

FILED
Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL)	NO. 51741-8-II
RESTRAINT PETITION OF)	
)	RESPONSE TO
)	PERSONAL RESTRAINT
LIA Y. TRICOMO)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Joseph J.A. Jackson, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

The Petitioner, Lia Yera Tricomo is currently serving a 357 month sentence in the custody of the Department of Corrections following her plea of guilty to murder in the second degree, three counts of assault in the third degree and taking a motor vehicle in the second degree. CP 27-35, 213-222.

II. STATEMENT OF PROCEEDINGS

1. Substantive Facts

On April 4, 2013, Thurston County Detectives were called out to a homicide investigation at the residence of John Alkins, a former

counselor of Lia Tricomo. CP 4. Deputies responded to the residence following a welfare check request for Behavioral Health Resources (BHR) who indicated that Lia Tricomo had contacted BHR by phone and indicated that she had stabbed a man at the residence. CP 4.

Deputies found Alkins body on his bed facedown. There was a large amount of blood throughout the residence, including in the kitchen, the entry way, smeared on the walls, on the stairway and on the floors. CP 4. Alkins was found with an extension cord partially wrapped around his neck. CP 4. Lia Tricomo went to St. Peters Hospital in the mental health section and was contacted there by Thurston County Detectives. The detectives were told by Dr. Tim Zola that Tricomo stated she had stabbed her former counselor at BHR and had stated that she had moved in with the man the day prior and had stabbed him after some form of a sexual encounter. CP 5.

Detectives advised Tricomo of her *Miranda* warnings Tricomo was interviewed by law enforcement. Tricomo stated that she had moved in with Alkins on April 29, 2013, and had been consuming vodka. CP 5. She described a sexual encounter with Alkins and said

that she had hid a folding razor blade knife next to the head of the bed. CP 5. Tricomo said that she grabbed the knife and slit Alkins throat approximately 6 times. She also admitted that she had hid the knife as preparation to kill him and said that he was a creep. CP 5.

Tricomo told detectives that after she slit Alkin's throat he walked around the house trying to stop the bleeding for hours. Tricomo said that she followed him around the house to make sure that he didn't leave. CP 5. She stated that there was a struggle for the knife downstairs near the front door. Alkins tried to take the knife away but she cut his wrist as he did so. CP 5. Alkins eventually went upstairs and was lying on the floor bleeding. Tricomo stated she grabbed an extension cord, wrapped it around his neck, crossed it and pulled it to strangle him. She stated that she then drank more vodka and went to bed. CP 5.

The next day, Tricomo woke up and went to check on Alkins before going downstairs to eat. She then used his computer and tried to access his bank accounts. She said that she was attempting to get money so that she could flee. CP 5-6. She placed a call to the crisis line and reported that she stabbed a man. She left the residence in

Alkins' vehicle and went to an AA meeting in downtown Olympia. CP 6.

Following her arrest, Detectives served a search warrant on Tricomo's personal property that was recovered from St. Peter Hospital. In a backpack belonging to Tricomo, they recovered a blood stained folding razor knife and a set of keys labeled John. CP 6.

2. Procedural History

Tricomo was charged with attempted murder in the first degree with deliberate cruelty, while armed with a deadly weapon and murder in the first degree with deliberate cruelty to a vulnerable victim while armed with a deadly weapon. CP 7. On November 6, 2014, the State amended the charges to murder in the second degree, three counts of assault in the third degree, and taking a motor vehicle without the owner's permission. CP 25-26. Tricomo pled guilty to the charges in the first amended information, with agreement that the State would recommend 357 months on the murder count, 70 months concurrent on the three assault counts, and 12 months concurrent on the taking a motor vehicle count, with the defense free to argue for a lesser sentence. CP 27-35.

Both the State and the defense filed briefing in advance of the sentencing hearing. Tricomo submitted a 79-page sentencing brief to the court. CP 42-120. It included psychological evaluations by Dr. David Dixon, on Tricomo's behalf, CP 60-80, and Dr. Delton Young, chosen by the State. CP 82-96. There were letters from a number of Tricomo's friends, CP 98-112, and news articles and material regarding a concert in which Tricomo played the violin. CP 114-20. There was a six-page mitigation report by Dhyana Fernandez, along with Fernandez's declaration regarding her qualifications. CP 50-58. Tricomo separately filed a five-page document titled "Allocution of Lia Tricomo." CP 208-12. The State submitted an 83 page sentencing memorandum that included the reports of Dr. Dixon and Dr. Young, and mental health/competency evaluations conducted by Western State Hospital CP 121-203.

At sentencing, the State objected to the court considering the mitigation report prepared by Fernandez. CP 131-33; 01/28/15 RP 30-34. The court ruled that it would consider all of the background information contained in the mitigation report, but not a section regarding Paxil. The court found that Fernandez had no expertise in

that subject and did nothing but provide a list of articles which she suggested might be relevant. The court also said it would not consider Fernandez's opinion as to the length of the sentence. 01/28/15 RP 39. Following all of the recommendations provided, the trial court imposed a sentence of 357 months on the murder count, 70 months on each of counts two through four and 12 months on count five. Counts two through five were concurrent with count 1. CP 213-221.

Tricomo appealed alleging that her convictions violated double jeopardy, her plea was not entered voluntarily, and the trial court erred in not considering evidence at sentencing. This Court disagreed and affirmed her convictions. Unpublished Opinion, No. 47238-4-II, Appendix 1, at 1. The opinion was amended following a motion to reconsider. Order Denying Motion for Reconsideration and Amending Opinion, No. 47238-4-II, Appendix 2. The Washington State Supreme Court denied review. Appendix 3. The mandate was entered and the case became final on January 5, 2017. Appendix 4. This personal restraint petition follows.

III. RESPONSE TO ISSUES RAISED

1. This petition should be dismissed because it seeks to

re-litigate the issues that were raised on direct appeal.

Collateral attack by use of a personal restraint petition should not simply be a reiteration of issues resolved at trial and direct review. In re Pers. Restraint of Davis, 152 Wn.2d 647, 670-671, 101 P.3d 1 (2004). The petitioner is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interest of justice require relitigation of that issue. Id. The availability of collateral relief through a personal restraint petition is limited because it undermines the principles of finality of litigation, degrades the prominence of trial and at times deprives society of the right to punish admitted offenders. State v. Riofta, 134 Wn.App. 669, 696, 142 P.3d 193 (2006), citing, Davis, 152 Wn.2d at 670.

On direct appeal, Tricomo raised the same double jeopardy argument and the same argument that the trial court failed to consider the effect of her medications at sentencing which she now assigns error to. Her petition does not add any additional information or reason for this Court to conclude that the interest of justice requires relitigation of either issue.

2. This Court correctly found in the direct appeal that Tricomo's double jeopardy argument fails and this Petition adds no additional facts for this Court to

consider.

Double jeopardy claims are reviewed de novo. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). The Fifth Amendment to the United States Constitution and Washington Constitution art. I, § 9, provide coextensive protection against being twice prosecuted for the same offense. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). That protection precludes more than one punishment for the same offense. Villanueva-Gonzalez, 180 Wn.2d at 980.

Whether a defendant has been punished more than once for the same crime depends on what the legislature intended as the punishable act. State v. Leyda, 157 Wn.2d 335, 343, 138 P.3d 610 (2006). When a defendant has been convicted of multiple counts of the same statute, the question is what the legislature intended to be the unit of prosecution. Villanueva-Gonzalez, 180 Wn.2d at 980. If only one unit of prosecution of the crime has been committed, there can be only one punishment. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). If the statute does not define the unit of prosecution, or if the intent of the legislature is not clear, the ambiguity

must be resolved in favor of the defendant. Lyeda, 157 Wn.2d at 343.

Tricomo was charged with three counts of second degree assault and one count of second degree murder against the same victim on the same date. CP 25-26. One count of second degree assault alleges that she used a razor to inflict neck wounds (Count II), one count alleges she used a razor to inflict facial wounds (Count III), and one count alleges she used a razor knife to inflict hand wounds (Count IV). *Id.* Tricomo pled guilty to all of these charges and did not raise a double jeopardy claim in the trial court.

Courts will generally decline to consider issues that were not raised in the trial court. RAP 2.5(a). However, RAP 2.5(a)(3) provides an exception where there is a manifest error affecting a constitutional right. The right to be free of double jeopardy is clearly of constitutional magnitude. “The manifest error exception is a narrow one. . . . We particularly decline to consider a double jeopardy argument to automatically be manifest error in circumstances where the record lacks specificity for review.” State v. Lazcano, 188 Wn. App. 338, 360, 354 P.3d 233 (2015) (internal cite omitted). The court

in Laczano reviewed a number of Washington cases which considered a double jeopardy claim for the first time on appeal, some of which did not address manifest error, and concluded that “[n]o Washington decision has held that the accused need not show manifest constitutional error on double jeopardy claims not asserted below.” Id. at 360. The State maintains that the record does not contain facts upon which a manifest error can be identified, and the facts that are in the record support a finding that there is no double jeopardy. The insufficiency of the record will be further addressed below. This Court agreed in the direct appeal. Appendix 1.

The Washington Supreme Court has addressed the unit of prosecution of assault, and concluded that it is a course of conduct crime. Villanueva-Gonzalez, 180 Wn.2d at 983. It reached this result after determining that the legislature did not specify a unit of prosecution and then examining the common law. Id. at 986. Based upon the ambiguity of the common law definition of assault and after considering authority from other jurisdictions, the court applied the rule of lenity and adopted the interpretation most favorable to the defendant. Id. The court said that this interpretation avoids “the risk

of a defendant being ‘convicted for every punch thrown in a fistfight.’”
Id. at 985, quoting State v. Tili, 139 Wn.2d 107, 116, 985 P.2d 365
(1999).

Once the court determines the unit of prosecution, it must then
conduct a factual analysis to determine if the facts show one or more
than one unit of prosecution. State v. Bobic, 140 Wn.2d 250, 266,
996 P.2d 610 (2000). The court in Villanueva-Gonzalez, having
determined that assault is a course of conduct crime, said:

There is no bright-line rule for when multiple
assaultive acts constitute one course of conduct. While
any analysis of this issue is highly dependent on the
facts, courts in other jurisdictions generally take the
following factors into account:

- The length of time over which the assaultive
acts took place,
- Whether the assaultive acts took place in the
same location,
- The defendant’s intent or motivation for the
different assaultive acts,
- Whether the acts were uninterrupted or
whether there were any intervening acts or events, and
- Whether there was an opportunity for the
defendant to reconsider his or her actions.

We find these factors useful for determining
whether multiple assaultive acts constitute one course
of conduct. However, no one factor is dispositive, and
the ultimate determination should depend on the totality
of the circumstances, not a mechanical balancing of the
various factors.

Villanueva-Gonzalez, 180 Wn.2d at 985.

Because Tricomo pled guilty to the charges, there was no trial and no testimony. At the plea hearing, she agreed that the court could rely on the statement of probable cause to establish the factual basis for the plea. CP 34; 11/06/14 RP 10-11. At sentencing, Tricomo presented a sentencing brief including materials which she asked the court to consider. CP 42-120. The State objected to the report of the mitigation specialist and Tricomo's attorney argued that it should be considered. 01/29/15 RP 30-38. The defendant's sentencing brief contains substantial information regarding Tricomo's version of events.

According to Sgt. Brady, one of the investigating officers, the crime scene was one of the most horrific he had seen in his experience of more than 30 homicide investigations. He said that the amount of blood throughout the house indicated that the incident had lasted for a long period of time. 01/28/15 RP 53. The probable cause statement described the large amount of blood in the house. CP 4-5. Tricomo spoke to the police and told them that after sexual acts that began approximately 6:00 p.m. on April 29, 2013, she had used a

razor knife to slit the victim's throat six times. After that "he walked around the house trying to stop the bleeding for what she described as hours." CP 5. Tricomo said she followed him to make sure he didn't leave the house. She said that there was a struggle for the knife near the front door and during that struggle she cut the victim's wrists. CP 5. The victim "eventually" went upstairs and lay on the floor bleeding. CP 5. There was a large pool of blood near the bed, indicating that the victim had lain there for "quite some time." CP 4. At some later time, Tricomo used an electrical cord to strangle the victim. CP 5.

Tricomo was evaluated psychologically by two different psychologists. CP 60-80, 82-96. She told Dr. Young, as she told the police, that she had taken the razor knife into the bedroom before a sexual encounter and hidden it. CP 5, 92. "I had a vision that I would cut him open . . . that's it, on his neck. I don't know if the plan was for him to die." "I hid the razor 'cause I was thinking of cutting him open. I don't know why." CP 92. "I didn't want him to kiss me. I felt kind of trapped in there, so my plan was to cut him open. He reached out and I cut him five or six times, deep. There was lots of blood." CP

93. She explained she followed the victim downstairs because she was afraid he'd obtain a weapon to use against her. CP 93. When the victim tried to take the razor knife away from her she cut his hand and wrist "because I wanted him to stay . . . because we were supposed to have sex and he would walk all over the house." CP 93. At some time during the evening the victim got dressed and told Tricomo to go to bed, refusing her request to sleep with him. This caused her to feel rejected and she strangled him with the electrical cord. "I wanted him dead because he didn't want to sleep with me." CP 93.

Tricomo argues that all of these actions were one unbroken chain of events driven by a single intent to kill. The available evidence does not support that assertion. While it is unclear from the record when the cuts to the victim's face occurred, it is clear that the cuts to the neck and the cuts to the hand occurred at different times in different parts of the house. Tricomo cut the victim's neck in the bedroom and his hand downstairs. Tricomo herself told the police that there was a period of hours between the time she cut his neck and his eventual death, and the record supports the implication that

there was a substantial period of time between her cutting his neck and cutting his hand. CP 5. Nor did she ever say she had the intent to kill the victim when she cut him with the razor knife. Tricomo said she didn't know whether she meant for him to die when she cut his neck. CP 92. She cut his hands in the struggle over the knife because she didn't want him to leave. CP 93. It was only when she strangled him with the electrical cord that she "wanted him dead because he didn't want to sleep with me." CP 93.

Applying the factors identified by the court in Villanueva-Gonzalez, there is a solid basis for characterizing these three assaults as separate events rather than a continuing course of conduct. First, the length of time over which the acts took place is extraordinarily long. Tricomo said it lasted for hours. CP 5. At least two of the acts occurred in different places, albeit in the same house. One was in the upstairs bedroom and the other downstairs. CP 5; 92-93. The intent for the different assaults was different. The cutting of the victim's neck was because "he was a creep." The cuts to the hand occurred because the victim was trying to disarm Tricomo. CP 5. The acts were not uninterrupted. Although the entire account of what occurred

comes from Tricomo, she said that the two walked around the house for some time, the victim trying to stop the bleeding and Tricomo making sure he didn't leave. CP 5. There was ample opportunity for Tricomo to reconsider her actions and not only stop following the victim and refrain from further assaults, but to summon aid for a dying man.

The court in Villanueva-Gonzalez said that no one factor is dispositive, and the determination as to whether a series of actions are a continuing course of conduct depends on the totality of the circumstances. Villanueva-Gonzalez, 180 Wn.2d at 985. The totality of these circumstances supports a conclusion that these assaults were not a continuing course of action. Where they are separate incidents, they are separate units of prosecution, and Tricomo is not being punished more than once for the same crime.

It is important to remember that Tricomo pled guilty to these charges; there was no trial. The parties spent much time in negotiations. 10/29/14 RP 5, 7. Because this was a guilty plea, a claim of double jeopardy is waived unless the violation is clear from the record presented on appeal. State v. Knight, 162 Wn.2d 806,

811-12, 174 P.3d 1167 (2008); In re Pers. Restraint of Newlun, 158 Wn. App. 28, 34, 240 P.3d 795 (2010). In Tricomo's case, no double jeopardy violation is clear from the record. The record is silent as to the assault resulting in cuts to the victim's face. A defendant may not expand the record to establish a double jeopardy violation. Knight, 162 Wn.2d at 811-12. The assaults resulting in cuts to the victim's neck and hand occurred at different times on different floors of the house and for different reasons. There was more than enough time for Tricomo to reconsider her actions and form a different intent. Therefore, each count of second degree assault should be considered a separate crime rather than constituting one continuous course of action. Tricomo is not being punished more than once for a single act.

Tricomo also argues that her act of strangling the victim was merely part of a continuous course of conduct. However, the unit of prosecution analysis applies only when there are multiple counts of the same crime. Second degree murder is not the same offense as second degree assault. Tricomo also argues that the second degree assaults merge into the murder, claiming that there was a single intent

to cause the victim's death and that he would have eventually bled to death had she not strangled him with an electrical cord. She was not charged with assault for the strangulation.

The judicially created merger doctrine occurs in several contexts, but it may be applied to determine whether the legislature intended more than one punishment for a single act. State v. Slemmer, 48 Wn. App. 48, 56, 738 P.2d 281 (1987). It is not of constitutional magnitude. Id. at 57. Nor can it be raised for the first time on appeal. Id.

Two crimes merge when one crime is elevated to a higher degree by committing another act that the criminal statutes also define as a crime. If one crime (unlawful possession of a firearm) need not be committed to elevate another crime [here first degree assault] to a higher degree, the two crimes at issue do not merge.

State v. Moreno, 173 Wn. App. 479, 498, 294 P.3d 812, *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013), internal cites omitted.

The victim did not bleed to death. He died of asphyxia due to strangulation. The argument that the assaults merged into the murder because they would have eventually been fatal by themselves makes little sense. Even disregarding the possibility that the victim might

have sought medical attention for the bleeding before it was too late, it is illogical to argue that because he could have died in a manner which he did not, the crimes constitute the same offense.

Where there is a claim that convictions under two different statutes constitute double jeopardy, the test articulated in Blockburger v. United States, 284 U.S. 299, 304, 52 C. Ct. 180, 76 L. Ed. 306 (1932), applies. State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005). That test analyzes the statutory elements, not the facts of the case itself. Gocken, 127 Wn.2d at 107. The offenses must be the “same in law and in fact.” State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Double jeopardy is not violated if each offense requires proof of a fact that the other offense does not. Gocken, 127 Wn.2d at 100-01. When two crimes contain different legal elements, there is a “strong presumption” that the legislature intended separate punishments. State v. Cole, 117 Wn. App. 870, 875, 73 P.3d 411 (2003).

Tricomo cites to State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), for the proposition that when the charges are based upon the

same conduct, murder and assault constitute the same criminal conduct. Womac, however, is not only distinguishable from the present case, but it did not hold that the underlying felony always merges into felony murder. Womac's four-month-old son died from head injuries; Womac was subsequently charged and convicted of homicide by abuse, second degree felony murder, and first degree assault, all as separate crimes rather than in the alternative. The Supreme Court held that there had been a single crime against a single victim, but it resulted in three convictions. Under the facts of that case, that is true; the assault was the cause of death, for which Womac was convicted of two different homicide crimes.

In Tricomo's case, however, the second degree assaults to which she pled guilty were not part of the murder. The victim died because she tightened an electrical cord around his neck until he stopped breathing. ". . . I pulled hard to be sure he was dead. . . I could tell he was dead 'cause he wasn't breathing." CP 93. The victim may have been weakened by loss of blood, and, left untreated, may have died eventually from blood loss had Tricomo not strangled him, but the fact remains that he died of strangulation. Tricomo was

not charged with assault by pulling the cord around the victim's neck, nor was she charged with first degree felony murder. She was charged with, and pled guilty to, first degree intentional murder. CP 25-27. Further, as argued above, Tricomo did not say she had the intent to kill the victim when she cut him with the knife. She did say she wanted him dead when she strangled him. The intents are not the same. CP 5-6, 92-93.

“The double jeopardy doctrine protects defendants against ‘prosecution oppression.’” Womac, 160 Wn.2d at 650, quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 25.1(b), at 630 (2d ed. 1999). Tricomo's convictions resulted from guilty pleas to charges agreed on after lengthy negotiations. She was represented by counsel during the entire pendency of the case. CP 24, Verbatim Report of Proceedings generally. She admitted to the conduct that resulted in the charges. There can be no concern in her case of “prosecution oppression.”

There is no double jeopardy violation. This Court correctly concluded that with regard to all of the offenses that Tricomo pled guilty to, either the facts sufficiently showed that the offenses were

based on different laws and/or actions, or a double jeopardy argument was not clear from the record presented on appeal and therefore waived. Appendix 1, at 3-8. Tricomo offers no additional facts or argument that could lead to a conclusion that relitigation of the issue is required in the interest of justice.

3. The trial court did not err by not considering opinions about the effects of Tricomo's medications and Tricomo offers no reason why this Court should relitigate the issue.

Tricomo argued on direct appeal that the trial court erred in not considering the role her prescribed medication attributed to her criminal acts. This Court did not consider the argument because Tricomo failed to provide any argument as to how the trial court erred. Appendix 1, at 11. Tricomo now makes essentially the same argument that was made in her direct appeal. Appellant's Opening Brief, No. 47238-4-II, Appendix 5, at 18-21.

At her sentencing hearing, Tricomo submitted a 79-page sentencing brief to the court before her sentencing hearing. CP 42-120. As previously noted in this brief, it included psychological evaluations by Dr. David Dixon, on Tricomo's behalf, CP 60-80, and Dr. Delton Young, chosen by the State, CP 82-96, letters from a

number of Tricomo's friends, CP 98-112, and news articles and material regarding a concert in which Tricomo played the violin. CP 114-20. There was also a six-page mitigation report by Dhyana Fernandez, along with Fernandez's declaration regarding her qualifications. CP 50-58. Tricomo separately filed a five-page document titled "Allocution of Lia Tricomo." CP 208-12.

The State objected to the court considering the mitigation report prepared by Fernandez. CP 131-33; 01/28/15 RP 30-34. The court ruled that it would consider all of the background information contained in the mitigation report, but not a section regarding Paxil. The court found that Fernandez had no expertise in that subject and did nothing but provide a list of articles which she suggested might be relevant. The court also said it would not consider Fernandez's opinion as to the length of the sentence. 01/28/15 RP 39. There was no such opinion offered. 01/28/15 RP 35; CP 50-58. Tricomo did not object to the court's ruling.

Tricomo misconstrues the statements of the sentencing court. In fact, the court excluded only Fernandez's opinion about the sentence, which was not even contained in the report, and the portion

of her report dealing with Paxil. 1/28/15 RP 39. That section, which begins at the bottom of CP 56 and takes up approximately three-quarters of the page of CP 57, actually says nothing of substance. It repeats Tricomo's report of her experience with Paxil, and then lists the titles of several articles from scientific journals, although she never identified the journals themselves. CP 56-57. That list is followed by a second list of titles of articles "by watchdog groups, a doctors (sic) website, Time Magazine, a prescription drug website, a lawyer and settlement website, and the New York Times." CP 57. No specific source is identified for any article. Fernandez then offers that an unidentified physician wrote a book in 2001 about the dangers of antidepressants, and that the website for the drug Paxil contains a warning that patients taking the medication should immediately contact their health care providers if they feel aggressive, violent, or suicidal. CP 57.

In her declaration, Fernandez identified herself as a mitigation specialist in death penalty cases and described her training, all of which was in legal, not medical, areas. CP 50. The court did not exclude from consideration the reports of doctors Dixon or Young,

both of whom discussed Tricomo's use of Paxil. See CP 68-69, 77, 78, 88, 91, 94.

RCW 9.94A.530(2) addresses the information the court may consider in deciding upon a sentence.

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. . . .

RCW 9.94A.530(2), in relevant part. It would seem to follow that the information the court considers should be something actually useful in making a sentencing decision.

The argument that Tricomo now makes in support of her claim simply states that the defense sentencing brief offered peer reviewed scientific journals about the violent side effects of Paxil and SSRIs which was a key factor in the challenge of diminished capacity." Petition at 10. In support of her claim, Tricomo cites to Estate of Tobin v. Smithline Beecham Pharms, 164 F.Supp. 2d 1278 (2001), which is a products liability case. That court found that, "in considering the evidence in a light most favorable to the non-moving party,...a reasonable jury could find that Paxil caused the damages

suffered by the Plaintiff.” Id. at 1283. Tricomo also cites to State v. Warden, 133 Wn.2d. 559, 947 P.2d 708 (1997) for a discussion of the use of diminished capacity as a defense to specific intent. Tricomo’s reliance on these cases is misplaced and fails to recognize that Tricomo entered a guilty plea and the trial court did consider the evaluations of Dr. Dixon and Dr. Young.

While the court recognized that it was not being asked to impose an exceptional sentence either above or below the standard range, it said nothing to indicate it would not consider mitigating factors when deciding where, in the 100-month range of the standard range sentence, to place the defendant. 01/28/15 RP 39-40. The Court properly considered the evidence before it at sentencing. Tricomo provides no compelling basis to show that the interest of justice requires relitigation of the issue. Moreover, the trial court sentenced Tricomo within the standard range. “As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review,” as long as the sentence is within the standard range. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Tricomo cannot show error.

4. Tricomo presents no evidence of prosecutorial error or

ineffective assistance of counsel. To the contrary, the record demonstrates that she was competently represented.

As stated above, Tricomo's claim that the prosecutor and her defense attorney conspired to compel a guilty plea and therefore committed misconduct and rendered ineffective assistance is time barred. However, the record demonstrates that Tricomo's counsel was effective and the prosecutor committed no misconduct.

Tricomo was originally charged with attempted murder in the first degree and murder in the first degree. CP 7. Both allegations contained a deadly weapon enhancement; a knife for the attempted charge and an electrical cord for the completed offense. As originally charged, Tricomo would have had an offender score of 1 on the murder charge and zero on the attempted murder charge, based on the single prior conviction for assault in the third degree. CP 36, RCW 9.94A.589(1)(b). As such, Tricomo would have had a standard range of 250-333 months on the murder followed by 180-240 months on the attempted murder, followed by two consecutive 24 month deadly weapon enhancements for a total range of 478-621 months of confinement. RCW 9.94A.589(1)(b), RCW 9.94A.533(4)(a). In

addition, the original information contained an alleged aggravator on the murder charge that the defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance. CP 7. RCW 9.94A.535(3)(b). If proven to a jury, this aggravator could have allowed the trial court to sentence Tricomo above the 621 month high end of the originally charged standard range. Given that the facts of the case clearly demonstrate that the victim was injured by Tricomo hours before she decided to strangle him with an extension court, it is clear that a rational jury could have found that he had been rendered physically helpless prior to the murder.

Pursuant to a plea agreement, Tricomo pled guilty to murder in the second degree, three counts of assault in the second degree, and taking a motor vehicle without permission. CP 27-35. The agreement lowered the standard range on the highest offense to 257 – 357 months and did not include any deadly weapon enhancement, nor did it include the previously alleged vulnerable victim aggravator. Further, the prosecutor agreed to argue for 357 months on the murder count and concurrent time on the remaining offenses, with the defense free

to argue for a “lesser sentence.” CP 30. Both the prosecutor and Tricomo’s defense attorney filed lengthy trial memorandums in making their sentencing recommendations. CP 42-120, 121-203. The trial court sentenced Tricomo at the high end of the standard range.

During her change of plea hearing, the trial court specifically asked Tricomo, “do you understand that your standard range of actual confinement is 257 to 357 months, 36 months of community custody, a maximum fine of \$50,000, and a maximum term of confinement of life. Do you understand all of that?” 11/06/14 RP 7. Tricomo affirmed that she understood the recommendation. *Id.* Tricomo also acknowledged that she understood that the prosecutor would recommend 357 months and that her defense attorney would be able to argue that the court should impose a lesser sentence on her behalf. 11/06/14 RP 8. With those advisements, Tricomo entered her plea of guilty to the offenses charged in the First Amended Information and acknowledge that nobody had promised her anything or forced her to plead guilty. 11/06/14 RP 10. Tricomo also acknowledge that pursuant to the plea, her offender score on the

murder in the second degree charge was eight. 11/6/14 RP 6.

During the sentencing hearing, Tricomo's counsel acknowledged that the outcome was the product of negotiations, stating, "the State and I through a series of negotiations based on evidence, theories of defense, and, of course, all of the considerations in negotiating have come to this resolution." 1/28/15 RP 82. Tricomo negotiated for a standard range that could be argued at sentencing and received the benefit of that bargain.

Despite the beneficial plea agreement that Tricomo entered, knowingly, voluntarily and intelligently, Tricomo now argues that the agreement somehow constitutes prosecutorial misconduct, ineffective assistance of counsel and conspiracy to obtain a guilty plea. 11/06/14 RP 11, Petition at 6.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs

when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn.

2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Tricomo cannot overcome the presumption of effective representation. Simply looking at the standard range as Tricomo was initially charged versus the range pursuant to the plea bargain that she entered demonstrates that her trial counsel was quite effective. Moreover, in the context of the sentencing argument, Tricomo's counsel submitted a 79-page sentencing brief to the court before her sentencing hearing. CP 42-120. Tricomo's counsel did everything he could to argue for a sentence at the bottom of the standard range on Tricomo's behalf.

Tricomo received the bargain that she and her counsel negotiated for. There is nothing in the record to indicate that she was in any way prejudiced by her counsel's performance. The record shows that she received a tremendous benefit in reduction of charges

and the length of the possible sentence from the efforts that her attorney put into negotiating a more favorable resolution for her.

Further, Tricomo fails to even allege an incidence of prosecutorial error that could be grounds for relief in a personal restraint petition. A personal restraint petition is not an appeal. It is a collateral challenge to a judgment and sentence, and relief granted in a collateral attack is extraordinary. In re Pers. Restraint of Coats, 173 Wn.2d 123, 132, 267 P.3d (2011). A petitioner must demonstrate by a preponderance of the evidence that he or she has suffered a constitutional violation which caused actual and substantial prejudice, or that there occurred a nonconstitutional error that inherently resulted in a complete miscarriage of justice. Id.; In re Pers. Restraint of Brett, 142 Wn.2d 868, 874, 16 P.3d 601 (2001).

This standard was reaffirmed in the context of prosecutorial misconduct claims in In the Matter of the Personal Restraint of Phelps, No. 94185-8, ___ Wn.2d ___, 410 P.3d 1142 (February 22, 2018). The Washington State Supreme Court stated that a petitioner must overcome three hurdles to establish a claim of prosecutorial misconduct in a PRP, stating:

“First, he must show the prosecutor committed

misconduct. Second, because he did not object during trial, Phelps must show that misconduct was flagrant and ill-intentioned and caused him prejudice incurable by a jury instruction. Third, because he raises this issue in a PRP, Phelps must show the prosecutor's flagrant and ill-intentioned misconduct caused him actual and substantial prejudice."

Id. at 11-12. Here, Tricomo has shown that the prosecutor made a beneficial plea offer, that she accepted, and the prosecutor abided by in making the State's sentencing recommendation. Tricomo fails to allege a specific act of prosecutorial misconduct, let alone misconduct that caused actual or substantial prejudice.

Tricomo attempts to re-open the issue of double jeopardy with regard to Count III by re-naming the issue as prosecutorial misconduct and ineffective assistance of counsel. However, simply recasting an argument that was raised on appeal as ineffective assistance of counsel does not create a new ground for relief or constitute good cause for reconsidering the previous rejected claim. In re Davis, 152 Wn.2d at 670-671. This Court previously ruled that where "a double jeopardy violation is not clear from the record presented on review, we hold that Tricomo waived her challenge to count III, the second degree assault conviction based on the use of a

razor knife to inflict facial wounds.” Appendix 1, at 5. Re-naming the issue as prosecutorial misconduct and ineffective assistance of counsel is not a basis for this court to reconsider Tricomo’s claim.

IV. CONCLUSION

This petition attempts to re-litigate issues that were previously raised and rejected in Tricomo’s direct appeal. This Court has previously ruled that Tricomo’s double jeopardy claim fails and she has provided no additional evidence in support of her claim. The trial court properly considered the recommendations of both the State and Tricomo’s defense attorney and sentenced Tricomo within the standard range for the offenses she pled guilty to. Tricomo fails to demonstrate that either the prosecutor committed misconduct or her attorney rendered ineffective assistance of counsel. Tricomo received the benefit of the plea bargain that she entered. The State respectfully requests that this Court dismiss this personal restraint petition.

RESPECTFULLY SUBMITTED this 13 day of April, 2018.

JON TUNHEIM
Prosecuting Attorney


Joseph J.A. Jackson, WSBA #37306
Deputy Prosecuting Attorney

APPENDIX 1

April 26, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LIA YERA TRICOMO,

Appellant.

No. 47238-4-II

UNPUBLISHED OPINION

LEE, J. — Lia Yera Tricomo pleaded guilty to second degree murder, three counts of second degree assault, and second degree taking a motor vehicle without owner's permission. Tricomo appeals, arguing that her convictions violate double jeopardy, her plea was not entered voluntarily, and that the trial court erred in not considering evidence at sentencing. We disagree and affirm.

FACTS

Tricomo and the victim, her former counselor, had a sexual encounter at the victim's home in the upstairs bedroom. Following the sexual encounter, Tricomo repeatedly slit the victim's throat with a razor knife. Tricomo acknowledged that she brought the knife to the upstairs bedroom in preparation to kill the victim. For several hours after having his throat slit, the victim "walked around the house," attempting to stop the bleeding. Clerk's Papers (CP) at 5. Tricomo, concerned that the victim would attempt to leave the house, struggled with the victim over the razor knife at the entryway. The victim's wrists were cut in the struggle. The victim then went

back upstairs to the bedroom, and Tricomo strangled him with an electrical extension cord, killing him.

The State charged Tricomo with second degree murder and three counts of second degree assault.¹ At the plea hearing, the trial court informed her that the applicable maximum term of confinement for the second degree murder charge was a life sentence, the “standard range of actual confinement was 257 to 357 months,” and the State would recommend a sentence of 357 months. Verbatim Report of Proceedings (VRP) (Nov. 6, 2014) at 7. Tricomo acknowledged that she understood.

At sentencing, Tricomo offered an expert report that included a discussion of the effects of Tricomo’s medication. The trial court ruled that it would consider the expert’s report for purposes of background information, but that it would disregard the expert’s discussion of medication because “I don’t find that [the expert] has any expertise in that particular area and she basically only sets forth a number of articles suggesting that they may have some relevance.” VRP (Jan. 28, 2015) at 39. The trial court reviewed letters from individuals in support of Tricomo, two reports from Western State Hospital, and portions of Tricomo’s expert’s report. The trial court noted that the “issue before me today is not whether or not Ms. Tricomo had the ability to form a specific intent to kill. That’s been established by her pleading guilty to this charge.” VRP (Jan. 28, 2015) at 92. Ultimately, the court sentenced Tricomo to 357 months, which was within the standard sentencing range. Tricomo appeals.

¹ The State also charged Tricomo with second degree taking a motor vehicle without the owner’s permission. The morning after Tricomo strangled the victim, she left the victim’s home in the victim’s vehicle. The conviction for second degree taking a motor vehicle is not at issue in this appeal.

ANALYSIS

A. DOUBLE JEOPARDY

Tricomo argues that double jeopardy bars her convictions for three counts of second degree assault, and her convictions for second degree assault and second degree murder. Tricomo did not raise the double jeopardy argument below, but a constitutional challenge may be raised for the first time on appeal. *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998); *see accord State v. Reeder*, 181 Wn. App. 897, 925-26, 330 P.3d 786 (2014), *review granted in part*, 337 P.3d 325, *aff'd*, 184 Wn.2d 805, 365 P.3d 1243 (2015).

Both the federal and state double jeopardy clauses protect against multiple punishments for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Hart*, 188 Wn. App. 453, 457, 353 P.3d 253 (2015). Generally, a guilty plea will insulate the defendant's conviction from collateral attack. *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). A guilty plea waives "'constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers.'" *Knight*, 162 Wn.2d at 811 (quoting *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)). But claims that go to "'the very power of the State to bring the defendant into court to answer the charge brought against him,'" like the double jeopardy clause, are not waived by guilty pleas. *Knight*, 162 Wn.2d at 811 (quoting *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)); *see Menna v. New York*, 423 U.S. at 62, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975). After a defendant pleads guilty, "the double jeopardy violation must be clear from the record presented on appeal, or else be waived." *Knight*, 162 Wn.2d at 811.

We review alleged violations of double jeopardy de novo. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Different double jeopardy analyses apply depending on whether the convictions at issue were under the same statutory provision or different statutory provisions. *Villanueva-Gonzalez*, 180 Wn.2d at 980. Where a defendant has multiple convictions under the same statutory provision, we apply the “unit of prosecution” analysis. *Villanueva-Gonzalez*, 180 Wn.2d at 980. But when a defendant has convictions under different statutes, we apply the same evidence analysis.² *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

1. Three Counts of Second Degree Assault

Tricomo was convicted of three counts of second degree assault pursuant to RCW 9A.36.021. Because the second degree assault convictions arise from the same statutory provision, we apply the “unit of prosecution” analysis. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81.

Tricomo argues that her acts constituted a single criminal episode driven by the singular intent to kill the victim. Tricomo argues that because her acts were a single criminal episode, she could only be convicted of one count of assault, or two at the most, but definitely not three.

Tricomo was charged, in relevant part, with three counts of second degree assault³ stemming from the events of one evening. Count II charged second degree assault based on the “use of a razor knife to inflict neck wounds.” CP at 25. Count III charged second degree assault

² The same evidence test mirrors the federal “same elements” standard adopted in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *State v. Gorken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

³ RCW 9A.36.021(1)(a), (c).

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based on the “use of a razor knife to inflict facial wounds.” CP at 25. And count IV charged second degree assault based on the “use of a razor knife to inflict hand wounds.” CP at 25.

Tricomo pleaded guilty as charged and agreed that the trial court could rely on the State’s statement of probable cause and police reports to find the facts necessary to establish a factual basis for her plea. The trial court found that a sufficient factual basis existed in the record before it to accept the plea.

a. Count III (facial wounds)

The statement of probable cause does not include any information about count III, the assault charge based on infliction of facial wounds. And, the record does not contain any police reports. It is the appellant’s burden to provide a sufficient record for us to review. *See State v. Gomez*, 183 Wn.2d 29, 34, 347 P.3d 876 (2015). Because a double jeopardy violation is not clear from the record presented on review, we hold that Tricomo waived her challenge to count III, the second degree assault conviction based on the use of a razor knife to inflict facial wounds. *Knight*, 162 Wn.2d at 811.

b. Count II (neck wounds) and Count IV (hand wounds)

Tricomo argues that “it is clear from the facts” that her acts “constituted a single criminal episode driven by the singular intent to kill” the victim. Br. of Appellant at 9. Tricomo also acknowledges that the facts may support two assault counts. But the record shows that the two assaults were separate courses of conduct.

Assault is a course of conduct crime, which “helps to avoid the risk of a defendant being ‘convicted for every punch thrown in a fistfight.’” *Villanueva-Gonzalez*, 180 Wn.2d at 985 (quoting *State v Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999)). Thus, if multiple assaultive acts

constitute only one course of conduct, then double jeopardy protects against multiple convictions. *Villanueva-Gonzalez*, 180 Wn.2d at 985. There is no bright-line rule for when multiple assaultive acts constitute one course of conduct. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. In determining whether multiple assault acts constitute one course of conduct, we consider the length of time over which the acts occurred, the location of the acts, the defendant's intent or motivation for the assaultive acts, whether the acts were uninterrupted, and whether there was an opportunity for the defendant to reconsider her acts. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. No single "factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors." *Villanueva-Gonzalez*, 180 Wn.2d at 985.

Here, the assaultive acts occurred over several hours and in different places in the victim's home. According to Tricomo, there were hours in between the act of slitting the victim's throat and cutting the victim's wrists. Further, Tricomo's account of the events indicate that her motivation for the two attacks was different. Tricomo stated that she brought the knife with her into the upstairs bedroom "as preparation to kill" the victim, but that she cut the victim's wrists because the victim was attempting to take the knife from her. CP at 5. And, she had considerable time to reconsider her actions. For instance, she had time to reconsider during the "hours" the victim spent walking around the house after she slit his throat in the upstairs bedroom and before she cut his wrists during the struggle at the entryway. See CP at 5. Considering the totality of the circumstances, the assault that resulted in neck wounds was a separate course of conduct from the assault that resulted in wrist wounds. Therefore, Counts II and IV do not violate double jeopardy.

2. Second Degree Murder and Second Degree Assault

Tricomo was charged with second degree murder under RCW 9A.32.050(1)(a), and three counts of second degree assault under RCW 9A.36.021(1)(a) and (c). Tricomo contends that the murder and assaults “arose from a single course of conduct and constitute the same offense.” Br. of Appellant at 10. Tricomo misconstrues the double jeopardy analysis for multiple convictions under separate statutes.

To determine if a defendant’s convictions under different statutes violate double jeopardy, we apply the same evidence test. *Calle*, 125 Wn.2d at 777; *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. The same evidence analysis asks whether the convictions were the same in law and in fact. *Calle*, 125 Wn.2d at 777; *accord Villanueva-Gonzalez*, 180 Wn.2d at 980-81. “If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.” *Calle*, 125 Wn.2d at 777 (quoting *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)).

Tricomo was charged with second degree murder under RCW 9A.32.050(1)(a), one count of second degree assault under RCW 9A.36.021(1)(a), and two counts of second degree assault under RCW 9A.36.021(1)(c). A person commits second degree assault under RCW 9A.36.021 when:

- (1) . . . he or she, under circumstances not amounting to assault in the first degree:
 - (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
 -
 - (c) Assaults another with a deadly weapon.

Because assault is not defined in the criminal code, courts have turned to the common law for its definition. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009); *State v. Kier*, 164 Wn.2d 798, 806, 194 P.3d 212 (2008). Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *Elmi*, 166 Wn.2d at 215.

A person commits second degree murder under RCW 9A.32.050(1)(a) when:

With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

Tricomo's convictions for second degree murder and second degree assault are legally different. Proof of second degree assault does not necessarily prove second degree murder because a person can assault another person without actually causing death. Second degree murder, on the other hand, requires proof of intent to cause death, and actual death. Therefore, the convictions are not the same in law.

Also, Tricomo's convictions for second degree assault and second degree murder are factually different. As discussed above, Tricomo's assault convictions arise from her acts of assaulting the victim with a razor knife. But Tricomo's second degree murder conviction arises from her strangling the victim with an electrical extension cord.

Thus, Tricomo's murder and assault convictions are not the same in law and in fact. While it is true that the convictions are based on Tricomo's actions from a particular day, they are based on different laws and actions. Tricomo's double jeopardy challenge fails.

B. CONSEQUENCES OF GUILTY PLEA

Tricomo argues that she should be able to withdraw her guilty plea because she was misinformed about the maximum sentence in her guilty plea. We disagree.

Due process requires that a defendant's guilty plea be made knowingly, voluntarily, and intelligently. *State v. Kennar*, 135 Wn. App. 68, 72, 143 P.3d 326 (2006). CrR 4.2 precludes a trial court from accepting a guilty plea without first determining that the defendant is entering the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. *Kennar*, 135 Wn. App. at 72.

Here, Tricomo pleaded guilty to second degree murder. At the plea hearing, the trial court informed her that the applicable maximum term of confinement was a life sentence and the "standard range of actual confinement was 257 to 357 months," with the State recommending a sentence of 357 months. VRP (Nov. 6, 2014) at 7. Tricomo acknowledged that she understood. The court then sentenced Tricomo within the standard range.

Tricomo contends that her plea was not made knowingly, voluntarily, and intelligently because the trial court misinformed her of the applicable maximum sentence for the offense with which she was charged. Tricomo asserts that the applicable maximum sentence was the top end of the standard range, not the statutory maximum sentence declared by the legislature. Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Tricomo claims that the trial court misinformed her when it told her that life imprisonment was the applicable maximum sentence for second degree murder.

Kennar rejected Tricomo's precise argument. *Kennar*, 135 Wn. App. at 72. In *Kennar*, the court held that "CrR 4.2 requires the trial court to inform a defendant of both the applicable

standard sentence range and the maximum sentence for the charged offense as determined by the legislature.” *Kennar*, 135 Wn. App. at 75. The *Kennar* court, noting that *Blakely* is a sentencing case, not a plea-entry case, held:

Because a defendant’s offender score and standard sentence range are not finally determined by the court until the time of sentencing, the Sixth Amendment concerns addressed in *Blakely* do not apply until that time. Thus, when *Kennar* entered his guilty plea, the maximum peril he faced was, in fact, life in prison. He was correctly informed of this by the trial court. His plea was knowingly, intelligently, and voluntarily entered. There was no error.

Kennar, 135 Wn. App. at 76.

Similarly here, at the time of her plea, Tricomo was informed of the maximum sentence and the standard sentence range for the charged offense. *Kennar* controls, and Tricomo’s plea was entered knowingly, intelligently, and voluntarily.

C. EVIDENCE AT SENTENCING

Tricomo argues that the trial court erred in refusing to consider relevant evidence at sentencing. We disagree.

“As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate review,” as long as the sentence is within the standard range.⁴ *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Tricomo was sentenced within the standard range. However, even if we consider whether the trial court erred in not considering Tricomo’s evidence, her argument fails.

⁴ We may review the sentence where a defendant requests an exceptional sentence below the standard range if the court abused its discretion by either refusing to exercise its discretion or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). Here, however, Tricomo did not request an exceptional sentence below the standard range and was sentenced within the standard range.

In Tricomo's sentencing brief, Tricomo asked the court to consider evidence regarding her background, urging the court to sentence her at the low end of the standard range. Tricomo argues that "the court refused to consider any opinion as to the appropriate sentence." Br. of Appellant at 18. Tricomo fails to provide any authority suggesting that the sentencing court is required to consider an expert's opinion about "the appropriate sentence" where the defendant does not request an exceptional sentence. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Thus, Tricomo's argument fails.

Tricomo next argues that the trial court erred by not considering the experts' opinions about the effects of Tricomo's medications. The trial court ruled that it would disregard the expert's discussion of medication, because "I don't find that [the expert] has any expertise in that particular area and she basically only sets forth a number of articles suggesting that they may have some relevance." VRP (Jan. 28, 2015) at 39. Tricomo fails to provide any argument as to how the trial court erred. Therefore, we do not consider this argument. RAP 10.3; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

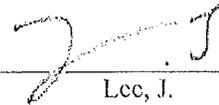
Finally, Tricomo argues that she should have been able to present more evidence about her culpability for the crimes because the sentencing court should be concerned with whether the punishment is proportional to the culpability. Culpability is determined by the charge and conviction. *See State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 15 (2014). And the legislature, in determining the sentencing range, accounts for culpability and dangerousness. *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014). Tricomo provides no authority suggesting that during

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sentencing, where the defendant does not request an exceptional sentence below the standard range based on mitigating circumstances, the trial court should readdress and reestablish a defendant's culpability for an offense that the defendant has pleaded guilty to. Again, Tricomo's argument fails. *See DeHeer*, 60 Wn.2d at 126.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

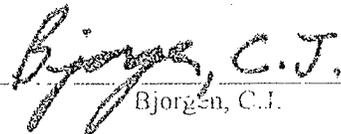


Lee, J.

We concur:



Worswick, J.



Bjorgen, C.J.

APPENDIX 2

June 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LIA YERA TRICOMO,

Appellant.

No. 47238-4-II

ORDER DENYING
MOTION FOR RECONSIDERATION
AND
AMENDING OPINION

Appellant, Lia Year Tricomo, moved for reconsideration of this court's unpublished opinion filed on April 26, 2016. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied. It is further

ORDERED that the court's opinion is hereby amended as follows: On page 9, last paragraph, after the sentence ending with "maximum sentence for second degree murder," we insert the following footnote:

Tricomo also contends that *State v. Knotek* "is directly on point," and requires this court to allow her to withdraw her guilty plea. Br. of Appellant at 16. In *Knotek*, the United States Supreme Court issued its *Blakely* opinion after the defendant pleaded guilty but before she was sentenced. *State v. Knotek*, 136 Wn. App. 412, 425, 149 P.3d 676 (2006). The defendant argued that she was misinformed because the trial court told her that she faced the possibility of an exceptional sentence, but *Blakely* eliminated the possibility in her case. *Knotek*, 136 Wn. App. at 425. The court denied Knotek's claim, holding that she was not entitled to withdraw her plea

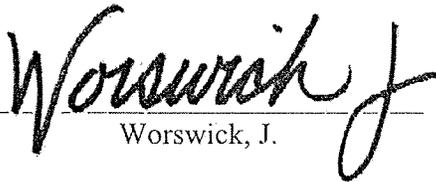
No. 47238-4-II

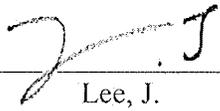
when she entered her plea under the belief that her standard ranges are higher than they are in fact. *Knotek*, 136 Wn. App. at 426. Thus, *Knotek* is factually distinguishable.

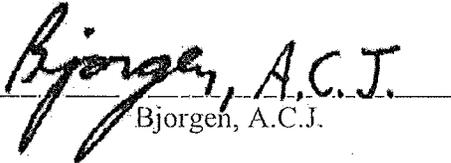
The subsequent footnotes are renumbered accordingly.

IT IS SO ORDERED.

DATED this 1st day of June, 2016.


Worswick, J.


Lee, J.


Bjorgen, A.C.J.

APPENDIX 3

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,)	No. 93379-I
)	
Respondent,)	ORDER
)	
v.)	Court of Appeals
)	No. 47238-4-II
LIA TRICOMO,)	
)	
Petitioner.)	
)	
_____)	

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, Stephens, González and Yu, considered at its November 1, 2016, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington, this 2nd day of November, 2016.

For the Court

Madsen, C.J.

 CHIEF JUSTICE

APPENDIX 4

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2017 JAN 10 AM 10:03

Linda Myhre Enlow
Thurston County Clerk

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LIA TRICOMO,

Appellant.

No. 47238-4-II

MANDATE

Thurston County Cause No.
13-1-00655-7

The State of Washington to: The Superior Court of the State of Washington
in and for Thurston County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 26, 2016 became the decision terminating review of this court of the above entitled case on November 2, 2016. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 5th day of January, 2017.

Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

CASE #: 47238-4-II

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APPENDIX 5

NO. 47238-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LIA TRICOMO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Lia Tricomo's multiple assault convictions violate Double Jeopardy.

2. Because Ms. Tricomo was misadvised of the consequences of her guilty plea his plea violates the Due Process Clause of the Fourteenth Amendment.

3. The trial court erroneously limited its consideration of relevant mitigation at sentencing.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The double jeopardy provisions of the State and federal constitutions bar multiple convictions for the same offense. Where the unit of prosecution of a crime consists of course of conduct a person may not be separately convicted for acts within that course of conduct. Because assault is a course of conduct offense do Ms. Tricomo's multiple assault convictions violate double jeopardy?

2. If the defendant is misadvised about the direct sentencing consequences, including the applicable maximum sentence for the offense and term of community custody, the resulting plea is not entered knowingly, voluntarily and intelligently. Where Ms. Tricomo

was misadvised about the maximum sentence that could be imposed was her guilty plea invalid?

3. At sentencing court's task is to impose a sentence which is proportionate to a person's culpability. The court should consider evidence which bears upon or mitigates the person's culpability. Did the sentencing court err where it artificially and substantially limited its consideration of such evidence?

C. STATEMENT OF THE CASE.

Coming from a childhood marked by poverty, abuse and array of familial dysfunction, such as being introduced to the regular use of alcohol by her father beginning at age 12. CP 53-54. Ms. Tricomo sought refuge in music, becoming an accomplished violinist. CP 54. As early as middle-school, she began performing in community orchestras comprised mainly of adult musicians. CP 54-55

Beginning in adolescence and continuing into adulthood, Ms. Tricomo began to suffer from mental illness. CP 63-64. Ms. Tricomo's diagnoses include on Axis I: Major Depressive Disorder, Bipolar Disorder, Posttraumatic Stress Disorder and Alcohol Dependence, and on Axis I Borderline Personality Disorder and Antisocial Personality Disorder. CP 76-77. Her history is marked by numerous suicide

attempts and commitments to Western State Hospital and other regional mental health facilities on several occasions. CP 56, 63-64.

For a period of time and despite these hurdles, she succeeded in obtaining a bachelor's degree in music, and continued to play with larger and more prestigious regional orchestras. CP 66

In 2010, Ms. Tricomo began receiving treatment at Behavioral Health Resources (BHR) in Olympia. CP 56. In 2011, she began working with therapist John Alkins. *Id.*

BHR records indicate Mr. Alkins sessions with Ms. Tricomo were twice or more in duration than with other counselors. CP 56. During their sessions, Mr. Alkins often talked about music rather than her mental health or other topics common to therapy. *Id.* On occasion he would visit Ms. Tricomo at home to record music. *Id.*

Mr. Alkins was subsequently placed on leave and then fired by BHR, apparently for an inappropriate relationship with another client. Even after this, Mr. Alkins continued communicating with Ms. Tricomo. CP 56.

In April 2013, Ms. Tricomo was faced with losing her residence. CP 56. During that same period she was using Paxil as prescribed for her depressive disorder. *Id.*

Mr. Alkins offered to Ms. Tricomo a room in his home, which she accepted. After picking up her things from her apartment, Mr. Alkins stopped to buy Ms. Tricomo a bottle of vodka on the drive home. This despite the fact that as her therapist for a period of months he must have known of her history of alcohol dependence.

At his home, and after Ms. Tricomo had consumed a large portion of the vodka, Mr. Alkins initiated sex. CP 5. Ms. Tricomo later described the sexual activity as unwanted, although she did not tell him that. *Id.* After the two went to Mr. Alkins's bedroom, Ms. Tricomo briefly tied Mr. Alkins's hands to his bed, untying them when he stated he did not like that. *Id.* When she did so, Ms. Tricomo slit his neck several times with a knife she had brought into the bedroom. *Id.* She stated she did so with the intent to kill him. *Id.*

Mr. Atkins walked about the house for a period of time trying to stop the bleeding, but refused to call for help due to concerns about the consequences of having a sex with a former client. *Id.* Near the front door, the two struggled over the knife and Ms. Tricomo cut his wrists several times. *Id.* Mr. Alkins returned upstairs where he lay on the floor bleeding. Ms. Tricomo strangled him with an electrical cord. *Id.*

The following morning Ms. Tricomo called a crisis line and reported she had stabbed a man. CP 6. Ms. Tricomo then used Mr. Alkins's car to drive to an Alcoholics Anonymous meeting where she asked for help. *Id.* Another meeting participant drove her to the mental health unit at St. Peters Hospital in Olympia. *Id.*

The State charged Ms. Tricomo with one count of first degree murder and one count of attempted first degree murder. CP 7. The State subsequently amended the information to charge one count of second degree murder, three counts of second degree assault, and one count of taking a motor vehicle. CP 25-26. Ms. Tricomo pleaded guilty as charged. CP 27-35.

Prior to sentencing, Ms. Tricomo submitted a mitigation report prepared by Dhyana Fernandez as well as psychological evaluation prepared by Dr. David Dixon. CP 42-120. Ms. Fernandez detailed Ms. Tricomo's family history of deprivation and abuse, her struggles with mental illness and alcohol, and highlighted her successes despite that history. Ms. Fernandez also provided information regarding reported violent side effects for the use of Paxil. CP 52-57. Dr. Dixon described Ms. Tricomo's history of "aberrant" violent behavior when she perceives violations by others. Dr. Dixon explained these are redirected

at the childhood violations she suffered at the hands of others including her father. CP 77. Dr. Dixon explained her withdrawal from Paxil “exacerbated her mood disorder into a manic state with psychosis.” CP 98. Ms. Tricomo requested a sentence of 257 months.

The trial court substantially limited its consideration of this material and imposed a sentence of 357. CP 217.

D. ARGUMENT.

1. Double Jeopardy protections do not permit Ms. Tricomo’s multiple convictions.

a. The federal and state constitutions prohibit multiple punishments for the same offense.

The Double Jeopardy Clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. amend. V; Const. art. I, § 9. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

The double jeopardy provisions of the state and federal constitutions protect against (1) a second prosecution for the same

offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Focusing on the third of these, the prohibition on multiple punishments, the Supreme Court has said

When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.

State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000) (citing *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). A person may not be convicted more than once under the same criminal statute if only one “unit” of the crime has been committed. *State v. Leyda*, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)).

The unit of prosecution is designed to protect the accused from overzealous prosecution. *State v. Turner*, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

The United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges. *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (“The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.”); [*Ex parte Snow*, 120 U.S. 274, 282, 7 S. Ct. 556, 30 L. Ed. 658 (1887)] (if prosecutors were allowed arbitrarily to divide up ongoing criminal conduct into separate time periods to support separate charges, such division could be done ad infinitum, resulting in hundreds of charges).

Adel, 136 Wn.2d at 635. The unit of prosecution, the punishable conduct under the statute, may be an act or a course of conduct. *Tvedt*, 153 Wn.2d at 710. The Supreme Court has determined assault is a course of conduct crime. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 984, 329 P.3d 78, 82 (2014). Moreover, the State may not “divide a defendant’s conduct into segments in order to obtain multiple convictions.” *State v. Jackman*, 156 Wn.2d 736, 749, 132 P.3d 136 (2007).

b. The charges in this case are the same in law and fact.

“Where a double jeopardy violation is clear from the record, a conviction violates double jeopardy even where the conviction is entered pursuant to a guilty plea. *State v. Knight*, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008). In her guilty plea Ms. Tricomo agreed to permit the trial court to review the affidavit of probable cause to determine the factual basis for her plea. That affidavit describes the incident and permits this Court to conclude the multiple convictions violate Double Jeopardy.

It is clear from the facts, Ms. Tricomo’s acts constituted a single criminal episode driven by the singular intent to kill Mr. Alkins. She first attempted to kill him by repeatedly slitting his neck. She prevented him from leaving and in the process repeatedly cut him again. Ultimately she strangled him with an electrical cord. While some time did pass, the acts were a part of an unbroken chain of events driven by that singular intent. Because her acts were a single course of conduct Ms. Tricomo could only be convicted of a single count of assault. *Villanueva-Gonzalez*, 180 Wn.2d at 984. Even if the brief separation in time suggested two separate assaultive acts, that could not support three

assault convictions. As such, Ms. Tricomo's multiple assault convictions violate double jeopardy prohibitions.

Further, the assaults and the murder constitute the same offense for double jeopardy purposes. Where they are based on same conduct murder and assault are the same offense for double jeopardy purposes. *See State v. Womac*, 160 Wn.2d 650, 654-55, 160 P.3d 40 (2007) (entry of convictions for homicide by abuse, second degree felony murder, and first degree assault for death of his son violated double jeopardy principles). Again the facts establish a single intent to kill Mr. Alkins. While an autopsy determined strangulation caused his death, it specifically found the bleeding caused by the knife wounds to be a contributing factor in that death and concluded the bleeding would have ultimately proved fatal. CP 124. The assault and murder counts therefore arose from a single course of conduct and constitute the same offense.

c. Because they violate double jeopardy, the assault convictions must be vacated.

If two convictions violate double jeopardy prohibitions, the remedy is to vacate the conviction for the lesser offense. *E.g., State v.*

Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). As the lesser offense, Ms. Tricomo's assault convictions should be vacated.

2. Ms. Tricomo was misinformed of the consequences of her guilty plea.

a. *To satisfy the Due Process Clause of the Fourteenth Amendment, a guilty plea must be voluntary.*

The Fourteenth Amendment's Due Process Clause requires that a defendant's guilty plea be knowing, voluntary, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969); *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009). When a person pleads guilty:

He . . . stands witness against himself and he is shielded by the Fifth Amendment from being compelled to do so -- hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his constitutional right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

Because of the constitutional rights waived by a guilty plea, the State bears the burden of ensuring the record of a guilty plea demonstrates the plea was knowingly and voluntarily entered. *Boykin*, 395 U.S. at 242. “The record of a plea hearing or clear and convincing extrinsic evidence must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an understanding of the full consequences of such a plea.” *Wood v. Morris*, 87 Wn.2d 501, 502-03, 554 P.2d 1032 (1976).

A guilty plea is involuntary if the defendant is not properly advised of a direct consequence of his plea. *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *see also, In re the Personal Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004) (“A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences.”) “A direct consequence is one that has a ‘definite, immediate and largely automatic effect on the range of the defendant's punishment.’” *Bradley*, 165 Wn.2d at 939 (quoting *Ross*, 129 Wash.2d at 284).

The length of a sentence is a direct consequence of a guilty plea. *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006); Thus, a

plea is involuntary if a defendant is misinformed of the length of sentence even if the resulting sentence is less onerous than represented in the plea. *Id.* at 591.

Moreover, a defendant is not required to show the misinformation was material to his decision to plead guilty:

We have . . . declined to adopt an analysis that focuses on the materiality of the sentencing consequence to the defendant's subjective decision to plead guilty. . . . Accordingly, we adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated. Absent a showing that the defendant was correctly informed of all of the direct consequences of his guilty plea, the defendant may move to withdraw the plea.

Mendoza, 157 Wn.2d at 590-91 (Internal citations omitted); *Bradley*, 165 Wn.2d at 939.

b. Ms. Tricomo was misinformed in her guilty plea of the maximum sentence.

The relevant maximum sentence is a direct consequence of a guilty plea. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); *State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). A “defendant must be advised of the maximum sentence which could be imposed

prior to entry of the guilty plea.” *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980).

Mr. Tricomo’s guilty plea states:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a *Standard Sentence Range* as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1	B	257-357 months	N/A	36 months	\$50,000, Life
2	B	53-70 months	N/A	12 months	\$20,000, 10 yrs
3	B	53-70 months	N/A	12 months	\$20,000, 10 yrs
4	B	53-70 months	N/A	12 months	\$20,000, 10 yrs
5	5	4-12 months	N/A	N/A	\$10,000, 5 yrs

CP 28.

RCW 9A.20.021(a) provides the maximum terms for various degrees of felony convictions. Class A felonies such as second degree murder may be punished with up to life imprisonment. Class B felony offenses, such as second degree assault, may be punished up to ten years in prison. Class C felony offenses have five year maximum terms.

However, as the Supreme Court ruled in *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004), while a certain term imprisonment may be permitted under RCW 9A.20.021, it is not the statutory maximum sentence for the charged offense. Instead, the Court noted the maximum sentence was “the maximum

sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (Emphasis in the original.) *Id.*

The maximum sentence is the maximum permissible sentence the court could impose as a consequence of the guilty plea. *Id.* Here, the standard range is the maximum possible sentence the court could impose for the offenses of which Ms. Tricomo was convicted. The court has authority to impose a sentence above the standard range only under the strict parameters of RCW 9.94A.535 and RCW 9.94A.537, in addition to the requirements of the state and federal constitutional guarantees of trial by jury and due process of law.

Under RCW 9.94A.537(1), the State is required to give notice it will seek a possible exceptional sentence before the entry of a guilty plea. When not sought by the prosecution, the court is only permitted to impose an exceptional sentence if the increased sentence is based on the enumerated factors in RCW 9.94A.535(2). These factors essentially require egregious criminal history that enables an offender commit “free crimes” that go unpunished and renders the standard range to be unduly trivial. RCW 9.94A.535(2). Mr. Tricomo’s standard range fully accounted for her criminal history of this nature and an exceptional

sentence based on unscored criminal convictions would be unreasonable and unauthorized.

There were no circumstances in Ms. Tricomo's case which would have permitted the imposition of any sentence above the standard range. Thus, the "maximum term" was not "life," "10 yrs" or "5 yrs" as the plea stated. Rather, the maximum was the top-end of the respective standard ranges. Ms. Tricomo was misadvised of the maximum punishment he faced as a consequence of her guilty plea. *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006), *review denied*, 161 W.2d 1013(2007).

Knotek is directly on point. There the Court acknowledged that before pleading guilty, a defendant needs to understand the "direct consequences of her guilty plea, not the maximum potential sentence if she went to trial. . . ." *Id.* at 424 n.8. The *Knotek* Court further agreed that *Blakely* "reduced the maximum terms of confinement to which the court could sentence Knotek post-*Blakely* as a result of her pre-*Blakely* plea—[to] the top end of the standard ranges" *Id.* at 425. Thus, where a defendant is told the maximum sentence is life when in fact it

is the top of the standard range the defendant is misadvised of the consequences of the plea.¹

Ms. Tricomo was not properly informed of the consequences of her plea he must be permitted to withdraw it.

c. Because the court misinformed him of the consequences of his plea, Mr. Williams is entitled to withdraw his plea.

“Where a plea agreement is based on misinformation generally the defendant may choose . . . withdrawal of the guilty plea.” *Walsh*, 143 Wn.2d at 8 (citing *State v. Miller*, 110 Wn.2d 528, 532, 756 P.2d 122 (1988)). The premise of this holding is that a guilty plea is not voluntary and thus cannot be valid where it is made without an accurate understanding of the consequences. *Walsh*, 143 Wn.2d at 8. As *Mendoza* made clear, it does not matter whether the misadvisement was material to Ms. Tricomo’s decision to plead guilty or whether his sentence was more lenient than previously indicated. 157 Wn.2d at 590-91.

¹ *Knotek*, concluded the appellant waived the right to challenge her guilty plea because the defendant was subsequently advised that no exceptional sentence was available and at the time of sentencing she “clearly understood that *Blakely* had eliminated the possibility of exceptional life sentences and, thus, had substantially lowered the maximum sentences that the trial court could impose.” *Id.* at 426. In the case at bar, no discussion of *Blakely* ever occurred.

3. The trial court erred in refusing to consider relevant evidence at sentencing.

A person “may always challenge the procedure by which a sentence was imposed.” *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183, 1185 (2005). While no defendant has a right to any particular sentence, she does have the right to propose a sentence and have the court actually consider it. *Id.* at 342.

Here the court strictly limited its consideration of Mr. Tricomo’s mitigation report. The court stated it would only consider it as background, and would not consider any discussion of the potential effects of prescribed use of Paxil in the weeks preceding the incident. 1/28/15 RP 39. Moreover, the court refused to consider any opinion as to the appropriate sentence. *Id.* at 39-40. The court based these self-imposed limitations on its belief that since Ms. Tricomo was not requesting an exceptional sentence below the standard range the court could not consider mitigation evidence. *Id.*

Later in the hearing the court voiced a similar view concluding RCW 9.94A.530 prevented the court from considering any facts other than those contained in the statement of probable cause, as those were the facts Ms. Tricomo’s acknowledged in her plea. *Id.* at 43.

In his argument in support of the defense recommendation, defense counsel highlighted forensic evaluations, by both the State and defense experts, which found Ms. Tricomo was suffering from mental impairment. *Id* at 78. Dr. Dixon went further to describe the impact of Ms. Tricomo's withdrawal from Paxil as exacerbating her disorder into a manic state with psychosis. CP 98. The defense expert concluded it amounted to diminished capacity. CP 98-99. While disagreeing as to its legal effect, the state's expert, Dr. Delton Young, agreed that at a minimum Ms. Tricomo was suffering psychotic symptoms. 1/28/15 RP at 78; CP 201. Counsel urged the court to consider two statutory mitigating factors in support of Ms. Tricomo's recommended sentence: (1) that while insufficient to constitute a complete defense her mental health significantly affected her conduct, and (2) that her capacity to appreciate the wrongfulness of her conduct was significantly impaired. 1/28/15 RP 84.

In announcing its decision the court discounted the import of the expert opinion, commenting that Mr. Tricomo's ability to form the intent was no longer at issue as a result of her guilty plea. 1/28/15 RP 92. But that misses the point. The mitigating factors cannot be limited to circumstances where a defendant has not pleaded guilty or has not

been found to have a certain intent by a jury. Instead, by their very language they apply only after conviction and despite such a guilty plea or verdict. Contrary to the court's conclusion, the mitigating factors and evidence had continued and substantial relevance in Ms. Tricomo's case.

Mitigating factors do not absolve a person of liability for the crime; rather they focus the court's analysis on the person's relative culpability for what is admittedly a criminal act. The Supreme Court explained "sentencing courts are concerned with the proportionality of a defendant's punishment in relation to his or her culpability." *State v. Williams*, 181 Wn.2d 795, 800, 336 P.3d 1152 (2014); *see also State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992) ("[w]hat is important is whether the conduct was proportionately more culpable than that inherent in the crime."). Relative culpability for a given act is the essence of criminal law.

"[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law." *Grayson*, 154 Wn.2d at 338. The notion that that Ms. Tricomo's guilty plea finally prevented consideration of this

mitigating evidence would preclude courts from engaging in their obligation of ensuring sentences is proportionate to culpability.

This court should remand for a new hearing at which the sentencing court gives full consideration to the evidence before it.

D. CONCLUSION.

For the foregoing reasons, Ms. Tricomo's assault conviction should be vacated and dismissed. In addition, she is entitled to withdraw her plea. Finally, Ms. Tricomo should receive a new sentencing hearing at which the court considers evidence bearing on her relative culpability. Williams must be permitted to withdraw his plea.

Respectfully submitted this 14th day of August, 2015.

s/Gregory C. Link
GREGORY C. LINK – 25228
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 47238-4-II
v.)	
)	
LIA TRICOMO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> CAROL LA VERNE, DPA
[Lavernc@co.thurston.wa.us]
THURSTON COUNTY PROSECUTOR'S OFFICE
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OLYMPIA WA 98502-6045 | ()
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| <input checked="" type="checkbox"/> LIA TRICOMO
348594
WCC FOR WOMEN
9601 BUJACICH RD NW
GIG HARBOR, WA 98332 | (X)
()
() | U.S. MAIL
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_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF AUGUST, 2015.


X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Response to Personal Restraint Petition on the date below as follows:

ELECTRONICALLY FILED AT DIVISION II

TO: DEREK M. BYRNE, CLERK
COURT OF APPEALS DIVISION II
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TACOMA WA 98402-6045

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TO: LIA YEAR TRICOMO
DOC #348594
WA CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR WA 98332

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

Dated this 13th day of April, 2018, at Olympia, Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

April 13, 2018 - 2:12 PM

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