FILED
Court of Appeals
Division II
State of Washington
1/6/2020 10:24 AM

NO. 53195-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JAMES ROBERSON,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 18-1-01953-4

BRIEF OF RESPONDENT

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I. INTRODUCTION

As part of plea negotiations, the State dropped multiple charges against Christopher Roberson in exchange for a plea to attempting to elude a pursuing police vehicle with an endangerment enhancement. The enhancement added twelve months and one day to the standard sentence. The parties agreed to a joint recommendation of twelve months and one day in prison. At sentencing, Roberson asked the court to follow the agreed recommendation by the parties. He did not request an exceptional sentence. And he did not present any mitigating factors to the court in support of an exceptional sentence.

First, the trial court properly exercised its discretion by deciding to follow the agreed recommendation by both parties and impose a standard range sentence. Roberson may not appeal this standard range sentence. Nothing in the trial court's ruling indicated that it believed it was prohibited from issuing an exceptional sentence if there were mitigating factors presented to the court in support of such a sentence. Here, Roberson did not present *any* information to the court about a Post-Traumatic Stress Disorder (PTSD) diagnosis. This alleged diagnosis, or any other diagnosis, is not referenced anywhere in the record below. Roberson improperly raises this for the first time on appeal.

Second, the trial court properly added the twelve months and one day to the standard range sentence as required by the statute. This Court should decline to issue an advisory opinion on the mandatory nature of the endangerment enhancement because this issue was not addressed by the trial court. Roberson did not request that the court waive this enhancement or impose an exceptional sentence. Finally, contrary to Roberson's assertion, *both* parties were bound by the plea agreement and the joint recommendation of twelve months and one day in prison. This Court should affirm this standard range sentence.

II. RESTATEMENT OF THE ISSUES

A. Should this Court dismiss the appeal for seeking review of an issue that was not identified in the Notice of Appeal?

B. Did the trial court abuse its discretion by following the joint recommendation of the parties and sentencing Roberson to a standard range sentence where there was no mitigating evidence presented to the court to support an exceptional sentence and where Roberson explicitly asked the court to follow the agreed recommendation?

C. Should this Court decline to issue an advisory opinion on the mandatory nature of the endangerment enhancement where this issue was not addressed by the trial court?

D. Did the trial court abuse its discretion by imposing a standard range sentence where both parties were bound by the plea agreement and where Roberson did not present any mitigating mental health information to the court at sentencing?

III. STATEMENT OF THE CASE

On or about May 17, 2018, two uniformed deputies were on routine patrol when a white sedan approached their vehicle at a high rate of speed. CP 1. The driver of the sedan, later identified as Christopher Roberson, was traveling at twice the posted speed limit when he ran a stop sign and skidded around a corner, nearly striking the deputies' vehicle. CP 1. Roberson fled after the deputies activated the vehicle's emergency lights and siren. CP 1.

Roberson ran two stop signs, passed several vehicles on both the shoulder and in oncoming lanes, and continued to travel at twice the speed limit for approximately twenty blocks. CP 1. He ran a red light and then entered the freeway, where he accelerated over 100 miles per hour while weaving through traffic. CP 1. While fleeing from the pursuing deputies, Roberson nearly struck another officer who was deploying "stop sticks" in the road in an attempt to end the pursuit. CP 1-2. The pursuit ended when another officer did a successful PIT maneuver. CP 2. Roberson was taken into custody. CP 2. Officers confirmed that Roberson's license was suspended and that there was a no contact order prohibiting Roberson from having contact with his passenger, Leonard Hahn. CP 2; *see also* 1/9/19 RP 5-6. Mr. Hahn informed the officers that he was afraid for his life and that he yelled at Roberson several times to stop. CP 2.

On May 18, 2018, the State charged Roberson with violation of a no contact order, driving while license suspended or revoked in the third degree, and attempting to elude a pursuing police vehicle with a special allegation of endangerment. CP 3-4. While charges were pending, Roberson sought a mental health evaluation in order to apply to mental health court. CP 138. He subsequently advised the court that he did not qualify for mental health court. 1/9/19 RP 10.

Based on plea negotiations, the State filed an amended information charging Roberson only with the attempting to elude a pursuing police vehicle and the endangerment enhancement. CP 5, 139. On December 5, 2018, Roberson pled guilty to the amended information. CP 6-15. Roberson made the following statement at the time of his guilty plea:

> On 5-17-18 in Pierce County WA, I was driving a car on the public roadways when I observed a uniformed officer in a vehicle equipped with police lights and sirens signal me with police emergency lights to stop. I willfully decided not to stop, and tried to escape the pursuing officers by driving in a reckless manner (high speeds, dangerous lane travel, ignoring traffic control devices, etc.) as multiple police vehicles joined in my pursuit. During the pursuit my dangerous driving behaviors endangered persons other than myself and the pursuing officers, including other motorists around me and Det. Yabe (who was on foot and trying to lay down spike strips and was almost injured by the dangerous driving maneuver I used to avoid the spikes)

CP 14. Roberson acknowledged to the court that this is a true statement. 12/5/18 RP 3-4. As part of the agreed resolution, the parties agreed to a

"joint recommendation" of twelve months and one day in prison. CP 9; 12/5/18 RP 2-3; 1/9/19 RP 4, 8.

At Roberson's request, the court set over sentencing to December 19, 2018. 12/5/18 RP 4-6; CP 142. Roberson was advised that if he failed to appear at sentencing, the State would no longer be bound by the plea agreement and could add a charge of felony bail jump. 12/5/18 RP 6; CP 141. Roberson failed to appear at sentencing, and the court issued a bench warrant for his arrest. CP 143-44. Roberson subsequently appeared in court to quash the warrant, and the court rescheduled sentencing for January 9, 2019. CP 145; 1/9/19 RP 3.

Mr. Hahn spoke on Roberson's behalf at sentencing and asked the court to impose "time served" and allow Roberson to go to treatment via mental health court instead of prison. 1/9/19 RP 5-8.[1] The sentencing judge explained to Mr. Hahn that he was not the mental health court coordinator and that the Legislature decides the length of sentences. 1/9/19 RP 7 ("You do understand the legislature decides the length of time. I'm not a knight-errant.").

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[1] The trial court heard from Mr. Hahn at sentencing because he was a passenger in Roberson's vehicle at the time of the offense and could be considered a "victim" in terms of the endangerment enhancement. *See* 1/9/19 RP 4-6. He was also the subject of the no contact order violation that was dismissed as part of plea negotiations. *Id.* Mr. Hahn did not support prosecution of the case. *See* CP 139. While the case was pending, Mr. Hahn filed multiple letters and "pleadings" with the court on Roberson's behalf and was subsequently informed that the court does not act on ex-parte letters or improperly filed pleadings. *See* CP 42-46, 47-48, 52-87, 88-96, 97-101, 102-05,148-50.

Roberson, through his attorney, explained that the parties "spent a good deal of time hammering out the particulars in this case" and explicitly requested that the court adopt the agreed recommendation of the parties for twelve months and one day in prison. *See* 1/9/19 RP 8.[2] At sentencing, Roberson acknowledged responsibility for eluding the officers and informed the sentencing judge that he learned his lesson:

> To make a long story short, I should have just pulled over, and this whole entire mess could have just been avoided entirely. I should have known better from a previous encounter with law enforcement. And pulling over is honestly, just for the lack of a better word, anyone could figure that out, to just pull over and do as you're told, you know, hand them your ID or your driver's license or whatever you have at the given time and do as the officer tells you to do. I have learned my lesson.
>
> Given whatever happens, whatever your ultimate decision is, I know that I just need to, you know, respect law enforcement as a citizen of Washington State and pull over and do whatever the laws say to do.
>
> I mean pretty much the only thing I'm looking forward to doing is getting this over with and behind me and getting back into some sort of recovery-based treatment program. That is the direction that I want to take in my life.

1/9/19 RP 9.

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[2] In his opening brief, Roberson incorrectly asserts that "the defense" requested an "exceptional sentence below the year and a day endangerment enhancement agreed to in the plea bargain" because his PTSD episode compromised his ability to conform his conduct to the law. *See* Br. of App. at 4-5. This is a misrepresentation of the record. The defense explicitly asked the court to adopt the agreed recommendation of the parties, which was for a standard range sentence of twelve months and one day in prison. 1/9/19 RP 4, 8; *see also* CP 9.

When the court inquired as to what type of treatment he has been attending, Roberson stated that he had been voluntarily attending Greater Lakes Comprehensive Mental Health even though he was denied mental health court. 1/9/19 RP 9-10. Roberson informed the court that he believed it was important to get his "mental health in check" because he was having "sort of an episode" at the time of the incident, which led to the rash decision he made. 1/9/19 RP 10. He decided to attend treatment with or without the court's incentive in order to make himself "a better person." 1/9/19 RP 10. Roberson did not submit any mental health evaluation or any other mental health information for the court's consideration at sentencing. *See* 1/9/19 RP 8-13.[3]

The trial court acknowledged that there may have been mental health issues that manifested themselves during the incident and exercised its discretion to sentence Roberson to the agreed recommendation of twelve months and one day in prison:

> I understand that there have been mental health issues that may have manifested themselves here.
>
> I also understand that there was an agreed upon sentence that has an enhancement, and that relates to both your decision and the State's decision about what kind of a

[3] Although Roberson claims in his opening brief that he "was experiencing a PTSD episode" during the offense, this information is not part of the record below. *See* Br. of App. at 3 (citing "CP 1; RP 11 (01-09-19), CP 42"). This alleged post-traumatic stress disorder (PTSD) episode is not referenced in any of the documents involving Roberson's guilty plea or in any materials submitted by Roberson for sentencing. *See* CP 1-2, 14; *see also* 1/9/19 RP 4-13.

> deal they are going to offer and whether they are going to prosecute you and for what crime. I don't think it's my place here to jump into that at this late stage of the game.

1/9/19 RP 12; *see* CP 25. The court then ruled it is "going to go along with the recommendation that has been put forward by the parties" and sentenced Roberson to twelve months and one day in prison. 1/9/19 RP 13; CP 25. The court encouraged Roberson to avail himself of any treatment available in prison. 1/9/19 RP 12-13.

The court advised Roberson of his limited right to appeal. CP 146-47. Roberson filed a Notice of Appeal seeking review of "the decision of the Superior Court to deny therapeutic court without a hearing before the authorized judge which occurred on January 9, 2019 at sentencing." CP 34.

IV. ARGUMENT

A. This Court should dismiss the appeal for seeking review of an issue that was not identified in the Notice of Appeal.

According to the Notice of Appeal filed by Roberson, he is appealing the trial court's decision "to deny therapeutic court without a hearing" at the January 9, 2019 sentencing hearing. CP 34. But the trial court did not "deny therapeutic court without a hearing" at sentencing. *See* 1/9/19 RP 3-14. Rather than seeking review of the issue identified in the Notice of Appeal, Roberson instead filed an opening brief seeking review of an entirely different issue—that the trial court abused its discretion by failing to recognize it could sentence Roberson outside of the standard

range. *See* Br. of App. at 2-3. This issue is not properly before this Court, and the appeal should be dismissed under RAP 5.3(a).

A Notice of Appeal must be filed within 30 days after the entry of the decision that the party filing the notice wants reviewed. RAP 5.2(a). A Notice of Appeal "must" designate the decision the party wants reviewed and "should" attach that decision to the notice. RAP 5.3(a); *Clark County v. W. Wash. Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 144-45, 298 P.3d 704 (2013). To be effective, a Notice of Appeal must be timely and must contain specified information. *State v. Sorenson*, 2 Wn. App. 97, 100, 466 P.2d 532 (1970). An appellate court should not review an order from which no appeal has been taken. *Clark County*, 177 Wn.2d at 144.

Here, Roberson's Notice of Appeal indicates that he is seeking review of the trial court's decision to deny him therapeutic court without a hearing. CP 34. But this is not the issue addressed in his opening brief. He is not challenging any decision regarding "therapeutic court." Rather, he is challenging the trial court's failure "to recognize it could depart from the standard range" based on his alleged mental condition. *See* Br. of App. at 6. This Court should dismiss the appeal under RAP 5.3(a) for failure to designate the decision he wants reviewed.

B. The trial court properly exercised its discretion by following the joint recommendation of the parties and sentencing Roberson to a standard range sentence.

The trial court did not abuse its discretion by following the joint recommendation of the parties and sentencing Roberson to a standard range sentence of twelve months and one day. Roberson did not request an exceptional sentence downward or present any mitigating evidence at sentencing. Thus, there was no basis for the trial court to impose an exceptional sentence. Roberson is not entitled to appeal the standard range sentence imposed by the trial court.

The Sentencing Reform Act (SRA) provides that a standard range sentence "shall not be appealed." RCW 9.94A.585(1); *State v. Ramos*, 187 Wn.2d 420, 433, 387 P.3d 650 (2017). A trial court's decision to sentence a defendant within the standard range is not appealable because as a matter of law there can be no abuse of discretion. *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993); *State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). This accords with the traditional notion that, outside of narrow constitutional or statutory limitations, a sentencing judge's discretion remains largely unfettered. *Mail*, 121 Wn.2d at 710.

Appellate review is still available in order to correct legal errors or abuses of discretion in determining what sentence applies. *Williams*, 149 Wn.2d at 147. A defendant may appeal a standard range sentence if the court

violated the constitution or failed to comply with the procedural requirements of the SRA. *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

The trial court may impose any sentence within the standard range that it deems appropriate. RCW 9.94A.530(1). The Legislature has structured the trial court's discretion by establishing presumptive sentence ranges. *State v. Ammons*, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986). Appellate courts generally defer to the discretion of the sentencing court. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Although every defendant is entitled to ask the court for an exceptional sentence downward and to have the court consider the request, no defendant is entitled to such a sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "A trial court abuses discretion when it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *Id.* A trial court also abuses its discretion if it incorrectly believes it is prohibited from exercising its discretion. *State v. O'Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015).

A trial court may impose a sentence outside the standard sentence range if it finds "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Under the SRA, the defendant bears the burden of proving by a preponderance of the evidence that there

are substantial and compelling reasons justifying an exceptional sentence below the standard range. RCW 9.94A.535; *Ramos*, 187 Wn.2d at 434; *State v. Gregg*, 9 Wn. App. 2d 569, 579, 444 P.3d 1219 (2019). It is the defendant's burden to prove any mitigating circumstances justifying an exceptional sentence. *Gregg*, 9 Wn. App. 2d at 572, 574. One such mitigating circumstance is if the "defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e).

Here, Roberson explicitly requested that the trial court impose the agreed recommendation of the parties, which was a standard range sentence of twelve months and one day. 1/9/19 RP 8; *see also* CP 9; 1/9/19 RP 4. Although Roberson obtained a mental health evaluation while the case was pending, he either did not qualify for mental health court or did not obtain the favorable evaluation he was anticipating. *See* CP 138; *see also* 1/9/19 RP 8-10. Roberson did not submit any mental health evaluation to the court for consideration at sentencing.

Nothing in the record indicates that Roberson was diagnosed with *any* mental disorder that would justify a mitigated exceptional sentence. Roberson's assertion in his opening brief that he was experiencing a "PTSD episode" during the offense and that he was diagnosed with PTSD is simply

not in the record. In fact, the phrase "post-traumatic stress disorder" or "PTSD" was never uttered at sentencing. *See* 1/9/19 RP 3-14.

It is disingenuous for Roberson to now claim, for the first time on appeal, that the trial court erred by not considering a diagnosis that was not part of the record. Not only was there no evidence that Roberson suffered from PTSD, but there was no evidence that this alleged condition, or any other mental condition, significantly impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *See* RCW 9.94A.535(1)(e); *see State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989) (there must be evidence that the mental condition "led to" significant impairment of the capacity to appreciate the wrongfulness of one's conduct or conform to the law in order to justify an exceptional sentence).

Relying on *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993), Roberson asserts that PTSD can significantly impair a defendant's capacity to conform his conduct to the law and justify an exceptional sentence downward. Br. of App. at 12. But there must be evidence that the defendant actually suffers from PTSD and that this condition significantly impairs his ability to conform to the law.

In *Janes*, the court heard extensive expert testimony from multiple experts about the defendant's PTSD diagnosis and the psychological effects he suffered from prolonged abuse. *Janes*, 121 Wn.2d at 227-30. Here, there

is no evidence that any mental health professional ever diagnosed Roberson with PTSD, let alone evidence that this condition significantly impaired his capacity to conform his conduct to the law. Rather, at the time of his plea, Roberson stated that he "willfully decided not to stop" and that he tried to escape the pursuing officers by driving in a reckless and dangerous manner. CP 14. And at sentencing, Roberson took full responsibility for his behavior and admitted that he "should have just pulled over" and that he "should have known better from a previous encounter with law enforcement." 1/9/19 RP 9. He told the court that he has now learned his lesson. 1/9/19 RP 9.

Although Roberson briefly discussed his mental health at sentencing, this was in response to the court's inquiry into his involvement in treatment. 1/9/19 RP 9-10. And this was after Roberson asked the court to follow the agreed recommendation by the parties and sentence him to twelve months and one day in prison. *See* 1/9/19 RP 8; *see also* CP 9. The court considered all of this information at sentencing and exercised its discretion to follow the agreed recommendation for a standard range sentence. *See* 1/9/19 RP 10-13.

Roberson's reliance on *O'Dell* is misplaced. *See* Br. of App. at 7, 17. In *O'Dell*, the defendant *asked* the trial court to impose an exceptional sentence below the standard range because the mitigating qualities of his youth significantly impaired his capacity to appreciate the wrongfulness of

his conduct and conform his conduct to the law. *O'Dell*, 183 Wn.2d at 685. The trial court erroneously believed it was prohibited from considering youth as a mitigating factor. *Id.* at 685-86. The Court held that youth can be a mitigating factor that diminishes a defendant's culpability and supports an exceptional sentence downward. *Id.* at 696-99. The Court remanded for resentencing because the trial court erroneously believed it was prohibited from considering youth as a mitigating factor. *Id.* at 696-97. *O'Dell* does not stand for the proposition that a trial court abuses its discretion any time it imposes a standard range sentence without considering mitigating factors that were never presented or argued to the court.

Unlike the defendant in *O'Dell*, Roberson never asked the court for an exceptional sentence below the standard range. Thus, the trial court neither refused to consider an exceptional sentence downward nor expressed an erroneous belief that it was prohibited from considering such a sentence. On the contrary, based on plea negotiations, Roberson elected not to present any mitigating evidence in support of an exceptional sentence. *See* 1/9/19 RP 8.

It is Roberson's burden to prove mitigating circumstances and to present "substantial and compelling reasons" justifying an exceptional sentence. *See Ramos*, 187 Wn.2d at 434; *see also Gregg*, 9 Wn. App. 2d at 572-74. He did not. In fact, doing so would have been a breach of the plea

agreement. *See State v. Church*, 5 Wn. App. 2d 577, 584, 428 P.3d 150 (2018) (plea agreements are contracts that bind both the State and the defendant). Nothing in *O'Dell* requires trial courts to consider mitigating factors that are not presented.

Roberson cites to a "pleading" filed by his passenger in support of his claim that he was suffering from PTSD at the time of the offense. Br. of App. at 10 (citing CP 42). But this pleading was not before the court at sentencing. Rather, it was an improperly filed pleading by a non-party who wanted to express his views regarding mental health court shortly after charges were filed. *See* CP 42-46.[4] The court does not act on ex-parte letters or improperly filed pleadings. CP 148. Further, not only does this "pleading" fail to make any reference to a PTSD diagnosis, but there is no indication that the passenger has any first-hand knowledge of Roberson's mental condition. *See* CP 42-43. There is simply nothing in the record to support Roberson's argument, which he makes for the first time on appeal, that his "brain was particularly vulnerable to startling or unexpected events" and "compromised the rational processes" that would have allowed him to pull over. *See* Br. of App. at 11.

[4] The improper pleading was filed approximately six months prior to sentencing.

Finally, the trial court's comment about not being a "knight-errant" was not a concession that it was prohibited from considering a mitigated sentence outside the standard range. Roberson's argument fails to consider the context of the court's comment. *See* Br. of App. at 11-12, 16-17; *see also* 1/9/19 RP 6-8. The court's comment was in response to statements made by Roberson's passenger, Mr. Hahn, who informed the court that he wanted Roberson to go to mental health court in lieu of prison.

The court informed Mr. Hahn that it was not the mental health court coordinator and that it was not a "knight-errant" as the Legislature "decides the length of time." 1/9/19 RP 7. This is an accurate statement of the law that was made to a lay person who clearly did not want his friend to go to prison. Mr. Hahn filed multiple letters and "pleadings" throughout Roberson's case expressing strong views that the case should not be prosecuted, and that Roberson should get treatment instead of prison. *See e.g.* CP 42-46, 47-48, 52-87, 88-96, 97-101, 102-05; *see also* CP 148-50.

The court allowed Mr. Hahn to address the court at sentencing after noting it had read Mr. Hahn's "lengthy submission" and pointing out that Mr. Hahn had "buttonholed" the judge in the hallway to express his views on the case. 1/9/19 RP 4, 6-8; *see also* CP 52-87 (Mr. Hahn's 35-page sentencing "comments"). The court's comment to Mr. Hahn was not part of the court's ruling and was not indicative of any belief that it was prohibited

from considering a mitigated exceptional sentence if there were factors supporting such a sentence.

In *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007), the trial court erroneously believed it lacked discretion to impose concurrent sentences for separate serious violent offenses even if it found mitigating factors justifying such a sentence. At sentencing, Mulholland had requested concurrent sentences, and the trial court indicated an openness to imposing an exceptional sentence but erroneously believed it did not have the discretion to do so. *Id.* at 326, 333-34. Here, unlike the court in *Mulholland*, the trial court never indicated it lacked discretion to impose a mitigated exceptional sentence if there were mitigating factors supporting such a sentence. *See* 1/9/19 RP 6-13. In fact, the record is silent on this issue because a mitigated sentence was never requested by Roberson. The trial court followed the correct procedures by imposing a sentence within the standard range, and Roberson's appeal is barred by RCW 9.94A.585(1).

C. This Court should decline to issue an advisory opinion on the mandatory nature of the endangerment enhancement because this issue was not addressed by the trial court.

There is no basis for this Court to issue an advisory opinion and "hold that the legislature intended RCW 9.94A.533(11) to be a non-mandatory and non-consecutive sentence enhancement" as Roberson

requests. *See* Br. of App. at 15-16. This issue was not before the trial court in Roberson's case. The trial court did not "misunderstand" its authority regarding the endangerment enhancement as Roberson claims. *See id.* at 13. This Court should decline to issue an advisory opinion on an issue not addressed below.

Based on plea negotiations, Roberson and the State requested a joint recommendation of twelve months and one day in prison. CP 9, 139; 12/5/18 RP 2-3; 1/9/19 RP 4, 8. The agreed recommendation was the low end of the standard range (zero days) plus the twelve months and one day for the enhancement. 1/9/19 RP 4. Roberson's attorney explained that the parties "spent a good deal of time hammering out the particulars in this case" and explicitly requested that the court follow the agreed recommendation. 1/9/19 RP 8. He did not ask that the court waive the enhancement or impose an exceptional sentence. Consequently, the trial court did not issue any ruling on the mandatory nature of the endangerment enhancement or make any comments on whether it was required to impose twelve months and one day for the enhancement. Rather, the court exercised its discretion and imposed the sentence requested by both parties:

> I understand that there have been mental health issues that may have manifested themselves here.
>
> I also understand that there was an agreed upon sentence that has an enhancement, and that relates to both your decision and the State's decision about what kind of a

> deal they are going to offer and whether they are going to prosecute you and for what crime. I don't think it's my place here to jump into that at this late stage of the game.

1/9/19 RP 12. The court then ruled it is "going to go along with the recommendation that has been put forward by the parties" and sentenced Roberson to twelve months and one day in prison. 1/9/19 RP 13; CP 25.

Nothing in the trial court's ruling indicates that it misunderstood its authority or that it issued any ruling on the mandatory nature of the enhancement. Roberson is essentially asking this Court to issue an advisory opinion on an issue not addressed below. But appellate courts "do not give advisory opinions." *State v. Maloney*, 1 Wn. App. 1007, 1009, 465 P.2d 692 (1970); *State v. Norby*, 122 Wn.2d 258, 269, 858 P.2d 210 (1993) ("Advisory opinions are disfavored by courts."). This Court should decline to issue an advisory opinion on the mandatory nature of the endangerment enhancement.

Even if this Court decides to address the merits of Roberson's claim, the plain language of the statute indicates that the endangerment enhancement is a mandatory enhancement that adds twelve months and one day to the presumptive standard sentence.

"The purpose of sentencing enhancements is to provide legislative guidance to courts in calibrating the appropriate punishment for crimes based on relevant circumstances surrounding the underlying conduct." *State*

v. Eaton, 168 Wn.2d 476, 483, 229 P.3d 704 (2010). An enhancement increases the presumptive or standard sentence. *State v. Silva-Baltazar*, 125 Wn.2d 472, 475, 886 P.2d 138 (1994). An enhanced sentence is not an exceptional sentence which allows the court to sentence outside the presumptive or standard sentencing range. *Id.* The enhanced range is considered a standard range term and a departure from that range is an exceptional sentence. *State v. Gutierrez*, 146 Wn. App. 151, 155, 188 P.3d 546 (2008). "A sentence range increased by an enhancement is still a standard range sentence." *Id.*

The State may file a special allegation of endangerment where there is sufficient evidence that "one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle." RCW 9.94A.834(1). Once the presumptive sentence is determined, the endangerment enhancement increases the presumptive standard sentence by twelve months and one day:

> An additional twelve months and one day *shall* be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

RCW 9.94A.533(11) (emphasis added). "The sentence enhancement *must* include a sentence of 12 months and one day of imprisonment that is added

to the offender's presumptive sentence." Final Bill Report, H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008) (emphasis added).

The endangerment enhancement logically imposes a greater punishment if there is danger to individuals other than the defendant and the pursuing officer. *State v. Feely*, 192 Wn. App. 751, 762, 368 P.3d 514 (2016). The enhancement extends to endangering officers who were not following the defendant, including officers deploying spike strips. *Id.* at 756. "If officers who are not following are endangered, then the statute increases punishment based upon that risk that is not inherent in the mandatory elements of the crime." *Id.* at 762.

"It is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty, rather than to confer discretion." *In re Matter of K.J.B.*, 187 Wn.2d 592, 601, 387 P.3d 1072 (2017). "Shall" imposes a mandatory duty. *See id.* at 602. When the Legislature uses the word "shall" in a statute, the language is mandatory. *See State v. Williams*, 70 Wn. App. 567, 572, 853 P.2d 1388 (1993).

In *Williams*, the State appealed the trial court's sentence, arguing that because Williams sold cocaine within 1,000 feet of a school, the court was required to enhance the sentence by twenty-four months. *Id.* at 568-69. The statute at issue provided that an "additional twenty-four months *shall* be added to the presumptive sentence" for certain controlled substance

offenses that were committed within 1,000 feet of a school. *Id.* at 571 (emphasis added). The Court held that the use of the word "shall" means that the language is mandatory and that the trial court should have added twenty-four months to the standard range sentence. *Id.* at 572-73; *State v. Lusby*, 105 Wn. App. 257, 265-66, 18 P.3d 625 (2001) (statute providing that an additional twenty-four months "shall" be added to the presumptive sentence was mandatory).

The use of the word "shall" in a statute imposes a mandatory requirement unless a contrary legislative intent is apparent. *State v. Gonzales*, 198 Wn. App. 151, 155, 392 P.3d 1158 (2017). Here, there is no such contrary intent apparent in the statute. Rather, the legislative intent indicates that the twelve months and one day sentence enhancement "must" be added to the offender's presumptive sentence. Final Bill Report, H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008).

If the language in a statute is plain and unambiguous, the court's inquiry must end, because the meaning must be derived from the wording of the statute itself. *Lusby*, 105 Wn. App. at 266. Here, there is no need to engage in a statutory construction argument because the plain language of the statute is clear and unambiguous. The statute provides that an "additional twelve months and one day *shall* be added to the standard sentence range." RCW 9.94A.533(11) (emphasis added). As the Legislature

explained when it enacted the statute, the sentence enhancement of twelve months and one day "must" be added to the presumptive sentence." Final Bill Report, H.B. 1030, 60th Leg., Reg. Sess. (Wash. 2008). There is no need to inquire beyond this plain language of the statute.

In *Lusby*, the Court held that the trial court properly imposed the twenty-four month enhancement and added it to the standard range sentence because it was a mandatory enhancement. *Lusby*, 105 Wn. App. at 266. The Court noted that the trial court followed the statute "to the letter." *Id.* Here, the trial court also followed the statute "to the letter." It imposed the twelve month and one day enhancement and added it to the standard range sentence because it was a mandatory enhancement. *See* CP 22, 25; *see also* 1/9/19 RP 12-13. Whether or not the trial court could waive this mandatory enhancement and impose an exceptional sentence was not before the court because the parties reached an agreed resolution, and Roberson did not present any mitigating evidence in support of an exceptional sentence. The trial court never issued a ruling on whether this enhancement was mandatory such that it was precluded from issuing an exceptional sentence under the appropriate circumstances. Thus, this Court need not issue an advisory opinion on an issue that was not addressed below.

D. The trial court did not abuse its discretion by imposing a standard range sentence that was jointly recommended by both parties as part of the plea agreement.

The parties were bound by the plea agreement and its joint recommendation of a standard range sentence of twelve months and one day in prison. Roberson cites no legal authority for his claim that the joint recommendation of the parties only involved "the lawyers" and not Roberson. *See* Br. of App. at 16. This argument defies logic and is not supported by the law. And although the trial court was not bound by the agreed recommendation in the plea agreement, it properly exercised its discretion and imposed the standard range sentence requested by the parties.

It is well established that plea agreements bind both the State and the defendant. A plea agreement is a contract between the State and the defendant. *State v. Sledge*, 133 Wn.2d 828, 838, 839 n. 6, 947 P.2d 1199 (1997); *State v. Talley*, 134 Wn.2d 176, 182, 949 P.2d 358 (1998); *State v. Jerde*, 93 Wn. App. 774, 780, 970 P.2d 781 (1999) ("The State enters into a contract with a defendant when it offers a plea bargain and the defendant accepts."). "The agreement binds the State *and* the defendant." *State v. Church*, 5 Wn. App. 2d 577, 584, 428 P.3d 150 (2018) (emphasis added). "The prosecutor and the defendant are the only parties to a plea agreement." *State v. Wakefield*, 130 Wn.2d 464, 474, 925 P.2d 183 (1996); *State v. Sanchez*, 146 Wn.2d 339, 348, 355, 46 P.3d 774 (2002) ("The only parties

to a plea agreement are the prosecutor and the defendant either through counsel or pro se.").

The trial court is not bound by any recommendations in the plea agreement. RCW 9.94A.431(2); *Sledge*, 133 Wn.2d at 839 n. 6. But the court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved at trial or at sentencing. RCW 9.94A.530(2); *Grayson*, 154 Wn.2d at 338-39. "Acknowledged" facts include all facts presented or considered during sentencing that are not objected to by the parties. *Grayson*, 154 Wn.2d at 339.

"The implied duty of good faith and fair dealing inherent in every contract extends to both parties." *State v. McInally*, 125 Wn. App. 854, 867, 106 P.3d 794 (2005). A party may not undercut the terms of a plea agreement either explicitly or by conduct evidencing an intent to circumvent the terms of the agreement. *See Sledge*, 133 Wn.2d at 840. The plea bargaining process requires that both the State and the defendant adhere to their promises, otherwise the fairness of the sentencing hearing is seriously called into question. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 88, 143 P.3d 343 (2006).

A breach of a plea agreement occurs when a party offers unsolicited information by way of report, testimony, or argument that undercuts the party's obligations under the plea agreement. *See id.* at 83. Courts have

found a breach of the plea agreement where the State downplays its mid-range sentencing recommendation and emphasizes aggravating factors that would support an exceptional sentence. *See e.g. State v. Van Buren*, 101 Wn. App. 206, 215-17, 2 P.3d 991 (2000); *Jerde*, 93 Wn. App. at 782.

Here, the parties were bound by its plea agreement and the joint recommendation from *both* parties for a sentence of twelve months and one day. It would have been a breach of the plea agreement for Roberson to present mitigating mental health evidence in support of an exceptional sentence when that was contrary to his agreement with the State. Although the trial court was not bound by this recommendation, it did not abuse its discretion by following the agreed recommendation and imposing a standard range sentence of twelve months and one day in prison. There was very limited information before the court regarding Roberson's alleged mental health condition. And there was no information before the court that any mental condition "played a direct role in his conduct" as Roberson asserts for the first time on appeal. *See* Br. of App. at 18.

Roberson's reliance on *O'Dell* is again misplaced. Roberson cites to *O'Dell* for his assertion that the discretion of sentencing judges to impose exceptional sentences "is critical to the integrity of plea negotiations and to prevent manifest injustice where the State possesses significant advantages in bargaining position" that fail to incorporate mitigating circumstances. Br.

of App. at 17 (citing *O'Dell*, 183 Wn.2d at 696). But *O'Dell* did not involve a plea bargain. O'Dell was convicted after a jury trial. *O'Dell*, 183 Wn.2d at 684. There is no discussion of plea negotiations anywhere in the *O'Dell* decision.

Roberson argues that he had already served 131 days in jail at the time of sentencing and that "[n]o further incarceration was necessary to deliver a commensurate and appropriate sentence." Br. of App. at 19. But the standard is not whether a sentence is "necessary." The standard is whether the trial court abused its discretion by imposing a standard range sentence. *See Mail*, 121 Wn.2d at 710; *Williams*, 149 Wn.2d at 146-47. Here, it did not.

Roberson further argues that issuing a sentence below the agreed recommendation of twelve months and a day would have allowed him "to seek treatment for his mental illness at Greater Lakes Mental Health, where he had already received a referral." Br. of App. at 19 (citing CP 57). But the record shows that the two months of "behavioral health services" he received at Greater Lakes Mental Health Services ended on December 31, 2018, which was prior to sentencing. *See* CP 57; *see also* 1/9/19 RP at 10.

Finally, Roberson raises policy concerns about the treatment of mentally ill individuals. Br. of App. at 17-19. But these concerns are simply not present in this case and are not supported by the record. Roberson chose not to request a mitigated sentence. And he chose not to submit his mental health evaluation to the court or present any other information to the court at sentencing about his mental health that would support an exceptional sentence. Roberson received the exact sentence he requested the court impose.

Further, Roberson was aware that his failure to appear at the initial sentencing date meant the State was no longer bound by the plea agreement and could have added charges of felony bail jump, violation of a no contact order, and driving while license suspended. *See* 12/5/18 RP 6; CP 3-4, 140-44. The State apparently elected not to pursue filing additional charges and allowed Roberson to proceed with sentencing based on the prior plea agreement. Roberson could have been facing significantly more time in prison. Thus, it is understandable why Roberson requested that the court impose the joint recommendation of twelve months and one day in prison. The trial court did not abuse its discretion in following the joint recommendation of the parties for a standard range sentence.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the standard range sentence imposed by the trial court, which was based on the joint recommendation of the parties.

RESPECTFULLY SUBMITTED this 6th day of January, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

KRISTIE BARHAM WSB# 32764
Deputy Prosecuting Attorney

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1/6/20 _____
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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Superior Court Case Number:	18-1-01953-4

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