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State of Washington  
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No. 51431-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY LLOYD MENZIES, JR.,

Appellant.

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

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SUPPLEMENTAL OPENING BRIEF OF APPELLANT

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**I. SUPPLEMENTAL ASSIGNMENTS OF ERROR**

4. The trial court erred when it concluded that “[t]he fact that the defendant’s conduct during the commission of this offense involved multiple incidents of offenses over years of time ... is a substantial and compelling reason that justifies a sentence above the standard range.” (Conclusion of Law 2)
5. The trial court erred when it concluded that “[t]he fact that there were multiple victims is a substantial and compelling reason that justifies a sentence above the standard range.” (Conclusion of Law 3)
6. The trial court erred when it concluded that [t]he appropriate length of sentence the defendant should receive is 240 months to life on both Count I and Count II.” (Conclusion of Law 4)

**II. SUPPLEMENTAL ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

4. Should this case be remanded for resentencing because two of the reasons supplied by the sentencing court do not legally justify a departure from the standard range? (Assignments of Error 2, 3, 4, 5 & 6)
5. 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, 4, 5 & 6)

### **III. SUPPLEMENTAL STATEMENT OF THE CASE**

Pursuant to this Court’s order dated March 29, 2018, the trial court entered written Findings of Fact and Conclusions of Law for Exceptional Sentence. The court’s conclusions of law state:

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 defense at sentencing.

(CP 103)

#### **IV. SUPPLEMENTAL ARGUMENT & AUTHORITIES**

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, 101-04; RP 46)

As argued in detail in the Opening Brief of Appellant, the multiple victims and multiple incidents factors are not legally applicable in this case because the specific conduct that formed the factual basis for these two offenses did not result in multiple incidents or victims.

In conclusion of law number two, the trial court finds that “[t]he 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.” (CP 103)

However, multiple incidents only 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). The trial court's reliance on uncharged incidents occurring "over years of time" to justify the exceptional sentence in this case was improper.

In conclusion of law number three, the trial court finds that "[t]he fact that there were multiple victims is a substantial and compelling reason that justifies a sentence above the standard range." (CP 103) But "multiple victims" may form the basis for an exceptional sentence only "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)) (emphasis added). Here, however, each charged count of first degree rape of a child did not impact multiple victims. The charged incident relating to K.M. impacted only K.M., and the charged incident relating to K.E. impacted only K.E.

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). The trial court did not indicate in its oral ruling or its written findings that it would have imposed an exceptional sentence based on the “position of trust” aggravator alone. Accordingly, this case should be remanded for a new sentencing hearing.

**V. CONCLUSION**

For the reasons argued above and in the Opening Brief of Appellant, Menzies should be resentenced and the trial court should be precluded from considering the “multiple victim” or “multiple incidents” aggravators.

DATED: May 18, 2018



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Attorney for Timothy L. Menzies, Jr.

**CERTIFICATE OF MAILING**

I certify that on 05/18/2018, 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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STEPHANIE C. CUNNINGHAM, WSBA #26436

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**Transmittal Information**

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