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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY LLOYD MENZIES, JR.,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-02309-8
The Honorable Leslie Thompson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court failed to enter written findings of fact and conclusions of law in support of the exceptional sentence as required by the Sentencing Reform Act.
2. The trial court erred in imposing an exceptional sentence.
3. Two of the reasons supplied by the sentencing court for imposing an exceptional sentence do not justify a departure from the standard range.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Must this case be remanded, where the trial court imposed an exceptional sentence but never set forth the reasons for its decision in written findings of fact and conclusions of law as required by the Sentencing Reform Act? (Assignment of Error 1)
2. Should this case be remanded for resentencing because two of the reasons supplied by the sentencing court do not justify a departure from the standard range? (Assignments of Error 2 & 3)
3. Did the trial court improperly rely on the “multiple incidents” or “multiple victims” aggravators to justify the exceptional sentence in this case, when those aggravators must be

based on facts related to the charged crimes, but the trial court instead relied on facts related to uncharged incidents? (Assignments of Error 2 & 3)

III. STATEMENT OF THE CASE

The State charged Timothy Lloyd Menzies, Jr. by Information with two counts of first degree rape of a child (RCW 9A.44.073) and two counts of first degree child molestation (RCW 9A.44.083). The State alleged that Menzies had sexual intercourse or sexual contact with his minor daughter, K.M., on numerous different occasions between March 1, 2014 and June 7, 2016. (CP 1-3, 4-6)

The State subsequently filed an Amended Information charging Menzies with four additional counts of first degree rape of a child committed against his minor step-daughter, K.E. between December 27, 2014 and June 7, 2016. (CP 7-10) The State alleged that these incidents occurred multiple times a week for several years. (CP 1-2, 37-38)

Menzies agreed to plead guilty to two counts of first degree rape of a child, one count for K.M. and one count for K.E. (CP 11-12, 14, 22) Menzies also agreed to stipulate to the existence of three aggravating factors charged in the Second Amended

Information: (1) that Menzies' "used his ...position of trust, confidence or fiduciary responsibility to facilitate the commission of the current offense;" and (2) that Menzies' "conduct during the commission of this offense involved multiple incidents of offenses per victim or multiple penetrations, or multiple acts;" and (3) that Menzies' "conduct during the commission of this offense involved multiple victims." (CP 11-12, 29)

In his written plea form, Menzies acknowledged having sexual intercourse with K.M. and with K.E. when they were less than 12 years old, and that he "used my position of trust to facilitate the crime, and there were multiple offenses per victim and multiple victims." (CP 22) In a separate form, Menzies waived his right to have a jury decide whether there is a factual basis for the aggravating factors, and agreed that the judge would decide whether the facts provide a substantial and compelling reason to order an exceptional sentence above the standard range. (CP 30)

Menzies stipulated to facts to support the aggravating factors, but he did not stipulate that an exceptional sentence should be imposed. (CP 18, 22, 29-30) The plea agreement instead provided that the State would seek an exceptional sentence and Menzies would seek a standard range or Special Sex Offender

Sentencing Alternative (SSOSA) sentence. (CP 18)

After a lengthy colloquy, the trial court found that Menzies' plea was knowing and voluntary, and it accepted his guilty plea. (RP 4-15) The trial court also found a factual basis for the substantive crimes and for the aggravating factors. (RP 15, 45-46; CP 58)

At sentencing, the State urged the court to impose an exceptional sentence of 240 months on each count, twice the low end of Menzies' standard range sentence. (RP 20-21; CP 18) Menzies requested a standard range sentence, arguing that he had taken responsibility for his actions and that although there were two victims there were also two charges, one for each victim. (RP 41)

The trial court adopted the State's recommendation, and imposed an exceptional sentence of 240 months to life. (RP 46; CP 57) In explaining its reasons for imposing an exceptional sentence above the standard range, the trial court stated:

This was abuse of trust, multiple victims. Yes, the two victims are multiple victims. There are two crimes. They're also multiple, because every doggone day they were a victim again. Multiple victims, multiple times; and the power of authority and trust, coupled with threats of violence and death.

(RP 46) The trial court checked boxes on the Judgment and

Sentence corresponding to preprinted language that indicates that “[s]ubstantial and compelling reasons exist which justify an exceptional sentence,” and that aggravating factors were “stipulated by the defendant” and “found by the court after the defendant waived jury trial.” (CP 58) But the trial court did not enter any written findings of fact and conclusions of law explaining its reasons for imposing an exceptional sentence.

Menzies filed a timely Notice of Appeal. (CP 73)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED BY NOT ENTERING WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE EXCEPTIONAL SENTENCE.

The Sentencing Reform Act (SRA) imposes a mandatory duty on the trial court to enter written findings of fact and conclusions of law whenever it imposes an exceptional sentence in a criminal case. RCW 9.94A.535 expressly provides: “Whenever a sentence outside the standard sentence range is imposed, the court *shall* set forth the reasons for its decision in written findings of fact and conclusions of law.” (Emphasis added.) The written findings must then be sent to the Washington State Sentencing Guidelines Commission along with the trial court’s judgment and

sentence. CrR 7.2(d).¹

In State v. Friedlund, 182 Wn.2d 388, 393, 341 P.3d 280 (2015), the Washington Supreme Court held “the entry of written findings is essential when a court imposes an exceptional sentence.” The court reasoned that (1) permitting verbal reasoning to substitute for written findings ignores the plain language of RCW 9.94A.535, (2) a written judgment and sentence affords a defendant finality, and (3) the absence of written findings hampers public accountability as both “the Sentencing Guidelines Commission and the public at large [cannot] readily determine the reasons behind exceptional sentences.” 182 Wn.2d at 394-95.

In this case, the trial court gave an oral explanation of its reasons for an exceptional sentence. (RP 46) But a court’s oral ruling is not sufficient to satisfy the mandate of the statute because “[a] trial court’s oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.” Friedlund, 182 Wn.2d at

¹ CrR 7.2(d) states, in relevant part: “For every felony sentencing, the clerk of the court shall forward a copy of the uniform judgment and sentence to the Sentencing Guidelines Commission. . . . If the sentence imposed departs from the applicable standard sentence range, the court’s written findings of fact and conclusions of law shall also be supplied to the Commission.”

394-95 (quoting State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966)).

The entry of written findings is mandatory. Friedlund, 182 Wn.2d at 393. Accordingly, if the trial court fails to enter such findings and conclusions, remand is required. Friedlund, 182 Wn.2d at 395 (citing In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999)); State v. Shemesh, 187 Wn. App. 136, 148, 347 P.3d 1096 (2015).

Here, the trial court imposed an exceptional sentence but never entered written findings of fact and conclusions of law as required by the plain language of the SRA and the policies it embodies. Friedlund, 182 Wn.2d at 395; RCW 9.94A.535. The remedy is to remand Menzies' case to the trial court for entry of those written findings and conclusions. Friedlund, 182 Wn.2d at 395.

B. MENZIES SHOULD BE RESENTENCED BECAUSE TWO OF THE AGGRAVATING FACTORS RELIED UPON BY THE TRIAL COURT ARE OBVIOUSLY UNJUSTIFIED AS A MATTER OF LAW.

A sentencing court “may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. The

State and trial court relied upon three such reasons in this case: (1) “[t]he current offense involved multiple victims or [2] multiple incidents per victim” or when (3) “[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense[.]” RCW 9.94A.535(3)(d)(i), .535(n). (CP 11-12, 22, 29; RP 46)

To reverse an exceptional sentence, the reviewing court must find: (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. RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).² Menzies stipulated to facts supporting all three aggravators. But the multiple victims and multiple incidents factors are not legally applicable and do not justify an exceptional sentence

² The SRA’s list of aggravating circumstances includes the following factor in the context of a major economic offense or series of offenses: “The offense involved multiple victims or multiple incidents per victim”. RCW 9.94A.535(3)(d). The Supreme Court has sanctioned the application of this factor to noneconomic offenses, noting the nonexclusive nature of the SRA’s list of aggravating circumstances. State v. Armstrong, 106 Wn.2d 547, 550, 723 P.2d 1111 (1986).

in this case because the specific conduct that formed the factual basis for these two offenses did not result in multiple incidents or victims.

Only the underlying facts and nature of the crime can and should be a basis for an exceptional sentence. State v. Perez, 69 Wn. App. 133, 138, 847 P.2d 532 (1993) (citing David L. Boerner, SENTENCING IN WASHINGTON §§ 9.6–9.7 (1985)). Therefore, an exceptional sentence may not be based on an unproven or uncharged crime. State v. McAlpin, 108 Wn.2d 458, 466, 740 P.2d 824 (1987); State v. Ratliff, 46 Wn. App. 466, 468-69, 731 P.2d 1114 (1987).

“Multiple victims” may form the basis for an exceptional sentence “when a defendant’s *conduct which forms the basis of the charge creates multiple victims* and the State has not filed multiple charges.” State v. Flake, 76 Wn. App. 174, 184, 883 P.2d 341 (1994) (quoting State v. Smith, 67 Wn. App. 81, 90, 834 P.2d 26 (1992), *modified on other grounds*, 123 Wn.2d 51, 864 P.2d 1371 (1993)) (emphasis added).

For example, in State v. Davis, 53 Wn. App. 306, 311, 766 P.2d 1120 (1989), where only one occupant of a vehicle died but three other occupants were injured, the existence of multiple

victims justified an exceptional sentence for one count of vehicular homicide.

[W]e hold that multiple victims injured by the conduct forming the basis of a charged crime can provide a legally sufficient basis for an exceptional sentence. The presumptive range of vehicular homicide is based on there being one victim of the charged crime—the decedent. *When in reality the conduct forming the basis of the charge creates multiple victims, an exceptional sentence is permissible to ensure that the sentence given is proportional to the offense. We note that in this circumstance, the court is not so much looking at other uncharged crimes as an aggravating factor as it is looking at the consequences of the charged crime.* Accordingly, the trial court was correct in determining that there was a multiple victims aggravating circumstance justifying appellant’s sentence.

Davis, 53 Wn. App. at 313, 766 P.2d 1120 (emphasis added) (citing State v. Armstrong, 106 Wn.2d 547, 550, 723 P.2d 1111 (1986)). Similarly, in State v. Bourne, 90 Wn. App. 963, 976-77, 954 P.2d 366 (1998), the multiple victims that formed the basis of the exceptional sentence were occupants of a single vehicle hit by Bourne in a hit-and-run accident.

Multiple incidents or penetrations can also justify an exceptional sentence when they occur during the course of the incident underlying the charged crime. State v. Vaughn, 83 Wn. App. 669, 677, 924 P.2d 27 (1996). That is because “[m]ultiple acts

in themselves establish a greater level of culpability than that contemplated by the legislature in establishing the punishment for a crime committed by a single act.” Vaughn, 83 Wn. App. at 677-78.

For example, in Vaughn, the court upheld an exceptional sentence based on this factor where the defendant was charged with one count of first degree rape of a child based on a single five-hour incident where he penetrated the victim five different times. 83 Wn. App. at 672, 678. In Armstrong, 106 Wn.2d at 550, the Court approved an exceptional sentence where the multiple incidents that caused multiple injuries took place in the course of a single assault. And in State v. Dunaway, 109 Wn.2d 207, 219, 743 P.2d 1237 (1987), the court held that the multiple incidents aggravator justified the defendant’s exceptional sentence where the defendant shot the victim, partially left the room, and returned to shoot him again, thereby inflicting multiple injuries during the course of attempting first degree murder.

Here, on the other hand, each charged count of first degree rape of a child did not impact multiple victims. And any assertion that each charged count encompassed more than one penetration or incident would be contrary to law for several reasons. First, the unit of prosecution under the rape of a child statutes is each and

every independent act of sexual intercourse or penetration. See State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) (addressing the proper unit of prosecution for first degree rape under RCW 9A.44.040). Each penetration would support a separate rape conviction. Tili, 139 Wn.2d at 314-15, 317. Thus, multiple distinct incidents of sexual intercourse are not combined into a single count of rape.

Second, if Menzies had gone to trial on the Amended Information charging six counts of rape of a child, the jury would have been required to unanimously agree that Menzies committed a separate and distinct act of intercourse for each charged count. See State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (a criminal defendant may be convicted only if a unanimous jury concludes he or she committed the criminal act charged in the information; State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (if the State presents evidence of multiple acts that could form the basis of a particular charged count, the State must elect which of the acts it is relying on, or the court must instruct the jury to agree on a specific act).

The act underlying each of Menzies' two convictions did not include multiple incidents or injuries, and did not result in multiple

victims. The trial court improperly relied on separate, uncharged acts to support the multiple incident and multiple victim aggravating factors. Therefore, these reasons do not justify a departure from the standard range.

If any of the reasons relied upon to impose an exceptional sentence is invalid, remand is necessary only if it is not clear whether the sentencing court would have imposed the same sentence based on the valid factors alone. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Here, the trial court did not indicate in its oral ruling or on the Judgment and Sentence that it would have imposed an exceptional sentence based on the “position of trust” aggravator alone. Accordingly, this case should also be remanded for a new sentencing hearing.

V. CONCLUSION

Because the trial court did not enter written findings of fact and conclusions of law in support of the exceptional sentence, this case must be remanded for entry of written findings and conclusions. On remand, Menzies should also be resentenced and the trial court should be precluded from considering the “multiple

victim” or “multiple incidents” aggravators.

DATED: March 24, 2018



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CERTIFICATE OF MAILING

I certify that on 03/24/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Timothy L. Menzies, Jr., #400176, Coyote Ridge Corrections Center BB-42U, P.O. Box 769, Connell, WA 99326-0769.



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