NO. 31206-2

IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

JOHN HERBERT FRIEDLUND

Petitioner/Appellant

BRIEF OF RESPONDENT

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Stevens County

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to enter written findings of fact to support an exceptional sentence.
2. Mr. Friedlund's 120-month exceptional sentence was clearly excessive under the circumstances of this case.
3. Mr. Friedlund received ineffective assistance of counsel.

II.STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case.

III. ISSUES PRESENTED

1. Did the trial court err when it failed to enter written findings of fact to support the exceptional sentence which was imposed?
2. Did the trial court abuse its discretion when it sentenced Mr. Friedlund to 120 months given the facts of the case?
3. Did Mr. Friedlund receive ineffective assistance of counsel?

IV. ARGUMENT

1. Did the trial court err when it failed to enter written findings of fact to support the exceptional sentence which was imposed?

RCW 9.94A.535 provides, "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." In the present case a sentence outside of the standard range was imposed and no written findings of fact or conclusions of law were entered by the court. The State concedes this issue and stipulates that the appropriate remedy is to remand this issue to the sentencing court for entry of written findings of fact and conclusions of law.

2. Did the trial court abuse its discretion when it sentenced Mr. Friedlund to 120 months given the facts of the case?

The Court did not abuse its discretion when it sentenced Mr. Friedlund to 120 months for the offense he was found guilty of. RCW 9.94A.585(4) provides, "To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record

which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." The appellant is correct in stating that, and appellate court, in determining the appropriateness of a sentence will examine, "(1) whether the reasons given by the sentencing judge are supported by evidence in the record, under the clearly erroneous standard of review; (2) whether the reasons justify a departure from the standard range, under *de novo* review, as a matter of law; or (3) whether the sentence is clearly too excessive or too lenient, under the abuse of discretion standard of review." *State v. Ferguson* 142 Wash.2d 631, 646, 15 P.3d 1271, 1279 (2001).

The appellant argues that, "...the imposition of the 120 sentence amounts to a life sentence for Mr. Friedlund. It is clearly excessive, shocking, and an abuse of discretion." *See* Opening Brief of Appellant at 10. Appellant argues that due to his age and medical conditions the sentence is clearly excessive. No authority is provided to support these assertions. *See id.* However, in addressing age as a factor for exceptional sentence, the Supreme Court has ruled, "We decline to hold that age alone may be used as a factor to impose an exceptional sentence outside of the standard range for the crime." *State v. Ha'mim* 132 Wash.2d 834, 846, 940 P.2d 633, 639 (1997). *Ha'mim* involved a case in which the Court

addressed an exceptional sentence below the standard range. *See id.* However, the Court in *Ha'mim* did not limit its ruling regarding age as a basis for an exceptional sentence to sentences below the standard range. *See id.*

Lengthy exceptional sentences for theft cases involving large amounts of money have been upheld similar to that which was imposed by the court in this case. For example, In *State v. Branch,* 129 Wn.2d 635, 919 P.2d 1228 (1996), a sentence of 48 months for first degree theft in the amount of $398,652.91 was affirmed. The court held that the trial court did not abuse its discretion in imposing a 48–month sentence, "because 48 months is not a clearly excessive sentence for a theft of nearly $400,000." *Branch,* 129 Wn.2d at 650. Similarly, In *State v. Oxborrow*, the Supreme Court affirmed a 10–year sentence for first degree theft for defrauding approximately 51 investors of over $1 million, to be served consecutively to a 5–year sentence for willful violation of a cease and desist order. *See generally* 106 Wash.2d 525, 723 P.2d 1123 (1986). In examining whether the theft sentence was clearly excessive, the court noted that, at the time, first degree theft could involve an amount as little as $1,500, such that the presence of a fraud involving over $1 million was, "the quintessential crime for which the Legislature contemplated a maximum sentence." *Id* at 533, 723 P.2d at 1128. Lastly, in *State v. Knutz,* a case similar to this one,

a superior court imposed a five year sentence for the theft of $347,000 from a single elderly victim over a three-year period. 161 Wn.App. 395, 253 P.3d 437 (2011). The sentencing court noted that the total amount of theft was "210 times the minimum" amount of $1,500. *Knutz* at 402, 253 P.3d at 440. The Division II Court of Appeals upheld the exceptional sentence in light of the "extreme amounts of money that Knutz took from her elderly victim over the years." *Id.* at 411, 253 P.3d at 445.

A 120 month sentence in this case is not excessive, shocking, or an abuse of discretion. As the testimony during the trial revealed Mr. Friedlund systematically isolated Mrs. Swan, a centenarian, in her bedroom over a period of several years. *See generally* RP 295 – 326. Mr. Friedlund also abused the general power of attorney he was given. *Id.* Mrs. Swan was not allowed to receive phone calls during that period of time as well. *Id.* Caregivers testified that Mr. Friedlund expected them to feed Mrs. Swan rotten food. *Id.* During this same period of time Mr. Friedlund wired in excess of $400,000 to individuals that he met through a website called gaysugardaddyfinder.com. *See generally* RP 129 – 163. Additionally, Mr. Friedlund also withdrew cash, which could not be accounted for, in excess of $200,000 in cash during the same period of time. *Id.* The jury listened to Mr. Friedlund's assertions that this was all done with the knowledge, consent, and at the direction of Mrs. Swan. Mr.

Friedlund's arguments were ultimately rejected by the jury which convicted him of First Degree Theft with two aggravating circumstances. At sentencing, Judge Nielsen stated,

> Now, the obligations that you have here were two in number: One, is a legal obligation. A fiduciary obligation which I know you fully understand. The second is a moral obligation to an old friend. Somebody that you have – as you brought repeatedly – known for 60 years, knew her husband, and this is again not somebody that you just – a casual acquaintance, but somebody that you go way back with. You, uh, have ignored both the fiduciary, legal duty and the moral duty to your old friend. What occurred here as I listened to this testimony, is in later years your greed and your self interest overtook any sense of obligation that you might have had for Frances Swan, and you were basically in the last three years keeping her alive to avoid a probate, keeping her alive so that the family wouldn't learn what you had done with her estate, but at the same time keeping her isolated and cut off from her friends and her family; and this was a cruel game you were playing, and it was motivated again by your greed.
>
> ...
>
> Your behavior has been predatory, and cruel, and self-serving, and your malignant manipulation of this elderly woman in her vulnerable state where she looked to you for protection is particularly reprehensible. Now, when I back up and look at this, uh, embezzlement I'll call it, this wrongful obtaining of her assets, uh, $800,000.00 that Mr. Radzimski explains that 200 went for her care, as it should, $600,000.00 over a three or four year period was essentially squandered, and you did that. The enormity of this crime is pointed out by the fact the only other case like this in this three county area came up a couple of years ago where an individual in a particularly brazen theft and embezzlement at Hewes Craft here in Colville, made off with about half-a-million dollars in scrap aluminum. Now, this case though, in my judgment, is even worse because of the amount, but even more so because of the betrayal of the legal duty and the personal moral duty that you owed here. And, again, you took advantage of a vulnerable person.

See Transcript of Hearing October 5, 2012 at 14 to 15

Mr. Friedlund's actions, not the court's sentence, were excessive, shocking, and abuse of discretion. In light of all the evidence which was presented at trial the court appropriately sentence Mr. Friedlund to 120 months.

3. Did Mr. Friedlund receive ineffective assistance of counsel?

Mr. Friedlund received effective assistance of counsel in the present case. The appellate court reviews challenges to effective assistance of counsel de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). There is a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 335, 337, (1995). Effective does not mean successful. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). The competency of counsel is not measured by the result. *Id.*

To prevail on an ineffective assistance claim, appellant must show that his attorney was not functioning as counsel as guaranteed by the Sixth Amendment. He must demonstrate errors so serious as to call into question the reliability of the result of the trial. *PRP of Gentry*, 137 Wn.2d 379, 400 (1999), citing *Strickland v. Washington*, 466 U.S. 668,

687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 335, 337, (1995).

To prove ineffective assistance of counsel on appeal the Appellant must prove that (1) defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

A failure to present a diminished capacity defense was not ineffective assistance of counsel as nothing in the record suggests that such a defense was appropriate. If the court is unable to reach a decision on this issue based on the record before it an additional evidentiary hearing pursuant to RAP 9.11 may be required to create a more complete record regarding this issue to address whether or not trial counsel had concerns regarding Mr. Friedlund's mental state. Mr. Friedlund was represented by two attorneys, Bevan Maxey and James Irwin during the

fourteen months this case was pending. James Irwin was ultimately trial counsel. Nothing in the record indicates that Mr. Friedlund had discussed with Mr. Irwin or Mr. Maxey the possibility of raising a diminished capacity defense. Additionally, Mr. Friedlund's trial testimony contradicts such a defense. *See generally* RP 337 to 387. Mr. Friedlund's testimony does not indicate that he suffered from any mental disease or defect. *See id.* He was able to recall specific transactions he entered into and his reasons for doing so. *See id.* In *State v. McCreven* the court found that trial counsel was not ineffective by failing to present a diminished capacity defense when there was no evidence to support such a claim. 170 Wash.App. 444, 483, 284 P.3d 793 (2012). In *State v. Crenshaw* the Supreme Court held,

> Insanity is an affirmative defense the defendant must establish by a preponderance of the evidence. RCW 9A.12.010. Sanity is presumed, even with a history of prior institutional commitments from which the individual was released upon sufficient recovery. *State v. McDonald,* 89 Wash.2d 256, 571 P.2d 930 (1977).
>
> The insanity defense is not available to all who are mentally deficient or deranged; legal insanity has a different meaning and a different purpose than the concept of medical insanity. *State v. White,* 60 Wash.2d 551, 589, 374 P.2d 942 (1962). A verdict of not guilty by reason of insanity completely absolves a defendant of any criminal responsibility. Therefore, "the defense is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law." *White,* at 590, 374 P.2d 942.

State v. Crenshaw 98 Wash.2d 789, 792, 659 P.2d 488 (1983)

At trial Mr. Friedlund testified extensively that all of his actions were done with the consent, knowledge, and at the direction of Mrs. Swan. Mr. Friedlund presented a defense that he had, "appropriated [the money] openly and avowedly under a good faith claim of title, even though the claim be untenable." CP 102. Appellant argues that, "Compulsive hoarding may develop along with other mental illnesses, such as dementia." *See* Opening Brief of Appellant at 12. No additional is provided by the appellant that he was actually suffering from a mental illness. At various points during the proceedings in this case Mr. Friedlund freely brought to the court's attention issues regarding his heart, hearing, and other medical issues he believed would impact his case. *See generally* RP 18-19, 21, 56, 433. The record is silent regarding any issues regarding mental health issues that would lead to a diminished capacity defense.

Appellant concludes that the defendant must have suffered from some mental disease or defect because, "...there was no explanation of how a very close friendship over 50 years evolved into one senior citizen taking advantage of the other senior citizen." *See* Opening Brief of Appellant at 14. As Judge Nielsen stated at sentencing, Mr. Friedlund's

actions were driven by greed. Greed not mental deficiencies explain why Mr. Friedlund behaved in the manner he did. Based upon the arguments above, Mr. Friedlund does not meet the two prong test to prove ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Mr. Friedlund has not rebutted the strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 335, 337 (1995). Based upon the trial transcript, there is no basis that defense counsel's preparation was deficient or that the outcome would have been different.

V. CONCLUSION

The State respectfully concedes on the first issue raised by the appellant and requests that the court remand this matter for entry of written findings of fact and conclusions of law by the trial court. The State further requests that the court find that the sentence of 120 months imposed by Judge Nielsen was not an abuse of discretion. Lastly, the State requests that the court find that Mr. Friedlund received effective assistance of counsel, in the alternative the State would request that the court remand pursuant to RAP 9.11 in order to create a more complete record regarding any issues concerning diminished capacity.

Respectfully submitted this 6th day of May, 2013.

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Attorney for Respondent

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201-1905 and to Marie Jean Trombley, Attorney at Law, P.O. Box 829., Graham, WA 98338-0829; and to John H. Friedlund, c/o Spokane County Detention Services, 1100 W. Mallon Ave., Spokane, WA 99260 on May 6, 2013.

Michele Lembcke

Michele Lembcke, Legal Assistant
to Lech Radzimski