Supreme Court No. _____

Court of Appeals No. 87065-3-I

IN THE SUPREME COURT
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RAYMOND JAY FEMLING,
Appellant.

APPELLANT'S MOTION FOR DISCRETIONARY REVIEW ON REVIEW FROM CLARK COUNTY SUPERIOR COURT

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A. IDENTITY OF THE PETITIONER

Raymond Femling, Appellant and Petitioner, by and through attorney Sean M. Downs, asks this court to accept review of the decision of the court of appeals attached as "Appendix A" herein.

Appellant is seeking review of the court of appeals decision denying his direct appeal after resentencing wherein his offender score was increased due to current counts that were same criminal conduct; his sentence was aggravated by an invalid plea agreement; and the sentencing court failed to exercise its discretion in that it did not believe that the court could run Femling's sentence concurrently with a previously served sentence.

B. ISSUES PRESENTED FOR REVIEW

1. The superior court erroneously increased Mr. Femling's offender score by failing to find that Counts 1 and 4 encompassed the same criminal conduct.

2. The superior court erroneously imposed an exceptional sentence that was not stipulated to by the defense.

3. The trial court abused its discretion by failing to understand that it had discretion to impose a mitigated exceptional sentence by running the sentence from this case concurrently with a previously revoked DOSA sentence.

C. STATEMENT OF THE CASE

Femling entered a plea of guilty to possession of controlled substance with intent to deliver in case 10-1-00823-3 and possession stolen property first degree in case 10-1-01376-8 at the same time. *See*, *generally*, CP 80-177 (defendant's resentencing memorandum); CP 24-79 (defendant's CrR 7.8 motion). Femling was sentenced to a prison-based DOSA sentence on both matters to be served concurrently. The controlling range was from case 10-1-00823-3 wherein 90 months was imposed with 45 months to be served as prison time and 45 months to be served as community custody. CP 67. This sentence was premised on Femling having three prior convictions for possession of controlled substance. *Id*.

Mr. Femling served his initial 45 months of prison time for his prison-based DOSA sentence. He then had his prison-

based DOSA sentence revoked due to a new conviction in case 14-1-02617-0 (the instant case). Mr. Femling's 45 months of suspended time was then imposed and his sentence in case 14-1-02617-0 was run consecutively to the 10-1-00823-3 and 10-1-01376-8 matters.

Mr. Femling's criminal history included prior convictions pursuant to RCW 69.50.4013(1) (possession of controlled substance – or "PCS"), which were no longer punishable crimes according to *State v. Blake*, *infra*. The defendant's criminal history also included a felony bail jumping conviction (08-1-01301-4), pursuant to a PCS charge, which the defense contended should not be counted in the offender score. The defense filed a separate motion to vacate that conviction, or in the alternative, to resentence as a simple misdemeanor. That motion was denied by the superior court.[1] Mr. Femling's remaining PCS convictions included the following:

[1] This matter was subject to direct appeal and was also denied. *State v. Femling*, 31 Wn. App. 2d 1023, review denied, 559 P.3d 497 (2024) (unpublished opinion).

- PCS-meth. 04-1-00192-7.
- PCS-meth. 07-1-00192-1.
- PCS-meth. 07-1-01628-7.

The defense argued that the correct offender scores at the time of sentencing in case 10-1-00823-3 should have been 1 point with range of 12+ to 20 months; case 10-1-01376-8 should have been 1 point with range of 2 – 6 months. This assumed that the bail jumping conviction (08-1-01301-4) would not score.

Mr. Femling was arrested on the 14-1-02617-0 matter on December 29, 2014. He was not able to get credit on that case until his sentences in cases 10-1-00823-3 and 10-1-01376-8 were served because they were run consecutively as required by statute. Mr. Femling served over 40 months of time in case 10-1-00823-3 (after accounting for good time) before he was arrested in case 14-1-02617-0. Accordingly, the defense requested that the superior court give Mr. Femling credit for

time served in case 14-1-02617-0 beginning upon his arrest on December 29, 2014 by running those matters concurrently.

The defense also argued that Mr. Femling's offender score from the 14-1-02617-0 case included two offenses which constitute the same criminal conduct (counts 1 and 4). In the 2014 case, Mr. Femling was charged in a third amended information with:

- (Count 1) Kidnapping first degree from December 26, 2014 regarding victim James Braithwaite;
- (Count 2) Robbery first degree from December 26, 2014 regarding victim James Braithwaite;
- (Count 3) Assault second degree from December 26, 2014 regarding victim James Braithwaite;
- (Count 4) Theft second degree from December 26, 2014 regarding victim James Braithwaite;
- (Count 5) Solicitation to commit murder first degree between May 22, 2015 and June 5, 2015 regarding victim James Braithwaite;

- (Count 6) Intimidating a witness between May 22, 2015 and June 5, 2015 regarding victim James Braithwaite;
- (Count 7) Solicitation to commit murder first degree between March 10, 2015 and October 14, 2015 regarding victim James Braithwaite;
- (Count 8) Solicitation to commit murder first degree between December 5, 2015 and December 23, 2015 regarding victim James Braithwaite.

CP 108-110. The probable cause statement indicated that while incarcerated, Mr. Femling communicated with another inmate to make sure that Braithwaite did not show up for court by harming him. CP 129-30.

Mr. Femling ended up pleading guilty to a fourth amended information to the following related counts:

- (Count 1) Solicitation to commit assault first degree from December 26, 2015;
- (Count 2) Kidnapping second degree from December 26, 2014 regarding victim James Braithwaite;

- (Count 3) Tampering with witness between May 22, 2015 and October 14, 2015 regarding victim James Braithwaite;
- (Count 4) Tampering with witness between December 5, 2015 and December 23, 2015 regarding victim James Braithwaite.

CP 111-12; 224-243.

(Count 1) Solicitation to commit assault first degree initially erroneously listed December 26, 2014 as the date of the offense. That date was then amended on the document to change the year to 2015 and listed December 26, 2015 as the date of the offense. CP 111. However, the probable cause statement indicated that the conduct regarding solicitation from December 2015 occurred between December 6, 2015 and December 8, 2015. CP 137. There are no allegations from December 26, 2015. *Id*.

Mr. Femling was granted a resentencing pursuant to *Blake*, but the resentencing court ultimately ruled against Mr.

Femling regarding his offender score, consecutive sentence, and mitigated sentence arguments. CP 189-193. The resentencing court believed that in order to run the 2014 case concurrently with the 2010 cases would be a "hybrid" sentence and that it was not allowable. RP 74.

D. ARGUMENT

1. Counts 1 and 4 in case 14-1-02617-0 are the same criminal conduct and should be scored as one point.

"Same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The focal sentence in RCW 9.94A.589(1)(a) directs the sentencing court to concentrate on the offender's criminal intent, the identity of the victim or victims, and the location and timing of the crimes when adjudging whether the crimes entail the same criminal conduct for purposes of sentencing. *State v. Aldana Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). Washington cases naturally inquire to what extent the criminal

intent of the defendant changed from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Under this analysis, the offender must intend to commit one crime, end this intent, and then form a new intent to commit another crime in order to have different intents. We do not read the offender's mind, but assess whether the criminal intent, objectively viewed, changed from one crime to the next. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). The two crimes are the same for purposes of the offender score if the defendant used the first crime to accomplish the second crime. *State v. Collicott*, 118 Wn.2d 649, 668-69, 827 P.2d 263 (1992). The two crimes should be scored as one if the crimes are intimately related. *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

In the 2014 case, Mr. Femling was charged in a third amended information with:

- (Count 1) Kidnapping first degree from December 26, 2014 regarding victim James Braithwaite;
- (Count 2) Robbery first degree from December 26, 2014 regarding victim James Braithwaite;

- (Count 3) Assault second degree from December 26, 2014 regarding victim James Braithwaite;
- (Count 4) Theft second degree from December 26, 2014 regarding victim James Braithwaite;
- (Count 5) Solicitation to commit murder first degree between May 22, 2015 and June 5, 2015 regarding victim James Braithwaite;
- (Count 6) Intimidating a witness between May 22, 2015 and June 5, 2015 regarding victim James Braithwaite;
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Mr. Femling ended up pleading to a fourth amended information to the following related counts:

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- (Count 3) Tampering with witness between May 22, 2015 and October 14, 2015 regarding victim James Braithwaite;
- (Count 4) Tampering with witness between December 5, 2015 and December 23, 2015 regarding victim James Braithwaite.

(Count 1) Solicitation to commit assault first degree initially erroneously listed December 26, 2014 as the date of the offense.

That date was then erroneously amended on the document to list December 26, 2015 as the date of the offense. However, the probable cause statements make clear that the original charges regarding solicitation from December 2015 are between December 5, 2015 and December 8, 2015. There are no allegations from December 26, 2015. This is a scrivener's error in the information, but the factual support for the plea is contained in the probable cause statement which lists the correct date range of December 5, 2015 to December 8, 2015. A clerical error is one that, when amended, would correctly convey the intention of the court based on other evidence. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

Given the above, count 1 and count 4 are in regards to the same victim and are during the same timeframe. The criminal intent for tampering with a witness is to attempt to induce a person to absent said witness from the proceedings. Here, the solicitation to commit assault first degree was done in furtherance of the tampering with witness charge. Namely, Mr. Femling

solicited another to assault Mr. Braithwaite in order to absent him from the proceedings. The acts of the solicitation and the witness tampering are the same act – Mr. Femling approached another inmate at the jail, Richard Schend, and asked him to assault Mr. Braithwaite in order to prevent him from testifying at trial. Therefore, the two crimes are the same for purposes of the offender score since the defendant used the first crime to accomplish the second crime. *Collicott*, 118 Wn.2d at 668-69. Count 1 and 4 are same criminal conduct. It should be noted that the original sentencing court did not undergo a same criminal conduct analysis as Mr. Femling's offender score at the time was believed to be well above 9 points and same criminal conduct analysis would not have affected the applicable sentencing ranges.

Given the above, the Court of Appeals decision is in conflict with a decision of the supreme court (*see Collicott*, *supra*). RAP 13.4(b)(1).

2. An exceptional sentence was not stipulated to, therefore the court could not impose an exceptional consecutive sentence.

Where an exceptional sentence is imposed, as it was here, the erroneous addition of a point to the offender score is still a prejudicial error. *State v. Parker*, 132 Wn.2d 182, 187–88, 937 P.2d 575, 578 (1997) ("We conclude that the sentencing court must first correctly determine the standard range before it can depart therefrom."); *State v. Brown*, 60 Wn. App. 60, 69, 802 P.2d 803 (1990) ("It is obvious from the wording of the statute that the sentencing court must first determine the standard range before deciding to impose an exceptional sentence."); *State v. Worl*, 129 Wn.2d 416, 918 P.2d 905 (1996) (" 'Imposition of an exceptional sentence is directly related to a correct determination of the standard range. That determination can be made only after the offender score is correctly calculated.' ") (quoting *State v. Collicott*, 118 Wn.2d 649, 660, 827 P.2d 263 (1992) (*Collicott II*)). *See* David Boerner, *Sentencing in Washington: A Legal*

Analysis of the Sentencing Reform Act of 1981 at 5-1 (1985) ("The starting point in the application of the Sentencing Reform Act to an individual case lies in determining the sentence range applicable to the particular case at hand.").

In *State v. Waller*, 197 Wn.2d 218, 227, 481 P.3d 515, 520 (2021), the Washington Supreme Court held that when a trial court grants a motion to vacate brought under CrR 7.8, the order "vacates the entire sentence." "Controlling case law permits no other interpretation of those orders." It makes clear that the judgment "in a criminal case means sentence" and the "sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212, 58 S. Ct. 164, 82 L. Ed. 204 (1937). So, if a court vacates the sentence, it vacates the entire judgment. Just as was the case in Waller, that includes the aggravating factors. *See also State v. McWhorter*, 2 Wn.3d 324, 535 P.3d 880, 882 (2023) (until resentencing occurs, there is "no sentence."); *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (when a sentence is vacated, "the finality of the judgment is destroyed" and

accordingly, the "prior sentence ceased to be a final judgment on the merits, and collateral estoppel does not apply") (citing *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)).

When a case returns to trial court for resentencing, the prior sentence is no longer the final judgment in the case. *State v. McNeal*, 142 Wn. App. 777, 787-88, 175 P.3d 1139 (2008); *see also State v. Kilgore*, 167 Wn. 2d 28, 37, 216 P.3d 393 (2009). The only exception is when the resentencing court acts in a purely ministerial capacity and does not exercise any discretion. *Kilgore*, 167 Wn.2d at 37; *McNeal*, 142 Wn. App. at 786-87. At a resentencing hearing, the court must comply with the due process and jury trial requirements as explained in *Blakely*[2] and its progeny. *State v. Powell*, 167 Wn.2d 672, 223 P.3d 493 (2009) (explaining necessity of complying with *Blakely* upon remand) (overruled on other grounds); U.S.

[2] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22; RCW 9.94A.537.

These recent decisions make it clear that an order vacating a judgment pursuant to CrR 7.8 vacates the entire sentence, which includes any prior findings used to support an exceptional sentence. A court cannot vacate an entire sentence and still leave a portion intact.

In *Blakely*, the United States Supreme Court held that punishment may only follow from facts found by a jury beyond a reasonable doubt, and invalidated Washington's exceptional sentencing scheme, which permitted courts to impose sentences greater than the standard range based on judicial fact finding. *Blakely*, 542 U.S. at 304-05. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum, besides the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The United States Supreme Court noted in *Blakely* that the

"'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303.

When a court imposes an exceptional sentence predicated on an unstipulated fact not found by a jury beyond a reasonable doubt, the court violates the defendant's Sixth Amendment right. *State v. Hagar*, 158 Wn.2d 369, 374, 144 P. 3d 298 (2006). After *Blakely*, a jury must find beyond a reasonable doubt that factual bases for establishing the aggravating factor existed. *In re Beito*, 167 Wn.2d 497, 503, 220 P. 3d 489 (2009).

Where a *Blakely* error occurs, the defendant may challenge the imposition of an exceptional sentence pursuant to *Blakely* without first having to withdraw his plea. *Hagar*, 158 Wn.2d at 374 (defendant need not challenge his stipulation in order to establish that a *Blakely* violation occurred). In *Hagar*, the defendant stipulated to certain facts but did not stipulate that the crimes constituted a "major economic offense." There, the

trial court imposed an exceptional sentence based on a finding that *Hagar* committed a major economic offense. On review, the court held the sentence violated *Blakely* because the exceptional sentence was predicated on an unstipulated fact that was not found by a jury beyond a reasonable doubt.

In *Suleiman*, the court held that a defendant's stipulation to facts that support imposing an exceptional sentence would survive *Blakely* requirements only where the defendant stipulated specifically to the aggravating factor at issue and agreed the record supported the factor. *State v. Suleiman*, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). Put otherwise, it is not enough to stipulate to facts from which the trial court could find additional facts, the existence of which would support finding the aggravating factor was present and provides support for imposing an exceptional sentence. *Id*. at 493.

The *Suleiman* court imposed an exceptional sentence relying on the statutory aggravating sentencing factor that the victim was particularly vulnerable. *Id*. at 281. To reach its

conclusions, the trial court had to engage in judicial fact-finding to find particular vulnerability, a fact Mr. Suleiman neither stipulated to nor was found by a jury. *Id*. The finding violated Suleiman's *Blakely* right to a jury. In order for Suleiman's plea to comply with the *Blakely* stipulation exception, he must have stipulated to the underlying facts and stipulated that the record supported a determination of particular vulnerability. Otherwise, the trial court engaged in decision-making that this court has labeled as fact finding. *Id*. at 292. The "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." In other words, the "statutory maximum" is the maximum that a judge may impose "without any additional findings".

Any resentencing must be done *de novo* and the resentencing judge should exercise independent discretion. *State v. Dunbar*, 27 Wn. App. 2d 238, 244, 532 P.3d 652 (2023). Resentencing must proceed as an entirely new proceeding when all issues bearing on the proper sentence must

be considered de novo and the defendant is entitled to the full array of due process rights. *Dunbar*, 27 Wn. App. 2d at 245 (citing *Bruce v. State*, 311 So. 3d 51, 53-54 (Fla. Dist. Ct. App. 2021)). The Washington courts wish to promote rehabilitation by rewarding it on resentencing. *Dunbar*, 27 Wn. App. 2d at 247. Evidence of rehabilitation relates to the legislature's explicit provision that a sentence should "[o]ffer the offender an opportunity to improve himself or herself." *Id* (citing RCW 9.94A.010(5)).

In the instant case, the original judgment and sentence included findings and conclusions that the parties agreed to a recommended sentence above the standard sentencing range. CP 46. Later, the superior court vacated the erroneous judgment and sentence pursuant to *Blake*. Upon entry of the new judgment and sentence, the findings of fact and conclusions of law indicate that the court found aggravating circumstances based upon stipulation of the defendant. However, Mr. Femling never stipulated to a consecutive sentence at the resentencing

hearing, as the court relied on the original sentencing court's imposition of a consecutive sentence. Moreover, upon resentencing, there no longer was a basis for an aggravated sentence based upon a high offender score, as Mr. Femling's corrected offender score was no longer above 9 points. He certainly did not agree on specific facts to support an exceptional sentence. The resentencing court was required to proceed with resentencing anew instead of relying on findings and rulings from an erroneous past sentencing hearing.

The remedy for a *Blakely* violation is resentencing within the standard range. *State v. Hughes*, 154 Wn. 2d 118, 110 P.3d 192 (2005), abrogated by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (abrogation in regards to harmless error test unrelated to the issues in the instant case).

Given the above, the Court of Appeals decision is in conflict with a decision of the supreme court (*see Hughes*, *supra*). RAP 13.4(b)(1).

3. The trial court abused its discretion by failing to understand that it had discretion to impose a mitigated exceptional sentence with concurrent sentences.

A trial court is not bound by a plea agreement reached between the State and the defendant. *State v. Barber*, 152 Wn. App.223, 229, 217 P.3d 346 (2009); RCW 9.94A.431(2). While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Generally, this court does not review the standard range sentencing decisions of a lower court; however, this court reviews 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." *State v. McGill*, 112 Wn. App. 95, 99-100 47 P.3d 173 (2002); *Garcia-Martinez*, 88 Wn. App. at 330.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is based on untenable reasons when it is "based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Id*. at 47. A trial court's failure to exercise its discretion is itself an abuse of discretion. *State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

Here, the trial court's decision was based on an incorrect standard resulting in an abuse of discretion. Remand for resentencing is necessary where the sentence is based on the trial court's incorrect belief about the law. *State v. McGill*, 112 Wn. App. at 99-100. RCW 9.94A.589(2)(a) provides that "whenever a person while under sentence for a felony is

sentenced to another term of confinement the latter term shall not begin until expiration of all prior terms."

Here, Mr. Femling had 40 months left on his revoked DOSA sentence and under RCW 9.94A.589(2), he was under sentence for another crime at the time of his later conviction. However, RCW 9.94A.535, provides that a sentencing court has the discretion to order a departure from the sentencing standards outlined in RCW 9.94A.589 regarding whether a defendant's sentences are run concurrently or consecutively to one another. Thus, under the clear wording of the statute, the trial court was authorized to exercise its discretion to impose concurrent sentences.

In *In re Personal Restraint of Mulholland*, the trial court sentenced the defendant under RCW 9.94A.589(1). The court did not believe it had discretion to run the sentences concurrently. *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 328, 166 P.3d 677 (2007). The Supreme Court

disagreed and remanded, holding the statute clearly allowed the trial court to impose an exceptional sentence. *Id*. at 330.

Similarly, in *State v. McGill*, the court held the sentencing court had the authority to consider and impose an exceptional downward sentence under the multiple offense policy. *McGill*, 112 Wn. App. at 98-99. The court remanded with instructions for the sentencing court to exercise "its principled discretion." *Id*. at 101.

In both *Mulholland* and *McGill*, the sentencing court commented that if it believed it had discretion, and an exceptional sentence was an option, it would have considered imposing it. *Mulholland*, 161 Wn.2d 333; *McGill*, 112 Wn. App. 100-101.

Here, as in both *Mulholland* and *McGill*, it is not clear the trial court would have ordered the same sentence had it been aware it had discretion to run the DOSA sentence concurrently with the 2014 conviction. Mr. Femling's first three felony convictions were affected by *Blake* and his revoked DOSA

sentence resulted in at least 74 months of additional time that Mr. Femling would not have served if he had been sentenced properly at the time. Since Mr. Femling had already completed his revoked DOSA sentence, he was unable to challenge that sentence anymore, as the issue was moot. The only way Mr. Femling could receive an equitable resolution to that issue was to run the sentence in the instant case concurrent with the revoked DOSA matter. *See, e.g.*, *In re Personal Restraint of Dean*, 27 Wn. App. 2d 1039 (2023)[3] (when an offender serves two consecutive sentences for separate crimes, the first of which was possession of a controlled substance, the time spent incarcerated for the drug crime can be credited as time served against the sentence for the second crime once the trial court vacates the drug possession conviction). When a "State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he remain in

[3] Unpublished opinion, cited for persuasive value only, pursuant to GR 14.1.

jail". *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (relying on an analysis based on U.S. Const. Amend. VIII). An offender is constitutionally entitled to credit for time spent in confinement prior to a sentence ordering confinement. *State v. Enriquez-Martinez*, 198 Wn.2d 98, 101-03, 492 P.3d 162 (2021).

After acknowledging Mr. Femling's good works while incarcerated, and lowering the sentence on count 2 by over 30 months, the court explicitly said:

> It's not - - you know, it's there, as you've said and you have to acknowledge that, and you have to accept responsibility for that and move on. And you have been. So, I think that doing what I'm being asked to do in terms of running 2010 cases and the 2014 cases concurrent to each other is a hybrid situation and I don't think that it is allowable.

RP 73-74.

Where a court fails to recognize it has discretion to impose an exceptional sentence, its failure to do so is reversible error. *McGill*, 112 Wn. App. at 99-100. A trial court can impose

a sentence that is both concurrent and consecutive in nature. Trial courts view sentences as a whole in sentencing, considering the sentence on one count as relevant to the sentence on another count (determining, for example, whether sentencing on one count runs concurrently or consecutively with other counts). *State v. Carter*, 3 Wn.3d 198, 548 P.3d 935, 950–51 (2024). The type of sentence contemplated by the defense in this case was not unlawful or even unusual. *See State v. Jones*, 169 Wn. App. 1034 (2012) (a sentencing court has discretion to run a sentence concurrently to a revoked DOSA sentence)[4].

Given the above, the Court of Appeals decision is in conflict with a decision of the supreme court (*see Enriquez-Martinez*, *Mulholland*, and *McGill*, *supra*). RAP 13.4(b)(1). This matter also involves a significant question of law under the United States Constitution (amendment eight) (*see Montgomery*

[4] Unpublished opinion, cited for persuasive value only, pursuant to GR 14.1.

v. Louisiana) and Washington Constitution (*see* Wash. Const. art. I, § 14 which provides greater protections than its federal counterpart; *State v. Bassett*, 192 Wn.2d 67, 80, 428 P.3d 343 (2018). RAP 13.4(b)(2). Lastly, this issue is a matter of substantial public importance, as there are numerous incarcerated individuals that are subject to resentencing pursuant to *Blake* that will be in similar situations to Femling's. RAP 13.4(b)(4).

E. CONCLUSION

Given the foregoing, the appellant respectfully requests that this court accept review of this matter.

DATED this February 26, 2025.

RAP 18.17 certification: This document contains 4,966 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, declare under penalty of perjury under the laws of the State of Washington that on February 26, 2025 I electronically filed the APPELLANT'S MOTION FOR DISCRETIONARY REVIEW with the clerk of the court using the electronic filing system, which will send a copy to the following electronic participant: Aaron Bartlett <Aaron.Bartlett@clark.wa.gov>, attorney for Respondent.

Dated this February 26, 2025. Signed in Vancouver, WA.

s/ Sean M. Downs
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APPENDIX A

FILED
1/27/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RAYMOND JAY FEMLING, Appellant.	No. 87065-3-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Following our Supreme Court's decision in State v. Blake, 197 Wn.2d 170, 186, 481 P.3d 521 (2021), a superior court resentenced Raymond Jay Femling, largely holding him to the original plea agreement, while giving him credit for the rehabilitation he had shown in prison. He argues that, pursuant to Blake, the court should not have counted a related bail jumping conviction in his offender score, nor should it have counted separately two of his convictions, which he claims constitute the same criminal conduct. Femling also argues the court lacked authority to impose an exceptional consecutive sentence and failed to exercise its discretion to impose a mitigated sentence. He also requests to strike the victim penalty assessment. Finding no error, we affirm, remanding this matter only so the court may strike the victim penalty assessment.

I. BACKGROUND

This case arises from the 2014 kidnapping and assault of James Braithwaite, and Femling's subsequent attempt to hire various persons to murder Braithwaite to prevent him from testifying. The State charged Femling with eight crimes, including kidnapping in the first degree, robbery in the first degree, assault in the second degree, and three counts of solicitation to commit murder in the first degree. In 2016, Femling pled guilty to kidnapping in the second degree, solicitation to commit assault in the first degree, and two counts of tampering with a witness.

In his statement on plea of guilty Femling agreed to the State's settlement offer in which the parties jointly would ask the court to enter an exceptional sentence of 216 months of confinement by running the convictions for solicitation (120 months) and for kidnapping (96 months) consecutively. Both sentences represented the high end of the standard ranges. Otherwise, Femling faced a standard term of confinement of up to 411 months for the original solicitation charge.

At his sentencing hearing, the court asked Femling if knew that he was stipulating to consecutive sentences and that he could not appeal such a sentence without being in violation of the plea agreement. Femling acknowledged orally and in writing that he understood both and also agreed that an exceptional sentence was in the "interest of justice." The court followed the parties' recommendation and sentenced Femling to 216 months total confinement for these crimes (the "2016 sentence").

Separately, in 2011, Femling had pled guilty to two crimes and was granted a drug offender alternative sentencing alternative (DOSA) sentence, which suspended a portion of his confinement on the condition he obeyed all criminal laws. Following the conviction in the present case, the DOSA sentences were revoked and the remaining suspended time imposed, which the court in this case ordered to run consecutively to the 2016 sentence.

The 2016 sentence was predicated in part on several convictions for possession of a controlled substance (PCS) under RCW 69.50.4013(1). After our Supreme Court's decision in Blake, which held that such convictions were unconstitutional, Femling moved for resentencing in 2021. 197 Wn.2d at 186. The State did not oppose his request to correct his offender score so that the three prior PCS convictions were removed from the calculation and the court did so.

But in several motions for resentencing, Femling also raised several of the arguments it now raises on appeal, each of which the resentencing court rejected. The court held the parties to the plea agreement, but found it was not obligated to follow their recommendation and would base its sentence on all available information before it. The court resentenced Femling to the same term of confinement on the solicitation conviction (120 months) but sentenced him to 62 months on the kidnapping conviction, which represented the low end of the standard range, for a total of 182 months. It held that its sentence accounted for the work commendations Femling provided and the programs he had completed in prison since the initial sentencing. And the court ran those sentences, as well as the DOSA sentence, consecutively, finding there was no need to resentence

the DOSA.

Femling timely appeals.

II. ANALYSIS

A. Femling's Prior Bail Jumping Conviction

The 2016 sentence was predicated in part also on a conviction for bail jumping, where the PCS conviction was the underlying offense. Femling claims that the bail jumping conviction should not have counted in his offender score. As he had asserted in a separate appeal, he argues that, because his bail jumping conviction was based on his PCS convictions, the former is an invalid judgment and must be erased from his offender score, as was the latter. Alternatively, he contends that, because PCS was never an offense, the punishment for bail jumping where PCS was the underlying crime "remains undefined," and therefore, it should only be considered a misdemeanor. We disagree, noting that this court has already rejected both assertions.

As to the first argument, the fact that charges arose under a constitutionally valid statute is not required for a valid bail jumping conviction. State v. Paniagua, 22 Wn. App. 2d 350, 357, 511 P.3d 113 (2022). As to the second argument, this court has already rejected Femling's claim that we should reclassify his prior conviction as a misdemeanor. State v. Femling, No. 57512-4-II, slip op. at 2 (Wash. Ct. App. May 29, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2057512-4-

II%20Unpublished%20Opinion.pdf.[1] And, our Supreme Court has denied his petition for review of that decision. State v. Femling, 559 P.3d 497 (2024). We see no reason to revisit either holding on these facts.

Thus, the trial court did not err by including the bail jumping conviction in Femling's offender score.

B. Same Criminal Conduct

Femling argues the court erred when it found that the solicitation and kidnapping convictions do not constitute the same criminal conduct. He contends that they do so and, thus, the two convictions should have been scored as one point.

When a defendant is convicted of two or more crimes the sentencing court may "enter[] a finding that some or all of the current offenses encompass the same criminal conduct," which reduces the offender score. RCW 9.94A.589(1)(a). But our Supreme Court has held the statute is "generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act." State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974, 976 (1997).

"In order for separate offenses to 'encompass the same criminal conduct' under the statute, three elements must therefore be present: (1) same criminal intent, (2) same time and place, and (3) same victim." Id.; see also RCW 9.94A.589(1)(a). "The absence of any one of these prongs prevents a finding of same criminal conduct." Id.

[1] We cite this decision pursuant to GR 14.1(a) as it is necessary for a reasoned opinion.

It is a defendant who bears the burden "of production and persuasion" on the issue. State v. Aldana Graciano, 176 Wn.2d 531, 539-540, 295 P.3d 219 (2013). A trial court's same criminal conduct determination will be reversed by an appellate court only when there is an abuse of discretion or misapplication of the law. Id. at 533, 535-38. "A court abuses its discretion when the record supports only one conclusion on whether crimes constitute the same criminal conduct." State v. Latham, 3 Wn. App. 2d 468, 479, 416 P.3d 725 (2018).

Our Supreme Court recently held that our cases "consistently" have looked to the statutory definitions of the crimes to determine the objective intent as "the starting point" in determining "'same criminal conduct.'" State v. Westwood, 2 Wn.3d 157, 167, 534 P.3d 1162 (2023). "If the objective intent for the offenses were the same or are similar, courts *can then* at whether the crimes furthered each other and were part of a same scheme or plan." Id. at 168. This analysis prevented courts from "speculating" over a defendant's proposed subjective purpose. Id. On the facts there, the Court also held that—because the State brought and proved beyond a reasonable doubt distinct charges each alleging a separate necessary statutory intent element, and because no challenge was raised concerning the sufficiency of the evidence supporting either charge—the objective analysis pointed to the conclusion that the crimes did not have the same objective criminal intent. Id. at 169.

As to the first crime here, a person is guilty of solicitation to commit assault in the first degree when, "with intent to promote or facilitate the commission of [assault in the first degree], he or she offers to give or gives money or other thing

of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed." RCW 9A.28.030(1); RCW 9A.36.011(1) (specifying that person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm, assaults another and inflicts great bodily harm or death).

As to the second crime here, a person is "guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . to [t]estify falsely or . . . [a]bsent himself or herself from such proceedings." RCW 9A.72.120(1).

Looking to these statutory definitions, it is plain that the crimes' corresponding objective intentions are distinct. For instance, a crime that could satisfy the intent for soliciting first degree assault—by promoting the commission of action resulting in great bodily harm or death—could then easily exceed the intent necessary for witness tampering, where a person could keep another from testifying by simply, say, bribing the witness to testify falsely. Or, a person could keep another from testifying without any desire to cause any physical harm, e.g., by directing the witness to the wrong courthouse on the wrong day.

In response, Femling starts his analysis, relying on State v. Collicott, 118 Wn.2d 649, 668-69, 827 P.2d 263 (1992), by arguing that we look to whether the two charges "are in regards to the same victim and are during the same timeframe"

and whether one offense "was done in furtherance" of another. This argument ignores the analytic structure of the most recent binding authority, which again sets as our starting point the objective intent made manifest in the statutory definitions of the crimes, and mandates for consideration the remaining factors only if needed. Westwood, 2 Wn.3d at 167-68. Again, the absence of any one prong prevents a finding of "same criminal conduct." Id. at 162. We simply need not reach Femling's arguments.

In short, Femling fails to carry his burden to show that the court abused its discretion in finding that the objective intent of the two crimes were distinct and, thus, we affirm the holding they did not encompass the same criminal conduct.

C. Imposition of Exceptional Consecutive Sentence

Femling argues the resentencing court erred by imposing an exceptional sentence, which ran the solicitation and kidnapping convictions consecutively as he had agreed to in his original plea, but not at his resentencing. He asks us to remand this matter for resentencing and to order the court to run convictions in the 2016 sentence concurrently to each other and with his prior 2010 cases. We decline these requests first because he has waived his arguments on appeal about why such remedies are justified.

Appellate courts generally do not entertain issues not raised in the trial court. State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). An exception to the rule exists, however, for manifest errors affecting a defendant's constitutional rights. RAP 2.5(a)(3). But the exception must be construed narrowly. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "'Manifest' in RAP 2.5(a)(3)

requires a showing of actual prejudice." State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Prejudice in this context means that the error had "practical and identifiable consequences in the trial of the case." State v. J.W.M., 1 Wn.3d. 58, 91, 524 P.3d 556 (2023). That said, this court has declined to even address whether a claim raised for the first time on appeal survives waiver if a party "fails to argue that any of the exceptions listed in RAP 2.5(a) apply." State v. Lindsey, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

At resentencing, Femling asked for a lower sentence, arguing that he was no longer bound by the plea agreement's terms because the Blake decision rendered the agreement invalid, and running the DOSA sentence consecutively was generically unjust. At oral argument, he conceded, "[t]here's, unfortunately, a lack of direct authority on point."

In contrast, the gravamen of Femling's argument on appeal is that, under the sixth amendment, the court could not impose an exceptional sentence again without a renewed stipulation or a jury finding. (Citing inter alia Blakely v. Washington, 542 U.S. 296, 304-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)); U.S. CONST. amend VI. This argument is simply new. And, in reply, Femling does not respond to the State's contention that this argument is waived and, thus, his claim fails under Lindsey, 177 Wn. App. at 247.

Though we need look no further, we alternatively hold that his arguments are equally unavailing on their merits. A defendant may argue for a lower sentence, but a court may bind the defendant to their stipulation that an exceptional sentence is legally justified. In re Pers. Restraint of Fletcher, 3 Wn.3d 356, 382,

552 P.3d 302 (2024). "Ultimately, the appropriate sentence must be determined by the independent judgment of the resentencing court in accordance with the [Sentencing Reform Act, chapter 9.94A RCW] SRA." Id.

Additionally, we have held that an appellant who does not challenge the validity of his plea agreement in his appeal cannot challenge a stipulation to an exceptional sentence he had made in that plea—one in which he agreed to a joint recommendation in exchange for the State not filing additional charges. State v. Poston, 138 Wn. App. 898, 900, 905, 158 P.3d 1286 (2007). The same is true here, where Femling stipulated to an exceptional consecutive sentence in exchange for lesser charges and a number of dismissed charges, significantly reducing his confinement, but not challenging the plea itself.

Even if Femling had not waived this issue, the fact that Femling did not stipulate to a consecutive sentence at the resentencing hearing did not preclude the court holding him to his prior stipulation.

D. The Alleged Refusal to Impose an Exceptional, Mitigated Sentence Concurrent to Femling's 2010 cases

Under RCW 9.94A.585, a defendant generally may not appeal a standard range sentence, but this court will still review such a sentence under circumstances in which the trial court refused to exercise discretion at all or relied on an impermissible basis for refusing to impose the requested sentence. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling." State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173, 176

(2002).

Femling assigns error to the court's failure to impose a mitigated exceptional sentencing running his 2016 sentence concurrently with the 2010 sentence. To the extent that Femling argues the court abused its discretion by *failing* to exercise discretion, we reject that claim because the record indicates it did, in fact, exercise discretion, even if not in the manner Femling preferred. The court expressly held that it did not have to follow the plea agreement. And it ultimately departed from the prior sentence by deciding to sentence Femling to the low-end of the standard range on the kidnapping charge, rather than the higher range as the original sentencing judge had. The court further noted it relied on recent information about Femling's rehabilitation in prison. The court clearly exercised its discretion. McGill, 112 Wn. App. at 100.[2]

In short, Femling does not demonstrate the court abused its discretion based on an incorrect belief it lacked a legal ability to do what it actually did, which

[2] We also reject Femling's claim to the extent he asserts the court abused its discretion based upon an incorrect belief in the law. Femling appears to contend that the court incorrectly believed that it lacked authority to impose the sentence for his 2014 case concurrently to his 2010 case when RCW 9.94A.535 actually enabled it to do so. But he fails to provide sufficiently reasoned or supported argument for this position. Despite alluding to the statute's "clear wording," Femling quotes no language from RCW 9.94A.535 nor cites any particular provision of it, let alone explains how it indicated the court had authority to run a sentence for a subsequent case concurrently to a prior one that was already served because the earlier one was alleged to be unfair. Where a party fails to provide authority in support of a specific claim, we may "assume that counsel, after diligently searching, has found none." In re Pers. Restraint of Campbell, 27 Wn. App. 2d 251, 264, 533 P.3d 144 (2023); RAP 10.3(a)(6). Moreover, this court need not consider arguments that a party does not support with meaningful analysis or citation to pertinent authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

is to look at the facts, consider the law, and determine the appropriate sentence using its independent judgment in accordance with the SRA. Fletcher, 3 Wn.3d at 382.

E. Victim Penalty Assessment Fee

Femling's judgment and sentence imposed a victim penalty assessment (VPA) fee. He now requests a remand to strike that legal financial obligation. The State concedes the matter should be remanded for that purpose. We accept this concession and remand this case to the trial court to strike the VPA in accordance with RCW 7.68.035(4) and RCW 43.43.7541(2).[3]

III. CONCLUSION

Though we reject Femling's other assignments of error, we remand this case to the trial court to strike the VPA fee.

Díaz, J.

WE CONCUR:

Colum, J.

Smith, C.J.

[3] Formerly, RCW 7.68.035(1)(a) mandated a $500 victim penalty assessment for all adults found guilty in superior court of a crime. State v. Mathers, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016). In 2023, our legislature amended RCW 7.68.035 to state that "[t]he court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(4). Further, courts are required to waive VPAs imposed prior to the 2023 amendments, on the offender's motion. Id.; RCW 7.68.035(5)(b).

GRECCO DOWNS, PLLC

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