SUPREME COURT NO. 97122-6

NO. 50335-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JULIEN BROUSSARD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Michael Schwartz, Judge

PETITION FOR REVIEW

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WASHINGTON CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Julien Broussard asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Broussard seeks review of the Court of Appeals' unpublished decision in State v. Julien Broussard, filed March 26, 2019 ("Opinion" or "Op."), which is appended to this brief.

C. ISSUE PRESENTED FOR REVIEW

1. Reversal of an exceptional sentence is required where the trial court's reasoning does not justify the departure from the standard range. The court imposed exceptional, consecutive sentences on two charges based on a determination that "some of the current offenses" would go unpunished. However, only one current offense failed to increase the sentence. Where the plain language of the statute allows for an exceptional sentence on this ground only where multiple current offenses will otherwise go unpunished, should this Court grant review and vacate the unlawful finding as well as the resulting exceptional sentence?

D. STATEMENT OF THE CASE

Julien Broussard entered a guilty plea to one count of Promoting Prostitution in the First Degree (Count II) and one count of Assault in the Second Degree (Count III).[1] CP 48-57. Mr. Broussard entered a stipulation to his prior record and offender score. CP 58-59.

On Count II, the trial court found that Mr. Broussard's offender score was 9+ (actual score 12), the standard range was 108-144 months, and the statutory maximum was 120 months, which reduced the standard range sentence to 108-120 months. CP 95 (Finding of Fact II). On Count III, the trial court found that the offender score was 9+ (actual score 12), and the standard range was 63-84 months, and the statutory maximum was 120 months. CP 95 (Finding of Fact II). The trial court sentenced Mr. Broussard to 120 months on Count II and 63 months on Count III, to run *consecutively* to each other, for a total of 183 months. CP 95 (Finding of Fact IV) (emphasis in original).

Mr. Broussard appealed the imposition of this exceptional sentence. CP 97. He challenged his exceptional sentence on the grounds that the trial court erred in applying this basis for an exceptional sentence because the plain language of the statute does not allow for an exceptional sentence on this basis where only one crime would go unpunished.

[1] The first information charged three counts. CP 1-2 (Information 12/07/2015). The State later agreed to dismiss Count I. CP 45-46 (Amended Information 11/14/2016).

In its decision, the Court of Appeals rejected Broussard's argument regarding "some of the current offenses" going unpunished, known as the "free crimes" aggravator. Op. at 1-3. The Court of Appeals based this ruling on its recent decision in State v. Smith, __ Wn. App. 2d __, 433 P.3d 821, 823-24 (2019), where it held that the free crimes aggravator allows a sentencing court to impose an exceptional sentence when one crime will go unpunished.

Mr. Broussard now asks this Court to accept review, reverse, and remand for resentencing.

E. REASON REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(4) BECAUSE THE ISSUE RELATED TO THE FREE-CRIMES AGGRAVATOR IS ONE OF SUBSTANTIAL PUBLIC INTEREST.

This Court should accept review under RAP 13.4(b)(4) because the issue related to the free-crimes aggravator is one of substantial public interest and is likely to recur.

The trial court's finding that if concurrent sentences were imposed, "some of" the current crimes would go unpunished was entered in error. CP 95; RP Vol. III 50-52. Under its plain language, and as a matter of law, this statutory aggravator does not apply to the facts of this case. Broussard was only convicted of two offenses. Because Mr. Broussard

has an offender score greater than nine, only one of his current offenses would not add to his sentence if he had received standard range concurrent sentences. Thus, the trial court erred in imposing consecutive sentences and lengthening each term under RCW 9.94A.535(2)(c) ("defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.").

a. An exceptional sentence, including consecutive sentences, may be imposed under the Sentencing Reform Act only when "some" of the current offenses would otherwise go unpunished.

Under the plain language of the statute, an exceptional sentence, including consecutive sentences, may be imposed only when "some"—not *one*—of the current offenses would otherwise go unpunished.

Appellate review of a defendant's sentence is dictated by statute. RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). In reviewing an exceptional sentence, this Court determines whether:

> (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.

State v. Feely, 192 Wn. App. 751, 770, 368 P.3d 514 (2016). De novo review applies in this case because the trial court's reasoning does not justify the departure from the standard range. De novo review is also appropriate because the issue is one of statutory construction. State v. Conover, 183 Wn.2d 706, 711, 355, P.3d 1093 (2015).

The trial court may impose a sentence outside the standard range for an offense if it finds, considering the purposes of the Sentencing Reform Act (SRA), that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Mr. Broussard faced sentencing on two felony convictions. Under the SRA, when an individual is sentenced on two or more offenses at the same time, the sentences imposed on each count must be served concurrently. RCW 9.94A.589. Consecutive sentences may be imposed only under the exceptional sentence provisions of RCW 9.94A.535. See RCW 9.94A.589(1)(a).

The trial court imposed consecutive sentences in Broussard's case based on RCW 9.94A.535(2)(c). This provision provides:

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> . . . .
>
> The defendant has committed multiple current offenses and the defendant's high offender score results in *some of* the current offenses going unpunished.

RCW 9.94A.535(2)(c) (emphasis added).

Broussard had an offender score greater than nine and, under the SRA, standard range sentences do not increase when an offender score is nine or more. RCW 9.94A.510. But, contrary to the court's finding that "some" offenses would go unpunished (mirroring the statutory language), the record demonstrates that only one offense would not increase the period of incarceration. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d345 (2008) ("punishment" is expressed in terms of the total confinement time); RCW 9.94A.510 (each point up to nine increases potential punishment).

To properly interpret RCW 9.94A.535(2)(c), this Court must determine the legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Where a statute is plain on its face, "the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). This Court may determine a statute's plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme in its entirety. State v. Larson, 184 Wn.2d 843, 365 P.3d 740 (2015) (citing Ervin, 169 Wn.2d at 820). "When a term

has a well-accepted, ordinary meaning, [this Court] may consult a dictionary to ascertain the term's meaning." Alvarado, 164 Wn.2d at 562.

The plain language of RCW 9.94A.535(2)(c) demonstrates that the legislature did not intend for a trial court to impose an exceptional sentence where only one count failed to increase the standard range. The word "some," when used in this manner, indicates more than one.

"Some" means different things in different contexts. As the Collins English Dictionary explains, the word "some" is used to refer to a quantity of something that is not precise.[2] When used as a determiner, meaning at the beginning of a noun group to indicate a reference to one thing or several things,[3] it can indicate the quantity of things is either fairly large or fairly small.[4] For example, an activity may take "some time" or something may only happen to "some extent." However, when the word "some" is placed in front of the word "of"—as it is in RCW 9.94A.535(2)(c)—it acts as a quantifier. Thus, "some of" one particular

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[2] COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/dictionary/english/some_1 (last accessed Nov. 9, 2017) (at definition 1).

[3] See COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/us/dictionary/english/determiner (last accessed Nov. 9, 2017) (definition of "determiner").

[4] COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/dictionary/english/some_1 (at definition 2).

thing means a part of the thing but not all of it, whereas "some of" several things means a few of the things, but not all of them.[5]

When describing "some of" a discrete thing, the term "some" is synonymous with the word "few."[6] Thus, when the legislature expressed its concern as "some of the current offenses" going unpunished, it indicated that the trial court could impose an aggravated exceptional sentence where a few of the crimes would otherwise go unpunished. RCW 9.94A.535(2)(c).

An examination of the broader statutory scheme demonstrates that, in contrast to the use of the word "some" in RCW 9.94A.535(2)(c), the legislature employs the use of the phrase "one or more" in other provisions. See State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (a "fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms"); accord Conover, 183 Wn.2d at 713 ("Clearly, the legislature's choice of different language indicates a different legislative intent."). For example, the legislature describes "one or more crimes" in RCW 9.94A.730, "one or more of the facts" in RCW 9.94A.537, and "one or more violent acts" in RCW 9.94A.562.

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[5] Id. at definition 4.

[6] Id.

The use of "some of" rather than "one or more" in RCW 9.94A.535(2)(c) demonstrates the legislature did not intend for a sentencing court to impose an exceptional sentence where only one charge went unpunished. See State v. Slattum, 173 Wn. App. 640, 656, 295 P.3d 788 (2013) (use of particular language in one statute demonstrated legislature "knew how to say it" when it intended to do so, and did not intend same meaning when using different language). Because the plain language of the statutory provision is unambiguous, the plain language controls. See State v. K.L.B., 180 Wn.2d 735, 739, 328 P.3d 886 (2014).[7]

In summary, the plain language permits an exceptional sentence only where "some of" the current offenses would otherwise go unpunished. RCW 9.94A.535(2)(c). The legislature could have, but did not, say an exceptional sentence is available where "one or more" current offenses go unpunished. The provision does not permit an exceptional sentence where only one offense fails to increase the potential punishment.

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[7] A plain language analysis, aided by principles of statutory construction, controls over any external statement of intent. See State v. Reis, 183 Wn.2d 197, 212, 351 P.3d 127 (2015) ("legislative intent . . . does not trump the plain language of the statute"). Courts have addressed different arguments regarding the provision at issue here by resorting to the usual plain-language principles of statutory construction. In Alvarado, for example, this Court addressed an argument regarding the meaning of the word "unpunished" under RCW 9.94A.535(2)(c) by invoking the plain-meaning rule, including consideration of related provisions and dictionary definitions. Alvarado, 164 Wn.2d at 561-63.

b. The remedy is reversal and remand for resentencing.

The remedy for erroneous reliance on this factor is remand for resentencing. The court explicitly relied on RCW 9.94A.535(2)(c) to impose the sentences *consecutively*. CP 95; RP Vol. III 50-52. Where an exceptional sentence is not justified by the aggravating factor, reversal is required. State v. Davis, 182 Wn.2d 222, 232, 340 P.3d 820 (2014). This Court should grant review under RAP 13.4(b)(4), reverse, and remand for resentencing.

F. CONCLUSION

This Court should accept review under RAP 13.4(b)(4) and reverse Mr. Broussard's exceptional sentence.

DATED this 25th day of April, 2019.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

March 26, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JULIEN BROUSSARD, Appellant.	No. 50335-2-II UNPUBLISHED OPINION

LEE, J. — Julien Broussard appeals his exceptional sentence, arguing that the "free crimes" aggravator, RCW 9.94A.535(2)(c), does not support an exceptional sentence if only one crime will go unpunished. We disagree and affirm.

FACTS

Broussard pleaded guilty to first degree promoting prostitution and second degree assault. The sentencing court found that the second degree assault would go unpunished because of Broussard's high offender score, which was 12. Based on its finding, the sentencing court imposed an exceptional sentence by imposing consecutive sentences. Broussard appeals his exceptional sentence.[1]

[1] In his Statement of Additional Grounds for Review, RAP 10.10, Broussard also argues that the sentencing court may not impose an exceptional sentence under RCW 9.94A.535(2)(c) without a finding by a jury. Broussard's argument has already been considered and rejected by our Supreme

ANALYSIS

Broussard argues that the sentencing court did not have the authority to impose an exceptional sentence because the "free crimes" aggravator does not allow an exceptional sentence if only one crime will go unpunished. We disagree.

A defendant's offender score is calculated based on current and prior convictions. RCW 9.94A.525(1). The standard sentencing ranges in the Sentencing Reform Act, chapter 9.94A RCW, do not account for offender scores in excess of nine. RCW 9.94A.510; *State v. France*, 176 Wn. App. 463, 468, 308 P.3d 812 (2013), *review denied*, 179 Wn.2d 1015 (2014). Therefore, "[w]here a defendant has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range." *Id.*

RCW 9.94A.535(2)(c) allows a sentencing court to impose an exceptional sentence when the "defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." Imposing consecutive sentences is an exceptional sentence. RCW 9.94A.535. We review the sentencing court's authority to impose an exceptional sentence de novo. *France*, 176 Wn. App. at 469.

In *State v. Smith*, ___ Wn. App. 2d ___, 433 P. 3d 821, 823-24 (2019), we held that the free crimes aggaravtor allows a sentencing court to impose an exceptional sentence when one crime will go unpunished. Therefore, we reject Broussard's arguments. Under *Smith*, the sentencing court properly imposed an exceptional sentence based on the "free crimes" aggravator.

Court. *State v. Alvarado*, 164 Wn.2d 556, 566-69, 192 P.3d 345 (2008). Accordingly, we do not address it any further.

We affirm.

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

Lee, J.

We concur:

Maxa, C.J.

Sutton, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	SUPREME COURT NO. ____
	)	
v.	)	COA NO. 50335-2-II
	)	
JULIEN BROUSSARD,	)	
	)	
APPELLANT.	)	

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I, JENNIFER STUTZER, STATE THAT ON THE 25th DAY OF APRIL, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X_____

STUTZER LAW PLLC

April 25, 2019 - 4:34 PM

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