

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

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STATE OF WASHINGTON,

Respondent,

v.

ARNOLD CRUZ,

Appellant.

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

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BRIEF OF APPELLANT

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KATHLEEN A. SHEA  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The reasons supplied by the trial court to do not justify the imposition of an exceptional sentence.

2. The trial court erred as a matter of law when it entered Conclusion of Law 2. CP 39.

3. The trial court erred as a matter of law when it entered Conclusion of Law 3. CP 39.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Reversal of an exceptional sentence is required where the trial court's reasoning does not justify the departure from the standard range. The trial court imposed consecutive sentences against Mr. Cruz based on a determination that, because his current offenses elevated his offender score to 10, "some of the current offenses" would otherwise go unpunished. However, in fact, only *one* current offense failed to increase Mr. Cruz's total period of confinement. Given that the plain language of the statute allows for an exceptional sentence only where multiple offenses will otherwise go unpunished, should this Court reverse?

### C. STATEMENT OF THE CASE

A jury convicted Arnold Cruz of rendering criminal assistance in the first degree and removal or concealment of a deceased body, which is a gross misdemeanor. CP 23. At the time of these convictions, felony possession of methamphetamine and bail jumping charges remained pending against him under a separate cause number.<sup>1</sup> CP 23.

Mr. Cruz decided to plead guilty to the possession and bail jumping charges and proceed with sentencing on both cause numbers together. RP 5-8. Electing to proceed with one sentencing hearing on all four counts increased Mr. Cruz's offender score from an eight to a 10 on the rendering criminal assistance charge, but entitled him to the presumption that the trial court would impose concurrent sentences on the three felony charges. RP 5.

The State requested an exceptional sentence, asking for the top of the standard range on all of the charges and requesting that, aside from the possession charge, the sentences be served consecutively because one of the offenses would otherwise go unpunished. RP 29-30,

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<sup>1</sup> Mr. Cruz was convicted on rendering criminal assistance and removal or concealment of a deceased body under cause number 15-1-01503-4. He pled guilty to possession and bail jumping under cause number 15-1-00436-9. Both cases are pending on appeal. This appeal concerns cause number 15-1-00436-9 only.

32. This brought the State's total request to 156 months plus an additional 364 days on the concealment charge. RP 32.

The trial court largely adopted the State's recommendation, sentencing Mr. Cruz to the maximum sentence of 96 months on the rendering charge, 180 days on the concealment charge, 24 months on the possession charge and 55 months on the bail jumping charge. RP 59. The trial court granted the State's request for an exceptional sentence and directed that, other than the possession charge, each sentence run consecutive to the other. RP 59. The total sentence imposed was 151 months plus 180 days, or over 13 years of imprisonment.

D. ARGUMENT

**This Court should reverse Mr. Cruz's exceptional sentence and remand for resentencing because the plain language of RCW 9.94A.535(2)(c) did not permit the trial court to impose consecutive sentences.**

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). To reverse an exceptional sentence, the Court must determine 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 a 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); *Law*, 154 Wn.2d at 93. Here, this Court should apply de novo review and reverse because the trial court’s reasoning does not justify the departure from the standard range.

- a. Consecutive sentences may be imposed under RCW 9.94A.535(2)(c) only when “some” of the current offenses will otherwise go unpunished.

Mr. Cruz faced sentencing on three separate felony counts. RP

5. Under the Sentencing Reform Act, 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. RCW 9.94A.589(1)(a).

The State requested the trial court impose consecutive sentences in Mr. Cruz’s case based on RCW 9.94A.535(2)(c). This provision states:

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).

At the time of his sentencing, Mr. Cruz's offender score was an eight based upon his criminal history. CP 24. Had Mr. Cruz elected to proceed with sentencing on the possession and bail jumping charges separately, his offender score would have remained an eight for sentencing on the rendering criminal assistance charge.<sup>2</sup> RP 5; CP 23. However, because the court sentenced Mr. Cruz on the three felonies at one sentencing hearing, his offender score increased to a 10 on all three counts. RP 5; CP 24; RCW 9.94A.589(1)(a) ("other current offenses" count as prior convictions for purposes of a defendant's offender score); *In re Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013) (finding the term "current offense" is "defined functionally as convictions entered or sentenced on the same day").

Despite this increase in Mr. Cruz's score, the State argued some of the current offenses were going unpunished because the possession and bail jumping charges increased Mr. Cruz's offender score to 10,

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<sup>2</sup> Because the second count under cause number cause number 15-1-01503-4 was a gross misdemeanor, it did not impact his offender score. RCW 9.94A.525.

and the standard ranges for a single crime ended at “9 or more.” RP 32; RCW 9.94A.510. The trial court agreed, concluding that Mr. Cruz’s “high offender score” resulted “in some of the current offenses going unpunished.” CP 39.

- b. The requirements of RCW 9.94A.535(2)(c) were not satisfied where only one offense failed to increase the amount of prison time Mr. Cruz received.

The trial court’s conclusion that the requirements of RCW 9.94A.535(2)(c) had been satisfied was reached in error. First, relatively speaking, a score of 10 is not high. *See e.g., State v. Alvarado*, 164 Wn.2d 556, 563, 192 P.3d 345 (2008) (consecutive sentences appropriate under RCW 9.94A.535(2)(c) where offender score was 21). Second, contrary to the court’s finding that “some” offenses went unpunished, the record demonstrates that only *one* offense failed to increase Mr. Cruz’s period of incarceration. *See id.* at 562 (“punishment” is expressed in terms of the total confinement time). Mr. Cruz was punished for the bail jumping charge when his offender score on the rendering criminal assistance charge increased from an eight to a 10. The only remaining count was the simple possession conviction. CP 23.

In order 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 as a whole. *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015) (citing *Ervin*, 169 Wn.2d at 820).

Here, 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 multiple convictions increased a defendant's period of incarceration and only one charge went unpunished. The word "some," when used in this manner, indicates more than one.

"Some" is a term that 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.<sup>3</sup> When used as a determiner, meaning at the beginning of a noun group to indicate a reference to one thing or several things,<sup>4</sup> it can indicate the quantity of things is either fairly large or fairly small.<sup>5</sup> 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.<sup>6</sup> “Some of” a particular thing means a part of the thing but not all of it, whereas “some of” things means *a few* of the things but not all of them.<sup>7</sup> For example, when cooking one might place “some of” the sauce into a bowl, or “some of” the carrots into a bowl.

Using this analogy here, the important distinction is that placing “some of” the carrots into a bowl is not synonymous with placing *one* carrot into the bowl. When describing “some of” a discrete thing, the

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<sup>3</sup> COLLINS ENGLISH DICTIONARY, *available at* [https://www.collinsdictionary.com/dictionary/english/some\\_1](https://www.collinsdictionary.com/dictionary/english/some_1) (last accessed April 4, 2017).

<sup>4</sup> *See* COLLINS ENGLISH DICTIONARY, *available at* <https://www.collinsdictionary.com/us/dictionary/english/determiner> (last accessed April 4, 2017) (definition of “determiner”).

<sup>5</sup> COLLINS ENGLISH DICTIONARY, *available at* [https://www.collinsdictionary.com/dictionary/english/some\\_1](https://www.collinsdictionary.com/dictionary/english/some_1) (last accessed April 4, 2017).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

term “some” is synonymous with the word “few.” 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 larger 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”). 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. The use of “some of” rather than “one or more” in RCW 9.94A.535(2)(c) demonstrates the legislature did not intend for the imposition of consecutive sentences where only one charge went unpunished. Because the plain language of the statutory provision is unambiguous, the Court’s inquiry should end here. *See State v. K.L.B.*, 180 Wn.2d 735, 739, 328 P.3d 886 (2014).

If the Court were to find the language of RCW 9.94A.535(2)(c) is susceptible to more than one reasonable interpretation, the rule of lenity requires the Court to construe the statute strictly against the State and in favor of Mr. Cruz. *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012). “The rule of lenity applies to the SRA [Sentencing Reform Act] and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant.” *Id.* (quoting *In re Pers. Restraint of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994)). Under the rule of lenity, RCW 9.94A.535(2)(c) must be construed so as to require that more than one offense will go unpunished before permitting the trial court to impose an exceptional sentence.

c. Reversal and remand for resentencing is required.

Where an exceptional sentence is not legally justified by the aggravating factor, reversal is required. *State v. Davis*, 182 Wn.2d 222, 232, 340 P.3d 820 (2014). Here, the record is clear that only one charge, rather than “some of” the charges, failed to increase Mr. Cruz’s sentence. When the trial court found the requirements of RCW 9.94A.535(2)(c) had been satisfied, it mistakenly interchanged the word “some” with “one.” Because the trial court was wrong to impose consecutive sentences against Mr. Cruz based on the plain language of

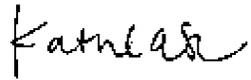
this provision, this Court should reverse and remand his case for resentencing.

E. CONCLUSION

This Court should reverse Mr. Cruz's exceptional sentence and remand his case for resentencing.

DATED this 5<sup>th</sup> day of April, 2017.

Respectfully submitted,



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KATHLEEN A. SHEA (WSBA 42634)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 49264-4-II
v.	)	
	)	
ARNOLD CRUZ,	)	
	)	
Appellant.	)	

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614 DIVISION ST		COA PORTAL
PORT ORCHARD, WA 98366-4681		
[X] ARNOLD CRUZ	(X)	U.S. MAIL
791749	( )	HAND DELIVERY
STAFFORD CREEK CORRECTIONS CENTER	( )	_____
191 CONSTANTINE WAY		
ABERDEEN, WA 98520-9504		

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**Washington Appellate Project**  
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