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No. 35242-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

TREY JORDAN MICHEL, Appellant.

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BRIEF OF RESPONDENT

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**I. ASSIGNMENT OF ERROR**

ISSUES PRESENTED BY ASSIGNMENT OF ERROR

- A. Did the trial court act within its discretion in finding that Michel's offender score was three because his three prior convictions for felony harassment involved three distinct victims?
- B. Has Michel failed to show an abuse of discretion at sentencing because he never asked the court to read *State v. Trey M.*, never provided the court a copy of the opinion, chose to quote parts of the dissenting opinion, and did not object?

**II. STATEMENT OF THE CASE**

Appellant, Trey Jordan Michel, pled guilty to first degree child molestation. CP 8, 19. At sentencing, Michel first argued for a Sex Offender Disposition Alternative (SODA) sentence. RP 13-24. The State objected, arguing that he would not be successful given the evaluation reports. RP 24. The trial court found that he would not be a good candidate for the SODA program. RP 46-7.

Appellant also argued that his three prior convictions should not count as three points for criminal history purposes. RP 57. At the time of sentencing, Michel had three prior felony harassment convictions in Yakima county cause number 14-8-00667-6. CP 9, 19. The three victims in the prior case were listed in the information. RP 49. Count 2 of the information involved a victim with the initials G.G.C. *Id.* Count 3

involved a victim with the initials W.B. *Id.* Count 4 involved a victim with the initials E.C.D. *Id.* The State argued that there were three separate victims, and thus separate courses of conduct. RP 51-2.

The defense argued that Michel should not have been prosecuted for the three felony harassment charges. RP 55. He took issue with the fact that his client was previously convicted, RP 54-8, despite the State Supreme Court affirming all three convictions, *State v. Trey M.*, 186 Wn.2d 884, 908, 383 P.3d 474 (2016). He also disagreed with caselaw holding that if there is more than one victim, the crimes do not encompass the same criminal conduct. RP 57.

The trial court reviewed caselaw, as well as the information, disposition order, and findings of fact and conclusions of law from the prior harassment case. RP 48, CP 52-63,<sup>1</sup> Defense Exhibit 3. The trial court found that Michel articulated his desire to kill three separate victims and pointed out that if he had carried out the threats, there would be three counts of murder. RP 68. The court concluded that the three prior crimes were not the same course of conduct, and that Michel had an offender score of three. RP 68-9, 74, 86-7, CP 52-63. As such, his standard

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<sup>1</sup> On March 29, 2018, the State filed a supplemental designation of clerk's papers. The supplemental clerk's papers have not been paginated yet, so the State has used the next numbers in line, CP 52-63, to cite to the findings of fact and conclusions of law.

sentencing range was calculated to be 103 to 129 weeks. RP 69, CP 52-63.

Appellant also argued for a sentence of 52 weeks, which was below the standard range. RP 84. Appellant conceded at sentencing that there were no “specific enunciated factors that would warrant a downward departure based on the offense conduct.” RP 89, 108-9. He argued that the community would be well-protected, that 24 to 36 months of parole would be sufficient, and that 30 to 40 weeks would provide enough treatment in a juvenile institution. RP 84, 89. He argued that anything more than that would be strictly punishment. RP 83. He again raised his concerns about the defendant being convicted in the prior threats case and quoted from the sole dissenting opinion of the *Trey M.* case. RP 81-3, 91-2. The State argued for a standard range sentence. RP 52-3.

The court sentenced the defendant to a standard range sentence. RP 96, 103, 105-6, CP 52-63.<sup>2</sup> The trial judge discussed some of the programs that would be available to Michel in a juvenile institution and how long those programs would take. RP 93. The judge then went through the facts of his case, pointing out how Michel set up the

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<sup>2</sup> Initially the court imposed a sentence of 103 weeks but later corrected the sentence to reflect a range of 103 to 129 months. RP 96, 103, 105-6, CP 52-63.

opportunity to commit the crime, manipulated the victim, and caused substantial harm to the victim. RP 93-5. Findings of Fact and Conclusions of Law were filed on July 17, 2017. CP 52-63. In those findings, the court attached and incorporated by reference the findings of fact and conclusions of law from the 2014 threats case. *Id.* Appellant has not assigned error to any of the factual findings. Appellant's Brief at 2.

### III. ARGUMENT

**A. The trial court acted within its discretion in finding that Michel's offender score was three because his three prior convictions for felony harassment involved three distinct victims.**

Appellate courts generally defer to the discretion of the sentencing court and will reverse a sentencing court's determination of same criminal conduct only on a "clear abuse of discretion or misapplication of the law." *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). If the record supports a single conclusion about whether the crimes constitute the same criminal conduct, the sentencing court abuses its discretion if it arrives at a contrary result. *State v. Aldana Graciano*, 176 Wn.2d 531, 537-8, 295 P.3d 219 (2013). But if the record supports different conclusions, the issue lies in the court's discretion. *Id.* at 538.

A trial court abuses its discretion where the court: (1) adopts a view no reasonable person would take and is manifestly unreasonable; (2) rests on facts unsupported in the record and is therefore based on

untenable grounds; or (3) was reached by applying the wrong legal standard and is made for untenable reasons. *State v. Johnson*, 180 Wn. App. 92, 100, 320 P.3d 197 (2014). In this case, Michel has not shown an abuse of discretion.

The Juvenile Justice Act (JJA) states that “Where the offenses were committed through a single act or omission, omission, or through an act or omission which in itself constituted one of the offenses and also was an element of the other, the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense.” RCW 13.40.180(1)(a).<sup>3</sup> Similarly, under the Sentencing Reform Act (SRA), “when calculating an offender’s score, a court must count all convictions separately except offenses which encompass the same criminal conduct.” RCW 9.94A.525(5)(a)(i), .589(1)(a). Our State Supreme Court has held that the same analysis that applies to the SRA’s

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<sup>3</sup> Under RCW 13.40.180(1), “Where a disposition in a single disposition order is imposed on a youth for two or more offenses, the terms shall run consecutively, subject to the following limitations: (a) Where the offenses were committed through a single act or omission, omission, or through an act or omission which in itself constituted one of the offenses and also was an element of the other, the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense; (b) The aggregate of all consecutive terms shall not exceed three hundred percent of the term imposed for the most serious offense; and (c) The aggregate of all consecutive terms of community supervision shall not exceed two years in length, or require payment of more than two hundred dollars in fines or the performance of more than two hundred hours of community restitution.”

phrase “same course of conduct” applies to the JJA’s phrase “single act or omission.” *State v. Contreras*, 124 Wn.2d 741, 880 P.3d 1000 (1994).

Offenses which constitute the same criminal conduct are counted as one offense. RCW 9.94A.525(5)(a)(i). “‘Same criminal conduct ...’ means two or more crimes that require the same criminal intent, are committed at the same time and place, *and involve the same victim.*” RCW 9.94A.589(1)(a) (emphasis added). If any element of the same criminal conduct analysis is missing, a trial court must count the offenses separately when calculating the offender score. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993). Thus, same criminal conduct cannot occur where there are multiple victims. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

The same criminal conduct statute is “construed narrowly to disallow most claims that multiple offenses constitute the same criminal act.” *Aldana Graciano*, 176 Wn.2d at 540 (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)). The defendant bears the burden of proving current offenses encompass the same criminal conduct. *Id.*

In this case, appellant has not assigned error to any of the factual findings made by the trial court. Appellant’s Brief at 2. Unchallenged

findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611, 615 (2002).

Furthermore, the trial court's decision that the priors did not constitute same course of conduct is consistent with the prior sentencing court's disposition order. In the prior case, each prior harassment count involved a different victim. CP 52-63. It is clear from the disposition order that the prior sentencing court did not find that the prior offenses were committed through a single act or omission under RCW 13.40.180(1). First of all, the prior sentencing court did not make a special finding under section 2.2 that the harassment counts "encompass the same course of conduct." Defense Exhibit 3. Second, the court did not find that the counts were "committed through a single act or omission" in section 4.1. *Id.* Third, the court ran the sentences consecutively, for a total of 72 days. *Id.*

Finally, while the prior sentencing court did not make any explicit findings about the three prongs of same criminal conduct, the findings of fact show that the crimes did not involve the same victim. *See* CP 52-63. The three persons threatened were the victims in the prior case. Under RCW 9A.46.020(1)(a)(i), the person threatened is generally the victim of the threat, i.e., the person against whom the threat to inflict bodily injury is made. *State v. J.M.*, 144 Wn.2d 472, 488, 28 P.3d 720 (2001).

In *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), our State Supreme Court held that “Convictions of crimes involving multiple victims must be treated separately.” The Court overruled the portion of *State v. Edwards*, 45 Wn. App. 378, 380-82, 725 P.2d 442 (1986), that held that crimes involving two victims could constitute “the same course of conduct.” *Id.* The Supreme Court reasoned:

To hold otherwise would ignore two of the purposes expressed in the SRA: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public. RCW 9.94A.010(1), (4). As one commentator has noted, “to victimize more than one person clearly constitutes more serious conduct” and, therefore, such crimes should be treated separately. D. Boerner, *Sentencing in Washington* § 5.8(a), at 5-18 (1985). Additionally, treating such crimes separately, thereby lengthening the term of incarceration, will better protect the public by increasing the deterrence of the commission of these crimes. For these reasons, we conclude that crimes involving multiple victims must be treated separately.

*Dunaway*, 109 Wn.2d at 215.

For the first time on appeal, Michel claims that there was only one victim in the prior case, “the public.” In *State v. Haddock*, the State argued that convictions for unlawful possession of a firearm and possession of stolen firearms did not encompass the same criminal conduct. 141 Wn.2d at 110. Our State Supreme Court held that the victim

of unlawful possession of a firearm, like the victim of unlawful possession of a controlled substance, was the general public. *Id.* at 110-1. However, the victims of the possession of stolen firearm counts were the owners of the firearms. *Id.* at 111. As explained by our State Supreme Court in

*Haddock*:

While we recognize that all crimes victimize the public in a general sense, we are satisfied that these crimes directly inflicted specific injury on individuals, of the sort described in the aforementioned statute. Surely the concurring justices would not identify the general public as the victim of a theft of personal property or firearms. In our opinion, the unlawful possession of property taken in a theft is a mere continuation of the thief's act of depriving the true owner of his or her right to possess property. If we were to conclude otherwise, we would be discounting the significance of the injury to the owner of the property that was unlawfully possessed and would render the "same victim" requirement superfluous. We should not construe statutes so as to render language meaningless.

*Id.* at 111-2. Applying this to Michel's prior felony harassment convictions, the victim was not the "general public," but rather, the three individuals who Michel threatened to kill. As such, the trial court was required to treat them as separate offenses.

In *State v. Victoria*, Division One addressed a similar claim in the context of two counts of witness tampering. 150 Wn. App. 63, 206 P.3d

694 (2009). In that case, the defendant claimed that only the public at large can be a victim of the crime of witness tampering. *Id.* at 66. The Court of Appeals disagreed, finding that the public at large was not the crime's only victim. *Id.* at 68. The court stated:

Multiple crimes constitute the same criminal conduct only if they involve the same victim. A witness who is the target of tampering suffers injury by being unduly pressured to act illegally and is therefore a victim. Because Victoria tampered with two different witnesses, his crimes did not involve the same victim and therefore did not constitute the same criminal conduct.

*Id.* at 64-5. The court noted:

...as our Supreme Court recently explained, when criminal liability “does not depend on the existence of a victim, [but] the law [nonetheless] does contemplate” a victim, the proscribed conduct is not a victimless crime. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 652-53, 201 P.3d 315 (2009). The tampering statute specifically criminalizes any attempt to tamper with “a witness.” RCW 9A.72.120 (emphasis added). Thus, it contemplates that a particular witness will be the target of tampering. *See State v. DeSantiago*, 149 Wn.2d 402, 419, 68 P.3d 1065 (2003). Therefore, the public at large is not the crime's only victim. An inchoate tampering effort or one that fails to achieve its objective is no different than a poorly aimed gunshot of which the target is unaware. Each instance involves an identifiable, individual victim. Because Victoria tampered with two

different witnesses, each of whom was a victim of his unlawful machinations, the trial court correctly ruled that his two convictions for tampering with a witness did not encompass the same criminal conduct.

*Id.* at 68-9.

In the context of harassment, the law is similar in that it contemplates a victim. The harassment statute provides:

- (1) A person is guilty of harassment if:
  - (a) Without lawful authority, the person knowingly threatens:
    - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
    - (ii) To cause physical damage to the property of a person other than the actor; or
    - (iii) To subject the person threatened or any other person to physical confinement or restraint; or
    - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
  - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020(1). Like the witness tampering statute, the law contemplates that a specific person will be the target of the threat. Each instance involves an identifiable, individual victim who must be threatened and placed in fear. As such, the crime of felony harassment is

not a victimless crime. The trial court correctly held that the three prior convictions did not constitute the same course of conduct.

**B. Michel has failed to show an abuse of discretion at sentencing because he never asked the court to read *State v. Trey M.*, never provided the court a copy of the opinion, chose to quote parts of the dissenting opinion, and did not object.**

Under the Juvenile Justice Act of 1977, the juvenile court must impose a standard range disposition absent a finding that the imposition of a standard range disposition would effectuate a manifest injustice. RCW 13.40.0357, 13.40.160(2). “Manifest injustice” means a disposition that would either impose an excessive penalty on the juvenile or would impose a serious and clear danger to society in light of the purposes of the Juvenile Justice Act of 1977. *State v. M.L.*, 134 Wn.2d 657, 660, 952 P.2d 187 (1998). As explained in *State v. J.W.*:

A criminal defendant is permitted to appeal a standard range sentence only if the sentencing court failed to follow a procedure required by the Sentencing Reform Act. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Simply arguing that the court abused its discretion in imposing a standard range sentence does not raise an appealable issue. *State v. Onefrey*, 119 Wn.2d 572, 574 n.1, 835 P.2d 213 (1992).

84 Wn. App. 808, 811-12, 929 P.2d 1197, 1199 (1997).

In this case, Michel argues that the trial court did not read an appellate opinion, *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474, 485-86

(2016), and therefore, there was an “obvious failure to exercise its discretion and failure to consider a mitigating factor.” Appellant’s Brief at 11. Michel, however, provides no support for this meritless argument. He does not cite to any case that indicates the trial court fails to exercise its discretion by not reading an appellate opinion.

Neither does he explain which of the five factors the court failed to consider. Under RCW 13.40.150(3)(h), none of the five mitigating factors were argued in this case. At trial, Michel’s trial counsel conceded that he was not arguing any statutory mitigating factors. RP 106-7. Counsel specifically stated, “...we agree that there’s nothing in the specific enunciated factors that would warrant a downward departure based on the offense conduct.” RP 107-8. Michel cannot now argue on appeal that the court did not consider one of the mitigating factors that he did not even raise during the sentencing hearing.

On appeal, Michel also fails to explain the “obvious failure to exercise discretion” due to the trial court’s failure to read an opinion generated from a different case. He argues that the court was required to read excerpts from the prior opinion. He provides no authority for his argument. As such, this court can assume that there is none, and does not need to consider an assignment of error unsupported by argument and authority, RAP 10.3(a)(6).

In deciding another issue, criminal history points, the trial court brought up *State v. Trey M.* Michel's attorney indicated that the felony harassment convictions were affirmed. RP 49. The trial judge asked if the "same course of conduct" issue was addressed because she did not get a chance to look at the opinion. RP 49. Ms. Emmans, co-counsel for Michel, stated, "The Supreme court didn't deal with that." RP 49. There was no defense objection to the court not reading the decision. RP 49.

Later on, after the trial court had ruled that the three priors would count as three points, RP 69, Michel's trial attorney read excerpts from the dissenting opinion of *Trey M.* during his sentencing argument. RP 81. He stated:

I'm going to just close my thoughts, basically just by ending with Justice Gordon-McCloud's conclusion when talking about Judge Hancock's words to Trey when he was being sentenced. Justice Gordan-McCloud writes, "The Judge's advice is consistent with our holding in J.M. and Kilburn. It warns Trey M. that he faces criminal sanction as a felon for therapeutic disclosures that are 'over the line' regardless of his criminal intent"—that's from 259. "Under J.M. and Kilburn, then Trey M. must sensor himself when he returns to therapy. Because this outcome is as frightening and counterproductive as it is unconstitutional, I would overturn these cases."

RP 81-2 (quoting *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016) (dissent)). Importantly, the quote read by the defense did not address the “special needs” of the defendant, something Appellant now claims was important for the sentencing court to know. Appellant’s Brief at 11. Nonetheless, the trial court was well aware of the defendant’s specific needs because they were thoroughly addressed during the sentencing hearing when Michel asked for a SODA disposition. *See* RP 26-47.

Appellant claims that the trial court did not read the “proffered” 2016 Supreme Court opinion. Appellant’s Brief at 2, 4. However, a copy of the opinion was never presented or offered to the court. Trial counsel never asked the court to read the opinion, nor did he hand up a copy. Instead, the defense attorney chose to read a very specific part of the dissenting opinion, likely for strategic reasons. Michel’s attorneys could have provided a copy of the opinion to the court like they did with the *State v. Contreras* case. RP 52. Earlier during sentencing, defense counsel offered the court a copy of the *Contreras* opinion to look at and said they would hand it forward to the court. RP 52. But Michel’s attorneys chose not to hand up the *Trey M.* opinion, most likely because they strategically chose to focus on the lone dissent, in which one justice said that she would have overturned the convictions. The other eight

justices agreed to affirm all three felony harassment convictions. *State v. Trey M.*, 186 Wn.2d 884, 908, 383 P.3d 474 (2016).<sup>4</sup>

Furthermore, Michel never asked the court to read the opinion, or any part of it, as he did with the *State v. Evans* case. The night before sentencing, defense counsel sent an email to the trial judge and prosecutor, asking them to review *Evans*. CP 18. The defense attorney specifically stated, “Please review *State v. Evans*.” *Id.* The next day, the trial judge started reviewing *Evans* before court and took a recess to finish reading the case. RP 11-12. Later on, the court used another recess to read the *Contreras* case. RP 64-5. But the defense never asked the trial judge to read *State v. Trey M.* Had there been such a request, the judge most likely would have used a recess to read *Trey M.* as well.

Importantly, when the judge indicated that she had not read the *Trey M.* case, there was no objection made by the defendant. Ordinarily, a party must contemporaneously object to preserve an error. RAP 2.5. As such, this claim is being raised for the first time on appeal and without any legal authority supporting it.

As indicated by the defense, “simply arguing that the trial court abused its discretion does not raise an appealable issue.” Appellant’s

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<sup>4</sup> The United States Supreme court later denied review. *Trey M. v. Washington*, 138 S. Ct. 313, 199 L. Ed. 2d 207 (2017).

Brief at 10 (citing *State v. J.W.*, at 811). Yet, that is exactly what Michel has done in this case. Michel also correctly notes in his brief that “Review is limited to circumstances where the trial court relied on an impermissible basis for refusing to impose a mitigating sentence or refused to exercise its discretion at all.” *Id.* at 10 (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). Yet, the trial court in this case did neither. First, Michel does not argue that the trial court relied on an impermissible basis. He simply claims that the trial court did not read an appellate opinion involving unrelated crimes committed by the defendant. Second, there is nothing in the record to suggest that the trial court refused to exercise its discretion at all. To the contrary, the trial court’s reasons for imposing a standard range sentence are amply supported in the record. As such, there was no abuse of discretion.

#### **IV. CONCLUSION**

The trial court did not abuse its discretion in finding that three prior harassment convictions with three distinct victims were not the same course of conduct. In addition, the trial court did not refuse to exercise its discretion or rely on an impermissible basis for refusing to impose a sentence below the standard range. As such, the conviction and sentence should be affirmed.

Respectfully submitted this 29th day of March, 2018,

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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on March 29, 2018, via the portal, I emailed a copy of BRIEF OF RESPONDENT to Joel Penoyar and Edward Penoyar at penoyarlawyer@gmail.com and edwardpenoyar@gmail.com. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of March, 2018 at Yakima, Washington.

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