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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

No. 39327-1-II
COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
RICHARD L. SALLEE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay, Trial Court Judge
Cause No. 08-1-00482-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. Appellant’s Assignments of Error.....1

B. Issues Pertaining to Assignments of Error.....1-2

C. Evidence Relied Upon.....2

D. Statement of the Case.....2-5

 1 & 2. Procedural History & Statement of Facts.....2-3

 3. Summary of Argument.....4-5

E. Argument.....5-12

 1. THE TRIAL COURT DID NOT ERR BY NOT TAKING COUNTS TWO, THREE AND FOUR, MALICIOUS HARASSMENT AND ASSAULT IN THE SECOND DEGREE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE:

 (a) SALLEE MALICIOUSLY AND INTENTIONALLY INSULTED NARANJO AND RIVAS BY YELLING “DAMN MEXICANS, GO BACK TO YOUR OWN COUNTRY, YOU’RE ILLEGAL” AT THEM, WHICH CAUSED THE COUPLE TO;

 (b) FEAR FOR THEIR PERSONAL SAFETY AS HIS REMARKS MADE THEM SEEK THE SHELTER OF THEIR APARTMENT;

 (c) SALLEE THEN WENT INTO HIS APARTMENT RETRIEVED A RIFLE, RETURNED AND THEN;

 (d) INTENTIONALLY POINTED IT AT BOTH NARANJO AND RIVAS, WHICH MADE BOTH OF THEM FEAR FOR THEIR SAFETY.....5-8

2. THE TRIAL COURT DID NOT MISCALCULATE SALLEE’S OFFENDER SCORE REGARDING HIS CONVICTIONS FOR MALICIOUS HARASSMENT AND ASSAULT IN THE SECOND DEGREE IN TERMS OF SAME CRIMINAL CONDUCT BECAUSE:

- (a) RCW 9A.36.080(5)-MALICIOUS HARASSMENT-DEFINITION AND CRIMINAL PENALTY, CONTAINS AN ANTI-MERGER PROVISION;
- (b) SALLEE SEPARATED HIS CRIMES BY GOING INTO HIS APARTMENT TO RETRIEVE A RIFLE AFTER MAKING RACIAL EPITHETS AGAINST;
- (c) NARANJO AND RIVAS, WHO WERE TWO SEPARATE VICTIMS.....8-11

3. SALLEE DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COURT APPOINTED ATTORNEY DID NOT ARGUE AT SENTENCING FOLLOWING A JURY TRIAL THAT HIS (SALLEE’S) OFFENDER SCORE WAS MISCALCULATED BECAUSE THESE CRIMES ID NOT INVOLVE THE SAME CRIMINAL CONDUCT.....11-12

F. Conclusion.....12

TABLE OF AUTHORITIES

1. Table of Cases

<u>State v. Alvarez</u> , 128 Wash.2d 1, 904 P.2d 754 (1995).....	6
<u>State v. Day</u> , 51 Wash.App. 544, 754 P.2d 1021 (1988).....	11
<u>State v. Delmarter</u> , 94 Wash.2d 634, 618 P.2d 99 (1980).....	6
<u>State v. Haddock</u> , 141 Wash.2d 103, 110, 3 P.3d 733 (2000).....	9
<u>State v. Jensen</u> , 149 Wash.App. 393, 203 P.3d 393 (2009).....	11
<u>State v. McFarland</u> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	11
<u>State v. O’Neal</u> , 159 Wash.2d 500, 150 P.3d 1121 (2007).....	6
<u>State v. Salinas</u> , 119 Wash.2d 192, 829 P.2d 1068 (1992).....	6
<u>State v. Walton</u> , 64 Wash.App. 410, 824 P.2d 533 (1992).....	6

2. Other Jurisdictions

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	11
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3. Court Rules

RAP 10.3(b) Content of Brief.....	2
-----------------------------------	---

4. Statutory Authority

RCW 9A.36.080(5)-Malicious harassment-definition and criminal penalty.....	1, 4, 5, 8, 9, 10, 12
RCW 9.94A.589(1)-Consecutive or concurrent sentences.....	9, 11

A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking Counts II and IV (malicious harassment) and Count III (assault in the second degree) from the jury for lack of sufficient evidence.
2. The trial court erred in calculating Sallee's offender where Counts I and II involving the same victim (Rivas) and Counts III and IV involving the same victim (Naranjo) constituted the same or similar criminal conduct.
3. The trial court erred in allowing Sallee to be represented by counsel who provided ineffective assistance in failing to argue at sentencing that his offender score was miscalculated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by not taking counts two, three and four, malicious harassment and assault in the second degree, from the jury for lack of sufficient evidence when:
 - (a) Sallee maliciously and intentionally insulted Naranjo and Rivas by yelling "damn Mexicans, go back to your own country, you're illegal" at them, which caused the couple to;
 - (b) Fear for their personal safety, as his remarks made them seek the shelter of their apartment;
 - (c) Sallee went into his apartment, retrieved a rifle, returned and then;
 - (d) Intentionally pointed it at Naranjo and Rivas, which made both of them fear for their safety?
2. Did the trial court miscalculate Sallee's offender score regarding his convictions for malicious harassment and assault in the second degree in terms of same criminal conduct when:
 - (a) RCW 9A.36.080(5)-Malicious harassment-definition and criminal penalty, contains an anti-merger provision;
 - (b) Sallee separated his crimes by going into his apartment to retrieve a rifle after making racial epithets against;
 - (c) Naranjo and Rivas, who were two separate victims?

3. Did Sallee receive ineffective assistance of counsel when his court appointed attorney did not argue at sentencing following a jury trial that his (Sallee's) offender score was miscalculated when these crimes did not involve the same criminal conduct?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP." The Appellant's Brief shall be referred to as "AB."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Sallee's recitation of the procedural history and facts and adds the following:

On October 18, 2008, Maria Naranjo and Edgar Rivas returned to their apartment on 900 Olympic Avenue in Shelton, WA, between 10:30 PM and 11:00 PM after attending a dance. RP Vol.I 78: 8-25; 79: 1-6. When Naranjo and Rivas arrived at their apartment building, there was "a man seated outside" who was later identified as Richard L. Sallee. RP Vol.I 79: 9-10; 15-20. Sallee insulted Naranjo and Rivas by yelling "damn Mexicans, go back to your own country, you're illegal" at them. RP Vol.I 79: 23-25; 80: 2-3. Naranjo noted that the tone of Sallee's voice

while he was yelling “seemed bothered” and “aggressive” towards both her and her husband. RP Vol.I 80: 5-6. These comments initially made Naranjo and Rivas go “upstairs quickly” to their apartment. RP Vol.I 89: 22-23.

After yelling at Naranjo and Rivas, Sallee then "went into his apartment and then came back carrying a weapon.” RP Vol.I 80: 9-10. Rivas noted that when he started to leave and looked back, Sallee “was pointing a gun at us.” RP Vol.I 88: 24-25; 89: 1. When Rivas saw Sallee pointing a gun and him, he felt that Sallee was going to hurt him with it. RP Vol.I 92: 9-10.

Although Naranjo did not see Sallee point the firearm at her, Rivas told Naranjo that Sallee had a gun and that she needed to “go upstairs really fast.” RP Vol.I 80: 19-22. Sallee’s actions made Naranjo feel “very scared” and “afraid” and caused her to “cry.” RP Vol.I 80: 25; 81: 1. Naranjo was also “afraid that [Sallee] would probably harm us with the gun.” RP Vol.I 82: 24. When Naranjo and Rivas were inside their apartment, Rivas called a friend named Gloria Krise because “[w]e couldn’t call the police because we didn’t speak English.” RP Vol.I 81: 13-15.

3. Summary of Argument

The trial court did not err by not taking counts two, three and four, malicious harassment and assault in the second degree, from the jury for lack of sufficient evidence because: (a) Sallee maliciously and intentionally insulted Naranjo and Rivas by yelling “damn Mexicans, go back to your own country, you’re illegal” at them, which caused the couple to; (b) fear for their personal safety, as his remarks made them seek the shelter of their apartment; (c) Sallee went into his apartment, retrieved a rifle, returned and then; (d) intentionally pointed it at both Naranjo and Rivas, which made both of them fear for their personal safety.

Similarly, the trial court did not miscalculate Sallee’s offender score regarding his convictions for malicious harassment and assault in the second degree on the issue of same criminal conduct because: (a) RCW 9A.36.080(5)-Malicious harassment-definition and criminal penalty, contains an anti-merger provision; (b) Sallee separated his crimes by going into his apartment to retrieve a rifle after making racial epithets against; (c) Naranjo and Rivas, who were two separate victims.

Lastly, Sallee did not receive ineffective assistance of counsel when his court appointed attorney did not argue at sentencing following a jury trial that his (Sallee’s) offender score was miscalculated, because these crimes did not involve the same criminal conduct.

Because Sallee's convictions for assault in the second degree have a multiplier of 2 (please see State's Attachment A from the SRA), his offender score is neither 3 as was determined by the trial court, nor 1 as Sallee argues on appeal. See: CP: 64; AB 13-14. If the Court determines that the anti-merger provision in RCW 9A.36.080(5) does not dictate that each offense is separate and distinct, the State respectfully requests the Court to: (1) specifically find which of Sallee's actions constituted the same criminal conduct; and (2) remand on the sole issue of offender score so that it can be properly calculated. The State also respectfully requests the Court to affirm the remainder of the judgment and sentence as being complete and correct.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT TAKING COUNTS TWO, THREE AND FOUR, MALICIOUS HARASSMENT AND ASSAULT IN THE SECOND DEGREE FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE:
 - (a) SALLEE MALICIOUSLY AND INTENTIONALLY INSULTED NARANJO AND RIVAS BY YELLING "DAMN MEXICANS, GO BACK TO YOUR OWN COUNTRY, YOU'RE ILLEGAL" AT THEM, WHICH CAUSED THE COUPLE TO;
 - (b) FEAR FOR THEIR PERSONAL SAFETY AS HIS REMARKS MADE THEM SEEK THE SHELTER OF THEIR APARTMENT;
 - (c) SALLEE THEN WENT INTO HIS APARTMENT RETRIEVED A RIFLE, RETURNED AND THEN;

(d) INTENTIONALLY POINTED IT AT BOTH NARANJO AND RIVAS, WHICH MADE BOTH OF THEM FEAR FOR THEIR SAFETY.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995).

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wash.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992).

Malicious Harassment

Sallee committed malicious harassment against both Naranjo and Rivas by yelling “damn Mexicans, go back to your own country, you’re illegal” specifically at both of them in an “aggressive” tone RP Vol.I 79: 23-25; 80: 2-6. The record does not show that Sallee directed his comments to anyone but Naranjo and Rivas. Sallee’s racial commentary threatened Naranjo and Rivas and placed them in reasonable fear that he would harm each of them, as his slurs made them go “upstairs quickly” in an attempt to reach the safety of their apartment. RP Vol.I 89: 22-23. That Sallee acted maliciously and intentionally is also borne out in the record, as the comment, “damn Mexicans, go back to your own country, you’re illegal” would be interpreted by the average person as a way to vex, annoy or injure another person. RP Vol.I 79: 23-25; 80: 2-6.

Assault in the Second Degree

Sallee intentionally assaulted both Naranjo and Rivas by pointing a firearm at them as they tried to get inside their apartment. While Naranjo did not actually see Sallee point the gun specifically at her, Rivas told her what Sallee had done; something that made her feel “frightened.” RP Vol.I 86: 2. As Instruction No. 6 reads in part:

An assault is also an act, with unlawful force, done with the intent to inflict bodily injury upon another, tending but failing to accomplish it, and accompanied with the apparent

present ability to inflict bodily injury if not prevented. It is not necessary that bodily injury be inflicted. CP 49.

Hypothetically, had Rivas had never told Naranjo that Sallee had pointed a firearm at them, then the trial court would have had a stronger reason to dismiss the assault charge in count three with Naranjo as the victim. CP 18. Given the record before the Court, however, it was for the jury and not the judge to determine whether Sallee completed the crime of assault in the second degree against Naranjo: She knew that Sallee had returned with a gun, pointed it at both Rivas and herself as they tried to return to their apartment and was frightened. Accordingly, the trial court did not err by not taking count three from the jury.

2. THE TRIAL COURT DID NOT MISCALCULATE SALLEE'S OFFENDER SCORE REGARDING HIS CONVICTIONS FOR MALICIOUS HARASSMENT AND ASSAULT IN THE SECOND DEGREE IN TERMS OF SAME CRIMINAL CONDUCT BECAUSE:
 - (a) RCW 9A.36.080(5)-MALICIOUS HARASSMENT-DEFINITION AND CRIMINAL PENALTY, CONTAINS AN ANTI-MERGER PROVISION;
 - (b) SALLEE SEPARATED HIS CRIMES BY GOING INTO HIS APARTMENT TO RETRIEVE A RIFLE AFTER MAKING RACIAL EPITHETS AGAINST;
 - (c) NARANJO AND RIVAS, WHO WERE TWO SEPARATE VICTIMS.

Every person who commits another crime during the commission of a crime under this section may be punished and prosecuted for the other

crime separately. RCW 9A.36.080(5)-Malicious harassment-definition and criminal penalty.

“Same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1). If any one of these elements are missing, the offenses must be individually counted toward the offender score. State v. Haddock, 141 Wash.2d 103, 110, 3 P.3d 733 (2000).

Under RCW 9A.36.080(5), Sallee’s argument regarding same criminal conduct fails because two victims were involved; Naranjo and Rivas. The crimes of assault in the second degree and malicious harassment also have different elements, as Instructions 10 and 19 show:

Instruction No. 10

To convict the defendant of the crime of assault in the second degree as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 18th day of October, 2008, the defendant intentionally assaulted Edgar Rivas with a deadly weapon; and
- (2) That the acts occurred in the State of Washington...CP 49.

Instruction No. 19

To convict the defendant of the crime of malicious harassment as charged in count 2, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 18th day of October, 2008, the defendant threatened a specific person;
- (2) That the defendant placed that person in reasonable fear of harm to person or property;
- (3) That the defendant acted because of the defendant's perception of the person's race, color or national origin ;
- (4) That the defendant acted maliciously and intentionally; and
- (5) That this act occurred in the State of Washington...CP 49.

The record shows that Sallee completed the crime of assault in the second degree against both Naranjo and Rivas by pointing the gun at them. As argued in the previous section, this comports with Instruction No. 6, which did not require the jury to find that Sallee actually fired the gun at Naranjo or Rivas:

An assault is also an act, with unlawful force, done with the intent to inflict bodily injury upon another, tending but failing to accomplish it, and accompanied with the apparent present ability to inflict bodily injury if not prevented. It is not necessary that bodily injury be inflicted. CP 49.

Sallee first committed malicious harassment against both Naranjo and Rivas, then separated his acts by going into his apartment and returning with a firearm. This demonstrates the different intent that Sallee had for the separate crimes. Put another way, when Sallee went into his apartment, retrieved a firearm and then confronted the couple again by pointing it at them, his intent had changed from threatening to assaultive. Considering the anti-merger provision in RCW 9A.36.080(5), Sallee

cannot be considered to have engaged in same criminal conduct, and the Court should find that his crimes are separate and distinct.

3. SALLEE DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COURT APPOINTED ATTORNEY DID NOT ARGUE AT SENTENCING FOLLOWING A JURY TRIAL THAT HIS (SALLEE'S) OFFENDER SCORE WAS MISCALCULATED BECAUSE THESE CRIMES DID NOT INVOLVE THE SAME CRIMINAL CONDUCT.

In order to show ineffective assistance of counsel, the defendant must show that his attorney's performance was deficient, and that the deficiency prejudiced him. State v. Jensen, 149 Wash.App. 393, 401-402, 203 P.3d 393 (2009); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant is prejudiced when he can show that but for his counsel's errors, there was a reasonable probability that the trial result would have differed. State v. McFarland, 127 Wash.2d 322, 337, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it will not be deemed ineffective. State v. Day, 51 Wash.App. 544, 553, 754 P.2d 1021 (1988).

Sallee's court appointed attorney did not provide ineffective assistance when he failed to object to the offender score calculation, because Sallee's conduct was not same criminal conduct under RCW 9.94A.589(1). That Sallee's offender score was improperly calculated

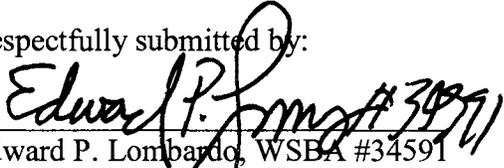
means that the Court should remand on this single issue so that the trial court can re-calculate it and re-sentence him accordingly.

F. CONCLUSION

If the Court determines that the anti-merger provision in RCW 9A.36.080(5) does not dictate that each offense is separate and distinct, the State respectfully requests the Court to: (1) specifically find which of Sallee's actions constituted the same criminal conduct; and (2) remand on the sole issue of offender score so that it can be properly calculated. The State also respectfully requests the Court to affirm the remainder of the judgment and sentence.

Dated this 18TH day of FEBRUARY, 2010

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

State's Attachment A

MALICIOUS HARASSMENT

(RCW 9A.36.080)

CLASS C - NONVIOLENT

I. OFFENDER SCORING (RCW 9.94A.525(7))

ADULT HISTORY:

Enter number of felony convictions..... x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 1 = _____

Enter number of nonviolent felony dispositions x ½ = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other felony convictions x 1 = _____

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
(Round down to the nearest whole number)

--

II. SENTENCE RANGE

A. OFFENDER SCORE:

	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL IV)	3 - 9 months	6 - 12 months	12+ - 14 months	13 - 17 months	15 - 20 months	22 - 29 months	33 - 43 months	43 - 57 months	53 - 60* months	60* months

- B. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8 or III-9 to calculate the enhanced sentence.
- C. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-10, Sexual Motivation Enhancement – Form C.
- D. If the current offense was a gang-related felony and the court found the offender involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), the standard sentencing range for the current offense is multiplied by 125%. See RCW 9.94A.533(10).

- **Statutory maximum sentence is 60 months (5 years) (RCW 9A.20.021(1)).*

III. SENTENCING OPTIONS

- I. First-Time Offender Wavier; for eligibility and sentencing rules see RCW 9.94A.650
- II. Alternative to Total Confinement; for eligibility and rules see RCW 9.94A.680.
- III. Work Ethic Camp; for eligibility and sentencing rules see RCW 9.94A.690.
- IV. Drug Offender Sentencing Alternative; for eligibility and sentencing rules see RCW 9.94A.660.

Although the Washington Sentencing Guidelines Commission does all that it can to assure the accuracy of its publications, the scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Sentencing Guidelines Commission.

ASSAULT, SECOND DEGREE

(RCW 9A.36.021(2)(a))

CLASS B - VIOLENT

I. OFFENDER SCORING (RCW 9.94A.525(8))

ADULT HISTORY:

Enter number of serious violent and violent felony convictions x 2 = _____

Enter number of nonviolent felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 2 = _____

Enter number of nonviolent felony dispositions x ½ = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other serious violent and violent felony convictions x 2 = _____

Enter number of nonviolent felony convictions x 1 = _____

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
(Round down to the nearest whole number)

--

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL IV)	3 - 9 months	6 - 12 months	12+ - 14 months	13 - 17 months	15 - 20 months	22 - 29 months	33 - 43 months	43 - 57 months	53 - 70 months	63 - 84 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8 or III-9 to calculate the enhanced sentence.
- D. If a sentence is one year or less: community custody may be ordered for up to one year (See RCW 9.94A.545 for applicable situations).
- E. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 18 to 36 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- F. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-10, Sexual Motivation Enhancement – Form C.
- G. If the current offense was a gang-related felony and the court found the offender involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), the standard sentencing range for the current offense is multiplied by 125%. See RCW 9.94A.533(10).

- *Statutory maximum sentence is 120 months (10 years) (RCW 9A.20.021)*

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