IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SYLVESTER JAMES MAHONE, Appellant.	No. 41591-7-II Consolidated with:
In re the Personal Restraint of SYLVESTER JAMES MAHONE, Petitioner.	No. 41743-0-II UNPUBLISHED OPINION

Johanson, J. — Sylvester James Mahone appeals his conviction and sentence for felony harassment. We affirm his conviction because (1) Mahone knowingly, intelligently, and voluntarily waived his right to counsel; (2) the trial court properly granted a continuance; (3) sufficient evidence supports the conviction;[1] and (4) the trial court properly handled the jury question.[2] Although we conclude that the record is sufficient to support Mahone's exceptional sentence, we remand for resentencing because the State failed to prove Mahone's community custody status at

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[1] In his statement of additional grounds for review, Mahone argues that the trial court erred by denying his motion to arrest judgment for insufficient evidence. RAP 10.10(a).

[2]Mahone's direct appeal is consolidated with his personal restraint petition, in which he argues he was denied an opportunity to respond to a jury question.

the time he committed the current offense.

FACTS

I. Felony Harassment

In May 2010, Deputy Richardo Cruz conducted a security check in the Pierce County jail unit where Mahone was incarcerated. When Mahone saw Deputy Cruz he said:

> You're the f**king officer, the wetback that put me here. I'm going to f**king kill you and your family as Clemmons killed those officers.
> . . . I'm going to f**king kill you.

1 Report of Proceedings (RP) at 65. Mahone pointed his finger at Deputy Cruz as if holding a gun and simulated pulling the trigger. Shortly thereafter, Deputy Cruz learned that Mahone had previously served prison time for a murder conviction. During a subsequent security check, Mahone again threatened Cruz saying, "I'm going to kill you and f**k your mother" and he then pulled down his pants and exposed himself. 1 RP at 70.

II. Procedure

A. Pretrial

The State charged Mahone with one count felony harassment contrary to RCW 9A.46.020(2)(b) and RCW 9A.46.020(1)(a)(i)(b). His arraignment was May 19, 2010 and trial was set for August 19, 2010. Mahone remained incarcerated throughout pretrial and trial. In a handwritten motion, dated July 12, 2010, Mahone told the court that he was presently incarcerated on a 16-month "probation-community supervision violation sentence," ordered on April 23, 2010; that the present charges involved Deputy Cruz; and that he required an emergency

jail transfer because Deputy Cruz was now threatening him as he continued to serve his sentence. Clerk's Papers (CP) at 93. This July 12 motion does not say, however, that he was on community custody at the time he committed the current offense.

To determine if Mahone should be allowed to represent himself, the court engaged Mahone in a long colloquy. Mahone asked to act as his own attorney because (1) his appointed counsel failed to secure his witnesses, (2) he had an associate's degree in paralegal studies and 15 years of legal experience—including self-representation in two civil trials and filing legal pleadings on other inmates' behalf. Mahone asserted that he could better represent himself and he would "be more diligent as far as securing my innocence." Verbatim Transcript of Proceedings (VTP) (July 29, 2010) at 9. Mahone acknowledged a potential sentence of "[t]hree, four, six months, with the extension that they seek it." VTP (July 29, 2010) at 10. Mahone was informed that his sentencing range would be four to twelve months, with a five-year maximum, and that a law enforcement enhancement would apply.

Although Mahone never asked his attorney about "aggravating circumstances," he knew that it meant that the trial court could sentence him to additional or "extra" time. VTP (July 29, 2010) at 14. Mahone acknowledged that the trial court could not advise him and stated that he was "very familiar" with the evidence rules and that he could abide by them. VTP (July 29, 2010) at 156. Mahone was "very familiar" with the case law providing that if he represented himself incompetently, he could not obtain appellate relief based on ineffective assistance of counsel. VTP (July 29, 2010) at 16. Mahone affirmed that he understood that a civil case has different

laws, rules, and strategy from a criminal case. In addition, Mahone had seen the plea offer, including the charge, sentence range, and aggravating circumstances. VTP (July 29, 2010) at 15. No one had made a promise to Mahone in exchange for his decision to represent himself; and his decision was voluntary. The trial court "strongly" urged Mahone not to represent himself, telling him that his appointed attorneys are "professional people and very good lawyers." VTP (July 29, 2010) at 21, 23. But Mahone was undeterred and the trial court found that Mahone knowingly and voluntarily waived his right to counsel.

On August 3, 2010, the State moved to continue the August 19 trial date because the prosecutor had just closed a month long trial, Mahone had not yet received discovery, and Mahone had requested an investigator. Over Mahone's objection, the trial court continued the trial date to September 13, 2010.

In an amended information, the State charged Mahone with committing the current offense with two aggravators, (1) being on community custody, and (2) committing the offense against a law enforcement officer performing official duties, and knowing him to be a law enforcement officer contrary to RCW 9.94A.535(3)(v). The State explained that the amendment added a community custody point to Mahone's offender score and increased his maximum sentence to five years. Mahone did not object; he affirmed that he understood the charges and the aggravating circumstances.

B. Trial and Sentencing

After five additional continuances, trial began on October 11, 2010.[3] The State called

[3] Mahone argues that only the August 3 continuance injured him.

three witnesses and Mahone[4] testified that he referenced Maurice Clemmons during his interaction with Deputy Cruz, but denied threatening him or his family.

The court excused the jury to deliberate, telling Mahone that it would summon him when the jury reached a verdict or if the jury had a question. The next day, the jury asked to see transcripts of Mahone's and Deputy Cruz's testimony. At that time, neither the trial judge, nor the parties (including Mahone) were present. Before court staff could summon the parties, but only 11 minutes after it sent the question, the jury reached its verdict. The jury found Mahone guilty of felony harassment. The jury also returned a special verdict finding that Mahone committed the crime with an aggravating circumstance.[5] The parties discussed a sentencing date, considering that Mahone was serving a 16-month probation violation sentence, imposed the previous April.

Before sentencing, Mahone moved to arrest the judgment because the case was a credibility contest therefore, insufficient evidence supported the verdict. The trial court denied Mahone's motion. At sentencing, the State argued that because Mahone committed a felony while under community custody for a felony, Mahone's sentences should run consecutively. The State also argued that Mahone's offender score was 2 and urged the trial court to add another point because Mahone was on community custody at the time of the offense. Mahone did not dispute his prior convictions. Noting that Mahone was on community custody at the time of the

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[4] Standby counsel for Mahone conducted Mahone's direct examination.

[5] Specifically, the jury found that Mahone committed the offense against a law enforcement officer, performing his official duty, and that Mahone knew the victim to be a law enforcement officer.

offense, the trial court asked Mahone if he wanted to say anything about sentencing. Mahone denied making the statements to Deputy Cruz; and he did not respond regarding his community custody status at the time of the offense. Mahone asked that his sentence run "concurrent with [his] community custody." RP (Nov. 5, 2010) at 40-41. The trial court found that Mahone's offender score was 3 and his standard range sentence was 9-12 months. Noting that the jury found a law enforcement enhancement, the trial court imposed a 24-month exceptional sentence to run consecutively to his sentence for community custody violations. Mahone appeals.

ANALYSIS

I. Waiver of Counsel

Mahone argues that the trial court did not fully inform him of self-representation's dangers and disadvantages, including the nature and severity of the charge or the risks of not following technical rules. We disagree. The trial court did not abuse its discretion by finding that Mahone knowingly, intelligently, and voluntarily waived his right of counsel.

We review a trial court's grant of a self-representation request for an abuse of discretion.[6] *State v. James*, 138 Wn. App. 628, 636, 158 P.3d 102 (2007), *review denied*, 163 Wn.2d 1013 (2008). A trial court abuses its discretion if its "'decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *James*, 138 Wn. App. at 636 (quoting *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002), *review denied*, 148 Wn.2d 1022 (2003)).

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[6] Mahone discusses the de novo standard used in federal court but Washington affords the trial court discretion to determine the validity of waiver. *See State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991); *State v. Nordstrom*, 89 Wn. App. 737, 741, 950 P.2d 946 (1997).

Criminal defendants have a constitutional right to make a personal defense; thus, the court cannot force a defendant to accept counsel. *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). A defendant's self-representation request must be unequivocal. *DeWeese*, 117 Wn.2d at 376. Once a defendant unequivocally demands self-representation, the trial court determines if the defendant knowingly, intelligently, and voluntarily waives right of counsel. *James*, 138 Wn. App. at 635. The trial court ascertains that the defendant has at least a minimal knowledge of the task involved, preferably by a colloquy on the record. *DeWeese*, 117 Wn.2d at 378. The validity of waiver of counsel depends on each case's facts and circumstances; there is no particular checklist of legal risks and disadvantages, which the trial court must recite to the defendant. *DeWeese*, 117 Wn.2d at 378.

Mahone compares his case to *State v. Nordstrom*, 89 Wn. App. 737, 742-44, 950 P.2d 946 (1997), to argue that the trial court failed by not clarifying his offense's nature or severity, and by not reviewing the elements. But in *Nordstrom*, the defendant neither expressly nor impliedly waived his right to counsel and there was no waiver colloquy on the record. *Nordstrom*, 89 Wn. App. at 739, 742. In contrast, Mahone unequivocally asserted his right to self-representation and the trial court engaged in an extensive waiver colloquy with him. Therefore, we examine whether the trial court determined that Mahone knowingly, intelligently, and voluntarily waived his right of counsel and whether the trial court ascertained that Mahone had a minimal knowledge of the task involved. *James*, 138 Wn. App. at 635; *DeWeese*, 117 Wn.2d at 378.

Here, the trial court confirmed that Mahone was familiar with the felony harassment charge; the sentence range, including the five-year maximum; and the effect of the aggravating circumstances. The record shows that Mahone had enough information to waive his right to counsel knowingly and intelligently. Additionally, Mahone has an associate's degree in paralegal studies, he had represented himself in two civil trials, and he had prepared various legal pleadings for other inmates. Further, Mahone's prior incarcerations make him uniquely capable of appreciating the gravity of a potential five-year prison sentence for his felony harassment charge.

Mahone also argues that he was not informed of the risks posed by failure to follow technical procedural rules. But, the trial court told Mahone that a civil case is different from a criminal case, with different laws, rules, and strategy. The trial court warned Mahone that the court could not advise him, that he needed to know and to abide by the evidence rules and the criminal procedure rules, and that if he represented himself incompetently, he could not obtain appellate relief based on ineffective assistance of counsel. Further, the trial court told Mahone that he would be better off with his "professional" and "very good" appointed attorneys. VTP (July 29, 2010) at 22-23. Additionally, the trial court "strongly" urged Mahone not to represent himself, but he was undeterred and continued to assert his right to self-representation. VTP (July 29, 2010) at 21. Finally, the trial court verified that Mahone's decision to represent himself was voluntary and not in exchange for a promise.

Nothing in the record supports Mahone's argument that the trial court failed to inform him of the risks posed by failure to follow applicable rules. Instead, the trial court ascertained that

Mahone had a minimal knowledge of the task involved and urged him to consider the risk. *DeWeese*, 117 Wn.2d at 378. We hold that the trial court did not abuse its discretion by finding that Mahone knowingly, intelligently, and voluntarily waived his right of counsel. *James*, 138 Wn. App. at 635.

II. Speedy Trial

Mahone argues that although it is routine to grant a continuance to the *defense* for trial preparation, it is erroneous for the trial court to grant a continuance to the State on that basis. We disagree because the trial court granted the continuance in the administration of justice.

The decision to grant or deny a continuance motion rests within the trial court's sound discretion and we will not disturb that decision unless there is a clear showing it is "'manifestly unreasonable, or exercised on untenable grounds, or for some untenable reasons.'" *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009) (internal quotations marks omitted) (quoting *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). We review an alleged speedy-trial-rule violation de novo. *Kenyon*, 167 Wn.2d at 135.

Superior Court Criminal Rule 3.3 (f)(2) provides:

> On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.

"'In exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors.'" *Flinn*, 154 Wn.2d at 199 (quoting *State v. Heredia–Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003)). A trial court grants a continuance for good cause in order "to

give the State ample preparation time." *Flinn*, 154 Wn.2d at 201. Although, "[t]here is a point at which the length of the continuance would be unreasonable," Mahone does not argue that the continuance's *length* was unreasonable. *Flinn*, 154 Wn.2d at 201. Rather, Mahone argues that good cause did not exist when the State required a continuance to prepare for trial and we reject that argument.

Mahone argues that this continuance prejudiced his defense because his inmate witnesses would be released from confinement and become unavailable. There is nothing in the record, however, to support this bald assertion. Here, the trial court found good cause to grant a continuance because the assigned prosecutor just finished a month long case that morning and, needed time to prepare.

We conclude that Mahone does not show that the trial court's finding of good cause was manifestly unreasonable. *Flinn*, 154 Wn.2d at 201. Therefore, the trial court did not abuse its discretion when it granted a continuance from August 19 to September 13, 2010. .

III. Offender Score

Mahone argues that the trial court imposed an illegal sentence when it added a community custody point to his offender score because (1) he never acknowledged being on community custody at sentencing and (2) the crime occurred during his incarceration, not during community release. We hold that although Mahone's incarceration did not change his community custody status, the State failed to prove that Mahone was on community custody at the time the harassment occurred.

A. Standard of Review

We review de novo the sentencing court's offender score calculation. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005), *review denied*, 158 Wn.2d 1008 (2006), *cert. denied*, 549 U.S. 1308 (2007). A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

"[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." *Ford*, 137 Wn.2d at 481. "The State does not meet its burden through bare assertions, unsupported by evidence." *Ford*, 137 Wn.2d at 482. At sentencing, the facts relied upon "'*must have some basis in the record*.'" *Ford*, 137 Wn.2d at 482 (quoting *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975), *review denied*, 86 Wn.2d 1001 (1976)). The sentencing court may rely on the defendant's stipulation or acknowledgement of prior convictions to calculate the offender score. *James*, 138 Wn. App. at 643. Sentencing determinations are "critical step[s]," which the sentencing court should not render "in a cursory fashion," even if informal determinations would reach the same result. *Ford*, 137 Wn.2d at 484.

The remedy for miscalculated offender score is to remand for resentencing. *Mendoza*, 165 Wn.2d at 930. Where the defendant did not raise a specific objection at sentencing, the State may offer new evidence to prove the defendant's prior convictions at resentencing. *Mendoza*, 165

Wn.2d at 930.

RCW 9.94A.525(19) provides that the sentencing court shall add one point to the defendant's offender score "[i]f the present conviction is for an offense committed while the offender was under community custody." The law requires the State to show Mahone's status by a preponderance of the evidence. *Ford*, 137 Wn.2d at 479–80. Mahone first argues that the State lacked proof of his community custody status because he never signed the stipulation on prior record and offender score, nor acknowledged his community custody status at his sentencing hearing.

At sentencing, after discussing Mahone's community custody point, the trial court asked Mahone if he would like to say anything. Mahone affirmed his convictions and did not contest his community custody status. Then, Mahone asked the trial court to run his sentence "concurrent with my community custody." RP (Nov. 5, 2010) at 40-41. But Mahone's failure to contest his community custody status at sentencing is insufficient proof of his community custody status. *State v. Hunley*, 161 Wn. App. 919, 928, 253 P.3d 448, *review granted*, 172 Wn.2d 1014.[7]

In pretrial matters, Mahone told the court that he was "presently incarcerated" on a 16-month community custody violation ordered on April 23, 2010, and that he had ongoing interactions with Deputy Cruz, the alleged victim in the present charges. CP at 93. But at

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[7] In *Hunley*, the majority held, "[C]onstitutional due process requires the State to meet its burden of proof at sentencing. The defendant's silence is not constitutionally sufficient to meet this burden." *Hunley*, 161 Wn. App. at 928. But the dissent concluded that the sentencing court may consider the defendant's lack of objection to the State's criminal history summary and failure to demand additional documentary proof as an acknowledgement. *Hunley*, 161 Wn. App. at 942-43 (Hunt, J., dissenting).

sentencing, Mahone did not acknowledge that he was on community custody when he committed the offense. Neither did the State provide such evidence. Because "constitutional due process requires the State to meet its burden of proof at sentencing," we remand for resentencing. *Hunley*, 161 Wn. App. at 928.

Next, Mahone argues that the trial court erroneously imposed a point for community custody because RCW 9.94A.030 defines community custody as that time served in the community. Br. of Appellant at 42. RCW 9.94A.030(5) provides:

> "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.

But for sentencing purposes, RCW 9.94B.020 defines the term "community placement" as the "period during which the offender is subject to the conditions of community custody and/or postrelease supervision." *See also State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006), *cert. denied sub nom. Thomas v. Washington*, 549 U.S. 1354 (2007). Our Supreme Court has recognized the legislative intent that "all terms and conditions of an offender's supervision in the community . . . not be curtailed by an offender's absence from supervision for any reason including confinement in any correctional institution." *In re Pers. Restraint of Dalluge*, 162 Wn.2d 814, 819, 177 P.3d 675 (2008) (quoting Laws of 2000, ch. 226, § 1).

Thus, during a person's confinement, when on community custody status, the corrections department retains community supervisory powers and responsibilities and the community custody status continues. *Dalluge*, 162 Wn.2d at 819. Here, Mahone's incarceration did not

alter his community custody status and we reject his argument.

IV. Exceptional Sentence

Mahone argues that remand is required when the trial court imposes an exceptional sentence without entering written findings and conclusions. We disagree that remand is required because the record is sufficient to support Mahone's exceptional sentence.

RCW 9.94A.535 includes a mandatory requirement that "[w]henever 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." *State v. Hale*, 146 Wn. App. 299, 306, 189 P.3d 829 (2008). But when the trial court's oral ruling states that the jury's aggravator finding supported an exceptional sentence, the record is sufficient for effective review and we need not remand for written findings and conclusions. *State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537 (2011).

Here, the trial court noted that the jury returned a special verdict finding that Mahone committed the crime against a law enforcement officer, performing his official duty, and that Mahone knew the victim to be a law enforcement officer. Then the trial court stated that the case warranted something above the standard range and imposed a 24-month sentence running consecutively to his sentence for community custody violations. Additionally, Mahone's judgment and sentence states that the trial court imposed an exceptional sentence for the "[s]ubstantial and compelling" reason that the jury found an aggravating factor. CP at 43.

Because the trial court's oral opinion and the trial record clearly and sufficiently state that

it imposed an exceptional sentence based on the jury's finding of an aggravating circumstance, we do not remand for specific written findings and conclusions reiterating the jury's special verdict. *Bluehorse*, 159 Wn. App. at 423.

V. Statement of additional Grounds (SAG)

Mahone argues that the trial court erred by denying his arrest judgment motion for insufficient proof that he knowingly communicated a threat to kill because (1) there was no corroborative evidence of its occurrence and (2) there was no evidence that Deputy Cruz sought mental health counseling showing a reasonable fear that Mahone would carry out the threat. Again, we disagree because sufficient evidence supports the conviction.

Evidence sufficiently supports a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the crime's essential elements beyond a reasonable doubt. *State v. Notaro*, 161 Wn. App. 654, 670–71, 255 P.3d 774 (2011). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact regarding conflicting testimony, witness credibility, and the evidence's persuasiveness. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, Deputy Cruz testified that when Mahone saw him during a security check, Mahone said:

> You're the f**king officer, the wetback that put me here. I'm going to f**king kill you and your family as Clemmons killed those officers. . . . I'm going to

f**king kill you.

1 RP at 65. Deputy Cruz testified that Mahone pointed his finger at him as if holding a gun and simulated pulling the trigger. Deputy Cruz testified that after learning that Mahone had a murder conviction, he felt afraid that Mahone would carry out the threats. 1 RP at 66-67. Deputy Cruz also testified that during a subsequent security check, Mahone again turned around saying, "I'm going to kill you and f**k your mother" and then Mahone pulled down his pants and exposed himself. 1 RP at 70.

Taking the testimony in the light most favorable to the State, there was sufficient evidence to support the jury's felony harassment verdict including the elements that Mahone threatened to kill Deputy Cruz and that Deputy Cruz had reasonable fear that Mahone would carry out the threat.

VI. Personal Restraint Petition

In his personal restraint petition, Mahone argues that the trial court committed reversible error by failing to summon him for a jury question before the jury returned its verdict. We conclude that the trial court correctly handled the jury's question.

Personal restraint petitioners challenging a court judgment and sentence must do more than show legal error; they must show either constitutional error that caused actual and substantial prejudice or non-constitutional error that inherently caused a complete miscarriage of justice. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (citing *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)).

CrR 6.15(f)(1) requires the trial court to notify the parties of the content of the jury's questions and to "provide them an opportunity to comment upon an appropriate response." Additionally, CrR 6.15(f)(2) provides that once jury deliberations have begun, "the court shall not instruct in such a way as to suggest . . . the length of time a jury will be required to deliberate."

Here, after receiving a jury question, trial court staff was in the process of summoning the parties when the jury reached its verdict. When the parties did convene, the trial court provided the jury's question to the parties, informing the parties that the jury received no response to the question. Mahone argued that the trial court should have instructed the jury to delay its verdict until the trial court consulted with the parties. But such an instruction would be contrary to the requirement under CrR 6.15(f)(2) that once jury deliberations have begun, "the court shall not instruct the jury in such a way as to suggest . . . the length of time a jury will be required to deliberate." Thus, we conclude the trial court did not err.

We affirm the conviction, we vacate and remand the sentence for the State to prove Mahone was on community custody at the time of the current offense, and we deny his personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

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Hunt, J.

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Worswick, C.J.