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No. 52260-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ARON D. SHELLEY  
Appellant.

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

The Honorable Erik Price, Judge  
Cause No. 15-1-00582-4

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BRIEF OF RESPONDENT

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Joseph J.A. Jackson  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a trial judge, sitting on a resentencing hearing, categorically declines to consider a request for an exceptional sentence when the judge considers the arguments of counsel, finds that they are not different than arguments that had been rejected by another superior court judge, and finds no basis to rule differently than the previous judge had.

B. STATEMENT OF THE CASE.

1. Substantive Facts

Aron Shelley and Cheri Burgess were raising Burgess's son, A.S. together while living with A.S.'s Aunt Cindy and Uncle Tom. 1 RP 72.<sup>1</sup> A.S. was fourteen months old on April 29, 2015 and although he was not Shelley's biological son, he had Shelley's name, and Shelley was acting as the paternal figure in the child's life. 1 RP 71.

On April 29, 2015 Shelley got angry with Burgess. RP 74. He wanted her to leave and he yelled profanities at her, telling her "I want you to effing leave." 1 RP 74. Burgess told him that she did

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<sup>1</sup> The verbatim report of proceedings in this matter appears in seven volumes. Volumes 1, 2 and 3, contain the jury trial held October 24-27, 2016, and are sequentially number. As such those volumes are collectively referred to as 1 RP in this brief. Volume 4 contains the original sentencing hearing held November 17, 2016, and will be referred to as 4 RP in this brief. Volume 5 contains a motion to revoke release, May 22, 2015 and will not be otherwise referred to in this brief. Volume 6 contains a defense attorney motion to withdraw heard February 16, 2016, and will not otherwise be referenced in this brief. Volume 7 contains the resentencing hearing held August 9, 2018, and will be referenced herein as 7 RP.

not have to leave, but that made Shelley angrier and he tried to make her leave. 1 RP 78. While they were in the living room Shelley attempted to throw her out the door, tearing her sweater and her sports bra in the process. 1 RP 78. Burgess fought hard because her son was still in the house. 1 RP 78. She ended up by the door “naked from the top up.” 1 RP 79. Burgess went into the bedroom to put on a shirt, and when she came out and entered the kitchen, Shelley followed her, telling her to leave. 1 RP 79. Shelley grabbed a butcher knife and put it against Burgess’s throat, telling her he “was going to kill (her), effing kill (her), because (she) wasn’t leaving.” 1 RP 79. At this moment Burgess believed that she was going to die. 1 RP 80. Uncle Tom intervened, hitting Shelley, and Shelley relinquished the knife. 1 RP 80. Shelley then went into the living room and Burgess followed him hoping that she could talk with him, 1 RP 81, however she saw that Shelley was no longer in the living room and her son was not in his playpen. 1 RP. 81.

After noticing her son was gone, Burgess ran outside to find Shelley in the driver’s seat of their car, with the baby in the front seat. 1 RP 82. Shelley told her he was going to kill himself and the baby. 1 RP 82. Burgess stood in front of the car to try and get her son. 1 RP 82. Shelley then revved the engine lunging forward,

striking Burgess with the vehicle. 1 RP 83. When she would not move, he did it again, hitting her in the knee. 1 RP 83. Shelley then got out of the car, and when he did Burgess got in the driver's seat and attempted to drive off, however the gate was closed. 1 RP 84. When she got out to unlock the gate Shelley was chasing her. 1 RP 85. Burgess told Shelley that he could do what he wanted to himself but that he could not take the baby. 1 RP 85. Shelley then grabbed the baby by his throat squeezing him, telling Burgess that if she did not leave he would continue to squeeze the baby's neck. 1 RP 85-87. Burgess then went into the house where she called the police. 1 RP 87.

While Burgess was calling the police, Uncle Tom got in the car with Shelley and tried to talk to him. 1 RP 143. Shelley told Uncle Tom that "he was gonna take the car, ram it through the fence, into a tree, kill himself, kill the boy." 1 RP 143.

When Deputy Hamilton arrived he saw Shelley in the driver's seat, holding the baby in a choke hold. 1 RP 163. Deputy Hamilton attempted to talk to Shelley, and eventually he got Shelley to get out of the car. 1 RP 165. Deputy Hamilton then grabbed the baby and gave him to Uncle Tom before placing Shelley in custody. 1 RP 166.

## 2. Procedural History

Shelley was charged with second degree assault, intentional assault with a deadly weapon, a knife, during the commission of a crime (Count 1) and second degree assault based on intentional assault with a deadly weapon, a car (Count 2). Burgess was the complainant in counts 1 and 2. Shelley was also charged with second degree assault of a child, based on strangulation or suffocation (Count 3) and felony harassment based on a threat to kill A.S. (Count 4). The State also charged Shelley with 4 counts of violating a no-contact order (Counts 5-8). CP 8-9.

On July 29, 2015, defense counsel filed a Motion and Declaration for Competency Determination and an Order for Pretrial Mental Health Evaluation by Western State Hospital was entered. CP 10-17. Shelley was evaluated at Western State Hospital and Licensed Psychologist Melissa Dannelet opined that "Shelley has the capacity to understand the nature of the proceedings against him and to assist in his defense." CP 33. Based on that report, the parties entered an Agreed Order on Competency on August 31, 2015. CP 34. On June 22, 2016, a subsequent Order for Pretrial Mental Health Evaluation by Western State Hospital was entered with the request for an evaluation on diminished capacity. CP 39-

41. On August 23, 2016, Western State Hospital Licensed Psychologist, Melissa Dannelet completed a report which concluded that “Shelley had the capacity to for the requisite mental stated to commit the alleged offense. Whether Mr. Shelley indeed formed the requisite mental state to commit the alleged offenses is the province of the trier of fact.” CP 42-53. At trial, the defense called Dr. David Dixon to testify regarding Shelley’s mental state. 1 RP 221-254. Dr. Dixon testified that Shelley was suffering from a mental defect and was “not able to form the intent to commit the crimes he’s charged with.” 1 RP 253-254. In rebuttal, the State called Dr. Dannelet to testify regarding her evaluation of Shelley. 1 RP 309-333. Dr. Dannelet testified, “It’s my opinion that [Shelley] did have the capacity to form intent of the time of his actions.” 1 RP 328.

At trial Shelley was convicted of counts 1,3,4,5, and 6. CP 161, 166, 168, 170, 172. For the charge in count 1, the jury answered yes to each of the special verdict forms for domestic violence and a deadly weapon. CP 162-163. Special verdict forms alleging domestic violence were also answered yes on counts 3, 4, 5, and 6. CP 167, 169, 171, 173. The jury returned not guilty verdicts on counts 2, 7, and 8. CP 164, 174, 176. Shelly’s offender

score was calculated at 9 on each felony count and he was sentenced to a term of total confinement of 132 months. CP 290-301.

On direct appeal, Division I of this Court affirmed Shelley's convictions, but found that the domestic violence special verdicts on counts three and four were invalid because Shelley did not have a biologic or legal parent-child relationship with A.S. State v. Shelley, 3 Wn.App.2d 196, 197, 201, 414 P.3d 1153 (2018). The Court remanded "for resentencing with an offender score consistent with" the opinion." Id. at 203.

On remand, the trial court imposed a total sentence of 114 months, which was the new high end of the standard range following remand. 7 RP 14-15; CP 367-377. This appeal follows alleging that the trial court failed to exercise its discretion during the resentencing hearing. Additional facts related to that claim will be included in the argument section below.

### C. ARGUMENT.

1. The judge at resentencing properly considered the defense request for an exceptional sentence downward before finding no basis to deviate from the original sentencing judge's decision denying an exceptional sentence downward for the same alleged mitigating factors.

A sentence within the standard range is generally not subject to appeal. RCW 9.94A.585(1). However, when a defendant requests an exceptional sentence below the standard range, the appellate court may review the decision if the 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, 138-139, 5 P.3d 727 (2000). When a trial court has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and that ruling may not be appealed. 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).

A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances. Id. At the resentencing hearing in this case, the judge did not categorically refuse to consider an exceptional sentence. At Shelley's original sentencing hearing, Shelley requested an exceptional sentence based on RCW 9.94A.535 (e) and (g), arguing that his capacity to appreciate the wrongfulness of his conduct was significantly impaired, and that that operation of the multiple offense policy resulted in a

presumptive sentence that is clearly excessive in light of the purposes of the Sentencing Reform Act (SRA). CP 259; 280-287; 4 RP 17-25.

The Honorable Judge Anne Hirsch denied the request for an exceptional sentence. First, Judge Hirsch discussed the purposes of the SRA as outlined by RCW 9.94A.010. 4 RP 31-32. With regard to the request for the exceptional sentence, Judge Hirsch stated that the jury “found that he had the ability to form the requisite intent to perform each of the five crimes that they convicted him of,” and that Shelley’s comments to the court “indicate to the court that Mr. Shelley knows that he had the ability to make choices and that he did in fact make choices as to his behavior that day.” 4 RP 35. Judge Hirsch further stated, “These are very, very serious offenses, and I don’t believe that there is a sufficient basis for the Court to impose an exceptional sentence.” 4 RP 36.

Prior to the resentencing hearing, Shelley submitted a Second Amended Request for Exceptional Sentence Downward Departure, arguing the same mitigating factors under RCW 9.94A.535 (e) and (g), and adding an argument that Shelley had used his time in prison to learn and improve. CP 340-349. A

different Judge, the Honorable Erik Price, listened to the arguments of counsel and then discussed the situation. Judge Price stated:

“oftentimes the judge in the circumstance of a plea doesn’t really know or have a good sense of what happened. A judge who sits in a trial is a little more informed as to what an appropriate sentence might be. In this case, the judicial officer who sentenced you initially sat through a trial and heard arguments what the appropriate sentence was and made the decision to do what she did. Now of course the Court of Appeals has come and changed what those ranges should be and have made a legal correction to those ranges.”

7 RP 13. He continued:

“As I understand - - and I read carefully the Court of Appeals decision. The corrections that the Court of Appeals made had to do with ranges and ranges alone and not so much as to calling into question the judicial decision regarding the sentence, so that’s where I start.”

7 RP 13.

Judge Price then discussed the request for an exceptional sentence, stating:

“Now, with respect to the request made by the defense, the defense has made a request for an exceptional downward sentence for several reasons. Of those reasons that the defense cited, the Court noted both of those reasons were cited to the original sentencing judge and were rejected by that judge. In my view, the appropriate role that I sit in here today, it would be inappropriate to second-guess those decisions.”

7 RP 13. The resentencing court was in essence finding that Shelley had not provided any additional basis that had not been considered by Judge Hirsch, and therefore, the defense had not provided a compelling justification to impose an exceptional sentence.

The resentencing court was not categorically refusing to exercise its discretion. To the contrary, the court was exercising its discretion in finding that the defense had not provided a basis for him to conclude differently than the previous judge. Even after indicating that he did not believe it would be appropriate to impose an exceptional sentence based on the factors that the original sentencing judge had rejected, Judge Price considered the other arguments that Shelley had made in regard to an exceptional sentence, stating: "The other additional issue raised in defense - - or in support, rather, of an exceptional downward departure has to do with Mr. Shelley's behavior since the sentence." 7 RP 14.

The resentencing court indicated that it appreciated Shelley's efforts, but noted that "what you do afterwards is not relevant on an exceptional sentence downward request." 7 RP 14. This was a correct statement of the law. "A defendant's good conduct following the commission of a crime is not a factor which

relates to the crime itself or the defendant's criminal history. There, it is not an appropriate factor to consider in sentencing." State v. Roberts, 77 Wn.App. 678, 685, 894 P.2d 1340 (1995).

The resentencing considered the defense request for an exceptional sentence, found no reason to disagree with the decision entered by the original sentencing judge, and like the prior judge, rejected the request for an exceptional sentence. The resentencing court considered the circumstances, stating,

"Under the circumstances, however, I think the appropriate role for the Court is to adopt what was done previously, with respect to the ranges, of course adjusted downward as requested by the Court of Appeals."

7 RP 14. The decision to adopt what was previously done was within the court's discretion.

This case is distinguishable from State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005), where the trial court categorically declined to consider a DOSA sentence due to a believe that the program was underfunded, and State v. McFarland, 189 Wn.2d 47, 58-59, 399 P.3d 1106 (2017), where the State Supreme Court said the trial court appeared to not understand that it had the ability to impose an concurrent firearm sentences. The resentencing court in this case considered the defense arguments

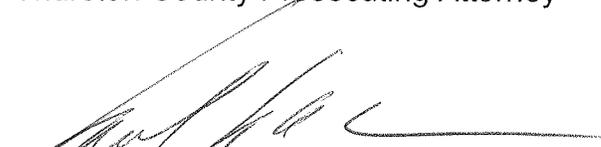
and essentially agreed with the original sentencing judge. The court did not categorically decline to consider an exceptional sentence for any reason.

D. CONCLUSION.

At resentencing, the trial court considered the defense request for a downward exceptional sentence, found no basis to deviate from the original sentencing court's ruling rejecting a downward exceptional sentence, and adopted the previous ruling. The court clearly considered the facts and concluded that there is no basis for an exceptional sentence. There was no categorical refusal to consider and exceptional sentence for any reason. The State asks that this Court affirm Shelley's judgment and sentence.

Respectfully submitted this 28<sup>th</sup> day of February, 2019.

JON TUNHEIM  
Thurston County Prosecuting Attorney



Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

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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TO: DEREK M. BYRNE, CLERK  
COURT OF APPEALS DIVISION II  
950 BROADWAY, SUITE 300  
TACOMA WA 98402-6045

**VIA E- MAIL**

TO: LISE ELLNER  
ATTORNEY AT LAW  
P O BOX 2711  
VASHON WA 98070-2711

LISEELLNERLAW@COMCAST.NET

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

Dated this 28<sup>th</sup> day of February, 2019, at Olympia, Washington.

  
\_\_\_\_\_  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**February 28, 2019 - 10:05 AM**

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