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Court of Appeals
Division III
State of Washington

34230-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CRAIG S. BURTON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. In violation [of] the guarantees of due process under the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, the evidence and findings do not support the conclusion that Mr. Burton committed second degree assault.

2. To the extent it is a finding of fact and if it can be read to support a conclusion that Mr. Burton intended to specifically cause fear and apprehension of bodily harm, the trial court erred in entering Conclusion of Law (CL) 11. CP 140.

3. To the extent it is a finding of fact, the trial court erred in entering CL 29. CP 143.

4. To the extent it is a finding of fact, the trial court erred in entering CL 30. CP 143.

5. To the extent it is a finding of fact, the trial court erred in entering CL 31. CP 144.

6. In violation of the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution, Mr. Burton was deprived of his right to effective assistance of counsel.

7. In violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and the prohibition against special privileges and immunities set forth in article I, § 12 of the

Washington Constitution, the court erred in imposing three firearm enhancements.

8. Erroneously believing it lacked discretion, the trial court erred in denying Mr. Burton's request to grant an exceptional sentence down on his base sentence range of 15 to 20 months.

9. Erroneously believing it lacked discretion, the trial court erred in denying Mr. Burton's request to reduce the length of the firearm enhancements under the exceptional sentence provisions.

10. In violation of the prohibition against cruel punishment under the Eight Amendment to the United States Constitution and article I, § 14 of the Washington Constitution, the trial court erred in sentencing Mr. Burton to 10 years of imprisonment.

II. ISSUES PRESENTED

1. Admitting the truth of the State's evidence and drawing all reasonable inferences from that evidence, was there sufficient evidence presented from which the trial court could find all of the essential elements of second degree assault beyond a reasonable doubt?

2. If no expert testimony was presented linking Mr. Burton's suicidal thoughts at the time of the incident to his ability to form the intent necessary to commit second degree assault, was his lawyer ineffective for

not specifically identifying "diminished capacity" as a defense at the time of trial?

3. Has Mr. Burton established that he was prejudiced at the time of trial, under an ineffective assistance of counsel argument, if his lawyer was allowed to present his theory of the case through expert testimony regarding Mr. Burton's suicidal thoughts and the adverse effects of his prescribed medication on his ability to form intent at the time of the incident?

4. Has Mr. Burton established the requirement for an equal protection claim analysis that he is similarly situated to those offenders convicted of drive-by shooting, if his case differs both factually and legally from those offenders convicted of drive-by shooting?

5. If Mr. Burton has established that he is similarly situated to those offenders convicted of drive-by shooting, was his right to equal protection violated, as applied to him, by the imposition of firearm sentencing enhancements to his second degree assault convictions, when compared to offenders convicted of drive-by shooting, if the disparity is rationally related to a legislative purpose?

6. Did the trial court abuse its discretion when it denied Mr. Burton's request for a downward departure on the sentence for his

second degree assault convictions, if there was no evidence to support the request?

7. Did the trial court err when it concluded it had no discretion to impose a downward departure on the mandatory firearm enhancements?

8. Is a firearm enhancement imposed under RCW 9.94A.533 cruel and unusual punishment under article I, section 14 of the Washington Constitution, which proscribes the infliction of "cruel punishment," and the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments," U.S. Const. amend. VIII?

III. STATEMENT OF THE CASE

The defendant/appellant, Craig Burton, was charged by information in the Spokane County Superior Court with three counts of first degree assault, each with a corresponding firearm enhancement. CP 1-2. Spokane Police Officers Adam Potter, Christopher Benesch, and Jake Jensen were named as the victims of the crimes. CP 1-2.

The case proceeded to a bench trial, and Mr. Burton was convicted of three inferior counts of second degree assault. CP 110-147. The court also made a finding that Mr. Burton was armed with a firearm during the commission of each offense. CP 139-40.

a. Substantive facts.

On May 6, 2015, Rebecca Libby lived with Mr. Burton at 5527 North Ash in Spokane. RP 94-95. Ms. Libby was involved in a romantic relationship with Mr. Burton. RP 97-98. After work, Ms. Libby arrived at her residence around approximately 6:30 to 7:00 p.m. RP 103. Mr. Burton was on the couch drinking beer. RP 103-04. Mr. Burton was not intoxicated, but appeared "shut down." RP 104. After a short discussion, Ms. Libby told Mr. Burton she was going to stay with her mom for several days.[1]

After Ms. Libby arrived at her mother's house around 8:00 p.m., she was concerned Mr. Burton may attempt to commit suicide or hurt himself. RP 108-09, 133-34.[2] Thereafter, Ms. Libby and her mother returned to Ms. Libby's residence, in an attempt to get Mr. Burton to a hospital. RP 113-14. Upon their arrival, Mr. Burton was seated on the back porch steps. RP 115, 136. A short time later, Mr. Burton told Ms. Libby several

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[1] Mr. Burton discussed his desire to speak with his ex-wife, Nikki Shuskey, a/k/a Burton, which upset Ms. Libby. RP 105.

[2] Mr. Burton later told Ms. Libby's mother, Karen Christopher, that his divorce with Ms. Burton was in the process of being finalized and he was going to lose his house, probably his car, and his children because he could not afford the child support. RP 138. Mr. Burton asked at least six times for Ms. Christopher to call the police. RP 139, 145.

times to call "the cops." RP 117. At this point, Mr. Burton appeared intoxicated, but not to where he could not function. RP 118. He had a gun in his hand, and Ms. Libby was concerned enough for his welfare that she took a full clip of bullets, placing it into her purse.[3] RP 118-19, 141. Likewise, Ms. Christopher asked Mr. Burton for the pistol, but Mr. Burton remarked "no." RP 141.

Eventually, Mr. Burton walked through the backyard gate, and Ms. Libby heard several gunshots. RP 119-21. Both Ms. Libby and her mother called 911. RP 121-22, 142. After the incident, Ms. Libby believed Mr. Burton wanted to shoot himself, or have the police shoot him. RP 129-30.

b. Officers, including Potter and Benesch, were deployed at the north end of the alley from the Burton residence.

Spokane Police officers responded and initially developed a plan on how to deal with Mr. Burton. RP 212, 214-15, 339. Officers Wheeler, Potter, and Benesch maneuvered down the dark alleyway behind the residence, with the intent of removing Ms. Libby and her mother from Mr. Burton's residence. RP 215-16, 218-19. As officers approached the backyard of the residence and waited, other officers approached the front of

[3] The original location of the clip is unknown.

the residence. RP 219. The backyard of the residence had a six foot high vinyl privacy fence. RP 359-60. The officers' initial intention was to get residents and neighbors out of harm's way and to offer Mr. Burton mental health services. RP 256-58.[4] Their ultimate desire was to diffuse the situation without incident. RP 470.

Officer Potter waited several minutes, and then heard a noise. RP 219. He then heard gunshots coming from the backyard gate area of the Burton residence. RP 220. At this point, officers Wheeler, Potter, and Benesch were all crouched behind a ballistics shield.[5] RP 220-21, 263. Officers heard Mr. Burton yell, "just do it," or something similar. RP 221, 273-74. Officer Potter believed Mr. Burton was suicidal, shooting at the officers, and wanting officers to return fire. RP 221.

Because the officers felt in danger, and they did not know Mr. Burton's exact location, they decided to retreat in the alleyway. RP 220-21. As the officers began moving backward, Mr. Burton started

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[4] Officers were armed with varying weapons, including Tasers, a non-lethal "bean bag" shotgun, service revolvers, and a rifle. RP 216, 217, 260, 315-16, 470-71.

[5] The ballistics shield had only a small opening through which officers could look, making it difficult to observe any activity. RP 220.

shooting again. RP 221.[6] Officer Potter believed the suspect was trying to hit the officers because of their movement. RP 221. Officer Potter summarized his fear as follows:

> I feared big time for my life and my partners' lives at that time that, heck, I don't know if anyone's been shot. So as we backed up, we came back here about this light pole because there's a garage and we kind of hunkered down over here and we said is everyone okay? We checked everyone out. Yeah, we're fine.

RP 222.

At this juncture, the officers had no concealment from the shooter. RP 223, 231, 262. Mr. Burton had the advantage of being able to observe the officers, yet they had no indication of his location. RP 262. Officer Sean Wheeler estimated Mr. Burton had fired nine or ten shots at this stage. RP 265. The officers then heard Mr. Burton "racking" a semi-automatic pistol.[7] RP 224, 264, 282-283. They looked for cover. RP 266. Officer Wheeler left the group to get a police cruiser, and Officer Spolski

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[6] There was a sequence of separate gunshots, with two or three bursts at a time. RP 357, 364-66, 475.

[7] Officer Potter described this action: "So in my mind at that point in time, the gun was out, it was being reloaded because I could hear. It's a very distinct sound when a semi[-]automatic slide is being racked[.]" RP 224. However, Officer Potter did not observe Mr. Burton point the weapon at anyone during the encounter. RP 235.

joined the group. RP 224. Officer Wheeler feared Mr. Burton had a tactical advantage because of the darkness in the alleyway. RP 266, 268-69.[8]

Several minutes later, Officer Potter observed Mr. Burton walking along the driveway between the fence and a car, pacing back and forth. RP 226. A few times Mr. Burton peered towards the spotlights of the police car. RP 226. He then disappeared out of view, walking into the backyard. RP 226.

Officer Wheeler subsequently drove down the alley with the cruiser's spotlight turned on, with Officer Spolski flanking his vehicle. RP 227, 270-71. Mr. Burton was observed in the alleyway, approximately thirty feet away, holding a handgun to his side. RP 227, 238, 261, 271-72. Mr. Burton did not comply with the many commands officers gave him to drop his weapon. RP 227, 306-307. Officer Potter recounted his concern:

> We ha[d] nothing locked down. In my frame of mind I was being shot at. I hear the gun being racked. It's reloading. I see Mr. Burton doing this again and then he steps out in the alleyway with a gun. In my mind at that time I felt that there

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[8] Officer Wheeler also described his concern: "[Mr. Burton] had displayed his intent with the firing of the weapon and we had nowhere to go. We were all kind of hanging out there with no real cover. We had garages but bullets go right through wood. So that was our main concern was that we were going to get a piece of armor there for officers to be able to protect themselves… I think with the armed and suicidal it is -- we don't know if they are truly suicidal or if they're homicidal or if it's a means to carry out their suicidal attempt. But either way, we still have an armed individual that we have to deal with." RP 267.

> was several options that could happen. He's either out there to try and engage us again, wants us to engage him, or flee.

RP 228.

As described above, Officer Benesch was behind a ballistics shield with other officers. He observed a motion light activate, a pistol rise over the fence pointed at or near the officers, and then a muzzle flash was observed, and gunshots fired from the handgun. RP 451-52. Officer Benesch was "extremely scared" at this point. RP 452. He again heard another series of shots and Mr. Burton yell "do it" from the backyard of the residence. RP 452. Officer Benesch heard three additional shots. RP 453. He and other officers retreated north in the alley. RP 453. The officer observed Mr. Burton exit from the backyard facing northward, with his firearm pointed downward with his left hand.[9] RP 454.

Consequently, Officer Spolski shot Mr. Burton once, and he dropped his weapon. RP 229, 272-73. Officers secured the weapon and immediately began medical treatment for Mr. Burton. RP 230. The pistol was checked, and its bullets were spent. RP 231. Empty casings from Mr. Burton's handgun were observed next to a van. Mr. Burton had fired approximately eleven shots. RP 243.

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[9] In these situations, Officers are trained not to allow an active shooter the opportunity to shoot at officers; rather they are trained to stop the threat. RP 229.

c. Officer Jenson, along with other officers, was positioned in the south end of the alley.

Contemporaneous with officers from the north end of the alley, officers also responded to the south end of the alley. Officers were concerned about cross-fire with officers in north part of the alley. RP 319, 489. Officers in the south end were also unsure of Mr. Burton's location when he fired his weapon because of the darkness. RP 319. They looked for cover. RP 326.

After arrival at the south end of the alleyway, Officer Jensen heard three loud, close gunshots. RP 474. The officer dove and scrambled for cover. Officer Jensen described his emotional response to the gunshots:

> It's a sense of fear. I think obviously when somebody is shooting at you, you don't know -- it's one thing, but when somebody is shooting and you can't see them, it's almost like your mind says, they're shooting at me. You can't determine where they're at. You can't determine where the rounds were going, but it's definitely one lot away or one yard away, so we're talking 30 to 40 feet away from you where you're hearing shots going off, and -- I don't know. It just causes you a sense of fear for your life and the fear for the lives of the officers around you that are trying to do their job and make this thing end peacefully, so.

RP 474.

The officer further remarked:

> We're still containing even though this thing turned into a situation to where our lives are in danger, at least that's what I felt. You can't leave. You can't go away. It's your job to stay there and contain it because, really, we don't know what

> we're dealing with. All we know is somebody's fired off 11 shots in a neighborhood where many people live. If we leave, who's to say what happened. Not only does he present a threat to us but the local community there. What is he capable of doing[?]

RP 491.

Like other officers, Officer Jensen initially heard three gunshots, and three more gunshots, and then heard Mr. Burton in the backyard yell something similar to, "Come and do it." RP 475. At one point during the encounter, Officer Jensen moved behind a car to avoid being shot in the head. RP 488. Officer Jensen did not return fire because he was uncertain of the location of the shots, as Mr. Burton was concealed behind a fence. RP 488.

When there was a lull in the shots fired by Mr. Burton, Officer Jensen observed:

> I've been a cop for 15 years and yeah, I've been on calls where shots have been exchanged but they're few and far between. They're a rare incident that occurs and when it occurs, it causes your fear senses obviously to escalate and when you have a lull in the moment of six minutes to where you don't know where the whereabouts of the person is who just shot a weapon off, it's frightening.

RP 502.

After the incident, detectives collected Mr. Burton's Smith and Wesson .40-caliber Beretta handgun at the scene. RP 380-82, 549. Shell casings from Mr. Burton's pistol were gathered in the alley between an SUV

and the vinyl fence. RP 558. No shell casings were located within the backyard of the residence and no bullet strikes were observed at the scene. RP 554, 558-56.

IV. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S CONVICTIONS FOR SECOND DEGREE ASSAULT.

Standard of review.

A defendant challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Unchallenged findings of fact are verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). An appellate court reviews the trial court's conclusions de novo. *Id.*

When considering whether sufficient evidence supports a criminal conviction, this court must "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). When the sufficiency of evidence is challenged in a criminal case, an appellate court draws all reasonable inferences from the evidence in the State's favor and interprets them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899,

907, 567 P.2d 1136 (1977). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

As this Court stated in *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010): "Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact." In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

a. Sufficiency of the evidence regarding the second degree assault convictions (assignment of error numbers one, two, three, four and five).

Mr. Burton contends under his first assignment of error that the State presented insufficient evidence to support his convictions for second degree assault with regard to Officers Potter, Benesch, and Jensen, as charged under counts one, two, and three of the information.[10] Appellant's Br. at 15-24.

[10] Mr. Burton does not challenge any of the trial court's findings of fact. Unchallenged findings of fact are verities on appeal. *Homan*, 181 Wn.2d at 106.

To establish the elements of second degree assault, the State was required to prove beyond a reasonable doubt that Mr. Burton intentionally assaulted the officers with a deadly weapon. RCW 9A.36.021. Firearms are deadly weapons. RCW 9A.04.110(6). A firearm is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1).[11]

The statute does not define "assault"; thus, courts resort to the common law definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). Washington recognizes the common law definition of assault which includes putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Specific intent to create apprehension and fear of bodily harm is an essential element of second degree assault. *Byrd*, 125 Wn.2d at 713. "Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all of the circumstances surrounding the event." *State v. Gallo*, 20 Wn. App. 717, 729, 582 P.2d 558 (1978).

Mr. Burton has not provided any authority to support his position that the State was required to prove that he pointed the pistol directly at the

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[11] Washington State forensics firearms examiner, Glenn Davis, examined Mr. Burton's 40-caliber Beretta handgun and determined the pistol was fully functional and capable of shooting bullets. RP 385-86.

officers in order to prove second degree assault with a firearm. Intent "can be inferred as a logical probability from all the facts and circumstances." *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

Moreover, it is disingenuous for Mr. Burton to argue that he did not intend to frighten the officers with his repeated and separate gunshot bursts from his firearm under cover, in or near the dark alleyway. He asserts he simply discharged a firearm in a public place. Appellant's Br. at 21. If he did not specifically intend to cause fear and apprehension in the officers, he would not have achieved his goal and elicited the response from the police he was seeking at the moment, namely, to carry out his "suicide by cop" plan by provoking a lethal response whereby police officers would become fearful to the degree they would shoot him and halt his perceived threat.

Likewise, Mr. Burton's argument assumes that intent to cause fear or apprehension and his intent to provoke a plan of "suicide by cop" are mutually exclusive. Logically, they are not. Assuming for the sake of argument that Mr. Burton's goal was to provoke the officers into killing him and in order to achieve that goal, and as stated above, a credible threat to the officers would be required. Without a credible threat to justify the officers' use of deadly force, it is unlikely that the officers would use it. In other words, Mr. Burton's intent to commit suicide by cop would remain

unrealized unless he intentionally threatened the officers. There was sufficient evidence to support the convictions for second degree assault.

b. Sufficiency of the evidence of the second degree assault conviction regarding Officer Jensen (assignment of error numbers one, two, three, four and five).

Mr. Burton next argues the evidence was insufficient to support the second degree assault conviction with a firearm regarding Officer Jensen because he specifically did not intend to place the officer in fear or apprehension because he was unaware of the officer's presence at the scene. *See* Appellant's Br. at 22-24.

Even accepting as true that Mr. Burton only focused on the officers in the northern portion of the alley, it is of no consequence. In *Elmi, supra*, the defendant used a firearm to shoot into his estranged wife's home. He was convicted of attempted first-degree murder against his wife and first degree assault against her children who were also present in the house during the shooting. 166 Wn.2d 209.

On appeal, Elmi challenged his convictions as to the children, arguing he was unaware of their presence in the house. *Id.* Our high court affirmed the convictions, holding that "once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 [first degree assault] to any unintended victim." *Id.* at 218.

In effect, this intent transfers to any victims who were unintentionally harmed or put in apprehension of harm. *Id*. at 218. The court held that there was sufficient evidence to find that the children were put in apprehension of harm and, thus, Elmi's intent to assault his wife properly transferred to her children. *Id.* at 218-19.

Similarly, in *Wilson, supra*, the defendant fired three bullets through a tavern window. 125 Wn.2d at 218. Two of the bullets hit unintended victims and resulted in convictions for first degree assault. The issue before the *Wilson* court was whether, under the first degree assault statute, "an intent to inflict great bodily harm upon an intended victim transfers to an unintended victim." *Id.* at 216. The Supreme Court held that transferred intent is unnecessary when a statute does not require that intent match a specific victim. When intent must match a specific victim, the doctrine of transferred intent may transfer intent from intended to unintended victims *Id.* at 219. Noting that the first degree assault statute requires specific intent to inflict great bodily harm but *does not* require that such intent match a specific victim, the *Wilson* court concluded that Wilson's intent toward his intended victim transferred to his unintended victims by operation of the statute. *Id.* at 218. Once the State establishes that the defendant intended to inflict great bodily harm, "the mens rea is transferred under RCW 9A.36.011 to any unintended victim." *Id.* at 218. The court

noted that the doctrine of transferred intent was unnecessary for liability to attach for harm to the defendant's unintended victims *Id.* at 219.

From *Elmi* and *Wilson*, it is clear that the intent to assault one victim transfers to all victims who are unintentionally harmed or put in apprehension of fear. Here, Officer Jensen initially heard three *loud, close* gunshots in the dark alleyway and Mr. Burton's whereabouts were unknown at the time. Mr. Burton's actions caused Officer Jensen to immediately seek cover for his perceived threat of immediate deadly force. To compound his sense of fear, there were several subsequent and distinct gunshot bursts from Mr. Burton's pistol. Even accepting Mr. Burton's premise that he was not aware of Officer Jensen's presence or whereabouts, and that he focused only on officers in the opposite direction, his intent to place harm or fear in the other officers transferred to Officer Jensen.

With regard to his claim on appeal that he was unaware of Officer Jensen's presence, Mr. Burton testified he knew officers were at both ends of the alleyway.

> I knew that the other officers were on the east side of the alley while these officers were on the west side of the alley, so I knew that when I stepped out into the alleyway I needed to remain -- I needed to hug the west -- or the east side of the alley so that gunfire didn't come anywhere near here and I knew they had cordoned off the block so there should be no traffic either way.

RP 679.

His claim has no merit and there was sufficient evidence to convict Mr. Burton of second degree assault regarding Officer Jensen.

B. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE NO EVIDENCE WAS PRESENTED THAT MR. BURTON'S DESIRE TO COMMIT SUICIDE AT THE TIME OF THE INCIDENT, IN CONJUNCTION WITH HIS INGESTION OF PRESCRIBED MEDICINE AND ALCOHOL BEFORE THE INCIDENT, AFFECTED HIS ABILITY TO FORM THE INTENT TO COMMIT THE CRIME OF SECOND DEGREE ASSAULT.

Mr. Burton next claims, under his assignment of error number six, that his lawyer was ineffective for not pursuing a diminished capacity defense, as it would have negated the mens rea for second degree assault. Appellant's Br. at 24-30.

Standard of review.

An appellate court reviews de novo a claim of ineffective assistance of counsel. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient, and that, "but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An appellate court's scrutiny of defense counsel's performance is highly deferential and employs a strong

presumption of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

Under a diminished capacity defense, evidence that the defendant is diagnosed with a mental disorder is not relevant unless expert testimony demonstrates that the defendant's mental disorder affected his ability to form the required mens rea. *State v. Atsbeha*, 142 Wn.2d 904, 918-19, 16 P.3d 626 (2001). Further, that evidence must logically and reasonably connect the defendant's alleged mental condition with the purported inability to form the required mental state to commit the crime charged. *Id.* at 918. Failure to argue diminished capacity does not constitute ineffective assistance of counsel per se. *State v. Cienfuegos,* 144 Wn.2d 222, 229-30, 25 P.3d 1011 (2001). Moreover, "[a]n attorney is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense." *Hendricks v. Calderon,* 70 F.3d 1032, 1038 (9th Cir. 1995), *cert. denied,* 517 U.S. 1111 (1996).

In *Cienfuegos,* a prosecution for escape, the evidence and argument focused almost exclusively on whether the defendant's drug-intoxicated

state at the time he escaped from custody prevented him from knowing that he was escaping from custody. The court concluded that he was entitled to a diminished capacity instruction and counsel should have requested one. Nonetheless, because the jury was given a correct instruction on knowledge and intent from which defense counsel could, and did, argue diminished capacity, our high court held that Cienfuegos had not met the second prong of *Strickland* requiring that his counsel's error actually deprived him of a fair trial because he was able to argue his theory of the case. *Cienfuegos,* 144 Wn.2d at 229-30.

In the present case, a psychiatrist, Dr. Michael Layton, evaluated Mr. Burton after the incident. RP 634. Mr. Burton had a clinical history of attention deficit disorder. RP 634-35. He presented no history of depression or suicidal ideation. RP 635. When Mr. Burton was on active duty in the military, he was prescribed Adderall XR (an amphetamine). RP 635-36, 645. After his release from the military, he was prescribed other medication for his attention deficit disorder. RP 636-37.

In February of 2015, Mr. Burton was prescribed the drug Paxil for anger and irritability, due to his complaints regarding his marriage. RP 638. In April of 2015, Mr. Burton informed his doctor that he had suicidal thoughts. RP 640. On April 21, 2015, Mr. Burton reported a suicide attempt, and his Paxil dosage was increased by his doctor, and an additional

medication Clonidine was prescribed, in addition to his Adderall XR drug. RP 641-42.

The psychiatrist opined that Mr. Burton's suicidal thoughts were the result of the Paxil medicine. RP 644. After Mr. Burton's arrest and the discontinuation of the Adderall XR, his suicidal ideation stopped. RP 646-47. However, the doctor remarked that there was no evidence Mr. Burton suffered from any side effects from the Adderall XR. RP 652.

The doctor further observed that if an individual is prescribed Paxil and the dosage is correct, the person can make rational decisions and form intent. RP 649. He further stated that drinking alcohol while on the medication is not recommended and a person can become more impulsive. RP 649-50.

Here, the record is insufficient to support a finding of ineffective assistance of counsel. Even though there is evidence in the record that the prescription medication and his life circumstances may have caused Mr. Burton to experience suicidal ideation, there is no evidence linking this to a diminished capacity claim. There was no evidence produced by *any* expert witness that established Mr. Burton's "suicide ideation" affected his ability to form the intent required to commit an assault. Given the failure of the evaluation to show an inability to form the necessary mental state, the trial court could have excluded the psychiatrist's testimony. *See*

State v. Pittman, 185 Wn. App. 614, 623, 341 P.3d 1024, *review denied*, 184 Wn.2d 1021 (2015).

Indeed, Mr. Burton testified regarding his actions and thought processes leading up to his encounter with the police, stating:

> And I went to the back gate, and when I opened it, I could see through the windshield of my Suburban and out the driver's side window a three-man stack team with a ballistic shield angled at about a 45-degree angle towards the vehicle where the gate is behind. And in my mind, at the time, I saw this, and the thought that went through my head was they're obviously not here to talk. You know, they've got a long rifle, a shotgun -- or I know now that it was a shotgun but I figured it was either a shotgun or another long rifle, and then I don't know what the first individual in the stack was carrying other than the ballistic shield, but I saw that and with what was going on through my head and with the tactical training that I have and then especially in urban environments and a general knowledge of law enforcement and their tactics and how they respond to certain situations, I saw them and it appeared to me that they consider. There's obviously the people I care about in my own house, my dog, you know. I even took her into consideration.
>
> …
>
> So the first few volleys was to get the police to do what they were supposed to do, which is -- I knew they couldn't tell where I was at or they would have immediately said something to me. But I could see them clear as day, so I knew that they would do what you're supposed to do and that's retreat to cover and determine where the fire and direction of fire was coming from. And they made it back to a little egress parking lot, to the parking lot of two houses north of mine.
>
> …

And once I saw where they were, that's when I fired another three rounds, hoping that they would move back further into the alleyway. And you can kind of hear it in the video. I fire two pointless rounds just kind of to empty out the magazine.

…

The situation at the time dictated that they retreat to cover and determine where the gunfire is coming from and in what direction that gunfire is going. And after I could see that they had left their first location and started moving further north in the alley, I sat for a minute and that's when I was like -- I was preparing to go out into the alleyway but before I did that, I did a few quick peeks to the south to see if there was anybody located there. And I saw the officer's position behind this car (indicating) and I knew that the other officers were on the east side of the alley while these officers were on the west side of the alley, so I knew that when I stepped out into the alleyway I needed to remain -- I needed to hug the west -- or the east side of the alley so that gunfire didn't come anywhere near here and I knew they had cordoned off the block so there should be no traffic either way. And they actually had their spotlight on and I noticed that this area was darker (indicating), so it would be better to just position myself for somebody to take a shot from the north than from the south because from the south, they would have had to have fired into the light, which affects your accuracy.

So I determined -- I walked -- when I walked out, you know, I did look back and make sure everyone was where I thought they were, and then I stood a couple feet off of the Prius and squared up -- I couldn't see the officers to the north, but I -- I mean I knew they were north, so I just made my body as perfect of a silhouette as I could.

…

So what I had already known was I demonstrated that there was a real gun somewhere. When I stepped out in the alleyway, obviously they would see it. I expected them to tell me to drop it as part of their escalation of force. I knew

> they would go through that process, giving the command, repeat the command, and if I didn't comply, they would shoot me. And that's another reason I wanted them farther north. I didn't want them to have the capability of using the less than lethal super shock shells.

RP 674-75, 677, 679-680.

Mr. Burton then asserted:

> [The officers] did exactly what I thought they would do. I mean for it being -- for it to take place on the fly the way that it did to be so spontaneous, for everything to fall in place the way that it did, so perfectly, it is, I mean, that's -- you know, kudos to the police officers. It could haven't gone more perfect as far as accomplishing what my goal was, which was to get shot and die.
>
> …
>
> It played out to the T. They responded based on what training I knew they had. They responded to the T, and left me an avenue that was perfect to get to place myself in their line of sight with the least amount of danger to anybody else in the area.
>
> …
>
> I was trying to make sure that the only person that got hurt was me. Like I said, I checked to make sure where everybody was at in order to position myself in such a way that if a round were to go through me, there wouldn't be somebody directly behind me that could get hit by an in-and-out round.

RP 687-88.

Notwithstanding there was no evidence that logically and reasonably connected Mr. Burton's "suicide ideation" with his inability to form the requisite mens rea, defense counsel was able to argue his theory

of the case and present evidence to the court of Mr. Burton's asserted diminished mental abilities by way of the doctor's testimony and his own testimony by presenting evidence that his cognitive abilities may have been impaired due to his ingestion of alcohol and prescription drugs prior to shooting his weapon.

During defense counsel's closing argument he stated:

> [R]regarding Dr. Layton's testimony, what he was presented for and why that was important is because this incident -- the suicidal urges were caused by this medication. It's not a matter of is it the VA's fault, is it the manufacture of Paxil's fault? It's just a simple fact that without this particular medication he would not be suicidal. He had been separated before taking this medication without any suicidal thoughts or attempts. He's been in jail for several months now facing an immensely large sentence and once he's off the medication, he's not suicidal at all. So it was clear that what made him suicidal was the effects of this medication.
>
> But what's important is that one of the effects of this medication is not to make people homicidal. Dr. Layton testified he reviewed all of the records leading up to this incident that showed even though he'd been assessed for homicidal thoughts along with suicidal thoughts, none of that was present at all. His testimony was that based on all of the police reports he read and the medical reports, that Mr. Burton showed no homicidal tendencies on the date of the incident and has not shown any after the incident. And importantly, his testimony was that this medication has been found to cause suicidal behaviors and thoughts. It has not been found to cause homicidal behaviors or thoughts.

RP 749-50.

Mr. Burton has not and cannot demonstrate any prejudice. The trial court was aware of the required mens rea necessary to find Mr. Burton guilty of the charged offenses or the inferior offenses of second degree assault. CP 141, Conclusions of law 17 and 19. In making its determination, the court considered Mr. Burton's evidence concerning his assertion that he was unable to form the necessary intent to commit the crime. CP 131-134, Findings of fact 113-133. There was simply no testimony, let alone expert testimony, establishing that Mr. Burton actually suffered from a mental disorder or linking his alleged disorder to his ability to form the necessary intent for committing the second degree assaults. Moreover, he was allowed to present testimony and argument to the court on his ability to form intent. Mr. Burton has not established ineffective assistance of counsel and his claim has no merit.

C. MR. BURTON, WHO WAS SENTENCED FOR THREE COUNTS OF SECOND DEGREE ASSAULT, INCLUDING SEVERAL FIREARM ENHANCEMENTS, IS NOT SIMILARLY SITUATED TO DEFENDANTS SENTENCED FOR THE COMMISSION OF A DRIVE-BY SHOOTING.

Mr. Burton next contends, under his assignment of error number seven, that his right to equal protection was violated "as applied" to his conduct by the imposition of three firearm enhancements to his three convictions for second degree assault. Appellant's Br. at 30-35. He argues he is similarly situated to those offenders convicted of drive-by shooting

who are exempt from the sentence enhancement under RCW 9.94A.533(3)(f).[12] Although unclear, Mr. Burton appears to argue there are irrational distinctions between the facts of his case and the facts of cases involving drive-by shootings and the resulting punishment. Mr. Burton did not raise this issue at trial. His argument lacks both factual and legal merit.

1. <u>If this Court determines Mr. Burton can raise an as-applied equal protection claim for the first time on appeal, his claim fails.</u>

<u>Standard of review</u>

An appellate court presumes that a statute is constitutional and Mr. Burton bears the burden of overcoming this presumption. *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). Due process violations are reviewed de novo. *State v. Mullen*, 171 Wn.2d 881, 893, 259 P.3d 158 (2011). A challenged statute should not be declared unconstitutional unless it appears to be so beyond a reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Due process requires fair notice of proscribed criminal conduct and standards to prevent arbitrary enforcement. *State v. Becker*, 132 Wn.2d 54, 61, 935 P.2d 1321

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[12] RCW 9.94A.533(3)(f) states: "The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony."

(1997). An "as applied" challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions is unconstitutional. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004).

The Fourteenth Amendment provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." The Washington State Constitution provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Const. art. I, § 12.

Under the Washington and federal constitutions, persons similarly situated with respect to the legitimate purposes of the law are guaranteed equal treatment. U.S. Const. amend. XIV; Const. art. I, § 12; *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997).

"Equal protection is denied if a valid law is administered in a way that unjustly discriminates between similarly situated persons. Before [an appellate court] will scrutinize an equal protection claim, the defendant must establish that he is situated similarly to others in a class." *Harris v. Charles*, 151 Wn. App. 929, 936, 214 P.3d 962 (2009). Likewise,

"[d]isparate treatment of those within and without a designated class rationally relates to achievement of the State's objective if there is some basis in reality for the distinction between the two classes and the distinction serves the purpose intended by the legislature." *State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006).

The legislature's power to fix the penalties and punishments for crimes is plenary and subject only to constitutional provisions. *State v. Varga*, 151 Wn.2d 179, 193, 86 P.3d 139 (2004). RCW 9.94A.533(3) governs sentencing enhancements for the use of firearms in the commission of a crime. The statute requires enhancements of five years (60 months) for the use of a firearm in a class A felony, RCW 9.94A.533(3)(a), three years for class B offenses, RCW 9.94A.533(3)(b), and 18 months for a class C felony, RCW 9.94A.533(3)(c).[13] Under RCW 9.94A.533(3), firearm enhancements are mandatory, must be served in total confinement, and run consecutively to all other sentencing provisions.

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[13] RCW 9.94A.533, "Adjustments to Standard Sentences," was enacted without amendment as part of the "Hard Time for Armed Crime" Initiative, Laws of 1995, ch. 129, § 1 (Initiative Measure No. 159 (I-159)). The purpose of I-159 was to require additional punishment for crimes committed with a firearm or other deadly weapon, to "punish armed offenders more harshly to discourage the use of firearms" because "[a]rmed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death." Laws of 1995, ch. 129, § 1(1)(a); *State v. Berrier*, 110 Wn. App. 639, 649-50, 41 P.3d 1198 (2002).

It is well-settled that the equal protection provisions of the state and federal constitutions are not violated in cases in which statutes authorize varying punishments for the same criminal act. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978); *State v. Edwards*, 17 Wn. App. 355, 563 P.2d 212 (1977). Denial of equal protection is found only where prosecution is permitted for the same criminal act under different criminal classifications, *i.e.*, felony or misdemeanor. *State v. Caldwell*, 47 Wn. App. 317, 320, 734 P.2d 542 (1987).

Here, Mr. Burton does not allege RCW 9.94A.533(3)(f) treats similarly situated individuals differently on the basis of a suspect classification, or that it impinges on a fundamental right. Rather, he asserts the statute has no rational basis in its application towards him because he did not intend to cause harm at the crime scene and his conduct was less culpable than offenders who commit the offense of drive-by shooting. Appellant's Br. at 33-34.[14] As a result, Mr. Burton claims he was subject to the statutory exemption for imposition of a firearm enhancement. His

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[14] Because persons convicted of felony crimes under RCW 9.94A.533(3) are not a suspect or semi-suspect class, and because physical liberty is not a fundamental right recognized in equal protection doctrine, rational basis review applies. *See Manussier*, 129 Wn.2d at 673-74.

argument fails because he is not similarly situated to those individuals convicted of drive-by shooting, either in fact or in law.

2. Mr. Burton is not similarly situated to those convicted of drive-by shooting because the offenses of second degree assault and drive-by shooting are not the same in law.

Drive-by shooting[15] and second degree assault each contain an element that is absent from the other. *See* RCW 9A.36.021; RCW 9A.36.045. Drive-by shooting can only occur when a firearm is discharged from or in the vicinity of a vehicle. *See* RCW 9A.36.045. However, second degree assault requires neither a vehicle nor the discharge of a firearm. *See* RCW 9A.36.021. Conversely, assault requires an intent to inflict bodily harm or to create an apprehension of bodily harm. Drive-by shooting merely requires a reckless discharge of a firearm. *See* RCW 9A.36.045(1) and (2). Under RCW 9A.36.045(2), the act of discharging a gun from a moving motor vehicle suffices to establish the shooter's recklessness. Each crime requires proof not required by the other. *See State v. Larson*, 160 Wn. App. 577, 593, 249 P.3d 669, *review denied*,

[15] RCW 9A.36.045(1) states: "(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge."

172 Wn.2d 1002 (2011); *State v. Gassman*, 160 Wn. App. 600, 615-16, 248 P.3d 155, *review denied*, 172 Wn.2d 1002 (2011); *State v. Statler*, 160 Wn. App. 622, 638-39, 248 P.3d 165, *review denied*, 172 Wn.2d 1002 (2011).

In the present case, it was proven that Mr. Burton *intentionally*, rather than recklessly, discharged a firearm and that he intended to cause fear or apprehension in the officers. Fear or apprehension in another is not an element of drive-by shooting. Mr. Burton has not established that he is legally similarly situated to those offenders convicted of drive-by shooting.

3. <u>The offenses are not the same in fact.</u>

First, there is no evidence that a vehicle was involved in the incident, other than possibly used by Mr. Burton as cover. Second, it was established that Mr. Burton *intended* to and did create an apprehension of fear of bodily injury in the officers, which is not necessary for a drive-by shooting. Firing the several and distinct volley of shots from the firearm with the intention to create an apprehension of fear elevated the facts to the crime of second degree assault. The crimes are factually distinguished for purposes of an equal protection claim.

Mr. Burton relies on *Berrier, supra*, which is easily distinguishable. There, the court held that applying a firearm sentence enhancement to a defendant's conviction for unlawful possession of a short-barreled shotgun

violated equal protection because similarly situated defendants convicted of the crime of possessing a machine gun under the same criminal statute were not subject to firearm sentence enhancements. 110 Wn.App. at 649-50.[16]

Division One of this court rejected essentially an identical argument in *State v. Pedro*, 148 Wn. App. 932, 201 P.3d 398 (2009), *review denied*, 169 Wn.2d 1007 (2010), in which the defendant challenged the firearm enhancement for his first degree assault conviction. The court observed that persons committing exempt crimes are punished specifically for the use or possession of the firearm: "the use or possession is a necessary element of the exempt crimes. Without the use or possession of a firearm, there would be no sentence." *Id.* at 947. In contrast, use of a firearm is merely one way to elevate assault to the first degree, and the sentence for first degree assault remains the same regardless of whether the defendant uses a firearm. *Id.* at 947. Consequently, the defendant in *Pedro* was not similarly situated to those persons who commit the exempt crimes. *Id.* at 947.

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[16] The court concluded that (1) the legislative "purpose of exempting certain crimes from the firearm sentence enhancements ... appears to be that the possession or use of a firearm is a necessary element of the underlying crime itself"; (2) applying that exception to possessing a machine gun, but not to possession of a short-barreled shotgun, did not further that purpose because "possession [was] a necessary element of the underlying crime in both cases"; and (3) the "most plausible explanation for the distinction" at issue was "legislative oversight." 110 Wn. App. at 650-51.

The same analysis applies to Mr. Burton's convictions for second degree assault. Because Mr. Burton is not similarly situated to those who commit crimes for which possession or use of a firearm is a necessary element, his as-applied equal protection challenge fails. Moreover, the legislature could rationally determine, as applied to Mr. Burton, that he face an enhancement for the crime of second degree assault because he intentionally discharged the firearm and placed another in reasonable apprehension of fear or injury.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MR. BURTON'S REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD ON THE BASE SENTENCES FOR THE SECOND DEGREE ASSAULT CONVICTIONS.

Mr. Burton faults the trial court for not imposing a downward departure on the base sentences for the second degree assault convictions under his assignment of error number eight. Appellant's Br. at 35-40. At the time of sentencing, Mr. Burton argued that he suffered from attention deficit-hyperactivity disorder, "which was grossly exacerbated by a reaction to prescribed medication," which was at the direction of his doctor. CP 155. At the time of trial, defense counsel attempted to minimize the several beers Mr. Burton drank, in conjunction with the medication, before the incident. CP 156.

1. Downward departure from the standard range sentence.

Although the trial court expressed frustration with the Sentencing Reform Act, it found no basis existed to impose a downward departure on the base sentences because the factors relied on by defense counsel were inherent within a standard range sentence. RP 902-03. Ultimately, the trial court found no reason to impose a downward departure in this particular case:

> I'm confident *I don't have any reasonable basis* that's been offered to mitigate below the standard range. I just don't have that in front of me. And doing so, I am confident would be absolute reversible error by the Court.

RP 903 (emphasis added).

Standard of review.

Generally, a defendant cannot appeal a standard range sentence. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Likewise, a party generally cannot appeal a trial court's refusal to impose an exceptional sentence, which necessarily results in a standard-range sentence. *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). If a trial court has exercised its discretion, its decision is not reviewable if it has "considered the facts and concluded there

is no legal or factual basis for an exceptional sentence." *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).[17]

Notwithstanding the general prohibition against review of standard range sentences, appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies, which includes constitutional error, procedural error, an error of law, or the trial court's failure to exercise its discretion. *Id*. at 147.

Mr. Burton argues on appeal that the trial court misapplied RCW 9.94A.535(1)(e).[18] There is no evidence to support this contention.

The Sentencing Reform Act of 1981(SRA), chapter 9.94A, and applicable case law limit the trial court's discretionary authority on sentencing matters. A trial court has discretion to impose a sentence outside the standard range "if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

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[17] In *McGill*, remand was appropriate because the trial court erroneously believed that it lacked the authority to depart from the standard range, although it expressed a willingness to impose an exceptional sentence downward. 112 Wn.App. at 100.

[18] RCW 9.94A.535(1)(e) states: "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded."

Typically, when sentencing an adult defendant, a court can impose an exceptional sentence below the standard range if it finds a "defendant's capacity to appreciate the wrongfulness of his ... conduct ... was significantly impaired." RCW 9.94A.535(1)(e). The record must show both the existence of the mental condition and the connection between the condition and significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct. *State v. Rogers,* 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

There is no evidence that Mr. Burton's concentration of prescribed medication and voluntary ingestion of alcohol impacted, let alone significantly impaired, his ability to appreciate the wrongfulness of his conduct. To the contrary, the evidence suggests Mr. Burton took steps to mitigate the harmfulness of his behavior during commission of the crimes. During trial, he testified that it was his responsibility that the officer's bullets were directed in a safe direction if they shot at him. RP 685, 688. Mr. Burton also attempted to minimize bullet strikes against his house, neighbors' homes, and at his dog. RP 674-75. As stated by Mr. Burton at the time of trial:

> I was trying to make sure that the only person that got hurt was me. Like I said, I checked to make sure where everybody was at in order to position myself in such a way that if a

> round were to go through me, there wouldn't be somebody directly behind me that could get hit by an in-and-out round.

RP 688.

The evidence insufficiently linked Mr. Burton's attention deficit disorder, suicidal ideation, prescription medication, or his alcohol use at the time of the incident to a significant impairment of his ability to appreciate the wrongfulness of his conduct. The trial court did not commit error and this claim fails.

2. Downward departure regarding the firearm enhancements.

Mr. Burton next asserts the trial court erred by concluding it did not have authority to impose a mitigated sentence with respect to the firearm enhancements. Appellant's Br. at 43-44.

At the time of sentencing, the trial court remarked:

> [T]urning to the issue of the firearm enhancement, I've said this before, I'm going to say it again, I am very saddened by this situation that Mr. Burton finds himself in and I return to my earlier comments that not only am I saddened, I'm incredibly frustrated by a mandatory firearm enhancement in the State of Washington that I have no ability to deviate from. But I'm absolutely satisfied I cannot deviate from that and for me to ignore or adopt an analysis that the 36-month firearm enhancement can be waived or sidelined or modified or amended in some fashion would be for me to violate my own oath to uphold the law of Washington State, regardless of whether I agree with it and regardless of whether I like it.

RP 903-04.

Notwithstanding that there was no factual basis to impose a downward departure on the firearm enhancements, as discussed above, there was no legal basis upon which to do so either.

Our Supreme Court has held: "The plain language of [9.94A.533] not only anticipates the imposition of multiple enhancements under a single offense but clearly insists that all firearm and deadly weapon enhancements ... must be served consecutively." *State v. DeSantiago,* 149 Wn.2d 402, 418, 68 P.3d 1065 (2003).[19]

Washington courts have consistently held that establishing and varying the sentencing process is a legislative duty. *State v. Ammons,* 105 Wn.2d 175, 180, 713 P.2d 719, *amended* 105 Wn.2d 175, 718 P.2d 796, *cert. denied,* 479 U.S. 930, (1986) ("[T]he Legislature, not the judiciary, has the authority to determine the sentencing process," citing numerous prior decisions supporting this proposition); *State v. Pillatos,* 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

Accordingly, an appellate court looks to a statute's plain language in order to fulfill its obligation and give effect to legislative intent.

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[19] The *DeSantiago* court analyzed RCW 9.94A.510. The language at issue there has now been recodified in RCW 9.94A.533.

State v. Mandanas, 168 Wn.2d 84, 87, 228 P.3d 13 (2010). The firearm enhancement sentencing statute, in relevant part, provides:

> (1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.
>
> ....
>
> (3) The following *additional times shall be added* to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime.
>
> ....
>
> [3](e) *Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory,* shall be served in total confinement,[20] and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, *for all offenses sentenced under this chapter*…;

RCW 9.94A.533 (emphasis added).

With regard to statutory interpretation, the Supreme Court has stated:

> Statutory interpretation is a question of law that this court reviews de novo. When interpreting any statute, our primary objective is to ascertain and give effect to the intent of the

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[20] "Served in total confinement" means a defendant is not eligible for good time while serving the enhancement. *In re Pers. Restraint of Scott*, 149 Wn. App. 213, 222 n. 5, 202 P.3d 985 (2009), *rev'd sub nom. on other grounds, In re Scott*, 173 Wn.2d 911, 271 P.3d 218 (2012).

> Legislature. In order to determine legislative intent, we begin with the statute's plain language and ordinary meaning. If the plain language of a statute is subject to only one interpretation, then our inquiry ends. If a statute is subject to more than one reasonable interpretation, it is ambiguous. The rule of lenity requires us to interpret an ambiguous criminal statute in favor of the defendant absent legislative intent to the contrary.

State v. Mandanas, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010).

In *Mandanas,* the defendant argued that where multiple firearm enhancement eligible offenses constitute "the same criminal conduct," the trial court could only impose one enhancement. Our Supreme Court rejected this argument, holding that *the enhancement statute is unambiguous* and "a sentencing court must impose multiple firearm enhancements where a defendant is convicted of multiple enhancement-eligible offenses that amount to the same criminal conduct under the sentencing statute." *Mandanas,* 168 Wn.2d at 90.

Mr. Burton's claim was foreclosed in *State v. Brown,* 139 Wn.2d 20, 983 P.2d 608 (1999). In *Brown,* the State argued that the trial court had no discretion to deviate from the mandatory minimum sentence for the weapon enhancement under former RCW 9.94A.310(4)(e).[21] *Id.* at 26. The defendant argued that if compelling reasons exist, and once the total range was calculated, the sentencing court could depart from the sentencing range

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[21] Recodified as RCW 9.94A.533.

without impediment. In rejecting the defendant's claim, the Supreme Court held:

> RCW 9.94A.310(4) [recodified as RCW 9.94A.533] begins by providing that deadly weapon enhancements "shall be added to the presumptive sentence[.]" The more specific language within RCW 9.94A.310(4)(e) requires that "[n]otwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, [and] shall be served in total confinement." This language clearly dictates a reading by the average informed lay voter that deadly weapon enhancements are mandatory and must be served.

Id. at 28.

The court held that sentencing courts do not have the discretion to depart from mandatory weapon enhancements because of the legislature's "absolute language." *Id.* at 29. In effect, the trial court is precluded from imposing a downward departure from the fixed punishment imposed by the legislature.[22]

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[22] Contrary to Mr. Burton's argument, the meaning of RCW 9.94A.533 is plain and the statute unambiguously states that firearm enhancements are mandatory: "[n]otwithstanding any other provisions of law, all firearm enhancements under this section are mandatory." *State v. Kelley*, 168 Wn.2d 72, 79, 226 P.3d 773 (2010); *see State v. Nguyen*, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006) (legislative intent in adopting the firearm enhancement statute and in mandating additional punishment for the use of a firearm is "unmistakable." The ordinary meaning of "mandatory" is "obligatory in consequence of a command." COMPACT OXFORD ENGLISH DICTIONARY, 1731 (1971). "Mandatory" has been defined by other courts as "authoritatively commanded or required; obligatory," *Berge v. Comm'r of Pub. Safety*, 588 N.W.2d 177, 179

Here, the trial court had no discretion to modify the fixed term of incarceration for the firearm enhancements. There was no error.

E. THE FIREARM SENTENCING ENHANCEMENT IS NOT CRUEL AND UNUSUAL PUNISHMENT.

Mr. Burton next complains, under his assignment of error number ten, that the trial court's imposition of the fixed term of incarceration for the firearm enhancements violates the article I, section 14 of the Washington Constitution, which proscribes the infliction of "cruel punishment," and the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII; Appellant's Br. at 43-49.

Cruel punishment under article I, section 14 includes disproportionate sentencing in addition to certain modes of punishment. *Manussier*, 129 Wn.2d at 676. The Washington Constitution provides greater protection than its federal counterpart. *Id.* at 674. It follows that if the state provision is not violated, a sentence violates neither constitution. *See State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000).

An appellate court considers three factors in determining whether a sentence is disproportionate as applied to the particular facts of a case: "(1) the nature of the offense; (2) the legislative purpose behind the ...

(Minn. Ct. App. 1999), or "containing a command." *Dep't of Revenue v. S. Union Gas Co.*, 119 Ariz. 512, 513, 582 P.2d 158 (1978).

statute; and (3) the punishment the defendant would have received in other jurisdictions for the same offense." *Manussier*, 129 Wn.2d at 485.[23] Mr. Burton offers no substantive analysis with respect to these factors, nor does he cite any case in which the court has found that imposition of the firearm enhancement is cruel under either the state or federal constitutions.

Applying the *Manussier* factors to this case leads to the conclusion that Mr. Burton's sentence is not disproportionate. The second degree assault convictions are violent crimes and class B felonies. RCW 9A.36.021(2)(a); RCW 9.94A.030(55)(a)(viii). As stated previously, the purpose of the "Hard Time for Armed Crime Act" is to stigmatize armed crime in order to reduce the frequency of dangerous crimes against persons. Laws of 1995, ch. 129, § 1. Mr. Burton has not shown nor discussed how Washington is different from other jurisdictions.

In addition, the second degree assault convictions carry a maximum sentence of ten years or 120 months for each offense, with an accompanying firearm enhancement for each offense of 36 months, for a total determinate firearm enhancement of 108 months for the three crimes. Mr. Burton's total

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[23] The *Manussier* court disregarded analysis of the comparison of punishment the defendant might receive for other crimes in Washington because there is no logical or practical basis for doing so as sentences under the Sentencing Reform Act vary with each defendant's criminal history and the presence or absence of aggravating or mitigating factors. *Id.* at 678.

enhancement time for the three second degree assault convictions does not exceed the maximum sentence for one offense, let alone that of three offenses. Finally, the fixed firearm enhancement punishment is the same for anyone in this state convicted of second degree assault with a firearm enhancement. Mr. Burton's sentence is not in violation of article I, section 14, or under the Eight Amendment. His claim fails.

The basic concept of the Eighth Amendment is that punishment for a crime must be proportionate to the offense. *Graham v. Florida,* 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (the Eighth Amendment prohibits a court from imposing a sentence of life without parole on a juvenile offender for a crime that is not a homicide). The Eighth Amendment "does not require strict proportionality between crime and sentence" and "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan,* 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring). The Court has shown a reluctance to review legislatively mandated sentences. *Rummel v. Estelle,* 445 U.S. 263, 274, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). As a result, successful challenges to the proportionality of sentences are "exceedingly rare." *Id.* at 272; *Graham,* 560 U.S. at 67;

Gonzalez v. Duncan, 551 F.3d 875, 879-80 (9th Cir. 2008).[24] Indeed, the Ninth Circuit has recognized "[p]unishment within legislatively mandated guidelines is presumptively valid" and does not violate the Eighth Amendment. *United States v. Mejia-Mesa*, 153 F.3d 925, 930 (9th Cir. 1998); *Belgarde v. State of Montana*, 123 F.3d 1210, 1215 (9th Cir. 1997) (so long as sentence imposed does not exceed statutory maximum, it will not be overturned on Eighth Amendment grounds).

Here, it cannot be said that Mr. Burton's sentence is one of the "exceedingly rare" situations in which the sentence is "grossly disproportionate" to the crimes for which Mr. Burton was convicted. Mr. Burton does not dispute that his sentence, including the firearm enhancement, was within the legislative guidelines for firearm enhancements. Moreover, he has not established that his sentence is grossly disproportionate to the crime of second degree assault and related firearm enhancement. As a result, his claim also fails under an Eighth Amendment analysis.

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[24] *State, v. Zyion Houston-Sconiers*, No. 92605-1, 2017 WL 825654, at *14 (Wash. Mar. 2, 2017) is distinguished from the present case. In that case, our high court found that because juveniles are different under the Eighth Amendment, and because "criminal procedure laws" must take the defendant's youthfulness into account, sentencing courts have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing *juveniles* in adult court.

F. UNLESS THE DEFENDANT'S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT'S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

(Emphasis added).

Should the defendant's appeal be unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

V. CONCLUSION

For the reasons stated herein, the State requests this Court affirm Mr. Burton's convictions and sentence.

Respectfully submitted this 3 day of April, 2017.

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

STATE OF WASHINGTON, Respondent, v. CRAIG S. BURTON, Respondent.	NO. 34230-1-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on April 3, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Richard W. Lechich
wapofficemail@washapp.org

4/3/2017	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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