

No.49008-1-II
Kitsap County Superior Court No. 15-1-01013-0

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

BRYAN WHITLOCK,
Defendant-Appellant.

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

The Honorable Melissa A. Hemstreet, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

The sentencing judge failed to properly exercise her discretion when she denied Whitlock's request for a Special Sex Offender Sentencing Waiver [SOSSA] pursuant to RCW 9.94A.676.

II.
ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the sentencing judge fail to exercise the discretion vested in her by statute by when she incorrectly found that Whitlock failed to express remorse for his crime?
2. Did the sentencing judge fail to exercise the discretion vested in her by statute when she relied upon an undefined and vague basis for denying Whitlock a SOSSA sentence?

III.
STATEMENT OF THE CASE

On September 1, 2015, Bryan Edward Whitlock was charged with First Degree Rape of a Child. CP 1-6. On April 25, 2016, Whitlock plead guilty to attempted first-degree rape. CP 13-23. The parties agreed that the standard sentencing range for the crime was 69.75 to 92.75 months in prison.

Prior to sentencing Whitlock was evaluated by Dr. Joseph Jensen, Ph.D. Supp. CP¹ _____, Sub. 42, filed May 20, 2016. Dr. Jensen did an extensive evaluation of Whitlock and found that he qualified for a SOSSA.

In his report he quoted from Whitlock's statements that he was disgusted by what he had done and he felt intense shame. He said that his abuse of the victim was "just something else I could hate myself for." *Id.*

Dr. Jensen administered the Static 99 R Risk Assessment. Whitlock had a total score of "0", which means he has a low risk of re-offense. Dr. Jensen said: "Typical of most incest offenders whose offense occurs within a family setting, Mr. Whitlock is not a sexual predator and is likely to present minimal risk to the community at large." *Id.* He also noted that while the case was pending Whitlock completed substance abuse treatment and started his sexual deviancy treatment. *Id.*

The state probation officer opposed the request for a SOSSA sentence as did the prosecutor. The probation officer appeared to oppose the sentence because he believed the prosecutor should have charged Whitlock with aggravating circumstances.

At the sentencing hearing the prosecutor argued that the trial court should not impose a SOSSA sentence because she did not believe that

¹ A supplemental designation of clerk's papers was filed on October 20, 2016.

Whitlock ever acknowledged that he harmed the victim or expressed remorse. RP 6-16.

The defense disagreed with the State's assessment. Defense counsel pointed out that Whitlock had already begun treatment and had expressed remorse. He pointed out that Whitlock had met three times with Dr. Jensen, submitted to a polygraph exam, been interviewed by the probation officer and admitted to all of the "worse parts of his life." RP 25.

During his allocution, Whitlock said, in part:

I take full responsibility and accountability for my actions. And I am sorry beyond what words can express for the impact my actions have had on my victim and her family.

I can scarcely begin to imagine the impact that it's had on everyone involved. I'm sorry for the hurt and betrayal. I'm sorry for the shame and heartache. And I wish more than anything I could undo the damage I've caused and the pain being felt.

RP 37.

The trial judge refused to grant a SOSSA and instead imposed a sentence at the high end of the standard range. She stated that she was "shocked and surprised at the outcome and the result that [Dr. Jensen] found in his report." RP 41. She said that "nowhere in any of the materials that I received did I have any acknowledgment or recognition of how your conduct harmed a developmentally disabled, non-verbal child."

RP 42. That finding regarding Whitlock's lack of remorse appeared to be her rationale for declining to grant Whitlock a SOSSA sentence.

IV. ARGUMENT

Where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002, 966 P.2d 902 (1998). When a defendant requests a SOSSA:

the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section.

RCW 9.94A.670.

A. THE EVIDENCE DID NOT SUPPORT THE SENTENCING JUDGE'S FINDING THAT WHITLOCK LACKED REMORSE

Constitutional and statutory procedures protect defendants from being sentenced on the basis of untested facts. See generally *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, *reh'g denied*, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004); RCW 9.94A.530(2). Under the SRA, a trial judge may rely on facts that are admitted, proved, or acknowledged to determine "any sentence," including whether to sentence a defendant to a SOSSA. RCW 9.94A.530(2). "Acknowledged" facts include all those facts presented or considered during sentencing that are not objected to by the parties. See *State v. Handley*, 115 Wn.2d 275, 282-83, 796 P.2d 1266 (1990). Under the SRA, where a defendant raises a timely and specific objection to sentencing facts, the court must either not consider the fact or hold an evidentiary hearing. *Grayson*, 154 Wn.2d at 339.

Here, the trial judge abused her discretion because she did not discuss any of the statutorily required considerations. Instead, she rejected Whitlock's request because she found he had failed express any remorse for his actions.

To the extent that the sentencing judge was making her decision based upon Whitlock's allocution, she was simply wrong. Whitlock quite

clearly expressed his remorse for hurting the victim and her entire family. The sentencing judge had just heard Whitlock's acknowledgement and recognition of how his conduct hurt the victim and her family.

To the extent the sentencing judge was making her decision based upon what was in Dr. Jensen's report, it was disputed. As defense counsel pointed out the statements that the State referenced were "taken out of context from the psychosexual evaluation" and were attempts by Whitlock to "try and understand his own reasoning, or his own behavior, but he does not in any way do anything but take full responsibility for his own actions." RP 24.

Further, the sentencing judge failed to note that Dr. Jensen's report clearly did not contain everything Whitlock said to him. Throughout the report, Dr. Jensen used ellipses to denote that he was quoting portions of his conversations with Whitlock. Supp. CP ____, Sub. 42, filed May 20, 2016. Whitlock had no control over what was included in Dr. Jensen's assessment. And there was no statutory requirement that Dr. Jensen specifically ask Whitlock about remorse during his evaluation.²

Under *Grayson*, once the defense objected to the statement that Whitlock lacked remorse the trial court had to either ignore the fact or set

² Given that Dr. Jensen supported a SOSSA sentence and found that Whitlock had a low risk of re-offense, it is unlikely that he found Whitlock lacking in remorse.

an evidentiary hearing. At that time, the parties could have called Dr. Jensen as a witness to determine whether or not Whitlock had expressed remorse and concern for his victim.

Here, the sentencing court's decision was manifestly unreasonable because Whitlock not only disputed the idea that he lacked remorse, the evidence was to the contrary. Thus, the sentencing judge's refusal to consider imposing a SOSSA sentence was an abuse its discretion. See *State v. McDougal*, 120 Wn.2d 334, 354, 841 P.2d 1232 (1992).

And the sentencing judge failed to consider that the statutory factors supported imposing the SOSSA sentence. Whitlock had no other victims. He was amenable to treatment. Dr. Jensen found Whitlock was a very low risk to reoffend. It is true that the victim's family opposed the SOSSA sentence and the sentencing judge apparently gave it great weight, but did not state that that opposition was the basis of her rejection of the SOSSA request.

B. ASSUMING, WITHOUT CONCEDEDING, THAT THERE WAS SOME EVIDENCE THAT COULD BE CONSTRUED AS A LACK OF REMORSE ON WHITLOCK'S PART, CONSIDERATION OF LACK OF REMORSE IS AN IMPROPER BASIS FOR REJECTING WHITLOCK'S REQUEST FOR A SOSSA SENTENCE

It is true that "egregious lack of remorse" is an aggravating factor under the SRA. RCW 9.94A.535(3)(q). This is not a case about

exceptional sentences. But they provide some guidance about what might constitute proof of a lack of remorse.

No case defines precisely what constitutes an egregious lack of remorse. Thus, one must compare those cases where the facts do not support a finding of egregious lack of remorse with those that do. Under the common law, an egregious lack of remorse requires more than a denial of guilt. *State v. Garibay*, 67 Wn. App. 773, 781-82, 841 P.2d 49 (1992), *abrogated on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996) (“The mundane lack of remorse found in run-of-the-mill criminals is not sufficient to aggravate an offense; the lack of remorse must be aggravated or egregious ... Trial courts may not use a defendant’s silence or continued denial of guilt as a basis for justifying an exceptional sentence.”). The assertion of a failed defense, or a refusal to apologize, also does not support a finding of egregious lack of remorse. *State v. Ramirez*, 109 Wn. App. 749, 766, 37 P.3d 343, review denied, 146 Wn.2d 1022, 52 P.3d 521 (2002); *State v. Russell*, 69 Wn. App. 237, 251, 848 P.2d 743, review denied, 122 Wn.2d 1003, 859 P.2d 603 (1993) (refusing to admit guilt or silence insufficient).

On the other hand, a finding of egregious lack of remorse has been upheld in the following cases: *State v. Ross*, 71 Wn. App. 556, 563-64, 861 P.2d 473, 883 P.2d 329 (1994) (egregious lack of remorse established

when the defendant continued to blame the justice system for his crimes and that his statement that he was sorry was not credible); *State v. Erickson*, 108 Wn. App. 732, 739–40, 33 P.3d 85 (2001), *review denied*, 146 Wn.2d 1005, 45 P.3d 551 (2002) (a defendant’s lack of remorse was sufficiently egregious when he bragged and laughed about the murder, mimicked the victim’s reaction to being shot, asked the victim if it hurt to get shot, thought the killing was funny, joked about being on television for the murder, and told police he felt no remorse); *State v. Wood*, 57 Wn. App. 792, 795, 800, 790 P.2d 220, *review denied*, 115 Wn.2d 1015, 797 P.2d 514 (1990) (egregious lack of remorse found when a woman joked with her husband’s killer about sounds her husband made after the killer shot him and went to meet a boyfriend’s family ten days after her husband’s death); *Russell*, 69 Wn. App. at 252 (egregious lack of remorse sustained when the defendants sought to prevent the pain-afflicted child victims from receiving medical care for the defendant-inflicted injuries); *State v. Creekmore*, 55 Wn. App. 852, 861-62, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990) (similar holding as in *Russell*); *State v. Stuhr*, 58 Wn. App. 660, 664, 794 P.2d 1297 (1990), *review denied*, 116 Wn.2d 1005, 803 P.2d 1309 (1991) (egregious lack of remorse supported by the defendant’s statement that he felt more remorse over the dog he killed the same night than the 80-year-old disabled man).

Those cases that found egregious remorse are qualitatively different than the facts here. And Whitlock's expressions of remorse were confirmed by his plea of guilty and his sentencing allocution. The sentencing judge found, at best, that Dr. Jensen did not document any overt expression of remorse by Whitlock during the evaluation. And she ignored Whitlock's allocution that expressed remorse. This evidence is simply insufficient to support a finding of lack of remorse.

The trial court's finding is even more troubling in light of the fact that there is currently no evidence that remorse can be accurately evaluated in the courtroom. As one federal court said:

Lack of remorse is a subjective state of mind, difficult to gauge objectively since behavior and words don't necessarily correlate with internal feelings. In a criminal context, it is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt. To allow the government to highlight an offender's "lack of remorse" undermines those safeguards.

United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996). Some commentators go even further and assert that remorse should not be relevant in criminal sentencing because its application is completely subjective. This subjectivity has led to a multitude of different approaches for determining the presence (or absence) of remorse, many of which are illogical and prejudice either the criminal defendant or the prosecution.

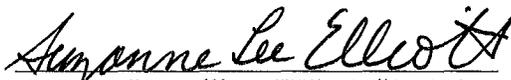
See, Bryan H. Ward, *Sentencing Without Remorse*, 38 Loy. U. Chi. L.J.
131 (2006).

V.
CONCLUSION

Based on the above arguments, this Court should reverse and
remand for resentencing.

DATED this 21st day of October, 2016.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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Appellant's Opening Brief

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