

70936-4

70936-4

NO. 70936-4-I

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

STATE OF WASHINGTON

Respondent

v.

CARLA A. FORD,

Appellant

BRIEF OF RESPONDENT

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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I. ISSUES

1. The defendant stipulated to the admissibility of her statements to police. After answering several questions she responded to one question by closing her eyes and hanging her head.

a. Was this evidence a comment on the defendant's exercise of her right to remain silent?

b. If it was error to admit that evidence and for the prosecutor to comment on it in closing argument, was that error harmless?

2. The defendant did not object when the trial judge did not articulate on the record whether he considered alternatives to total confinement and when he did not reduce to writing his reasons for not using those alternatives despite a statutory directive to do so.

a. Has the defendant failed to preserve this issue for review?

b. When the defendant has already completed serving her sentence, and the issue is moot, should the court decline to review this error?

II. STATEMENT OF THE CASE

On December 10, 2012 Scott Nance left his Lake Stevens home to shop for a birthday present. He returned home after 11:00

a.m. Mr. Nance noticed an unoccupied green Chevrolet pickup truck parked on a gravel road across from his driveway. Mr. Nance also noticed that the screen door to his front door was open and a light was on in his bedroom. Mr. Nance did not typically use his front door, and he had turned the light off before he left. 7/29/13 RP 43-44, 46-47.

Mr. Nance had loaded weapons in his home and was concerned that someone had gotten to them. He pulled out his pistol and went to his front door. He noticed that the lock fell out of the door when he pushed it open. The lock had not previously been broken. When Mr. Nance walked in he saw Shauntel Raymur coming out of his bedroom. Mr. Nance pointed his gun at Ms. Raymur and asked her what she was doing. Ms. Raymur responded "I'm with her." Mr. Nance heard someone come out of his bathroom and go out the back door. Mr. Nance looked out of his window and saw the defendant, Carla Ford, running out of his carport. Ms. Raymur followed the defendant out the back door. The two women ran to the pickup truck parked across the street. Mr. Nance called 911. As he did that the defendant and Ms. Raymur started the truck and drove toward Mr. Nance, swerving to avoid him as they drove off. 7/29/13 RP 47-52.

Mr. Nance went back into his house and found that it has been ransacked. Drawers in his bedroom had been dumped out. A box from the spare bedroom had been emptied and Mr. Nance's computer, knives, bullets, prescription medication, and other property had been placed in that box. 7/29/13 RP 53.

Police arrived on scene about five minutes later. On December 13 police showed Mr. Nance two photo line ups. Mr. Nance picked Ms. Raymur and the defendant out as the two women who had broken into his home without his permission. 7/29/13 RP 53-57.

On December 6, 2012 Mr. Francis Schatz went outside when he heard his dog barking. Mr. Schatz's next door neighbor, Liz Ries, had left for work by that time. Her son, Nathen Ries, was home studying. Mr. Schatz saw a woman get out of a blue Chevrolet pickup truck and walk up to the Ries' front door. Mr. Schatz had never seen that truck in the neighborhood before. Mr. Ries heard the doorbell ring, but ignored it because he was studying. The woman then walked away from the door, looked toward the backyard, and then got back into the passenger side of the pickup truck. The driver was a dark haired woman. 7/29/13 RP 30-31, 36-37; 7/30/13 RP 77-80, 85-86.

Mr. Schatz saw the pickup drive off. Mr. Schatz got dressed and left looking for the truck. He found it parked around the corner, unoccupied. Mr. Schatz wrote down the license plate number which he later provided to the police. When Mr. Schatz returned home he noticed Ms. Ries' gate and her back door was open. He then called Ms. Ries at work regarding what he saw. Mr. Schatz then left to get coffee. When he returned he saw the two women he had previously seen at the Ries's residence walking near that residence. One of the women was carrying a backpack. 7/30/13 RP 83-91.

The gate and the door had been closed when Ms. Ries left for work. When Ms. Ries heard from Mr. Schatz she called her son. Mr. Ries had been listening to music so he had not heard anyone come in the house. When he went downstairs he found his boots were not where he left them. There were boxes that had been in the garage that were strewn inside the house. His binder had been removed from his backpack, and his backpack was gone. 7/29/13 RP 31-33, 37-39.

Detective Margaret Ludwig investigated both the Nance and Ries burglaries. She showed Mr. Nance and Mr. Schatz photomontages. Ms. Raymur was picked out by both Mr. Nance

and Mr. Schatz. Only Mr. Nance picked the defendant out as one of the women at his house. 7/30/13 RP 104-110.

Detective Ludwig located Ms. Raymur and the defendant together at a trailer park. The defendant was standing by the truck that had been identified in both burglaries. The truck was impounded and later searched pursuant to a search warrant. Inside the truck police found backpacks, a crowbar, a police scanner, a blank check for the defendant, walkie talkies, a pair of gloves, and some tools. In Detective Ludwig's experience burglars use walkie talkies to communicate with one another and used tools like those found in the truck to pry open doors. 7/30/13 RP 111-120.

The defendant was charged with the burglary of the Nance home and the Ries home. 1 CP 53-54. The defendant was convicted of the burglary of the Nance home. The jury also found Mr. Nance was present in his residence when the crime was committed. The defendant was acquitted of the burglary of the Ries home. 1 CP 19- 21.

III. ARGUMENT

A. THE COURT DID NOT ERR WHEN IT PERMITTED EVIDENCE OF THE DEFENDANT'S NONVERBAL RESPONSE TO AN OFFICER'S QUESTION. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY REFERRING TO THAT CONDUCT IN CLOSING ARGUMENT.

Before trial the defendant stipulated that when she spoke to police she had been advised of her Miranda warnings and had knowingly, voluntarily, and intelligently waived those rights when she spoke to the police. She stipulated that therefore her statements to police were admissible. 5/10/13 RP 6-7; 3 CP ___ (sub 23).

The defendant and Ms. Raymur's cases were joined for trial. Ms. Raymur's counsel moved in limine to exclude the defendant's response when Detective Ludwig asked her "you remember the guy who pulled the gun on you guys?" The defendant had responded by closing her eyes and hanging her head. She then requested an attorney. The State clarified that it did not intend to elicit the defendant's request for counsel. It offered to redact reference to Ms. Raymur from the detective's question. Counsel for Ms. Raymur accepted that resolution. The defendant did not object to evidence that she closed her eyes and hung her head when

Detective Ludwig asked her about the man with the gun. 7/29/13
RP 5-7, 17-20.

The defendant now argues that the prosecutor committed prejudicial prosecutorial misconduct when it elicited evidence of the defendant's reaction to Detective Ludwig's question, and when he referenced that evidence in his closing argument.

1. The Court May Consider The Issue Although The Defendant Did Not Make A Contemporaneous Objection At Trial.

Although the defendant did not object to the admission of the evidence she now challenges, the court may consider the issue if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). An issue meets this criteria if the claimed error raised suggests a constitutional issue, and if the appellant has made a plausible showing that that the error had a practical and identifiable consequence in the trial of the case. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). "If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

Here, because a comment on a defendant's exercise of her right to remain silent implicates the Fifth Amendment, the defendant

raised a constitutional issue. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Further, because the record is sufficient to determine the merits of that claim, any error would be manifest.

A defendant must unambiguously invoke her right to remain silent to be effective. Berghius v. Thompkins, 560 U.S. 370, 381, 130 S.Ct. 2250, 176 L.Ed.2d 108 (2010). Whether a defendant has invoked her right to remain silent is assessed based on an objective evaluation of her statements in the context of the interrogation. State v. Piatnitsky, ___ Wn.2d ___, 325 P.3d 167, 170-171 (2014). Thus whether the defendant asserted her right to remain silent when she hung her head in response to the detectives' question can be determined based on the record in the trial court.¹ Therefore, despite the defendant's decision not to object to the evidence she now challenges, the court may nevertheless review the claimed error.

¹ If the standard to determine whether a defendant had asserted her right to remain silent was a subjective one, then the alleged error would not be manifest. As the discussion between the judge and the prosecutor demonstrates, what the defendant intended to convey by her conduct was subject to alternative interpretations. 7/29/13 RP 19-20. Because that record was not developed, there is insufficient evidence in the record to determine the defendant's subjective intent. Thus, under a subjective standard the error would not be manifest, and should not be reviewed. Given the Supreme Court's most recent pronouncement in Piatnitsky however, the State agrees the test is an objective one, and the court may review the issue despite the defendant's lack of objection.

2. The Prosecutor Did Not Improperly Comment On The Defendant's Right To Remain Silent.

In order to obtain a new trial on the basis of prosecutor misconduct the defendant bears the burden to show that the prosecutor's actions were improper and that she was thereby prejudiced. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Here the evidence and argument that the defendant challenges were not a comment on her right to remain silent for two reasons. The defendant's reaction to the detective's question was a response; she therefore was not silent. Further, it did not constitute an unequivocal assertion of her right to remain silent. Therefore the prosecutor's actions were not improper.

Evidence concerning a defendant's responses to questions does not implicate the Fifth Amendment right to silence. State v. Gregory, 158 Wn.2d 759, 837, 147 P.3d 1201 (2006). For that reason the Court found no error when evidence that the defendant refused to give a formal or recorded statement was admitted when he otherwise agreed to talk to police. Id.

Although the defendant here did not verbalize her response when the detective asked her about having a gun pulled on her at one of the burglaries, her reaction to that question was a nonverbal

statement. Nonverbal conduct is a statement when intended as an assertion. In re Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985). Thus, just as it was proper to admit the defendant's refusal to be recorded in Gregory because that did not constitute silence, it was proper to admit the defendant's reaction here because that reaction was actually a responsive statement to the detective's question.

Even if it was unclear what the defendant was attempting to convey when she hung her head and closed her eyes, it was not an unequivocal assertion of her right to remain silent. A defendant's invocation of her right to remain silent "must be sufficiently clear 'that a reasonable police officer in the circumstances would understand the statement to be [an invocation of Miranda rights].'" Piatnitsky, 325 P.3d at 171, quoting, Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Here the defendant answered several questions about her employment and the items found in her truck. 7/30/13 RP 127-128, 131. When she was asked about one fact directly relating to one of the burglaries however, she did not give a verbal response. She did not say "I don't want to talk about it" or "I won't answer that question."

The defendant did, however give a response. The defendant initially denied any involvement in the burglaries. 7/29/13 RP 19. When the officer revealed that she knew about one specific detail of one of the burglaries, i.e. that Mr. Nance had pulled a gun on the defendant and Ms. Raymur, the defendant's conduct conveyed something about her thought process. As the prosecutor argued it was a tacit admission that she had been present at the burglary. Or as the judge suggested it perhaps conveyed irritation, that "this is baloney." 7/29/13 RP 19. The defendant's conduct, however, did not convey an unequivocal statement that she was asserting her right to remain silent.

A defendant's conduct may make clear to the officer that she did not want to talk to the officer. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). There the defendant never answered any of the officer's questions. Instead he "totally ignored" the officer, at one point looking down. Id. at 232. Under those circumstances the court held that evidence the defendant did not answer the officer's questions, and that he was a "smart drunk" for refusing to do so, violated Easter's right to silence. Id. at 241.

Unlike Easter the defendant here had answered some of the officer's questions. By that action she had indicated her willingness

to waive her right to remain silent. Those circumstances would reasonably lead an officer to consider whether or not the defendant wanted to continue talking when she hung her head and closed her eyes. It would be reasonable for the officer to ask a question to clarify the defendant's wishes in that regard. If an officer needs to clarify whether a defendant wishes to continue talking, then the defendant has not clearly invoked her right to remain silent.

Since at best the defendant's actions were equivocal, she did not invoke her right to remain silent. Evidence that she hung her head in response to the detective's question about a specific fact relating to the Nance burglary was not a comment on her right to remain silent. Evidence of an action that is responsive to a question, and at best can be described as equivocal is therefore not an impermissible comment on the defendant's right to remain silent. It was not improper therefore to elicit testimony regarding that evidence, and to refer to it in closing argument. Where a prosecutor's conduct is not improper, no misconduct has occurred.

3. Even If Evidence And Argument Regarding The Defendant's Conduct Was Error It Was Harmless.

If the court finds that the evidence at issue here violated her right to remain silent, the defendant fails to show prejudice. To

assess the prejudice from a claim of a direct constitutional violation from the prosecutor's arguments the court employs the constitutional harmless error standard. State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653 (2012). Under that standard the court will look at the untainted evidence to determine if that evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986).

Here the only contested issue at trial was the identity of the burglars. Mr. Nance caught the defendant and Ms. Raymur in the act of burglarizing his home. He identified both Ms. Raymur and the defendant from a photomontage within a few days after the burglary. Mr. Nance made his selection fairly quickly. The manner in which he selected the defendant as one of the burglars indicated that he was sure that the defendant was one of the people he caught in his home. 7/30/13 RP 105-110. In addition to that Mr. Nance identified the defendant in court, without hesitation, as the woman he saw running from his carport after he heard the backdoor open. 7/29/13 RP 50. Nothing in the defendant's cross examination of Mr. Nance cast doubt on his identification. This

evidence, standing alone provides overwhelming evidence that the defendant burglarized Mr. Nance's home.

Other evidence corroborated Mr. Nance's identification. The defendant was arrested next to a truck containing her property. The license plate on the truck matched the license plate of the truck Mr. Schatz saw when the Ries home had been burglarized. Mr. Schatz and Mr. Nance both identified Ms. Raymur as one of the two people seen at each burglary. Ms. Raymur and the defendant admitted that they were friends, and were found together when he detective contacted them. The truck contained items commonly used in burglaries. There was a police scanner, which could be used to monitor whether police were in the area, and whether it was safe to commit a burglary at a particular location. The inference from the walkie talkies is that two people were involved in the burglary. Mr. Nance's door lock had been damaged and there were tools in the defendant's truck that could have caused that damage. 7/29/13 RP 48, 84, 94; 7/30/13 RP 111-122.

The defendant argues that the evidence was not overwhelming, pointing to testimony from eyewitness identification expert and an alibi witness. The testimony from these witnesses was not so compelling that it undermined Mr. Nance's identification.

The eyewitness identification expert witness reviewed one of the montages and concluded that it was suggestive. She based her opinion on her view that some of the women in the montage were not in the age and weight range of the witnesses' description of that suspect and that the officer investigating the case was the officer that presented the montages to the witnesses. 7/30/13 RP 165-167. However she could not say that the officer influenced Mr. Nance when he identified the defendant. She conceded that several aspects of the montage and the procedure by which it was shown to the witnesses were not suggestive. Further there were several factors that were present in this case which would enhance the witness' encoding of information identifying the defendant. 7/30/13 RP 179, 186-87. In addition, several of the factors which she testified might affect a witnesses' ability to encode a suspect's identity did not necessarily affect the witnesses' memory in this case. 7/30/13 RP 186-187. Finally she conceded "I have no idea whether [Scott Nance] was accurate or inaccurate" when he picked the defendant out of the line-up. 7/30/13 RP 189.

Mr. Freeman-Krenzer testified that Ms. Ford was with him on December 10. 7/30/13 RP 146-147. However Mr. Freeman-Krenzer also admitted that he had been in a traffic accident either

10 or 13 years before and sometimes suffered from memory loss.
7/30/13 RP 149-152.

Neither of these witnesses provided evidence that discredited Mr. Nance's identification of the defendant. Given that Mr. Nance saw the defendant under circumstances that even the expert witness conceded could enhance his ability to identify the defendant, the untainted evidence was sufficient to conclude that a jury would have found her guilty even without the evidence that she challenges. Any error in admitting that evidence was therefore harmless.

B. WHETHER THE COURT ERRED BY FAILING TO COMPLY WITH CERTAIN PROCEURAL REQUIREMENTS AT SENTENCING SHOULD NOT BE CONSIDERED BY THE COURT.

The defendant failed to appear for her original sentencing hearing. She was arrested on a warrant and was in custody at the time she was sentenced. 3 CP __ (sub. 49); 9/18/13 RP 3.

The defendant's standard range was 3-9 months. 1 CP 9. The State recommended an exceptional sentence of 12 months plus 1 day. 9/18/13 RP 2. The defense argued for 6 months confinement, noting that this was the defendant's first offense. 9/18/13 RP 3-4.

The court rejected both recommendations and sentenced the defendant to 9 months confinement. The court did not specifically address sentencing alternatives. Instead the court stated "I think the high end of the range is sufficient. So I'm going to sentence you, Ms. Ford, to nine months....I understand this is your first offense, but I believe this is an appropriate sentence and this will be the sentence of the court." 9/18/13 RP 5-6.

The defendant did not request an appeal bond. Nor did she object when the court did not specifically address sentencing alternatives on the record. Nor did she object when the court did not state its reasons for not allowing any sentence alternative. The defendant completed serving her sentence by March 2014. 3 CP ___ (sub 70).

1. Whether The Trial Court Erred When It Failed To Perform Certain Procedures At Sentencing Has Not Been Preserved For Review.

The defendant argues for the first time on appeal that the trial court erred when it did not consider alternatives to total confinement or state its reasons in writing for not granting those alternatives as required by RCW 9.94A.680. Generally appellate courts will not consider an issue raised for the first time on appeal. Kirkman, 159 Wn.2d at 926. An exception applies for sentencing

errors that result in illegal or erroneous sentences. State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). A sentence was erroneous when the court calculated the defendant's offender score without sufficient evidence to establish the defendant's criminal history. Id. In addition a challenge to the defendant's sentence may be raised without prior objection when the court acts without statutory authority to do so. State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993). Likewise, a challenge based on the constitutionality of the sentence has been permitted without a prior objection lodged in the trial court. State v. Bahl, 164 Wn.2d 739, 745, 193 P.3d 678 (2008).

The sentence imposed here was neither illegal nor erroneous. The court had the statutory authority to impose a term of total confinement if it chose to do so. The court's failure to articulate its consideration of alternatives to total confinement on the record and to reduce the reasons for not using those alternatives to writing did not render the sentence erroneous or illegal. Rather it amounted to a procedural error.

The defendant argues that she is entitled to raise a procedural error in sentencing for the first time on appeal, citing State v. Rienks, 46 Wn. App. 537, 541, 731 P.2d 1116 (1987). That

case does not support the conclusion that the procedural error here may be reviewed for the first time on appeal.

In Rienks the defendant challenged the trial court's calculation of his offender score, arguing that the court should have found two of his convictions constituted same criminal conduct. Rienks, 46 Wn. App. at 540-541. This court reviewed the sentence relying on State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719, 718 P.2d 796, cert denied, 479 U.S. 930 (1986).

In Ammons the Court considered the constitutionality of the SRA provision precluding appeal of a sentence within the standard range. Id. at 182-183. The court went on to state “[a]n appellant, of course, is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed.” Id. at 183. The Supreme Court called this statement dictum after Reinks had been decided. State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1012 (1993). The court held that in order for a “procedural appeal’ to be allowed the party challenging the court’s sentence must show the sentencing court had a duty to follow some specific procedure required by the SRA, and that it failed to do that. Id. at 712. In the context of a sentence within the standard range the defendant must show either that the trial court refused to employ

the procedure mandated by statute or that she timely and specifically objected. Id. at 713. Thus, the defendant was entitled to claim an error in the procedure used by the trial court when denying his request for a DOSA where the prosecutor had alerted the court to the issue and the court refused to amend the procedure it had employed even though the defendant had not specifically objected. State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005).

These decisions are consistent with cases which have articulated the reasoning underlying the requirement for a contemporaneous objection to permit appellate review. Kirkman, 159 Wn.2d at 935, State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), State v. Strine, 176 Wn.2d 742, 751, 293 P.2d 1177 (2013). A contemporaneous objection permits the court the opportunity to correct mistakes and avoid expensive appeals. Id. at 749. For that reason the "court has consistently refused to review alleged errors that were not objected to at trial, especially when an objection would have given the trial court an opportunity to correct the error." Id. at 751.

Here the defendant did not object either when the court did not specifically articulate that it had considered alternatives to total confinement or when it did not put in writing the reasons for not

granting her an alternative sentence. Nor did the prosecutor alert the court to the error. There is no indication that the court would have refused to comply with the requirements in RCW 9.94A.680 had it been alerted that it had overlooked those requirements. If the defendant had objected then the court could have easily corrected its oversight. The circumstances of this case are unlike those in which the court has contemplated that a procedural error could be raised for the first time on appeal. For that reason the court should decline to consider this issue.

2. Whether The Trial Court Erred At Sentencing Is Moot.

Alternatively, the court should decline to consider this issue because the issue is moot. "A case is moot if a court can no longer provide effective relief" Orwick v. Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). Because the defendant has served her entire sentence, a remand for the trial court to specifically consider alternatives to confinement on the record and put the reasons for not granting an alternative to total confinement in writing would not provide the defendant any effective relief. The issue is therefore moot.

A reviewing court will generally not consider an issue that is moot. In re Silas, 135 Wn. App. 564, 568, 145 P.3d 1219 (2006).

The court can make an exception when the issue presents a matter of continuing and substantial public interest. Seattle v. Johnson, 58 Wn. App. 64, 67, 791 P.2d 266 (1990). The criteria to consider in determining whether an issue falls within this category are (1) the public or private nature of the question, (2) the need for future guidance of public officers, and (3) the likelihood that the issue will reoccur. Id.

The first criterion is met when a court's decision has the potential to impact many offenders who are similarly situated. In Silas this court considered a challenge to the Department of Corrections' interpretation to amendments to the SRA relating to earned early release in part because it had the potential to affect many inmates. Silas, 135 Wn. App. at 568.

Unlike the issue in Silas the court's action here does not have the potential to affect many similarly situated offenders. There is nothing to suggest that a sentencing court would make a different decision if articulated on the record its consideration of alternatives to confinement and reduced its reasons for not using those alternatives so to writing.

Nor do the second or the third factor justify consideration in this case. The second criterion may be met when a statute has not

been previously construed, and there is a possibility that reasonable minds could differ on how to interpret the provisions of a statute. Under those circumstances there exists a need for the court to provide guidance in the future for public officers. That was the case in Silas; depending on who had correctly interpreted an amendment to the SRA, either DOC or the defendant, the defendant was entitled to either 30% or 50% earned early release time. Silas, 135 Wn. App. at 566. Similarly this Court construed RCW 10.73.170, the post-conviction DNA statute, even though the test had already been performed, when the parties disputed whether “serving a term of imprisonment” included offenders who were serving a term of community custody. State v. Slattum, 173 Wn. App. 640, 648, 295 P.3d 788, review denied, 178 Wn.2d 1010 (2013).

RCW 9.94A.680 is part of the SRA. The legislature employed the term “shall” when it enacted that portion of the statute at issue here. Law of Washington 1988, Ch. 157, §4. That provision has not been amended since it was adopted. The court has previously interpreted the word “shall” as it is contained in the SRA. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). In doing so the court considered the structure of the entire SRA to

conclude that in the context of the SRA, the term “shall” indicates a legislative intent to create a mandatory obligation. Id. Thus, although there are no cases that specifically address whether the language of the statute at issue here is discretionary or mandatory, it is clear from prior case law that is no need for further guidance of the court on this issue. Further, because the law is settled regarding what “shall” means within the context of the SRA, it is not likely that this error will recur as a result of an intentional act resulting from a misinterpretation of the statute.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant’s conviction and decline review of the sentencing error.

Respectfully submitted on July 17, 2014.

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