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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LAJUANE ROBERSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. ISSUES PRESENTED

1. Was the defendant's highly probative admission that he "robbed the place but did not rape anyone" overly prejudicial such that the court should have excluded the admission?

2. Was the admission of this statement, if admitted in error, harmless?

3. Was any error with respect to the admission of this statement invited by the defendant?

4. Whether this Court can determine, on this record, that trial counsel was ineffective for failing to argue at sentencing for a reduced sentence based on the defendant's youthfulness, and, in any event, where the sentencing court did consider the defendant's youth?

5. Was trial counsel ineffective for failing to argue that the defendant's current offenses constituted the same criminal conduct for purposes of sentencing, where he is unable to demonstrate the result of the proceeding would have been different?

6. Whether sufficient facts exist in the current record for this Court to determine that the defendant's prior offenses were the same criminal conduct such that counsel was deficient for failing to raise the issue

and that there was a substantial likelihood that the outcome of the proceeding would have been different?

II. STATEMENT OF THE CASE

The defendant, LaJuane Roberson, was charged in the Spokane County Superior Court by amended information¹ with one count of first-degree burglary with sexual motivation, one count of first-degree rape, and one count of tampering with a witness. The matter proceeded to a jury trial before the Honorable Annette Plese and the defendant was convicted, as charged, of all three counts. CP 100-03.

The State's Case-In-Chief.

Aleta Brady lived in the Summit Ridge apartment complex on the South Hill of Spokane, Washington. RP 70-71. Her apartment was on the third floor of a three-story apartment building. RP 71-72. Before bed on September 22, 2016, Ms. Brady locked her front door, but not the sliding balcony door. RP 76.

Ms. Brady later awoke to see a shadow near her window. RP 76, 110. She realized that the shadow was a person wearing a mask and gloves; the figure immediately jumped on top of Ms. Brady, pinned her to the bed,

¹ The original information was filed May 17, 2017. CP 1.

and began strangling her. RP 76-77. Ms. Brady called out for her son,² but the masked figure grabbed her face, covered her mouth with one hand, and continued to strangle her with the other. RP 78. Ms. Brady attempted to scratch the man's eyes or face, but was physically unable to break free from his hold. RP 78. She lost consciousness, awoke, and attempted to scream, at which time the masked man again choked her into unconsciousness. RP 79-80. After awaking, she did not attempt to fight back, pretended to remain unconscious, and felt the man repositioning her body in the bed and covering her up with a blanket. RP 80. The man left the room and Ms. Brady again lost consciousness. RP 80.

When she awoke, she realized she was naked, even though she had underwear on prior to the assault. RP 85. Ms. Brady went to the bathroom to vomit; while there, she saw bruises and redness on her face. RP 87. She discovered her underwear on her bedroom floor; they were soaking wet, as was her pillow and an area on her bed. When later attempting to clean her bed, Ms. Brady observed a stain that was yellow and smelled of urine.³ RP 86, 90, 93, 94.

² Ms. Brady's son, E.K., stated that he heard his mother scream, but was too afraid to move. RP 128. He also saw a figure in black walk by his room, but was unsure if the figure left through the front or patio door. RP 128-129. After the assault, Ms. Brady found her son in his bed, hiding under the covers. RP 89.

³ A forensic scientist determined the stain on the bedsheet fluoresced, consistent with a urine stain, but, due to various potential reasons, samples of the stain tested

After the assault, and unsure if the assailant was still in the apartment, Ms. Brady grabbed a kitchen knife and called the police. RP 89. When the police arrived, Ms. Brady had to unlock the deadbolt on her front door for them. RP 91. Police briefly searched Ms. Brady’s balcony for evidence but did not see any disturbed dust⁴ that would indicate how an individual could have accessed the balcony. RP 208. Police did not process the roof overhang for evidence, nor did they fingerprint the slider door or balcony.⁵ RP 208.

Ms. Brady felt little comfort from the police officers, who she perceived doubted her story. RP 93. However, police collected her underwear and sheets as evidence. RP 93. An ambulance arrived, and medics gave Ms. Brady medication to ease her vomiting and transported her to the hospital. RP 94-95. There, a nurse and physician’s assistant

negative for THP (Tamm-Horsfall protein), a protein that is specific to urine. RP 292-94, 297 (Urine samples may test negative for THP dependent on the subject’s diet, hydration, genetics, or presence of other bodily fluids – such as vaginal secretions). Nonetheless, the forensic scientist believed, based on his training and experience, that the stain was consistent with urine.

⁴ One officer indicated he observed a spot “rubbed off on the balcony railing” but a cobweb was also present in that area; ultimately, the area was not processed for evidence. RP 266-67.

⁵ Unrelatedly, on September 12, 2016, Ms. Brady’s neighbor, Olga Yurkova, filed a complaint with the apartment complex’s management, in which she stated that, at approximately 4:30 a.m. she had observed an unknown individual attempting to access another neighbor’s balcony from the roof, stating, “he was trying to get from the roof on the balcony and kind of flip over, but I got scared because I knew there was a way to be in the house.” RP 236-39, 244.

performed a sexual assault kit. RP 95, 163. Ms. Brady suffered petechial hemorrhaging (burst capillaries associated with strangulation) on her neck below her chin as well as other areas of redness and bruises. RP 161. She continued to experience pain throughout her body days after the assault. RP 100.

Forensic scientist William Culnane received and examined the sexual assault kit, and detected the presence of semen on the perineal, vaginal, and anal swabs that had been taken from Ms. Brady. RP 193. From those samples, Culnane developed a DNA profile; he then searched a DNA database and that profile returned to the defendant, LaJuane Roberson. RP 195. After requesting a reference sample from Roberson, Culnane matched the DNA profile from the swabs to Roberson's known sample. RP 196-97.

Approximately eight months after the assault, on May 9, 2017, police contacted Ms. Brady to show her a photo lineup. RP 103, 342. She recognized one individual as someone she had seen around her apartment complex, but did not know his name; Ms. Brady indicated that Roberson was the man depicted. RP 103 -104, 345. She denied knowing him, inviting him into her home, or consenting to sexual contact with him.⁶ RP 104-05.

⁶ The defendant derives *his* version of facts that this was a consensual encounter from his own trial testimony, RP 419-23, which was necessarily rejected by the

During September 2016, Roberson lived with Jessica Sanfilippo in the same Summit Ridge Apartment complex; Roberson dated Sanfilippo's daughter, Alyssia Tancredi, and was friends with Sanfilippo's son. RP 307-08. Sanfilippo often eavesdropped on the defendant and her son during their conversations, and overheard the defendant say "he robbed the place, but he didn't rape anyone. He doesn't have a need to rape anyone. He was kind of like boastfully saying I don't need to rape anyone."⁷ RP 316. This statement was made "shortly before he was arrested" on the criminal charges associated with this case.⁸ RP 317.

jury's verdict. Br. at 3. E.K. corroborated that there were no invited guests in the home when he and his mother went to bed. RP 129.

⁷ This testimony is taken from a hearing outside the presence of the jury, during which the court considered the admissibility of these statements based upon the uncertainty of the date they were made. RP 313-16. The court ultimately determined that the statement was relevant, and that the uncertainty as to the time frame in which the statement was made bore on the statement's weight, not admissibility. RP 322.

Sanfilippo's testimony *in* the presence of the jury regarding the defendant's statements is found at RP 326. Sanfilippo also testified that after the defendant was no longer welcome in her home, he would sneak in through her son's window without her permission. RP 329, 431.

⁸ The statement was made after the defendant was convicted of earlier charges on September 8, 2016, none of which were alleged to involve a rape. RP 312; CP 33-63. Defense counsel, Mark Lorenz, indicated that the statement was made before the defendant's arrest on December 3, 2016, and that the time frame at issue was approximately two and a half months. RP 313. Alicia Tancredi testified Roberson was actually arrested on these charges in June 2017. RP 376.

After the defendant was arrested on these charges, he contacted Tancredi by telephone and by letter. RP 352. The letter, sent from the jail, was dated June 13, 2017. RP 366, 369. It said, in pertinent part:

Hey, baby girl. I'm going to go through a speedy trial and need you and Curtis to testify for me. It would help a lot. All you need to say is we were together and that I barely left the apartment when I was up there and for Curtis to say is that bitch [is] Amy's drinking buddy and that she hated me and Curtis because we're men and because Amy hated us. Please and thank you...I don't want them to have me on record saying any of this and stop rolling your eyes and saying oh, my God.

RP 369; Ex. 14.

Tancredi testified, however, that Mr. Roberson *did* leave the apartment and he was not always accompanied when he did so. RP 370.

Mr. Roberson's Testimony.

On the date in question, Mr. Roberson claimed he was in the Sanfilippo apartment, "chugging a bottle of Smirnoff." RP 416. He left the apartment to visit another friend in the complex when he saw Ms. Brady "hanging out with her friend, Amy," drinking wine on a patio. RP 416, 437. Roberson approached to talk to Amy,⁹ and started talking to Ms. Brady as well; this conversation lasted 45 minutes. RP 417. At that point, "Ms. Brady got up and told [Mr. Roberson] to come to her apartment."

⁹ "Amy" was not called to testify at trial.

RP 418. Roberson claimed that Ms. Brady told him her son was sleeping, and that the two went straight to her bedroom. RP 420. Although Roberson admitted the two had oral sex,¹⁰ he denied ejaculating, claiming “[t]he only sexual contact that occurred was [Roberson’s] mouth on her vagina.” RP 423, 435, 441.

Roberson stayed in Ms. Brady’s apartment for 20 to 25 minutes. RP 423. He claimed that he “tr[ie]d to insert his penis into her and she told [him] no,” and when he performed an oral sex act on Ms. Brady, he did not like the smell or taste, so he left. RP 423. He denied that any nonconsensual force was involved. RP 423-24, 428-29. He denied telling Sanfilippo’s son, to paraphrase, “that he robbed her but did not rape her.” RP 426-27. Roberson additionally testified that, due to social anxiety, he did not leave the apartment often, and when he did, he did not leave alone. RP 410, 428.

Sentencing.

After the jury convicted the defendant, as charged, the court sentenced the defendant on November 6, 2018. CP 132. The defendant’s offender score for the two sex offenses, counts one and two (first-degree burglary with sexual motivation and first-degree rape) was “9+” and his

¹⁰ Culnane, the forensic scientist who examined the swabs taken from Ms. Brady, tested those swabs for the presence of amylase, the enzyme in saliva, and found the samples were negative for the enzyme. RP 193.

offender score for the tampering with a witness charge, count three, was “8.”¹¹ RP 135. On count one, the court ordered confinement of 140 months-to-life, which included the 24-month enhancement for the special finding that the offense was committed with sexual motivation.¹² RP 137. The court imposed confinement of 318 months-to-life on count two.¹³ RP 137. The court sentenced the defendant to 57 months on count 3. RP 137.

When imposing the sentence, the court remarked that the PSI (Pre-Sentence Investigation) “was one of the most depressing pre-sentence investigation reports [she had] ever read.” RP 561. The court remarked that the PSI investigator had written in conclusion that “in looking at [the defendant’s] criminal history, [his] actions, [his] lifestyle, [he] appear[s] to be impulsive, opportunistic with little ability to take any ownership for [his] actions.” RP 561; *see also* CP 126. The court considered that the PSI investigator had communicated concerns that the defendant had “a high risk in sexual entitlement, hostility towards women, and issues of power and

¹¹ The defendant was previously convicted of three counts of second-degree burglary, one count of first-degree theft and one count of second-degree malicious mischief. CP 135. The defendant also committed the current offenses while supervised on community custody. CP 135.

¹² Thus, the defendant was sentenced to the high-end of the standard range, 116 months (to life), plus 24 months for the enhancement. CP 135.

¹³ The defendant was sentenced to the high-end of the standard range of 240 to 318 months (to life). CP 135.

control that [he doesn't] take any accountability for.” RP 562; *see also* CP 126. Based upon that information, the court imposed high-end standard range sentences.¹⁴ The defendant timely appealed.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY THAT THE DEFENDANT SAID HE “ROBBED THE PLACE BUT DID NOT RAPE ANYONE.”

Standard of Review.

A trial court has discretion concerning the admissibility and relevance of evidence. *State v. Sherburn*, 5 Wn. App. 103, 105, 485 P.2d 624 (1971). This Court reviews a trial court’s determination under ER 403 for “manifest abuse of discretion.” *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *State v. Taylor*, No. 96325-8, 2019 WL 3227313 at *3 (July 18, 2019). A decision is manifestly unreasonable if it “adopts a view that no reasonable person would take.” *In re Duncan*, 167 Wn.2d 398, 402-

¹⁴ The court also considered the defendant’s family support, and, at least to some extent, the defendant’s age, stating, “I’m glad you have family members that love you and care about you, but, I, also, look at this, and someone that is 21 years old and there was nothing here in this report, no accountability at all that the court starts in the middle [of the standard range] and there’s not a whole lot of mitigating factors. Family is a mitigating factor, but there’s a lot of aggravating factors in your history... I think you deserve the high end on these crimes based on your history.” RP 563.

03, 219 P.3d 666 (2009) (internal quotation marks omitted). A decision is based upon untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Id.*

The defendant claims that Ms. Sanfilippo's statement (that she overheard the defendant state that he "robbed the place but did not rape anyone" shortly before his arrest on this case) was overly prejudicial and its prejudicial effect outweighed any probative value of the testimony. This argument fails for three reasons: (1) the evidence's highly probative value was not outweighed by the danger of unfair prejudice; (2) in any event, any error in admitting the evidence was harmless; (3) any claim that the trial court abused its discretion in admitting the evidence was compounded by defense counsel's inadvertent, inaccurate recitation of the salient facts regarding the time frame in which the statement was made.

1. This testimony was highly probative, and no more prejudicial than any other evidence admitted against the defendant.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664,

669, 230 P.3d 583 (2010). All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402.

Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Evidence is unfairly prejudicial if it is “more likely to arouse an emotional response than a rational decision by the jury.” *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). “Unfair prejudice” may be caused by evidence of “scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.” *Carson*, 123 Wn.2d at 223. The rule also may prohibit otherwise relevant evidence if the evidence appeals to the jury’s sympathies, arouses its sense of horror, or provokes an instinct to punish. *Id.* Although nearly all evidence worth presenting in a contested case will prejudice one side or the other, under ER 403, the court is not concerned with “ordinary prejudice.” *Id.* at 224.

The evidence elicited in this case, that the defendant admitted to a friend that he “robbed the place but did not rape anyone” is highly probative evidence. It is an admission by the defendant that he unlawfully entered a premises to commit a crime therein. The admission’s reference to a rape would indicate that the admission involved an incident where a rape was alleged. Ms. Sanfilippo indicated that the statement was made shortly before his arrest on the current charges, and after the disposition on his prior

offenses. The statement, which was made close in time to his arrest on these charges, had little risk of misleading the jury or confusing the issues – the *only* material issue in the case was whether Mr. Roberson had unlawfully entered Ms. Brady’s home and raped her, as claimed by Ms. Brady, or whether, as he asserted, he had lawfully entered, by invitation, and engaged in consensual sexual activity with Ms. Brady.

The defendant attempts to downplay the probative nature of this evidence by his insistence that ambiguity in the statement could mislead the jury into believing that the statement was made about *this* incident, when it could have been made about some *other* incident. Pointing to the fact that Ms. Sanfilippo could not recall the exact date when the statement was made, and the fact that no “robbery” was alleged (as no property was taken), the defendant argues that this statement lacked a sufficient nexus to the facts of this case.

In making this argument, however, the defendant ignores other evidence that was considered by the court in determining the admissibility of the evidence. Ms. Sanfilippo knew that the statement was made *after* the defendant resolved his earlier burglary charges. Those charges similarly did not involve a “robbery.” *See* CP 30-64. For that matter, none of the defendant’s other known crimes involved a rape allegation. CP 30-64. Ms. Sanfilippo also knew that the statement was made “close in time” to the

defendant's arrest on this case, which would indicate that the statements were made after the incident occurred and, in fact, referenced these allegations. There was a sufficient nexus between the statement and the crime alleged.

Additionally, the defendant's argument that this statement could not refer to the incident at hand because no "robbery" occurred during this incident is not well taken. The defendant likely has no legal training, and would not necessarily know that there is a legal distinction between the terms "robbery" and "burglary;"¹⁵ further, at least one thesaurus provides that the verb, "to rob" is synonymous with to "burglarize." MERRIAM WEBSTER'S DICTIONARY AND THESAURUS 700 (2007). In other words, the terms "robbery" and "burglary" may be used interchangeably in non-legal settings.

Unfair prejudice did not result from the admission of this statement. The statement was not introduced for its emotional effect. It was not introduced simply for the sake of prejudicing the defendant. Instead, the statement was directly relevant to an essential element of the crime of first-degree burglary – whether the defendant entered or unlawfully remained in

¹⁵ In that vein, the defendant's statement, "I robbed the place" is a misnomer, as one commits robbery *against a person* by use or threatened use of force; one does not commit robbery against a place.

a building. The trial court did not abuse its discretion when it allowed this evidence to be introduced at trial.

2. Harmless error.

The erroneous introduction of evidence under ER 403 is not an error of constitutional magnitude, and such an error only requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Beadle*, 173 Wn.2d 97, 121, 265 P.3d 863 (2011).

Here, there is no reasonable probability the outcome of the trial would have been different had the court suppressed Ms. Sanfilippo's testimony recounting the defendant's admission. Perhaps the most damaging admitted evidence was the defendant's *own* testimony that he never ejaculated during the claimed consensual sexual encounter – yet, despite this claim, his semen was found on the vaginal, perineal and anal swabs taken from Ms. Brady. Equally damaging was the defendant's claim that he had *only* performed oral sex on Ms. Brady, and yet, despite *that* claim, the forensic scientist found no evidence of the presence of saliva in the swabs taken from Ms. Brady.

The defendant's own testimony irretrievably undermined his claim that he had been invited into Ms. Brady's residence and had engaged in consensual, oral sex. When that evidence is considered along with Ms. Brady's testimony about the violent attack, the testimony establishing

that a third story balcony could be breached, and Ms. Brady's son's testimony that no one was in the home when he and his mother went to bed, only one conclusion could be reached – the defendant's version of events was not credible and Ms. Brady's testimony was credible. Even if the admission of Ms. Sanfilippo's testimony was in error, it was harmless in the context of the entire trial.

3. Invited error.

Although not discussed by the defendant in his brief, the timeline provided to the court, and upon which it may have decided to admit the evidence in question (at least in part),¹⁶ was based upon flawed factual information. Ms. Sanfilippo's testimony was that she overheard the defendant admit to robbing the place but not to raping anyone "shortly before his arrest" on this case. Defense counsel represented to the court that Mr. Roberson was arrested on these charges on December 3, 2016, two and a half months after the alleged rape occurred. But the defendant's arrest likely could not have occurred on that date. Detective Woodyard did not complete her investigation or request charges be filed until May 9, 2017.

¹⁶ The court's full ruling is found at RP 322-23. The court indicated that the evidence could be relevant and that all of the defendant's arguments in support of suppression went to the weight of the evidence, not its admissibility. The court did rule that Ms. Sanfilippo could not reference the defendant's prior convictions, but she could testify that the statements were made "prior to the arrest on this case and that it was close in time to the incident," finding that "three months is still close in time enough." RP 323.

RP 276. Ms. Tancredi testified that the defendant was not arrested on these charges until June 2017.

A party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires “affirmative actions by the defendant.” *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000).

Any issue with regard to the court’s exercise of its discretion in admitting the evidence in question was materially affected by defendant’s inaccurate recitation of the facts. The court’s specific determination that there were three months between the incident and the last possible date the statement could have been made, was flawed – occurring because defense counsel represented to the court that only three months had elapsed before the defendant’s arrest and the defendant failed to correct his attorney’s assertion. The defendant should not reap the benefit of a flaw in the trial court’s ruling when he contributed to the claimed error.

B. THE DEFENDANT’S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING FAIL.

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An appellate court’s scrutiny of defense counsel’s performance is highly deferential, and the court employs a strong presumption of reasonableness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335-36. To rebut this presumption, the defendant bears the burden of establishing the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

To establish prejudice, a defendant must show a reasonable probability that the outcome of the hearing would have been different absent counsel’s deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226,

743 P.2d 816 (1987). Failure on either prong of the test bars a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

Defendant claims on appeal that counsel was ineffective for failing to make three arguments at sentencing: (1) that the defendant's youthfulness was a mitigating factor; (2) that three of the defendant's prior offenses were the same criminal conduct for purposes of determining his offender score; and (3) that the first-degree burglary with sexual motivation and the first-degree rape were the same course of conduct for purposes of sentencing and should have been scored as one offense.

1. Youthfulness as a mitigating factor.

A defendant's youthfulness¹⁷ can be a mitigating factor for purposes of sentencing where that youthfulness in fact diminishes the defendant's culpability for the crime. *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015).¹⁸ However, as with any other mitigating factor,

¹⁷ In referring to "youthfulness" the State acknowledges the multiple cases both from Washington courts and federal courts which rely heavily on scientific studies that "establish a clear connection between youth and decreased moral culpability for criminal conduct." *O'Dell*, 183 Wn.2d at 695. As a general proposition, there are "fundamental differences between adolescent and mature brains in the areas of risk assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *Id.* at 692.

¹⁸ *O'Dell* specifically held that prior case law "did not bar trial courts from considering a defendant's youth at sentencing; it held only that the trial court may not impose an exceptional sentence *automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability.*" 183 Wn.2d at 689 (emphasis added).

youthfulness must be a “substantial and compelling factor” which justifies a sentence below the standard range. *Id.* at 696.

The defendant argues that counsel was ineffective for failing to request a mitigated sentence based upon the defendant’s youthfulness and evidence found in the PSI that the defendant was impulsive. This argument fails.

First, the record is insufficient to establish that defense counsel did not have the defendant separately evaluated, prior to trial, in an effort to procure an expert witness who would testify at the sentencing hearing about the defendant’s youthfulness and impulsivity. The record is likewise devoid of whether, if such an evaluation occurred, counsel considered that evidence and decided that the testimony would not benefit his client. The defendant is, therefore, unable to either demonstrate deficient performance or prejudice. For that reason, a PRP is a better vehicle by which the defendant may attempt to seek relief on these grounds.

For instance, in *McFarland*, the Supreme Court considered the consolidated appeals of two defendants. Both defendants argued that their counsel had provided ineffective assistance by failing to bring suppression motions. 127 Wn.2d at 327. The court affirmed both convictions holding that neither defendant had demonstrated deficient representation or prejudice. *Id.* at 337. In assessing actual prejudice, the *McFarland* court

noted that the record did not indicate whether the trial court would have granted a motion to suppress. *Id.* at 334. In so holding, the court unequivocally stated that:

If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.

Id. at 335 (internal citations omitted). The court also emphasized that “remanding for expansion of the record is not an appropriate remedy.”¹⁹ *Id.* at 338. The *McFarland* court acknowledged that this rule places defendants in the difficult position of having to demonstrate prejudice based on the record before the trial court, even though the record is silent on the issue precisely because counsel did not raise it. *Id.* at 334. Nonetheless, this quandary did not persuade the Court to change its result.

Such is the case here. If the defendant has information outside the current record that demonstrates that his attorney failed to consider his youthfulness as a mitigating factor and bring that evidence to the attention of the sentencing court, he should offer that evidence in support of a

¹⁹ The policy behind this principle is that “a person charged with crime is protected from incompetent counsel by an integrated bar, experienced trial judges, a complete review of the entire record by an appellate court, and in an extraordinary case a full factual hearing in a personal restraint petition proceeding. RAP 16.3. The procedure provided by that rule is admirably suited to litigate claims of lawyer incompetence based upon alleged facts outside of the record.” *State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917, *review denied*, 96 Wn.2d 1023 (1981).

personal restraint petition. Otherwise, on this record, this Court does not know what arguments or evidence counsel did or did not consider prior to sentencing, and whether, based upon those arguments or evidence, the result of the proceedings would have been different, i.e., the sentencing court would have given the defendant a reduced sentence within the standard range, or granted an exceptional sentence downward. This claim fails.

Additionally, the record establishes that, to some extent, the court *did* consider the defendant's youth – at least in the context of deciding where within the standard range the defendant should be sentenced. RP 560-562. The court acknowledged reviewing the PSI and, specifically, the evaluator's comment that the defendant's criminal history and actions in the current offense made him “appear impulsive and opportunistic with little ability to take ownership for his actions.”²⁰ Yet, the court opted, even in light of that

²⁰ The State would further argue that the defendant's reliance on the PSI to establish that his culpability was reduced by his youthfulness or impulsivity is misplaced. While the PSI investigator mentions her opinion that Mr. Roberson “appears impulsive,” that report does not establish the investigator's credentials to offer that opinion. It does not establish that the community custody officer who acted as the PSI investigator has any training in the area of juvenile (youthful) brain science. It does not establish anything, other than the investigator's impressions based upon a review of the defendant's criminal history. It is not sufficient to establish that the defendant's youth *actually* affected his culpability for the crime of first-degree rape and first-degree burglary with sexual motivation. And, if anything, the report indicates (and the court found) that the defendant's behavior was escalating as he grew older – progressing from stealing electronic cigarettes from businesses during Spokane's windstorm of 2015, to breaking into a single mother's residence, while she and her child slept, in order to violently strangle and rape her.

comment, to impose a *high-end* standard range sentence.²¹ Based upon this record, the defendant's difficult childhood and alleged impulsivity were insufficient to sway the court to impose even a mid-range sentence, let alone a low-end, standard range sentence (or exceptional sentence downward).

2. Same course of conduct.

The defendant next alleges that trial counsel was ineffective for failing to argue both that his prior offenses and his current offenses were the same course of conduct for purposes of sentencing. He claims that the failure to make this argument resulted in an inflated offender score, and in turn, because of that offender score, the court sentenced him to a high-end standard range sentence.

A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The defendant has the burden of proving that current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). Because this finding favors the defendant by lowering his presumed offender score, it is

²¹ Contrary to defendant's assertions, Br. at 20, there is no evidence in the record that indicates that the trial court believed it did not have discretion to impose a lesser standard range sentence (or for that matter, an exceptional sentence downward) based on the defendant's youthfulness.

the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.*

The scheme – and the burden – could not be more straightforward: each of a defendant’s convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place and victim. The decision to grant or deny this modification is within the sound discretion of the [trial] court, and like other circumstances in which the movant invokes the discretion of the trial court, the defendant bears the burden of production and persuasion.

Id.

Offenses are the same criminal conduct 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). In this context, “intent” does not mean the particular statutory mens rea required for the crime. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012 (2013). Rather, it means the defendant’s “objective criminal purpose in committing the crime.” *Id.* at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone”). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in

the calculation of the defendant's offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This narrow construction disallows most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wn.2d at 540 (citing *Porter*, 133 Wn.2d at 181).

a. The defendant's current offenses were not the same course of conduct and counsel was not deficient for failing to present this argument.

The defendant claims his counsel was ineffective for failing to argue that his current offenses (first-degree burglary with sexual motivation and first-degree rape) were the same course of conduct for purposes of calculating his offender score and sentencing. This claim fails.

First, although the time, place and victim of the two offenses are the same, the record supports that the defendant's criminal intent changed between his unlawful entry into the home and when he committed the sexual assault. As evidenced by the defendant's own admission, he entered the residence "to rob the place." Thus, his objective criminal intent was to take someone's property after entering the home. The court could reasonably find that it was only after he entered the home that he remained there in order to commit the crime of rape. Because the two offenses had different objective criminal intents, any argument that the two crimes were the same course of criminal conduct would fail.

Second, even assuming the two crimes to be the same criminal conduct, the defendant's argument still fails. The burglary anti-merger statute, RCW 9A.52.050, allows the court discretion to punish a burglary separately from the crime(s) committed during the burglary, even if the offenses encompass the same criminal conduct.²² *State v. Lessley*, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992). As a result, even if counsel should have raised this issue at sentencing, there is little likelihood²³ (let alone a reasonable likelihood) that the trial court would have found these two offenses to constitute the same criminal conduct for purposes of sentencing. Therefore, the defendant is unable to demonstrate prejudice from his attorney's failure to argue the issue to the sentencing court.

²² "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050.

²³ The defendant correctly acknowledges that, with regard to the calculations of his prior offenses, the requisite prejudice that must be shown is a "reasonable probability" that his sentence would have been calculated differently. Br. at 24. However, with regard to his current offenses, he merely argues that "there is a *possibility* that the sentencing court would have exercised its discretion to score the offenses as a SCC if it had been made aware of that option." Br. at 26 (emphasis added).

b. There is insufficient evidence in the record to support the defendant's claim of ineffective assistance of counsel based upon his attorney's failure to argue his prior offenses should be counted as one point at sentencing.

The defendant was convicted on September 8, 2016, of five offenses: three counts of second-degree burglary, one count of second-degree malicious mischief and one count of first-degree theft. CP 50-51. The defendant claims that one of the burglaries, the malicious mischief and the first-degree theft were the same course of conduct. Br. at 22. The allegations found within the affidavit of probable cause supporting these charges indicated that the defendant and a friend broke into a Smart Smoke store, caused \$5,000 damage and stole over \$7,000 worth of merchandise. CP 37. The external window of the establishment was found to have a hole in it, large enough for a person to fit through, and the product counters were broken; items were scattered on the floor and multiple electronic smoking devices and accessories were taken. CP 34-35.

Although not dispositive of the issue, it does not appear that the previous sentencing court found the defendant's prior offenses to be the same criminal conduct. CP 52 (under Section 2.1 of previous judgment and sentence, the finding of same criminal conduct has been left blank). In fact, these documents establish the contrary – both the prior sentencing court and the defendant's prior attorney (as well as the State) treated the defendant's

prior offenses as separate offenses. CP 40 (calculating the offender score to be “4” on both the malicious mischief and first-degree theft); CP 53 (same).

In any event, the probable cause affidavit, and plea and sentencing documents for the prior offenses are insufficient for this Court to make a sound determination that these charges were the same course of conduct, and, therefore, that counsel was ineffective for failing to raise the issue. The probable cause affidavit does not establish that the malicious mischief only furthered the theft, or whether the facts of the case establish that the defendant gratuitously damaged areas of the store for no purpose other than facilitating the theft. The record is silent as to whether defense counsel researched these charges more deeply and determined, based on more specific facts than those found in the probable cause affidavit (i.e., from the full detailed police reports available in those cases), the offenses were not the same course of conduct.²⁴ As indicated above, it is the defendant’s burden to establish that the offenses are the same criminal conduct. He has not done so, even on appeal. As a result, assuming there are facts outside the appellate record that could assist the defendant in this claim, the more

²⁴ The State agrees with the defendant that *State v. Williams*, 181 Wn.2d 795, 336 P.3d 1152 (2014), stands for the proposition that the burglary anti-merger statute does not apply to prior offenses – it only “applies to the present punishment and prosecution of offenses.” *Id.* at 800. Thus, the anti-merger statute would not have provided a basis for the court to find the prior offenses should be counted separately in the defendant’s current offender score.

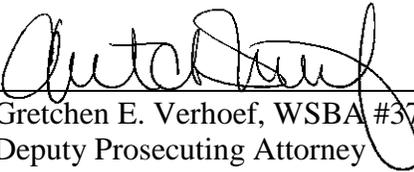
appropriate avenue to request relief on this basis would be by personal restraint petition.

IV. CONCLUSION

For the reasons discussed herein, the State respectfully requests this Court affirm the defendant's convictions and sentencing.

Dated this 14 day of August, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef, WSBA #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

LAJUANE ROBERSON,

Appellant,

NO. 36452-6-III

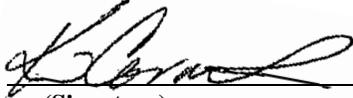
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 14, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Skylar Brett
skylarbrettlawoffice@gmail.com

8/14/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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