Supreme Court No. 95593-0
Court of Appeals No. 34933-1-III

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

STATE OF WASHINGTON,
Respondent,

v.

JONATHAN KINSMAN,
Petitioner.

PETITION FOR REVIEW

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The Court of Appeals issued an unpublished decision in *State v. Kinsman,* 34933-1-III. See attached.

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IV.
STATEMENT OF THE CASE

Jonathan Kinsman was charged with 21 counts of criminal conduct relating to child pornography. CP 1-24. He entered a plea of guilty to nine counts of possession of child pornography in violation of RCW 9.68A.070(1) and one count of disseminating child pornography in violation of RCW 9.68A.050(1). CP 24-35. The parties agreed that Kinsman's standard range was 87-116 months in prison. CP 26.

Before sentencing, Kinsman obtained a psychosexual evaluation by John Colson who opined that Kinsman had "a developmental disorder which plays a significant role" in his criminal conduct. He also proffered medical records from Tim Rehnberg, Ph.D., a 2014 psychological

evaluation by Maria Arellano, M.A., M.S., and a letter from his treating psychiatrist, Robert L. Johnson.

Dr. Johnson said that Kinsman suffered from chronic depression. CP 88. He said that Kinsman rarely left home, was "detached, fearful, and suffers greatly with interpersonal relationship issues."

Ms. Arellano said that Kinsman suffered from a major depressive disorder, an anxiety disorder, panic disorder, pervasive developmental disorder, and epilepsy. Kinsman was referred to her by DSHS to evaluate his eligibility for state benefits. At that time, Kinsman had lost his job as a dishwasher apparently because he had trouble completing multiple tasks simultaneously. *Id.* He could not drive because at a "fourway stop he is unable to trust his judgment and know when it is a good time to cross." He had tried to commit suicide. He said that growing up, he was also considered "the weird one." CP 79.

Dr. Rehnberg stated that Kinsman suffered from autism. CP 67. He discussed Kinsman as "a little eccentric" and as having a difficult time "making and maintaining eye contact." CP 69.

John Colson described Kinsman's medical history:

> Mr. Kinsman's medical/mental health history is significant. Mr. Kinsman and his mother report that in "2011 or 2012" Mr. Kinsman was diagnosed with "Autism (ASD) and seizure disorder". This was the first time that these issues were clinically diagnosed although Mr. Kinsman showed

significant indicators all his life. He was language deficit (not speaking) at three years old. He demonstrated social anxiety and no peer relationships throughout his schooling and isolation which appeared to increase in intensity. While attending WSU Mr. Kinsman reports that his grades were falling and his financial aide "didn't come through". He didn't talk "With anyone and he was socially isolated. Mr. Kinsman stated he attended only two semesters before he states, "I had a breakdown". This precipitated his seeking mental health treatment and his diagnosis. He is currently being seen at St. Joseph's Mental Health in Lewiston, Idaho by a Dr. Johnson and a neurologist, Dr. Thompson at the same center. Mr. Kinsman had been put on medications. He is currently taking Lamictal for his seizures, Paxil for his depression, Clasipan for his anxiety and Omeprasol for his stomach issues. Mr. Kinsman is currently supported by his SSI/disability assistance. Apparently Mr. Kinsman's Paxil has been increased due to the current stress. Releases were sent for collateral information however none has been received to date.

CP 55.

He also said:

Mr. Kinsman's primary social outlet is the Internet and the computer as he is socially isolated and anxious. He was exposed to pornography use at an early age by his older siblings and this activity has continued finding it a way in which to interact and to soothe. Although he states that he knew the behavior was wrong the drive to connect and "interact" over rides his choice.

CP 59.

Colson concluded:

It is my opinion that Mr. Kinsman has a developmental disorder which plays a significant role in his access and use of child pornography as well as adult pornography. To incarcerate Mr. Kinsman would be counterproductive to eradicating this problem. It is seen as a mental health issue

> and due to the low risk of hands on offending Mr. Kinsman, I believe can be managed in the community.

CP 60.

Based on this information, Kinsman sought a sentence below the standard range. He noted that he did not need to establish a statutory mitigator. However, he pointed out that two items on the non-exclusive list of mitigating factors in RCW 9.94A.535 provided guidance to the Court: 1) Kinsman's capacity to appreciate the wrongfulness of his acts was impaired, RCW 9.94A.535(1)(e), and 2) the multiple offense policy would result in a clearly excessive sentence "in light of the SRA policies expressed in RCW 9.94A.010." RCW 9.94A535(1)(g). Kinsman asked the sentencing judge to impose a mitigated sentence "resembling a SSOSA, as outlined in the psychosexual evaluation, including three years' probation to include sexual deviance treatment." CP 51.

The State opposed a mitigated sentence.

The sentencing judge rejected Kinsman's request. He said:

> Mr. Laws, you make a compelling argument, but I'm afraid that it's one that I can't go along with for the reasons that the reports, while they have the language that's been recited by both parties indicating that there may be some mental health issues on the part of Mr. Kinsman, don't go far enough, and the legislature provided that avenue for individuals who simply can't conform to what they need to be wrong. This case doesn't quite rise to that level.

5/2/16 RP 37.

The judge imposed a standard range sentence. CP 104-116.

On appeal, Kinsman argued that the sentencing judge abused his discretion for two reasons. First, he appeared to believe that the only basis for departing below the standard range for mental health issues was the strict confines of RCW 9.94A.535(1)(e). Second, he did not apply the required two-part test from .

V.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH *STATE V. ODELL*[1] AND *STATE V. LIGHT-ROTH*.[2] RAP 13.4(B)(1)&(2).

Statutory mitigating factors are only illustrative and the Supreme Court has stated that other factors can be used in mitigation. *State v. Ha'mim*, 132 Wn.2d at 843. For example, this Court has held that youthfulness can amount to a substantial and compelling factor justifying a sentence below the standard range in some cases. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359, 366 (2015). And , the Court went further and said that a defendant need not present expert testimony to establish that youth diminished his capacities for purposes of sentencing. *Id.* at 697.

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[1] 183 Wn.2d 680, 696, 358 P.3d 359, 366 (2015).

[2] 200 Wash. App. 149, 156, 401 P.3d 459, 463, review granted sub nom. In re Light-Roth, 189 Wash. 2d 1030, 408 P.3d 1094 (2017).

In *State v. Ligh-Roth*, Division I held that But O'Dell marked a significant change in the law.

Without citing or acknowledging *O'Dell* or *Light-Roth*, the Court of Appeal, held under RCW 9.94A.340, "the personal circumstances of an adult actor are relevant only as they relate to the criminal incident." Slip Opinion at 6. This holding is wrong. *O'Dell* unquestionably overruled that statutory interpretation. An exceptional sentence below the standard range may be based on offender-specific factors.

The Court of Appeals also cited *State v. Law*, 85, 97, 110 P.3rd 717 (2005). But the decision in *Light-Roth* recognized that *Law* had been abrogated. This Court now recognizes that, sometimes, the personal characteristics of the defendant can support a mitigated sentence.[3]

Kinsman's mental health history was substantial and compelling enough to distinguish this crime from others in the same category. Kinsman presented expert opinion. He was diagnosed with autism. CP 70. He exhibited a pervasive developmental disorder including delayed language development. CP 71. He had difficulty reading and writing

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[3] The Court of Appeals appears to conclude incorrectly that Kinsman relied only on statutory mitigating factors when making his request for a sentence below the standard range. Kinsman made it clear in his sentencing memorandum that, while there were two statutory mitigating factors that could apply, there were "additional substantial and compelling reasons justifying a sentence below the standard range." CP 48, 46-51.

"when required to perform cognitive and academic tasks quickly." CP 72. He suffered from seizures. CP 56. He never held a job, dropped out of college and qualified for SSI disability. CP 56

Two experts explained how Kinsman's diagnosis was a substantial and compelling reason to impose a mitigated sentence. Tim S. Rehnberg, Ph.D., said one characteristic of person with a pervasive developmental disorder is a "difficulty and/or inability to understand." CP 67

> Because of this, they often display behaviors that they do not realize could be "socially inappropriate" because they are "clueless" when it comes to understanding social norms.

Id.

Mr. Jon Colson, a state certified sex offender treatment provider, evaluated Kinsman and his medical records. He stated:

> Research has described pornography use by those who have ASD [Autism Spectrum Disorder] as not unusual and often the only non-threatening manner in which to feel "connected" to other or to express their sexual behaviors despite knowing it is wrong but having little concept as to the as to the future consequences.

CP 57. He said that, because ASD patients have social anxiety, they are unlikely to "escalate to actual physical hands on contacts" with others. CP 57. He opined that the viewing of child pornography was "due to the users level of developmental immaturity." *Id.* He concluded:

> Research also supports this problem to be treated as a mental health issue and developmental issue rather than to imprison which appears to exasperate the issues.

CP 57.

This connection between Kinsman's autism and his crimes of conviction are like the relationship between youthfulness and criminality. Like youth, it provides a substantial and compelling basis for a mitigated sentence and the trial judge erred in concluding otherwise and the Court of Appeals should have reversed sentencing judge's imposition of a standard range sentence.

VI.
CONCLUSION

The Court should accept review and reverse Kinsman's sentence.

DATED this 20th day of February 2018.

Respectfully submitted,

Suzanne Lee Elliott

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email where indicated, and by United States Mail one copy of this brief on:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JONATHAN S. KINSMAN, Appellant.	)	No. 34933-1-III
	)	UNPUBLISHED OPINION

KORSMO, J. — Jonathan Kinsman appeals from a standard range sentence for ten counts of possessing and disseminating child pornography. Since the trial court was not convinced that he established the mitigating factor he was relying on, there was no error.

FACTS

Mr. Kinsman receives disability benefits due to several psychological conditions, including one that an evaluator described as a developmental[1] disorder, which makes social interactions stressful to him. Nonetheless, his cognitive abilities rank toward the higher end of the "average" spectrum.

[1] Also described as "high functioning autistim." Clerk's Papers at 71.

A police child pornography investigation led to the issuance of a search warrant for Mr. Kinsman's computer. Police recovered over 1100 images of suspected child pornography, leading prosecutors to file 21 charges. An agreement was reached and Mr. Kinsman pleaded guilty to nine counts of possession of a minor engaging in explicit sexual conduct and one count of disseminating such images. The prosecutor agreed to recommend a sentence of 96 months in prison, while the defense sought an exceptional sentence.

The defense sought a treatment based sentence consistent with the approach of a special sexual offender sentencing alternative (SSOSA), arguing that three mitigating factors were available: (1) Mr. Kinsman was unable to appreciate the wrongfulness of his conduct, (2) the appropriate sentencing alternative was not available, and (3) the sentence was clearly excessive. The argument was supported by evaluations, including from a treatment provider, suggesting that prison would only exacerbate Mr. Kinsman's problems.

The trial judge concluded that Mr. Kinsman had not established that his condition rose to the level of being unable to appreciate the wrongfulness of his conduct, the absence of SSOSA for his offenses was not a basis for declaring an exceptional sentence, and that the standard range was not excessive for his conduct. The court imposed a low end term of 87 months in prison and 36 months of community supervision.

This court permitted Mr. Kinsman to file an untimely appeal due to lack of advice at sentencing concerning his appeal rights. A panel considered the case without argument.

ANALYSIS

Mr. Kinsman argues on appeal that the trial court abused its discretion in denying his request for an exceptional sentence due to his mental health condition.[2] We disagree.

An exceptional sentence is appropriate when the facts of a case are atypical and result in a harm either more or less egregious than the norm. *E.g.*, *State v. Akin*, 77 Wn. App. 575, 892 P.2d 774 (1995) (escape was less egregious than typical, justifying mitigated sentence). "A sentence within the standard sentence range . . . for an offense shall not be appealed." RCW 9.94A.585(1). This means, generally, that a party cannot appeal a standard range sentence. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Thus, "so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." *Id.* at 146-147.

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[2] Although Mr. Kinsman argues that the purposes of the Sentencing Reform Act also justified an exceptional sentence, those purposes cannot alone justify an exceptional sentence since those purposes are already reflected in the legislature's determination of the standard range. *E.g.*, *State v. Law*, 154 Wn.2d 85, 97, 110 P.3d 717 (2005). We consider his argument as supporting his chosen sentence rather than as a separate basis for imposing a mitigated sentence.

There are some exceptions to this general prohibition. *Id.* at 147. A party's right to "challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision" is not barred by the prohibition. *Id.* An appellate court may review a standard range sentence resulting from constitutional error, procedural error, an error of law, or the failure to exercise discretion. *E.g.*, *id.* (State can appeal determination of a defendant's eligibility for a sentencing alternative); *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (defendant can challenge a trial court's failure to follow a specific sentencing provision); *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986) (defendant can challenge trial court's failure to comply with mandatory procedures); *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (sentencing court erred when it failed to recognize it had authority to impose an exceptional sentence).

Trial judges exercise structured discretion given by the legislature. *Ammons*, 105 Wn.2d at 182-183. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A reviewing court does not find facts and has no ability to believe that which the trial court chose not to believe. *Quinn v. Cherry Lane Auto Plaza*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

Here, Mr. Kinsman argued at trial that a statutory mitigating factor applied:

> The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535(1)(e).[3] On appeal, Mr. Kinsman argues that the mitigating factors recognized in our statutes are illustrative and not exclusive, and, thus, the trial court could have found his mental health to be a mitigating factor even if his condition did not arise to the level of the statutory mitigating factor. While that observation is correct, it is legally unavailing.

The primary problem is that Mr. Kinsman attempted to establish the statutory mitigating factor rather than a different, unarticulated standard. The trial court cannot be faulted for failing to exercise discretion in favor of a mitigating factor it was not asked to consider.

A second problem is that Mr. Kinsman now focuses on his own condition instead of how that condition related to the commission of the crime. Since the enactment of our

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[3] To justify an exceptional sentence under this provision, a defendant must prove impairment in his or her capacity to think and act in conformity with the law. *State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989). Impaired judgment and irrational thinking, alone, are insufficient to establish the mitigating circumstance. *Id.* Mr. Rogers was a 50-year-old, highly-educated former schoolteacher and school principal, whom the trial judge determined was acting under severe stress. *Id.* at 182, 184. On review, the court found no proof that the stress Rogers experienced significantly impaired his capacity to appreciate the wrongfulness of his conduct. *Id.* at 185. The court reversed on that basis and made clear that the test is "stringent." *Id.*

current sentencing act, trial courts must apply the statutes equally "without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340. The personal circumstances of an adult actor are relevant only as they relate to the criminal incident. Here, Mr. Kinsman appropriately made that argument to the trial court in terms of how his condition made him unable to appreciate the wrongfulness of his conduct. He did not attempt to explain what other impact his condition might have had on the criminal activity.

Mr. Kinsman made a pitch for the statutory factor and failed to establish it. The trial court had a very tenable reason for exercising its discretion as it did. There was no abuse of that discretion.

The judgment is affirmed.

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.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

LAW OFFICE OF SUZANNE LEE ELLIOTT

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