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Division II
State of Washington

NO. 53671-4-II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY JOSHUA GREEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01391-7

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Green is barred from appealing his standard-range sentence where the trial court did not categorically refuse to consider a mitigated exceptional sentence?

2. Whether Green fails to show counsel was ineffective for focusing on Green's strongest argument for an exceptional sentence, particularly where the remaining arguments any lacked factual support?

II. STATEMENT OF THE CASE

Timothy Joshua Green was charged by information filed in Kitsap County Superior Court with felony violation of a court order. CP 1.

A few weeks later the court ordered a competency evaluation. CP 11, 22. Subsequently, at the request of Western State Hospital, Green was transported to its facility for evaluation. CP 34. Green was ultimately found incompetent to proceed due to a lack of capacity to assist in his defense.¹ CP 42. The court entered a restoration order. CP 39. Green was thereafter found competent to proceed. CP 64.

At omnibus, Green asserted the defenses of general denial, diminished capacity, and intoxication. CP 71. The case was then set for

¹ The evaluator did note evidence of malingering, describing him as "uncooperative in that he presented information that I suspected to be a volitional attempt to exaggerate symptoms." CP 144.

trial on stipulated facts. RP (9/14) 2. On the day set for trial, the parties announced that Green would enter an *Alford* plea. RP (9/14) 2.

A plea agreement had been reached, with Green pleading guilty to the original charge. CP 77. In the statement of defendant on plea of guilty, Green entered an *Alford* plea and deferred to the probable cause statement for a factual basis for the plea. CP 92. The probable cause statement set forth the following facts:

On Monday 09-25-17 at 0302 hours, Officer Mayfield and [Corporal Jeff Schaefer] were dispatched to 2228 Eastview Avenue in the City of Bremerton. Christine Foley (aka Christine Burrus) texted 9-1-1 to report Timothy GREEN was outside of her residence in violation of a no contact order. Foley and GREEN were in a dating relationship for about a year previously.

The order was located in WACIC and confirmed. It was issued in Kitsap County Superior Court on 06-27-17 and protects Foley from GREEN. The order is valid through 06-27-19 and prohibits GREEN from being within 500' of Foley's residence.

While enroute, CenCom advised that Foley reported GREEN was in her shed in the back of the house. [Officers] arrived and [Schaefer] approached the home. [He] observed GREEN in the carport/storage area on the side of the house. He was placed under arrest. He was well within 500' of FOLEY's residence.

An NCIC III criminal history check of GREEN showed four prior court order violation convictions, two felony convictions from June 2016 and April 2015 and two gross misdemeanor convictions from December 2009 and October 2005. He was booked for a felony no contact order violation.

CP 4. After a colloquy, the court accepted the plea. RP (9/14) 11.

The State agreed to recommend a sentence of 60 months, which was the standard range. CP 78, RP (9/14) 2. Green indicated that he would be seeking a mitigated exceptional sentence of 18 months, and the court requested briefing before the sentencing hearing. RP (9/14) 3-5, 15.

In his brief, Green argued that the court should impose an exceptional sentence, alleging a number of mitigating circumstances: (1) that the victim was the initiator, willing participant, aggressor or provoker of the incident, RCW 9.94A.535(1)(a); (2) that Green committed the crime under compulsion insufficient to establish a complete defense, RCW 9.94A.535(1)(c); and (3) that Green's capacity to appreciate the wrongfulness of his conduct was impaired, RCW 9.94A.535(1)(e). CP 109-11.

Between the plea hearing and sentencing, Green was charged in Kitsap Superior Court No. 18-1-01429-18 with fourth-degree assault.² RP (3/14) 2-5. At the sentencing hearing in this case, Green first pled guilty in the subsequent case. *Id.* The Court deferred whether to impose the 90-day sentence concurrently to the sentence in the instant case until it determined the sentence it would impose. RP (3/14) 13.

Turning to Green's request for an exceptional sentence, the court

² That matter had initially been charged as an indecent liberties that had occurred in the jail. RP (3/14) 6.

noted that it saw nothing in the probable cause statement supporting the claim that the victim initiated contact. Green responded that it was in Schaefer's full report. RP (3/14) 14-15. The court reviewed that report, which was not made part of the record, and noted that it still did not appear to support the defense:

According to this report, he calls her -- so he initiated the contact. She agreed to meet with him. And then he was acting strange, so she went back inside. And then later on he comes back.

RP (3/14) 16. The court indicated that it was willing to have a contested facts hearing if Green wished, but that the facts in the police report did not support the defense. RP (3/14) 14-15. The court further explained its position:

THE COURT: I'm serious about this. Because this is a big deal. I mean, if I make a finding that -- if I make a finding that the preponderance of the evidence - - as it sits here right now, I don't know that I can make a finding by a preponderance of the evidence that she was a willing participant. He calls her. She says okay. But then disengages, goes back in the house. And then he's still there.

So on the one hand, I'm not sure as a matter of fact I can make that finding. Looking at Trowbridge's report, you know, he says that your client is capable of knowing -- understanding the order, knowing not to violate the order.

So there have been a number of violations in the past. And I'm serious about this. 60 months and 18 months, whatever it is -- you're recommending 18 months?

MR. BRENNAN: That's what we were at the time.

THE COURT: That's a big deal.

MR. BRENNAN: Now we're past that.

THE COURT: That's a big deal. So, you know, we can have contested factual sentencing hearings. If you want to call -- I think she works in Olympia, right? She didn't want to be here because she works in Olympia. Or is that your client's mom?

MR. BRENNAN: My client's mom.

THE COURT: So If you want to call the protected party in this case and ask about whether or not -- you know, there have been mutually agreed upon contacts with one another or something like that, that might be one thing. As it sits here right now in front of me, I don't think it's there. I don't think a preponderance of the evidence exists.

MR. BRENNAN: I think it does. I don't think this crime makes any sense without there having been mutual contact.

THE COURT: But she disengaged. According to the report -- so according to the report, I see this as really two contacts. He calls her. She says, okay, I'll talk with you. And then he called her three times. So finally she says, okay, I'll meet with you. So he was acting strange.

So she goes back in the home. And an hour and a half later, he shows up and rings her doorbell.

So, you know if the incident ended when she walked back in the home, then I'm on board with your theory, I think.

But the incident didn't. An hour and a half later, he's back at her house ringing her doorbell, which I don't think is an invited contact.

So that's my problem, is that I think -- he calls her three times. You know, I don't know that -- he calls her three times. Hard to say why she decided to meet with him. That's kind of speculative. But she does. Okay. Maybe she's a willing participant at that point.

But then when she disengages an hour and a half later and he shows up at her house, I don't see that as being -- her being a willful participant. At that point, it's 4:30 in the morning and he's at her house ringing her doorbell.

RP (3/14) 18-20.

The trial court also rejected the notion that Green did not understand the wrongfulness of his conduct. Green was relying on a report from Dr. Brett Trowbridge in support of that claim. CP 142, RP (3/14) 17. The court, however, noted that “Trowbridge doesn’t say that.” RP (3/14) 21. Green conceded that point. *Id.*

In his statement to the court, Green first asserted that it was the victim who was contacted him, and then asserted that he had no recollection of the incident. RP (3/14) 22-23.

The court found that Green had failed to meet the statutory language as a factual matter, noting that he had declined the court’s offer to present witnesses supporting his theory:

The statute says to a significant degree the victim was an initiator. The victim may have been an initiator, but I don’t know if it was to a significant degree. It sounds like on this particular occasion, Mr. Green -- on this occasion for which he’s charged, he initiated the contact, made three phone calls. She agrees to meet with him. She disengages -- I’m saying this as a matter of fact based on what is in the report.

She disengages. And an hour and a half later he shows up at her door ringing the doorbell. At that point it must have been in the wee hours of the morning.

I could say to a degree she may have been a willing participant, to a degree she may have been a willing participant. But I can’t say that it’s to a significant degree when she disengaged the contact, and then Mr. Green shows up. I get that he doesn’t remember necessarily what

was happening, he wasn't on his meds.

RP (3/14) 23-24. Green's counsel in the assault case then interposed that Green was asking the court to consider the broader course of conduct between the parties. RP (3/14) 24. The court again pointed out that it was lacking a factual basis to make that finding:

THE COURT: I understand that. But the information that I have -- this is why I asked Mr. Brennan if he wants to call the protected party for me to take testimony about that. I'm getting secondhand -- I believe Mr. Brennan in his declaration that Mr. Green's mom told him -- Mr. Brennan is telling the truth about what his mom told him.

MR. PIMENTEL: Right.

THE COURT: But doesn't -- if I'm going to make this determination, doesn't the protected party have the -- should have the opportunity to say what happened as a matter of fact?

MR. PIMENTEL: Yes. She may disagree. She may disagree with whether she's a participant. That doesn't mean objectively that she isn't.

THE COURT: I understand that. But the facts that I have before me is Mr. Green's mom saying that they were having some sort of contact beforehand.

MR. PIMENTEL: Right.

THE COURT: Maybe they were, maybe they weren't. I don't know.

MR. PIMENTEL: Oh, I see.

THE COURT: It's just a matter of fact.

MR. BRENNAN: You have him telling you that too.

THE COURT: I understand. Again, I think I can make a finding that to a degree, to a degree, the party may have been a willing participant. To a significant degree,

something beyond a disagreement to a significant degree, I don't know that I can make that finding based on the record before me. In particular when -- let's say they're having phone calls back and forth, let's say she was at some point during this time frame a willing participant. It seems to me once she disengages, an hour and a half later he shows up back at her door ringing her doorbell, that that's a violation.

MR. BRENNAN: If the court wants testimony, we can call her. I don't know what she's going to say. I've spoken to her before, but we can do that.

THE COURT: I would like to know. I mean, it's a big deal.

MR. PIMENTEL: Yeah.

THE COURT: If, in fact, there's evidence to suggest that she was to a significant degree a willing participant during this time period, then maybe I go a different way on it. He's looking at -- I mean, if I don't bite on what you're proposing, he's getting 60 months.

MR. BRENNAN: I understand.

THE COURT: If I do bite, then maybe he gets 18 and he's done. That's a big deal.

MR. BRENNAN: Yep.

THE COURT: So I'm not taking this lightly at all. I think it's a big deal. The record that I have before me, I don't know I can make a finding to a significant degree she was a willing participant. That word -- if the legislature just meant to a degree, that's what they would say.

When they say "significant degree," that impacts the way that I'm interpreting this situation. And if she comes in and testifies that -- when was this? This incident was on September 25th. So if -- I'm not making any promises -- if she were to come in and say we were having contact back and forth, he was calling me, I was calling him. He wouldn't have expected it to be a problem for him to call me since we were having contact before September 25th, I agreed to meet with him. Depending on how that contact was disengaged, I mean, there could be a reason why I might make a finding that to a significant degree she was a willing participant.

But I guess without getting testimony from her about that, with the record I have in front of me, I'm not inclined to make that finding. I'm going to leave it up to you. I guess you're probably going to want to subpoena her and have a hearing.

RP (3/14) 24-27. The matter was then set over to allow Green to present evidence. RP (3/14) 33.

At the beginning of the next hearing, Green's counsel informed the court that he had spoken to the victim and would not be calling her as a witness. RP (4/1) 2. Green then told the court he had no other evidence. RP (4/1) 3. Nevertheless, Green was then sworn in and testified. RP (4/1) 6.

Green asserted that the victim had repeatedly called his mother and asked to speak to him. RP (4/1) 7. He stated that he refused to talk to her because he knew he had a no-contact order. RP (4/1) 7.

After considering the facts before it, the court concluded that Green had not met his burden of showing that the victim was a willing participant:

So I signed, actually, a domestic violence no-contact order on June 27 of 2017, this offense dated September 25, 2017. It may be that Mr. Green and Ms. Foley Burrus had some communications in violation of the order, perhaps mutual communications.

This crime was charged from an incident date of September 25, 2017, and so I'm focusing on the facts of that particular date. It does indicate that Mr. Green initiated conversation. Ms. Foley Burrus may have agreed to have

further conversations, but she did leave, and then later on, Mr. Green was at her residence.

I'm not able to make a finding that there's a preponderance of the evidence or sufficient evidence to make a finding that Ms. Foley Burrus was a willing participant to a significant degree. The order I signed says that Mr. Green does have the sole responsibility to avoid or refrain from violating the Court's provisions.

It's a difficult situation. It's a lengthy sentence that I'm required to impose, but I have to follow the law. The law in this case indicates, based on the information I have, I have to impose the 60 months at this point.

RP (4/1) 11. The court thus imposed the standard range sentence of 60 months. *Id.*; CP 159.

III. ARGUMENT

A. GREEN IS BARRED FROM APPEALING HIS STANDARD-RANGE SENTENCE WHERE THE TRIAL COURT DID NOT CATEGORICALLY REFUSE TO CONSIDER A MITIGATED EXCEPTIONAL SENTENCE.

Green argues that the trial court improperly refused to impose a mitigated exceptional sentence. This claim is without merit because the trial court extensively considered his request for an exceptional and found that it was not factually supported. Under these circumstances, Green may not appeal his sentence.

Generally speaking, a sentence within in the standard range "shall not be appealed." RCW 9.94A.585(1). A limited exception to the rule is provided for "where the court has refused to exercise discretion at all or

has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). A court refuses to exercise its discretion only if it refuses categorically to impose an exceptional sentence under any circumstances. *Id.* “Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.” *Id.*

Here, not only did the trial court *not* refuse to exercise its discretion, it granted Green considerable leeway to prove that sufficient mitigating circumstances existed, going so far as to set over the sentencing hearing to allow him to present more evidence. Here, the trial court simply found that the evidence Green presented was insufficient to warrant an exceptional sentence. That decision is not appealable. *Garcia-Martinez*, 88 Wn. App. at 330.

Green argues that the trial court abused its discretion because it did not consider the alleged mitigating factors that Green committed the crime under a compulsion that was insufficient to constitute a complete defense, RCW 9.94A.535(1)(c), and that his capacity to appreciate the wrongfulness of his conduct was impaired. RCW 9.94A.535(1)(a). The latter factor was directly addressed by the court, which noted that Dr.

Trowbridge's report, on which Green relied, did not support the factor. RP (3/14) 18, 21. Green conceded that point. RP (3/14) 21. Clearly, the trial court considered that mitigating circumstance and found it lacked a factual basis.

With regard to the remaining factor, the court indicated that it had read Green's written submissions. RP (3/14) 14. It should be noted that during the three sentencing hearings, the only mention of the compulsion factor by Green was a brief reference at the first hearing. RP (9/14) 18. In his written submission, Green combined his arguments regarding the compulsion and capacity to appreciate the wrongfulness mitigators. CP 110 ("While these are two different statutory prongs, the Defense will address them both here given their similarity."). He did not differentiate between the two factors in his written argument. CP 110-11. Given that the trial court specifically stated that it had read Green's briefing, that it rejected the failure to appreciate the wrongfulness factor as a factual matter, that Green never explicitly argued the compulsion factor in either his written or oral submissions, never objected that that factor had not been considered, and the trial court never explicitly refused to consider that factor, the record simply does not show that the trial court "refuse[d] categorically" to exercise its discretion. *Garcia-Martinez*, 88 Wn. App. at 330. This claim should be rejected.

B. COUNSEL WAS NOT INEFFECTIVE FOR FOCUSING ON GREEN'S STRONGEST ARGUMENT FOR AN EXCEPTIONAL SENTENCE, PARTICULARLY WHERE THE REMAINING ARGUMENTS LACKED ANY FACTUAL SUPPORT.

Green next claims that counsel was ineffective for not sufficiently briefing or arguing the mitigating circumstances under RCW 9.94A.535(1)(c) and (e). This claim is without merit because counsel was not ineffective for focusing on Green's strongest argument for an exceptional sentence, particularly where the remaining arguments lacked any factual support.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make

every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Here, Green presented the following written argument regarding these circumstances:

In *State v. Pascal*, the defendant was convicted at trial of first degree manslaughter and sentenced to an exceptional sentence below the standard range. The State appealed the sentence. There, the Trial Court's rationale for the downward departure were the same prongs being argued here. The Defense had specifically argued that Ms. Pascal suffered from battered woman syndrome. Yet, the Defense did not offer any expert testimony to support this finding and/or diagnosis. The Supreme Court affirmed the Trial Court's sentence. See *id.* While sometimes such defenses may be inadmissible at trial for various defenses,

they are appropriate at sentencing. See Footnote 5 of *State v. Riker*, 123 Wn.2d 351,869 P.2d 43 (1994) (citing *State v. Pascal*).

Here, Mr. Green has stated that he has no recollection of this incident (see Dr. Trowbridge's attached evaluation). Further, Mildred Green has stated that Mr. Green had not been taking his prescribed medication in the time leading up to this incident and was increasingly worried about his behavior and what it might lead to. And, per Officer Schaeffer's report, Ms. Foley stated that Mr. Green was "acting strange."

The Defense does not claim that the evaluation attached is perfect, nor that it does not contain some information that could be considered harmful to its position in this case. Mr. Green did not get along with the evaluator. And, the lack of recollection made things difficult. However, in correlation with Mr. Green's statements at sentencing argument (see attached), it does reflect that he was suffering from mental health challenges that had unfortunately not yet been effectively treated. Further, it makes mention of two times in the month of September 2017, shortly before the incident at hand, in which his family took him to the hospital for what appeared to be mental health episodes.

CP 111. In the referenced statements Green made at the change of plea hearing, the only assertion relating to the crime was that he had been assaulted at some point before the crime was committed and that he did not recall committing it because he was "off his meds." CP 135.

Likewise, as previously noted, Trowbridge's report also failed to support these factors. He noted that despite some mental health issues, there was little evidence of a psychiatric condition that would support these factors:

It does not appear to me that there is sufficient evidence of serious mental illness which could conceivably cause Mr. Green to not have been capable of knowing he was violating the court order, although I acknowledge Mr. Green does have some documented mental health history. The fact that he states he does not remember a period of at least many days before the incident makes it very difficult to determine what his thinking was at the time. He was found hiding in a shed, suggesting possible knowledge of guilt. My diagnostic impression is bi-polar disorder, mixed, and in my view, a diminished capacity defense would not be appropriate, as it appears to me that Mr. Green did have the capacity to know that he “was knowingly violating a restraint provision.”

CP 150. There is thus no evidence in the record to support either of these factors.

Green’s reliance on *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987), thus is misplaced. In that case the findings were supported by the record. There was evidence that on several occasions, both prior to and on the day of the incident in which the victim was killed, he had subjected the defendant to physical beatings and to verbal and emotional abuse. *Pascal*, 108 Wn.2d at 136. Here is no such evidence here. Moreover, that case involved whether the court abused its discretion in *granting* the exceptional sentence.

More instructive is *State v. Rogers*, 112 Wn.2d 180, 184, 770 P.2d 180 (1989), where, two years after *Pascal*, the Supreme Court held “as a matter of law that duress, as a factor in mitigation of [a] presumptive sentence, cannot be established by evidence of internal emotional and

psychological stress.” The only evidence cited in support of the duress factor was based on Green’s mental health issues. The duress or compulsion mitigator is thus without support in the record.

Rogers also announced the “stringent test” that before a trial court may base an exceptional sentence on an inability to conform conduct to the law, it “must find, *based upon the evidence*, that [the alleged mental issues] led to significant impairment of defendant’s capacity to appreciate the wrongfulness of his conduct and to conform to the law.” *Rogers*, 112 Wn.2d at 185 (emphasis supplied). Here, there is absolutely no evidence in the record tying whatever mental problems Green may have to the commission of the crime. Indeed, Dr. Trowbridge came to the opposite conclusion, and Green denies any recollection of the incident. *See also State v. Hart*, 188 Wn. App. 453, 464, 353 P.3d 253 (2015) (defendant’s paranoid schizophrenia did not justify exceptional sentence without evidence tying it to the offense).

A defendant establishes neither deficient performance nor prejudice where the underlying claim would not have succeeded. *State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518, *review denied*, 171 Wn.2d 1015 (2010); *State v. Schwab*, 141 Wn. App. 85, 96, 167 P.3d 1225, 1229 (2007) (same), *review denied*, 164 Wn.2d 1009 (2008), *cert. denied*, 555 U.S. 1188 (2009). Here, as shown, there is no record evidence sufficient to

support either of these aggravating circumstances. As such Green's claim must fail.

Given that there is no evidence that supports these aggravators, counsel acted reasonably in focusing on the victim-as-participant argument, particularly since the trial court was willing to entertain that argument, even allowing a sentencing delay for Green to present witnesses. Moreover, given the utter lack of evidence supporting these two aggravators, Green cannot show prejudice. *State v. Goldberg*, 123 Wn. App. 848, 853, 99 P.3d 924 (2004) (to prevail on a claim of ineffective assistance based on inadequate argument at sentencing, defendant must show that he would have received a different sentence).

IV. CONCLUSION

For the foregoing reasons, Green's conviction and sentence should be affirmed.

DATED February 13, 2020.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal flourish extending to the right.

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