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Division III
State of Washington
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NO. 35485-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE PEDRO LINARES,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

3. The trial court abused its discretion when it denied repeated requests by the defendant for “another attorney.”
4. The trial court exceeded its statutory authority when it ordered current offenses to run consecutively.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The record before this court indicates that there was never an actual motion to appoint new counsel filed. There were innumerable statements by Linares that he wanted another attorney. The trial court properly denied Linares’ unsupported demands to have another attorney appointed.
2. The trial court had the authority to run the sentences in this case consecutive to the sentence in Linares’ other cases.

II. STATEMENT OF THE CASE

The second time Linares was before the trial court, at his arraignment on these charges, his trial counsel stated to the court that “[h]e has asked for a new attorney on several occasions in front of (Judge) Bartheld.” (Hearings RP 13)¹ This was apparently in a companion case because this is literally the second time this defendant had been before the court with his counsel in this cause of action.

¹ There are two “volumes” of VRP filed, one consists of hearings, the other is the actual trial. The State will identify them by using the word “Hearings” for that volume and simply “RP” followed by a page number for the trial transcript.

Linares's indicated to the court on this first occasion that although he had had no continuances in this cause number, he had continuances in the other case; he had not wanted any continuances in the other case.

(Hearings RP 14)

Trial counsel then gave the trial court a brief history of what had occurred in both matters. Stating counsel's motions had been denied by Judge Bartheld. Counsel stated on the record the basis for the motion in the other cases was that Linares had not wanted any continuances in those cases and that counsel had had to ask for continuances, counsel also stated there was a "...lack of meaningful communication between me and my client." Counsel speculated this was because soon after appointment in the other matter, counsel had asked for a continuance because of the birth of one of his children. (Hearings RP 15-16.)

February 9, 2017. Linares continuously asked for a new attorney with the basis being "I don't -- I haven't been wanting continuances." Even when the trial court explained...[d]o you understand that if you get another attorney, then your speedy trial starts all over again? And "[a]d that makes it go out even farther because that person has to prepare for your cases, do you understand that?" Linares had no other basis for this request. He continued his mantra of stating he understood what would happen if he was given new counsel, the case would be pushed out further

but stating "...it's just that I don't -- I haven't been wanting the - no continuances." (Hearings RP 25-7). After this specific request the court's oral ruling was:

...it's necessary that your attorney complete some investigation, including interviews. As a result of that and the necessity to have adequate defense for you, it's necessary in the administration of justice that that continuance be granted in each of these cases over your objection.

Additionally, I make a finding that this would not prejudice you in the presentation of your defense. If anything, it's going to assist with your attorney to be well prepared and understand all of the facts and can forward your defense in an effective manner. (Hearing RP 27)

At this same hearing the trial court "...invite(d) (Linares) to file a written motion, if you want to file a written motion about our relationship with your attorney and we'll take another look at that at another time.

Linares' response was "[w]ell, that's the thing. I don't want to do, I'm just asking for another attorney." The court again stated that Linares could file a written motion to address this need and again he stated "[t]hat's not what I'm going to do. I'm asking for another attorney. That's all I'm saying."

(Hearings RP 27-8)

April 7, 2017, once again before the court the following colloquy occurred between the court and Linares²:

² The State attempts to not include long verbatim sections of the verbatim report of proceeding but in Linares' case the State believes it is necessary in order for this court to realize how the case proceeded.

THE COURT: ...Mr. Linares, you had something you wanted to say?

MR. LINARES: I do.

THE COURT: Go ahead.

MR. LINARES: I want another attorney.

THE COURT: Okay. I've heard this before. Can you tell me why?

MR. LINARES: I haven't been wanting to do no continuances. I haven't - I didn't show up to my last Court, I don't know why. Not only that, I have - I don't want no continuances.

THE COURT: Okay. Well, I understand that that was your position before, which is why I made the trial counsel move this toward trial. So, you understand that it's not being continued any further. It's going to trial on Monday.

MR. LINARES: Well, that's when - that's what - it should have been in trial already. All I have been doing is been doing continuances, which I don't want no continuances.

THE COURT: And I'm aware of that, so. Is there any other reason that you think that you need a different attorney? You understand if you get a different attorney, you're going to get a big continuance because that attorney is not going to be ready to go.

MR. LINARES: I do understand it.

THE COURT: So, you're complaining about this case being continued, but if you get a new attorney it's going to be a long continuance. Do you understand that?

MR. LINARES: I do. I ain't complaining, I'm just asking for another attorney.

THE COURT: Okay. Can you tell me any other reason that you think you need an attorney other than the fact that this case has gone on a while?

MR. LINARES: I haven't been wanting to do no continuances ever since my speedy trial (indiscernible).

THE COURT: Okay. I understand your argument.

Mr. Therrien-Power, anything that you'd like to state at this time?

MR. THERRIEN-POWER: Your Honor, I've laid my right here and I've joined this motion twice in the past. The Court has denied that. I have no additional (indiscernible).

THE COURT: Okay. The motion is denied. You're going to trial, I believe on Monday, Mr. Linares, so. All

right, I've signed the order. There doesn't appear to be a basis for it.

...

THE COURT: All right. Mr. Linares, on your other two cases - you've got one case going to trial on Monday and these other two cases are trailing, they're not going to be tried at the same time. Over your objection, I'm going to make a finding that the continuances on these two cases are necessary in the administration of justice and that they would not prejudice you in the presentation of your defense on either of these cases. And this is fairly common practice that when you have several types of cases and they're not related, that the other cases trail the more significant case. So, signing the order over objection.

MR. LINARES: I would like another attorney.

THE COURT: Yeah, I understand that. That motion is denied. There's no basis for it. Thank you, sir. (Hearings RP 43-4, 46)

May 3, 2107 Linares again was asking for a new attorney. He had no basis other than he did not want any continuances and "I haven't been coming to all my courts." (Hearings RP 49-50). The court ruled that this was not a basis for a new attorney. (RP Hearing 51)

May 26, 2017 once again asks for new counsel:

MR. LINARES: I would like another attorney.

...

MR. LINARES: I haven't been wanting to do no continuance. I haven't been wanting to do no continuances at all.

...

MR. LINARES: I'm not really communicating with the lawyer. I'm not really communicating - that's pretty much it.

...

MR. LINARES: I haven't been wanting to do no continuances.

...

MR. LINARES: Why - I don't want to go to trial. I no longer want him as an attorney.

MR. LINARES: Well, I don't want to go to trial with -- I want another lawyer.

...

MR. LINARES: I would like another lawyer-- I don't want to go to trial with this lawyer.

...

MR. LINARES: Well, the continuances, the Courts that I haven't been there for. (Hearings RP 58-62)

Trial counsel for Linares replied "I am ready to go to trial. I have interviewed all the witnesses. My client does not prefer to have me in trial, does not wish to communicate with me, which we'll address next on the notice of appeal. I have nothing to add. My position is the same as it was when my prior motion was denied."

After this entire conversation the court ruled:

THE COURT: Okay. You're entitled to an attorney at public expense if you can't afford one. You have an attorney now. You can't really be the one selecting which attorney you get, so it sounds to me like you've been able to communicate well enough to get to this point. I understand that you don't want continuances, but we're pushing your case forward to trial now. You've had one trial, now you're going to have two more trials. So, you're not getting any further continuances, so. And I don't think that you're being prejudiced in any way with the communication issues. I think it's something that you are doing yourself -- that you're choosing not to communicate with your attorney and making it difficult for him to represent you. I don't think that another attorney would be in any different position to help you because I don't think that you're really working with them either. You've said the

same thing to me over and over and over and to other judges, so your motion is denied. (Hearing RP 61-2)

...

THE COURT: All right. Mr. Linares, I'm going to deny your request. You're poised and ready to go to trial on this. Mr. Therrien-Power is ready to go to trial for you. You've had a long period of time in which to obtain your own attorney, you haven't done so. So, basically, it would be impeding -- it would be impeding the administration of justice, but also the process would cause you to have further delays and you're asking not to have further continuances, so it's counterintuitive, as far as the Court's concerned. So, I'm denying your motion. (Hearings RP 63)

Linares persisted:

MR. LINARES: Well, I - I don't want to go to trial with this attorney.

THE COURT: I know, but you will.

MR. LINARES: I would like another attorney.

THE COURT: Thank you. (Hearings RP 63)

TRIAL

The actual facts of the crime charged are not challenged in this appeal and therefore, they will not be addressed to any real extent in this brief.

The very first day of trial Linares continued his request for another attorney. Linares continued as he had throughout the earlier hearings insisting that he wanted a new attorney, that he did not want continuances, he had not been to "all his courts," he was not communicating with his attorney. The communication allegation was inquired into by the trial court and Linares response was that he just did not communicate with his

attorney. (RP 4-5, 6-10) When asked if it was his choice not to communicate with his attorney Linares stated “yes.” (RP 5-6)

The trial court denied this request for a new attorney. RP 9. The court then inquired if Linares was going to hire his own attorney. Linares stated that he had called an attorney but Linares could not state the name of this attorney, the number called or exactly when that occurred, stated that he had not left a message and he did not have a method by which he was going to pay for this attorney. RP 10-14. The court denied the defendant’s motion for time to hire an attorney. RP 14.

The trial court then inquired as to whether the defendant was going to appear for his trial, Linares stated “no.” RP 14-15. Linares persisted in asking for a new attorney. The trial court inquired about the reason and basis for the defendant’s refusal to appear at this trial. After this conversation the trial court ruled that the defendant was voluntarily absenting himself from his trial. RP 16-21.

In the middle of the court and counsel discussing procedural matters Linares interrupted and again demanded a new attorney and stated that he was “...ready to go back.” The court made additional inquiry then had Linares taken back to jail. With the indication that he could change his mind at any time and tell jail staff and that trial counsel would continue to inquire if Linares wanted to join his own trial. RP 27-8.

And instruction was crafted and given to the jury that indicated the defendant had the right to not appear at his trial and he had chosen to exercise that right and that the jury was not to infer anything from his absence. RP 29-30.

Part way through trial defendant's counsel went to the jail and discussed his continued absence. Linares continued to assert that he would not appear. RP 85. At the beginning of the second day of trial the court convened in a secure courtroom and inquired of Linares in person if he was going to continue to not attend his own trial. The court made detailed inquiry of the defendant as to why he was not appearing and determined once again this was a voluntary act on the part of Linares. RP 163-6. Shortly thereafter both parties rested. RP 169.

Sentencing

On June 9, 2017 the parties appeared in court for sentencing. The occurrence of the actual assault on trial counsel has not been supplied to this court, it would appear that the parties were not on the record when that occurred. The State has set forth the conversation between trial counsel where he explains the assault, the query of the court and counsels reply in Appendix A.

That assault was a kick to the leg of trial counsel by Linares who was then forcibly removed from the courtroom. At the time of the kick

Linares was, according to the court, "...in his security clothing and was wearing ankle chains and a belly chain where his hands were handcuffed and fell close to his stomach."

The court inquired of trial counsel if he believed that he would still be able to represent Linares. Trial counsel confirmed for the record that Linares had kicked him. But, Mr. Therrien-Power indicated to the court that he did not believe it affected his continued representation because all that was left was a 20-minute sentencing. There was discussion about new counsel being appointed but the determination was that the parties would just continue as before. (Hearings RP 74-5) .

On June 14, 2017 counsel for Linares moved the court to allow him to withdraw. Counsel stated he had conferred with the Washington State Bar Association and was told he should move for withdrawal based on the conflict which had arisen due to the kick. The court allowed counsel to withdraw and assigned DAC (Department of Assigned Counsel) to appoint new counsel setting this last matter, sentencing, to a later date. (Hearings RP 78-82)

The next hearing which physically took place was on July 10, 2017 sentencing was set. At one of those hearings Linares assaulted his trial attorney by kicking him while in court. Apparently, he also assaulted the next attorney who was appointed. This attorney also withdrew from the

case which resulted in a request for yet another attorney. (Hearings RP 85-6) At this juncture the court inquired of Linares if he was going to be able to work with another attorney and if not, the court would consider that action a waiver of Linares' right to counsel. (Hearings RP 86)

When asked by the court for assurances that Linares would discontinue his assaultive behavior against his attorney's he stated more than one time that "I am assuring nothing." (Hearings RP 87) Linares then attempted to waive his right to an attorney several times while the court indicated that was not be requested. (Hearings RP 87-8) Immediately after this he once again requested another attorney be appointed. (Hearings RP 88-9)

At a subsequent sentencing hearing Mr. Kelley, the head of the Department of Assigned Counsel stated that Linares wanted him to make a motion under CrR 7.8 for a new trial there was not written motion filed by counsel as he was representing to the court what Linares stated to him. Mr. Kelley stated "... I'm an officer of the Court and I did not see a reason to file that motion and he may not like what I have to say about it, but that's my opinion." When asked by the trial court for a basis for this motion Mr. Kelly went on to state "...His - the only - well, let me (indiscernible). I don't believe this is incompetence, Judge. He - it's - he did not like the lawyer who represented him." (Hearings RP 118-119) The trial court stated it had dealt with a similar issue throughout trial, the court

did not believe the reason provided was a basis to grant a motion for a new trial under CrR 7.8. (Hearings RP 119)

There were several hearings regarding the defendant's criminal history and the basis for that history. (Hearings RP 119-42, 145-161.) The State argued that the court should impose an exceptional sentence, consecutive terms because the defendant had history that pushed his point total past 9 which would then allow him to reap a benefit of being a recidivist, that there would be "free crimes." (Hearings RP 96-7) The discussion addressed Linares' juvenile convictions, same course of conduct and many other issues. The State conceded one conviction because it was unclear the defendant, who was at the time a juvenile, had been represented by counsel at the time of his plea. (Hearings RP 107) Numerous documents supplied to the trial court addressing Linares prior criminal history. At the hearing on July 27, 2017 the court took final testimony, reserved on the final ruling so that it could review all of the information supplied and any pertinent case law. (Hearings RP 117-142)

At the final sentencing hearing the trial court determined that Linares' position regarding his past history was correct. The court determined it would not count the one conviction from Adams County and that it would consider convictions from Walla Walla County to be the same course of conduct which then made the defendant's offender score

9.5. Therefore, when his score was rounded down his offender score was 9. Therefore, the State's basis for an exceptional sentence did not exist. (Hearings RP 145-153.

However, the court determined that it would run the sentence in this case consecutive to the previous conviction for Assault in the Second degree for which the defendant had previously been convicted. The court did run the sentence in this case concurrent to Linares' other Third Degree Assault. (Hearings RP 153-4) Linares objected to that sentence arguing that the Assault Second degree should be run concurrently to the charges from these convictions. Hearing RP 215. The State pointed out that the court had at its discretion the ability to determine that these charges should run consecutively. (Hearings RP 145-160)

Linares again requested the court grant him new trials, this was denied again. (Hearings RP 161)

III. ARGUMENT.

1. Response to Assignment of Error One - The trial court did not err when it denied, on numerous occasions, Linares' request for a new attorney.

State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), “[a] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in

communication between the attorney and the defendant.” In determining whether the court should substitute counsel, the factors the court should consider are “(1) the reasons given for the dissatisfaction, (2) the court’s own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings.” Stenson, at 734. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991) The right to counsel does not encompass the right to choose any advocate if the defendant wishes representation.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant effective assistance of counsel, free from any conflict of interest in the case. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); see also State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). State v. White, 80 Wn.App. 406, 412-13, 907 P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996).

It is Linares duty to establish a Sixth Amendment violation. For that Linares must show an actual conflict of interest adversely affected his attorney's performance. See Dhaliwal, 150 Wn.2d at 571, “An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.” citing Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).

Linares need not demonstrate the outcome of the trial would have been different but for the alleged conflict, the "mere theoretical division of

loyalties" is insufficient to establish a Sixth Amendment violation. Mickens, 535 U.S. at 171; see also State v. Fualaau, 155, *infra*. A conflict adversely affects counsel's performance if "some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." State v. Regan, 143 Wn.App. 419, 428, 177 P.3d 783(2008) (internal quotation marks omitted) (quoting United States v. Stantini, 85 F.3d 9, 16 (2d Cir. 1996)), review denied, 165 Wn.2d 1012 (2008).

During the totality of this case, and clearly during the trial, there was no actual conflict between counsel and Linares. It was only after the jury rendered its verdict that Linares kicked his attorney and at that time counsel made inquiry of the WSBA about the existence of a conflict. It was only after he was appointed a second attorney that he struck out again and that attorney too was removed from the case and a third attorney appointed.

The actions of the trial court in denying the motion to withdraw was discretionary and therefore appellant must demonstrate to this court that the trial court abused that discretion. There are no indications in the record supplied to this court that Linares' attorney ever moved the court for leave to withdraw before the kick. And after the kick the motion

which was filed was granted. CP 57, 59. Hearing RP 134-149

As can be seen from the extensive pretrial and trial history set forth above, the only thing that the defendant could come up with was he “wanted” a new attorney. He parroted back one or two comments made by one of the several judges who had to address this ad nauseum request on the part of Linares. Linares never once placed on the record any valid, substantive reason as to why he needed a new attorney. His counsel states that he has addressed this a couple times and that was denied by the court, but those instances are not reflected in the record. Perhaps they occurred in one of Linares’ other cases because there is nothing that the State can find in the VRP or in the clerk’s papers from this case which would confirm that any motions were filed by counsel.

The only document filed in this case that addressed the issue of Linares right to an attorney was filed by counsel, Paul Kelley, who was the counsel from the Department of Assigned Counsel who has been substituted in for original counsel whom Linares kicked. CP 60-68.

In this case the trial court took the proper action when it reviewed the claims of appellant and determined that his attorney could continue to effectively represent him. The case law indicates where the error occurs is when the court does not make this inquiry. Holloway v. Arkansas, 435 U.S. 475, 484, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The court's failure to

take these steps deprives defendant of the guarantee of assistance of counsel. Holloway, 435 U.S. at 484, 98 S.Ct. 1173. Our Supreme Court has stated the rule as follows: "[A] trial court commits reversible error if it knows or reasonably should know of a particular conflict [of interest] into which it fails to inquire." In re Personal Restraint of Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983).

On occasion after occasion several different judges who heard this case came to the same conclusion, Linares was just attempting to manipulate the system. This court should not countenance this type of activity.

The Court in State v. Fualaau, 155 Wn.App. 347, 228 P 3d 771 (2010) review denied, 169 Wn.2d 1023, 238 P.3d 503 (2010) set forth the applicable law regarding this allegation a matter with striking similarities to this case, citing a New York case bearing the Linares name. Fualaau stated:

A criminal defendant cannot force the withdrawal of his court appointed attorney and the appointment of a new attorney simply by assaulting his present counsel during the trial. " Substitution of counsel is an instrument designed to remedy meaningful impairments to effective representation, not to reward truculence with delay." People v. Linares, 2 N.Y.3d 507, 512, 780 N.Y.S.2d 529, 813 N.E.2d 609 (2004).

...

A defendant's misconduct toward his attorney does not necessarily create a conflict of interest. Where the

defendant's actions do not create an actual conflict of interest adversely affecting the attorney's performance, the defendant is not entitled to a new attorney. State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). However, even in circumstances wherein the defendant's wrongful actions create an actual conflict of interest, the defendant may properly be denied substitution of counsel. State v. Colbert, 17 Wn. App. 658, 664, 564 P.2d 1182 (1977):

The defendant is entitled to a fair and unbiased trial. State v. Beard, 74 Wn.2d 335, 444 P.2d 651 (1968). He is not entitled to a perfect trial. A perfect trial is always sought but seldom, if ever, attained.

State v. Sorenson, 6 Wn.App. 269, 272, 492 P.2d 233 (1972) “We have examined the entire record and find the claimed error to be without merit. See also, State v. Thomas, Supra, 71 Wn.2d at 472, 429 P.2d at 233, '(s)ome defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal.”

In the matter before this court the defendant brought these alleged errors upon himself; State v. Barnett, 104 Wn.App. 191, 200, 16 P.3d 74 (Div. 3 2001) “The doctrine of invited error precludes review of Mr. Barnett's assigned error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. A potential error is deemed waived "if the party asserting such error materially contributed thereto.” (Citations omitted.) In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) “In these invited error doctrine cases, the defendant took knowing and voluntary

actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine.”

Linares attorney struggled with issues that were put into place by Linares. He did what he could do with what he was given. This was a case where an inmate assaulted a guard in jail, another guard observed the assault and the actual assault was on a surveillance camera. This was all placed on the record. Linares refused to work with his own attorney, he refused to come to trial. Finally, when he was convicted of his actions and was not given his way, he once again physically struck out against, not one but two attorneys appointed to represent him.

He should not be rewarded for his actions.

2. RESPONSE TO ALLEGATION THE COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE.

Linares’ second allegation is that the trial court improperly imposed an exceptional sentence in both of his cases, which were both convictions for Third Degree Assault. He claims that when the trial court ran the sentences for those cases consecutive to the sentence previously imposed in his Assault Second Degree conviction, this was an exceptional sentence. The Second-Degree Assault conviction is the subject of an appeal before this court, COA #35374-5-III.

Linares’ second-degree assault occurred on February 4, 2016, he

was found guilty on April 17, 2017 and the judgment and sentence in the second degree assault, COA 35374-5-III, was entered on May 25, 2017.

The third-degree assault in this case occurred on December 18, 2016, he was found guilty on June 2, 2017, the judgment and sentence was entered on August 1, 2017. CP 1-2, 4, 92-99

When the trial court imposed the sentence, it ruled in Linares' favor and reduced his point total to 9 and ran the sentences for both of the Assault Third Degree convictions concurrently. The State had argued that based on Linares' high point total, in excess of 9, and the nature of the two assaults, the court should impose an exceptional sentence. Linares obviously objected. (Hearings RP 119-42, 145-161.) CP 73-83, 85-91

There was very in-depth discussion regarding the State's request for an exceptional sentence. The court took briefing from both sides as well as exhibits which addressed Linares' criminal history. In the end the court ruled that one previous crime should not be counted at all and that two others should be considered same course of conduct and not counted separately. This ruling reduced Linares' point total to 9.5 and as this court is aware, point totals are "rounded down" for sentencing. Therefore, this defendant no longer had a point total that was in excess of 9 which would qualify for consideration under the commonly known phrase of "free crimes." (Hearings RP 98)

This court should note that at no time during sentencing does the trial court state it is imposing an exceptional sentence. The court does not state, and there was no need to state, the reason it ran the two concurrent assault three sentences consecutive to the sentence in the unrelated Second Degree Assault.

In fact the trial court physically hands back the judgment and sentence to the State and states “[t]here’s a lot that needs to be changed because there’s a lot of language in there regarding the (sic) (im)position of an exceptional sentence and a whole variety of things that the Court –“ (Hearings RP at 159)

And page two (2) of the judgment and sentence found at CP 93, in section 2.6 below the grid containing the defendant’s criminal history and the sentencing range grid the sentence has a box with an “x” prior to the sentence which states **“Exceptional Sentence: Substantial and compelling reasons do not exist which justify an exceptional sentence.”** (Emphasis added.)

This is because the facts elicited at this hearing support the sentence imposed. The court does not set forth a factual basis for and exceptional sentence nor does it request the production of findings and conclusions by the State.

The State addressed the prior sentence and trial court discusses the

imposition of an exceptional sentence in Linares' previous case where he was convicted of Second Degree Assault but not for this crime before this court in this appeal. (Hearings RP 98, 146) When Linares' counsel for sentencing asks the court about this conversation is as follows:

MR. KELLEY: The argument by the Defendant that the 2nd Degree Assault conviction would be considered a current offense and, therefore, be presumed concurrent -- the Court isn't agreeing with that analysis?

THE COURT: I do not agree with that analysis.

MR. KELLEY: Okay.

THE COURT: The facts in the 2nd Degree Assault case involve in position (imposition) of an exception(al) sentence in that case, based upon specific finding of the jury in that particular circumstance. It was not based upon an analysis of criminal history or based on a request in that regards.

The trial court simply states:

THE COURT: That brings us to an offender score of nine under this Court's analysis. The Court is going to find in this particular circumstance that the range is 51 to 60 months. The Court will sentence Mr. Linares to a term of 60 months on Count 1 -- or actually, 60 months under Cause No. 16-1-00804-39, and 60 months on 16-1-02276-39, that they will run concurrent. They will not run, however, concurrent with his other conviction for 2nd Degree Assault, which that's going to run consecutive.

So, it's the order of this Court that the total period of confinement on both is 60 months, to run concurrent for each charge. (Hearings RP 152-4)

The trial court was adamant that the sentences for these two assault convictions should run consecutive to the previous assault:

THE COURT: It is the Court's intent to run it consecutive, there's no question of that. The 2nd Degree Assault stands upon its own facts and the sentence that the court rendered in that particular case, I felt, were justified under the facts and circumstances of this case. These cases then, in fact, arose from conduct while he was incarcerated. In this particular case, both violent assaults upon Corrections staff and the Court, in this case, is exercising its discretion to run those convictions concurrent to the 2nd Degree Assault. They'll run -- excuse me, the Court is choosing to run consecutive is what I meant to say -- to the 2nd Degree Assault, but they will run concurrent with one another. (Hearings RP 153-4)

There are several sections of the Revised Code which allow a court to impose a sentence such as was done herein.

RCW 9.94A.535(2)(c) provides that the trial court may impose an aggravated exceptional sentence without a finding of fact by a jury "[if] the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." A trial court may impose an exceptional sentence without entering findings if in support of its imposition of consecutive sentences under RCW 9.94A.589(3), a trial court "expressly order" a defendant to serve consecutive sentences.

Because of the trial court's ruling regarding Linares criminal history, reducing his score to 9, RCW 9.94A.535(2)(c) would not be a valid basis for an increase in his sentence, likewise it would appear that because Linares was on community custody that RCW 9.94A.589(3)

would not be applicable.

Linares argues he was not on community custody at the time of this sentencing, this is patently incorrect. The court and even Linares' trial attorney concurred that, "And at the time of these 3rd Degree Assaults in 16-1-00804-39 and Ms. Holbrook's case, which is 16-1-02276-39, he was still on community custody..." RP 161..." ...the State Community Corrections Officer to Mr. Linares did provide an affidavit indicating that Mr. Linares was, in fact, on community custody at the time he committed both the Assaults in the 3rd Degree. I'll pause for them to --" RP 121

THE COURT:...First of all, let me start by stating that absent the juvenile convictions, **both sides agree that Mr. Linares's criminal history and the fact that he was on community custody at the time that the 3rd Degree Assaults occurred** within the Yakima County Department of Corrections puts him at an offender's score of eight. (Hearings RP 145) (Emphasis added.)

...

THE COURT: ...Now, the Court's not inclined to do that for the following reason. He's still on community custody. All of this time period is tolled and so he's still on community custody from the two cases that he was placed on - that are referenced in Exhibit B, which is the statement from the Corrections Officer. Hearings RP 157-8

The State addressed what it referred to as the "default" position in an instance such as this and referred specifically to a case that this court had issued an opinion on. That other Yakima County case, State v. Mata, 180 Wn.App. 108, 321 P.3d 291 (Div. 3 2014) published in part which the

State would direct this court, pursuant to GR 14.19(a) to consider as nonbinding authority and accord such persuasive value as this court deems appropriate, was asked to address a similar issue.

In that case, this court stated:

...the default provision applicable to defendants in Mr. Mata's situation is RCW 9.94A.589(2)(a). It provides in relevant part that "whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms." The result is consecutive sentencing. See State v. Mahone, 164 Wn. App. 146, 152, 262 P.3d 165 (2011). While the trial court might have lacked the discretion provided by RCW 9.94A.589(3) that was urged by the State, the default result is the consecutive sentencing reflected in the judgment and sentence. Any mistaken reasoning was harmless.

This is exactly what occurred in this case. The court stated it had imposed an exceptional sentence on Linares in the second degree assault case and that sentence having been imposed prior to the sentencing in this case the court simply applied the law, "the latter term shall not begin until expiration of all prior terms." The result is consecutive sentencing." Mata, *infra*.

As this court can see, the Court's statement regarding imposition of this sentence was unequivocal, "It is the Court's intent to run it consecutive, there's no question of that." State v. Perez, 69 Wn. App. 133, 140, 847 P.2d 532 (1993) allows this court to uphold the actions of a

trial court even if the underlying rationale is not supported if “[w]e are satisfied that the trial court would have followed the State's recommendation and imposed the same sentence absent the improper factor. Therefore, we need not remand for further consideration. State v. Fisher, 108 Wn.2d 419, 429-30, 430 n.7, 739 P.2d 683 (1987). State v. Drummer, 54 Wn. App. 751, 760, 775 P.2d 981 (1989).” See also State v. Davis, 53 Wn. App. 306, 316, 766 P.2d 1120 (1989).

The trial court did not impose an exceptional sentence. It imposed a sentence mandated by the laws of this state. This is clear from the statement of the trial court at the time of sentencing and is unequivocally set forth in the judgment and sentence where on section states there was no exceptional sentence imposed.

This court should affirm the actions of the trial court.

IV. CONCLUSION

This court should deny this appeal. The record supports the actions of the trial court. There is nothing in this record which would support Linares’s allegation that the trial erred when it denied his requests for a new attorney. Linares was disruptive throughout this case; to the point that more than one judge ruled that his actions were being done to impede the trial.

Linares finally physically assaulted two attorneys however this was

after substantive actions were being addressed in trial.

The third and final attorney appointed was able to argue his client's case and successfully convince the trial court to reduce the defendant's point total to a number greatly reducing Linares' chances of receiving an exceptional sentence.

The sentence which was imposed was not an exceptional sentence. The record does not contain a single instance of trial court stating that it was imposing the sentences here consecutively to the previous sentence as an exceptional sentence and the judgment and sentence document supports this.

The actions of the trial court should be upheld, and this appeal should be dismissed.

Respectfully submitted this 7th day of January 2019,

s/ David B. Trefry
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APPENDIX A

THE COURT: A couple of concerns that — well, actually, a couple of comments, first of all. Mr. Linares did not appear for trial on either of the two cases that the State proceeded with. But Mr. Linares was cooperative in coming down each morning before those trials and explaining to us that he didn't want to go to trial and was waiving his right to appear. So, I don't know that I can necessarily draw a correlation between that and his (indiscernible).

MR. THERRIEN-POWER: I think that (indiscernible) because the first time we did have to get a Court order. I think he refused, I think, the first day of trial or I can't remember on that.

THE COURT: Yeah, you are right on that, yeah. What I, the Court is inclined to do at this point — I understand that Judge Harthcock is not going to be available next week, so between Judge Elofson and myself, we're probably going to begin to be splitting up those dockets — criminal dockets — next week.

I would like to proceed perhaps with the sentencing Wednesday afternoon. Mr. Therrien-Power, a couple things that the Court is concerned about as far as your continuing representation of Mr. Linares. I think the Court can understand Mr. Linares's frustrations. The Court has continually found that his request for an attorney was simply not approved and that — I don't know that whether or not that evidence is a frustration or his acts today, but do you believe that you are in a position that you can continue to represent the best interest of your client, despite the fact that he may have attempted or, in fact, kicked you today? Again, I didn't see the episode, I couldn't — I wasn't looking in that direction, frankly.

MR. THERRIEN-POWER: For the record, he did kick me. He was able to successfully strike me on the lower leg. Yes, Your Honor, I can represent him. Nothing's going to change in my sentencing argument. It's a — this is a simple case, should be a 20-minute sentencing.

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I will have to give a statement in regards to what happened in Court today, I expect. And I expect to cooperate

with law enforcement — that will be up to the State. But, yes, I can. I'm just raising the issue of the fairness issue because I think that's the only issue that needs to be raised, if I believe that I can do this and I do.

I think I can — throughout this case, I've had a tough relationship with my client. There has never — except for at the very inception of this case — not been that type of a relationship. And I don't think that's changed in any way, shape, or form. So, yes, Your Honor, I can. And I'll leave any other appointee to the Court's discretion and that's what Mr. Kelley advised me as well, so I don't know what other answer I can give. I'll answer other questions you have.

THE COURT: Okay. The Court does not have any other questions at this point in time. I will set the matter for a sentencing hearing then on Wednesday, June 14th. Are you going to be available then, Ms. Holbrook?

Hearings RP 72-5.

DECLARATION OF SERVICE

I, David B. Trefry, state that on this date I emailed a copy of the Respondent's Brief to: Ms. Tanesha Canzater at Canz2@aol.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of January, 2019 at Spokane, Washington,

 s/David B. Trefry
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