73401-6

NO. 73401-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOOD,

Appellant.

FILED
Feb 29, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Washington courts have consistently held that the language of WPIC 4.01 defining "reasonable doubt" provides an accurate, constitutional statement of the law. The trial court here provided that instruction at the joint request of the State and the defendant. Did the defendant invite any error? If not, has he failed to demonstrate that all cases upholding the challenged language are incorrect and harmful, the standard required to overturn precedent?

2. An instructional error may be harmless. Here, the trial court gave the jury a pattern instruction defining "prolonged period of time" to mean "more than a few weeks" for purposes of the pattern of abuse aggravator. That instruction has since been held to be an improper comment on the evidence that is prejudicial when the abuse occurred just longer than a few weeks. Here, the evidence established the defendant's 15-year history of domestic violence. Was any error in providing the pattern instruction harmless?

3. The burglary anti-merger statute gives the sentencing judge discretion to punish for burglary, even where it and another crime encompass the same criminal conduct. Here, a jury

convicted the defendant of both first-degree burglary and felony violation of a no contact order, and the trial court imposed an exceptional sentence based on the jury's finding that the crimes were part of a pattern of abuse. Did the court act within its discretion to impose punishment for both crimes?

4. For offenders sentenced to the Department of Corrections, RCW 9.94A.701 sets out a tiered approach to imposition of community custody according to the seriousness of the offense categories. By mandating 36 months of community custody for "serious violent offenses" and 18 months for "violent offenses," did the legislature unambiguously intend that 12 months of community custody be imposed only for crimes against persons that are not also categorized as "serious violent" or "violent" offenses?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

By amended information, the State charged Christopher Robin Hood with Burglary in the First Degree – Domestic Violence, Stalking – Domestic Violence, and Domestic Violence Felony Violation of a Court Order ("FVNCO"), all of which were committed against Hood's ex-wife, Linawati Djohan. CP 14-15. The State

further alleged that the burglary and FVNCO were part of an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time. CP 14-15. The Honorable Hollis Hill held a bifurcated jury trial in which the jury was first tasked with determining guilt, and then determined whether the aggravating factor had been proven. See RP 495.[1] The jury took less than an hour to convict Hood as charged in the first phase. RP 493, 495; CP 56-58. After a relatively short second phase, the jury also found the aggravating factors proven. RP 562; CP 91-92.

At sentencing, the State represented that Hood had an offender score of 8 with respect to the burglary and a score of 7 with respect to the FVNCO, and it recommended an exceptional sentence of 156 months. RP 550-51; CP 155-70. Hood argued that the burglary and FVNCO were the same criminal conduct and that his offender score on these offenses should be 6 and 5, respectively. RP 555; CP 128-31. The trial court rejected the argument and imposed an exceptional sentence of 156 months for the burglary, to be served concurrently with a 60-month sentence

[1] The Verbatim Report of Proceedings consists of seven volumes. Because they are consecutively paginated, the State refers to this material by page number alone.

for the FVNCO. RP 562; CP 114. The court imposed a suspended sentence for the stalking charge. RP 562; CP 122-24.

2. SUBSTANTIVE FACTS

Linawati Djohan married Hood in 2006. RP 213. The couple initially lived with Hood's grandmother. RP 214. The marriage deteriorated after a couple of years, and Hood became abusive. RP 215. On one occasion, Hood pushed Djohan down and kicked her until his grandmother intervened and called the police. RP 216. This incident prompted Djohan to move out in 2008 or 2009 and separate from Hood. RP 214, 217.

Djohan and Hood were separated for more than two years. RP 217. During that time, Hood was convicted of domestic violence offenses against another woman. RP 217, 526-28. After Hood was released from jail on those charges, Djohan allowed him to move into the condo she had purchased. RP 221. The condo building had secured outer doors with separate keys for the exterior door and each individual apartment. RP 220. Hood had keys to the exterior door and to Djohan's apartment. RP 222.

Djohan and Hood were together again for nearly three years. RP 222. In April 2014, Djohan discovered that Hood was having an affair and confronted him. RP 224-25. Hood pushed her down and

sat on her belly, covering her mouth with his hand when she tried to call for help. RP 225. Djohan filed for divorce the next day. RP 225.

Djohan and Hood reconciled and he moved back. RP 227. But eventually Djohan asked him to move out and return her keys. RP 229. Their divorce was finalized in November 2014. RP 230.

In October and November of 2014, Hood began appearing at Djohan's apartment uninvited. On one occasion, after Hood had purportedly returned his keys, Djohan came home from work to find Hood and the woman with whom he had been having an affair inside her apartment. RP 231. The next day, Hood was there with the same woman and another man. RP 232. Both times, Djohan told Hood to leave. RP 232-33. A neighbor overheard Djohan say "Don't touch me. Get out." RP 176. When the neighbor walked into the hallway, Djohan opened the door and said "Becky, help." RP 176. On the second day, Hood locked Djohan out of her apartment and she had to call for help from her neighbors, who called the police. RP 233, 320. Djohan changed the locks on her apartment, but the lock on the exterior door to her building was not changed. RP 182, 234.

At 3 or 4 a.m. on October 28, Hood entered the building and tried to pry open Djohan's door. RP 235. Damage to the door indicated that he used a crow-bar. RP 164, 182. Djohan was able to identify Hood by looking through the peep-hole in the door. RP 235. Djohan called the police and sought a protection order. RP 235, 250.

On October 31, Hood appeared at Djohan's work. RP 245, 296-302. Hood grabbed Djohan by the arm and demanded that she change the locks back. RP 245. Djohan's coworkers called the police, but Hood left before the police arrived. RP 245. When Officer Dave Foley responded, he discovered that the protection order Djohan had obtained on October 28 was not yet in the system and that Hood had not yet been served. RP 302. The protection order was reissued on November 10 and effective until December 1. RP 250. Hood was served with the protection order on November 12. RP 294-95.

When Djohan came home from work on November 2, she discovered that her door had been thoroughly epoxy-glued shut, with a broken key glued into the lock and glue covering the peep-hole in the door. RP 239, 307, 323. Djohan called the police

and someone from her home-owner's association helped her get into the apartment. RP 239.

On November 6, someone again tried to pry open Djohan's door. RP 164, 236, 364. This time, Djohan could not see out through the glue-covered peep-hole, but she recognized Hood's ring tone when his phone rang outside the door. RP 236-37, 242, 366. She called the police and reported that Hood had tried to break in. RP 364.

On November 10, the words "bitch" and "cunt" were spray-painted on Djohan's door. RP 184, 240. The next day, Hood followed Djohan while she was driving, got in front and forced her to stop, then got out and began beating on her windows. RP 242-44, 332. On November 19, after Hood had been served with the protection order, the words "Die bitch" were added in spray-paint on the wall next to Djohan's door. RP 184, 310, 361. No other units in the building were vandalized and there was no damage to the exterior doors of the building. RP 311.

Hood's behavior escalated on November 21. At about 3:45 a.m., Djohan was preparing to leave for her job as a baker when she noticed a shadow through a gap between the door and the door jamb that was caused when Hood previously tried to pry

her door open. RP 251. When she opened the door, Hood burst into her apartment and shoved her against the wall. RP 251. Djohan fell to the floor and screamed, so Hood closed her mouth with his hand. RP 252. They struggled, and then Hood pulled a gun from his waistband. RP 253. Hood hit Djohan with the butt of the gun two or three times and held the gun to her head. RP 253-54. Djohan continued to scream and pound on the walls to draw help. RP 253. Hood warned her that "if someone comes, I'm going to shoot them." RP 354-55. When a dog started barking in the apartment upstairs, Hood left the apartment and Djohan called the police. RP 255.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF REASONABLE DOUBT.

Hood asserts that the language of WPIC 4.01 defining reasonable doubt as "one for which a reason exists" is a misstatement of the law and therefore his conviction (along with every other conviction where WPIC 4.01 has been given) must be reversed. This argument has no merit and was never raised below. This Court recently rejected that argument and is bound by

precedent of the Washington Supreme Court upholding WPIC 4.01 and the language used therein.

a. Relevant Facts.

During a pretrial hearing, the trial court asked both parties to submit proposed jury instructions. RP 16. Hood did not submit instructions, and instead "stipulated to" and "joined in the submission of the prosecution[.]"[2] RP 290, 415-16.

With respect to reasonable doubt, the trial court instructed the jury as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> ***A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence***. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

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[2] Hood excepted to one instruction, which the court then omitted from the packet. RP 420.

RP 425; CP 65 (emphasis added). Although Hood did not object, RP 425, he now complains of the highlighted language. This language is from WPIC 4.01.

b. Hood Invited Any Error.

The doctrine of "invited error" provides that a "party may not request an instruction and later complain on appeal that the requested instruction was given." City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002) (quoting State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999)). Invited error prevents review of instructional errors even if they are of "constitutional magnitude." Id. at 720. It applies when the trial court's instruction contains the same error as the defendant's proposed instruction. State v. Bradley, 96 Wn. App. 678, 681-82, 980 P.2d 235 (1999). It is undoubtedly a strict rule, but our courts have "rejected the opportunity to adopt a more flexible approach." Studd, 137 Wn.2d at 547. Failure to employ the invited error doctrine "would put a premium on defendants misleading trial courts; this we decline to encourage." State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

Hood affirmatively "stipulated" and "joined" in the State's proposed jury instructions, including the pattern instruction on

reasonable doubt. RP 290, 415-16. The Court should not allow him to now complain that the trial court gave the instruction he proposed.

Hood acknowledges that his stipulation to the reasonable doubt instruction would ordinarily bar review of his challenge. In arguing against application of the invited error doctrine, he contends that defense counsel is necessarily constitutionally ineffective when he or she joins the State's proposed instructions. Brief of Appellant at 25. Hood provides no authority for that proposition. He also overlooks CrR 6.15(a), which applies equally to all parties and provides that "[p]roposed jury instructions *shall be served and filed*" before trial begins. CrR 6.15(a) (emphasis added). Where defense counsel has no objection to the instructions proposed by the State, it is fair and efficient to allow the defense to satisfy its CrR 6.15(a) obligations by joining in the State's submission. Appellate counsel's suggestion that trial counsel always falls below an objective standard of reasonableness by complying with court rules designed to ensure a fair trial unwisely encourages defendants to mislead the courts and should be rejected.

c. The Alleged Error Is Not Manifest And Cannot Be Raised For The First Time On Appeal.

An instructional error not objected to below may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). To obtain review, Hood must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). To demonstrate actual prejudice there must be a plausible showing "that the asserted error had practical and identifiable consequences in the trial of the case." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.2d 125 (2007). The error must be "so obvious on the record that [it] warrants appellate review." O'Hara, 167 Wn.2d at 99-100.

Although the Washington Supreme Court recently reached an unpreserved challenge to the trial court's oral explanation of reasonable doubt, it did so because the court's erroneous statement was obvious in the record. See State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (trial court told the jury that reasonable doubt was a doubt for which a reason "can be given.").

That is not so in this case. The trial court's use of WPIC 4.01, which defense counsel affirmatively adopted, is not an "obvious error," and there can be nothing more than pure speculation that the inclusion of the disputed language in the jury instructions had any identifiable consequences. This is insufficient to allow for appellate review. State v. Donald, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013) (refusing to consider defendant's argument regarding the "to convict" jury instructions because he failed to object below and failed to demonstrate prejudice as required under RAP 2.5). This Court should refuse to address Hood's unpreserved argument regarding the reasonable doubt instruction.

d. The Instruction Correctly States The Law.

Hood contends that WPIC 4.01 is unconstitutional. He argues that the instruction required the jury to articulate a reason to doubt, thereby undermining the presumption of innocence and shifting the burden of proof. He is incorrect; the supreme court-mandated instruction does not lead jurors to believe that that they must be able to write out their reason for acquittal. Hood's arguments should be rejected.

Jury instructions are read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116

(1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). Instructions are legally sufficient as long as they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The instructions must define reasonable doubt and convey to the jury that the State bears the burden of proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Over 100 years ago, the Washington Supreme Court approved a reasonable doubt instruction similar to WPIC 4.01. In State v. Harras, the jury was instructed that a reasonable doubt was "a doubt for which a good reason exists." 25 Wash. 416, 420, 65 P. 774 (1901). The court held that the instruction was correct "according to the great weight of authority" and was not error. Id. at 421.

Almost 60 years ago, our supreme court rejected a challenge to a similar reasonable doubt definition. State v. Tanzymore, 54 Wn.2d 178, 178-79, 240 P.2d 290 (1959). The challenged instruction defined reasonable doubt as:

> a doubt for which a reason exists .... A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

Id. The court said that a challenge to that definition, which had been accepted as a fair statement of the law for "many years," was without merit. Id. at 179.

Forty years ago, Division Two of this Court reaffirmed the correctness of that definition in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). Thompson argued that the phrase "a doubt for which a reason exists" required jurors to assign a reason for their doubt in order to acquit. Id. at 4-5. The court disagreed. Id. at 5. When read together with all of the instructions, the reasonable doubt instruction did not tell the jury to assign a reason for its doubts, but rather to base its doubts "on reason, not on something vague or imaginary." Id.

Within the last decade, the Washington Supreme Court has determined that the wording of WPIC 4.01's definition of reasonable doubt is constitutional. In Bennett, supra, the defendant had asked

the court to instruct the jury using WPIC 4.01. Instead, the court gave the so-called Castle[3] instruction which read, in part:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. . . . There are very few things in this world we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.

161 Wn.2d at 309. The Bennett court said this instruction was constitutionally adequate but not necessarily "a good or even desirable instruction." Id. at 316. The court therefore exercised its "inherent supervisory powers to maintain sound judicial practice" to mandate that every trial court use WPIC 4.01 to define reasonable doubt. Id. at 306. Even the four-justice dissent, which would have overturned the conviction based on the Castle instruction, agreed that WPIC 4.01's language was clear and appropriate. Id. at 320. Hood fails to acknowledge Bennett.

The Washington Supreme Court most recently reaffirmed that WPIC 4.01 was "the correct legal instruction on reasonable doubt" in Kalebaugh, 183 Wn.2d at 586. There, during its introductory remarks, the trial court orally paraphrased the term as "a doubt for which a reason *can be given*." Id. at 585 (emphasis in

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[3] The instruction first appeared in State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997).

original). However, at the end of the case, the court provided "the complete and proper version of WPIC 4.01, the reasonable doubt instruction." Id. at 582. In concluding that error in the trial judge's "offhand" explanation was harmless beyond a reasonable doubt, the court specifically disagreed that WPIC 4.01 requires the jury to articulate a reason for having a reasonable doubt or was akin to the improper "fill in the blank" argument made in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Id. at 585. Hood's reliance on Emery and similar misconduct cases is thus undercut by Kalebaugh.

Only months ago, this Court added to the long list of cases upholding WPIC 4.01 in State v. Lizzaraga, __ Wn. App. __, 364 P.3d 810 (2015). This Court soundly rejected the very argument that Hood makes here: that the language "A reasonable doubt is one for which a reason exists" contains an articulation requirement that undermines the presumption of innocence and the burden of proof. 364 P.3d at 830. Indeed, numerous courts have concluded that it is misconduct for a prosecutor to suggest that WPIC 4.01 contains such an articulation requirement. Emery, 174 Wn.2d at 759-60; State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d

926 (2012); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). If WPIC 4.01 contained an articulation requirement, the prosecutors' statements in the above-cited cases would not have been misconduct; they would have been a correct statement of the law. The prosecutors' statements were erroneous precisely *because* WPIC 4.01 contains no articulation requirement.

For example, in Emery, the prosecutor argued that a reasonable doubt was "a doubt for which a reason exists." 174 Wn.2d at 760. That was a correct statement of the law. Id. The error came when the prosecutor argued that, in order to acquit, the jury had to articulate its reason to doubt, something not required under WPIC 4.01. Id. A prosecutor's statement that a reasonable doubt is one for which a reason exists is not error. Only when the prosecutor tells the jury that it must articulate a reason to doubt in order to acquit does error occur, precisely because that argument misstates what the instruction says.

Hood argues that "it makes no sense" to conclude that the articulation requirement is unconstitutional when voiced by the prosecutor but not when given as an instruction by the judge. Brief of Appellant at 13. The answer is simple: judges do not voice an

articulation requirement when they read WPIC 4.01 because that instruction contains no articulation requirement. As the line of cases cited above states, it is error for a judge or prosecutor to suggest that it does.

WPIC 4.01 simply defines a reasonable doubt as a doubt for which a reason exists, with no further requirement. Hood asks this court to parse WPIC 4.01 to give it subtle shades in meaning that simply would not exist in the mind of a juror. There is no reason to believe that jurors would engage in that sort of technical hairsplitting when they are given the definition.

Hood has provided this Court with no basis upon which to depart from the holdings of the Washington Supreme Court in Bennett and Kalebaugh. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this Court were inclined to entertain a challenge to controlling precedent, Hood bears the burden of making a "clear showing" that WPIC 4.01 is both "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not done so. "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and

responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). Hood has failed to show that the Supreme Court's multiple decisions are wrong or that this Court should depart from its recent decision in Lizzaraga. This Court should affirm.

2. THE ERROR IN PROVIDING A LATER-DISAPPROVED INSTRUCTION DEFINING A "PROLONGED PERIOD OF TIME" AS "LONGER THAN A FEW WEEKS" WAS HARMLESS WHERE EVIDENCE ESTABLISHED A PATTERN OF ABUSE SPANNING MORE THAN A DECADE.

The State alleged that the burglary and FVNCO were "part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim or multiple victims manifested over a prolonged period of time." CP 15. In the bifurcated trial on the aggravator, the trial court gave the jury a pattern instruction providing that, "The term 'prolonged period of time' means more than a few weeks[.]" RP 531; CP 95-96; WPIC 300.17. Hood did not object to the instruction. RP 531. The jury found that each offense was aggravated by the prolonged pattern of abuse. CP 91-92.

Our supreme court subsequently disapproved that pattern instruction, holding that it "constituted an improper comment on the evidence." State v. Brush, 183 Wn.2d 550, 559, 353 P.3d 213 (July

2, 2015). In light of Brush, the State concedes that it was error to give the instruction. Reversal is not required, however, because the error was harmless.

Although judicial comments are presumed to be prejudicial, that presumption may be rebutted where the record shows that no prejudice could have resulted. Id. (quoting State v. Levy, 156 Wn.2d 709, 721-22, 132 P.3d 1076 (2006)). The Brush court concluded that the State could not rebut the presumption in that case because "[t]he abuse occurred over a time period just longer than a few weeks," so "defining a 'prolonged period of time' as 'more than a few weeks' likely affected the jury's finding on this issue." Id. at 559. That is not so here. Rather, the evidence here was that Hood's abuse of various victims spanned *more than a decade*. In addition to the charged offenses, which all took place in 2014, the State introduced evidence of the earlier abuse of Djohan at his grandmother's home, of his four domestic violence convictions involving another woman during their separation in 2010, and his abuse of a third woman in 1999. RP 524-29. Given evidence of Hood's 15-year history of domestic violence, the erroneous reference to "more than a few weeks" likely had no

impact on the jury's verdict. This Court should find the error harmless.

3. HOOD'S OFFENDER SCORE WAS PROPERLY CALCULATED.

Hood contends that the trial court miscalculated his offender score for the burglary and FVNCO by scoring each offense against the other because the two offenses are the same criminal conduct. Hood overlooks the burglary anti-merger statute, which empowers the trial court to do just that. His argument should be rejected.

The burglary anti-merger statute provides: "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050. Our supreme court has held that this statute gives the trial judge discretion to punish burglary separately, even if the burglary and another crime encompass the same underlying criminal acts. State v. Lessley, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992).

While the trial court did not expressly invoke the anti-merger statute,[4] it imposed a sentence that reflects its intention that Hood be punished for both the burglary and the FVNCO. The court

[4] The trial court rejected Hood's same-criminal-conduct argument without seeking a response from the State, concluding that burglary and felony violation of a court order did not share the same criminal intent. RP 555.

adopted the State's recommendation to impose an exceptional sentence that would be roughly equivalent to the standard range for each felony if served consecutively. RP 553, 561-63. Because the court had discretion to punish both felonies and the record indicates its intent to do so, the court did not err by including both felonies in Hood's offender scores. This court should affirm Hood's sentence.

4. RCW 9.94A.701 UNAMBIGUOUSLY REQUIRES AN 18-MONTH TERM OF COMMUNITY CUSTODY BE IMPOSED FOR AN OFFENDER SENTENCED TO PRISON FOR FIRST-DEGREE BURGLARY.

Hood claims that because first-degree burglary is classified both as a "violent offense" and a "crime against persons," there is an ambiguity as to whether the legislature intended 12 or 18 months of community custody as part of his sentence, and that the rule of lenity requires that only 12 months of community custody be imposed. This Court should reject Hood's argument because it is contrary to the clear intent of the legislature and renders meaningless a section of the community custody statute.

A court's primary duty in construing a statute is to determine the legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Reviewing courts look to the text of the statutory provision in question, as well as "the context of the statute in which

that provision is found, related provisions, and the statutory scheme as a whole." Ervin, 169 Wn.2d at 820 (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). 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). Only in that situation may the court "resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). A "stopgap principle" is that, in construing a statute, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results." J.P., 149 Wn.2d at 450. Appellate courts review questions arising out of the Sentencing Reform Act de novo to discern and implement the legislature's intent. State v. Graham, 181 Wn.2d 878, 337 P.3d 319 (2014).

RCW 9.94A.701 is not ambiguous because the provisions dictating imposition of community custody, considered in light of the clearly articulated legislative policy goals of the Sentencing Reform Act, are susceptible to only one reasonable interpretation: that for an offender sentenced to prison, 18 months of community custody is mandatory for a violent offense and 12 months is to be imposed for crimes against persons that are not violent offenses.

RCW 9.94A.701 dictates mandatory community custody terms for offenders sentenced to the Department of Corrections; those terms are longer for the most serious offenses and shorter for the less serious offenses. The statute reads, in pertinent part:

> (1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall ... sentence the offender to community custody for three years:
>
> (a) A sex offense not sentenced under RCW 9.94A.507; or
> (b) **A serious violent offense.**
>
> (2) A court shall ... sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for **a violent offense that is not considered a serious violent offense.**
>
> (3) A court shall ... sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:
>
> (a) **Any crime against persons under RCW 9.94A.411(2);**

> (b) An offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate;
> (c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000; or
> (d) A felony violation of RCW 9A.44.132(1) (failure to register) that is the offender's first violation for a felony failure to register.

RCW 9.94A.701 (emphasis added).

The statute thus establishes a legislative scheme intended to impose the longest term of community custody for those convicted of the most serious offenses ("serious violent offenses"), a medium term for those convicted of "violent offenses," and the shortest term of community custody for those whose offenses were "crimes against persons" but not serious violent or violent offenses. This approach is plainly consistent with the legislature's purpose to "ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.110(1).

Hood argues that it is unclear whether the legislature intended first-degree burglary to be subject to 12 or 18 months of community custody because that crime is both a "violent crime" and a "crime against persons." He is incorrect. The list of "crimes against persons" in RCW 9.94A.411(2) includes all serious violent

offenses and most violent offenses. For example, that statute lists first-degree murder as a crime against a person. RCW 9.94A.411(2). That crime is also both a "violent offense" and a "serious violent offense" under RCW 9.94A.030(46). Under Hood's reasoning, first-degree murder would be eligible for only 12 months of community custody, contrary to the 36 months expressly provided for in RCW 9.94A.701(1). Given the clear legislative scheme to require more community custody for more serious crimes, Hood's analysis leads to an absurd result.

Finally, Hood argues that to the extent there is any ambiguity in the statute, it must be construed in his favor. However, the rule of lenity does not trump a construction that best reflects the legislature's intent. State v. Oakley, 117 Wn. App. 730, 734, 72 P.3d 1114 (2003), rev. denied, 151 Wn.2d 1007 (2004). The rule of lenity does not require that a "forced, narrow, and over-strict construction . . . be applied to defeat the obvious intent of the legislature." State v. Gilbert, 68 Wn. App. 379, 383, 842 P.2d 1029 (1993). Here, the intent of the legislature was obvious—that RCW 9.94A.701 mandates 12 months of community custody only for the crimes against persons that are neither serious violent nor violent offenses.

RCW 9.94A.701 makes clear that the legislature intended a tiered step-down approach to community custody in accordance with the goal of proportionality in sentencing. An offender's term in custody is determined by the combination of the seriousness of the offense and the offender's offender score. RCW 9.94A.530. For the more serious offenders – those sentenced to prison -- the legislature also established gradations of community custody terms determined by the seriousness of the particular offense. For the less serious offenders, whose combination of offense seriousness level and offender score did not result in a prison sentence, the legislature found it unnecessary to distinguish between violent offenses and crimes against persons and limited community custody to 12 months for all cases. RCW 9.94A.702.

Hood was convicted of first-degree burglary, a violent offense, and sentenced to the Department of Corrections. The trial court properly imposed an 18-month term of community custody, as unambiguously intended by the legislature. This Court should affirm Hood's sentence.

D. CONCLUSION

For the reasons expressed above, the State respectfully asks this Court to affirm Hood's conviction and sentence.

DATED this 29th day of February, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A. March (marchk@nwattorney.net), the attorney for the appellant, Christopher Hood, containing a copy of the Brief of Respondent in State v. Hood, Cause No. 73401-6-I, in the Court of Appeals, Division I, 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.

L Brame
Name

2/29/16
Date

Done in Seattle, Washington