

FILED
Court of Appeals
Division II
State of Washington
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NO. 52784-7-II

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent

v.

TERRY SHEPARD,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

Although the prosecution argues otherwise, this Court should hold that to prove the offenses, as charged, required proof of both victim vulnerability and abuse of trust. As such, it was improper to impose an exceptional sentence based on these aggravators. Mr. Shepard asks this Court to reverse and remand for a new sentencing hearing.

- 1. A trial court may not base an exceptional sentence on factors already considered by the legislature in setting the standard range.**

The government argues that the legislature did not consider the vulnerability of the victims and abuse of trust when it set the standard range for attempted rape in the second degree and indecent liberties. Brief of Respondent at 9. This Court should find otherwise and hold that because both of the women were residents of a facility for mentally disordered persons whom Mr. Shepard had authority over, that an exceptional sentence based on vulnerability and abuse of trust is not authorized. *See* RCW 9A.44.050(e) and (c); RCW 9A.44.100(1)(c).

“[F]actors inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant’s behavior from that inherent in all crimes of that type—may not be relied upon to justify an exceptional sentence” *State v. Ferguson*, 142 Wn.2d 631, 647–48, 15 P.3d 1271 (2001).

To prove rape in the second degree, as charged, the prosecution was required to prove the victim was a resident of a facility for mentally disordered persons or was a person with developmental disabilities whom Mr. Shepard had supervisory authority over. RCW 9A.44.050(e) and (c). Indecent liberties required the government to prove the victim was a developmentally disabled person whom Mr. Shepard had authority over. RCW 9A.44.100(1)(c).

An exceptional sentence may be authorized when the jury finds the “defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age,

disability, or ill health.” RCW 9.94A.535(3)(b). An exceptional sentence may also be authorized when the jury finds the 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)(iv).

While the prosecution argues otherwise, these aggravating factors require of the same elements required to prove the higher degree of crimes the prosecution charged Mr. Shepard with. Brief of Respondent at 14. In *State v. Soderquist*, this Court examined whether abuse of trust and victim vulnerability were elements under the forcible compulsion prong of attempted second-degree rape. 63 Wn. App. 144, 151, 816 P.2d 1264 (1991). But unlike *Soderquist*, Mr. Shepard was charged under the subsections of both attempted rape in the second degree and indecent liberties that require a finding that the victims were particularly vulnerable and that Mr. Shepard abused their trust. *Id.* at 151; *see also State v. Grewe*, 117 Wn.2d 211, 215, 813 P.2d 1238 (1991).

The prosecutor argues that this Court's analysis in *Soderquist* was flawed and incomplete. Brief of the Respondent at 15. This Court should reject the prosecutor's arguments. Instead, this Court should recognize that the only way to prove attempted rape in the second degree, as charged, was to establish either that the victims were persons with a developmental disability and Mr. Shepard had supervisory authority over them or that the victims were residents of a facility for persons with a mental disorder and Mr. Shepard had supervisory authority over them. RCW 9A.44.050(c) and (e). These are the same factors required to prove the aggravators. Likewise, indecent liberties, as charged, requires proof that the victim is a person with a developmental disability who Mr. Shepard had supervisory authority over. RCW 9A.44.100(c).

Because the jury found Mr. Shepard guilty under the subsections of both offenses were the legislature contemplated trust and vulnerability, an exceptional sentence is not authorized. *Soderquist*, 63 Wn. App. at 151. The legislature

considered the particular vulnerability of developmentally delayed persons living in mental health facilities who lived under the authority of their caregivers when it set the standard range for offenders convicted of subsections (e) and (c) of rape in the second degree and of indecent liberties. *See e.g., State v. Ortega-Martinez*, 124 Wn.2d 702, 710, 881 P.2d 231 (1994).

2. The facts presented to the jury do not distinguish it from other cases so that an exceptional sentence might otherwise be authorized.

The prosecution relies on *State v. Fisher* to argue that the extreme facts of this case authorize an exceptional sentence, even if the legislature considered the aggravating factors when it set the standard range for the offenses the government alleged. Brief of Respondent at 12 (citing *State v. Fisher*, 108 Wn.2d 419, 420-21, 739 P.2d 683 (1987)). But *Fisher* involved victim vulnerability because of extreme youth. *Id.* The *Fisher* Court considered the wide range of victims, who could be anywhere from zero to 14-years old.

Such was not the case here. The crime alleged occurred in Pat C, which is a unit of the Rainier State School where less vulnerable residents of the facility live. RP 471. While residents of this facility still need help, they can do a lot of things on their own. *Id.* Factually, residents of the facility are not extremely disabled, so as to justify departing from the standard range.

Instead, this Court should hold that it was only possible to prove the offenses, as charged, by establishing the aggravators. See RCW 9A.44.050(e) and (c); RCW 9A.44.100(1)(c). 525(3)(b). The women's vulnerability was because of their developmental disabilities. Mr. Shepard's position of trust depended on his supervisory authority. These facts cannot be separated from each other or used to justify an exceptional sentence. *Soderquist*, 63 Wn. App. at 151.

Because the facts of this case do not distinguish themselves from other cases of the same type, this Court should hold that the reasons given by the trial court to exceed the standard range do not justify an exceptional sentence.

Fisher, 108 Wn.2d at 423-24; *Soderquist*, 63 Wn. App. at 151.

Remand for a new sentencing hearing is required. *Fisher*, 108 Wn.2d at 423-24.

B. CONCLUSION

Because the offenses as charged contemplate the aggravating factors, the sentencing court was not authorized in imposing an exceptional sentence. Mr. Shepard asks this Court to reverse his sentence and order the sentencing court to impose a sentence within the standard range.

DATED this 9th day of September 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52784-7-II
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)	
TERRY SHEPARD,)	
)	
Appellant.)	

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