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State of Washington  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

BILLY JO DALAGER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. If defense counsel successfully negotiated a substantial reduction from the original charge of first-degree murder and defendant's potential sentence with the State, was defense counsel ineffective by not further pursuing an agreement to allow for argument requesting an exceptional sentence downward on the already reduced charge of second-degree murder?

2. Can Dalager establish prejudice regarding his ineffective assistance of counsel claim if the trial court imposed an above mid-range sentence after defense counsel requested a low-end sentence.

## **II. STATEMENT OF THE CASE**

Billy Dalager was charged in superior court with first-degree premeditated murder and with second-degree felony murder, arising from Dalager striking and killing Don Mielike with his vehicle. CP 1-2. Dalager eventually pleaded guilty to second-degree felony murder. CP 53-60, 121,134-35.

### *Substantive facts.*

Prior to July 31, 2016, Dalager and Mielike had an ongoing dispute over a set of car stereo speakers that Mielike wanted Dalager to return.<sup>1</sup>

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<sup>1</sup> The statement of facts are taken from the statement of the investigating officer, paginated as CP 3-12.

CP 3. On July 31, 2016, after midnight,<sup>2</sup> Melissa Eller arrived at a residence located at 2407 East Central Avenue in Spokane and confronted Dalager about the speakers and alleged Dalager had recently stolen numerous personal items from her. CP 3. Dalager became angry. CP 3. Soon thereafter, Dalager removed the stereo speakers from his car and remarked, “let’s go f—king beat his ass.” CP 4. Both Alexis Eller (daughter of Melissa Eller) and Dalager then got into their vehicle, a 1998 Honda Civic, and drove at a high rate of speed, eastbound on Central Avenue. CP 3-4. Dalager was driving the Honda. CP 3.

As Dalager and Eller approached Cook Avenue, Mielike and another individual stood on the northside of Central Avenue. CP 3. As Dalager drove past Mielike, Dalager tossed the stereo speakers out of the car, which landed near Mielike. CP 3. Dalager continued driving, made a U-Turn, and drove back toward Mielike. CP 3-5, 7. As Dalager approached Mielike, Mielike hurled one the speakers at the Honda, which caused the Honda’s front windshield to shatter. CP 4. Dalager then drove directly at Mielike, travelling between 30 m.p.h. and 50 m.p.h., based upon witness estimates.<sup>3</sup> CP 3-5, 6, 7. As Mielike ran for cover, Dalager drove over the

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<sup>2</sup> Witnesses observed Dalager ingest methamphetamine after midnight on July 31, 2016. CP 3-4.

<sup>3</sup> Witness Melissa Eller told officers that Dalager “gunned it” immediately before he struck Mielike. CP 7.

curb, which caused the vehicle to go airborne.<sup>4</sup> CP 4-6, 8. Dalager ultimately struck Mielike and ran over him with his car. CP 4-6. Thereafter, Dalager fled the scene at a high rate of speed, with an estimated speed of approximately 100 m.p.h. CP 4-5. Mielike died at the scene. CP 8, 9, 10.

After waiving his Miranda rights, Dalager informed Detective Brian Cestnick that he had smoked marijuana and methamphetamine on the day of the incident. CP 11. Dalager admitted that he became extremely upset over the dispute with the car stereo speakers.<sup>5</sup> CP 11. Dalager and several friends had planned to find Mielike and assault him. CP 11. Dalager remarked to the detective that he was “Gonna run that mother f—ker down.” CP 11. Regarding the facts leading up to the murder, Dalager stated Alexis Eller tossed the stereo speakers out of the car window as they drove past Mielike; Dalager made a U-Turn and drove toward Mielike. CP 11. Dalager denied he intentionally struck Mielike. CP 12. He also admitted he left the crime scene at a high rate of speed. CP 12.

*Procedural history.*

Prior to trial, the State and defense reached a plea agreement. The parties agreed that the State would move the court to amend the information

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<sup>4</sup> Eller contemporaneously pleaded with Dalager not to strike Mielike with the car. CP 4-5.

<sup>5</sup> Dalager claimed that he had anger management issues and loses control. CP 11.

to second-degree felony murder. CP 56. Regarding second-degree murder, Dalager faced a standard range sentence of 123 months to 220 months of incarceration. CP 54, 149. Specifically, it was agreed the State could request the high end of the standard range of 220 months and the defense could request the low end of 123 months. CP 56; RP 23.

In pleading guilty to second-degree murder, Dalager acknowledged, in his statement on plea of guilty, that if he went to trial, he could be convicted of the greater offense of murder in the first-degree. CP 60. If convicted of first-degree murder, Dalager would have faced a standard range sentence of 240 months to 320 months. RCW 9A.32.030(2); RCW 9.94A.515; RCW 9.94A.510; Attach. A.

Before sentencing, defense counsel filed a memorandum with the court in support of counsel's request for the court to impose a low-end sentence. CP 72-80. Counsel asked the court to consider the following as mitigation and her request to impose a low-end sentence: a failed defense of "self-defense,"<sup>6</sup> and Dalager's purported childhood trauma, coupled with his age at the time of the offense and diagnosis of post-traumatic stress

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<sup>6</sup> Defense counsel requested the court consider "self-defense" as a failed defense in mitigation of Dalager's sentence. CP 74-76. However, when interviewed by a detective shortly after the event, Dalager remarked that he drove toward Mielike, that he "snapped" and did not know "what came over me." CP 24. It was only later during an interview with a psychologist that Dalager alleged Mielike had threatened him with a firearm several days before the murder. CP 99.

disorder (PTSD), diminished Dalager's capacity to commit the offense. CP 74-78. Defense counsel furthered these same arguments at sentencing remarking that the defendant was 25-years-old at the time of the offense and that the court should take the "juvenile brain" science into consideration. RP 36. Defense counsel also asserted that Dalager had a traumatic childhood, when combined with self-medication,<sup>7</sup> which diminished Dalager's culpability at the time of the murder. RP 36-37.

At sentencing, the Honorable John Cooney, acknowledged that Dalager assumingly had a traumatic childhood which contributed to his chemical dependency. RP 40-41. Ultimately, the court sentenced Dalager to a mid-range sentence of 205 months. CP 125; RP 43.

### **III. ARGUMENT**

**DALAGER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS AS HIS TRIAL COUNSEL TACTICALLY NEGOTIATED A SUBSTANTIAL REDUCTION IN THE LIABILITY DALAGER FACED AT SENTENCING. MOREOVER, DALAGER CANNOT ESTABLISH THAT HE WAS PREJUDICED BY HIS COUNSEL'S REASONABLE STRATEGY.**

The defendant generally claims his trial counsel was ineffective during plea negotiations and during sentencing by not requesting an

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<sup>7</sup> Under RCW 9.94A.535(1)(e), voluntary use of drugs or alcohol is excluded as a basis for mitigation.

exceptional sentence downward based upon an asserted “mental illness” and a failed defense.

*Standard of review.*

Ineffective assistance of counsel claims are reviewed de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record in the trial court. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). This Court gives great deference to defense counsel’s performance and begins with a strong presumption that counsel was effective. *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015).

Generally, a sentencing court must impose a sentence within the standard sentencing range under the SRA. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). However, the sentencing court may exercise its discretion by imposing a sentence below the standard range if “substantial and compelling reasons” justify an exceptional sentence. RCW 9.94A.535. The sentencing court must find that mitigating circumstances justifying a sentence below the standard range are established by a preponderance of the evidence. RCW 9.94A.535(1). A failed defense and “[t]he defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly

impaired” can constitute mitigating circumstances. RCW 9.94A.535(1)(a)(e) *see State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997) (failed defenses).

Here, the sentencing court considered Dalager’s proffered mental health condition<sup>8</sup> at sentencing and rejected it. The court reasoned that many individuals experience traumatic childhoods and do not commit murder. CP 41. The court also expressed concern that Dalager had a violent tendency which ultimately led the murder. CP 43.

1. Deficient performance prong.

Dalager argues that his trial counsel was deficient because she did not request an exceptional sentence downward based upon his reputed act of “self-defense” and his mental health history including PTSD and a major depressive disorder.<sup>9</sup> *See* Appellant’s Br. at 8. Dalager also faults his trial counsel, claiming the record does not support any reasoning by his trial

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<sup>8</sup> Psychologist, Dr. Nathan Henry, was appointed at the behest of defense counsel to conduct an evaluation of the defendant; his findings, conclusions and opinions are not contained within the record. In addition, the psychologist’s findings were not presented at sentencing and it is unknown whether those findings were beneficial to the defendant. *See* CP 49-50.

<sup>9</sup> Although not apparent here, this Court has recognized that “an allegedly unsuccessful or poor quality sentencing argument alone is unlikely to result in demonstrable prejudice because of the near impossibility of showing a nexus between the argument and the eventual sentence.” *State v. Goldberg*, 123 Wn. App. 848, 853, 99 P.3d 924 (2004).

counsel for not pursuing an exceptional sentence during plea negotiations. *See* Appellant's Br. at 9.

“In a plea bargaining context, effective assistance of counsel merely requires that counsel actually and substantially assist his [or her] client in deciding whether to plead guilty.” *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (internal quotations omitted). To prove ineffective assistance of counsel, the appellant must demonstrate both that defense counsel provided deficient representation and that such deficient representation prejudiced him or her. *Estes*, 188 Wn.2d at 457-58. A defendant must prove both prongs to prevail on an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

Matters that involve trial strategy or tactics do not establish deficient performance; a defendant bears the burden of proving there were no legitimate strategic or tactical reasons behind his attorney's choices. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001). To rebut this presumption, the defendant bears the burden of establishing the absence of any “conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 42.

If the State and the defendant reach a plea agreement, it is analogous to a contract right and its terms are read as a contract. *State v. Armstrong*, 109 Wn. App. 458, 462, 35 P.3d 397 (2001). If a defendant breaches the

plea agreement, the State has the option to specifically enforce the agreement, or move the court to rescind the agreement. *State v. Thomas*, 79 Wn. App. 32, 37, 899 P.2d 1312 (1995).

The main roadblock to Dalager's argument is that he *presupposes* the State would have both agreed to a plea bargain, with a joint recommendation to reduce the charge to second-degree murder and allow Dalager to argue for a downward departure from the standard range of the reduced charge. It is highly unlikely the State would have agreed to such terms as the deputy prosecutor reserved the right during negotiations to argue for a high-end sentence on the reduced charge of second-degree murder. Notwithstanding that Dalager fails to acknowledge that his trial counsel obtained a significant reduction from the original charge and the punishment he faced during negotiations, Dalager fails to produce any evidence from the record that his trial counsel did not advocate for the ability to argue for an exceptional sentence, in addition to a reduction of the original charge, during plea negotiations.

Accepting Dalager's argument at par value, if defense counsel had repudiated the plea agreement at sentencing in front of Judge Cooney by arguing for an exceptional sentence downward based upon his purported mental health issues and ostensible self-defense claim, rather than respect the plea agreement and argue for a low-end sentence within the standard

range, the State could have moved the trial court to find the defendant in breach, with the potential of Dalager once again facing first-degree murder and its attendant higher standard range sentence. Dalager fails to establish his lawyer was not reasonably effective under prevailing professional norms.

2. Prejudice prong.

Dalager also fails to establish he was prejudiced by his lawyer's performance for several reasons. A defendant establishes actual prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *Grier*, 171 Wn.2d at 34. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 34 (internal quotation marks removed). Prejudice is not established if the record shows that the defendant benefited from his or her lawyer's representation. *State v. Acevedo*, 137 Wn.2d 179, 198-99, 970 P.2d 299 (1999). In addition, prejudice is not established if the record shows defense counsel engaged in a legitimate strategy or tactic. *Osborne*, 102 Wn.2d at 99-100.

Accordingly, Dalager must establish that there is a reasonable probability that had defense counsel negotiated and requested an exceptional sentence, the trial court would have imposed such a sentence,

notwithstanding the additional hurdle that the State would have agreed to such a recommendation.

As discussed above, Dalager's defense counsel engaged in a reasonable strategy and negotiated a substantial reduction on his behalf. He originally faced a first-degree murder charge and, if convicted, a standard range sentence of 20 years to 26.66 years. The parties agreed to a reduction to second-degree murder with a standard range sentence of 10.25 years to 18.33 years.<sup>10</sup> Dalager received 17.08 years.

Likewise, Dalager fails to establish prejudice because there is nothing in the record to indicate that the State would have agreed, as part of a plea bargain, to allow defense counsel to argue for an exceptional sentence downward in conjunction with a reduced charge of second-degree murder. To the contrary, as part of the negotiated plea bargain, it was agreed the State could argue for a high end standard range sentence on the reduced charge of second-degree murder. Certainly, if Dalager had proceeded to trial and been convicted on the original charge of first-degree murder, he would have been on a much steeper hill in terms of asking the court to impose an exceptional sentence below what he received from the plea bargain and

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<sup>10</sup> The low end of a standard range sentence for first-degree murder is nearly twice that of second-degree murder. The high end of second-degree murder is nearly two years less than the low end of first-degree murder.

resultant term of incarceration. Defense counsel effectively reduced Dalager's exposure to a significantly longer prison term.

Finally, there is nothing to suggest the trial court would have sentenced Dalager to a sentence below the standard range if requested by defense counsel. This Court's decision in *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719, *review denied*, 143 Wn.2d 1024 (2001), is instructive. In that case, defense counsel had argued mitigating factors seeking a low-end standard range sentence. *Id.* at 265. The State had recommended the high end. *Id.* Afterwards, the court sentenced the defendant to a standard range sentence. On appeal, the defendant argued that his trial counsel was ineffective for failing to request an exceptional sentence downward based on the small amount of cocaine in his possession and applicable case law at the time of his sentencing. *Id.* at 265-66.

This Court rejected that argument and concluded that the defendant could not prove the prejudice prong of his ineffective assistance of counsel claim. *Id.* at 266. This Court reasoned that, even without his counsel's argument, the trial court had the discretion on its own to impose an exceptional sentence downward. *Id.* Thus, the Court was "not convinced the outcome would have been different had defense counsel argued [the relevant case law] to support an exceptional sentence." *Id.*

In the instant case, Dalager's defense counsel presented the court with Dalager's mental health examination, his putative disorders including PTSD, anxiety and depression, his self-mediation, and his "youthfulness" in support of a mitigated sentence within the standard range. The court acknowledged receipt and consideration of both parties sentencing materials. RP 40. Defense counsel argued much of the same at sentencing.

Based on the sentencing court's rejection of defense counsel's recommendation for a low-end standard range sentence and imposition of a sentence within 15 months of the high end of the standard range, there is no reasonable probability that Judge Cooney would have imposed a sentence below the standard range but for counsel's alleged unprofessional errors. Dalager cannot establish that the outcome of the proceedings would have been different if his lawyer would have requested an exceptional sentence. His claim of ineffective assistance of counsel fails.

#### **IV. CONCLUSION**

With great deference given to defense counsel's performance and a strong presumption that counsel was effective, Dalager has not overcome that presumption in that his lawyer successfully negotiated a substantial reduction in the risk Dalager faced in terms of a greatly increased determinate sentence if convicted of the original charge of first-degree murder. Defense further obtained an agreement by the State which allowed

defense counsel the opportunity to request a low-end sentence on the reduced charge. The defense attorney's actions constitute a legitimate strategy which is not a basis for an ineffective assistance of counsel claim. The fact that Dalager is disappointed that he did not get a bigger bite of the apple does not constitute deficient performance on the part of his counsel.

Furthermore, Judge Cooney rejected a recommendation by the defense to impose a low-end sentence. Dalager cannot establish the court would have imposed an exceptional sentence downward if requested by his lawyer. Resultantly, Dalager cannot establish his lawyer's representation prejudiced him and his claim fails.

The State requests this Court affirm the judgment and sentence.

Respectfully submitted this 21 day of October, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry Steinmetz, WSBA #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

# ATTACHMENT A

## Murder First Degree

### RCW 9A.32.030 CLASS A – SERIOUS VIOLENT/CRIMES AGAINST PERSONS ATTEMPT/SOLICITATION/CONSPIRACY = CLASS A OFFENDER SCORING RCW 9.94A.525(9)

*If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Serious Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 251.*

**ADULT HISTORY:**

Enter number of serious violent felony convictions ..... x 3 = \_\_\_\_\_  
 Enter number of violent felony convictions ..... x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent felony dispositions ..... x 3 = \_\_\_\_\_  
 Enter number of violent felony dispositions ..... x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony dispositions ..... x ½ = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other violent felony convictions ..... x 2 = \_\_\_\_\_  
 Enter number of other nonviolent felony convictions ..... x 1 = \_\_\_\_\_

**STATUS:**

Was the offender on community custody on the date the current offense was committed?..... + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score** (Round down to the nearest whole number) ..... \_\_\_\_\_

### SENTENCE RANGE

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
<b>LEVEL XV</b>	280m	291.5m	304m	316m	327.5m	339.5m	364m	394m	431.5m	479.5m
	240 - 320	250 - 333	261 - 347	271 - 361	281 - 374	291 - 388	312 - 416	338 - 450	370 - 493	411 - 548

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 58 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 237 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 245.
- ✓ For sentencing alternatives, see page 227.
- ✓ For community custody eligibility, see page 239.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 234.
- ✓ Multiple current serious violent offenses shall have consecutive sentences imposed per the rules of RCW 9.94A.589(1)(b).
- ✓ Excluding attempt, solicitation and conspiracy convictions, the statutory minimum sentence is 240 months (RCW 9.94A.540). The statutory minimum sentence shall not be varied or modified under RCW 9.94A.535.
- ✓ Per RCW 9A.32.040, an offender convicted of Murder 1 shall be sentenced to life imprisonment.

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

STATE OF WASHINGTON,

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BILLY JO DALAGER,

Appellant.

NO. 36664-2-III

CERTIFICATE OF MAILING

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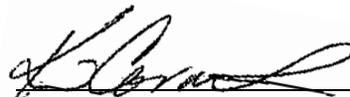
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