Supreme Court No. 98737-8
(COA No. 79652-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN WILLIAMS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Allen Williams, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Williams seeks review of the Court of Appeals decision dated June 8, 2020, a copy of which is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Was there insufficient evidence to establish Mr. Williams violated a no-contact order, as charged in counts four to eight of the amended information, when the trial court speculated that Mr. Williams was having contact with the protected party?

2. Did the trial court abuse its discretion when it imposed a clearly excessive sentence, fifty percent more than the statutory maximum?

D. STATEMENT OF THE CASE

April Jensen was never a willing participant in the prosecution of Allen Williams. CP 62. Nevertheless, the government charged Mr. Williams with six counts of violating a no-contact order, in addition to driving while under the influence and escape in the third degree. CP 155-59.

When Mr. Williams was stopped for rolling a stop sign, Ms. Jensen was in the passenger seat. RP 110. [1] Mr. Williams acknowledged the no-contact order but explained why contact was necessary. RP 111, 220. Based on this, the government charged Mr. Williams violating a no-contact order. RP 132-33.

The trooper suspected also Mr. Williams was under the influence of substances other than alcohol. RP 45. He was taken to the hospital where he consented to a blood draw. RP 46. The drug analysis revealed he had low levels of heroin and methamphetamines in his system. RP 69-70. The officer

[1] The trial transcript and the transcripts from other hearings are not in sequential order. To avoid confusion, references to the non-trial transcripts will include the date. Because the trial transcripts are in sequential order, they will only be referred to by "RP."

believed the drugs in Mr. Williams system affected his ability to operate a motor vehicle. RP 141.

At the hospital, Mr. Williams was treated at the hospital for possible illnesses, gave a voluntary blood sample, and was then determined to be fit for jail. RP 111. When he was told he was going to be taken to jail, Mr. Williams tried to leave the hospital. RP 138. In his testimony, Mr. Williams agreed he knew he was not allowed to leave. RP 213. He was quickly apprehended and caused the officer no more trouble. RP 139.

While in custody, Mr. Williams made many phone calls on the recorded jail lines. RP 28. The government alleged 67 were calls to the phone number the government alleged belonged to contact Ms. Jensen. RP 29. Based on the phone calls, Mr. Williams was charged with six additional charges of violating a no-contact order for contacting Ms. Jensen while he was in custody. CP 156-57.

Mr. Williams waived his right to a jury trial. CP 63. After his trial, the court issued findings of fact. CP 63-69.

In its findings of fact, the court stated it listened to the jail phone calls and compared the voice it heard to Ms. Jensen's voice, which was recorded when Mr. Williams was arrested. CP 66. The court found the voices were the same, although it acknowledged they were at times different, attributing this to the speaker's sleepiness or to intoxication. CP 67. The court also found the discussions Mr. Williams had with the person he was speaking were about facts particularly relevant to Ms. Jensen. CP 34.

The court also heard testimony about the phone calls. The court heard from the prosecutor's domestic violence advocate, who said the number she used for Ms. Jensen was the same number Mr. Williams was accused of calling. RP 38. She said she spoke to Ms. Jensen four times on the phone. *Id.* She could not, however, verify the person she was speaking to was actually Ms. Jensen, as the two never met. RP 40. The arresting officer was also asked to compare the voices. RP 148, 150. He stated he believed the person who was with Mr.

Williams on the night of Mr. Williams' arrest was the same person Mr. Williams spoke to from the jail. *Id.*

Mr. Williams testified. RP 211. He did not deny taking the controlled substances but stated the drugs did not affect his ability to drive. RP 213. He was trying to get Ms. Jensen close to the hospital because he was worried she had ingested a dangerous dose of a controlled substance. RP 220. The only reason he took any drugs was to verify the drugs were laced and potentially fatal to Ms. Jensen. RP 219.

Mr. Williams denied violating the no-contact order after the night he was arrested. RP 212. The phone number he called belonged to Erin Williams. *Id.* He did not deny contacting her, but he never spoke with Ms. Jensen. *Id.* He acknowledged the two women were acquaintances, but that he never intentionally violated the no-contact order after the night of his arrest. RP 216.

The court found Mr. Williams guilty of all of the charged offenses. RP 69. Based on Mr. Williams' offender score, he faced a standard range of 60 months. CP 69. The

court issued findings analyzing whether an exceptional sentence could be imposed. CP 61-62. The court found as a mitigating factor Ms. Jensen was complicit in Mr. Williams' crimes. CP 62. The court also found that Mr. Williams' offender score, which the court found to be 19, allowed the court to impose a sentence above the standard range, based on the free crimes aggravator. *Id.*, RCW 9.94A.535(2)(c).

The court imposed a sentence of 90 months. CP 81. The court imposed a 60 month sentence for all the felony offenses, except for count four. *Id.* For this count, the court imposed 30 months but ordered this term to run consecutively with the remainder of his sentence. *Id.* For all the felony counts, the court imposed 12 months of community custody. *Id.*

E. ARGUMENT

1. **This Court should grant review of whether there was sufficient evidence to support the no-contact order violations.**

The Court of Appeals found that there was sufficient evidence to support the no-contact order violations that were based on uncorroborated telephone calls. App. 6. Because the

government failed to establish all of the elements of these offenses beyond a reasonable doubt, Mr. Williams asks this Court to take review. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

a. The government must prove every element of the crime beyond a reasonable doubt and may not rest on speculation.

The Fourteenth Amendment requires the government to prove every element of the crime charged beyond a reasonable doubt. *Winship*, 397 U.S. at 364; *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). While reasonable inferences are construed in favor of the prosecution, they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Smith,* 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a verdict where "mere speculation, rather than reasonable inference, supports the government's case." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). The failure to present sufficient evidence requires reversal and an order for dismissal with prejudice. *State v.*

Hummel, 196 Wn. App. 329, 359, 383 P.3d 592 (2016), *review denied*, 187 Wn.2d 1 (2017).

b. The court had to speculate the female voice it heard on the in-custody phone recordings belonged to Ms. Jensen.

Ms. Jensen was not interested in testifying at Mr. Williams' trial. CP 62. The government did not call her as a witness. Mr. Williams made an effort to get her to appear, but she did not appear. RP 207.

As a result, the court had to determine whether the person who spoke to Mr. Williams on the phone was Ms. Jensen without ever hearing from her. CP 68-69. This required the court to speculate about who the person on the phone was.

Outside of the recording of Ms. Jensen's voice at the scene, there was no other basis from which to compare Ms. Jensen's voice with that of the person on the phone with Mr. Williams. Even in assessing her voice, the court acknowledged that it did not always sound the same. Rather

than find this to be a doubt, the court attributed the difference to sleepiness and intoxication. CP 67.

This was improper speculation.[2] Much like eyewitness testimony, voice recognition testimony creates false confidence with fact finders. Cindy E. Laub, Lindsey E. Wylie, Brian H. Bornstein, *Can the Courts Tell an Ear from an Eye? Legal Approaches to Voice Identification Evidence*, 37 Law & Psychol. Rev. 119, 124 (2013). And despite significant research having been conducted into the ability to make an eyewitness identification, less has been done to determine whether such an identification of voice evidence is actually reliable. *See* A. Daniel Yarmey, *Earwitness Speaker Identification*, 1 Psychol. Pub. Pol'y & L. 792 (1995).

Many factors can impact the reliability of a recording. For example, if the initial recording is made under stress or is yelling, it may not sound the same in later comparisons where

[2] The Court of Appeals declined to consider how speculative evidence of voice recognition testimony affected the sufficiency of the evidence, citing RAP 2.5. App. 5. But RAP 2.5 discusses claims of error raised for the first time on appeal. Challenging the sufficieny of the evidence where it was an issue at trial is not a challenge RAP 2.5 seeks to prevent.

the stress is not present. Daniel Read & Fergus I. M. Craik, *Earwitness Identification: Some Influences on Voice Recognition, 1 J. Experimental Psychol.: Applied* 6, 7 (1995). In fact, research shows that even whispering can greatly affect the ability of a person to later identify a voice. Tara L. Orchard & A. Daniel Yarmey, *The Effects of Whispers, Voice-Sample Duration, and Voice Distinctiveness on Criminal Speaker Identification*, 9 Applied Cognitive Psychol. 249, 250 (1995). In addition, voices heard in-person and over the telephone have different frequencies, which can impact tone and pitch, making a later comparison of the voices difficult. A. Daniel Yarmey, *The Psychology of Speaker Identification and Earwitness Memory*, 2 The Handbook of Eyewitness Psychology: Memory for People 101, 122-23 (Rod C. L. Lindsay et al. eds., 2007).

And even though the court expressed confidence in its opinion the voices it heard were the same, this is also based on speculation. In research on eyewitness testimony, one meta-analysis found that only 21 of 40 studies found a

relationship between confidence and accuracy. Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 95 (1995). Research on voice analysis has also found there is not a reliable correlation between confidence and the accuracy of voice identification. Kenneth A. Deffenbacher et al., *Relevance of Voice Identification Research to Criteria for Evaluating Reliability of an Identification*, 123 J. Psychol. 109, 115 (1989).

It was uncontested the court had no familiarity with Ms. Jensen's voice, other than what it heard from the recordings. Likewise, the trooper who verified the voice from the tapes had only a passing relationship with Ms. Jensen, having no further contact with her after Mr. Williams was arrested. RP 171. No other evidence was introduced to verify the voice the court heard in the jail phone calls was the same as the voice played on the night Mr. Williams was arrested.

In fact, little other evidence supported that Mr. Williams was speaking to Ms. Jensen when he made the phone calls. No evidence showed the phone number belonged

to Ms. Jensen. Mr. Williams gave testimony the number belonged to another person, Ms. Williams, who he was authorized to call. RP 212. The court heard testimony from an employee of the prosecutor's office who works with witnesses in domestic violence cases. RP 37. She stated she spoke to a woman she believed was Ms. Jensen at the number Mr. Williams called but had no independent ability to identify the voice, having never actually met Ms. Jensen. RP 40. And while the trooper also identified the voice as the same, he had no expertise in voice recognition and, other than listening to the voices in the courtroom, only met Ms. Jensen briefly when he arrested Mr. Williams. RP 148, 150.

The trial court also relied heavily on the substance of the phone calls to ascertain identity. CP 66-68. The court speculated the person whose phone number Mr. Williams called was fictitious, with no basis for such a finding. CP 67. The court also found much of the phone conversations could only have occurred with Ms. Jensen, again speculating. CP 68. This is again speculation and insufficient for proof beyond

a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

c. Review should be granted to address the question of whether the speculative evidence provided to the trial court was sufficient to support Mr. Williams' conviction.

Although the Court of Appeals found that the evidence presented to the trial court was sufficient, if review is granted this Court would likely find that, consistent with its prior opinions that the speculative nature of the evidence was insufficient to support a conviction. *Vasquez*, 178 Wn.2d at 16. Given the unreliability of the voice evidence, this Court cannot be confident the trial court's identification of Ms. Jensen was not speculative. *Id.* As such, this Court should grant review on the question of whether there was sufficient evidence Mr. Williams committed the no-contact order violations based on the jail phone calls.

2. **This Court should accept review of whether the trial court abused its discretion when it imposed an exceptional sentence, fifty percent above the maximum allowed by the standard range.**

The Court of Appeals found that the trial court did not err when it imposed an exceptional sentence, fifty percent above the standard range set by the legislature. App. 7. Examining the legislative intent of the no-contact order violation statute, this Court should accept review to address this trial court's exceptional sentence was authorized.

The standard range for Mr. Williams' offenses was 60 months. CP 79-80. Rather than impose this sentence, the court imposed 90 months, imposing 30 months on count four and running those months consecutively to the other counts. *Id.* When a court imposes a consecutive sentences for the crimes the court found Mr. Williams guilty of, the sentence may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

In its findings, the court found as a mitigating factor that Ms. Jensen was complicit in the crimes it found Mr. Williams committed. CP 62. The court also found the free

crimes aggravator authorized an upward departure from the standard range. *Id.* Mr. Williams asks this court to find the trial court abused its discretion when it imposed a clearly excessive sentence and remand this matter for a new sentencing hearing.

The Sentencing Reform Act requires sentencing courts to generally impose a sentence within the standard sentencing range. RCW 9.94A.505(2)(a)(i); *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). A sentence outside the standard range may only be imposed where there are substantial and compelling reasons to justify an exceptional sentence. RCW 9.94A.535. And while a sentencing court has the discretion to determine the length of an exceptional sentence, it abuses its discretion when the sentence is clearly excessive. *State v. Bluehorse*, 159 Wn. App. 410, 433-34, 248 P.3d 537 (2011); RCW 9.94A.585(4)(b).

Here, the court departed from the standard range under the free crimes aggravator, which allows the court to impose a sentence above the standard range when some of the

current offenses may go unpunished. CP 62; RCW 9.94A.535(2)(c); *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013). The court also found a mitigating factor, finding Ms. Jensen was a willing participant in the crimes the court found Mr. Williams committed. CP 62.

All of the crimes Mr. Williams was found guilty of were C felonies, which the legislator has determined has a maximum range of 60 months. RCW 9A.20.021(1)(c). And while the legislature modified the scoring for domestic order violations to include misdemeanor domestic violence convictions, it did not reclassify this offense as more serious, in order to allow for greater standard ranges. RCW 9.94A.030(42); RCW 9.94A.510.

The legislature also stated sentencing courts must consider the purposes of the Sentencing Reform Act when imposing its sentence. RCW 9.94A.535(2)(a); RCW 9.94A.537(6). An exceptional sentence is only appropriate "when the circumstances of the crime distinguish it from

other crimes of the same statutory category." *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).

When the court imposed a sentence half again as long as the legislature authorized, it imposed an excessive sentence. None of the purposes of the Sentencing Reform Act are achieved by imposes a sentence outside the standard range, especially in light of the mitigating circumstances found by the sentencing court. *State v. Weller*, 185 Wn. App. 913, 931, 344 P.3d 695 (2015). This Court should accept review of whether Mr. Williams' excessive sentence achieved the goals of the Sentencing Reform Act and the legislature's intent.

F. CONCLUSION

Mr. Williams respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 6th day of July 2020.

Respectfully submitted,

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APPENDIX

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FILED
6/8/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAMS, ALLEN JAMES, DOB: 08/08/1976, Appellant.	)	No. 79652-6-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Allen James Williams was convicted of driving under the influence of drugs (DUI), escape in the third degree, and six counts of domestic violence felony violation of a no-contact order (VNCO) following a bench trial. He argues that insufficient evidence supports five of the VNCO convictions. He also contends that the court imposed a clearly excessive exceptional sentence and that the terms of community custody cause his sentence to exceed the statutory maximum on all but one of the VNCO counts. We conclude that sufficient evidence supports Williams' convictions and that his sentence is not clearly excessive. But we remand for the court to either amend the community custody terms or resentence within the statutory maximum on all but one count of domestic violence felony VNCO.

FACTS

On the evening of December 29, 2017, Washington State Patrol Trooper John Axtman pulled over a gray Mazda driven by Williams for failing to stop at a stop sign. Williams' girlfriend April Jensen sat in the front passenger seat of the car. Williams told Trooper Axtman that he was violating an active no-contact order by being with Jensen. Trooper Axtman conducted a records check and confirmed the existence of a court order protecting Jensen from Williams.

Trooper Axtman noticed signs of intoxication. Williams admitted he used drugs earlier that day and the day before. Trooper Axtman asked Williams to perform field sobriety tests and concluded Williams was driving while under the influence of drugs. He arrested Williams for DUI and VNCO.

Trooper Axtman drove Williams to the hospital for a blood test. After the blood draw, Williams ran from the emergency room. Hospital security eventually caught Williams "on the other side of the hospital." The results of the blood test showed Williams tested positive for amphetamine, methamphetamine, and morphine. Trooper Axtman booked Williams into the Snohomish County jail.

While in jail, Williams continued to contact Jensen in violation of the no-contact order. Jail telephone logs show that between December 29, 2017 and May 18, 2018, Williams made 1,374 calls to the telephone number associated with Jensen. Of these, 67 calls were "completed."

The State charged Williams with one count of DUI, one count of escape in the third degree, and six counts of domestic violence felony VNCO. One of the VNCO counts was for being in the car with Jensen the night of his arrest and the

other five counts were for the calls he made to Jensen from jail. Williams waived his right to a jury trial.

Jensen refused to appear to testify at trial. The State played the video and audio recording of Trooper Axtman's contact with Williams during the traffic stop and his arrest. The recording includes a conversation between Trooper Axtman and Jensen. Trooper Axtman identified the voice on the jail call recordings as that of Jenkins. The court also admitted into evidence the completed calls Williams made from jail to the phone number associated with Jensen. Victim advocate Shervin Sima testified that she had called the same number Williams dialed from jail at least four times and each time Jensen answered.

Williams testified that he had not spoken to Jensen since the night he was arrested. He claimed that the telephone number and the female voice in the recorded jail calls belonged to his other girlfriend "Erin Williams."

The court convicted Williams as charged. The court entered extensive findings of fact and conclusions of law. The court imposed a concurrent suspended sentence of 363 days for the misdemeanor convictions of DUI and third degree escape. With an offender score of 19, including nine prior convictions for domestic violence VNCO between 2005 and 2019, the standard sentence range for each count of felony VNCO was "60-60 months." The court imposed an exceptional sentence above the standard range of 90 months total confinement—60-month concurrent sentences for five counts of domestic violence felony VNCO and a consecutive 30-month sentence for the sixth count.

The court entered findings of fact and conclusions of law in support of the exceptional sentence. The court also imposed 12 months of community custody on each VNCO conviction. Williams appeals.

ANALYSIS

Sufficiency of the Evidence

Williams concedes the evidence supports one count of felony VNCO because Trooper Axtman saw Jensen in the front passenger seat of Williams' car on December 29, 2017. Williams argues that insufficient evidence supports the other five VNCO convictions as to the jail telephone calls.

When assessing whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). Following a bench trial, we determine whether substantial evidence supports the trial court's findings of fact and whether the findings in turn support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Stevenson, 128 Wn. App. at 193. Unchallenged findings are verities on appeal. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). We review conclusions of law de novo. Stevenson, 128 Wn. App. at 193.

In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences drawn therefrom. State v.

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact to resolve conflicting testimony and evaluate the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

" 'Circumstantial evidence and direct evidence are equally reliable' in determining the sufficiency of the evidence." State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470, 477 (2010) (quoting Thomas, 150 Wn.2d at 874). But inferences based on circumstantial evidence must be reasonable and cannot stem from speculation. State v. Scanlan, 193 Wn.2d 753, 771, 445 P.3d 960, 968 (2019).

A person commits the crime of felony VNCO when the person knows of an existing order, knowingly violates that order, and "has at least two previous convictions for violating the provisions of" a no-contact order. RCW 26.50.110(1)(a), (5). Here, there is no dispute that Williams knew of an existing order prohibiting him from contacting Jensen and that he had at least two prior VNCO convictions. Williams contends that the evidence at trial is insufficient to establish beyond a reasonable doubt that he knowingly violated the no-contact order while he was in jail. He argues that the court "speculated" that the voice on the recorded telephone calls belonged to Jensen.[1] He challenges several of the trial courts findings of fact, including:

> 16. The Court finds that "Erin" was created so that the Defendant and Ms. Jensen could communicate, or attempt to communicate, in violation of the no contact order.
>
> 26. In [jail telephone] call [number 22 made on January 20, 2018], the Defendant referenced telling Trooper Axtman he thought the restraining order was dropped. The female responded by

[1] Williams cites various scientific articles that discuss the reliability of voice recognition testimony. However, as Williams did not raise these issues at the trial court, we do not consider them on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

> saying, ["]I thought you did not want me to do that." Only April Jensen had a restraining order. There would have been no reason why Erin would have [made] such a comment since Erin did not have a restraining order with the Defendant.
>
> 29. April Jensen was the only one that had the no contact order and the only one that would have sought to have it modified or removed, not Erin Williams.[2]

We conclude that substantial evidence supports the court's findings. A jail receptionist and records custodian identified the telephone number that Williams dialed for each count of VNCO. Victim advocate Sima testified that she dialed the same number several times and each time, the person who answered the phone identified herself as Jensen. Trooper Axtman testified that he recognized the female voice on each of the calls and that the voice belonged to Jensen. Trooper Axtman also testified that "there's little bits of information" in the calls "that only [Jensen] would technically know" because she was at the scene of Williams' arrest, such as conversations about confiscating Williams' cell phone and details about the traffic "stop itself," the field sobriety tests, and impounding Williams' car. After reviewing all of the evidence, the court concluded there was "no reasonable doubt" that the "distinctive" voice on the calls "was April Jensen and was not Erin Williams."

Further, the content of many of the calls made clear that Williams was talking to Jensen rather than "Erin." For example, Williams conceded that

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[2] Williams also challenges findings of fact 34 and 40. He argues that they are actually conclusions of law. Where the court erroneously labels a conclusion of law as a finding of fact, we review it de novo as a conclusion of law. State v. Z.U.E., 178 Wn. App. 769, 779, 315 P.3d 1158 (2014); see State v. Fedorov, 183 Wn. App. 736, 744, 335 P.3d 971 (2014) ("We review findings of fact and conclusions of law not as they are labeled, but for what they truly are."). But because Williams challenges only the labeling of the conclusions, not their sufficiency, we do not address them. See RAP 10.3(a)(6).

Jensen was "the only person [he] had a no-contact order with at the time of this incident." In one of the recorded calls, he talks specifically about dropping the no-contact order. He tells Jensen, "The ball is in your court" and to "just get on it will [you] please." In another recording, Williams states he told Trooper Axtman that he thought the no-contact order had been dropped. Jensen responds, "I thought you did not want me to do that."

Finally, the unchallenged findings establish that Williams often referred to "Erin" in the third person during the calls with Jensen and that Jensen was sometimes confused about who Williams was talking about. For example, during one of the calls, Williams told Jensen, "That chick told me she had that restraining order dropped." Jensen was "clearly confused." Williams attempted to refocus her by saying, "You picking up what I'm putting down?" Jensen responded, "Yes, yeah."

Viewing the evidence in a light most favorable to the State, a reasonable finder of fact could conclude that Williams knowingly violated an existing no-contact order. Sufficient evidence supports his convictions.

Exceptional Sentence

Williams argues that the trial court abused its discretion by imposing a "clearly excessive" sentence. We disagree.

A trial court may impose a sentence outside the standard range if it finds that there are "substantial and compelling reasons" to do so. RCW 9.94A.535. A sentence outside the standard range is subject to appeal. RCW 9.94A.585(2). But we may reverse a sentence outside the standard sentence range only if we

find (a) the reasons provided by the sentencing court are not supported by the record or (b) the sentence was "clearly excessive." RCW 9.94A.585(4). A "clearly excessive" sentence is one that is exercised on untenable grounds or for untenable reasons or that is based on an action that no reasonable person would have taken. State v. Knutz, 161 Wn. App. 395, 410, 253 P.3d 437 (2011). When the trial court bases an exceptional sentence on proper reasons, a sentence is excessive "only if its length, in light of the record, . . . shocks the conscience." Knutz, 161 Wn. App. at 410-11. We review whether an exceptional sentence is clearly excessive for an abuse of discretion. Knutz, 161 Wn. App. at 410.

Here, the trial court imposed an exceptional sentence under RCW 9.94A.535(2)(c). RCW 9.94A.535(2)(c) authorizes a trial court to depart from the standard range when a defendant has "committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." Williams does not dispute that the record supports the court's authority to depart from the standard range. He argues that the consecutive 30 months added to his standard-range sentence is "clearly excessive" because the court found Jensen's willing participation in the crimes was a mitigating factor.

We conclude Williams' sentence was not clearly excessive. Williams had an offender score of 19 on each of the six felony counts of domestic violence VNCO. His criminal history includes multiple domestic violence VNCO convictions. The standard-range sentence for each count of VNCO is 60 months to run concurrently.[3] Had the court imposed concurrent sentences on all six

[3] See RCW 9.94A.589(1)(a).

counts, Williams would serve a total of 60 months in prison. This is the same sentence Williams would serve if convicted of only one count of VNCO. Thus, five of the six felony charges would have gone unpunished had the court imposed a standard-range sentence. Instead, the court imposed a concurrent standard-range sentence on five of the VNCO counts and a consecutive 30-month sentence on one count for a total of 90 months. The court's sentence was not exercised on untenable grounds or for untenable reasons. And it does not shock the conscience given the number of current felony VNCO convictions before the court and Williams' extensive criminal history.

Statutory Maximum Sentence

Williams argues that the trial court abused its discretion when it imposed a term of community custody exceeding the statutory maximum sentence on all but one of the counts of felony VNCO. We agree.

RCW 9.94A.701(9) prohibits imposing a term of community custody that "exceeds the statutory maximum for the crime." See State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012) (per curiam). Williams was convicted of class C felonies. RCW 26.50.110(5). The statutory maximum sentence for a class C felony is 60 months. RCW 9A.20.021(1)(c). The court sentenced Williams to 60 months in custody on five of the VNCO convictions as charged in counts 1, 5, 6, 7, and 8. It also imposed 12 months of community custody for each of those counts. Combined with his prison sentence, Williams' 12-month community custody term exceeds the 60-month maximum sentence.

We remand to the trial court to either amend the community custody terms or resentence on the applicable counts.

Statement of Additional Grounds

Williams filed a statement of additional grounds for relief. We address his claims to the extent that we can discern the allegations. See RAP 10.10(c).

Williams argues he received ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, Williams must show that his attorney's representation fell below an objective standard of reasonableness and the deficient representation caused prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Courts apply a strong presumption that defense counsel's trial choices fall within a wide range of reasonable professional assistance. State v. Grier, 171 Wn.2d 17, 38, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). This includes decisions about which witnesses to call for trial and what evidence to present at trial. In re Pers. Restraint Petition of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004); In re Pers. Restraint of Lui, 188 Wn.2d 525, 552, 397 P.3d 90 (2017).

Williams claims that his attorney played for the court only selective parts of the video from Trooper Axtman's patrol car dashboard camera, portions he describes as "beneficial to the State"; did not call several witnesses for trial that Williams believes would have benefitted him; and did not adequately "question" Sergeant James Arnold. Williams fails to show that his attorney's tactical decisions were deficient.

Williams also claims that he was denied his right to CrR 3.5 and 3.6 hearings and that he was precluded from pointing out that Trooper Axtman conducted the field sobriety tests outside the view of his dashboard camera.[4] Williams is mistaken. The court conducted both CrR 3.5 and 3.6 hearings before trial. And Williams questioned Trooper Axtman about the failure to video record the field sobriety tests during cross-examination.

We affirm Williams' convictions but remand to either amend the community custody terms or resentence within the statutory maximum on all but one count of domestic violence felony VNCO.

Brennan, J.

WE CONCUR:

[4] Williams refers to this as a "Brady v. Maryland issue" but raises no claim that the State withheld exculpatory evidence. See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79652-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Snohomish County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 6, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

July 06, 2020 - 4:26 PM

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