

FILED
Court of Appeals
Division II
State of Washington
7/16/2018 2:36 PM
NO. 51431-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY LLOYD MENZIES, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold Johnson

No. 16-1-02309-8

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court properly conclude that substantial and compelling reasons justified a sentence above the standard range on the basis that (1) “defendant’s conduct during the commission of this offense involved multiple incidents of offenses over years of time for both K.M. and K.E.,” (2) “there were multiple victims,” and (3) “defendant occupied a position of trust with both K.M and K.E.?” (Defendant’s assignments of error 2, 3, 4, 5, and 6)..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 9

 1. THE TRIAL COURT PROPERLY CONCLUDED THAT SUBSTANTIAL AND COMPELLING REASONS JUSTIFIED A SENTENCE ABOVE THE STANDARD RANGE ON THE BASIS THAT (1) "DEFENDANT'S CONDUCT DURING THE COMMISSION OF THIS OFFENSE INVOLVED MULTIPLE INCIDENTS OF OFFENSES OVER YEARS OF TIME FOR BOTH K.M. AND K.E.," AND (2) “DEFENDANT OCCUPIED A POSITION OF TRUST WITH BOTH K.M AND K.E.” ... 9

D. CONCLUSION..... 15

Table of Authorities

State Cases

<i>State v. Estrella</i> , 115 Wn.2d 350, 798 P.2d 289 (1990).....	9
<i>State v. Fisher</i> , 108 Wn.2d 419, 739 P.2d 683 (1987).....	10
<i>State v. Gaines</i> , 122 Wn.2d 502, 859 P.2d 36 (1993)	12, 13, 14, 15
<i>State v. Harding</i> , 62 Wn. App. 245, 813 P.2d 1259, <i>review denied</i> , 118 Wn.2d 1003, 822 P.2d 287 (1991).....	12
<i>State v. Law</i> , 154 Wn.2d 85, 93, 110 P.3d 717 (2005).....	10
<i>State v. Modest</i> , 88 Wn. App. 239, 252, 944 P.2d 417 (1997), <i>review denied</i> , 134 Wn.2d 1017 (1998).....	15
<i>State v. Tili</i> , 148 Wn.2d 350, 372, 60 P.3d 1192 (2003)	10
<i>State v. Tunell</i> , 51 Wn. App. 274, 284, 753 P.2d 543, <i>review denied</i> , 110 Wn.2d 1036 (1988), <i>overruled on other grounds by State v. Batista</i> , 116 Wn.2d 777, 808 P.2d 1141 (1991).....	14
<i>State v. Vaughn</i> , 83 Wn. App. 669, 924 P.2d 27 (1996).....	10, 11

Statutes

RCW 9.94A.010(1).....	9
RCW 9A.44.073(1).....	11

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly conclude that substantial and compelling reasons justified a sentence above the standard range on the basis that (1) “defendant’s conduct during the commission of this offense involved multiple incidents of offenses over years of time for both K.M. and K.E.,” (2) “there were multiple victims,” and (3) “defendant occupied a position of trust with both K.M and K.E.?”

(Defendant’s assignments of error 2, 3, 4, 5, and 6).

B. STATEMENT OF THE CASE.

On June 8, 2016, the State charged Timothy Lloyd Menzies Jr. (“defendant”) with two counts of first degree child rape and two counts of first degree child molestation. CP 4-6. The State amended the charges on March 3, 2017, adding three more counts of first degree child rape and one count of second degree child rape. CP 7-10. On June 2, 2017, defendant entered a guilty plea to the State’s second amended information, filed that day, charging two counts of first degree child rape, along with three

aggravating factors per each count. RP 4. Count I named the victim K.M.; count II named victim K.E. CP 11-12, 14-25; RP 4.¹

Defendant stipulated to the three aggravating factors, including that (1) defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense; (2) defendant's conduct during the commission of the offense involved multiple incidents of offenses per victim or multiple penetrations, or acts; and (3) defendant's conduct during the commission of the offense involved multiple victims. CP 11-12, 29.

In his plea of guilty, defendant stated:

Between March 1, 2014 and June 7, 2016, in Pierce County, Washington, I had sexual intercourse with K.M., who is less than 12 years old and not married to me and we are not in a state registered domestic partnership, and I used my position of trust to facilitate the crime, and there were multiple offenses per victim. and multiple victims. TM

Between December 27, 2008 and December 26th, 2014, in Pierce County, Washington, I had sexual intercourse with K.E. who is less than 12 years old and not married to me and we are not in a State registered domestic partnership. I used my position of trust to facilitate the crime. There were multiple offenses per victim. and multiple victims. TM.

CP 14-25. The court accepted defendant's guilty plea. CP 14-25; RP 15.

Defendant freely and voluntarily waived his right to have a jury decide whether there was a factual basis for the aggravating circumstances. CP

¹ The verbatim report of proceedings (RP) are contained in two duplicate files. They are referred to by page number.

30. Defendant agreed that the court would decide whether the facts provided a substantial compelling reason to order an exceptional sentence above the standard range. *Id.*

Defendant was sentenced on October 13, 2017. CP 55-70; RP 17. At sentencing, the trial court considered statements from those close to the case, including the victims, K.M. and K.E., and their mother, Deborah Evans. CP 107-126. In addition to their written statements, K.M, K.E., and Evans each gave oral statements to the court. K.E. read her written statement to the court. An excerpt is transcribed below:

1,620, that is the number of nights since I was four that I spent in total terror next to a monster. As I write this, it's been 3,610 nights and counting where every night from the time I was four years old up until now since I've been able to sleep normally without a nightmare, panic attack, or horror movies in my head that will never turn off.

Ever since I can remember there has been an ugly presence in the house of my siblings and I grew up in. The monster whom I knew as my stepfather and the biological father of my two younger siblings, Tim Menzies, impatient in the worst way, wicked and mean as a snake, and a very heavy drinker who never seemed to get drunk.

Tim Menzies not only severely physically abused my two younger siblings, but also performed horrendous acts of sexual abuse toward my younger sister and myself.

When I was only four, possibly five years old was the first time Mr. Menzies engaged in inappropriate acts with me. I was too young to understand what was happening but old enough to know that what was happening wasn't right or okay. He would touch my arms, legs, bottom and back. He would also make me give him full body massages and engage in oral sex with him.

When I was seven the anal rape started, and when I was twelve he began to vaginally rape me. All of this, the touching, oral, anal and vaginal rape took place over eight or nine years.

Each night that I was at my mom's house he made me sleep in bed with him. He would tell my mom that he missed me, and they would get in bad arguments because my mom wanted me to sleep in my own bed, but he never listened to her. He never cared what she wanted or thought.

RP 31-32; CP 107-26.

The youngest, K.M., also related the court:

One day when my mom was driving me and my brother and my sister from home to school, before we got out of the house my mom asked if we had any secrets.

I said, Yes. I do have a secret. I told her everything that is going to be on these pages. Kallie Evans.

I told – it all started one day when I was four. I couldn't go all the way down. At four what – we were still practicing.

Then it – when I was five I was old enough to go all the way down.

It hurts my throat. It went, like, all the way to my lungs, my lungs right before they came out of his penis. He made me swallow it. When it was over he made me sick.

Now, what would happen if I said no. He would beat me on my bare butt. So I always said yes.

If I stayed with him in the shower until he got out I would get cats and lots of kittens.

I have to get dressed in the same room as Tim Menzies.

And then I drew a picture of him coming out of his room and I was going to my room. And it says, "Do you want to take a shower with me?" And I said, "Sure."

And then I drew another picture. It's – it's a sad face because when he did it I was sad. And I was nervous, scared, too.

And then I also wanted him sent to jail and stay away from kids, sent to prison and stay away from all of my family.

I want my name legally changed forever. Tim Menzies sent to prison for his rest of his life.

RP 36-38; CP 107-26.

Describing how defendant's actions continue to affect her and her family, Evans explained:

For instance, taking my youngest to the dentist is a trigger for me. I took her to the dentist a few months after everything happened and she told her dentist that she was hurting her mouth because she was putting too much gauze in it.

I instantly had a panic attack. The last time she said her mouth hurt was when she was telling me how Mr. Menzies would force his penis in her mouth. It hurt so bad, mom.

Or when we were having a family dinner, and she hollers across the table, "Mom, this salad is so gross. I can't eat it. It tastes like that white stuff that came out of Tim's wiener."

Or when she is constantly whispering things in my ear so other people don't hear her.

Every time I have an anxiety attack, I get flashbacks to the day she told me that Mr. Menzies had been making her suck on his penis.

Or how I've been – or how I've had to take my oldest daughter in for TB testing to make sure he didn't give her anything.

Or when my oldest daughter hears a motorcycle she starts having a hard time breathing.

Or no matter how much counseling my oldest daughter receives, she thinks it's her fault. "Mom, if I would have just said something my little sister would have never had to go through this."

RP 28-29.

After hearing from the victims, their mother, the defendant, and members of the defendant's family, the court made oral findings:

This is a defendant who was in a position of trust and authority as a parent or stepparent to the two victims.

The pattern of abuse was excessive, as if any abuse wouldn't be excessive. But even in that context, this pattern of abuse was incredibly excessive, daily patterns, oftentimes more than once a day, lasting for years. Done with threats of violence and terror and even the threat of death.

Now that the defendant has been caught he recognizes his shortcomings. Frankly, it's impossible for this Court to believe that the very first incident, the very first moment, the very first opportunity, the very first inclination he wouldn't have recognized the damage he was about to do.

If I had the power I certainly would be removing the pain from these children, the ugliness from their lives, which are going to last for a heck of a lot more than the sentence I'm going to impose in this case. It will last the rest of their lives; and by the way, probably through your grandchildren's lives and possibly through their grandchildren as well.

This pattern goes on and on and on. It does not stop. Hopefully, they'll get the help they need. The damage is really unmeasurable. There's no word for it.

An exceptional sentence is really called out for in this case. The Legislature set some parameters for us to take a look at. They mean doggone well that we follow those parameters unless there is exceptions.

There is exceptions here. 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 4-46.

Finding substantial and compelling reasons justifying an exceptional sentence for counts I and II, the court sentenced defendant to twice the low end of the standard range, totaling 240 months to life for each count. CP 55-70; RP 46.

Written findings of fact and conclusions of law for the exceptional sentence were entered on April 18, 2018. CP 101-104.² The court's findings of facts are stated as follows:

1. The defendant pled guilty on June 2, 2017 to two counts of Rape of a Child in the First Degree.

2. When the defendant pled guilty he stipulated to the existence of three aggravating circumstances: (I) pursuant to RCW 9.94A.535(3)(n), the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, and (II) pursuant to RCW 9.94A.535, defendant's conduct during the commission of this offense involved multiple incidents of offenses per victim, or multiple penetrations, or multiple acts and (III) pursuant to RCW 9.94A.535 involved multiple victims.

3. That the standard range sentence for the defendant with an offender score of 3 on two counts of Rape of a Child in the First Degree is 120-160 months to life, ultimate release date determined by the Indeterminate Sentencing Review Board. Rape of a Child in the First Degree is a Class A sex offense with a maximum sentence of life imprisonment.

4. The defendant is the stepfather of K.E. and the biological father of K.M. The defendant occupied a position of trust with respect to both K.E. and K.M.

² In defendant's Opening Brief, defendant assigned error to the trial court's failure to enter written findings of fact and conclusions of law for the aggravating circumstances. (Defendant's Assignment of Error 1). The trial court subsequently entered written findings of fact and conclusion of law, and defendant submitted a Supplemental Opening Brief assigning error to three of the trial court's conclusions of law.

5. The defendant engaged in multiple acts of sexual intercourse with both K.M. and K.E. The sexual abuse of K.M. and K.E. was excessive, lasted for years, occurred on a daily or more than once daily basis and included threats of violence.

6. There are multiple victims in this case.

CP 101-104 (FoF 1-6).³ The court's conclusions of law are stated as follows:

1. The fact that the defendant occupied a position of trust with both K.M. and K.E. is a substantial and compelling reason that justifies a sentence above the standard range.

2. The fact that the defendant's conduct during the commission of this offense involved multiple incidents of offenses over years of time for both K.M and K.E. is a substantial and compelling reason that justifies a sentence above the standard range.

3. The fact that there were multiple victims is a substantial and compelling reason that justifies a sentence above the standard range.

4. The appropriate length of sentence the defendant should receive is 240 months to life on both Count I and Count II. In imposing this sentence, the Court has considered the conduct of the defendant, the lack of any prior criminal history, the standard range sentences available to the court, and the argument presented by defendant at sentencing.

CP 101-104 (CoL 1-4).

Defendant appeals, challenging the trial court's conclusions of law 2, 3, and 4. CP 73; Supplemental Opening Brief of Appellant. Defendant does not challenge the trial court's conclusion that substantial and compelling reasons justified a sentence above the standard range where

³ (FoF #) refers to the trial court's Findings of Fact and the specific finding number. (CoL #) refers to the trial court's Conclusions of Law and the specific conclusion number.

defendant occupied a position of trust with both K.M. and K.E. CP 101-104 (CoL 1).

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY CONCLUDED THAT SUBSTANTIAL AND COMPELLING REASONS JUSTIFIED A SENTENCE ABOVE THE STANDARD RANGE ON THE BASIS THAT (1) "DEFENDANT'S CONDUCT DURING THE COMMISSION OF THIS OFFENSE INVOLVED MULTIPLE INCIDENTS OF OFFENSES OVER YEARS OF TIME FOR BOTH K.M. AND K.E.," AND (2) "DEFENDANT OCCUPIED A POSITION OF TRUST WITH BOTH K.M AND K.E."

One of the primary purposes of the Sentencing Reform Act of 1981 is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010(1). An exceptional sentence is justified when the reasons supporting the sentence are consistent with that purpose. *State v. Estrella*, 115 Wn.2d 350, 357, 798 P.2d 289 (1990).

In analyzing the appropriateness of an exceptional sentence, the court employs a three-prong analysis: (1) under a clearly erroneous standard, whether the reasons given by the sentencing judge are supported by evidence in the record; (2) under a de novo standard, whether the reasons justify a departure from the standard range; and (3) under an abuse

of discretion standard, whether the sentence is clearly too excessive or too lenient. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

- a. “Multiple Incidents” justified an exceptional sentence above the standard range.

Multiple incidents of offense or multiple penetrations per victim can justify an exceptional sentence. *State v. Tili*, 148 Wn.2d 350, 372, 60 P.3d 1192 (2003); *State v. Vaughn*, 83 Wn. App. 669, 677, 924 P.2d 27 (1996). The rationale is that “multiple penetrations or multiple sexual acts over a period of time are more degrading and have a more serious impact on the victim than a single act of rape.” *Vaughn*, 83 Wn. App. at 677. “Multiple acts in themselves establish a greater level of culpability than is contemplated by the Legislature in establishing the punishment for a crime that can be committed by a single act. In addition, multiple acts prolong the period of danger and degradation endured by the victim.” *Id.* at 677-78. *State v. Fisher*, holds that the existence of multiple incidents cannot serve as grounds for an exceptional sentence where the multiple incidents form the basis for multiple counts. 108 Wn.2d 419, 425-26, 739 P.2d 683 (1987). However, the multiple incidents factor may “be used to support an exceptional sentence where the defendant admitted to inflicting multiple injuries but was only charged with a single count of criminal activity.” *Tili*, 148 Wn.2d at 381 (*discussing Fisher*, 108 Wn.2d 419).

Defendant here was charged with only one count per victim. Count I alleged first degree child rape of K.M. on or between March 1, 2014, and June 7, 2016. CP 11-12. Count II alleged first degree child rape of K.E. on or about December 27, 2008, and December 26, 2014. *Id.* One instance of rape per count would have been enough to secure convictions for each. RCW 9A.44.073(1). However, the record is clear that there were numerous incidents per count and that they occurred over a period of time; defendant admitted as such. CP 55-70. In his plea of guilty, defendant stated:

Between March 1, 2014 and June 7, 2016, in Pierce County, Washington, I had sexual intercourse with K.M., who is less than 12 years old and not married to me and we are not in a state registered domestic partnership, and I used my position of trust to facilitate the crime, and there were multiple offenses per victim...

CP 14-25. As the court noted in *Vaughn*, “Multiple acts in themselves establish a greater level of culpability than is contemplated by the Legislature in establishing the punishment for a crime that can be committed by a single act.” 83 Wn. App. at 677. Accordingly, an exceptional sentence was overwhelmingly justified here where defendant raped both of his daughters countless times over a period of years but was only charged with a single count of rape for each child.

- b. The trial court properly imposed an exceptional sentence based on the “Position of Trust” factor.

Remand for resentencing is only necessary if it is not clear whether the sentencing court would have imposed the same sentence based on the valid factors alone. *Gaines*, 122 Wn.2d at 512. An exceptional sentence may be upheld even where all but one of the trial court’s reasons for the sentence have been overturned. *State v. Harding*, 62 Wn. App. 245, 813 P.2d 1259, *review denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991) (exceptional sentence upheld where 2 of 3 aggravating factors invalidated).

In *Gaines*, the Washington Supreme Court overturned an exceptional sentence downward where it was unclear whether the trial court would have imposed the same sentence based on the only valid factor. 122 Wn.2d at 512-13. The trial court in that case imposed an exceptional sentence below the standard range based on considerations about the defendant’s drug addiction. *Id.* at 512. But because “drug addiction and its causal role in an addict’s criminal offense may not properly serve as justification for a durational departure from the standard range[.]” the defendant would have had to show that the trial court’s reliance on the defendant’s “minor role in the offense,” by itself, would have justified an exceptional sentence below the standard range in order to

uphold the exceptional sentence. *Id.* at 512. The Supreme Court held that the trial court mentioned the defendant's minor role in the offense "only as incidental support for the durational departure." *Id.* Thus, it was "not clear whether the trial court would have imposed the exceptional sentence" on that basis alone. *Id.* Remand for resentencing was the appropriate remedy. *Id.*

The trial court here properly relied on both the "multiple incidents" and "position of trust" factors. However, for the sake of argument, it is also clear that the trial court would have imposed the same exceptional sentence based solely on the unchallenged "position of trust" factor. The trial court did not mention defendant's position of trust as only "incidental support." Rather, the "position of trust" factor was at the top of the list of the trial court's reasons for departing from the standard range.

The very first words uttered by the trial court at the oral sentencing hearing was that "[t]his is a defendant who was in a position of trust and authority as a parent or stepparent to the two victims." RP 45. The trial court specifically found that the "defendant occupied a position of trust with respect to both K.E. and K.M." on the basis that "defendant is the stepfather of K.E. and the biological father of K.M." CP 101-04 (FoF 4). The trial court's first conclusion of law states that "[t]he fact that the defendant occupied a position of trust with both K.M. and K.E. is a

substantial and compelling reason that justifies a sentence above the standard range.” CP 101-04 (CoL 1).

Defendant argues that “[t]he trial court did not indicate in its oral ruling or in its written findings that it would have imposed an exceptional sentence based on the ‘position of trust’ aggravator alone.” Supplemental Opening Brief of Appellant at 5. But a trial court need not say the magic words for an appellate court to affirm a defendant’s sentence. All that is required is that the record clearly show that the trial court would have imposed the same sentence based on the valid factor alone. *Gaines*, 122 Wn.2d at 512-13; *see also State v. Tunell*, 51 Wn. App. 274, 284, 753 P.2d 543, *review denied*, 110 Wn.2d 1036 (1988), *overruled on other grounds by State v. Batista*, 116 Wn.2d 777, 808 P.2d 1141 (1991).

It is clear from the trial court’s oral and written findings that defendant’s position of trust was a principal reason for the imposition of an exceptional sentence. That reason was overwhelmingly supported by the written and oral statements of the victims and their mother, as well as by defendant’s own admission. Given the trial court’s reliance on defendant’s position of trust, remand for resentencing is unnecessary.

c. The trial court properly imposed an exceptional sentence.

A court may not rely on the “multiple victims” factor when the State charges separate crimes for each victim. *State v. Modest*, 88 Wn.

App. 239, 252, 944 P.2d 417 (1997), *review denied*, 134 Wn.2d 1017 (1998). Here, while there were multiple victims, the State filed charges for each victim. CP 11-12. Consequently, it would have been error for the trial court to rely solely on “multiple victims” to support an exceptional sentence. As stated above, an appellate court will affirm a conviction even where one or more of the factors relied on by the trial court is error as long as the record clearly shows that the court would have imposed the same sentence based on the valid factor or factors alone. *State v. Gaines*, 122 Wn.2d 502, 512-13, 859 P.2d 36 (1993).

Thus, the appropriate corrective is not to remand for resentencing because it is clear from the record that the trial court would have imposed the same sentence based solely on the “position of trust” and/or “multiple incidents” factors. *See Gaines*, 122 Wn.2d at 512.

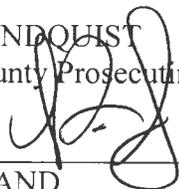
D. CONCLUSION.

The trial court properly relied on the “multiple incidents” and “position of trust” factors in its decision to sentence defendant above the standard range. Furthermore, regardless of whether the trial court properly relied on the two challenged factors, the record is clear that the court

would have imposed the same sentence based on the unchallenged
“position of trust” factor alone. Remand is unnecessary in either case. The
State respectfully requests this Court affirm defendant’s exceptional
sentence.

DATED: July 16, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838



Madeline Anderson
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by US mail or
ABC-LMI delivery to the attorney of record for the appellant and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

7.16.18 Theren Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 16, 2018 - 2:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51431-1
Appellate Court Case Title: State of Washington, Respondent v Timothy Lloyd Menzies Jr, Appellant
Superior Court Case Number: 16-1-02309-8

The following documents have been uploaded:

- 514311_Briefs_20180716143406D2753402_8117.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Menzies Response Brief.pdf
- 514311_Designation_of_Clerks_Papers_20180716143406D2753402_3519.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was menzies supp designation.pdf

A copy of the uploaded files will be sent to:

- SCCAttorney@yahoo.com

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Robin Khou Sand - Email: rsand@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180716143406D2753402