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No. 51845-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

Pablo Bellon
Appellant.

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

The Honorable Erik Price, Judge
Cause No. 16-1-01675-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence at the stipulated facts bench trial to support the trial court's conclusion that Bellon is guilty of assault of a child in the second degree, domestic violence, beyond a reasonable doubt.
2. Whether the State presented sufficient evidence at the stipulated facts bench trial to support the trial court's conclusion that the Bellon is guilty of assault of a child in the third degree, domestic violence, beyond a reasonable doubt.
3. Whether Bellon's written request to enter a diversion program, with acknowledgement that by entering the diversion Bellon waived the right to a jury trial and agreed to a stipulated facts trial in exchange for a possible dismissal of the charges satisfied due process where Bellon was represented by counsel and was fully informed that the consequence of failure of the diversion would be a stipulated facts bench trial.
4. Whether RAP 2.5 allows Bellon to raise for the first time on appeal an argument that the diversion contract misinformed him of the consequences of failure, where the contract clearly informed Bellon that the consequence of failure was a stipulated facts bench trial and the record demonstrates that if any misinformation existed in the diversion contract, it was not material to Bellon's decision to enter the diversion.
5. Whether the holding of State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, (2018), requires the entry of an order striking the \$200 filing fee that was imposed.

B. STATEMENT OF THE CASE.

The appellant, Pablo Bellon, is the father of B.B. (D.O.B. 7/18/2008). Exhibit 1 at 3, 6.¹ B.B. was eight years old on September 24, 2016, when she was visiting her father along with her two siblings. Id. at 3, 6. Bellon told her to get ready for bed and brush her teeth, but when she was not fast enough, he walked up to her, grabbed her by the neck and picked her up shaking her. Id. at 6. B.B. told a Tumwater Police Officer that she could not talk or breathe because Bellon was squeezing her neck so hard. Id. Bellon used both of his hands to grab her around the neck and picked her up. Id. Bellon then briefly put her down and grabbed her around her stomach, picked her up and started squeezing with his hands. Id. B.B. told the officer that her stomach still hurt. Id.

B.B.'s brother, J.B. witnessed the incident and indicated that Bellon grabbed B.B. by the neck and picked her up shaking her. Id. J.B. stated that Bellon then briefly put B.B. down before picking her back up and holding her around the waist. Id. J.B. stated that he

¹ The evidence was presented at a stipulated facts bench trial as Exhibit 1, a 38-page long document that includes a Tumwater Police Department Incident Investigation Report as pages 2-7; photographs of B.B. as pages 8-13; a Transcript of Interview of B.B. as pages 14-38. For purposes of this brief, the State will refer to the sequential page number of the exhibit, except, when referencing the transcript, the State will also refer to the page number of the transcript for clarity.

yelled at Bellon to stop hurting B.B. and pushed Bellon to make him let go of B.B. Id. J.B. said that Bellon had been drinking several beers all day and just appear to snap and grab B.B. Id.

On September 20, 2016, B.B. was interviewed by Sue Villa at Monarch Children's Justice and Advocacy Center. B.B. stated, "he picked me up by my neck, and um, then he choked me." Exhibit 1, at 22 (Transcript of Interview at 9). When asked what does choked mean, B.B. stated, "Like, squeezed your neck really hard so you couldn't breathe." Id. at 23. She further stated "and then uh he squeezed my tummy really hard so my stomach hurt for a couple of days." Exhibit 1, at 22, (Transcript of Interview at 9). B.B. stated that her tummy and back were sore, stating, "my back was sore for the next day, but my neck was sore for the rest of the week." Id. at 25 (Transcript of Interview at 12).

Bellon was charged with assault of a child in the second degree, domestic violence, and assault of a child in the third degree, domestic violence. CP 3, 4. On January 19, 2017, Bellon entered a diversion contract with the State. CP 5-9. In the diversion contract, Bellon agreed that a stipulated facts bench trial would occur in the event that he fail to comply with the diversion. CP 6. In the diversion contract, Bellon acknowledged that he

understood that he was giving up certain constitutional rights, including the right to a jury trial, the right to a speedy and public trial by an impartial jury, the right to hear and question witnesses, the right to call witnesses on his behalf, the right to testify, the right to appeal a determination of guilty after trial, and the presumption of innocence until the charge had been proven beyond a reasonable doubt. CP 6.

In consideration, the State agreed to dismiss the charges if Bellon successfully completed the diversion program. CP 5. The trial court discussed the diversion with Bellon and Bellon acknowledged that his counsel discussed it with him, and went over the significant consequences of failure of diversion “in great detail.” 1/19/17 RP 5.² The trial court noted, “my job is merely to assure myself you have been adequately advised about the rights you are giving up.” 1/19/17 RP 7. Based on that discussion, the trial court informed Bellon, “I am going to sign off on these diversion documents.” 1/19/17 RP 7.

Shortly after Bellon entered diversion, he was arrested for driving under the influence. 4/20/17 RP 4. The State agreed to

² The Verbatim Report of Proceedings in this case includes hearings held on 1/19/17; 4/20/17; 1/8/18; 2/28/18; 3/26/18; 4/9/18; and 5/7/18. The State received several copies of these reports. For clarity, the State will refer to each by date and RP as was done in the Appellant’s Opening Brief.

allow Bellon to stay in diversion. 4/20/17 RP 4; 1/8/18 RP 7. On September 26, 2017, the State filed a motion to revoke the diversion agreement based on Bellon's failure to comply with the Friendship Diversion program. CP 11-15. Following an evidentiary hearing on revocation, the trial court found "by a preponderance of the evidence that there [was] a violation of the diversion agreement." 1/8/18 RP 49-50; *generally*.

Following the revocation, the trial court conducted a stipulated facts bench trial and found, "beyond a reasonable doubt that Mr. Bellon is guilty of assault of a child in the second-degree domestic violence," and "beyond a reasonable doubt that Mr. Bellon is guilty of the crime of assault of a child in the third-degree domestic violence." 4/9/18 RP 48, 50. The trial court entered findings of fact and conclusions of law consistent with its oral ruling on April 27, 2018. CP 78-80.

At the sentencing hearing, May 7, 2018, the defense moved the court to find that the two offenses were the same criminal conduct, the State conceded the issue, and the trial court found that the offenses were the same criminal conduct. 5/7/18 RP 5, 7, 30. Bellon requested an exceptional sentence downward, arguing that the unique nature of the diversion proceedings and the progress

that Bellon made during the diversion were substantial and compelling justifications for a mitigated sentence. 5/7/18 RP 18, 22, 25. After a lengthy discussion of the law, the trial court concluded that there was no basis for an exception sentence and imposed 31 months, the low end of the standard range for count one with an offender score of zero. 5/7/18 RP 32-39, CP 102-112. This appeal follows. Additional facts are included in the argument as necessary.

C. ARGUMENT.

1. Sufficient evidence supported the trial court's finding of guilt on the charges of Assault of a Child in the Second Degree and Assault of a Child in the Third Degree.

Sufficiency of the evidence is a question of law that is reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record

evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact

finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

- a. The evidence presented by the State was sufficient to support the conviction for assault of a child in the second degree.

Assault of a child in the second degree requires that the State show that a person eighteen years of age or older commits the crime of assault in the second degree against a victim under the age of thirteen. RCW 9A.36.130(1)(a). One means of committing assault in the second degree is by strangulation or suffocation. RCW 9A.36.021(1)(f). Strangulation means “to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with the intent to obstruct the person’s blood flow or ability to breathe.” RCW 9A.04.110(26).

In this case, J.B. reported that his father, Bellon, got angry with his sister B.B. and picked her up by her head and began shaking her. Exhibit 1, at 6 (Incident/Investigation Report at 4). B.B. reported that Bellon was yelling at her for not listening to him and not doing what he had asked her to do, “grabbed her by her neck and picked her up shaking her.” Id. She further indicated, “she could not talk or breathe because Pablo was squeezing her

neck so hard.” Id. In her taped statement, B.B. stated, “he picked me up by my neck, and um, then he choked me.” Exhibit 1, at 22 (Transcript of Interview at 9). When asked what does choked mean, B.B. stated, “Like, squeezed your neck really hard so you couldn’t breathe.” Id. at 23.

Proof of intent can be made through circumstantial evidence. State v. Hagler, 74 Wn.App. 232, 236, 872 P.2d 85 (1994). Even if B.B. could breathe well enough to scream, her description of choking her by squeezing her neck really hard so she couldn’t breathe, combined with her brother’s observations of Bellon picking her up by the head and shaking her was sufficient circumstantial evidence to demonstrate an intent to obstruct her blood flow or ability to breathe. The evidence, when viewed in a light most favorable to the State, was sufficient for the finder of fact to conclude that Bellon compressed B.B.s neck and either obstructed her blood flow or ability to breathe, or did so with the intent to obstruct the blood flow or ability to breathe. Bellon’s conviction for assault in the second degree should be affirmed.

- b. Sufficient evidence supported the trial court’s conclusion that Bellon committed assault in the third degree.

As charged in this case, the State was required to prove that

Bellon was eighteen years of age or older and with criminal negligence, caused bodily harm accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering to a person under the age of thirteen. CP 3, RCW 9A.36.031(1)(f); RCW 9A.36.140(1).

After Bellon grabbed B.B. by the neck and shook her, he briefly put her down and then grabbed her around the stomach and started squeezing her with his hands. Exhibit 1, at 6 (Incident/Investigative report at 4). After B.B.'s mother had picked the children up and then contacted law enforcement, B.B. was still complaining that her stomach hurt. *Id.* During the forensic interview, B.B. described the squeezing of her stomach stating, "and then uh he squeezed my tummy really hard so my stomach hurt for a couple of days." Exhibit 1, at 22, (Transcript of Interview at 9). B.B. stated that her tummy and back were sore, stating, "my back was sore for the next day, but my neck was sore for the rest of the week." *Id.* at 25 (Transcript of Interview at 12).

In State v. Robertson, 88 Wn.App. 836, 841, 947 P2d 765 (1997), Division I of this Court found that a headache that lasted two weeks, combined with bruising and a black eye, was sufficient to demonstrate substantial pain. Later, Division I clarified that,

while Robertson provides guidance on the issue, it does not set limits on what types of injuries are sufficient to sustain a conviction. State v. Saunders, 132 Wn.App. 592, 600, 132 P.3d 743 (2006). The Saunders Court found that neck pain that lasted for three hours, a swollen cheek and an abrasion were sufficient evidence of substantial pain and considerable suffering. Id.

Division III of this Court cited to Saunders when holding that swelling and pain that lasted throughout the morning of an assault was sufficient to demonstrate substantial pain and considerable suffering. State v. Fry, 153 Wn.App. 235, 240-241, 220 P.3d 1245 (2009). Here, B.B. complained of pain in her tummy that lasted a couple of days, a sore back lasting into the next day, and neck pain for the rest of the week. Exhibit 1 at 22, 25 (Transcript of Interview at 9, 12). In a light most favorable to the State, the evidence was sufficient to show that B.B. experienced substantial pain and considerable suffering. This Court should affirm the conviction for assault of a child in the third degree.

2. The diversion contract entered into between the State and Bellon was a valid contract.

A diversion agreement is not a plea agreement. State v.

Ashue, 145 Wn.App. 492, 500, 188 P.3d 522 (2008). A plea agreement requires “the entering of a plea to a charged offense or to a lesser or related offense.” Id.; RCW 9.94A.421. In this agreement, Bellon did not enter a guilty plea in exchange for participation in the Friendship Diversion Program. Instead, Bellon, by the terms of the agreement, requested participation in the Friendship Diversion Program, stipulated to the admissibility of investigative reports and any statements related to the prosecution and waived any and all objections to the admission of such statements. CP 5-6. Bellon further waived the right to a jury trial; the right to a speedy and public trial; the right to confront witnesses; the right to call witnesses; the right to appeal a determination of guilt after trial; and the presumption of innocence. CP 6. Essentially, the consequence of failing to successfully complete the diversion program was a stipulated facts bench trial. CP 6.

Pretrial diversion programs are nonstatutory. State v. Kessler, 75 Wn.App. 634, 636, 879 P.2d 333 (1994). Case law in the area of diversions is limited and primarily addresses the due process requirements for the termination of a pretrial diversion agreement. Id. at 639; State v. Marino, 100 Wn.2d 719, 725, 674 P.2d 171 (1984). “Prosecutorial discretion in the charging process

has historically provided a basis for informal diversion from the criminal justice system.” Marino, 100 Wn.2d at 721.

A stipulation is functionally and qualitatively different than a guilty plea. State v. Saylor, 70 Wn.2d 7, 422 P.2d 477 (1966); State v. Wiley, 26 Wn.App. 422, 425, 613 P.2d 549, *review denied*. 94 Wn.2d 1014 (1980). Because stipulations in diversion agreements differ from guilty pleas, such agreements are not under the direct supervisory control of the trial court. Kessler, 75 Wn.App. at 639.

While case law regarding due process requirements for the entry of a pretrial diversion is limited, Marino, 100 Wn.2d at 725, guidance exists in case law regarding deferred prosecutions and drug court contracts. In State v. Drum, 143 Wn.App. 608, 181 P.3d 18 (2008), this Court considered the due process requirements for entry into a Drug Court contract. Similar to the arguments made Bellon, the defendant in that case argued that the entry of the contract was equivalent to a guilty plea. Id. at 617. This Court found that, as with deferred prosecutions, the drug court contract left adjudication by trial to a later time, and although, Drum stipulated to the sufficiency of the evidence, his termination resulted in a bench trial. Id. Citing City of Bremerton v. Tucker, 126

Wn.App. 26, 32, 103 P.3d 1285 (2005) and City of Richland v. Michel, 89 Wn.App. 764, 770, 950 P.2d 10 (1998), this Court found that a drug court contract does not require that all of the consequences of the agreement be written and rejected Drum's claim that due process required that he be informed of the standard range, financial penalties and community custody requirements if he were convicted. Drum, 143 Wn.App. at 617, 619-620.

As in Drum, there was no due process requirement that Bellon be notified in the diversion contract of the standard range for his offenses or the community custody term of the offenses. It was not until Bellon's defense attorney argued that the crimes were the same criminal conduct in his sentencing memorandum, the State acquiesced, and the trial court made a specific finding that the offenses were in fact same criminal conduct that the standard ranges were lowered to Bellon's benefit. 5/7/18 RP 5, 7, 30. A determination of same criminal conduct occurs at sentencing. State v. Aldana Graciano, 176 Wn.2d 531, 535-536, 295 P.3d 219 (2012).

"The validity of any waiver of a constitutional right, as well as the inquiry required to establish waiver, will depend on the circumstances of each case." State v. Stegall, 124 Wn.2d 719,

725, 881 P.2d 979 (1994). Here, the due process requirements for the waiver of rights that Bellon agreed to were met. Bellon's waiver of the right to trial was in writing as required by CrR 6.1(a). The analysis in Drum is analogous to the present situation and controls. There was no due process violation in the entry of the diversion agreement. The diversion agreement was a valid contract between the State and Bellon that gave Bellon the opportunity for dismissal of all charges if he had successfully completed the terms of the agreement. CP 5-8. Bellon was represented by counsel and specifically requested the opportunity to enter diversion. CP 5; 1/19/17 RP 4. His attorney specifically informed the trial court, "he understands the terms of the diversion." 1/19/17 RP 4.

The trial court discussed the diversion with Bellon and Bellon acknowledged that his counsel discussed it with him, and went over the significant consequences of failure of diversion "in great detail." 1/19/17 RP 5. The trial court noted, "my job is merely to assure myself you have been adequately advised about the rights you are giving up." 1/19/17 RP 7. Based on that discussion, the trial court informed Bellon, "I am going to sign off on these diversion documents." 1/19/17 RP 7. The record demonstrates that Bellon

voluntarily entered the diversion contract, with the advice of counsel, in order to obtain the benefits contained therein.

Bellon's arguments that he was misinformed of the consequences of the diversion contract are misplaced. Significantly, the consequences of his waiver of rights if he failed to comply with the diversion was not the sentence that he ultimately received, but rather the consequence was the stipulated facts bench trial that occurred. The cases that Bellon relies upon are all cases that dealt with the consequences of a plea of guilty. As argued above, a plea of guilty is functionally and qualitatively different than a diversion contract. As this Court made clear in Drum, due process in the context of a diversion contract does not require that the contract contain the standard range or the community custody term for the offenses that are charged.

This Court discussed the applicability of State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996), relied upon by Bellon, in the Drum decision, specifically noting that in Michel

“the Court rejected Michel's contention that the deferred prosecution agreement did not give him fair notice of a possible enhanced sentence, observing that unlike the case with guilty pleas, the deferred prosecution statute does not require written notice of all consequences of the agreement. Michel, 89 Wn.App. at 770. It compared CrR 4.2(d) and State v.

Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996), which require direct consequences of a guilty plea to be communicated to a defendant before entry of the plea, with RCW 10.05.020, which requires only that the defendant be advised of his rights as an accused and acknowledge the admissibility of the stipulated facts in any subsequent criminal hearing.”

Drum, 143 Wn.App. at 618-619. This Court continued, stating, “It also observed that as with juvenile diversion agreements, the procedure is designed to be somewhat informal.” Id. at 619. Here, as with the drug court procedures discussed in Drum, the diversion contract is non-statutory and is designed to be even less formal than a statutory deferred prosecution under RCW 10.05. The diversion contract here adequately informed Bellon of the consequence of failing to comply, which was a stipulated facts bench trial.

3. Even if this Court were to find that Bellon was somehow misinformed of the consequences of the diversion contract, the record demonstrates that entry into the diversion program was voluntary and not the product of a manifest constitutional error.

“The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). A party may raise an issue for the first time on appeal if the issue involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). The State does not concede that any error occurred in the entry of the

diversion agreement in this case. The issue of validity of the diversion contract was not raised in the trial court.

At the revocation hearing, Bellon's attorney argued that the State had failed to prove that the contract had been breached. 10/8/18 RP 39. The issue was likewise not raised in Bellon's Response to State's Memorandum RE: Revocation. CP 16-22. It was also clear in the record that prior to the revocation proceedings, Bellon had been allowed to remain in the diversion program after a subsequent driving under the influence arrest. 4/20/17 RP 4; 1/8/18 RP 7; 10/8/18 RP 31; 5/7/18 RP 16.

Even in cases that involve misinformation or omission of consequences, a review of the record is required to determine the materiality of the misinformation or omission. State v. Acevedo, 137 Wn.2d 179, 203, 907 P.2d 299 (1999)(rejecting argument that omission of community custody term in plea was a material factor in the defendant's decision to enter a plea on the facts of that case). In order to demonstrate that an alleged error is manifest,

"the defendant must identify a constitutional error and show how, in the context of [proceedings], the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review."

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Thus, even in the more formal context of a guilty plea, misinformation regarding a standard range or community custody term still requires a showing that the information materially affected the decision to plead guilty. State v. McDermond, 112 Wn.App. 239, 250, 47 P.3d 600 (2002).

In this case, Bellon was adequately advised that the consequence of failing to comply with the diversion agreement was a stipulated facts bench trial. Nothing more was necessary. Even if this Court were to find that he was somehow misinformed regarding the standard range and community custody ranges for the offenses that he was charged with, the record makes abundantly clear that any misinformation had no effect on his decision to enter diversion. He had several opportunities to argue that the diversion was not voluntarily entered into and he did not do so. At sentencing, Bellon's counsel indicated that Bellon entered the agreement "primarily because he did not think it was worth the trauma and the experience that it would cause his daughter and his family for him to go through that process, and given that it would have resulted, if it was successfully completed, in dismissal." 5/7/18 RP 18. During his right of allocution, Bellon stated, "I would

take the diversion again,” and in his mitigation letter to the trial court, he stated, “I still believe deferment was the optimal course to take...” 5/7/18 RP 28; CP 179.

The record demonstrates that if any error occurred in the entry of the diversion agreement, it was not material to Bellon’s decision to enter into the diversion. As such, Bellon is not entitled to the relief that he now requests for the first time on appeal.

4. The trial court acted within its discretion when it denied Bellon’s request for a sentence below the standard range.

A sentence within the standard range is ordinarily not appealable. RCW 9.94A.585(1); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). Where a defendant requests an exceptional sentence below the standard range, it may be reviewed if the trial court either refused to exercise its discretion at all 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). When a trial court has considered the facts, and has concluded there is no basis for an exceptional sentence, the trial court has exercised its discretion. State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002, 966 P.2d 902 (1998).

Here, Bellon requested a downward exceptional sentence. CP 89; 5/7/18 RP 14. RCW 9.94A.535(1) enumerates eleven circumstances for a court to consider when an exceptional sentence downward is requested. However, the list is “illustrative only” and is “not intended to be exclusive.” RCW 9.94A.535(1). The trial court “may impose a sentence outside the standard range for an offense, if it finds,” considering the purposes of the Sentencing Reform Act, “that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. In this case, Bellon’s attorney acknowledged, “this does not fit squarely into any of the enumerated factors set forth.” 5/7/18 RP 14.

Bellon’s argument for an exceptional sentence focused on the nature of the bench trial following the failed diversion and argued that had the matter gone to a jury trial, a jury might have found a reasonable doubt. 5/7/18 RP 18. Bellon further argued that the unique circumstances of the diversion and revocation did not leave a “huge benefit” to society for the imposition of the standard range. 5/7/18 RP 22. Finally, Bellon’s attorney focused on the progress that Bellon had made during the diversion stating “these specific circumstances and how far along he did get prior to

revocation and even since revocation, I think it warrants the exceptional sentence.” 5/7/18 RP 25.

While issuing the sentence, the trial court recited the seven purposes of the Sentencing Reform Act contained in RCW 9.94A.010. 5/7/18 RP 32. The trial court then discussed the circumstances that a court can consider when making a decision regarding a request for an exceptional sentence under RCW 9.94A.535. 5/7/18 RP 34. The trial court stated,

“There are 11 factors. And I think even your counsel, Mr. Strophy, would agree that none of them apply. But there’s this catchall. And your counsel, Mr. Strophy has urged me to use the catchall to use some of this support in your efforts to support an exceptional downward sentence.”

5/7/18 RP 34.

The trial court then quoted from State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005), before concluding, “there’s no authority under these circumstances to adopt a range - - a sentence outside the standard range.” 5/7/18 RP 39. In Law, the State Supreme Court held “that the SRA requires factors that serve as justification for an exceptional sentence related to the crime, the defendant’s culpability for the crime, or the past criminal record of the defendant.” 154 Wn.2d at 88.

Based on the holding of Laws, the trial court was correctly ruling that the letters of support and personal characteristics that were offered by Bellon were insufficient to demonstrate substantial and compelling reasons to justify an exceptional sentence. Washington courts have applied a two-part test for determining when a departure from the standard range is appropriate. State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997). First, "a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard range." Id. at 840. The purposes of the SRA were factors necessarily considered by the legislature in establishing the standard range. State v. Pascal, 108 Wn.2d 125, 137-138, 736 P.2d 1065 (1987).

Second, the asserted aggravating or mitigating factor must be substantial and compelling to distinguish the crime in question from others in the same category. Ha'mim, 132 Wn.2d at 840. The State Supreme Court has rejected reliance on SRA purposes alone as justification for a downward exceptional sentence. Pascal, 108 Wn.2d at 137-138 (rejecting lack of criminal history, low threat to the public, opportunity for the defendant to improve herself and frugal use of State's resources as stand-alone justification for exceptional sentence); Law, 154 Wn.2d at 102-103(rejecting post-

offense strides as personal factors unrelated to the offense). In Ha'mim, the court found that age alone is not a substantial and compelling reason justifying an exceptional sentence. 132 Wn.2d 847.

In State v. O'Dell, the Supreme Court applied the two-part Ha'mim test, finding that youth is not a factor that the legislature necessarily considered when it established the standard range for offenders, and ruling that a trial court must be allowed to consider youth as a mitigating factor. 183 Wn.2d 680, 690, 696, 358 P.3d 359 (2015). O'Dell did not change the test, but merely recognized that youth could be a sufficient substantial and compelling reason to distinguish the crime in question from others in the same category. *Id.* The Court clarified Ha'mim, stating, "it held only that the trial court may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability." O'Dell, 183 Wn.2d at 689.

The State Supreme Court again noted that the mitigating factor must relate to the commission of the crime in In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 336, 422 P.3d 444 (2018). Here, the record demonstrates that the trial court considered all of

the factors argued by the defense and found that none of the factors related to the commission of the crime. The trial court noted that the courts have “consistently interpreted the SRA by its terms to disallow personal characteristics *unrelated to the offense* to be considered as mitigating factors.” 5/7/18 RP 38 (emphasis added). The lengthy analysis that the trial court engaged in demonstrates that he exercised his discretion in finding that the arguments of Bellon did not demonstrate substantial and compelling justification, related to the commission of the crime, which would authorize the imposition of a downward exceptional sentence.

5. The State does not oppose an order striking the \$200 filing fee from the Judgment and Sentence pursuant to the holding of *State v. Ramirez*.

The Judgment and Sentence entered in this matter did not make specific findings regarding Bellon’s ability to pay legal financial obligations. CP 107. However, the trial court entered an Order of Indigency for purposes of appeal on the same day. CP 128-129.

Legislative amendments to RCW 43.43.7541 and RCW 36.18.020(2)(h), which took effect on June 7, 2018, require that costs as described in RCW 10.01.160, which include the \$200 filing fee, “shall not be imposed on a defendant who is indigent as

defined in RCW 10.101.010(3)(a) through (c), and that the \$100 DNA fee not be collected if the State has previously collected the offender's DNA as a result of a prior conviction. Laws of 2018, ch. 269, § 17.

The amendments apply prospectively to defendants whose appeals were pending when the amendment was enacted. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, (2018). However, the "crime victim penalty assessment under RCW 7.68.035 may not be reduced, revoked, or converted to community restitution hours." RCW 10.01.180(5).

It is clear that the trial court properly ordered the \$200 filing fee and the \$100 DNA fee prior to the legislative amendments which took effect in June of last year. Based on the holding in Ramirez that those amendments apply prospectively to cases which were on appeal at the time the amendments took effect, the State does not oppose an order striking the \$200 filing fee. Bellon had no prior felony history, thus the \$100 DNA fee was appropriately ordered and Bellon does not argue otherwise.

No specific action is necessary regarding interest. RCW 10.82.090(1) states, "as of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(2)(a)

further states that the court “shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018.” The specific reference to RCW 10.82.090 judgment and sentence should have the effect of removing any nonrestitution interest without further action.

D. CONCLUSION.

Bellon knowingly, voluntarily and intelligently entered a diversion contract with the State, knowing that the consequence of failing to comply would be a stipulated facts bench trial where the trial court would determine his guilt or innocence. Such a pretrial diversion agreement does not need to contain the standard range for the offenses or the community custody term of the offenses in order to comply with due process. The inclusion of the standard range in the agreement was unnecessary, and even if it were necessary and incorrect, the record demonstrates that any error was not manifest constitutional error because it was not material to Bellon’s decision to enter the diversion, and this Court should not consider the issue for the first time on appeal. Sufficient evidence was presented at the stipulated facts bench trial, when viewed in a light most favorable to the State, to support the trial court’s conclusion that Bellon is guilty of assault of a child in the second

degree, domestic violence and assault of a child in the third-degree domestic violence.

The record demonstrates that the trial court exercised its discretion by considering Bellon's request for an mitigated exceptional sentence and finding that Bellon had not provided a substantial and compelling justification related to the commission of the offense. The State does not oppose remanding the matter only for entry of an order striking the \$200 filing fee. The State requests that this Court affirm Bellon's convictions and sentence in all other aspects.

Respectfully submitted this 21 day of February 2019.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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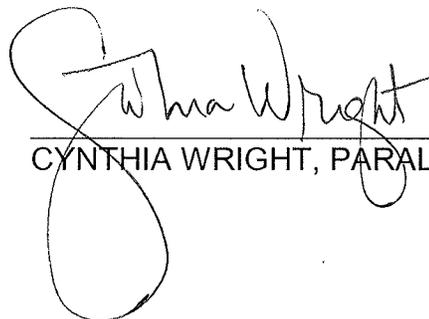
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of February, 2019, at Olympia, Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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