

NO. 47319-4-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

LYNN SOUTHMAYD, JR.,

Appellant.

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

The Honorable Carol Murphy, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Appellant Lynn Southmayd, Jr. received ineffective assistance of counsel at his jury trial for residential burglary and felony violation of a no-contact order because counsel failed to move to bifurcate the trial.

2. The trial court abused its discretion when it failed to consider the statutory mitigating factor of “willing participant” when it declined Mr. Southmayd’s request for an exceptional sentence below the standard range.

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

1. The appellant was charged with residential burglary and felony violation of a no-contact order. The State alleged that Mr. Southmayd had two prior convictions for violating a no-contact order. Did Mr. Southmayd receive ineffective assistance of counsel where his attorney neither offered to stipulate to the *two* prior qualifying convictions alleged by the State nor moved to bifurcate the trial, thereby needlessly allowing the jury to hear that he had previously violated no-contact orders on two occasions? Assignment of Error 1.

2. Where both statute and case law allow a sentencing court to consider the mitigating fact that the victim was a willing participant when imposing a sentence for violation of a no contact court order, did the trial court abuse its discretion when it failed to address this specific mitigating factor when it considered his request to impose an exceptional sentence below the standard range, and instead solely addressed the issue of services and

treatment that would available if the court imposed an exceptional sentence downward? Assignment of Error 2.

## C. STATEMENT OF THE CASE

### 1. Procedural facts:

Lynn Southmayd, Jr. was charged in Thurston County Superior Court with one count of residential burglary and one count of felony violation of a no-contact court order, pursuant to RCW 9A.52.025(1) and former RCW 26.50.110(5). Clerk's Papers (CP) 18. The State alleged that Mr. Southmayd had contact with his mother—Henrietta Southmayd—with knowledge of the existence of a valid no-contact order issued pursuant to Chapter 10.99 RCW on February 20, 2014, preventing him from contacting her, by going to her apartment on October 13, 2014, and that he had two prior convictions for violation of a no-contact order. CP 18. The State also alleged that both offenses were committed against a family member pursuant to RCW 10.99.020. CP 18.

The matter came on for jury trial on February 18 and 19, 2015, the Honorable Carol Murphy presiding.

Although the Information indicated that the State would rely on prior convictions for violating no-contact orders, restraining orders, or protection orders to prove the current alleged contact constituted a felony under RCW

26.50.110(5), Mr. Southmayd's attorney did not offer to stipulate to the prior qualifying convictions, move under ER 404(b) to limit testimony in regard to the fact of two prior convictions, nor did he move to bifurcate the proceedings to exclude evidence of the alleged prior convictions until after the jury decided the underlying charge. Report of Proceedings (RP) (2/18/15) at 39.<sup>1</sup>

The jury found Mr. Southmayd guilty of residential burglary and felony violation of a no-contact order as charged. RP (2/19/15) at 129; CP 78, 79. The jury also found by Special Verdict that the appellant and Ms. Southmayd are members of the same family or household. CP 80, 102.

At sentencing, the State calculated an offender score of "9" for Count 1 and "8" for Count 2, resulting in a standard range of 63 to 84 months for Count 1 and 60 months for Count 2. RP (3/17/15) at 11, 22. Mr. Southmayd asked the trial court to impose an exceptional sentence below the standard range. RP (3/17/15) at 25-30; CP 104-107. Mr. Southmayd's counsel argued that the victim in the offense—his mother Henrietta Southmayd—was a willing participant which therefore constituted a mitigating factor under RCW 9.94A.535(1)(a). RP (3/17/15) at 24-25; CP 106. Counsel argued that the court should sentence Mr. Southmayd to 12

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<sup>1</sup>The record of proceedings is designated as follows: RP – October 14, 2014, October 28, 2014, December 10, 2014, December 16, 2014, January 21, 2015, January 22, 2015, February 11, 2015, February 18, 2015 (jury trial), February 19, 2015 (jury trial), March 3, 2015, and March 17, 2015 (sentencing).

months in jail, thus permitting him to have access to treatment and services not available in the Department of Corrections. RP (3/17/15) at 23-25; CP 107. Counsel also argued that Mr. Southmayd was not provided treatment or other resources after he was released from prison in a previous case, and that he would be able to benefit from services if kept in county custody. RP (3/17/15) at 26-29; CP 106-107.

The court addressed the defense's request for a downward sentence regarding the argument that Mr. Southmayd was not previously provided resources or treatment after his release from prison. The court stated:

But the reality is that Mr. Southmayd has been provided with many, many resources in the past, and despite that, he violated a court order. That was a choice. No amount of treatment would make a difference.

Mr. Southmayd is able to work, and it is my hope that eventually he does work. There is no reason to think that he can't with appropriate services. There is an indication both in the letter that was sent and by the things stated today that Mr. Southmayd has a willingness to enter into treatment. However, looking at his standard range, the Court does not believe that it would be appropriate to issue a sentence so far below the standard range that to be a jail sentence. I certainly wish that the Department of Corrections had appropriate services and not just during custody but in preparing to be out of custody and transitioning out to the community. That is something I wish our community had both here in Thurston County and throughout the state, but the Court can't rely on that.

I believe that a standard range sentence is appropriate in this case, and I see no reason to depart downward from that standard range. Although I appreciate the efforts of our jail and I think that they have bent over backwards in assisting Mr. Southmayd—and appropriately so—there are so many people that need services like that and continue to, but that

downward departure would be significant from what the legislature has indicated is appropriate in this case.

RP (3/17/15) at 47-48.

The court did not address the defense argument that Ms. Southmayd's role as a "willing participant" was a mitigating factor as provided in RCW 9.94A.535(1)(a). RP (3/17/15) at 44-50.

The court sentenced Mr. Southmayd to 73 months for Count 1 and 60 months for Count 2, to be served concurrently. RP (3/17/15) at 49; CP 136. The court addressed Mr. Southmayd's ability to pay Legal Financial Obligations pursuant to *State v. Blazina*.<sup>2</sup>

Timely notice of appeal was filed on March 17, 2015. CP 109-120. This appeal follows.

## **2. Trial testimony:**

Henrietta Southmayd is the mother of appellant Lynn Southmayd, Jr. RP (2/18/15) at 81. Ms. Southmayd obtained a no-contact order in Thurston County Superior Court Cause No. 13-1-00615-8 on February 21, 2014, with an expiration date of February 20, 2016, prohibiting her son from having contact with her. RP (2/18/15) at 51, 59, 70. Exhibit 2. The State introduced Judgment and Sentences filed in the Mason County District Court showing that Mr. Southmayd had been convicted of violation of a no contact

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<sup>2</sup> 182 Wn.2d 827, 344 P.3d 680 (2015)

order two times. RP (2/18/15) at 58, 59. Ex. 3 and 4.

On October 13, 2014, police officers were dispatched to the apartment of Ms. Southmayd at 519 Washington Street SE, Olympia, Washington, in response to a report of a violation of a no-contact order. RP (2/18/15) at 48, 50. Olympia Police Officer Paul Evers and George Clark arrived at Ms. Southmayd's apartment, located in a multi-story apartment building. RP (2/18/15) at 48, 55.

Ms. Southmayd agreed to allow the officers to enter her apartment and said that her son was not there. RP (2/18/15) at 52, 73. Before they entered, she asked them to stay out of the bathroom because she needed to use that room. RP (2/18/15) at 52. As the officers came into the apartment, she went to a room located at the back of the of the bedroom area and opened the door. RP (2/18/15) at 52. As she opened the door, Officer Evers could see Mr. Southmayd through the hinge-side gap in the bathroom door. RP (2/18/15) at 52. Officer Evers said "Lynn, why don't you step out here," and the man complied. RP (2/18/15) at 53. The man, subsequently identified as Lynn Southmayd, Jr., was taken into custody. RP (2/18/15) at 52.

Ms. Southmayd stated that her son was homeless at the time and that she was concerned about him, so she permitted him to come into her apartment. RP (2/19/15) at 84. She stated that when she allowed officers to

enter her apartment on October 13, 2014, she acknowledged that she told them that her son was not in the apartment. RP (2/19/15) at 82. She said that she did that because she did not want him to be arrested. RP (2/19/15) at 83.

The defense rested without calling witnesses. RP (2/19/15) at 89.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER MR. SOUTHMAYD'S ARGUMENT FOR AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE BASED ON THE MITIGATING FACTOR THAT THE PROTECTED PARTY INVITED MR. SOUTHMAYD INTO HER APARTMENT

In Washington, the general rule is that a court must impose a sentence within the standard sentence range. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). A standard range sentence is usually not reviewable. RCW 9.94A.585(1). An appellate court, however, can review a standard range sentence resulting from constitutional error, procedural error, an error of law, or the trial court's failure to exercise its discretion. *See e.g. State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003); *State v. Watson*, 120 Wn. App. 521, 527, 86 P.3d 158 (2004); *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

A sentencing court may impose a sentence outside the standard

sentence range for an offense if it finds, considering the purpose of the Sentencing Reform Act (SRA), that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535.

Trial courts have authority to depart downward from the standard sentence range based on a number of specifically enumerated mitigating factors. The SRA sets forth a number of nonexclusive "illustrative" factors which the court may consider when exercising its discretion to impose an exceptional sentence, including whether "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). This includes the factor that the individual who was subject of a no-contact order was willingly in the defendant's presence. *State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086 (2008).

In a memorandum of law filed March 2, 2015, counsel for Mr. Southmayd asked the sentencing court to impose an exceptional sentence below the standard range based on the mitigating factor that Ms. Southmayd was a willing participant by permitting her son to come to her apartment because he was homeless and she was concerned about him. Defense Request for Exceptional Sentence Downward Departure at 3. CP 106.

The fact that the protected party initiated the forbidden contact is not a defense to violating a no-contact order. *See* RCW 10.99.040(4)(b) and RCW

26.50.035(I)(c) (domestic violence protection orders must inform restrained person that he is subject to arrest even if protected party invites or permits contact); *State v. Dejarlais*, 136 Wn.2d 939, 942, 969 P.2d 90 (1998) (consent is not defense to charge of violating a domestic violence protection order).

Here, the court addressed the requirements for an exceptional sentence downward, but focused entirely on the defense argument that the sentence should be 365 days so that Mr. Southmayd could receive county-based treatment and services. The sentencing court ignored the argument that Ms. Southmayd was a willing participant in that she permitted the contact by allowing her son to be in her apartment because she was concerned that he was homeless. RP (3/7/15) at 44-50. Therefore, the court failed to exercise its discretion by failing to address the main prong of the defense argument—that Ms. Southmayd participated in the offense. A trial court's failure to exercise discretion constitutes an abuse of discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

In *State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086 (2008), *aff'd*, 169 Wn.2d 571, 238 P.3d 487 (2010), a jury found Bunker guilty of violating the terms of a no-contact order, premised on the protected party's presence

in his vehicle. *Bunker*, 144 Wn. App. at 411. Police stopped Bunker for speeding. *Id.* at 410. Bunker had a female passenger with him. *Id.* While the woman was not honest about her identity, police eventually learned there was a no-contact order as to the woman against Bunker. *Id.* Bunker requested that the trial court impose an exceptional sentence downward based on the mitigating factor that the protected party had been a willing participant in the commission of the offense. *Id.* at 411. The trial court declined to consider imposing an exceptional mitigated sentence. *Id.* However, on appeal, Division I found that this mitigating factor could apply to the offense of violating a protective order. *Id.* at 421. The Court noted that the trial court "erroneously believed that it did not have the authority to depart downward from the standard sentence range on the basis of the mitigating factor that [the protected party] was willingly present in Bunker's [vehicle]." *Id.* at 421. Division I reversed Bunker's sentence and remanded to allow the trial court to consider this mitigating factor. *Id.* at 422.

Accordingly, under *Bunker*, the court had a legal basis to exercise discretion and sentence Mr. Southmayd below the standard range. Similarly, in *State v. Clemons*, the trial court granted Clemons an exceptional downward sentence after he pleaded guilty to third degree rape of child. *State v. Clemons*, 78 Wn. App. 458, 460, 898 P.2d 324 (1995). The Court's basis for the

downward sentence was that the victim was an initiator and a willing participant in the offense. *Id.* at 462.

Following the reasoning of *Clemons*, the fact that the no-contact order prohibited Mr. Southmayd's mother from contacting him is immaterial; she can nevertheless qualify as a "willing participant" in her son's contact with her.

Here, the trial court failed to consider the "willing participant" mitigating factor when sentencing Mr. Southmayd. "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342. A trial court's erroneous failure to consider a mitigating factor for a downward departure from the standard sentencing range is itself an abuse of discretion warranting remand. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997).

The trial court therefore abused its discretion when it failed to consider Mr. Southmayd's request for an exceptional sentence below the standard range based on the "willing participant" factor. Therefore, Mr. Southmayd's case should be remanded for resentencing so that the trial court can properly determine whether or not the "willing participant" mitigating factor presents a cogent reason for downward departure from the standard range.

2. **MR. SOUTHMAYD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL**

Where a prior conviction raises the base crime to a felony, the existence of the prior convictions is an element of the crime and not an aggravator.

Former RCW 26.50.110(5) provides:

A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

The prior violations are therefore elements of the crime of felony violation of a no-contact order.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). A conviction based in part on propensity evidence is not the result of a fair trial. *Id.*, at 776, 777-778.

Washington courts have long recognized that prior convictions are inherently prejudicial, and increase the likelihood of erroneous conviction based on propensity. *State v. Hardy*, 133 Wn.2d 701, 946 P.2d 1175 (1997);

*State v. Calegar*, 133 Wn.2d 718, 947 P.2d 235 (1997); *State v. Young*, 129 Wn. App. 468, 119 P.3d 870 (2005). The risk of unfair prejudice is especially great where the prior offense is similar to the charged offense. *Young*, at 475.

A trial court has broad discretion to control the order and manner of trial, and may bifurcate a trial where necessary to avoid prejudice to the accused. *State v. Monschke*, 133 Wn. App. 313, 334-335, 135 P.3d 966 (2006).

However, a defendant does not have an absolute right to bifurcate the proceedings and waive jury trial on the element of the prior convictions alone. *State v. Roswell*, 165 Wn.2d 186, 197, 196 P.3d 705(2008). Nevertheless, when the statutory framework establishes a base crime with elevated penalties if certain facts are present, the trial court may bifurcate the trial. See *Roswell*, 165 Wn.2d at 197 (holding that the defendant had no right to keep his prior convictions for violation of a court order from the jury by presenting that evidence at a separate bench trial, but the court does the discretion to do so).

In spite of case law establishing Mr. Southmayd's right to stipulate to prior qualifying convictions when they constitute an element of the offense or seek a bifurcated trial, counsel neither offered to stipulate nor moved to limit the prior conviction evidence to the fact of *two* prior convictions by requesting

bifurcation. As a result of counsel's failings, the jury heard evidence Mr. Southmayd had two prior convictions for violating no-contact orders in the past. Reasonable counsel would have taken steps to better protect his client from such prejudicial propensity evidence.

Under the Sixth Amendment to the U.S. Constitution, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009). "To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Although apparently unreasonable decisions can be excused on tactical grounds, where the record shows an absence of conceivable legitimate trial tactics or theories explaining counsel's performance, such performance falls "below an objective standard of reasonableness" and is

deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Hendrickson*, 129 Wn.2d 61,77-78, 917 P.2d 563 (1996). *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002);

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

Second, the defendant must show prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability

sufficient to undermine confidence in the outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), *citing Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, *citing Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

Here, the State alleged that Mr. Southmayd had two prior convictions for violation of a no-contact order in the Mason County District Court and entered Judgment and Sentence from the cases as Exhibits 3 and 4. A reasonable juror, hearing that a defendant had been convicted of two similar offenses, could not reasonably be expected to acquit. Accordingly, defense counsel should have moved to bifurcate the case, or otherwise to remove consideration of the prior convictions from the jury's consideration.

There is no conceivable legitimate trial strategy or tactic explaining counsel's performance and no reason to inform the jury during the guilt phase of the trial that he had previously been convicted of virtually identical offenses. Accordingly, defense counsel should have moved to bifurcate the trial and endeavored to remove the prior offenses from the jury's determination.

Mr. Southmayd was prejudiced by his attorney's failure to seek bifurcation of the trial and removal of highly prejudicial evidence from the jury's consideration. Courts have long recognized that prior convictions are inherently prejudicial, and increase the likelihood of erroneous conviction based on propensity. *State v. Hardy, supra*. The risk of unfair prejudice is especially great where the prior offense is similar to the charged offense. *Id.*, at 475.

Here, the evidence was extremely prejudicial in that the convictions involved virtually identical offenses. Without the prior convictions, the jurors may have had a reasonable doubt that Mr. Southmayd knowingly violated the order or that he acted with intent to commit a crime in the apartment. Jury Instruction Number 11, and Number 14, Court's Instructions to the Jury, CP 93, 96. Accordingly, Mr. Southmayd's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution were violated. Moreover, his conviction for residential burglary is premised on the intent to commit the crime of violation of the protection order in the residence. Therefore, his convictions must be reversed and the case remanded for a new trial.

3. IF THE COURT ACCEPTS THE ARGUMENT PRESENTED IN SECTION 1 OF THIS BRIEF AND REVERSES MR. SOUTHMAYD'S CONVICTION IN COUNT 2, IT MUST ALSO REVERSE HIS CONVICTION FOR

### RESIDENTIAL BURGLARY

The State charged Mr. Southmayd in Count 1 with residential burglary. The State alleged that an intent to violate the no-contact order served as the predicate crime for residential burglary. CP 18.

Residential burglary has two elements: “[ (1) ] intent to commit a crime against a person or property therein, [and (2) ] the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025. Although the State's evidence must independently satisfy both elements, “the Legislature has adopted a permissive inference to establish the requisite intent whenever the evidence shows a person enters or remains unlawfully in a building.” *State v. Grimes*, 92 Wash.App. 973, 980 n. 2, 966 P.2d 394 (1998) (citing RCW 9A.52.040 and *State v. Brunson*, 128 Wash.2d 98, 107, 905 P.2d 346 (1995)). But this permissive inference does not relieve the State from meeting its evidentiary burden to prove a defendant's intent to commit a crime therein; “[t]he standard of proof regarding a permissive inference is more likely than not.” *State v. Snedden*, 112 Wn.App. 122, 127, 47 P.3d 184 (2002).

Violation of a protection order provision can serve as a predicate crime for residential burglary. *See State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985) (“The intent required by our burglary statutes is simply the

intent to commit *any crime* against a person or property inside the burglarized premises.”); *State v. Pollnow*, 69 Wn.App. 160, 166, 848 P.2d 1265 (1993); *State v. Stinton*, 121 Wn.App. 569, 89 P.3d 717(2004).

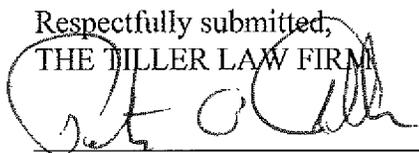
Here, the State presented no additional evidence showing an intent to commit an offense other than violation of the no-contact order while he was inside the apartment. Therefore, if the Court reverses Mr. Southmayd’s conviction in Count 2, the State will *a priori* have failed to prove that Mr. Southmayd entered or remained unlawfully in his mother’s apartment, necessitating reversal of his conviction for residential burglary.

**E. CONCLUSION**

For the foregoing reasons, Lynn Southmayd, Jr. respectfully requests that the court reverse his convictions.

DATED: August 19, 2015.

Respectfully submitted,  
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835  
Of Attorneys for Lynn Southmayd, Jr.

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 19, 2015, that this Appellant’s Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

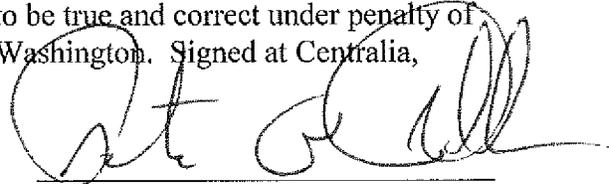
Ms. Cailen Wevodau  
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 19, 2015.

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

PETER B. TILLER

## APPENDIX A

### ***RCW 9.94A.535***

Departures from the guidelines.

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.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

#### (1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or

injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical

professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The 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;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an

exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

RCW 10.99.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Agency" means a general authority Washington law enforcement agency as defined in RCW 10.93.020.

(2) "Association" means the Washington association of sheriffs and police chiefs.

(3) "Family or household members" means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

(4) "Dating relationship" has the same meaning as in RCW 26.50.010.

(5) "Domestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:

- (a) Assault in the first degree (RCW 9A.36.011);
- (b) Assault in the second degree (RCW 9A.36.021);
- (c) Assault in the third degree (RCW 9A.36.031);
- (d) Assault in the fourth degree (RCW 9A.36.041);
- (e) Drive-by shooting (RCW 9A.36.045);

- (f) Reckless endangerment (RCW 9A.36.050);
- (g) Coercion (RCW 9A.36.070);
- (h) Burglary in the first degree (RCW 9A.52.020);
- (i) Burglary in the second degree (RCW 9A.52.030);
- (j) Criminal trespass in the first degree (RCW 9A.52.070);
- (k) Criminal trespass in the second degree (RCW 9A.52.080);
- (l) Malicious mischief in the first degree (RCW 9A.48.070);
- (m) Malicious mischief in the second degree (RCW 9A.48.080);
- (n) Malicious mischief in the third degree (RCW 9A.48.090);
- (o) Kidnapping in the first degree (RCW 9A.40.020);
- (p) Kidnapping in the second degree (RCW 9A.40.030);
- (q) Unlawful imprisonment (RCW 9A.40.040);
- (r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);
- (s) Rape in the first degree (RCW 9A.44.040);
- (t) Rape in the second degree (RCW 9A.44.050);
- (u) Residential burglary (RCW 9A.52.025);

(v) Stalking (RCW 9A.46.110); and

(w) Interference with the reporting of domestic violence (RCW 9A.36.150).

(6) "Employee" means any person currently employed with an agency.

(7) "Sworn employee" means a general authority Washington peace officer as defined in RCW 10.93.020, any person appointed under RCW 35.21.333, and any person appointed or elected to carry out the duties of the sheriff under chapter 36.28 RCW.

(8) "Victim" means a family or household member who has been subjected to domestic violence.

## TILLER LAW OFFICE

**August 19, 2015 - 4:34 PM**

### Transmittal Letter

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Court of Appeals Case Number: 47319-4

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Objection to Cost Bill

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