

Supreme Court No. 88663-6  
COA No. 66836-6-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD SWEAT,

Petitioner.

**FILED**  
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ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

The Honorable Mariane Spearman

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**PETITION FOR REVIEW**

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**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER ..... 1

B. COURT OF APPEALS DECISION ..... 1

C. ISSUES PRESENTED ON REVIEW ..... 1

C. STATEMENT OF THE CASE ..... 3

E. ARGUMENT ..... 5

    1. THE DEFENDANT'S EXCEPTIONAL SENTENCE  
    MUST BE REVERSED WHERE THE STATE'S  
    EVIDENCE WAS INSUFFICIENT TO PROVE THE  
    SOLE AGGRAVATING FACTOR ..... 5

        a. Supreme Court review is warranted. ..... 5

        b. The State must prove aggravating factors beyond a  
        reasonable doubt. ..... 5

        c. The "pattern of abuse" aggravating factor was not proved  
        below by evidence that the defendant's criminal history included  
        convictions involving complainants who were not the victim of the  
        current offense. ..... 8

        d. Remedy. ..... 11

    2. IF THE EVIDENCE WAS SUFFICIENT, THE  
    EXCEPTIONAL SENTENCE MUST NONETHELESS  
    BE REVERSED WHERE THE SENTENCING COURT  
    IMPOSED THE SENTENCE BASED ON PRIOR  
    CONVICTIONS, WHICH WERE MATTERS ALREADY  
    CONSIDERED BY THE LEGISLATURE IN SETTING  
    MR. SWEAT'S OFFENDER SCORE AND  
    CONSEQUENT STANDARD RANGE ..... 12

        a. Supreme Court review is warranted. ..... 12

b. The exceptional sentence was based on matters already reflected by the defendant's offender score. ..... 12

F. CONCLUSION ..... 14

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Alexander</u> , 125 Wn.2d 717, 888 P.2d 1169 (1995). . .	13,14
<u>American Continental Insurance Co. v. Steen</u> , 151 Wn.2d 512, 91 P.3d 864 (2004). . . . .	10
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008) . . . . .	7
<u>State v. Barnett</u> , 104 Wn. App. 191, 16 P.3d 74 (2001). . . . .	8
<u>State v. Barnes</u> , 117 Wn.2d 701, 818 P.2d 1088 (1991) . . . . .	6
<u>State v. Ferguson</u> , 142 Wn.2d 631, 15 P.3d 1271 (2001). . . . .	14
<u>State v. Fisher</u> , 108 Wn.2d 419, 739 P.2d 683 (1987) . . . . .	12,13,14
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999) . . . . .	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980). . . . .	7
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998). . . . .	7
<u>State v. Houf</u> , 120 Wn.2d 327, 841 P.2d 42, 44 (1992) . . . . .	9
<u>In re Postsentence Review of Leach</u> , 161 Wn.2d 180, 163 P.3d 782 (2007) . . . . .	5
<u>State v. Nordby</u> , 106 Wn.2d 514, 723 P.2d 1117 (1986). . . . .	9,12,13
<u>State v. Rowland</u> , 160 Wn. App. 316, 249 P.3d 645 (2011), <u>aff'd</u> , 174 Wn.2d 150, 272 P.3d 242 (2012). . . . .	13
<u>In re Pers. Restraint of Tobin</u> , 165 Wn.2d 172, 196 P.3d 670 (2008). . . . .	7
<u>State v. Watson</u> , 146 Wn.2d 947, 51 P.3d 66 (2002) . . . . .	10

State v. Wilson, 125 Wn.2d 212 883 P.2d 320 (1994) ..... 5

State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009) ..... 7

**STATUTES AND COURT RULES**

RCW 9.94A.030 ..... 9,10,11

RCW 9.94A.535 ..... passim

RCW 9.94A.537(3) ..... 6

RCW 9.94A.585(4). ..... 7

RAP 13.4(b)(1) ..... 5,12

Laws 1990, ch. 3, § 602 ..... 9

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. 14 ..... 6

**UNITED STATES SUPREME COURT CASES**

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). 6

## **A. IDENTITY OF PETITIONER**

Richard Sweat was the defendant in King County No. 10-1-08897-7 SEA, the appellant in Court of Appeals No. 66836-6-I, and is the Petitioner herein.

## **B. COURT OF APPEALS DECISION**

Mr. Sweat seeks review of the Court of Appeals decision issued March 18, 2013, affirming his exceptional sentence.

Appendix A.

## **C. ISSUES PRESENTED ON REVIEW**

1. Under the SRA, the “pattern of abuse” aggravating factor of RCW 9.94A.535(3)(h)(i), read in conjunction with the statutory definition of “victim” at RCW 9.94A.030(53), is expressly limited to circumstances where the defendant’s current offense is merely the latest manifestation of an ongoing pattern of abuse targeting the *same* victim(s). The State does not successfully prove this aggravating factor simply by reciting the defendant’s conviction history of domestic violence offenses committed against past complainants who are unconnected to the current crime and which convictions are already accounted for in Mr. Sweat’s offender score.

Must the defendant’s exceptional sentence be reversed

where the sole aggravating factor proffered to support the over-length term was not established by evidence sufficient to allow it to be proved beyond a reasonable doubt?

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

3. Where the definitional section of the SRA indicates that the term “victim” is defined as the victim of the current offense unless the context clearly requires otherwise, does a change to the language of the aggravating factor, adding the word “multiple” as an adjective before the word “victim,” clearly indicate by context that the underlying definition of “victim” is different for purposes of the factor, and now means the unrelated victims of other past incidents?

4. If the “pattern of abuse” aggravating factor, pursuant to the language of RCW 9.94A.535(3)(h)(i), may indeed be proved as it was purported to be here by the defendant’s prior convictions for abuse of women unconnected to the current crime, must the

sentence nonetheless be reversed where a court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the defendant's offender score and standard range for the offense?

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

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

Mr. Sweat waived his right to a jury and the case was tried to the court. CP 11; 1/10/11RP at 48-49. In addition, following an oral colloquy and a written waiver of his right to counsel, Mr. Sweat represented himself at trial. CP 12-13. 1/10/11RP at 61-73.

Kellie Kenworthy testified that Mr. Sweat punched her forcefully in the eye during an argument, causing her to fall to the floor and become unconscious. 1/12/11RP at 291-98. According to Ms. Kenworthy, Mr. Sweat then took her to the emergency room;

however, he instructed her to say that she had fallen accidentally and hit herself on a box. 1/12/11RP at 298.

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

The trial court found Mr. Sweat guilty of second degree assault, and also found the aggravating factor of a pattern of abuse had been proved, based on prior judgments documenting convictions involving abuse of "other women." 1/12/11RP at 368, 372, 424. Mr. Sweat was given an exceptional sentence of 84 months, beyond his standard range of 43 to 57 months. CP 113; 3/3/11RP at 79-80.

He timely appealed. CP 122. The Court of Appeals affirmed. Appendix A.

## **E. ARGUMENT**

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

**a. Supreme Court review is warranted.** The Court of Appeals concluded that the Legislature's use of the term "multiple" as an adjective modifying the statutorily-defined term "victim" plainly changed the meaning of the term "victim" into a term with a different meaning from that employed in the SRA's definitional statute. Appendix A, at pp. 4-5. Review is warranted under RAP 13.4(b)(1), because the decision conflicts with this Court's decision in State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (court applies unambiguous statutes according to their plain language and construes only ambiguous statutes). See also In re Postsentence Review of Leach, 161 Wn.2d 180, 183-84, 163 P.3d 782 (2007) (addressing meaning of language of RCW 9.94A.411(2) under criteria within RAP 13.4(b)).

**b. The State must prove aggravating factors beyond a reasonable doubt.** The trial court in a criminal case may impose a prison sentence that is longer than the standard range term of incarceration authorized by the

defendant's current offense and his prior convictions, where, *inter alia*, the State proves one or more of the "aggravating factors" enumerated in the Sentencing Reform Act at RCW 9.94A.535.

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

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

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

To reverse an exceptional sentence, the appellate court must find: "(a) Either that the reasons supplied by the sentencing

court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive[.]” RCW 9.94A.585(4).<sup>1</sup>

On appeal, the appellate court uses the same standard of review for the sufficiency of the evidence to prove an aggravating factor as it does for assessing the sufficiency of the evidence to prove the elements of a crime. State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). The test for reviewing a defendant's challenge to the sufficiency of the evidence is to ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential facts beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980).

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

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

This evidence was inadequate. A court may impose an exceptional sentence if the jury determines that the offense involved domestic violence and “[t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.” RCW 9.94A.535(3)(h)(i); see, e.g., State v. Barnett, 104 Wn. App. 191, 203, 16 P.3d 74 (2001).

However, Mr. Sweat’s prior convictions fail to establish the aggravating factor where the prior incidents did not involve the

same victim, Kellie Kenworthy, as the currently charged offense for which the defendant was being sentenced. The SRA's plain language establishes that various other complainants plucked from past cases in Mr. Sweat's criminal history do not constitute "victims" for purposes of aggravating the defendant's current offense under RCW 9.94A.535(3)(h)(i).

In general, the reasons for the imposition of an exceptional term must not be predicated on matters that are necessarily considered in computing the defendant's presumptive range. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117, 1119 (1986).

Additionally, the reason for the departure must relate to the circumstances of the crime. State v. Houf, 120 Wn.2d 327, 331, 841 P.2d 42, 44 (1992); State v. Barnes, 117 Wn.2d at 711.

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

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

(Emphasis added.) RCW 9.94A.030(53). Pursuant to Laws 1990, ch. 3, § 602, the definition of "victim" was expanded to include

those who have sustained emotional or psychological injury as a result of the charged crime. Plainly, however, the definition of victim makes clear that complainants from prior convictions do not qualify as victims for purposes of the SRA's "pattern of abuse" aggravating factor unless they are the same person as the victim of the current crime, here, Ms. Kenworthy.

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

Put another way, the definitional section of the SRA makes clear that the term "victim" means the victim (or others harmed as a result of) the current offense. The SRA's definitional section suggests that any of its defined terms may be used in certain subsequent SRA provisions pursuant to a *different* meaning than that set forth in RCW 9.94A.030 – however, the definitional section makes unequivocally clear that the set definition of terms applies "[u]nless the context clearly requires otherwise[.]" (Emphasis

added.) RCW 9.94A.030.

This means that if a particular SRA provision uses a term that is defined in the definitional section, it means, in that provision, exactly what the definitional section says it means – *unless* it is clearly indicated by context that a different meaning is intended, and unless it is clearly indicated *what that different, changed meaning is to be*. The mere insertion of the adjective “multiple” in front of “victim” – which does nothing more than pluralizes the pre-defined statutory term – in no way makes clear that the term “victim,” for purposes of this aggravating factor, now means something diametrically different from the presumptive, defined meaning.

As per the SRA, if the context of the provision does not clearly indicate a different meaning is intended for purposes of that provision, and indicate what that meaning is, then there is no change, and the statutory definition must control. The Court of Appeals decision rejecting or eliding this argument, which was repeatedly placed before the Court, was in error.

**d. Remedy.** The complainants from Mr. Sweat’s prior convictions are not “victims” to whom the pattern of abuse aggravating factor applies. No sufficient proof of the aggravating

factor at RCW 9.94A.535(3)(h)(i) was presented below, and Mr. Sweat's exceptional sentence must therefore be reversed. U.S. Const. amend. 14.

**2. IF THE EVIDENCE WAS SUFFICIENT, THE EXCEPTIONAL SENTENCE MUST NONETHELESS BE REVERSED WHERE THE SENTENCING COURT IMPOSED THE SENTENCE BASED ON PRIOR CONVICTIONS, WHICH WERE MATTERS ALREADY CONSIDERED BY THE LEGISLATURE IN SETTING MR. SWEAT'S OFFENDER SCORE AND CONSEQUENT STANDARD RANGE.**

a. **Supreme Court review is warranted.** Review is warranted under RAP 13.4(b)(1), because the decision of the Court of Appeals conflicts with this Court's decision in State v. Nordby, supra, 106 Wn.2d at 518; and State v. Fisher, 108 Wn.2d 419, 426, 739 P.2d 683 (1987), infra.

b. **The exceptional sentence was based on matters already reflected by the defendant's offender score.** As noted, the exceptional sentence imposed by the court below was based on RCW 9.94A.535(3)(h)(i), which establishes an aggravator where

[t]he . . . offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time[.]

The court was not permitted to rely on this aggravating factor because the ongoing "pattern" of abuse consisted of acts that had

each sustained a prior, separate criminal charge – convictions already used to determine Mr. Sweat’s standard range. State v. Nordby, *supra*, 106 Wn.2d at 518.

The imposition of an exceptional sentence is a two-step process. State v. Rowland, 160 Wn. App. 316, 330, 249 P.3d 645 (2011), *aff’d*, 174 Wn.2d 150, 272 P.3d 242 (2012). First, a jury makes a factual determination; and second, a judge determines whether an exceptional sentence is warranted for substantial and compelling reasons. *Id.* However, a court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard range. State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995).

Criminal history was already taken into account in computing Mr. Sweat’s offender score of 7, and may not be considered in imposing an exceptional sentence. See State v. Nordby, 106 Wn.2d at 518. For example, in State v. Fisher, 108 Wn.2d 419, 426, 739 P.2d 683 (1987), the Supreme Court held that the multiplicity of incidents cannot support an exceptional sentence where some of the incidents were punished by prior convictions, which were necessarily accounted for in computing the range. *Id.*

Here, the court imposed an exceptional sentence because

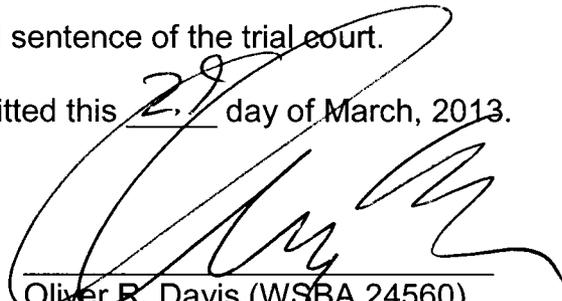
the crime was part of an ongoing pattern as shown by multiple incidents, but the multiple incidents were prior domestic violence crimes of which Mr. Sweat was already convicted. The Legislature could have constructed an offender score scheme which counted subsequent domestic violence offenses using a multiplier, but it did not. Therefore, the court could not rely on the incidents to impose an exceptional sentence. Fisher, 108 Wn.2d at 426; Alexander, 125 Wn.2d at 725.

On this basis, remand for resentencing is necessary. State v. Ferguson, 142 Wn.2d 631, 649 & 649 n.81, 15 P.3d 1271 (2001).

#### **F. CONCLUSION**

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

Respectfully submitted this 27 day of March, 2013.



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## Appendix A



violence against multiple victims. Sweat elected to waive his right to a jury trial and proceed to trial before the court.

The court found him guilty as charged. The court also found that the State had established the aggravating factor of an ongoing pattern of psychological, physical, or sexual abuse of multiple victims over a prolonged period of time, based on five prior convictions for offenses involving domestic violence and physical and/or sexual abuse. The court imposed an exceptional sentence of 84 months' confinement. Sweat appeals his sentence.

#### ANALYSIS

Sweat contends that his exceptional sentence must be reversed because the evidence was insufficient to prove the aggravating factor that he had engaged in a pattern of abuse. He asserts that because the prior convictions upon which the court relied to support this finding did not involve the same victim involved in the charged offense, the State failed to establish that aggravating factor for his current offense. We disagree.

A trial court may impose a sentence outside of the standard range for an offense if the court finds that there are substantial and compelling reasons justifying an exceptional sentence.<sup>1</sup> The legislature has set forth a list of aggravating factors that may justify an exceptional sentence above the standard range, one of which is a pattern of domestic violence abuse, as provided in RCW 9.94A.535(3)(h)(i):

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

(i) The offense was part of an ongoing pattern of psychological,

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<sup>1</sup> RCW 9.94A.535.

physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

Here, the trial court considered five prior convictions from 1996 to 2006 involving domestic violence and physical and/or sexual abuse and made the following findings of fact in support of the aggravating factor:

2. In 1995 the defendant committed the crime of Assault in the Second Degree. He was convicted in 1996. The victim was Jeanette Walner. This was not designated as a crime of domestic violence. In this case the Assault in the Second Degree was charged, and the defendant plead, under the prong that with the intent to commit the crime of rape and indecent liberties the defendant did assault Jeanette Walner. This is relevant to show an ongoing pattern of physical, psychological, and sexual abuse.

3. In 1998 the defendant was convicted of Unlawful Imprisonment and Assault in the Third Degree. The victim was Julia Harter. While this case was not specifically designated as a crime of domestic violence, the court is considering this conviction for the purpose of the aggravating factor. The Assault in the Third Degree was charged, and the defendant plead, under the prong that the defendant had caused bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering to Julia Harter. This is relevant to show an ongoing pattern of physical, psychological, and sexual abuse.

4. The defendant was convicted of Unlawful Imprisonment – Domestic Violence and Assault in the Fourth Degree – Domestic Violence in 2005. The defendant was ordered to participate in a Domestic Violence perpetrator treatment program. The victim of that crime was Angelique Montes.

5. The defendant was convicted of felony Riot – Domestic Violence and Assault in the Fourth Degree – Domestic Violence in 2006. The victim of the crimes was Nina Northington.

6. In 2006 the defendant was convicted of felony Riot – Domestic Violence. The victim was Cheryl Mainer.

7. The defendant's first offense considered by the court occurred in 1995. The most recent event occurred September 26, 2010. This is a prolonged period of time.

8. Each of the six separate convictions involved distinct victims. Each

conviction also involved physical, psychological and or sexual abuse. The six separate incidents constitute multiple incidents. Together the events show a pattern of ongoing physical, psychological and or sexual abuse.

Sweat contends that this aggravating factor is limited to circumstances where the current offense is part of an ongoing pattern of abuse of the same victim and that the State failed to establish this by relying on incidents involving victims other than the one involved in the current offense. He relies on the definition of "victim" in the Sentencing Reform Act of 1981, which provides: "'Victim' means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged."<sup>2</sup>

We review issues of statutory construction de novo.<sup>3</sup> While Sweat contends that the definition of "victim" contemplates only those who suffered injury from the charged crime, the statute read as a whole indicates otherwise. RCW 9.94A.030 provides that the definitions in this section apply throughout the chapter, "[u]nless the context clearly requires otherwise." Here, the context does otherwise require: the statute contemplates abuse that was not the direct result of the charged crime by referring to abuse "manifested by multiple incidents over a prolonged period of time," and stating that the current offense was "part of an ongoing pattern" of abuse.<sup>4</sup> The legislative history also makes abundantly clear that the intent of the statute was to address the serial domestic violence offender and consider additional victims who suffered past abuse by the

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<sup>2</sup> RCW 9.94A.030(53).

<sup>3</sup> State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). If the plain words of a statute are unambiguous, the court need not inquire further. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). But if the language is ambiguous, the rule of lenity applies and requires the statute to be interpreted in the defendant's favor unless there is legislative intent to the contrary. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

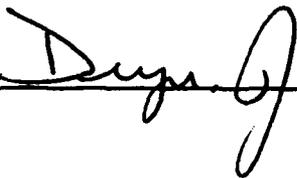
<sup>4</sup> RCW 9.94A.535(3)(h)(i) (emphasis added).

offender.<sup>5</sup> As set forth above in the trial court's findings, the evidence here was sufficient to support a finding of this aggravating factor.

We affirm the judgment and sentence.

  
\_\_\_\_\_

WE CONCUR:

  
\_\_\_\_\_  
\_\_\_\_\_

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<sup>5</sup> As the State notes, Attorney General Rob McKenna's proposed legislation to increase sentencing for repeat felony domestic violence offenders included an aggravating factor for serial domestic violence batterers with different victims, which was ultimately adopted as the "multiple victims" language in the statute. The Senate Bill Report also evidences an intent to modify the aggravating factor "so that it applies in situations with different victims," and testimony before the Senate Judiciary Committee urged punishment for the chronic and serial offender because it was not available under the old version of the aggravating factor that was limited to a single victim. S.B. REP. on S.B. 5208, at 3-4, 61st Leg., Reg. Sess. (Wash. 2009).

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 66836-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Jeffrey Dernbach, DPA  
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party

  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: March 29, 2013