No. 46248-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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**STATE OF WASHINGTON**,

Respondent,

vs.

**MARCUS ALMANZOR,**

Respondent.

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Appeal from the Superior Court of Washington for Lewis County

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# Respondent's Brief

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## I. ISSUES

A. Can Almanzor, for the first time on appeal, argue that the State failed to give notice of the intent to seek an exceptional sentence based on the free crimes aggravating factor?

B. Was Almanzor's trial counsel ineffective for failing to object to the State's request for an exceptional sentence?

## II. STATEMENT OF THE CASE

On July 19, 2013 the State charged Almanzor with Count I: Burglary in the Second Degree, Count II: Residential Burglary, Count III: Trafficking in Stolen Property in the First Degree and Count IV: Unlawful Possession of a Firearm in the Second Degree. CP 1-3. The allegations stemmed from a series of break ins at 234 Hubbard Road in Curtis, Washington in June through July of 2013. CP 1-3.

David Jarman lived at 234 Hubbard Road, a rural piece of property that consisted of three buildings, a residence, a shop and a storage shed. RP 32-33.[1] Mr. Jarman's shop contained numerous tools. RP 33. Mr. Jarman left his property in November 2011 to go on a 22 month mission for his church to Cincinnati, Ohio. RP 34. Mr. Jarman did not return to his property until late July 2013. RP

[1] The State will refer to the trial transcript, which includes two volumes sequentially paginated, as RP. The State will refer to the sentencing hearing as SRP. Any other transcripts will be cited as RP (date).

34. Mr. Jarman had someone housesitting except for the last three months of his absence. RP 34. Mr. Jarman's daughter and a neighbor also checked in on his property. RP 34-35. Mr. Jarman was notified on July 1, 2013 that his house had been broken into. RP 35. Mr. Jarman returned home to find TVs, computers, DVDs, a lock box, three pistols and three rifles were taken from the residence. RP 36, 135. Mr. Jarman also had numerous items taken out of his shop including chainsaws, pullers, jacks, big tool boxes, hand tools and cutting torches. RP 37.

Christopher Lopez admitted to burgling Mr. Jarman's place with Almanzor and a person named Donny. 60-62. Mr. Lopez cased Mr. Jarman's residence after finding out Mr. Jarman was not staying at the property. RP 54-59. The men gained access to the shop by removing screws from the siding and pulling back the siding. RP 60. Mr. Lopez helped Almanzor and Donny load lots of tools into the van. RP 60. Two days after the initial burglary of the shop Almanzor contacted Mr. Lopez because he wanted to go back and break into the house. RP 62. They got a crowbar out of the garage and gained entry into the house through a window. RP 62-63. Almanzor and Mr. Lopez took numerous items out of the house including DVDs, computer, laptop, swords, a lockbox and guns

(rifles and pistols). RP 63. In exchange for gas money for Almanzor, Mr. Lopez sold the television to a person for $40. RP 67. Lopez also sold numerous items without Almanzor. RP 68, 84.

Almanzor elected to have his case tried to a jury. *See* RP. Mr. Lopez received a deal from the State, a much reduced sentence, to secure Mr. Lopez's testimony against Almanzor. RP 53. Mr. Lopez's sister, Clarissa Lopez, testified that Mr. Lopez said he was going to set up Almanzor for sleeping with Kara behind Mr. Lopez's back. RP 160. According to Clarissa, she received this text from Mr. Lopez in the beginning of June. RP 151. Almanzor was convicted on all counts. RP 201-02.

At sentencing the State asked the trial court to impose an exceptional sentence. SRP 2-3. The State requested the trial court, pursuant to RCW 9.94A.535(2)(c), find that Almanzor's high offender scores, 27 and 20 respectively, leave a number of the crimes unpunished (commonly referred to as the "free crimes" aggravator) and therefore an exceptional sentence above the standard range would be appropriate. SRP 2-3. The State requested Almanzor be sentenced to the high end of the standard range and each count run consecutive to the others. SRP 3. Almanzor's attorney argued for low end of the standard range and

for each count to run concurrent. SRP 3-4. The trial court sentenced Almanzor to high end of the standard range and ran Count IV consecutive to the other counts. SRP 5-6. Almanzor timely appeals his sentence. CP 85-99. The State will further supplement the facts as necessary in its argument below.

## III. ARGUMENT

### A. ALMANZOR DID NOT PRESERVE FOR APPEAL THE ISSUE REGARDING THE STATE'S ALLEGED FAILURE TO GIVE NOTICE OF THE AGGRAVATING FACTOR AND THEREFORE, CANNOT RAISE THE ISSUE ON APPEAL BECAUSE THE ERROR IS NOT MANIFEST.

Almanzor argues that his constitutional right to notice was violated because the State requested, without giving proper notice, and the trial court sentenced, Almanzor to an exceptional sentence using the aggravating factor that Almanzor's high offender score left some crimes unpunished. Brief of Appellant 5-9. There was no objection to the State's request for an exceptional sentence on the grounds that it did not give notice of intent to seek an exceptional sentence. SRP 2-3. Almanzor cannot now raise issue with the State's request because he failed to preserve the issue for review.

#### 1. Standard Of Review

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220

(2010). A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012). Statutory interpretation is also reviewed de novo. *State v. Siers*, 174 Wn.2d 269, 274, 274 P.3d 359 (2012).

**2. Almanzor Did Not Preserve The Error And Therefore Cannot Raise It For The First Time On Appeal.**

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted)*.

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional

interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted)*. No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id*.

At no point during the sentencing hearing did Almanzor object to the State's request for an exceptional sentence based upon the aggravating factor of "free crimes" on the basis that the State failed to give notice. SRP 2-11. Almanzor must show that the error is of constitutional magnitude and manifest. The State agrees that the alleged error, failure to give notice of an aggravating factor, would be of constitutional magnitude. Therefore, the only question left to answer is whether the alleged error is manifest. Almanzor cannot meet his burden to show the error was manifest.

### a. The State is generally required to give a defendant notice if it intends to seek an aggravating factor.

A criminal defendant has a constitutional right to be informed of the nature of the cause of the accusation the State is alleging. U.S. Const. amend. VI; Const. art. I, § 22. "An aggravating factor is not the functional equivalent of an essential element, and thus, need not be charged in the information." *Siers*, 174 Wn.2d at 271. The Sentencing Reform Act requires the State to give the defendant notice that it will seek an exceptional sentence with the exception of the free crimes aggravating factor. RCW 9.94A.535; RCW 9.94A.537(1); *State v. Mutch*, 171 Wn.2d 646, 656-57, 254 P.3d 803 (2011); *State v. Edvalds*, 157 Wn. App. 517, 531, 237 P.3d 368 (2010). The statute does not require a specific procedure be followed or dictate the manner in which notice shall be given. RCW 9.94A.537; *Siers*, 174 Wn.2d at 277. A defendant must receive notice of an aggravating factor prior to the proceedings in which the State will seek to prove the factor. *Siers*, 174 Wn.2d at 277. This notice requirement gives the defendant the ability to mount an adequate defense against the aggravating factor. *Id.* at 277.

**b. Almanzor's failure to object to the State's request to sentence Almanzor to an exceptional sentence leaves an incomplete record and therefore Almanzor cannot show prejudice.**

It is "well established that to raise a claim for the first time on appeal, the trial record must be sufficient to determine the merits of the claim.'" *State v. Koss*, 181 Wn.2d 493, 503, 334 P.3d 1042, (2014), *citing O'Hara*, 167 Wn.2d at 99. Nothing in the case law or the statute that requires notice be given in a specific manner, such as in a charging document or other pleading filed with the court. The Supreme Court held in *Siers* that aggravating factors are not the functional equivalent to essential elements. *Siers*, 174 Wn.2d at 271. There is no requirement that the State "charge" an aggravating factor.

Without a set procedure required for giving notice the record is incomplete in this matter. Had Almanzor objected to the State's request for an exceptional sentenced on the basis he had not received notice the record would be complete. The State would have been able to make a record in regards to what, if any, notice had been given to Almanzor that the State would seek an exceptional sentence. The absence of an objection here renders the trial record insufficient to determine the merits of this claim.

**c. Even if this Court were to determine that Almanzor could raise this issue for the first time on appeal, the State is not required to give notice of the intent to seek an exceptional sentence on the basis of a "free crimes" aggravator.**

Arguendo, even if Almanzor can raise the issue regarding failure of notice to seek an exceptional sentence, the State is not required to give notice in this case. RCW 9.94A.535 governs departures from the sentencing guidelines.

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
>
> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

RCW 9.94A.535. The free crimes aggravator states, "The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). This aggravating factor only considers the defendants offender score, which means the only fact considered is the fact of a prior

conviction. Therefore, the statutory requirement for providing notice of an intent to seek a sentencing aggravator does not include the free crimes aggravator. RCW 9.94A.535; RCW 9.94A.537; *Mutch,* 171 Wn.2d at 656-57; *Edvalds*, 157 Wn. App. at 531-35.

Almanzor argues *Edvalds* is incorrect because it supposes the only reason that notice is required is to prepare a defense against an aggravator and ignores the bigger picture, which is whether a defendant would go forward with a trial if they knew the State would be seeking an exceptional sentence. Brief of Appellant 8-9. But Almanzor ignores the most fundamental piece of the free crimes aggravator, because there is no requirement of a jury fact finding, a trial or sentencing judge can impose an exceptional sentence for free crimes *sua sponte*. *See Mutch*, 171 Wn.2d at 658.

This Court should reject Almanzor's argument and demand to be resentenced to a standard range sentence. The alleged error is not a manifest constitutional error that can be raised for the first time on appeal because the trial record is insufficient to determine if any error occurred. Further, the State is not required to give a defendant notice it will seek an exceptional sentence for free crimes. This Court should affirm Almanzor's sentence.

## B. ALMANZOR RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY DURING HIS SENTENCING HEARING.

Almanzor's attorney provided competent and effective legal counsel throughout the course of his representation. Almaznor asserts that his trial counsel was ineffective for failing object to the State's failure to give notice of the intent to seek an exceptional sentence for the free crimes aggravating circumstance. Brief of Appellant 9-10. Almanzor's assertion that his attorney was ineffective is false. Almanzor's attorney was not deficient in his representation of Almanzor. If Almanzor's attorney was deficient in any way, Almanzor cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

### 1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *McFarland,* 127 Wn.2d at 335 (citations omitted).

### 2. Almanzor's Attorney Was Not Ineffective During His Representation Of Almanzor During The Sentencing Hearing.

To prevail on an ineffective assistance of counsel claim Almanzor must show that (1) the attorney's performance was

deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

As argued above, there is no requirement that the State give notice of the intent to seek an exceptional sentence for the aggravating factor of free crimes. Therefore, Almanzor's trial counsel was not ineffective for failing to object. Further, because, as argued above, there is no requirement of how notice be given to a defendant this argument would require consideration of matters outside the record and is more properly left to a personal restraint petition.

Finally, as argued above, a trial court may *sua sponte* give an exceptional sentence after finding that '[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). Almanzor, who stipulated to his prior record, had an offender score of 20 and 27. CP 65-68. Almanzor had been previously convicted of 16 different felonies which he racked up over a decade. CP 66-67. When imposing the sentence the trial court stated:

> Well, the concern that I have here is the extensive criminal history going back for 13 years or so. And there are -- there's a theft, here's residential burglary, one, two, three, four, four more burglaries, another theft, another burglary, and now we have these, residential burglary and burglary. It's clear to me that you just can't stay out of other people's places, other people's stuff.

> And I can't -- there is no basis whatsoever for me to go to the low end of the range. Given the number of points that you have, you know, with 27 points on the burglary and the residential burglary, 20 points on the trafficking and the UPF, clearly, given your criminal history, the point schedule determined by the legislature does not adequately anticipate those high of numbers.
>
> So what I'm going to do in this case, I am going to impose the high end of the range on the burglary. On the burglary in the second degree it's going to be 68 months, residential burglary 84 months, trafficking in stolen property in the first degree 84 months. Those three will be concurrent. On the UPF that's 60 months that will be consecutive to the other three.

SRP 5-6. While the State maintains that Almanzor's trial counsel's performance was not deficient for failing to object, if he was, Almanzor, on this record, cannot show he was prejudiced by his trial counsel's actions. Almanzor's ineffective assistance of counsel claim must fail and this Court should affirm Almanzor's exceptional sentence.

## IV. CONCLUSION

Almanzor cannot raise, for the first time on appeal, that his rights were violated because the State failed to give notice of its intent to seek an exceptional sentence based on the aggravating factor of free crimes. If Almanzor can raise the issue, there was no error because the State is not required to give notice. Finally,

Almanzor's attorney gave Almanzor effective representation during the sentencing hearing. This Court should affirm Almanzor's exceptional sentence.

RESPECTFULLY submitted this 31st day of January, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
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Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON**
**DIVISION II**

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| STATE OF WASHINGTON,<br>Respondent,<br>vs.<br>MARCUS ALMANZOR,<br>Appellant. | No. 46248-6-II<br>DECLARATION OF SERVICE |

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 30, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Thomas E. Doyle, attorney for appellant, at the following email address: ted9@me.com.

DATED this 30th day of January, 2015, at Chehalis, Washington.

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

# LEWIS COUNTY PROSECUTOR

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