

66836-6

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COA No. 66836-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD SWEAT,

Appellant.

2011 SEP 21 PM 4:57  
COURT OF APPEALS  
DIVISION ONE  
CLERK OF COURT  
JENNIFER L. SPOFFORD

ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

The Honorable Mariane Spearman

APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. The defendant's exceptional sentence must be reversed where the State failed to prove the sole aggravating factor.
2. The court erred in entering Conclusion of Law I.b.
3. The court erred in entering Conclusion of Law II.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Under the SRA, the "pattern of abuse" aggravating factor of RCW 9.94A.535(3)(h)(i), read with the statutory definition of "victim" at RCW 9.94A.030(53), is limited to circumstances where the defendant's current offense is part of an ongoing pattern of abuse of the same victim(s). The State does not successfully prove this aggravating factor simply by reciting the defendant's criminal history of domestic violence offenses committed against past complainants who are unconnected to the current crime.

Must the defendant's exceptional sentence be reversed where the sole aggravating factor proffered to support the over-length term was not established by evidence sufficient to allow it to be proved beyond a reasonable doubt?

2. Was the evidence submitted at Mr. Sweat's bench trial insufficient to prove the aggravating factor that the crime charged was part of a pattern of abuse of the victim, where the prior

incidents submitted to prove the factor consisted merely of the defendant's prior convictions for crimes against past complainants, unconnected to the present charge?

3. Where the term "victim" or "victims" as used in the Sentencing Reform Act, including in the aggravating factor of RCW 9.94A.535(3)(i), is defined as person(s) suffering harm as a direct result of the currently charged offense, are different complainants culled from the defendant's prior convictions "victims" for purposes of this aggravating factor?

### **C. STATEMENT OF THE CASE**

Richard Sweat was charged with Assault in the Second Degree – Domestic Violence pursuant to RCW 9A.36.021(1)(a) and RCW 10.99.020. CP 1. In addition, the charging document alleged the aggravating factor that the crime involved domestic violence and was part of an ongoing pattern of psychological, physical or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time, pursuant to RCW 9.94A.535(3)(h)(i). CP 1-2.

Mr. Sweat waived his right to a jury and the case was tried to the court. CP 11; 1/10/11RP at 48-49. In addition, following an oral colloquy and a written waiver of his right to counsel, Mr. Sweat

represented himself at trial. CP 12-13. 1/10/11RP at 61-73.

Kellie Kenworthy testified that Mr. Sweat punched her forcefully in the eye during an argument, causing her to fall to the floor and become unconscious. 1/12/11RP at 291-98. According to Ms. Kenworthy, Mr. Sweat then took her to the emergency room; however, he instructed her to say that she had fallen accidentally and hit herself on a box. 1/12/11RP at 298.

A triage nurse at the Seattle Veterans Hospital, who conducted an intake interview of Ms. Kenworthy for purposes of determining treatment, testified that Ms. Kenworthy initially said she injured herself by falling. However, later when she was separated from Mr. Sweat in the hospital's admitting area, she stated that he had struck her. 1/11/11RP at 183-88. The treating physician, Dr. Luther Richey, testified that Ms. Kenworthy had an orbital fracture in her left eye socket. 1/11/11RP at 229-34.

The trial court found Mr. Sweat guilty of second degree assault, and also found the aggravating factor of a pattern of abuse had been proved, based on prior judgments documenting convictions involving abuse of "other women." 1/12/11RP at 368, 372, 424. Mr. Sweat was given an exceptional sentence of 84 months, beyond his standard range of 43 to 57 months. CP 113;

3/3/11RP at 79-80.

He timely appeals. CP 122.

#### D. ARGUMENT

##### **THE DEFENDANT'S EXCEPTIONAL SENTENCE MUST BE REVERSED WHERE THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE THE SOLE AGGRAVATING FACTOR.**

a. The State must prove aggravating factors beyond a reasonable doubt. The trial court in a criminal case may impose a prison sentence that is longer than the standard range term of incarceration authorized by the defendant's current offense and his prior convictions, where, *inter alia*, the State proves one or more of the "aggravating factors" enumerated in the Sentencing Reform Act at RCW 9.94A.535.

RCW 9.94A.535, entitled "Departures from the guidelines," provides in pertinent part as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.535.

Pursuant to RCW 9.94A.535, upward departure sentences may be imposed based on proof of the presence of one or more of the

aggravating factors listed in subsections (2) and (3). RCW 9.94A.535(1), (2), (3). These aggravating factors must be proved to the fact-finder beyond a reasonable doubt. RCW 9.94A.537(3); State v. Barnes, 117 Wn.2d 701, 711, 818 P.2d 1088 (1991); U.S. Const. amend. 14; see also In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

To reverse an exceptional sentence, the appellate court must find: “(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive[.]” RCW 9.94A.585(4).<sup>1</sup>

On appeal, the appellate court uses the same standard of review for the sufficiency of the evidence to prove an aggravating factor as it does for assessing the sufficiency of the evidence to prove the elements of a crime. State v. Yarbrough, 151 Wn. App.

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<sup>1</sup> This issue may be raised initially on appeal. A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). A defendant may challenge an illegal or erroneous sentence initially on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Furthermore, a defendant may always challenge the sufficiency of the evidence for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998).

66, 96, 210 P.3d 1029 (2009). The test for reviewing a defendant's challenge to the sufficiency of the evidence is to ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential facts beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980).

**b. The “pattern of abuse” aggravating factor was not proved below by evidence that the defendant’s criminal history included convictions involving complainants who were not the victim of the current offense.** Based on his current offense and his criminal history, Mr. Sweat’s standard sentencing range was 43 to 57 months. During the aggravating factor portion of Mr. Sweat’s bench trial, the prosecutor submitted judgments reflecting prior Washington convictions for assault and other offenses committed against complainants unconnected to the current offense of conviction. 1/12/10RP at 377- 90; Supp. CP \_\_\_\_, Sub # 43A (State’s exhibits 15, 16, 17; 18, 19, 20, 21, 22); see also CP 42-49.

This evidence was inadequate and the court erred in entering Conclusions of Law I.b and II. Supp. CP \_\_\_\_, Sub # 60. A court may impose an exceptional sentence if the charged offense involved domestic violence and “[t]he offense was part of an

ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(h)(i); see, e.g., State v. Barnett, 104 Wn. App. 191, 203, 16 P.3d 74 (2001).

However, Mr. Sweat’s prior convictions fail to establish the aggravating factor where the prior incidents did not involve the same victim, Kellie Kenworthy, as the currently charged offense for which the defendant was being sentenced. The SRA’s plain language establishes that various other complainants plucked from past cases in Mr. Sweat’s criminal history do not constitute “victims” for purposes of aggravating the defendant’s current offense under RCW 9.94A.535(3)(h)(i).

In general, the reasons for the imposition of an exceptional term must not be predicated on matters that are necessarily considered in computing the defendant’s presumptive range. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117, 1119 (1986). Additionally, the reason for the departure must relate to the circumstances of the crime. State v. Houf, 120 Wn.2d 327, 331, 841 P.2d 42, 44 (1992); State v. Barnes, 117 Wn.2d at 711.

Specifically, RCW 9.94A.030, the definitional section of the SRA, provides that "[u]nless the context clearly requires otherwise," the term "victim" is defined as follows:

"Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

(Emphasis added.) RCW 9.94A.030(53). Pursuant to Laws 1990, ch. 3, § 602, the definition of "victim" was expanded to include those who have sustained emotional or psychological injury as a result of the charged crime. Plainly, however, the definition of victim makes clear that complainants from prior convictions do not qualify as victims for purposes of the SRA's "pattern of abuse" aggravating factor unless they are the same person as the victim of the current crime, here, Ms. Kenworthy.

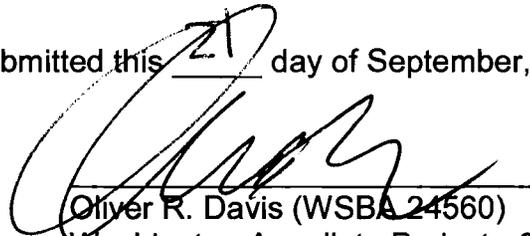
Legislative definitions included in a statute are controlling. State v. Watson, 146 Wn.2d 947, 954–55, 51 P.3d 66 (2002). The above statutory provision is clear on its face, and its meaning is to be derived from the plain language alone. Ultimately, therefore, the SRA's definition of "victim" is not ambiguous and need not be "construed" or "interpreted." See American Continental Insurance Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004).

c. **Remedy.** The complainants from Mr. Sweat's prior convictions are not "victims" to whom the pattern of abuse aggravating factor applies. No adequate proof of the aggravating factor at RCW 9.94A.535(3)(h)(i) was presented below, and Mr. Sweat's exceptional sentence must therefore be reversed.

**E. CONCLUSION**

Mr. Sweat respectfully requests this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 21 day of September, 2011.

  
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STATE OF WASHINGTON,	)	
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	)	
RICHARD SWEAT,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |                            |  |
|---|----------------------------|--|
| <p>[X] KING COUNTY PROSECUTING ATTORNEY<br/>APPELLATE UNIT<br/>KING COUNTY COURTHOUSE<br/>516 THIRD AVENUE, W-554<br/>SEATTLE, WA 98104</p> | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |
| <p>[X] RICHARD SWEAT<br/>756749<br/>COYOTE RIDGE CORRECTIONS CENTER<br/>PO BOX 769<br/>CONNELL, WA 99326-0769</p>                           | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>HAND DELIVERY<br/>_____</p> |

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COURT OF APPEALS DIVISION ONE  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2011.

X \_\_\_\_\_ 

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