Supreme Court No. 89926-6

Court of Appeals No. 31206-2

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JOHN HERBERT FRIEDLUND, Petitioner

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, John Herbert Friedlund, asks this Court to accept review of the Court of Appeals decision terminating review, designated in part II of this petition.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals decision filed January 9, 2014, which affirmed his conviction and sentence. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW

1. RCW 9.94A.535 mandates: "Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." In this case, the Court of Appeals held that while the requirement is mandatory, appeals courts have permitted review when a trial court's oral ruling "is sufficiently comprehensive and clear" that written facts would be a mere formality. Does the Court of Appeals decision conflict with the plain reading of the statute and this Court's ruling in *In re Beedlove,* 138 Wn.2d 298, 311, 979 P.2d 417 (1999)?

2. Was trial counsel ineffective for failing to present a diminished capacity defense where the facts support evidence of a mental condition, which may have prevented the requisite intent necessary to commit first degree theft?

IV. STATEMENT OF THE CASE

John Friedlund was charged by amended information with one count of theft in the first degree, where the State alleged a series of transactions which were part of a common plan or scheme. He was also charged with aggravating circumstances of using a position of trust to facilitate the offense, and a victim who was particularly vulnerable or incapable of resistance. The violation date range was January 1, 2007 to December 31, 2010. CP 88-90.

John Friedlund was a close family friend of Francis Swan and her husband for about 60 years. RP 116; 338. They treated him like a son and shared their investment and financial information with him. RP 338;342. In 2000, after Mr. Swan had passed way, Mrs. Swan called Mr. Friedlund to help her. RP 340. He moved himself and his belongings into her home in 2001, when she was 96 years old. RP 312;341. He was 68 or 69 years old. CP 88.

That same year, Mrs. Swan had an attorney prepare her will and also name Mr. Friedlund as her primary 'attorney in fact'. RP 177-179. The attorney did not question Mrs. Swan's competence at the time her prepared her documents. RP 188.

As she aged, Mrs. Swan began to spend most of her time her in bedroom. Mr. Friedlund instructed caregivers to keep her there and she was rarely allowed phone calls or visitors. RP 118; 267;297;303;311.

After 2004, hired caregivers described that the home became so cluttered there were only narrow pathways to get around in the home. Mr. Friedlund stored old newspapers, guns, ammunition, fishing poles and reels, magazines and garbage in the home. RP 119;134;234;298;312. Caregivers were instructed they were not allowed to touch Mr. Friedlund's possessions. RP 313. Caregivers testified that Mr. Friedlund stored rotten food at the home, ate rotten food himself, and directed them to feed it to Ms. Swan. RP 264;301;303. The yard was also unkempt, with overgrown grass and doc feces littering the yard. RP 119.

In 2006, at age 101, Mrs. Swan transferred approximately $800,000 into an Edward R. Jones account. RP 97. In 2007, the Financial manager went to Mrs. Swan's home to speak with her.

Mr. Friedlund had instructed that the Edward R. Jones assets were to be transferred out and placed in a bank account. RP 101;105;345. As a result of the conversation with Mrs. Swan, the fund manager transferred the money into a joint bank account, with the names of Mr. Friedlund and Mrs. Swan. RP 105;345.

Between the years of 2004 and 2010, Mr. Friedlund paid Mrs. Swan's caregivers. RP 260;296;308;324. The cost of her care for the years 2007-2010 was about $200,000. Mr. Friedlund paid the caregivers and other household expenses from both the joint account as well as his personal bank account. RP 260-296. He moved money from the joint account into his personal bank account. RP 138;181.

Mr. Friedlund made numerous purchases with the Swan bank account funds, which he believed had been approved by Mrs. Swan. He testified that all property was appropriated openly and avowedly under a good faith claim of title, saying:

> "...she was bothered, she says, 'We're writing checks out for all the help and everything, and you're doing more than anybody keeping everything organized. You need to get paid.' And I says, 'I'm not gonna write...myself checks.' And so then she started in, 'Well, then I want you to take our

money...' that she always considered our money, buy these different things..." RP 349.

Mr. Friedlund used money from the joint account to purchase two trucks, a horse trailer, hay, an NRA membership, and a car. RP 141-146. He also paid for his prescription medications and doctor bills from the same account. RP 143. At trial he stated that she had also directed him to make wire transfers of money of approximately $400,000 to individuals the two of them met on the website "gaysugardaddyfinder.com" RP 143-144; 239;382;385.

The trial court gave the following defense to a charge of theft instruction:

> It is a defense to a charge of theft that the property or serve was appropriated openly and avowedly under a good faith claim of title, even though the claim be untenable. The State has the burden or proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilt. CP 102.

After a jury trial, Mr. Friedlund was found guilty of first-degree theft with two aggravating circumstances. CP 120-121.

Because Mr. Friedlund, at 79 years old with no criminal history, the standard range sentence was three to nine months. The court imposed an exceptional sentence of 120 months. CP 129. The court did not enter written findings of fact or conclusions of law to support the exceptional sentence. Mr. Friedlund appealed. CP 137.

In its unpublished opinion, the Court of Appeals held that despite the mandatory language of RCW 9.94A.535, requiring the trial court to set for the reasons for its decision in written findings of fact and conclusions of law, the appeals court could review the trial court's oral ruling and any failure to follow the statute was harmless. The Court cited to *State v. Bluehorse,* 159 Wn.App. 410, 248 P.3d 537 (2011). *Slip Op.* at 6.

The Court also held that Mr. Friendlund's trial counsel did not act unreasonably when he failed to consider a diminished capacity defense, stating, "While the record shows that Mr. Friedlund filled Ms. Swan's home with garbage and boxes, it is not reasonable to conclude that these actions were caused by diminished capacity." *Slip Op.* at 12. The Court further stated that even if Mr. Friedlund did suffer from a mental disorder, it was not unreasonable for defense counsel to conclude it had no effect on

his misappropriation of Mrs. Swan's money. And finally, even if counsel's performance were deficient, Mr. Friedlund failed to show prejudice as a result of that performance. *Slip Op.* at 12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Appeals Court Ruling That It Could Review The Exceptional Sentence Based On Oral Rulings Is In Direct Conflict With RCW 9.94A.535, Decisions of This Court And Other Courts of Appeal, And Is A Matter Of Substantial Public Interest.

The considerations which govern the decision to grant discretionary review are set forth in RAP 13.4(b). Petitioner believes this Court should accept review because the decision by the Court of Appeals, citing to *State v. Bluehorse,* 159 Wn.App. 410, 248 P.3d 537 (2011) is inconsistent with the clear mandate of RCW 9.94A.535: Whenever a sentence outside the standard range is imposed, the trial court is required to set forth the reasons for its decision in written findings of fact and conclusions of law.

The Court of Appeals ruling is in direct contradiction to This Court's ruling and reasoning in *In Re Breedlove,* 138 Wn.2d 298, 979 P.2d 417 (1999); RAP 13,4(b)(1). The *Breedlove* Court reasoned, "Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate

courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." *Id.* at 311. The Court prescribed the remedy for the trial court's failure to issue findings of fact and conclusions of law: remand for entry. *Id.* This Court cited to *State v. Head,* 136 Wn.2d 619, 624, 964 P.2d 1187 (1988) and *Templeton v. Hurtado,* 92 Wn.App. 847, 965 P.2d 1131 (1998).

The decision in this case is also in conflict with Division 2 of the Court of Appeals decision in *State v. Hale,* 146 Wn.App. 299, 304, 189 P.3d 829 (2008). RAP 13.4(b)(2). There, the Court followed the remedy of *Breedlove*, remanding for entry of findings of fact and conclusions of law after imposition of an exceptional sentence. *Id.*

The citation by the Court in this case, *State v. Bluehorse,* 159 Wn.App. 410, 423, 248 P.3d 537 (2011) analogizes a court's failure to follow the mandatory requirement of RCW 9.94A.535 to failure to file findings of fact and conclusions of law in the CrR 3.5 context. The Court concluded that where the trial court's oral opinion and the hearing record were sufficiently comprehensive and clear that written facts would be a mere formality, the failure to enter mandatory written findings and conclusion was harmless.

Bluehorse, at 423. *Bluehorse* represents a departure from case precedent and is in direct conflict with the mandate in RCW 9.94A.535.

This Court should accept this case for review because it is of substantial public interest. RAP 13.4(b)(4). A trial court judge has very broad discretion in imposing the length of an exceptional sentence. If the exceptional sentence is based on proper reasons, on review it may be ruled excessive only if its length, in light of the record, shocks the conscience. *State v. Kolesnik,* 146 Wn.App. 790, 805, 192 P.3d 937 (2008). Even if the appellate court is willing to comb through the record to garner the trial court's reasoning, the purpose of the statute is greater: the public and the Sentencing Guidelines commission have been designated as groups entitled to be informed of the trial court's reasoning. *Breedlove,* 138 Wn.2d at 311.

This Court noted that no language in the SRA imposed a requirement on the trial court to articulate its reasons for the length of an exceptional sentence. *State v. Ritchie,* 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). However, it went on to state, "When the Legislature wanted a statement of reasons for a particular decision

it so stated in clear language. RCW 9.94A.120(3)[1] requires the trial court to set forth reasons for its decision to impose an exceptional sentence." *Id.* The need for review and public awareness of the court's reasoning is especially significant given the "all but unbridled discretion in setting the length of the sentence." *State v. Knutz,* 161 Wn.App. 305, 411, 253 P.3d 437 (2011).

2. A Criminal Defendant Has A Federal and State Constitutional Right To Effective Assistance Of Counsel. Where Significant Evidence Of A Mental Disorder Is Presented That May Have Negated Intent, It Is Ineffective Assistance of Counsel To Fail To Pursue The Available Defense.

At trial, the State presented evidence that beginning in 2004, Mr. Friedlund, then 71 years old, displayed most of all of he symptoms of compulsive hoarding, as defined by the American Psychiatric Association.[2] Signs and symptoms of compulsive hoarding include: severely cluttered living spaces that threaten the health and safety of home occupants; inability to discard items, keeping stacks of newspapers, magazines, or junk mail; acquiring seemingly useless items, including garbage and rotten food; and discomfort letting others touch or borrow items. Compulsive

[1] RCW 9.94A.120(3) is now found in RCW 9.94A.535.
[2] The Diagnostic and Statistical Manual (DSM-5) added hoarding as a diagnosable psychiatric disorder beginning in 2013.

hoarding may develop alongside other mental illnesses such as dementia.[3]

Between 2007 and 2010, when he was between 74 and 77 years old, Mr. Friedlund's behavior escalated to a pattern of compulsive hoarding: He made purchases of allegedly unauthorized and useless items, transferred large sums of money to strangers, made poor judgments about hygiene and nutrition, stored garbage and rotten food in the home, and neglected to pay utility and tax bills.

Here, despite the State's poignant presentation of Mr. Friedland's mental state during the charging period, the Court of Appeals concluded the record did not show that Mr. Friedlund suffered from a mental condition. *Slip Op.* at 12. The Court reasoned that because Mr. Friedlund had the capacity to stand trial it was not reasonable to conclude he had a diminished capacity. *Slip Op.* at 12. Aside from the fact that the Court was without the benefit of an expert opinion, a defense of diminished capacity relates to the time of the charged crime, not at the time of trial.

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[3] http://www.ocfoundation.org/uploadedFiles/Hoarding; www.mayoclinic.com/health/hoarding.

A defense of diminished capacity arises out of a mental disorder that is demonstrated to have had a specific effect on an individual's capacity to achieve the level of culpability required for a charged crime. *State v. Atsbeha,* 142 Wn.2d 904, 16 P.3d 626 (2001); *State v. Ferrick,* 81 Wn.2d 942, 944, 506 P.2d 860, as modified by *State v. Griffin,* 100 Wn.2d 417, 418, 670 P.2d 265 (1983). Under the facts of this case, effective representation required the jury to have been given admissible, competent and expert testimonial evidence about his mental state.

At trial, Mr. Friedlund maintained an unshakeable belief that his acquisitions and use of money were exactly in accord with Mrs. Swan's wishes. They had been friends for 60 years. Mrs. Swan knew Mr. Friedlund. It is difficult to imagine that she would entrust her life savings to someone she knew to be a compulsive hoarder and untrustworthy. It is easier and far more reasonable to suspect that Mr. Friedlund had some type of mental condition, which compromised both his thinking and his ability to entertain the mental state of intent to deprive. Under the circumstances, it was unreasonable not to address the possibility of organic factors that compromised Mr. Friedlund's inability to entertain the mental state

of intent to deprive. *State v.Gough,* 53 Wn.App. 619, 622, 768 P.2d 1028, *rev. denied,* 112 Wn.2d 1026 (1989).

The right to effective assistance of counsel is constitutionally guaranteed by the Sixth Amendment and Const.art. 1,§22. To establish a claim of ineffective assistance, the petitioner must show counsel's performance was deficient and the deficient performance created a reasonable probability the outcome of the proceedings would have been different had counsel not rendered ineffective assistance. A reasonable probability means confidence in the outcome of the proceedings is compromised. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Whether defense counsel's performance was ineffective must be determined on a case –by- case basis. *State v. Cienfuegos,* 144 Wn.2d 222, 229, 25 P.3d 1101 (2001). Failure of defense counsel to present a diminished capacity defense where the facts support one has been held to satisfy both prongs of the *Strickland* ineffective assistance of counsel test. *State v. Thomas,* 109 Wn.2d 222, 226-229, 743 P. 2d 816 (1987).

Here, the Court of Appeals stated that even if defense counsel's performance was deficient, Mr. Friedlund failed to show prejudice. However, it cannot be said that trial counsel's deficiency in failing to

explore and provide expert testimony about Mr. Friedlund's mental state or a jury instruction on diminished capacity did not prejudice Mr. Friedlund. Mr. Friedlund was entitled to the use all available criminal defenses.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Friedlund respectfully requests this Court to grant review of his petition.

Respectfully submitted this 10th day of February 2014.

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APPENDIX A

FILED
JAN. 9, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 31206-2-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JOHN HERBERT FRIEDLUND,	)	
	)	
Appellant.	)	

KULIK, J. — John Friedlund appeals his conviction for first degree theft. Mr. Friedlund misappropriated approximately $600,000 from an elderly woman in his care. A jury found Mr. Friedlund guilty of the aggravating circumstances of using a position of trust to facilitate the offense and involving a victim who was particularly vulnerable or incapable of resistance. Mr. Friedlund contends his exceptional sentence of 120 months is clearly excessive. He also claims ineffective assistance of counsel. His arguments are unpersuasive. We affirm the conviction and the exceptional sentence.

FACTS

Mr. Friedlund was a close family friend of Severt and Frances Swan for over 60 years. In 2000, after Mr. Swan passed away, Ms. Swan called Mr. Friedlund to help her. Mr. Friedlund moved into Ms. Swan's home in 2001 when she was 96 years old. Mr. Friedlund was 68 or 69 years old. Ms. Swan named Mr. Friedlund as her primary attorney in fact and designated a relative as an alternative.

Over the course of Mr. Friedlund's care of Ms. Swan, Ms. Swan went from being able to join Mr. Friedlund at the table for dinner, to spending most of her time in her bedroom. Mr. Friedlund instructed caregivers to keep Ms. Swan in her bedroom. She was rarely allowed any telephone calls or visitors.

Mr. Friedlund brought his belongings to Ms. Swan's home. Mr. Friedlund instructed caregivers that no one was to touch his possessions. Within a few years of moving in, boxes and garbage were stacked from floor to ceiling, with only narrow pathways for movement between rooms. The yard became unkempt, with overgrown grass and dog feces littering the yard. Caregivers reported that Mr. Friedlund stored rotten food in the home and directed them to feed it to Ms. Swan.

In 2006, Ms. Swan and Mr. Friedlund contacted an independent financial advisor at Edward R. Jones. The advisor recognized that Ms. Swan had difficulty understanding

and managing her assets. Ms. Swan, who was now over 100 years old, was becoming more dependent on caregivers and needed a consistent flow of cash to meet those expenses. Ms. Swan transferred approximately $800,000 into the Edward Jones account.

The advisor continued to meet with Ms. Swan and Mr. Friedlund. However, as Ms. Swan became more frail, the advisor had fewer meetings with Ms. Swan and more contact with Mr. Friedlund. Mr. Friedlund used his power of attorney to make financial decisions for Ms. Swan.

In 2007, Mr. Friedlund sought to move a large quantity of the assets out of the Edward Jones account to a bank account. The financial advisor did not consider this a wise financial decision because the Edward Jones account was accomplishing its purpose of generating the income needed to pay caregivers. Putting the assets in the bank would generate less income. Also, the amount of the transfer to the bank would far exceed the $100,000 insured limit of a bank. The advisor visited Ms. Swan at her home and verified the transfer, but still thought the transfer was Mr. Friedlund's idea.

Eventually, all $800,000 was transferred out of the Edward Jones account. The money was transferred into a joint bank account in the names of Mr. Friedlund and Ms. Swan. Mr. Friedlund then moved money from the joint checking account to his personal bank account on a monthly basis.

Mr. Friedlund hired, supervised, and paid Ms. Swan's caregivers. Between 2007 and 2010, the cost for the caregivers was approximately $200,000. Also during this time, Mr. Friedlund made numerous purchases with Ms. Swan's bank account funds. For example, he purchased two trucks, a horse trailer, a lifetime membership to the National Rifle Association, a welding machine, hay, and a car. He also paid his prescription medications and doctor bills. Mr. Friedlund testified that he discussed his transactions with Ms. Swan and that she approved the purchases. He stated that Ms. Swan told him that the money belonged to both her and Mr. Friedlund.

Mr. Friedlund also made over $400,000 in wire transfers out of Ms. Swan's account. Mr. Friedlund testified that Ms. Swan directed him to make the wire transfers to individuals that the two of them met on www.gaysugardaddyfinder.com. He also testified that he and Ms. Swan used the website because they were both interested in what caused homosexuality.

Stevens County sheriff's officers visited Ms. Swan's home after receiving a report that there was an elderly woman living in the home who had not been seen for some time. The officers found garbage, feces, and deceased pets outside the home. Inside the home, garbage and boxes filled the rooms to the extent that officers had only a narrow path to move. There was rotting food on the kitchen counter and dog feces on the floor, giving

the home a concentrated smell. When the officers contacted Ms. Swan in her bedroom, a detective testified that Ms. Swan appeared to be fearful and in immediate need of help. Emergency medical services took Ms. Swan to the hospital. Eventually, Adult Protective Services removed Ms. Swan from the home after receiving allegations of lack of care.

In 2011, a guardian was appointed for Ms. Swan. Ms. Swan had $6,000 left in a checking account.

Mr. Friedlund was charged by amended information with first degree theft of Ms. Swan's money. The State alleged the theft involved a series of transactions that were a part of a common plan or scheme. The State also charged Mr. Friedlund with the aggravating circumstances of using a position of trust to facilitate the offense and a victim who was particularly vulnerable or incapable of resistance. He was also charged with criminal mistreatment in the second degree. The two matters were joined for trial.

After a jury trial, Mr. Friedlund was found guilty of first degree theft and the charged aggravating circumstances. The jury did not reach a verdict on the charge of criminal mistreatment. The standard range was 3 to 9 months. Mr. Friedlund was 79 years old at the time of sentencing. He had no criminal history that counted toward sentencing. The court imposed an exceptional sentence of 120 months. Mr. Friedlund appeals.

ANALYSIS

First, Mr. Friedlund contends that the trial court erred by failing to enter written findings of fact and conclusions of law to support the exceptional sentence.

RCW 9.94A.535 provides, "Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." While this requirement is mandatory, appeals courts have permitted review when a trial court's oral ruling is sufficiently comprehensive and clear that written facts would be a mere formality. *See State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537 (2011) (quoting *State v. Hickman*, 157 Wn. App. 767, 771 n.2, 238 P.3d 1240 (2010)). In this situation, the failure to enter written findings and conclusions is harmless. *Id.* Such is the case here.

The jury found two aggravating factors, which Mr. Friedlund does not challenge on appeal. The record shows that the trial court relied on the jury's finding of two aggravating factors when imposing the exceptional sentence. The court stated, "The range that I have here, the standard range, is three to nine months, but there have been two aggravating factors that were found by the jury—that you took advantage of the vulnerability of Frances Swan and also that you took advantage and abused the trust, the fiduciary duty that you had as her—holding her power of attorney." Report of

Proceedings (RP) at 450. Later, the court repeated, "And, again, you took advantage of a vulnerable person. So, the sentence of the Court is 120 months." RP at 451. Based on the oral ruling, it is sufficiently clear that the trial court imposed the exceptional sentence based on the aggravating factors found by the jury.

The trial court's oral opinion clearly and sufficiently articulates the exceptional sentence was imposed based on the jury's finding of the aggravating circumstances. Therefore, we do not remand for specific written findings and conclusions reiterating the aggravating factors as the basis for the exceptional sentence. *Bluehorse*, 159 Wn. App. at 423.

Second, Mr. Friedlund contends that the 120-month exceptional sentence was clearly excessive under the circumstances of this case. He points out that the sentence was 40 times the low end of the standard range of 3 to 6 months, he had no prior criminal history, and the length equates to a life sentence based on his age and heart condition.

Generally, a court must impose a sentence within the standard sentencing range. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). However, a sentencing court may impose a sentence above the standard range for reasons that are "substantial and compelling." RCW 9.94A.535. A judge exercises his or her discretion in determining whether the aggravating facts found by the jury warrants an exceptional sentence and, if

warranted, the appropriate length of the sentence. *State v. Rowland*, 160 Wn. App. 316, 330, 249 P.3d 635 (2011), *aff'd*, 174 Wn.2d 150, 272 P.3d 242 (2012).

Reviewing courts have near plenary discretion to affirm the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence. *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007) (quoting *State v. Creekmore*, 55 Wn. App. 852, 864, 783 P.2d 1068 (1989)).

A clearly excessive sentence is one that is exercised on untenable grounds or untenable reasons, or is an action that no reasonable person would have taken. *State v. Ross*, 71 Wn. App. 556, 571, 861 P.2d 473, 883 P.2d 329 (1993) (quoting *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)). "When a sentencing court bases an exceptional sentence on proper reasons, we rule that sentence excessive only if its length, in light of the record, 'shocks the conscience.'" *State v. Knutz*, 161 Wn. App. 395, 410-11, 253 P.3d 437 (2011) (internal quotation marks omitted) (quoting *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008)). A sentence shocks the conscience if it is a sentence that "'no reasonable person would adopt.'" *Id.* at 411 (quoting *Halsey*, 140 Wn. App. at 324-25).

In *Knutz*, the defendant was sentenced to 5 years for first degree theft after she took more than $300,000 from an elderly victim. *Id.* The standard range was 2 to 6

months. *Id.* at 402. The reviewing court found that the exceptional sentence was not clearly excessive and did not shock the conscience when the jury found three aggravating factors that supported the exceptional sentence and because of the extreme amounts of money involved. *Id.* at 411.

Here, the trial court did not abuse its discretion when sentencing Mr. Friedlund to 10 years. The sentence was not unreasonable based on the record before the court. The court noted that Mr. Friedlund ignored the legal and moral duty to his longtime friend by keeping her alive to avoid probate and, at the same time, keeping her isolated from her family and friends. The court told Mr. Friedlund, "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." RP at 451. The court also recognized the enormity of the crime, citing that Mr. Friedlund wrongfully obtained $600,000 of Ms. Swan's assets and that it was one of the largest thefts in his three-county area. In comparing this case to another high dollar theft case involving scrap metal, the court stated, "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." RP at 451. The trial court also noted that Mr. Friedlund showed no remorse for what he did to Ms. Swan and continued to blame others.

The trial court's reasoning justified departure from the standard range. Mr. Friedlund used a position of authority to misappropriate funds from a 100-year-old woman who trusted him and depended on him for care. The amount of money misappropriated was excessive. The $600,000 taken by Mr. Friedlund was needed by Ms. Swan to pay for her ever-increasing health care costs. Instead, Mr. Friedlund left Ms. Swan with less than $6,000. Ms. Swan's family told the sentencing court that her wish was to stay in her home, but she no longer has a home to go to because it was sold to pay the State's lien for her care. Based on these circumstances, the sentence is not clearly excessive. The length of the sentence does not shock the conscience, considering the position of trust that Mr. Friedlund abused, the vulnerability of Ms. Swan, and the large amount of money involved that Ms. Swan was dependent upon for her care.

Mr. Friedlund contends that the trial court should have considered his age and his health conditions when determining the length of his sentence. He provides no authority for this position. The court knew Mr. Friedlund's age and health condition. However, the court had the discretion to conclude that these factors did not carry the same weight as

the aggravating factors found by the jury. The exceptional sentence is not excessive and was within the trial court's discretion.

Third, Mr. Friedlund contends that he received ineffective assistance of counsel. He maintains that his attorney's representation was deficient because he failed to raise or investigate a diminished capacity defense based on the evidence of Mr. Friedlund's hoarding, and that this failure prejudiced him by losing the right to assert the defense.

"To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it 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." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The appellant must show that there is a sufficient basis in the record to rebut the strong presumption that counsel's representation was effective. *Id.* at 335.

The evidence in the record does not support Mr. Friedlund's ineffective assistance of counsel claim. Defense counsel did not act unreasonably when he failed to consider a diminished capacity defense. The record does not show that Mr. Friedlund suffered from

a mental condition. While the record shows that Mr. Friedlund filled Ms. Swan's home with garbage and boxes, it is not reasonable to conclude that these actions were caused by diminished capacity. On the contrary, Mr. Friedlund had the capacity to participate in his defense. He continually claimed that he completed the purchases with Ms. Swan. He did not claim to have an obsession for hoarding, even though he brought other issues regarding his health to the court's attention.

Additionally, even if he did suffer from a disorder, it is not unreasonable for defense counsel to conclude that his compulsion had no effect on his misappropriation of Ms. Swan's money. His allegedly diminished mental capacity was not enough to absolve him of criminal responsibility.

Counsel's performance was not deficient. Furthermore, even if we were to find defense counsel's performance deficient, Mr. Friedlund fails to show prejudice as a result of the performance. As previously stated, it is not probable that a diminished capacity defense would have been successful or would have produced a different result at trial.

Mr. Friedlund's claim of ineffective assistance of counsel fails.

We affirm the conviction and exceptional sentence of 120 months.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Korsmo, C.J.

Fearing, J.