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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LISA MICHAEL, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence was insufficient to sustain a conviction for assault second degree.
2. The prosecutor misstated the law in rebuttal argument which prejudiced Ms. Michael's right to a fair trial.
3. The trial court erred when it declined to impose an exceptional downward sentence.

II. ISSUES PRESENTED

1. Viewing the evidence in the light most favorable to the State, did the State establish the absence of self-defense beyond a reasonable doubt?
2. Did the prosecutor misstate the law or argue the "first aggressor doctrine" during closing argument where the prosecutor did not direct the jury that the defendant was not entitled to claim self-defense if she was the aggressor?
3. If the prosecutor misstated the law in closing argument, was any misstatement so flagrant and ill-intentioned that it could not have been cured by an objection and curative instruction?
4. May the defendant use an inquiry from the jury, a matter that inheres in the verdict, to sustain her claim that the jury was confused about the law during its deliberations?
5. Has the defendant established that the trial court abused its discretion during sentencing and did not consider her failed self-defense claim?
6. Is a conviction for second-degree assault with a deadly weapon which results in little or no injury subject to a request for an exceptional sentence downward based upon an argument that the

conduct and result of the crime were relatively minor when compared to other second-degree assaults?

III. STATEMENT OF THE CASE

Substantive Facts.

In March 2018, Selena Joe was staying at Harold and Kathy Passmore's residence on West Sinto in Spokane. She and other homeless individuals were permitted to stay at the residence,¹ and in exchange, Ms. Joe helped Ms. Passmore cook and clean the house. RP 133-34.

On March 21, 2018, Ms. Joe was awakened by the defendant, Lisa Michael, and Carmen Gardipee;² one of the women punched or smacked Ms. Joe repeatedly in the head. RP 134, 222. Ms. Joe jumped up and faced Ms. Michael, who accused Ms. Joe of stealing a phone. RP 135. Ms. Michael and Ms. Cruz then held Ms. Joe down by her arms, and both punched her in the face. RP 135. Ms. Michael and Ms. Cruz temporarily stopped hitting Ms. Joe, but believing they would resume, Ms. Joe grabbed a glass vase and hit Ms. Michael with it.³ RP 136. Ms. Michael and

¹ Ms. Joe agreed that the house was a "chronic nuisance house" or "flop house" often visited by police. RP 147-48.

² Ms. Gardipee also used the last name "Cruz" and Ms. Joe knew her by that name. RP 142. For clarity, the State will refer to her by the surname Cruz.

³ Carmela Gardipee, Ms. Cruz' sister, testified that Ms. Michael had the vase first and struck Ms. Joe with the vase. RP 223. Carmela Gardipee was admittedly drunk or hung over at the time of the incident. RP 226. The defense investigator testified that Carmela Gardipee had given inconsistent statements during a pretrial interview; namely, that Ms. Cruz was not

Ms. Cruz wrestled the vase away from Ms. Joe, and Ms. Michael struck her with it in the back of the head, while holding her down. RP 136. Ms. Joe stated that she was struck again several times. RP 136.

Ms. Joe was ultimately able to escape. RP 136. She located her telephone, ran into another room, and called 911. RP 136. The other occupants left the house when Ms. Joe called 911. RP 147. Believing help would arrive more quickly, Ms. Joe told the operator that she had been stabbed. RP 138. Ms. Joe also used her cousin's name when reporting the assault because she had a warrant out for her arrest and did not want to go to jail. RP 139.

Multiple officers arrived. RP 152. Ms. Joe was flustered, shaken, and crying. RP 154. Officer Shawn Maguire observed a laceration on Ms. Joe's head. RP 189. During the investigation, Maguire learned that Ms. Joe had allegedly "kicked down Ms. Michael."⁴ RP 192.

involved in the fight, even though, at the time of trial, she testified that Ms. Cruz was involved in the altercation. RP 228, 235.

⁴ When the defense asked this question, it did not clarify when Ms. Joe was alleged to have kicked Ms. Michael. RP 143, 192. For all the jury knew, it could have been in an attempt to escape Ms. Michael's assault. The defendant's characterization of the facts, that Ms. Joe "kicked Ms. Michael down and picked up a vase" is not necessarily accurate, as there was no evidence when the kick occurred.

After law enforcement determined Ms. Michael was a suspect, they located her at her residence and spoke to her. RP 156. Ms. Michael told law enforcement that she had gone to the Sinto residence, “stepped inside and got hit, and she turned around and she walked back out of the house.” RP 157. Ms. Michael advised that, she too, was injured, and Officer Maguire observed a small laceration to her head as well; Ms. Michael sought treatment, receiving two staples. RP 195, 198.

Ms. Michael testified on her behalf. She claimed that her bad knees would have prevented her from instigating a fight, and denied hitting Ms. Joe first. RP 237-38.

Procedural History.

The State requested a first aggressor instruction based upon Ms. Joe’s testimony that the defendant entered the house and immediately started punching her. RP 243-44. The defendant opposed the instruction, noting it should be given sparingly, and arguing that it was not clear, under the facts of this case, that Ms. Michael was the first aggressor. RP 243. The court ruled that the self-defense instruction was sufficient, and declined to give a first aggressor instruction. RP 246.

In its closing argument, the defense posited that the State had not established both that Ms. Michael had committed a second-degree assault, and was not acting in self-defense. RP 273.

In rebuttal closing the State argued, in part:

The first injury doesn't matter. If you read your instruction, it's an assault. It's that -- if Lisa Michael, if you find that she struck, touched or in any offensive manner did any of those things to Selena Ms. Joe, it doesn't matter if Selena Joe got the vase first. It just matters what happened in the beginning of that assault.

RP 274.

During deliberations, the jury asked (1) for a transcript of Ms. Joe's testimony and (2) whether "under assault second degree does it matter who used the vase first?" RP 280. The court answered both questions, without objection, by directing the jury to continue deliberating and to consult their instructions. RP 280.

The jury returned a guilty verdict. RP 283. At sentencing, the defense asked for an exceptional sentence below the standard range based on: (1) the failed self-defense claim; (2) that the victim was, to a significant degree, an initiator, aggressor, provoker, or willing participant; (3) that the offending conduct was at the low end of the range – predicated upon the slight injury Ms. Joe received and her declination to receive medical treatment;⁵ and (4) that Ms. Michael's medical needs would cost the taxpayers greatly. 11/2/18 RP 5-9. The State argued that none of these

⁵ The State had offered to resolve the case without trial upon Ms. Michael's plea of guilty to fourth degree assault. 11/02/18 RP 8.

reasons were substantial and compelling; Ms. Michael's criminal history, which included multiple assault offenses, had not changed over three decades. RP 12-14. The State recommended a low-end sentence. RP 14.

The court ruled:

So, as far as mitigating circumstances go, the code section indicates that I can do that if there are substantial and compelling reasons, it actually indicates that, that would justify an exceptional sentence. And the factors include that, to a significant degree, the victim was an initiator, a willing participant, aggressor, or provoker of the incident. And while I know that you proffered a self-defense argument at trial, the jury did not conclude that that was the case. So based upon a failed defense, it is certainly a basis for a mitigating factor. But when I look at the overall circumstances here, the jury did not find that Ms. Joe was an initiator of this, and I can also look at the facts as testified to, and merely one fact from the trial that I don't believe is disputed, despite the other credibility issues that Ms. Foley argues here today, you were not at your home. You went to the home of Ms. Joe, and the assault happened there. So that alone would indicate to me you are some place where you did not belong, and so that causes some pause with regards to whether what you're indicating as being Ms. Joe as the aggressor to this or not. Now, that's really not what my issue is because the jury did not make that finding, so I'm having a difficult time finding that, although the failed defense allows me to do that.

11/08/18 RP 19-20.

The court looked at other statutory mitigating factors as well.

11/02/18 RP 20-22. The court determined that

[W]hat is really before the court is whether your failed self-defense defense is sufficient based upon the nature of the charge to mitigate your sentence here. And what I come to

the conclusion is that it does not rise to that level, that is not a substantially compelling reason to sentence you to what would be the level of a gross misdemeanor as has been asked by Ms. Foley.

11/2/18 RP 22.

The Court imposed a low-end sentence of 22 months and community custody, stating, “the low end is all the farther this Court will go at this point in time.” 11/02/18 RP 22.

The defendant timely appealed.

IV. ARGUMENT

A. THE DEFENDANT’S SUFFICIENCY OF THE EVIDENCE CHALLENGE FAILS.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A reviewing court must defer to the trier of fact on issues of conflicting

testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Circumstantial evidence carries the same weight, and is as reliable as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). “[A] verdict does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts.” *State v. Jameison*, 4 Wn. App. 2d 184, 197-98, 421 P.3d 463 (2018).

In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). In that regard, our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Similarly expressed:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to

reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict.

State v. Randecker, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

The second-degree assault statute under which the State charged Ms. Michael provides “[a] person is guilty of assault in the second degree if he or she ... assaults another with a deadly weapon.” RCW 9A.36.021(1)(c). Because there is no statutory definition of assault, the courts must use the common law definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995).

Washington recognizes three common law definitions of assault: “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” *State v. Elmi*, 166 W[n].2d 209, 215, 207 P.3d 439 (2009).

State v. Abuan, 161 Wn. App. 135, 154, 257 P.3d 1 (2011).

When a jury is instructed on self-defense, the State is also required to disprove the defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). Self-defense is evaluated “from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees.” *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). This analysis involves both subjective and objective components. *Id.* at 242-43. For the subjective component, the jury

must “place itself in the defendant’s shoes and view the defendant’s acts in light of all the facts and circumstances the defendant knew when the act occurred.” *Id.* at 243. For the objective component, the jury must “determine what a reasonable person would have done if placed in the defendant’s situation.” *Id.*

These two components of self-defense break down into four elements: “(1) the defendant subjectively feared that he [or she] was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable”; “(3) the defendant exercised no greater force than was reasonably necessary”; and “(4) the defendant was not the aggressor.” *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). Disproof of any one of these elements negates the self-defense claim. *Id.*

First, the defendant’s claim that she acted in self-defense is seriously undercut by her original statements to law enforcement which were considered by the jury during deliberations; Ms. Michael told law enforcement that she had gone to the Sinto residence, “stepped inside and got hit, and she turned around and she walked back out of the house.” RP 157. Under Ms. Michael’s original version of events, she did not even strike Ms. Joe. “One cannot deny that [s]he struck someone and then claim that [s]he struck them in self-defense.” *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977). Based upon the defendant’s conflicting statements,

the jury could reasonably find that any assertion of the use of self-defense was disingenuous.

Ms. Michael's trial testimony was limited to her claim that her medical condition would prevent her from initiating⁶ a fight with anyone and that she was injured in the altercation; in fact, during her trial testimony, she never admitted to hitting Ms. Joe – she simply stated that she did not hit Ms. Joe first. RP 237-38. Ms. Michael did not testify that she subjectively feared danger of imminent death or injury at the hands of Ms. Joe. *Id.* Ms. Michael's testimony did not, in and of itself, establish the self-defense claim.

It was *Ms. Joe's testimony* that provided a basis upon which Ms. Michael could attempt to assert self-defense. Yet, Ms. Joe's testimony, while raising the possibility that Ms. Michael acted in self-defense, also dispelled the reasonable use of self-defense beyond a reasonable doubt. Although Ms. Joe admitted to initially hitting Ms. Michael with the vase, the jury likely considered whether in light of that act, the defendant's subsequent use of force was reasonable. Most compellingly, the evidence established by Ms. Joe was that Ms. Michael's conduct went beyond the

⁶ It is uncertain how the defendant's medical condition would prevent her from initiating an altercation, but would not prevent her from engaging in an altercation once it was begun.

bounds of reasonable necessity – repeatedly striking Ms. Joe while holding her down was not, under any circumstance, objectively reasonable. Under the deferential sufficiency of the evidence standard, even if this Court does not find the evidence compelling, sufficient evidence existed by which the jury could find, beyond a reasonable doubt, that the defendant did not reasonably act in self-defense. This claim fails.

B. THE DEFENDANT’S PROSECUTORIAL MISCONDUCT CLAIM FAILS.

To establish prosecutorial misconduct, a defendant bears the burden of proving the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant shows that the prosecutor’s conduct was improper, the court must determine whether the improper conduct prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A prosecutor’s improper conduct results in prejudice when ““there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.”” *Thorgerson*, 172 Wn.2d at 443 (alteration in original) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

Where, as here, a defendant fails to object to alleged prosecutorial misconduct, the defendant is deemed to have waived any error unless he or she shows that the misconduct was so flagrant and ill-intentioned that an

instruction from the trial court could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. To meet this heightened standard, the defendant must show that “(1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Id.* at 761. Reviewing courts focus less on whether the conduct was flagrant and ill-intentioned, and more on whether the resulting prejudice could have been cured. *Id.* at 762.

This standard of review serves to give the court an opportunity to correct any alleged error and to caution jurors against being influenced by improper remarks. *Id.* at 761. Objections are required not only to prevent or remedy counsel’s improper remarks, but also to “prevent potential abuse of the appellate process”; otherwise, a party “could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict and then seek a new trial on appeal.” *Id.* (internal citations omitted).

The defendant claims that the State improperly argued the first aggressor doctrine in its rebuttal closing after the trial court declined to provide a first aggressor instruction to the jury. The State disagrees that the prosecutor’s remarks were improper, or amounted to an unsanctioned first aggressor instruction. The prosecutor’s argument, even if somewhat inarticulate, did not conflict with the self-defense instructions given by the

trial court. The prosecutor merely explained its theory that it was immaterial who received the first injury and it did not matter whether Ms. Joe first retrieved the vase, and explained to the jury the timeline the State argued was material to its decisionmaking. The prosecutor told the jury to “read your instruction” which directed the jury to consider whether the defendant acted in reasonable self-defense.

The first aggressor instruction provides:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense...and thereupon...use...force upon...another person. Therefore if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense...is not available as a defense.

WPIC 16.04.

Therefore, under this definition, the State’s rebuttal argument *did not* include the salient elements of a first aggressor instruction. The State did not argue that the defendant’s acts had created the necessity for the use of self-defense. The State did not argue that the defendant was *not entitled to use self-defense* because *she* had provoked the fight.

Rather, the State’s remarks were proper rebuttal argument, based upon the State’s version of facts elicited at trial, the instructions given by the court, and the arguments made by the defendant during her closing remarks. A prosecutor has “wide latitude” to make arguments supported by

the evidence. *See, e.g., State v. Gregory*, 158 Wn.2d 759, 859–60, 147 P.3d 1201 (2006), *as corrected* (Dec. 22, 2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). The prosecutor here did nothing more than that.

To support her argument that the prosecutor improperly argued the first aggressor doctrine, the defendant cites to the jury’s mid-deliberations question: “Under assault second degree, does it matter who used the vase [first?].” CP 64; RP 280. The defendant’s use of the jury’s question to the court is of no avail. Inquiries from the jury are not final determinations, and courts have emphasized that confusion at the time of an inquiry may clear up without assistance from the court during further deliberations. *See e.g., State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). The individual or collective thought processes of the jury “inhere in the verdict” and cannot be used to impeach a verdict. *Id.* As in *Ng*, this Court should “refuse to speculate as to the meaning” of the question posed by the jury. *Id.* The question posed to the court could have been from one juror alone and, here, there is no evidence that the jury or juror did not ultimately resolve its question to the court by deciding that the force used to assault Ms. Joe was more force than reasonably necessary – after all, Ms. Joe’s testimony was that at the time Ms. Michael struck her “repeatedly” with the vase, Ms. Michael and/or Ms. Cruz held Ms. Joe down, preventing her escape.

Even assuming the State’s argument was improper, it was not so improper that a curative instruction would not have remedied any resulting prejudice. Even if a jury instruction on the law of the first aggressor were improper in this circumstance, “closing argument cannot be likened to instructional error. Because jurors are directed to disregard any argument that is not supported by the law and the court’s instructions, a prosecutor’s arguments do not carry the ‘imprimatur of both the government and the judiciary.’” *Emery*, 174 Wn.2d at 759.

As a result, defendant should have objected to the argument, if improper, providing the trial court an opportunity to cure any confusion or prejudice the State’s rebuttal may have caused. Defendant failed to do so, likely to avoid highlighting the argument. Had the defendant done so, however, the court could easily have cured any potential prejudice resulting from the State’s argument, by a simple instruction to the jury that it should disregard counsel’s remarks.

The defendant cites *State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000), in support of her argument that the State committed misconduct by straying from the jury instructions provided to the jury by the court. *Perez-Cervantes*, however, is of no avail to the defendant. First, the case did not involve a prosecutorial misconduct claim – it was *defense counsel* who presented argument outside the bounds of the law given to the

jury by the court. Second, the State *actually objected* to the improper argument, unlike here, where defense counsel did not object.

The defendant also cites *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), a case in which the prosecution argued the law of accomplice liability in rebuttal argument, after the jury had not been instructed on accomplice liability by the Court. There, unlike here, the defendant objected and the court overruled the objection. *Id.* at 759. The Court held the argument improper because although it responded to the defendant's closing argument, it went beyond a pertinent reply and brought before the jury extraneous matters not in the record. *Id.* at 761. *Davenport* is distinguishable from this case. Here, the court instructed the jury on the law of self-defense and the prosecutor's argument did not go beyond the bounds of a pertinent reply. This claim fails.

C. THE TRIAL COURT PROPERLY CONSIDERED THE DEFENDANT'S REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

The defendant claims that the trial court abused its discretion by failing to consider her request for an exceptional sentence downward predicated upon her failed self-defense claim and her claim that the criminal conduct was at the "low end" of the range of conduct covered by the statute. Br. at 13. The trial court considered the defendant's request for an exceptional sentence downward, but the defendant laments that the trial

court improperly considered *only* the statutory mitigating factors found in RCW 9.94A.535, failing to consider her other proffered grounds.

Generally, a defendant cannot appeal a standard range sentence. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Likewise, a party generally cannot appeal a trial court's refusal to impose an exceptional sentence, which necessarily results in a standard range sentence. *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). If a trial court has exercised its discretion, its decision is not reviewable if it has "considered the facts and concluded there is no legal or factual basis for an exceptional sentence." *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Notwithstanding the general prohibition against review of standard range sentences, appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies, which includes constitutional error, procedural error, an error of law, or the trial court's failure to exercise its discretion. *Id.* at 147. While no defendant is entitled to challenge a sentence within the standard range, this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision; every

defendant is entitled to have an exceptional sentence actually considered. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).⁷

To impose an exceptional sentence downward, the trial court must find that substantial and compelling reasons exist to do so. RCW 9.94A.535. A sentencing court may impose an exceptional sentence downward based upon a failed self-defense claim if it finds that the claim is established by a preponderance of the evidence. RCW 9.94A.535(1)(a) and (1)(c) (exceptional sentence may be imposed if victim was willing participant or aggressor or defendant committed crime under duress or coercion); *State v. Jeannotte*, 133 Wn.2d 847, 947 P.2d 1192 (1997).

[T]he list of mitigating factors is not exclusive, [and] any reasons that are relied on for deviating from the standard range must “distinguish the defendant’s crime from others in the same category.” *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993) (citing *State v. Grewe*, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991)). A sentencing court may not, in imposing an exceptional sentence, take into account the defendant’s criminal history and the seriousness level of the offense because those are considered in computing the presumptive range for the offense. *See State v. Nordby*, 106 Wn.2d 514, 518 n. 4, 723 P.2d 1117 (1986).

State v. Fowler, 145 Wn.2d 400, 405, 38 P.3d 335 (2002).

⁷ A trial court errs when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances,” *Garcia-Martinez*, 88 Wn. App. at 330, or when it operates under the “mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible,” *In re Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

The defendant claims that the trial court failed to consider that Ms. Joe was a willing participant in the physical fight by her use of the glass vase as a deadly weapon against Ms. Michael. Contrary to this assertion, the trial court noted, “I can [impose an exceptional sentence] if there are substantial and compelling reasons...And the factors include, that, to a significant degree, the victim was an initiator, a willing participant, aggressor, or provoker of the incident.” 11/02/18 RP 19.

Regarding this factor, the trial court declined to impose an exceptional sentence because she did not find that the victim was a willing participant. 11/02/18 RP 20. The court noted that it was undisputed that Ms. Michael went to Ms. Joe’s residence (whether a “flophouse” or not) and that led the court to question whether Ms. Joe was the aggressor. This was not unreasonable, nor an abuse of discretion.

The defendant claims that the testimony that Ms. Joe “kicked Ms. Michael down” established that this altercation was caused, at least in part, by Ms. Joe. Br. at 14-15. The timing of the sequence of events including the timing of when Ms. Joe allegedly kicked Ms. Michael is unclear. Ms. Joe might have kicked Ms. Michael during the first attack by Ms. Michael (before Ms. Joe retrieved the vase); the kick might have occurred in proximity to Ms. Joe’s use of the vase; the kick might have occurred in proximity to Ms. Michael’s second assault on Ms. Joe, with the

vase and while restraining her. The defendant's claim that this series of events supports a finding that Ms. Joe was a willing participant is unfounded.

Second, the defendant claims that the trial court failed to consider a non-statutory mitigating factor – that the nature of the defendant's conduct “was at the very low end of the range.” Br. at 15-16. In short, the defendant asks this Court to find that the fact that the vase did not cause either the defendant or the victim substantial injury is a substantial and compelling reason for the Court to have departed from a standard range sentence. The defendant's claim is unfounded.

A non-statutory mitigating factor must “distinguish the defendant's crime from others in the same category.” *Gaines*, 122 Wn.2d at 509. A sentencing court may not, when imposing an exceptional sentence, take into account the defendant's criminal history and the seriousness level of the offense because those factors are considered in computing the presumptive range for the offense. *See Fowler*, 145 Wn.2d 400.

Here, the legislature has determined that the offense of second degree assault, whether by intentional assault (battery) and reckless infliction of substantial bodily harm, assault with a deadly weapon (whether by assault or actual battery), or an assault with the intent to commit a felony,

is a class B felony with a seriousness level of “IV.” RCW 9A.36.021; RCW 9.94A.515.

Despite the fact that the legislature has declared that all assaults fitting within this statutory definition should be sentenced with the same seriousness level, the defendant seems to argue that factually minor second-degree assaults should be subject to an exceptional sentence inquiry. The defendant argues that a second-degree assault with a glass vase with little resulting injury is minor in comparison to other offenses contemplated by the legislature to be within the same seriousness level. Br. at 16. In doing so, however, the defendant engages in improper comparison of the seriousness of an offense based upon similar offenses described in published decisions, an analysis disavowed by our high court:

Comparing the circumstances of a violation of the statute prohibiting the possession of marijuana with intent to manufacture or deliver to grow operations which are described in other appellate decisions skews the inquiry. Comparing the facts of the current drug crime with prior crimes described in published appellate decisions would likely result in comparing the crime to the most egregious examples of violations of the statute because most minor cases are resolved by plea bargaining, at the trial court level or in unpublished decisions.

...Even if a “proportionality” review based on prior published appellate decisions were a correct inquiry, which it is not, the cases cited to, and compared...do not provide

useful comparisons...One problem with this approach is that none of the cited cases involved a sentencing issue.

State v. Solberg, 122 Wn.2d 688, 703-04, 861 P.2d 460 (1993).

Although the defendant does not label her analysis as a “proportionality” analysis, that is its practical effect. The defendant implicitly claims that true second-degree assaults (requiring a standard range sentence) are those which require stitches, or result in the loss of an organ. Br. at 16. In contrast, she claims, the second-degree assault of which she was convicted was “less egregious,” and, therefore, meriting an exceptional downward departure from the standard range.

Under the defendant’s logic, a second-degree assault by strangulation which results in loss of consciousness for a matter of seconds, as opposed to minutes or longer, would be deserving of an exceptional sentence downward because its result is fortuitously less egregious than another, similar assault. Similarly, a second-degree assault with a firearm would merit consideration of an exceptional sentence downward if the firearm is discharged but misses its intended target.

By simple luck, the assault Ms. Michael committed did not result in substantial bodily injury (or worse). Even though Ms. Joe was left relatively unscathed, the defendant’s intent and actions still constituted an

assault with a deadly weapon – a weapon capable of causing death or substantial bodily harm.⁸

As in *Solberg*, the defendant’s comparison of her assault to other second-degree assaults is improper, skewing the inquiry. Further, also as in *Solberg*, none of the cases cited by the defendant addresses the reasons the trial court imposed a particular sentence.^{9, 10}

The defendant has proffered no reason, let alone a substantial and compelling reason, that her second-degree assault should be distinguished from other second-degree assaults. Her argument that her conduct was

⁸ The vase was admitted as P-6. The court and the jury had the opportunity to view the size and weight of the vase to determine whether it was a “weapon readily capable of causing death or substantial bodily harm.”

⁹ *State v. Shilling*, 77 Wn. App. 166, 889 P.2d 948 (1995) (bar glass used to strike victim was a deadly weapon; sentencing issue presented did not involve whether a standard range sentence or mitigated sentence was appropriate); *State v. Pomeroy*, 18 Wn. App. 837, 573 P.2d 805 (broken beer glass thrust into victim’s face was a deadly weapon, justifying the imposition of a mandatory minimum sentence for persons armed with a deadly weapon at the time of the crime); *State v. Ramirez*, 432 P.3d 454 (Wash. Ct. App. 2019), *review denied*, 193 Wn.2d 1025 (2019) (Published portion of the opinion involving Confrontation Clause).

¹⁰ One of the cases cited by the defendant in support of her argument is “*State v. Teas*, 7 Wn. App. 2d 277, 432 P.3d 454 (2019).” This citation belongs to *Ramirez*, 432 P.3d at n. 8; *Ramirez* involves an assault with a “dark metal” weapon. The State surmises that defendant inadvertently ascribed the wrong case name to *Ramirez*, as *State v. Teas*, 447 P.3d 606 (Wash. Ct. App. 2019), does not appear to have any bearing on this case.

relatively minor is, at best, a reason supporting the imposition of a low-end sentence – an argument which the trial court agreed.

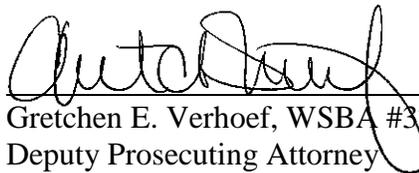
The trial court acknowledged its ability to impose an exceptional sentence downward, but found no reason to do so, stating, “the low end is all the farther this Court will go at this point in time.” 11/02/18 RP 22. As a result, Ms. Michael has failed to demonstrate that the trial court erred in declining to impose an exceptional sentence.

V. CONCLUSION

The State respectfully requests this Court affirm the defendant’s conviction and the standard range sentence imposed by the court after considering, and rejecting, her request for an exceptional downward departure from the standard range.

Dated this 22 day of November, 2019.

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

STATE OF WASHINGTON,

Respondent,

v.

LISA MICHAEL,

Appellant.

NO. 36473-9-III

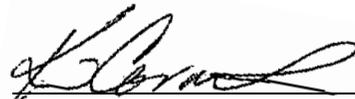
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on November 22, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marie Trombley
Marietrombley@comcast.net

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(Place)



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SPOKANE COUNTY PROSECUTOR

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