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

STATE OF WASHINGTON, Respondent

v. .

JOHN THOMAS TYLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.02-1-00419-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly sentenced Tyler to an exceptional sentence as substantial evidence supported that many of Tyler's offenses would go unpunished without an exceptional sentence.**
- II. **Tyler's high offender score justified an exceptional sentence beyond the standard range.**
- III. **The trial court did not abuse its discretion and sentenced Tyler to an appropriate sentence.**

STATEMENT OF THE CASE

John Tyler (hereafter 'Tyler') was convicted after a trial of 15 crimes, including 11 counts of Rape of a Child in the First Degree, 2 counts of Child Molestation in the First Degree, and 2 counts of Rape of a Child in the Second Degree. CP 170-71. Tyler was convicted in 2002. CP 170-91. In 2002, Tyler was sentenced to an exceptional sentence above the standard range; the trial court sentenced him to a total of 878 months of total confinement. CP 176. He first appealed his convictions and sentence many years later; this court issued its opinion, upholding his convictions, but remanding for resentencing, in July 2016. *State v. Tyler*, COA 46426-8-II. Tyler was resentenced to the same 15 crimes in June 2017. CP 242-63. The trial court sentenced Tyler to an exceptional sentence, a total sentence of 732.5 months of total confinement. CP 247. Tyler appealed his resentencing, and this Court again remanded for resentencing. *State v.*

Tyler, COA 50434-1-II. Tyler was sentenced for the third time in February 2019. CP 303-25. The sentencing judge imposed the same exceptional sentence as at his second sentencing, for a period of total confinement of 732.5 months. CP 309. The sentencing court determined that an exceptional sentence was warranted in this case, finding that the “defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished under RCW 9.94A.535(2)(c).” CP 322.

Tyler again appeals his sentence. CP 327.

ARGUMENT

I. The trial court properly sentenced Tyler to an exceptional sentence as substantial evidence supported that many of Tyler’s offenses would go unpunished without an exceptional sentence.

Tyler argues the trial court erred in sentencing him to an exceptional sentence because there was no evidence that some of his crimes would go unpunished. However, the standard range sentence would have been imposed if Tyler had committed only XX offenses. Instead, Tyler committed 15 sex offenses against multiple different victims. It is clear that many of his offenses would go unpunished without an exceptional sentence since he would have received the same standard

range if he had only committed a few of his fifteen crimes. The trial court had sufficient reason to sentence Tyler to an exceptional sentence.

In reviewing the propriety of an exceptional sentence, this Court first determines whether there is sufficient evidence in the record to support the reasons for imposing an exceptional sentence. RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). This is reviewed under a clearly erroneous standard. *Id.* Next, the Court looks to whether the reasons supplied by the sentencing court justify a departure from the standard range, under a de novo standard of review. *Id.* Finally, this Court, applying an abuse of discretion standard of review, determines whether the exceptional sentence is clearly excessive or clearly too lenient. *Id.* Tyler challenges all three of these areas in his exceptional sentence. In this first section, we address whether there is sufficient evidence in the record to support the reasons for imposing an exceptional sentence.

The trial court sentenced Tyler to an exceptional sentence finding under RCW 9.94A.535(2)(c) that his high offender score resulted in some of his crimes going unpunished. A defendant's standard range sentence reaches its maximum limit at an offender score of "9 or more." RCW 9.94A.510. When a defendant has multiple current offenses that result in an offender score greater than nine, further increases in the offender score

do not increase the standard sentencing range. *See State v. Alvarado*, 164 Wn.2d 556, 561-63, 192 P.3d 345 (2008). However, the trial court is not without sentencing options when an offender has an offender score above nine: it may impose an aggravated exceptional sentence under the “free crimes aggravator” if the offender “has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” *See State v. France*, 176 Wn.App. 463, 468-69, 308 P.3d 812 (2013); RCW 9.94A.535(2)(c). Essentially, if an offender’s presumptive sentence, i.e., his standard range, is the same as what it would be had he committed fewer current offenses, then the court may impose an exceptional sentence. *State v. Newlun*, 142 Wn.App. 730, 743, 176 P.3d 529 (2008).

Tyler had four points from prior criminal history that were calculated as part of his offender score. RP 14. Each current offense counted as 3 points as sex offenses. Had Tyler only committed three total offenses he would have been at 10 points, one point more than the maximum number of points for our sentencing range grid. Therefore, Tyler committed *five times* the number of crimes necessary to receive the high end of the standard sentencing range. 12 crimes were therefore going unpunished. Two entire victims’ worth of crimes would go unpunished had the trial court not sentenced Tyler to an exceptional sentence. The trial

court clearly had substantial evidence to find that some of his crimes would go unpunished without an exceptional sentence.

In *France, supra*, the defendant pled guilty to 9 counts of felony harassment. *France*, 176 Wn.App. at 466. The defendant had 6 prior points in his offender score. *Id.* Thus, for each offense, the defendant had an offender score of 14. *Id.* In this situation, the Court of Appeals upheld his aggravated exceptional sentence based on the “free crimes aggravator,” noting that some of his crimes would go unpunished without an exceptional sentence. *Id.* at 468-70. Thus with only an offender score of 14, our Court has upheld an exceptional sentence based on the free crimes aggravator. Tyler’s offender score of more than three times that of the defendant’s in *France* most certainly then resulted in some of his crimes going unpunished.

Tyler argues that his offenses were in no danger of going unpunished because he is subject to the Indeterminate Sentence Review Board (ISRB) for many of his offenses. However, review by the ISRB is not punishment, and is speculative at best that he’d receive any additional time. The ISRB is not about further punishment for crimes, but concerns itself with the safety of society if a person is to be released and considers risk assessment scores, behavior in prison, release plan, and public safety, among other things, in determining whether to retain an inmate in prison

for an additional length of time. This is not the punishment considered by the Legislature in creating RCW 9.94A.535(2)(c). RCW 9.94A.535(2)(c) clearly gives the trial court the authority to increase an offender's sentence above the standard sentencing range if the offender has such a high offender score that additional crimes do not increase his standard sentencing range. This is exactly the case the trial court faced in Tyler's situation. Tyler reached the highest standard range upon the conviction of three offenses. Yet he was convicted of 15 offenses, therefore 12 offenses did not increase his standard time in prison. Given this simple face, RCW 9.94A.535(2)(c) authorized the trial court to increase Tyler's sentence above the standard range to reflect that many of his offenses were going without additional time in prison. When a defendant's sentence would be the same whether he committed three offenses or fifteen offenses, the trial court has the authority to give additional time pursuant to RCW 9.94A.535(2)(c). That is exactly what the trial court did here and it was done with substantial evidence that many of his crimes were going unpunished. The trial court's findings on this should be affirmed.

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II. Tyler's high offender score justified an exceptional sentence beyond the standard range.

Tyler argues that his offender score did not justify an exceptional sentence. However, the trial court's reasons for imposing an exceptional sentence were sound. Tyler's claim fails.

The second step of analyzing an exceptional sentence is to determine whether the reasons supplied by the sentencing court justify a departure from the standard range. *Law*, 154 Wn.2d at 93. This is reviewed de novo. *Id.* Pursuant to RCW 9.94A.535(2)(c), a trial court may impose an aggravated exceptional sentence without a finding of fact by a jury when "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). For this aggravating factor, the trial court "need only find the fact of the defendant's prior convictions in order to be justified in imposing an exceptional sentence pursuant to RCW 9.94A.535(2)(c)." *State v. Newlun*, 142 Wn.App. 730, 742, 176 P.3d 529 (2008). Importantly, our Courts have found that for an exceptional sentence to be imposed under RCW 9.94A.535(2)(c), the sentencing court need only find that the same standard range sentence would be imposed if the offender had committed fewer crimes. "If the number of current offenses, when applied to the sentencing grid, results in the legal

conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then an exceptional sentence may be imposed." *Newlun*, 142 Wn.App. at 743.

The trial court in Tyler's case had sufficient reason, from a de novo review, to impose an exceptional sentence. Tyler reached the maximum grid block on the sentencing grid for each offense after the commission of three new offenses. Therefore, the following 12 offenses he was convicted of committing did not result in any higher presumptive sentence. This falls squarely in line with our Court's reasoning in *Newlun*, that if when the new offenses are applied to the sentencing grid and the offender's sentence is identical to that which it would have been had he committed fewer offenses, then an exceptional sentence may be imposed. *See Newlun*, 142 Wn.App. at 743. Twelve of Tyler's offenses did not affect the sentencing grid. His standard range sentence remained the same whether he committed three or fifteen crimes. This absolutely justifies a departure from the standard sentencing range and is exactly the type of scenario that our Legislature contemplated in authorizing this action, and is the type of scenario our Courts have found fits within the meaning of the statute.

Tyler's extremely high offender score justified a departure from the standard sentencing range. His sentencing range would have been the same had he committed twelve fewer offenses; therefore twelve offenses would have gone unpunished had he not been sentenced to an exceptional sentence. The trial court's finding that Tyler's high offender score justified an exceptional sentence was appropriate and proper. It should be affirmed.

III. The trial court did not abuse its discretion in sentencing Tyler to an exceptional sentence above the standard range.

Tyler argues that the sentence the trial court imposed in his case was clearly excessive. Tyler received an appropriate sentence for his actions and the trial court did not abuse its discretion in imposing the sentence. Tyler's claim fails.

If the reasons for an exceptional sentence are supported by the record and justify an exceptional sentence, then to reverse the sentence, this Court must find that "the sentence imposed was clearly excessive...." *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) (quoting RCW 9.94A.210(4)(b)). The length of an exceptional sentence should not be reversed by an appellate court unless the trial court abused its discretion in setting the sentence length. *Id.* (citing *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)). A trial court abuses its discretion if it makes its decision based on untenable grounds or for untenable reasons.

Oxborrow, 106 Wn.2d at 531. A sentence is “clearly excessive” if it “goes beyond the usual, reasonable, or lawful limit.” *Oxborrow*, 106 Wn.2d at 531. A sentence is only clearly excessive if it is “clearly unreasonable,” or is a sentence that no other reasonable judge would have imposed. *See id.* In addition, a sentence is “clearly excessive” if it shocks the conscience of the reviewing court. *Ritchie*, 126 Wn.2d at 395-96.

Stated otherwise, the ‘clearly excessive prong’ of appellate review under the sentencing reform act gives courts near plenary discretion to *affirm* the length of an exceptional sentence, just as the trial court has all but unbridled discretion in setting the length of the sentence. This necessarily follows from the lack of a legislative definition of ‘clearly excessive’ and from the abuse-of-discretion standard of review.

State v. Creekmore, 55 Wn.App. 852, 864, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990).

In the unpublished case of *State v. Aylward*, 3 Wn.App.2d 1016 (Div. 2, 2018),¹ this Court upheld a sentence that was nearly four times the length of the high end of the standard range in a sex abuse of a child case. There, the offender’s standard sentence range for Rape of a Child was 240-318 months. *Aylward*, slip op. at 9. The trial court sentenced him to 1,200 months for each Rape of a Child count. *Id.* This Court found that

¹ GR 14.1 permits citation to unpublished decisions of the Court of Appeals issued on or after March 1, 2013. This opinion is not binding on this Court and may be given as much persuasive authority as this Court chooses.

this sentence did not “shock the conscience” given the facts of his crimes.

Id.

In the unpublished case of *State v. Cover*, 200 Wn.App. 1044 (Div. 2, 2017), this Court affirmed the maximum possible sentence Cover could have received in his Rape of a Child case. There, this Court found that the sentencing court did not rely on impermissible reasoning and that the sentence did not shock the conscience based on the evidence presented at trial showing that this was repeated abuse of a child. *Cover*, slip op. at 13.

In *State v. Halsey*, Division 3 of this Court affirmed a 720 month exceptional sentence in a child abuse case, despite the fact that the sentence was several times the standard range. *State v. Halsey*, 140 Wn.App. 313, 325, 165 P.3d 409 (2007). Exceptional sentences that have significantly gone above the standard range have been upheld by our courts: *State v. Branch*, 129 Wash.2d 635, 650, 919 P.2d 1228 (1996) (affirming 48 month sentence for first degree theft, which was more than 16 times the standard range sentence of 90 days); *State v. Oxborrow*, 106 Wash.2d 525, 535–36, 723 P.2d 1123 (1986) (upholding a 10 year sentence for first degree theft, 15 times more than the standard range); *State v. Vaughn*, 83 Wash.App. 669, 680–81, 924 P.2d 27 (1996) (upholding sentence that was 2 ½ times the standard range), *rev. denied*, 131 Wash.2d 1018, 936 P.2d 417 (1997); *State v. Smith*, 82 Wash.App.

153, 167, 916 P.2d 960 (1996) (upholding sentence that was 3 times the standard range); *State v. Bedker*, 74 Wash.App. 87, 92, 871 P.2d 673 (holding that the sentence of 180 months for child rape, compared to standard range sentence of 72 to 96 months, was not clearly excessive), *rev. denied*, 125 Wash.2d 1004, 886 P.2d 1133 (1994); *Creekmore*, 55 Wash.App. at 864, 783 P.2d 1068 (upholding 720 month sentence for second degree murder despite a standard range of 144–192 months); *State v. Harmon*, 50 Wash.App. 755, 761–62, 750 P.2d 664 (upholding a 648 month sentence for first degree murder, which was 315 months longer than standard range sentence), *review denied*, 110 Wash.2d 1033 (1988). Based on what our Courts have previously upheld, and giving the trial court the discretion it should be afforded, Tyler’s sentence was not clearly excessive. It is not a decision which shocks the conscience or is a decision which a reasonable judge would not have made.

The trial court did not abuse its discretion in setting the length of Tyler’s exceptional sentence. Tyler’s sentence should be affirmed.

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CONCLUSION

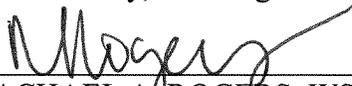
The trial court properly sentenced Tyler to an exceptional sentence. The trial court had substantial evidence to support the imposition of an exceptional sentence, his high offender score justified an exceptional sentence, and the length of the exceptional sentence was not clearly excessive. The trial court's imposition of Tyler's sentence in this case should be affirmed.

DATED this 25th day of November, 2019.

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