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NO. 88663-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD SWEAT,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

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A. ISSUES

1. A court may impose an exceptional sentence in a domestic violence case if “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.” In this domestic violence case with one charged victim, the sentencing court imposed an exceptional sentence because Sweat had abused six different women over a ten-year period, establishing an ongoing pattern of abuse over a prolonged period of time. Does this pattern of abuse aggravator permit an exceptional sentence where the pattern is based on abuse against victims not charged in the present case, or may the aggravator be used only where a defendant has abused a charged victim?

2. A trial court exceeds its legislatively granted sentencing authority if it uses conduct that was already considered by the legislature in setting the standard range to impose an exceptional sentence. Here, in imposing an exceptional sentence, the trial court relied on a pattern of past conduct that the legislature has expressly said authorizes an exceptional sentence. Did the trial court properly impose an exceptional sentence based on this express legislative authorization?

B. STATEMENT OF THE CASE

1. FACTS.

Richard Sweat and Kellie Kensworthy were in a dating relationship for approximately four weeks. 1/10/11 RP 137; 1/12/11 RP 292. Two weeks after they began dating, Kensworthy began living with Sweat in a shed on property owned by Sweat's relatives. 1/12/11 RP 292, 297. Soon after the relationship began Sweat became controlling. 1/12/11 RP 292.

On the morning of September 26, 2010, Sweat told Kensworthy during an argument that he would "smack her in the face" if she kept talking. 1/12/11 RP 294, 299. Sweat then struck Kensworthy in the left eye with his hand with sufficient force to knock her unconscious. 1/12/11 RP 294, 296. When she awoke, she could not see out of her left eye for about thirty minutes. 1/12/11 RP 294.

Sweat was apologetic and asked Kensworthy to lie and say that she fell out of bed and hit her eye on a box. 1/12/11 RP 296-97. Kensworthy walked to the hospital with Sweat. 1/10/11 RP 132; 1/11/11 RP 183. Nurse Shawna Moorehead escorted a crying and upset Kensworthy to an examination room. 1/11/11 RP 183. Kensworthy initially reported that she fell off her bed and

hit her eye on a dresser. 1/11/11 RP 186. She later said Sweat caused her injuries and asked the hospital staff to call the police. 1/11/11 RP 187-88; 1/12/11 RP 301. Dr. Luther Richey diagnosed Kensworthy with a fractured orbital socket. 1/11/11 RP 212-13. There was no laceration near the injury leading the doctor to conclude it was unlikely to have been caused by a fall. 1/11/11 RP 218.

Police contacted Sweat in the hospital waiting room. 1/10/11 RP 134. He was nervous and agitated, asking why the police were there. 1/10/11 RP 135. When Officer Linder told Sweat he was investigating a domestic violence assault, Sweat denied he had any argument with Kensworthy. 1/10/11 RP 136. Sweat told police that Kensworthy injured herself by falling out of bed and hitting her eye on a dresser. 1/10/11 RP 136. Officer Farrow went to Sweat's residence and took photographs. 1/11/11 RP 251-52. He noted that there was no dresser next to the bed. 1/11/11 RP 253-54.

Sweat was charged with assault in the second degree - domestic violence. An aggravator alleged that the assault was part of a pattern of domestic violence against multiple victims. CP 1-2.

On the eve of trial, Sweat waived his right to a jury trial, requested a bench trial, and then asked to fire his attorney and

proceed pro se. CP 11 1/10/11 and RP 48-50 (jury waiver); CP 12-13 and 1/10/11 RP 62-72 (pro se request). The trial court granted Sweat's request and he represented himself. 1/10/11 RP 66-72. After hearing the evidence, the court found Sweat guilty of assault in the second degree.

The State presented evidence that Sweat had an extensive history of violence against women including five prior convictions from 1996 to 2006 involving domestic violence, or physical or sexual abuse. The court made the following findings of fact in support of the aggravating factor:

2. In 1995 the defendant committed the crime of Assault in the Second Degree. He was convicted in 1996. The victim was Jeanette Walner. ... [T]he Assault in the Second Degree was charged ... under the prong that with the intent to commit the crime of rape and indecent liberties the defendant did assault Jeanette Walner. This is relevant to show an ongoing pattern of physical, psychological, and sexual abuse.

3. In 1998 the defendant was convicted of Unlawful Imprisonment and Assault in the Third Degree. The victim was Julia Harter. . . . The . . . defendant had caused bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering to Julia Harter. This is relevant to show an ongoing pattern of physical, psychological, and sexual abuse.

4. The defendant was convicted of Unlawful Imprisonment—Domestic Violence and Assault in the

Fourth Degree—Domestic Violence in 2005. . . . The victim of that crime was Angelique Montes.

5. The defendant was convicted of felony Riot—Domestic Violence and Assault in the Fourth Degree—Domestic Violence in 2006. The victim of the crimes was Nina Northington.

6. In 2006 the defendant was convicted of felony Riot—Domestic Violence. The victim was Cheryl Mainer.

7. The defendant's first offense considered by the court occurred in 1995. The most recent event occurred September 26, 2010. This is a prolonged period of time.

8. Each of the six separate convictions involved distinct victims. Each conviction also involved physical, psychological and or sexual abuse. The six separate incidents constitute multiple incidents. Together the events show a pattern of ongoing physical, psychological and or sexual abuse.

CP 138-44. Sweat was sentenced on March 4, 2011 and the court imposed an exceptional sentence of 84 months confinement.

CP 113-21.

## 2. COURT OF APPEALS OPINION.

Sweat appealed and argued that the sentencing court had erred in imposing an exceptional sentence because the aggravating factor for a pattern of abuse applies only to a defendant who has abused the charged victim or victims. At oral argument, Sweat claimed for the first time that if prior incidents could be considered,

his sentence violated the principle that factors used to establish the standard range cannot be used to justify an exceptional sentence. He filed a short supplemental brief on the topic. Appellant's Supp. Br. at 1-2. The State objected to the untimely argument and distinguished the cases Sweat cited. Response to Appellant's Supp. Br. at 1-7.

The Court of Appeals rejected Sweat's statutory construction argument and affirmed his exceptional sentence. State v. Sweat, 174 Wn. App. 126, 129-30, 297 P.3d 73 (2013), review granted, 177 Wn.2d 1023 (2013). It held that, read as a whole,

. . . 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.

State v. Sweat, 174 Wn. App. at 130. The court chose not to address Sweat's untimely argument. Sweat petitioned for review raising both arguments. Again, the State objected to the untimely-raised argument. The petition for review was granted.

### C. ARGUMENT

Sweat argues that a serial domestic violence offender can receive an exceptional sentence only if a pattern of abuse is

established by evidence that he abused a victim or victims charged in the current case. This argument should be rejected. In an attempt to allow greater punishment for recidivist batterers who go from victim to victim over time, the legislature has plainly authorized an exceptional sentence when a defendant abuses one woman, or many, over the course of years, regardless of whether those victims are charged in the current case.

Sweat's additional argument is also meritless. A judge cannot impose an exceptional sentence based solely on factors used to establish the standard range, because such a sentence exceeds that authorized by the legislature. But, a judge *may* consider a pattern of abuse—whether resulting in convictions or not—where the legislature has authorized such a sentence, even if there is some overlap between facts used to establish the pattern and the facts used to establish the standard range.

1. AN EXCEPTIONAL SENTENCE IS AUTHORIZED IF AN OFFENDER ABUSES MANY DIFFERENT WOMEN OVER A LONG PERIOD OF TIME.

Sweat contends that the Sentencing Reform Act (SRA) authorizes an exceptional sentence only when there is a pattern of abuse against a charged victim or victims. Sweat's argument is not

supported by the language of the statute as a whole or the statute's history. The argument must be rejected.

“Legislation never is written on a clean slate, never is read in isolation, and never applies in a vacuum. Every new act is a component of an extensive and elaborate system of written laws.” 2B Statutes and Statutory Construction §53:1, 373-74 (7th ed. 2012). The primary goal of statutory construction is to discern and carry out the legislature's intent. If that intent cannot be discerned from the plain text of the statute, the court applying the statute should resort to principles of statutory construction, legislative history, and relevant case law to discern the legislative's intent. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Further, “[a]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous.

State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010).

The entire legislative scheme must be considered so that provisions are analyzed in context. In re Pers. Restraint of Adams, No. 87501-4, Slip op. at 6-7 (Wash. S.Ct., filed Sept. 12, 2013)

(analyzing exceptions to statutory time bar on the filing of collateral attacks on a judgment). Statutory construction claims are reviewed *de novo*. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008).

A court derives the meaning of an unambiguous statute from the wording of the statute itself. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). Each word must be accorded meaning so that no portion of the statute is rendered superfluous. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002); State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). A statute is ambiguous only if it is susceptible to more than one reasonable interpretation. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

Under the SRA, a trial court may impose a sentence outside the standard sentence range for an offense if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. There is an exclusive list of aggravating factors that may justify an exceptional sentence. One factor allows a higher sentence in a case of domestic violence where the State proves the defendant has engaged in a pattern of similar abuse against other women:

(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).

The most natural reading of this language suggests that, in sentencing the offender for the case before the court (“the offense”), the court should consider whether this offense was part of a pattern of aberrant behavior of a similar character over a prolonged period of time. Most people would conclude that, because the “pattern” can include “a victim or multiple victims,” and “multiple incidents” spread over a “prolonged time,” the aggravator allows consideration of misbehavior far beyond the charged offense. “Multiple incidents” over a “prolonged period of time” against “multiple victims” will frequently occur outside the time-frame of any single offense, and across many distinct offenses, whether or not those priors incidents were charged and resulted in any sort of misdemeanor or felony conviction.

Additionally, given that domestic violence occurs in the context of a one-on-one or a familial relationship, it would be odd to

find a case where a defendant abuses *multiple* victims in a single domestic violence relationship over a long period of time.<sup>1</sup> Thus, it is difficult to imagine why the legislature would create an exceptional sentence provision for such a limited class of cases.

Sweat argues that the definition of "victim" demands that the pattern of abuse be limited to the charged victim or victims. This interpretation is unreasonable in light of the statute as a whole. The SRA generally defines a victim as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(53). The definitional section includes, however, the caveat that definitions will apply throughout the chapter, "[un]less the context clearly requires otherwise." RCW 9.94A.030. Notably, the caveat does not say that any deviation must be express; rather, it provides that the need for a different interpretation can be clear from the "context."

The context here makes clear that the legislature intended that a serial abuser of women can be punished more severely in a domestic violence case, even if the serial nature of the defendant's abusive past is proved by conduct not directly related to the crime

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<sup>1</sup> An assault is domestic violence if committed against a family or household member or in a dating relationship. RCW 10.99.020.

charged. Sweat's interpretation would defeat legislative intent, render recent legislative changes superfluous, and would lead to the absurd conclusion that the legislature intended to authorize exceptional sentences only against serial abusers who have assaulted a small class of victims, to the exclusion of serial abusers who have abused unconnected victims over decades.

As noted above, the primary goal of statutory construction is to carry out legislative intent. Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). This Court can consider a broad range of evidence probative of the legislature's intent, including testimony offered to a committee, Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc., 159 Wn.2d 292, 304, 149 P.3d 666 (2006), committee staff's explanations of a bill's effects, Brown v. State, 155 Wn.2d 254, 265-66, 119 P.3d 341 (2005), discussion among committee members, State v. Heiskell, 129 Wn.2d 113, 119, 916 P.2d 366 (1996), and committee staff memoranda, State v. Turner, 98 Wn.2d 731, 737-38, 658 P.2d 658 (1983). Several such sources from the 2009-2010 legislative sessions are available and they illustrate without question that the legislature amended the domestic violence aggravator in order to punish serial abusers more harshly.

Domestic violence sentencing reform was initially proposed in 2009 but legislation was not passed until 2010. See SB 5208 at 24, 61<sup>st</sup> Leg. Reg. Sess. (Wash.2009); Laws of 2010, ch. 274, §402. The original bill sought to reform sentencing in domestic violence cases in three ways: first, it included prior domestic violence misdemeanors in a felony offender score; second, it created multipliers to score prior domestic violence felonies; and third, it expanded the aggravator for the pattern of domestic violence abuse from “the victim” to “a victim or multiple victims.” Id. at 12, 18, 24. The Senate Bill Report indicates “[t]his bill allows us to look at a chronic violent offender with multiple victims.” S.B. Rep. on SB 5208 at 3-4, 61<sup>st</sup> Leg. Reg. Sess. (Wash.2009). The report specifically notes “[t]he bill modifies the aggravating factor so that it applies in situations with *different* victims.” Id. (emphasis added).

During testimony at the Judiciary Committee, the bill's sponsor Senator Brandland said the purpose of the bill was to address the “chronic offender” who goes from “victim to victim.” Test. of Brandland, January 23, 2009 Senate Judiciary Committee at 1:30pm at 5:50-6:15 (testimony can be viewed at

[http://www.twv.org/index.php?option=com\\_tvwplayer&eventID=2009011149](http://www.twv.org/index.php?option=com_tvwplayer&eventID=2009011149)).

At the same hearing David Martin from the Domestic Violence Unit of the King County Prosecuting Attorney's Office testified. Mr. Martin pointed out that the Sentencing Reform Act (SRA) fails to hold "serial" domestic violence batterers accountable. He cited the example of Damon Overby, an offender with many prior misdemeanor incidents with multiple victims, specifically noting that Overby had no contact orders with five different victims. Test. of David Martin, January 23, 2009 Senate Judiciary Committee at 1:30pm at 19:30-20:06. Mr. Martin testified that the pattern of abuse aggravator should be modified because the old version was limited to a single victim and would not apply to offenders like Overby because he abused many different women instead of just one. Id. at 21:13-23:29.

There was only one speaker in opposition to the bill. Darron Morris spoke on behalf of the Washington Association of Criminal Defense Lawyers and the Washington Defender Association. Test. of Darron Morris, January 23, 2009 Senate Judiciary Committee at 1:30pm at 39:20-39:27. Mr. Morris argued that the exceptional sentences available were a better alternative to deal with recidivist

offenders than changing the offender score calculations.

40:55-40:15. He specifically noted that the aggravating factor for the pattern of abuse “could be changed to include not just the same victim but other victims.” Id. at 42:13-42:32.

The discussion of the “multiple victims” language in SB 5208 demonstrates that the legislature was aware that the prior language was limited to a single victim of the charged offense and the proposed amendment expanded the aggravator to include past victims of the offender. The “multiple victims” proposal was not particularly controversial and even the Washington Association of Criminal Defense Lawyers argued that the proposed scoring changes were not necessary because the expansion of the pattern of abuse aggravator to multiple victims gave the courts discretion to punish the chronic, serial offenders that were the target of the bill.

These views were consistent with the general theme of the legislation, and with the effort spearheaded by Washington State Attorney General Rob McKenna to increase sentencing for repeat felony domestic violence offenders in Washington State. ROB MCKENNA, WASH. STATE OFFICE OF ATT'Y GEN., DOMESTIC VIOLENCE SENTENCING REFORM: ENHANCED PENALTIES FOR REPEAT/SERIAL DOMESTIC VIOLENCE OFFENDERS 2

(2009), available at [http://www.sgc.wa.gov/Minutes/11\\_Nov\\_08\\_DV\\_Sentencing\\_ReformPackage.pdf](http://www.sgc.wa.gov/Minutes/11_Nov_08_DV_Sentencing_ReformPackage.pdf). See also 34 Seattle U. L. Rev. 963, 964 (2011). His proposal included an aggravating factor for serial domestic violence batterers with different victims.

The current [aggravating] factor for a history of domestic violence only allows for exceptional sentences for a history of domestic violence with one victim. We constantly see recidivists who move from victim to victim engaging in battering. We should not limit exceptional sentences to the same victim, and should formally recognize the serial batter.

Id. at 8.

Some proposed scoring changes prompted debate and consideration, however, and SB 5208 was not brought to a vote in the legislature in 2009. The following year, in 2010, several bills were proposed to reform domestic violence sentencing. See HB 2777, 61<sup>st</sup> Leg. Reg. Sess. (Wash.2010), HB 2778, 61<sup>st</sup> Leg. Reg. Sess. (Wash.2010), and HB 2427, 61<sup>st</sup> Leg. Reg. Sess. (Wash.2010). The “multiple victims” aggravator was included in each proposal in the identical form as SB 5208. HB 2777 at 23, HB 2778 at 26, HB 2427 at 24.

Ultimately, HB 2777 was enacted by the legislature with the amendment to the pattern of abuse aggravator with the “multiple victims” language. Laws of 2010, ch. 274, § 402. Looking at the

testimony and comments of the bill's sponsor as a whole, it was clear that changing "the victim" to "a victim" and adding the "multiple victims" language was understood to expand the aggravating factor to include victims other than those directly involved in the charged crime, and to more severely punish chronic, serial domestic violence offenders. It is unclear what purpose the amendment would serve if not to include serial abusers into the realm of the aggravating factor. Allen v. Employment Sec. Dep't, 83 Wn.2d 145, 150, 516 P.2d 1032, 1035 (1973) (an amendment of an unambiguous statute indicates a purpose to change the law).

Commentators, too, have interpreted the aggravator to apply to serial domestic violence abusers of different victims.

Prior to HB 2777, there was no aggravating factor for a general history of domestic violence if the same victim was not implicated. HB 2777 changed the aggravating-factor scheme, allowing for "multiple victims" as opposed to only the current victim of domestic violence. This serial-offender aggravator recognizes the danger of serial batterers and allows all past domestic violence history to be considered as a factor in sentencing.

*TAKING IT SERIOUSLY: REPAIRING DOMESTIC VIOLENCE SENTENCING IN WASHINGTON STATE*, 34 Seattle U. L. Rev. 963, 979-80 (2011). So, both the plain language of the amended aggravator and its history clearly demonstrate that, in context, the

"victim or victims" referred to in the aggravator need not be people injured "as a direct result of the crime charged." RCW 9.94A.030(53). Sweat's suggested interpretation of the statute is not reasonable.

Sweat's argument to reverse his sentence depends on his statutory interpretation argument. The usual sufficiency of the evidence standard applies to a challenge to the sufficiency of the evidence to support an exceptional sentence. State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029, 1044 (2009). If this Court accepts his reading of the statute, his sentence must be reversed; if this Court accepts the State's interpretation, there was certainly sufficient evidence to support the aggravating factor and the exceptional sentence, and Sweat has not argued otherwise.

2. THE EXCEPTIONAL SENTENCE DOES NOT EXCEED THE SENTENCE AUTHORIZED BY THE LEGISLATURE.

Sweat argues that a court could never consider his prior abuse because "a court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the

standard range.” Pet. for Review at 13. His argument fails because it misperceives the cited cases.<sup>2</sup>

In State v. Nordby, 106 Wn.2d 514, 723 P.2d 1117 (1986), a victim’s severe injuries could not be used to impose an exceptional sentence when the legislature had already determined that severe injury was required to prove the crime, because the level of injury had already been considered by the legislature in setting the presumptive sentence range. In State v. Fisher, 108 Wn.2d 419, 426, 739 P.2d 683 (1987), a court could not impose an exceptional sentence based on multiple instances of indecent liberties where the multiplicity was already accounted for in the two charges that were leveled and scored for sentencing purposes. In State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995), a very small amount of cocaine was not inherent in setting the standard range, so it could be a mitigating factor.

These cases are distinguishable from the present situation. In each of these cases the question was whether the sentencing court used factors in setting an exceptional sentence that the legislature had already considered in setting the standard range, thereby imposing a sentence not intended by the legislature. In this

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<sup>2</sup> The State maintains its objection to consideration of this untimely and poorly developed argument.

case, however, the legislature has—if this Court accepts the State's arguments above—expressly authorized an exceptional sentence based on the serial and abusive nature of the defendant's past conduct. The prior abuse need not have been a prior conviction, and it need not have been a conviction that counts in the offender score. Sweat identifies no constitutional impediment to the legislature allowing exceptional sentences based on serial abuse. Thus, the cases cited by Sweat are inapposite, and his argument should be rejected.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Sweat's exceptional sentence.

DATED this 11<sup>th</sup> day of October, 2013.

Respectfully submitted,

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Today I directed electronic mail addressed to the attorneys for the petitioner, Oliver Davis @ oliver@washapp.org, containing a copy of the Supplemental Brief of Respondent, in STATE V. RICHARD DEDE 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.

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Please accept for filing the attached documents (Supplemental Brief of Respondent) in State of Washington v. Richard Sweat, No. 88663-6.

Thank you.

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