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Court of Appeals
Division III
State of Washington

No. 34230-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CRAIG BURTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

1. The State did not prove that Mr. Burton committed second degree assault. 1

a. The State did not prove Mr. Burton specifically intended to cause fear and apprehension through his firing of a gun harmlessly into some trees. 1

b. The State did not prove that Mr. Burton had the specific intent to cause fear and apprehension in Officer Jensen, whose presence Mr. Burton was unaware of. 5

2. Mr. Burton was deprived of his right to effective assistance of counsel through his counsel's failure to raise a diminished capacity defense. 6

3. As applied to Mr. Burton, the firearm enhancements deprived Mr. Burton of the equal protection of the laws. 8

4. The trial court erred in concluding that it lacked authority to grant an exceptional sentence downward on the base sentencing range. 10

5. The trial court erred in concluding that it lacked authority to grant an exceptional sentence by modifying the length of the firearm enhancements. 12

6. Sentencing Mr. Burton to a decade of imprisonment for a failed suicide attempt in which he intended to hurt no one and no one besides himself was actually hurt is unconstitutionally cruel. . 17

B. CONCLUSION 19

TABLE OF AUTHORITIES

United States Supreme Court Cases

Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) 18

Dean v. United States, __ U.S. __, 137 S. Ct. 1170, __ L. Ed. 2d (2017) 15, 16

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) 4

Washington Supreme Court Cases

Morris v. Blaker, 118 Wn.2d 133, 821 P.2d 482 (1992) 9

State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999) 13

State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015) 13

State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009) 6

State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980) 17

State v. Houston-Sconiers, __Wn.2d __, 391 P.3d 409 (2017). 10, 13, 14, 15

State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010) 13

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) 12, 16

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 6

Washington Court of Appeals Cases

Crosswhite v. Washington State Dep't of Soc. & Health Servs., 197 Wn. App. 539, 389 P.3d 731 (2017) 7

State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011) 5, 6

State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997) 2

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 11

State v. Mohamed, 187 Wn. App. 630, 350 P.3d 671 (2015)..... 13

State v. Pedro, 148 Wn. App. 932, 201 P.3d 398 (2009)..... 9

State v. Pittman, 185 Wn. App. 614, 623, 341 P.3d 1024 (2015) 7

Statutes

RCW 9.41.230(1)..... 2

RCW 9.94A.533..... 15

RCW 9.94A.533(3)(e) 12, 16

RCW 9.94A.533(3)(f)..... 9

RCW 9.94A.535..... 10

RCW 9.94A.535(1)(e) 10, 11

RCW 9A.08.010(1)..... 2

RCW 9A.08.010(2)..... 2

Rules

GR 14.1..... 7

A. ARGUMENT

1. The State did not prove that Mr. Burton committed second degree assault.

a. The State did not prove Mr. Burton specifically intended to cause fear and apprehension through his firing of a gun harmlessly into some trees.

Mr. Burton was convicted of three counts of second degree assault based on the trial court's determination that Mr. Burton intended to cause fear and apprehension of imminent bodily injury. CP 143 (Conclusions of Law (CL) 29-31). Because the court's findings and the evidence do not support this determination, all three convictions should be reversed and dismissed. Br. of App. at 19-21.

As argued, the direct evidence did not support the trial court's determination that Mr. Burton intended to cause fear and apprehension of imminent harm. Br. of App. at 20. Mr. Burton wanted an encounter in which the police would kill him, but result in no harm to others. As the trial court recounted, Mr. Burton "did not want the police to have any reason to shoot neighbors or, for that matter, even the dog in his home." CP 136 (Finding of Fact (FF) 161). Consistent with this goal, Mr. Burton did not shoot at law enforcement and never pointed his weapon at law enforcement. CP 141 (CL 20). Rather, to cause law enforcement to react per their training, Mr. Burton harmlessly discharged his weapon into the

air at some trees away from law enforcement. CP 130, 136-37, 139 (FF 101, 103-04, 157, 162, 169-70; CL 9).

The State appears to agree that there was no direct evidence proving that Mr. Burton intended to cause fear and apprehension of imminent bodily injury. See Br. of Resp't at 15-16. Rather, the State argues the circumstantial evidence was sufficient for the trial court to infer this. Br. of Resp't at 15-17. The State's analysis ignores the trial court's findings of fact and conclusions of law, which determined that Mr. Burton did not want anyone besides himself to get hurt.

The trial court's determination rests on the proposition that when one discharges a firearm, it is generally foreseeable that this will cause apprehension and fear in others nearby, including highly trained law enforcement. CP 144 (CL 31). But knowledge does not prove intent. RCW 9A.08.010(1), (2). Our Legislature has provided that except where injury results, the willful discharge of a firearm is not inevitably an assault, even where the discharge might endanger others. RCW 9.41.230(1). Similarly, the mere display of a gun is insufficient to infer the requisite intent. State v. Callahan, 87 Wn. App. 925, 930 n.1, 943 P.2d 676 (1997).

The State recasts Mr. Burton's argument as being that the State was required to prove that he pointed his weapon directly at the officers. Br. of Resp't at 16-17. Mr. Burton is not arguing this is the only way to

infer intent. The argument is that there must be sufficient circumstances to infer intent. Such circumstances were not present in this case.

The State contends Mr. Burton's position is "disingenuous." Br. of Resp't at 16. The State argues that a person who plans to commit "suicide by cop" must inevitably intend to cause fear of bodily injury in law enforcement. Br. of Resp't at 16. This does not follow.

Mr. Burton testified he had training in the military and knowledge of police procedures learned from his father, who was in law enforcement. CP 134 (FF 138-140). This evidence was uncontroverted and the trial court found Mr. Burton's testimony on these topics credible. See CP 141 (CL 21) ("it strikes the Court as highly unlikely that the Defendant would have missed his mark 11 separate times, given his level of knowledge and expertise with multiple firearms."). Thus, Mr. Burton's testimony (which the trial court accepted) shows that a person can fire a weapon without intending to cause fear of bodily harm in nearby law enforcement.

The State equates proof that a defendant presented a "credible threat" to law enforcement giving rise to the use deadly force with proof the defendant intended to cause fear and apprehension of imminent bodily injury. Br. of Resp't at 16. Again, this does not follow. A person may present a credible threat to law enforcement even if there was no intent to frighten or harm law enforcement. For example, police may use deadly

force without violating the Fourth Amendment when it is "objectively reasonable" under the circumstances. Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Thus, justified police shootings may occur in situations where there appears to be a credible threat, but facts not known at the time prove otherwise.[1] Accordingly, that Mr. Burton may have reasonably appeared to be a credible threat does not prove that he intended to scare law enforcement into shooting him.

The trial court's findings and conclusions show that the trial court confused knowledge with intent. And the evidence did not support a conclusion that Mr. Burton had the specific intent to cause fear and apprehension of bodily harm in others when he discharged his firearm. All three convictions should be reversed.

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[1] This helps to (partly) explain tragic police shootings that appear indefensible in retrospect. See, e.g., https://en.wikipedia.org/wiki/Shooting_of_John_Crawford_III (man with BB-gun shot and killed in Wal-Mart); https://en.wikipedia.org/wiki/Shooting_of_Tamir_Rice (boy with airsoft pistol shot in park while playing).

b. The State did not prove that Mr. Burton had the specific intent to cause fear and apprehension in Officer Jensen, whose presence Mr. Burton was unaware of.

The trial court did not find that Mr. Burton was aware of Officer Jensen's presence at the south end of the alley when he discharged his weapon. Moreover, the record establishes that the evidence did not prove that Mr. Burton was aware of Officer Jensen's presence at the south end of the alley before he discharged his weapon. Br. of App. at 22-24. Still, the State fails to concede this point. In support of its contrary position, the State cites to testimony from Mr. Burton indicating that he was aware of law enforcement at both ends of the alley. Br. of Resp't at 19 (citing RP 679). This misreads (or misrepresents) the record. The record shows that Mr. Burton learned of the officers to the south *after* he had discharged his weapon. Br. of App. at 22.

Because Mr. Burton was not aware of Officer Jensen's presence to the south and his actions were directed at law enforcement to the north, the trial court erred in concluding that Mr. Burton specifically intended to assault Officer Jensen. State v. Abuan, 161 Wn. App. 135, 159, 257 P.3d 1 (2011); Br. of App. at 23-24.

The State argues a transferred intent analysis is appropriate, citing our Supreme Court's decision in State v. Elmi, 166 Wn.2d 209, 207 P.3d

439 (2009). Elmi, however, involved first degree assault. Elmi, 166 Wn.2d at 211. It also involved victims who were in the same general area together, a house. Id. In contrast, this case involves second degree assault. And Officer Jensen was not in the general area that Mr. Burton directed his actions toward. Thus, as this Court concluded in Abuan, a transferred intent analysis is inappropriate for second degree assault. Abuan, 161 Wn. App. at 158-59 (reasoning that transferred intent analysis did not apply to second degree assault with a deadly weapon; shots also hit the garage and not the house where charged victim was located).

The State fails to discuss Abuan, which is on point. Following Abuan, this Court should reverse the third count of second degree assault.

2. Mr. Burton was deprived of his right to effective assistance of counsel through his counsel's failure to raise a diminished capacity defense.

The failure by defense counsel to present a diminished capacity defense can constitute ineffective assistance of counsel. See State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). As explained, the evidence at trial was sufficient to raise a diminished capacity defense. Br. of App. at 25-27. Counsel was deficient in not raising this defense because Mr. Burton's mental state was the key issue and there was no reasonably valid reason for not doing so. Br. of App. at 28. This performance was prejudicial because there is a reasonable probability that the trial court

would have concluded that Mr. Burton lacked the requisite intent to commit the charged assaults. Br. of App. at 29-30. Thus, Mr. Burton was deprived of his right to effective assistance of counsel.

In response, the State appears to argue that the evidence was insufficient to raise a diminished capacity defense. Br. of Resp't at 23. But Dr. Layton testified about Mr. Burton's mental state and the untoward effects paroxetine (Paxil) had on it.[2] Br. of App. at 26-27. Mr. Burton also testified about how these drugs affected him. Br. of App. at 27. This evidence showed that Mr. Burton's mental state negated the specific intent needed to commit assault.

In support of its contrary argument, the State cites to State v. Pittman, 185 Wn. App. 614, 623, 341 P.3d 1024 (2015). The State fails to disclose that the relevant portion on ineffective assistance of counsel was unpublished. While recent unpublished decisions may be cited to under GR 14.1, the State has failed to disclose its status or that unpublished opinions are nonprecedential. Accordingly, it should be disregarded. Crosswhite v. Washington State Dep't of Soc. & Health Servs., 197 Wn. App. 539, 544, 389 P.3d 731 (2017) ("The party must point out that the

[2] The State mistakenly represents that Mr. Burton's suicidal thoughts stopped after discontinuation of the Adderall XR. Br. of Resp't at 23. These thoughts stopped after discontinuation of the paroxetine. RP 646-47 ("he was taken off of the Paroxetine and the suicidal thoughts resolved.").

decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. The party should also cite GR 14.1.”).

The State argues there was no prejudice because the trial court considered Mr. Burton’s mental state. Br. of Resp’t at 28. The trial court, however, used jury instructions in reaching its decision. RP 617, 825-28; CP 142-43 (CL 26-27). If there had been such an instruction, the trier-of-fact could have reasonably evaluated the evidence in a different manner and concluded Mr. Burton did not possess the requisite intent. Mr. Burton establishes a reasonable probability of a different result.

Because Mr. Burton was deprived of his right to effective assistance of counsel, the convictions should be reversed.

3. As applied to Mr. Burton, the firearm enhancements deprived Mr. Burton of the equal protection of the laws.

As the trial court found, when Mr. Burton harmlessly discharged his firearm, he did not intend to harm anyone but himself. CP 141-42 (CL 20, 24). His convictions for second degree assault rest on a determination that he intended to create reasonable apprehension and imminent fear of bodily injury through the discharge of his firearm. CP 143 (CL 29). Because Mr. Burton was armed with a firearm in these “assaults,” his sentence was enhanced by nine years.

The Legislature has exempted sentences for drive-by shootings from being enhanced under the firearm enhancement statute. RCW 9.94A.533(3)(f). As argued, there is no rational basis for not applying an exemption to Mr. Burton's case. Br. of App. at 33-35. Thus, as applied in this case, Mr. Burton's enhanced sentences are unconstitutional.

In arguing otherwise, the State appears to conduct a double jeopardy analysis. Br. of Resp't at 33-35. This is not the analysis. The question is: "Does some rational basis exist for reasonably distinguishing between those within the class and those outside the class?" Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992) (quotation omitted). Mr. Burton is arguing that there is no plausible justification for exempting the generally dangerous act of recklessly discharged a firearm from a (usually moving) vehicle and not the less dangerous act of harmlessly discharging a firearm with intent to create fear and apprehension.

The State argues this Court rejected an identical argument in State v. Pedro, 148 Wn. App. 932, 946-47, 201 P.3d 398 (2009). Br. of Resp't at 35. Pedro, however, did not involve an as applied challenge. Pedro, 148 Wn. App. at 945-48. And the facts of Pedro are materially distinct from this case. In Pedro, the defendant committed first degree assault by firing multiple shots at a fleeing victim. Id. at 940-41. This case involves second

degree assault where the defendant discharged his firearm in a manner so that no one would be hurt.

There is no rational reason for applying an exemption to a person who recklessly discharges a firearm from a vehicle (likely endangering countless people), but not a person who discharges a firearm with only the purpose to frighten and not harm anyone but himself. Under the specific facts of this case, the firearm enhancements should be vacated as violating equal protection.

4. The trial court erred in concluding that it lacked authority to grant an exceptional sentence downward on the base sentencing range.

Sentencing courts are authorized to impose a sentence below the standard range if there is (1) a mitigating circumstance and (2) substantial and compelling reasons. RCW 9.94A.535. Here, there was sufficient evidence for the trial court to find these requirements met. Br. of App. at 36-37. Specifically, there was evidence to support the mitigator set forth at RCW 9.94A.535(1)(e). Br. of App. at 36-37. Thus, the trial court should have entertained Mr. Burton's request to grant an exceptional sentence downward by making his base range sentence zero days.[3]

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[3] Similar relief was granted to defendants by the sentencing court in Houston-Sconiers. There, the trial court imposed an exceptional sentence downward to zero months on the substantive crimes, leaving only the time triggered by the firearm enhancements. State v. Houston-Sconiers, __Wn.2d __, 391 P.3d 409, 416, 420 (2017). This was despite a belief by the trial court and the

The trial court, however, erroneously ruled that it lacked authority to impose an exceptional sentence downward as to Mr. Burton's base range sentence. RP 903-04. Inexplicably, the court did not analyze whether the evidence satisfied RCW 9.94A.535(1)(e). Rather, the Court appears to have confused Mr. Burton's argument with an argument that the purposes of the Sentencing Reform Act (SRA) are mitigating circumstances which were satisfied. RP 903-04. This misunderstanding constitutes an abuse of discretion requiring remand.

The State does not truly defend the trial court's ruling. Br. of Resp't at 37. The State appears to concede that the trial court rejected Mr. Burton's argument because it misunderstood his argument as being that "the factors relied on by defense counsel were inherent within a standard range sentence." Br. of Resp't at 37.

Instead, the State improperly invites this Court to rule that the evidence was inadequate to satisfy RCW 9.94A.535(1)(e). Br. of Resp't at 39-40. The issue is for the trial court, not the appellate court. See State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) ("While no defendant is entitled to an exceptional sentence below the standard range,

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prosecutor that this sentence was illegal. Id. Contrary to this belief, our Supreme Court held it was lawful because the defendants were juveniles and youthfulness is a mitigating circumstance. Id. at 420.

every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered."). A trial court's failure to exercise discretion is an abuse of discretion, requiring reversal and remand. State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015).

The trial court abused its discretion in concluding that it lacked authority to grant an exceptional sentence downward on Mr. Burton's base range. This Court should reverse and remand.

5. The trial court erred in concluding that it lacked authority to grant an exceptional sentence by modifying the length of the firearm enhancements.

The trial court further erred that when it concluded that it did not have authority under the exceptional sentence statutes to modify the length of firearm enhancements. Br. of App. at 41-43. The law currently restricts a sentencing court's authority as to firearm enhancements. RCW 9.94A.533(3)(e). This statute, however, does not state that the length of time imposed for a firearm enhancement cannot be modified under the exceptional sentence provisions of RCW 9.94A.535. Because the Legislature has not specifically forbidden this and other statutes show that the Legislature knows how to do this, trial courts may modify the length of firearm enhancements as part of an exceptional sentence. Br. of App. at 41-42; see State v. Conover, 183 Wn.2d 706, 714-15, 355 P.3d 1093

(2015); State v. Mohamed, 187 Wn. App. 630, 641-45, 350 P.3d 671 (2015).

The State argues that Mr. Burton's argument is foreclosed by State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999). Br. of Resp't at 43-44. What Brown held was that trial courts lack discretion to run firearm sentencing enhancements *concurrently* as part of an exceptional sentence. Brown, 139 Wn.2d at 29. Mr. Burton was not asking the trial court to run the enhancements concurrently. He was asking the trial court to modify the length of each enhancement downward to two months each and to run them consecutively. CP 159-63; RP 848-51. Thus, Brown is not on point and is not controlling.[4]

Justice Madsen's recent concurring opinion in Houston-Sconiers supports Mr. Burton's analysis. In Houston-Sconiers, two youths robbed mainly other youths of candy on Halloween while armed with a firearm and were sentenced to decades of imprisonment due to "mandatory" firearm sentence enhancements. State v. Houston-Sconiers, __ Wn.2d __ 391 P.3d 409, 416 (2017). Our Supreme Court reversed, holding that for juvenile defendants sentenced in adult court, constitutional due process

[4] The same is true for State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010), a case the State cites in a footnote. Br. of Resp't at 44 n.22. Kelley involved an argument about double jeopardy, not a trial court's authority to modify an enhanced sentence under the exceptional sentence provisions. Kelley, 168 Wn.2d at 74. It is inapposite.

requires that sentencing courts have complete discretion to consider mitigating circumstances and may impose exceptional sentences downward even when there are firearm enhancements. Id. Justice Madsen agreed this was the right result, but reasoned this was because "the discretion vested in sentencing courts under the Sentencing Reform Act of 1981 (SRA) includes the discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." Houston-Sconiers, 391 P.3d at 426 (Madsen, J., concurring). Her analysis would apply to adult defendants.

In reaching this conclusion, Justice Madsen used a similar analysis to Mr. Burton's on how the relevant statutes should be read. Because the Legislature did not specifically forbid exceptional sentences downward for firearm enhancements, but forbade exceptional sentences in other circumstances, exceptional sentences for firearm enhancements are proper:

> Although the SRA explicitly gives sentencing courts the discretion to impose exceptional sentences, it also sets forth certain crimes with mandatory minimum sentences from which sentencing courts have no discretion to depart. RCW 9.94A.540. The legislature explicitly stated that such mandatory minimums "shall not be varied or modified under RCW 9.94A.535," the exceptional sentence provision. RCW 9.94A.540(1). The enumerated crimes for which courts do not have the power to impose exceptional sentences do not include any of the crimes or enhancements at issue in this case. *See* RCW 9.94A.540. And where a statute specifies the things on which it operates, we infer the legislature intended all omissions. *Queets Band of*

> *Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984). Therefore, RCW 9.94A.540 did not apply in this case to deprive the sentencing court of its ability to consider an exceptional sentence.

Id. at 427. The language of RCW 9.94A.533 also did not mandate a contrary result because it "does not exclude the enhanced sentences from modification under the exceptional sentence provision." Id.

Mr. Burton's argument is supported by the analysis used by the United States Supreme Court recently in Dean v. United States, __ U.S. __, 137 S. Ct. 1170, __ L. Ed. 2d (2017). There, the defendant was sentenced to a mandatory minimum of 30 years because he used a firearm in committing criminal offenses. Dean, 137 S. Ct. at 1174-75. Statute provided that this sentence run consecutive to sentences for the remaining offenses. Id. Due to this 30-year minimum, the defendant asked that he be sentenced to one day on the other offenses. Id. at 1175. The trial court reasoned it lacked discretion to do so by statute. Id. The Supreme Court reversed. Id. at 1178.

The Supreme Court reasoned that the provisions at issue did not expressly forbid the trial court from doing what the defendant asked. Id. at 1176-77. The court refused to read in an additional limitation into the relevant statute because Congress had been silent on the matter. Id. at 1177. The court reasoned that this would be inappropriate because other

provisions showed that Congress knew how to write such a restriction because Congress had done so in different provisions. Id. ("[d]rawing meaning from silence is particularly inappropriate where Congress has shown that it knows how to direct sentencing practices in express terms.") (internal quotation omitted).

As in Dean, it is improper to read in additional prohibitions into RCW 9.94A.533(3)(e). The Legislature was silent as to whether the length of firearm enhancements could be modified as part of an exceptional sentence. RCW 9.94A.533(3)(e). As RCW 9.94.540(1) shows, the Legislature knows how to prohibit this, but did not. Accordingly, RCW 9.94A.533(3)(e) should not be read to deprive sentencing courts of their discretion to impose exceptional sentences when there are firearm enhancements.

The trial court erred in concluding that it lacked legal authority to consider Mr. Burton's request to modify the length of the firearm enhancements as part of an exceptional sentence. This Court should reverse and remand for resentencing. O'Dell, 183 Wn.2d at 697.

6. Sentencing Mr. Burton to a decade of imprisonment for a failed suicide attempt in which he intended to hurt no one and no one besides himself was actually hurt is unconstitutionally cruel.

Excessive punishment is unconstitutionally cruel under article I, § 14 of the Washington Constitution.

In this case, Mr. Burton felt suicidal because of an untoward side effect of a prescribed medication. Wanting the police to kill him, Mr. Burton harmlessly discharged a firearm. Intending to hurt no one, he made efforts to ensure that no else but himself would be hurt (such as never pointing his weapon at law enforcement and unloading it before stepping out to be shot), and was the only person hurt due to his actions. Based on these facts, the State of Washington has imprisoned a veteran without a felony record for a decade. This is excessive punishment which violates article I, § 14.

As argued, the Fain[5] factors establish that Mr. Burton's sentence is disproportionate. Br. of App. at 44-45, 47-48. Moreover, the four legitimate penological justifications (retribution, deterrence, incapacitation, and rehabilitation) indicate that the length of Mr. Burton's sentence is wholly unjustified. Br. of App. at 45-47.

[5] State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980).

The constitutional inquiry is fact specific rather than abstract. Atkins v. Virginia, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). The State does not abide by this rule. Rather, the State makes the abstract argument that it is not unconstitutionally excessive to punish a person with ten years' imprisonment for committing three second degree assaults while armed with a firearm. See Br. of Resp't at 46-48. This abstract analysis fails to grapple the specific facts of Mr. Burton's case.

The State fails to respond to Mr. Burton's argument that no legitimate penological justification supports his sentence. The State does not argue that retribution justifies imprisoning Mr. Burton for a decade. The State does not argue that Mr. Burton's sentence will deter others from attempting to commit "suicide by cop." The State does not argue that Mr. Burton is a threat to the public. The State does not argue that Mr. Burton needs rehabilitation. The State's lack of argument proves Mr. Burton's case for him.

Ten years is unnecessary and is too much. The year of approximately 2025 is too long for Mr. Burton and his children to wait. It wastes state resources and needlessly deprives the community of a productive member of society. Article I, § 14 is a safety valve that prevents excessive punishment when prosecutors and statutes go awry in circumstances such as these. So that Mr. Burton can to return to his family

and the community in a reasonable time, this Court should hold that the sentence is unconstitutionally excessive and remand for imposition of a proportionate, just, and constitutional sentence.

B. CONCLUSION

Mr. Burton was wrongfully convicted of three counts of second degree assault. And the sentence imposed upon him is wholly unjustifiable. Mr. Burton asks that this Court do justice and grant him his requested relief.

DATED this 10th day of May, 2017.

Respectfully submitted,

/s Richard W. Lechich

Attorney for Appellant
WSBA#43269
Washington Appellate Project
1511 Third Ave, Ste 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

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DIVISION THREE

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	)	
RESPONDENT,	)	
	)	
v.	)	NO. 34230-1-III
	)	
CRAIG BURTON,	)	
	)	
APPELLANT.	)	

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

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