SUPREME COURT NO.
98513-8
COA NO. 36452-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

LAJUANE ROBERSON,
Petitioner.

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

Spokane County Cause No. 17-1-01907-1

The Honorable Annette S. Plese, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Lajuane Roberson, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Lajuane Roberson seeks review of the Court of Appeals unpublished opinion entered on April 9, 2020. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: A defense attorney provides ineffective assistance of counsel by failing to bring applicable mitigating factors to the court's attention during sentencing. Did Mr. Roberson's attorney provide ineffective assistance by failing to argue that his client's youth posed a mitigating factor when Mr. Roberson was nineteen-years-old at the time of the alleged offenses and both the sentencing court and Pre-Sentence Investigation found that he had acted impulsively?

ISSUE 2: A defense attorney provides ineffective assistance of counsel by failing to argue at sentencing that prior offenses should be scored together as the "same criminal conduct," when applicable. Did Mr. Roberson's attorney provide ineffective assistance by failing to raise that three of his prior convictions comprised the "same criminal conduct" when they occurred at the same time and place, against the save victim, and with the same criminal intent?

ISSUE 3: A sentencing court has discretion to score a burglary conviction together with other offenses as "same criminal

conduct," when the statutory test is met. Did Mr. Roberson's attorney provide ineffective assistance of counsel by failing to argue that the sentencing court should score Counts I and II together when they occurred at the same time and place, against the save victim, and with the same criminal intent?

IV. STATEMENT OF THE CASE

When Lajuane Roberson was nineteen years old, he lived for a few months with a friend and the friend's mother, Jessica Sanfilippo, in their apartment. RP 307-08, 406-07.[1]

Mr. Roberson was friendly with some of the neighbors who also lived in the apartment complex. *See* RP 412, 415-16. One evening, Mr. Roberson ran into Aleta Brady and her friend, Amy[2], sitting on Amy's porch and drinking wine. RP 416-17. Both Ms. Brady and Amy lived in the apartment complex. RP 416-17. The three of them talked for about forty-five minutes. RP 417. After that, Ms. Brady invited Mr. Roberson up to her apartment, where they engaged in sexual activity. RP 419-23.

Afterward, Mr. Roberson left through the front door to Ms. Brady's apartment. RP 425.

Around 1:00 am, Ms. Brady called the police. RP 89; 205. She told them that someone had come into her apartment while she was asleep and

[1] All citations to the Verbatim Report of Proceedings refer to the chronologically-paginated volumes covering 8/30/18 through 11/6/18.

[2] Amy's last name is not in the record. *See* RP *generally*. No disrespect is intended.

strangled her until she blacked out. *See* RP 76-84. She said that she woke up naked. RP 85.

The apartment's front door was locked with the deadbolt when the police arrived. RP 91. It had been locked from the inside since before Ms. Brady went to sleep. RP 76, 110-12. The only other way into Ms. Brady's apartment – which was on the third floor of the building – was through the sliding door to the balcony. RP 113, 217-18. The police officers noted that it would be very difficult to climb onto or off of Ms. Brady's third-floor balcony. RP 230, 254. The officers surmised that, in order to leave via the balcony, a person would need to using repelling equipment and then, somehow, take all of that equipment with them when they left. RP 260.

There was also no evidence that anyone had come in or left through Ms. Brady's balcony door. RP 213, 262.

Ms. Brady told the police that she had gone to sleep in her clothes, but woken up in the night, taken her clothes off, and thrown them onto the floor because she was hot. RP 85. After that, she said she went back to sleep wearing only her underwear. RP 85. She said that her attacker had removed her underwear while she was unconscious. RP 86.

But the police noted that Ms. Brady's laptop computer was on top of her clothes, on the floor of her bedroom, which did not appear to

coincide with her story of taking her clothes off while she was asleep. RP 259-60. The police also did not see any injuries to Ms. Brady. RP 227.

A few months later, the results of Ms. Brady's "rape kit" testing came back, showing that Mr. Roberson's DNA had been found on a vaginal swab. *See* RP 195. The state charged Mr. Roberson with first-degree burglary and first-degree rape. CP 13-14.[3] The jury convicted Mr. Roberson of those charges. CP 100-03.

At sentencing, the state claimed that Mr. Roberson had an offender score of ten. RP 541. The state had scored each of Mr. Roberson's prior and current offenses separately. *See* RP 152-53. Defense counsel did not argue that any of the old or new convictions constituted the same criminal conduct for sentencing purposes. *See* RP 540-68.

This was so even though three of Mr. Roberson's prior convictions were from an incident in which he allegedly entered a business called Smart Smoke, caused some damage to a display case, and stole some e-cigarette supplies. *See* RP 30-63.

Mr. Roberson was nineteen years old at the time of the alleged incident involving Ms. Brady. *See* RP 406. He had suffered physical abuse as a child, resulting in removal from his parents by the state. *See* CP 110-

[3] The state also charged Mr. Roberson with witness tampering. CP 13-14. The jury convicted him of that charge. CP 102. But that conviction is not at issue in this appeal.

11. His Pre-Sentence Investigation found that he appeared to be impulsive and to lack stability or responsibility in his life. CP 113.

The trial court also noted that Mr. Roberson "appear[s] to be impulsive." RP 560. But the court found that there were "not a whole lot of mitigating factors" that applied to the case for sentencing. RP 562.

Mr. Roberson's defense attorney never argued that his client's youthfulness and its attendant characteristics weighed in favor of leniency in sentencing or an exceptional sentence below the standard range. *See* RP 540-68. The court sentenced Mr. Roberson to the high end of the standard range, based on the understanding that he had an offender score of ten. RP 562.

Mr. Roberson timely appealed. CP 154. The Court of Appeals affirmed his convictions and sentence. (See Appendix).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review and hold that defense counsel provided Mr. Roberson with ineffective assistance during sentencing. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Kyllo*, 166

Wn.2d 856, 862, 215 P.3d 177 (2009). The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Kyllo*, 166 Wn.2d at 862.[4]

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009), *as amended* (Sept. 17, 2009). This includes a duty to investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

A defense attorney provides ineffective assistance of counsel by failing to recognize and point the sentencing court to appropriate caselaw permitting leniency in sentencing. *Adamy*, 151 Wn. App. at 588 (*citing State v. McGill*, 112 Wn. App. 95, 101, 47 P.3d 173 (2002)).

This is because "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority." *McGill*, 112 Wn. App. at 102. "Nor can [the court] exercise its discretion if it is not told it has discretion to exercise." *Id.*

[4] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a). Generally, one cannot appeal a standard-range sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). But that rule does not apply to appeals addressing (a) a sentencing court's mistaken belief that a mitigating factor did not apply or (b) ineffective assistance of counsel by counsel's failure to research and raise an applicable mitigator. *Id.*

An accused person is prejudiced by such a failure when there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if the applicable mitigating factor had been properly raised. *Id.* This prejudice standard does not require the sentencing court to overtly express discomfort with the sentence imposed. *See McFarland*, 189 Wn.2d at 59. Rather, reversal is required so long as "the record suggests at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so." *Id.*

In Mr. Roberson's case, defense counsel provided ineffective assistance at sentencing by (a) failing to argue that the fact that Mr. Roberson was only nineteen-years-old at the time of the allegations was a mitigating factor; (b) failing to point out that three of his prior convictions constituted the same criminal conduct; and (c) failing to inform the court that it had discretion to score the burglary and rape charges as same criminal conduct for sentencing purposes. This case must be remanded for a new sentencing hearing at which Mr. Roberson is afforded his constitutional right to the effective assistance of counsel.

A. Defense counsel provided ineffective assistance at sentencing by failing to raise Mr. Roberson's youthfulness as a mitigating factor when his client was nineteen-years-old at the time of the alleged

offenses and both the sentencing court and the Pre-Sentence Investigation took note of his impulsivity.

Mr. Roberson was nineteen years old at the time of the alleged offenses in this case. *See* RP 406. Both the sentencing court and the Pre-Sentence Investigation noted that he had acted impulsively. RP 560; CP 113. The trial court should have been required to consider whether Mr. Roberson's youthfulness (and attendant impulsivity) constituted mitigating factors for sentencing purposes. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

But defense counsel never brought the issue up or requested that it be considered a mitigating factor. *See* RP 540-68. Mr. Roberson's attorney provided ineffective assistance of counsel.

Recent advances in brain science have revealed "fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *O'Dell*, 183 Wn.2d at 692 (*citing Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain,* 1021 Ann. N.Y. Acad. Sci. 77 (2004)).

These characteristics of the still-developing adolescent brain cause young people to be "overrepresented statistically in virtually every

category of reckless behavior." *Roper*, 543 U.S. at 569 (*citing* Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992)); *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Young adults' relative lack of control over their conduct and environment means that "their irresponsible conduct is not as morally reprehensible" as that of a fully-mature adult. *Roper*, 543 U.S. at 570; *O'Dell*, 183 Wn.2d at 692. This diminished blameworthiness and "the distinctive attributes of youth" "diminish the penological justifications for imposing the harshest sentences." *O'Dell*, 183 Wn.2d at 692 (*citing Miller v. Alabama*, 567 U.S. 460, 477-78, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham*, 560 U.S. at 71; *Roper*, 543 U.S. at 571).

Additionally, a young person's "inability to deal with police officers or prosecutors (including during a plea agreement) or his incapacity to assist his own attorneys" also create a greater likelihood that a young person will be convicted of a more serious offense in circumstances under which an older adult would only have sustained a less serious conviction. *Miller*, 567 U.S. at 477-78 (*citing Graham*, 560 U.S. at 78; *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)).

Because the parts of the brain involved in behavior control remain undeveloped "well into a person's 20s," these advances in adolescent brain science apply to younger adults, in addition to juveniles. *O'Dell*, 183 Wn.2d 691 (*citing* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 152 & n.252 (2009) (collecting studies); Giedd, 1021 Ann. N.Y. Acad. Sci. 77); *Roper*, 543 U.S. at 574.

As a result, This Court has ruled that a sentencing court must be permitted to consider youth as a mitigating factor in cases involving offenses committed shortly after a person reaches legal adulthood. *O'Dell*, 183 Wn.2d at 696.[5]

While an offender is never entitled to an exceptional sentence below the standard range, "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A sentence imposed without proper consideration of "an authorized mitigated sentence" qualifies as a "'fundamental defect' resulting in a miscarriage of justice." *McFarland*, 189 Wn.2d at 58 (*citing Mulholland*, 161 Wn.2d at 332).

[5] This type of discretion is also required by the Eighth Amendment. *See State v. Houston-Sconiers*, 188 Wn.2d 1, 19, 391 P.3d 409 (2017).

Mr. Roberson was entitled to request a mitigated sentence based on his youth and impulsivity at the time of the alleged offenses. *O'Dell*, 183 Wn.2d at 696. His defense attorney provided ineffective assistance of counsel by failing to recognize and request that the sentencing court take those attributes into consideration. *Adamy*, 151 Wn. App. at 588; *McGill*, 112 Wn. App. at 101.

Mr. Roberson was prejudiced by his defense counsel's negligence because there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if his youthfulness had been properly considered. *McGill*, 112 Wn. App. at 102. Though the court sentenced Mr. Roberson to the high end of the standard range, it did so based on the misapprehension that his offender score was higher than the top of the sentencing grid (as argued below). RP 562.[6]

The sentencing court also stated that there were "not a whole lot of mitigating factors" that applied to Mr. Roberson's situation at sentencing. RP 562. But a significant mitigating factor related to Mr. Roberson's youthfulness did apply and was supported by the findings of the Pre-

[6] In different circumstances, a sentence at the high end of the standard range can indicate that an accused person was not prejudiced by his/her defense attorney's failure to request an exceptional sentence below the standard range. *See e.g. State v. Knight*, 176 Wn. App. 936, 957-58, 309 P.3d 776 (2013).

Unlike in *Knight*, however, the sentencing court in Mr. Roberson's case based the high-end sentence on a mistaken belief that Mr. Roberson's offender score was higher than nine. RP 562. The court's reasoning in *Knight* is not applicable to Mr. Roberson's case.

Sentence Investigator. Defense counsel's failure to raise this point requires resentencing in Mr. Roberson's case because "the record suggests at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so." *McFarland*, 189 Wn.2d at 59.

Mr. Roberson's defense attorney provided ineffective assistance of counsel at sentencing by unreasonably failing to raise his client's youth and impulsivity as a mitigating factor. *Id.* Mr. Roberson's case should have been remanded for resentencing with that factor properly considered. *Id.*

This significant issue of constitutional law is of substantial public interest because it could affect a large number of criminal cases involving youthful Washingtonians. This Court should accept review pursuant to RAP 13.4(b)(3) and (4).

B. Defense counsel provided ineffective assistance at sentencing by failing to argue that three of Mr. Roberson's prior convictions and two of his current convictions constituted the "same criminal conduct" for purposes of calculating his offender score.

Two or more offenses qualify as the "same criminal conduct" (SCC) for sentencing purposes if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

The criminal intent element of the SCC inquiry looks to whether the offender's intent "as objectively viewed, changed from one crime to the next." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992) (*citing State v. Collicott*, 118 Wn.2d 649, 667-68, 827 P.2d 263 (1992); *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987)). Under this test, if one crime "*furthered* another," then the criminal purpose or intent did not change. *Id.* (emphasis in original).

Offenses that encompass SCC are "counted as one crime" and are scored together as one point for sentencing purposes. RCW 9.94A.589(1)(a). A sentencing court must determine whether prior offenses – as well as current offenses – constitute SCC when calculating the offender score. RCW 9.94A.525(5)(a)(i).

Defense counsel provides ineffective assistance by failing to argue at sentencing that two or more convictions should be scored as SCC, when warranted. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

Mr. Roberson's defense attorney provided ineffective assistance of counsel at his sentencing hearing by failing to properly argue that (a) three of his prior convictions were required to be scored together as SCC and (b) the court had discretion to score his current rape and burglary convictions as SCC.

1. Three of Mr. Roberson's prior convictions constituted the same criminal conduct and should only have collectively added one point to his offender score. Defense counsel failed to point this fact out to the sentencing court.

The sentencing court did not score any of Mr. Roberson's five prior convictions as SCC when determining his offender score in this case. CP 135. Nor did defense counsel ask the court to do so. *See* RP 540-68.

But three of Mr. Roberson's prior convictions (for burglary, malicious mischief, and theft) arose from a single incident in which Mr. Roberson allegedly broke into a business called Smart Smoke, caused some damage to display cases, and stole e-cigarette supplies. CP 30-31, 34-37, 51-52.

The three offenses involved the same victim and occurred at the same time and place. RCW 9.94A.589(1)(a). Additionally, because the burglary and malicious mischief were committed to further the alleged theft, the three offenses comprised the same criminal purpose or intent. *Lessley*, 118 Wn.2d at 777.

Defense counsel provided ineffective assistance by failing to point out that those three convictions should have been scored as SCC when determining Mr. Roberson's offender score in this case. *Phuong*, 174 Wn. App. at 548.

Though the burglary anti-merger statute gives a sentencing court discretion to score burglary separately from other offenses for sentencing purposes, that statute applies only to the score related to the *current* offenses. *State v. Williams*, 181 Wn.2d 795, 800-01, 336 P.3d 1152 (2014); RCW 9A.52.050. A sentencing court must treat *prior* burglary convictions identically to other prior convictions, examining whether they constitute SCC with other offenses for purposes of the current offender score. *Id*.

Defense counsel provided deficient performance during Mr. Roberson's sentencing hearing by failing to research this rule and bring it to the court's attention. *Phuong*, 174 Wn. App. at 548.

Mr. Roberson was prejudiced by his attorney's deficient performance. Properly scoring Mr. Roberson's three prior Smart Smoke convictions as SCC would have lowered his offender score to eight, which would have decreased the high end of the sentencing range by forty-one months. Wash. State Caseload Forecast Council, 2017 Washington State Adult Sentencing Guidelines Manual 431, https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2017.pdf. There is a reasonable probability that Mr. Roberson's sentence would have been lower absent counsel's mistake.

McGill, 112 Wn. App. at 102. Indeed, a lower sentence would have been required.

The Court of Appeals held that Mr. Roberson's attorney was not ineffective in this regard because "there is no factual basis" for determining whether those three offenses qualified as same criminal conduct. Opinion, p. 7. The Court fails to acknowledge that the police report for those offenses is included in the record, demonstrating that the same time/place, same intent, same victim test is easily satisfied. RCW 9.94A.589(1)(a); *See* CP 34-37. The Court of Appeals' reasoning is belied by the record in this case.

Mr. Roberson's defense attorney provided ineffective assistance of counsel by unreasonably failing to inform the sentencing court that three of his prior convictions should have been scored as "same criminal conduct" in the offender score calculation. *Phuong*, 174 Wn. App. at 548; *McGill*, 112 Wn. App. at 102; *McFarland*, 189 Wn.2d at 59. Mr. Roberson's case should have been remanded for a new sentencing hearing. *Id.*

2. The sentencing court had discretion to score Mr. Roberson's convictions in Counts I and II as same criminal conduct, which would have lowered his offender score by three points. Defense counsel failed to make that argument to the court.

The sentencing court also had discretion to score Mr. Roberson's current burglary and rape convictions as "same criminal conduct" when calculating his offender score. But, again, defense counsel failed to bring that to the court's attention. *See* RP 540-68. This also constituted ineffective assistance of counsel at sentencing.

The burglary anti-merger statute gives a sentencing judge discretion to score a current burglary conviction separately or as SCC when determining the offender score. RCW 9A.52.050; *State v. Davis*, 90 Wn. App. 776, 783–84, 954 P.2d 325 (1998).

Mr. Roberson's current burglary and rape convictions involved the same victim and occurred at the same time and place. Because the burglary was allegedly committed in furtherance of the rape, Mr. Roberson's "criminal purpose or intent" did not change, either, and the offenses encompass the SCC for sentencing purposes. *Lessley,* 118 Wn.2d at 777. Accordingly, the sentencing court had discretion to score those convictions as SCC and not increase the offender score for the rape conviction based on the burglary charge. *Davis*, 90 Wn. App. at 783–84.

But Mr. Roberson's defense attorney never raised this option during Mr. Roberson's sentencing hearing. *See* RP 540-68. This failure meant that the court could not exercise its discretion because it had not

been told that it had discretion to exercise. *McGill*, 112 Wn. App. at 102. Defense counsel's performance was deficient. *Id.*

Mr. Roberson was prejudiced by his attorney's deficient performance. *McFarland*, 189 Wn.2d at 59. Because the burglary charge counted as a sex offense (due to the sexual motivation finding), it added three points to Mr. Roberson's offender score for the rape charge, without scoring as SCC. RCW 9.94A.525(17). If the sentencing court had scored the burglary and rape charges as SCC, the high end of Mr. Roberson's standard sentencing range would have gone down from 280 months to 158 months. Wash. State Caseload Forecast Council, 2017 Washington State Adult Sentencing Guidelines Manual at 431.

There is a possibility that the sentencing court would have exercised its discretion to score the offenses as SCC if it had been made aware of that option. The court relied heavily on the state's assertion Mr. Roberson had an offender score more than nine points. RP 562. But that was not necessarily the case (especially when considering counsel's other mistakes at sentencing). The court also relied on the conclusion that there were "not a whole lot of mitigating factors" that applied to Mr. Roberson's case. RP 562. While not, technically, a mitigating factor, the fact that the burglary and rape convictions constituted SCC represented an important opportunity to significantly lower the sentencing range. Properly raising

that issue would have made the sentencing judge aware of the breadth of the sentencing options in Mr. Roberson's case.

Mr. Roberson's defense attorney provided ineffective assistance of counsel by unreasonably failing to make the sentencing court aware of the its discretion to score the current burglary and rape convictions as "same criminal conduct." *Phuong*, 174 Wn. App. at 548; *McGill*, 112 Wn. App. at 102; *McFarland*, 189 Wn.2d at 59. Mr. Roberson's case should have been remanded for a new sentencing hearing. *Id.*

This significant question of constitutional law is of substantial public interest. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted May 7, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Lajuane Roberson
(private mailing address)

and I sent an electronic copy to

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on May 7, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Renee S. Townsley
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April 9, 2020

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CASE # 364526
State of Washington v. Lajuane A. Roberson, Jr.
SPOKANE COUNTY SUPERIOR COURT No. 171019071

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
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FILED
APRIL 9, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. LAJUANE A. ROBERSON, Appellant.	))))))))))	No. 36452-6-III UNPUBLISHED OPINION

KORSMO, J. — Lajuane Roberson appeals his convictions for first degree burglary, first degree rape, and tampering with a witness, arguing that the court erred by admitting his statements and that his counsel provided ineffective assistance at sentencing. We affirm.

FACTS

A.B. lived in a third floor apartment in Spokane. She woke one night to a masked man standing over her; he choked her to unconsciousness, sexually assaulted her, and fled. A.B.'s child saw the man leave. A rape examination revealed semen; DNA testing determined that it belonged to Mr. Roberson. A.B. recognized Roberson's picture in a photo montage.

Law enforcement arrested Mr. Roberson. From jail, he wrote an ex-girlfriend a letter asking her to provide him an alibi. Based on that communication, the prosecutor filed the noted charges. The matter proceeded to a jury trial in the Spokane County Superior Court.

At trial, the State sought to admit a statement through Ms. Sanfilippo, the woman in whose house Mr. Roberson had lived. She had overheard Roberson claim that he robbed a place but he did not need to rape anyone. The statement was made after A.B. was raped, but before Mr. Roberson's arrest. The defense objected on ER 403 grounds that the statement could refer to his prior offenses, but the court admitted the statement.

Mr. Roberson testified that he had a consensual encounter with A.B. Nonetheless, the jury convicted Mr. Roberson on all charges.

At sentencing, the defense presented numerous family and community members to ask the court for a merciful sentence. The defense also had no objections to the pre-sentence investigation (PSI). His counsel noted Mr. Roberson was young and highlighted Mr. Roberson's positive character witnesses.

Mr. Roberson's offender score was a 10 due to three prior second degree burglary convictions as well as convictions for felony malicious mischief and theft. The malicious mischief, theft, and one burglary charge occurred on the same day. The trial judge expressed concern over Mr. Roberson's escalating criminal history, a concern shared by

the PSI. Recognizing his difficult childhood and impulsivity, the court nonetheless imposed a high end standard range sentence.

Mr. Roberson timely appealed to this court. A panel considered his appeal without conducting argument.

ANALYSIS

This appeal presents challenges to the admission of the statement reported by Ms. Sanfilippo and to counsel's performance at sentencing. We address the two arguments in the order listed.

ER 403

Mr. Roberson first argues that his statement should have been excluded as unduly prejudicial. ER 403. The trial court did not abuse its discretion.

Trial judges have great discretion with respect to the admission of evidence and will be overturned only for manifest abuse of that discretion. *State v. Luvene*, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. Relevant evidence is generally admissible at trial, but can be excluded where its value is outweighed by other considerations such as undue prejudice. ER 402; ER 403.

ER 403 is designed to exclude prejudicial evidence that is meant to elicit an emotional response from jurors. *State v. Barry*, 184 Wn. App. 790, 801-802, 339 P.3d 200 (2014). The rule primarily applies when evidence has limited probative value. *Carson v. Fine*, 123 Wn.2d 206, 223-224, 867 P.2d 610 (1994). Courts differentiate between evidence that prejudices a defendant because it is highly probative to guilt and evidence that has limited relevance accompanied by unrelated, overwhelming prejudice. *State v. Johnson*, 185 Wn. App. 655, 671-672, 342 P.3d 338 (2015).

The statement related by Ms. Sanfilippo was highly relevant and probative because it tied Mr. Roberson to a burglary and rape during the appropriate time period. The statement did not suggest the existence of other crimes or otherwise inject prejudicial outside matters into the case. The trial court had tenable reasons for admitting the evidence. There was no abuse of discretion.

Ineffective Assistance of Counsel

Mr. Roberson also argues that his attorney rendered ineffective assistance at sentencing by failing to argue youth as a mitigating factor and by not challenging the offender score calculation. His arguments lack factual basis.

We consider ineffective assistance of counsel claims using well settled standards. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Courts evaluate counsel's performance using a two-prong test that requires determination as to whether or

not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-692. When a claim fails one prong, a reviewing court need not consider both *Strickland* prongs. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). If the necessary evidence is not in the record, the claim cannot be addressed on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). A personal restraint petition is the appropriate method to present new evidence. *Id*. at 335.

Sentencing ranges do not always account for the immaturity of youth. *State v. Houston-Sconiers*, 188 Wn.2d 1, 23-24, 391 P.3d 409 (2017). An exceptional sentence may be available to a youthful offender whose offense bears the hallmarks of youth—lack of maturity, impetuous or ill-considered actions and decisions, susceptibility to peer pressure, and transitory character traits. *State v. Gregg*, 9 Wn. App. 2d 569, 574-575, 444 P.3d 1219 (2019) (citing *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). To receive a mitigated sentence, a defendant must demonstrate he is less culpable because of his age and immaturity. *State v. Moretti*, 193 Wn.2d 809, 824, 446 P.3d 609 (2019).

Mr. Roberson argues that his attorney failed to raise his immaturity as a mitigating factor at sentencing. He cannot show from the record that his counsel had a reasonable argument that he was less culpable for his current offenses due to immaturity. These crimes do not reflect impulsiveness; instead, they suggest planning and sophistication.

The PSI indicated that Mr. Roberson might have some mental health deficits, but did not suggest that those contributed to the offenses. There was simply no evidence that a third story break-in and rape were impulsive acts that reflected immaturity. In light of Mr. Roberson's theory of the case, immaturity also was an unlikely argument to make at sentencing.

The argument was also unlikely to be persuasive with the trial court since the judge specifically found Mr. Roberson engaged in increasingly serious criminal activity despite his age and cited the escalating behavior as a reason for a high-end sentence. On this record, there is no reason to believe that counsel erred by failing to raise an immaturity claim or that Mr. Roberson was prejudiced by the absence of such an argument.

His remaining contention is that counsel should have argued that the rape and burglary constituted the same criminal conduct and three of his previous offenses also should have been considered the same criminal conduct. Again, the record does not support the argument.

The defendant bears the burden of showing prior offenses constitute same criminal conduct. *State v. Phuong*, 174 Wn. App. 494, 547-548, 299 P.3d 37 (2013). Same criminal conduct exists when two or more crimes share the same criminal intent, occurred at the same time and location, and involved the same victim. RCW 9.94A.589(1)(a). Defense counsel may be ineffective for failing to present this argument if it would likely

lower the defendant's sentence. *Phuong*, 174 Wn. App. at 547. This court can examine the record to ascertain whether there was a reasonable probability the court could have found similar criminal conduct. *State v. Saunders*, 120 Wn. App. 800, 824-825, 86 P.3d 232 (2004). However, that cannot occur unless there is a sufficient record to assess the claim. *Phuong*, 174 Wn. App. at 547-548; *State v. Brown*, 159 Wn. App. 1, 16-17, 248 P.3d 518 (2010).

Even when burglary and another offense constitute same criminal conduct, the sentencing judge has discretion whether to treat the current offenses as separate offenses. RCW 9A.52.050. Counsel is not ineffective for failing to argue same criminal conduct in this context. *State v. Bradford*, 95 Wn. App. 935, 950-951, 978 P.2d 534 (1999). The antimerger statute is not applicable to the scoring of earlier burglary convictions. *State v. Williams*, 181 Wn.2d 795, 801, 336 P.3d 1152 (2014).

Due to the existence of the antimerger statute, counsel was not ineffective for declining to make the argument that the two current offenses should be treated as one. *Bradford*, 95 Wn. App. 935. With respect to the three older crimes, there is no factual basis for determining whether the three offenses satisfied the same criminal conduct standard of RCW 9.94A.589(1). The fact that the original trial judge did not make a same criminal conduct determination is also reason to suspect that there was no evidentiary basis for making the finding on this occasion. If there is evidence to support the argument, it must be presented in a personal restraint petition.

Mr. Roberson has not established that his counsel erred, let alone that he was prejudiced by the alleged error. He has not shown that counsel rendered ineffective assistance.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, C.J.

LAW OFFICE OF SKYLAR BRETT

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