception for a conviction of violation of a no-contact order.” *Id.* In response, “the trial court replied, ‘[v]ery good. Well, the court is not going to do that. Given the sentence that the Legislature has designated in this matter . . . that will be the sentence of the court.’” *Id.* (omission in original).

Based on defense counsel’s citation to authority and the trial court’s response, this Court held that when the trial court denied the defendant’s request for an exceptional sentence it did so when it “was no longer under the erroneous legal impression that it was prohibited from imposing an exceptional downward sentence.” *Ames*, 2015 WL 6506635 at 3. And that “[b]ased on the evidence before it, the trial court simply declined to do so.” *Id.*⁵ Consequently, the trial court did not abuse its discretion in declining to impose an exceptional sentence. *Id.*

⁵ See also *State v. Rife*, --- Wn.App. ----, 2018 WL 1831137 (an unpublished decision holding that the trial court did not refuse to exercise its discretion in declining to impose an exceptional sentence when it concluded “I’ve considered mitigating factors, and I don’t believe there are any mitigating factors that would justify a sentence below standard range”); GR 14.1

Here, Bowens argues that the trial court abused its discretion by refusing to consider an exceptional sentence based on the “willing participant” mitigating factor. *See* Br. of App. More specifically, Bowens claims that the “trial court [] stated that willing participation was ‘necessarily considered by the legislature is [sic] establishing a standard range [sentence]’” and cites to RP 393. Br. of App. at 8 (alteration in original). Bowens later similarly claims that the trial court held “that the willing participant factor could not justify an exceptional sentence.” Br. of App. at 9. These claims are not supported by the record because at no point does the trial court explicitly make such statements. RP 386-394. To be fair, however, the trial court’s concluding comments on the request for an exceptional sentence are not a paragon of clarity and are relatively short. The trial court states:

Okay. So here’s the law, okay? Here’s the law as I understand it. In – in doing this analysis of an exceptional down or up I’ve got to consider two factors. The first factor:

The trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing a standard range.

We clearly don’t have that here. I – we can’t even get past the first one.

RP 393. The factors the trial court references are those reviewing courts utilize to determine if an exceptional sentence was properly imposed. *Law*, 154 Wn.2d at 95. Based on the trial court’s comments above, divining its

exact legal conclusion is difficult since the comment does not reference the “willing participant” mitigating factor. But it seems impossible to claim that the trial court was straightforwardly concluding it could not legally impose an exceptional sentence based on that factor when keeping in mind that during the sentencing (1) the victim asked for the lowest possible sentence for the defendant due to their (the victim and defendant) family and child status; (2) that the defendant was heading in the same direction before being cut off by the trial court and told that it (the trial court) “can’t really consider those personal factors . . . because the legislature sets the standard range”; and (3) that Bowens’ trial attorney also sought an exceptional sentence based on the “multiple offense policy” and reiterated that he was arguing for an exceptional sentence based on the “willing participant” mitigating factor for which he provided the correct statutory authority. RP 386-394.

As a result, there is a fair inference that the trial court was aware that the “willing participant” factor was a statutorily authorized mitigating factor—taking it outside the first factor of the test that the court employed—but instead was referencing the other, personal reasons proffered for giving Bowens a mitigated sentence, which are not legally permissible reasons for imposing an exceptional sentence below the

standard range. RP 386-87, 391, 393.⁶ The above inference is buttressed by the fact that after Bowens' trial attorney's first argument about why the "willing participant" mitigating factor was grounds for an exceptional sentence the following discussion, which is not substantially different from the one described in *Ames*, *supra*, occurred:

[COURT]: Now the question is do I have enough to support an appellate review to go down? And I – I apologize – unless I'm missing something – but I'm just not – other than just personal to him – he's the one that made the calls from the jail. It's not like she was of – of – an aggressor in –in that respect.

[DEFENSE]: Well – no – a willing participant I think – accepted –

[COURT]: Most of the – most of the exceptional downwards – the case law on it – most of the exceptional downwards was where the victim was an aggressor in the case. And that's kind of what they key on.

[DEFENSE]: - right. And that's one of the factors – and what I'm focusing on is willing participant and – and my – my point in that Your Honor is that in order to set up these calls both parties have to arrange for it and – and then it has to be approved.

RP 392. While Bowens' trial attorney, in contrast to the trial attorney in *Ames*, did not cite *Bunker*, he had previously cited the correct statute and then corrected the trial court to extent that the trial court was asserting that the victim had to be an "aggressor" for the mitigating factor to apply. As in *Ames*, this court should conclude that the trial court recognized that it

⁶ This is not the only fair inference, of course, as the trial court's comment that "[w]e clearly don't have that here. I – we can't even get past the first one" suggests that it is referencing the possibility of an exceptional sentence in total rather than a particular factor or factors. RP 393. This inference is friendlier to Bowens' position.

had the discretion to impose an exceptional sentence based on the “willing participant” mitigating factor.

Even if this Court resolves the above argument in favor of Bowens, however, reversal is not required as a trial court properly exercises its discretion in declining to impose an exceptional sentence when it “has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually *or* legally insupportable and imposed a standard range sentence.” *Garcia-Martinez*, 88 Wn.App. at 330. (emphasis added). Here, the trial court considered the fact of Ms. Marcus’ willing participation in Bowens’ violations of the no-contact order and did not find her actions sufficiently compelling to impose an exceptional sentence. *Garcia-Martinez*, 88 Wn.App. at 330 (holding that a trial court “that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion . . .”). The trial court stated:

The second one is the mitigating factors of – her answering the phone is really all we’ve got as mitigating factors – she answers the phone so:

The mitigating factor must be sufficiently substantial and compelling to distinguish this crime from others in the same category.

And I can’t get there either. So under the law the appellate review would send it right back for re-sentencing. So your request for an exceptional sentence downwards is denied.

RP 393-94. Here, the trial court’s consideration of the facts on the record is more substantial than that of trial court in *Ames*,⁷ which this Court concluded showed that the trial court “[b]ased on the evidence before it . . . simply declined to . . .” impose an exceptional sentence. 2015 WL 6506635 at 3.

The trial court’s decision to impose a standard range sentence is supported by the record. Ms. Marcus’ willing participation in the violations of the no-contact order for which Bowens was convicted was not as elaborate or effortful as Bowens portrays; rather, save for the traditional jail call, she setup an account under her own name and “answered the phone”⁸ at the scheduled time. This willing participation is not compelling and not substantially different than the legion of “consensual” violations of no-contact orders that are prosecuted throughout the State. As this Court recently commented in *State v. Horn*, there is “judicial recognition of the cycles of violence and *reconciliation* in relationships involving domestic violence. . . .” --- Wn.App. ----, --- P.3d ----, 2018 WL 19118236, 5 (emphasis added). In short, consensual contact by the victim is not unexpected in these relationships.

⁷ In response to the defendant’s argument in *Ames* that an exceptional sentence should be imposed based on the “willing participant” mitigating factor the trial court responded “[v]ery good. Well, the court is not going to do that. Given the sentence that the Legislature has designated in this matter . . . that will be the sentence of the court.” 2015 WL 6506635 at 3 (omission in original).

⁸ Used her computer with a webcam.

Consequently, the trial court was aware it could impose an exceptional sentence below the standard range, but based on the evidence presented it simply declined to do so. *Ames*, 2015 WL 6506635 at 3.

Assuming *arguendo*, however, that the trial court erred during the sentencing proceeding in the manners alleged by Bowens, a reversal of the sentence and a remand to the trial court for resentencing is not required since there is not a reasonable “possibility the [trial] court would have imposed a mitigated sentence had it recognized its discretion to do so” as it made no “statements on the record which indicated some openness toward an exceptional sentence.” *McFarland*, 189 Wn.2d. at 58 (citing cases) (internal quotation omitted); *Hecker*, 2016 WL 562748 at 4. The record, instead, shows that the trial court did not find Ms. Marcus’ willing participation to be compelling enough to impose an exceptional sentence. Importantly, Bowens fails to argue with any specificity or cite to the record to show that there is actually “a reasonable possibility” that this trial court would have imposed an exceptional sentence based on the “willing participant” mitigating factor. *Hecker*, 2016 WL 562748 at 4; Br. of App. at 9-10; RAP 10.3(6).

II. Trial counsel was not ineffective since he advised the trial court of the statutory authority supporting his request for an exceptional sentence.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed the successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 211 P.3d 441 (2009) (stating that "[j]udicial scrutiny of counsel's performance must be highly deferential") (quotation and citation omitted). Thus, "given the deference afforded to

decisions of defense counsel in the course of representation” the “threshold for the deficient performance prong is high.” *Grier*, 171 Wn.2d at 33. In order to prove that deficient performance prejudiced the defense, “the defendant must establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *State v. Greer*, 171 Wn.2d 17, 246 P.3d 1260 (2011) (quoting *Kyllo*, 166 Wn.2d at 862).

Here, Bowens’ trial counsel’s performance was not deficient since he advised the trial court of the correct statutory authority supporting the request for an exceptional sentence. RP 387-88. Nothing more was required. Bowens’ trial counsel’s performance is easily distinguishable from the counsel in *Hecker*, who was found to have performed deficiently. 2016 WL 562748 at 1. The trial counsel in *Hecker* in arguing for an exceptional sentence focused solely on the unfairness of the sentence and failed to inform the trial court of the statutory authority *or* case law that would have allowed for an exceptional sentence based on the “willing participant” mitigating factor. *Id.* Bowens’ trial counsel informed the court of the correct statutory authority and primarily argued for an exceptional sentence on the basis of the “willing participant” mitigating factor. RP 387-88, 392. Thus, Bowens’ trial counsel did not perform deficiently.

But even assuming deficient performance, Bowens' cannot, and does not attempt to show that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Greer*, 171 Wn.2d at 34 (quoting *Kyllo*, 166 Wn.2d at 862). As noted above, the trial court made no "statements on the record which indicated some openness toward an exceptional sentence" and, instead, appeared to find that Ms. Marcus' willing participation in the violations of the no-contact order was not compelling. *McFarland*, 189 Wn.2d. at 58. As a result, Bowens' claim of ineffective assistance of counsel must fail.

CONCLUSION

For the reasons argued above, this Court should affirm Bowens' sentence.⁹

DATED this 7th day of MAY, 2018.

Respectfully submitted:

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⁹ The State will not be seeking appellate courts should it prevail.

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