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NO. 71631-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS GAUTHIER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass North, Judge

# BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct during closing argument violated appellant's right to a fair trial by appealing to the jury's passions and prejudice and encouraging the jury to render a verdict for reasons not grounded in the evidence.

2. Appellant's attorney was ineffective

3. The trial court erred in including in appellant's offender score, points for his convictions for class C felonies from 2007 and earlier.

Issues Pertaining to Assignments of Error

1. Did the prosecutor commit misconduct when she argued in rebuttal closing argument appellant was calling the complaining witness a "slut" and "this is why people don't report" rapes? Alternatively, was counsel ineffective in failing to object?

2. Under RCW 9.94A.525, did the court err in including appellant's prior class C felony convictions in his offender score when he committed no crimes and was not in custody for a valid felony conviction from 2007 until 2013, a period of more than five years?

B. STATEMENT OF THE CASE

1. Procedural Facts

In 2009, the King County prosecutor charged appellant Thomas Gauthier with one count of second-degree rape. CP 1. This Court reversed

Gauthier's conviction in 2013. State v. Gauthier, 174 Wn. App. 257, 270-71, 298 P.3d 126 (2013). At a second trial, the jury found Gauthier guilty, and the court imposed sentence at the low end of the standard range. CP 75, 80. Notice of appeal was timely filed. CP 96.

2. Substantive Facts

a. Gauthier's Testimony

In 2001, Gauthier lived in the area of Des Moines Memorial Drive in South King County. 16RP[1] 18. At that time, he was addicted to crack cocaine and had trouble keeping a job or a driver's license. 16RP 13-16. He also frequented prostitutes in the area. 16RP 30-31. Gauthier recalled being contacted on the street by Detective Zimnisky about a rape investigation in 2001. 16RP 20. He talked to the detectives for a few minutes, answered their questions, and went on his way. 16RP 21. Initially, he thought it was laughable when, in 2008, law enforcement contacted him regarding that same investigation. 16RP 78.

At first, he did not recognize the photograph of the complaining witness, T.A. 16RP 24-25. Eventually, he realized she looked familiar and

[1] There are 16 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 5, 9, 10, 23, 24, 2011; 2RP – May 25, 2011; 3RP – May 26, 2011; 4RP – May 31, 2011; 5RP – June 1, 2, and July 8, 2011; 6RP – May 23-24, 2011; 7RP – May 24, 2011; 8RP – Nov. 6, 7, 2013; 9RP – Nov. 7, 14, 18, 2013; 10RP – Nov. 12, 2013; 11RP – Nov. 13, 14, 2013; 12RP – Nov. 18, 26, 2013, Jan. 24, 2014, Feb. 14, 2014; 13RP – Nov. 18, 2013; 14RP – Nov. 19, 2013; 15RP – Nov. 21, 25, 2013; 16RP – Nov. 25, 2013.

recalled more details of their interaction. 16RP 24-25. He explained he first met her in the parking lot of a grocery store where he was waiting for someone who was supposed to be bringing him crack cocaine. 16RP 25. When the dealer was late, Gauthier testified, he asked T.A. if she could get him some "dope," (meaning crack), and she replied that she could. 16RP 26. He gave her $60 for the drugs, but she failed to return with either his drugs or his money. 16RP 26.

On April 22, 2001, Gauthier saw T.A. again on Des Moines Memorial Drive around 2:30 or 3:00 a.m. 16RP 26-27. He called out to her from two or three blocks behind, and she slowed to wait for him. 16RP 28. When he caught up, he asked her, "Do you got anything," meaning, "Do you have any crack?" 16RP 29. When she said she did not, Gauthier decided to ask if she "dated" by which he meant to ask if she would perform oral sex for money. 16RP 30. Specifically, he asked if she would date for $20. 16RP 33. When she said no, he asked if she would date for $50. 16RP 33. When she agreed to the price, they stepped together over the guardrail into a secluded grassy area, where she performed oral sex on him. 16RP 36. At some point during the encounter, Gauthier testified, he recognized her as the woman who had cheated him of $60 previously and decided not to pay her. 16RP 37-38. After she was finished, he told her she was "burnt," meaning

she would not be paid. 16RP 37. She was angry and yelled at him as he walked away. 16RP 38.

b. T.A.'s Testimony

T.A. testified she was walking home at 3:00 a.m. from the casino where she worked when she was grabbed from behind and tripped over the guardrail into the grass. 14RP 400-02. She told her assailant she was on her period in hopes he would leave her alone. 14RP 405. She testified she was forced to have oral sex, with the man's hand around her neck. 14RP 406. She testified she had never seen the man before and did not in any way consent to sexual contact with him. 14RP 408-09. After he left, she walked home frightened and angry, grabbed a knife, and returned to the streets intending to kill her assailant. 14RP 410. She did not call 911 because she could not call out on her phone and her neighbor did not answer the door. 14RP 911. Also, she testified, she did not call 911 because she wanted to find the man and kill him herself. 14RP 411-12.

When Donald Brown, T.A.'s sister's partner, called she told him what had happened. 14RP 412. He came over, and the two left in his car, still trying to find the man. 14RP 412. Later that morning, seven or eight hours after the incident, T.A. called 911. 14RP 413.

c. Other Evidence

Brown and T.A.'s sister, who spoke with her on the phone that night, both testified they had never known her to be so upset. 14RP 364, 370; 15RP 508. The responding officers testified that, when they arrived, she was still very upset. 12RP 437; 13RP 257. T.A. showed them the grassy area near the guardrail. 12RP 444. There, officers found an area of matted down grass and a recently used tampon. 12RP 445; 13RP 269, 272. Grass, foliage, and grass stains were found on the tights, leggings, and pants T.A. wore that night. 14RP 288, 294, 414-18.

T.A. gave the officers her jacket, which was subjected to forensic analysis. 12RP 443; 14RP 294--96. By agreement, the testimony of William Stubbs, the forensic scientist from Gauthier's first trial, was read to the jury. 15RP 436-37, 494. The result of DNA testing was a mixed profile: one partial male profile and a partial female profile matching T.A. 3RP 128. At the time, there was no reference sample in the database matching the male profile. 3RP 133. In the fall of 2008, police reactivated the case upon learning Gauthier's DNA matched the sample from T.A.'s jacket sleeve. 15RP 480-82.

Detective Knudsen testified that, when he initially called Gauthier to ask about the DNA match, Gauthier offered no explanation for why his semen would be found on T.A.'s jacket. 16RP 115-17. Knudsen asked

Gauthier about any bad experiences with prostitutes in the area, and Gauthier told him nothing came to mind. 16RP 120-21. Gauthier repeatedly denied raping T.A. 16RP 549.

d. Closing Arguments

The prosecutor's closing argument focused on disproving Gauthier's account of a prostitution transaction gone bad. Gauthier argued there were many reasons to doubt T.A.'s version of events including inconsistent statements, the fact that there were no runs in her nylons, and the fact that, initially, she had identified someone else with 80% certainty who was later excluded by DNA testing. 15RP 587-92. Defense counsel expressly argued that, "By finding him not guilty, you are not calling or labeling [T.A.] as a prostitute. You are not invalidating her feelings that night, that she was ripped off by this man, that her anger was based upon this man." 15RP 599.

During rebuttal, the prosecutor argued Gauthier's defense was a "cliché," "She is a slut, she is a prostitute, she was out there, you know what, she had it coming. That is what this man is saying. She looked like a prostitute." 15RP 607. The argument continued with, "She was standing, because she was walking in the dark by herself? She must have wanted it. She had it coming. This is why people don't report, because they are called sluts, whores, prostitutes." 15RP 607. The prosecutor further argued:

> And he took advantage of her. And he thinks that if he calls her a slut and a prostitute, that you are going to be distracted and think, well maybe she did have it coming, to be out there. Maybe there is something else going on. But there is no evidence of that.
>
> And you are told in your instructions that you are not to base your decision on passion, or prejudice, or speculation. And that is exactly what the defense is engaging in is speculation that that is what this encounter was, with all of the evidence, these injuries on [T.A.], the bruises, the grass stains.

15RP 609-10. Finally, the prosecutor argued, "She must have wanted it. That is not a defense." 15RP 610.

C. ARGUMENT

1. THE PROSECUTOR IMPROPERLY APPEALED TO JURORS' EMOTIONS AND INVITED THEM TO PENALIZE GAUTHIER FOR EXERCISING HIS RIGHT TO TESTIFY.

During closing argument, the prosecutor appealed to the jury's passion and prejudice by arguing Gauthier's defense was a cliché and is the reason why women do not report rapes. 15RP 607. This argument improperly injected evidence outside the record regarding rapes that go unreported and also appealed to the jury's emotions about the sexist history of women's rape allegations not being believed. This prosecutorial misconduct requires reversal of Gauthier's conviction. Alternatively, if this Court finds the error not sufficiently preserved, his conviction should be reversed for ineffective assistance of counsel.

a. The Prosecutor Committed Misconduct by Arguing Gauthier's Defense Is a Cliché and Is the Reason Why Women Do Not Report Rapes.

A prosecutor is a quasi-judicial officer with an independent duty to ensure a fair trial. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Misconduct by a prosecutor can deprive a defendant of his constitutionally guaranteed right to a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Therefore, prosecutors must not urge guilty verdicts on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-508, 755 P.2d 174 (1988). A prosecutor's latitude in closing argument is limited to arguments "'based on probative evidence and sound reason.'" Glasmann, 175 Wn.2d at 704 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

Here, the prosecutor's remarks were not designed to seek a verdict based on the evidence and free of prejudice. By arguing, "this is why people don't report," the prosecutor cast Gauthier as the villain in the ongoing battle against sexism. This improper argument referred not to the facts or evidence in this case, but to the overarching societal problem that many women do not report rapes for fear they will be blamed for what happened to them. This portion of the rebuttal argument was designed to provoke an emotional

response based on this fear. The prosecutor focused the jury's attention not on the evidence of what occurred on April 22, 2001, but on patterns of behavior in the larger society and the plight of all rape victims who fear not being believed. The prosecutor implicitly urged the jury to protect these women, to send a message to all women, by punishing Gauthier, not for raping T.A., but for calling her a prostitute.

"[T]he State commits misconduct by asking the jury to convict based on their emotions, rather than the evidence." State v. Fuller, 169 Wn. App. 797, 821, 282 P.3d 126 (2012) review denied, 176 Wn.2d 1006 (2013) (citing State v. Bautista–Caldera, 56 Wn. App. 186, 194–95, 783 P.2d 116 (1989). Prohibited appeals to jurors' emotions include encouraging the jury to convict in order to send a message to others, be they other victims or other offenders. See, e.g., State v. Finch, 137 Wn.2d 792, 839-42, 975 P.2d 967 (1999); Bautista-Caldera, 56 Wn. App. at 195. Arguments based on a "general societal problem" are improper appeals to the jury's emotions and are prohibited. See State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85, 92 (1993) (argument that society is concerned about children yet still requires them to undergo the frightening experience of testifying at trial was improper appeal to jury's passion and prejudice).

The prosecutor's argument here crossed the line drawn in Bautista-Caldera and Jones. By arguing, "This is why people don't report, because

they are called sluts, whores, prostitutes," the prosecutor suggested the jury owed it to all women and all rape victims to take T.A. at her word and convict Gauthier. 15RP 607. The argument is akin to the one made in Bautista-Caldera, where the prosecutor in a child-sex case reminded the jury of, "all the children who do not talk that well . . . whose only hope is people like yourself who are willing to take this case seriously. 56 Wn. App. at 194. In addition, the prosecutor urged the jury, "do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf." Id. at 195.

The Court expressly condemned this argument because it "exhorts the jury to send a message to *society* about the general problem of child sexual abuse." Id. Although the court declined to reverse because the prosecutor's immediately preceding remarks had urged the jury to decide the case based on the evidence, the court concluded, "Such an emotional appeal is improper." Id.

As in Bautista-Caldera, the prosecutor's remarks here urged the jury to address the general societal problem of rape by believing T.A. and punishing Gauthier for defending himself and telling the story of their encounter. This was an improper emotional appeal.

b. The Prosecutor's Improper Argument Requires Reversal of Gauthier's Conviction Because It Is Not the Type of Argument a Jury Could Disregard.

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal of the conviction when the prosecutor's argument was improper and there is a substantial likelihood the misconduct affected the verdict. Glasmann, 175 Wn.2d at 703-04. Even when there was no objection at trial, reversal is required when the misconduct was so flagrant and ill intentioned as to be incurable by instruction. Id. The focus of this inquiry is more on whether the effect of the argument could be cured than on the prosecutor's mindset or intent. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012) rev. denied, 175 Wn.2d 1025 (2012) (citing State v. Emery, 174 Wn.2d 741, 759–61, 278 P.3d 653 (2012)).

This misconduct was likely to affect the jury's verdict because the case turned on whether the jury found Gauthier or T.A. more credible. See State v. Gauthier, 174 Wn. App. 257, 270-71, 298 P.3d 126 (2013) (Gauthier's first trial "boiled down to whether the jury believed his story" or T.A.'s and much of the evidence "could support either version of the facts"). Where there is little corroboration of the State's evidence and the credibility of witnesses is the central question in the case, prejudice based on reversible misconduct is more likely to be found. State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993); see also State v. Walker, 164 Wn. App. 724, 738,

265 P.3d 191 (2011) (finding that mostly unobjected-to prosecutorial misconduct was prejudicial, and warranted reversal, because case was "largely a credibility contest"). In light of the credibility contest at trial, argument that inflamed passion and prejudice against Gauthier was likely to affect the jury's verdict.

The effect on the jury was not curable by instruction because "[a]rguments that have an 'inflammatory effect' on the jury are generally not curable by a jury instruction." Pierce, 169 Wn. App. at 552 (quoting Emery, 174 Wn.2d at 763). The prosecutor here created an inflammatory effect by diverting the jury's focus away from the evidence at trial and toward the plight of rape victims everywhere and the sexist and demeaning treatment often afforded rape victims in the past, particularly prior to the passage of laws such as Washington's rape shield law. It invited jurors to punish Gauthier for defending himself by telling his version of events.

No instruction could have cured the prejudice because this is one of those cases of prosecutorial misconduct in which "[t]he bell once rung cannot be unrung." State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), rev. denied, 118 Wn.2d 1013 (1992) (quoting State v. Trickel, 16 Wn. App. 18, 30, 533 P.2d 139 (1976)). A jury was not likely to be able to

put out of its mind the sexual dynamics that have played out in this country over the past 50 years at least.

This case parallels Powell, where the prosecutor told the jury a not guilty verdict "would send the message that children who reported sexual abuse would not be believed, thereby 'declaring open season on children.'" 62 Wn. App. at 918. The State conceded the comments could be construed as improper, but argued the defense objection was sustained and no curative instruction was sought. Id. at 919.

This court rejected this argument, holding, "It may be that a carefully worded curative instruction could have remedied the prejudice those flagrant remarks would have engendered, but that is speculation." Id. The court held the argument denied Powell a fair trial. Id.; see also State v. Echevarria, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993) (prosecutor's inflammatory references to war on drugs were so flagrant and prejudicial that no objection was required to preserve error).

As in Powell and Echevarria, it is unlikely jurors could have erased from their minds either the history of sexism that often leads women not to report rapes or the animosity the prosecutor inspired against Gauthier on that basis. The jury should have been allowed to reach its verdict free from the prejudicial effects of the prosecutor's statements. This Court should reverse Gauthier's conviction and remand for a new trial.

c. Alternatively, Reversal Is Required Because Gauthier's Attorney Was Ineffective in Failing to Object to This Inflammatory Argument.

Alternatively, assuming the court finds a jury instruction could have ameliorated the effect of the misconduct, counsel's failure to object and request such an instruction was ineffective. Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on

appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Counsel was ineffective in failing to object or move for mistrial based on the rebuttal argument that appealed to the jury's passion and prejudice regarding pervasive sexism that often results in women's allegations of rape not being believed. As discussed above, this theme developed during the prosecutor's rebuttal could not have been effectively countered by objection or a jury instruction. Gauthier's conviction should be reversed either due to prosecutorial misconduct that violated his constitutional rights or ineffective assistance of counsel.

2. THE TRIAL COURT ERRED IN INCLUDING GAUTHIER'S PRIOR CONVICTIONS IN HIS OFFENDER SCORE.

Gauthier was sentenced in April 2007 to three months of work release for taking a motor vehicle without permission in the second degree. CP 119. His criminal history also includes a conviction for possession of cocaine in 1996 and three convictions for taking a motor vehicle without permission in 2001 and 2006. CP 84. Taking a motor vehicle without permission in the second degree and possession of cocaine

are class C felonies.[2] RCW 9A.56.075; RCW 69.50.4013. On the basis of these convictions, the court calculated his offender score as 5. CP 78. This calculation was in error because all of these convictions should be excluded from the offender score under RCW 9.94A.525.

A sentencing court's interpretation of a sentencing statute and calculation of an offender score are both reviewed de novo. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010); State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). Under the Sentencing Reform Act, class C felonies must be excluded from the offender score "if, since the last date of release from confinement . . . pursuant to a felony conviction, . . . the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c).[3]

Since April 2007, Gauthier has committed no new offenses. He was taken into custody on July 23, 2010, in pre-trial detention for the 2001 rape of T.A. CP 109-110. At that time, his detention was not "pursuant to a felony conviction," as he had yet to be convicted. The following year, in

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[2] Gauthier's 2001 conviction for taking a motor vehicle without permission occurred before the offense was divided into first and second degrees. Former RCW 9A.56.070 (2001). Prior to the division, taking a motor vehicle without permission was also a class C felony. Id.

[3] The current version of the statute is identical in relevant respect to the prior version of the statute in effect in 2001 when the current offense was committed. Former RCW 9.94A.525(2) (2001). This brief therefore simply cites to RCW 9.94A.525(2)(c).

July 2011, he was convicted of raping T.A. CP 6-15. However, the 2011 conviction was reversed on appeal in 2013. CP 17-18.

Thus, from 2007 until his most recent conviction in 2013, a period of six years, Gauthier was not confined pursuant to a valid felony conviction, and the class C felonies prior to 2007 should be excluded from his offender score. If this Court does not reverse the conviction, Gauthier's case should be remanded for resentencing under the correct offender score of zero.

a. Gauthier's 2010 Arrest Did Not Interrupt the Wash-Out Period Because He Was Not Confined Pursuant to a Felony Conviction.

The State will likely argue, as it did to the sentencing court, that as of July 2010, the five-year wash-out period was interrupted because Gauthier was no longer "in the community." But the Washington Supreme Court squarely rejected this argument in Ervin. 169 Wn.2d at 821.

Under Ervin, being in custody does not necessarily prevent the person from being "in the community" for purposes of the wash-out provisions. During the wash-out period for his class C felony, Ervin was jailed on a probation violation for a misdemeanor. Id. at 819. Even though he was in jail for a portion of the five-year wash-out period, the court concluded

> Because Ervin, for a period of five years, did not commit any crime subsequently resulting in a conviction, and because Ervin was not confined pursuant to a felony conviction during that period, his prior class C felonies washed out and should not have been included in his offender score.

Id. at 826-27. Specifically, the court interpreted the phrase "in the community" to refer to the status of not being "confined pursuant to a felony conviction." Id. at 822.

Like Ervin, Gauthier did not commit any crime subsequently resulting in a conviction after 2007. Beginning in 2010, he was confined, but under Ervin, he was still "in the community" because he was not confined pursuant to a felony conviction. Id. He was in pre-trial detention due to a felony *charge*, not a conviction. The Ervin court expressly discussed the possibility of an arrest (rather than a conviction) interrupting the wash-out period, and concluded it was "unlikely" the Legislature intended that "any brush with the law" would interrupt the wash-out period. Id. at 824. Thus, Gauthier's 2010 arrest did not interrupt the wash-out period.

b. Gauthier's 2011 Conviction Did Not Interrupt the Wash-Out Period Because that Conviction Was Reversed on Appeal.

The State will likely also argue Gauthier was confined pursuant to a felony conviction beginning in 2011. This argument should be rejected

because Gauthier's 2011 conviction was reversed on appeal in 2013. CP 17-18.

This Court should hold that a person confined pursuant to a felony conviction that has been reversed on appeal is still "in the community" because such confinement is more akin to pre-trial detention or the misdemeanor probation sanction at issue in Ervin. The plain language of RCW 9.94A.525 does not specify whether a person is "in the community" while confined pursuant to a felony conviction that is subsequently reversed on appeal. The Ervin court did not specifically address this issue. However, this interpretation is consistent with the Ervin court's interpretation of the phrase "in the community" as referring not to location but to the status of not being confined pursuant to a felony conviction. 169 Wn.2d at 822, 826.

Moreover, the same principles of statutory construction that supported the court's decision in Ervin support Gauthier's interpretation here. Interpreting "in the community" as meaning not confined pursuant to a valid felony conviction is consistent with the principle that all words in the statute are to be given meaning and effect, with none rendered superfluous. Id. at 823. As in Ervin, interpreting "in the community" as the opposite of "confined pursuant to a [valid] felony conviction" still ensures that any time spent confined pursuant to a *subsequent* felony cannot count toward the

wash-out period, as the Legislature intended. Id. And it avoids the absurd result of unfairly increasing the offender scores of those whose subsequent convictions are reversed on appeal.

Finally, the rule of lenity requires that ambiguities in sentencing statutes be interpreted in favor of the defendant. City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). "[A]n ambiguous criminal statute cannot be interpreted to increase the penalty imposed." Id. (citing State v. Adlington–Kelly, 95 Wn.2d 917, 920–21, 631 P.2d 954 (1981)). Under the rule of lenity, this court should hold that the wash-out period is not interrupted by confinement pursuant to a wrongful felony conviction.

If this Court should affirm Gauthier's conviction, he will have been confined pursuant to a felony conviction beginning in 2013. But by then, the five-year wash-out period had passed, and the class C felonies from 2007 and earlier must be excluded from his offender score. The Ervin court held that, "Because Ervin, for a period of five years, did not commit any crime subsequently resulting in a conviction, and because Ervin was not confined pursuant to a felony conviction during that period, his prior class C felonies washed out and should not have been included in his offender score. Ervin, 169 Wn.2d at 826-27. The same is true of Gauthier. "[F]or a period of five years," he "did not commit any crime subsequently resulting in a conviction"

and "was not confined pursuant to a felony conviction during that period." Id. Therefore, his prior class C felonies washed out and must not be included in his offender score. Id.; RCW 9.94A.525. His case should be remanded for sentencing with an offender score of zero.

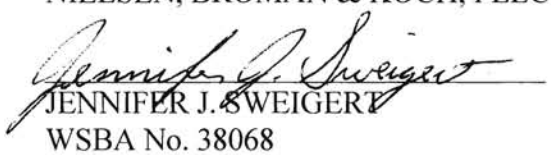
D. CONCLUSION

For the foregoing reasons, Gauthier's conviction should be reversed, or, in the alternative, the case should be remanded for resentencing under the correct offender score.

DATED this 17th day of October, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
## DIVISION ONE

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|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| vs. | ) | COA NO. 71631-0-I |
| | ) | |
| THOMAS GAUTHIER, | ) | |
| | ) | |
| Appellant. | ) | |

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF OCTOBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS GAUTHIER
DOC NO. 757736
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 17TH DAY OF OCTOBER, 2014.

X Patrick Mayovsky