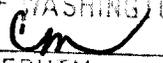


FILED
COURT OF APPEALS
DIVISION II

No. 41736-7-II

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

RAYMOND HERNANDEZ, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court violate Hernandez's constitutional rights when it re-imposed an exceptional sentence after vacating four of the five counts of child molestation?
- B. Did the trial court fail to sufficiently justify the exceptional sentence it imposed upon Hernandez?

II. STATEMENT OF THE CASE

Raymond Hernandez, Jr.¹ was convicted by a jury on February 6, 2009, of five counts of child molestation in the first degree. CP 1; Sup. CP² Verdict Forms A-E and Statement of Prosecuting Attorney (SPA). All counts had the same victim. CP 35. The jury also returned two aggravating factors on each count via special verdict form. Sup. CP Special Verdict Forms A-E1. The jury found for each count that the molestation was part of an ongoing pattern of sexual abuse of the same victim, who was under 18 years old, manifested by multiple incidents over a prolonged period of time. Sup. CP Special Verdict Forms A-E. The jury also found on each count that Hernandez used his position of trust or

¹ Hereafter Hernandez

² The State has filed a supplemental designation of Clerk's Papers to include all verdict forms (A-E) and special verdict forms (A-E1) along with the Statement of Prosecuting Attorney. They will be referred to as Sup. CP and their description.

confidence to facilitate the commission of the crime. Sup. CP Special Verdict Forms A1-E1.³

Hernandez was originally sentenced on April 8, 2009 and was given a sentence of minimum term of 198 months, maximum term of life on each count, with counts one, two and three to run consecutively. CP 1-15. This is the sentence the State requested in its SPA. Sup. CP SPA. The State outlined in its sentencing memorandum that grooming and abuse of trust Hernandez violated was not only the victim's but her entire family's trust. Sup. CP SPA.

Further, the defendant groomed Mr. And Mrs. Housely in order to lower their suspicions. Ultimately, the defendant's actions constituted a depraved abuse of trust. The defendant abused the trust placed in him by his own family, the victim, and the victim's parents. For this reason, the Sate believes that an exceptional sentence should be imposed.

Sup. CP SPA. In total, Hernandez was sentenced to a minimum term of 594 months with a maximum term of life. CP 5. A special finding, Appendix 2.4 was signed by the trial court and trial counsel, stating that the exceptional sentences on counts one, two and three

³ It should also be noted that Hernandez only designated Motion hearings from December 2010 and January 2011 along with his new sentencing hearing in January 2011 as the verbatim report of proceedings necessary for this appeal. The State is going to work within this constraint (especially given current budgetary restraints) because it believes it is possible to write a thorough response with the verbatim report of proceedings as currently designated, but if the Court should feel it necessary to review the trial record, the State would be willing to request the production of the transcript for the Court.

were for the two aggravating circumstances found by the jury and that either of the grounds, considered individually, would constitute sufficient cause for the imposition of the exceptional sentence. CP 15. Hernandez appealed. CP 16-31.

The Court of Appeals, in an unpublished decision vacated four of the five convictions for child molestation in the first degree because they violated Hernandez's double jeopardy right and remanded for vacation of four of the counts and resentencing. CP 34-44. On January 25, 2011 the trial court vacated Hernandez's judgment and sentence. CP 46-47. The trial court also signed an order vacating counts two, three, four and five. RP 7-8.⁴ The State requested Hernandez be sentenced to 594 months on the sole remaining count of child molestation in the first degree. RP 8. The deputy prosecutor stated:

If your Honor will recall in this particular case during the trial there was testimony outlining just an outrageous abuse of trust the way that he as the State argued didn't only groom the victim, but also groomed the victim's family and became very close to them for the purposes of doing what he did to G.H.⁵. I'd argue this abuse of trust is much more egregious than one would normally find in a case of this nature.

⁴ The State will refer the verbatim transcript that includes the sentencing hearing on January 25, 2011 as RP.

⁵ The State will refer to the victim as G.H. due to the victim's tender age.

Furthermore, the jury special verdict does remain that this was part of an ongoing pattern of sexual abuse and was there testimony about this happening multiple times. There was detailed testimony about this happening on different times.

RP 8.

Hernandez's new trial counsel argued that the vacation of counts two through five taints the special verdicts on the aggravating factors and Hernandez should be sentenced within the standard range. RP10-12. The trial court told trial counsel, "I understand the argument that you are making, with regard to the multiple offenses. How does that affect the abuse of position of trust?" RP 11. The trial court ultimately ruled the sentence would be for a minimum term of 500 months with a maximum of life. RP 13; CP 51. The trial court explained its ruling:

I agree with Mr. Blair that to simply impose the same sentence would be to in effect ignore what the Court of Appeals has done by dismissing four of the five counts in this case, but it is clear to me that from reading the decision of the Court of Appeals that the aggravating factors that were found by the jury were not reversed. They still stand. I'll address both of those first.

The first the aggravating factor regarding ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time, the jury answered that question yes. They found that had occurred. Dismissal of the four counts does not affect that because of the reason for the dismissal. Those

counts were dismissed, because the Court of Appeals was concerned that the defendant could have been convicted for four of five separate counts for the same conduct for the same activity.

This finding by the jury was specifically that there were multiple incidents, so that stands.

Also, the abuse of position of trust stands. That's not affected in any way by the dismissal of Counts two, three, four and five, so when faced with those, even though the range is 51 to 68 months, I'm imposing the exceptional sentence, and I'm finding that either one of these aggravating factors would be sufficient to support this sentence.

This was an egregious case. This was horrendous testimony to listen to. The facts of this case well support this type of exceptional sentence, so for those reasons I'm imposing the exceptional sentence of 500 months minimum, maximum life, credit for time served 743 days.

RP 13-14. Hernandez timely appealed his sentence. CP 63-78.

III. ARGUMENT

A. THE JURY'S FINDINGS ON THE AGGRAVATING FACTORS REMAIN INTACT AND THE COURT THEREFORE PROPERLY REIMPOSED AN EXCEPTIONAL SENTENCE.

When a defendant elects to have a jury decide his or her case a sentencing judge may only impose a sentencing enhancement when authorized by a jury verdict. *In re Cruze*, 169 Wn.2d 422, 432, 237 P.3d 274 (2010). The exception to this rule is the statutorily recognized aggravating factors that may be found by

a judge. RCW 9.94A.535(2). The State must prove beyond a reasonable doubt every essential element of enhancement before a defendant may be subjected to the enhanced penalty. *State v. Luna*, 62 Wn. App. 34, 42, 813 P.2d 588, *review denied*, 117 Wn. 2d 1025 (1991). If the trial court imposes a sentence on a defendant that is greater than authorized by the jury or statute the error is never harmless. *In re Cruze*, 169 Wn.2d at 432.

In the present case, the State elected to submit two aggravating factors to the jury. See Sup. CP Special Verdict Forms A-E1. The jury instructions in Hernandez's case instructed the jury that they must find the aggravating factors beyond a reasonable doubt. 2 Sup. CP Instruction 17.⁶

You will also be given a special verdict forms for each crime charged. If you find the defendant not guilty of a crime, do not use the special verdict forms. If you find the defendant guilty of a crime, you will then use the special verdict forms and fill in the blanks with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no."

⁶ The State after filing its supplemental designation of Clerk's papers realized the jury instructions had not been designated. The State apologizes for this oversight and has filed a second supplemental designation of Clerk's papers to include the jury instructions. Any reference to the jury instructions will be 2 Sup. CP and the instruction number.

2 Sup. CP Instruction 17; WPIC 161.00. This instruction is clear that the jury must unanimously find each of the special verdicts beyond a reasonable doubt.

The State presented facts for two aggravating factors and asked the jury to return special verdicts on both. The first aggravating factor was that the offense of child molestation in the first degree was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(g); Sup. CP Special Verdict Forms A-E. The second aggravating factor was that Hernandez used his position of trust or confidence, to facilitate the commission of the crime of child molestation in the first degree. RCW 9.94A.535(3)(n); Sup. CP Special Verdict Forms A1-E1. After finding Hernandez guilty of all five counts of child molestation in the first degree the jury also answered yes on all of the special verdict forms. See Sup. CP Verdict Forms A-E, Special Verdict Forms A-E1.

Due to faulty jury instructions the Court of Appeals vacated four of the five convictions for child molestation due to violation of Hernandez's double jeopardy right. CP 41-44. The Court of Appeals did not state which of the four counts must be vacated,

only that it was remanding the case with instructions to the trial court to vacate four of the convictions. CP 44. The special verdicts were not addressed in the initial appeal of Hernandez's case. CP 35-45. The trial court elected to vacate counts two, three, four and five. RP 7-8. This left a conviction for count one, child molestation in the first degree and the two special verdicts found by the jury. RP 8; Sup. CP Verdict Form A, Special Verdict Form A, A1.

Hernandez's argues to this court that the trial court improperly relied upon the aggravating factors found by the jury because the Court of Appeals vacated four of the convictions and therefore somehow the remaining aggravating factors found by the jury are now suspect . Brief of Appellate 6-7. Hernandez's argument is based upon a presumption that because the other counts were vacated the aggravating factors found by the jury for count one can no longer be found beyond a reasonable doubt. Brief of Appellate 6-7. This is a faulty presumption. The State, while not agreeing, can see how Hernandez could make such an argument in regards to the first aggravating factor for a pattern of abuse. Yet, the testimony still stands and the jury, found on count one, that beyond a reasonable doubt, Hernandez committed child molestation in the first degree and it was a pattern of ongoing

sexual abuse of G.H. manifested by multiple incidents over a prolonged period of time. Sup. CP Special Verdict Form A. This aggravating factor stands alone. In regards to the second aggravating factor, the State does not see how it would even be conceivable that the verdict for violation of abuse of trust could not stand, regardless of the vacation of the other counts of child molestation. Sup. CP Special Verdict A1. Further, the jury did find on each and every count of child molestation that both aggravating factors had been committed, so regardless of which counts were vacated, the special verdicts that were attached to the non-vacated count would stand.

The trial court stated in its sentencing decision that either aggravating factor, as found by the jury, would be sufficient to support the sentence given standing on its own. RP 14; CP 59. The exceptional sentence of 500 months should be affirmed.

B. THE COURT PROPERLY ANALYZED THE AGGRAVATING FACTORS AND SUFFICIENTLY EXPLAINED WHY THEY SUPPORTED AND JUSTIFIED THE EXCEPTIONAL SENTENCE HANDED DOWN BY THE TRIAL COURT.

When a trial imposes a sentence outside the standard sentence range it must find compelling and substantial reasons justifying the exceptional sentence. RCW 9.94A.535. Once a trial

court has made the required determination, “the sentence court may exercise its discretion to determine the length of an appropriate exceptional sentence.” *State v. Knutz*, 161 Wn. App. 395, ___, 253 P.3d 437, 444 (2011). A trial court’s exceptional sentence is reviewed under an abuse of discretion standard for a determination if the sentence was clearly excessive. *Id.* A sentence is clearly excessive when it is clearly unreasonable. *Id.* A sentence is clearly unreasonable when the sentence is “exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” *Id.* (citations omitted).

If the trial court bases its exceptional sentence on proper reasons, as stated above, then the reviewing court will only find the sentence to be excessive, “if its length, in light of the record, shocks the conscience.” *Id.* A sentence is considered to shock the conscience only if it is a sentence that no reasonable person would adopt. *Id.*⁷

Hernandez argues that because the specific factual reasons are omitted from the findings and conclusions entered by the trial court that the trial court did not find or supply substantial and

⁷ The page cite for the Pacific Reported is 445.

compelling reasons for the exceptional sentence and therefore the exceptional sentence is not justified. Brief of Appellant 8-9. Yet, the Findings of Fact in the judgment and sentence do set forth the substantial and compelling reasons for the exceptional sentence. CP 59. The findings state that there was an abuse of trust and an ongoing pattern of sexual abuse to a victim under 18 years of age. CP 59. This alone is sufficient to justify the sentence, but when coupled by the trial court's oral explanation of his sentence, as contained in the record, there is no doubt that the sentence is completely justified. The trial court stated:

The first the aggravating factor regarding ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time, the jury answered that question yes. They found that had occurred. Dismissal of the four counts does not affect that because of the reason for the dismissal. Those counts were dismissed, because the Court of Appeals was concerned that the defendant could have been convicted for four of five separate counts for the same conduct for the same activity.

This finding by the jury was specifically that there were multiple incidents, so that stands.

Also, the abuse of position of trust stands. That's not affected in any way by the dismissal of Counts two, three, four and five, so when faced with those, even though the range is 51 to 68 months, I'm imposing the exceptional sentence, and I'm finding that either one of these aggravating factors would be sufficient to support this sentence.

This was an egregious case. This was horrendous testimony to listen to. The facts of this case well support this type of exceptional sentence, so for those reasons I'm imposing the exceptional sentence of 500 months minimum, maximum life, credit for time served 743 days.

RP 13-14.

Hernandez's standard range for one count of child molestation in the first degree is a minimum term of 51 to 68 months and a maximum term of life. CP 50. The exceptional sentence handed down by the trial court is reasonable and clearly not excessive. The sentence does not shock the conscience. A reasonable person would adopt such an exceptional sentence after, as the trial reminded everyone, hearing such horrendous testimony as that heard at the trial. Hernandez's sentence should be affirmed.

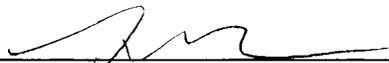
IV. CONCLUSION

For the reasons argued above this court should affirm Hernandez's exceptional sentence for child molestation in the first degree.

RESPECTFULLY submitted this 21st day of July, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: _____


SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

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STATE OF WASHINGTON
BY C
DEPUTY

DECLARATION OF
MAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 21, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Peter B. Tiller
Attorney at Law
PO Box 58
Centralia, WA 98531

DATED this 21 day of July, 2011, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office