73913-1

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Court of Appeals
Division I
State of Washington

NO. 73913-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BINH THAI TRAN,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) A statute requires the court to give "great weight" to the victim's opinion in determining whether to grant SSOSA. No one called this statute to the trial court's attention. In explaining its reasons for denying SSOSA, the court did not mention the victim's opinion. Can the alleged failure to consider the victim's opinion be raised for the first time on appeal?

(2) If the issue can be raised, does the record establish that the court abused its discretion by failing to give proper weight to the victim's opinion?

(3) At sentencing, the trial court was presented with written reports that included conflicting information. Is the court's resolution of this conflict subject to de novo review?

(4) If this court conducts de novo review, does the record support the trial court's finding that the defendant's deception and failure to accept responsibility renders him not amenable to treatment?

II. STATEMENT OF THE CASE

The defendant pleaded guilty to one count of indecent liberties by forcible compulsion. This crime was committed against J.V.T. (born 10/99) during January, 2012. 1 CP 37. In the plea

agreement, the prosecutor reserved making any recommendation regarding the Special Sex Offender Sentencing Alternative (SSOSA). 1 CP 48.

At sentencing, the court considered two documents: a Presentence Investigation (2 CP 63-72) and a Sexual Deviancy Evaluation (2 CP 73-88). The evaluation recommended SSOSA, while the presentence report recommended against it. 2 CP 86.

A. VICTIM'S ACCOUNT OF ABUSE.

The Presentence Investigation sets out the victim's account of the abuse. 2 CP 64-65, 74. The defendant first abused her in Hawaii when she was 9 or 10 years old.

> The defendant encouraged her to take a shower in the master bedroom shower because he said it was bigger, then unexpectedly joined her in the shower. The defendant told J.V.T. "if you show me, I'll show you." J.V.T. ran out of the shower, but the defendant chased her and pinned her down on the master bed while she tried to kick and scream. The defendant then held J.V.T.'s legs open and licked her vagina.

2 CP 64.

The victim described two other incidents that occurred in Hawaii. In one, the defendant penetrated her with the top of his finger while she was sitting on the bottom half of a bunk bed. Her sister was on the top half. In another, the defendant forced her to touch his penis with her hand. 2 CP 64-65.

The final incident of abuse occurred in Bothell in January, 2012.

> J.V.T. said that the defendant approached J.V.T. in an upstairs bedroom and "tried to undress me," ultimately succeeding in removing all of her clothing. J.V.T. was trying to kick the defendant and scream, but the defendant held J.V.T.'s legs down with his own legs and covered her mouth so she couldn't scream. Although J.V.T. was very uncomfortable and shy discussing this subject with the child interview specialist, she was able to describe that the defendant used his penis to attempt penetration of her vagina. His penis felt hard, and it hurt a lot when the defendant tried to put it inside of J.V.T., but he did not achieve penetration. She remembered her wrist and ankles hurting because the defendant was holding her so tightly. The incident stopped because the defendant's mother was calling his name repeatedly from the kitchen, asking for his help.

2 CP 64.

B. SEXUAL DEVIANCY EVALUATION.

The Sexual Deviancy Evaluation sets out a similar but less-detailed summary of the victim's account. 2 CP 74. It also sets out the defendant's version. With regard to the shower incident, he "denies that there was any struggling associated with this incident as she reported." With regard to the Bothell incident, "she struggled and screamed for help and that's when I let her go." The defendant claimed that prior to that, he "had always thought we had a mutual bond." 2 CP 75-76. "After the first three or four times I swore I

would stop but she then invited me back into her bedroom to watch movies." He explained that "he was not saying she invited the sexual touching but she invited him to see movies and she knew what came from it." 2 CP 81-82.

The evaluator administered the Millon Clinical Multiaxial Inventory ("MCMI-III"). This is "a highly valid test of long-term personality development." 2 CP 81. The evaluator believed that the profile generated from the test "capture[s] important aspects of Mr. Tran's personality."

> The MCMI-III profile of this man suggests the presence of an arrogant sense of self-worth, a talent for feigning dignity and confidence, indifference to the welfare of others, and a facile—if not deceptive—social manner. Speculative though these hypotheses may be, there do appear to be tendencies to charm and exploit others and to extract special recognition and consideration without assuming reciprocal responsibility. Actions that raise questions of personal integrity, such as cleverly circumventing social conventions and thereby beguiling and seducing others, may also be present and indicate a rather pervasively deficient social conscience.
>
> He may feel unfairly treated and may be easily provoked to anger. His facade of sociability can give way quickly to antagonistic and caustic comments, and he may obtain gratification by humiliating and dominating others. A marked suspicion of those in authority causes him to feel secure only when he is in control.
>
> Probably deficient in strong feelings of loyalty and displaying an occasional indifference to truth, he may

successfully scheme behind a veneer of civility. A guiding principle for him is probably that of outwitting others, controlling and exploiting them before they control and exploit him. Employing his craft and boldness, he may exhibit a readiness to engage in deception and fraud, should they be necessary. If he is unsuccessful in channeling these impulses, he may become frustrated and begin to engage in risky acts that could result in legal complications.

That this man experiences repeated episodes of alcohol abuse may be reliably assumed. These bouts may be prompted in part by the frustration and disappointment in his life. He is characteristically unpredictable, moody, and impulsive, and these behaviors may be intensified when he is drinking heavily. At these times, his brooding resentment breaks out of control, often resulting in stormy and destructive consequences. He may subsequently express genuine feelings of guilt and contrition, but the destructive and injurious effects of his behavior are likely to persist. Deep resentment that is restrained in the sober state may be unleased in full force when he is drinking and manifests itself in irrational accusations and physical intimidation, if not brutality, toward family members.

Edgy, irritable, and hostile, he may use drugs not only to aid him in resolving his conflicts, in moderating his tensions, and in permitting him a measure of narcissistic indulgence, but also to serve as a statement of resentful independence from the constraints of social conviction and expectation. In addition to giving him a sense of freedom from feelings of ambivalence toward himself and others, drugs liberate what guilt feelings he may have over discharging his hostile impulses in a full and direct manner. Despite their apparent unrestrained quality, his defiant and resentful acts are fused with self-destructive elements. These are evident during periods of heavy use when he may throw caution to

> the winds, seemingly testing the fates and inviting serious injurious consequences to himself and others.

2 CP 82-83.

Despite these problems, the evaluator recommended a treatment program:

> He wants treatment and I believe he will be able to utilize it. Treatment can help him confront his impaired thinking, his deviant arousal, his sexual compulsivity, and his self-centeredness.
>
> ...
>
> When he has begun to deal with his substance abuse and the rules are in place, it seems likely that he will submit to external controls until he has developed the internal controls necessary to behave responsibly.

2 CP 86.

C. SENTENCING HEARING.

At the sentencing hearing, the prosecutor advised the court that "the victim is in support of a SSOA sentence." The prosecutor nonetheless recommended against such a sentence. This recommendation was largely based on the forcible nature of the abuse, combined with the defendant's denial of force. The prosecutor pointed out that the defendant was "putting the responsibility on [the victim] as if she should have been able to stop him." Sent. RP 2-6.

Defense counsel argued for a SSOSA sentence. She urged the court to put "more stake" in the sexual deviancy evaluation than in the pre-sentence report. She argued that the defendant had "the tools to succeed" in the treatment program. Sent. RP 6-9. She also read a statement from the defendant expressing remorse and promising to "attend the treatment programs with all my heart." Sent. RP 10-11; 1 CP 34-36.

The trial court rejected the argument that the forcible nature of the conduct required a rejection of SSOSA. The court nonetheless refused to grant a SSOSA sentence:

> I have been sitting on this bench for a while now. I have done a number and granted a fair amount of SSOSAs in my time when I am convinced that the defendant is amenable to treatment, that they have approached the acts that gave rise to the criminal charge with honesty, with humility, with acceptance, realizing that they have a problem, not knowing fully the extent of it but willing to deal with it in a forthright manner. In reading all of the materials that I've read, Mr. Tran, you don't come in front of me as that type of individual.
>
> ...
>
> And the answers to the questions, of which I read fairly carefully, I don't see any willingness on your behalf to accept responsibility for this. The profile that I'm being presented with is a gentleman of arrogant sense of self-worth, a talent for feigning dignity and confidence, indifference to the welfare of others, and a deceptive social manner. There do appear to be tendencies to charm and exploit others and to extract

> special recognition and consideration without assuming any responsibility. [The court is quoting the Sexual Deviancy Evaluation, 2 CP 82.]
>
> You are a predator. You are one of those people that you say you're not. And your excuse is you continued to do it because a 12-year-old didn't tell you to stop so you thought you had permission...
>
> After due consideration, sir, I don't believe that you are amenable to treatment, frankly. I'm going to decline to grant you a SSOSA. I'm going to impose 82 months, high end of the standard range, community custody for life.

Sent. RP 12-14.

After determining other terms of the sentence, the court asked if the parties needed any clarifications. Neither asked for any. Sent. RP 15. Judgment was then entered in accordance with the court's oral decision. 1 CP 18-33.

III. ARGUMENT

A. THE RECORD DOES NOT ESTABLISH THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A SSOSA SENTENCE.

1. A Challenge To The Court's Exercise Of Discretion Cannot Be Raised For The First Time On Appeal.

The trial court imposed a sentence within the standard sentence range. 1 CP 20-21. According to RCW 9.94A.585(1), a sentence within the standard sentence range shall not be appealed. Although this requirement has not been applied literally, it does limit

the circumstances under which a sentence can be challenged. "[A]ppellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Appellate review is also allowed if the sentencing court failed to follow some specific procedure required by statute. State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993).

The defendant claims that the trial court abused its discretion in refusing to sentence under SSOSA. This argument falls within the limited scope of challenges that can be raised to a standard-range sentence. The argument nonetheless raises a different procedural problem: it cannot be raised for the first time on appeal.

"[I]llegal or erroneous sentences may be challenged for the first time on appeal." This rule "tends to bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court." State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). In contrast, a sentence cannot be challenged for the first time on appeal "where the alleged error involves a matter of trial court discretion." In re Shale, 160 Wn.2d 489, 494 ¶ 10, 158 P.3d

588 (2007). Since the alleged error here involves an abuse of discretion, it cannot be raised for the first time on appeal.

The defendant's arguments on appeal are based on a statutory provision requiring the court to give "great weight" to the victim's opinion. RCW 9.94A.670(4). This provision was never called to the court's attention. Defense counsel never suggested that the court should give great weight to the victim's views. To the contrary, counsel mentioned the victim's opinion only to explain the history of plea negotiations. Sent. RP 7. After the court explained its reasons for rejecting SSOSA, counsel did not ask for any further findings or explanations. Sent. RP 15.

An objection is insufficient unless it calls the court's attention to the specific legal basis for the objection. See, e.g, State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986) (objection to admissibility of evidence); State v. McDaniel, 155 Wn. App. 829, 856 ¶ 50, 230 P.3d 245, review denied, 169 Wn.2d 1027 (2010) (objection to jury instruction) State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) (objection to prosecutorial misconduct). Although the defense sought a sentence under SSOSA, they never argued that the victim's opinion was entitled to great weight.

The purpose of requiring a timely objection is to give the trial court the opportunity to correct any errors, thereby avoiding unnecessary appeals. State v. Robinson, 171 Wn.2d 292, 304-05 ¶ 22, 253 P.3d 84 (2011). This purpose is fully applicable to the present case. If anyone had called the statute to the court's attention, this appeal would have been avoided. If the judge gave the appropriate weight to the victim's opinion, he could have said so. If he had overlooked the statute, he could have properly considered the victim's opinion and imposed an appropriate sentence. There would have been no need for any appeal, remand, or re-sentencing.

Because the sentence was within the standard range, the only issue that the defendant can raise is abuse of discretion. That issue, however, cannot be raised without a timely objection, which did not occur here. Consequently, the defendant's claims cannot be reviewed.

2. When The Record Is Silent On What Factors The Trial Court Considered, The Appellant Has Not Established That The Court's Decision Was Based On Improper Factors.

If the issue can be raised at all, the defendant has failed to establish an abuse of discretion. The party challenging a discretionary decision bears the burden of showing abuse of

discretion. See State v. Davis, 174 Wn. App. 623, 642 ¶ 51, 300 P.3d 465, review denied, 178 Wn.2d 1012 (2013) (challenge to "same criminal conduct" determination). For example, abuse of discretion was found when the trial judge expressly stated an impermissible reason for refusing to grant a DOSA sentence. State v. Grayson, 154 Wn.2d 333, 341-42 ¶¶ 17-19, 111 P.3d 1183 (2005). Here, however, the trial judge never said that he was *not* giving weight to the victim's opinion. Nor did he say that he *was* giving weight to that opinion. The record is silent on what weight he gave. Sent. RP 12-14. Since the record is silent, the defendant has not carried his burden of establishing an abuse of discretion.

To overcome this deficiency, the defendant argues that the court was required to enter findings concerning how it considered the victim's opinion – even though no such findings were ever requested. RCW 9.94A.670(2) requires findings in one situation: "If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for *imposing* the treatment disposition." The statute does not require any findings of the reasons for *rejecting* a treatment disposition, even if that decision is contrary to the victim's opinion.

The Supreme Court has refused to require the entry of findings beyond those mandated by statute. State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) (no findings required to explain length of exceptional sentence); cf. State v. Boze, 47 Wn. App. 477, 480, 735 P.2d 696 (1987) (trial judge not required to explain reasons for rejecting first-time offender waiver). The Supreme Court rejected prior decisions for this court that had required such findings. Ritchie, 126 Wn.2d at 394-95, Even when a trial court is required to consider specific factors, it is not required to enter findings reflecting that consideration. For example, when a court imposes a sentence above the standard range, it is required to consider any mitigating factors. The court is nonetheless not required to enter findings showing what mitigating factors were considered. State v. Davis, 47 Wn. App. 91, 97, 734 P.2d 500 (1987).

The defendant relies on State v. Fullers, 37 Wn. App. 613, 683 P.2d 209 (1984). That case involved a sentence under the Juvenile Justice Act. RCW 13.40.150(3) requires juvenile courts to follow certain procedures and consider certain factors in imposing disposition. The juvenile court in Fullers had not followed the required procedures. For example, the court had not given the

juvenile's parents an opportunity to speak, even though this is specifically required by RCW 13.40.150(3)(d). This court determined that absent findings or an oral decision, it was impossible to determine whether the trial court had followed the statutory directives. Fullers, 37 Wn. App. at 619.

Fullers is a case in which the trial court clearly failed to follow statutory requirements. This court properly condemned that failure. It is not clear whether Fullers intended to impose a general requirement that juvenile courts explain their application of statutory factors. If Fuller is interpreted as imposing such requirements in adult cases, it is comparable to the other appellate decisions that were disapproved in Ritchie. Under Ritchie, sentencing courts are not required to enter findings except when mandated by statute.

Such a holding does not impose any undue burden on defendants. If the trial court's decision does not address some important factor, defendants can call the court's attention to the problem and ask for an explanation. If the court's answer shows any legal error, that error can be reviewed on appeal. What a party cannot do is remain silent, seek no clarification, and then complain on appeal that the record does not show how the court considered

the factor. Since the record here does not establish any abuse of discretion, the sentence should be upheld.

B. THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE DEFENDANT IS NOT AMENABLE TO TREATMENT.

1. The Trial Court's Resolution Of Credibility Disputes Is Not Subject To Appellate Review, Even If That Resolution Was Based On Documentary Evidence.

The defendant asks this court to review the trial court's finding that he is not amenable to treatment. He claims that this review should be de novo. His analysis over-simplifies the standards governing appellate review of findings made on documentary evidence:

> [T]here are cases that stand for the proposition that appellate courts are in as good a position as trial courts to review written submissions and, thus, may generally review de novo decisions of trial courts that were based on affidavits and other documentary evidence. The aforementioned cases differ from the instant in that they did not require a determination of the credibility of a party. Here, credibility is very much at issue.
>
> [N]o Washington appellate court reviewing documentary records has weighed credibility. Indeed, the general rule relating to de novo review applies only when the trial court has not *seen* or heard testimony requiring it to assess the credibility of the witnesses. Here, where the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith, it seems entirely appropriate for a reviewing court to apply a substantial evidence standard of review.

In re Marriage of Rideout, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003) (court's emphasis, citations omitted); see State v. Bartolome, 139 Wn. App. 518, 161 P.3d 471 (2007) (when trial is on stipulated record, factual findings are reviewed for substantial evidence).

Here, there was a dispute concerning the expert's conclusion that the defendant was amenability to treatment. The trial court was called on to determine the credibility of that conclusion. Furthermore, that conclusion turned on subsidiary factual disputes. The defendant and the victim gave markedly different accounts of the abuse. 2 CP 74-75. The court needed to determine which account was more accurate. The defendant also submitted a statement to the court expressing remorse. 1 CP 34-36. The credibility of that statement was strongly disputed. See 2 CP 70 (description in pre-sentence report of defendant's efforts to "put the blame for his actions onto the victim"). Indeed, the Sexual Deviancy Evaluation described the defendant's personality as including "a readiness to engage in deception and fraud, should they be necessary." 2 CP 83. Since the trial court made credibility determinations, its findings should be reviewed for substantial evidence.

In reviewing standard-range sentences, it is particularly important to reject a de novo standard. As already pointed out, a statute purports to bar appellate review of sentences within the standard range. RCW 9.94A.585(1). Courts have nonetheless allowed limited review for narrow categories of errors. See Williams, 149 Wn.2d at 147; Mail, 121 Wn.2d at 712. When defendants have pleaded guilty, however, courts often impose sentences based on pre-sentence reports and the arguments of counsel. If findings based on such documents are reviewed de novo, appellate review of standard range sentences could become commonplace – in clear violation of the statute.

In explaining its reasons for denying a SSOSA sentence, the trial court said that the defendant was not amenable to treatment. This is consistent with RCW 9.94A.670(4), which lists amenability to treatment as one of several factors that the court should consider. The defendant has not claimed that this decision is unsupported by substantial evidence. The trial court's finding should therefore be upheld.

2. Even If This Court Undertakes De Novo Review, The Record Establishes That The Defendant's Entrenched Dishonesty Renders Him Unamenable To Treatment.

If this court nonetheless undertakes de novo review, it should make the same finding as the trial court. The defendant's dishonesty and risk to the community render him not amenable to treatment.

The Sexual Deviancy Evaluation describes the defendant's as having a "pervasively deficient social conscience." He has a "marked suspicion of those in authority" and displays an "occasional indifference to truth." His guiding principle is "outwitting others, controlling and exploiting them before they control and exploit him." He sometimes has "genuine feelings of guilt and contrition, but the destructive and injurious effects of his behavior are likely to persist." When abusing drugs, he may "throw caution to the winds" and invite "serious injurious consequences to himself and others." 2 CP 82-83. This profile does not describe a person who can safely be treated in the community. Rather, it describes a person who is deceptive, manipulative, and dangerous.

The report says that "[t]he overriding requirement of treatment and supervision is HONESTY." 2 CP 86 (evaluator's emphasis). The report also indicates that the defendant was not

honest about his conduct. Contrary to the victim's account, he denied that she resisted the first time he molested her. He admitted that on the last occasion, he "held her down and undressed her," stopping only when she screamed. 2 CP 73-74. He also admitted being "sexual" with his wife even though she was upset and "didn't want to be sexual." 2 CP 78. Yet despite these admissions, on a polygraph examination he answered "no" to the question, "Did you ever have sexual contact with anyone that you forced to have sexual contact with you?" 2 CP 81.

Disturbingly, the polygraph examiner concluded that this denial was "truthful." 2 CP 81. The evaluator found this "puzzling." He concluded that the defendant interpreted "sexual contact" as limited to penile-vaginal intercourse. 2 CP 84. Another possibility is that the defendant is such an entrenched liar that he feels no guilt over his lies. Whatever the true explanation, it is clear that polygraph examinations would be of minimal value in monitoring the defendant's compliance with treatment condition.

The evaluator's response to these problems was that "[t]reatment can help him control his impaired thinking, his deviant arousal, his sexual compulsivity, and his self-centeredness." The evaluator believed that the defendant would "submit to external

controls until he has developed the internal controls necessary to behave responsibly." 2 CP 86. There is no apparent basis for this belief. Treatment might overcome a person's "impaired thinking," but it is unlikely to change entrenched personality traits. The defendant's history of dishonesty renders "external controls" ineffective. Despite the evaluator's optimism, the record as a whole confirms the trial court's finding – the defendant cannot be safely treated in the community. Regardless of what standard of review is employed, the trial court's decision should be affirmed.

IV. CONCLUSION

The sentence should be affirmed. Since the defendant has not challenged his conviction, it should be affirmed in any event.

Respectfully submitted on April 27, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. BINH THAI TRAN, Appellant.	No. 73913-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of April, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Travis Stearns, Washington Appellate Project, travis@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of April, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office