

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.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

The Honorable Mariane Spearman

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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**ORIGINAL**

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**A. IDENTITY OF PETITIONER AND RELIEF SOUGHT**

Richard Sweat asks this Court to vacate his exceptional sentence, which was premised on the statutory aggravating factor that the crime charged was part of an ongoing pattern of abuse of "a victim or multiple victims." RCW 9.94A.535(3)(h)(i). The sentence was imposed following Mr. Sweat's bench trial conviction for assault (domestic violence).

The complainant and a victim of the current crime was K.K., Mr. Sweat's girlfriend. CP 1-2; 1/10/11RP at 137; 1/12/11RP at 292. However, the prior incidents relied upon by the court for finding the exceptional sentence were Mr. Sweat's past Washington judgments of conviction, for assault and other domestic violence crimes involving *other* persons. 1/12/11RP at 423-24; CP 138-44. This does not meet the statutory aggravating factor, and is not a substantial and compelling basis for departing upward from the standard range already established by those judgments and his consequent offender score. CP 119.

**B. SUMMARY OF ARGUMENT**

The plain meaning of "victim," set forth in the definitional section of the Sentencing Reform Act, indicates that the aggravating factor is directed toward abuse of a victim or victims of

the crime charged that has been ongoing:

"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). Thus, the aggravating factor of .535(3)(h)(i) plainly applies to multiple incidents wherein the defendant's current domestic violence assault is the latest in an ongoing pattern of abuse of the same victim or victim(s) as the currently charged crime.

The unambiguous language of this aggravating factor, read as it must be with the prescribed definition of victim, indicates that exceptional punishment under this factor is manifestly **not** proved by multiple prior incidents involving different, unrelated persons than the victim or victims of the current crime. The Legislature's 2010 change to the aggravating factor, to change "victim" to "victim or multiple victims" did not change the statutory definition of victim. If anything, the plain language of the factor at .535(3)(h)(i) is simply now consistent with the definition of "victim" at .030(53).

Further, Mr. Sweat's exceptional sentence was specifically constructed using his prior Washington criminal convictions, which in turn did not involve any victim or victims of the current offense.

The trial court's reason for the exceptional sentence did not relate to the offense, but merely to the defendant's recidivism, already accounted for by the Legislature in his standard range. The court's basis for the sentence was therefore not substantial or compelling.

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

1. Under the SRA's aggravating factor for a pattern of abuse of a victim or multiple victims [RCW 9.94A.535(3)(h)(i)], when read in conjunction with the statutory definition of "victim" at RCW 9.94A.030(53), may the State successfully prove this aggravating factor by reciting the defendant's criminal conviction history of offenses committed against other persons, none of whom were either a victim or victims of the current offense?

**No.** Where the term "victim" is defined at RCW 9.94A.030(53) as meaning any person or persons suffering harm as a result of the current offense, the aggravating factor is not proved by the existence of complainants culled from the defendant's prior convictions, none of whom were also a victim or victims of the charged crime.

2. Where the definitional section of the SRA indicates that the term "victim" is defined as the sufferer(s) of harm as a result of the current offense "unless the context clearly requires otherwise,"

does the aggravating factor of RCW 9.94A.535(3)(h)(i) clearly indicate by context that the plural phrase "multiple victims" must be read to change the meaning of "victim" from its statutorily-defined meaning, for the special purposes of that factor?

**No.** If the SRA's definitional section defines a term and mandates it be used whenever the term appears in any provision unless the context "clearly" requires otherwise, that standard for abandoning the statutory definition is not met merely by a party's ability to suggest some lack of clarity in the particular provision's use of the term. This is what the SRA's plain language says.

**3.** If the "pattern of abuse" aggravating factor, pursuant to the language of RCW 9.94A.535(3)(h)(i), may be proved as it was here by the defendant's prior convictions for abuse of persons unconnected to the current crime, must the sentence 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?

**Answer: Yes.** Mr. Sweat's sentence violates the rule exemplified by RCW 9.94A.535, State v. Nordby,<sup>1</sup> and State v.

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<sup>1</sup> State v. Nordby, 106 Wn.2d 514, 518-20, 723 P.2d 1117 (1986).

Fisher,<sup>2</sup> providing that a trial court cannot impose exceptional punishment predicated on matters, such as prior convictions, that are already factored by the Legislature as component parts of the defendant's offender score and consequent standard range.

#### **D. 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, and the ongoing pattern of abuse aggravating factor of RCW 9.94A.535(3)(h)(i). CP 1-2. At Mr. Sweat's bench trial, K.K. testified that Mr. Sweat punched her in the eye during an argument, causing her to fall and become unconscious. 1/12/11RP at 291-98. The trial court found Mr. Sweat guilty, and also found the aggravating factor of a pattern of ongoing abuse, based on prior Washington judgments documenting convictions involving assault and other domestic violence crimes against different persons, none of whom were a victim or victims of the charged crime. 1/12/11RP at 368, 372, 424. Based on the aggravating factor, Mr. Sweat was given an exceptional sentence of 84 months, above the standard range of 43 to 57 months that was derived from his offender score of 7. CP 113; 3/3/11RP at 79-80.

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<sup>2</sup> State v. Fisher, 108 Wn.2d 419, 426, 739 P.2d 683 (1987).

## **E. ARGUMENT**

### **1. THE PLAIN LANGUAGE OF THE AGGRAVATING FACTOR AND THE STATUTORY DEFINITION OF VICTIM PROVIDE THAT A PATTERN OF ONGOING ABUSE IS NOT PROVED BASED ON THE EXISTENCE OF PRIOR INCIDENTS INVOLVING PERSONS WHO WERE NOT A VICTIM OR VICTIMS OF THE CHARGED CRIME.**

a. **Plain language.** The Court of Appeals and all parties agree that the appellate court applies unambiguous statutes according to their plain language, and construes only ambiguous statutes. Decision (Appendix A) at p. 4 n. 3 (citing State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010)); Court of Appeals Brief of Respondent, at p. 5 (citing Gonzalez and State v. Till, 139 Wn.2d 107, 115, 985 P.2d 365 (1999)); Brief of Appellant, at p. 8 (citing American Continental Insurance Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004)); see also State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

b. **The State must prove aggravating factors beyond a reasonable doubt.** The pattern of abuse aggravating factor must be proved to the fact-finder by the same beyond a reasonable doubt standard as applicable to the traditional elements of the crime charged. RCW 9.94A.535(3)(h)(i); RCW 9.94A.537(3); State

v. Barnes, 117 Wn.2d 701, 711, 818 P.2d 1088 (1991); State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009); 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).

**c. The “ongoing pattern of abuse” factor was not proved where the State showed merely that the defendant had perpetrated incidents in the past, involving persons unrelated to the crime charged, none of whom were a victim or victims of the charged offense under 9.94A.030(53).** 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 by Mr. Sweat against persons unconnected to the currently charged crime as a victim or victims. 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).

However, under the aggravating factor in question, it must be proved that the current domestic violence crime

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. Douglas, 173 Wn. App.

849, 850-51, 295 P.3d 812 (2013) (involving assault of wife's mother and father, and subsequent burglary and arson of wife's mother's and father's home). Mr. Sweat's history of past convictions fails to establish this aggravating factor, where none of the prior incidents involved a victim or victims of the currently charged crime for which the defendant was being sentenced. Rather, the factor authorizes additional punishment where the defendant's crime is part of a pattern of incidents of abuse of the same victim or victims, over a prolonged period of time. Common experience indicates that the harmfulness of *ongoing* domestic abuse is more than just the sum of the individual punches that a spouse, or the members of an abused family, sustains.

The Court of Appeals was wrong when it decided that the use of the term "victim or multiple victims" in the (3)(h)(i) factor changes the SRA to mean persons from prior incidents who are unrelated to the current crime under this factor. Appendix A (Decision), at p. 4. The SRA's plain language establishes that unrelated, unconnected persons harmed in prior incidents are not included for purposes of aggravating the defendant's current crime on the basis of a pattern of ongoing abuse of the same victim or victims, under RCW 9.94A.535(3)(h)(i).

In this case, the aggravating factor employs the term "victim," a word which has a statutorily-defined meaning, encompassing multiple victims of one charged crime, that must be applied to the SRA's aggravating factor at issue. Specifically, RCW 9.94A.030 provides that "[u]nless the context clearly requires otherwise," the term "victim" means the following:

"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). The Legislature's addition of the language "or multiple victims" to the pattern of abuse aggravating factor, by Laws 2010, ch. 274, § 402, is consistent with this expansive definition, which provides for the existence of numerous victims of a crime including all persons suffering injury as a result, persons injured by 'victimless' crimes, and persons who commenced the crime as accomplices. City of Auburn v. Hedlund, 165 Wn.2d 645, 651, 653, 201 P.3d 315 (2009) (victims are "anyone" injured in a crime"); see, e.g., State v. Bourne, 90 Wn. App. 963, 977-78, 954 P.2d 366 (1988) (defendant's crime had three victims under statutory definition of "victim" at then RCW

9.94A.030(37).<sup>3</sup>

The plain language of the statutory definition of "victim," read along with the beginning proviso in .030, indicates that this definition must be applied whenever that defined term is used in the Chapter, unless the context indicates otherwise, and does so clearly – i.e., *without* any ambiguity or lack of clarity.<sup>4</sup>

As a result, the aggravating factor in question, read in conjunction with the .030(53) definition of victim, indicates that exceptional punishment may be imposed under .535(3)(h)(l)'s "pattern of abuse of a victim or multiple victims" standard only where the defendant's current charged crime is the *latest*

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<sup>3</sup> In Hedlund, this Court examined the plain language of RCW 9A.08.020, which defines accomplice liability. The statute says that a person may not be charged as an accomplice if they are a "victim" of the crime. RCW 9A.08.020(5)(a). The trial court ruled that this applied only to crimes that required a victim, which DUI and reckless driving do not. This Court held that the definition of victim in then RCW 9.94A.030(46) was in accord with its common understanding as anyone injured as a result of the crime, a definition which the Court said has broad application to many categories of persons, including accomplices. Auburn v. Hedlund, 165 Wn.2d 645, 648, 651-54, 657, 201 P.3d 315 (2009) (stating that the Court would follow the language of accomplice statute, which is plainly written, and noting that, "Should the legislature intend a more limited definition of "victim," it, not this court, should amend that statute.").

<sup>4</sup> The Legislature commonly prescribes the particular manner in which a legal term in a statute, including a criminal law definition, shall be read. For example, RCW 9A.08.010(4) provides that "[a] [crime's] requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears." See, e.g., State v. Delcambre, 116 Wn.2d 444, 447-48, 805 P.2d 233 (1991) (applying rule, and holding that existence of a statutory provision stating that larcenies should be treated as thefts did not

*manifestation* of an ongoing pattern of abuse of the same victim or victim(s) of the charged crime.

**d. The State's proposed alternative reading of 535(3)(h)(i) is not reasonable, and at most merely suggests a claimed lack of clarity in the aggravating factor's use of the term victim.** The language of the aggravating factor at issue in this case is clear, and unambiguous. But crucially, even if the State could persuade that there is some possible lack of clarity in an aggravating factor's use of a SRA-defined term, that does not amount to a clear indication of a different intended meaning -- which is what the SRA expressly demands before its definitional statute can be jettisoned, as the State wishes to do in order to fit the facts of the present case.

In Mr. Sweat's case, the State is the proponent of ascribing a meaning to the term "victim," for purposes of the aggravating factor in question, that is dramatically *different* than the pre-defined meaning of the term in RCW 9.94A.030(53). The Respondent notes that the aggravating factor previously referred to abuse of "a victim" until the language "or multiple victims" was added by Laws 2010. The State also contends that the SRA's aggravating factor

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"plainly indicate" a purpose to impose a different mental state than willfully for

provisions “as a whole” suggest that the language “victim or multiple victims” changes the definition of victim to include prior unrelated incidents. Brief of Respondent, at pp. 7-10.

It is true that another aggravating factor, at .535(3)(g), does state, “The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen.” RCW 9.94A.535(3)(g). The State contends that the change to “multiple victims” in our factor at issue, when interpreted and construed by reference to this other factor that uses the phrase “same victim,” suggests that the language “victims or multiple victims” does not require a pattern of abuse of the same person or persons. Brief of Respondent, at p. 9-10. But the aggravating factors in RCW 9.94A.535(3) subsections (g) and subsections (h)(i), have long coexisted, since well before the 2010 addition of the “multiple victims” language in (3)(h)(i). The absence of the word “same” in .535(3)(h)(i) is just as insignificant now for construal purposes, as it was before the 2010 change.

And crucially, even if there was some ambiguity in the way that the (3)(h)(i) factor employs the term victim (there is not), the statutory scheme expressly establishes that lack of clarity is not

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purposes of welfare fraud under RCW 74.08.331).

enough to override subsection .030 and allow the reader to assign a new, different meaning to a pre-defined SRA term. RCW 9.94A, subsection .030, clearly establishes the following rule for reading the Chapter's subsequent provisions: Only where a pre-defined term is used in a context that clearly requires application of a different meaning, may the reader depart from the term's pre-defined meaning as set forth in .030.

Ultimately, no interpretation or construal of (3)(h)(i) is necessary, because the SRA unambiguously provides that party's contention of a lack of clarity in a provision's use of a pre-defined term is not adequate to trigger a departure from the governing definition. Legislative definitions included in a statute are controlling, State v. Watson, 146 Wn.2d 947, 954–55, 51 P.3d 66 (2002), and 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). The statutory definition of victim governs. RCW 9.94A.030(53); RCW 9.94A.535(3)(h)(i).

The only way around the foregoing is for the State to suggest, as it seems to have timorously done, that this particular aggravating factor indeed specifically allows or requires it to be based on the existence of unrelated sufferers of prior crimes,

rendering those sufferers “victims” -- of a crime charged in the *past*. See, e.g., Supplemental Court of Appeals Brief of Respondent, at pp. 5-6. This aggravating factor – so the State’s argument must necessarily go – specifically and unambiguously imposes increased punishment based on the defendant’s *conviction history* of abuse of past crime victims.

However, this is a strained and unreasonable reading of the statute. If the aggravating factor in question was directed at increasing punishment for persons who had a pattern of prior criminal convictions – which would be necessary in order for there to be past crime victims -- then .535(3)(h)(I) would say exactly that, instead of using the term “incidents.” The Legislature did not write the statute that the State envisions.

Further, such a reading of the statute would be contradictory to the Legislature’s continuing statements that exceptional punishment must be based on matters that are “substantial and compelling.” This means that the reasons for departing from the range must relate to the crime, distinguishing it from other crimes of the same statutory category. RCW 9.94A.535 (trial court may impose a sentence above or below the standard range for reasons that are “substantial and compelling”); State v. Pennington, 112

Wn.2d 606, 609-10, 772 P.2d 1009 (1989) (explaining substantial and compelling language) (citing D. Boerner, Sentencing in Washington § 9.6, at 9–13 (1985), and State v. Nordby, 106 Wn.2d 514, 520, 723 P.2d 1117 (1986)); see also RCW 9.94A.585(4) (exceptional sentences must be based on reasons that justify punishment *above* the calculated standard range); State v. Barnes, 117 Wn.2d at 708, 711 ("the SRA itself bars the sentencing judge from considering criminal history . . . as a reason for imposing an exceptional sentence"); State v. Houf, 120 Wn.2d 327, 331, 841 P.2d 42, 44 (1992); see, e.g., State v. Bolton, 68 Wn. App. 211, 214-18, 842 P.2d 989 (1992) (prohibition against considering facts unrelated to the crime as basis for exceptional sentence required reversal of upward departure premised on defendant's longstanding disregard for dangers of alcohol shown by long history of driving under the influence).<sup>5</sup>

All of the foregoing means that the reasons for the imposition of an exceptional term may not be predicated on matters that are necessarily already considered in computing the defendant's

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<sup>5</sup> The Bolton Court also held that, in this regard, Bolton's prior conviction for DWI had also already been used in calculating his standard sentence "and, accordingly, could not be used as an aggravating factor." Bolton, at 218 (relying on Barnes, at 708 ("the SRA itself bars the sentencing judge from considering criminal history . . . as a reason for imposing an exceptional sentence")).

standard range. State v. Fisher, 108 Wn.2d 419, 426, 739 P.2d 683 (1987); State v. Nordby, 106 Wn.2d at 518; see also State v. Suleiman, 158 Wn.2d 280, 291-92 and n. 3, 143 P.3d 795 (2006) (question whether found factors are sufficiently substantial and compelling to justify an exceptional sentence is a matter of law).

The Legislature would not write, and this Court would not adopt such a strained reading of, the aggravating factor at .535(3)(h)(i) that allows an exceptional sentence to be based on the defendant's already-scored criminal history. Certainly, it is demonstrably untenable for the State to suggest that this aggravating factor specifically indicates that the prior incidents may be or are to be crimes of conviction. If the past acts forming a "pattern of abuse"-type aggravating factor also led to criminal conviction, "the aggravating factor cannot be applied" under Washington law. Ende and Fine, Washington Practice, Criminal Law § 3908 (2010-2011 ed.) (addressing RCW 9.94A.535(3)(g) ("In such a case, the multiple acts would be taken into account in the offender score").

Ultimately, showing a possible lack of clarity in the aggravating factor's use of the term "victim or multiple victims" accomplishes exactly nothing. Subsection .030 of the SRA does

not say, “you should ignore these statutory definitions if a later provision uses a term in a way that you claim makes it ambiguous or unclear whether the pre-defined meaning still governs.” Certainly, the use of the pluralizing word “multiple,” added to the .535(3)(h)(i) aggravating factor in 2010, does not clearly indicate a new, changed meaning of the subject noun (“victim”) that dramatically transforms the factor’s meaning so as to bring within its ambit the defendant’s already-scored criminal history, a matter the Legislature and this Court has said fails to meet the requirement of substantial and compelling reasons to depart from the standard range already calculated therefrom.

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. THE EXCEPTIONAL SENTENCE MUST BE REVERSED WHERE THE SENTENCING COURT BASED IT ON THE DEFENDANT’S PRIOR CONVICTIONS, WHICH WERE MATTERS ALREADY CONSIDERED BY THE LEGISLATURE IN SETTING MR. SWEAT’S OFFENDER SCORE.**

**a. 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 trial court was not authorized to rely on this aggravating factor, because the defendant's prior incidents had sustained criminal convictions already used to determine Mr. Sweat's standard sentence range for the current crime. 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). There must first be a factual determination; and second, an exceptional sentence must warranted for substantial and compelling reasons. *Id.* A court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard range. State v. Nordby, 106 Wn.2d at 518; *see also* State v. Alexander, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995).

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 [see Part E.1, supra] 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[.]" (Emphasis added.) RCW 9.94A.585(4); see, e.g., State v. Griffin, 173 Wn.2d 467, 474 n. 1, 268 P.3d 924 (2012) ("Appellate courts review exceptional sentences outside of the standard sentence range pursuant to the standards set forth in RCW 9.94A.585(4)" (citing RCW 9.94A.535)).

Specifically, here, criminal conviction 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. CP 119 (judgment and sentence offender scoring table); 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 convictions, which were necessarily accounted for in computing the range. Id., see also Fine and Ende, 13B Washington Practice § 3801 (2012-2013 ed.) (summarizing decisions explaining what "substantial and compelling reasons" are, including that reason must not be a factor that is necessarily considered in computing the presumptive range,

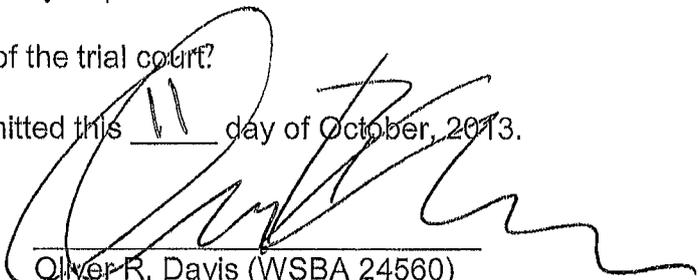
and that it must relate to the circumstances of the crime) (citing State v. Nordby, 106 Wn.2d at 518; and State v. Houf, 120 Wn.2d at 331)).

**b. Reversal is required.** 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 trial court could not rely on these incidents to impose an exceptional sentence of discretionary length as an aggravator. Nordby, supra; Fisher, 108 Wn.2d at 426. On this basis, reversal is required, and remand for resentencing to a standard range sentence is necessary. State v. Ferguson, 142 Wn.2d 631, 649 & 649 n.81, 15 P.3d 1271 (2001) (Nordby violation requires resentencing to standard range term).

#### **F. CONCLUSION**

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

Respectfully submitted this 11 day of October, 2013.

  
Oliver R. Davis (WSBA 24560)  
Washington Appellate Project - 91052  
Attorneys for Petitioner

## Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 RICHARD DEDE SWEAT, )  
 )  
 Appellant. )

No. 66836-6-1  
DIVISION ONE  
PUBLISHED OPINION  
FILED: March 18, 2013

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAR 18 AM 8:43

GROSSE, J. — The aggravating factor set forth in RCW 9.94A.535(3)(h)(i) that a defendant has engaged in a pattern of psychological, physical, or sexual abuse “of a victim or multiple victims manifested by multiple incidents over a prolonged period of time” does not require proof that the prior incidents of abuse involved the same victim in the current offense. Thus, evidence that the defendant had multiple domestic violence convictions over a period of 15 years involving different victims was sufficient to support the trial court’s finding that this aggravating factor had been established. Accordingly, we affirm.

FACTS

In September 2010, Richard Sweat began dating Kellie Kenworthy and Kenworthy moved in with Sweat. On September 26, 2010, the two had an argument during which Sweat struck Kenworthy in the eye with his hand. She lost consciousness from the blow and when she awoke could not see out of her left eye for about 30 minutes. She was later diagnosed with a fractured orbital socket.

The State charged Sweat with second degree assault – domestic violence. The State also charged as an aggravating factor that Sweat had a pattern of domestic

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 pleaded, 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 pleaded, 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 Malner.

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).

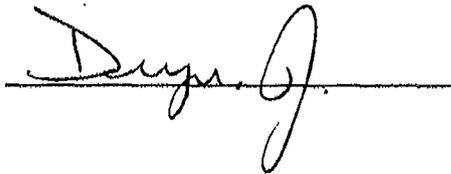
offender.<sup>5</sup> As set forth above in the trial court's findings, the evidence here was sufficient to support a finding of this aggravating factor.

We affirm the judgment and sentence.

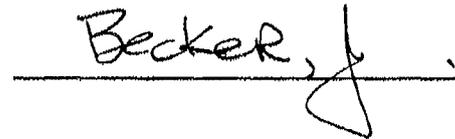


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WE CONCUR:



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A handwritten signature in cursive script, appearing to be "Becker, J.", written over a horizontal line.

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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).

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 88663-6
v.	)	
	)	
RICHARD SWEAT,	)	
	)	
Petitioner.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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516 THIRD AVENUE, W-554	
SEATTLE, WA 98104	

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF OCTOBER, 2013.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1514 Third Avenue  
Seattle, WA 98101  
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**Subject:** 886636-SWEAT-BRIEF

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### **Supplemental Brief of Petitioner**

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