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Court of Appeals No. 52389-2-II
(Pierce County Superior Court No. 14-1-00779-7)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE RESTRAINT OF VENIAMIN RUSEV,

STATE OF WASHINGTON,

Respondent,

v.

VENIAMIN RUSEV,

Petitioner.

REPLY BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

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I. Argument in Reply

Mr. Rusev's conviction was obtained, and his sentence imposed, in violation of his state and federal constitutional rights to due process of law and jury trial, as well as the effective assistance of counsel and the right to be free from double jeopardy and cruel and unusual punishments.

A. Instructing the jury regarding the State's burden to disprove self-defense beyond a reasonable doubt was not reasonable.

1. Ample evidence supported a request for self-defense instruction.

The defendant need only produce some evidence demonstrating self-defense in order to shift the burden of proof to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *See State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). To do this, the defendant may rely on evidence solicited from the State's witnesses to make the case for self-defense because the parties are entitled to the benefit of all the evidence admitted at trial. *Id.*

In Mr. Rusev's case, the evidence demonstrating meaningful claims of self-defense was substantial. Dymtro Onishchuk testified that it was Ihor who grabbed Mr. Rusev. RP 398. Dymtro then grabbed Mr.

Rusev from behind and they held him in a “bear hug” as they pushed toward the door. RP 398, 407, 464-66, 474, 484-85.

Ihor Onishchuk similarly confirmed that he grabbed Mr. Rusev’s shoulder and pushed him to the side toward the door. RP 1021. He also acknowledged that he was 3-4 inches taller than Mr. Rusev and Dymtro was strong and athletic. RP 1023. Ihor himself testified that he was confident he and Dymtro would have overpowered Mr. Rusev. RP 1024.

Vossler Blesch further confirmed that Ihor grabbed Mr. Rusev and that Rusev was in danger when he saw Ihor was on top, in the “bear hug.” RP 994, 1039. Consistent with such concerns, after scuffling for a few seconds, Mr. Rusev called out “Voss help me.” RP 995; 1039. In the face of this imminent threat of danger, Mr. Blesch fired one shot aimed at Ihor’s arm. RP 995, 1040; 1050.

The evidence established Mr. Blesch did this with the specific intention of defending Mr. Rusev because he was scared after the brothers had spoken to each other in Russian at the same time and it looked like one was going to make a move to pull something from his waist which he thought may have been a gun. RP 1052-54.¹ In the grips of that fear he

¹ This was consistent with his earlier statement to the police, “Aggressor Onishchuk was communicating to the other brother in Russian. The other brother looked at me like he was going to pull something out on me since he still had his hand on his belt.” RP 1160. The statement to police specifically described the Onishchuk brothers as the aggressors. RP 1158-60.

fired. RP 1055. Although Mr. Blesch was aiming for Ihor's arm, he did not wish to hurt anyone, nevertheless, he saw the Onishchuks as the aggressors. RP 1058-59; 1072.

This view of the evidence was in turn consistent with what Mr. Blesch told his mother, that he shot someone after two individuals attacked his friend. RP 1075. He reiterated from the witness stand that he believed Mr. Rusev was fighting for his life after the Onishchuks grabbed him. RP 1149. It was then that Mr. Rusev cried out for help. RP 1151. Ample evidence, therefore, would have supported a request for self-defense instructions.

2. The failure to seek instructions on self-defense to guide the jury's deliberations was not reasonable.

Defense counsel's failure to request self-defense instructions under these circumstances was deficient because had counsel requested the instruction the trial court would certainly have been obligated to have given it. As outlined above, there was substantial evidence from which the defense could argue, and the jury could find, that the Onishchuks were the aggressors in the scuffle which preceded the shooting, having grabbed Mr. Rusev and placed him in a "bear hug." The evidence plainly supported a

reasonable inference that Mr. Blesch perceived an imminent threat to Mr. Rusev's life and he acted in response to that threat.

In Mr. Rusev's case, the instructions on self-defense were essential in order to outline the relationship between the burden of proof and the legal limits of the first aggressor doctrine. The failure to request these crucial instructions was not a reasonable or legitimate tactical decision. State v. Rodriguez, 121 Wn.App. 180, 184-85, 87 P.3d 1201 (2004) (defense counsel was deficient for not requesting an adequate self-defense instruction); State v. Powell, 150 Wn.App. 139, 155, 206 P.3d 703 (2009) (failure to request reasonable belief instruction was deficient performance).

Defense counsel was left arguing self-defense without any instructional support for the jury when he notes that "Vossler was shocked that he had fired that gun. Remember what he said? I pulled it out and, in a panic, fired because he saw the client fight for his life." RP 1888. Where this theory is presented to the jury, it was essential that the jury have proper instructions to conduct its examination of the defense. Rodriguez, 121 Wn.App. at 184-85; Powell, 150 Wn.App. at 155. A decision not to provide the jury with these critical guideposts cannot reasonably be characterized as legitimate tactic and this failure

amounted to deficient performance. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Where defense counsel argues that the defendant did not necessarily ask Mr. Blesch to shoot, but acknowledges that he was requesting assistance in his defense then it was essential that the jury be provided with the full legal framework. Defense counsel argued: “He just asked him to come to his aid. Counsel would suggest to you in or a dime, in for a dollar. All he had to do was ask for the assault. At that point I’d submit to you my client was in a defensive mode, not an aggressive mode. He was asking for help for his own defense.” RP 1904. This is a plain request to act in the defense of another, but it was undertaken without the benefit of any instructions for the jury explains it’s the application to the parties’ burden of proof. Under these circumstances there was no reasonable tactical or strategic reason not to provide the jury with the legal basis to support this argument.

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998).² The testimony and argument left open a

² See also State v. Fernandez-Medina, 141 Wn.2d 448, 459-62, 6 P.3d 1150 (2000) (an inconsistent defense goes to the weight of, but does not entirely

significant question regarding the right to defense of persons and property. Under these circumstances, there was no objectively reasonable tactical basis for failing to request instructions. See e.g. Powell, 150 Wn.App. at 155. That there were other “conceivable” alternative theories does not absolve counsel of his responsibility because a decision is not a permissible tactical or strategic choice if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”). While defense counsel’s decisions are treated with deference, the actions must be reasonable under the circumstances and that was not true here.

3. Petitioner was substantially prejudiced by the incomplete and inadequate instructions.

Whenever self-defense is an issue, the instructions must “more than adequately” inform the jury of the law on self-defense in order to pass appellate scrutiny. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). This is necessary because when the “defense-of-others” defense to assault charge is properly raised, the trier of fact must

negate the evidence supporting alternative instructions); State v. McClam, 69 Wn.App. 885, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993).

determine whether a parties' apprehension of danger and use of force were reasonable. State v. Kirvin, 37 Wn.App. 452, 682 P.2d 919 (1984).

The failure to provide the jury with a complete definition of assault which reflected the right to self-defense and its interplay with Mr. Rusev's complicity in the acts of Vossler Blesch was prejudicial because the jury was otherwise left with misimpression that all shootings are assaults as a matter of law. See Court's Instruction 22. Complete self-defense instructions were necessary to guide the jury through its analysis of the unique facts presented by the possibility that while a defendant whose aggression provokes assaultive contact may lose his right of self-defense. This was a question for the jury, guided by an appropriate first-aggressor instruction because proper self-defense instructions were necessary to put the jury in the defendant's shoes. Only from that perspective could the jury determine the reasonableness based upon all the surrounding facts and circumstances as they appeared to the defendants. State v. Rodriguez 121 Wn.App. 180, 184-86, 87 P.3d 1201 (2004); State v. Bailey, 22 Wn.App. 646, 650, 591 P.2d 1212 (1979).

The prejudice that resulted from the failure to request a necessary instruction flows from the jury's having no way to understand the legal significance of the evidence. See e.g. In re Personal Restraint of Hubert, 138 Wn.App. 924, 926-32, 158 P.3d 1282 (2007) (failure to advance defense that defendant reasonably believed victim was not mentally incapacitated constituted deficient performance). This problem is particularly acute in the case of self-

defense because it is the State's burden, once the issue is raised; to disprove the act was in self-defense, beyond a reasonable doubt. Walden, 131 Wn.2d at 473-74. Where defense counsel fails to identify and present a viable defense available to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial. Powell, 150 Wn.App. at 156.

The prosecutor posits the only "question is did the defendant act as an accomplice with Vossler Blesch in the ... robbery of both Ihor Onishchuk and Dymtro Onishchuk and the assault of Ihor? And the answer to that is yes." RP 1840. Without an instruction fully defining self-defense, defense of others, justifiable use of force, its relevance to the determination of "lawful force" and whether or not Mr. Rusev was knowingly complicit in the "assault." The prosecutor argued the need to find general knowledge of the crime of assault. RP 1852. Given the lack of instructions, however, this essentially nullified this critical aspect of the defense because it failed to provide the jury with an opportunity to make a finding on all the essential elements of the offense charged. See Powell, 150 Wn.App. at 156; Hubert, 138 Wn.App. at 930-32. This certainly includes a proper description of the first aggressor and how that plays into the continuum of legal responsibility. The prosecutor argues however that "since the State's proven that they're an accomplice, you view everything they do together as a whole." "so if Vossler Blesch met three of the four elements and the defendant met one, that's sufficient. That's all we

have to prove.” RP 1854. The question is not answered by the mere fact that a gun was present, even if Mr. Rusev facilitated its presence.

The jury’s ability to properly apply the burden of proof, particularly here where the burden is on the State to disprove self-defense, requires the full legal construct in order to produce a just and reliable result. Rodriguez, 121 Wn.App. 184-85. This is an error of constitutional magnitude and substantially prejudices Mr. Rusev’s ability to receive a fair determination by the jury on all the essential elements of his alleged offense.

B. Improper argument prejudiced the jury’s ability to fairly resolve of the conflicting evidence and properly apply the law.

1. The prosecutor’s closing and rebuttal included improper argument.

The prosecutor’s closing argument began with an appeal to the sympathies of the jury. RP 1828.³ This is significant because a prosecutor violates a defendant’s right to an impartial jury when the prosecutor resorts to incendiary and inflammatory rhetoric to achieve convictions.

State v. Claflin, 38 Wn.App. 847, 850, 690 P.2d 1186 (1984).

³ “[A]s he held his brother in his arms and applying pressure to the gunshot wound, pleading with the defendant to call 911 for help, he was terrified that his brother wasn’t going to make it.” RP 1828

Furthermore, the prosecutor interjected her own personal conclusions into the jury's calculus in several different ways. RP 1846;⁴ RP 1847. ⁵ Washington law bars a prosecutor, however, a representative of the State, from commenting on the credibility of the witnesses or the guilt and veracity of the accused. State v. Warren, 165 Wn.2d 17, 26-30, 195 P.3d 940 (2008). Critically, therefore, as to the reliability of Ihor and Dymtro, the prosecutor repeatedly placed her own personal ratification on their credibility,

Back to Ihor's and Dmytro's testimony, I submit to you that it was credible. There's an issue with Ihor. There's spots that he doesn't have a memory of. He doesn't have a memory of ever doing anything that was physically aggressive towards the defendant other than pushing him off to the side. I submit to you that it's not a matter of his lying to you or being deceptive to you or to the law enforcement when they came out total to him or to defense counsel and myself when we went to talk to him.

RP 1848. The same was true with regard to the robbery charge, where the prosecutor summarized the evidence and again concluded, "I submit to you his intent is to commit the theft and it's to commit it with force." RP

⁴ "I submit to you that the defendant's account of what occurred when he spoke to the detectives completely minimized his involvement, completely minimized his actions, what he did in the robbery and assault of these two." RP 1846.

⁵ "I submit to you that Vossler Blesch's testimony, although difficult at times and back and forth at times, you look at what he told the detective and what he testified to and what he told you about the actions, yeah, frantic situation, but actively participated in it, actively participate in at the request of the defendant."

1862. The prosecutor continues this form into the application of the burden of proof. RP 1863-64.⁶ Lastly, the prosecutor asserts:

I submit to you that the State has proven the defendant acted as an accomplice with Vossler Blesch, and he acted with the general knowledge that his aiding and facilitating for the crime of robbery, which was then elevated to robbery in the first degree because of the firearm involved, and he acted with the general knowledge of aiding and facilitating the simple crime of assault.

RP 1868-69. The prosecutor's rebuttal was similarly spoiled.

See e.g. RP 1915;⁷ RP 1923.⁸

The Rules provide that an attorney shall not assert his or her personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused, but each of these prohibitions is violated by the repeated vouching for the case in the prosecutor's argument. See State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The prosecutor's closing and rebuttal arguments were

⁶ "I submit to you the State has proven beyond a reasonable doubt that the defendant acted with knowledge, that his actions of demanding, of grabbing, of handing, all of those actions support that we've proven beyond a reasonable doubt that he acted with knowledge to commit the crime of robbery." RP 1863-64.

⁷ "I submit to you that they did plan an assault, and I went through several pieces of evidence and testimony that came out on why that assault was planned, but the robbery was not." RP 1915.

⁸ "And I submit to you that based on the defendant's actions, his intentional deliberate actions, it was clear that he wanted to cause fear and intimidate Dmytro and Ihor. And it's clear that he acted with the intent to take their property and to do so with force with Vossler behind him." RP 1923.

significantly tainted both by the opening appeal to passions and prejudices of the jury and this error was compounded by numerous assertions of her own personal beliefs regarding the credibility of the witnesses and the verdict.

2. The improper argument prejudiced the jury's ability to render a reliable verdict.

The improper argument in Mr. Rusev's case included inflammatory rhetoric designed to stoke sympathy for the victims and then was reinforced by the prosecutor's first person endorsements of the credibility of her witnesses. When viewed in its totality these improper arguments were "both improper and prejudicial." State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). There is a clear picture of the prejudicial effect of a prosecutor's improper argument because "there is a *substantial likelihood* the misconduct affected the jury's verdict." State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

These comments were highly likely to have caused such enduring prejudice that they could not be neutralized by a curative instruction. In re Pers Restraint of Phelps, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). This occurs because the jury will inevitably draw "improper influences from the evidence ... or where the prosecutor otherwise comments on the evidence in an inflammatory manner." Id. at 170. As our Supreme Court

has noted, “[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of [her] public office ... and the expression of [her] own belief of guilt into the scales against the accused.” Case, 49 Wn.2d at 71 (citing State v. Susan, 152 Wash. 365, 278 P. 149 (1929)). A new trial free from this improper argument is, therefore, warranted.

C. The robbery and assault offenses furthered the same ultimate criminal objective and were the same criminal conduct; therefore, there was no reasonable basis not to so argue.

Multiple offenses encompass the same criminal conduct and are counted as one crime when they have (1) the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. In re Connick, 144 Wn.2d 442, 459, 28 P.3d 729 (2001). Mr. Rusev was convicted of robbery and assault against Ihor Onishchuk, as well as robbery of Dymtro Onishchuk, based on his conduct in the garage on February 23, 2014. This episode and the convictions in counts two and three involving Ihor which arose from it, arose from the same criminal objective and the two offenses furthered each other, not any other separate or independent criminal objective. As a result, they constituted the same criminal conduct for purposes of sentencing.

Critically, for purposes of determining whether two offenses involve “same criminal conduct,” “intent” is not the specific *mens rea* element of particular crime, but objective criminal purpose in committing crime. State v. Adame, 56 Wn.App. 803, 785 P.2d 1144, *review denied* 114 Wn.2d 1030 (1990). The determination of whether offenses involve the same criminal intent for purposes of the sentencing statute considers whether one crime furthered the other, or the two were part of a recognizable scheme or plan. State v. Williams, 176 Wn.App. 138, 307 P.3d 819, *review granted* 180 Wn.2d 1001 (2013) *affirmed* 181 Wn.2d 795; State v. Calvert, 79 Wn.App. 569, 903 P.2d 1003, *review denied* 129 Wn.2d 1005 (1995).

2. The robbery and assault convictions concerning Ihor were the “same criminal conduct.”

There is no doubt as to counts two and three, that the two offenses involved the same victim and occurred at the same time and place. Both counts named Ihor Onishchuk as the victim and the offense occurred in the same relatively short encounter on February 23, 2104, in Mr. Rusev’s automotive garage.

The law is clear that multiple current offenses are considered the same criminal conduct, and counted as one crime in the offender score, when they are committed at the same time and place, involve the same

victim, and have the same objective criminal intent. State v. Chenoweth, 185 Wn.2d 218, 222, 370 P.3d 6 (2016); State v. Wilkins, 200 Wn.App. 794, 809, 403 P.3d 8909 (2017); State v. Davis, 174 Wn.App. 623, 300 P.3d 465, *review denied* 178 Wn.2d 1012 (2013) (sentencing court's determination that assault and attempted murder convictions were the same criminal conduct was not an abuse of discretion).

The analysis of whether offenses involved the same criminal intent may include the extent to which one crime furthered other, whether they were part of same scheme or plan, and whether criminal objectives changed. State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994); State v. Calvert, 79 Wn.App. 569, 903 P.2d 1003, *review denied* 129 Wn.2d 1005 (1995). In determining the objective criminal intent, the court focuses on the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next. In re Connick, 144 Wn.2d at 459.

At sentencing, Judge Hickman concluded that this was a singular effort from the outset:

I don't think this was a benign incident from the very beginning. I never considered it a benign incident. A deliberate action was created by Mr. Rusev to shake down these two individuals.

RP 1966. Similarly, the State's theory of accomplice liability was that Mr. Rusev shared a common goal of intimidation and the taking of the

property that was the subject of the robbery was part of that same criminal endeavor.

This is a flat-out robbery that went further than planned on and an assault that went much further than planned on.

RP 1921. The State argued and the judge agreed that these offenses occurred in the context of singular criminal enterprise whose objective was intimidation. RP 1867. Where these efforts were all part of a single enterprise in which the propriety of the degree of force used was the issue in dispute, the underlying objective was always the same.

3. The failure to challenge the same criminal conduct determination served to tactical purpose.

By agreeing to the scoring and failing to assert the same criminal conduct claim, defense counsel waived Mr. Rusev's right to challenge the calculations of the sentencing court. *In re Connick*, 144 Wn.2d 442, 463-64, 28 P.3d 729 (2001); *State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000, *review denied* 141 Wn.2d 1030 (2000). There was no reasonable basis, however, not to seek a reduction in the sentencing range. Under these circumstances, a new sentencing proceeding is required because (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *State v Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *Strickland*, 466 U.S. at 687.

The evidence fully supported the contention that both crimes involved same objective criminal intent, measured by how one crime furthered the other. The defendant's criminal intent, viewed objectively, never changed from one crime to the other. See State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993).

The application of the rule to Mr. Rusev is best seen in State v. Clark 46 Wn.App. 856, 732 P.2d 1029 (1987), where first-degree assault and two counts of first-degree robbery should have been considered part of same conduct, since there was no substantial change in nature of defendant's criminal objective.⁹ In this way Mr. Rusev's case is distinguishable from Freeman. State v. Freeman, 118 Wn.App. 365, 76 P.3d 732 (2003) *affirmed* 153 Wn.2d 765, 108 P.3d 753 (2005).¹⁰

Freeman's convictions for first degree assault and first degree robbery did

⁹ Second degree assault and second degree kidnapping are treated as the same criminal conduct where the offenses happened at the same time and place and involved the same victim, and there was no evidence of any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction. State v. Taylor, 90 Wn.App. 312, 950 P.2d 526(1998); State v. Worl 129 Wn.2d 416, 918 P.2d 905(1996) (attempted second-degree murder and malicious harassment arising from knife attack comprised same criminal conduct as matter of law).

¹⁰ Mr. Rusev's case was also not like Tomgren where convictions for second-degree robbery and second-degree assault did not share the same criminal intent because the defendant and his gang assaulted the victim in a convenience store parking lot for disrespecting one of their members, defendant fled after the gang beat the victim unconscious, the purpose of the assault was not to rob the victim, while the purpose of another gang member, who remained at the scene, in robbing the victim was to deprive the victim of his money. State v. Tomgren, 147 Wn.App. 556, 196 P.3d 742 (2008).

not constitute same offense for sentencing purposes because the defendant did something far beyond what was necessary to merely further the robbery, as victim offered no resistance and gave no indication that he was not going to give over his money. Mr. Rusev's was not a case of gratuitous violence because the robbery and assault were part of the same ongoing endeavor.

Instead, the circumstances here parallel Green where robbery and attempted murder committed by defendant during commission of robbery would not merge, but the two crimes encompassed same criminal conduct for sentencing purposes. State v. Green, 46 Wn.App. 92, 730 P.2d 1350, *reversed on other grounds and remanded* 109 Wn.2d 207, 743 P.2d 1237 (1986). Similarly, the defendant's convictions should not have been counted as separate crimes in the criminal history in arriving at standard sentencing range.

Trial counsel's failure to advance at sentencing the argument that Mr. Rusev's convictions for robbery and assault against Ihor should be considered the same criminal conduct for purposes of calculating his offender score prejudiced him greatly. This constitutes constitutionally ineffective assistance of counsel because there was a reasonable probability that, had counsel so argued, the trial court would have found that the two offenses encompassed the same criminal conduct. See State v.

Phuong, 174 Wn.App. 494, 299 P.3d 37, *review denied* 182 Wn.2d 1022 (2013); In re Goodwin, 146 Wn.2d 861, 867, 50 P.3d 618 (2002) (a miscalculation of an offender score results in a fundamental defect which inherently results in a complete miscarriage of justice).

Clearly there was a reasonable probability of the trial court finding the two offenses constituted the same criminal conduct because there was no dispute that they occurred at the same time and place, involved the same victim. Furthermore, these offenses involved the same objective criminal intent animated both crimes. As a result, the failure to advance such a factually supported claim in order to significantly reduce the sentencing exposure Mr. Rusev faced, served to reasonable tactical or strategic purpose. Phuong, 174 Wn.App. at 494. Instead it exposed Mr. Rusev to a substantially greater sentencing range and undercut his ability to argue for a lesser sentence. These shortcomings constitute a manifest injustice which substantially compromised the integrity of the proceedings and require a new sentencing hearing at which Mr. Rusev's claims for lesser sentence can be heard.

D. Petitioner received constitutionally deficient representation where defense counsel failed to advocate for an exceptional sentence below the standard range to ameliorate the effect of the firearm enhancements.

1. Petitioner’s sentence was “clearly excessive” in light of the multiple offense policy and the firearm enhancements.

Although Mr. Rusev had asked that Vossler Blesch to be present with him in the garage to scare or intimidate Ihor Onishchuk, he certainly did not anticipate a shooting would take place. It was in fact Mr. Rusev who called 911 to summon aid for Ihor. Mr. Rusev himself conveyed his “deep regrets and pain inside” over what had transpired. RP 1965.

The prosecutor noted that Mr. Rusev had no criminal history but argued for the long sentence based on the severity of the injury to Ihor. RP 1955. In response, the sentencing court imposed concurrent sentences for the underlying offenses in addition to the three consecutive firearm enhancements for a total sentence of 335 months of confinement driven in large part by the three consecutive 60-month firearm enhancements. RP 1968. This sentence is clearly excessive in light of the absence of any other criminal history any desire to have inflicted the substantial injuries which Ihor suffered.

2. The SRA allows for an exceptional sentences to ameliorate the onerous effects of the consecutive firearm enhancements. .

The SRA was designed to “[e]nsure that the punishment for a criminal offense is proportionate to the the seriousness of the offense and the offender’s criminal history” and “commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010(1), (3). In order to ensure this goal, a court “may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535.

In Mr. Rusev’s case, the sentencing range is driven by the firearm enhancements provisions of RCW 9.94A.533(3). To avoid the imposition of such excessive sentences, therefore, the Washington Supreme Court has recognized that “in a case in which standard range consecutive sentencing for multiple firearm-related convictions ‘results in a presumptive sentence that is clearly excessive in light of the purpose of the [the SRA],’ a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences.” State v. McFarland, 189 Wn.2d 47, 55, 399 P.3d 1106 (2017), quoting RCW 9.94A.535(1)(g).

3. The failure to advocate for an exceptional sentence fell below the standards of reasonable practice and relief is appropriate.

Where the defense has argued that this is a stupid and tragic accident by a young man who has been otherwise hard working and committed to being a good citizen, the imposition of consecutive firearm enhancements in addition to the standard range sentences on the underlying offenses produces an onerous level of punishment beyond that which the circumstances support. RP 1962-64 (“Simply because my client did not trust Vitali and simply because he wanted Vossler, a six-foot-four-inch, 250-pound young man behind him doesn’t mean that he would anticipate that a shooting would take place.”)

The failure to offer a reasonable alternative in the form of an exceptional sentence, however, which would alleviate the most cruel and oppressive portions of the rigid application of such mandatory, discretionless sentencing provisions which were identified served no tactical purpose and failed to identify for the sentencing court the basis upon which it could exercise its discretion to impose a more appropriate sentence. Moreover, proportionality and consistency in sentencing are central values of the SRA, and reviewing courts should afford relief when it serves those values. McFarland, 189 Wn.2d at 57; Mullholland, 161 Wn.2d at 332-33.

If there is a reasonable probability that but for counsel's failure to advocate for an exceptional sentence, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A reasonable probability "is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); In re Personal Restraint of Hubert, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007); In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

Mr. Rusev is entitled to relief because the error in failing to advocate for an exceptional sentence actually and substantially prejudiced his constitutional rights. In re Wilson, 169 Wn.App. 379, 387, 279 P.3d 990 (2012) (reversing for instructional error and ineffective assistance); In re Pers. Restraint of Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004); RAP 16.4(c) (2). The sentencing court's failure to consider its ability to craft a sentence more in keeping with Mr. Rusev's culpability and not solely driven by the imposition of consecutive firearm enhancements has a substantial prejudicial effect on the petitioner.

Furthermore, even if defense counsel was not necessarily deficient in failing to advocate for an exceptional sentence, the Washington Supreme Court has recognized that a sentence imposed without due

consideration of an authorized mitigated sentence constitutes a “fundamental defect” resulting in a complete miscarriage of justice. Mullholland, 161 Wn.2d at 332. Even where the sentencing court has not expressed a particular level of sympathy or discomfort with the sentencing range, the judge noted that Mr. Rusev had no prior record and was remorseful. RP 1968. The failure to consider the alternative forms of an exceptional sentence under these circumstances constitutes a fundamental defect which resulted in a miscarriage of justice. In re Matter of Swagerty, 186 Wn.2d 801, 383 P.3d 454 (2016).

... the record suggests at least the possibility that the sentencing court would have considered imposing [an exceptional sentence] had it properly understood its discretion to do so. Remand for resentencing is therefore warranted.

McFarland, 189 Wn.2d at 58-59. Remand for resentencing is similarly warranted in Mr. Rusev’s case.

II. CONCLUSION.

Mr. Rusev requests this Court find that he is entitled to reversal of his conviction and sentence, or in the alternative to remand for a reference hearing in order to establish relief is appropriate.

DATED this 29th day of April, 2019.

Respectfully submitted,

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