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NO. 36452-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

LAJUANE ROBERSON,
Appellant.

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

Spokane County Cause No. 17-1-01907-1

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by admitting evidence that was inadmissible under ER 403.
2. Ms. Sanfilippo's testimony regarding statements by Mr. Roberson that she had allegedly overheard were inadmissible under ER 403.
3. Mr. Roberson was prejudiced by the improper admission of Ms. Sanfilippo's testimony regarding his alleged statements.

ISSUE 1: Evidence is inadmissible if its probative value is outweighed by unfair prejudice or the risk of confusing or misleading the jury. Did the trial court err by admitting evidence that Mr. Roberson had told his friend that he had "robbed the place" but that he "did not need to rape anyone" when there was no evidence that those statements referred to the instant case?

4. Mr. Roberson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.
5. Defense counsel provided ineffective assistance by unreasonably failing to argue Mr. Roberson's youthfulness as a mitigating factor at sentencing.
6. Mr. Roberson was prejudiced by his attorney's deficient performance.

ISSUE 2: A defense attorney provides ineffective assistance of counsel by failing to bring applicable mitigating factors to the court's attention during sentencing. Did Mr. Roberson's attorney provide ineffective assistance by failing to argue that his client's youth posed a mitigating factor when Mr. Roberson was nineteen-years-old at the time of the alleged offenses and both the sentencing court and Pre-Sentence Investigation found that he had acted impulsively?

7. Counts III, IV, and V of Mr. Roberson's prior 2016 convictions comprised the same criminal conduct for sentencing purposes under RCW 9.94A.589(1)(a).
8. Counts III, IV, and V of Mr. Roberson's prior 2016 convictions should only have added one point to Mr. Roberson's current offender score under RCW 9.94A.525(5)(a)(i).

9. Defense counsel provided ineffective assistance by unreasonably failing to argue that Counts III, IV, and V of Mr. Roberson's prior 2016 convictions comprised the same criminal conduct for sentencing purposes.

ISSUE 3: A defense attorney provides ineffective assistance of counsel by failing to argue at sentencing that prior offenses should be scored together as the "same criminal conduct," when applicable. Did Mr. Roberson's attorney provide ineffective assistance by failing to raise that three of his prior convictions comprised the "same criminal conduct" when they occurred at the same time and place, against the same victim, and with the same criminal intent?

10. Mr. Roberson's current convictions for Counts I and II comprised the same criminal conduct for sentencing purposes under RCW 9.94A.589(1)(a).
11. The sentencing court had discretion to not add to Mr. Roberson's current offender score for Count II based on his conviction for Count I under RCW 9A.52.050.
12. Defense counsel provided ineffective assistance by unreasonably failing to argue that Counts I and II comprised the same criminal conduct.

ISSUE 4: A sentencing court has discretion to score a burglary conviction together with other offenses as "same criminal conduct," when the statutory test is met. Did Mr. Roberson's attorney provide ineffective assistance of counsel by failing to argue that the sentencing court should score Counts I and II together when they occurred at the same time and place, against the same victim, and with the same criminal intent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

When Lajuane Roberson was nineteen years old, he lived for a few months with a friend and the friend's mother, Jessica Sanfilippo, in their apartment. RP 307-08, 406-07.¹

Mr. Roberson was friendly with some of the neighbors who also lived in the apartment complex. *See* RP 412, 415-16. One evening, Mr. Roberson ran into Aleta Brady and her friend, Amy², sitting on Amy's porch and drinking wine. RP 416-17. Both Ms. Brady and Amy lived in the apartment complex. RP 416-17. The three of them talked for about forty-five minutes. RP 417. After that, Ms. Brady invited Mr. Roberson up to her apartment, where they engaged in sexual activity. RP 419-23.

Afterward, Mr. Roberson left through the front door to Ms. Brady's apartment. RP 425.

Around 1:00am, Ms. Brady called the police. RP 89; 205. She told them that someone had come into her apartment while she was asleep and strangled her until she blacked out. *See* RP 76-84. She said that she woke up naked. RP 85.

¹ All citations to the Verbatim Report of Proceedings refer to the chronologically-paginated volumes covering 8/30/18 through 11/6/18.

² Amy's last name is not in the record. *See* RP *generally*. No disrespect is intended.

The apartment's front door was locked with the deadbolt when the police arrived. RP 91. It had been locked from the inside since before Ms. Brady went to sleep. RP 76, 110-12.

The only other way into Ms. Brady's apartment – which was on the third floor of the building – was through the sliding door to the balcony. RP 113, 217-18. The police officers noted that it would be very difficult to climb onto or off of Ms. Brady's third-floor balcony. RP 230, 254. The officers surmised that, in order to leave via the balcony, a person would need to use repelling equipment and then, somehow, take all of that equipment with them when they left. RP 260.

There was also no evidence that anyone had come in or left through Ms. Brady's balcony door. RP 213, 262. The balcony's railing was covered with dust, which was undisturbed. RP 207-08, 262. There was one small area with no dust, but that area had a cobweb over it. RP 254. There were also stringed lights hung on the balcony's railing, which did not appear to have been disturbed. RP 261.

Ms. Brady told the police that she had gone to sleep in her clothes, but woken up in the night, taken her clothes off, and thrown them onto the floor because she was hot. RP 85. After that, she said she went back to sleep wearing only her underwear. RP 85. She said that her attacker had removed her underwear while she was unconscious. RP 86.

But the police noted that Ms. Brady's laptop computer was on top of her clothes, on the floor of her bedroom, which did not appear to coincide with her story of taking her clothes off while she was asleep. RP 259-60.

The police also did not see any injuries to Ms. Brady. RP 227.

A few months later, the results of Ms. Brady's "rape kit" testing came back, showing that Mr. Roberson's DNA had been found on a vaginal swab. *See* RP 195.

The state charged Mr. Roberson with first-degree burglary and first-degree rape. CP 13-14.³

At trial, the state sought to admit testimony from Ms. Sanfilippo that she had overheard Mr. Roberson admit to robbery by eavesdropping on his conversation with her son. RP 309-26.

Mr. Roberson objected. RP 309-10. He noted that Ms. Sanfilippo did not remember when she had allegedly heard Mr. Roberson make those statements. RP 310. Mr. Roberson also pointed out that Ms. Sanfilippo did not know whether he was talking about the allegation against Ms. Brady or some other incident. RP 314.

³ The state also charged Mr. Roberson with witness tampering. CP 13-14. The jury convicted him of that charge. CP 102. But that conviction is not at issue in this appeal.

Indeed, there was no allegation that Mr. Roberson had robbed Ms. Brady. RP 314. But Mr. Roberson had been arrested and charged with theft-related offenses in other cases. *See* RP 313-14. Mr. Roberson moved to exclude the testimony under ER 403.

But the court overruled Mr. Roberson's objection. RP 322. Ms. Sanfilippo was permitted to testify that she had overheard Mr. Roberson tell her son that he had "robbed the place" but that he "did not need to rape anyone." RP 325-26.

Ms. Sanfilippo admitted that the statement she allegedly overheard did not refer to a specific location. RP 332. She did not call the police or tell anyone about the alleged statements until the police came to her home almost two years later. RP 332.

Ms. Sanfilippo admitted that she did not like Mr. Roberson and had kicked him out of her apartment. RP 329, 332. She had deliberately eavesdropped on Mr. Roberson and her son because she believed that they were engaged in unsavory activity. RP 309, 325.

Ms. Brady testified that a masked man had come into her room, strangled her to the point of unconsciousness, and then left before she woke up. RP 76-84. She said that she did not know how he had gotten into her apartment. RP 219. She admitted that the front door had been locked from the inside the whole time. RP 110, 112. She said that injuries from

the attack had shown up later but neither she nor the police had taken any photographs of those injuries. *See* RP 100.

The state called another resident of the apartment complex to testify that she had once seen a man climb from the roof onto a second-story balcony. RP 239-40. But that man was white and Mr. Roberson is African-American. RP 280; CP 33. The white man who climbed onto the balcony did so by throwing his leg over the railing and trying to roll over that railing onto the balcony. RP 245.

The police also confirmed that a person would have to throw their body over the railing (or at least step on top of it) in order to enter Ms. Brady's apartment through the balcony door. RP 285.

No witness had ever seen anyone climb onto a third-floor balcony. *See* RP *generally*. No witness could explain how it was possible to do so without disturbing the dust built-up on the railing. *See* RP *generally*. The police never tried climbing onto the third-floor balcony themselves, to see if it was possible. RP 232, 282.

Ms. Brady also testified that she had urinated involuntarily on her bed while she was unconscious. RP 86, 94. She said that the large wet spot on her bed was a result of that urination. RP 94. But the crime lab did not find any urine on Ms. Brady's sheet. RP 297.

During closing argument, the prosecutor told the jury that Ms. Sanfilippo's testimony meant that Mr. Roberson had admitted to the burglary charge:

You know from Mr. Roberson's statement, himself, that you heard Jessica Sanfilippo overhear he told his friend, Curtis, he had just robbed the place, but he didn't rape anybody. *He admitted to unlawfully being in that apartment.*

...

You heard the statement that Ms. Sanfilippo says she overheard. You heard that she heard Mr. Roberson tell his friend, Curtis, that he had just robbed the place. He didn't rape anybody. Didn't want to admit rape to his friend, *but he admitted unlawful entry.* He did feloniously enter into Ms. Brady's apartment.

RP 478 (emphasis added).

The jury convicted Mr. Roberson of each charge. CP 100-03.⁴

At sentencing, the state claimed that Mr. Roberson had an offender score of ten. RP 541. The state had scored each of Mr. Roberson's prior and current offenses separately. *See* RP 152-53. Defense counsel did not argue that any of the old or new convictions constituted the same criminal conduct for sentencing purposes. *See* RP 540-68.

This was so even though three of Mr. Roberson's prior convictions were from an incident in which he allegedly entered a business called Smart Smoke, caused some damage to a display case, and stole some e-cigarette supplies. *See* RP 30-63.

⁴ The jury also entered a finding that Mr. Roberson had committed the burglary charge with sexual motivation. RP 101.

Mr. Roberson was nineteen years old at the time of the alleged incident involving Ms. Brady. *See* RP 406. He had suffered physical abuse as a child, resulting in removal from his parents by the state. *See* CP 110-11. His Pre-Sentence Investigation found that he appeared to be impulsive and to lack stability or responsibility in his life. CP 113.

The trial court also noted that Mr. Roberson “appear[s] to be impulsive.” RP 560. But the court found that there were “not a whole lot of mitigating factors” that applied to the case for sentencing. RP 562.

Mr. Roberson’s defense attorney never argued that his client’s youthfulness and its attendant characteristics weighed in favor of leniency in sentencing or an exceptional sentence below the standard range. *See* RP 540-68.

The court sentenced Mr. Roberson to the high end of the standard range, based on the understanding that he had an offender score of ten. RP 562. This timely appeal follows. CP 154.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ERRONEOUSLY ADMITTING EVIDENCE AT MR. ROBERSON’S TRIAL THAT CONFUSED AND MISLED THE JURY INTO BELIEVING THAT HE HAD ADMITTED TO THE BURGLARY CHARGE.

Mr. Roberson was not charged with robbery in this case. CP 13-14. There was no allegation that he had stolen anything from Ms. Brady’s

home. *See* RP *generally*. But Mr. Roberson had been previously convicted for incidents involving breaking into businesses and committing theft inside. *See* CP 29-73.

Mr. Roberson did not make any statements to the police regarding the allegations by Ms. Brady and did not admit to any of the charges. *See* RP *generally*.

But the trial court permitted Ms. Sanfilippo to testify (over Mr. Roberson's objection) that she overheard him admit to her son that he had "robbed the place." RP 325-26. She also told the jury that she had overheard Mr. Roberson say that "he did not need to rape anyone." RP 325-26.

During closing argument, the prosecutor relied on Ms. Sanfilippo's testimony to repeatedly tell the jury that Mr. Roberson had admitted to unlawfully entering Ms. Brady's apartment. RP 478.

The trial court abused its discretion by admitting Ms. Sanfilippo's testimony because its probative value was far outweighed by the risk of unfair prejudice or of confusing and misleading the jury.

Because she did not know any of the context surrounding the things she allegedly heard Mr. Roberson say, there is a significant likelihood that Ms. Sanfilippo had mistakenly believed that he was talking about "robbing" Ms. Brady's apartment when he was actually either

discussing his prior convictions or talking about something that never happened.

Evidentiary rulings are reviewed for abuse of discretion. *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998). A trial court abuses its discretion by basing a decision on untenable grounds or by failing to properly exercise that discretion. *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) (citing *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)).

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). Improperly admitted evidence is only harmless if it is “of little significance in light of the evidence as a whole.” *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002)).

Under ER 403, evidence must be excluded if its probative value is outweighed by the risk of unfair prejudice or confusion of the issues; or if it is misleading to the jury. ER 403; *State v. Briejer*, 172 Wn. App. 209, 226, 289 P.3d 698 (2012).

Reversal is also required when the improperly admitted evidence “is likely to stimulate an emotional response rather than a rational

decision.” *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (citing *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995); accord *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009)).

Ms. Sanfilippo’s testimony regarding Mr. Roberson’s alleged statements were inadmissible under ER 403 because – when properly understood -- they carried only minimal probative value but presented a very high risk unfair prejudice and of confusing or misleading the jury.

The allegation that Mr. Roberson had admitted to “robb[ing] the place” had very limited probative value in the instant case. RP 325-26. Mr. Roberson was not accused of robbing Ms. Brady’s apartment and there were no allegations that he had stolen anything. *See RP generally*. Ms. Sanfilippo had merely speculated that the alleged admission referred to Ms. Brady at all. *See RP 314*.

Mr. Roberson did, however, have prior convictions for burglaries involving theft. *See CP 29-73*. In that context, it is just as likely that the statements Ms. Sanfilippo overheard referred to a totally different case. But Mr. Roberson’s attorney could not point that out on cross-examination without placing undue emphasis on his client’s prior convictions for offenses very similar to one of the current charges. *See e.g. Briejer*, 172 Wn. App. at 227 (noting the unfair prejudice that stems from evidence supporting an improper propensity inference).

Even so, the statements carried a very high risk of confusing or misleading the jury into believing that Mr. Roberson had, in fact, admitted to illegally entering Ms. Brady's apartment. Indeed, that is the very purpose for which the prosecutor relied on Ms. Sanfilippo's testimony during closing argument. RP 478.

The alleged statement that Mr. Roberson "did not need to rape anybody" also carried a high risk of unfair prejudice because it needlessly made Mr. Roberson appear crass and insensitive to rape survivors and was "likely to stimulate an emotional response rather than a rational decision" by the jury. *Beadle*, 173 Wn.2d at 120.

Ms. Sanfilippo's testimony regarding the statements that she had allegedly overheard Mr. Roberson make was inadmissible under ER 403.

Mr. Roberson was prejudiced by the improper admission of Ms. Sanfilippo's testimony. The testimony was not is "of little significance in light of the evidence as a whole," as demonstrated by the prosecutor's choice to rely on it during closing argument. *Fuller*, 169 Wn. App. at 831; RP 478.

The question for the jury in Mr. Roberson's case came down to a credibility contest between Ms. Brady and himself. The improper admission of his alleged statements undermined his entire testimony at trial. The evidence against Mr. Roberson was not overwhelming,

particularly in light of the fact that the state was unable to explain how he could have gotten into Ms. Brady's apartment without her letting him in. There is a reasonable probability that the admission of Ms. Sanfilippo's testimony materially affected the outcome of Mr. Roberson's trial. *Gunderson*, 181 Wn.2d at 926.

The trial court abused its discretion by admitting Ms. Sanfilippo's testimony regarding the statements she had allegedly overheard Mr. Roberson make to her son. ER 403; *Johnson*, 90 Wn. App. at 62. Mr. Roberson's convictions must be reversed. *Id.*

II. MR. ROBERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING HEARING. DEFENSE COUNSEL UNREASONABLY FAILED TO RAISE MR. ROBERSON'S YOUTHFULNESS AS A MITIGATING FACTOR AND TO ARGUE THAT HIS PRIOR (AND CURRENT) CONVICTIONS QUALIFY AS "SAME CRIMINAL CONDUCT" FOR PURPOSES OF HIS OFFENDER SCORE.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Kylo*, 166 Wn.2d at 862.⁵

⁵ Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kylo*, 166 Wn.2d at 862; RAP 2.5(a). Generally, one cannot appeal a standard-range sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106

(Continued)

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009), *as amended* (Sept. 17, 2009). This includes a duty to investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

A defense attorney provides ineffective assistance of counsel by failing to recognize and point the sentencing court to appropriate caselaw permitting leniency in sentencing. *Adamy*, 151 Wn. App. at 588 (*citing State v. McGill*, 112 Wn. App. 95, 101, 47 P.3d 173 (2002)).

This is because “[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority.” *McGill*, 112 Wn. App. at 102. “Nor can [the court] exercise its discretion if it is not told it has discretion to exercise.” *Id.*

An accused person is prejudiced by such a failure when there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if the applicable mitigating factor had been properly raised. *Id.* This prejudice standard does not require the sentencing court to overtly express discomfort with the sentence imposed. *See McFarland*,

(2017). But that rule does not apply to appeals addressing (a) a sentencing court’s mistaken belief that a mitigating factor did not apply or (b) ineffective assistance of counsel by counsel’s failure to research and raise an applicable mitigator. *Id.*

189 Wn.2d at 59. Rather, reversal is required so long as “the record suggests at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so.” *Id.*

In Mr. Roberson’s case, defense counsel provided ineffective assistance at sentencing by (a) failing to argue that the fact that Mr. Roberson was only nineteen-years-old at the time of the allegations was a mitigating factor; (b) failing to point out that three of his prior convictions constituted the same criminal conduct; and (c) failing to inform the court that it had discretion to score the burglary and rape charges as same criminal conduct for sentencing purposes.

This case must be remanded for a new sentencing hearing at which Mr. Roberson is afforded his constitutional right to the effective assistance of counsel at sentencing.

A. Defense counsel provided ineffective assistance at sentencing by failing to raise Mr. Roberson’s youthfulness as a mitigating factor when his client was nineteen-years-old at the time of the alleged offenses and both the sentencing court and the Pre-Sentence Investigation took note of his impulsivity.

Mr. Roberson was nineteen years old at the time of the alleged offenses in this case. *See* RP 406. Both the sentencing court and the Pre-Sentence Investigation noted that he had acted impulsively. RP 560; CP 113.

The trial court should have been required to consider whether Mr. Roberson's youthfulness (and attendant impulsivity) constituted mitigating factors for sentencing purposes. *O'Dell*, 183 Wn.2d at 696.

But defense counsel never brought the issue up or requested that it be considered a mitigating factor. *See* RP 540-68. Mr. Roberson's attorney provided ineffective assistance of counsel.

Recent advances in brain science have revealed "fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *O'Dell*, 183 Wn.2d at 692 (*citing Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Ann. N.Y. Acad. Sci. 77 (2004)).

These characteristics of the still-developing adolescent brain cause young people to be "overrepresented statistically in virtually every category of reckless behavior." *Roper*, 543 U.S. at 569 (*citing* Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992)); *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Young adults' relative lack of control over their conduct and environment means that "their irresponsible conduct is not as morally

reprehensible” as that of a fully-mature adult. *Roper*, 543 U.S. at 570; *O’Dell*, 183 Wn.2d at 692. This diminished blameworthiness and “the distinctive attributes of youth” “diminish the penological justifications for imposing the harshest sentences.” *O’Dell*, 183 Wn.2d at 692 (*citing Miller v. Alabama*, 567 U.S. 460, 477-78, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham*, 560 U.S. at 71; *Roper*, 543 U.S. at 571).

Additionally, a young person’s “inability to deal with police officers or prosecutors (including during a plea agreement) or his incapacity to assist his own attorneys” also create a greater likelihood that a young person will be convicted of a more serious offense in circumstances under which an older adult would only have sustained a less serious conviction. *Miller*, 567 U.S. at 477-78 (*citing Graham*, 560 U.S. at 78; *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)).

Because the parts of the brain involved in behavior control remain undeveloped “well into a person’s 20s,” these advances in adolescent brain science apply to younger adults, in addition to juveniles. *O’Dell*, 183 Wn.2d 691 (*citing Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 152 & n.252 (2009) (collecting studies); Giedd, 1021 Ann. N.Y. Acad. Sci. 77); *Roper*, 543 U.S. at 574.

As a result, the Washington Supreme Court has ruled that a sentencing court must be permitted to consider youth as a mitigating factor in cases involving offenses committed shortly after a person reaches legal adulthood. *O'Dell*, 183 Wn.2d at 696.⁶

While an offender is never 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.” *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A sentence imposed without proper consideration of “an authorized mitigated sentence” qualifies as a “‘fundamental defect’ resulting in a miscarriage of justice.” *McFarland*, 189 Wn.2d at 58 (*citing Mulholland*, 161 Wn.2d at 332).

Mr. Roberson was entitled to request a mitigated sentence based on his youth and impulsivity at the time of the alleged offenses. *O'Dell*, 183 Wn.2d at 696. His defense attorney provided ineffective assistance of counsel by failing to recognize and request that the sentencing court take those attributes into consideration. *Adamy*, 151 Wn. App. at 588; *McGill*, 112 Wn. App. at 101.

⁶ This type of discretion is also required by the Eighth Amendment. *See State v. Houston-Sconiers*, 188 Wn.2d 1, 19, 391 P.3d 409 (2017).

Mr. Roberson was prejudiced by his defense counsel's negligence because there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if his youthfulness had been properly considered. *McGill*, 112 Wn. App. at 102. Though the court sentenced Mr. Roberson to the high end of the standard range, it did so based on the misapprehension that his offender score was higher than the top of the sentencing grid (as argued below). RP 562.⁷

The sentencing court also stated that there were "not a whole lot of mitigating factors" that applied to Mr. Roberson's situation at sentencing. RP 562. But a significant mitigating factor related to Mr. Roberson's youthfulness did apply and was supported by the findings of the Pre-Sentence Investigator. Defense counsel's failure to raise this point requires resentencing in Mr. Roberson's case because "the record suggests at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so." *McFarland*, 189 Wn.2d at 59.

⁷ In different circumstances, a sentence at the high end of the standard range can indicate that an accused person was not prejudiced by his/her defense attorney's failure to request an exceptional sentence below the standard range. *See e.g. State v. Knight*, 176 Wn. App. 936, 957-58, 309 P.3d 776 (2013).

Unlike in *Knight*, however, the sentencing court in Mr. Roberson's case based the high-end sentence on a mistaken belief that Mr. Roberson's offender score was higher than nine. RP 562. The court's reasoning in *Knight* is not applicable to Mr. Roberson's case.

Mr. Roberson’s defense attorney provided ineffective assistance of counsel at sentencing by unreasonably failing to raise his client’s youth and impulsivity as a mitigating factor. *Id.* Mr. Roberson’s case must be remanded for resentencing with that factor properly considered. *Id.*

B. Defense counsel provided ineffective assistance at sentencing by failing to argue that three of Mr. Roberson’s prior convictions and two of his current convictions constituted the “same criminal conduct” for purposes of calculating his offender score.

Two or more offenses qualify as the “same criminal conduct” (SCC) for sentencing purposes if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

The criminal intent element of the SCC inquiry looks to whether the offender’s intent “as objectively viewed, changed from one crime to the next.” *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992) (citing *State v. Collicott*, 118 Wn.2d 649, 667-68, 827 P.2d 263 (1992); *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987)). Under this test, if one crime “*furthered* another,” then the criminal purpose or intent did not change. *Id.* (emphasis in original).

Offenses that encompass SCC are “counted as one crime” and are scored together as one point for sentencing purposes. RCW 9.94A.589(1)(a). A sentencing court must determine whether prior

offenses – as well as current offenses – constitute SCC when calculating the offender score. RCW 9.94A.525(5)(a)(i).

Defense counsel provides ineffective assistance by failing to argue at sentencing that two or more convictions should be scored as SCC, when warranted. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

Mr. Roberson’s defense attorney provided ineffective assistance of counsel at his sentencing hearing by failing to properly argue that (a) three of his prior convictions were required to be scored together as SCC and (b) the court had discretion to score his current rape and burglary convictions as SCC.

1. Three of Mr. Roberson’s prior convictions constituted the same criminal conduct and should only have collectively added one point to his offender score. Defense counsel failed to point this fact out to the sentencing court.

The sentencing court did not score any of Mr. Roberson’s five prior convictions as SCC when determining his offender score in this case. CP 135. Nor did defense counsel ask the court to do so. *See* RP 540-68.

But three of Mr. Roberson’s prior convictions (for burglary, malicious mischief, and theft) arose from a single incident in which Mr. Roberson allegedly broke into a business called Smart Smoke, caused some damage to display cases, and stole e-cigarette supplies. CP 30-31, 34-37, 51-52.

The three offenses involved the same victim and occurred at the same time and place. RCW 9.94A.589(1)(a). Additionally, because the burglary and malicious mischief were committed to further the alleged theft, the three offenses comprised the same criminal purpose or intent. *Lessley*, 118 Wn.2d at 777.

Defense counsel provided ineffective assistance by failing to point out that those three convictions should have been scored as SCC when determining Mr. Roberson's offender score in this case. *Phuong*, 174 Wn. App. at 548.

Though the burglary anti-merger statute gives a sentencing court discretion to score burglary separately from other offenses for sentencing purposes, that statute applies only to the score related to the *current* offenses. *State v. Williams*, 181 Wn.2d 795, 800-01, 336 P.3d 1152 (2014); RCW 9A.52.050. A sentencing court must treat *prior* burglary convictions identically to other prior convictions, examining whether they constitute SCC with other offenses for purposes of the current offender score. *Id.*

Defense counsel provided deficient performance during Mr. Roberson's sentencing hearing by failing to research this rule and bring it to the court's attention. *Phuong*, 174 Wn. App. at 548.

Mr. Roberson was prejudiced by his attorney's deficient performance. Properly scoring Mr. Roberson's three prior Smart Smoke convictions as SCC would have lowered his offender score to eight, which would have decreased the high end of the sentencing range by forty-one months. Wash. State Caseload Forecast Council, 2017 Washington State Adult Sentencing Guidelines Manual 431, https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2017.pdf. There is a reasonable probability that Mr. Roberson's sentence would have been lower absent counsel's mistake. *McGill*, 112 Wn. App. at 102. Indeed, a lower sentence would have been required.

Mr. Roberson's defense attorney provided ineffective assistance of counsel by unreasonably failing to inform the sentencing court that three of his prior convictions should have been scored as "same criminal conduct" in the offender score calculation. *Phuong*, 174 Wn. App. at 548; *McGill*, 112 Wn. App. at 102; *McFarland*, 189 Wn.2d at 59. Mr. Roberson's case must be remanded for a new sentencing hearing. *Id.*

2. The sentencing court had discretion to score Mr. Roberson's convictions in Counts I and II as same criminal conduct, which would have lowered his offender score by three points. Defense counsel failed to make that argument to the court.

The sentencing court also had discretion to score Mr. Roberson's current burglary and rape convictions as "same criminal conduct" when calculating his offender score. But, again, defense counsel failed to bring that to the court's attention. *See* RP 540-68. This also constituted ineffective assistance of counsel at sentencing.

The burglary anti-merger statute gives a sentencing judge discretion to score a current burglary conviction separately or as SCC when determining the offender score. RCW 9A.52.050; *State v. Davis*, 90 Wn. App. 776, 783–84, 954 P.2d 325 (1998).

Mr. Roberson's current burglary and rape convictions involved the same victim and occurred at the same time and place. Because the burglary was allegedly committed in furtherance of the rape, Mr. Roberson's "criminal purpose or intent" did not change, either, and the offenses encompass the SCC for sentencing purposes. *Lessley*, 118 Wn.2d at 777. Accordingly, the sentencing court had discretion to score those convictions as SCC and not increase the offender score for the rape conviction based on the burglary charge. *Davis*, 90 Wn. App. at 783–84.

But Mr. Roberson's defense attorney never raised this option during Mr. Roberson's sentencing hearing. *See* RP 540-68. This failure meant that the court could not exercise its discretion because it had not

been told that it had discretion to exercise. *McGill*, 112 Wn. App. at 102. Defense counsel's performance was deficient. *Id.*

Mr. Roberson was prejudiced by his attorney's deficient performance. *McFarland*, 189 Wn.2d at 59. Because the burglary charge counted as a sex offense (due to the sexual motivation finding), it added three points to Mr. Roberson's offender score for the rape charge, without scoring as SCC. RCW 9.94A.525(17). If the sentencing court had scored the burglary and rape charges as SCC, the high end of Mr. Roberson's standard sentencing range would have gone down from 280 months to 158 months. Wash. State Caseload Forecast Council, 2017 Washington State Adult Sentencing Guidelines Manual at 431.

There is a possibility that the sentencing court would have exercised its discretion to score the offenses as SCC if it had been made aware of that option. The court relied heavily on the state's assertion Mr. Roberson had an offender score more than nine points. RP 562. But that was not necessarily the case (especially when considering counsel's other mistakes at sentencing). The court also relied on the conclusion that there were "not a whole lot of mitigating factors" that applied to Mr. Roberson's case. RP 562. While not, technically, a mitigating factor, the fact that the burglary and rape convictions constituted SCC represented an important opportunity to significantly lower the sentencing range. Properly raising

that issue would have made the sentencing judge aware of the breadth of the sentencing options in Mr. Roberson's case.

Mr. Roberson's defense attorney provided ineffective assistance of counsel by unreasonably failing to make the sentencing court aware of the its discretion to score the current burglary and rape convictions as "same criminal conduct." *Phuong*, 174 Wn. App. at 548; *McGill*, 112 Wn. App. at 102; *McFarland*, 189 Wn.2d at 59. Mr. Roberson's case must be remanded for a new sentencing hearing. *Id.*

CONCLUSION

The trial court abused its discretion by admitting highly prejudicial evidence that carried a very strong risk of confusing the jury into incorrectly believing that Mr. Roberson had admitted to the burglary charge against him. The prosecutor committed misconduct during closing argument by "testifying" to "facts" not in evidence. Mr. Roberson's convictions must be reversed.

In the alternative, Mr. Roberson's defense attorney provided ineffective assistance of counsel at his sentencing hearing by unreasonably failing to argue that his client's youthfulness was a mitigating factor and by failing to raise that his prior and current convictions qualified as same

criminal conduct for offender-score purposes. Mr. Roberson's case must be remanded for resentencing.

Respectfully submitted on May 20, 2019,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Lajuane Roberson/DOC#393510
Clallam Bay Corrections Center
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on May 20, 2019.



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