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SUPREME COURT
STATE OF WASHINGTON
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NO. 88663-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD SWEAT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

RESPONSE TO PETITION FOR REVIEW

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A. ISSUE PRESENTED

1. The legislature authorized the imposition of an exceptional sentence for a pattern of domestic violence against multiple victims. The trial court found that Sweat had a prolonged history of abuse with five different victims prior to the assault in the present case. Was there sufficient evidence that Sweat had a pattern of domestic violence against multiple victims to justify an exceptional sentence?

B. FACTS

1. PROCEDURAL FACTS

The defendant, Richard Sweat, was charged with assault in the second degree - domestic violence. CP 1. The State also charged an aggravating factor that Sweat had a pattern of domestic violence against multiple victims. CP 1-2. The State alleged that on September 26, 2010, Sweat punched his girlfriend, Kellie Kensworthy, in the face causing a fracture to her orbital socket. CP 4-5. Sweat waived his right to a jury trial and requested a bench trial. CP 11; 1/10/11 RP 48-50. The court found Sweat guilty of assault in the second degree, and found the aggravating factor that he had a pattern of domestic violence against multiple

victims. CP 138-44. Sweat was sentenced on March 4, 2011. CP 113-21. The court imposed an exceptional sentence of 84 months confinement. CP 113-21.

The trial court considered five prior convictions from 1996 to 2006 involving domestic violence and physical and/or sexual to support the exceptional sentence. Each of the separate convictions involved distinct victims. Each conviction also involved physical, psychological and or sexual abuse. Together the events showed a pattern of ongoing physical, psychological and or sexual abuse. State v. Sweat, 297 P.3d 73, 75 -76 (Wash.App. Div. 1, 2013). Sweat appealed and Division One affirmed his sentence. Id.

C. ARGUMENT

1. AN EXCEPTIONAL SENTENCE IS AUTHORIZED IF AN OFFENDER ABUSES MANY DIFFERENT WOMEN.

Sweat contends that the Sentencing Reform Act (SRA) only authorizes an exceptional sentence when there is a pattern of abuse against a single victim. Sweat's argument is not supported by the plain language of the statute or the statute's history.

If the plain words of a statute are unambiguous, the Court need not inquire further. State v. Gonzalez, 168 Wn.2d 256, 263,

226 P.3d 131 (2010) The plain language of RCW 9.94A.535(3)(h)(i) includes victims that are beyond the direct result of the crimes charged:

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(3)(h)(i) (emphasis added).

The legislature amended the statute in 2010. The pattern of abuse aggravator originally applied to "the victim." The legislature changed that language to "a victim or multiple victims." Laws of 2010, ch. 274, § 402. The legislature clearly intended the additional language to have meaning beyond the SRA's definition of "victim" as tied to a particular charged case. The Court need not look any further than the plain language of the statute to reject Sweat's argument.

As the Court of Appeals decision makes clear, the plain language of the statute permits an exceptional sentence for a pattern of domestic abuse against multiple different victims. The Court of Appeals held:

the statute contemplates abuse that was not the direct result of the charged crime by referring to abuse “manifested by multiple incidents over a prolonged period of time,” and stating that the current offense was “part of an ongoing pattern” of abuse. The legislative history also makes abundantly clear that the intent of the statute was to address the serial domestic violence offender and consider additional victims who suffered past abuse by the offender. As set forth above in the trial court’s findings, the evidence here was sufficient to support a finding of this aggravating factor.

State v. Sweat, 297 P.3d 73, 76 (Wash.App. Div. 1, 2013).

Furthermore, as the Court of Appeals noted, even of the statutory language were ambiguous the legislative history makes it very clear the purpose of the amendment adding “multiple victims” was to address serial domestic violence abusers. Id. at 75, fn 5.

Sweat raised a new issue after the briefing was completed at the Court of Appeals. When it became clear that his statutory interpretation argument would fail he claimed that an exceptional sentence cannot be imposed based on matters that are necessarily considered in computing the offender score. The State responded in supplemental briefing that the issue was not properly raised. The Court of Appeals presumably agreed and did not address the issue in their decision. While appellate courts may accept review of constitutional issues not raised in the trial court pursuant to RAP

2.5(a)(3), the party must raise the issue on appeal in accordance with the rules of appellate procedure. Issues not so raised, even constitutional issues, are not properly before the court. State v. Johnson, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992). This court should not accept review of an issue that was not properly raised and not decided by the Court of Appeals.

D. CONCLUSION

For the foregoing reasons this Court should reject the petition for review.

DATED this 25th day of April, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Response to Petition for Review, in STATE V. RICHARD SWEAT, Cause No. 88663-6, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

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Date 4/29/13

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Please accept for filing the attached documents (Response to Petition for Review) in State of Washington v. Richard Sweat, No. 88663-6.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Jeff Dernbach's direction.

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