

No. 35113-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MATHEW PHILLIPS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF BENTON

BRIEF OF APPELLANT

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A. INTRODUCTION

Kevin Phillips received an exceptional 18-month prison sentence for calling his girlfriend in violation a protection order that she never requested or wanted.

The trial court imposed this exceptional sentence based on the State's claim that Mr. Phillips' offender score was an eleven (11), thus triggering application of the "free crimes aggravator," despite the fact that the State offered insufficient evidence to support this calculation of his offender score.

The State's failure to meet its burden of proof establishing Mr. Phillips' offender score for sentencing requires reversal of his exceptional sentence. Reversal is also required where the court's sentencing of Mr. Phillips pursuant to the "free crimes" aggravator was not authorized by statute.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Phillips' due process rights by sentencing him to an exceptional sentence predicated on an offender score that the State failed to establish by sufficient proof.

2. The trial court erred in imposing an exceptional sentence under the “free crimes” aggravator where Mr. Phillips had only one crime that would otherwise go unpunished, and not *some* current offenses that would go unpunished as required by statute.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The burden to prove prior convictions at sentencing rests firmly with the State. Due process requires the State to prove a person’s offender score at sentencing with more than a mere summary assertion of his criminal history. Here, where the State presented insufficient documentation in support of Mr. Phillips’ offender score, and this specific offender score was relied on by the court for imposing an exceptional sentence under RCW 9.94A.535, did the State’s failure to meet its burden deprive Mr. Phillips of his due process rights?

2. When a person’s high offender score results in *some of* the current offenses going unpunished, the trial court has discretion to impose an exceptional sentence under the “free crimes” aggravator. The plain language of the statute does not allow for an exceptional sentence on this basis where only one crime would go unpunished, as was the case when Mr. Phillips was sentenced on the offense of violation of a protection order. Did the trial court err in applying this basis for an exceptional sentence?

D. STATEMENT OF THE CASE

Kevin Phillips entered a guilty plea to one count of felony violation of a no contact order for calling his girlfriend, Kelsey Kirkpatric, from the jail. CP 5-15. Ms. Kirkpatric spoke at Mr. Phillips' hearing. RP 24. She explained that she and Mr. Phillips had been together for years, but once when they briefly broke up, there was an incident in which he hit her car windows. RP 24. This incident resulted in a domestic violence protection order that was imposed "automatically," even though she "didn't request it" and "didn't want to." RP 24. She was particularly upset the no-contact order carried the label of "domestic violence," because he never once put a hand on her and she never thought he would. RP 26. She tried to get the no-contact order dropped three different times, but her request was denied each time. RP 25. She didn't think prosecuting him for the violation was fair because she never wanted the no-contact order in the first place. RP 25. She was pregnant with his child when he made the call from the jail, which is why they both felt compelled to have communication. RP 20, 25.

In addition to being sentenced on this offense, Mr. Phillips was sentenced on two unrelated offenses during the same sentencing hearing: assault in the second degree, domestic violence, for an offense in which he

claimed self-defense against his father but was convicted at trial, and possession of a controlled substance, to which he pleaded guilty. RP 2, 10, 35; Supp. CP____, sub. no. 42.

The defense asserted that Mr. Phillips had an offender score of eight (8) before he was sentenced on these three offenses. Supp. CP____, sub. no. 46. The State asserted that his score was a nine (9). RP 5; Supp. CP____, sub. no. 42.

The trial court first sentenced Mr. Phillips to what it characterized as a “mid-range” sentence of 96 months for the assault in the second degree conviction based on his offender score of nine (9). RP 33; Supp. CP____, sub. no. 42. The court then sentenced Mr. Phillips on his plea to possession of a controlled substance. RP 35. He received the maximum sentence of 24 months, which the court ran concurrent to the 96 months already imposed. RP 36.

The court then sentenced Mr. Phillips on his plea to one count of violation of a protection order. RP 36-37. The court imposed a 60-month sentence. CP 20; RP 55. The court ordered 18 months of this sentence to run consecutive to the 96 months imposed in the assault in the second degree. CP 20-24; 29; RP 55. 42 months was sentenced as concurrent time. CP 20-24; CP 29; RP 55.

Mr. Phillips appeals the court's imposition of this exceptional sentence.

E. ARGUMENT

1. **Reversal of Mr. Phillips' exceptional sentence is required where the State failed to prove his criminal history for purposes of calculating his offender score.**

Under the Sentencing Reform Act, when a person is sentenced on two or more offenses at the same time, the sentences on each count must be served concurrently. RCW 9.94A.589. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a). The defense requested that all the sentences run concurrently, and also asked the court to impose an exceptional sentence below the standard range. RP 11. The State requested an exceptional sentence, arguing that because Mr. Phillips' offender score was eleven (11), the offense of violation of a protection order would go unpunished if consecutive time were not imposed.¹ RP 37. The trial court granted the State's request to impose an exceptional sentence under RCW 9.94A.535(2)(c). RP 55; CP 20-24; 29.

¹ When a person has multiple current offenses that result in an offender score greater than nine, further increases in the offender score do not increase the standard sentence range. RCW 9.94A.510; *State v. Alvarado*, 164 Wn.2d 556, 561–63, 192 P.3d 345 (2008) (When there are multiple crimes that could go unpunished, courts may impose an exceptional sentence under the “free crimes aggravator.” RCW 9.94A.535(2)(c)).

Courts review a sentencing court's calculation of an offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

- a. The State failed to meet its burden to prove Mr. Phillips' prior convictions.

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909–10, 287 P.3d 584 (2012). The State's failure to prove the defendant's prior convictions for sentencing violates due process. *Hunley*, 175 Wn.2d at 915. Bare assertions, unsupported by evidence, do not satisfy the State's burden. *Id.* at 910. The best evidence of a prior conviction is a certified copy of the judgment. A certified copy of a judgment and sentence is the best evidence of a prior conviction. *State v. Rivers*, 130 Wn. App. 689, 701, 128 P.3d 608 (2005). In *Hunley*, the State presented only a written summary of its understanding of the defendant's criminal history. *Hunley*, 175 Wn.2d at 905. It failed to present "a certified judgment and sentence or other comparable document of record, like a DISCIS criminal history summary." *Id.* at 913. A mere written summary absent any record to support it does not satisfy the preponderance standard and falls "below even the minimum requirements of due process." *Id.* at 914.

The State and defense disagreed about Mr. Phillips' base offender score. Supp. CP _____, sub. no. 46; RP 5. Here, because there was no "affirmative acknowledgement of the facts and information alleged at sentencing," the State cannot be relieved of its evidentiary obligations. *Hunley*, 175 Wn.2d at 912.

The documentation in Mr. Phillips' case was even more deficient than in *Hunley*. There is no record of a certified judgment and sentence from any of his prior convictions or any other documentation of his criminal history provided by the State. And like Mr. Hunley, Mr. Phillips never affirmatively acknowledged the prosecutor's assertions regarding his criminal history.² *Id.* Like in *Hunley*, Mr. Phillips' criminal history was established solely on the prosecutor's summary assertion of the offenses. *Id.* at 913. The State's failure to meet its burden of proof requires reversal of Mr. Phillips' exceptional sentence.

² Though the record includes an "amended offer letter," signed only by the defendant, this could in no way be construed as a written summary of the State's understanding of his criminal record for sentencing. First, it was signed only by the defendant, not the attorney. RP 16. This signature acknowledges the prior offenses are "true and accurate," but it is not the same list incorporated into the Judgment and Sentence, because it does not indicate any findings of domestic violence as does the list in the court's judgment and sentence. CP 20. Further, it is dated from September 20, 2016, nearly six months before the sentencing hearing held on March 1, 2017. There is no stipulation as to offender score. CP 16. The letter states that the "criminal history is subject to change." RP 16. It does not have a court's date filed stamp on it. RP 16.

- b. Insufficient documentation of Mr. Phillips' prior convictions denied him the right to be sentenced based on an accurate offender score.

The State's failure to provide documentation of Mr. Phillip's prior convictions made accurate calculation of his offender score impossible. "A sentencing court acts without statutory authority ... when it imposes a sentence based on a miscalculated offender score." *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002) (citing *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997)).

For sentencing on the offense of violation of a protection order, Mr. Phillips' prior offender score would be calculated according to RCW 9.94A.525 (21), because this conviction for a felony domestic violence offense contained a finding that domestic violence was "pleaded and proven." CP 18-19. Under this provision, "prior" felony domestic violence offenses that are "pleaded and proven" count as two points. *Id.* One of the prior offenses listed in the Judgment in Sentence, felony harassment, contains an asterisk indicating "domestic violence was pled and proved." CP 20. This would thus count as two points under RCW 9.94A.525(21)(a). But the prior felony DV VNCO conviction contains no such finding that domestic violence was "pleaded and proven." RCW 9.94A.525(21)(a); CP 20. Thus, there is an insufficient basis for determining whether this prior felony DV VNCO felony offense, which does not contain the asterisk with

the court's finding, counts as a "domestic violence offense" for Mr. Phillip's sentencing under RCW 9.94A.525(21)(a). Were domestic violence not pleaded and proven for this offense, the felony DV VNCO offense would be scored as only one point under RCW 9.94A.525(7). Likewise, the gross misdemeanor offense of DV VNCO appears to have been included in his offender score, but it does not have an asterisk indicating that domestic violence was "pleaded and proven" as required to count as one point under RCW 9.94A.525(21)(d). Absent the finding that domestic violence was "pleaded and proven," this misdemeanor offense should not have been included in his offender score. Finally, there is no documentation provided by the State by which to assess whether there was sufficient evidence to find that domestic violence was "pleaded and proven" for the felony harassment charge. CP 20.

And absent the underlying judgment and sentences for Mr. Phillips' prior convictions, it was impossible for the court to fulfill its obligation under RCW 9.94A.525(5)(a)(i), which requires the sentencing court to determine whether prior convictions qualify as the "same criminal conduct:" "the current sentencing court shall determine with respect to other prior adult offenses... whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis

found in RCW 9.94A.589(1)(a)”(emphasis added).³ This deficiency in the documentation of Mr. Phillips’ criminal history is certainly pertinent here, where his criminal history includes convictions for felony harassment and DV-VNCO, which share the same date of sentence and same date of crime, thus raising the question the court was required to resolve, as to whether these offenses would qualify as “same criminal conduct” under RCW 9.94A.589(1)(a). CP 20.

“A sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *Goodwin*, 146 Wn.2d. at 867-868. Because evidence of Mr. Phillips’ prior convictions would change how his offender score should have been calculated when he was sentenced for violation of a protection order, his correct offender score was not determined. A correct offender score was especially crucial here, where a lower base offender score could have meant that the “free crimes” aggravator might not even have applied to him. His due process rights were thus violated where the State produced insufficient evidence to determine whether this aggravator should even apply to Mr. Phillips. This due process violation requires reversal of the exceptional sentence.

³ “‘Same criminal conduct,’ as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

2. **Mr. Phillips’ exceptional sentence was not authorized under the plain language of the statute.**

Generally, a court must impose a sentence within the standard sentence range. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). However, a person may be sentenced outside the standard range if there are “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Under the Sentencing Reform Act, when a person is sentenced on two or more offenses at the same time, the sentences on each count must be served concurrently. RCW 9.94A.589(1)(a). Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a).

The Legislature gives courts discretion to impose an exceptional sentence in the case of the “free crimes” aggravator, which is triggered when the defendant’s high offender score combines with multiple current offenses that results in “some of the current offenses going unpunished.” RCW 9.94A.535(2)(c); *State v. France*, 176 Wn. App. 463, 469, 470, 308 P.3d 812 (2013).

Appellate review of an exceptional sentence is dictated by statute. RCW 9.94A.585(4). Reversal of an exceptional sentence is required 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 sentencing 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. *France*, 176 Wn. App. at 469 (citing RCW 9.94A.585(4))

Here, de novo review is required where the trial court’s reasoning does not justify departure from the standard range. De novo review is also appropriate because this is an issue of statutory construction. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

- a. The plain language of the statute provides that the “free crimes” aggravator applies only when “some of,” or more than one, current offenses would otherwise go unpunished.

Courts have a duty to ascertain the legislature’s intent in construing the “free crimes aggravator.” *France*, 176 Wn. App. at 470 (citing *Lake v. Woodcreek Homeowner Ass’n*, 169 Wn.2d 516, 526, 243, P.3d 1283 (2010)). Statutory interpretation begins with the statute’s plain meaning. *France*, 176 Wn. App. at 471. Where a statute is plain on its face, “the court must give effect to that plain meaning as an expression of legislative intent.” *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In an unambiguous statute, a word is given its plain and obvious meaning. *Id.* at 10 (citing *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)). If a

statute's meaning is unambiguous, the inquiry ends. *France*, 176 Wn. App. at 470. A court determines a statute's plain language by examining the statute in which the provision is found, related provisions, and the larger statutory scheme as a whole. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

The "free crimes" aggravator applies 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)(emphasis added). Here, the plain meaning of the statute states that it applies only in cases where some of the current offenses would go unpunished absent the exceptional sentence.

"Some" is an ordinary word, and this court can thus look to its dictionary definition. *Alvarado*, 164 Wn.2d at 562. ("When a term has a well-accepted, ordinary meaning, we may consult a dictionary to ascertain the term's meaning."). The word "some" when followed by "of," functions as a quantifier.⁴ As a quantifier it means, "a few of them but not

⁴ COLLINS ENGLISH DICTIONARY, available at https://www.collinsdictionary.com/us/dictionary/english/some_1 (last accessed 9/15/2017)

all of them.”⁵ “A few” is used to indicate a small number of people or things.⁶ A small group of things is necessarily more than one thing.

Analysis of the use of quantifiers in the Sentencing Reform Act shows the Legislature used the quantifier “some of,” differently than “one or more.” *State v. Mathers*, 193 Wn. App. 913, 919, 376 P.3d 1163 (2016) (“where the legislature uses different language within a provision, a different intent is indicated.”). For example, the legislature describes “one or more crimes” in RCW 9.94A.730, “one or more of the facts” in RCW 9.94A.537, and “one or more violent acts” in RCW 9.94A.562. By contrast, like in RCW 9.94A.535(2)(c), “some of” is used to describe a plurality in RCW 9.94A.589: “if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.”(emphasis added).

A plain reading of the statute then necessarily leads to the conclusion that RCW 9.94A.535(2)(c) does not apply when only one crime would go unpunished, because the Legislature did not employ the quantifier “one or more.” Because the plain language of the statutory

⁵ COLLINS ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com/us/dictionary/english/some_1 (last accessed 9/15/2017) (description of some as quantifier).

⁶ COLLINS ENGLISH DICTIONARY, *available at* <https://www.collinsdictionary.com/us/dictionary/english/few> (last accessed 9/15/2017) (definition of “a few.”)

provision is unambiguous, the court’s inquiry should end here. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). And because this court is required to “assume that the Legislature meant exactly what it said and apply the statute as written,” RCW 9.94A.535(2)(c) may only apply in instances where more than one crime would go unpunished. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (citing *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000)).

- b. Mr. Phillips received an exceptional sentence based on only one crime that would go unpunished under RCW 9.94A.535(2)(c).

The trial court erred in finding that the RCW 9.94A.535(2)(c) applied to Mr. Phillips, where only one offense, and not “some of” his current offenses would have gone unpunished as required by statute.

As argued in section one (1) above, there was insufficient evidence upon which to accurately determine Mr. Phillips’ offender score.

However, even if this court were to permit the trial court to rely on the State’s unproven offender score, when the trial court sentenced Mr. Phillips on the offense of violation of a protection order, it sentenced him based on the State’s assertion that his offender score was 11. CP 20; RP 43. This was two (2) points above the sentencing grid’s standard range. *France*, 176 Wn. App. at 468 (“Where 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 sentence range”).

The State’s contention that he had an offender score of eleven (11) when sentenced on the offense of felony violation of a protection order supports the Defense’s position that he started with an offender score of eight (8) prior to being sentenced on the three offenses, because this is the only possible way to arrive at an offender score of eleven (11). When he was sentenced on the offense of felony of a protection order, his offender score would have been calculated under RCW 9.94A.525(21), because domestic violence was pleaded and proven for this offense. CP 19. This means he would have received one (1) point for the offense of possession of a controlled substance under RCW 9.94A.525(7) and two (2) points for the offense of assault in the second degree, domestic violence. RCW 9.94A.525(21)(a). He was accordingly sentenced on the offense of assault in the second degree with an offender score of nine (9). Supp. CP____, sub. no. 42. This was one offense that scored with two (2) points that put him above the maximum range of the offender score. Thus, when he was sentenced for the offense of violation of a protection order, this was the only offense that was sentenced in excess of the sentencing grid’s maximum offender score of nine (9). CP 19. The trial court thus imposed this exceptional sentence where he had only one offense—the felony

violation of a protection order—that would go unpunished if the court had not imposed an exceptional sentence. CP 20; RP 55.

Where an exceptional sentence is not legally justified by the by the aggravating factor, reversal is required. *State v. Davis*, 182 Wn.2d 222, 232, 340 P.3d 820 (2014). Reversal of Mr. Phillips’ exceptional sentence is thus required where the trial court erred in imposing an exceptional sentence under RCW 9.94A.535(2)(c). A plain reading of this statute did not permit its application because Mr. Phillips’ offender score resulted in only one offense, and not “some of” his current offenses to go unpunished as required by statute.

F. CONCLUSION

The State failed to meet its burden to prove Mr. Phillips’ criminal history that was used to calculate his offender score. This is a due process violation that requires reversal for resentencing, at which time the State must be required to prove Mr. Phillips’ prior convictions in establishing his offender score. In the alternative, even if this court permits the State to proceed on an unproven offender score, the trial court’s imposition of an exceptional sentence here was not authorized by statute and requires reversal.

DATED this 22nd day of September, 2017.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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RESPONDENT,)	
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v.)	NO. 35113-1-III
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KEVIN PHILLIPS,)	
)	
APPELLANT.)	

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