SUPREME COURT NO. 95922-6

NO. 75872-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ROBERTS, JR.,

Petitioner.

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

The Honorable John Chun, Judge
The Honorable Mariane Spearman, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Joseph Roberts, Jr., asks this Court to grant review of the court of appeals' unpublished decision in State v. Roberts, No. 75872-1-I, filed April 30, 2018, attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Washington courts merge no-contact order violations into felony stalking convictions, but refuse to merge assault convictions into felony no-contact order violations. Is this Court's review is warranted under RAP 13.4(b)(2) and (b)(3) to resolve this conflict and provide guidance as to whether no-contact order violations merge?

2. RCW 9.94A.589(1)(a) specifies that current offenses found to be the same criminal conduct "shall be counted as one crime." Is this Court's review warranted under RAP 13.4(b)(1) and (b)(4) to definitively answer whether consecutive sentences are prohibited following a finding of same criminal conduct, given this "one crime" rule?

C. STATEMENT OF THE CASE

After a bench trial, Roberts was found guilty, as charged, of felony violation of a no-contact order (FVNCO) – domestic violence, third degree assault – domestic violence, witness tampering, and five counts of misdemeanor violation of a no-contact order (MVNCO). CP 79-82; 6RP 553-59.

The basic evidence was Roberts assaulted Katrina Wooldridge, with whom he has a child, in violation of a no-contact order entered in Bothell Municipal Court. The State introduced evidence that Roberts hit Wooldridge with a broom handle until it broke and then began kicking her. 6RP 511-15. The trial court also found the aggravating factor that the FVNCO and assault occurred within sight or sound of Roberts's and Wooldridge's infant son. 6RP 557.

The MVNCO convictions were based on several calls Roberts made to Wooldridge from jail and were essentially undisputed at trial. 6RP 549. The witness tampering conviction was based on jail calls where Roberts asked Wooldridge to write to the prosecutor's office and "tell the truth." 5RP 382-84; 6RP 557-59.

At sentencing, the trial court found the FNVCO and assault to be the same criminal conduct and reduced Roberts's offender score. 6RP 563-64. The trial court imposed an exceptional sentence: 41 months on the FVNCO and 22 months on the assault, to run consecutively, for a total of 63 months of confinement plus 12 months of community custody. 6RP 579-80; CP 131-32, 158-59. The court also imposed eight months on the witness tampering and 364 days on all the MVNCO convictions, to run concurrently to the first two counts. CP 139, 158.

On appeal, Roberts challenged his sentence on two primary bases. First, he argued his conviction for third degree assault should be dismissed because it merged into his FVNCO conviction. The assaultive conduct elevated the no-contact order violation from a misdemeanor to a felony. Br. of Appellant, 27-36.

The court of appeals dismissed Roberts's argument, holding "[w]e have previously considered this issue and held that imposing punishment for both assault in the third degree and felony violation of a no-contact order based on the same assault does not violate double jeopardy." Opinion, 14 (citing State v. Moreno, Wn. App. 663, 671, 132 P.3d 1137 (2006)). The court did not address Roberts's merger argument, reasoning in a footnote that, "[h]aving already discerned the legislative intent with regard to these crimes, we need not employ the merger doctrine." Opinion, 14 n.6.

Second, Roberts argued that even if his FVNCO and assault convictions did not merge, the trial court erred in imposing consecutive sentences where it found the two crimes to encompass the same criminal conduct. Br. of Appellant, 36-43. Roberts asserted that the plain language of RCW 9.94A.589(1)(a) required two offenses to be treated as "one crime" for sentencing purposes. Roberts pointed to this Court's decisions in State v. Tili, 139 Wn.2d 107, 112, 985 P.2d 365 (1999) [hereinafter Tili

I], and State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003) [hereinafter Tili II], for support. Br. of Appellant, 39-41; Reply Br., 18-25.

The court rejected Roberts's argument, holding "the plain language of RCW 9.94A.589(1)(a) and RCW 9.94A.535 authorize the imposition of consecutive sentences when an exceptional sentence is warranted, even when the offenses constitute the same criminal conduct." Opinion, 17. Again in a footnote, the court reasoned that "[n]either Tili I nor Tili II held that consecutive sentences may not be imposed as an exceptional sentence when the offenses constitute the same criminal conduct." Opinion, 18 n.8.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT'S GUIDANCE IS NECESSARY TO RESOLVE A CONFLICT AMONG COURT OF APPEALS' DECISIONS AS TO WHETHER THE LEGISLATURE INTENDED NO-CONTACT ORDER VIOLATIONS TO MERGE.

Washington courts apply a three-part test for determining whether the legislature intended multiple punishments in particular situation. State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). First, courts consider explicit or implicit legislative intent based on the criminal statutes involved. Id. Second, if the legislative intent is unclear, courts may turn to the "same evidence" test, articulated in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), which asks if the crimes are the same in law and in fact. Kier, 164 Wn.2d at 804. Third, if

applicable, the merger doctrine is a rule of statutory construction that may help determine legislative intent. Id.

The merger doctrine applies "when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code." State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). Put another way, "when the degree of one offense is raised by conduct separately criminalized by the legislature, [courts] presume the legislature intended to punish both offenses through a greater sentence for the greater crime." State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

Violation of a no-contact order is defined in RCW 26.50.110. It is usually a gross misdemeanor, but is elevated to a felony if one of two circumstances are present. RCW 26.50.110(1). First, if the individual has two prior convictions for violating a no-contact order. RCW 26.50.110(5). Second, if violation involves assaultive conduct, specifically (1) "[a]ny assault . . . that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021," or (2) "any conduct . . . that is reckless and creates a substantial risk of death or serious physical injury to another person." RCW 26.50.110(4). Roberts was charged and convicted under this subsection. CP 79-80; 6RP 555-57.

Third degree assault is separately criminalized in RCW 9A.36.031. It carries a lower seriousness level than a domestic violence court order

violation and has a lower standard range sentence. RCW 9.94A.510, .515. FVNCO is therefore a greater offense than third degree assault.

To convict Roberts of FVNCO, the State needed to prove an assault not amounting to first or second degree, or reckless conduct that created a substantial risk of death or serious physical injury. RCW 26.50.110(4). The State did so by proving Roberts committed a third-degree assault against Wooldridge. The assaultive conduct giving rise to Roberts's assault conviction was the same assaultive conduct that elevated the VNCO to a felony. Roberts hit Wooldridge with a broom handle and kicked her with his feet. In closing argument, the State relied on this single, ongoing assault to prove both third degree assault and FVNCO. 6RP 532-33. The trial court likewise relied on the same assault to find Roberts guilty of both crimes. 6RP 555-57. The court further found the crimes to encompass the same criminal conduct, noting "the assault is the same assault for both." 6RP 563.

The court of appeals rejected Roberts's argument that the merger doctrine required dismissal of his third degree assault conviction. But there is conflict among court of appeals' decision as to whether no-contact order violations merge, warranting this Court's review under RAP 13.4(b)(2) and (b)(3), because merger implicates double jeopardy.

In Parmelee, Division One held protective order violations under RCW 26.50.110 merged into stalking when they elevated stalking to a felony, separately criminalized under RCW 9A.46.110. 108 Wn. App. at 710-11. Parmelee was convicted of one count of felony stalking and three counts of gross misdemeanor protective order violations. Id. at 708. The court concluded "two of Parmelee's three convictions for protection order violations merge into the felony stalking conviction because the State was required to prove facts to support at least two of the protection order violation convictions in order to establish facts sufficient for a felony stalking conviction under RCW 9A.46.110(5)(b)." Id. at 711.

Division One reached the same conclusion in State v. Whittaker, 192 Wn. App. 395, 367 P.3d 1092 (2016). Whittaker was convicted of felony stalking and FVNCO. Id. at 400-01. As in Parmelee, Whittaker's stalking conviction was elevated to a felony because he violated a no-contact order. Id. at 411. Though Whittaker violated the no-contact order multiple times, the verdict was ambiguous as to which violation the jury relied on to convict him of stalking. Id. at 415-16. It was possible, then, that the jury relied on the same no-contact order violation to convict Whittaker of both offenses. Id. Under the rule of lenity, the FVNCO conviction merged into the stalking conviction. Id. at 416.

By contrast, Division One in Moreno rejected a double jeopardy challenge to Moreno's FVNCO and third degree assault convictions, applying the legislative intent and Blockburger tests, but not addressing merger. The Moreno court concluded "the separation of the crimes in the statutes" indicated the legislature's intent to punish third degree assault and FNVCO separately. 132 Wn. App. at 669-70. This, of course, conflicts with the premise of the merger doctrine that "when the degree of one offense is raised by conduct separately criminalized by the legislature, [courts] presume the legislature intended to punish both offenses through a greater sentence for the greater crime." Freeman, 153 Wn.2d at 772-73.

The Moreno court also noted VNCO carries a greater seriousness level than third degree assault in concluding the legislature intended to punish the crimes separately. 132 Wn. App. at 671. But, again, this conflicts with the merger analysis. The Freeman court held first degree assault does not merge into first degree robbery because it carries a greater sentence, but second degree assault does because it carries a lesser sentence. 153 Wn.2d at 775-76. This Court noted, "[w]hile this is not necessarily dispositive, it does weigh upon our analysis." Id. at 776.

Finally, the Moreno court emphasized RCW 26.50.210 specifies "[a]ny proceeding under [the Domestic Violence Protection Act] is in addition to other civil or criminal remedies." Moreno, 132 Wn. App. at

669. Under the first prong of the double jeopardy test, the court held this language "evidences legislative intent to treat separately punishment under RCW 26.50.110(4) from that under RCW 9A.36.031." Id.

Division Three recently followed the reasoning of Moreno. In State v. Novikoff, 1 Wn. App. 2d 166, 170, 404 P.3d 513 (2017), the court emphasized "RCW 26.50.210 expressly provided that remedies under chapter 26.50 RCW were 'in addition to other civil or criminal remedies.'" The Novikoff court therefore concluded fourth degree assault did not merge into FVNCO "because the legislature intended to punish them separately." Id. at 173.

Moreno and Novikoff cannot be squared with Parmelee and Whittaker—the court of appeals currently merges no-contact order violations into felony stalking, but does not merge assaults into felony no-contact order violations. The court of appeals in Roberts's case did not grapple with this conflict, holding only that "[w]e have previously considered this issue and held that imposing punishment for both assault in the third degree and felony violation of a no-contact order based on the same assault does not violate double jeopardy." Opinion, 14 (citing Moreno). In a footnote, the court reasoned that, "[h]aving already discerned the legislative intent with regard to the crimes, we need not employ the merger doctrine." Opinion, 15 n.6.

Notably, however, the legislature did not define "remedies" in RCW 26.50.210. By contrast, the burglary anti-merger statute specifies a person "may be punished" for the burglary as well as each crime committed in the course of the burglary. RCW 9A.52.050. The malicious harassment anti-merger statute likewise provides a person "may be punished" for other crimes committed during the malicious harassment. RCW 9A.36.080(5).

These latter provisions show the legislature knows how to write an anti-merger statute: "The burglary antimerger statute by its plain terms applies to the present punishment and prosecution of offenses." State v. Williams, 181 Wn.2d 795, 336 P.3d 1152 (2014) (emphasis in original). RCW 26.50.210 does not use the same clear language regarding punishment and should not be characterized as such. RCW 26.50.210 is, at best, ambiguous as to whether the legislature intended FNVCO and the underlying assault to merge. Under the rule of lenity, an ambiguous statute must be resolved in the defendant's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

The divergent line of cases discussed here necessitates clarification from this Court: Do convictions for no-contact order violations merge or not? Roberts asks that this Court grant review to resolve this question.

2. THIS COURT'S GUIDANCE IS ALSO NECESSARY TO FINALLY ANSWER THE OPEN QUESTION OF WHETHER CONSECUTIVE SENTENCES CAN FOLLOW A SAME CRIMINAL CONDUCT FINDING.

The trial court found Roberts's FVNCO and third degree assault convictions to encompass the same criminal conduct. 6RP 561-64. Pursuant to this finding, the court properly counted Roberts's FNVCO and assault convictions as one crime for purposes of his offender score. 6RP 564, 569; CP 156, 161. However, the trial court imposed consecutive sentences on the FNVCO and assault convictions: 41 months on the FNVCO and 22 months on the assault, for a total of 63 months, plus 12 months of community custody. CP 158.

RCW 9.94A.589(1)(a), which discusses and defines same criminal conduct, provides, in relevant part:

> Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

(Emphasis added.) Roberts contended below that, pursuant to this provision, the trial court erred in failing to count his assault and FNVCO

as "one crime" not just for the purposes of his offender score, but for sentencing purposes in general.

The statute repeatedly used the word "shall," which is mandatory: the current offenses "shall be counted as one crime" and sentences imposed under RCW 9.94A.589(1)(a) "shall be served concurrently. See State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) ("The general rule is that the word 'shall' is presumptively imperative and operates to create a duty rather than conferring discretion.").

The statute also provides "[c]onsecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." But RCW 9.94A.535 does not specify any exception to the "one crime" rule following a same criminal conduct finding. The only exceptions to RCW 9.94A.589(1)(a) are those specified in subsections (1)(b), (1)(c), and (1)(d), none of which are relevant to this case. Nowhere does the provision specify that multiple offenses are not "one crime" if an exceptional sentence is imposed.

Furthermore, the "one crime" requirement is included in the provision addressing consecutive and concurrent sentences, RCW 9.94A.589(1)(a). It is not included in the offender score calculation provisions of RCW 9.94A.525. This suggests the "one crime" language in RCW 9.94A.589(1)(a) does not apply only to offender score calculations.

Legislative history supports this conclusion, as well. The provision used to read: "Separate crimes encompassing the same criminal conduct shall be counted as one crime in determining criminal history." Former RCW 9.94A.400(1)(a) (1984) (emphasis added). The legislature removed the "in determining criminal history" qualifier in 1986. Laws of 1986, ch. 257, § 28. This, too, suggests the provision is no longer strictly limited to offender score calculations, but also prohibits consecutive sentences following a same criminal conduct finding.

The court of appeals rejected Roberts's argument based on the language of RCW 9.94A.589(1)(a) and RCW 9.94A.535, along with Division Three's dated decision in State v. Worl, 91 Wn. App. 88, 92, 955 P.2d 814 (1998). Opinion, 16-18.

Worl's convictions for second degree murder and malicious harassment comprised the same criminal conduct. Worl, 91 Wn. App. at 92. Despite this finding of same criminal conduct, the trial court ordered the sentences to run consecutively based on aggravating factors. Id. at 92, 95. Considering the language of former RCW 9.94A.400(1)(b) (1996), now codified at RCW 9.94A.589(1)(a), the court rejected Worl's challenge to this sentence. Id. at 95. The court acknowledged "confusion may result from the first part" of the provision, but "the final sentence is permissive language referring to the imposition of consecutive

sentences . . . ." Id. Thus, because aggravating factors were found, "it follows that the sentencing court correctly exercised its discretion when ordering the consecutive sentences under RCW 9.94A.400(1)." Id.

In reaching this conclusion, the Worl court emphasized "[t]he Supreme Court found Mr. Worl's convictions arose out of the same criminal conduct and remanded for resentencing 'so the trial court may determine whether consecutive sentences are now appropriate pursuant to RCW9.94A.400(1) and RCW 9.94A.120(16).'" Id. at 94 (quoting State v. Worl, 129 Wn.2d 416, 429, 918 P.2d 905 (1996) [hereinafter Worl III]).

However, three dissenting justices in Worl III criticized the majority for remanding "with instructions that the trial court may reconsider whether to run sentences for these crimes consecutively." 129 Wn.2d at 437 (Madsen, J., dissenting). The dissent emphasized the "one crime" language now codified at RCW 9.94A.589(1)(a). Id. at 438. RCW 9.94A.525(5)(a)(i) further provides that "[p]rior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score." (Emphasis added.) Reading these provisions together, the dissent believed, "strongly suggest that treating current offenses involving 'same criminal conduct' as one offense precludes

sentences from being run consecutively." Worl III, 129 Wn.2d at 438 (Madsen, J., dissenting).

The dissent stressed that the supreme court "has never addressed the question of whether offenses which encompass 'same criminal conduct' may be run consecutively, nor have the parties briefed the issue." Id. The dissent believed the majority should not use the "questionable instructions regarding consecutive sentences" without briefing by the parties. Id. This Court has yet to definitively decide this issue.

This Court came close to deciding it in Tili I and Tili II. The court of appeals rejected Roberts's argument because of language in Tili I and Tili II that, once Tili's convictions were determined to be the same criminal conduct, his sentence was "statutorily required to be served concurrently unless an exceptional sentence [was] imposed." Tili II, 148 Wn.2d at 365-66 (alteration in original) (quoting Tili I, 139 Wn.2d at 110). Opinion, 18 n.8. However, there is conflicting language in the Tili decisions. A closer look is necessary.

Tili was convicted of one count of first degree burglary and three counts of first degree rape for three penetrations in quick succession. Tili I, 139 Wn.2d at 112. The trial court ordered Tili to serve consecutive sentences on the rapes, as "two or more serious violent offenses" under RCW 9.94A.589(1)(b). Id. at 123.

In Tili I, this Court concluded Tili's rape convictions were the same criminal conduct, reversed Tili's sentence, and remanded for resentencing. Id. at 128. The court held that, given the finding of same criminal conduct, the convictions must be treated "as one crime for sentencing purposes." Id. The Tili I court emphasized: "[S]entences determined under [the same criminal conduct provision] are served concurrently." Id. at 119.

At Tili's resentencing, the trial court imposed an exceptional sentence, but with all counts to run concurrently. Tili II, 148 Wn.2d at 357. On Tili's second appeal, this Court recognized "[u]nder Tili I, all offenses are to be served concurrently." Tili II, 148 Wn.2d at 359. The Tili II court emphasized its "one crime" rule: "Sentencing the same offenses as same criminal conduct results in concurrent sentences." Id. at 362; see also id. at 362-63 (again noting that, after the finding of same criminal conduct, "the sentences for each rape count were to be served concurrently").

The issue on Tili's second appeal was whether an exceptional sentence was nevertheless acceptable based on the aggravating factors of deliberate cruelty and operation of the multiple offense policy. Id. at 357. The Tili II court held sufficient evidence supported the deliberate cruelty aggravator. Id. at 372.

The court then considered the multiple offense policy aggravating factor. Id. at 374. The SRA used to allow an exceptional sentence if "'the

operation of the multiple offense policy of [former] RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of [the SRA].'" Tili II, 148 Wn.2d at 357 (alteration in original) (quoting former RCW 9.94A.390(2)(i) (1998)).

The Tili II court explained the multiple offense policy comes from two general rules of the SRA: (1) the same criminal conduct rule for determining the offender score and (2) the default use of concurrent sentences for multiples convictions. Id. at 374. The purpose of the multiple offense policy "is to limit the consequences of multiple convictions stemming from a single act." State v. Borg, 145 Wn.2d 329, 337, 36 P.3d 546 (2001). The multiple offense policy aggravator was enacted at the same time as the same criminal conduct rule. Id. (citing Laws of 1984, ch. 209, § 24). Thus, the aggravator gave courts discretion "to impose an exceptional sentence when, under the above rules, the presumptive sentence is 'clearly too lenient.'" Tili II, 148 Wn.2d at 374 (quoting Borg, 145 Wn.2d at 338).

In Tili II, the same criminal conduct finding—i.e., operation of the multiple offense policy—resulted in no additional incarceration for two of the rapes. Id. at 375. The court held Tili's case was "precisely the type of exceptional case" that warranted application of the multiple offense policy aggravator, given the multiple, degrading harms to the victim resulting from Tili's multiple penetrations. Id.

The court distinguished Tili II from Borg, where it held the multiple offense policy aggravator should be used only in exceptional cases involving multiple offenses—not any case involving multiple offenses. Id. (citing Borg, 145 Wn.2d at 339). The Tili II court accordingly held the trial court did not abuse its discretion in concluding operation of the multiple offense policy resulted in a presumptive sentence that was too lenient, and upheld Tili's exceptional sentence. 148 Wn.2d at 376.

Contrary to the court of appeals' decision, Tili I and Tili II support Roberts's argument. The multiple offense policy aggravator essentially gave courts authority, in exceptional cases, to override the "one crime" rule articulated in RCW 9.94A.589 (1)(a) and Tili I, following a finding of same criminal conduct. However, the aggravator no longer exists. The legislature removed it from the SRA in 2005. Laws of 2005, ch. 68, § 3. Any possibility of consecutive sentences after a same criminal conduct finding was abolished along with the multiple offense policy aggravator.

Tili II did not disavow the "one crime" holding of Tili I and did not hold consecutive sentences are permissible after a finding of same criminal conduct. See, e.g., Tili II, 148 Wn.2d at 359 ("Under Tili I, all offenses are to be served concurrently."). Rather, the surviving portion of Tili II stands for the unremarkable proposition that a trial court may impose an exceptional sentence following a finding of same criminal conduct. Roberts

does not dispute the trial court's authority to impose an exceptional sentence. What Roberts disputes is the imposition of consecutive sentences.

The trial court in Tili II did not impose consecutive sentences on the rapes, instead imposing an exceptional sentence of 417 months on all counts and ordering them to run concurrently. 148 Wn.2d at 357. Both first degree rape and first degree burglary and are class A felonies, which carry a statutory maximum of life imprisonment. Given the deliberate cruelty and now-defunct multiple offense policy aggravators, the trial court had discretion to impose an exceptional sentence above the standard range for all the offenses. There was really no limit on the length of sentence the trial court could impose, given the maximum term of life.

Here, the sight or sound aggravating factor applied only to the assault and FVNCO convictions and no others. CP 79-80, 131-34. The trial court found those two convictions to be the same criminal conduct. 6RP 563-64. Both offenses are class C felonies, which carry a statutory maximum of five years. Typically, an exceptional sentence cannot exceed the statutory maximum for *each* crime. RCW 9.94A.505(5). But, here, the two offenses became "one crime" after the finding of same criminal conduct and had to run concurrently to one another. Thus, the statutory maximum for the "one crime" of assault and FVNCO was five years, not five years each for a total of ten years if the two crimes were separate and distinct. The trial court

could have imposed five years (60 months), *total*, for both offenses. Instead, however, the court imposed 63 months of confinement, plus 12 months of community custody, for a total of 75 months. CP 131-32. This exceeded the statutory maximum for the "one crime" by 15 months.

The conflicting language in the Tili decisions and the ultimately unanswered question of whether consecutive sentences may follow a finding of same criminal conduct warrants this Court's review under RAP 13.4(b)(1) and (b)(4).

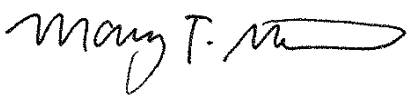
E. CONCLUSION

For the aforementioned reasons, Roberts respectfully asks this Court to grant review, reverse the court of appeals, and remand for resentencing.

DATED this 25th day of May, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH JW ROBERTS, JR. Appellant.	DIVISION ONE No. 75872-1-I UNPUBLISHED OPINION FILED: April 30, 2018

DWYER, J. — Following a bench trial, Joseph Roberts, Jr. was convicted of domestic violence felony violation of a court order, assault in the third degree domestic violence, tampering with a witness, and five counts of domestic violence misdemeanor violation of a court order. On appeal, Roberts contends that he received ineffective assistance of counsel because his attorney failed to pursue a diminished capacity defense. Roberts also contends that the trial court erred by (1) denying his request for an exceptional sentence downward, (2) failing to vacate his conviction for assault in the third degree, claiming that it merges into his conviction for felony violation of a no-contact order, (3) imposing consecutive sentences on two offenses that constituted the same criminal conduct, and (4) incorrectly calculating his offender score. Roberts also submits a pro se statement of additional grounds.

We remand for correction of certain clerical errors in the judgment and sentence but affirm in all other respects.

I

Joseph Roberts, Jr. and Katrina Wooldridge began a dating relationship sometime in 2013 or 2014. Together they have one child, who was born in April 2015.[1]

In August 2015, following a domestic violence incident, the Bothell Municipal Court issued a pretrial domestic violence no-contact order protecting Wooldridge. In November 2015, Roberts rented a room in a house in Bellevue. Days later, Wooldridge and her son moved in with Roberts in violation of the no-contact order.

On November 19, 2015, Wooldridge called 911. Wooldridge told the emergency operator that Roberts was pointing a BB gun at his own face. Roberts could be heard in the background saying that Wooldridge had hit him and that he was bleeding. Wooldridge told the emergency operator that she could not leave because her son was in the house. Wooldridge then said that Roberts had put down the gun and was throwing her things out of the house while she was putting her son in the car.

Wooldridge began to argue with Roberts while on the telephone with the emergency operator.

WOOLDRIDGE:	Why did you just fucking do that? What the fuck?
OPERATOR:	Ma'am.
WOOLDRIDGE:	Oh my God.
OPERATOR:	Hello?
WOOLDRIDGE:	Get the fuck away from me and my fuckin' son. He's in the fuckin' car.

[1] Wooldridge was 17 years old when she began dating Roberts, who was 26 years old at the time.

. . .

WOOLDRIDGE: Get the fuck away from me.

Jonnie Jones, who rented a room in the same house as Roberts, could be heard in the background telling Roberts "Don't touch that girl no god damn more."

Wooldridge asked the emergency operator for help. The call then abruptly ended. The call soon resumed. Wooldridge told the emergency operator that Roberts "just broke a broom over me" and that he "came to me and brought a broom and started hitting my car with my son." Wooldridge said that Roberts had been hitting her with a broom for about 20 minutes and that she had welts all over her body. Wooldridge said that her son was still with her. Roberts left before the police arrived.

Bellevue Police Officer Curtis McIvor responded to the emergency call. Upon arriving at the residence, McIvor noticed that there was a vehicle in the driveway with the door partially open and the light on inside. The vehicle's windshield had been smashed and there were glass particles inside of the vehicle. McIvor also observed that there were various items strewn about the front yard. McIvor went inside the house and spoke with Wooldridge. Wooldridge was sobbing and had a large welt—12 to 15 inches long—on the right side of her shoulder. Wooldridge was too upset to answer any questions.

Wooldridge was treated at the scene by Joshua Holthenrichs, a firefighter medic. Wooldridge told Holthenrichs that she was in a domestic violence dispute and that she was in extreme pain. Wooldridge stated that she was hit with a broom repeatedly, knocked to the ground, kicked in the stomach, and "stomped" on the head. Wooldridge stated that the assault lasted about 20 minutes.

Dr. Marc Bellis treated Wooldridge at the hospital. Wooldridge told Dr. Bellis that she was assaulted by her ex-boyfriend. Wooldridge stated that Roberts kicked her several times in the abdomen and head and hit her with a broomstick. Dr. Bellis reported that Wooldridge was lucid and did not appear to be under the influence of drugs or alcohol.

Wooldridge saw her mother—Lisa Davis—at the hospital that night. Davis testified that Wooldridge was crying and had bruises all over her body. Wooldridge told her mother that Roberts had almost killed her and had been hurting their child. Roberts had sent text messages to Davis earlier that day, stating that he had really hurt Wooldridge and that she was in the hospital. Roberts told Davis that "I could have killed her. You know she is, how she makes me."

Police arrested Roberts the next day. Roberts initially told the arresting officer that he was injured. Roberts changed his mind after the officer offered to take pictures of the injuries. Following his arrest, Roberts began calling Wooldridge from jail.

On December 15, 2015, the King County Superior Court issued a no-contact order protecting Wooldridge based on the current charges against Roberts. Nevertheless, Roberts called Wooldridge from jail at least two times in January in violation of the no-contact order. Roberts called Wooldridge repeatedly from December 1, 2015 through August 5, 2016.[2] Roberts directed

[2] The trial court noted that Roberts had called Wooldridge over 800 times while in jail.

Wooldridge to contact the prosecutor's office and the judge and tell them that she had lied about the assault.

At trial, Wooldridge recanted her report of the assault. Wooldridge testified that she was injured after getting in a fight with another person earlier in the day and that her vehicle windshield was broken weeks earlier. Wooldridge testified that she was intoxicated on the day of the assault. Wooldridge testified that she started to argue with Roberts and began trying to pull him out of the house. Wooldridge testified that the only time that Roberts touched her was when he was trying to stop her from pulling him. Wooldridge admitted that she had received telephone calls from Roberts while he was in jail, but testified that it was her idea to pretend to be other women during the calls.

During closing argument, defense counsel argued that Wooldridge had fabricated the entire assault. Defense counsel argued that Wooldridge was mad at Roberts and manufactured her screaming on the 911 call in order to get Roberts in trouble. Defense counsel also argued a theory of self-defense. Defense counsel argued that Wooldridge was the initial aggressor and that, if Roberts did injure Wooldridge, it was because he was defending himself from further harm.

The trial court found Roberts guilty of domestic violence felony violation of a court order, assault in the third degree domestic violence, tampering with a witness, and five counts of domestic violence misdemeanor violation of a court order. The trial court found that the assault occurred within the sight and sound of the parties' minor child. The trial court imposed exceptional sentences on the

felony violation of a court order and assault in the third degree convictions, ordering that those sentences run consecutively. Roberts appeals.

II

Roberts first contends that he received ineffective assistance of counsel. This is so, he asserts, because his attorney failed to present a diminished capacity defense at trial. We disagree.

"Constitutionally ineffective assistance of counsel is established only when the defendant shows that (1) counsel's performance, when considered in light of all the circumstances, fell below an objectively reasonable standard of performance, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." State v. Woods, 198 Wn. App. 453, 461, 393 P.3d 886 (2017) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Failing to satisfy either part of the analysis ends the inquiry. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The defendant bears the burden of demonstrating deficient representation and prejudice. In re Det. of Hatfield, 191 Wn. App. 378, 401, 362 P.3d 997 (2015).

"Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). "[T]he presumption of adequate representation is not overcome if there is any '*conceivable* legitimate tactic' that can explain counsel's performance." Hatfield, 191 Wn. App. at 402 (emphasis

added) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Prejudice is established when there is a reasonable probability that the outcome of the proceedings would have been different had counsel's performance not been deficient. McFarland, 127 Wn.2d at 337.

"Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged." State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). "To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Here, Roberts was initially represented by attorney David Montes. Prior to trial, Montes investigated a possible diminished capacity defense. Montes received funding for a clinical psychologist, Dr. Robert Deutsch, to conduct a mental examination of Roberts. Dr. Deutsch conducted an in-person evaluation of Roberts on February 29, 2016 at the King County Correctional Facility.

Roberts told Dr. Deutsch about the night of the assault. Roberts stated that "[e]verything is a blur that night," and that Wooldridge "made me crazy. Wild, literally. I acted as a monster. I wasn't able to control myself." Roberts reported that Wooldridge hit him with the broom first. Roberts reported that he grabbed the broom from Wooldridge and "started poking her with the broom and then it escalates." Roberts continued:

> Then I started hitting her. Then overwhelmed. I was lost – in a trance. Angry, scared, I lost time. Time stopped. I felt I needed to keep hitting her. I didn't know how to stop. I went overboard. I couldn't stop. I felt compelled. Like high. Weird. There was no reason for me to go that far. I probably would have killed her. I was that crazed. I've never done that before.
>
> Based on his evaluation, Dr. Deutsch concluded:
>
> On and around November 19, 2015, Joseph Roberts was in a severely regressed psychological state that, per his authentic sounding descriptions, may have reached manic proportions which would have loosened his grip on reality as well as impaired his ability to control his behavior.
>
> In this debilitated mental state, Mr. Roberts' capacity to form the intent for his actions was significantly compromised in that it was based on, and driven by, powerful feelings which were overly influenced by his extensive past experience of subordination.

After receiving Dr. Deutsch's report, Montes withdrew as Roberts' attorney due to an irreparable breakdown in communications. The case was continued for several months and eventually reassigned to attorney Seth Conant.

Defense counsel elected to pursue two distinct defense theories at trial. The first was a general denial defense. Roberts had been contacting Wooldridge from jail and urging her to recant. At trial, Wooldridge testified that she had fabricated the entire assault. Wooldridge testified that her injuries stemmed from a fight earlier that day and that her vehicle's windshield was shattered weeks earlier. Wooldridge testified that she was upset with Roberts and lied in order to get him in trouble. This testimony supported a general denial defense.

Although it was inconsistent with a defense of general denial, defense counsel also pursued a theory of self-defense. Roberts had instructed Wooldridge to testify that he had acted in self-defense. At trial, Wooldridge

testified that she was the initial aggressor. Wooldridge testified that she was intoxicated and that she began trying to pull Roberts out of the house. Wooldridge testified that the only time that Roberts touched her was when he was trying to push her away for his own protection. This testimony supported a theory of self-defense.

Defense counsel considered a third defense—diminished capacity. A theory of diminished capacity was inconsistent with both of the other proffered defenses. First, diminished capacity would have admitted that the assault occurred, contrary to a defense of general denial. Second, a defense of diminished capacity would have relied on Dr. Deutsch's report, which contained statements made by Roberts establishing that he used more force than was reasonably necessary to protect himself from Wooldridge, contrary to theory of self-defense.[3]

Notably, unlike the theories of general denial and self-defense, diminished capacity was not applicable to the charge of assault in the third degree. The mental state required for assault in the third degree, as charged here, was criminal negligence.[4] "Because criminal negligence is based on an objective 'reasonable person' standard, a person may be criminally negligent despite an impairment in mental capacity." State v. Warden, 80 Wn. App. 448, 456, 909

[3] The report contained statements by Roberts admitting that he had beaten Wooldridge, that he "felt [he] needed to keep hitting her," and that he "didn't know how to stop."

[4] The State charged Roberts with assault in the third degree by two alternative means: that he, with criminal negligence, caused bodily harm to Wooldridge accompanied by "substantial pain that did extend for a period sufficient to cause considerable suffering," and that he, with criminal negligence, caused bodily harm to Wooldridge "by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d), (f).

P.2d 941 (1996), aff'd on other grounds, 133 Wn.2d 559, 947 P.2d 708 (1997). Accordingly, diminished capacity is "not a valid defense to a crime based on criminal negligence." Allstate Ins. Co. v. Raynor, 143 Wn.2d 469, 484, 21 P.3d 707 (2001) (citing State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987)).

Defense counsel ultimately decided against presenting a diminished capacity defense.

We can conceive of legitimate tactical reasons why defense counsel decided against pursing a diminished capacity defense. First, it is conceivable that defense counsel made a strategic decision against pursuing a third defense that was inconsistent with both of the other proffered defenses. It is also conceivable that defense counsel, realizing that a diminished capacity defense was not applicable to the charge of assault in the third degree, pursued the only two defense theories that could potentially rebut that charge. Because we can conceive of legitimate tactical reasons why defense counsel elected not to pursue a diminished capacity defense, Roberts fails to overcome the presumption of adequate representation. See Hatfield, 191 Wn. App. at 402 ("[T]he presumption of adequate representation is not overcome if there is any '*conceivable* legitimate tactic' that can explain counsel's performance." (emphasis added) (quoting Reichenbach, 153 Wn.2d at 130)).

Nevertheless, Roberts contends that defense counsel should have either pursued *all* possible defense theories or, alternatively, eschewed the self-defense claim in favor of a diminished capacity defense. This is so, he asserts, because (1) this was a bench trial and the trial judge would have been

accustomed to conflicting defense theories, and (2) a theory of self-defense was implausible given the trial court's posttrial determination that Wooldridge was not a credible witness.

Roberts' contentions are unavailing. Defense counsel must investigate "all reasonable lines of defense." In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). "Once counsel reasonably selects a defense, however, 'it is not deficient performance to fail to pursue alternative defenses.'" Davis, 152 Wn.2d at 722 (quoting Rios v. Rocha, 299 F.3d 796, 807 (9th Cir. 2002)). Roberts' attorney investigated and considered three alternative defense theories. In the end, defense counsel elected to pursue two of those theories. Both theories were supported by testimony. "That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." State v. Grier, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011).

Roberts has failed to establish that defense counsel's performance, when considered in light of all the circumstances, fell below an objectively reasonable standard of performance.[5] Accordingly, he has not established ineffective assistance of counsel.

III

Roberts next contends that the trial court erred by denying his request for an exceptional sentence downward. This is so, he asserts, because Dr.

[5] Because Roberts has failed to establish the first prong of the Strickland analysis, 466 U.S. at 687, we need not consider whether he was prejudiced by his counsel's performance. Hendrickson, 129 Wn.2d at 78.

Deutsch's report established that his capacity to appreciate the wrongfulness of his conduct was significantly impaired. We disagree.

A sentence within the standard sentence range is generally not appealable. State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993); RCW 9.94A.585(1). "[W]hile trial judges have considerable discretion under the [Sentencing Reform Act of 1981 (SRA)], they are still required to act within its strictures and principles of due process of law." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing Mail, 121 Wn.2d at 712). A trial court abuses its discretion when it "refuses categorically to impose an exceptional sentence below the standard range under any circumstances." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Likewise, "[t]he failure to consider an exceptional sentence is reversible error." Grayson, 154 Wn.2d at 342.

Here, Roberts requested an exceptional sentence downward pursuant to the impaired mental capacity statutory mitigating factor. That mitigating factor requires the defendant to establish, by a preponderance of the evidence, that the "defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e). Roberts relied on Dr. Deutsch's report to establish this mitigating factor.

The trial court considered the proffered mitigating factor, recognized that the court possessed the authority to impose an exceptional sentence downward,

and concluded that Roberts had failed to establish the mitigating factor by a preponderance of the evidence.

> As far as the exceptional down, you know, it's the Defendant's obligation to establish that there is a mental defect or a mental condition such that Defendant couldn't appreciate the wrongfulness of his conduct. I read the report from the psychologist, and it's heartbreaking what Mr. Roberts went through as a child. There's no – no doubt about it, and it would make anybody angry. You know, he has anxiety. He has depression. He has all these – all these things, but that doesn't mean that when he was beating her with the broomstick that he didn't know – he couldn't appreciate that that was wrong. There is no basis for an exception down here.

"[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." Garcia-Martinez, 88 Wn. App. at 330. Roberts has failed to establish a basis for appellate relief.

IV

Roberts next contends that his conviction for assault in the third degree must be dismissed because it merges into his conviction for felony violation of a court order. He is wrong.

We review de novo questions of double jeopardy. State v. Leming, 133 Wn. App. 875, 881, 138 P.3d 1095 (2006). The double jeopardy clauses of the federal and state constitutions "protect against multiple punishments for the same offense." In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); U.S. CONST. amend V; WASH. CONST. art. I, § 9. "If the legislature authorizes cumulative punishments for both offenses, double jeopardy is not offended." State v. Moreno, 132 Wn. App. 663, 667, 132 P.3d 1137 (2006).

"Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." Orange, 152 Wn.2d at 815.

The violation of a no-contact order is generally a gross misdemeanor but may be elevated to a felony if the violation involves "[a]ny assault that is a violation of an order issued under this chapter . . . and that does not amount to assault in the first or second degree" or "any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person." RCW 26.50.110(4). As pertinent here, a defendant is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree, "[w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm"; or, "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(d), (f). Felony violation of a no-contact order carries a greater seriousness level than does assault in the third degree. Moreno, 132 Wn. App. at 671.

We have previously considered this issue and held that imposing punishment for both assault in the third degree and felony violation of a no-contact order based on the same assault does not violate double jeopardy. Moreno, 132 Wn. App. at 667-71 ("[T]he legislature clearly intended that the crimes of felony violation of a court order and third degree assault should be

considered separate crimes and punished separately."); see also Leming, 133 Wn. App. at 883-87. There was no double jeopardy violation.[6]

V

Roberts next contends that the trial court erred by ordering that his convictions for assault in the third degree and felony violation of a court order be served consecutively. Roberts asserts that, because the two crimes constitute the same criminal conduct, the sentences are statutorily required to be served concurrently. Again, he is wrong.

The SRA provides, in pertinent part:

> Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.589(1)(a).

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[6] Roberts contends that our conclusion in Moreno, 132 Wn. App. at 667-71, is contrary to the merger doctrine, which he asserts is an independent standard that must be analyzed separately from legislative intent. He is wrong. The merger doctrine is simply one tool that courts may use to discern legislative intent. See, e.g., State v. Freeman, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005) ("Third, if applicable, the merger doctrine is *another aid in determining legislative intent*, even when two crimes have formally different elements." (emphasis added)). Having already discerned the legislative intent with regard to these crimes, we need not employ the merger doctrine.

The SRA further provides that "[a] departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section." RCW 9.94A.535. As pertinent here, a trial court may impose an exceptional sentence if it finds beyond a reasonable doubt that the "offense involved domestic violence" and that "[t]he offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years." RCW 9.94A.535(3)(h)(ii); RCW 9.94A.537(3).

Here, the trial court found that the offenses of assault in the third degree and felony violation of a court order constituted the same criminal conduct. The trial court counted those convictions as one crime for purposes of calculating the offender score. However, the trial court also concluded that an exceptional sentence was warranted because the offense involved domestic violence that occurred within the sight or sound of the parties' minor child. RCW 9.94A.535(3)(h)(ii). Accordingly, the trial court imposed a sentence within the standard range for each conviction and ordered that those sentences run consecutively.

RCW 9.94A.589(1)(a) does not prohibit the imposition of consecutive sentences as an exceptional sentence. Although the first part of the statute states that sentences for multiple offenses constituting the same criminal conduct shall run concurrently, the second part of the statute explicitly permits consecutive sentences "imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). RCW 9.94A.535 provides that "[a]

departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section." Read together, the plain language of RCW 9.94A.589(1)(a) and RCW 9.94A.535 authorize the imposition of consecutive sentences when an exceptional sentence is warranted, even when the offenses constitute the same criminal conduct.

Division Three of this court has previously reached the same conclusion:

> Whatever confusion may result from the first part of this section, the final sentence is permissive language referring to the imposition of consecutive sentences . . . . RCW 9.94A.120 addresses the bases for departing from the standard range and [RCW 9.94A.535] lists mitigating and aggravating factors for the imposition of exceptional sentences. The Supreme Court upheld the aggravating factors of deliberate cruelty and multiple injuries as applied to both offenses. Because RCW 9.94A.390(2)(a) specifically mentions deliberate cruelty as an aggravating factor, it follows that the sentencing court correctly exercised its discretion when ordering the consecutive sentences . . . .
>
> . . . .
>
> Despite a determination that offenses comprise the "same criminal conduct," where the sentencing court finds aggravating factors that apply to multiple offenses, the SRA permits the imposition of more than one exceptional sentence and consecutive sentences.

State v. Worl, 91 Wn. App. 88, 95, 955 P.2d 814 (1998) (citing State v. Smith, 123 Wn.2d 51, 57-58, 864 P.2d 1371 (1993)); see also State v. Garnica, 105 Wn. App. 762, 768-69, 20 P.3d 1069 (2001) ("[T]he court determined the rapes encompassed the same criminal conduct . . . [b]ut a trial court can sentence

consecutively under RCW 9.94A.400(1)[7] provided aggravating factors justify imposition of an exceptional sentence." (citing Worl, 91 Wn. App. at 94-95)).

There was no error.[8]

VI

Roberts submits pro se statements of additional grounds pursuant to RAP 10.10. None of them warrant appellate relief.

Roberts first contends that he received ineffective assistance of counsel because his counsel failed to pursue a diminished capacity defense. As discussed herein, we disagree.

Roberts also contends that there was insufficient evidence to support the trial court's finding that the assault occurred within the sight and sound of the parties' minor child. Roberts asserts that Jones and Wooldridge both testified that the child was inside the vehicle during the assault and that the assault occurred inside the house.

In determining the sufficiency of the evidence, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "A claim of insufficiency admits the truth of the State's evidence and all

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[7] RCW 9.94A.400(1)(a) was later recodified as RCW 9.94A.589(1)(a) with substantially the same language.

[8] Roberts contends that this result is contrary to our Supreme Court's decisions in State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) (Tili I) and State v. Tili, 148 Wn.2d 350, 357, 60 P.3d 1192 (2003) (Tili II). We disagree. Neither Tili I nor Tili II held that consecutive sentences may not be imposed as an exceptional sentence when the offenses constitute the same criminal conduct. Rather, the court indicated the opposite, stating that Tili's "'sentence . . . [was] statutorily required to be served concurrently *unless an exceptional sentence* [*was*] *imposed.*'" Tili II, 148 Wn.2d at 366 (alterations in original) (quoting Tili I, 139 Wn.2d at 110).

reasonable inferences drawn therefrom." State v. Fleming, 155 Wn. App. 489, 506, 228 P.3d 804 (2010).

As discussed herein, Wooldridge told the emergency operator that she could not leave the house because her infant son was with her. Wooldridge told the emergency operator that Roberts was throwing her things out of the house as she was trying to put her son in the vehicle. Wooldridge could be heard telling Roberts to "[g]et the fuck away from me and my fuckin' son. He's in the fuckin' car." After Wooldridge told the emergency operator that Roberts had beaten her with a broom, she stated that her son was still with her. Wooldridge told the emergency operator that Roberts had smashed her vehicle's windshield while her son was still inside the vehicle. Wooldridge stated that Roberts had almost killed her and that he had hurt their son. This evidence is sufficient to support the trial court's finding.

Roberts has failed to establish a basis for appellate relief.

VII

Finally, the State concedes that this matter should be remanded for correction of certain clerical errors in the judgment and sentence.

As discussed herein, the trial court found that the assault in the third degree and felony violation of a court order offenses constituted the same criminal conduct. The trial court found that the appropriate offender score for those convictions was six. The trial court corrected the standard range sentences on the amended judgment and sentence, but failed to change the offender score to six for these convictions. The trial court also changed the

standard range sentence for the witness tampering conviction to reflect an offender score of one, but did not amend the offender score itself.

We remand for correction of these clerical errors. We affirm in all other respects.

We concur:

NIELSEN, BROMAN & KOCH P.L.L.C.

May 25, 2018 - 2:31 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Joseph Roberts, Appellant
Superior Court Case Number:	15-1-06824-1

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