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Division III Court of Appeals No. 32873-2-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CECILY MCFARLAND,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Petitioner
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

 ORIGINAL

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A. ISSUES ON REVIEW

Issue I: Whether a trial court may impose concurrent sentences for firearm convictions as an exceptional sentence downward, notwithstanding the consecutive sentencing requirement of RCW 9.94A.589(1)(c), and, if so, whether defense counsel was ineffective for not requesting an exceptional sentence in this case.

Issue II: Whether a trial court abuses its discretion by admitting a police officer's body camera video of the defendant's arrest, which showed the defendant in handcuffs, in an obviously impaired and belligerent state, sitting on a porch answering police questions, with the officer discussing the elements of burglary.

B. STATEMENT OF THE CASE

The petitioner relies on and incorporates herein the statements of the case in her petition for discretionary review (filed 3/31/2016, pgs. 1-4), and in her opening brief (filed in Division III on 5/5/2015, pgs. 3-8).

C. ARGUMENT

Issue I: Whether a trial court may impose concurrent sentences for firearm convictions as an exceptional sentence downward, notwithstanding the consecutive sentencing requirement of RCW 9.94A.589(1)(c), and, if so, whether defense counsel was ineffective for not requesting an exceptional sentence in this case.

An exceptional sentence downward, whether as concurrent sentences or a lesser term, is permitted for multiple firearm offenses. Statutory grounds for a mitigated sentence were supported by the record in this case, including the operation of the multiple offense policy, so that remand for resentencing is appropriate where the trial court suggested it did not have the authority to order anything except consecutive sentences.

Alternatively, remand for resentencing is appropriate due to ineffective assistance of counsel where defense counsel failed to cite those facts and legal authorities that supported a mitigated sentence in this case.

1. An exceptional sentence downward, whether as concurrent sentences or a lesser term, is permitted when sentencing for multiple firearm offenses.

Cecily McFarland was convicted of multiple counts of theft of a firearm (RCW 9A.56.300) and second-degree unlawful possession of a firearm (RCW 9.41.040(2)). The Legislature has directed pursuant to the Hard Time for Armed Crimes Act that the “offender shall serve consecutive sentences for each conviction of [these felony crimes], and for each firearm unlawfully possessed.” RCW 9.94A.589(1)(c); Laws of 1995, ch. 129, §1(b) (Initiative Measure No. 159). *Accord* RCW 9.41.040(6) (“Notwithstanding any other law, if the offender is convicted under this section for [these firearm offenses], then the offender shall serve consecutive sentences”); *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003) (“statute unambiguously prohibits concurrent sentences for the listed firearm crimes.”); *State v. Murphy*, 98 Wn. App. 42, 47-49, 988 P.2d 1018 (1999) (firearm counts to be sentenced consecutively “[n]otwithstanding any other law.”)

While RCW 9.41.040(6) and 9.94A.589(1)(c) direct consecutive sentences for multiple firearm offenses, RCW 9.94A.535 states a “court

may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” “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...” RCW 9.94A.535.

This Court “interpret[s] the SRA de novo to discern and implement the legislature’s intent.” *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014) (internal citations omitted). If the plain language of the statute is unambiguous, the inquiry ends. *Id.* “If there is no plain meaning and the language is ambiguous, we may glean the statute’s intent from its legislative history.” *Id.*

No known authority prohibits the exceptional sentencing statute (RCW 9.94A.535) from applying to the firearm sentencing statute (RCW 9.94A.589(1)(c)), so as to order an exceptional sentence downward by running multiple firearm sentences concurrently or by imposing a lesser term of confinement.¹ On the other hand, there is authority allowing exceptional, concurrent sentences for multiple serious violent offenses,

¹ Division III questioned whether concurrent sentencing was permitted for firearm offenses, versus whether a reduction of the terms of confinement may instead be allowed. *State v. McFarland*, 2016 WL 901088, at *8. But, whether a trial court imposes concurrent firearm sentences, or a downward departure from the standard sentencing range, both would cure the same concern. *Graham*, 181 Wn.2d at 886-88 (allowing exceptional sentence for multiple serious violent offenses by ordering concurrent sentences or reducing terms of confinement).

despite the language of RCW 9.94A.589(1)(b) requiring serious violent offenses to be sentenced consecutively. This suggests that a mitigated sentence can also be imposed for multiple firearms, notwithstanding the consecutive sentencing directive of RCW 9.94A.589(1)(c). The plain language of these statutes anticipates mitigated sentences for multiple firearm offenses, like it does for multiple serious violent offenses.

Although this Court has not specifically acknowledged that a mitigated sentence may be imposed for multiple firearm offenses, such as through concurrent sentences, this Court has previously addressed the markedly similar sentencing provision of RCW 9.94A.589(1)(b), which parallels .589(c), and requires consecutive sentences for multiple serious violent offenses. *Graham*, 181 Wn.2d 878; *State v. Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). In so doing, this Court found the exceptional sentencing statute broadly references RCW 9.94A.589(1) in its entirety; thus, despite the consecutive sentencing mandated for serious violent offenses in subsection (b), a mitigated sentence could still be imposed as an exceptional sentence pursuant to RCW 9.94A.535. *Graham*, 181 Wn.2d at 882-85; *Mulholland*, 161 Wn.2d at 329-30.

This Court also looked beyond the statutes at issue and noted, unlike sentences for other crimes (such as persistent offenders, offenses with mandatory offenses and some sex offenses), the Legislature has never

expressly revoked discretion to impose exceptional sentences for serious violent offenses scored under .589(1)(b). *Graham*, 181 Wn.2d at 884. Likewise, the Legislature has never expressly revoked discretion to impose exceptional sentences for multiple firearm offenses. The plain language of RCW 9.94A.535 references RCW 9.94A.589(1) in its entirety for the consideration of exceptional sentences, which would include the firearm sentencing provisions in subsection (1)(c). Like with serious violent offenses (*see Mullholland and Graham, supra*), there is no restriction on imposing a mitigated sentence for multiple firearm offenses.

Permitting exceptional, mitigated sentences for multiple firearm offenses is also consistent with the purposes and history of the Hard Time for Armed Crimes Act, and is consistent with other statutes in the SRA. First, it would seem illogical to sentence a person who possesses firearms more strictly and severely than the person who used a firearm to commit a serious violent offense. It has already been settled that those who commit serious violent offenses, and even those who are subject to a firearm sentencing enhancement for their offenses, may receive concurrent sentences either as an exceptional sentence downward (*see Mullholland and Graham, supra*), or as a standard range sentence as is the case for firearm enhancements (*see State v. Bonisisio*, 92 Wn. App. 783, 797, 964 P.2d 1222 (1998)). Such disparity in sentencing for those who possessed

or committed theft of a firearm from those committing serious violent offenses with a firearm, would not seem consistent with the purposes of the SRA, including concern with proportionality and just punishment. *See State v. Alexander*, 125 Wn.2d 717, 730, 888 P.2d 1169 (1995).

Further, the Bill Reports on Initiative 159 did call for increased penalties for crimes involving firearms. F.B. REP. and S.B. REP. on I-159, 1995 Wash. Legis. Serv. Ch. 129 (I.M. 159). But these reports do not suggest potential mitigated sentences be eliminated for multiple firearm offenses. *See id.* Indeed, a search of Initiative 159's text shows no reference to limiting the exceptional sentencing statute (RCW 9.94A.535). *See* Laws of 1995, ch. 129, §§1-23 (Initiative Measure No. 159).

On the other hand, Initiative 159 did result in the passing of important, pertinent language in RCW 9.94A.475 and .480, suggesting mitigated sentences have long been anticipated for firearm offenses. Initiative 159 states that the judgment and sentence document for certain offenses, including theft of a firearm and unlawful possession of a firearm, shall provide additional space for the sentencing judge to list his or her reasons for either going above or below the presumptive sentence range. RCW 9.94A.480(1); RCW 9.94A.475(5); Laws of 1995, ch. 129, §6 (Initiative Measure No. 159). *See also* Paul Wright, *Washington Initiative to Increase Gun Penalties*, Prison Legal News, available at

<https://www.prisonlegalnews.org/news/1994/aug/15/wa-initiative-to-increase-gun-penalties/> (last visited 10/10/2016) (“Any sentences [involving a violent crime or a weapon that are] above or below the standard range will indicate what the prosecutor’s recommendation was regarding the sentence.”) Mitigated sentences for firearm offenses are anticipated: otherwise, judges need not list their reasons for ordering sentences below the standard range on these publicly available records.

Given the plain language of RCW 9.94A.589(1)(c), RCW 9.94A.535, and RCW 9.94A.475 and .480; and considering *Mulholland, supra*, and *Graham, supra* (discussing mitigated sentencing for multiple serious violent offenses); and considering the Legislative history for I-159, mitigated sentences may be imposed for firearm offenses, either as concurrent sentences or downward departures in sentencing terms.

2. Statutory grounds for a mitigated sentence were supported by the record, including the operation of the multiple offense policy, so that remand for resentencing is appropriate where the trial court suggested it did not have the authority to order anything except consecutive sentences.
 - a. *The record supported a mitigated, exceptional sentence in this case pursuant to the multiple offense policy and other criteria.*

A court may impose an exceptional sentence downward if it finds there are substantial and compelling reasons justifying an exceptional sentence. *Alexander*, 125 Wn.2d at 722. RCW 9.94A.535(1) provides an illustrative list of nonexclusive reasons for mitigated sentences. For

example, a court may impose a mitigated sentence if it finds “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purposes of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g); *Graham*, 181 Wn.2d at 882-85 (exceptional, concurrent sentences permitted pursuant to the multiple offense policy after defendant was convicted of shooting an AK-47 at six police officers); *Mulholland*, 161 Wn.2d at 325-30 (same, as to defendant who shot at a home while six people were inside eating dinner); *State v. Solis-Diaz*, 194 Wn. App. 129, 133-37, 376 P.3d 458 (2016)² (remanded for resentencing where trial court did not consider exceptional sentence downward due to its mistaken belief that the mitigating factor of the multiple offense policy did not apply to the defendant’s drive-by shooting, serious violent offenses).

“A trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range.” *Alexander*, 125 Wn.2d at 725. The factor must “be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” *Id.* Once a sentencing court identifies a mitigating factor, it should then consider the purposes of the SRA and,

² This case was decided by Division II two months after Division III affirmed in Ms. McFarland’s appeal.

finally, determine if the sentence to be imposed is clearly too lenient.

Alexander, 125 Wn.2d at 725, 730, 731.

Here, the record supported an exceptional, mitigated sentence. Ms. McFarland's presumptive standard range for burglarizing her ex-boyfriend's parents' home, where she used to live, was 237 to 306 months in prison, because the multiple firearm offenses all stacked upon one another with consecutive sentences. RP 23, 25. The trial judge and defense counsel both expressed concern with this presumptive standard range, comparing Ms. McFarland's resulting sentence to that imposed on offenders convicted of murder, nearly 20 years. RP 23-25. Ms. McFarland's culpability did not change significantly between the various firearm offenses. This case is a prime candidate for the multiple offense policy, given that Ms. McFarland's sentence appeared to the trial court and counsel as clearly excessive in light of the purposes of the SRA.

Indeed, the purposes of the SRA include just and proportional punishment to the seriousness of offense and to the punishment imposed on others committing similar offenses. The trial court and defense counsel said Ms. McFarland's punishment did not seem just or proportional when compared to someone who had committed murder in the same county. RP 24. It was also not just or proportional when compared to the punishment actually imposed on Ms. McFarland's accomplice, her boyfriend who

removed the Legault's property from their home and stored it at his own parents' house. The boyfriend received only a few years in prison via a DOSA sentence, despite having been arguably at least as culpable as Ms. McFarland, who is now serving a nearly 20-year sentence. RP 23. The other purposes of the SRA include offering the offender opportunity to improve herself, and making frugal use of state resources. *Graham*, 181 Wn.2d at 887 (citing RCW 9.94A.010). Ms. McFarland certainly seemed remorseful and amenable to rehabilitation when she addressed the sentencing court (RP 24-25), and it would seem our State's scarce resources would be better served elsewhere than on the high costs of incarcerating Ms. McFarland for nearly 20 years.

Ultimately, there were substantial and compelling reasons to impose a mitigated sentence here, at least based on the multiple offense policy of RCW 9.94A.535(1)(g), if not based on other circumstances not listed in the statute. *Accord State v. Stevens*, 137 Wn. App. 460, 153 P.3d 903 (2007) (mitigated sentence for multiple firearm offenses affirmed based on factors related to defendant's lesser culpability than typical offender). Ms. McFarland requests this Court remand for resentencing so she has the opportunity to ask the court to consider a mitigated sentence.

- b. *Remand for resentencing is appropriate to correct the trial court's expressed misunderstanding of the law.*

Division III said Ms. McFarland cannot maintain a challenge to the trial court's failure to consider an exceptional sentence, because she had to show the judge failed to consider something he was required to, or that the judge failed to follow a mandatory process. *State v. McFarland*, 192 Wn. App. 1071, 2016 WL 901088*7 (No. 32873-2-III, March 8, 2016) (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)).

It is true sentences within the standard range are generally not appealable. RCW 9.94A.585(1). That is, "appeals which challenge the amount of time given within the correct standard range are precluded." *Mail*, 121 Wn.2d at 710 (citing *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986)). For a "procedural" appeal, an appellant challenging a standard range sentence must generally show "that the sentencing court had a duty to follow some specific procedure required by the SRA [Sentencing Reform Act], and that the court failed to do so." *Id.* at 712, 713.

On the other hand, this Court cautioned in *State v. Mail*, *supra*, that its explanation of when a standard range sentence is appealable should not necessarily "be confused with our discussions regarding the appropriate considerations for exceptional sentences. Unlike the nearly unlimited discretion afforded judges in imposing the appropriate sentence within the standard range, the discretion to impose an exceptional sentence is both

more limited and more amenable to review.” 121 Wn.2d at 711n.2. Standard range sentences may be reviewed “where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. Garcia-Martinez*, 88 Wn. App. 322, 944 P.2d 1104 (1997).

In other words, a sentencing court’s failure to consider an exceptional sentence downward, even where not specifically requested by the defense, may still be amenable to review, particularly where the trial court’s statements on the record suggest an error has been made. *See State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002). An appellate court can “review a court’s decision to impose a standard range sentence ‘in circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.’” *Id.* at 99-100 (quoting *Garcia-Martinez*, 88 Wn.2d at 330). “Remand for resentencing is often necessary where a sentence is based on a trial court’s erroneous interpretation of or belief about the governing law.” *Id.* at 100.

In *State v. McGill*,³ defense counsel had requested the low end of the standard range for multiple drug offenses. 112 Wn. App. at 98. The trial court followed defense counsel’s recommendation, but commented as

³ *State v. McGill*, *supra*, was cited and relied upon by Ms. McFarland in her opening brief to Division III and her Petition for Discretionary Review, but neither the State nor Division III addressed this case in its Answer or Ruling.

follows: “[S]ometimes some of these drug cases, it seems like, when you compare them to some of the really violent and dangerous offenses, it doesn’t seem justified. But it’s not my call to determine the standard range... So I have no option but to sentence you within the range...” *Id.* at 98-99. The Court of Appeals reversed: “The court’s belief that it lacked authority to impose an exceptional sentence was incorrect. Under RCW 9CW 9.94A.535(1)(g), it is within the discretion of a sentencing court to consider and impose an exceptional sentence downward under the multiple offense policy of the SRA.” *Id.* at 99. The *McGill* Court remanded “for the court to exercise its principled discretion” since the reviewing Court “[could not] say the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option.” *Id.* at 100-01.

Here, just as in *McGill, supra*, defense counsel requested a low-end, standard range sentence, rather than an exceptional sentence downward. RP 23-24. Defense counsel did express concern with the length of Ms. McFarland’s presumptive sentence range (*id.*) and, like in *McGill*, the sentencing court echoed that concern by stating, “237 months is -- just a little shy of 20 years, which is what people typically get for murder in the second degree.” RP 24. The sentencing court further commented, “It seems to be counsel, that given the -- I don’t have --

apparently don't have much discretion, here. Given the fact that these charges are going to be stacked one on top of another..." RP 25.

The trial court's comments on the record suggest an error has been made in this case. Like in *McGill*, the court indicated concern when comparing the presumptive standard range of the defendant's multiple offenses with other, more violent offenses. RP 24; *McGill*, 112 Wn. App. 98-99. But the trial court suggested it could not impose any sentence other than one where "the charges are going to be stacked one on top of another." RP 25. The court's belief that it lacked authority to impose anything other than consecutive sentences was incorrect. Its failure to consider an exceptional sentence downward based on a misunderstanding of the law is subject to review and remand by this Court. *McGill*, 112 Wn. App. at 98-100; *Garcia-Martinez*, 88 Wn.2d at 330 (remand appropriate where trial court failed to impose a mitigated sentence based on the expressed misunderstanding that it lacked authority to do so).

Division III suggested the trial court judge's "no discretion" comment meant that "there was nothing presented to him other than a standard range sentence, leaving the judge little room to maneuver." *McFarland*, 2016 WL 901088 *7n.9. Ms. McFarland disagrees with this reading of the record. The State had informed the court that consecutive sentences for the multiple firearm offenses were mandatory. CP 189-90;

RP 22. The parties then informed the court of the resulting standard range of 237 to 306 months in prison. RP 23. Defense counsel then requested the low end of the standard range based on the lack of sophistication of the crime and “lack of proportionality in the -- in the punishment based on consecutive sentences that are required by the legislature.” RP 23-24. The court then immediately responded, “237 months is -- just a little shy of 20 years, which is what people typically get for murder in the second degree.” RP 24. It is in this context that the trial court explained its lack of “discretion... [g]iven the fact that these charges are going to be stacked one on top of another...” RP 25. The trial court was discussing its lack of discretion in relation to the mandatory consecutive sentences, not in relation to counsel’s failure to request a mitigated sentence. Division III’s interpretation of the judge’s “no discretion” comment is unsupported.

3. Alternatively, remand for resentencing is appropriate due to ineffective assistance of counsel where Ms. McFarland’s defense attorney failed to cite those facts and legal authorities that supported a mitigated sentence.

Even if this Court declines to reverse based on the sentencing court’s *expressed* misunderstanding of the law, remand is warranted due to Ms. McFarland receiving ineffective assistance of counsel.

Defense counsel’s performance may be deficient where he fails to cite pertinent law to the trial court and use it to argue for an exceptional sentence downward. *McGill*, 112 Wn. App. at 101-02 (alternatively

remanding for resentencing where defense counsel failed to cite applicable law regarding the multiple offense policy or argue for an exceptional sentence downward following defendant's drug convictions). "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." *Id.* at 102.

Division III refused to find defense counsel ineffective for not requesting a mitigated sentence when no known published authority had extended the holding in *Mulholland, supra* –allowing concurrent, exceptional sentences for serious violent offenses sentenced under RCW 9.94A.589(1)(b) – to multiple firearm offenses sentenced under .589(1)(c). *McFarland*, 2016 WL 901088 *8. Despite there being a lack of published authority so extending the holding of *Mulholland, supra*, and *Graham, supra*, to .589(1)(c), this does not mean the argument for a mitigated sentence for multiple firearm offenses was previously unavailable to defense attorneys. Indeed, this Court recently explained in *State v. Miller* that, even before its decision in *Mulholland*, "[n]othing prevented [defendants] from arguing at sentencing that the trial court had discretion to impose concurrent sentences [for serious violent offenses]." *State v. Miller*, 185 Wn.2d 111, 116, 371 P.3d 528 (2016). The "argument was not previously 'unavailable' to [defendants]." *Id.* Similarly, nothing has

prevented defense attorneys from arguing for mitigated, exceptional sentences in the case of multiple firearm offenses.

Also, contrary to Division III's Ruling, there is not a "lack of any history of other counsel successfully [requesting a mitigated sentence for multiple firearm offenses]" (*McFarland*, 2016 WL 901088 *8), so that counsel's failure to request such a sentence in this case can be excused or considered in line with professional norms. Exceptional, mitigated sentences for multiple firearm offenses have long been anticipated by our Legislature, argued for by defense attorneys, and ordered by sentencing courts. *See* RCW 9.94A.475(5) and .480(1) (requiring record keeping and reporting by judges when mitigated sentences are imposed for firearm offenses); *Stevens*, 137 Wn. App. at 460 (defense counsel successfully argued for an exceptional sentence downward after defendant's conviction of four counts of first-degree unlawful possession of a firearm.)

Because judges are now required to make public record when a sentence outside the standard range is imposed for firearm offenses, this Court can easily discern the fact that mitigated sentences are regularly imposed by trial courts (and presumably requested by defense attorneys) for firearm offenses. *See, e.g.*, John C. Steiger, Wash. State Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing* (2014), pgs. 33-34, available at <http://www.cfc.wa.gov/Publications.htm> (last

visited 10/13/2016) (in 2014, the same year Ms. McFarland was sentenced, 29 total sentences were imposed below the standard range for theft of a firearm and unlawful possession of a firearm).⁴ Division III's excusal of defense counsel's performance when he failed to request a mitigated sentence in this case, simply because no published authority has extended *Mulholland, supra*, to RCW 9.94A.589(1)(c), should be reversed in light of prevailing professional norms.

Finally, the record does not have to show that an exceptional sentence downward would definitely have been imposed by the trial court. *Mulholland*, 161 Wn.2d at 334. But where, as here, the court's remarks indicate a mitigated sentence was a possibility, and the appellate court cannot say the sentencing court would have imposed the same sentence had it known of this possibility, remand is proper. *Id.* (citing *McGill*, 112 Wn. App. at 100-01. "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..." *Grayson*, 154 Wn.2d at 342.

Ms. McFarland's defense attorney should have requested an exceptional sentence below the standard range on her behalf. She was

⁴ Similar statistics of sentencing are available dating back to 1999, all available at <http://www.cfc.wa.gov/Publications.htm>. As additional demonstration of professional norms prior to this case being heard in 2014, 25 total mitigated sentences were imposed in 2013 for Ms. McFarland's same offenses (theft of a firearm and unlawful possession of a firearm), and 33 mitigated sentences were ordered for these offenses in 2012. *Statistical Summary of Adult Felony Sentencing* (2013), pgs. 29-30; *Statistical Summary of Adult Felony Sentencing* (2012), pgs. 28-29.

prejudiced by his failure to do so; the record does not show the trial court would have imposed the same sentence absent counsel's deficiency. The record suggests the trial court was at least open to the idea of imposing an exceptional sentence. The failure to present legal and factual argument supporting an exceptional sentence constituted ineffective assistance of counsel that warrants this case being remanded for resentencing.

Issue II: Whether a trial court abuses its discretion by admitting a police officer's body camera video of the defendant's arrest, which showed the defendant in handcuffs, in an obviously impaired and belligerent state, sitting on a porch answering police questions, with the officer discussing the elements of burglary.

1. The video portion of Ms. McFarland's arrest was not relevant.

As a threshold matter, Ms. McFarland disagrees with Division III's view of the record to the extent it suggested defense counsel agreed Exhibit P44 (the redacted video of the defendant's arrest) was relevant to prove consciousness of guilt. *See McFarland*, 2016 WL 901088*5.⁵ Defense counsel only suggested the statements would be relevant to disprove Ms. McFarland's presence at the Legault home, which related to the trial court's comment: "She indicates she didn't participate in the burglary. This is a gift to you, isn't it?" RP 195. Even if the statements to the officer were relevant (see defense counsel's comments at RP 190),

⁵ Majority at *5: "The video was relevant because it included Ms. McFarland's denial of involvement in the crime, a facet of the recording that she agreed was relevant. The State offered that evidence to show her consciousness of guilt."

defense counsel vehemently contested the relevance of the video and audio portions of the body cam recording. RP 187-203, 212-14.

In other words, the officer may have been permitted to testify Ms. McFarland made false statements to him regarding her whereabouts the previous evening. *See e.g. State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001)⁶; *State v. Clark*, 143 Wn.2d 731, 764-65, 24 P.3d 1006 (2001).⁷ But, other than Ms. McFarland's statements themselves being admitted through the officer's testimony, there was no probative value at all to admitting the video that showed Ms. McFarland "slovenly dressed,"⁸ in handcuffs, swearing at the officer, reciting her own *Miranda* rights, appearing impaired, or with the officer describing the elements of burglary and falsely implying fingerprint evidence might have linked Ms. McFarland to the crime. *See* Exhibit P44. Ultimately, when consciousness of guilt evidence is admissible, it is "only marginally probative as the ultimate issue of guilt or innocence." *Freeburg*, 105 Wn. App. at 498. Therefore, even if Ms. McFarland's statements to the officer about not being at the Legault home could have been admitted through the

⁶ "Actual flight is not the only evidence [of consciousness of guilt]; evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime." *Freeburg*, 105 Wn. App. at 497-98.

⁷ "False information given to the police is considered admissible as evidence relevant to the defendant's consciousness of guilt." *Clark*, 143 Wn.2d at 765.

⁸ J. Fearing, concurring, *State v. McFarland*, 2016 WL 901088*9.

officer's testimony, it was entirely inappropriate to admit the irrelevant body cam video of her arrest in order to prove consciousness of guilt.

2. Admission of Exhibit P44 violated Ms. McFarland's constitutional rights when an officer improperly opined to the elements of burglary on the arrest video.

Admitting Exhibit P44 also violated Ms. McFarland's constitutional rights, since the officer described the elements of burglary.

"Opinions on guilt are improper whether made directly or by inference." *State v. Quaal*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *Id.* Even where an officer's testimony accurately parrots the legal standard in the jury instructions, such testimony is still improper as it goes to the ultimate factual issue to be decided by the jury. *See id.* at 200 (officer's testimony that the defendant was "impaired" was an improper opinion on guilt by inference, going to the core element of whether the defendant drove under the influence.) *See also State v. King*, 167 Wn.2d 324, 330, 219 P.3d 642 (2009) (improper opinion testimony where officer testified he was trained on reckless driving elements and the defendant's conduct fit the elements).

The trial court and State acknowledged the officer would not have been permitted to testify to those burglary elements discussed on the body cam video. RP 193.⁹ But there is no meaningful difference between the officer testifying to those burglary opinions in court, versus the jury hearing the officer describe burglary on the body cam video. Either way, the jury heard an officer of the law, who had a special aura of reliability, describe the legal elements and that a burglary had, in fact, occurred:

Ms. McFarland: “Burglary?... I don’t...know what you f--ing mean burglary... I was here the whole time except... when I went out to get my clothes.” (Exhibit P44, 3:12-3:18)

Officer: “Do you understand what burglary is?... You don’t have to break in... it means being--being anyplace or entering or remaining unlawfully in a building while committing another crime... That’s burglary.” (Exhibit P44, 3:20-3:33)... As far as I know there was a burglary that occurred last night and apparently somehow your name or some video or fingerprints or something, I don’t know, something came up that’s leading us back to you.” (Exhibit P44, 5:23-5:34)

The officer would not have been permitted to testify to the elements of burglary or testify that a “burglary” had in fact been committed. These were ultimate guilt determinations for the jury. Likewise, the officer’s opinion on these ultimate issues, expressed through the video, was improper. Because the officer’s opinions on guilt were inadmissible, the trial court erred by admitting the body cam video. At

⁹ Trial court: “the officer could not take the stand and tell the jury what the elements of burglary are.” State: “I agree that some of the stuff probably shouldn’t come in. Like the informing the Defendant about what constitutes a burglary is obviously shouldn’t come into [sic].” RP 193.

most, the trial court could have permitted the officer to testify to Ms. McFarland's statements denying presence at the Legault home, rather than infringing upon Ms. McFarland's constitutional rights by showing the jury a video with impermissible opinion testimony.

3. The prejudicial value of the body cam video far exceeded any claimed probative value.

Alternatively, the trial court abused its discretion by admitting the arrest video, since the prejudice far exceeded any probative value.

Even relevant evidence is inadmissible where the prejudicial effect of the evidence substantially outweighs its probative value. ER 403. "The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response." *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012) (citing *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). "In determining whether the probative value of evidence outweighs its unfair prejudice, a trial court should consider the availability of other means of proof and other factors." *Id.*

Here, the State sought to admit Ms. McFarland's false statements to the officer as consciousness of guilt. But the officer could have testified to these statements, and even the defendant's related demeanor while making them, without showing the jury an unduly prejudicial body cam video of Ms. McFarland's arrest. Ms. McFarland's false statements to the officer were "only marginally probative as to the ultimate issue of guilt or

innocence.” *Freeburg*, 105 Wn. App. at 498. On the other hand, there is significant prejudice in seeing a defendant in handcuffs. *C.f. State v. Finch*, 137 Wn. App. 792, 844-45, 975 P.2d 967 (1999) (a jury’s viewing of the defendant in handcuffs during trial infringes upon constitutional rights, including the presumption of innocence, and “tends to prejudice the jury against the accused.”)¹⁰ Evidence of prior misconduct by a defendant is also highly prejudicial. *State v. Sanford*, 128 Wn. App. 280, 286-87, 115 P.3d 368 (2005) (unduly prejudicial to admit evidence that implies a defendant had previously been arrested for some other crime).

In *Sanford, supra*, officers were investigating allegations of assault when they contacted a suspect and asked if he was Sanford. 128 Wn. App. at 283. Initially, Sanford denied he was the named suspect and provided a false name to the officers. *Id.* The officers then retrieved a prior booking photo of Sanford, confirmed the photo looked like the person they had just contacted, and arrested the defendant. *Id.* At trial, the court admitted the booking photo, reasoning it linked Sanford to the charged crime by showing his identity. *Id.* at 283-84.

¹⁰ See also *United States v. McCoy*, 848 F.2d 743, 745-46 (6th Cir. 1988) (cautioning against admission of photographs of defendant in prison garb, which may be unduly prejudicial pursuant to Fed.R.Evid. 403, by causing a typical juror to be influenced irrationally to conclude the defendant is a bad guy who belongs in jail and is guilty of the offense charged.) And see *Sanford*, 128 Wn. App. at 286-87 (booking photos may be unduly prejudicial by raising an inference of criminal propensity).

But the Court of Appeals reversed in *State v. Sanford*, explaining the defendant's identity was not at issue since the defendant did not challenge he was the same person who had previously given false information to the officer. 128 Wn. App. at 286. The Court held the prejudicial nature of the booking photo, which implied the defendant had previously been arrested for some other crime, exceeded any probative value. *Id.* at 287. The Court explained that the State could have had its witnesses simply testify that, after confronting Sanford with additional information (without specifically referring to the prejudicial booking photo), Sanford admitted his true identity. *Id.* at 287n.3. Ultimately, the testimony regarding Sanford's false statements was adequate to show consciousness of guilt, without admitting an unduly prejudicial booking photo and exposing the jury to the prejudice of Sanford's implied criminal propensity. *Id.*

Here, too, the body cam video of Ms. McFarland's arrest was more likely to stimulate an emotional rather than rational response in the jury, given Ms. McFarland was seen so "slovenly" dressed, using foul language with the officer and appearing impaired by drugs or alcohol. The video was also unduly prejudicial since the officer suggested Ms. McFarland might be a flight risk and falsely suggested additional fingerprint evidence may have linked her to the burglary that had occurred. Finally, the video

831. An evidentiary error “is harmless if the improperly admitted evidence is of little significance in light of the evidence as a whole.” *Id.*

Under either harmless error standard, Ms. McFarland should receive a new trial. Ms. McFarland did not testify. Ms. McFarland’s boyfriend, Chad Faircloth, the only apparent eye witness to the removal of any firearms from the Legault home, did not testify. Instead, Chad Faircloth’s father Jeffrey Faircloth testified. But, Jeffrey Faircloth never saw Ms. McFarland remove any firearms from the Legault home. RP 120. On the other hand, when the firearms were eventually located by law enforcement, they were in a locked shed at the Faircloths’ home. RP 158-66. Jeffrey Faircloth and Bobbie Palma (Chad Faircloth’s mother) testified and placed responsibility on Ms. McFarland. But Jeffrey Faircloth and Ms. Palma obviously could have been biased to tell the officers they and their son had nothing to do with the firearms taken.

The only direct testimony connecting Ms. McFarland specifically to the firearms was provided by persons naturally inclined to protect their son from legal consequences (and perhaps to protect themselves as well, particularly since Jeffrey Faircloth helped transport items from the Legault home, and the guns were found in the Faircloths’ locked shed). While such evidence would be sufficient if this Court was reviewing for sufficiency, such evidence does not satisfy a harmless error standard. The

jury had reason to doubt the extent of Ms. McFarland's involvement with the firearms and could have viewed Ms. McFarland as a bystander to firearm crimes committed by Chad Faircloth (*see* argument, RP 331, 336).

The evidence connecting Ms. McFarland to the firearms was subject to bias and was not "overwhelming." Further, the error in admitting the highly prejudicial arrest video was of great significance in light of the evidence as a whole. There is at least a reasonable probability the erroneous admission of Ex. P44 materially affected the outcome of the case, since it cast Ms. McFarland in a negative light with an offensive character and apparent criminal propensity. A new trial is warranted.

D. CONCLUSION

Based on the foregoing, Ms. McFarland requests this Court reverse and remand for a new trial or, at a minimum, remand for resentencing.

Respectfully submitted this 24th day of October, 2016.



Kristina M. Nichols, WSBA #35918
Attorney for Petitioner

IN THE SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON)	Supreme Court No. 92947-5
Respondent)	COA No. 32873-2-III
vs.)	
CECILY MCFARLAND)	PROOF OF SERVICE
Appellant/Petitioner)	

I, Kristina M. Nichols, assigned counsel for the Appellant/Petitioner herein, do hereby certify under penalty of perjury that on October 24, 2016, having obtained prior permission, I served a true and correct copy of the attached supplemental brief of petitioner on the Respondent via email at kburns@grantcountywa.gov. I also mailed by first-class mail with the U.S. Postal Service, postage prepaid, a true and correct copy of the same to the Appellant/Petitioner at:

Cecily McFarland, DOC #320691
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

Dated this 24th day of October, 2016.



Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com

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Please find attached for filing the Petitioner's Supplemental Brief and Motion to File Overlength Supplemental Brief. Thank you,

Kristina M. Nichols, Attorney at Law
Jill S. Reuter, Attorney of Counsel
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
[\(509\) 731-3279](tel:5097313279)

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