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NO. 52564-0-II

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

STATE OF WASHINGTON,

Appellant,

v.

PAUL ELLIOTT,

Respondent.

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

The Honorable Stephanie Arend, Judge

BRIEF OF RESPONDENT

KEVIN A. MARCH
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. COUNTERSTATEMENT OF THE ISSUES

Did the trial court act within the bounds of law and within the bounds of its discretion in imposing a mitigated exceptional sentence of 30 months?

B. STATEMENT OF THE CASE

Rather than provide a duplicative factual summary of the case, Elliott believes that the statement of the case provided by the State adequately describes the pertinent facts. See RAP 10.3(b). Still, Elliott cites the record pursuant to RAP 10.3(a)(6) and RAP 10.3(b) in his argument section below.

C. ARGUMENT

THE TRIAL COURT ACTED WELL WITHIN THE BOUNDS OF LAW AND WELL WITHIN ITS DISCRETION IN IMPOSING AN EXCEPTIONAL MITIGATED SENTENCE OF 30 MONTHS

A trial court may impose a sentence outside the standard range "if it finds, considering the purpose of [chapter 9.94A RCW], that there a substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The legislature intended this exceptional sentence provision "to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid." In re Postsentence Petition of Smith, 139 Wn. App. 600, 603, 61 P.3d 483 (2007).

An exceptional sentence may be reversed on appeal only if: (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 trial 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. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

RCW 9.94A.535(1) permits a trial court impose an exceptional sentence below the standard range "if it finds that mitigating circumstances are established by a preponderance of the evidence." The statute provides an illustrative list of mitigating factors that "are not intended to be exclusive reasons for the exceptional sentences." RCW 9.94A.535(1). One mitigating factor that multiple offenses charged result in a clearly excessive standard range sentence: "The operation of the multiple offense policy of RCW 9.94A.589[1] results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.[2]" RCW 9.94A.535(1)(g).

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[1] RCW 9.94A.589(1)(a) establishes that the "sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score . . . ." Applying this policy here, the State's charges of one count of first degree theft and 16 counts of first degree identity theft resulted in an offender score of 16 for each charge. See CP 50 (judgment and sentence listing each count with offender score of 16).

[2] RCW 9.94A.010 provides that the purpose of the Sentencing Reform Act is to

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

The State contends that the trial court erroneously applied the multiple offense mitigator in this case. The State seemingly disagrees with the trial court's determination that Elliott's single charged theft and 16 charged identity thefts were all part of a single, general scheme: Elliott stealing from his employer. See CP 90 ("The Identity Theft 1st Degree counts were a means of committing the broader theft."). The State is incorrect. The trial court's decision is supported by substantial evidence in the record, pertinent law justifies a departure from a standard range sentence, and the trial court's determination that a standard range sentence would be clearly excessive was not an abuse of discretion. The trial court's mitigated sentence should be affirmed.

1. The different ways Elliott used to steal money, including using a credit card, resulted in furthering his overall scheme—theft from his employer—as the trial court correctly found

The trial court's reasons for departing from the standard range must be supported by substantial evidence in the record. State v. Statler, 160 Wn. App.

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(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve himself or herself;

(6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

622, 639-40, 248 P.3d 165 (2011); State v. Davis, 146 Wn. App. 714, 721, 192 P.3d 29 (2008). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

The trial court correctly found that "[t]he Identity Theft 1st Degree counts were a means of committing the broader theft." CP 90 (finding of fact 3). As the State notes, for the identity theft counts, Elliott used the company's credit card to make payments into his PayPal or Square accounts on 38 different occasions. Br. of Appellant at 5-6. As the State also notes, Elliott also rerouted payments from customers intended to pay his employer into his own accounts. Br. of Appellant at 6-7. Thus, the record is plain that Elliott used two different methods to steal money that was rightfully his employer's, the credit card method and the rerouting payment method.

The State's argument essentially hinges on the significance of Elliott's use of these two different methods. The State provides a discussion of double jeopardy principles, asserting that the crimes of identity theft and theft are different crimes for the purpose of double jeopardy. Br. of Appellant at 18-21. And the State asserts that identity theft and theft may be punished separately because they are not the same in law. Br. of Appellant at 20. Elliott agrees with the State's discussion of double jeopardy principles. The problem

is that double jeopardy principles do not aid the State's position because they do not foreclose a mitigated sentence based on the multiple offense policy.

Just because the crimes of theft and identity theft may be punished separately does not mean that the trial court cannot conclude that counting each of the 17 crimes toward the offender score results in a standard range sentence that is clearly excessive considering the purposes of the Sentencing Reform Act. Substantial evidence in the record showed that Elliott stole money from his employers in two ways. As the trial court correctly determined, whether Elliott stole from his employer by means of identity theft (theft by credit card) or by means of plain old theft (rerouting payments) does not really matter—it was all part of one overarching scheme of one large continuing course of theft. The trial court's determination that the identity thefts "were a means of committing the broader" theft is supported by substantial evidence.

2. The trial court articulated substantial and compelling reasons to justify departure from the standard range

On review, the appellate court must determine whether the reasons given by the trial court for the exceptional sentence justify departure from the standard range. Davis, 146 Wn. App. at 720-21. "The sentencing court may consider other factors [beyond the nonexclusive list of mitigating factors] so long as they are consistent with the purposes of the SRA and are supported by

the evidence." Id. at 721. Because it was all part of one scheme of theft, the cumulative effect of each of the individual thefts—whether by using the credit card method or by using the rerouting method—is trivial. As the trial court appropriately determined, the main issue is the total amount of money Elliott stole, not how he incrementally stole it. The trial court was therefore legally justified in departing from the standard range.

The State relies heavily on State v. Kinneman to support its position that the court must look at solely at the '"difference between the effects of the first criminal act and the cumulative effects of the subsequent criminal acts"' to determine if the differences '"are nonexistent, trivial, or trifling."' 120 Wn. App. 327, 343, 84 P.3d 882 (2003) (quoting State v. Hortman, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994)). But case law does not support Kinneman's narrow, one-analysis-fits-all view. As Judge Ellington persuasively pointed out in her concurrence,

> But this approach poses special problems in multiple theft offense cases, because the comparison cannot be like to like—the amount taken in the first theft will always be smaller than the total, and the thefts will often not be identical crimes. Where the charges include multiple counts of first degree theft and multiple counts of second degree theft, examining only the first transaction versus the total of all the others leads to serendipitous results depending on the size of the first transaction. Under the 'first act' approach, the thief who steals a large amount early in the scheme has an odd advantage.

Kinneman, 120 Wn. App. at 350 (Ellington, J., concurring).

The "first act" approach espoused in Kinneman, though perhaps one way to view the multiple offense policy, is not strictly required. As the Court of Appeals held in State v. Calvert, 79 Wn. App. 569, 581-83, 903 P.2d 1003 (1995), it is just as appropriate to look at each individual act—there, forgery—as part of the broader overall scheme or plan of theft. Although the Calvert court acknowledged that it might be appropriate in drug cases to '"focus on the difference, if any, between the effects of the first buy and the cumulative effects of subsequent controlled buys,'" it nonetheless approved of the trial court's focus "on the difference between the cumulative effects of writing several small checks . . . and the effect of writing one large check for that amount." Id. at 583. "In essence, the court found that the whole should not be greater than the sum of its parts," which was a substantial and compelling reason for imposing an exceptional sentence downward based on the minimal cumulative effects of the crimes. Id.

State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993), also supports this conclusion. There, the court determined that the "difference between the first buy, viewed alone, and all three buys, viewed cumulatively, was trivial or trifling." Id. at 261. This was so because the buys all involved the same buyer and seller, occurred in the same residence in a short period of time, and involved small amounts of drugs. Id. The State's charges of subsequent buys "had no apparent purpose other than to increase Sanchez's presumptive

sentence."[3] Id. Thus, the "second and third buys added little or nothing to the first." Id.

Just as in Sanchez and Calvert, it was legally appropriate for the trial court to view the 16 different identity thefts as part of one overall scheme of theft. The victim was the same for every transaction—Elliott's employer. The various identity theft dollar amounts did not vary wildly: the 16 transactions span from a little more than $2000 to a little more than $6000. CP 81-86. The State's inclusion of 16 counts of identity theft had no apparent purpose other than to greatly increase Elliott's presumptive standard range sentence. And, as the State acknowledges, other identity thefts were incorporated in its first degree theft charge given that the State was unable to charge several identity thefts due to the statute of limitations. Br. of Appellant at 5 ("The [State] was unable to charge [Elliott] with the 12 incidents of identity theft that had occurred prior to December 2, 2014 because of the statute of limitations."). Thus, as in Sanchez and Calvert, the first identity theft does not add much to the subsequent identity thefts, or to Elliott's overall scheme of theft. It was therefore legally justifiable for the trial court to apply the multiple offense policy as a basis for a mitigated sentence.

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[3] The Sanchez court recognized "that the prosecutor has discretion to choose the number of charges. We merely hold that although the prosecutor has discretion to charge and obtain [multiple] convictions, the sentencing court has power to determine whether the resulting standard range sentence is 'clearly excessive' as a result of the multiple offense policy . . . ." 69 Wn. App. at 262.

The State attempts to distinguish Calvert because there was a "close relationship in time" between the forgeries and, in this case, Elliott's thefts spanned 41 months. Br. of Appellant at 11-13; Calvert, 79 Wn. App. at 583. While it is true that Elliott's overall scheme of stealing from his employer lasted 41 months, the charged identity thefts lasted only six months. Br. or Appellant at 6 (citing CP 1-3, 81-86). Relative to the three-and-a-half years Elliott committed thefts against his employer, the charged identity thefts did have a close relationship in time.

In sum, under Calvert and Sanchez, as well as under the concurrence in Kinneman, the trial court was amply justified in treating Elliott's thefts, including the identity thefts, as relatively insignificant parts of Elliott's overall scheme to steal from his employer. As such, the trial court was justified in relying on the multiple offense policy mitigator to impose a sentence below the standard range.

Because the trial court justifiably invoked the multiple offense policy in imposing an exceptional sentence, the State's contention that the court erred in assessing the purposes of the Sentencing Reform Act delineated in RCW 9.94A.010 lacks merit. Br. of Appellant at 14, 16. Under RCW 9.94A.535(1)(g), the trial court appropriately determined the multiple offense policy results in a clearly excessive sentence in light of the purpose of the Sentencing Reform Act, focusing particularly on the third stated purpose, that

the sentence is to "[b]e commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(3); CP 91 (conclusion of law 3 stating, "The purpose of the Sentencing Reform Act . . . in RCW 9.94A.010, particularly subsection 3, is served by providing a departure downward from the standard range in order to issue a punishment commensurate with the punishment imposed on others committing similar offenses").

In considering commensurate punishment, the trial court appropriately relied on two theft cases involving defendants in a similar position of trust as Elliott, State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996), and State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986).

In Branch, the defendant was a general partner at an equity firm and, over the course of two years, used his position to wrongfully appropriate nearly $400,000 of partnership funds to his personal use. 129 Wn.2d at 639. Although Branch had 180 victims, he was charged with and pleaded guilty to one count of theft in the first degree. Id. at 639-40. Branch's presumptive sentence was 0-90 days given his lack of criminal history; based on the major economic offense aggravator given the number of victims and Branch's significant planning, the trial court imposed an exceptional sentence of 48 months. Id.

In Oxborrow, the defendant also pleaded guilty to theft in the first degree and willful violation of a cease and desist order concerning the sale of

securities based on an elaborate fraudulent investment scheme. 106 Wn.2d at 527-28. The crimes occurred between 1979 and 1984. Id. at 526-27. Oxborrow also pleaded guilty to four federal crimes and of other state crimes that were not eligible for sentencing under the SRA. Id. at 528 n.1. Based on his lack of criminal history, Oxborrow's standard range sentences (for the state crimes) were 0-90 days and 0-12 months. Id. at 528. Oxborrow specifically defrauded "approximately 51 investors of over $1 million." Based on the major economic offense aggravator, the trial court sentenced Oxborrow to a total term of 15 years, consecutive 10- and five-year sentences for the theft and willful violation of the cease and desist order.

The trial court appropriately drew parallels between Oxborrow, Branch, and this case in terms of the total length of time the defendants were sentenced to. In Oxborrow, there were at least 51 victims and theft of more than $1 million; this resulted in a sentence of 15 years.[4] CP 90-91 (findings 10, 12, 19). In Branch, there were 180 victims and theft of nearly $400,000. CP 90-91 (findings 10, 12, 19). In Elliott's case, by contrast, there was one victim and theft of nearly $300,000. CP 90 (findings 9, 11). All three defendants' crimes "occurred over a period of time," all three defendants

[4] The trial court erroneously stated that Oxborrow's sentence was 120 months; but this error is inconsequential. CP 91 (finding of fact 19).

"stole a large amount of money," and all three defendants were "in a position of trust." CP 90 (findings 14-16).

Given the facts of each case, it was not legal error to conclude that all three defendants committed similar offenses. And given that Elliott's crime involved one victim and less money than either Oxborrow or Branch and that Branch received a 48-month sentence for stealing $100,000 more and having 179 victims more than Elliott, it was not a legal error to conclude that a 30-month sentence for Elliott was commensurate with the punishment imposed on others who had committed similar offenses. The trial court's determination that Elliott's 30-month sentence was "commensurate with the punishment imposed on others"—Branch and Oxborrow—"committing similar offenses" under RCW 9.94A.010(3) was a measured and appropriate legal conclusion.[5] The trial court thus articulated a substantial and compelling reason to depart from Elliott's presumptive sentence of 63 to 84 months and impose a 30-month sentence commensurate with the sentences Branch and Oxborrow received. The trial court did not err.

The State's primary complaint with the trial court's reliance on Oxborrow and Branch is that the trial court engaged in "mere speculation" that

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[5] In its oral ruling, the trial court also believed that additional prison time for Elliott would not necessarily protect the public, given that he was unlikely to ever be placed in a similar position of trust again. RP 31. "[W]ritten findings may be supplemented by the trial court's oral decision or statements in the record." In re Det. of LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986).

the defendants in those cases could have been charged with more than one crime or with identity theft specifically. Br. of Appellant at 17. This is untenable. Oxborrow and Branch had 51 and 180 victims, respectively; therefore, they obviously could have been charged with 51 and 180 individual thefts instead of one theft. Moreover, in Oxborrow, the defendant was charged with several other state and federal crimes. 106 Wn.2d at 528 & n.1. The absence of the availability of identity theft as a specific charge notwithstanding, in both Oxborrow and Branch, the defendants could certainly have faced multiple theft charges. The State's contentions should be rejected.

Finally, the State asserts that because it could have alleged Elliott committed a major economic offense under RCW 9.94A.535(3)(d), this should somehow be factored into the trial court's decision making because "'[t]he lack of an aggravating circumstances does not create a mitigating circumstance.'" Br. of Appellant at 15-16 (quoting State v. Armstrong, 106 Wn.2d 547, 551, 723 P.2d 1111 (1986)). The State's decision not to allege the major economic offense aggravator should have absolutely no bearing on whether the trial court appropriately imposed a mitigated exceptional sentence. How could it? The State's discussion of the major economic offense aggravator is inapposite to the issues presented in its appeal and should be disregarded entirely.

The trial court correctly determined that Elliott's various identity theft charges were a means of furthering his overall scheme of theft and this determination represented a substantial and compelling reason to invoke the multiple offense policy. The trial court also correctly determined that, under the fats of Oxborrow and Branch, imposing a standard range sentence on Elliott would not be commensurate with the punishments imposed on defendants committing more egregious albeit similar crimes. The trial court committed no legal error.

3. The sentence is not clearly too lenient

A sentence is clearly too lenient "only if the trial court's action was one that no reasonable person would have taken." Jeannotte, 133 Wn.2d at 858. Based on its reliance on Oxborrow and Branch, the trial court determined that a 30-month sentence was appropriate based on the nature of Elliott's crime compared to the sentences received by others. Elliott's standard range sentence for the first degree theft was 43 to 57 months and his standard range sentence for the first degree identity thefts was 63 to 84 months. It does not shock the conscience to deny Elliott's request for a first-time offender waiver and impose 30 months of imprisonment, which is still a significant amount of time. It cannot be said that no reasonable person would have imposed the sentence, given the facts of the case and the facts of other cases the trial court

determined were similar. Nor does the State argue as much. The trial court's exceptional sentence of 30 months should be affirmed.

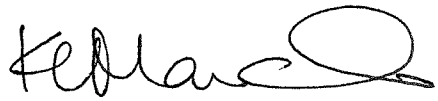
D. CONCLUSION

The trial court's exceptional sentence below the standard range is legally and factually supportable. Elliott respectfully requests that the exceptional sentence be affirmed.

DATED this 24th day of January, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Respondent

NIELSEN, BROMAN & KOCH P.L.L.C.

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