APPENDIX

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APPENDIX A

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Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRENNARIS MARQUIS JOHNSON, Appellant.	No. 83738-9-I DIVISION ONE PUBLISHED OPINION

SMITH, C.J. — Brennaris Marquis Johnson appeals a jury verdict finding him guilty of second degree assault and felony violation of a no-contact order. On appeal, Johnson contends that the trial court erred by (1) instructing the jury that fourth degree felony assault was a lesser degree offense to second degree assault, (2) admitting evidence of prior assaults against the victim in this case, (3) imposing an exceptional sentence, (4) making an impermissible factual finding when it imposed an exceptional

sentence, and (5) imposing a longer than statutorily permitted sentence on the no-contact order violation. Not finding his first four arguments persuasive, we affirm the convictions. However, we agree that Johnson's sentence for the violation of the no-contact order is longer than statutorily permissible and remand for the court to correct the sentence.

FACTS

Brennaris Marquis Johnson and Nicole Trichler began dating in early 2020. Following an incident in August 2020, Johnson was arrested and a no-contact order protecting Trichler was entered. Despite the no-contact order, the parties stayed in contact.

In late January 2021, while the no-contact order was still in place, Trichler picked Johnson up from jail and the two spent a handful of days at Trichler's apartment. During this time, Johnson was "very argumentative" and accused Trichler of stealing his stimulus check[1] and cheating on him. When Trichler denied stealing the check, Johnson responded by hitting her under the jaw. Trichler asked Johnson why he had hit her, but Johnson just walked away before then turning around and punching Trichler repeatedly on her head, like he would hit a punching bag. Trichler again asked Johnson why he had hit her. In

[1] During the COVID-19 pandemic, the federal government issued "Economic Impact Payments," commonly known as "stimulus checks" to eligible recipients as part of the pandemic relief.

response, Johnson again struck Trichler on her temple. He then told Trichler that he could "do this and nobody would ever see a bruise." Trichler's head started to hurt and she asked Johnson if she could take some aspirin. Trichler testified at trial that at this point in time, she was trying not to get upset because she didn't want Johnson to accuse her of playing the victim. Trichler took four aspirin for the pain.

About 15 minutes later, Trichler described hearing a buzzing noise and feeling an intense pressure in her head. Trichler told Johnson to call 911 because she felt like she was "going to die."[2] By the time emergency personnel responded, Trichler was "crawling around" on her hands and knees. One of the responding emergency medical technicians (EMTs) checked Trichler's vital signs, concluded she was not in danger of serious injury, and advised her to visit a walk-in clinic. Trichler did not report any assault to the EMTs or tell them that she and Johnson had been arguing.

Once the EMTs departed, Trichler's condition steadily deteriorated. She began to vomit and asked Johnson to call 911 again. When the EMTs returned, Johnson or Trichler[3] told them that Trichler had used methamphetamine and had been drinking rum

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[2] Johnson had taken Trichler's phones away from her at this point.

[3] Trichler testified that Johnson relayed this information to the EMTs but EMT Galen Wallace testified that Trichler told him herself.

that day. The EMTs changed their impression of the incident to one involving substance abuse, reasoning that Trichler's headache was from her drug and alcohol use. The EMTs then drove Trichler to the hospital.

At the hospital, Trichler told staff she had used methamphetamine and immediately developed a severe headache. She denied any assault or trauma. A CT[4] scan revealed Trichler had a subdural hematoma, a type of inner brain bleed. Trichler was transferred to the trauma and acute care surgery team for brain surgery to remove the hematoma. After the surgery, Trichler spent several days recovering in the hospital.

Trichler initially blamed the aspirin for her condition. But after talking with her mother, Trichler realized the severity of her injuries and decided to report the assault to police. Johnson was subsequently charged with second degree assault and felony violation of a no-contact order.

Before trial, during motions in limine, the State moved to admit evidence of Johnson's prior assaults against Trichler. The State argued that Trichler's credibility would be a primary issue because of her delay in reporting and general denial of the assault. After hearing pretrial testimony from Trichler, the court granted the State's motion, subject to a limiting instruction. The State also requested that the jury be instructed on fourth degree felony assault as

[4] Computerized tomography.

a lesser degree offense of second degree assault. Johnson objected. The court noted that the jury could conclude Trichler's injuries were caused by something other than the assault, such as a fall, and preliminarily granted the State's request.

The jury found Johnson guilty as charged, and the trial court sentenced him to a total of 168 months of confinement and 30 months of community custody. Johnson appeals.

ANALYSIS

Lesser Degree Offense

Johnson contends that the court violated his due process rights by instructing the jury on fourth degree felony assault as a lesser degree offense of second degree assault, denying that it is a lesser degree offense. He maintains that even if fourth degree felony assault is a lesser degree offense, the evidence did not support such an instruction. He also argues that, although the jury did not convict him of fourth degree felony assault, he suffered substantial prejudice because the State introduced evidence to support that instruction. We conclude that the instruction was not given in error.

Criminal defendants are generally entitled to notice of the charges they are to meet at trial and may be convicted only of the crimes charged in the information. State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998). But when a defendant is charged with an offense consisting of different degrees, the

jury may find the defendant guilty of a lesser degree[5] of the charged offense. RCW 10.61.003. A trial court may instruct the jury on a lesser degree offense when

> "(1) the statutes for both the charged offense and the proposed [lesser] degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is a [lesser] degree of the charged offense; and (3) there is evidence that the defendant committed only the [lesser] offense."

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (internal quotation marks omitted) (quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

"The standard of review applied to a trial court's decision to give a jury instruction depends on whether that decision was based on an issue of law or fact." State v. Loos, 14 Wn. App. 2d 748, 760, 473 P.3d 1229 (2020). The first two prongs of the Fernandez-Medina test are legal questions, which we

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[5] A lesser degree offense is a close cousin of a lesser included offense. A lesser included offense instruction is warranted where (1) each of the elements of the lesser offense are a necessary element of the offense charged and (2) the evidence in the case supports an inference that the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong of the Workman test is not implicated in a lesser degree analysis. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

review de novo. Loos, 14 Wn. App. 2d at 760. The third prong presents a question of fact that we review for an abuse of discretion. Loos, 14 Wn. App. 2d at 760. Only the first and third prongs are at issue here.[6]

1. Offense Proscribed

To determine whether criminal statutes " 'proscribe but one offense,' " Washington courts look to whether the statutes criminalize the same or different conduct. Tamalini, 134 Wn.2d at 732-33 (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)). For example, in Tamalini, our Supreme Court concluded that first and second degree manslaughter were not lesser degree offenses of second degree felony murder because "the manslaughter statutes and the felony murder statutes proscribe significantly different conduct and thus define separate and distinct crimes." 134 Wn.2d at 732. The court examined the statutory elements of manslaughter and felony murder and reasoned that, although both statutes generally proscribe killing another human, they are "directed to significantly differing conduct of defendants." Tamalini, 134 Wn.2d at 733. Similarly, in State v. McJimpson, this court concluded that second degree felony murder and second degree manslaughter were not the same offense because "they prohibit significantly different con-

[6] Johnson does not appear to contest the second element of the Fernandez-Medina test, that the information charges an offense divided into degrees.

duct with regard to such killing" and the statutes involve different mens rea requirements. 79 Wn. App. 164, 171–72, 901 P.2d 354 (1995).

Here, Johnson was charged under RCW 9A.36.021(1), which provides:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

The jury instructions reflect this iteration of second degree assault. Under RCW 9A.36.041(1), a person is guilty of fourth degree assault "if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."

Fourth degree assault is a class C felony if the defendant, within the preceding decade, has been convicted of two or more of the following offenses, for which domestic violence against an intimate partner was proved:

> (i) Repetitive domestic violence offense as defined in RCW 9.94A.030;
>
> (ii) Crime of harassment as defined by RCW 9A.46.060;
>
> (iii) Assault in the third degree;
>
> (iv) Assault in the second degree;

(v) Assault in the first degree; or

(vi) A municipal, tribal, federal, or out-of-state offense comparable to any offense under (b)(i) through (v) of this subsection.

RCW 9A.36.041(3)(b). Similarly, the jury instructions reflect this type of fourth degree felony assault.

Assault is undefined in our criminal code, and courts apply the common law definition. State v. Walden, 67 Wn. App. 891, 894, 841 P.2d 81 (1992). Here, the jury was instructed that an "assault" is "an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive."

Comparing the conduct covered by each criminal statute, it is apparent that RCW 9A.36.021(1)(a) and RCW 9A.36.041(1) and (3) proscribe the same conduct. Both statutes proscribe acting with intent to achieve the same result: causing harmful contact to another. That the two crimes require the same mens rea is particularly relevant, since case law has often distinguished offenses because they require different mens rea. See Loos, 14 Wn. App. 2d at 762-73 (holding fourth degree intentional assault is not a lesser degree offense to third degree assault of a child when the latter was based on criminal negli-

gence). We conclude that fourth degree felony assault is a lesser degree offense to second degree assault.

Still, Johnson attempts to distinguish the two offenses by arguing fourth degree felony assault is not the same offense because it "requires proof of an additional fact not required for second degree assault," that being proof of prior convictions. We disagree. Only in the context of lesser included offenses must the lesser offense contain all the elements of the greater offense. State v. Coryell, 197 Wn.2d 397, 411-12, 483 P.3d 98 (2021). Lesser degree offenses can have an element that is not an element of the greater offense. Coryell, 197 Wn.2d at 411.

2. Evidence of Lesser Offense

The third Fernandez-Medina prong is satisfied "only if based on some evidence admitted, the jury could reject the greater charge and return a guilty verdict on the lesser." Coryell, 197 Wn.2d at 407. But it is not enough that the jury might simply disbelieve the State's evidence; some evidence presented must affirmatively establish the defendant's theory on the lesser degree offense. Fernandez-Medina, 141 Wn.2d at 456. When determining on appeal whether the evidence at trial was sufficient to support a lesser degree instruction, we "view[] the 'supporting evidence in the light most favorable to the party that requested the instruction.' " Coryell, 197 Wn.2d at 415 (quoting Fernandez-Medina, 141 Wn.2d at 455-56). Specifically, "a requested jury instruction on a

lesser included or inferior degree offense should be administered 'if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.' " Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

Here, the evidence could have supported that Johnson assaulted Trichler but did not cause her substantial bodily harm. At trial, Detective Maiya Atkins testified that during a police interview, Johnson told the detective that he called 911 because Trichler had "been falling all over the place." Detective Atkins also relayed that Johnson mentioned Trichler had "been using methamphetamine and thought that might have been an issue [that caused her to fall]" and that Trichler's "use of aspirin . . . might have been a reason why" Trichler had fallen. Dr. Eric Kinder also testified that he believed Trichler's symptoms might have been caused by her methamphetamine use, which could have raised her blood pressure enough to trigger "a very rare kind of aneurysmal hemorrhage." Dr. Amy Walker's testimony further supported this view; she noted that Trichler reported the headache's onset as coming immediately after using methamphetamine. And an emergency medical services (EMS) responder, Galen Wallace, testified that he changed his impression of Trichler at the second EMS visit to substance use because Trichler admitted to "using methamphetamine and to drinking rum that day."

This evidence affirmatively supported an inference that Johnson assaulted Trichler. But the conflicting testimony about the origin of Trichler's symptoms left it for the jury to determine whether it was Johnson's assault or, instead, Trichler's drug use, drinking rum, and falling that caused her subsequent brain injury. Viewing the evidence in the light most favorable to the State, the party requesting the lesser degree instruction, the evidence could have allowed the jury to reject the greater charge and return a verdict only on the lesser.

We briefly note that Johnson misconstrues the "light most favorable" standard. He contends that viewing the evidence in the light most favorable to the State, the jury would conclude that Johnson assaulted Trichler and that this assault was the sole cause of Trichler's injuries. In support of this conclusion, Johnson points to Trichler's testimony that Johnson punched her, her testimony that she did not fall, and medical testimony that head trauma likely caused Trichler's injuries. But because fourth degree felony assault does not require Johnson to have caused Trichler substantial injury, the proper inquiry is whether the evidence could support an inference that something other than Johnson caused Trichler's injuries. In this case, it can. As already noted, there were many possible causes of Trichler's injuries that the jury could have believed as being the proximate cause of her injuries.

Johnson also contends that the court erred by granting the State's request for the lesser degree offense before hearing any evidence. This is inaccurate. During motions in limine, the State requested that the jury be instructed on fourth degree felony assault as a lesser degree offense of second degree assault. The parties then discussed what evidence they intended to proffer and whether that evidence could support the lesser degree offense. Johnson argued that the prior conviction evidence necessary to support the lesser degree offense violated ER 404(b) and that the court should first consider pretrial testimony from Trichler before making a ruling. The court then overruled the State's motion, finding that probative value of the prior offense evidence did not outweigh its prejudicial effect. The court noted that it was open to reconsidering its ruling.

The next day, the court heard pretrial testimony from Trichler. The court then acknowledged that it had erred in overruling the State's request for a lesser degree instruction because it had misunderstood the applicable law and asked both parties to reargue their positions. After the parties presented their positions, the court concluded that based on the facts presented, there was sufficient evidence for the lesser degree instruction and granted the State's request.

Later on, at the close of evidence, Johnson again objected to fourth degree felony assault as a lesser degree offense. The court overruled the objection and allowed the instruction.

Contrary to Johnson's contention, the court heard evidence before initially ruling on the jury instruction. The State also described the evidence it intended to offer to support the lesser degree instruction before the court made its ruling. The court then reconsidered its ruling at the close of trial and reaffirmed that the instruction was proper. The court properly determined on both occasions that an instruction on fourth degree felony assault was warranted. Such an instruction was not error.

3. Substantial Prejudice

Johnson maintains that the court's instruction on fourth degree felony assault resulted in substantial prejudice because (1) the jury was instructed on an uncharged offense and (2) this instruction permitted admittance of prejudicial evidence. We disagree.

Generally, a defendant is entitled to notice of the charges they will face at trial and may be convicted of only charges contained in the information. Tamalini, 134 Wn.2d at 731. But RCW 10.61.003 provides sufficient notice to defendants that they may be convicted of any lesser offense to the charged crime. Foster, 91 Wn.2d at 472. Thus, there is no prejudice and a jury may properly find a defendant guilty of any lesser degree crime of the crimes included in the original information. Peterson, 133 Wn.2d at 893.

In this case, the jury was instructed on a lesser degree offense to second degree assault, so the fact that the lesser offense was not charged is a nonissue.

Johnson's argument that evidence related to the lesser degree offense was wrongly admitted is also unconvincing. That evidence—namely, that there were two prior assaults—was subject to a limiting instruction: the jury was not permitted to consider evidence of Johnson's prior convictions if it found him guilty of second degree assault. The jury found him guilty of second degree assault, and we presume the jury followed instructions and did not consider the prior convictions as evidence. State v. Mohamed, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016) ("We presume that a jury will follow the instructions provided to it.").

ER 404(b)

Johnson asserts that evidence of prior assaults between him and Trichler was not relevant to Trichler's credibility and that the court erred by admitting it. Because this evidence helped explain Trichler's inconsistent statements and her conduct following the assault at issue here, we disagree.

We review the trial court's determination to admit or exclude evidence for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). The appellant bears the burden of proving the court abused its discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But this evidence may be used for another purpose, such as proof of motive, plan, or identity. Foxhoven, 161 Wn.2d at 175. Evidence that a defendant previously assaulted a victim is generally inadmissible if the defendant assaults the same victim on a later occasion. State v. Harris, 20 Wn. App. 2d 153, 157, 498 P.3d 1002 (2021), review denied, 199 Wn.2d 1016, 510 P.3d 1001 (2022). However, such evidence may be admissible to "assist the jury in judging the credibility of a recanting victim." State v. Magers, 164 Wn.2d 174, 1886, 189 P.3d 126 (2008) (plurality opinion). And the victim's credibility need not be an element of the charged offense. See, e.g., Harris, 20 Wn. App. 2d at 158 (evidence of prior assaults admissible to help jury determine recanting witness's credibility in case involving violation of a no-contact order charge). To determine if ER 404(b) evidence is admissible, Washington courts use a four-part test:

> "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."

State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012) (quoting State v. Vy Thang, 145 Wn.2d 630,

642, 41 P.3d 1159 (2002)). "The party seeking to introduce the evidence has the burden of establishing the first, second, and third elements." State v. Ashley, 186 Wn.2d 32, 39, 375 P.3d 673 (2016). "This analysis must be conducted on the record." Foxhoven, 161 Wn.2d at 175. If the evidence is admitted, the court must give a limiting instruction to the jury. Ashley, 186 Wn.2d at 39. A court's decision to admit evidence of prior bad acts depends heavily on the facts of the case and the purpose for which the evidence is sought to be introduced. Ashley, 186 Wn.2d at 44.

In this case, the trial court conducted the appropriate four-step analysis on the record and gave a limiting instruction to the jury. However, neither party cites or addresses this four-part test on appeal. The State relies on an older, two-part test that concerns only relevance and prejudice, and Johnson argues generally that any evidence of past incidents of domestic violence is categorically impermissible, irrelevant, and unduly prejudicial. Johnson's argument largely tracks the second, third, and fourth prongs of the four-part test. Because neither party challenges or addresses the first prong, we address only the other three.

1. Second Prong: Purpose for Introducing Evidence

The State sought to introduce evidence of past domestic violence incidents and how Trichler responded to those incidents to help the jury assess

Trichler's credibility. This clearly satisfies the second prong of the ER 404(b) inquiry, which only requires a party to identify a purpose for offering the evidence. See, e.g., Magers, 164 Wn.2d at 185-86 (prior acts of domestic violence admissible to support a witness's credibility after their testimony changed).

2. Third Prong: Relevance

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Evidence of prior incidents of domestic violence is probative of a witness's credibility in cases where a witness gives conflicting statements about the defendant's conduct. State v. Gunderson, 181 Wn.2d 916, 923-25, 337 P.3d 1090 (2014); cf. Ashley, 186 Wn.2d at 47 (trial court improperly admitted prior assault evidence where victim's trial testimony was consistent with prior statements to police).

Here, the trial court found that, "with regard to [Trichler's] credibility and her allegation in this case," evidence of prior domestic abuse was "relevant as to how she behaves in this relationship." The State contends that evidence of prior assaults and Trichler's response to those assaults were relevant to explain her inconsistent statements and conduct. We agree.

Johnson contends that the prior assaults are not relevant because they show only that "sometimes [Trichler] reports alleged assaults and sometimes

she does not." But Trichler's inconsistent reporting is exactly what is relevant. As is reflected in this case, victims of domestic violence often minimize, deny, or lie about abuse in an effort to protect themselves and avoid repeated violence from their batterer. Anne L. Ganley, Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases, in DOMESTIC VIOLENCE MANUAL FOR JUDGES ch. 2, at 41 (2016), https://www.courts.wa.gov/content/manuals/domViol/chapter2.pdf [https://perma.cc/UA2L-STVU]. This is particularly true when domestic violence issues go public, such as in court proceedings, and batterers try to increase their coercive control over the abused party. Ganley, supra, ch. 2 at 41. And sometimes, the abused party's minimization or denial is actually a survival mechanism: when asked by others if they were injured, they may honestly answer no because they have been so successful in blocking out the event. Ganley, supra, ch. 2, at 42. This is not to say that victims of domestic violence are less credible. We merely acknowledge the tremendous emotional toll that a relationship plagued by domestic violence may have on a person.

These dynamics are present in this case. The State offered evidence of two prior assaults to demonstrate that Trichler had a pattern of inconsistently reporting past abuse and later recanting. After the first prior assault, Trichler decided not to report it to authorities, despite Johnson having strangled her until she was "out cold." And after the second

prior assault, Trichler reported the incident to police but "ran off" before they arrived. She later wrote a letter to the trial court recanting her earlier report of assault.

Trichler's conduct in this case mirrors her past conduct. After the present assault, Trichler denied repeatedly to emergency medical personnel and hospital staff that she had been assaulted or suffered any trauma. But at trial, Trichler testified repeatedly that Johnson had hit her. Trichler also waited several days to report the assault, and testified that she did not initiate the reporting—her mother called the police for her. Moreover, once Trichler was discharged from the hospital, she continued to communicate with Johnson and even went to his apartment. Trichler's inconsistent statements before and at trial, along with her actions after the assault, undercut her credibility at trial. Contrary to Johnson's assertion that evidence of past abuse "does nothing" to assist the jury, this evidence allows the jury to evaluate Trichler's credibility in the context of a relationship marked by domestic violence.

Johnson also argues that our Supreme Court announced a domestic violence exception to ER 404(b) in Magers that was later rejected in Gunderson. We disagree. Magers did not announce a "domestic violence exception" and Gunderson did not reject the Magers plurality holding. Rather, Gunderson clarified the Magers plurality holding. The Gunderson court explained:

> In State v. Magers, we took great care to specifically establish that "evidence that [the defendant] had been arrested for domestic violence and fighting and that a no-contact order had been entered following his arrest was relevant to enable the jury to assess the credibility of [the complaining witness] *who gave conflicting statements about [the defendant's] conduct*."

181 Wn.2d at 923–24 (alterations in original) (quoting Magers, 164 Wn.2d at 186). The court noted that unlike in Magers, the victim in Gunderson did not give any conflicting statements—there was only evidence from other sources that contradicted the victim's account. 181 Wn.2d at 924. The court then explained the effect of Gunderson on Magers: "Accordingly, we decline to extend Magers to cases where there is no evidence of injuries to the alleged victim and the witness neither recants nor contradicts prior statements." Gunderson, 181 Wn.2d at 925. And in a footnote, the court clarified that it was not announcing a domestic violence exception and rejected Johnson's assertion that Magers stood for such a proposition: "The blanket extension of Magers proposed by the dissent would create a domestic violence exception for prior bad acts that is untethered to the rules of evidence." Gunderson, 181 Wn.2d at 925 n.3. In another footnote, the court clarified that its opinion "should not be read as confining the requisite overriding probative value exclusively to instances involving a recantation or an inconsistent

account by a witness." Gunderson, 181 Wn.2d at 925 n.4.

Here, there was evidence of injuries to Trichler and Trichler also contradicted her previous statements at trial. The rule set forth in Magers and Gunderson applies here; evidence of prior assaults was properly admitted for the jury to judge Trichler's credibility in light of her inconsistent statements about the assault.

3. Fourth Prong: Probative Value versus Prejudicial Effect

Finally, Johnson argues that the probative value of the prior assault testimony is outweighed by its prejudicial effects. He also contends the jury relied on Trichler's testimony as propensity evidence.

This prong implicates ER 403. Ashley, 186 Wn.2d at 43. In domestic violence cases, "courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts . . . because the risk of unfair prejudice is very high." Gunderson, 181 Wn.2d at 925. "To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events." Gunderson, 181 Wn.2d at 925.

Here, the State succeeded in showing the overriding probative value of the evidence for credibility

purposes because Trichler gave inconsistent statements about the abuse. She denied any abuse to various medical personnel but then later testified at trial that Johnson had assaulted her. Therefore, the court did not err in admitting the domestic violence evidence for credibility purposes. Cf. Gunderson, 181 Wn.2d at 925 (court erred in admitting past domestic violence evidence where victim's testimony before and at trial was consistent); Ashley, 186 Wn.2d at 47 (court erred in admitting domestic violence evidence where trial testimony was consistent with prior statements to police).

Johnson's contention that the jury improperly relied on the evidence as propensity evidence is similarly unavailing. Johnson overlooks a limiting instruction that prohibited the jury from considering Trichler's testimony for anything other than determining her credibility. Again, we presume juries follow instructions. Mohamed, 186 Wn.2d at 244.

Exceptional Sentence

Johnson contends that the court relied on an invalid factor in imposing an exceptional sentence and that it is unclear whether the court would have imposed the same sentence based on the remaining valid factors, requiring reversal. The State concedes that the court relied on an invalid factor, but asserts that the record makes clear that the court considered two other factors as independent bases for an exceptional sentence. We conclude the sentence is valid because, based on the court's written findings,

at least one other valid factor provided an independent basis for the exceptional sentence.

A trial court may impose an exceptional sentence outside the standard range if it concludes that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Whenever the court imposes an exceptional sentence, it must set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. However, " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The statutory maximum 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 (emphasis omitted). Thus, any exceptional sentence that exceeds the statutory maximum is subject to the two Blakely requirements.

On appeal, an exceptional sentence may be upheld "even where all but one of the trial court's reasons for the sentence have been overturned." State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Remand is necessary "where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld."

Gaines, 122 Wn.2d at 512; see also State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Here, the court imposed an exceptional sentence based on three factors: (1) that Johnson reoffended shortly after being released from incarceration (the "rapid recidivism" aggravator); (2) that Johnson's prior unscored criminal history resulted in a sentence that was clearly too lenient; and (3) that Johnson had committed multiple current offenses and his high offender score resulted in some of the current offenses going unpunished.[7] RCW 9.94A.535(3)(t), (2)(b), (c). Of the three factors, the first and the second require either a jury finding or a stipulation from the defendant. See RCW 9.94A.535(3)(t) (rapid recidivism factor must be considered by jury); State v. Saltz, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007) (RCW 9.94A.535(2)(b) subject to Blakely requirements); cf. State v. Newlun, 142 Wn. App. 730, 742-43, 176 P.3d 529 (2008) (RCW 9.94A.535(2)(c) does not require courts to look beyond facts reflected in jury verdict or admitted by defendant).

Johnson asserts, and the State concedes, that the second factor—whether unscored crimes rendered the sentence "too lenient"—is invalid because the jury did not consider it and Johnson did not stipulate

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[7] Though the State argues that the court did not conclude the sentence was "too lenient," the court's written conclusions of law say otherwise: "This court has discretion under RCW 9.94A.535(2)(b) & (c) to impose a sentence outside the standard range where the prior unscored criminal history results in a sentence that is clearly too lenient." (Emphasis added.)

to facts supporting it.[8] Thus, the crux of the matter is whether, absent the invalid factor, the court clearly intended to impose an exceptional sentence. The record indicates that it would have. The court's conclusions of law for an exceptional sentence list the first factor separately from the other two:

1. The court has discretion under RCW 9.94A.535 to impose a sentence outside the standard range because the aggravating circumstance under *RCW 9.94A.535(3)(t)* has been pled and proved.

2. The court has discretion under *RCW 9.94A.535(2)(b)&(c)* to impose a sentence outside the standard range where the prior unscored criminal history results in a sentence that is *clearly too lenient* and where the defendant has committed mul-

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[8] Johnson also contends that the court did not make a finding that the presumptive sentence would be too lenient. Rather, he claims the court impermissibly invented a new aggravating factor based on the following finding:

> There are three prior unscored misdemeanor domestic violence court order violation convictions from 2011. These convictions are similar in character to the conduct alleged in count two, but do not alter the standard range for either count.

Though the court did not use the words "too lenient" in this finding, it did use those words in its corresponding conclusion of law. And contrary to Johnson's assertion, it appears the court was describing the "too lenient" factor, not creating a new factor.

> tiple current offenses and the high offender score results in *some offenses going unpunished*.

(Emphasis added.) The second conclusion of law does, admittedly, blur the lines between the second and third factors. But even absent these factors, the court's first conclusion of law, determining that RCW 9.94A.535(3)(t) provides an independent basis to impose an exceptional sentence, and its division into a separate conclusion supports that the trial court would have relied on it alone.

The court's oral ruling at sentencing also supports this outcome. The court delineated factors one and three as bases for an exceptional sentence:

> The State has requested for an exceptional upward [sentence] based on, *A*, rapid recidivism, and *B*, the three crimes argument that the offender score is so high that the maximum doesn't go up that high, and that he would be allowed basically to get away with a crime without some sort of punishment. Having taken all of this into consideration, I do find that there is grounds for an exceptional upward sentence.

(Emphasis added.) We affirm the imposition of an exceptional sentence.[9]

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[9] Johnson also contends that the State failed to provide him notice of the "too lenient" aggravating factor. But as the

Constitutionality of Exceptional Sentences

Johnson argues that the imposition of any exceptional sentence under the SRA (Sentencing Reform Act of 1981, ch. 9.94A RCW) violates the Sixth and Fourteenth Amendments to the United States Constitution because it requires the court to make a factual determination that facts found by the jury are substantial and compelling reasons justifying an exceptional sentence. We disagree. This court previously addressed this same issue in State v. Sage, 1 Wn. App. 2d 685, 407 P.3d 359 (2017), and determined that this secondary inquiry is a legal one, not a factual one.

The Sixth Amendment provides criminal defendants with a right to a jury trial. This right, in conjunction with the due process clause of the Fourteenth Amendment, requires that each element of a crime be proved to a jury beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 104, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (plurality opinion). As previously noted, "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to the jury." Hurst v. Florida, 577 U.S. 92, 97, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (alteration in original) (quoting Apprendi, 530 U.S. at 494).

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court's oral ruling makes clear, the State did not ask for this aggravating factor to be imposed—the court did it sua sponte.

The imposition of an exceptional sentence under the SRA is a two-step process prescribed by statute. First, the jury must find "unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence" exist. RCW 9.94A.537(6). Then, the court may impose an exceptional sentence "if it finds, considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6) (emphasis added).

This court previously addressed the constitutionality of the SRA's exceptional sentencing scheme in the context of the Sixth and Fourteenth Amendments and concluded that it met due process requirements. Sage, 1 Wn. App. 2d at 710.

Like Johnson, the defendant in Sage argued that the trial court engaged in prohibited fact-finding, in violation of his Sixth Amendment right to a jury trial, by concluding an exceptional sentence was warranted. This court disagreed, concluding that, despite the statute's imprecise word choice,

> [t]he only permissible "finding of fact" by a sentencing judge on an exceptional sentence is to confirm that the jury has entered by special verdict its finding that an aggravating circumstance has been prove[d] beyond a reasonable doubt. Then it is up to the judge to make *the legal, not factual, determination* whether

> those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence.

1 Wn. App. 2d at 709 (emphasis added) (footnote omitted).

Johnson's argument that the SRA is akin to the Florida sentencing scheme deemed unconstitutional by the Supreme Court in Hurst is also rejected in Sage:

> But the Florida statute at issue expressly state[d] that the jury findings were "advisory." [Former] FLA. STAT. § 921.141 (2010). By contrast, under Washington procedure here, the jury exclusively resolves the factual question whether the aggravating circumstances have been prove[d] beyond a reasonable doubt.

1 Wn. App. 2d at 710 n.86.

We reject Johnson's constitutional argument and conclude that the court did not engage in impermissible fact finding by determining the jury's findings supported an exceptional sentence.

No-Contact Order Sentence

Johnson argues the court erred by sentencing him to more time than statutorily permitted on the no-contact order violation. The State concedes that the court erred. We agree that the court erred and remand for the court to correct the sentence.

RCW 9.94A.505(5) provides that, except in limited circumstances, the court may not impose a sentence that exceeds the statutory maximum for a given crime. Here, the statutory maximum on Johnson's no-contact order violation was 60 months. RCW 7.105.450(5) (no-contact order violation is a class C felony); RCW 9A.20.021(1)(c) (statutory maximum for class C felony is 5 years). Despite this, the court sentenced Johnson to 60 months of confinement and 12 months of community custody. This sentence clearly exceeds the statutory maximum and remand is warranted.

We affirm Johnson's convictions but remand for the court to resentence Johnson on the no-contact order violation conviction.

/s/ Smith, C.J.

WE CONCUR:

/s/ Birk, J. /s/ Chung, J.

APPENDIX B

FILED
SUPREME COURT
STATE OF WASHINGTON
5/8/2024
BY ERIN L. LENNON
CLERK

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRENNARIS MARQUIS JOHNSON, Petitioner.	No. 102772-9 ORDER Court of Appeals No. 83783-9-I

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener, considered at its May 7, 2024, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 8th day of May, 2024.

For the Court

/s/ Gonzáles, C.J.

APPENDIX C

FILED
2022 FEB-7 PM 2:45
HEIDI PERCY
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, v. JOHNSON, BRENNARIS MARQUIS, Defendant. SID: [Redacted] If no SID, use DOB: 08/18/1980	No. 21-1-00311-31 JUDGMENT AND SENTENCE [X] Prison * * * [X] Clerk's action required, firearm rights revoked, ¶ 5.5a [X] Clerk's action required, ¶¶ 2.1, 4.1, 4.3, 4.5, 5.2, 5.3, 5.8 * * *

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's attorney and the deputy prosecuting attorney were present.

II. FINDINGS

2.1 CURRENT OFFENSE(S). The defendant was found guilty on December 15, 2021 by jury verdict of:

COUNT: **1**.

CRIME: SECOND DEGREE ASSAULT substantial bodily harm) RAPID RECIDIVISM and DOMESTIC VIOLENCE - INTIMATE PARTNER
RCW: 9A.36.021(1)(a), 9.94A.535(3)(t) and 10.99.020 and 26.50.010
CLASS: CLASS B FELONY
DOV: 02/2/2021 **INCIDENT#**: EVE 21014454

COUNT: **2**.

CRIME: VIOLATION OF COURT ORDER (FELONY) DOMESTIC VIOLENCE- INTIMATE PARTNER
RCW: 26.50.110(4) or (5), 10.99.020 and 26.50.010
CLASS: CLASS C FELONY
DOV: 03/5/2021 **INCIDENT#**: EVE 21014454

as charged in the Information.

The jury returned a special verdict or the court made a special finding with regard to the following: Rapid Recidivism

* * *

[X]**GV** For the crime(s) charged in Count(s) 1+2, domestic violence as defined in RCW 10.99.020 was pied and proved.

* * *

[X] The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

* * *

2.2 CRIMINAL HISTORY. Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

1	
CRIME	Violation No Contact Order (DV)
DATE OF SENTENCE	11/18/11
SENTENCING COURT (County & State)	King County, WA
A or J (Adult or Juvenile)	A
TYPE OF CRIME	C

2	
CRIME	VUCSA - Attempt Possession w/ Intent (2 Counts)
DATE OF SENTENCE	5/17/13

SENTENCING COURT (County & State)	King County, WA
A or J (Adult or Juvenile)	A
TYPE OF CRIME	C

3	
CRIME	VUCSA - Solicit Possession w/ Intent (DOSA)
DATE OF SENTENCE	10/13/14
SENTENCING COURT (County & State)	King County, WA
A or J (Adult or Juvenile)	A
TYPE OF CRIME	C

4	
CRIME	Residential Burglary (DOSA)
DATE OF SENTENCE	10/31/14
SENTENCING COURT (County & State)	King County, WA
A or J (Adult or Juvenile)	A
TYPE OF CRIME	B

5	
CRIME	Attempted Possession Stolen Vehicle
DATE OF SENTENCE	10/7/16
SENTENCING COURT (County & State)	King County, WA
A or J (Adult or Juvenile)	A
TYPE OF CRIME	C

6	
CRIME	Assault 4 (DV)
DATE OF SENTENCE	8/20/17
SENTENCING COURT (County & State)	King County, WA
A or J (Adult or Juvenile)	A
TYPE OF CRIME	GM

7	
CRIME	Assault 4 (DV)
DATE OF SENTENCE	8/18/20
SENTENCING COURT (County & State)	King County, WA
A or J (Adult or Juvenile)	A

TYPE OF CRIME	GM

* * *

2.3 SENTENCING DATA

COUNT NO. 1	
OFFENDER SCORE	11
SRA LEVEL	Level IV
STANDARD RANGE (Not including enhancements	63–84 Months
PLUS ENHANCEMENTS	
TOTAL STANDARD RANGE (Including enhancements)	63–84 Months
MAXIMUM TERM	CLASS B FELONY—The maximum penalty is 10 years imprisonment and/or a $20,000.00 fine.

COUNT NO. 2	
OFFENDER SCORE	11
SRA LEVEL	Level V
STANDARD RANGE (Not including enhancements	60–60* Months
PLUS ENHANCEMENTS	

TOTAL STANDARD RANGE (Including enhancements)	60–60* Months
MAXIMUM TERM	CLASS C FELONY—The maximum penalty is 5 years imprisonment and/or a $10,000.00 fine.

2.4 [X] EXCEPTIONAL SENTENCE Substantial and compelling reasons exist which justify an exceptional sentence [X] above [ ] below the standard range for Count(s) one or [ ] ~~within the standard range for Count(s) ____~~ but served consecutively to Count(s) two.

* * *

[✓] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [✓] found by jury by special interrogatory. [✓] Findings of fact and conclusions of law are attached in Appendix 2.4. [✓]The jury's interrogatory is attached. The prosecuting attorney [✓] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The

court finds that the defendant is an adult and is not disabled and therefore the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

* * *

2.7 PROSECUTOR'S RECOMMENDATION. The prosecutor's recommendation is as follows:

120 months on Count I

60 months on Count II

* * *

Terms on each count to run:

[ ] concurrently with [X] consecutively to each other

* * *

III. JUDGMENT

3.1 The defendant is GUILTY of the counts and charges listed in Paragraph 2.1.

* * *

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 CONFINEMENT OVER ONE YEAR. The court sentences the defendant to total confinement as follows:

(A) Confinement. RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

108 months on Count I

60 months on Count II

* * *

Actual term of total confinement ordered is 168 months.

* * *

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at ¶ 2.3, and the following counts which shall be served consecutively:

Counts one and two to be served consecutively

* * *

Confinement shall commence immediately unless otherwise set forth here: _____

CREDIT FOR TIME SERVED. The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: From booking 2/19/21 to include #2632A21F

4.2 COMMUNITY CUSTODY. RCW 9.94A.701 and .702, RCW 10.95.030(3).

Prison Sentence For offenders sentenced to the custody of Department of Corrections (DOC), the court shall order community custody under the jurisdiction of (DOC) for 36 months if the defendant is convicted of a serious violent offense; 18 months if the defendant is convicted of a violent offense; or 12 months if the defendant is convicted of a crime against a person under RCW 9.94A.411, a felony violation of Chapter 69.50 or 69.52 RCW or an attempt, conspiracy or solicitation to commit such a crime, or an offense involving the unlawful possession of a firearm by a street gang member or an associate.

Jail Sentence For offenders sentenced to jail, the court may order community supervision for up to 12 months if the defendant is convicted of a violent offense, a crime against a person under RCW 9.94A.411, or a felony violation of Chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime.

The defendant shall serve the term(s) of community custody set forth below. These terms may be adjusted to ensure the combined terms of confinement and community custody actually served do-not exceed the statutory maximum.

Count I for a period of 18 months

Count II for a period of 12 months

Plus all accrued earned early release at the time of release and the conditions ordered are set forth below.

The defendant shall report to a DOC office located in the county where the defendant is released not later than 72 hours after release from custody.

While on community custody, the defendant shall (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in the defendant's address or employment; (4) not possess or consume controlled substances except pursuant to lawfully issued prescriptions; (5) not own, use, or possess firearms or ammunition; (6) ~~pay supervision fees as determined by DOC~~; (7) perform affirmative acts as required by DOC to confirm compliance with orders of the court; and (8) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The term of community custody begins immediately upon release from confinement or at the time of sentencing if no confinement is ordered. The defendant is subject to the conditions of community custody as of the date of sentencing unless otherwise ordered here: _____ . RCW 9.904A.707.

The court orders that during the period of supervision:

* * *

[X] The defendant shall not possess or consume controlled substances without a valid prescription.

[X] The defendant shall have no contact with Nicole Trichler. [✓] See ¶ 4.5.

* * *

[X] The defendant shall undergo an evaluation for the following: [X] substance use disorder [ ] mental health [ ] anger management. The defendant shall fully comply with all recommended treatment.

[X] The defendant shall comply with the following crime-related prohibitions: no criminal law violations

Court Ordered Treatment: If any court orders mental health or substance use disorder treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

* * *

4.3 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the clerk of the court:

PVC [X] $500 Victim assessment RCW 7.68.035

FRC [ ] ~~$200~~ waived Criminal filing fee (mandatory unless) [sic] court finds defendant indigent) RCW 36.18.020(2)(h)

* * *

PDV [] ~~$100~~ Biological Sample Fee (Mandatory if no DNA sample on file) RCW 43.43.7541 [] ~~$115 waived~~ Domestic Violence Penalty (for offenses committed after 7/24/15—maximum $115). RCW 10.99.080 [X] $15 Violation of DV Protection Order ($15 mandatory fine).

* * *

$515.00 TOTAL RCW 9.94A.760

[X] **RESTITUTION.** The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753.

* * *

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here of not less than:

$15.00 per month commencing 60 days from release. RCW9.94A.760.

All payments shall be made within 60 months of [X] release of confinement; [ ] entry of judgment; [ ] other _____.

The defendant shall report to the clerk of the court or as directed by the clerk to provide financial and other information requested. RCW 9.94A.760(7)(b).

* * *

Legal financial obligations may not be satisfied out of any funds subject to the Social Security Act's anti-attachment statute, 42 U.S.C. § 407(a).

The restitution imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 [ ] **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[X] **DNA TESTING NOT REQUIRED.** The Washington State Patrol Crime Laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

4.5 NO CONTACT.

The defendant shall not have contact with Nicole M. Trichler 1/27/1973 *(name, DOB)* including, but not limited to, personal, verbal, telephonic, written or contact through a third party until 2/7/2032 *(date)* (not to exceed the maximum statutory sentence).

EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.

[X] A separate post-conviction Domestic Violence No Contact Order, Stalking No Contact Order, Anti-Harassment No Contact Order, or Sexual Assault Protection Order [ ] was filed at the time of entry of the plea of guilty/guilty verdict [X] is filed contemporaneously with this Judgment and Sentence. *(Entry of a separate order makes a violation of this no contact sentencing provision also punishable as a criminal offense, and the order will be entered into the law enforcement database.)*

[X] The pre-trial Domestic Violence No Contact Order, Stalking No Contact Order, Anti-Harassment No Contact Order, or Sexual Assault Protection Order entered on 3-15-2021 is hereby terminated.

* * *

4.8 SENTENCE CONDITIONS PENDING APPEAL. Unless otherwise ordered, all conditions of this sentence shall remain in effect notwithstanding any appeal.

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not

limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10. 73.100. RCW 10. 73.090.

5.2 LENGTH OF SUPERVISION. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.753(4); RCW 9.94.A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections or the

clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A. 7606.

5.4 VIOLATION OF JUDGMENT AND SENTENCE/COMMUNITY CUSTODY VIOLATION.

(a) Any violation of a condition or requirement of sentence is punishable by up to 60 days confinement for each violation. RCW 9.94A.633(1).

(b) If you have not completed your maximum term of total confinement and you are subject to a violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 94A.633(2)(a).

5.5a FIREARMS. You may not own, use or possess any firearm and under federal law any firearm or ammunition unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. *(The clerk of the court shall forward a copy of the defendant's driver's license, identification card, or comparable identification to the Department of Licensing along with the date of conviction or commitment.)* RCW 9.41.040, 9.41.047. *(Pursuant to RCW 9.41.047(1),*

the Judge shall read this section to the defendant in open court.)

The defendant is ordered to forfeit any firearm he/she owns or possesses no later than _____ to

_____ (name of law enforcement agency). RCW 9.41.098

5.5b FELONY FIREARM OFFENDER REGISTRATION. If the court decided that you are required to register as a felony firearm offender, the specific requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved.

5.7 MOTOR VEHICLE. If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. Your driver's license will also be revoked if this crime involves the offenses of vehicular homicide, vehicular assault, felony hit and run, or perjury related to Title 46 RCW or any other law relating to the ownership or operation of motor vehicles. RCW 46.20.285.

* * *

5.9 CERTIFICATE OF DISCHARGE.

(a) If you are under the custody and supervision of

the Department of Corrections, the court will not issue a Certificate of Discharge until it has received notice from Department of Corrections and clerk's office that you have completed all requirements of the sentence and satisfied all legal financial obligations. RCW 9.94A.637.

(b) If you are not under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received verification from you that you have completed all sentence conditions other than payment of legal financial obligations and the clerk's office that you have satisfied all legal financial obligations.

5.10 RIGHT TO APPEAL. You have a right to appeal this conviction and sentence. If you pleaded guilty, your right to appeal is limited.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the portions of the record necessary for the appeal will be prepared at public expense.

5.11 VOTING RIGHTS STATEMENT. I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must reregister before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the Indeterminate Sentence Review Board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

* * *

DONE in Open Court and in the presence of the defendant this 7 day of February 2022

/s/ M. Judge, J.

/s/ Michelle L Rutherford	/s/ Dustin D. Drenguis	Refused
MICHELLE L RUTHERFORD, WSBA #44377	DUSTIN D. DRENGUIS, WSBA #48014	BRENNARIS MARQUIS JOHNSON

* * *

ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Corrections Center of the State of Washington:

WHEREAS, BRENNARIS MARQUIS JOHNSON, has been duly convicted of the crime(s) of SECOND DEGREE ASSAULT (substantial bodily harm) RAPID RECIDIVISM DOMESTIC VIOLENCE - INTIMATE PARTNER, VIOLATION OF COURT ORDER (FELONY) DOMESTIC VIOLENCE - INTIMATE PARTNER, as charged in the Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term(s) as provided in the judgment which is incorporated by reference, all of which appears of

record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof; Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to transfer to the custody of the Superintendent for the Washington State Department of Corrections or his designee for transport to either the Washington Corrections Center at Shelton, Washington or Washington Corrections Center for Women at Purdy, Washington and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presence shall be authority for the same. HEREIN FAIL NOT.

WITNESS the Honorable Millie M. Judge, Judge of the said Superior Court and the seal thereof, this 7th day of February, 2022

Heidi Percy
CLERK OF THE SUPERIOR COURT

By: M.R. King
Deputy Clerk

APPENDIX D

FILED
2022 FEB-7 PM 2:45
HEIDI PERCY
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, v. JOHNSON, BRENNARIS MARQUIS, Defendant. SID: [Redacted] If no SID, use DOB: 08/18/1980	No. 21-1-00311-31 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AN EXCEPTIONAL SENTENCE APPENDIX 2.4 JUDGMENT AND SENTENCE

An exceptional sentence [X] above [ ] within [ ] below the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. The offender score for each count is 11. Without the "other current offense" the offender score on each count would still be 9, meaning that the existence of the second count does not alter the standard range at all.

2. There are three prior unscored misdemeanor domestic violence court order violation convictions from 2011. These convictions are similar in character to the conduct alleged in count two, but do not alter the standard range for either count.

3. The jury found the aggravating circumstance of rapid recidivism beyond a reasonable doubt. A copy of the special interrogatory is attached.

II. CONCLUSIONS OF LAW

1. The court has discretion under RCW 9.94A.535 to impose a sentence outside the standard range because the aggravating circumstance under RCW 9.94A.535(3)(t) has been pled and proved.

2. The court has discretion under RCW 9.94A.535(2)(b)&(c) to impose a sentence outside the standard range where the prior unscored criminal history results in a sentence that is clearly too lenient and where the defendant has committed multiple current offenses and the high offender score results in some offenses going unpunished.

3. The court finds substantial and compelling reasons justify an exceptional sentence in this case.

Dated this 7th day of February, 2022.

/s/ M Judge
JUDGE

/s/ Michelle L Rutherford
MICHELLE L RUTHERFORD, WSBA#: 44377
Deputy Prosecuting Attorney

/s/ Dustin D. Drenguis
DUSTIN D. DRENGUIS, WSBA#: 48014
Attorney for Defendant

BRENNARIS MARQUIS JOHNSON
Defendant

APPENDIX E

Filed in Open Court
December 15, 2021
Heidi Percy
County Clerk
By M.R. King
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON, Plaintiff, v. BRENNARIS Johnson, Defendant.	CASE NO. 21-1-00311-31 SPECIAL VERDICT FORM AGGRAVATING CIRCUMSTANCE

We, the jury, having found the defendant guilty of assault in the second degree or the lesser degree offense of assault in the fourth degree (felony), or assault in the fourth degree (gross misdemeanor) as denied in instructions 13, 15, 16, return a special verdict by answering as follows:

QUESTION: Did the defendant commit the crime shortly after being released from incarceration?

ANSWER: yes
(Write "yes" or "no"

DATED this 15th day of December, 2021

/s/
Presiding Juror

APPENDIX F

FILED
1/2/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRENNARIS MARQUIS JOHNSON, Appellant.	No. 83738-9-I ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION

Appellant Brennaris Johnson has moved for reconsideration of the published opinion filed on October 16, 2023. The respondent State of Washington has filed an answer. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied, the opinion should be withdrawn, and a substitute opinion be filed.

Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied; and it is further

ORDERED that the published opinion filed on October 16, 2023, is withdrawn; and it is further

ORDERED that a substitute published opinion be filed.

/s/ Smith, C.J.

/s/ Birk, J. /s/ Chung, J.

APPENDIX G

Wash. Rev. Code § 9.94A.010

Purpose.

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve himself or herself;

(6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

Wash. Rev. Code § 9.94A.505

Sentences. ***(Effective until January 1, 2026.)***

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517;

* * *

Wash. Rev. Code § 9.94A.510

Table 1—Sentencing grid.

* * *	
SERIOUSNESS LEVEL IV	
Offender score	Midrange sentence, months and years Standard sentence range in months
0	6m 3–9
1	9m 6–12
2	13m 12+–14
3	15m 13–17
4	18m 15–20
5	2y2m 22–29
6	3y2m 33–43
7	4y2m 43–57
8	5y2m 53–70
9 or more	6y2m 63–84
* * *	

Wash. Rev. Code § 9.94A.515

Table 2—Crimes included within each seriousness level. *(Effective until April 1, 2025.)*

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XVI

Aggravated Murder 1 (RCW 10.95.020)

XV

Homicide by abuse (RCW 9A.32.055)

Malicious explosion 1 (RCW 70.74.280(1))

Murder 1 (RCW 9A.32.030)

* * *

V

* * *

Domestic Violence Court Order Violation (RCW 7.105.450, 10.99.040, 10.99.050, 26.09.300, 26.26B.050, or 26.52.070)

* * *

IV

* * *

Assault 2 (RCW 9A.36.021)

* * *

Wash. Rev. Code § 9.94A.520

Offense seriousness level.

The offense seriousness level is determined by the offense of conviction.

Wash. Rev. Code § 9.94A.525

Offender score. ***(Effective until January 1, 2026.)***

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

* * *

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction which is scorable under subsection (1)(b) of this section.

* * *

(21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after August 1, 2011, for any of the following offenses: A felony violation of a no-contact or protection order (RCW 7.105.450 or former RCW 26.50.110), felony Harassment (RCW 9A.46.020(2)(b)), felony Stalking (RCW 9A.46.110(5)(b)), Burglary 1 (RCW 9A.52.020), Kidnapping 1 (RCW 9A.40.020), Kidnapping 2 (RCW

9A.40.030), Unlawful imprisonment (RCW 9A.40.040), Robbery 1 (RCW 9A.56.200), Robbery 2 (RCW 9A.56.210), Assault 1 (RCW 9A.36.011), Assault 2 (RCW 9A.36.021), Assault 3 (RCW 9A.36.031), Arson 1 (RCW 9A.48.020), or Arson 2 (RCW 9A.48.030);

(b) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after July 23, 2017, for any of the following offenses: Assault of a child in the first degree, RCW 9A.36.120; Assault of a child in the second degree, RCW 9A.36.130; Assault of a child in the third degree, RCW 9A.36.140; Criminal Mistreatment in the first degree, RCW 9A.42.020; or Criminal Mistreatment in the second degree, RCW 9A.42.030; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was pleaded and proven after August 1, 2011.

* * *

Wash. Rev. Code § 9.94A.530

Standard sentence range.

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that estab-

lish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h).

Wash. Rev. Code § 9.94A.535

Departures from the guidelines.

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

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

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

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

(1) Mitigating Circumstances—Court to Consider

* * *

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

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

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

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

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

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

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

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

* * *

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

* * *

Wash. Rev. Code § 9.94A.537

Aggravating circumstances—Sentences above standard range.

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the

state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.