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Court of Appeals  
Division II  
State of Washington  
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NO. 51845-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

PABLO LARA BELLON,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

---

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TABLE OF CONTENTS

A. ARGUMENT ..... 1

1. **The State presented insufficient evidence that Mr. Bellon committed the offenses of assault of a child in the second and third degrees.**..... 1

    a. The State failed to present sufficient evidence of strangulation. .... 1

    b. The State failed to present sufficient evidence of substantial pain extending for a sufficient period to cause considerable suffering. . 3

    c. This court should reverse both assault convictions with instructions to dismiss the charges with prejudice. .... 6

2. **This diversion contract misinformed Mr. Bellon of the direct consequences of waiving his core constitutional rights. Therefore, Mr. Bellon’s waiver of those rights was involuntary, and the contract and resulting convictions relying on that waiver are invalid.**..... 6

    a. Due process demands a waiver of core constitutional rights be voluntary, whether done by plea, contract, or any other method. .. 6

    b. The diversion contract misinformed Mr. Bellon of the direct consequence of his waiver of core constitutional rights, rendering the waiver involuntary. .... 12

    c. This Court should reject the State’s argument that even if Mr. Bellon waived his constitutional rights based on misinformation of the consequences of the waiver, the waiver was voluntary. .... 13

    d. Because Mr. Bellon involuntarily waived his core constitutional rights, the diversion contract is invalid, and the convictions based on that contract must be reversed. .... 16

3. **Resentencing is required because the court misunderstood its discretion and failed to consider meaningfully Mr. Bellon’s motion for an exceptional sentence below the standard range based on mitigating circumstances.** ..... 17

4. **This Court should accept the State’s concession and strike the imposition of certain legal financial obligations from Mr. Bellon’s judgment and sentence.**..... 19

**B. CONCLUSION..... 19**

TABLE OF AUTHORITIES

**Cases**

*In re Detention of Moore*, 167 Wn.2d 113, 216 P.3d 1015 (2009)..... 11

*In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ..... 2

*Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979)  
..... 1

*State v. Acevedo*, 137 Wn.2d 179, 970 P.2d 299 (1999)..... 14, 15

*State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997) ..... 2, 5

*State v. Ashue*, 145 Wn. App. 492, 188 P.3d 522 (2008) ..... 7, 8

*State v. Drum*, 143 Wn. App. 608, 181 P.3d 18 (2008)..... 8, 9

*State v. Drum*, 168 Wn.2d 23, 225 P.3d 237 (2010)..... 8, 9

*State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) ..... 18

*State v. Johnson*, 104 Wn.2d 338, 705 P.2d 773 (1985)..... 11

*State v. Law*, 154 Wn.2d 85, 110 P.2d 717 (2005) ..... 17, 18

*State v. McDermond*, 112 Wn. App. 239, 47 P.3d 600 (2002)..... 16

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)..... 14, 15

*State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995)..... 11

*State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)..... 17, 18

*State v. Robertson*, 88 Wn. App. 836, 947 P.2d 765 (1997)..... 4

*State v. Saunders*, 132 Wn. App. 592, 132 P.3d 743 (2006)..... 4

*State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003)..... 12

*State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001) ..... 14

*State v. Weyrich*, 163 Wn.2d, 554, 182 P.3d 965 (2008)..... 16

*State v. Wiley*, 26 Wn. App. 422, 613 P.2d 549 (1980) ..... 10

**Statutes**

RCW 10.05 ..... 9

RCW 9A.36.021..... 3

RCW 9A.36.031..... 3, 5

RCW 9A.36.130..... 3

**Rules**

CrR 4.2..... 10

RAP 2.5..... 14

**Constitutional Provisions**

Const. art. I, § 3..... 2

U.S. Const. amend. XIV ..... 2

## A. ARGUMENT

### 1. The State presented insufficient evidence that Mr. Bellon committed the offenses of assault of a child in the second and third degrees.

#### a. The State failed to present sufficient evidence of strangulation.

Where the only evidence on an essential element (in this case, from the complaining witness) is entirely contradictory, that inconsistent evidence fails to provide more than a “modicum of evidence” on that essential element. *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979). Such inconsistent evidence is “simply inadequate” to be legally sufficient. *Id.*

In response to Mr. Bellon’s contention that the State failed to prove the element of strangulation by sufficient evidence, the State ignores Mr. Bellon’s argument regarding the conflicting evidence from the complaining witness. The State instead invites this Court to affirm the conviction because sufficient evidence supports a fact that the court below did not find and upon which it did not rely in convicting Mr. Bellon. This Court should reject the State’s arguments.

First, the State isolates a single statement made by B.E.B. that she could not talk or breathe. Br. of Respondent at 8-9. B.E.B. did state this, as Mr. Bellon already acknowledged. Br. of Appellant at 11 (citing Ex.1,

Incident/Investigation Report p.4). But the State fails to address the conflicting evidence from this same witness that also established B.E.B. could breathe and scream during the incident. CP 37 (“[Q] Could you scream? [A] Yea.”); CP 37 (“[Q] Were you able to breathe? [A] Yea.”); CP 40 (“[Q] Could you breathe? [A] A little bit. [Q] A little – You could breathe a little bit while he was squeezing you? [A] Mmhhh.”). In the face of this conflicting evidence from the same source, the element is not established.

Second, the State argues this Court should affirm because sufficient evidence supports that Mr. Bellon had the intent to obstruct B.E.B.’s ability to breathe. Br. of Respondent at 9. However, the court made no such finding. CP 78-80. The State had the burden to prove each element of the offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Since the State bore the burden, this Court should construe the absence of this factual finding against the State. “In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

The court did not find that Mr. Bellon strangled B.E.B. by intending to obstruct her breathing. The court found Mr. Bellon strangled

B.E.B. by actually obstructing her breathing. CP 78-80 (finding B.E.B. “could not breathe or talk;” finding Mr. Bellon strangled her by “obstructing her breathing”). The court specifically found Mr. Bellon obstructed B.E.B.’s breathing and found him guilty based on its conclusion that obstruction requires partial or complete blockage. CP 80. The court made no finding of fact that Mr. Bellon compressed B.E.B.’s neck with the intent to obstruct, and the court did not conclude the element of strangulation was sufficient under such a finding.

This Court should reject the State’s invitation to affirm on a grounds unsupported by the court’s factual findings. In addition, the finding the court actually made was insufficient to establish the essential element of strangulation. *See* above and Br. of Appellant at 11-12. Therefore, this Court should reverse Mr. Bellon’s conviction for assault of a child in the second degree. RCW 9A.36.130(1)(a), 9A.36.021(1)(g).

- b. The State failed to present sufficient evidence of substantial pain extending for a sufficient period to cause considerable suffering.

Assault in the third degree requires proof of negligent assault causing “bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(f). In response to Mr. Bellon’s argument that the State failed to prove the

elements of assault in the third degree by sufficient evidence, the State cites several cases affirming such convictions on findings of sufficient evidence. These cases can be distinguished.

In *State v. Robertson*, this Court affirmed the sufficiency of an assault in the third degree conviction based on substantial bodily harm extending for a sufficient period to cause considerable suffering. 88 Wn. App. 836, 947 P.2d 765 (1997). However, in *Robertson*, the Court affirmed based on evidence supporting not only the duration of the pain (two weeks) but also evidence supporting the type and intensity of suffering. *Id.* at 841 (describing extensive bruising, black eye, and pain that ““felt like [her] brain was going to explode””). Likewise, in *State v. Saunders*, the complainant’s description of the duration of her suffering (more than three hours) was accompanied by evidence supporting the type and intensity of the injury. 132 Wn. App. 592, 597-98, 600, 132 P.3d 743 (2006) (complainant’s description of injuries corroborated by paramedic’s observations and doctor’s findings of abrasions, tenderness, and puffiness, as well as his prescribing medication to treat injuries).

Unlike these cases, here the evidence was insufficient to support either the duration or the type of pain. The court specifically found B.E.B. suffered pain “some time later” while speaking with the responding officer. CP 79 (Finding of Fact 9). This is insufficient to establish the

length of time. Although the State points to evidence that B.E.B. told an interviewer her stomach hurt for “a couple of days,” the court below made no such factual finding. Br. of Respondent at 10-11; CP 78-80. The absence of this finding must be construed against the State because the State bore the burden of proof. *Armenta*, 134 Wn.2d at 14 (construing absence of factual finding against party with burden and declining to rely on evidence supporting fact where court made no finding).

In addition, even if this Court were to find the evidence sufficient to establish the duration of B.E.B.’s pain, evidence establishing the length of the pain alone is insufficient to establish negligent assault. Thus, the State must present evidence not only that the length of suffering was a sufficient period of time, but the State must also present sufficient evidence of the type or intensity of the harm from which the court could reasonably find B.E.B. suffered “substantial pain” extending for a sufficient period of time to cause “considerable suffering.” RCW 9A.36.031(1)(f) (emphasis added). Here, such evidence is lacking. The absence of evidence of this essential element is not overcome by evidence supporting merely the duration of the pain.

- c. This court should reverse both assault convictions with instructions to dismiss the charges with prejudice.

The State failed to prove beyond a reasonable doubt either charge of assault. Insufficient supports the court's findings of fact and conclusions of law to the contrary. CP 78-80. This Court should reverse both counts with instructions to dismiss the charges.

**2. This diversion contract misinformed Mr. Bellon of the direct consequences of waiving his core constitutional rights. Therefore, Mr. Bellon's waiver of those rights was involuntary, and the contract and resulting convictions relying on that waiver are invalid.**

The diversion contract misinformed Mr. Bellon of critical information about the sentences he faced. This diversion contract also required Mr. Bellon to waive the very same fundamental rights as in a guilty plea. The same due process protections apply. Because Mr. Bellon waived his core constitutional rights based on misinformation of the direct consequences of that waiver, the waiver was involuntary, and the contract based on that waiver is invalid. Therefore, this Court must reverse the convictions which are predicated on the contract.

- a. Due process demands a waiver of core constitutional rights be voluntary, whether done by plea, contract, or any other method.

The State claims any contract labeled "diversion" is wholly divorced from due process protections. The State's hyperfocus on the label, as opposed to the action, misses the point. Mr. Bellon

acknowledges the diversion contract is not labeled a guilty plea.<sup>1</sup> Br. of Appellant at 21-22. But it is not the mere label by which one waives rights but the waiver itself that requires due process protections. Br. of Appellant at 15-17.

In *State v. Ashue*, this Court recognized that any waiver of constitutional rights, even as part of a diversion agreement, must be knowing, intelligent, and voluntary. 145 Wn. App. 492, 502-04, 188 P.3d 522 (2008). This Court engaged in the very analysis the State argues the court need not engage in because the waiver of rights is not by a guilty plea.

It is well established that constitutional rights are subject to waiver by an accused if he or she knowingly, intelligently, and voluntarily waives them. *State v. Forza*, 70 Wn.2d 69, 71, 422 P.2d 475 (1966). The burden to establish a valid waiver is upon the prosecution. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

*Id.* at 502.

The Court engaged in this due process analysis even though the defendant waived these rights in a diversion contract, not a guilty plea. In addition, the defendant in *Ashue* was not required to waive her presumption of innocence or the right to appeal in her diversion contract.

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<sup>1</sup> Mr. Bellon notes, however, given the waiver of identical constitutional rights, the diversion contract is far closer to a guilty plea than to a traditional deferred prosecution agreements, which merely include factual stipulations and a waiver of jury trial but not a waiver of the presumption of innocence or the right to appeal.

*Id.* at 500. Mr. Bellon was required to waive these core constitutional rights.

The defendant in *Ashue* made no claim that she was specifically misadvised of the consequences of her waiver. Therefore, the Court ultimately found she knowingly, intelligently, and voluntarily waived her constitutional rights and rejected her challenge to the validity of the contract. *Id.* at 504. But under *Ashue*, due process protections do apply to waivers of constitutional rights, even when they are contained in diversion contracts.

Conversely, in *State v. Drum*, this Court declined to apply due process protections to a diversion contract because such contracts are not guilty pleas. 143 Wn. App. 608, 617-20, 181 P.3d 18 (2008). However, our Supreme Court specifically declined to affirm *Drum* on the Court of Appeal's reasoning that due process does not require a defendant enter a drug court contract knowingly, intelligently, and voluntarily and with an understanding of the consequences of the contract. *State v. Drum*, 168 Wn.2d 23, 26, 225 P.3d 237 (2010) ("We affirm Drum's conviction, though for different grounds."). Instead, the Court examined the drug court contract and held that the defendant's stipulation to the sufficiency of the evidence did not bind the trial court because courts are not bound to stipulations to legal conclusions. *Id.* at 34. Therefore, the Court found the

defendant did not waive her right to “an independent finding of guilt beyond a reasonable doubt” under the drug court contract. *Id.*

In addition, several relevant differences present themselves in Mr. Bellon’s case. First, Mr. Bellon’s contract is not pursuant to a deferred prosecution statute, or to any statute. As the State acknowledges, it is a nonstatutory contract. *Drum* was predicated on a comparison of such nonstatutory contracts to the deferred prosecution statute, which typically require a stipulation of facts but does not a waiver of all core constitutional rights. 143 Wn. App. at 616 (citing to Chapter 10.05 RCW). In this way, the analysis in *Drum* is flawed, and this Court should decline to follow the reasoning of this unaffirmed portion of the court of appeals’s opinion. Second, the contract in *Drum* did not include a waiver of the presumption of innocence or a waiver of the right to appeal, as did Mr. Bellon’s contract.

The State also relies on the diversion contract’s inclusion of factual stipulations and the distinction between factual stipulations and guilty pleas to avoid a due process analysis by arguing factual stipulations do not require due process protections and, therefore, no due process protections adhere to a diversion contract containing factual stipulations. Br. of Respondent at 13. Mr. Bellon does not argue a stipulation is a guilty plea and, therefore, due process applies. This Court has already rejected the

argument that the mere stipulation of facts is equivalent to a guilty plea such that rules-based protections are activated. *State v. Wiley*, 26 Wn. App. 422, 424, 613 P.2d 549 (1980). Nor does Mr. Bellon argue the waiver of his constitutional rights must be knowing, intelligent, and voluntary on rights derived from CrR 4.2. Rather, Mr. Bellon relies on the state and federal constitutions directly.

In distinguishing stipulations from guilty pleas, this Court has focused on the limited nature of a stipulation compared to the complete waiver of constitutional rights in a guilty plea. *Wiley*, 26 Wn. App. at 425 (“A stipulation . . . is only an admission that if the State’s witnesses were called, they would testify in accordance with the summary presented by the prosecutor.”). In a stipulated facts trial, and the defendant retains certain rights, including the rights to the presumption of innocence, to proof beyond a reasonable doubt, to present a defense, to confrontation, and to appeal. Therefore, nothing about the act of stipulating to facts alone requires a due process analysis.

In explaining how stipulated facts trials are different from guilty pleas and why the procedural safeguards required when a defendant plead guilty are unnecessary as an automatic protection when a defendant stipulates to facts, our Supreme Court has focused on the retention of rights accompanying a stipulated facts trial.

In a stipulated facts trial, the judge or jury still determines the defendant's guilt or innocence; the State must prove beyond a reasonable doubt the defendant's guilt; and the defendant is not precluded from offering evidence or cross-examining witnesses but in essence, by the stipulation, agrees that what the State presents is what the witnesses would say. Furthermore, in a stipulated facts trial the defendant maintains his right to appeal, which is lost when a guilty plea is entered.

*State v. Johnson*, 104 Wn.2d 338, 342-43, 705 P.2d 773 (1985); *see also* *State v. Mierz*, 127 Wn.2d 460, 469, 901 P.2d 286 (1995) (noting safeguards for guilty pleas are unnecessary for stipulated facts trials because defendant did not waive right to appeal, right to present defense, right to confrontation, or presumption of innocence). This is a far cry from the stipulated facts bench trial to which Mr. Bellon agreed in exchange for waiving his core constitutional rights. The stipulation to which Mr. Bellon was bound waived every single constitutional right that the Court identified in distinguishing a stipulated trial from a guilty plea. *See, e.g., In re Detention of Moore*, 167 Wn.2d 113, 120, 216 P.3d 1015 (2009) (noting due process does not “require the trial court to ensure that a defendant understands the rights waived by a factual stipulation as long as the stipulation is not tantamount to a guilty plea”).

- b. The diversion contract misinformed Mr. Bellon of the direct consequence of his waiver of core constitutional rights, rendering the waiver involuntary.

The State next argues the consequence of Mr. Bellon waiving his core constitutional rights was not to face a particular guideline range or community custody term but, rather, to have a stipulated facts trial. Br. of Respondent at 16. The Court should reject this incomplete and oversimplified analysis.

The State all but ignores the fact that the diversion contract not only misadvised Mr. Bellon of the guideline range but also failed to advise Mr. Bellon of the two mandatory terms of community custody. Instead, the State argues the omission of two mandatory terms of confinement is irrelevant and that the misinformation as to the guideline range is Mr. Bellon's fault since he is the one who insisted the court follow the law regarding same criminal conduct. Br. of Respondent at 14, 18-19.

Regardless of the confinement term, the contract was silent on both mandatory terms of community custody. As Mr. Bellon argued in his opening brief, community custody is a direct consequence of which defendants must be advised, and waivers are invalid where defendants are not advised of such terms. *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003); *see generally* Br. of Appellant at 18.

In the diversion contract, Mr. Bellon waived all of his core constitutional rights. CP 5-9. The direct consequence of that waiver was either a dismissal of the charges or a stipulated bench trial at which Mr. Bellon faced particular sentencing consequences. Thus, Mr. Bellon faced one of two consequences, and the diversion contract misadvised him of one of those consequences. The consequences was not merely a stipulated facts bench trial at which anything could happen. By omitting the mandatory sentences Mr. Bellon faced as a consequence, the State guts the meaning of the contract.

- c. This Court should reject the State's argument that even if Mr. Bellon waived his constitutional rights based on misinformation of the consequences of the waiver, the waiver was voluntary.

Finally, the State argues that, even if the contract did misinform Mr. Bellon of the consequences of waiving his core constitutional rights, the waiver was voluntary and so Mr. Bellon was not prejudiced. Br. of Respondent at 17-20.

The State's argument is fundamentally incorrect. Misinformation regarding the sentencing consequence renders a waiver of constitutional rights involuntary. A misinformed waiver of rights cannot be voluntary and is manifest constitutional error. One cannot voluntarily waive a right when one is misadvised as to the consequences of the waiver. The State's

argument that, even if Mr. Bellon was misadvised as to the consequences of waiving his rights, he still voluntarily waived them, is illogical.

An involuntary waiver is a manifest error affecting a constitutional right and may be raised for the first time on appeal. RAP 2.5(a)(3).

Where the defendant is misadvised as to the consequences of a waiver of his core constitutional rights, the waiver is involuntary. *State v. Walsh*, 143 Wn.2d 1, 4, 17 P.3d 591 (2001). Such an involuntary waiver is a manifest constitutional error that our courts permit defendants to raise for the first time on appeal. *Id.* at 6-8 (rejecting State's argument that defendant waived voluntariness issue by failing to raise it in trial court).

Just as an involuntary waiver of core constitutional rights based on misinformation of the sentencing consequences in the context of a guilty plea is a manifest error affecting a constitutional right that a defendant may raise for the first time on appeal, so is an involuntary waiver of core constitutional rights based on misinformation of the sentencing consequences in the context of a diversion agreement. RAP 2.5(a)(3); *Walsh*, 143 Wn.2d at 8.

*State v. McFarland* and *State v. Acevedo*, two cases cited by the State for the proposition that a defendant on direct appeal must establish materiality, do not hold otherwise. Br. of Respondent at 18-19; *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Acevedo*, 137

Wn.2d 179, 970 P.2d 299 (1999). *McFarland* does not address the involuntary waiver of core constitutional rights based on misinformation of sentencing consequences. Instead, *McFarland* address a warrantless stop and search. 127 Wn.2d at 333-34 (holding defendant may not challenge warrantless arrest for first time on appeal absent showing of actual prejudice).

*Acevedo*, cited by the State for the proposition that the omission of a mandatory term of community custody is immaterial and therefore not a manifest error, is also distinguishable. First, in *Acevedo*, although the written plea agreement did not contain the mandatory term of community custody, the court did, in fact, advise the defendant of that mandatory term of community custody before he waived his core constitutional rights. 137 Wn.2d at 186 (noting court directly advised defendant “that when you get out of prison you would be supervised by the Department of Corrections”). As such, it is not entirely clear that the defendant was, in fact, misadvised. In addition, the four-justice holding in *Acevedo* depended upon the Court’s recognition that the mandatory term of community custody was not actually mandatory because that particular defendant would be deported following his term of confinement and therefore would not serve the term of community custody. *Id.* at 196, 203, (finding community custody was not direct consequence of plea because

defendant would be deported following his confinement and would not actually serve community custody).

The final case to which the State cites is *State v. McDermond*, 112 Wn. App. 239, 47 P.3d 600 (2002). To the extent it suggests inaccurate information does not create an involuntary waiver that defendants may challenge for the first time on appeal, it is inconsistent with subsequent supreme court decisions on point. Br. of Appellant at 17-18, 22-23; *State v. Weyrich*, 163 Wn.2d, 554, 557, 182 P.3d 965 (2008) (rejecting State's argument defendant must prove "causal link" between involuntary waiver due to misinformation and guilty plea).

For these reasons, and because Mr. Bellon is actually prejudiced since he is now subject to mandatory terms of community custody of which he was not informed when he waived his rights, Mr. Bellon may raise this issue of manifest constitutional error on direct appeal. See Br. of Appellant at 21-23.

- d. Because Mr. Bellon involuntarily waived his core constitutional rights, the diversion contract is invalid, and the convictions based on that contract must be reversed.

Mr. Bellon waived his core constitutional rights based on inaccurate information regarding the sentences he faced, rendering his waiver involuntary. Therefore, the contract containing the waiver is

invalid, and the convictions resulting from that contract may not stand.

This Court should vacate the convictions and remand.

**3. Resentencing is required because the court misunderstood its discretion and failed to consider meaningfully Mr. Bellon's motion for an exceptional sentence below the standard range based on mitigating circumstances.**

The court failed to appreciate its discretion and therefore failed to consider Mr. Bellon's motion for an exceptional sentence below the standard range based on mitigating circumstances. Br. of Appellant at 23-32. In response, the State argues the court did recognize its discretion and did consider Mr. Bellon's motion. The State, like the court below, fails to understand the extent of the court's discretion.

The supreme court decision in *State v. O'Dell*, recognized that courts may consider any personal characteristic of a defendant that is a sufficiently substantial and compelling reason to distinguish the crime in question from others in the same category. 183 Wn.2d 680, 690, 358 P.3d 359 (2015) (recognizing personal characteristic of youth justified departure from standard range). In so holding, the court relaxed the strict interpretation of *State v. Law*, which constrained a court's discretion. 154 Wn.2d 85, 110 P.3d 717 (2005). The Court's interpretation in *O'Dell* changed the landscape of acceptable considerations at sentencing.

Here, the court specifically ruled it had no authority to consider an exceptional sentence downward. 5/7/18 RP 39. The court specifically quoted from *Law*, which it stated held the SRA prohibits courts from considering exceptional sentences based on factors personal to the defendant. 154 Wn.2d at 89; 5/7/18 RP 34-39.

Mr. Bellon offered mitigating circumstances that distinguished his crimes from others in the same category. Br. of Appellant at 28-31. The court failed to appreciate its discretion to consider the mitigating circumstances Mr. Bellon offered in support of his motion for an exceptional sentence. Because Mr. Bellon is entitled to actual consideration of his request for an exceptional sentence, and because the court must exercise meaningful discretion in deciding whether a departure is appropriate, this Court should remand for a resentencing hearing. *O'Dell*, 183 Wn.2d at 697 (noting failure to exercise discretion and consider exceptional sentence is abuse of discretion); *State v. Grayson*, 154 Wn.2d 333, 335-36, 111 P.3d 1183 (2005) (remanding for new sentencing hearing where court categorically denied defendant's request for DOSA sentence).

**4. This Court should accept the State's concession and strike the imposition of certain legal financial obligations from Mr. Bellon's judgment and sentence.**

The State agree that the recent legislative amendments prohibit the imposition of the criminal filing fee on indigent defendants and prohibit the accrual of interest on non-restitution LFOs. Br. of Respondent at 25-27. In addition, the State agrees these amendments apply prospectively to defendants whose cases are pending on direct appeal. *Id.* at 26.

This Court should accept the State's concessions and strike the \$200 criminal filing fee and interest from Mr. Bellon's judgment and sentence.

**B. CONCLUSION**

This Court should reverse and dismiss both convictions for insufficient evidence. In addition, the diversion contract misinformed Mr. Bellon of the direct consequences of the waiver of his core constitutional rights, rendering the waiver involuntary. Therefore, the contract and the convictions are invalid, and this Court should reverse the convictions and remand.

Alternatively, if the Court affirms the convictions, Mr. Bellon is entitled to a new sentencing hearing because the court misunderstood its discretion and failed to consider Mr. Bellon's motion for an exceptional sentence below the standard range. Finally, the Court should accept the

State's concession that the criminal filing fee and accrual of interest are no longer permissible and should be stricken.

DATED this 25th day of March 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', written in a cursive style.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 51845-7-II
v.	)	
	)	
PABLO BELLON,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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