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Division III
State of Washington

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
RESPONDENT/CROSS-APPELLANT

v.

MARK CAVAZOS, SR.,
APPELLANT/CROSS-RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State violated appellant's constitutional right to due process and right to remain silent by purposefully eliciting testimony from its police witnesses that appellant refused to talk with them after his arrest.

2. The trial court erred in concluding appellant had opened the door to testimony about his pre and post-arrest silence.

3. Appellant was denied his constitutional right to the effective assistance of counsel.

II. RESPONDENT'S ASSIGNMENTS OF ERROR

The following assignments of error relate to the findings of fact and conclusions of law entered by the trial court on November 5, 2014, after sentencing and following the court's imposition of an exceptional sentence downward. CP 379-82.

Findings of fact.

1. The trial court erred in finding the evidence heard by the court at trial, during pretrial hearings, and throughout the litigation established the defendant's burden that the victim was, to a significant degree, a willing participant, an aggressor, and a provoker of the incident because this is actually a conclusion of law made without any factual support. (Finding of fact number one.)

2. The trial court erred in making findings of fact numbered two a, b, c, d, e, and f, because these findings are not a basis in fact or in law for a downward departure of a standard range sentence. (Finding of fact number two.)

Conclusions of law.

3. The trial court erred in concluding the victim was, to a significant degree, a willing participant, an aggressor, and a provoker of the incident because there are no oral or written findings of fact supporting this conclusion. (Conclusion of law number one.)

4. The trial court erred in finding by a preponderance of evidence that the victim was, to a significant degree, a willing participant, an aggressor, and a provoker of the incident, as there is no factual basis to support this conclusion of law. (Conclusion of law number two.)

5. The trial court erred when it decided the imposition of a standard range sentence would not further the purpose of the sentencing reform act as there is no factual or legal basis for this conclusion. (Conclusion of law five.)

6. The trial court erred when it found “a standard range sentence would not reduce the risk of reoffending by offenders in the community and it is not necessary to protect the public” given the defendant’s lack of criminal history, his age and physical condition, his

amenability to probationary treatment, and his support from the community because these factors are not mitigating factors as a matter of law. (Conclusion of law number 6.)

7. The trial court erred when it concluded that a standard range sentence would not make frugal use of the state's and local governments' resources, particularly given the lack of any indication the defendant is not likely to reoffend and the likelihood that he will require significant and ongoing medical treatment, because these factors are not mitigating circumstances as a matter of law. (Conclusion of law number seven.)

8. The trial court erred when it determined that given the existence of the mitigating factors, a standard range sentence would not promote respect for the law, as this is not a mitigating factor as a matter of law. (Conclusion of law number eight.)

9. The trial court erred when it decided there were sufficient facts and mitigating circumstances to support a downward departure under the Sentencing Reform Act. (Conclusion of law number nine.)

III. ISSUES RELATED TO APPELLANT'S DIRECT APPEAL

1. Was the defendant's right to remain silent violated at the time of trial by the admission of statements made by the defendant to Deputy Vucinich at the crime scene, if the trial court previously found at a

CrR 3.5 hearing that the defendant's unsolicited statements to Deputy Vucinich were admissible at the time of trial because the statements were spontaneous and not the product of custodial interrogation?

2. Was the defendant's trial counsel ineffective by not objecting to the admission of defendant's statements to Deputy Vucinich at the time of trial that were previously ruled admissible by the trial court during a CrR 3.5 hearing?

3. Did the trial court abuse its discretion when it allowed the deputy prosecutor to question a detective on redirect examination regarding what information, if any, the defendant provided to law enforcement at the crime scene, after the trial court found the defendant had "opened the door" for this inquiry during cross-examination of the same detective?

IV. ISSUES RELATED TO RESPONDENT'S CROSS-APPEAL

1. Are the reasons given by the sentencing court for imposing a downward departure of the standard sentencing range supported by substantial evidence in the record?

2. Do the reasons given by the sentencing court justify substantial and compelling reasons for a downward departure from the standard range?

V. STATEMENT OF THE CASE

The appellant/defendant, Mark Cavazos, was charged by second amended information in the Spokane County superior court under count one, second degree felony murder based on an assault, and under count two, manslaughter in the first degree for events occurring on January 13, 2013. CP 127-28. Each crime included a firearm enhancement allegation. CP 127-28.

The defendant was convicted as charged by a jury and this appeal timely followed. The State cross appealed on the trial court's imposition of an exceptional sentence downward.

Substantive facts.

a. Events leading up to the shooting.

On January 12, 2013, around 10:00 p.m., James Cavazos¹ and Misty Beaumont went to the defendant's home,² after receiving a ride from the defendant. RP 1400-01. They drank beer and hard liquor, and played a dice game. RP 1402. All three smoked marijuana. RP 1403.

¹ James Cavazos, son of the defendant, will be referred to as the victim.

² The defendant residence was located at 4020 North Garfield, in the western portion of Spokane County, near the Northern Quest Casino. RP 1296-98, 1317, 1343, 1386, 1387, 1412.

During this time, the defendant was cajoling the victim; he did not believe the victim was living to his full potential. RP 1403-04, 1427-28.

After the dice game, all three individuals went outside and into the defendant's hot tub. RP 1404. The hot tub was situated near the residence. RP 1404. The defendant continued with questions regarding the victim's past. RP 1405. The group continued to drink beer in the hot tub. RP 1405. Ms. Beaumont and the victim asked the defendant to stop with his questions, but he did not. RP 1405. The victim was not angry at this point, but was irritated. RP 1405.

After approximately one hour, Ms. Beaumont advised the defendant he was ruining the mood, and that she was going sledding. RP 1406. Before she left the hot tub, there was a group hug. RP 1406.

When Ms. Beaumont arrived at the top of the sledding hill, she heard screaming and arguing between the defendant and the victim.³ RP 1407, 1431. Ms. Beaumont returned to the residence to determine what was happening. RP 1407. She observed the victim covered in blood outside the residence. RP 1407. The victim remarked to her: "This is what

³ Ms. Beaumont had observed the victim and defendant together approximately thirty to fifty times prior to the incident. RP 1349. She described the relationship as tense at times, but she never observed any physical confrontations between the defendant and his son. RP 1349.

happens when you leave me alone - - this is what happened when you left me alone.” RP 1407.⁴

She ushered the victim into the home to wash him off. RP 1433. When the pair walked into the home, the defendant was in the dining room. RP 1407. The defendant was visibly upset. RP 1408. Ms. Beaumont did not observe the victim with any weapon. RP 1409.

The defendant went into his master bedroom⁵ and retrieved a small handgun. RP 1409.⁶ The defendant and victim continued to scream at each other. RP 1409. The victim walked to the area of the kitchen sink. RP 1409. Ms. Beaumont was near the door to the residence. RP 1410.

⁴ Ms. Beaumont described the victim’s appearance stating: “I freaked out, I’d never seen so much blood on one person. And I tried to get -- I let him into the house to go wash off.” RP 1407. She further stated: “... I’d never see - - [the victim], I couldn’t see a single bit of flesh tone on him. His arms, his face, everything was just covered in blood.” RP 1409.

⁵ The master bedroom had a deadbolt lock on the door. RP 1484. Investigators did not observe any blood inside the master bedroom. RP 1486.

⁶ The defendant owned multiple firearms and had a small shooting range on his property. RP 1342, 1434, 1654. He was also teaching Ms. Beaumont’s children to shoot. RP 1434-35. The pistol used by the defendant to kill the victim was a .357 Smith & Wesson six-shot revolver. RP 1530, 1565. The weapon was fully loaded when collected by law enforcement, except for a spent cartridge case. RP 1532. The defendant was certified in the military as an expert in sharpshooting, and he had received several awards for his marksmanship. RP 1880; 1965.

After the defendant exited the bedroom with the pistol, he walked and stood next to Ms. Beaumont. RP 1410. The defendant pointed the handgun directly at the victim as both continued to argue. RP 1410, 1435. At this point, Ms. Beaumont remarked to the defendant: "Please stop. Please. He's covered in blood. He's hurting. Please stop." RP 1410, 1439. Neither the defendant nor the victim reacted to her comment. RP 1410. Ms. Beaumont had enough and she ran outside. RP 1411. She was only several feet out of the door when she heard a gunshot. RP 1411. She heard the defendant state: "Oh, I shot him." RP 1411. Ms. Beaumont ran down the driveway to a neighbor's home and called 911. RP 1411

On January 13, 2013, in the early morning hours, George Compton, neighbor of the defendant, was at his residence when he received a telephone call from a neighbor regarding the commotion at the defendant's residence. RP 1450. Thereafter, Mr. Compton drove to the defendant's home and observed blood on the porch of the defendant's residence. RP 1450-51. The defendant was speaking on the telephone and appeared distraught. RP 1450-51. Mr. Compton also observed the victim deceased on the floor. RP 1451-53. The defendant claimed the shooting was an accident. RP 1453, 1458. The defendant had a strong odor of alcohol. RP 1456. Mr. Compton did not observe any weapons in the vicinity of the victim. RP 1454.

b. Crime scene.

On January 13, 2013, at approximately 4:30 a.m., deputies from the Spokane County Sheriff's Office responded to several 911 calls from the defendant and Ms. Beaumont, referencing the shooting at the defendant residence. RP 1296-98, 1317, 1386-87, 1412.

When the deputies arrived at the defendant's home, they contacted the defendant and Mr. Compton. RP 1301-02, 1317. The defendant exited the home crying, bellowing several times into a telephone: "I shot my son." RP 1318. He advised deputies: "I will cooperate, I just shot my son." RP 1302, 1310, 1318. The defendant was subsequently detained in a patrol vehicle. RP 1304. At that time, the defendant repeated several times that he had killed his son. RP 1305. As deputies entered the residence, they observed the victim deceased, on the floor, of the kitchen. RP 1303, 1319-20, 1324, 1333.

Lyle Johnston, detective with the Spokane County Sheriff's Office, responded to the crime scene. RP 1465-66. In addition to observing a large pool of blood on the porch, the detective noted several blood droplets near and on a chain link fence in proximity to the residence, in the car port, on a car in the carport, the door to the residence, and blood spatter near the handle on the doorway. RP 1479-80, 1642, 1644-51, 1742-45. It appeared the victim bled outside the residence, traveling towards the fence, and then

to the carport. RP 1756. The victim's blood spatter was also detected from the entry door of the residence to the kitchen and from the kitchen to the family/TV room area. RP 1482, 1730-31, 1751-55.⁷ The detective did not observe any displaced furniture or any evidence of an altercation in the living room area. RP 1483.⁸

The victim's body was dragged from the location in the kitchen/pantry area, where it originally fell, to near the kitchen table/refrigerator based upon the blood evidence. RP 1490, 1622, 1741. None of the kitchen knives were out of place when inspected by the detective. RP 1493.

Dr. Sally Aiken, Spokane County medical examiner and forensic pathologist, performed an autopsy on the victim. RP 1596, 1600. Dr. Aiken attributed death to a single gunshot entrance wound on the right

⁷ A crime scene analyst opined the bloodletting (notwithstanding the area where the victim was shot) could have resulted from an injury to the victim's nose. RP 1755.

⁸ Spaghetti sauce staining and a jar lid were observed on a wall in the utility room. RP 1664-64, 1740. There was also a mixture of spaghetti sauce and blood located in the utility room. RP 1666. Some spaghetti sauce was also located in the pantry. RP 1667. A struggle appeared to have taken place from the refrigerator to inside the utility room based upon broken items, items knocked off a shelf, and some blood. RP 1667, 1676. Eye glasses were located in the area of the refrigerator, covered with spaghetti sauce and blood. RP 1668. No other areas in the home suggested a struggle. RP 1676.

side of the victim's nose. RP 1605, 1607, 1610, 1616.⁹ The victim died instantaneously or very rapidly from the gunshot wound. RP 1614, 1617. Dr. Aiken concluded the wound was an intermediate range gunshot wound,¹⁰ based upon the stipple marks and the soot around the entrance to the wound. RP 1611-12. The victim's blood alcohol concentration was 0.11 grams at the time of death. RP 1619. He also tested positive for marijuana and methamphetamine. RP 1619.

The defendant was photographed shortly after the incident at the public safety building. RP 1686. The taking of photographs had to be delayed for a period of time because the defendant was vomiting and he had a strong odor of alcohol. RP 1689. A small abrasion was observed on the side of his nose, some abrasions on his right wrist, a small abrasion on his right knee, and a red substance on some areas of his body. RP 1686-88. None of the abrasions were bleeding at that time. RP 1689. No other injuries were observed on the defendant's body. RP 1690. During inspection of the defendant's robe and shirt, the crime lab observed blood and spaghetti sauce. RP 1747-51.

⁹ The path of the bullet was from right to left, in a downward trajectory. RP 1626.

¹⁰ This type of wound is classified as beyond contact. RP 1612.

Glenn Davis, forensic scientist in the firearms and toolmarks section at the Washington State Patrol, tested the defendant's firearm, bullets, and cartridge cases collected at the crime scene and the bullet fragments located at autopsy. RP 1560-61, 1563. Mr. Davis determined the .357 revolver used by the defendant was operable and the safety features were properly functioning. RP 1567, 1569. Mr. Davis concluded the fired bullet fragments collected at autopsy¹¹ had similar rifling characteristics to the defendant's pistol, but he could not be conclusive due to the damage of the fired bullet. RP 1570-72.

Based upon his examination of the weapon and several test fires, Mr. Davis determined the defendant's weapon was fired less than ten inches from the victim's face. RP 1572-79. Visible blood stains were observed on the front sight of the revolver. RP 1659.

c. Defendant's case-in-chief.

Teisha Mathis testified she had a son together with the victim. RP 1843. The couple was in a relationship between 2002 and 2007. RP 1843. They had purchased a home in 2004. RP 1844. Some months after purchasing the home, the victim's brother, Mark Cavazos, Jr., resided with them. RP 1845. Ms. Mathis claimed there was violence between her

¹¹ The bullet fragments collected at autopsy from the back of the neck did not exit the skull. RP 1610.

and the victim, and between the victim and Mark Jr., while residing at the residence. RP 1845. She testified that she would relay the alleged acts of violence to the defendant. RP 1848.

Ms. Mathis never observed any physical or violent confrontations between the defendant and the victim. RP 1852.

Shelly Sumner, the defendant's significant other, described several instances, either first or second hand, of the victim and his brother, Mark Jr., fighting. RP 1857-1860. She claimed the victim threatened the defendant once, at an unknown period of time, via the telephone. RP 1860-61. However, she remarked the victim was never physically violent with the defendant. RP 1861. She testified that during the several months preceding the murder, the victim was drinking much less frequently and taking positive steps towards improving his lifestyle. RP 1862-63.

Ms. Sumner stated the defendant telephoned her after he killed the victim, and claiming the victim was crazy and that he was now scared. RP 1868. She advised the defendant to call 911. RP 1869.

The defendant testified he is partially disabled with a back injury. RP 1874-78. Many of the defendant's weapons were kept in a safe in his residence; however, he kept a shotgun and the loaded .357 magnum in his bedroom. RP 1881.

The defendant stated he was called, on occasion, to calm down situations between his two sons. RP 1883-85. He asserted he was called after one occasion (unknown time period) by the victim after the victim allegedly physically injured his brother. RP 1884. The defendant also claimed he was threatened over the telephone on one occasion (time period unknown) by the victim. RP 1887. However, he conceded the victim had never physically harmed him. RP 1887.

On the day of the murder, the defendant learned that Ms. Beaumont and the victim had been in a relationship for approximately three weeks. RP 1895. He was not “happy,” claiming Ms. Beaumont was “bad news.” RP 1896.

During the evening, around 9:30 p.m., the defendant received a phone call from Ms. Beaumont. RP 1899. Ms. Beaumont and the victim asked to come to the defendant’s residence. RP 1899. Eventually, the defendant picked up the pair. RP 1900. He was “not happy” about having to drive a distance to pick them up. RP 1900. However, he did want to “hash things out” with his son concerning his friendship with Ms. Beaumont and her two children. RP 1900. After picking up his son and Ms. Beaumont, and before they returned to the defendant’s residence around midnight, the defendant stopped and picked up a 24-pack of beer. RP 1900-01.

Upon returning to the residence, the group smoked some marijuana and played a dice game. RP 1901, 1954. Notwithstanding the alleged difficulties the victim had in the past with alcohol, the defendant offered the victim some scotch, but the victim declined. RP 1961. However, the victim did drink some beer provided by the defendant that evening. RP 1961. The defendant and Ms. Beaumont also drank some scotch liquor. RP 1901, 1954. The defendant alleged the victim was under the influence of “something” during the dice game. RP 1902-03.

Approximately one hour later, the group went out to the hot tub. RP 1903. The mood of the group was friendly and there was no tension. RP 1903, 1954. The victim did not converse much as he was observing the stars. RP 1903. The defendant stated he told the victim he was happy the victim was alive. RP 1905. However, he was critical of the victim about spending money on alcohol and cigarettes. RP 1905.

The defendant started preparing for his bedtime. RP 1908. He stated he again told the victim, who was in the kitchen, he was glad he was alive and attempted to give the victim a hug. RP 1910. The defendant alleged the victim attempted to punch his chin without reason. RP 1910, 1955-56. The defendant contended he next placed the victim into an arm hold. RP 1911. He asserted the victim then slammed them both into a cabinet, knocking off food containers, including the spaghetti

sauce jar. RP 1911-13. He then claimed the victim grabbed him, and swung the defendant back and forth. RP 1916.¹² On cross-examination, the defendant maintained he made no effort to defend himself at this point in time and he never became angry during the event. RP 1959, 1966. The defendant asserted his feet went into the air and he lost consciousness. RP 1917. He regained consciousness, and he observed his son outside the front door, cupping blood in both hands, speaking with Ms. Beaumont. RP 1919.

The defendant claimed he was scared, and he needed some “protection” as he did not know his son’s intentions. RP 1920.¹³ He further asserted his back was in “bad shape.” RP 1921.

The defendant went into his bedroom and grabbed his shotgun. RP 1922.¹⁴ He thought about his choice of firearm, and believed it too dangerous because he did not want to hurt the victim. RP 1923. He threw

¹² At the time of the event, the victim was five feet, five inches tall, and he weighed 135 pounds. RP 1617. The defendant was five foot, nine inches tall and he weighed between 155 – 160 pounds. RP 1958.

¹³ The defendant never observed the victim with any weapon or firearm during the event. RP 1964-65.

¹⁴ Although the defendant claimed he “feared for his life” when he entered the bedroom to fetch a firearm; he did not call the police before the shooting because he did not want his son in further trouble, he wanted to diffuse the situation, and he concluded that he was not seriously injured at the time. RP 1944.

the shotgun under the bed, apparently choosing a “less dangerous” firearm – his loaded .357 magnum pistol. RP 1924. He proceeded into the living room to close the front door to the residence to prevent the victim from reentering the house. RP 1926. As he did so, he purported that he saw the victim in the kitchen. RP 1926. He stated that although he had the presence of mind to choose the appropriate firearm, his thinking was “muddled” and “confused a bit.” RP 1926, 1945. He professed that he did not know the victim’s intentions, so he pulled the .357 magnum pistol out of its scabbard and cocked it. RP 1927. The defendant admitted on cross-examination that he did not know why he cocked his firearm. RP 1948. He maintained that he kept the weapon pointed upward when he was in the living room. RP 1948, 1952. He wanted his son to observe the weapon, and he told the victim to get out of the house. RP 1927. As the defendant testified:

I was letting him know that I had the gun. I said James, “Do you see this?” And it was just about that time that the gun jumped in my hand and went off.

RP 1927.

The defendant later suggested when he dropped the pistol down from its upward position, it could have been pointing at the victim. RP 1931. More so, the defendant alleged he did not intentionally point the pistol at the victim, pull the trigger, or look at the victim when the weapon

fired, even though the bullet entered the victim close to center of his eyes, less than ten inches away. RP 1572-79, 1931, 1938, 1952-53, 1972.

Rodney Strom, physical therapist, conducted a physical capacity examination on the defendant on March 19, 2013. Mr. Strom observed the defendant lift his right leg higher than average, and the defendant's right leg had less strength than his left leg. RP 1983-84, 1988. The defendant also had an increased risk for tripping and falling based upon his balance and gait pattern. RP 1985. The defendant had normal upper body strength. RP 1988. At the time of examination, the defendant weighed 163 pounds and he was five foot, ten inches tall. RP 1991.

VI. ARGUMENT

A. THE DEFENDANT'S ASSERTION THAT THE STATE IMPROPERLY COMMENTED ON HIS RIGHT TO REMAIN SILENT IS WITHOUT SUPPORT IN THE LAW OR FACT.

The defendant complains of two instances during trial in which he argues the State commented on his right to remain silent. The first instance involved unsolicited, and therefore, admissible statements by the defendant. The second claim is without merit because the defendant "opened the door" to the evidence.

1. The trial court determined the defendant's unsolicited comments to Deputy Vucinich were admissible.

Prior to trial, the court conducted a CrR 3.5 hearing and heard from various State witnesses. Deputy Beau Vucinich was one of the initial responders who had contact with the defendant. RP 24.¹⁵ He testified at the hearing that when the defendant exited the residence, he made an unsolicited statement: "I will cooperate. I just shot my son." RP 25. As the defendant and Mr. Compton were detained, the defendant kept repeating statements in reference to shooting his son. RP 26. At the hearing, the deputy testified he detained the defendant in his car and transported the defendant to the public safety building. RP 27. The deputy stated the defendant kept repeating: "I just killed my son." RP 27. The deputy was not conversing with the defendant when the defendant made the unsolicited statements. RP 27.

The trial court found the defendant's statements made to Deputy Vucinich and other deputies admissible at the time of trial as they were not the product of a custodial interrogation. CP 130 The court further found the statements were unsolicited and voluntary. CP 130-31.

At the time of trial, Deputy Vucinich testified that he responded to the defendant's residence after the 911 call. RP 1296-97. Deputies heard

¹⁵ The following report of proceedings were taken from the September 10, 2013 CrR 3.5 hearing.

yelling as they approached the defendant's residence. RP 1301. Deputies announced their presence, and the defendant and his neighbor exited the home. RP 1301. At trial, the following exchange took place between the deputy prosecutor and the Deputy Vucinich, as to what the defendant uttered when he exited the home.

Q. Did Mr. Cavazos say anything when he came out of the house?

A. He made comments "I will cooperate, I just shot my son."

RP 1302.

After the residence was cleared, the defendant was detained in a patrol car. RP 1304. The deputy smelled a strong odor of alcohol emanating from the defendant. RP 1305. The following interchange then took place between the deputy prosecutor and Deputy Vucinich.

Q. Did Mr. Cavazos make any other statements about what had happened that night?

A. He just kept repeating statements that he had killed his son.

RP 1304.

Only questions or actions reasonably likely to elicit an incriminating response from the defendant can be characterized as equivalent to interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Generally, a statement is not the

product of custodial interrogation when it is spontaneous and unsolicited, *State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985), *cert. denied*, 476 U.S. 1144 (1986), and *Miranda* does not “apply to voluntary, spontaneous statements made outside the context of custodial interrogation.” *State v. Sadler*, 147 Wn. App. 97, 131, 193 P.3d 1108 (2008), *review denied*, 176 Wn.2d 1032 (2013).

In the present case the defendant’s statements referenced above were not the product of *any* questioning by deputies and were properly admitted by the trial court. Accordingly, there was no violation of the defendant’s right to remain silent.

Because the defendant also rests his assertion on an ineffective assistance of defense counsel’s failure to object, he must show the trial court likely would have sustained an objection. *State v. Fortun–Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). No claim of ineffective assistance of counsel can rest on this claim because the trial court properly ruled the statements were admissible. An objection to Deputy Vucinich’s testimony would not have been sustained by the trial court. His ineffective assistance of counsel claim fails.

2. The defendant has not established that the trial court abused its discretion when it allowed the state, on redirect, to ask the detective if the defendant provided any information concerning the crime scene because the defense attorney “opened the door” during cross-examination to this line of questioning.

At the time of trial, the defense attorney cross-examined Detective Johnson who, in part, processed the crime scene. That exchange was as follows:

Q. Detective Johnston, who decides what items are of evidentiary value?

A. We typically work as a team. It's most likely the responsibility of the scene investigator or the lead investigator depending upon what information comes in. And so we work not only as the detectives, but we have forensic personnel that accompany us. And they have training in a number of evidence collection procedures and they assist us sometimes in making determinations on what should be and what shouldn't be collected, and how it should be processed and such.

Q. Who is the lead investigator in this case?

A. Detective Pannell is the lead investigator, however, he wasn't in the crime scene that particular day. I was there for a portion of it, and I unfortunately got called away and was not able to complete all the processing. Another detective came in and took over in my place.

Q. In deciding what items are of evidentiary value, what kind of information do you rely on?

A. Training, experience, and experience being having processed other homicide scenes and determining how things have appeared from those scenes are probably two of the main players. And then obviously depending upon what

information we can get from those people, there are witnesses as to what may have taken place.

Q. What witnesses did you have information from when you were deciding what items of evidence to collect?

A. Misty Beaumont had spoken with another detective, we had gotten part of the information from Mr. Compton, who had actually come to the scene to see if he could assist, were the main two individuals, I believe, that provided information.

Q. Did you have a description of what had actually occurred inside the house when you were making those decisions?

A. I had, I guess, what we would call a sketchy description of what took place.

Q. What kind of a sketchy description did you have?

[DEPUTY PROSECUTOR]: Objection, your Honor; hearsay.

THE COURT: Objection overruled, counsel. You may answer the question.

THE WITNESS: I received information from other detectives that an argument of some type had taken place within the residence, and that, of course, the deceased had been shot. Some of that information came from 911, when Mr. Cavazos called, so that information came from the other detectives that I had spoken with. And so that's pretty much the extent of my information as to what took place in the house.

BY [DEFENSE COUNSEL]:

Q. Did you have information at your disposal as to where the deceased, or the alleged shooter, were standing when this incident occurred?

A. I did not.

Q. Did you have information at your disposal as to the events that -- other than there was an argument, the events that led up immediately to the shooting?

A. No, I did not.

Q. In deciding what types of evidence to collect, would it have been helpful to know facts about what happened prior to the collection?

[DEPUTY PROSECUTOR]: Objection, your Honor; commenting on --

THE COURT: Well, objection overruled, counsel.

THE WITNESS: Well, certainly when we're processing any scene, the more information the better.

BY [DEFENSE COUNSEL]:

Q. I mean, it would allow you to collect evidence that either confirmed or denied, possibly, that depiction of events; correct?

A. Correct.

Q. And in this case, at least with regard to those topics that we discussed, the fight that occurred before the alleged shooting, those sort of things, you did not have that information at your disposal; correct?

A. Correct.

Q. And because you didn't have it, you weren't able to collect evidence that specifically could support or weaken a depiction of those events; correct?

A. I'm not sure if I exactly followed your question, counselor. But I would say to my knowledge, I think we collected the pertinent evidence in this instance. In reviewing the scene, and we were there for a number of hours, and, like I said, other detectives did follow up even after I left, I didn't find anything connected with the incident that I could determine to be part of the crime scene or it would have been collected.

Q. Now, you walked up the driveway to the house; correct?

A. Correct.

RP 1494-98.

At the end of cross-examination of the detective, the deputy prosecutor asked the trial court, outside the presence of the jury, whether the court would allow questioning on redirect regarding whether the defendant provided any information where individuals were located in the home prior to the shooting: More specifically, the deputy prosecutor remarked:

[I] believe Mr. Rasmussen's opened the door for me to ask the question would Mr. Cavazos tell you what happened during the shooting. Mr. Rasmussen said, "Well, shouldn't you have investigated and found out where everybody was standing and when the shot was fired? And wouldn't that have been a benefit if you had determined this before you did your investigation?" And the fact of it was, Mr. Cavazos asserted his right not to talk. And we did not know where everyone was allegedly standing according to his version until he testified during the trial. And right now Mr. Rasmussen has implied that the detectives weren't doing their job because they didn't determine from witnesses where people were standing, did not collect appropriate evidence based on where Mr. Cavazos said

everybody was standing. They couldn't know that because he asserted his rights.

RP 1509-11.

The defense attorney objected to the deputy prosecutor's request.

RP 1511-12.

Thereafter, the trial court ruled:

Well, it was very apparent from the examination that, it may be the defense's view at the time of closing to comment on the fact that the detective did not have all the information that subsequently came out in this case. The real -- that would not be the first time, by the way, that that occurs in the initial preservation of evidence at a crime scene.

This situation isn't all that unusual if, for instance, it was a case where the alleged perpetrator hadn't been apprehended. They're going to collect the evidence no matter what because collection of evidence is a time sensitive process. And it's going to happen whether there's a potential perpetrator or there's not a potential perpetrator. So the real issue is whether or not the -- leaving the jury with the implication that the officer had the opportunity to talk to an alleged perpetrator, or somebody had an opportunity to talk to him and they didn't do so, and/or they didn't use that information that they had from the alleged perpetrator in reviewing the crime scene. Leaving the jury with that implication is wrong. It is inaccurate because, number one. The defendant does not have to talk if he does not want to. And he has a right to remain silent. But by the same token, it is not fair to accuse the investigator, who has to work with the information that they have. That somehow or another their job -- they are not doing their job proper.

So trying to balance that both of those issues, it seemed to me that I would allow the state to ask directly to Detective Johnston, Detective Johnston, did you have any

information from Mr. Cavazos, and he can answer no. Period. Because that is true, he didn't. I will not permit, on re-cross, for you, Mr. Rasmussen, to go into that issue at all again. Because there is a fairness issue here. While the defendant has a right to remain silent, you do not have the right to have the jury be left with the impression that the officer didn't do his job. Okay? But why he's remaining silent, etc., about the fact and circumstances, is not relevant. I do not want Mr. Nagy going any further than what I just told you you could ask him. So you understand where -- on re-direct.

RP 1513-14.

On redirect examination of Detective Johnston, the deputy prosecutor asked the following questions:

Q. You were asked wouldn't it have been beneficial if you got all the information about what had happened from witnesses prior to gathering your evidence. When you collected the evidence, did you have any information from Mr. Cavazos, Mark Cavazos, Sr., about what had happened that morning in the kitchen or in the house?

A. I did not.

Q. About anywhere what had happened that day?

A. No.

RP 1523.

Standard of review.

The decision whether to admit or exclude evidence or limit the scope of redirect examination is within the trial court's discretion. *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). An abuse of discretion

occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. *Id.* at 473. "However, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights." *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claim of a denial of a constitutional right is reviewed de novo. *Id.* at 280.

The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington State Constitution§ states that "[n]o person shall be compelled in any criminal case to give evidence against himself." Both provisions guarantee a defendant the right to be free from self-incrimination, including the right to silence. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). A defendant has the right to remain silent both before and after *Miranda* warnings are given. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

Accordingly, when a person receives *Miranda* warnings, that person is implicitly guaranteed that his or her silence will not carry a penalty. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Thus, the general rule is that the prosecution may not use a criminal defendant's post-arrest silence to impeach him. *Greer v. Miller*, 483 U.S. 756, 762-63, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

Nevertheless, the defendant can “open the door” to questioning regarding his or her silence. The “open the door” policy, in general, was best expressed by our high court in *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969), where the Court stated:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Id. at 455.

More specifically, with regard to “opening the door” as to a defendant’s silence, in *United States v. Robinson*, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988), the defense lawyer argued in closing argument to the jury that the government had unfairly denied the defendant the opportunity to explain his actions. The trial court concluded that the defense had “opened the door” to comment on the defendant’s failure to testify at trial, and allowed the prosecutor to argue that the defendant had had opportunity to explain his actions through testifying at trial as well as

at earlier stages of the investigation. The Supreme Court affirmed this ruling, concluding that there is no violation of the privilege against self-incrimination when “the prosecutor’s reference ... is a fair response to a claim made by defendant or his counsel....” *Robinson*, 485 U.S. at 32.

In like manner, in *State v. Stackhouse*, 90 Wn. App. 344, 359, 957 P.2d 218 (1998), *review denied*, 136 Wn.2d 1002 (1998), the defendant initially waived his right to remain silent and confessed after his arrest. He later recanted and pleaded not guilty. The confession was admitted at trial. During cross examination of the detective, defense counsel brought into question the reliability and validity of the confession by asking the detective if she ever gave the defendant a chance to change his initial statement. In rebuttal, the State elicited testimony that the defendant had an opportunity to speak with the detective, but he chose not to do so.

On appeal, the defendant argued this was an improper comment on his right to remain silent. This Court held the state’s actions were permissible:

Because the central purpose of a criminal trial is to decide the factual question of guilt or innocence ‘it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.’

Id. at 359 (quoting *Robinson*, 485 U.S. at 33).

Similarly, in *State v. Kendrick*, 47 Wn. App. 620, 631, 736 P.2d 1079 (1987), *review denied*, 108 Wn.2d 1024 (1987), the defendant portrayed himself as cooperative with authorities. The defendant also introduced evidence, based on his attorney's advice, that he had not discussed the crime with the police or given a formal statement to the police. On cross-examination, the State sought to rebut Kendrick's assertion that he had cooperated with the police, and highlighted the fact that Kendrick had only provided a statement after he had the opportunity to see all the evidence against him. On appeal, the court held that the prosecutor was entitled to rebut the impression of cooperation given by Kendrick "by fully developing the extent of Kendrick's cooperation and by exploring the motive behind his actions" and the State did not improperly comment on the defendant's right to silence. *Id.*

Likewise, in *State v. Vargas*, 25 Wn. App. 809, 812, 610 P.2d 1 (1980), the defendant testified that he had cooperated fully with the police and given a statement. Police officers testified the defendant had refused to give a statement. The reviewing court concluded the State had not impermissibly commented on the defendant's assertion of his right to silence because "[h]aving brought his cooperation with the police into question, the defendant opened the door to a full development of that subject." *Id.*

Here, the defendant has not established the trial court abused its discretion by permitting the state to further inquire of the detective on redirect whether the defendant provided any information, at the crime scene, about the murder.

The defendant initially made several unsolicited remarks at the crime scene that he shot his son and he gave no further details. There was no further inquiry on direct examination of what the defendant said or didn't say at the crime scene because the defendant was not questioned at the scene and he requested a lawyer when brought to the public safety building. The impetus of the defense attorney's cross-examination of Detective Johnston was that law enforcement did not question all potential witnesses, including the defendant, as to what took place at the time of the shooting. This questioning left the impression the defendant would have provided useful information and the investigation by law enforcement was not complete. Allowing the State to question the detective whether the defendant provided any information regarding the initial investigation was a fair response to the defendant's questioning of the detective to complete the picture opened by the defendant.

The defendant's assertion that the questions were used as substantive guilt is without merit as no other reference to the defendant's silence was made by the deputy prosecutor at the time of trial, including

closing argument. More specifically, there was no reference at the time of trial that the defendant invoked his right to silence or that his silence should be used against him. The defendant's claim is without support and this court should affirm his conviction for second degree murder.

Notwithstanding the above analysis, the defendant is precluded from raising a claim that his right to silence was violated under the invited error doctrine. *See, State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005) (“The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally”), *rev'd on other grounds, Washington v. Recuenco*, 548 U.S. 212 (2006); *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006) (under invited error doctrine a party may not set up error at trial and then complain about the error on appeal).

In the event the court finds the trial court erred by allowing the State to ask two questions on redirect examination, the error was harmless.

In analyzing whether an improper comment on the defendant's right to silence was harmless, the standard of review depends on whether the comment was direct or indirect. *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). A direct comment on the defendant's right to silence occurs when the State or a witness specifically refers to the defendant's invocation of the constitutional right to silence, whereas an

indirect comment occurs when the State or a witness refers to conduct of the defendant that could be inferred as an invocation of the right to silence. *State v. Pottorff*, 138 Wn. App. 343, 347, 156 P.3d 955 (2007).

If the comment on the defendant's right to silence is direct, an appellate court must determine whether the error was harmless beyond a reasonable doubt. *Romero*, 113 Wn. App. at 790. Where the comment was indirect, an appellate court applies the lower nonconstitutional harmless error standard to determine whether there was any reasonable probability that the error affected the outcome of the case. *Pottorff*, 138 Wn. App. at 347.¹⁶ If the error was not harmless, the judgment must be reversed and remanded for a new trial. *Easter*, 130 Wn.2d at 242.

In the present case, the purpose of the deputy prosecutor's question was to counteract the imprint left by defense counsel's examination of the detective. Here, there was no direct testimony that the defendant invoked his right to silence for which the higher constitutional harmless error standard applies. Considering the evidentiary purpose, the comment was indirect and the nonconstitutional harmless error standard applies.

¹⁶ In assessing whether an error was harmless, an appellate must measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

There was testimony that the defendant disclosed several times at the scene that he shot his son and that he would cooperate. He testified at the time of trial that he was frightened of his son, but he did not intend to shoot him. The only question at the time of trial was whether the defendant's actions were justified or excused. A reasonable fact-finder would have reached the same result absent the error, if any; the evidence necessarily leads to a finding of guilt of second degree murder. This Court should affirm the conviction.

B. THIS COURT SHOULD REMAND FOR RESENTENCING WITHIN THE STANDARD RANGE BECAUSE THERE IS NO BASIS FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

At the time of sentencing, the trial court imposed an exceptional sentence downward at the request of the defendant. CP 349; RP 2219. The defendant's presumptive standard range sentence was 123 months to 220 months, plus the firearm enhancement of 60 months. CP 348; RP 2187. The State had requested a sentence totaling 230 months of incarceration, consisting of a mid-range sentence of 170 months, plus the 60-month firearm enhancement. RP 2186-87. The trial court sentenced the defendant to 24 months plus the 60-month firearm enhancement for a total sentence of 84 months. CP 349; RP 2219. The trial court entered findings of fact and conclusions of law justifying the imposition of the exceptional sentence. CP 379-82.

The trial court orally ruled on the defendant's request for an exceptional sentence downward stating:

[I]s there evidence before the court from which the court could conclude that James had a role to play in this incident, even though he ended up being the victim of the incident.

The answer to that question, I think, is clearly yes, he had a role to play in it. The evidence would indicate that they -- at least from Ms. Beaumont's point of view, an argument sort of ensued. It sounded to me, from her testimony, like it worked its way over a long period of time. Clearly James could have been affected by alcohol because there clearly was alcohol consumed, drugs possibly, and that over time that argument -- or the argument and the tension between the two was growing. I don't really see any reason, she does not really have any reason not to be truthful about that. She was not involved, she did not see, she did not say who actually did what to whom. She did see James after the spaghetti jar incident.

There was a lot of testimony about what that looked like in terms of what the forensic evidence would show, who might have thrown the spaghetti jar at whom. I think what's fair to say about Mr. Nesson's testimony, the forensic person who recreated the scene, is that either James or Mr. Cavazos, Sr. could have been the aggressor. The evidence -- there is evidence to support both sides of that. He did not make a determination. He could not make a determination, he was not there. He just simply indicated that there is evidence to support both sides of that story, and that's pretty much all he had to offer, although he explained, in great detail, what the scene looked like and what he examined Mr. Cavazos robe. He did some other things to indicate where some of the glass landed. It's fair to say that this was a very small area and it is fair to say that somebody threw a jar of spaghetti sauce, went all over, the glass went all over, and there was some sort of confrontation. As far as who started it, I think an argument

could be made for both sides. However, from my perspective as a judge, I can go through all the evidence piece by piece because I heard it twice, but the reality is what do I walk away with after I look at all this evidence in terms of what happened? Clearly James was under the influence. Mr. Cavazos had been drinking as well. Clearly there was some sort of argument. Something happened in the pantry. Without question something happened in the pantry. Then we have Mr. Cavazos going into the bedroom, getting a gun and coming back out with a gun. That's what we have. We don't have anybody who witnessed the confrontation between he and James. We don't have anybody who witnessed the actual shooting.

Once it occurs, in my mind there's no question that Mr. Cavazos readily admitted that he shot his son. He basically, although I excluded some testimony for various legal reasons that he made to the detective, he basically said the same thing to the detective. He said -- or the 911 call, that he had shot his son, that his son was dead. There's no question that he was hysterical, that he was beside himself for what happened. And that was true from the beginning through the contacts that he initially made prior, shortly after the event occurred. I don't think there was anyone who testified, any of the officers who testified that he was not distraught. That is something they all noticed and it was something consistent. Ms. Sumner testified about the phone call she had with him. He testified about the phone call and how he was afraid of James, that James was acting very strangely, he was threatening him, he was very scared of him, he didn't know what was going on. All of that is pretty consistent. That is consistent with what was being said at the time.

I do not want to go into a discussion of evidence rules, but I think courts and juries are more persuaded by what is said immediately after something than what, maybe, 12 months later somebody makes up or talks about in court. This first reaction to this horrible event is generally going to be the one that is going to be the most credible. Mr. Cavazos has never, never denied that he shot

his son. He did on that night. So we go into this case with a fair amount of credibility on his part that he shot his son. He was -- there is no question he was remorseful, he was distraught, and he told his wife -- or excuse me, his partner, that he was afraid, that he was scared of what was happening. Everything sounds like it got out of control, obviously. So all that have occurred right at the beginning and has consistently been maintained throughout the case. The jury heard that as well I think personally, and I have not talked to the jury, but I think the thing that probably resonated most with them, and resonates most with me, is that with all this concern about James and his violent behavior and what he was doing, or not doing or what he was threatening to do, when Mr. Cavazos walked into the bedroom and picked up a gun and came out with a gun, that changed everything. That introduced a deadly weapon into a situation where clearly James wasn't armed. There's no question he was armed with anything. And that I think resonates with the jury as it resonates with the court. It changes the whole perspective on what happened. Of course the ultimate happened here; that gun was fired and somebody died. So that needs to be taken into account as well.

With regard to Mr. Cavazos's person, I have had it for what, a year and a half. I have never had any issues with his behavior in the community. His presence in court when it is appropriate. I do not think it is a flight risk because his family is basically -- well, his immediately family is here, and I think extended family is not too far away. So at least prior to trial when you have the presumption of innocence as your standard, there was no reason that he could not be in the community. He has always been under bond, but it has not been all that high a bond. And I have never -- we have never had an issue with that. So he has support in the community, he has responsibilities in the community. He does not have any prior non-felony criminal history, he has no prior issues with the law to speak of, and I respect all of that. Obviously I think he would be -- he certainly could be a candidate for, well, you call it probation, we call it

community custody. Those are things that the court can consider in determining whether an exceptional sentence is appropriate.

At the end of the day, the question from my standpoint in looking at just the legal analysis: Is there evidence to show that James had a role to play in this? And the answer is yes, there clearly is. Just as Mr. Cavazos had a role to play in this tragedy. So I believe, counsel, that there is evidence supporting a defense request for an exceptional sentence from the standard range.

Now the question becomes what is appropriate as an exceptional sentence. The defense is asking me to consider no standard range sentence because of the 60 months of the deadly weapons enhancement as being appropriate. I will say that I have done that on occasion on other cases, but not on a homicide case. Because we have to remember that James paid the ultimate price for this. We have a homicide that should never have happened. Probably we would all agree it should never have happened but it did. It is appropriate that there be some punishment meted out to that, to Mr. Cavazos. I recognize he has lots of positive qualities and they should weigh on the scale, and I am going to weigh them, but they don't -- we still need to have punishment because somebody lost their life. So with regard to the standard range, counsel, I am going to sentence Mr. Cavazos to 24 months with whatever credit for time served.

RP 2213-19.

Standard of review.

An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005); *see also* RCW 9.94A.585(4).¹⁷

The first and second standards of review apply in the present case.

1. The trial court's reasons for imposing an exceptional sentence downward are clearly erroneous because there is insufficient evidence in the record to support the reasons for a downward departure of the presumptive standard sentencing range.

Generally, a trial court must impose a sentence within the standard range. *Law*, 154 Wn.2d at 94. The Sentencing Reform Act (SRA), chapter 9.94A RCW, permits departures from the standard range if the sentencing

¹⁷ RCW 9.94A.585(4) states: "To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient."

court “finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” *Id.* at 94 quoting former RCW 9.94A.120(2) (2000), *recodified as* RCW 9.94A.535.

A finding of fact supporting an exceptional sentence will be reversed solely when no substantial evidence supports it. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The fact-finder weighs the evidence and determines the credibility of witnesses. *Jeannotte*, 133 Wn.2d at 853.

The following trial court findings of fact that have been assigned error by the respondent.

Finding of fact 1: “The evidence heard by the court at trial, during pretrial hearings, and throughout the litigation of this case establishes by a preponderance of the evidence that the victim, James Cavazos, was to a significant degree, a willing participant, an aggressor, and a provoker of the incident.” CP 379.

This finding of fact is a conclusion of law. Furthermore, the trial court does not identify any fact, either in its oral opinion referenced above, or in the written finding of fact number one, which supports a conclusion of law that the victim was, to a significant degree, a willing participant, an

aggressor, or a provoker of the incident. Accordingly, no evidence supports finding of fact number one. It is clearly erroneous.

Finding of fact 2a. “The Defendant does not have any substantial misdemeanor criminal history.” CP 380.

Although supported by the record, the lack of criminal history (including misdemeanors) is not a basis to impose a downward departure as a matter of law. *State v. Fowler*, 145 Wn.2d 400, 405-06, 38 P.3d 335 (2002); *State v. Ha'mim*, 132 Wn.2d 834, 845, 940 P.2d 633 (1997) (lack of a misdemeanor history does not warrant an exceptional sentence downward).

The only exception to this general rule is that a lack of criminal history may be considered “in combination with the finding that the defendant was ‘induced’ to commit the crime or lacked a predisposition to commit the crime.” *Fowler*, 145 Wn.2d at 406–07 (quoting *Ha'mim*, 132 Wn.2d at 842-43). There was no evidence anyone induced the defendant to murder his child. Moreover, his lack of previous criminal history, including misdemeanors, is not a valid mitigating circumstance as a matter of law. This finding of fact is clearly erroneous.

Finding of fact 2b. “The Defendant is 55 years old, making his lack of any substantial misdemeanor criminal history more significant and also increasing the harshness of a standard range sentence.” CP 380.

The SRA requires factors that serve as a justification for an exceptional sentence to relate to the crime, the defendant’s culpability for the crime, or the past criminal record of the defendant. *Law*, 154 Wn.2d at 89. A mitigating factor “must relate to the crime and make it more, or less, egregious.” *Id.* at 98. The Supreme Court has viewed this limitation as required by the nondiscrimination mandate of the SRA, RCW 9.94A.340. This statute provides that sentences be imposed “without discrimination as to any element that does not relate to the crime or the previous record of the defendant.” *Id.*, at 97.

Although the defendant’s age is factually supported, it is not a substantial and compelling reason to justify an exceptional sentence downward of an adult offender. *Ha’ mim*, 132 Wn.2d at 847.¹⁸

Moreover, the trial court erred in independently assessing that a standard range sentence was too harsh (a conclusion of law rather than a finding of fact) as this conclusion is not a substantial and compelling reason justifying an exceptional sentence.

¹⁸ Although not applicable in the present case, “youth” can support a downward departure. *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

The SRA was designed to provide proportionate punishment, protect the public and provide rehabilitation, and the presumptive ranges established for each crime represent the *Legislature's judgment* as to how best to accommodate those interests. *State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987), held that the trial court's subjective determination that these ranges are unwise or that they do not advance these goals is not a reason justifying departure from the normal range....

State v. Allert, 117 Wn.2d 156, 169, 815 P.2d 752 (1991) (emphasis in the original). Accordingly, a presumptive sentence for a given offense is a matter for the legislature, and is not a determination left to the discretion of the sentencing judge, or reviewing court. *State v. Hortman*, 76 Wn. App. 454, 463, 886 P.2d 234 (1994).

Considering the defendant's age, although established by the evidence, as a basis for an exceptional sentence is clearly erroneous.

Additionally, the trial court's subjective determination that the standard sentence range is too harsh is clearly erroneous and is not a basis for imposing an exceptional sentence as a matter of law. *See, Allert*, 117 Wn.2d at 169.

Finding of fact 2c. "The Defendant's physical disabilities are well-established by the evidence presented throughout the trial and pretrial proceedings, and was the subject of expert testimony from the physical therapist, Rod Strom, who performed a physical capacity exam. The Defendant has significant injuries to his back

which cause regular pain and require regular medical treatment and pain management.” CP 380.

As stated above, a trial court’s subjective conclusion that the presumptive range does not adequately address the rehabilitative concerns or the personal characteristics of the offender is not a substantial and compelling reason justifying a departure. *Allert*, 117 Wn.2d at 169; *Pascal*, 108 Wn.2d at 137-38.

Moreover, the defendant’s physical disability does not distinguish his crime from other cases of second degree murder. The SRA applies “[e]qually to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.” RCW 9.94A.340; *Ha’mim*, 132 Wn.2d at 847, 940 P.2d 633 (1997). Here, the fact that the defendant may have had a physical disability at the time he committed the murder does not relate to his criminal record or the elements of second degree murder.

This finding of fact, although established by the evidence, is not a substantial and compelling reason to impose a downward departure and is clearly erroneous. The trial court’s reliance on this finding of fact was impermissible as a matter of law.

Finding of fact 2d. “The Defendant expressed remorse following the criminal act, as exhibited by his emotional state following the shooting during his phone call to 911 and the observations of the

witnesses that he was hysterical and distraught following the shooting.” CP 380.

Remorse is not a valid mitigating factor as a matter of law. *State v. McClarney*, 107 Wn. App. 256, 263, 26 P.3d 1013 (2001), *review denied*, 146 Wn.2d 1002 (2002) (using remorse as a mitigating factor would undermine the SRAs focus on meting out the appropriate punishment for a particular crime).

Even if substantial evidence supports the fact that the defendant expressed remorse after killing the victim, remorse is not a valid mitigating factor as a matter of law. This finding of fact is clearly erroneous and it was impermissible for the trial court to rely on it when imposing an exceptional sentence.

Finding of fact 2e. “The Defendant cooperated with law enforcement following the shooting by reporting the shooting to 911 and stating from the outset that he shot his son.”

Assistance and cooperation¹⁹ with law enforcement has been recognized as a mitigating factor. *State v. Nelson*, 108 Wn.2d 491, 499-501, 740 P.2d 835 (1987). In *Nelson*, the defendant and a co-defendant robbed two gas stations. *Id.* at 493. During both robberies, the

¹⁹ “Cooperation” is defined as “[a]n association of individuals who join together for a common benefit.” *Nelson v. Promising Future, Inc.*, 759 N.W.2d 551, 555 (2008) quoting BLACK’S LAW DICTIONARY 359 (8th ed. 2004).

co-defendant held a gun and demanded money, while Nelson held the bag into which the money was to be placed; the co-defendant also drove the getaway car. *Id.* at 493. After his arrest, Nelson confessed to both robberies and agreed to testify against his co-defendant. *Id.* at 493. Nelson expressed remorse for the crime and explained to the sentencing judge that the robberies were caused by his involvement with a troublesome group. *Id.* at 494.

The sentencing judge found that Nelson lacked the apparent predisposition to commit the crime and that his behavior had been induced by others. *Id.* at 494. The judge concluded that these factors justified an exceptional sentence under former RCW 9.94A.390(4) (now RCW 9.94A.535). *Id.* at 495. The Supreme Court upheld the trial court's decision. The Court explained that Nelson's lack of predisposition was demonstrated by the fact that the plan for the crime originated in his co-defendant, and that Nelson had a lack of prior contacts with police. *Id.* at 497–98. The Court also held that Nelson's cooperation with police and assistance in the codefendant's prosecution was properly considered to be a mitigating factor, even though not specifically listed under RCW 9.94A.390(1). *Id.* at 500–01.

Here, after killing his son, the defendant called his significant other who prompted him to call 911. He called 911 and made several unsolicited

statements that he shot his son. When law enforcement arrived at the crime scene, the defendant, although intoxicated, told deputies he would cooperate and that he shot his son. The defendant was not questioned at the scene. He was subsequently transported to the public safety building where he requested a lawyer. Thereafter, the defendant did not provide any other information or assistance to law enforcement or the prosecution.

The scant information made to law enforcement and to 911 shortly after the killing was not at the behest of law enforcement. The defendant provided no further details of how or under what circumstance the killing took place, nor did he offer any assistance. In addition, there was no “cooperation agreement” with the defendant for his assistance or for his help to resolve the crime. The lack of substantial evidence in the record negates finding of fact 2e. This finding is clearly erroneous.

Finding of fact 2f. “The Defendant is suitable for probationary treatment and/or supervision and he has the support of his friends and family in the community.” CP 380.

As stated earlier, a trial court’s subjective conclusion that the presumptive range does not adequately address rehabilitative concerns or the personal characteristics of the offender is not a substantial and compelling reason justifying a departure. *Allert*, 117 Wn.2d at 169; *Pascal*, 108 Wn.2d at 137-38. There is no factual or legal support for the trial court to impose “treatment and/or supervision” in lieu of a standard

range sentence for second degree murder and it is not a substantial and compelling reason to impose a downward departure in this case.

With regard to family support, in *Fowler, supra*, the trial court relied, in part, on the defendant's strong family support as justification for an exceptional sentence. *Fowler*, 145 Wn.2d, at 404. The Supreme Court rejected this justification based on the rule that mitigating factors "must relate to the crime and make it more, or less, egregious." *Id.* In so doing, the Court reaffirmed the rule that any reasons that are relied on for deviating from the standard range must "relate to the crime committed by the defendant and ... distinguish the crime from other crimes of the same statutory category." *Id.* at 411.

The trial court's statement that "the defendant is suitable for probationary treatment and/or supervision" as a basis for an exceptional sentence is clearly erroneous as a matter of law.²⁰ In addition, family support is not a valid mitigating factor nor can it be considered by the court for an exceptional sentence downward. This finding of fact is clearly erroneous.

²⁰ In addition to a standard range sentence, the legislature has prescribed that a defendant convicted of a serious violent offense be sentenced to 36 months of community custody in addition to the term of incarceration. RCW 9.94A.701(1)(b).

2. The trial court's legal reasons for imposing an exceptional sentence are not substantial and compelling reasons to justify a downward departure because the reasons are either barred from consideration as a matter of law or the circumstance is not supported by substantial evidence.

A court may impose a sentence above or below the guidelines if it finds “substantial and compelling reasons” for doing so, and those reasons support the purposes behind the SRA. *State v. Davis*, 146 Wn. App. 714, 719, 192 P.3d 29 (2008), *review denied*, 166 Wn.2d 1033 (2009). The SRA provides a nonexclusive list of aggravating and mitigating factors for the court to consider in RCW 9.94A.535(1) and (2). Any reasons cited by the court outside of the statutory factors must relate to the crime and make the crime more or less egregious. *Fowler*, 145 Wn.2d at 404. “An exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category.” *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).

Conclusion of law 2: “The Court concludes that the statutory mitigating factor in RCW 9.94A.535(1)(a) has been established by a preponderance of the evidence and that it justifies an exceptional sentence downward.” CP 381.

The SRA provides that certain “failed defenses” may constitute mitigating factors supporting an exceptional sentence below the standard range.

RCW 9.94A.535(1)(a) states:

1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

- (a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

These “failed defense” mitigating circumstances include self-defense. RCW 9.94A.535(1)(c); *Jeannotte*, 133 Wn.2d at 851.

However, in the present case, the trial court’s oral opinion and its written findings of fact do not detail what facts, if any, in the record support conclusion of law number two. A finding cannot be supported by speculation or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In addition, the findings must support the conclusions of law. *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994).

This unsupported conclusion of law is not a substantial and compelling reason for imposing an exceptional sentence downward as a matter of law because there are no findings of fact supporting the trial court’s legal conclusion that the victim, to a significant degree, was a willing participant, aggressor or provoker of the incident.

Conclusion of law 5: “The Court concludes that, based on the additional findings of fact above, the imposition of a standard range sentence would not further the purposes of the Sentencing Reform Act.” CP 381.

As referenced above, the trial court erred by entering findings of fact 2a, 2b, 2c, 2d, and 2f, as these finding of facts are prohibited from consideration for an exceptional sentence as a matter of law and finding of fact 2e is not supported by substantial evidence. This conclusion of law is clearly erroneous.

Conclusion of law 6: “A standard range sentence would not reduce the risk of reoffending by offenders in the community and is not necessary to protect the public, particularly given the Defendant’s lack of any misdemeanor criminal history, his age, his physical condition, his amenability to probationary treatment, and the support that he has from the community.” CP 381.

The trial court’s conclusion of law finding the defendant was at a low risk to reoffend is not a substantial and compelling reason for an exceptional sentence as a matter of law. *Fowler*, 145 Wn.2d at 409 (“protection of the public has already been considered by the legislature in computing the presumptive sentencing range.”); *State v. Estrella*, 115 Wn.2d 350, 353, 359–60, 798 P.2d 289 (1990) (rejecting rehabilitation potential and low risk to reoffend as mitigating circumstances). This conclusion of law is not substantial and compelling reason to impose an exceptional sentence as a matter of law.

Likewise, deterrence and protection of the public have already been considered by the legislature when it established the presumptive ranges for offenses. *Fowler*, 145 Wn.2d at 409; *Pascal*, 108 Wn.2d at 137. The lack of deterrence is not a mitigating factor as a matter of law and the trial court erred when it relied on this factor.

Conclusion of law 7: “A standard range sentence would not make frugal use of the state’s and local governments’ resources, particularly given the lack of any indication that the Defendant is likely to reoffend and the likelihood that he will require significant and ongoing medical treatment.” CP 381.

A conclusion of law suggesting the need to make frugal use of the State’s resources is not a substantial and compelling reason to impose an exceptional sentence as a matter of law. In *Pascal*, 108 Wn.2d at 137, the Supreme Court held the presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated and the need to make frugal use of the State’s resources is not a valid factor justifying a departure from the standard range. This “frugal use” of resources conclusion of law is not a substantial and compelling reason to impose an exceptional sentence as a matter of law.

Conclusion of law 8: “Given the existence of these mitigating factors, a standard range sentence would not promote respect for the law.” CP 381.

It is difficult to discern the meaning or application of this non-statutory conclusion of law. However, “[t]he lack of an aggravating circumstance does not create a mitigating circumstance.” *State v. Armstrong*, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986). Moreover, no finding of fact supports this conclusion of law. This conclusion of law is not a substantial and compelling reason to impose an exceptional sentence as a matter of law.

Conclusion of law 9: “The sentence imposed by the court of a total of seven (7) years imprisonment is sufficient given all of the mitigating circumstances and particular facts of the case to serve the purposes of the Sentencing Reform Act.” CP 382.

This conclusion of law is not supported by any finding of fact as the mitigating factors relied on by the sentencing court are either invalid as a matter of law or are not supported by substantial evidence.

C. THIS COURT SHOULD REMAND FOR RESENTENCING WITHIN THE STANDARD RANGE.

A reviewing court can affirm an exceptional sentence even though not every aggravating factor supporting the exceptional sentence is valid. “Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the

exceptional sentence rather than remanding for resentencing.” *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

However, remand for resentencing is necessary where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993).

This Court should remand for resentencing within the standard range because none of the mitigating factors relied on by the trial court are valid; they are either wholly unsupported by the record or are, as a matter of law, impermissible considerations by the trial court.

VII. CONCLUSION

This Court should affirm the judgment and remand the case to the trial court for resentencing within the standard range.

Dated this 27 day of January, 2016.

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

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

MARK CAVAZOS,

Appellant/Cross-Respondent

NO. 32872-4-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 27, 2016, I e-mailed a copy of the Brief of Respondent/Cross-Appellant in this matter, pursuant to the parties' agreement, to:

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