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Division III
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No. 35792-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

DAHNDRE KAVAUGN WESTWOOD,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in rejecting the plea agreement of the parties.

2. The trial court abused its discretion by following applicable case law and denying a motion for a mistrial based on juror misconduct.

3. The trial court erred by failing to merge Mr. Westwood's attempted Rape in the First Degree conviction with his Assault in the First Degree conviction.

4. The trial Court erred in following the most recent case law from the Supreme Court regarding same criminal conduct analysis.

5. The trial court erred in sentencing Mr. Westwood to a standard range sentence, despite lack of evidence that his youth contributed to his crime.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. What standard of deference does the trial court owe the prosecutor when determining a plea agreement meets with prosecutorial standards and is in the interests of justice?

2. Did the plea agreement comport with prosecutorial standards and was it in the interests of justice?

3. If the trial judge erred in denying the plea agreement, what is the proper remedy?

4. Did the Court properly deny a mistrial based on jury misconduct where it inquired of the remaining jurors about the extrinsic information posed and the State refuted the extrinsic information in its case in chief?

5. Did the trial court follow the proper Supreme Court precedent in deciding the same criminal conduct issue?

6. Did the trial court fail to consider Mr. Westwood's age at the time of the crime where Mr. Westwood failed to produce any evidence his age affected his criminal conduct?

III. STATEMENT OF THE CASE

The State does not take issue with the appellant's statement of the case. The State supplements the facts as follows.

The plea hearing took place on September 18, 2017. For reference, *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409, 413 (2017), was decided March 2, 2017. *Matter of Light-Roth*, 191 Wn.2d 328, 332, 422 P.3d 444, 446 (2018), was filed on August 2, 2018, and *State v. Scott*, 190 Wn.2d 586, 591, 416 P.3d 1182, 1184 (2018), was filed on May 10, 2018. During the plea hearing the prosecutor explained the case law under *Houston-Sconiers*, the other juvenile sentencing cases having not been

decided yet. The Judge asked if the prosecutor was doing the plea deal because he was afraid of the Supreme Court. 9/18/17 RP 6. The court stated how it was a sad comment on how the prosecutor could not predict the outcome of the case. *Id.* at 7. The trial judge then took a recess over lunch to consider the plea. *Id.* at 8. He then rejected the plea agreement without further significant comment. *Id.* at 14. The judge returned to the “are you afraid of me” theme at a pretrial hearing the next week. 9/27/17 RP 26. The prosecutor explained that developing case law is something he took into account in plea bargaining.

After the close of evidence defense counsel moved to dismiss the Assault in the First Degree charge. Bartunek RP 546 to 552. The court deferred ruling on the issue until the sentencing hearing after the jury had returned a guilty verdict on that charge. 1/8/18 RP 36. In denying the motion the court noted its reservations on the evidence for that count, but concluded there was some evidence that could support the verdict. *Id.*

IV. ARGUMENT

A. The trial judge abused his authority in rejecting the plea agreement.

- 1. Whether the trial court abused its discretion in rejecting the plea agreement depends on the deference the trial court owes the prosecutor.***

The standard of review an appellate court applies to a judge's decision to reject a plea agreement is clear and well established, it is an abuse of discretion standard. *State v. Haner*, 95 Wn.2d 858, 861, 631 P.2d 381, 383 (1981). However, the standard the judge's discretion is governed by has changed since *Haner*. It is now governed by RCW 9.94A.411. How this statute is interpreted is a matter of statutory interpretation, reviewed de novo. *State v. Bliss*, 191 Wn. App. 903, 908, 365 P.3d 764, 767 (2015). What has not been explicitly stated in case law the State is aware of is whether the trial court reviews the prosecutor's plea decision for abuse of discretion, or applies his own sense of justice de novo to what the prosecutor wishes to do. This is a matter of how to interpret the statute. Because the interests of justice is so subjective, and reasonable people can disagree, if the trial judge reviews the prosecutor's actions de novo, the trial judge did not abuse his discretion in rejecting the plea agreement. However, if the trial judge owes deference to the prosecutor's decision to make the plea bargain, as supported by recent case law, specifically *State v. Rice*, 174 Wn.2d 884, 897, 279 P.3d 849, 856 (2012), *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 180, 385 P.3d 769, 782 (2016), and *State v. Agustin*, 1 Wn. App. 2d 911, 407 P.3d 1155, 1156 (2018), then the trial court abused its discretion.

The branches of government are not hermetically sealed. “The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government. The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate. The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread.” *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173, 177 (1994).

Haner is the keystone case on this issue, but it involved a different version of CrR 4.2(e), which provided that no agreement shall be made which attempts to control the judge’s discretion. *Haner*, 95 Wn. 2d at 862. The current version of the CrR 4.2(e) refers to RCW 9.94A.431. This statute requires the court to determine whether the plea agreement is in the interests of justice and conforms to prosecutorial standards.

2. The plea decision comported with prosecutorial standards.

Prosecutorial standards are found in RCW 9.94A.401 through 9.94A.470. They are intended to be directory, not mandatory by their plain language. They are intended for guidance. They do not create an enforceable right. RCW 9.94A.401. They are entitled standards and use the term guidelines. RCW 9.94A.411. They are intended to be exercised with judgment and discretion. *State v. Korum*, 157 Wn.2d 614, 625, 141

P.3d 13, 20 (2006). The court found the plea agreement did not meet the standards laid out in RCW 9.94A.450, but ignored significant portions of the statute. The full statute reads:

STANDARD: (1) Except as provided in subsection (2) of this section, a defendant will normally be expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial.

(2) In certain circumstances, a plea agreement with a defendant in exchange for a plea of guilty to a charge or charges that may not fully describe the nature of his or her criminal conduct may be necessary and in the public interest. Such situations may include the following:

(a) Evidentiary problems which make conviction on the original charges doubtful;

(b) The defendant's willingness to cooperate in the investigation or prosecution of others whose criminal conduct is more serious or represents a greater public threat;

(c) A request by the victim when it is not the result of pressure from the defendant;

(d) The discovery of facts which mitigate the seriousness of the defendant's conduct;

(e) The correction of errors in the initial charging decision;

(f) The defendant's history with respect to criminal activity;

(g) The nature and seriousness of the offense or offenses charged;

(h) The probable effect on witnesses.

Notably the first subsection of the statute says the defendant will normally be expected to plead to the charge or charges which adequately describe the nature of his conduct. It does not say the defendant will be expected to plead as charged. There may well be more than one crime that describes

the defendant's conduct. Prosecutors can and often will manipulate charges to obtain plea agreements. *Korum*, 157 Wn.2d at 635-36. This is a recognized and accepted part of the plea system. "The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain." *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012). Indecent liberties with forcible compulsion, a class A felony, describes what Mr. Westwood did when he tried to force himself on A.B. Attempted rape in the first degree is a closer match, but the proposed crime Mr. Westwood would plead to is not far off. There may be more than one crime that describes a defendant's conduct.

Instead of focusing on the first part of the statute the court focused on the second, which applies when the State reduces the crime charged to something that does not describe the defendant's conduct. In addition the statute states that "such factors may include", it is not an exhaustive list. Changes in the law, such as those surrounding juvenile sentencing, or uncertainties in the law, such as those surrounding same criminal conduct, may also be an appropriate factor to consider.

Mr. Westwood was charged with Attempted Rape in the First Degree, Indecent Liberties with Forcible Compulsion, Burglary in the

First Degree, Assault 1 and Assault 2. Trial involves risk. Mr. Westwood put forth a non-frivolous defense. There may be factors completely outside the State's control that affect trials, such as the juror misconduct occurred in this case. Jurors reach illogical decisions. Based on the special verdict forms at least one juror concluded Mr. Westwood was armed when he committed the rape, but not the burglary. Given the evidence this is illogical. The not guilty verdict on the indecent liberties charge is also somewhat inconsistent with the guilty verdict on the attempted rape charge. Both same criminal conduct analysis and juvenile sentencing have large legal questions looming over them. The assault one charge was supported by sufficient evidence and probable cause, and thus was appropriate to charge and submit to the jury under RCW 9.94A.411(2). However, it would not have been far-fetched for a juror to conclude that Mr. Westwood was capable of inflicting great bodily harm, but did not intentionally do so, and thus he was guilty of assault in the second degree, not assault in the first degree. Instead the jury apparently believed A.B. that he was trying to inflict great bodily harm, but she prevented him from doing so.

In 20/20 hindsight the State came off well at trial. It obtained consecutive sentences for assault in the first degree and attempted rape in the first degree. However, a very possible result could have been guilty on

the attempted rape in the first degree, indecent liberties with forcible compulsion, burglary in the first degree and assault in the second degree, with a not guilty on the assault in the first degree. Depending on the same criminal conduct and double jeopardy analysis (see discussions *infra*)¹ as well as the discretion of the judge under the burglary anti merger statute it is certainly possible that the only crime left standing that would control sentencing would be attempted rape in the first degree. Mr. Westwood had one prior point of criminal conduct. Thus his standard range minimum sentence would have been 76.5 to 102 months. With the plea bargain he would have pled to another felony and thus had two points, with a standard minimum sentence range of 62-82 months. Thus from a distinctly possible outcome the State was giving up approximately 20% of the minimum time Mr. Westwood would serve in prison, assuming a standard range sentence would be imposed on someone who committed the crime as a 14 year old, and gaining the certainty of a plea bargain that would all but guarantee that he would be subject to DOC supervision for the rest of his life.² Even with the assault in the first degree conviction if the State is not successful in its same criminal conduct argument Mr.

¹ Particularly the same criminal conduct analysis, where, as Mr. Westwood notes, the Court of Appeals has issued split decisions in unpublished cases.

² Both Att. Rape in the First Degree and Indecent Liberties with Forcible Compulsion are class A sex offenses, thus subject to 10% good time rules. RCW 9.94A.729(3)(c).

Westwood's standard minimum range is 102-136. In any case Mr. Westwood would have been subject to the ISRB, which would have not released him unless it determined that it was more likely than not that he would not commit sex offenses if released, and would be subject to DOC supervision for the rest of his life. RCW 9.94A.507, 9.95.420.

In addition Mr. Westwood was fourteen at the time he committed his offense. To say that sentencing of juveniles in adult court involves uncertainty at the moment is an understatement. See discussion, *infra*. Thus the State had additional sentencing risk in this case that was mitigated by the plea.

The reality is our system is one of pleas. There are inadequate judicial and prosecutorial resources to take all cases to trial. The Washington State system does not have an acceptance of responsibility mitigator like the federal system. *See, e.g. United States v. Hopper*, 27 F.3d 378, 381 (9th Cir. 1994). Thus in order to induce pleas the State has to give up something, otherwise the defendant has no incentive not to take the case to trial. Here the State was willing to give up time before the defendant went before the ISRB in order to ensure that he was subject to DOC jurisdiction for the rest of his life, and not face the risks of trial, or risks the court would reduce the term of confinement or the community custody term under the juvenile sentencing cases. This is a rational trade

off the State is permitted to make, and is in keeping with prosecutorial standards. While it is possible not every prosecutor would make the same trade-offs, every prosecutor would recognize this as a reasonable plea bargain, in keeping with the prosecutorial standards.

3. Whether the plea bargain was in the interests of justice depends on who is defining justice.

The interests of justice is such a broad term that reasonable people can almost always disagree. One can reasonably disagree that any particular law is unjust. If a fourteen year old committed the same crime as Mr. Westwood today, and was caught immediately, the State would not be able to decline him to adult court, and would have no choice but to keep him in the juvenile system. RCW 13.40.110(1)(a) (2018). On the other hand, from A.B.'s perspective Mr. Westwood's age is irrelevant. The harm done to her is the same whether the perpetrator was fourteen or forty. The interests of justice are informed by the purposes of punishment; general and specific deterrence, just deserts, incapacitation and retribution. How one balances those particular concepts leads to much of what one concludes is justice.

The law and justice are often not the same thing, at least in the eye of the beholder. Some feel that the whole plea bargaining process is

unjust.³ But a judge who enforces this belief would bring the system to a grinding halt. Others believe that any incarceration of juveniles is unjust. *See End Prison Indus. Complex v. King Cty.*, 200 Wn. App. 616, 621, 402 P.3d 918, 921 (2017), *overruled by* ___ Wn.2d ___, ___ P.3d ___ (2018). The Supreme Court tells us juveniles are different. *Miller v. Alabama*, 567 U.S. 460, 470, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407 (2012). How different and whether the Supreme Court's opinion is just is subject to debate. The State is not going to answer the question "what is justice" in these limited pages. The question here is "who decides."

The prosecutor reasonably concluded that the plea agreement was in the interests of justice. The Court and A.B. disagreed. What is the proper role for the judge? Is the judge's role to insert his own sense of justice and the prosecutorial standards, or is it to ensure the prosecutor is reasonable in his assessment of what justice is and what the prosecutorial standards require? This is the statutory interpretation question the

³ E.g. Joy, Peter A. and Uphoff, Rodney J., *Sentencing Reform: Fixing Root Problems* (October 2, 2018). 87 UMKC Law Review 97 (2018); University of Missouri School of Law Legal Studies Research Paper No. 2018-31. Available at SSRN: <https://ssrn.com/abstract=3259278> (Last visited October 3, 2018); Johnson, *Thea, Fictional Pleas* (October 27, 2018). Indiana Law Journal, Forthcoming. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3273691(last visited November 5, 2018).

Appellate Court must decide. Given the purposes of the statute, its plain language and the doctrine of separation of powers, the answer is the latter. “The division of governmental authority ‘is especially important within the criminal justice system’; separation of powers ‘ensures that individuals are charged and punished as criminals only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency.’” *Agustin*, 1 Wn. App.2d 911, 917 407 P.3d 1155 (2018), at “In the criminal justice system, legislative authority must be exercised to define crimes and sentences, executive power must be applied to collect evidence and seek an adjudication of guilt in a particular case, and judicial power must be exercised to confirm guilt and to impose an appropriate sentence.” *Id.* at 916. The purpose of RCW 9.94A.431 is to provide a check on the prosecutor, not to substitute the Court’s judgment for that of the prosecutor. The judicial branch generally defers to other branches of government in their areas of expertise unless those other branches of government are clearly incorrect. For example, a party who believes that a statute is unconstitutional bears the burden of establishing its unconstitutionality beyond a reasonable doubt. *Sch. Districts’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1, 4 (2010). The burden exists because the legislature is a co-equal branch of government, also sworn to uphold the Constitution.

Id. Also, the legislature speaks for the people, and so the courts are hesitant to strike a duly enacted statute unless convinced, after a searching legal analysis, that the statute violates the Constitution. *Id.* The Courts assume the legislature considered the constitutionality of its enactments and afford great deference to its judgment. *Id.*

Likewise the prosecutor is a duly elected official, charged with prosecuting crimes. While having a judicial check on the prosecutor's discretion to settle cases may be desirable, an absolute veto where the prosecutor's actions are reasonable usurps the functions of the prosecuting attorney and makes the prosecutor subordinate to the court, with the prosecutor only able to dismiss or go to trial if the plea agreement offends the trial judge. At the extreme a trial judge could basically shut down the prosecutor's office by deciding plea deals in general are unjust. Resolving criminal cases is one of the core functions of a prosecutor's office. Given that the great majority of prosecutor's office resources are devoted to criminal cases, and the vast majority of criminal cases are resolved by plea bargains, it could easily be said resolving cases via pleas is *the* primary function of a prosecutor's office. [T]he legislature "cannot interfere with the core functions that make them 'prosecuting attorneys' in the first place." *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 180, 385 P.3d 769, 782 (2016). Thus the legislature cannot delegate, through RCW

9.94A.431, to the trial court functions that are inherently part of the prosecutor's position. In *Drummond* the Court ruled that the County Board of Commissioners cannot hire a civil attorney to supplant an elected County Prosecutor unless the prosecutor is incapable of performing his duties or consents. Even if the Board of Commissioners believe the prosecuting attorney is performing poorly, they still cannot supplant the duly elected official. Similarly the legislature cannot authorize a trial judge to supplant the elected prosecutor's judgment on a core function of resolving a criminal case unless the prosecutor's actions are so out of line he is no longer performing his duties.

In our system anyone is free to consider the law unjust. That is how and why people advocate to change the law. However, the prosecutor is bound to follow the law. This plea agreement clearly offended A.B.'s sense of justice, and also apparently offended the trial court. CP 79. The State cannot say they were wrong, as each individual has their own sense of justice. However, given the law and the justice it provides, neither can the trial court reasonably claim that the prosecutor was wrong when he determined the plea deal was just. Given the doctrine of separation of powers the only reasonable interpretation of RCW 9.94A.431 is that the trial judge may only reject a plea deal when it is clear the prosecutor is so far outside the normal scope of justice that he is no longer performing the

prosecutorial function. The trial judge erred in rejecting the plea agreement because he insisted on his own sense of justice, inserting himself into the prosecutorial role, rather than acting as a check on the prosecutor. Thus the order rejecting the plea should be reversed.

4. Remedy

Mr. Westwood asks that his convictions be reversed based on the trial court's error. There is no basis to do that. There was nothing wrong with Mr. Westwood's trial that would justify granting him a new one. The normal remedy for a wrongly denied plea agreement is to remand to require the State to reoffer the plea, and the defendant can either accept the plea or the results of the trial. *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1382, 182 L. Ed. 2d 398 (2012).

There is a problem with this remedy in this case. The plea offer was to plead to indecent liberties with forcible compulsion. This is the charge the jury found Mr. Westwood not guilty of. The State is prohibited by the double jeopardy clause from charging Mr. Westwood on this count. Double jeopardy protections cannot be waived in a plea agreement. *Matter of Schorr*, 191 Wn.2d 315, 323, 422 P.3d 451, 456 (2018),

Mr. Westwood was actually given a choice of three plea offers. The State can reoffer the other two options. That is the remedy the court should provide.

B. The court should follow the *State v. Jefferson*, 199 Wn. App. 772, 792, 401 P.3d 805, 816 (2017), rev'd on other grounds, ___ Wn.2d __ 429 P.3d 467 (2018), and conclude that Mr. Westwood's rights to a fair trial were not compromised by juror misconduct.

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). “[A] mistrial should be granted ‘only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.’” *State v. Greiff*, 141 Wn.2d 910, 920–21, 10 P.3d 390 (2000) (quoting *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

Mr. Westwood cites three old federal cases to indicate the court cannot question currently seated jurors to discover if extrinsic information tainted the jury. *Turner v. Louisiana*, 379 U.S. 466, 471, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Marshall v. United States*, 360 U.S. 310, 312-13, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959). However, they do not stand for that proposition. In *Turner* the Deputy Sheriffs who were in charge of the sequestered jury were also the key witnesses for the State. The trial court only asked the deputies if they discussed the case, it never asked the jurors what effect being in constant contact with two key witnesses had on them. Thus the trial court never conducted the subjective inquiry into the undue

influences on the jury. In *Dowd* the court essentially conducted the subjective inquiry during voir dire, and the Supreme Court concluded that the pool was so tainted, with almost every juror who was asked having a preset opinion on the case, that a change of venue was necessary. In *Marshall* some jurors were exposed to a newspaper account of the defendant's prior crimes. The trial court conducted a subjective inquiry, and the jurors avowed they could ignore the article. The Supreme Court felt differently.

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures.

In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts we think a new trial should be granted.

Marshall, 360 U.S. at 312–13 (internal citations omitted) In this per curiam opinion the court accepted the analysis was case by case, that the trial judge had discretion, but under those facts the prejudice was just too great, and so reversed under their supervisory authority.

Unlike *Marshall*, where the facts came in through a fairly authoritative source, a newspaper article,⁴ in this case the facts outside the record came in through one juror's comments to another in the jury room that were only heard clearly by one other juror who deliberated. The offending juror was dismissed. In addition the extraneous information, that transferred DNA was impossible, was directly contradicted by both the prosecutor and the State's expert. They both acknowledged that transferred DNA existed, and it was possible, however they argued the sample in this case was inconsistent with coming from transferred DNA. Trial RP 187-188, 407, 481-502, 614, 629, 647-48. This evidence was never contradicted by the defense, despite having an expert immediately available to do so. The court specifically noted the State was not asserting transfer DNA was impossible, which is what the misbehaving juror claimed. Trial RP 407.

Mistrials come at a high cost. The trial court assured itself there was no risk following Washington case law. As the U.S. Supreme Court held in *Marshall*, and the Court of Appeals held in *Jefferson*, each case is different and the trial judge has discretion. Mr. Westwood does not argue that the trial judge misapplied the test, instead arguing that an objective

⁴ In the 1950's newspapers were considered more authoritative than they are now.

test is mandatory. There is no case law that makes it so, and logic would dictate that where a trial judge can suitably ensure that no prejudice exists and extraneous information will not be passed to the jury such an objective test is unnecessary. While the court should use caution in determining that no prejudice exists, the court did so and came to an appropriate conclusion. There is no reason for this court to part from the other Divisions of the Court of Appeals and conclude the trial courts should not conduct subjective inquires where possible prior to extraneous information being injected into deliberations.

C. Convictions for Assault in the First Degree and Attempted Rape in the First Degree did not violate the Double Jeopardy Clause.

State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753, 756 (2005), outlines a three part test. The first step is to look to explicit legislative intent, the second is the Blockburger test, and the third is when one crime is raised by conduct separately penalized. Mr. Westwood argues the third step, but Rape in the First Degree is not raised by Assault in the First Degree, or vice versa.

Mr. Westwood was convicted of Assault in the First Degree. As relevant to his crime, the statute reads: A person is guilty of assault in the first degree if he or she, *with intent to inflict great bodily harm*:

- (a) Assaults another with any deadly weapon.

RCW 9A.36.011. As relevant to his Attempted Rape in the First Degree

Conviction the statute reads:

(1) A person is guilty of rape in the first degree when such person (attempts to) engage in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or

(d) Feloniously enters into the building or vehicle where the victim is situated.

RCW 9A.44.040. The case law cited by the defendant is essentially correct. However, its application is not. Assault in the First Degree is not a crime that raises Rape in the Second Degree to Rape in the First Degree. It contains an element that is not part of Rape in the First Degree, and is not necessary to Rape in the First Degree, specifically the intent to inflict great bodily harm. The intent to inflict great bodily harm was not necessary to carry out the First Degree Rape. While the intent to inflict great bodily harm developed during the attempt to rape, it was not necessary to carry out the attempt.

State v. Johnson, 92 Wn.2d 671, 673, 600 P.2d 1249, 1251 (1979), disapproved of on other grounds by *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999), supports the State's position. There the Court ruled that Assault in the First Degree, Kidnapping in the First Degree and Rape in

the First Degree merged under the double jeopardy doctrine, but the statutes were different in a significant way.

(Rape in the first degree.) (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person not married to the perpetrator by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon; or

(b) Kidnaps the victim; ...

(Assault in the first degree.) (1) Every person, who with intent to kill a human being, *or to commit a felony upon the person or property of the one assaulted*, or of another, shall be guilty of assault in the first degree when he:

(a) Shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death;

...

(Kidnaping in the first degree.) (1) A person is guilty of kidnaping in the first degree if he intentionally abducts another person with intent:

(b) To facilitate commission of any felony or flight thereafter; or...

Johnson, 92 Wn.2d at 674–75 (irrelevant means of commission omitted)

(emphasis added). In *Johnson* the defendant kidnapped two girls, held them and raped them. While he threatened to kill them there was no actual attempt to do so. Thus the intent for the assault in the first degree

was the intent to commit the felony of rape. Likewise the kidnapping was elevated to the first degree by the rape.

In this case the assault was not elevated by the rape, nor was the rape elevated by the assault with intent to cause great bodily harm. If Mr. Westwood had only been convicted of the assault in the second degree, which involves assault with a deadly weapon without the intent to inflict great bodily harm, *Johnson* may be on point, because assault with a deadly weapon does raise Rape in the Second Degree to Rape in the First Degree.

Because Assault in the First Degree contains an element Rape in the First Degree does not, namely intent to cause great bodily harm, and Rape in the First Degree contains an element that Assault in the First Degree does not, namely intent for sexual intercourse, they do not meet the same evidence test. In addition the assault is not used for the basis of the attempt charge. Because Rape in the First Degree is elevated by Assault in the Second Degree, not Assault in the First Degree, there is no presumption of punishment by the raised crime. Nor in this case are they factually the same. Mr. Westwood could have completed the rape without intending to cause A.B. great bodily harm.

Another area the court may look to determine whether the legislature intended to punish the crimes differently is whether the crimes have punishments that are different in kind, not just degree, and whether

the assault carries a greater punishment than the crime it raises. *Freeman*, 153 Wn.2d at 775. Both Attempted Rape in the First Degree and Assault in the First Degree are seriousness level XII offenses. *State v. Weatherwax*, 188 Wn.2d 139, 154 n 2, 392 P.3d 1054, 1061 (2017). However because of the attempt the Rape charge carries a lesser standard range than the Assault. However, the Assault guarantees the offender's release at the end of the standard range, whereas the Rape sentence is a minimum sentence, at which time the offender is allowed to seek release from the ISRB. RCW 9.94A.507. The normal practice when two convictions violate double jeopardy is to dismiss the lesser. Here it is not clear which is the lesser and which is the greater. Mr. Westwood contends that the attempted rape is the greater, and the assault is the lesser. But the assault one carries more mandatory jail time. An argument could be made that it is the greater crime. The attempted rape carries more potential jail time and lifetime supervision, thus Mr. Westwood's position that the attempted rape is the greater crime is not unreasonable. The legislature imposed punishments that are different in kind, not just degree, for these crimes. This would indicate that it intended they be punished separately.

Freeman is on point and controlling. There the court ruled that robbery in the first degree merged with assault in the second degree, but not assault in the first degree.

D. The trial court applied the correct same criminal conduct test as promulgated by the Supreme Court.

This is an issue of statutory interpretation, reviewed de novo. Mr. Westwood does not argue the court misapplied the same criminal conduct test as dictated by the most recent Supreme Court opinion, he instead argues that opinion was the wrong test. The most recent Supreme Court case discussing same criminal conduct is *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016). Two crimes constitute the same criminal conduct when they occur at the same time and place, have the same victim and the same intent. RCW 9.94A.589. *Chenoweth* and the trial court in this case focused on the intent prong of the analysis. *Chenoweth* involved rape of a child and incest, and Mr. Westwood argues that the case only applies to those two crimes. However, the analysis in *Chenoweth* is not so limited. The Court was analyzing RCW 9.94A.589 which applies to sentencing all felony crimes. *Chenoweth* found that it was the statutory mens rea that controlled the same criminal conduct analysis, not the objective intent of the offender. It further backed up its analysis by pointing out that incest and rape of a child are in separate statutory chapters. *Id.* at 224. Rape, burglary and assault are also in different statutory chapters.

While *Chenoweth* did not expressly overrule prior case law it cannot be said its holding was accidental. The dissent cited the same case

Mr. Westwood does here, *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). *Id* at 228 (Madsen J. Dissenting). The court was well aware of its prior case law, and choose not to follow it. Justice Madsen correctly described the majority's holding. "Contrary to the majority's view, the presence or absence of identical statutory mens rea elements is not the linchpin of this court's criminal intent inquiry." *Chenoweth*, 185 Wn.2d at 231 (Madsen, J. Dissenting). That may have been true before *Chenoweth*, however, the majority of the Supreme Court has now said statutory mens rea is what determines the intent element of the same criminal conduct analysis. The lower courts are bound by the rulings of five members of the Supreme Court. There is nothing in *Chenoweth* that limits its holding to rape of a child and incest. Therefore the trial court applied the correct test as determined by five members of the Supreme Court.

If the Appellate Court does reverse on this issue the proper remedy is to remand for resentencing under the proper test.

E. The court correctly determined Mr. Westwood did not merit a mitigated sentence.

1. Legal tests for exceptional sentences.

RCW 9.94A.585(4)⁵ governs appellate review of issues related to exceptional sentences. *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997).⁶ The question of whether the court's reasons for imposing a standard range sentence are supported by evidence in the record is reviewed under a clearly erroneous standard; whether the reasons given justify departure from the standard range is reviewed de novo. *Id.*

There is no general right to appeal a sentence within the standard range. RCW 9.94A.585(1). Appellate courts review standard range sentences only "in circumstances where the court has refused to exercise its discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (citing *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989), *review denied*, 136 Wn.2d 1002 (1998)); *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). "When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling." *Id.*

⁵ RCW 9.94A.585(4) provides, in relevant part:

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

⁶ *Ha'mim* cites RCW 9.94A.210(4), recodified in 2001 to RCW 9.94A.585(4).

While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). An exceptional mitigated sentence must be supported by facts proved by a preponderance of the evidence. RCW 9.94A.535(1). A trial court may impose an exceptional mitigated sentence if it finds there are substantial and compelling reasons justifying downward departure. RCW 9.94A.535.

In order to grant a mitigated sentence the court must address three questions. The first two are determined as a matter of law, the third is a matter of discretion. The first question the court must answer is “given the crimes (or enhancements) of conviction, does the law allow a mitigated sentence?” (Question one). Cases that address this question include *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999), *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017) and *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). In this case there was no dispute and no confusion as to the answer to this question. The crimes Mr. Westwood was convicted of do allow for a mitigated sentence.

To rephrase *Ha'mim*, the next question the court must answer is “given the facts of this case, as a matter of law, are there sufficient facts to

support a mitigated sentence?” (Question 2). Cases that address this question include *State v. O'Dell* 183 Wn.2d 680, 358 P.3d 359 (2015), *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997), *State v. Fowler* 145 Wn.2d 400, 38 P.3d 335 (2002) and many others. See annotations to RCW 9.94A.535. This is the question the sentencing judge was answering ‘no’ as a matter of law. Because the court correctly found the answer to this question was no, it did not reach the third question, whether, given there are sufficient facts to impose a mitigated sentence, the court should actually impose one, and if so, what exactly should it impose? (Question 3). This is the question the court applies discretion to.

2. Mr. Westwood did not meet the requirements for a mitigated sentence under O'Dell.

In *O'Dell* the Supreme Court reaffirmed and clarified its holding in *Ha'mim* that age alone was not a mitigating factor, instead it informs the court’s analysis as to whether the defendant was able to conform his actions with the law. For example, age may reflect on the defendant’s impulsivity, poor judgment and susceptibility to outside influences, which may justify an exceptional sentence. *O'Dell* 183 Wn.2d at 364. Thus age is a factor to consider in light of the adolescent brain’s tendency towards these traits. However, to obtain a mitigated sentence under *O'Dell* the defendant must still show the poor impulse control, subjectability to peer

pressure, etc., affected why the defendant committed the crime. Mr. Westwood did not make such a showing. Because he presented no evidence of such, he was ineligible for a mitigated sentence as a matter of law.

Mr. Westwood submitted what he titled letters of support for/on behalf of Dahndre K. Westwood. Confidential CP (CCP 466-476). First, these are simply statements from people who supposedly knew Mr. Westwood. While the rules of evidence are not strictly applied in a sentencing hearing, ER 1101(c)(3), to call these evidence stretches the term. They are from people with an agenda, not subject to any sort of cross examination. Mr. Westwood's mother made a post on Facebook blaming the victim in this case, and one of the people who submitted a letter later blamed the whole incident on the victim on a Facebook post to Mr. Westwood's mother. State's Supp. CP. In addition these letters are along the lines of "I cannot believe he would do such a thing" and not he was immature and incapable of understanding the consequences of his actions. The documents from the school and the juvenile department also submitted do not support that any immaturity gave rise to this crime.

Because Mr. Westwood was declined from juvenile to adult court Mr. Westwood's maturity was analyzed under the *Kent* factors. State's Supp. CP; *Kent v. U.S.*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84

(1966). Notably the juvenile court found that Mr. Westwood was more sophisticated than juveniles his age, and showed a pattern of behavior that would not be considered typical of his age.

Mr. Westwood points to no facts beyond his chronological age that would justify a mitigated sentence. Under *O'Dell* he must point to more. As a matter of law Mr. Westwood fails to justify a mitigated sentence with any facts showing his lack of maturity was a cause of his criminal behavior.

3. Houston-Sconiers does not allow a free for all in juvenile sentencing.

In the early 1980's much of the country was dissatisfied with criminal sentencing, including the arbitrariness of it. In response many States and the Federal Government passed sentencing reform acts (SRA's). Justice O'Conner described the purpose and reasoning behind Washington's SRA.

One need look no further than the history leading up to and following the enactment of Washington's guidelines scheme to appreciate the damage that today's decision will cause. Prior to 1981, Washington, like most other States and the Federal Government, employed an indeterminate sentencing scheme. Washington's criminal code separated all felonies into three broad categories: "class A," carrying a sentence of 20 years to life; "class B," carrying a sentence of 0 to 10 years; and "class C," carrying a sentence of 0 to 5 years. Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the

statutory range, including probation—*i.e.*, no jail sentence at all.

This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. (“[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.... These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence”). Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.

To counteract these trends, the state legislature passed the Sentencing Reform Act of 1981. The Act had the laudable purposes of “mak[ing] the criminal justice system accountable to the public,” and “[e]nsur[ing] that the punishment for a criminal offense is proportionate to the seriousness of the offense ... [and] commensurate with the punishment imposed on others committing similar offenses.” The Act neither increased any of the statutory sentencing ranges for the three types of felonies (though it did eliminate the statutory mandatory minimum for class A felonies), nor reclassified any substantive offenses. 1981 Wash. Laws ch. 137, p. 534. It merely placed meaningful constraints on discretion to sentence offenders within the statutory ranges, and eliminated parole. There is thus no evidence that the legislature was attempting to manipulate the statutory elements of criminal offenses or to circumvent the procedural protections of the Bill of Rights. Rather, lawmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise “‘labyrinthine’ sentencing and corrections system that ‘lack[ed] any principle except unguided discretion.’ ”

Far from disregarding principles of due process and the jury trial right, as the majority today suggests, Washington's reform has served them. Before passage of the Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sentence or probation. The ultimate sentencing determination could turn as much on the idiosyncrasies of a particular judge as on the specifics of the defendant's crime or background. A defendant did not know what facts, if any, about his offense or his history would be considered relevant by the sentencing judge or by the parole board. After passage of the Act, a defendant charged with second degree kidnaping knows what his presumptive sentence will be; he has a good idea of the types of factors that a sentencing judge can and will consider when deciding whether to sentence him outside that range; he is guaranteed meaningful appellate review to protect against an arbitrary sentence. Criminal defendants still face the same statutory maximum sentences, but they now at least know, much more than before, the real consequences of their actions.

Washington's move to a system of guided discretion has served equal protection principles as well. Over the past 20 years, there has been a substantial reduction in racial disparity in sentencing across the State. (Racial disparities that do exist “are accounted for by differences in legally relevant variables—the offense of conviction and prior criminal record”); (“[J]udicial authority to impose exceptional sentences under the court's departure authority shows little evidence of disparity correlated with race”). The reduction is directly traceable to the constraining effects of the guidelines—namely, their “presumptive range[s]” and limits on the imposition of “exceptional sentences” outside of those ranges. For instance, sentencing judges still retain unreviewable discretion in first-time offender cases and in certain sex offender cases to impose alternative sentences that are far more lenient than those contemplated by the guidelines. To the extent that unjustifiable racial disparities have persisted in Washington, it has been in the imposition of such

alternative sentences: “The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion.”

Blakely v. Washington, 542 U.S. 296, 314–18, 124 S. Ct. 2531, 2544–45, 159 L. Ed. 2d 403 (2004) (O’Conner, J. Dissenting) (Internal citations omitted). While *Blakely* was about who had to find the facts relevant to aggravating circumstances, the principles espoused by Justice O’Conner apply equally to mitigated sentences.⁷

In *Houston-Sconiers* the State agreed that the defendant was allowed a mitigated sentence under the second question regarding mitigated sentences when it agreed to mitigate the base part of the sentence for robbery to zero time. The primary issue in that case was whether the court could mitigate firearm enhancements, which is relevant to question one regarding mitigated sentences. The *Houston-Sconiers* Court stated

In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have

⁷ To what extent the SRA has met these goals, or is the best way to accomplish them, is a matter of fair debate, but simply throwing out the SRA for juvenile offenders does not offer the solution.

discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.

Id. at 23. This holding begs the question, what is the trial court supposed to base its discretion on? The court answers that in the next paragraph. The court cites to *O'Dell* in stating that the SRA allows the court to mitigate a sentence. *Id.* at 24. The Supreme Court ruled that the trial court was justified in mitigating *Houston-Sconiers'* base sentence under *O'Dell*. Thus in order to obtain a mitigated sentence, a juvenile defendant must meet the requirements of *O'Dell*. *Houston-Sconiers* simply extends *O'Dell* to previously mandatory deadly weapon enhancements.

As the Supreme Court recognized in *State v. Scott*, 190 Wn.2d 586, 588, 416 P.3d 1182, 1183 (2018), under federal jurisprudence the Eighth Amendment is satisfied if there is an opportunity for release after 20 years. RCW 9.94A.730. Because any juvenile, regardless of the crimes of conviction, will be eligible for release after 20 years, the eighth amendment cannot be offended on account of chronological age alone by any sentence imposed in Washington Courts.⁸

A trial judge afforded discretion is not free to act at whim or in boundless fashion, and discretion does not allow the trial judge to make any decision he or she is inclined to make:

⁸ There is an arguable exception regarding aggravated murder, but that is not relevant here.

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.

State v. Curry, 191 Wn.2d 475, 484, 423 P.3d 179, 183 (2018).

Here Mr. Westwood cites only his chronological age, and then says give me a mitigated sentence. This is simply not enough under the law. The trial judge correctly concluded that, as a matter of law, Mr. Westwood was not entitled to a below the standard range sentence. To allow trial courts unfettered discretion when it comes to juvenile sentencing, as Mr. Westwood appears to advocate here, would invite the evils Justice O'Conner referred to in her *Blakely* dissent. Because Mr. Westwood produced no evidence that his crime was a result of juvenile immaturity, he is not entitled to a mitigated sentence.

V. CONCLUSION

The trial judge inserted himself into the prosecutorial role when he rejected the plea agreement. Therefore the case should be sent back to give Mr. Westwood the chance to plead to one of the alternative agreements. The trial court properly denied a mistrial based on juror

misconduct. There was no double jeopardy violation under *Freeman*. Mr. Westwood did not present evidence that would justify a mitigated sentence. Thus the trial court should be reversed on the plea issue, and affirmed on all other aspects of the case.

Dated this 11th day of January 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Jill S. Reuter
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Dated: January 17, 2019.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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